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INTRODUCTION

The recent emergence around the world of lawyers and organizations dedicated to fighting wrongful convictions necessitated the need to hold a major international conference on the subject, which was held in Cincinnati, Ohio in April 2011, and sponsored by the Ohio Innocence Project. The works you will find in this symposium issue are the writings and speeches of those who participated in this groundbreaking conference. We thank all the participants for helping to make this conference a huge success.

Since the 2011 conference, the Innocence Movement has expanded greatly in just two short years, with new projects opening in, among other places, France, the Netherlands, Taiwan, the Philippines, Singapore, South Africa, Israel, and throughout Latin America. Major conferences were held on the subject in 2012 in Latin America, Europe, Asia, and North America.

We hope that this symposium issue will be a guide to emerging projects and established projects alike, as the Innocence Movement continues to spread across the globe, and as we work to establish new international human rights and norms relating to innocents who have been wrongfully convicted.

Special thanks are in order for all sponsors of the conference, and in particular, the Seasongood Good Government Foundation in Cincinnati, Ohio, for sponsoring this important symposium edition of the University of Cincinnati Law Review. In addition, special thanks to Jodi Shorr, Administrative Director of the Ohio Innocence Project, who went above and beyond in organizing the conference and ensuring that it was a success.

Sincerely,

Mark Godsey
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WRONGFUL CONVICTIONS AND INQUISITORIAL PROCESS: THE CASE OF THE NETHERLANDS

*Chrisje Brants**†

I. INTRODUCTION

Dutch criminal justice professionals, legal scholars, the media, and the public alike have always regarded the party-driven adversarial process and lay participation of American criminal justice as inherently unreliable. It has been said, for example, that Dutch inquisitorial justice produces fewer wrongful convictions than the American adversarial process.[1] A variation on this theme is that it would be best to be judged by an American jury if you are guilty, but that a Dutch court would be preferable if you are innocent.[2] Apparently, rational and professional judges, and appointed and impartial prosecutors in control of the police are regarded as better able to discover the truth and less likely to swallow implausible stories or bend the evidence than a bunch of lay people on a jury, (elected) partisan prosecutors, and autonomous police departments. More importantly, such sweeping statements reflect ingrained legal cultural notions of what proper justice should be. However, is there any truth to such assertions, or is it perhaps more likely that there just seems to be proportionately fewer miscarriages of justice in the Netherlands? I shall examine this issue in Part II of this Article.

Whatever the answer, deeply felt ideas about proper justice can be traced to the basic assumptions that underlie different types of criminal processes. This raises questions about the relationship between such

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† This article is being published as part of a symposium that took place in April 2011 in Cincinnati, Ohio, hosted by the Ohio Innocence Project, entitled The 2011 Innocence Network Conference: An International Exploration of Wrongful Conviction. Funding for the symposium was provided by The Murray and Agnes Seasongood Good Government Foundation. The articles appearing in this symposium range from formal law review style articles to transcripts of speeches that were given by the author at the symposium. Therefore, the articles published in this symposium may not comply with all standards set forth in Texas Law Review and the Bluebook.

1. P.J. VAN KOPPEN & T.M. SCHALKEN, *Rechterlijke Denkpatronen als Walkuilen: Over zes Grote Zaken en Derzelver Bewijs*, *in* HET MAATSCHAPPELIJK OORDEEL VAN DE STRAFRECHTER. DE WISSELWERKING TUSSEN RECHTER EN SAMENLEVING 85–132 (2004); P.J. VAN KOPPEN, DE SCHIEDAMMER PARKMOORD: EEN RECHTSPSYCHOLOGISCHE RECONSTRUCTIE (2003); PETER J. VAN KOPPEN & STEVEN D. PENROD, *The John Wayne and Judge Dee Versions of Justice*, *in* ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE 347–68 (Peter J. van Koppen & Steven D. Penrod eds. 2003).

2. An opinion recently voiced by a classroom of students taking a course in comparative criminal justice at Utrecht University.

theoretical differences and the proneness of one or the other system to produce wrongful convictions in practice. In other words, what, in theory, can typically go wrong in either system, and why? These questions are the subject of Part III. Part IV deals with Dutch criminal process and its specific vulnerabilities, while Part V provides a description of four major wrongful convictions that have occurred recently in the Netherlands and analyzes why wrongful verdicts were delivered by the courts. Such miscarriages of justice led to a public and political outcry that at one point called the very legitimacy of criminal justice into question. Thus, it should come as no surprise that several measures of improvement have been proposed which are the subject of Part VI.

II. HOW MANY WRONGFUL CONVICTIONS? A SPURIOUS QUESTION

That it should even be a matter of debate whether the adversarial process generates more wrongful convictions than the inquisitorial is somewhat ridiculous, given that there is no means of knowing how many people are wrongfully convicted in any one country, let alone whether the outcomes of one or the other type of system are inherently less accurate. As Samuel Gross has noted, "[B]y definition we do not know when [false convictions] occur. If we did, innocent defendants would not be convicted in the first place."[3] Even in the United States, where there is a relatively large body of research on the issue (in the Netherlands there is practically none), widely differing estimates circulate and almost all data concern wrongful convictions for serious offences such as murder and rape. Such estimates range between approximately 2.5% and 10%.[4] That is considerably higher than the 0.5% found by C. Ronald Huff et al. in 1996,[5] a discrepancy possibly caused by the fact that this study covered all felonies and not just rape and homicide.[6]

Like Gross,[7] Dutch forensic psychologist Peter van Koppen has remarked that almost all known wrongful convictions concern cases of homicide or very serious sexual crimes. That same pattern is apparent at the legal clinic of the University of Maastricht in the Netherlands where Van Koppen is involved in the innocence project *Gerede Twijfel*

3. Samuel R. Gross, *Convicting the Innocent*, ANN. REV. L. SOC. SCI. 175 (2008).

4. *Id.* at 177.

5. C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996).

6. It should be noted that it has been considered methodologically flawed in other areas: Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906 n.71 (2004).

7. Gross, *supra* note 3, at 179.

(Reasonable Doubt),[8] even though the criteria for admittance to the project certainly do not preclude other, less serious cases. Peter van Koppen concludes that it would be wrong to extrapolate percentages based on wrongful convictions for homicide and rape to other types of crime.[9] This conclusion may well be right, but we should not forget that rape and homicide incur severe penalties and draw a great deal of public attention; therefore, we are more likely to know about these crimes, while those wrongfully convicted for a minor offense are neither interesting from the point of view of the media nor are they likely to make the effort to have the verdict overturned. Indeed, the Criminal Cases Review Commission (CCRC), the official English innocence commission that examines possibly unsafe convictions, uses no criteria as to the type of case it will consider. While serious crimes are in the majority, the CCRC also reviews plenty of less serious offenses.[10]

Looking specifically to the Netherlands, it is clear that wrongful convictions occur and that there have been a number of highly publicized exonerations by the courts in the past decade—all involving murder cases.[11] But it is also clear that there are wrongful convictions in other types of cases too. A 1992 study found that the Dutch Supreme Court received 346 requests for cases to be reopened for revision between 1979 and 1991,[12] of which 71 were successful (21%)—mostly concerning fairly minor (traffic) offenses.[13] The same study also examined 35 so-called "dubious cases" that had not been reopened by the courts but were sent in by lawyers. While some of these cases surely represented wrongful convictions, there is no true way of knowing just

8. The project *Gerede Twijfel* is a legal clinic staffed by law students and supervised by professors, which undertakes investigations into alleged wrongful convictions. The criteria for the project to consider a case are that it has resulted in a prison sentence of four years or more, or a shorter sentence but with indefinite detention at a state psychiatric facility. *See Project Gerede Twijfel*, UNIVERSITEIT MAASTRICHT, www.geredetwijfel.nl (last visited May 15, 2012).

9. PETER VAN KOPPEN, OVERTUIGEND BEWIJS. INDAMMEN VAN RECHTERLIJKE DWALINGEN 268 (2011).

10. *About the Criminal Cases Review Commission*, CRIM. CASES REV. COMMISSION, www.ccrc.gov.uk (last visited May 15, 2012). Of the 12,696 cases dealt with by the CCRC between its inception in January 1997 and February 2011, 445 (approximately 2.5%) were referred to the Court of Appeal where 314 of the convictions were quashed as being "unsafe." It should be noted, however, that an "unsafe conviction" is not necessarily the same as a wrongful conviction, although in most cases it will be; neither does this percentage reflect convictions quashed by the Court of Appeal without intervention by the CCRC.

11. I will discuss these cases in detail *infra*.

12. H.F.M. CROMBAG ET AL., DUBIEUZE ZAKEN. DE PSYCHOLOGIE VAN STRAFRECHTELIJK BEWIJS 20 (1992). A similar study by the same authors has also appeared in English. WILLEM A. WAGENAAR, PETER J. VAN KOPPEN & HANS F.M. CROMBAG, ANCHORED NARRATIVES (1993).

13. Many defendants had been wrongfully convicted because of administrative errors (often by insurance companies), or because the real culprit had used their personal data; such traffic offences do not attract prison sentences but (automatic) fines. A minority of cases concerned more serious crimes, prison sentences, and mistaken verdicts delivered on the basis of flawed or insufficient evidence.

how many. The dearth of research and the fact that there are no systematic studies from which even remotely reliable estimates could be inferred as to the number or type of wrongful convictions by Dutch courts precludes any knowledge of how many wrongful convictions have occurred.[14] Even more importantly, there has been great reluctance in the Netherlands to admit that the Dutch inquisitorial process could somehow be prone to wrongful convictions, despite increasing evidence that it has systemic weaknesses in practice. General awareness of such weaknesses and their potential consequences is a (very) recent phenomenon indeed. It probably explains not only the lack of research but also that very few cases in which defendants have been wrongly sentenced to lengthy prison sentences (or indefinite detainment in a state psychiatric hospital) have come to light. When the research mentioned above was published in 1992, it was more or less dismissed by practically the entire legal community as unscientific and unconvincing.[15]

Until well into the 1990's, only two serious miscarriages of justice—one in 1923 and one in 1984, both wrongful convictions for murder that ended in exonerations—were generally known. However, in the course of the 1990s, a number of cases were taken up by the media and became *causes celèbres*. Additionally, between 2002 and 2010, five of these cases were reopened, resulting in exonerations. At present, there are at least seven other cases "that won't go away," if only for the simple reason that they have attracted the attention of journalists and moral crusaders. This still may not seem like a lot, but it should be borne in mind that 16 million inhabitants make the Netherlands a very small country compared to the United States, while both the crime rates and the general incarceration rates are also much lower. Add to this that the academic community, the media, and the justice system itself have only recently come to acknowledge that wrongful convictions not only can, but actually do, occur and are more than isolated incidents. Thus, it could well be that the Dutch inquisitorial system merely appears to produce more accurate outcomes as a percentage of all sentences passed.

14. One could measure the number of cases that are admitted to a revision procedure by the Supreme Court. However, these tell us next to nothing about wrongful convictions, as most such cases are concerned with inequalities in sentencing, while the statistics make no distinction between the types of issue that led to the revision. Peter van Koppen estimates that the project *Gerede Twijfel* has received about 200 requests since its inception in 2004, but many requests are, quite evidently, not cases of wrongful conviction; some cases are civil or administrative cases, in some cases the convicted person does not deny guilt but feels otherwise wrongly done to, and some cases are simply "people who have difficulty understanding the world," as Van Koppen puts it. He will not hazard a guess as to how many potentially unsafe convictions the project has seen (personal correspondence with the author by email of 12 March 2011).

15. *See, e.g.*, C.J.M. SCHUYT, *Het Juridische en het Sociaal-Wetenschappelijke Bewijs*, DELIKT EN DELINKWENT 655–61 (1992).

This is the more likely since, as we shall see, even though the criminal justice authorities themselves now admit there is a problem, neither the system nor the available legal remedies make it necessarily easy to discover wrongful convictions and have those wrongfully imprisoned exonerated.

III. INQUISITORIAL AND ADVERSARIAL PROCESS

If we cannot know how many wrongful convictions have taken place in the Netherlands, any talk of the inquisitorial system being inherently stronger than the adversarial is simply spurious. But it is possible to examine that system in theory to discover whether it has systemic weaknesses and, if so, where. A comparison of the two systems is intended to clarify, for readers from adversarial jurisdictions, the basic features—strengths and weaknesses—of both systems. The emphasis, however, is on the inquisitorial system which, to those schooled in the adversarial way of thought, often seems highly peculiar and, in a direct inversion of what Dutch legal scholars think about American justice, incapable of producing fair verdicts. Nevertheless, it is impossible to properly understand how wrongful convictions occur in inquisitorial process without insight into how and why it is, in theory, a coherent procedural system with interrelated safeguards against miscarriages (as is adversarial procedure).

This piece first compares the ideal-types of both systems. To help explain the internal equilibrium in which guarantees of truth finding and fairness, organizational principles, and authority, procedural roles and rights hang together in an overall structure. In practice, there no longer are procedures totally true to type. Given that almost all modern criminal justice systems combine procedural features of both traditions, it is better to consider them not as being totally adversarial or inquisitorial, but as positioned on a continuum.[16] Indeed, rather than speak of inquisitorial or adversarial systems, it is more accurate to see modern jurisdictions as primarily "shaped by" the inquisitorial or adversarial tradition.[17] It should be noted then that the terms inquisitorial and adversarial, neutrally and in their literal sense, clarify the essential difference between how each system seeks to find the truth: an authoritative investigation and a contest between parties respectively.

What do the terms inquisitorial and adversarial imply? Inquisitorial

16. For a much fuller discussion, see Chrisje Brants & Stijn Franken, *General Report on Fundamental Rights in Criminal Process for World Conference AIDC, Mexico 2008*, UTRECHT L. REV., 7 (Oct. 2009); CHRISJE BRANTS & ALLARD RINGSNALDA, ISSUES OF CONVERGENCE: INQUISITORIAL PROSECUTION IN ENGLAND AND WALES? 17–26 (2011).

17. S.A. FIELD, *Fair Trial and Procedural Tradition in Europe* (2009).

proceedings are associated with the torture, red robes, and pointed hats of an all-powerful, faceless Inquisition bent on establishing truth by all available means. Adversarial procedure has much less terrible connotations of medieval folk-gatherings under sacred oaks, communal decision making and solving disputes voluntarily before the elders of the tribe.[18] Neither of these images, although reflecting a rather skewed truth about history, says much about criminal process in the past and nothing about the present. But, they do still give rise to stereotypical misinterpretations of unfamiliar procedure and to prejudiced notions about what type of procedure is best. The different procedural rituals that underlie such caricatures of folk memory have indeed left recognizable traces in the legal cultures and criminal justice systems of today.[19]

Thus, it is not unusual to hear Americans describe the inquisitorial process as one in which the defendant is presumed guilty until he proves his innocence, although the presumption of innocence underlies all modern democratic criminal process. The burden of proof lies just as squarely on the inquisitorial prosecutor as on his adversarial counterpart. On the other hand, Dutch legal scholars, as we have seen, are sometimes convinced that the adversarial process, by definition, involves an ignorant jury and biased prosecution and police, and is, therefore, if not incapable of, seriously handicapped in establishing the truth in criminal matters. Yet, adversarial and inquisitorial criminal procedures are both geared to determining the truth and, moreover, to doing so in a fair manner that protects individual rights and interests. While neither system lays claim to the absolute truth, each seeks to establish a version of events that can be regarded as the relevant truth—acceptable and legitimate for all concerned and for society in general. Legitimate truth requires that it be established fairly, while procedural fairness is in itself a guarantee, albeit not an absolute one, that the truth will be found. This relationship between truth-finding and fair trial applies to both traditions. Where they differ fundamentally is in their concepts of truth and of the ideal way to find it. This dictates the type of necessary procedural guarantees and, in turn, is related to the civil and common law roots of the respective procedural models.

18. NICO JÖRG, STEWART FIELD & CHRISJE BRANTS, *Are Inquisitorial and Adversarial Systems Converging?*, *in* CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY 42 (Phil Fennell, Christopher Harding, Nico Jörg & Bert Swart eds. 1995).

19. Adversarial systems are mostly found in the common law countries where the law has its origins in English common law (therefore: England and Wales, the United States and all of the countries once colonized by the British). Inquisitorial systems are found predominantly in the civil law countries of continental Europe and the countries once colonized by them.

A. Inquisitorial Process

Modern inquisitorial process shares with its ancient predecessor an emphasis on pre-trial investigation by powerful authorities as a means of truth-finding. However, the modern version is rooted in 18th century civil law traditions reflecting a concept of political society in which the state is considered fundamental to the rational realization of the "common good." Because of the immensely intrusive powers needed for this task, the state is regarded with some suspicion because those powers represent a continuous threat to the liberty of the individual. Yet, it is expected to promote and safeguard individual liberty precisely because liberty is seen as transcending individual interests and as an essential part of the common good itself. In order to resolve this paradox, the exercise of state power is curtailed by written rules of law that also protect individual rights and freedoms (this is the original meaning of the European continental concept of *Rechtstaat*) and by the division of power within the state (*trias politica*). This calls for judicial scrutiny of executive action on the basis of written law and hierarchical monitoring and control within the executive itself.[20] Consequently, only the written law can give the executive the power to infringe individual rights in the course of a criminal investigation; without such legally conferred powers, executive officials can do nothing.

This political ideology is reflected in procedural and organizational arrangements. The assumptions of the civil law tradition imply that the state is best entrusted with truth-finding, but subject to written laws, judicial scrutiny of the executive, and internal hierarchical monitoring and control. These are the basic characteristics of modern inquisitorial procedure. The police, subordinate to the public prosecutor and the prosecutor himself (and sometimes, depending on the jurisdiction, an investigating judge), take the first but determinative steps towards establishing the truth. Logically, the final aim is to discover the substantive truth because anything less would be to overlook *a priori* the fundamental role of the state—guarding and promoting society's interests in crime control and in individual rights and freedoms (including those of the defendant).[21] In this context, finding the substantive truth implies a

20. For the classic description of the features of inquisitorial process that distinguish it from the adversarial in relation to the state, see M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986); and for the specific features of Dutch criminal procedure in relation to its legal cultural tradition: C.H. BRANTS, *Legal Culture and Legal Transplants*, *in* NETHERLANDS REPORTS TO THE EIGHTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, WASHINGTON 2010, at 1–92 (J.H.M. van Erp & L.P.W. van Vliet, eds. 2010).

21. This double duty imposed on the state is probably why Packer's dichotomy due process-crime control never seems to work very well when applied to inquisitorial systems: HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

criminal investigation and presentation of evidence at trial that are not only as complete as possible, but also non-partisan, taking into account the possibility that a person may be guilty or innocent.

What happens at trial is predominantly determined by the trial "dossier" compiled by the prosecution. During its compilation, the defense may point the prosecutor towards avenues of investigation favorable to the defendant and the prosecutor has a duty to investigate them, but once the case comes to court, the defense role is purely reactive—an attempt to cast doubt on the prosecution's case, among other things, by prompting the judge to ask the relevant questions. The trial judge has an actively investigative function, although the central role of the dossier means that there is already one version of the truth on paper that guides the investigation by the court. In inquisitorial systems, the emphasis is, therefore, very much on pre-trial procedure. It is not a theoretical necessity that all evidence is produced in court, given that incriminating and exculpating evidence is already contained in the dossier, including transcripts of witness statements.

Guarantees that the final decision can be accepted as the substantive truth lie in the prosecutor's, or investigating magistrate's, non-partisan role of representing and guarding all interests involved and in the prosecutor's control over the police. Other guarantees also flow from the notion that the truth is best found through investigation by the state: the role of the defense in pointing to factual and legal deficiencies in the prosecution case and the limited, attendant rights necessary for this, the active involvement of the judges in the truth-finding process at trial and their duty to give reasoned decisions, and appeal on the facts—a full re-trial before a higher court—as a form of internal judicial control. In the inquisitorial tradition, the legitimacy of criminal justice and the fate of the defendant depend to a large extent on the integrity of state officials and their visible commitment to non-partisan truth finding. What this system needs to work fairly is a good, i.e. non-partisan, prosecutor and an impartial judge willing to verify, actively and critically, the accuracy of the prosecutor's case.

B. Adversarial Process

By contrast, the benevolent state that acts in the common good is very much less in evidence in the common law tradition. Indeed, neither the concept of the state nor of the common good exists in the same way. The public interest in criminal justice is primarily defined as an interest in crime control and security with which the authorities are entrusted for so long as they happen to be democratically in power. Next to, and separate from, this shared interest in peace and security, individuals

define their relationship to the state in terms of the rule of law: as a set of concrete rights and freedoms from particular forms of state intrusion, which they themselves can assert. Law is not given by statute, it simply "is"—law of and for the people, containing fundamental freedoms to be invoked against state intrusion that are self-evident, attach to individuals as of right (although they may be embodied in a Bill of Rights), and will be "found" through interpretation by the courts.

These notions of individual autonomy form the basis of adversarial process. They also reflect a fundamental distrust in an all too powerful state, which is further displayed in the separation of investigative powers from those of prosecution. In civil law states, hierarchical monitoring (such as the prosecutor's control over the police investigation) is premised on the notion of a strong and organic executive arm of the state. Under the common law, executive organs of criminal justice do not monitor each other. Rather, they exist in a state of co-ordinate authority. Adversarial prosecutors do not control the investigation—other than that they can refuse to prosecute a weak case or one where illegalities have occurred—and cannot tell the police what to do.

The emphasis is on crime control and establishing guilt on the one hand (first during the police investigation and then at trial by the prosecution, acting for the people) and on individual participation and the capacity to assert one's rights directly on the other (the defendant and his lawyer). Consequently, adversarial criminal process is conceived of as a struggle between parties in which the individual defendant fights his own corner. In the clash of opinions between prosecution and defense about "what happened," the truth, it is assumed, will eventually emerge. That is possible only if each party has equal rights and uses them to try to establish their own version of events through pre-trial investigation and the presentation of evidence supporting that version at trial. An essential feature of adversarial trials is that they do not take place on the basis of a dossier compiled by state officials and reflecting all aspects of the case.

What happens in court is not verification of the prosecutor's—essentially one-sided—case by the judge but the two-sided presentation of evidence and attempts by each party to falsify the other's case in the presence of an impartial tribunal of fact. This logically means a tribunal not predisposed to a particular verdict through prior knowledge of the case, as well as not being biased in any other way. In such systems, the emphasis lies in the trial, which is, of necessity, highly oral and "immediate," given that adversarial debate requires all evidence to be produced in open court. Contrary to inquisitorial procedure, where witnesses and experts are called as the court sees fit and examined by the judge on the basis of what is already on the table in the dossier, in

adversarial trials each party examines the other's witnesses and their own, produces their own experts, and searches for and leads their own evidence in an attempt to establish that theirs is an equally, if not more compelling, version of events. The tribunal of fact is there to listen and to decide, and the judge makes sure the contest takes place according to the rules. Neither the tribunal nor the judge are actively involved in the process of truth-finding: that is the responsibility of the parties.

Here, a formal concept of truth prevails, which also implies that parties may avoid the uncertainty of trial by agreeing it. So long as the tribunal is convinced or parties agree, and so long as the outcome has been reached through following correct procedure, whatever emerges as the "truth" in the course of proceedings can be accepted as such. For this partisan-based system to work, equality of arms between prosecution and defense is a must. The defendant not only needs investigative, confrontation, and presentation rights on an equal footing with the prosecution. The defense also must use the information and resources they have, use their investigative and adversarial presentation skills, and be able to assist the client at every point in the process. The partisan contest that is characteristic of adversarial process provides no safety net. Pre-trial investigation by the police aims to find evidence to support the prosecution case, not to establish facts that would aid the defense.[22] At trial, the judge will not come to the defendant's aid to assert his rights for him or take over the lawyer's role. Also, there is usually no second chance, no appeal on facts that could have been put forward but weren't because the defense investigation failed to unearth them or chose not to lead evidence although it was available. In other words, what the defendant needs more than anything else in adversarial process, is a good lawyer.

C. Systemic Weaknesses

Both of these systems work, and in the overwhelming majority of cases, they produce legitimate and acceptable results. But the features outlined above, which are, in theory, the great respective strengths of the inquisitorial and adversarial traditions, are also their great weaknesses. It is through those weaknesses that criminal justice systems become vulnerable to delivering wrongful convictions. Superficially, errors often seem the same, or, at least, very similar. In a comparative study

22. Although the adversarial prosecutor is also expected to be impartial, unlike in inquisitorial procedure this notion of impartiality implies no duty to investigate a suspect's innocence, only to ensure and present sufficient evidence of his guilt honestly and without bias.

outlining the situation in many different countries,[23] inadequate defense, wrongful or incorrect interpretations of witness testimony or expert evidence, overambitious police or prosecutors, pressure from the media, investigations that concentrate on one obvious (but wrong) suspect, confirmation bias, group-processes among adjudicators of fact, and false confessions appear as contributing factors in almost every country, regardless of the legal system.

On closer examination, there are great differences in how such mistakes happen, how they enter the system, and the potential guarantees that prevent them from becoming disastrous. In other words, in their interrelated systemic characteristics, systems are vulnerable at different points. In the final event, the vulnerability of both systems can be traced to basic assumptions about the best way to reach accurate verdicts: the integrity of state officials in their non-partisan search for the truth on the one hand, party autonomy, equality, and equality in adversarial debate according to procedural rules on the other. Where these fail at any point in the process, a chain reaction can be set in motion leading inexorably to a wrongful conviction. That is why we must understand both the systemic strengths and weaknesses of a system before we can identify the causes (and potential remedies) of wrongful convictions.

That a defendant is in control of his own situation in the adversarial system, rather than being primarily dependent on the integrity and competence of the police, prosecutor, and judge as in the inquisitorial system, is not only the logical consequence of the individualist political–legal culture in which adversarial trials take place, but is also perhaps more preferable in terms of intrinsic rights of self-determination and even psychologically in terms of feeling less helpless. And certainly, from a scientific point of view, the presentation of and attempt to falsify two versions of events is surely a better way of arriving at the "truth" than verification of the prosecutor's version by the judge—however many limited opportunities the defense may have had to influence that version in the dossier pre-trial. At the same time, the ability of the defendant to prepare and present his own complete and convincing case depends entirely on equality of arms between defense and prosecution, and on an informed and capable defense lawyer with access to his client at all points in the procedure. While, in theory, this should be the case, the reality is quite different.

The same applies to expert witnesses and witnesses in general. The logic behind placing no restrictions on either party in introducing expert

23. WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE (C. Ronald Huff & Martin Killias eds. 2008).

testimony (other than those which guarantee that the expert actually knows what he is talking about) is obvious in the adversarial setting, but it is precisely this that can be a factor in a wrongful conviction. Not only are there the actual handicaps under which defense lawyers operate when it comes to finding, and paying for, experts of the stature that the prosecution may present, there is a real risk that the partisan nature of expert testimony will induce experts to identify with the party for whom they are testifying rather than present balanced considerations founded on their own expertise. As for witnesses, the whole idea of partisan contest is one which, however compelling in the theory of truth finding, in practice may all too easily lead the prosecution to ignore the spurious motives and, therefore, the potential unreliability of witnesses in the overpowering desire to win. (The use of jailhouse snitch testimony is a case in point.) Again, though, the almost unlimited right to call and (cross) examine witnesses is a great strength of the adversarial system, at the same time it bears the seeds of its own potential for error.

A final example is the instrument of plea-bargaining, which is in widespread use in all adversarial systems. A logical consequence of adversarial procedure is the acceptance of a version of events as the "truth," or at least the relevant outcome of a trial, because it has been agreed between parties. There is much to be said for avoiding a distressing and costly contest where none is necessary. But despite the guarantees that adversarial procedures have in place to protect the defendant and ensure informed consent, all of the literature on plea-bargaining points to the very real danger of the innocent defendant pleading guilty. This risk is exacerbated in states that have the death penalty or mandatory life sentences.

In the inquisitorial system, partisanship when applied to anyone else but the defense lawyer is a dirty word. There are, in theory, no parties and, thus, no witnesses or experts for the prosecution or the defense. Instead, there are merely witnesses, and experts are not regarded as witnesses but are simply experts appointed by the court, often from state laboratories or forensic institutions. Appointment by the court has the great advantage of releasing an expert from any unconscious obligation they may feel towards the party they are assisting. The main danger here is not that they are inherently partisan, although that is always possible, but that precisely because they are regarded (and regard themselves) as non-partisan professionals, a court may place too great a reliance on their findings without there being an automatic response from an expert from the other side to contradict them.

While there are differences in different inquisitorial jurisdictions, they all share the need to trust the integrity of the representatives of state institutions and, logically, a great and almost unquestioning faith that the

legal guarantees of the system at each stage in the process will prevent the state, in whatever guise, from going off the rails. Without such faith, the very basis of the system would be called into question. Paradoxically, this is precisely one of the strengths of inquisitorial justice: one can feel secure in the hands of a prosecutor, expert, or judge, from a legal culture where integrity and non-partisanship are expected and continually reinforced by training and experience.[24] That may be preferable to being forced to place one's fate in the hands of a lawyer who may or may not do a good job, depending, among other things, on how much he is paid. But again, in strength there is weakness.

The relative paucity of the scope of rights available to the defense is directly proportionate to the defense role of "looking over the prosecutor's shoulder"—making sure the prosecution does not lose sight of the defendant's interests. But the proportion is derived from the theoretical understanding of the ideal role of other participants in the procedure, not from what may actually happen in practice. If the faith in the ability of those participants to contribute to fair truth-finding is, for any reason, misplaced, the defense lawyer may be empty handed in terms of defense rights to challenge the prosecution case on issues, or at a point in the procedure, where it could make a difference.

IV. DUTCH CRIMINAL PROCESS

While no system fits its ideal type entirely, it is nevertheless fair to say that Dutch criminal process is decidedly at the inquisitorial end of the continuum compared to most other European criminal justice systems. (Just as American process lies at the adversarial end, more so than, for example English process.) The Netherlands is, moreover, one of the very few continental European countries without any involvement of the lay public. Where most other jurisdictions have some form of jury or mixed panel, the Dutch consider criminal justice a matter primarily requiring the considered and distanced judgment of state-employed legal professionals and, therefore, place considerable faith in their ability to bring a criminal investigation and trial to a truthful conclusion. While it is impossible to describe Dutch criminal process in detail, the following is a short summary of its most salient features.[25]

24. Where adversarial prosecutors are partisan advocates and trained as such, the demands on the inquisitorial prosecutor require that he take quasi-judicial decisions, and training in inquisitorial systems takes place in the context of a career judiciary, of which, in many countries, prosecutors form part.

25. For a much more detailed account though still a summary, (on which this Part is based), see CHRISJE BRANTS, *The Vulnerability of Dutch Criminal Procedure to Wrongful Conviction*, *in* WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 157–82 (C. Ronald Huff & Martin Killias eds. 2008).

A. The Professionals

Pre-trial investigation in the Netherlands is conducted almost exclusively by the police who may use only the powers granted by the Police Act and Code of Criminal Procedure. The police may arrest and interrogate persons against whom there exists a reasonable suspicion that they committed an offense and may hold suspects for a maximum of 15 hours before involving the prosecutor. Detention can last for 3 days and, in cases of urgent necessity, up to 6 days. After the original 15 hours has elapsed, custody must be ordered by the prosecutor, after which the judge of instruction (10 days), and then the court (90 days) may order further detention.[26] During all this time, the suspect may be questioned by the police in the context of the prosecutor's investigation. The police also have a number of intrusive investigative powers, the use of almost all of which requires the prosecutor's permission. In general, the police are answerable to the Prosecution Service (and internally, to their superior officers) and it is the prosecutor who, is responsible for the investigation and may, therefore, also issue instructions to the police. That the police investigate all aspects of the case impartially is not literally required by law, but is a professional criterion deriving from the relationship between police and prosecutor—thus from an assumption of non-partisan prosecution.

The Public Prosecution Service is a hierarchical organization, headed by a council of five so-called procurators-general (PG's). The council can issue binding instructions to both the police and the prosecutors at the 19 district courts and five appeal courts (where they are called advocates-general—AG's) and at the national prosecution department that deals with such matters as organized crime and terrorism. The minister of justice is accountable to Parliament for the actions of the prosecution service. Dutch public prosecutors are civil servants, trained after law school in the same way as judges: a five year theoretical and practical training course where, half way through, trainees opt either for the judiciary or the prosecution service. Constitutionally, the Public Prosecution Service is both part of the civil service and of the judiciary. Prosecutors are expected to adopt a quasi-judicial stance in their most important tasks, which are controlling and monitoring pre-trial investigation by the police; compiling a trial dossier of all relevant steps in the investigation and all relevant evidence, against and for the

26. Thus, the court case must begin, even if only formally, after 100 days. If the prosecutor is not ready, he must nevertheless make sure he subpoenas the defendant to appear and grants the defense full access to the dossier, at the latest 10 days before the first court appearance. He may then ask the court to set another date for continuing the trial to give more time to complete the investigation. There is a possibility of bail, but it is never used. As a consequence, suspects may spend considerable time in pre-trial detention before their case is heard in full by the court.

defendant; and presenting the case at trial. This non-partisan role is safeguarded not only by training, but also by a hierarchical system of monitoring and control—both of the police and within the prosecution service. Disclosure ensures that the defense can play a role in shaping the dossier that is eventually presented to the court. The final safeguard is active scrutiny of the pre-trial investigation and the evidence by the judge, if necessary prompted by the defense.

Originally, a non-partisan investigation was thought to be best safeguarded at the pre-trial stage by an investigating magistrate, of whom each court has several appointed on a rote basis. However, the magistrates' investigative role has been reduced over the years, and now their main task is authorizing telephone taps and bugs, and interviewing, under oath, witnesses the defense wants to challenge but who will not be called in court. Dutch trial judges sit alone in minor cases, sit in panels of three in more serious cases, and in panels of five in the appellate courts. There is no jury in any case, criminal or otherwise. The defense and prosecution have the right to appeal to one of the five appellate courts, which will conduct a full retrial. The judiciary is a state institution where appointment for life, a (very) good salary, and the absence of government involvement in day-to-day matters serve to guarantee independence. Impartiality is part of the professional ethic: judges are fully acquainted with the dossier before trial, but are expected (and trained) to keep an open mind as to guilt or innocence.

Every defendant in a criminal case has the right to be represented by a lawyer. If he cannot afford one, the defendant will be assigned an attorney. However, adults have no right to have the lawyer present during interrogations by the police.[27] Most criminal defense lawyers take assigned cases, which pay substantially less, as a matter of course. Criminal defense lawyers' role in criminal procedure is to represent the interests of the defendant and, pre-trial, they monitor the compilation of the dossier (not only as to the nature of the evidence but also the legality of police methods used to obtain it) pointing the prosecutor towards certain avenues of investigation. In court, defense attorneys attempt to weaken the prosecution case and direct the judge towards evidence favorable to the defense. Dutch lawyers have no powers of investigation (to approach and interview potential witnesses is regarded as tampering with the evidence) and cannot call witnesses or experts themselves. The lawyers are dependent on the prosecutor's willingness to grant a request that a witness be heard and, in the final instance, on the court that can overrule or uphold the prosecution's refusal to accede to a defense

27. This is currently a hot issue following recent rulings by the European Court of Human Rights. *See infra*, Part VI.C (describing the changes that are taking place as a result).

request.[28] Experts are appointed by the court and do not appear as partisan witnesses.

B. The Limited Role of Debate at Trial

Dutch trials are exceedingly short compared to adversarial procedures because they are document-based and debate in court is very limited. With only professional participants, there is little need to elaborate legal details that are understood by all, while the evidence will have been systematically added to the dossier beforehand—including most witness statements. The role of the judge as investigator of fact precludes the necessity of cross-examination. Although the Dutch Code of Criminal Procedure seems to place trial in open court at the center of proceedings and requires that all witnesses appear, pre-trial investigation is the focus of truth-finding, and the use of hearsay testimony is widespread. Threatened or vulnerable witnesses (e.g. children, rape victims, police informers) are not often called at trial and are more usually heard under oath by the investigating magistrate in chambers. Also, threatened witnesses have their identity kept from both court and defense with only limited opportunities for the lawyer—though not the defendant—to be present or submit (written) questions. The investigating magistrate then provides a written report to the court, and evidence given to him is regarded as evidence given to the trial court.

These procedures were introduced after the European Court of Human Rights gave a number of judgments against the Netherlands in which convictions had been based on unchallenged or anonymous testimony.[29] While a poor substitute for hearing witnesses at trial, such procedures are consistent with the ideology upon which Dutch procedure in general is based. More important than the "principle of immediacy" that requires evidence to be presented at trial is that of "internal transparency." All participants must be acquainted with the facts of the case as represented in the dossier on an equal footing so that there can be no conviction on evidence not known to the defense. However, the right of the defense to examine the complete dossier becomes absolute only ten days before trial and can be curtailed before that "in the interests of the investigation." The assumption is, thus, that the prosecutor will, in his non-partisan role, have included everything that is relevant and will have looked into all aspects of the case before

28. The lawyer can also physically bring witnesses to court, by-passing the necessity to have them subpoenaed by the prosecutor. Even so, the defense must still convince the trial judge why it is relevant that they should testify.

29. Eur. Ct. H.R. 1997, App. No. 21363/93, Eur. Ct. H.R. (Van Mechelen v. The Netherlands) (Neth.); Eur. Ct. H.R. 1989, App. No. 11454/85 (Kostovski v. The Netherlands) (Neth.).

the trial starts. Internal transparency is also a guarantee that the court will not base its decision on incomplete evidence. That is, the prosecutor and defense counsel cannot agree to leave some things unsaid, effectively ruling out charge bargaining. In the final event, the court must arrive at the substantive truth so that a full trial must always take place, even if the defendant has pled guilty.

The defense may challenge the accuracy of the prosecution case and request additions to the dossier or the hearing of new witnesses at trial. Such requests must be addressed to the prosecutor first. However, the active role of the court means that, within the criteria of the law, it has the final decision on which witnesses are to be heard; on whether the dossier is complete and relevant, or whether documents should be added to it or may be left out; and on whether expert opinion may be challenged by the introduction of other experts. In short, the court decides whether it considers itself to be in possession of all relevant facts. It is also the court that conducts the first and fullest questioning of witnesses. The defendant (never considered a witness in his own case and therefore never under oath) may speak in his own defense and always has the last word, but only if he so wishes. Dutch trials are essentially a debate on the relative weight to be given to the several pieces of evidence that the state has gathered in its non-partisan search for the truth.

C. Guarantees Against Miscarriages of Justice

In essence, Dutch criminal process relies almost exclusively on the non-partisan gathering of evidence by the prosecutor; his control of the police and their professionalism in conducting a non-partisan investigation without illegalities; the ability of the defense lawyer to "assist" in the compilation of the dossier, which is in turn dependent on the non-partisan professional attitude of the prosecutor; and on the impartiality and professional truth-finding activities of the court at trial. In short, the integrity of the system and its ability to police itself are the guarantees for fair procedures and accurate outcomes.[30] This is bolstered by professional ethics internalized during training, and by hierarchical and judicial monitoring and control, that reinforce written rules of law geared towards ensuring fair and substantive truth-finding both pre-trial and at trial.

Such pre-trial rules are primarily concerned with granting (and limiting) police, prosecutorial, and judicial powers to employ certain investigative methods and to arrest, detain, and interrogate suspects. The

30. JÖRG, FIELD & BRANTS, *supra* note 18.

Code of Criminal Procedure[31] also gives certain pre-trial rights to the suspect. Under its provisions, a suspect has the right to access the prosecution evidence and to the assistance of a lawyer of the suspect's choosing or provided by the state. The Code provides for lawyer–client contact and confidentiality for suspects in detention. If a pre-trial judicial investigation has been opened by the judge of instruction, the lawyer may be present when the suspect is interrogated by the judge. As there is no mention of any such right with regard to the police, this has always been interpreted to mean that, *a contrario*, the suspect has no right to have a lawyer present during police interrogations. This is accepted as established legal doctrine.[32] Furthermore, undue pressure against the suspect is forbidden and a caution by the interrogator that he has the right to remain silent is prescribed. But, given the emphasis on substantive truth-finding by the state and the fact that pre-trial-rights could be used to hinder the investigation, the provisions granting these rights also have a second paragraph: "[U]nless in the opinion of the judge of instruction (or prosecutor, as the case may be) the interests of the investigation make the exercise of right X undesirable" (or some such formulation).[33]

At trial, the defense's role is secondary to the prosecution, while both are subordinate to the authority and truth-finding activities of the court. That, in its turn, is bound by elaborate rules of evidence. Dutch courts are not free in the evidence they may consider. There are rules on how courts may use evidence to construe guilt. Further, courts are constrained in regards to the weight they may attach to different sorts of evidence and in regards to the relationship between the evidence and the court's decision that the defendant is guilty. The Code of Criminal Procedure contains a limitative list of what may be legally regarded as evidence: the court's own observations during trial; statements by the defendant (including confessions); witness statements; other statements

31. The 1926 Code replaced Napoleonic legislation introduced during the French occupation of the Netherlands between 1810 and 1813, although any revolutionary "foreign" ideas such as legal assistance and jury trial were abolished as soon as the occupying armies left. On the lasting influence of Napoleon, see C.H. BRANTS, *Legal Culture and Legal Transplants*, *in* NETHERLANDS REPORTS TO THE EIGHTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, WASHINGTON 2010, at 1–92 (J.H.M. van Erp & L.P.W. van Vliet, eds. 2010). On the situation in the 19th and early 20th Century, see TARU SPRONKEN, VERDEDIGING: EEN ONDERZOEK NAAR DE NORMERING VAN HAT OPTREDEN VAN ADVOCATEN IN STRAFZAKEN [DEFENSE: A STUDY ON THE STANDARDIZATION OF THE ACTIONS OF ATTORNEYS IN CRIMINAL CASES] 9–18 (2001).

32. *See, e.g.*, HR 21 May 1985, NJ 1986, 26.

33. The only exception is the suspect who is to be further detained (by the prosecutor) and who has the right to have a lawyer present at the detention hearing. The Dutch Bar has a system of duty lawyers to assist such suspects. However, even suspects detained by the judge of instruction or the court until the trial begins can be subject to denial or restriction of access to their lawyer "in the interests of the investigation."

or written documents, such as reports by experts); and official written statements by investigating officers.[34] With the exception of the latter (in so far as they do not in fact amount to the hearsay testimony of a single witness or the defendant), evidence requires other evidence as corroboration. A conviction may not rest on the statement of a defendant alone, on that of a single witness, or on anonymous testimony.

Moreover, even if the court has sufficient evidence of the proper sort, it may not convict unless that evidence has convinced the court of guilt "beyond reasonable doubt."[35] If this causal requirement is not met, *in dubio pro reo* prevails. An extra safeguard requires the court to give a reasoned decision setting out the (legal) evidence by which it has been convinced. Both the defendant and the prosecutor have the right to appeal following the decision in first instance. The appeal court's decision on the facts is final, although another avenue of appeal on points of law to the Supreme Court may be open (known as "cassation").

Given that even the most secure of evidentiary rules and the most professional of courts in two instances may still leave room for mistakes, there is also a revision procedure. The Supreme Court may order a case reopened (and, if necessary, retried) if new evidence casts doubt on the original decision. Either a convicted person or the prosecutor at the Supreme Court (also called advocate-general) can request revision. The procedure is designed to prevent the Supreme Court from becoming a court of third (factual) instance, by requiring that the Supreme Court establish, first, the existence of new evidence not known at the time to the original court (a so-called *novum*). If established, the court must find that such evidence, had it been known at the time, would have led the court that gave the final verdict on the facts to acquit. If the Supreme Court so finds, the case is referred to one of the appeal courts for a full retrial (but never to the court that originally gave the final verdict on the facts). Obviously, if another person has been convicted by another court for the same offense, this constitutes a typical *novum*, and this scenario is specifically provided for in the Code of Criminal Procedure. In many other cases, however, "new evidence" is strictly interpreted so that the requirement that the Supreme Court in effect second guess the original decision—and, therefore, also the decision that the referral court will reach on retrial—may prevent a case

34. Such reports may contain first hand evidence based on the officer's own experience—for example that he found drugs in the defendant's possession—but also may be the transcript (not verbatim) of an interrogation of a witness, i.e. hearsay.

35. This is known as a negative system of proof: the court may not convict without sufficient legal evidence even if it is convinced of guilt, but may also not convict if there is sufficient evidence but it is not convinced.

from reaching review.

B. Vulnerabilities

Although Dutch criminal justice lacks the safeguards found in adversarial process (and, indeed, in a number of inquisitorial jurisdictions that lie further towards the adversarial on our theoretical continuum), it is nevertheless an entirely coherent procedural system. Its safeguards are the integrity of the state institutions concerned, the cumulative monitoring and scrutiny that take place throughout the process, and the capacity of law and legal–ethical culture to ensure that each professional participant functions as required. If these guarantees work as intended, the system needs no external safeguards such as autonomous defense rights. However, just as adversarial process is based on the myth that adversarial debate between equal autonomous parties will produce the "truth," so long as procedural rules are followed, so too is Dutch inquisitorial process based on a myth of justified confidence in a system of state-controlled state investigation and the small professional elite through which it operates. The problem is that, in real life, parties in a criminal trial are seldom equal in a material sense and procedural rules do not always produce the truth. Likewise, the supreme confidence the Dutch place in their self-controlling system of criminal justice is no longer justified, if indeed, it ever was.

That confidence has historical and socio-political roots,[36] and it may be that the system originally functioned very well. In any event, there were few signs of public or legal–professional dissatisfaction (or of wrongful convictions) until about the 1980's. The last two decades of the 20th century brought increasing public criticism of the criminal justice authorities, fear of crime, and general feelings of insecurity. This led to demands for more and better crime control. It was said that criminals were treated too leniently, that due process rights were abused in criminal procedure, that the police and prosecution service were making too many mistakes, that the courts were too slow, and that the process was too bureaucratic. Although Dutch legal culture traditionally regards public opinion as irrational and emotional and, therefore, as unwarranted interference in the due process of rational justice, these developments have rendered the whole criminal justice system highly sensitive to critical media coverage and demands for results that are perceived as assaults on its legitimacy.

36. *See* C.H. BRANTS, *Legal Culture and Legal Transplants*, *in* NETHERLANDS REPORTS TO THE EIGHTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, WASHINGTON 2010, at 1–92 (J.H.M. van Erp & L.P.W. van Vliet, eds. 2010).

The response has been new legislation to increase both the efficiency of pre-trial investigation and court procedure and the number of trials that end in convictions. The result has been an erosion of the traditional safeguards against wrongful convictions that the inquisitorial system relies. This has affected the practical commitment of the police and the prosecution service to non-partisanship and the legal requirements that ensure that courts convict only on the basis of reliable and corroborated evidence and commit their reasoning for the conviction to paper. The powers of the prosecutor have increased dramatically. On the other hand, the powers of the investigative magistrate (intended as an extra and impartial safeguard in criminal investigation) have been reduced. Similarly, defense rights have been curtailed, most especially concerning disclosure of the dossier before the 10 day limit, the right to have witnesses called, and the right to full retrial. For instance, in the interests of efficiency, appeal courts may, and under certain circumstances do, rely on evidence and witnesses originally produced without re-examining them.

Consequently, what always was a process of verification of an essentially one-sided investigation has become even more one-sided. Changes to the procedural rules on how the court goes about its verification of the case make it more difficult for the defense to suggest alternative interpretations of the evidence. Case law increasingly requires the defense to show substantial reasons why the court should doubt the accuracy of the dossier or the legality or reliability of the evidence it contains. The defense in an inquisitorial system, however, does not have the defense rights or adversarial means and skills. Most importantly, the defense in an inquisitorial system does not conduct its own pre-trial investigation. Therefore, it is difficult to challenge the prosecutor's version of events, especially if rights to access the dossier are restricted. This is exacerbated by the nature of inquisitorial investigation. It places a search for the substantive truth above all other considerations, especially in pre-trial process. Thus, when the most important steps in the compilation of the dossier—and the prosecutor's version of the truth—take place, the defense has fewest opportunities to intervene.

All through the investigative process, there are stages at which the prosecutor, investigating judge, trial court, and appeal court, are expected to scrutinize the conduct and results of the previous phase. The goal is to ensure that all avenues of investigation have been explored, including alternative scenarios that could point to innocence rather than guilt. The great theoretical strength of this system is that the cumulative nature of such hierarchical and judicial controls, combined with the rules of evidence and the possibilities of retrial and review, make it

possible to catch and correct mistakes. At the same time, the cumulative nature of both investigation and hierarchical and judicial supervision are also great weaknesses. In practice, these weaknesses can allow errors to accumulate so that even the final safeguards, appeal and review, fail in a chain reaction of misguided actions and decisions. Mistakes at the level of the police investigation may, therefore, run all the way through the system until the appeal court adds its own wrongful verdict to the process, the Supreme Court refuses to admit a request for review, or the referral court finds the innocent defendant guilty once again.

V. CASES OF SYSTEMIC FAILURE: FOUR MAJOR WRONGFUL CONVICTIONS

This Part now looks at the four most serious miscarriages of justice that have occurred in the Netherlands in recent memory. These cases, three of which came after the defendants made false confessions to the police, shook the legal establishment to the core, although not immediately; the first was dismissed as an unfortunate "incident."

A. Murder in Putten[37]

Putten is a village in the east of the Netherlands with a predominantly protestant-religious population. In January 1994, a grandmother came home and found the body of her granddaughter who had been raped and strangled. A month later, four men were arrested on the basis of eyewitness testimony that their car had been seen in the vicinity of the house. The men gave conflicting statements on their whereabouts on the afternoon of the murder. During the interrogations that followed, two of the men stated that they had seen the others go to the house, and had seen them, through the window, sexually assault and strangle the victim. After lengthy interrogation, the other two then confessed to the crimes. Although the confessions (and one of the incriminating statements) were retracted at trial, the suspects were convicted in first instance and on appeal. The courts heard conflicting eyewitness testimony. Some witnesses put the men or their car at the scene of the crime. Others stated that they had seen nothing and no one in the vicinity of the house, while yet others said that the men—and the car—had been at home. The court also received rather uncertain expert reports.

The forensic laboratory found DNA in semen left on the girl's thigh and in hair found on the girl's body. However, neither sample matched the DNA of the defendants. The same was originally said of a pubic hair

37. Based on the final exonerating decision by App. Ct. Leeuwarden, Apr. 24 2002, LJN: AE1877 [www.rechtspraak.nl].

found at the scene, although a month later, after a second test, the expert changed his mind and reported that it "could not be ruled out" that the hair belonged to one of the suspects. Fibers were found on one of the defendant's trousers which were said to "probably match" a rug at the scene of the crime. The evidence on which the convictions were based was the eyewitness statements placing the men near the scene of the crime, the partially retracted statements by two men that they had seen the defendants murder the victim, and the (retracted) confessions. The courts also took most of the forensic evidence into consideration. An expert testified at trial that the semen was most likely the result of intercourse with someone else prior to the murder, but that it could well have been "dragged out" by one of the defendants during the rape. The expert testimony on the pubic hair and the rug was taken as corroborating. The two defendants went to prison, continuing to protest their innocence.

In the years that followed, the case was taken up by a well-known television journalist who devoted no fewer than 40 broadcasts to it. With the help of a respected, retired chief of police, the journalist reconstructed the case, concluding that the crime could not have taken place within the time-frame claimed by the prosecution and accepted by the courts. Additionally, the journalist and retired police chief concluded that the two witnesses (one of whom was of decidedly minimal intelligence) who said they saw the murder committed had lied (to which they admitted on camera) and that, in any event, it could not have been committed in that way. The journalist and retired police chief also found that the police had used undue pressure and tricks during the interrogations. It was also discovered that the police had fed the suspects information about the crime and told them they had irrefutable forensic evidence, and that this had led to the suspects giving false statements. The team of innocence crusaders also interviewed the forensic expert of the "dragged-out-semen-theory." It was discovered that crucial information had been withheld when the expert was asked to report. Now, given that information, the expert declared that his original findings were spurious. The journalist and retired police chief also commissioned new DNA tests, not possible at the time of the trial, which showed that the semen and both hairs came from the same person. Despite these new findings, the Supreme Court refused to admit them as "new evidence" that would have led to a different verdict and several requests to have the case reopened were denied. Finally, the expert wrote a new report retracting his original findings about the semen. This, the Supreme Court accepted (redefining "new evidence" to include, "under exceptional circumstances, revised expert opinion"), and the case was referred to be retried.

The exonerating judgment by the referral court lists a catalogue of errors on the part of the police and, thus, by definition, on the part of the prosecution. There had been a highly stressful (though not illegal) interrogation situation that lasted two months, during which the suspects had no contact with the outside world or with their lawyers; the police had focused exclusively on the two suspects and had subsequently attempted to find evidence to "fit" existing suspicions, failing to follow up on eyewitness testimony that seemed to contradict such suspicions or to check whether events could have taken place as alleged. There was a perhaps deliberately incomplete dossier and evidence had been destroyed. Expert reports and witnesses were presented as definitive evidence but were either ambiguous or had not been given crucial information. The court that gave the original verdict on appeal was also shown to have accepted unquestioningly controversial evidence and a dubious reconstruction of the crime. In effect, the court relied on two retracted confessions, convenient eyewitness statements, and ambiguous expert reports, thereby ignoring any evidence that pointed to an alternative crime scenario.

Finally, the advocate-general who represented the prosecution during the retrial came in for some severe, though subtly-worded, criticism. In putting forward the prosecution's case, he had ignored or misrepresented the following. Most of the witness statements pointed towards innocence, not guilt. The pathologist had confirmed that the victim could not have been strangled in the way the prosecution alleged, which was how the crime was described in the false confessions. New forensic evidence had shown that the mitochondrial DNA in the hairs found on the victim's body could possibly match that of the defendants, but that this could be said of anyone with any relationship to them whatsoever through the maternal line—a substantial part of the population of the socially isolated region where the crime took place. And finally, while the original, visual examination of the fibers of the rug suggested a match, forensic testing had now shown that, while there could possibly be a match, the fibers were present in fabric that could be bought in the village and could have come from anywhere, including the defendant's own carpet. The exonerating judgment concluded that reasonable doubt as to the defendants' guilt was underlined by the advocate-general's failure, even during the retrial, to acknowledge this exculpating evidence. The exonerees later received € 900,000 ($1,200,000) in compensation. Also, in October 2009, a man who claimed to be the victim's secret lover but knew nothing about her was convicted for her rape and murder. That case has now gone to appeal.[38]

38. The same defendant is also suspected of other murders.

B. The Schiedam Park Murder[39]

In June 2000, an 11 year old boy and a 10 year old girl were sexually assaulted by a man in the bushes of a park in Schiedam, near Rotterdam. The girl was strangled, and the boy seriously injured. A passer-by called the police. The boy then described his attacker to police. Although the boy's description of the attacker did not match the passerby's appearance, and although other witness statements were contradictory (though all said they had seen a bicycle standing near the bushes), the police soon focused on the passerby as the suspect. The man had been in the park at the time of the attack and, significantly, was a known pedophile. Under protracted police interrogation, the suspect confessed. However, the confession was retracted just two days later. DNA found on the girl's body and on the murder weapon did not match the suspect's. Instead, the DNA had come from a third unknown person. In addition, an alibi gave the suspect practically no time to commit the crime. Yet he was convicted in May 2001 and again on appeal in March 2002. The convictions were based primarily on the retracted confession, circumstantial evidence that the defendant had a bicycle, and evidence that the suspect was in the park at the time. The court backed this up through the prosecution's reconstruction of the time frame, dismissed the boy-victim's description of the attacker as not credible, and accepted the prosecutor's explanation of unidentified DNA on the girl's body. The prosecution claimed that anyone who had been in contact with the victim could have left the DNA, and the fact that the defendant's DNA was not found was proof of guilt rather than innocence. The prosecutor declared that the defendant "had been careful not to leave evidence behind." In 2003, the Supreme Court refused the defendant's petition for cassation. But while he was in prison, rumors started to circulate that he was innocent.

A leading academic from the Dutch innocence project, *Gerede Twijfel* in Maastricht, published a book outlining the case and casting serious doubt on the conviction.[40] It later emerged that, after the innocence project finished its investigations, it sent its report to the head of the prosecution service in 2002, but he never answered. Again, the case was taken up by the media and caused some public consternation. In September 2004, the Supreme Court dismissed a request for revision, because nothing pointed to there being "new evidence." The public

39. The facts are taken from the official report commissioned in January 2005 by the Prosecution Service (see *infra*) after it became apparent that someone else was most probably the perpetrator. The case was investigated by one of the advocates general at the Amsterdam appeal court, seconded by a law professor and an ex-police chief. The full report is available at RIJKSOVERHEID, www.rijksoverheid.nl (last visited May 15, 2012).

40. PETER J. VAN KOPPEN, DE SCHIEDAMMER PARKMOORD (2003).

clamor that something was wrong grew ever louder when journalists discovered that someone had been arrested for another crime and had confessed spontaneously to the murder in the Schiedam Park in August 2004. Suspicions grew that the prosecution had deliberately kept this information secret. It would have certainly constituted new evidence at the revision hearing a month later. Gradually, it emerged that there was a match with the new suspect's DNA, that he had no alibi, and that he had committed several other violent sexual offenses against children. Despite this, the prosecution service continued to deny mistakes had been made. By November, the media were talking about a prosecution disaster. In December, the convicted man was released and then exonerated after the Supreme Court had referred the case for retrial in January 2005. He received approximately € 600,000 in compensation, and the prosecution service set up an official inquiry into what had gone wrong. The chairman was one of the advocates-general at the Amsterdam appeal court, seconded by a law professor and an ex-police chief. What they found shocked the country.

Believing they had their man, the police had pressured the suspect to confess and disregarded any evidence in his favor. Backed up by a child psychologist, the police had also exerted what was described as inadmissible and intolerable pressure on a young and traumatized witness to make him admit the description of his attacker was a fabrication. The child stuck to his statement, but neither the prosecutor nor the courts took him seriously. Indeed, the prosecutor in the first instance ignored anything that pointed to the suspect's innocence. Before the original trial, and again before the appeal was heard, a number of scientists at the state forensic laboratory expressed serious doubts about the defendant's guilt. The scientists also took the unprecedented step of twice speaking to both district prosecutor and to the advocate-general before compiling their report. None of this was included in the final version of the report and was not communicated by either experts or the prosecution to the court or to the defense team. Although the court and the defense knew that unidentified DNA had been found on the body, they were not told the DNA had also been on the murder weapon.

The advocate-general at the appeal court did have doubts, but ignored them and said nothing about them in court. The forensic scientists identified sufficiently with the prosecution to leave their doubts out of the report. What was said to persuade the scientists during their two meetings with the prosecution is not known, except that the district prosecutor did tell them it was important to make sure that "the defense can't run away with this DNA-business." The defense lawyer, ignorant of the fact that only unknown DNA had been found on the murder

weapon, had no right to be shown the full results of the forensic institute's tests, only what was in the final report. Nor did the defense have the right of cross-examination so that they could do little more than argue the case on the face of what was known. Forensic experts who testified were never asked about doubts because neither the court nor the defense was aware that doubts existed.

In August 2005, the public effect of the inquiry's report was greatly reinforced by another television broadcast. While the convicted man was in prison, his case had been used by forensic institute scientists during a course for police and prosecutors about DNA evidence. This case, scientists said, demonstrated how an innocent man could be convicted. Despite the fact that at least 200 police officers and prosecutors attended this course, only one chose to speak out. Finding no response from his superiors, this police officer approached the media and set in motion a lengthy and detailed journalistic investigation. The officer was subsequently fired. The program provoked a furious public debate about the state of Dutch justice in general and about the prosecution service in particular. Parliament demanded answers from the Minister but eventually accepted his version of events: no one had acted intentionally but "serious mistakes" had been made. The government did, however, promise a "program of improvement," including a temporary innocence commission.[41] Its investigations resulted in the reopening of the following two cases and the eventual exoneration of the convicted defendants.

C. Lucia de Berk[42]

Lucia de Berk, a nurse at a children's hospital, was the subject of rumors between 2000 and 2010, which claimed that she was suspiciously often present when a child died. The hospital director first consulted a medical expert, who declared it unlikely that these deaths were all due to natural courses. The director then engaged in some amateur statistics. He ultimately concluded that it couldn't be coincidence that Lucia had either always been the one responsible for the child's medication or had been the last person present before they died. He then held a press conference about the deaths, naming the nurse

41. Commissie Evaluatie afgesloten strafzaken or CEAS—Commission Evaluation Closed Criminal Cases.

42. Based on positive review judgment, HR 7 Oct. 2008, LJN: BD4153, and exonerating judgment Hof Arnhem 14 Apr. 2010, LJN: BM0876 (both at www.rechtspraak,nl); J. DE RIDDER, C.M. HAARHUIS & W.M. DE JONGSTE, DE CEAS AAN HET WERK: BEVINDINGEN OVER HET FUNCTIONEREN VAN DE COMMISSIE EVALUATIE AFGESLOTEN STRAFZAKEN 2006–2008 (2008). Chapter 6, and the report by the CEAS-commission on the case are available at OPENBAAR MINISTERIE, www.om.nl (last visited May 15, 2012).

as a possible suspect. The police gathered information about the hospital unit where the nurse worked and about sudden, inexplicable deaths at other hospitals where she had worked previously. They also tapped Ms. de Berk's telephone and consulted a statistician whose findings they took as proof that the suspicions were well-founded. Lucia de Berk was then arrested. Although she never confessed, and despite a lack of direct evidence against her (no one, for example, had seen her do anything wrong) she was convicted in 2003 for four murders and three attempted murders. De Berk was sentenced to life imprisonment. In 2004, the sentence was upheld on appeal, but this time for seven murders and three attempts. The appeal court also imposed an order for indefinite detainment at a psychiatric institution.

The court of first instance convicted on the basis of statistical probability in combination with corroborating evidence of unnatural death after the statistician testified that the chance that a nurse could be present at so many suspicious deaths or incidents was 1 in 340 million. Some medical experts, though not all, testified that at least four of the children had been poisoned with an overdose of medication. On appeal, the court rejected the statistical evidence (that had come in for a great deal of criticism in the media). However, one of the medical experts, unfortunately the one suggested by the defense, testified that he "was now of the opinion" that the first child had been killed with a non-therapeutic overdose. This, the court took, as proof of murder. The court found corroboration in Lucia's diary where, on the day of the death of a patient she was attending, she had written of "her secret" and having to "stop this compulsive behavior." (Her own explanation was that she had become addicted to laying tarot cards in the presence of dying patients and felt she must stop; she had kept this secret because she felt it inappropriate behavior for a nurse. The court did not believe her.) The final verdict rested on these two pieces of evidence and what became known as "repeating proof." That is, given that there was proof she had murdered the first child and that the deaths of the other six were inexplicable, there could be no other explanation than that Lucia had murdered them too. Lucia de Berk suffered a stroke almost immediately after the decision. The Supreme Court admitted the case in cassation, but only on the point that a life sentence could not be combined with indefinite detainment at a psychiatric institution.[43] With that, any chance of overturning the verdict was eliminated by March 2006.

To some, including her lawyer, it was obvious from the start that Lucia de Berk had been wrongfully convicted. A few worried citizens

43. TON DERKSEN, LUCIA DE B. RECONSTRUCTIE VAN EEN GERECHTELIJKE DWALING (2006); METTA DE NOO, ER WERD MIJ VERTELD, OVER LUCIA DE B. (2010).

developed into crusaders in her case, starting a website and blog to help get the case reopened.[44] The problem then became finding the necessary new evidence. Statisticians and doctors appeared on television disputing the findings of the experts heard at trial. These statisticians and doctors claimed that the deaths were almost certainly due to natural causes and that the probability statistics were, quite simply, incorrect. One concerned individual, a professor in philosophy of science, published a book outlining the mistakes that had been made in the case citing a world renowned expert in this type of death in sick children. He approached the CEAS, asking them to reinvestigate and, once the case was admitted, the CEAS advised the prosecution service to push for revision.

It was discovered that the police had concentrated from the very start on just the one suspect. It was also discovered that the statistician had not included in his investigation a comparison with the other deaths in other hospital units where Lucia de Berk had not been present. Further, new calculations showed nothing suspicious about De Berk's presence at so many deaths. In fact, given her position as staff nurse, it would have been unusual if she had not been there. It also became clear that the report by forensic psychiatrists on the content of her diary had been ignored by the prosecution and the court, and most importantly, that the findings of the one medical expert who had stated that the first child had been deliberately overdosed were categorically repudiated by the world's leading expert in such cases. The prosecution at the Supreme Court feared that none of this could be regarded as "new evidence" because it had been known to the appeal court at the time even if it had not realized its significance. Nevertheless, the advocate-general at the Supreme Court again reinvestigated the case and requested revision because, in his opinion, the children had died of natural causes, and therefore, no crime had been committed. The advocate-general thought it difficult to construe his findings as "new evidence," but the Supreme Court admitted the case on the basis of "progressive scientific insight," and referred it to the appeal court in Amsterdam. Lucia de Berk was released awaiting the decision, and she was exonerated in April 2010. She received compensation of unknown, but reportedly "gigantic" proportions.

44. See, for example, the website started by Metta de Noo, *Licht voor Lucia*, LUCIA DE B., www.luciadeb.nl (last visited May 15, 2012). See also the blog started by Piet Groeneboom, PIET GROENEBOOM'S BLOG, http://pietg.wordpress.com (last visited May 15, 2012).

D. Ina Post[45]

This last case is the oldest in this series, but it is the most recent exoneration, which became possible only because of the existence of the CEAS. In August 1986, an 89 year old woman was strangled in an apartment block for the elderly. Several checks were stolen and later cashed—presumably by the murderer. The police used these checks to conduct a graphology test of the handwriting of the victim's caregivers, one of whom was Ina Post. She became a chief suspect because her signature resembled that of the presumed murderer and because the police found her "nervous" when she complied with their request that she produce a sample of her handwriting and signature. Ms. Post was thereafter detained for questioning. During police questioning, she twice confessed to committing the murder. However, she later retracted the confessions. Ms. Post was subsequently found guilty in first instance and again on appeal on the basis of her retracted confessions, and "nervous behavior," the expert's opinion that the signature on the checks was not the victim's, and the expert's inability to rule out that the signature could have been the defendant's. The Supreme Court refused a petition for cassation. Four requests for revision were also refused. The requests were based on new graphology tests, on expert testimony that Ina Post was highly suggestible, on information contained in interviews with a number of the police officers who participated in the investigation, on expert reports on new developments in graphology, and on reports questioning the authenticity of Post's confessions.[46] As far as the Supreme Court was concerned, none of this was new evidence.[47]

From the very beginning, the conviction of Ina Post attracted a great deal of media attention. Several people took up her case, including Post's aunt, a private detective, and a probation officer. In later years (the conviction took place long before the general population had access to the Internet), blogs and websites were created on her behalf. Also, the case was examined by the Maastricht innocence project, which found the conviction to be flawed and later referred the case to the CEAS-commission. The latter came to a number of devastating conclusions. First, the CEAS-commission concluded that the police had acted on unsubstantiated assumptions that had strongly determined the direction

45. Based on the exonerating judgment of June 6 2010, LJN BN94444 and the reconstruction by the CEAS Commission (CEAS 2006/0018), on OPENBAAR MINISTERIE, www.om.nl (last visited May 15, 2012).

46. *See, e.g.*, HAN ISRAËLS, DE BEKENTENISSEN VAN INA POST (2004).

47. After the Putten case, the Supreme Court returned to its previous strict definition of new evidence, which was one of the reasons why it took so long to exonerate Ina Post.

of the investigation. Specifically, these assumptions included the time of death being around 7 p.m., that the victim must have known her killer well, and later, that Ina Post had committed both the theft and the murder. As a result, the investigation became focused on finding proof of her guilt, not on establishing facts. Post's alibi was not verified, and police did not follow up on information that the murder could be linked to another death in the same apartment block with roughly the same modus operandi—in which Post could not possibly have been involved. Police ignored other indications that they had the wrong suspect, such as the failure to find any identification or other corroborating evidence. Additionally, the police failed to investigate the defendant's knowledge of details of the crime, which could have been obtained from the media and, indeed, in many cases were provided by the police themselves. Also, the police used suggestive, forceful questioning had twice led Post to confess, falsely, to both theft and murder. The CEAS recommended that the case be reopened and, in 2009, the Supreme Court granted Post's request for revision, referring the case to the Appeal Court, which finally acquitted Post in October 2010. At the time of writing, it is unknown whether she received compensation.

VI. PROPOSED REMEDIES

The cases outlined above are classic demonstrations, though in slightly different ways, of how self-repeating errors and confirmation bias can occur in the Dutch criminal justice system. These errors have a number of factors in common: flawed or biased police investigations,[48] tunnel vision, and the dubious role of forensic experts. While the police and prosecution seem to have been singularly inept in handling the case against Ina Post, the defendants in both the Putten and Schiedam Park cases were unfortunate enough to come up against prosecutors and experts actively conniving with the police to ignore indications of innocence. More importantly, these persons kept exculpating evidence away from the defense and the courts. Such aspects represent drastic failures of the guarantees typical of inquisitorial systems, but the most remarkable feature of all four cases is that the guarantees on which the Dutch system could be said to rely most in the final event—the active judge at trial and appeal, and the revision procedure—also failed to operate properly. The courts in all instances convicted or upheld convictions on evidence that was so flawed as to arouse serious doubts among academics and other (professional) outsiders. The judges

48. It should also be noted that three of the cases involve false confessions while the fact that Lucia de Berk never confessed was not for want of trying on the part of the police.

disregarded indications of possible innocence and failed to investigate further (although to be fair, in the Schiedam case the court was not totally informed about the scope of exculpatory evidence).

Although a confession is not enough under Dutch law to convict, false confessions, even if retracted, weigh heavily against the defendants. These cases show that the court can also reason away discrepancies between the prosecutor's version of events and the defendant's, alibi testimony, or forensic evidence, and that judges sometimes accept flawed forensics without question. Lucia de Berk is of a slightly different order. There was no confession and no apparent reason for the court to doubt the police and prosecution case or the expert evidence. However, De Berk's case shows the dangers of rules of evidence. These rules, although designed to do the opposite, actually allow courts to scrape together a conviction without really questioning the prosecution case. Perhaps most importantly, the rules of evidence allow courts to confirm what they believe in the first place. The construction of "repeating proof" is particularly alarming. Indeed, the courts (and experts) seem to have been carried away on the vicious preconception of guilt that informed public opinion in the case of Lucia de Berk.[49] The appellate court, for example, went out of its way—as De Berk's lawyer later bitterly complained—to put the worst possible interpretation on the evidence.

These cases, each in their own way, occasioned much public and political unease and also led to changes in the Dutch justice system. Some changes were self-imposed by the judiciary, though possibly unconsciously. Peter van Koppen has noted, for example, that courts are significantly more inclined to acquit in cases of homicide since the Schiedam Park murder case.[50] The manner in which the district court of Rotterdam had all too readily accepted the improbable prosecution case especially shocked the courts. This led the Rotterdam judges to conduct their own internal inquiry. The same case, which was particularly upsetting because it demonstrated lack of integrity on the part of the prosecution,[51] also led to the "program of improvements" and the creation of the CEAS. The case also prompted a legislative proposal to amend the review procedure. Meanwhile, the European Court of Human Rights has handed down a number of judgments that appear to make the presence of a lawyer during police interrogations mandatory—

49. She was the subject of a sustained whispering campaign of gossip by her colleagues and regularly depicted as a witch—sometimes literally in cartoons—by the media.

50. PETER VAN KOPPEN, OVERTUIGEND BEWIJS: INDAMMEN VAN RECHTERLIJKE DWALINGEN 289 (2011).

51. Although the same could be said of the murder in Putten, that case was originally dismissed as a one-off, while many in the judiciary continued to insist that the exonerees were guilty.

specifically mentioning the prevention of miscarriages of justice in its reasoning. This has also resulted in changes to the position and rights of the defense pre-trial. In this part, I briefly outline the most important of these proposed remedies.

A. Program of Improvements

The official inquiry committee, which was set up following the denouement of the Schiedam Park murder case, made a number of recommendations. All of these were accepted by the minister of justice, after which the police, the prosecution service, and the national forensic institute (NFI) produced plans showing how these recommendations were to be implemented.[52] These plans are highly detailed and, in some cases, seem to be no more than a combination of professional investigation requirements and common sense. For example, the requirements mandate that police and prosecutors be properly trained to investigate high profile, serious cases; that during and after an investigation all material should be correctly collected and kept; and that the NFI should produce reports that are clear and can be understood by police, prosecutors, courts, and defense lawyers.[53] Other measures are clearly reactions to specific details of the Schiedam Park murder case. These measures include new rules that apply if scientists at the NFI have doubts as to whether police and prosecutor are taking the right decisions or are focusing on the right suspect. Due to these new protective measures, scientists must commit their doubts to paper and discuss these doubts with the NFI director. If the NFI director agrees, he must discuss the doubts with the prosecutor and the judge of instruction, who also decides whether the defense will be present at this discussion. The NFI report of doubts must be included in the dossier so that the court, and also the defense, will always be informed before trial that doubts exist. There are also improvements that are much more general and are specifically aimed at improving the quality of policing and prosecution and, thus, preventing erroneous convictions.

Throughout, the report is based on the notion of the impartial, quasi-judicial prosecutor. An important aspect of the prosecutor's work is evaluating the police case, which must not mean simply asking whether

52. *Versterking Opsporing en Vervolging: Naar Aanleiding van het Evaluatierapport van de Schiedammer Parkmoord* [*Strengthen Investigation and Prosecution: Following the Evaluation of the Schiedam Park Murder*], OPENBAAR MINISTERIE, POLITIE NFI (Nov. 4, 2005), http://www.how2ask.nl/wp-content/uploads/2010/11/Rapport-versterking-opsporing-en-vervolging.pdf.

53. *Id.* at 26, 37, 46–50. These are not, however, superfluous exhortations, given that in the Putten case (but there have been many others too) forensic material was found to be contaminated through incorrect procedures and that all of these cases involve some measure of misunderstanding about the implications of forensic evidence.

there is sufficient evidence to convict. Rather, the prosecution must make sure that, before the case comes to court, it has been examined from all angles and that the right value has been placed on any possibly exculpating evidence. Organized evaluation of all aspects of the case, first internally by the police and then by the prosecution is, therefore, now mandatory. If there is any doubt, prosecutors should seek review by a third party, such as an academic.[54]

B. Audiovisual Registration of Police Questioning

While measures such as organized evaluation and third-party review are intended to prevent tunnel vision and confirmation bias from setting in from the police investigation onwards, others measures are aimed specifically at preventing false confessions. As long as some sort of due process awareness has colored Dutch legal thinking about the position of the suspect,[55] there have been discussions about what due process actually means. Inquisitorial ideology regards the suspect as an object of investigation and the most important source of information. How is this to be reconciled with pre-trial rights?

The most contested provision of the new Code in 1926 forbade undue pressure against the suspect and prescribed a caution that he had the right to remain silent. Many thought this quite mad, for it contradicted the principle that the state must search for the truth by all appropriate means: "[S]urely criminal procedure is about revealing the truth and eliciting the facts from the suspect who knows best what happened."[56] The caution was nevertheless included, but soon abolished in 1937 and not reinstated until 1974. This was regarded as sufficient protection against undue pressure, self-incrimination, and false confessions. Defense lawyers regularly advocated some form of external monitoring of police questioning. However, it was not until 1995, amidst public doubts about the guilt of the men convicted of the murders in Putten that the government bowed to demands for the video taping of interrogations. But, the government dragged its heels until the wrongful conviction in the Schiedam Park murder case of 2005. This, followed by the cases of Lucia de Berk and Ina Post, forced the minister of justice's hand.

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54. *Id.* at 18–22.

55. From the introduction of the Code of Criminal Procedure in the 1920's onwards.

56. For these and many more examples, see J J.H. DRENTH, DE HISTORISCHE ONTWIKKELING VAN HET INQUISITOIRE STRAFPROCES 224–28 (1939); JAN HENDRIK DRENTH, BIJDRAGE TOT DE KENNIS DER HISTORISCHE ONTWIKKELING VAN HET ACCUSATOIRE TOT HET INQUISITOIRE STRAFPROCES [CONTRIBUTION TO THE KNOWLEDGE OF THE HISTORICAL DEVELOPMENT OF THE ADVERSARIAL TO THE INQUISITORIAL TRIAL] 224–28 (1939).

The police have now introduced a new manual, have improved training on interrogation techniques, and have made officers aware of the danger of false confessions. The prosecution service has produced binding guidelines on the audiovisual registration of police questioning of suspects, witnesses, or those reporting a crime.[57] These guidelines are highly detailed, ranging from the situations in which registration is obligatory to exactly how it should take place, how data should be stored, and whether the defense should receive copies. At present, the guidelines' scope is somewhat restricted, given that the police districts of Amsterdam and surrounding area, Rotterdam, and The Hague are exempted.[58] (In short, video or audio tape-recording is now mandatory for all suspected crimes if the victim has died, the possible prison sentence is 12 years or more, the possible prison sentence is less but the victim has sustained serious injury, or the case concerns a serious sexual offense. Audiovisual registration is obligatory if experts assist the police during questioning, the person questioned is vulnerable (younger than 16 or mentally impaired), and the case falls under one of the above categories, or a witness is questioned by a behavioral expert. In all other cases, the prosecution or the judge of instruction may decide that audiovisual registration is necessary, depending on the person concerned, the nature of the case, or how questioning is proceeding. Visual registration of questioning must be such that all concerned are visible, and children must be questioned in a non-threatening environment.

If the suspect wishes to hear or see, together with his lawyer, the recording of his interrogation or that of a witness, or if the lawyer wishes to do so alone, a request must be filed with the public prosecutor. The prosecutor will then inform the police officer leading the investigation. The same guidelines go on to say where this may take place but do not specify if, or when, such a request may be denied. The rules expressly prohibit the defense receiving copies of the registration. Appendix 3 to the guidelines, however, specifically deals with this issue. According to standing case law of the Supreme Court, the defense has no right to receive a copy of the registration but does have a right to know that it has taken place and to request that (parts of) it be filed as evidence in the dossier. This disclosure right may be limited pre-trial if the interests of the investigation or of vulnerable witnesses should take

57. AANWIJZING AUDITIEF EN AUDIOVISUEEL REGISTREREN VAN VERHOREN VAN AANGEVERS, GETUIGEN EN VERDACHTEN (2010A018), 6 Apr. 2009 (in force 1 Sep. 2010–31 Aug. 2014), STC. 2010, no. 11885, *available at* http://wetten.overheid.nl/BWBR0027982/geldigheidsdatum_21-05-2011.

58. These are the three metropolitan areas where most of the crimes to which the guidelines refer are committed.

precedence over those of the defendant.[59] After registered interrogations have become part of the dossier,[60] the defense may still be refused a copy because of the privacy rights of third persons.

C. The Presence of Lawyers During Police Questioning

Despite the evidence that false confessions were a real danger, the presence of a lawyer during police questioning remained absolutely prohibited, both for the criminal justice authorities and for many legal scholars.[61] Calls by the European Committee for the Prevention of Torture (the last one, in 2008, referring explicitly to the prevention of miscarriages of justice) to review the legal aid situation,[62] were ignored. However, the European Court of Human Rights has upset this stubborn Dutch doctrine. The European Convention has direct effect in the Netherlands and is of higher status than national law. The courts can and must apply the European Convention's provisions—and their interpretation by the European Court—directly.[63] The impact of *Salduz v. Turkey* and the string of decisions that followed[64] became even more significant since they coincided with the revelation of the miscarriages of justice described in this Article. In what is known as the *Salduz* case law, the European Court appears to require the presence of a lawyer during police questioning. The wording of the judgments, however, is ambiguous, a fact which the Dutch courts and criminal justice authorities use to minimize the effect of these European judgments.

On June 20, 2009, the Dutch Supreme Court ruled on a case resembling the *Salduz* case in so far as it involved a minor in police custody whose statements, which were made without the assistance of a lawyer and were later retracted, were used as evidence.[65] The European

59. The prosecution refers to another decision by the Supreme Court: HR 7 May 1996, NJ 1996, 687.

60. (and are, therefore, open to inspection by the defense at the latest 10 days before trial).

61. AFRONDING EN VERANTWOORDING: EINDRAPPORT ONDERZOEKSPROJECT STRAFVORDERING 2001 78–79 (M S GROENHUIJSEN & G KNIGGE eds. 2004).

62. *See, e.g.*, EUROPEAN COMM. FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, REPORT TO THE AUTHORITIES OF THE KINGDOM OF THE NETHERLANDS ON THE VISITS CARRIED OUT TO THE KINGDOM IN EUROPE, ARUBA, AND THE NETHERLANDS ANTILLES BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT) IN JUNE 2007, 2 CPT/Inf (2008), *available at* http://www.cpt.coe.int/en/states/nld.htm (concerning a visit to the Netherlands in 2007).

63. The Dutch Constitution is not directly applicable; this makes the European Convention effectively the only Bill of Rights in the Netherlands.

64. Salduz v. Turkey, App. No. 36391/02, Eur. Ct. H.R. (2008); Dayanan v. Turkey, App. No. 7377/03, Eur. Ct. H.R. (2010); Pishchalnikov v. Russia, App. No. 7025/04, Eur. Ct. H.R. (2009); Brusco v. France, App. No. 1466/07, Eur. Ct. H.R. (2010).

65. HR 30 June 2009, LJN BH3084.

Court's decisions were not entirely clear and could be read restrictively or expansively—what does "from the first interrogation" mean, is "access to a lawyer" the same as "assistance of a lawyer" and does this imply physical presence *during* police interrogation? The Supreme Court took all this to mean that any suspect has the right to consult a lawyer prior to the first police interrogation (i.e., formal questioning after arrest), to be informed of that right, and except in cases of an unequivocal waiver or if there are other urgent reasons, to be able within reasonable limits to exercise that right. But the Dutch Court found there was no general right to have a lawyer present during an interrogation. Minors form an exception, though, as they do have the right to have a lawyer or other "person of trust" with them in the interrogation room. Statements made by the suspect without his having enjoyed the (relevant) right, and any other evidence found as a direct result of such statements if raised as a defense should, in principle, be excluded.

The prosecution service followed with a set of binding instructions[66] based on the idea that no more than a right to prior consultation is required for adults. These instructions qualify such consultation rights, of which every suspect must be informed on arrest, according to the seriousness of the offense. In the most serious cases, suspects must also be informed that this legal assistance is free and that the right to consultation cannot be waived. In the most minor cases, the suspect must be informed of his right to counsel and that, should he wish to exercise that right, he will have to pay for a lawyer himself. The police must always inform the pool of duty lawyers[67] or an attorney of the suspect's choice, and wait for a maximum of two hours for the lawyer to arrive before starting the interrogation. After 30 minutes of consultation, the interrogation may begin. Should a "life-threatening" situation arise that requires immediate police action, the prosecutor may authorize the police to start the interrogation immediately without the lawyer. Suspects who make spontaneous statements before being cautioned must still be informed of their consultation rights. The police may not ask further questions until the lawyer has arrived or the right has been waived. If new suspicions arise during the interrogation, there is no need to inform the suspect again of his consultation rights.

Given that there has not yet been a case against the Netherlands in Strasburg, it is a moot question as to whether the new rules meet the European standard. This is especially so since the European Court has clarified the *Salduz* decision in *Brusco v France*.[68] There now seems to

66. *Aanwijzing Rechtsbijstand Politieverhoor* (2010A007) STC 2010 4003, *available at* http://www.om.nl/organisatie/beleidsregels/overzicht/jeugd/@155139/aanwijzing-0/.

67. *See supra* note 33 (describing the system of duty lawyers).

68. Brusco v. France, App. No. 1466/07, Eur. Ct. H.R. (2010). This case involved an adult who

be little room for doubt that the rights of a fair trial include the right to have a lawyer present—although the European Court has still not used the magic words: "physical presence." In response to parliamentary questions, the Dutch minister of justice and security again interpreted the words of the European Court as restrictively as possible: "the suspect must have the opportunity to consult with a lawyer before and during the investigation . . . which does not lead directly to the conclusion that the lawyer must be present at the interrogation."[69] However, in what might have been a last ditch interpretative stand, in his comments on the *Brusco* decision, even the minister of justice and security has reluctantly conceded, "[I]t can by no means be ruled out that in future" there will be a right to have a lawyer present during police interrogations.[70]

D. Innocence Commission CEAS and New Rules on Revision

The CEAS commission installed immediately after the Schiedam Park murder to look into possible other cases of wrongful conviction officially came under the authority of the prosecution service, although it had a number of independent members. At the same time, Parliament asked the minister of justice to investigate the possibility of an independent innocence commission along the lines of the Criminal Cases Review Commission of England and Wales. The report the minister commissioned suggested that the great strength of the English commission was its complete independence from the police and prosecution service, and its ability to conduct its own investigations. This had greatly contributed to shoring up the legitimacy of criminal justice and had removed a great deal of (media) focus on possible wrongful convictions. In turn, this also relieved political pressure on the government. The English commission's weaknesses were its inability to deal with cases quickly enough to prevent a large backlog and, inevitably, the delay in bringing possible miscarriages to the Court of Appeal.[71]

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was originally a witness, but was then questioned by the police as a suspect. No lawyer was present. The words of the European Court ("in any event the suspect has the right to consult with a lawyer before and during the investigation") strongly imply that the presence of a lawyer during police questioning is a general right.

69. LETTER TO THE SECOND CHAMBER OF PARLIAMENT FROM THE MINISTER OF SECURITY AND JUSTICE, 16 Nov. 2010 (DDS5673300), http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2010/11/16/brief-tweede-kamer-raadsman-bij-het-politieverhoor/brief-raadsman.pdf (last visited Feb. 15, 2011).

70. *Id.*

71. C.H. BRANTS, THE CRIMINAL CASES REVIEW COMMISSION (CCRC). RAPPORT TEN BEHOEVE VAN DE MINISTER VAN JUSTITIE (2006).

Focusing on the weaknesses rather than the strengths, the minister decided not to introduce an independent innocence commission. Instead, he installed the CEAS commission that reviewed two of the miscarriages outlined above and recommended revision. A number of problems attached to the rules under which the CEAS operated: it was not independent of the prosecution service (although it never suffered from interference from that quarter), defendants and lawyers could not put their own case forward to be reviewed but had to work through the prosecution or "external experts" (usually academics interested in the case), and importantly, the CEAS was not allowed to examine the role of the courts. This latter restriction was logical in view of the civil law doctrine of *trias politica* and the fact that the commission was under the authority of the prosecution service. The administration (in this case, the prosecution) cannot examine the actions of the judiciary, but CEAS regarded this restriction as highly unsatisfactory given that most miscarriages also involve judicial errors.

CEAS was never meant to be a permanent solution. The government has finally produced a bill of law which is intended to provide a structural opportunity for reviewing possible miscarriages by extending the rules of the existing revision procedure with an eye towards protecting the wrongfully convicted.[72] In short, the new procedure redefines the ground for revision, "new evidence," to include new forensic insights. The Supreme Court will still have the final word, but the convicted person may file a request with the Procurator-General at the Supreme Court for further investigation.[73] Before deciding, the PG may—or must, if the defendant has been sentenced to 10 years or more—forward the request to a commission (comparable to the CEAS) that will advise on the necessity of further investigation. In conducting that investigation, the PG can call in the assistance of an investigation team consisting of police officers, prosecutors and, if necessary, external experts. Alternatively, he may have the judge of instruction open an investigation. Because it is feared that this more generous regulation of revision will lead to a large number of requests, the convicted person must be represented by a lawyer.

These new rules are certainly an improvement although they have been criticized for not going far enough. Much of this criticism is highly detailed and concerns intricacies of the rules of evidence. However, the

72. WIJZIGING VAN HET WETBOEK VAN STRAFVORDERING IN VERBAND MET EEN HERVORMING VAN DE REGELING BETREFFENDE HERZIENING TEN VOORDELE VAN DE GEWEZEN VERDACHTE (WET HERVORMING HERZIENING TEN VOORDELE, TK 2010/2011, 32 045. See also the Explanatory Memorandum to this bill of law at TK 2010/2011, 32 045, no. 3.

73. The PG at the Supreme Court is not a member of the prosecution service and is regarded as independent: his appointment is for life and his main function is to advise the Supreme Court as to the applicable law and the interests of justice in the specific cases that come before it.

major bone of contention is the fact that the new rules do not provide for an independent innocence commission and that they restrict mandatory new investigation into the facts to those sentenced to ten years or more. Some authors are convinced that the Supreme Court should not be the organ of revision at all because it is unlikely to regard decisions by fellow judges independently and critically. These critics call for a totally independent, administrative innocence commission that will both investigate and decide on possible miscarriages of justice.[74] Others are more enamored of a solution comparable to the English Criminal Cases Review Commission. That would still allow the Court of Appeal to have the final word on whether a conviction is safe or not, but the commission itself would be totally independent in its investigations.[75] One problem, which has also come up in the discussions in Parliament, is that the text of the new regulation is unclear about whether errors by the courts constitute grounds for revision. In reply to parliamentary questions, however, the minister has said that the definition of "new evidence" may also include the situation in which the tribunal of fact was acquainted with the evidence at the time of trial, but failed to recognize its significance, i.e. the Lucia de Berk scenario.

VII. CONCLUSIONS

While there is no way of knowing how often wrongful convictions occur in the Netherlands, during the past twenty years it has become clear that the criminal justice system is by no means as accurate as the Dutch have always thought. What is surprising is not that there have been miscarriages of justice that must be regarded as consequences of the system. Rather, what is astonishing is that the criminal justice authorities and most legal scholars believed, until very recently, that any wrongful conviction would be an extremely rare and isolated incident. Theoretical consideration of the strengths and weaknesses of inquisitorial process reveals that Dutch criminal justice has systemic features that make it vulnerable to miscarriages. Whether or not it is just as vulnerable as an adversarial system like the American one is a moot question.

The fundamental assumption that state officials can be trusted to conduct an independent and non-partisan investigation to find the truth that will allow the court to arrive at a reliable and therefore legitimate

74. H.F.M. CROMBAG, ET AL., HERZIENING: KANTTEKENINGEN BIJ HET W [REVIEW: COMMENTS ON THE BILL] (2009), *available at* http://njblog.nl/2009/03/05/herziening-kanttekeningen-bij-het-wetsontwerp/.

75. C.H. BRANTS & A.A. FRANKEN, OVER DE CRIMINAL CASES REVIEW COMMISSION EN DE COMMISSIE EVALUATIE AFGESLOTEN STRAFZAKEN 734–54 (2006).

verdict forms the major legal-cultural reason why so many in the legal world have been unable even to conceive of the system being flawed in any way. Under these conditions, the guarantees of due process that American legal scholars take as given are seen as unnecessary. The Dutch defendant has no right to have a lawyer present during police investigations. It is essentially the prosecution that decides the content of the dossier and, therefore, the case that is heard by the court. The court also has the final word on when it considers it has sufficient information to come to a verdict. The court may also refuse a defendant's request to hear more evidence. And finally, debate at trial based on autonomous defense rights is not regarded as essential for truth finding.

This state-driven system is surrounded by guarantees that should compensate for the lack of autonomous defense participation and contribution, namely hierarchical control and monitoring in and between the different state participants, of which a full retrial by a higher court forms part. The latter should, and perhaps does, mean that such inquisitorial systems make less irredeemable mistakes than adversarial systems where the defendant has only one chance. However, that is not to say that the court of first instance does not often get it wrong,[76] while such errors usually mean that any wrongfully convicted person will spend a considerable time in prison while the appeals system runs its course.[77] However, the very existence of these guarantees that are meant to catch and eradicate mistakes also means that these are only too easily passed further up the chain of decision making. This tendency has been exacerbated by recent changes to the system in the name of cost-effectiveness and efficiency (in the sense of better crime control). As the police and prosecution service struggle to get the desired result, a conviction, the relationship between these changes and intensified media pressure has had the effect of undermining the commitment to impartiality and of increasing the likelihood of tunnel vision and confirmation bias.

There are no indications that the Dutch police employ violence during interrogations—although they are not averse to psychologically coercive interrogation techniques. Further, few officers willfully ignore findings for the suspect. However, many officers do narrow their focus, seeking confirmation of existing suspicions. This undermines the first

76. If we were to include all the cases of wrongful conviction in first instance, therefore in which the court of appeal has acquitted (or the Supreme Court has returned a case for acquittal because of fundamental mistakes on points of law made by either of the tribunals of fact), the wrongful conviction rate in the Netherlands would be very much higher.

77. This problem besets all inquisitorial systems that, because of their reliance on monitoring and control and written evidence, generate huge amounts of paper and are very bureaucratic; this in its turn leads to fast trials but exceedingly slow procedures as a whole.

assumption of their inquisitorial role: an open mind and non-partisanship. Where traditionally the magisterial, non-partisan prosecutor, able and willing to take "judicial" decisions in the name of the common good, was the predominant role model,[78] this has been replaced among a substantial number of prosecutors by the model of the crime fighter.[79] While non-partisanship would lead the prosecution to attempt to falsify police findings, the prosecutor then becomes much more likely to seek to verify the police case and to base upon it the evidence he will present through the dossier and in court. With, until very recently, no external monitoring at all of the pre-trial investigation, this is all too easy.

Moreover, although the courts are traditionally regarded as the most important monitors of police and prosecution activities pre-trial, recent research indicates that judges are greatly influenced by the way prosecutors build and present their cases.[80] That renders the courts subject to confirmation bias on the basis of their prior knowledge of the prosecution's case. This means that defense allegations that exculpatory evidence exists but has not been investigated or disclosed must be very strong in order to be admitted to judicial decision making.

Indeed, it has been said that truth finding in Dutch courts is not geared towards discovering whether the evidence points beyond reasonable doubt to the guilt of the defendant. Rather, truth finding in Dutch courts focuses on whether the available evidence does not contradict the prosecutor's assertion that the defendant is indeed guilty.[81] It is the same mechanism that undermines the assumption of non-partisan gathering of evidence during pre-trial investigation. Dutch rules of evidence and the requirement that judges decide in collaboration on issues of guilt and innocence should mean that doubts about the prosecution case are debated in chambers on the basis of reliable direct and corroborative evidence and that possible other scenarios are considered. But here too there are inherent weaknesses.

The problems of expert testimony are, in some ways, no different from problems that may occur in other systems of criminal procedure.

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78. H.G. VAN DE BUNT, OFFICIEREN VAN JUSTITIE, VERSLAG VAN EEN PARTICIPEREND OBSERVATIEONDERZOEK (1985).

79. C.H. Brants & K. Brants, *Vertrouwen en Achterdocht: De Driehoeksrelatie Justitie, Media, Publiek* [*Trust and Suspicion: The Three Cornered Relationship between the Justice System, Media, and Citizens*], JUSTITIËLE VERKENNINGEN [JUDICIAL EXPLORATIONS], July–Aug. 2002, at 8.

80. J.W. KEIJSER ET AL., *Strafrechters over Maatschappelijke Druk, Responsiviteit en de Kloof Tussen Rechter en Samenleving* [*Judges on Social Pressure, Responsitivity, and the Gap Between the Courts and Society*], *in* HET MAATSCHAPPELIJK OORDEEL VAN DE STRAFRECHTER. DE WISSELWERKING TUSSEN RECHTER EN SAMENLEVING 21 (J.W. de Keijser & H. Elffers eds. 2004).

81. P.J. van Koppen & T.M. Schalken, *Rechterlijke Denkpatronen als Valkuilen: Over zes Grote Zaken en Derzelver Bewijs*, *in* Het Maatschappelijk Oordeel van de Strafrechter. De Wisselwerking Tussen Rechter en Samenleving 85-132 (J.W. de Keijser & H. Elffers, eds. 2004).

Judges may be inclined to give too much weight to expert testimony and forensic evidence (especially true of DNA). However, it is perhaps more problematic that judges will generally have at their disposal the evidence of only one expert. While neither judges nor the defense lawyers are usually knowledgeable enough to ask the relevant scientific questions at trial, the routine absence of an expert for the defense means that the court is dependent upon its own, often amateur, evaluation of the evidence.

The negative system of evidence[82] and legal requirements as to sorts and amount of evidence necessary to convict imply that (possibly false) confessions, the statement of a single (possibly biased or untruthful) witness, or of a single expert, may never lead to a conviction unless there is corroboration of guilt from an independent source. The defendant must also have had the opportunity to challenge the evidence brought against him. In reality, however, it is possible to convict on two sources of evidence—admittedly independent—while the conviction nevertheless rests on one witness, one expert, or a confession. The conviction of Ina Post is a case in point.[83] Moreover, while judges should look first at the evidence and then decide whether they find it convincing, if their mind is already made up by the information they themselves consider sufficient during trial—itself based on mainly the prosecution dossier—the judges will then simply look for the legally permissible forms of confirmation of what they already think. This psychological process is compounded by the fact that, in its written reasoning, the court need not discuss all available evidence and any residual doubt there may have been, but is merely required to enumerate the legally permissible sorts of evidence upon which the decision is based. This is true even though judges must give a reasoned response to specific defenses. Unanimity among the panel members is not necessary.[84]

This reality of judicial process is all the more problematic because, ultimately, the Dutch place the greatest faith in the career judiciary with its "impartial and open-minded" judges. The rationality of the legally trained mind and the experience of highly qualified practitioners is presumed to guide judicial decision making, not the irrational prejudice that may color the verdict of the inexperienced layman, who is probably also ignorant of the finer points of law. One of the more troubling aspects of a career judiciary, however, is that experience can degenerate

82. *See supra* note 35.

83. Van Koppen & Schalken, *supra* note 81.

84. Nevertheless, the judiciary is assumed to speak with one voice: dissenting opinions are unknown and what goes on in chambers is secret, making research very difficult and dependent on experimental situations with panel-groups.

into routine, so that panels of judges feel no need to explain to each other what the strength or weakness of the case are as all will understand them, and that in general a process of group-think governs deliberations. This is especially true of younger judges, who are quickly socialized into such a process and may well find out that too independent a frame of mind is not appreciated.[85]

The systemic problems outlined above are all evident in one way or the other in the wrongful convictions that have occurred in recent years. At last, measures have been designed to deal with them, albeit reluctantly, in the face of much public pressure. The question is whether the proposed solutions will actually have the desired effect.

As in any criminal justice system, the first point of risk of a wrongful verdict eventually being handed down occurs during police questioning. In the Netherlands, there has never been any way of knowing what exactly was said during an interrogation, whether a statement was skewed to produce confirmation of a suspicion or if a confession was tainted by coercion. Written police reports, on which a court may place great reliance as corroborating evidence, are not verbatim and do not contain the questions asked. Rather, reports of police findings are written in the form of a continuous statement made by the suspect. It is of course up to the prosecutor to recognize and correct police bias, but he is rarely present during the interrogation of a suspect—or a witness for that matter—and is usually quite content to rely on police findings. Besides making sure that the police are aware of the dangers of the type of interrogation techniques they employ (through education and training), there are other ways of countering the risk of coercive questioning, false confessions or tunnel vision—or at least being able to detect whether they have occurred. Ensuring that a suspect is informed of his rights is a *sine qua non*, while there is also audiovisual registration of interrogations or the physical presence of a lawyer in the interrogation room.

All of the above have now, finally, found their way into the Dutch version of inquisitorial justice. However, from the grudging introduction of the caution in 1926 to the greatly reluctant acceptance of the probability that the European Court's definition of essential fair trial rights includes the presence of a lawyer during police questioning, their reception has been half-hearted. Attempts to undermine these measures by the creation of legal exceptions are probably only to be expected. Audiovisual registration of interrogations is very important in the Netherlands, given the lack of verbatim transcripts, yet still, the position of the defense is weak and decisions as to what information is to be

85. KEIJSER ET AL., *supra* note 80, at 36–38.

disclosed are still in the hands of the prosecution and courts with the same exceptions as apply to withholding information about or obtained from witnesses. We may expect that, eventually, there will be a right in the Netherlands to have a lawyer present during questioning, but as yet this has not materialized other than for underage suspects.

There is a fundamental tension between the notion of the suspect as an object of investigation and source of information, and the idea of an autonomous subject at law with inalienable fair trial rights. This was explicitly argued in 1926 when the question was asked why would a policeman want to encourage a suspect to remain silent when the suspect is the one who knows most about the crime. In this sense, there is something to the American assertion that inquisitorial process is based on a presumption of guilt. In essence, the same argument has been used to deny suspects the right to a lawyer during questioning because lawyers will most likely tell their clients not to say anything and will, therefore, hinder the investigation. It does not seem to occur to these opponents of legal assistance, who would all regard themselves as proponents of fair trial rights, that there is something contradictory about accepting the right to remain silent as a fundamental aspect of due process and yet wanting to ensure that it is not exercised.

Moreover, in the specific Dutch situation, where there has always been a decided hint of smugness to the faith attached to the ability and integrity of the criminal justice authorities and judiciary, it has proved exceedingly difficult to introduce any form of external monitoring. Among those who oppose such a notion are not only the professionals of the criminal justice system, but many, if not most, of the leading legal academics. This applies in particular to the judiciary. It is telling that there is only one, very small, innocence project in the Netherlands that is regarded as renegade. The project's findings have often been literally, laughed out of court. Distrust of external monitoring is also probably the main reason why the new rules on revision do not instigate a true innocence commission but, instead, place decisions on whether or not a case should be reinvestigated first with the procurator-general at the Supreme Court and then with the Court itself. Although the PG functions independently, and the position has the same guarantees for independence as that of a judge, the PG is nevertheless "part of the system." He is not an outsider but a member of the judiciary, albeit one with idiosyncratic powers. The official argument for opting for this specific solution is twofold: constitutional arrangements (i.e. the *trias politica*) preclude any judgment or criticism of the judiciary by any institution but itself, and it is preferable to have in place a ruling that is coherent within the Dutch system rather than looking for solutions elsewhere (i.e. installing a commission akin to the Criminal Cases

Review Commission).

It is neither surprising, nor unwise, that the government has not opted to "borrow" from the essentially different adversarial system. Damaska has shown convincingly that allowing American trial judges to cross-examine witnesses would require a complete overhaul of institutional and procedural arrangements in the U.S.[86] The same applies vice versa. There is, moreover, a very real danger that such legal transplants will have the same result as sawing down a leg in the assumption that the table will stop wobbling, while with hindsight, it turns out that the floor is uneven. By then, the chance of restoring the table's equilibrium is almost certainly gone forever.

Nevertheless, while the proposed "measures of improvement" that have come in the wake of the public scandals about wrongful convictions are—rightly so—designed to fit into the inquisitorial scheme that governs Dutch criminal process, these measures still presume the ability of the system to ensure its own coherence and integrity, i.e. to police itself. The measures allow for no real defense participation or "outside interference" although it would be perfectly possible to design forms of both that are essentially compatible with inquisitorial process. What has now been put in place may perhaps be viewed as "state strategic selection mechanisms," designed to take the sting out of public criticism and unrest and to prevent even further reaching demands for reform.[87] Whatever the case, the very fact that the government has been forced by the revelations of wrongful convictions to do anything at all is a new and welcome development. For the first time, the Dutch criminal justice system now contains features that imply a healthy distrust of, rather than blind confidence in, the law and judicial authority. That is something that both the criminal justice authorities and the mainstream legal community in the Netherlands have never countenanced easily.

86. Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L., 839, 849–50 (1997).

87. *Cf.* Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289 (2005).

REDINOCENTE: THE CHALLENGE OF BRINGING INNOCENCE WORK TO LATIN AMERICA

*Justin Brooks**†

In 2008, I traveled to Oruro, Bolivia to train defense attorneys on DNA technology. I had done similar trainings in Chile, Paraguay, Mexico, and other countries in Latin America, but nowhere that felt quite so remote. The 143-mile bus trip from La Paz passed through dusty villages filled with mud huts and lacking basic infrastructure. The bus stopped many times, picking up Chola women wearing shawls and derby hats, and carrying their huge satchels of goods to sell and trade. It seemed unlikely that the technology I would be talking about would have much value in this remote outpost.

My fears were confirmed when I talked to the lawyers I was training in Oruro. They lacked access to basic technology and there were certainly no DNA labs readily available to them. On the other hand, I became optimistic when I talked to the local judges. They seemed very willing to allow test results from labs in the United States to be introduced in their courts and to allow expert witnesses from the United States to testify telephonically. Further, there seemed to be much less procedure involved in re-opening cases where there had been a possible wrongful conviction. There was no need for complex habeas litigation. A simple petition to the court explaining the circumstances of the case was enough to get a hearing.

The bus ride back to La Paz gave me the opportunity to think through a new model for innocence work. Although I was graciously made a member of the local bar at the end of my training program, I knew there was no way I could take on cases in Bolivia. Instead, I could initiate a program that would create a pipeline between American technology and the need for it in the criminal justice systems in Latin America. I could also work within countries in Latin America supporting the launching of their own domestic innocence efforts. The idea for Redinocente was born.[1]

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I. A BRIEF HISTORY OF POST-CONVICTION INNOCENCE WORK

There is nothing new about raising the defense of innocence. It is, after all, the most fundamental of all defenses and has existed as long as there have been criminal justice systems and long before DNA technology. One example is the 1883 case of *Marion v. State*.[2] The defendant, William Marion, was convicted of murdering his friend based on evidence that the two of them had left town on a journey and then Marion showed up back in town alone, but with his friend's belongings.[3] The court did not believe Marion's story that his friend had decided to carry on without him or his belongings, and Marion was sentenced to death.[4] Marion went to the gallows on March 25, 1887, continuing to profess his innocence.[5] Four years later, the alleged victim returned to town after finding out his friend had been convicted of murder and sentenced to death.[6]

James McCloskey is largely credited as the pioneer of the modern innocence movement.[7] He left his business career behind to begin the work of Centurion Ministries as a student chaplain at Trenton State Prison in 1980.[8] Since then, his organization has investigated and exonerated dozens of innocent people serving long prison sentences or sitting on death row.[9]

In 1992, Barry Scheck and Peter Neufeld founded the Innocence

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by the author at the symposium. Therefore, the articles published in this symposium may not comply with all standards set forth in Texas Law Review and the Bluebook.

1. RED INOCENTE, http://www.redinocente.org (last visited Dec. 1, 2012).

2. Marion v. State, 29 N.W. 911, 913 (1886) (stating that on April 20, 1883, the defendant was indicted for the murder of John Cameron on May 15, 1872).

3. In an opinion by the Supreme Court of Nebraska, the defendant, William Jackson Marion, insisted that he purchased a team and wagon for $315, paying $30 down, from his friend (and supposed victim, John Cameron). Within a few days, Marion returned alone to Nebraska without Cameron, saying that his friend had gone to Clay County, Kansas. Marion also returned wearing part of his friend's clothes and also had in his possession his friend's team and wagon. *Id.* at 914.

4. *Id.* at 920.

5. Rob Warden, *William Jackson Marion: Mistaken identity of a corpse led to his mistaken execution*, NORTHWESTERN LAW CENTER ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/neMarionSummary.html (last visited Dec. 1, 2012).

6. Cameron, the alleged victim, explained that he had absconded to Mexico in 1872 to avoid a shotgun wedding in Kansas. *Id.* Nearly 100 years after Marion's execution, Marion's grandson officially petitioned for his posthumous pardon. It was not until the centennial of Marion's execution that Nebraska's governor, Bob Kerrey, signed *In the Matter of a Posthumous Pardon to William Jackson Marion*, which took formal effect on March 25, 1987. *1887: William Jackson Mario, who'd be pardoned 100 years later*, EXECUTEDTODAY.COM, http://www.executedtoday.com/2011/03/25/1887-william-jackson-marion-wrongful-execution-pardon/ (last visited Dec. 1, 2012).

7. *About Us*, CENTURION MINISTRIES, http://www.centurionministries.org/about/ (last visited Dec. 1, 2012).

8. *Our History—1980s*, CENTURION MINISTRIES, *supra* note 7.

9. *Our History—2000s*, CENTURION MINISTRIES, *supra* note 7.

Project as a law school clinic at Cardozo Law School.[10] Armed with new advances in DNA technology, the project became a fixture on national news as exonerated inmate after exonerated inmate walked out of prison after findings of actual innocence.[11]

Throughout the 1990s, the concept of freeing the innocent while teaching lawyering skills inspired law school based programs in Arizona,[12] California,[13] Florida,[14] Illinois,[15] Washington,[16] and Wisconsin.[17] International efforts to free the innocent spread to Canada,[18] where legendary exoneree Rubin "Hurricane" Carter was the first executive director of the Association in Defense of the Wrongly Convicted.[19]

Since the turn of the century, the innocence movement has picked up tremendous steam. Hundreds of innocent men and women around the world have been exonerated due to the hard work of programs in 40 states, as well as those in Australia, Canada, Ireland, New Zealand, and the United Kingdom.[20] These programs have come together to form the Innocence Network, "an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions."[21]

10. *About the Organization*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/What_is_the_Innocence_Project_How_did_it_get_started.php (last visited Dec. 1, 2012).

11. *Id*.

12. ARIZONA JUSTICE PROJECT, http://www.azjusticeproject.org/ (last visited Dec. 1, 2012).

13. CALIFORNIA INNOCENCE PROJECT, http://www.californiainnocenceproject.org (last visited Dec. 1, 2012); NORTHERN CALIFORNIA INNOCENCE PROJECT, http://www.law.scu.edu/ncip/ (last visited Dec. 1, 2012).

14. INNOCENCE PROJECT OF FLORIDA, http://www.floridainnocence.org/ (last visited Dec. 1, 2012).

15. *About Us*, NORTHWESTERN LAW BLUHM LEGAL CLINIC: CENTER ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/wrongfulconvictions/aboutus/ (last visited Dec. 1, 2012).

16. *Innocence Project Northwest Clinic*, UNIVERSITY OF WASHINGTON SCHOOL OF LAW, http://www.law.washington.edu/Clinics/IPNW/ (last visited Dec. 1, 2012).

17. *Wisconsin Innocence Project*, UNIVERSITY OF WISCONSIN LAW SCHOOL, http://www.law.wisc.edu/fjr/clinicals/ip/index.html (last visited Dec. 1, 2012).

18. *About Us: AIDWYC History*, THE ASSOCIATION IN DEFENCE OF THE WRONGLY CONVICTED, http://www.aidwyc.org/history.html (last visited Dec. 1, 2012).

19. *Rubin "Hurricane" Carter*, AMERICAN PROGRAM BUREAU, http://www.apbspeakers.com/speaker/rubin-hurricane-carter (last visited Dec. 1, 2012).

20. *Other Projects Around the World*, INNOCENCE PROJECT, http://www.innocenceproject.org/about/Other-Projects.php (last visited Dec. 1, 2012).

21. THE INNOCENCE NETWORK, http://www.innocencenetwork.org/ (last visited Dec. 1, 2012).

II. THE RULE OF LAW MOVEMENT IN LATIN AMERICA

Redressing the causes of wrongful convictions has a different meaning in Latin America than it does in the United States. In the United States, the innocence movement has focused on changing the way eyewitness identifications are done and how confessions are obtained, creating healthy cynicism for jailhouse snitch testimony, and investigating and remedying poor practices in crime labs.[22] In Latin America, however, there has been a much larger and spectacular reform movement in several countries which involves a complete rethinking and reshaping of their systems.[23]

The so-called "rule of law" movement in Latin America goes well beyond reforming the criminal justice system.[24] This reformation involves creating countrywide stability, with a transparent, reliable, governmental system, that will lead to social order and economic development.[25] While in the United States, Australia, Canada, Ireland, and New Zealand, the innocence movement has focused on getting citizens to recognize that our systems are imperfect and sometimes get it wrong and convict the innocent, in Latin America there have been changes to instill confidence in systems the citizens already profoundly distrust.[26]

Reforming the relationship between the government and citizens in Latin America has been and still remains a difficult task. There is a long history of corruption which has allowed some citizens to operate outside the law, either due to their connections to the power structure in the government or due to the government's inability to control organized crime.[27] Dictators such as Chile's Pinochet created an environment where citizens feared the government.[28] Creating transparency where

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22. *Understand the Causes*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/ (last visited Dec 1, 2012).

23. RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 143 (Pilar Domingo & Rachel Sieder eds., University of London, 2001); *see also* William Ratliff and Edgardo Buscaglia, *Judicial Reform: The Neglected Priority in Latin America*, 550 ANNALS AM. ACAD. POL. & SOC. SCI. 59, 59 (Mar. 1997).

24. *Id*. at 152.

25. *Id*. at 147.

26. Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 168 (1995-96); *see also* Ratliff and Buscaglia, *supra* note 23, at 62 (stating that surveys in the late 1990s showed that 55-75% of citizens in Argentina, Brazil, Ecuador, and Peru had a very low perception of their judicial system; 46-67% of the citizens in Argentina, Brazil, Ecuador, and Venezuela considered the judicial sector inaccessible; 77% of the judges interviewed in Brazil thought there was a crisis in the judiciary).

27. RULE OF LAW IN LATIN AMERICA, *supra* note 23*; see also* Ratliff and Buscaglia, *supra* note 23, at 59.

28. Monte Reel and J.Y. Smith, *A Chilean Dictator's Dark Legacy*, WASH. POST (Dec. 11, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/12/10/AR2006121000302.html.

citizens see fair and just results in the criminal justice system is thus critical in repairing this relationship.[29]

One of the cornerstones of the reforms in Latin America has been a shift from inquisitorial to adversarial systems.[30] In the inquisitorial systems, the focus was on truth finding and judges were neither neutral nor detached.[31] Defendants were often unrepresented and overcome by the lack of independent judges to counteract potential bias against defendants.[32] As one commentator has stated, "the quality and integrity of a judicial system can be measured best by the quality and integrity of its judges. Efforts to promote judicial independence are, thus, at the heart of insuring judicial reform."[33]

In countries such as Chile, the shift from an inquisitorial to an adversarial system required a complete makeover of their criminal justice system. A new *defensoría* was created and public defenders represented the accused for the first time. Prosecutors became more involved in the legal process because they "feel personally responsible for the outcome of their cases, in part because the adversary system accepts the consequence that the outcome of a trial may be a reflection of the quality of the advocacy."[34] This created incredible challenges because the same people were serving new roles.[35]

Another change in the systems has been the introduction of oral trials. Over the past twenty years, most of the countries in Latin America have moved to the Anglo-style trials with opening statements, direct examination, cross examination, and closing arguments, which are all open to the public.[36] These trials create the opportunity for more transparency, but also for better development of facts through direct and cross examination, presentation of the evidence, and rebuttal testimony.[37]

Currently, Mexico is struggling with the change to oral trials. It is a change in how legal professionals do their jobs, and those changes are always difficult, but the change to oral trials goes beyond the simple notion that it is a different way to develop facts in a criminal case. Oral trials create the opportunity to reveal false testimony and police corruption. In the long term, transparency should lead to reform and

29. OFFICE OF THE ASSISTANT SECRETARY OF LEGAL AFFAIRS, JUDICIAL REFORMS OF CRIMINAL JUSTICE IN LATIN AMERICA 2, *available at* http://www.oas.org/legal/english/osla/pubs.htm [hereinafter JUDICIAL REFORMS].

30. *Id.* at 5.

31. *Id.*

32. *Id.*

33. Dakolias, *supra* note 26, at 172.

34. JUDICIAL REFORMS, *supra* note 29, at 5.

35. *Id.* at 6.

36. *Id.*

37. *Id.*

increased confidence in the criminal justice system. In the short term, there are great challenges.

III. WRONGFUL CONVICTIONS IN LATIN AMERICA

When I talk in Latin America about the successful exonerations we have had in the United States there is generally surprise that our system is so flawed as to allow an innocent person to be convicted. I find it important to talk about cases that do not involve misconduct in order to send the message that reforms need to be made in systems beyond getting rid of corrupt officials, because Latin America has struggled with much bigger process reforms than the United States over the past twenty years. Now, though, is the time to focus on the narrower reforms such as how identifications are done and how confessions are obtained.

Mistaken eyewitness identification is a universal problem. In Mexico, the problem was highlighted in the 2010 once-banned documentary *Presunto Culpable*, the highest grossing Mexican documentary in cinematic history.[38] The film documents the story of José Antonio Zúñiga, a young musician convicted of murder for the shooting death of another young man in a gang-ridden section of Iztapalapa, México.[39] Zúñiga was convicted despite tests showing he had never fired a gun and the testimony of numerous alibi witnesses who all said they saw Zúñiga throughout the day of the murder working on computers at his market stall.[40]

Zúñiga's conviction centered on the testimony of a single 17-year-old eyewitness, who was also the victim's cousin, who stated he saw Zúñiga shoot the victim.[41] Zúñiga was granted a retrial only after his supporters discovered that his lawyer had faked his license.[42] During the retrial, Zúñiga himself questioned the witness in a dramatic procedure known as a *faceoff* where defendants may question witnesses face to face.[43] It was

38. *Presunto Culpable* is the highest grossing Mexican documentary as of February 28, 2011. John Hecht, *'Presunto Culpable' Is Mexico's Highest-Grossing Documentary*, HOLLYWOOD REPORTER (Feb. 28, 2011), http://www.hollywoodreporter.com/news/presunto-culpable-is-mexicos-highest-162501.

39. Elisabeth Malkin, *A Free Man Still Looks Over His Shoulder in Mexico*, N.Y. TIMES (Mar. 4, 2011), http://www.nytimes.com/2011/03/05/world/americas/05mexico.html.

40. *Id.*

41. *Id.*

42. *Id.*

43. The Mexican *faceoff* procedure (in Spanish, careo de garantía constutiucional) is where the defendant has the ability to literally come face to face with the witnesses testifying against him or her. The defendant is given the opportunity to ask the witness questions, which is in contrast to the American system where only the attorney can examine a witness. The defendant is allowed to examine the witness and ask questions important to the defense and clear up the contradictions that exist in the case. The *faceoff* procedure is no longer as widely used due to recent Mexican penal reforms and the use of oral

during this *faceoff* that the eyewitness finally admitted that he never saw Zúñiga kill the victim.[44]

Similarly, in Belize, a jury convicted Juan Pop on March 15, 2009, for rape of a 13-year-old girl at the police station where he was a constable.[45] Pop was convicted solely based on the testimony of the victim.[46] On appeal, Pop claimed he was misidentified because there was no identification and the victim only described her assailant as a short "Spanish" policeman dressed in plainclothes who entered the room where she was sleeping."[47] His conviction was subsequently quashed on the grounds that there was insufficient evidence for the case to have been submitted to the jury.[48] Pop was released after spending six and a half months in prison.[49]

Leroy Gomez also fell prey to an unreliable eyewitness identification process in Belize. Gomez was convicted in 2010 of rape, robbery, and aggravated assault.[50] The Belize Court of Appeal quashed his convictions because of a highly prejudicial identification process after his face was broadcast on television before the victim identified him as her assailant.[51] The court held that the victim's identification of Gomez was unreliable, preventing him from getting a fair trial.[52] Gomez was exonerated and released only two months after his conviction.[53]

In 2010, faulty eyewitness testimony was the reason for the Cristian Lopez Rocha's detention for rape and sexual abuse in Ñuñoa, Santiago de Chile.[54] Lopez Rocha was detained when the Chilean police maintained he was identified by a drawing done through a sketch artist

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trials. *Boletin Mexicano de Derecho Comparado*, BIBLIOTECA JURÍDICA VIRTUAL, http://www.juridicas.unam.mx/publica/rev/boletin/cont/83/art/art8.htm (last visited Dec. 3, 2012).

44. *Id.*

45. *Police constable wins carnal knowledge appeal case*, NEWS 5 (Oct. 14, 2009), http://edition.channel5belize.com/archives/312.

46. Juan Pop v. The Queen, No. 4 of 2009, at 2 (Ct. App. 2009) (Belize), *available at* http://www.belizelaw.org/supreme_court/judgements/COA2010/Criminal%20Appeal%20No.%204%20of%202009%20-%20Juan%20Pop%20and%20The%20Queen.pdf (last visited Dec. 3, 2012).

47. *Id.*

48. *Id.* at 1. The victim testified that the policeman entered a room at the Dangriga Police Station at night between May 23rd and May 24th of 2007. She could not remember how long the policeman had stayed in the room, from what distance she saw him, in what light she saw him, and how often he entered. *Id.* at 2.

49. *Police constable wins*, *supra* note 45.

50. Hans Sherrer, *Leroy Gomez*, WRONGLY CONVICTED DATABASE RECORD, http://forejustice.org/db/location/Gomez--Leroy.html (last visited Dec. 3, 2012).

51. *Id.*

52. *Id.*

53. *Id.*

54. Waldo Ortega Jarpa, *Prueba de ADN demuestra inocencia de hombre imputado de violación*, BLOG CRIMINAL (June 22, 2010), http://blogcriminal.com/?p=255.

and was identified by the victims.[55] He was later released when his case was dismissed by a judge after DNA testing proved he was not responsible for the crimes.[56]

In Nicaragua, Eric Volz was released from prison after spending more than a year incarcerated for the murder of his ex-girlfriend, Doris Jiminez, in San Juan del Sur.[57] Prior to his conviction, Volz, a United States citizen, had lived in Nicaragua for years and founded a magazine called *El Puente*, which he hoped would bridge the gap between Nicaraguans and Americans.[58] At the time of the crime, Volz was a two-hour drive from the crime scene, and had an alibi corroborated by ten other witnesses.[59]

In spite of this seemingly airtight alibi, the presiding judge chose to believe a lone witness, Nelson Dangla, who said he saw Volz in San Juan del Sur on the day of the murder.[60] In a twist of events, Dangla also happened to be the person originally charged with Jiminez's murder, and was granted immunity in exchange for his testimony against Volz.[61] This snitch testimony convicted Volz of murder, but he was eventually released a year later when a three-judge panel overturned Volz's conviction and ordered his immediate release.[62]

Snitch testimony continuously proves to be extremely unreliable around the world. In Belize, co-defendants Francis Eiley, Lenton Polonio, and Ernest Savery were convicted of murdering an elderly man in San Pedro.[63] All three men were sentenced to life in prison.[64] The prosecution's only witness was the original suspect who was found at the crime scene with the

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55. *Id.*

56. *Libre acusado de violación*, LA ESTRELLA (June 23, 2010), http://www.estrellavalpo.cl/prontus4_noticias/site/artic/20100623/pags/20100623001135.html.

57. Eric Volz, a native of Nashville, Tennessee, was released from a Nicaraguan prison in 2007, when he was exonerated of his conviction for the 2006 strangulation of Doris Jimenez in San Juan del Sur. Brittany Harris, *Freed American, Eric Volz, says he still can't rest*, CNN WORLD (Jan. 11, 2008), http://articles.cnn.com/2008-01-11/world/eric.volz.interview_1_san-juan-del-doris-jimenez-innocent-man?_s=PM:WORLD.

58. *El Puente* means "*The Bridge*" in English. *Id.* In addition to publishing his own magazine, Volz also authored a book after his conviction was overturned entitled *Gringo Nightmare* to document his story in a Nicaraguan prison. More information about Volz's book and his history can be found at his website. *Eric Volz*, GRINGO NIGHTMARE, http://www.gringonightmare.com (last visited Dec. 16, 2012).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* The Nicaraguan judges who ruled in Volz's favor may face jail time because of their decisions. Nicaraguan prosecutors are appealing his exoneration to the Nicaraguan Supreme Court to try to get his conviction reinstated. *Id.*

63. Hans Sherrer, *Ernest Savery*, WRONGLY CONVICTED DATABASE RECORD, http://forejustice.org/db/location/Savery--Ernest.html (last visited Dec. 3, 2012).

64. *Id.*

victim's blood on his shoes and clothing.[65] The man was originally charged with the murder, but the charge was dismissed in exchange for his testimony against Eiley, Polonio, and Savery.[66] After numerous appeals through Belize courts, the convictions were overturned in 2009 for lack of evidence and all three men were released.[67]

False confessions also lead to wrongful convictions. In Mexico, Victor Javier Garcia was convicted of being a serial killer in 2002.[68] Garcia confessed to the crimes after the police tortured him by pressing burning cigarettes into his abdomen and genitals.[69] A lower court in Mexico used this coerced confession to convict Garcia even though DNA tests on the bodies identified as his victims were inconclusive, a forensic expert testified that his superiors forced him to plant false evidence, and the witnesses retracted their testimony stating that they were threatened by the police into making false statements.[70] The State Supreme Court of Chihuahua overturned his conviction in 2005 after Garcia served three and a half years in prison.[71]

A few months before Garcia's release, Mexican prosecutors also dismissed the case against an American woman, Cynthia Kiecker Perzábal, and her Mexican husband, Ulises Perzábal, which was brought in large part because of the couple's lifestyle which included long hair, tattoos, and a fondness for tarot cards.[72] After they were arrested for the murder of a 16 year old girl, police separated Kiecker from her husband.[73] Mexican officers then "stripped off her clothes and tortured her with electric shocks for two days and nights."[74] Kiecker could also hear her husband's screams from another room, often being forced to watch officers torture him.[75] Not surprisingly, Kiecker confessed in

65. *Id.*

66. *Id.*

67. *Id.*

68. Hans Sherrer, *Victor Javier Garcia*, WRONGLY CONVICTED DATABASE RECORD, http://forejustice.org/db/location/Garcia--V-ctor-Javier.html (last visited Dec. 16, 2012).

69. *Id.*

70. Garcia was sentenced to 50 years in a Mexican prison. Garcia was released in 2006, but only after he lost his business, his savings, and his wife to another man. Ginger Thompson, *In Mexico's Murders, Fury is Aimed at Officials*, N.Y. TIMES (Sept. 26, 2005), http://www.nytimes.com/2005/09/26/international/americas/26juarez.html?scp=1&sq=victor%20javier%20garcia&st=cse.

71. Cases like Garcia's led officials to uncover corruption and abuses at high levels in Mexican government, including former Mexican state prosecutor, Jesús José Solís Silva, and the former head of state police, Vicente González García. Both men, along with three other state police deputies, resigned from their positions when federal authorities found 12 male bodies in a backyard in Cuidad Juárez, México. The killings were believed to involve drug-related disputes. Authorities arrested at least 16 state police officers connected to the discovery of the bodies. *Id.*

72. Kiecker was 46 years old and Perzábal was 47 years old when the case was dismissed. *Id.*

73. Kiecker and Perzábal were arrested in their home in Chihuahua, México. *Id.*

74. Thompson, *supra* note 70.

75. *Id.*

order to stop the torture.[76] The false, forced confession was the couple's only connection to the crime.[77]

Chilean police also extracted false confessions from José Alfredo Soto Ruz, Juan Manuel Contreras San Martín, and Victor Eduardo Osses for the murder of María Soledad Opazo on June 25, 1989.[78] Opazo was found with 30 stab wounds and police believed she was raped.[79] Seven months after the murder, confessions were obtained from the three men under duress and none were allowed to consult an attorney.[80] After five years in prison, the court found them all innocent and ordered their immediate release.[81] In January of 2000, the details of the men's settlement with the Chilean government were made public, providing the men with a life-time pension and a public apology for the great miscarriage of justice.[82]

Poor police investigation often leads to wrongful convictions, and it was poor police work that led to the wrongful conviction of Francisco Rivera and Alfonso Calderon in 2002.[83] Rivera, a Mexican businessman, was convicted with his brother-in-law, Calderon, of drug trafficking after 37 pounds of marijuana was found in the door of a Nissan Pathfinder that Rivera bought for $2,600 at a United States government auction.[84] The marijuana in the door, however, was moldy and worthless.[85] The Pathfinder was originally seized before the auction when marijuana was found in the gasoline tank, but agents did not conduct a thorough search in the rest of the car.[86] Both Rivera and Calderon had their convictions overturned on appeal after attorneys established that the marijuana had been in the Pathfinder for more than a year when the two men were arrested, matching the time when the

76. Kiecker said in an interview with the *New York Times*, "I would have confessed to anything to stop them." In her confession, Kiecker agreed that her and her husband had killed Rayas as part of a satanic cult. *Id.*

77. The police used the couple's lifestyle to portray them in a false light to the court to create an image of satanic devil-worshipping to horrify the public and increase their chances of conviction, Kiecker said. *Id.*

78. COMISIÓN INTERAMERICANAN DE DERECHOS HUMANOS INFORME NÚMERO 32/02, IUS ET PRAXIS 665 (2002), available at http://redalyc.uaemex.mx/pdf/197/19780222.pdf.

79. *Id.*

80. *Id.*

81. *Id* at 666.

82. *Id* at 666-667.

83. Hans Sherrer, *Francisco Rivera*, WRONGLY CONVICTED DATABASE RECORD, http://forejustice.org/db/location/Rivera--Francisco.html (last visited Dec. 16, 2012).

84. *Id.*

85. The moldy marijuana was found tucked deep behind the wheel wells and back seats of the Pathfinder. *Men File Suit Against U.S. Customs over Car Purchase*, ABC 10 NEWS (June 5, 2007), http://www.10news.com/news/13448644/detail.html.

86. Channel 10 News in San Diego obtained documents using the Freedom of Information Act, which showed the truck's former owner was detained for attempting to smuggle marijuana. *Id.*

vehicle was originally seized.[87] United States Customs had missed the extra 37 pounds of marijuana in the door.[88]

On January 28, 1993, Juana Lazo left her home at 4:30 a.m. to get medicine for her son Alvaro, leaving him in the care of her husband, Victor Maco.[89] Unfortunately for Lazo, the terrorist movement Shining Path launched a general strike early the same day[90] and while she was attempting to flag down a cab, she caught the attention of the Peruvian police.[91]

Police subsequently accused Lazo of terrorism and refused to believe or confirm her story with her husband, Maco, or with the pharmacist.[92] Police also concluded she was working with her husband to stash a cache of arms in their home.[93] Lazo and Maco were tortured until they confessed.[94] Later, when the police tried to question the pharmacist where Lazo bought the medicine, the pharmacist denied seeing her out for fear of being accused of also supporting the Shining Path.[95] A

87. Sherrer, *supra* note 83.

88. In response to the investigation and release of Rivera and Calderon, U.S. Customs officials said "they would change its auction policies, promising to search vehicles more thoroughly." *Id.* On March 15, 2011, the United States House of Representatives was introduced a bill of resolution to compensate Rivera and Calderon for costs related to their arrest, prosecution, and incarceration in Mexico, further described in Claim No. 05-608C, filed in the United States Court of Federal Claims. For the relief of Francisco Rivera and Alfonso Calderon, H.R. 1108, 112th Cong. (2011). The bill was assigned to a congressional committee on March 15, 2011, "which will consider it before possibly sending it on to the House or Senate as a whole. [Unfortunately for Rivera and Calderon] [t]he majority of bills never make it past this point." *H.R. 1108: For the relief of Francisco Rivera and Alfonso Calderon*, POP VOX, https://www.popvox.com/bills/us/112/hr1108 (last visited Dec. 16, 2012).

89. Lazo and Maco were law students in Lima's public San Marcos University. San Marcos was known by some for its students' sympathy, and often support, for Shining Path, a terrorist movement during the 1980s and early 1990s. Deann Alford, *Peruvian Couple Wrongly Convicted Awaits Pardons*, NETWORK FOR STRATEGIC MISSIONS (December 1, 2001), http://strategicnetwork.org/index.php?loc=kb&view=v&id=9060&fto=280&.

90. *Id.* While traveling, Lazo was ordered to evacuate the bus she was traveling on because of gunfire and bombing. Lazo found herself stranded in an area of Lima where the Shining Path terrorist movement was active. The violence that stopped the traffic was caused by a strike ordered by the Shining Path through flyers sent out to its members. Ruiz, Lazo and Maco's lawyer, stated that "everyone in that area was suspected of being with Shining Path." *Id.*

91. *Id.*

92. *Id.*

93. Police found pistols, shotguns, bulletproof vests, incendiary devices, and Shining Path literature the police claimed were found under the stairs. To support the accusation that the arsenal belonged to Maco and Lazo, police found textbooks from Maco's class in Marxism, which was required at San Marcos and other public universities in Peru. *Id.*

94. Deann Alford, *Presidential Pardon Reunites Family In Peru—Couple Spend First Christmas Together Since 1993*, COMPASS DIRECT (Jan. 18, 2002), http://old.lff.net/resources/compass/cd102t.txt. Compass Direct is a news service dedicated to providing exclusive news and analyses of situations and events facing Christians persecuted for their faith. Lazo and her husband, Maco are evangelicals and were represented by lawyer Wuille Ruiz of the Peace and Hope Association, a Lima-based evangelical legal aid group.

95. Alford, *supra* note 89.

military judge convicted both Lazo and Maco of treason and sentenced them to life in prison.[96] Peru's Human Rights Commission conducted an investigation and concluded that both Lazo and Maco were innocent, begging Peruvian President Alejandro Toledo to pardon Lazo and Maco for their supposed crimes.[97] Finally, after each spending eight years in prison, President Toledo signed their pardons.[98]

IV. BRINGING INNOCENCE WORK TO LATIN AMERICA

A. Law Reform

Innocence project work has always combined exonerating the innocent and pushing for reforms to stop the same case from happening again. When there is a human face on the reforms—the innocent person who has often spent years of their life in prison for a crime he or she did not commit—they become much more concrete and compelling. Latin America clearly has stories of innocent people and now is the time to focus on the narrower reforms that they have been struggling with over the past decades.

For example, whereas Chile restructured their entire system from the inquisitorial to the adversarial system, decreased the chances of wrongful convictions by placing an advocate next to the defendant in the criminal process, and reassigned judges to a more neutral role, narrower reforms are needed to deal with preservation and access to DNA evidence and testing, as well as further education on the inherent limitations of eyewitness identification, and the risks of false confessions and snitch testimony. Model legislation and policing procedures in these areas has been developed in the United States and Canada, and many of these could be readily adopted in Latin America.[99]

DNA testing is a worthless post-conviction tool without access to the evidence to be tested and the ability to conduct testing. As a result, 48 states have passed post-conviction testing statutes, each with different rules regarding the right to testing and the state's obligation to preserve

96. In Peruvian military courts, judges were faceless and the judge's identity was hidden by a hood or by one-way mirrors. On appeal, in 1993, a second military trial upheld Lazo's verdict and sentence. In 1994, a third trial reduced the life sentence to 30 years, holding that the court had not proved that Lazo or Maco were, in fact, Shining Path militants, but that the arms still belonged to Lazo and Maco. *Id.*

97. *Id.*

98. Alford, *supra* note 94. After Lazo and Maco's release, they both intended to complete their law studies, which were interrupted three years into their six-year course.

99. *Fix the System: Model Legislation*, INNOCENCE PROJECT, http://www.innocenceproject.org/fix/ (last visited Dec. 1, 2012).

the biological evidence.[100] These statutes could be modeled in Latin America, using the experience of years of litigating them as a guide.

In the area of identification, traditional identification processes have proven flawed by many respected researchers.[101] For example, all agree that the lack of "double blind" procedures, where the witness and the investigator are unaware of who the suspects are in a lineup, is critical to getting good identifications.[102] This prevents the administrator of the lineup from affecting the identification by giving off intentional or unintentional verbal or non-verbal cues.[103] Although there is still a great deal of work to be done in convincing every jurisdiction in the United States to adopt double blind identification procedures, it has been fully implemented in some jurisdictions.[104] Double blind identification procedures could be implemented throughout Latin America. It is a simple reform that requires neither expensive equipment nor significant training, yet it leads to better identifications. With misidentification as the leading cause of wrongful convictions these types of reforms are critical.[105]

Coercive interrogation techniques have been a problem throughout Latin America for some time.[106] We have learned in the United States that

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100. *See* Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Post-Conviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799, 804 (2011).

101. *See generally* State v. Henderson, No. A-8-08 (N.J. Sept. 8, 2008), submitted by Geoffrey Gaulkin, P.J.A.D. (retired and temporarily assigned on recall), summarizing existing scientific and academic research on the flaws of traditional eyewitness identification procedures.

102. *See* Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1(4) PSYCHOL., PUB. POL'Y, & LAW 765, 768 (1995); R.M. Haw & R.P. Fisher. *Effects of Administrator–Witness Contact Identification Accuracy*. 89(6) J. APPL. PSYCHOL. 1106 (2004).

103. State v. Henderson, 27 A.3d 872 (NJ 2011).

104. As of June 2011, the following jurisdictions have implemented the sequential "double-blind" as standard procedure: the state of New Jersey; the state of North Carolina; Boston, Massachusetts; Northampton, Massachusetts; Madison, Wisconsin; Winston-Salem, North Carolina; Hennepin, Minnesota (Minneapolis); Ramsey County, Minnesota (St. Paul); Santa Clara County, California; and Virginia Beach, Virginia. Additionally, the state of Wisconsin has "promulgated double-blind sequential voluntary guidelines and incorporated them into law enforcement training." *News and Information: Eyewitness Identification Reform*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php (last visited Dec. 1, 2012) (internal quotations omitted).

105. John Turtle, R.C.L. Lindsay & Gary L. Wells, *Best Practice Recommendations for Eyewitness Evidence Procedures*, 1 CAN. J. POLICE & SEC. PRAC. 5 (2003); *Eyewitness Evidence: A Guide for Law Enforcement*, NAT'L INST. JUST. (Oct. 1999), *available at https://www.ncjrs.gov/txtfiles1/nij/178240.txt*; INNOCENCE PROJECT, EYEWITNESS IDENTIFICATION RESOURCE GUIDE: A PRIMER FOR REFORM (2007), *available at* http://www.wisspd.org/htm/ATPracGuides/Training/ProgMaterials/Conf2007/EF/EI2007.pdf.

106. *See generally* BUREAU DEMOCRACY, HUMAN RIGHTS, AND LABOR, *2010 Human Rights Report: Paraguay*, U.S. DEP'T STATE (Apr. 8, 2011), http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154515.htm; BUREAU DEMOCRACY, HUMAN RIGHTS, AND LABOR, *2010 Human Rights Report: Mexico*, U.S. DEP'T STATE (Apr. 8, 2011), http://www.state.gov/g/drl/rls/hrrpt/2010/

as a result of these techniques, innocent people confess to crimes they did not commit.[107] The simple reform of videotaping confessions decreases the likely use of coercive techniques, and if not, allows the courts to consider confessions in the context they were obtained. This simple, low cost reform could easily be adopted throughout Latin America.

Jailhouse snitch testimony has led to many wrongful convictions.[108] This testimony often has no credibility as inmates are incentivized to testify against their cellmates. Defense lawyers in the United States continue to struggle with this issue, but Canada has been a leader in limiting the use of snitch testimony, for example the Attorney General of Ontario only permits snitch testimony "where this evidence is justified by a compelling public interest, founded on an objective assessment of reliability" and "requires a rigorous, objective assessment of the informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities and the in-custody informer's general reliability."[109] These reforms could be adopted in Latin America.

B. Case Assistance

Although it is absolutely critical that countries within the Latin America justice system run their own cases and courts, it is incumbent upon the global defense community to assist these countries with with cases of actual innocence. These cases are often very complicated and often rely on technology that is unavailable in Latin America.[110]

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wha/154512.htm; BUREAU DEMOCRACY, HUMAN RIGHTS, AND LABOR, *2010 Human Rights Report: Ecuador*, U.S. DEP'T STATE (Apr. 8, 2011), http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154504.htm.

107. *See* Robert Kolker, *Why Do People Confess to Crimes They Didn't Commit?*, N.Y. MAG. (Oct. 3, 2010), http://nymag.com/news/crimelaw/68715/ (stating that 25% of DNA exonerations involve false confessions).

108. *See* THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 1 (2007), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Jailhouse%20snitch%20testimony%20policy%20brief.pdf (stating that over 15% of DNA exonerations involve jailhouse snitch testimony).

109. *See* ONTARIO MINISTRY ATTORNEY GEN., IN-CUSTODY INFORMERS (2005), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/InCustodyInformers.pdf (stating that the Attorney General of Ontario only permits snitch testimony "where this evidence is justified by a compelling public interest, founded on an objective assessment of reliability" and "requires a rigorous, objective assessment of the informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities and the in-custody informer's general reliability"); ONTARIO MINISTRY ATTORNEY GEN., REPORT OF THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/ (summarizing several factors from the Canadian Department of Justice Policy Handbook that must be assessed in order to determine the reliability and truthfulness of an informant's evidence).

110. For example, Chile's primary DNA testing laboratory is located in Santiago de Chile, the capital city. Recently, another laboratory was inaugurated in Valparaíso, another will be implemented in

The goal of Redinocente is to create a pipeline to provide this type of assistance to Latin America while assisting in the development of domestic projects. New technologies connect the world as it has never been connected in the past. It wasn't too long ago that it was difficult to identify forensic experts even in major U.S. cities. Criminal defense attorneys faced with their first case involving a technology they had never dealt with would ask around and get referrals. Now referrals are requested on a global scale and experts can be found with a few internet inquiries. However, the ability for lawyers in smaller cities in Latin America to acquire Spanish-speaking experts is still a challenge.

For the past fifteen years, California Western School of Law (CWSL), through Proyecto ACCESO, has been conducting trainings for criminal defense attorneys, prosecutors, judges, and law enforcement throughout Latin America.[111] For the past five years CWSL has been hosting a week-long training program to give Latin American attorneys a set of practical trial skills to take back to their native country.[112] Other organizations such as the National Institute for Trial Advocacy (NITA),[113] the Conference of Western Attorneys General (CWAG),[114]

Concepción, and yet another is being built in Iquique, Chile. In Santiago, researchers are working with the Ministerio de Justicia (Prosecutor's Office) to build a DNA laboratory to also work in mitochondrial DNA. Chile is one of the more advanced justice systems in Latin America and yet these labs still will not be able to handle the thousands of criminal cases that are processed each year. Daniel Fajardo C., *Avances en el Servicio Médico Legal: Banco de ADN chileno listo para la partida oficial*, EDICIONES ESPECIALES ONLINE, http://www.edicionesespeciales.elmercurio.com/destacadas/detalle/index.asp?idnoticia=0124112005021X0060039 (last visited on Dec. 16, 2012). Countries like Bolivia and Paraguay have nothing like these resources.

111. ACCESO Capacitación is a program of Proyecto ACCESO, whose Spanish acronym translates as Creative Lawyers Collaborating to Find Optimal Solutions Project. In the midst of Latin America's transformation from the inquisitorial system to the adversarial system, Proyecto ACCESO developed courses to meet the rising demand for attorneys as effective oral advocates. With the new adversarial system, lawyers needed to shift from primarily written trials, to new oral trials in front of a panel of judges. ACCESO CAPACITACIÓN, http://www.accesocapacitacion.com/ (last visited Dec. 16, 2012).

112. Legal professionals from Argentina, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Mexico, and Peru take part in the program to teach attorneys and judges to "become more efficient in trial techniques and strategies through role-playing the defense and prosecution in a simulated case. Participants learn to make better opening statements, direct and cross examine with confidence, present more comprehensive and powerful closing arguments, and develop trial strategies that work." *California Western Welcomes 100 Distinguished International Dignitaries, Lawyers, and Judges for 20th Trial Skills Academy*, CAL. W. SCH. L. (Feb. 15, 2011), http://www.cwsl.edu/main/default.asp?nav=news.asp&body=news/tsa_20th_class_021511.asp.

113. NITA was founded in 1971 by three organizations: The Section of Judicial Administration of the ABA; the American College of Trial Lawyers; and the Association of Trial Lawyers of America. NITA is an organization dedicated to promoting effective and ethical advocacy by developing and teaching trial advocacy skills. NITA also conducts one to two-day workshops in trial advocacy in North and South America. *About*, NAT'L INST. TRIAL ADVOCACY, http://www.nita.org/About (last visited Dec. 16, 2012).

114. Since 2006, CWAG has an Alliance Partnership (a cooperative program between many U.S. government agencies) aimed to strengthen the legal systems of both the United States and Mexico.

and the International Training Programme on the Criminal Justice System Reforms in Latin America (ILANUD)[115] also host trial skills training programs throughout Latin America.

These trainings have brought together lawyers from Latin America with their colleagues from the north to search for solutions to universal problems. The continuation and expansion of this networking and training will lead to exonerations and reforms as we help each other with our cases and our systemic problems.

V. CONCLUSION

Just over a decade ago, a handful of innocence projects were working in isolation when they decided to start meeting to talk about their common missions. That group grew to over 500 participants at the 2011 meeting hosted by the Ohio Innocence Project with representatives from around the world running innocence projects and looking to start them in various countries in Africa, Asia, South America, and Europe.[116]

This past year the Latin American Innocence Network (Redinocente) held its first conference in Santiago de Chile.[117] More than 100 participants came from countries throughout Latin America, shared their common experiences working in their various criminal justice systems, and laid the foundations for launching innocence efforts. This next year the conference will be held in Buenos Aires where a project has already been launched. It is an exciting time to be doing this work as we reach out to our colleagues in Latin America to join us on our mission of freeing the innocent and reforming systems to decrease the chances of wrongful convictions.

Through this, capacity trainings for a focus on trial skills have been implemented throughout Mexico. *CWAG Alliance Partnership Backgrounder*, CWAG, http://www.cwagweb.org/AP/index.html (last visited Dec. 16, 2012).

115. ILANUD was established in San José, Costa Rica, on June 11, 1975, between the United Nations and the Government of the Republic of Costa Rica. *Constitucion de ILANUD*, INSTITUTE LATINOAMERICANO DE LAS NACIONES UNIDAS PARA LA PREVENCIÓN DEL DELITO Y EL TRATAMIENTO DEL DELINCUENTE, http://www.ilanud.or.cr/acerca-del-ilanud/constitucion-del-ilanud.html (last visited Dec. 16, 2012). The objective of ILANUD is to collaborate with the governments for the economic development and social balancing in Latin American countries and the Caribbean. *Objetivo del ILANUD*, INSTITUTE LATINOAMERICANO DE LAS NACIONES UNIDAS PARA LA PREVENCIÓN DEL DELITO Y EL TRATAMIENTO DEL DELINCUENTE, http://www.ilanud.or.cr/acerca-del-ilanud/objetivo-principal.html (last visited Dec. 16, 2012).

116. OHIO INNOCENCE PROJECT, *2011 Innocence Network Conference: An International Exploration of Wrongful Conviction*, UNIV. OF CINCINNATI COLLEGE OF LAW, http://www.law.uc.edu/institutes-centers/ohio-innocence-project/past-events/2011-innocence-network-conference (last visited Dec. 16, 2012).

117. RED INOCENTE, *supra* note 1.

NIGERIAN ISSUES IN WRONGFUL CONVICTIONS

*Daniel Ehighalua**†

I. INTRODUCTION

Nigeria is the most populous black nation in Africa. With an official 2006 estimated population of over 151.5 million people,[1] more than 70 percent of whom live on less than a dollar a day;[2] the problem of wrongful conviction is pervasive due in large part—and as borne out by the findings of the United Nations Development Programme (UNDP) in Nigeria—to the ever continuously widening poverty gap in Nigeria. There is a direct correlation between access to justice by the haves and the have-nots. The judicial and policing infrastructures of the Nigerian state remain weak and fragile.[3] The police are overstretched, and the

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1. *See generally* NAT'L POPULATION COMMISSION NIGERIA, http://www.population.gov.ng (last visited May 15, 2012). The National Population Commission (NPC) of Nigeria was established by the federal government in 1988. The NPC has the statutory powers to collect, analyze and disseminate population and demographic data in the country. The NPC is also mandated to undertake demographic sample surveys, compile, collate and publish migration and civil registration statistics as well as monitor the country's Population Policy. Detailed breakdown of the 2006 population report along gender and the FCT and 36 state lines can be viewed from its website.

2. *Human Development Report Nigeria: Achieving Growth with Equity 2008–2009*, 50 UNITED NATIONS DEV. PROGRAMME (2008), http://hdr.undp.org/en/reports/national/africa/nigeria/NHDR_Nigeria_2008-2009.pdf. For 16 years (1980 to 1996), the total poverty head count rose by an annual average of 8.83 percent. The 54.4 percent official poverty prevalence in Nigeria at present translates to about 70 million poor persons. This document contains a detailed breakdown of the state of development in Nigeria, poverty index, et al. Amongst the report's conclusions is that, 20 percent of Nigerians own 65 percent of national aggregate value of assets.

3. *See* Innocent Chukwuma, *Civilian Oversight of Policing in Nigeria: Structure, Functions, and Challenges*, CLEEN FOUND. (Mar. 23–24, 2006), http://www.cleen.org/Civilian%20oversight%20

judiciary is not equipped to deal with criminal matters timely. Thus, the number of awaiting trial persons (ATP) continues to swell the ranks of persons in detention. These detention centers, though, are no more than death traps, given the unhealthy environment detainees are sequestered in and the health hazards it portends. The police and the myriad of other paramilitary and law enforcement agencies continue to undermine the most basic of rights to which even the accused persons themselves are no less ignorant of. There is widespread corruption within the Nigerian police force which fuels abuses against ordinary citizens and severely undermines the rule of law and respect for human rights.[4]

Corruption, broadly defined, permeates every facet of the Nigerian society, and the most recent 2011 Human Rights Watch Report on Nigeria provides anecdotal evidence to support the pervasiveness.[5] The judicial system, where it sometimes works, does so at such slow speed that an accused person is estimated to spend close to 3–5 years in police protective custody awaiting the hearing of his case in court. This time period only grows for felony trials like murder, manslaughter and armed robbery. This state of affairs is not for want of the basic "superstructure" of laws and international legal instruments to guide prosecutorial decisions and judicial processes, but due largely to the human operators of the justice system. In this Essay, I will attempt to examine the problems and causes and proceed to proffer credible legal and policy solutions to combating them.

II. DEFINITIONAL PROBLEMS

The term *wrongful conviction* can have many different uses. In this

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of%20Policing%20in%20Nigeria.pdf; *see also* Olanrewaju Ajiboye, *Nigeria Police: Comprehensive Restructuring Is a Desideratum*, SAHARA REPS. (July 12, 2011), www.saharareporters.com/article/nigeria-police-comprehensive-restructuring-desideratum. The Nigerian police have a numerical strength of about 357,000 police officers and men in a country of over 151 million people—way below the UN policing policy of one policeman to 400 civilians. This is coupled with the very harsh and unbearable conditions under which they are made to perform in Nigeria. There have been strident calls for reforms, but to date any form of reform is yet to be fashioned.

4. For a detailed analysis of the level of corruption, the justice system, prison conditions, unlawful killing and extra judicial executions and consequential violation of detainees and accused persons' rights, read the State of the World's Human Rights Report by Amnesty International for 2009. It's a compelling compendium of the most vicious forms of rights abuses. *State of the World Human Rights Report*, AMNESTY INT'L, www.report2009.amnesty.org/nigeria (last visited May 15, 2012).

5. *Corruption on Trial? The Record of Nigeria's Economic and Financial Crimes Commission*, H.R. WATCH (Aug. 2011), http://www.hrw.org/sites/default/files/reports/nigeria0811WebPostR.pdf. The report details the efforts made by the Economic and Financial Crimes Commission (EFCC) at fighting corruption and regrettably losing the grip on the battle. The report summary states, thus, "Corruption is so pervasive in Nigeria that it has turned public service for many into a kind of criminal enterprise. Graft has fueled political violence, denied millions of Nigerians access to even the most basic health and education services, and reinforced police abuses and other widespread patterns of human rights violations."

Essay, I will advisedly limit it to two. First, the "narrower" sense of wrongful convictions are those that occur in the course of trial, leading to conviction and sentence of a term of imprisonment, where it later emerges that the process was flawed.[6] Usually, the convicted person having suffered some form of reparable or irreparable damages in the course of imprisonment, or, prolonged trial, where the accused is dragged through the legal process and made to suffer scorn, odium and humiliation, not to speak of the socio-economic consequences loved ones and family members are put through—particularly when the trial ends up in an acquittal. The "Birmingham Six" case remains a cause célèbre. More painful is when a convict has almost served up part of the terms of their sentence as a consequence of the flawed process. An example would be when new evidence turns up, either as a result of forensics or technology. It could also be evidence of direct witnesses to the crime that was for some reason, never explored in the investigative process; or, where new corroborating evidence exculpating the convicted person comes to light, or material facts or legal technicalities that were ignored in the trial process.

The second and perhaps much wider use of the term, is broad enough to accommodate the abuse and damages suffered in the course of the judicial and prosecutorial process involving the police, judiciary and the machinery of the administration of justice. This type is prevalent in Nigeria, and the inherent lapses within the Nigerian system which produce wrongful convictions of this nature are a result of a systemic breakdown. The consequential punishment is suffered by an accused person when they suffer humiliation and are deprived of their right to liberty. The accused's families also experience pain and suffering over a prolonged period of time. This is where the system completely neglects and fails an accused person. This Essay will deal in extension with this latter sense of the term, in light of the facts and evidence in Nigeria.

Wrongful conviction in this sense encompasses the whole gamut of miscarriages of justice beginning when an accused person is arrested, interrogated, up through the court proceedings—including the appeal, sentencing, execution and clemency stages. It is in this context that the Nigerian situation will be examined. A corollary to this will be the discussion of the role international human rights law has on wrongful

6. The classic case of the Birmingham Six. The Birmingham Six were six men—Hugh Callaghan, Patrick Joseph Hill, Gerard Hunter, Richard McIlkenny, William Power and John Walker—sentenced to life imprisonment in 1975 in the United Kingdom for the Birmingham pub bombings. Their convictions were declared unsafe and overturned by the Court of Appeal on 14 March, 1991. The six men were later awarded compensation ranging from $840,000 to $1.2 million. The miscarriage of justice led the Home Secretary to set up a Royal Commission on Criminal Justice in 1991. The Commission reported its findings in 1993 and led to the Criminal Appeal Act of 1995 and the establishment of the Criminal Cases Review Commission in 1997.

convictions. This discourse will be centered on the following principles of the fundamental right to life: the right not to be subjected to torture; the respect for and upholding of due process—which will include the right to a fair hearing, the presumption of innocence, the right to call and examine witnesses, as well as submission of documentary evidence—the right not to self-incriminate or confess as a result of dubious or questionable means; the right to legal representation; the right of appeal to be review by a higher court, and finally, the right to liberty—not to be unjustly detained, restrained or confined, failing that, the right to be granted bail at no cost.[7]

In conclusion, this Essay will discuss the enormous role non-state actors like lawyers, civil society and non-governmental organizations can play in bringing this malaise to the fore of public discourse. Additionally, it will seek to show where policy makers can then seek to institute these recommendations with a view to dealing with the problem. The role of lawyers will be highlighted given that the legal profession in Nigeria appears implicated, indeed, in some cases complicit in the entire process. The dearth of pro bono legal services, the very steep professional fees and the inadequately funded legal aid scheme, all contribute to bring about this sorry state.[8] The accusations of incompetence and corruption leveled against the bench—particularly at the lower magisterial cadre—continue to undermine the quality of justice dispensed.[9] The submission then is that, the legal profession must

7. CONSTITUTION OF NIGERIA §§ 33, 35 (1999). All of these protective provisions are copiously embodied in Chapter 1V of the 1999 constitution of Nigeria. They are to be found in sections 33(1)(2)a, b, c; 34(1)a, b, c(2); 35(1)a, b, c, d, e, f(2)(3)(4). Section 36(1) specifically provides, "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality." The Nigerian Supreme Court has judicially interpreted these provisions to give it the wildest possible meaning. Legal Practitioners Disciplinary Comm. v. Gani Fawehinmi, [1985] 2 NWLR (Part 7) 300 (Nigeria); Denloye v. Med. & Dental Practitioners Disciplinary Comm., [1968] 1 All NLR 306 (Nigeria).

8. The Legal Aid Scheme in Nigeria was conceptualized during the military era in the 1970s. The current legal framework under which it now operates can be found in the Legal Aid Act. Cap 205, Laws of the Federation of Nigeria, 1990. In a paper presented by the Director General of the Legal Aid Council and put out by the Office of the Director, Planning, Research and Statistics at the Open Society Justice Initiative Legal Aid Meeting in London 18th January, 2007, the challenges of the council were highlighted. That challenge was identified primarily as the dearth of funding. The paper posited that "The underfunding has worked against the effective delivery of Legal Aid Scheme in Nigeria. Taking into consideration the size of the population about 120 million (note that this was in 2007 and the population of Nigeria has since increased to over 151 million) the vastness of the area and other peculiar circumstances, legal aid scheme deserve robust funding." The paper then proceeded to list the upshots of poor funding to include inadequate logistics, dearth of current and relevant law reports/books and journals, poor remuneration, low publicity for the scheme, failure to introduce new initiatives and programmes and dearth of essential infrastructure.

9. *Assessment of Justice System Integrity and Capacity in Three Nigerian States*, UNITED NATIONS OFF. ON DRUGS & CRIME (May 2004), http://www.unodc.org/pdf/crime/

drive the process of change along with policy makers.

III. STATEMENT OF THE PROBLEM

In Nigeria, wrongful convictions permeate through the system and remain undetected for some time. Is this a systemic problem or are the individuals within the system perverting it? Why is society acquiescing and seemingly accepting it as a fait accompli, rather than vehemently confronting the malfeasance? What obstacles stand in the way of confronting this anomaly, particularly the syndrome of awaiting trial for years? What is the excuse? Are they rooted in the skewed interpretation of the law, or is this just a case of blind justice when the veil could be lifted to see and do justice? What remedial actions are available to curb these aberrations? How do victims go about remedying the effects of wrongful convictions particularly in Nigeria where the mills of justice grind so slowly?

As a follow up to the above, we cannot avoid the intertwining of the socio-economic and political context within which these aberrant situations happen. Is there a political will to do justice? What supportive role has society or state failed to play? For instance, the Nigerian state led Legal Aid Council has remained comatose and unable to assist with taking up the legal challenge of the phenomenon. What checks and supervisory role exist within the state to detect and deal with wrongful convictions at the level of the executive and parliament? How has the National Human Rights Commission and the Public Complaints Commission (Ombudsman) fared in dealing with the plethora of police and paramilitary force abuses and brutality?[10] What is the role of judicial

corruption/Justice_Sector_Assessment_2004.pdf. In a 2004 Technical Research Report, conducted by Global Programme Against Corruption (GPAC) and the Nigerian Institute of Advanced Legal Studies, Nigeria (NIALS) under the aegis of the UN Office on Drugs and Crime, titled *Assessment of Justice Systems Integrity and Capacity in 3 Nigerian States*. Under broad heading of Recommendations, the report stressed the importance of access to the courts, timeliness and quality of justice delivery and trust in the justice system. Under the subhead of independence, fairness and impartiality of the judiciary, the recommendation stated, thus, "In theory, the judiciary is independent, fair and impartial. However based on the findings of this study, more reforms are required to enhance and sustain the independence of the judiciary. The lack of independence is strongly linked to corruption. A judicial system which is influenced by politics or by other factors is constantly undermined in its integrity and loses its ability to curb corruption. Curbing corruption requires a strong and independent judiciary." The Recommendation was blunter under the subhead—corruption within the justice sector. It stated, "Corruption is not peculiar to the judiciary alone in Nigeria. Nonetheless, corruption in the judiciary may turn out to be more harmful because it could undermine the credibility, efficiency, productivity, trust and confidence of the public in the judiciary as the epitome of integrity."

10. The National Human Rights Commission was established by the National Human Rights Commission Act (1995) Cap No 46, 11 LAWS OF THE FEDERATION OF NIGERIA (2004) (Nigeria). The Commission has the mandate amongst others to protect and monitor human rights violations and make recommendations to the government. In 2008, the Commission received roughly 1130 (one thousand one hundred and thirty) complaints, out of which 1115 (one thousand one hundred and fifteen) were

review of legal decisions? How can regional, continental and international tribunals and courts be useful in the fight against wrongful convictions? What is the place of science and technology in the process of criminal prosecution even after conviction and sentence? In Nigeria, these are the troubling issues.

IV. DECONSTRUCTING THE TRAJECTORY OF WRONGFUL CONVICTIONS IN NIGERIA

The problem of wrongful convictions in Nigeria can be identified at different levels of the justice system beginning the moment someone is arrested up through the judicial process.

A. Policing Strategy

At the level of policing and enforcement, evidence abounds which strongly suggests that the police forces severely compromise even the most basic of their duties. It is not uncommon for people to be randomly arrested and accused of grievous crimes as serious as murder in the expectation that a case will be built around such arrest that is, working towards the answer, rather than via any scientific approach towards investigation of crime and regard to the rights of the accused person. In Nigeria, it is common practice for the police to hold accused persons under the nebulous principle called a "Holden charge," with a view towards circumventing the person's constitutional right not to be held for an unreasonable length of time, or be charged within a reasonable time as stipulated by the constitution. It is common place for accused persons to be kept in police detention well beyond the statutory 24 hour maximum within which they should be informed of the facts and grounds for their arrest, indeed, charged in court within 48 hours of arrest as guaranteed by the constitution.[11] Although bail is advertised to

considered and treated as admissible while 185 were ruled to be inadmissible. The Commission was able to conclude and close 825 cases, and that 290 others were at different stages of investigation. This record performance is so infinitesimal for a country the size of Nigeria against the tons of abuses and violations of rights of accused persons in detention and prison custody, as well as against the over 48,000 persons in detention; two thirds of that figure awaiting trial and languishing in prison. Further information—albeit scarcely made available by the Commission—regarding the activities of the Commission can be accessed vide their website at NAT'L HUM. RTS. COMMISSION, www.nigeriarights.gov.ng (last visited May 15, 2012).

11. CONSTITUTION OF NIGERIA (1999) § 35. Section 35(3) of the 1999 Nigerian constitution states "Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention." Subsection 4 and 5 is even more poignant and specific. It states "Any person who is arrested or detained in accordance with subsection (1)(c) of this section shall be brought before a court within a reasonable time, and if he is not tried within a period of— (a) two months from the date of his arrest or detention in

be the right of an accused person, it is normal practice to deny bail even for petty crimes. This practice is commonly referred to as "police bail." It is also not uncommon for accused persons to be denied the services of a lawyer at this preliminary stage of the process when they require legal advise the most.

B. Police Brutality and Torture

It is common practice for police officers to brutalize accused persons at the point of arrest and while in police custody. The goal of this practice is to extract confessions of guilt by any means including the severest forms of torture as well as inhuman and degrading treatment. Admittedly, the Nigerian police work under very hostile conditions, but this is no excuse for the kind of flagrant disregard for the law and common decency. Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) states: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." This Covenant was ratified by Nigeria on the October 29, 1993.

C. The Paucity of Legal Representation

In Nigeria, over 70 percent of accused persons are indigent and therefore unable to secure legal representation. To combat this problem, the government established Legal Aid Council, but as highlighted above, the program is financially handicapped. In most cases, the accused person's first real contact with a lawyer comes when they are charged before a magistrate after being remanded into custody, which is euphemistically referred to as an "overnight case." This is clearly at variance with the requirements of the Nigerian constitution.[12] In Nigeria, magistrates are usually conscious of the rights of the accused person to legal representation, but they frequently deny bail on the first

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the case of a person who is in custody or is not entitled to bail; or (b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

12. CONSTITUTION OF NIGERIA (1999) § 36(5). Section 36(5) states that "Every person who is charged with a criminal offence shall be entitled to—(a) be informed promptly in the language that he understands and in detail of the nature of the offence; (b) be given adequate time and facilities for the preparation of his defence; (c) defend himself in person or by legal practitioner of his own choice; (d) examine, in person or by his legal practitioners, the witnesses called by the prosecution before any court or tribunal and obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court or tribunal on the same conditions as those applying to the witnesses called by the prosecution; and (e) have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence.

arraignment hearing, and often not proceed to hear an accused unless he has legal representation. The practice is for Magistrates to adjourn first arraignment hearings, and depending on the nature of the charges on the charge sheet, the length of sentence the offence attracts, gravity of the offence, whether he has jurisdiction to try the matter, and a host of other conditions, determine whether the accused should be given bail. This delay extends the misery of the accused as they are then returned and remanded into police custody. There is a growing body of evidence tending to support the view that the Nigerian judiciary is less than transparent, particularly at the magisterial level. Evidence of corrupt practices are notoriously difficult to prove, but it is a well-known fact amongst personnel at that level—usually in connivance with the police to extort money from accused persons—and sometimes through legal representatives—to create all manner of hurdles to stall proceedings.

D. The Skewed Bail System

Like Police bail, court bail curiously is not automatic or a right guaranteed by the law. With court bail however, it is usually down to logistics and procedural reasons, rather than any deliberate attempt to undermine the right of the accused. It is common practice for stringent conditions to be placed on guarantors and sureties, further hindering the right of the accused. The very nature of the bail requirements and conditions makes the determination of court bail application difficult to succeed at the first hearing. The facts and statistics of persons that will usually be stalled in-between this process is startling. For instance, there are 50 prisons in Nigeria, and it is estimated that there are over 48,000 prison inmates in detention, awaiting trial or convicted and serving their terms of imprisonment. Of this number, 30,000 are awaiting trial in decrepit prisons.[13]

E. Rights Awareness and Poor Investigative Skills

The very sluggish legal, investigative and evidence gathering process remain at the core of the wrongful conviction question in Nigeria. There

13. *Nigeria: Prisoners' Rights Systematically Flouted*, AMNESTY INT'L (Feb. 2008), http://www.amnesty.org/en/library/asset/AFR44/001/2008/en/4bd14275-e494-11dc-aaf9-5f04e2143f64/afr440012008eng.pdf. The outcome of the investigation was summarized, "Prisoners in Nigeria are systematically denied a range of human rights. Stakeholders throughout the Nigerian criminal justice system are culpable for maintaining this situation . . . . The judiciary fails to ensure that all inmates are tried within reasonable time . . . . The prisons cannot ensure that facilities are adequate for the health [and well-being] of the prisoners. Severe overcrowding and lack of funds have created a deplorable situation in Nigeria's prisons . . . . It is time the Nigerian government faces up to its responsibilities for those in its prisons."

is only one established forensic laboratory in Lagos, Nigeria, which is managed by the Nigerian police force, severely undermining and raising doubts about the quality of forensic results. No serious litigants use this laboratory, rather accused persons and indeed appellants requiring expert opinion on matters of forensics go abroad to procure experts or have their evidence tested professionally if they can afford to do so. The Nigerian judiciary is also seriously underfunded and is still not yet self-accounting. The judiciary's annual expenditure—federal and state budgets—are charged under the executive arm of government, rather than a First Line Charge on the Consolidated Revenue Fund which should ideally make them self-accounting. This only breeds corrupt practices as well as stymie the independence of the judiciary from the stranglehold of the executive arm of government.

The legal hurdles are so stacked against the accused person that it is usually in the accused person's interest to plead guilty rather than be dragged through the time-wasting and money-consuming process, which would end in a contrived conviction anyway. But accused and convicted persons hardly know their rights, and even if they do, the system clogs the process to deny them their rights. Although the death row phenomenon is not endemic in Nigeria, the problem however, is the dearth of, and use of technology in the process of reviewing perverse convictions. As noted above, there is only one forensic laboratory in Nigeria, and the legal cost of mounting a challenge on technical grounds of law, overwhelm a convicted person's resources, thence, he gives up and accepts his fate.

V. DOMESTIC AND INTERNATIONAL NORMATIVE LEGAL FRAMEWORK

The reason why international human rights law is so revolutionary—and a paradigm shift from the hitherto notions of customary international law—is that it focuses exclusively on the vertical relationship between the state and the subjects of that state, rather than the horizontal relationship between and among nation-states. International human rights law is individualistic, that is, it looks to the individual, rather than the restrictive classical notions of international law regulating the relationship and conduct inter se between states. Individuals are now the direct subjects of international human rights law, with no state intermediation. The 1948 Universal Declaration of Human Rights ensured that international human rights law was rewritten forever, with subsequent international legal instruments drawing inspiration from the declaration.

With the above premise, international human rights law potentially serves as the basis for effectively combating wrongful convictions in

Nigeria. The 1948 Universal Declaration of Human Rights (UDHR) was the touchstone in the evolution of international human rights law as a customary norm of international law, and Nigeria is Signatory to the declaration. That declaration, along with the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic and Socio Cultural rights, has been collectively referred to as the International Bill of Rights. Subsequent treaties, international and regional, have drawn their inspiration from these Instruments.[14] These Treaties collectively appeal to the universal character of international human rights law, not only as rights that are inherent in every human being, but ones that applies extra-territorially,[15] despite the inhibitions placed by sovereignty, jurisdiction and the territorial question; state responsibility and accountability, and the applicability of the trilogy of obligations to respect, protect and to fulfill. Nigeria is also Signatory to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). She ratified this Convention on the July 28, 2001. Over the course of time, violations of some of these rights have acquired the status of norms, including the right not to be subjected to torture, inhuman, degrading treatment or punishment. Torture is absolutely prohibited irrespective of the circumstance and justification.[16] Article 1 of UNCAT has broadened the reach of the various forms of, and acts of torture, inhuman and degrading treatment.[17]

Apart from the theoretical construct which international human rights law provides for addressing the problems of wrongful convictions at the domestic level, there remains a practical role in Nigeria for international human rights law to play in challenging the phenomenon by breaking the barriers of jurisdiction and territory. For example, appeals and reviews can be taken up before regional and international courts to

14. The 1950 European Convention for Human Rights and Fundamental Freedoms; the 1984 Covenant Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment; the 1980 African Charter on Human and Peoples Rights; ECOWAS Ratification, Popularisation and Implementation of the African Charter on Democracy, Elections and Governance and the ECOWAS Supplementary Protocol on Democracy and Good Governance.

15. *See* D. v. United Kingdom, App. No. 30240/96, Eur. Ct. of H.R. (1997); s*ee also* Soering v. United Kingdom, App. No. 14038/88, Eur. Ct. of H.R. (1989).

16. See article 3 of the ECHR, which states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 7 of the ICCPR also states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

17. Article 1 of UNCAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

confront wrongful convictions, but the questions to surmount usually would be: where does domestic jurisdiction end? At what stage does foreign jurisdiction begin? Where would be the appropriate forum? These questions are inapposite as international courts are loathe to see themselves as courts of "fourth instance."[18] Despite these limitations, international human rights law can circumvent these strict strictures to provide remedies to accused persons and victims of wrongful convictions. Although Nigeria makes jurisdictional provisions for reviewing adverse and perverse convictions, when new compelling evidence emerge—usually on grounds of law, and rarely on mixed facts and law—international human rights law will not only help further the process, but it will not be out of place to seek recourse to international mechanisms to address such wrongful convictions, if the Nigerian domestic courts fail to address the issues inadequately. For a like the Human Rights Committee (HRC) under the ICCPR; the UNCAT Committee; the UN Office of the High Commissioner for Human Rights and the numerous sub-regional and continental tribunals are examples of where remedial actions can be sought. Forum will be determined by who committed the violations and their egregious nature, rather than by territorial limitations.[19]

The recently approved Nigerian Fundamental Rights Enforcement Rules of 2009 have made it possible for the direct applicability of UNCAT, as well as other international Human Rights instruments in human rights litigation in Nigeria. The recent Human Rights Amendment Act 2011 as enacted will further expand the frontiers of these rights in terms of enforcement and respect. The 1999 Nigerian constitution, particularly the provisions of Chapter IV, deal with all the protective rights to be enjoyed by Nigerian citizens—the presumption of innocence, the right to fair hearing, the right to be informed of reasons for arrest, and the right to legal representation. Apart from the Constitution, the Police Act 1967 (as amended), the Evidence Act of

18. This means that international courts and tribunals do not see the exercise of their jurisdiction as amounting to retrying the matter de novo. International courts recognize the first instance jurisdiction of domestic courts to adjudicate on the matter, within the prisms of national laws; and limit their role essentially to a review of the lawfulness of the process, serious errors of law; serious breaches and miscarriage of justice; administrative lapses that leads to serious breaches of fundamental rights of the claimants, and other international obligations of the state in question.

19. Regional, continental and international courts are now empowering and looking to individuals making applications to challenge violations of human rights. Wrongful conviction is violation of the gravest kind. The ECHR blazed the trail in a number of celebrated cases allowing individuals to bring applications before the court. In 2006, ECOWAS by Article 9(4) of the Supplementary Protocol empowered individuals and NGOs to be able to bring individual applications before the court. The court recently in SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission ECW/CCJ/APP/08/08 granted amongst other reliefs, that an NGO had locus standi to bring the application before the court, as well as upholding education as a basic human right.

1958 (and the recent amendment thereto of 2011), the Criminal Procedure Law (for Southern Nigeria), as well as the Criminal Procedure Code and Penal Code (for Northern Nigeria) contain ample provisions safeguarding the rights of an accused person at every stage of the criminal process.

These Codes and Laws makes provisions for the right to remain silent, the right of representation, the right of accused persons to call witnesses to support their case, the right to cross examine witnesses produced by the state, the right to challenge confessional statements secured by duress, undue influence or procured by torture, the right to challenge the jurisdictional powers of the court, the right to bail, and generally, to be able to conduct his defense within the ambit of the law, as well as appeal the conviction and sentence of the court to a higher court. In essence, there are clearly defined rights for accused and convicted persons set out in these laws. The crux of the matter is that these laws are respected more in their breach than their observance. The government and its agencies point in the direction of constraints impeding the smooth running of the administration of justice, and point instead at different Commissions, Committees and Review Papers advocating review of the criminal justice administration system. The issue, however, has remained the political will to implement these changes.[20]

VI. FURTHERING THE INNOCENCE MOVEMENT GLOBALLY: A SUB-SAHARAN APPROACH

What then should the role of NGOs be in forestalling and confronting wrongful convictions? How can NGOs spread the Innocence Project globally? NGOs have been known to, or at the behest of the bench, provide expert opinions, to act as amicus curiae (friend of the court), to work in concert with barristers of both sides to make available documents which have come to light even after conviction and sentence have been served. What remains to be said is that a distinction must be made between the type and nature of wrongful convictions experienced in "developed" and "developing or underdeveloped" countries and the inevitable different strategies for confronting wrongful conviction infractions. In Nigeria, there would have to be a paradigm shift in

20. The 2005 National Working Group on Prison Reform and Decongestion; the Inter-Ministerial Summit on the State of Remand Inmates in Nigeria's Prison was set up also in 2005. In 2006, there was the Presidential Committee on Prison Reform and Rehabilitation; and in March 2006 came another Commission called the Presidential Commission on the Reform of the Administration of Justice. Finally, in April 2007, came the empanelling of the Committee on the Harmonization of Reports of Presidential Committees Working on Justice Sector Reform. Despite these litany of Committees and Commissions, the impact on the system has not changed significantly.

approach given that the phenomenon of wrongful conviction is more of a systemic breakdown of the administration of justice.

NGOs in developing countries like Nigeria are seriously hamstrung in terms of finances, in surmounting the red tape that is government bureaucracy, in the brazen manner of the violations of rights of accused persons in custody, and in the lack of effective remedial action—whether civil or criminal. The weak legal regulatory framework, corruption and the fragility of state institutions, has not helped matters; rather it has compounded the situation. It is submitted that the legal profession must drive that process pro-actively, with a pro poor approach to legal representation. This is because a majority of wrongfully convicted persons or persons who suffer deprivation of life and liberty are people at the bottom rung of societal ladder. With the dearth of legal aid, huge legal fees and barrister's fee note to contend with, it falls on the NGOs to take on the gauntlet. The case of the Birmingham Six in the United Kingdom is a classic example, as criminal law reform in the United Kingdom was anchored around the outcome of the successful overturning of the convictions of the six innocent men.

With specific reference to Nigeria, given that the phenomenon of wrongful conviction takes the shape more of the skewed system of the administration of justice, denial of basic rights, prolonged detention without trial, the awaiting trial syndrome—whilst detainees languish in very unhealthy prison conditions—NGO work must be focused primarily on re-engineering change, strengthening state institutions, as well as training and retraining of personnel involved in the administration of justice. There also remains a secondary role for Nigerian and Sub-Saharan African NGOs taking on test cases or class action suits. These sorts of actions will help push for law reform, systemic and attitudinal change. Most of these unlawful detentions are actionable and challengeable in court, with the prospect of civil actions—individual or class actions—that will lead to monetary compensation for victims. A successful hefty civil claim for aggravated damages will potentially send the right signals to government and its apparatus, about the consequences and failure to respect detainees and prisoners' rights under the law. Setting such a legal precedent will act as a catalyst for attitudinal and systemic change.

VII. CONCLUSION

Wrongful conviction in Nigeria is anchored around the inefficient machinery of the administration of justice, and hinges largely on how the police go about their duties—usually in violation of the laws they are

constitutionally obliged to observe. The Nigerian judiciary is reputed to be fairly independent, but with its own challenges of corruption at the lower level of the bench—now inexorably extending to the higher bench. It is still a Herculean task to expect to be treated justly, fairly and impartially in court. With funding as a major constraint, the legal profession itself is unable to play the role of the defender of the accused or convicted persons. Change, however, must be driven by the legal profession in concert with NGOs, given that the majority of convicted persons or persons who suffer deprivation of their rights are indigent.

WRONGFUL CONVICTIONS IN SWITZERLAND: A PROBLEM OF SUMMARY PROCEEDINGS

*Gwladys Gilliéron**†

I. INTRODUCTION

The risk of wrongful conviction is an inevitable part of any criminal justice system. It is related to the way in which criminal inquiries and trials are conducted in order to establish the truth. Recently, Switzerland has seen significant legal reform in its criminal justice system. On January 1, 2011, the first Swiss Code of Criminal Procedure came into force and replaced the 26 cantonal criminal procedure codes and the Federal Act on the Administration of Federal Criminal Justice. For efficiency reasons the role of the examining magistrate, which had previously existed in some cantons, was abolished. Thus, the prosecution occupies a pivotal position. It directs examination, charges, and prosecutes. Moreover, in order to deal with an increasing caseload, prosecutors have been given more power and discretion to divert cases. However, simplification of procedures may be a risk for wrongful convictions. Since the vast majority of cases are resolved by alternative proceedings, the traditional distinction between criminal justice systems that adhere to the principle of legality and those that adhere to the principle of opportunity shrinks gradually.

After a brief overview of the Swiss legal system, I will outline the criminal procedure in Switzerland and identify its strengths and weaknesses in regard to the prevention of wrongful convictions. This will be followed by the results of a study on wrongful convictions supported by the Swiss National Science Foundation. In the final section, I will present the mechanism that controls accuracy and reliability of the forensic sciences and describe the legal framework of the Swiss forensic DNA database.

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II. SHORT OVERVIEW OF THE SWISS LEGAL SYSTEM

Switzerland, like the United States, is a federal state. The Swiss Confederation consists of twenty-six federated states called cantons, which enjoy some degree of autonomy. Similar to the United States, all powers not specifically given to the Confederation belong to the cantons.[1] Under the 1848 federal Constitution, the cantons were responsible for commercial, civil, and criminal law. Thus, Switzerland had 26 different codes regulating these matters. At the end of the nineteenth century, the Confederation was granted the power to unify commercial, civil, and criminal law. A Swiss Code of Obligations was adopted by the federal Parliament in 1881, followed by a Civil Code in 1907, a new Code of Obligations in 1911, and finally a Criminal Code in 1937. However, the procedural laws regulating these matters were still vested in the cantons. As a consequence, each canton had its own code of civil procedure and its own code of criminal procedure. In addition, the Confederation adopted its own code of criminal procedure. The new federal Constitution, which came into force on January 1, 2000, transferred the powers to unify the law of criminal procedure[2] and civil procedure[3] to the Confederation. On January 1, 2011, the Swiss Code of Criminal Procedure (hereafter referred to as CCrP)[4] and the Swiss Code of Civil Procedure came into force and replaced the 26 cantonal codes of criminal and civil procedure.

III. CRIMINAL PROCEDURE IN SWITZERLAND

As a consequence of the implementation of the CCrP, criminal acts in Switzerland are now prosecuted and judged under the same procedural rules,[5] the hope being that the elimination of legal fragmentation will ensure increased equality before the law and greater legal certainty.

The absence of an examining magistrate is a characteristic feature of the CCrP. Thus, the prosecution holds a central position and its powers are wide. It conducts the preliminary proceedings, pursues criminal

1. BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT (Federal Constitution of the Swiss Confederation) Apr. 18, 1999, SR 101. art. 42, para 1.

2. *Id.* at art. 123, para 1.

3. *Id.* at art. 122, para 1.

4. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312. A complete translation of the CCrP into English is provided by Sarah Summers in KOMMENTAR ZUR SCHWEIZERISCHEN STRAFPROZESSORDNUNG (STPO) (Andreas Donatsch et al. eds., 2010).

5. For a description of a cantonal criminal justice system before the introduction of the CCrP, see Gwladys Gilliéron & Martin Killias, *The Prosecution Service within the Swiss Criminal Justice System*, 14 EUR. J. CRIM. POL. RES. 333 (2008).

offenses within the scope of the investigation, brings charges, and pleads in favor of the criminal charge.[6] The advantage of such a model is the achievement of a high grade of efficiency of prosecution by realizing homogenous investigation, examination, and charging. Moreover, allowing the public prosecutor to carry out the investigation from the beginning avoids dual proceedings as conditioned by the alternate work of the examining magistrate and prosecution. In this way, a considerable expenditure of time and personnel is avoided.[7] The enormous power vested in the prosecution is compensated by the judge being responsible for compulsory acts and extended defense powers.

A. The Prosecution

1. Duties

The prosecution service has the monopoly over prosecution. The public prosecutor investigates criminal offenses, files criminal charges as soon as there is a sufficient degree of suspicion, and represents the state at the trial. He is obliged to investigate in an objective and neutral way and must therefore take into account both the incriminating and the exculpatory circumstances.[8] If the public prosecutor is convinced that a decision needs to be reviewed for factual or legal reasons, he is entitled to appeal. He may do so to the disadvantage, as well as to the advantage, of the condemned.

2. Organization

Due to the country's federal structure, the prosecution service is organized on a cantonal and federal level.

Public Prosecutor of the Confederation: On the federal level, the Office of the Attorney General (Bundesanwaltschaft) is responsible for the prosecution of criminal offenses that are directed against the Confederation or that affect its interests (e.g. organized crime, white collar crime, money laundering, and corruption). The criminal offenses that fall within the jurisdiction of the Confederation are expressly listed

6. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 16, para 2.

7. BUNDESRAT, BOTSCHAFT ZUR VEREINHEITLICHUNG DES STRAFPROZESSRECHTS VOM 21. DECEMBER 2005 1106–1109 (2006).

8. For examples of prosecutors being subject to criminal prosecution if they withhold evidence favorable to the defendant, see Martin Killias, Wrongful Conviction in Switzerland: The Experience of a Continental Law Country, in WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 139, 146-148 (C. Ronald Huff & Martin Killias eds., 2008).

in the CCrP.[9] By far the majority of criminal acts are prosecuted by the cantons. The Office of the Attorney General has neither supervisory power over the cantonal authorities, nor does it have the right to issue any directives to them.

The Attorney General is appointed by the federal Parliament for a term of four years. Since January 1, 2011, the Office of the Attorney General is answerable to a supervisory authority elected by the federal Parliament.[10] Previously, the supervision of the activities of the Office of the Attorney General was carried out by the Swiss Federal Supreme Court, the highest court in Switzerland. The supervisory authority has the right to issue general rules and regulations but not to give orders concerning individual proceedings.

Public Prosecutors of the Cantons:[11] As has been the case up to now, the organization of the public prosecution service in Switzerland, like its court system, remains a matter for the cantons and is therefore highly decentralized. In general, prosecution services are organized hierarchically. This means that prosecutors have to follow directives and instructions received from their superiors. In most cantons the Minister of Justice, and hence the cantonal government, stands at the top of the hierarchy. In some other cantons, the public prosecutor's office is part of the judiciary and under supervision of the cantonal Supreme Court. In those cantons where the public prosecutor is subordinate to the cantonal government, the latter rarely exercises the power of issuing instructions. Therefore, the public prosecutor's office is autonomous and independent in a factual way regarding the functional scope (i.e. when fulfilling the tasks and in the decision practice).[12] At most, the cantonal government will issue general recommendations in order to ensure that certain aims of criminal policy are pursued. In the other cantons, where the public prosecutor is as independent as the judiciary, the cantonal Supreme

9. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 23 and 24.

10. The supervisory authority is composed of seven members (one judge from the Swiss Federal Supreme Court, one judge from the Swiss Federal Criminal Court, two attorneys recorded in a cantonal attorneys register, and three specialists not belonging to a Federal Court and not inscribed in a cantonal attorneys register.

11. For a detailed discussion of the position and function of the public prosecution service and its control in the 26 cantons, see CHRISTOPH METTLER, STAATSANWALTSCHAFT: POSITION INNERHALB DER GEWALTENTRIAS, FUNKTION IM STRAFPROZESS UND AUFSICHTSRECHTLICHE SITUATION SOWIE EIN VORSCHLAG ZUR NEUORDNUNG (2001). For an overview, *see* Pierre Cornu, *The Swiss public prosecutor's office: Its role in criminal procedure, its relations with political authorities and the police, its role in crime policy, in* WHAT PUBLIC PROSECUTION IN EUROPE IN THE 21ST CENTURY – PROCEEDINGS MAY 2000 109 (Council of Europe ed., 2000); *see also* Johannes Driendl, *Staatsanwaltschaft und Strafverfolgung in der Schweiz, in* FUNKTION UND TÄTIGKEIT DER ANKLAGEBEHÖRDE IM AUSLÄNDISCHEN RECHT 329 (Hans-Heinrich Jescheck & Rudolf Leibinger eds., 1979).

12. ROBERT HAUSER ET AL., SCHWEIZERISCHES STRAFPROZESSRECHT 97-98 (6th ed. 2005).

Court is normally not allowed to give any instructions. Its supervision is limited to receive and control the annual report.[13]

Each prosecutor's office is headed by a Chief Public Prosecutor (Leitender Staatsanwalt). The Chief Public Prosecutor decides on the assignment of business. He can issue decrees and can reverse decrees issued by personnel under his control. Furthermore, he has the ability to declare decrees as subject to his consent. The Chief Public Prosecutor ensures a lawful and expedient carrying out of investigations and provides for a homogenous exercise of substantive criminal and procedural law. In general, the public prosecutor's office consists of several divisions, such as a universal division, a division for economic crime, and a juvenile division.

The mode of nomination varies between the cantons. Chief Public Prosecutors are either elected by the executive power, by the parliament, or by another authority such as the Cantonal Supreme Court. Depending on the canton, they are appointed for a term of four, five, or six years with possible renewal on expiration of the term. A prosecutor who has the status of an independent judge and has been elected by the parliament will be in a stronger position vis-à-vis the political authorities than one who has been appointed by the cantonal government.[14] The occupation as public prosecutor usually requires a legal degree and working experience, for instance as a lawyer, prosecutor, or court clerk.

B. Main Features of the Swiss Legal Procedure

The following section describes some striking differences between the inquisitorial and the adversarial criminal justice systems and discusses the principles governing the Swiss criminal procedure.

1. Inquisitorial Criminal Justice System

The inquisitorial criminal justice system is generally contrasted with the common law adversarial system. The Swiss criminal justice system is based on the inquisitorial tradition. The goal of every criminal justice system is to ensure that those guilty of committing a criminal offense are convicted and that innocents are acquitted. In achieving this goal, the different criminal justice systems provide for different safeguards.

Briefly, in an adversarial system, the parties, acting independently, are responsible to investigate the case and to present their evidence before a passive and neutral judge or jury that will decide on guilt. The

13. Cornu, *supra* note 11, at 112.

14. *Id.* at 111.

duty of the judge is to ensure the fair play of due process, whereas the responsibility in seeking the truth of the case relies on the defense and prosecution. In an inquisitorial system on the other hand, the prosecution has the obligation to gather evidence against, as well as in favor of, the accused.[15] Furthermore, as a consequence of the right to be heard,[16] it is obliged to fully disclose its files to the defense. Therefore, the defense lawyer usually does not conduct his own investigation and plays a limited role in establishing the relevant facts. The court is required to actively investigate the case and is ultimately responsible for discovering the truth. The examination hearings are conducted through the court. There is no cross-examination. However, the parties may suggest additional questions to the judge.[17] Expert witnesses are appointed by the prosecution, or by the court, after the decision to charge a defendant with a crime has been made.[18]

In contrast to the adversarial system, a defendant's confession is just one more fact to be entered into evidence and the prosecution is still required to present a full and compelling case.[19] The prosecution and the court examine the credibility of the confession before accepting it. In doing so, the accused should be asked to provide in detail further information about the criminal act.[20] In the Swiss criminal justice system, a confession is a mitigating factor of limited impact on the sentence. A confession qualifies the defendant for a sentence reduction of about ten percent.[21]

The presumption of innocence of the accused is also fundamental in an inquisitorial criminal justice system.[22] The court reaches the decision about the innocence or guilt of the accused based on the "free evaluation" (freie Beweiswürdigung) of all available evidence.[23] A minimum standard of persuasion is provided with the principle of *in-time conviction*. The judge is required to be intimately convinced regarding the truth of the facts unless he admits them as being proven.[24]

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15. HAUSER ET AL., *supra* note 12, at 243.

16. About the "right to be heard," *see infra* Part III.B.2.

17. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 341.

18. *Id.* at art. 184.

19. HAUSER ET AL., *supra* note 12, at 242, 288.

20. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 160.

21. Killias, *supra* note 8, at 144.

22. The presumption of innocence is guaranteed in Article 32 para 2 Federal Constitution of the Swiss Confederation, Article 6 subparagraph 2 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 14 para 2 International Covenant on Civil and Political Rights (ICCPR).

23. HAUSER ET AL., *supra* note 12, at 244–246.

24. *Id.* at 247.

In the Swiss criminal justice system, juries have been abolished. Instead, criminal cases are judged by professional benches of judges, or by benches of lay judges with at least one professional judge as chair.

2. The Right to be Heard and the Right to Remain Silent

The right to be heard (Rechtliches Gehör) – one of the basic fundamental legal rights in Switzerland – is explicitly guaranteed in the federal Constitution[25] and in the CCrP.[26] In particular, this rule contains the right of the parties (a) to have access to the files, (b) to take part in procedural activities, (c) to appoint a legal adviser, (d) to comment on the facts and proceedings, and (e) to submit a claim that evidence be heard. Another consequence of the right to be heard is the court's obligation to cite its rationale for the verdict and the sentence. The aim of this duty is the protection of citizens against arbitrary state decisions. The right to be heard gives the opportunity to the parties to present their case and more specifically to ensure that the point of view of the accused has been taken into account before a decision affecting him has been taken. Unlike the United States, since all authorities are obliged to fully disclose the files of the case to the parties, there are no specific rules of disclosure. The entire disclosure of the files may be restricted only under certain conditions. A restriction of the right to be heard may be necessary if there is reasonable suspicion that a party is misusing its rights, to ensure the safety of people, or to guarantee public or private confidentiality interests.[27]

In the context of the abridged proceedings, which is comparable with the plea bargaining under the US system,[28] this rule may be of particular importance. In case the accused confesses to a criminal offense, he will act in full knowledge of the prosecutor's file and will hence be aware of the relative strengths and weaknesses of his case.

The CCrP also guarantees the right to remain silent.[29] The accused is not required to incriminate himself. He has the right to refuse any cooperation in the criminal proceedings, but must submit to those coercive measures designated by law. This right implies that no disadvantageous conclusions can be drawn from silence.

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25. BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT (Federal Constitution of the Swiss Confederation) Apr. 18, 1999, SR 101, art. 29, para 2.

26. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 107.

27. *Id.* at art. 108.

28. About the abridged proceedings, *see infra* Part III.C.2.

29. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 117.

3. Principle of Legality

The Swiss criminal justice system adheres to the principle of legality (Verfolgungszwang). This rule is based on the absolute equality of all citizens before the law. Hence, the prosecutor is required by law to prosecute whenever there is sufficient evidence that a criminal offense has been committed.[30] In contrast to the court, which may acquit of a charge in case of doubt, the prosecution may not. The prosecution only has the power to decide whether it is obvious from the start that, for lack of sufficient evidence, a condemnation may never be made by court. However, this rule is not strictly applied anymore. The CCrP has introduced a moderate principle of opportunity,[31] which dictates that the prosecution shall refrain from conducting a prosecution if (1) the level of culpability and consequences of the offense are negligible; if (2) the offender has made reparation for the loss, damage, or injury, or made every reasonable effort to right the wrong that he has caused; or if (3) the accused is so stricken by the immediate consequences of the offense that an additional penalty would be inadequate. As soon as the conditions are fulfilled, the prosecution must drop the case.

4. The Principles Governing the Investigation

The Swiss procedure is guided by the principle of the factual truth (Prinzip der materiellen Wahrheit). Since the goal of the prosecution is not to seek a conviction but instead to discover the truth and to apply the law, it is under an obligation to investigate exculpatory and incriminatory circumstances with equal care.[32]

C. Alternative Proceedings

In order to deal with an increasing caseload, the CCrP provides for different proceedings. These will be discussed in the following section.

1. Penal Order Proceedings

A preliminary investigation does not always lead to charges being brought before the court, even though the prosecutor may feel that there

30. Article 7 para 1 CCrP states: "The criminal justice authorities are required, within the scope of their competence, to institute and carry out criminal proceedings if they are aware, or have sufficient grounds to suspect, that a criminal offense has been committed."

31. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 8.

32. *Id.* at art. 6, para 2.

is sufficient reason to suspect the accused person of having committed the crime. Rather, he shall issue a penal order (Strafbefehl) if the accused person has, in the preliminary proceedings, accepted responsibility for the factual circumstances of the case or if the circumstances have been otherwise sufficiently resolved. This summary punishment is normally used when the prosecutor seeks a minor sanction, typically a fine. However, in the Swiss criminal justice system, the use of the penal order has considerably expanded over time. The CCrP allows the prosecutor to impose a prison sentence of up to six months.[33] This rule is rather critical. Imprisonment is a sanction serious enough that it should not be imposed by the sole appreciation of the prosecutor without a compulsory preliminary hearing of the defendant and without any judicial control.

The prosecutor has no discretion in deciding whether he wants to use the ordinary proceedings or the way of summary punishment. As soon as the conditions are fulfilled, the prosecutor has the obligation to issue a penal order.

In the case of summary punishment, the prosecutor writes out a form on which the circumstances of the case are described and a sentence is imposed.[34] If the suspect does not agree with the penal order, he has the possibility to raise a written objection to the order within ten days.[35] Consequently, the case is tried in court.[36]

This written procedure results in a judgment without the parties being heard. Since the defendant can raise objection and ask for a full trial, this procedure is not considered as incompatible with the constitutional right to be heard. In the absence of an objection, the penal order becomes final and has the same effect as a judgment following a main hearing.[37]

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33. A penal order shall be issued if the case can be terminated by the imposition of one of the following sentences: (a) a fine; (b) a financial penalty of up to a maximum of 180 day units; (c) a community service of up to a maximum of 720 hours; (d) a prison sentence of up to 6 months, SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 352 para 1.

34. Prior to the introduction of the CCrP, in some cantons it was the examining magistrate or a judge (*Strafbefehlsrichter*) who was responsible to issue the penal order. For an overview, *see* GWLADYS GILLIÉRON, STRAFBEFEHLSVERFAHREN UND PLEA BARGAINING ALS QUELLE VON FEHLURTEILEN 109–113 (2010).

35. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 354, para 1. Before the introduction of the CCrP, the time period to make opposition varied between the cantons. An objection could be raised between 10 and 30 days.

36. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 356. After the prosecution has taken any further evidence which is necessary to enable the objection to be determined, the prosecution can also decide to discontinue the proceedings, to issue a new summary punishment order, or to bring charges at the Court of First Instance (*Id.* at art. 355, para 3).

37. *Id.* at art. 354, para 3.

In Switzerland this procedure is used in the overwhelming majority of cases. Approximately 90 percent of the convictions are based upon a penal order.[38] The procedure is often used in cases of traffic offenses, minor thefts, and possession of drugs.

The penal order is also used in many other continental countries and is commonly referred to as the continental form of plea bargain.[39] However, it differs from the US system in many ways. A defendant who does not agree with the order and insists on a full trial does not run the risk of having a harsher sentence imposed by the court. Since a penal order can only be issued if the facts are sufficiently clear and the culpability is not dubious, a reduction of the charges is not possible. Therefore, the risk of a false confession (i.e. accepting the order) does not exist to the same extent in the continental law as in the US system.[40] In the case of a penal order, the prosecutor evaluates the case alone and imposes a sentence. During this process, the accused is not represented by a lawyer and does not participate. The accused only has the possibility to accept or to refuse the order. A bargain between prosecution and defendant does not take place.

2. Abridged Proceedings

The CCrP has introduced the possibility of ending a case by the way of abridged proceedings (abgekürztes Verfahren). Prior to the introduction of the CCrP, only three cantons offered a similar procedure. This procedure is quite similar to plea bargaining under US system.

The accused person may make an application to the prosecution for the case to be conducted by the way of abridged proceedings if he accepts liability for those circumstances which are essential to the legal evaluation of the case and accepts at least in principle the civil claims.[41] An abridged proceeding is excluded if the prosecution requests the imposition of a prison sentence of more than 5 years.[42] The prosecution decides definitively whether the case is to be conducted by way of abridged proceedings. Even if the conditions for an application are

38. DORIS HUTZLER, AUSGLEICH STRUKTURELLER GARANTIEDEFIZITE IM STRAFBEFEHLSVERFAHREN: EINE ANALYSE DER ZÜRCHERISCHEN, SCHWEIZERISCHEN UND DEUTSCHEN REGELUNGEN, UNTER BESONDERER BERÜCKSICHTIGUNG DER GESTÄNDNISFUNKTION 51 (2010). In some cantons, 97 percent of the cases are dealt with by penal order (e.g. Basel in 2010; http://www.statistik-bs.ch/tabellen/t19/2).

39. *See* John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974).

40. About wrongful convictions in the penal order proceedings, *see infra* Part IV.

41. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 358, para 1.

42. *Id*. at art. 358, para 2.

fulfilled, the prosecutor may decline the petition. There is no legal right of the accused to have the case proceed by the way of abridged proceedings. Since the prosecutor is not required to mention the reasons for the decision, his discretion remains uncontrolled.

If the case is handled by way of abridged proceedings, the accused must have a lawyer to represent him.[43] This rule aims to protect the accused during the informal negotiations with the prosecution.

The prosecution writes out an indictment and conveys it to the parties, who have 10 days to accept or reject the indictment. Among others, the indictment contains the sentence and the warning to the parties that by accepting the indictment they waive the right to ordinary proceedings and to initiate legal remedies. As a consequence, the convicted may not file a petition for revision based on new evidence.[44] An exception to this rule is made if new evidence concerning the criminal responsibility can be presented. If the indictment is rejected by the parties, the prosecution will conduct ordinary proceedings. If the indictment is accepted, the prosecution transmits the indictment together with the files to the Court of First Instance. The Court will then conduct a principal hearing and will have to establish whether the accused accepts the circumstances of the case on which the charge is based and whether this assertion corresponds to the position as set out in the files. It is important to note that the court will not conduct an evidentiary hearing, this in contrast to the normal proceeding.[45] Following the principal hearing, the court retires and conducts its deliberation in private. In particular, it determines whether the carrying out of abridged proceedings is lawful and appropriate, whether the charge corresponds to the conclusions of the principal hearing and to the files, and whether the sanctions requested are reasonable. If the conditions for a judgment by way of abridged proceedings are met, the court converts the criminal offenses, sentence, and civil claim of the indictment into a judgment. To the contrary, if the requirements are not met, the court sends the files back to the prosecution in order to proceed by way of ordinary proceedings. Declarations, like confessions, provided by the parties in respect of the abridged proceedings cannot be used in ordinary proceedings.

An abridged proceeding was introduced in 2000 in the canton of Basel-Landschaft. From its experience, sentences are not less severe in this kind of proceeding as compared to similar cases judged by way of ordinary proceedings. The danger exists that the accused may confess to an offense he did not commit. It may happen that the defense lawyer suggests his client to the abridged proceedings, although he did not

43. *Id.* at art. 130 (e).

44. About the petition for revision, *see infra* Part III.D.2.

45. This fact explains why a petition of revision based on new evidence cannot be filed.

confess to the offense during the preliminary proceedings. As a consequence, it is not unusual that the court rejects to handle the case by way of abridged proceedings.[46] Therefore, to a certain degree, the court is a safeguard against false confessions.

D. System of Appeal

1. Legal Remedies

The prosecution, and any person who has a legally protected interest in the quashing or amendment of a decision, has the right to appeal verdicts and sentences. The Court of Appeal will fully review the case. The appeal may be used to contest a violation of the law or an incorrect establishment of the facts. The Court of Appeal may not alter a decision to the disadvantage of the convicted if the appeal has been made to his advantage. Hence, legal remedies are subject to the proscription of *reformatio in peius*.[47]

2. The Petition for Revision (Motion for Retrial)

A petition for revision (Revisionsgesuch) can be filed once all procedural remedies have been exhausted and the decision has become final and legally binding. The motion may be granted if either (1) new facts or new evidence which were not available at the first trial may lead to a different conclusion, (2) the decision is irreconcilably in contradiction with a later criminal decision which involves the same factual circumstances, or (3) in the course of other criminal proceedings it turns out that the findings of the proceedings were influenced by criminal activity.[48]

If the petition for revision is based on the ground of new facts or new evidence, these new facts must likely result in an acquittal, the imposition of a substantially less severe or more severe sentence on a person who was convicted, or the conviction of a person who was acquitted. This rule makes it clear that a motion for retrial can be filed either in favor of the convicted or against an acquitted person. This means that the rule *ne bis in idem*[49] does not apply to the provisions on

46. GILLIÉRON, *supra* note 34, at 87–88.

47. *Reformatio in peius* means that no decision should be amended, in the course of appeals, in a way that is unfavorable to the person who files an appeal.

48. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 410.

49. According to Art. 11 of the CCrP, a person who has been convicted or acquitted in Switzerland shall not be prosecuted again for the same criminal offense.

retrial. In contrast, in the United States there is a strict application of the rule against double jeopardy.[50]

Petitions for revision are rarely accepted. In Switzerland, on average, about two out of five motions for retrial are granted.[51]

E. Compensation and Reparation

Any person having been illegally deprived of liberty or having been acquitted has the right to compensation for financial loss and reparation for non-pecuniary loss.[52] The same rule applies for an accused who, following a retrial, has been acquitted or on whom a milder sentence has been imposed.[53] Compensation should include attorneys' fees and costs incurred in bringing a claim. The amount of reparation awarded varies from case to case. In general, the amount of reparation has been fixed to 200 Swiss francs (approximately $210) per day passed in prison.[54]

F. Strengths and Weaknesses of the Swiss Criminal Justice System

1. Strengths of the Swiss Criminal Justice System

The right to be heard is a fundamental legal principle in the Swiss criminal justice system. The full disclosure of the prosecutor's files and the obligation of the courts to cite their rationale for the verdict and the sentence help to prevent wrongful convictions. Furthermore, the prosecutor's duty to investigate in an objective and neutral way may contribute to avoid and correct the conviction of an innocent person. The following case illustrates the importance of the prosecutor's objectivity.

Henri Poulard was convicted in 1991 by a jury for participation in a robbery and was sentenced to 5 years imprisonment. On a Saturday morning in November 1983, three robbers entered a jewelry shop in downtown Geneva and stole goods worth more than a million dollars. This crime remained unsolved until seven years later, when Poulard was arrested for drunk driving. The police officer in charge noticed a similarity between Poulard's picture on the driver's license and one of the artist's impressions of the robbers. At a lineup, the manager of the

50. Stefan Trechsel & Martin Killias, *Introduction to Swiss Law*, *in* INTRODUCTION TO SWISS LAW 245, 285 (François Dessemontet & Tugrul Ansay eds., 3d ed. 2004).

51. Estimate based on the number of submitted and accepted petitions for revision in ten out of 26 cantons between 1995 and 2004 (Gilliéron, *supra* note 34, at 103).

52. SCHWEIZERISCHE STRAFPROZESSORDNUNG (Swiss Code of Criminal Procedure) Oct. 5, 2007, SR 312, art. 429.

53. *Id.* at art. 436, para 4.

54. HAUSER ET AL., *supra* note 12, at 572.

jewelry shop and two employees identified Poulard as one of the robbers. Despite Poulard's denegation and his alibi, he was convicted. He was released after 40 months in prison. This release was due to the fact that the Chief Prosecutor of Geneva discovered exculpatory evidence in favor of Poulard. An Italian prosecutor requested legal cooperation from the Public Prosecutor's Office of Geneva. From the Italian file it emerged that the robbery in Geneva had been committed by an Italian gang and excluded any participation of Poulard. The Chief Prosecutor of Geneva filed a petition of revision in favor of the convicted. Poulard was acquitted and received a sum of 370,000 Swiss francs (approximately $387,000) in damages for unjust detention. This case illustrates the importance of the impartiality maxim and how prosecutors see their role.

2. Weaknesses of the Swiss Criminal Justice System

Simplification of proceedings like the summary punishment where the prosecutor has uncontrolled power and where the defendant's rights are restricted may lead to more convictions of innocent people.

As will be seen in the last part of this article, physical evidence such as human cells are destroyed within a few months by the lab. Hence, there is no possibility to redo some analysis. This fact might explain why, to this point, no exonerations due to DNA evidence have been found in Switzerland. In the interest of justice, items of physical evidence should be retained over extended periods.[55]

IV. WRONGFUL CONVICTIONS IN SWITZERLAND

A. Research

A project supported by the Swiss National Science Foundation (SNSF) has analysed all wrongful convictions (successful petitions of revision) in Switzerland between 1995 and 2004.[56] Since in Switzerland a national database of all admitted petitions of revision does not exist, each cantonal court has been contacted with the request to provide the relevant opinions.

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55. Killias, *supra* note 8, at 152.

56. This research was inspired by the study on wrongful convictions in Germany conducted by Karl Peters. *See* Karl Peters, *Fehlerquellen im Strafprozess: Eine Untersuchung der Wiederaufnahmeverfahren in der Bundesrepublik Deutschland*, 3 vols. (1970). Although the research in Switzerland had been conducted prior to the introduction of the CCrP, the results remain valid. The complete results of the research are to be found in Martin Killias et al., *Erreurs judiciaires en Suisse de 1995 à 2004: Report to the Swiss National Science Foundation* (July 2007).

B. Number of Admitted Petitions of Revision

A total of 236 petitions for retrial have been admitted between 1995 and 2004.[57] The vast majority concerned penal orders with 159 successful petitions for revision. This outcome is not out of proportion when considering the number of cases that are dealt with in this kind of summary proceeding. Over the considered time period, prosecutors issued over 500,000 penal orders.[58] However, it is highly probable that in this field, there are many more wrongful convictions than those discovered by the research. It can be assumed that the majority of convicted waive their right to challenge the decision and prefer to pay a fine.

C. Sources of Wrongful Convictions

1. Verdicts

The ignorance by the court of some mental problems of the convicted affecting his criminal responsibility was a factor in 46.4 percent of admitted petitions of revision based on new evidence.[59] In fact, in 26 cases a motion for retrial has been granted on the basis of new psychiatric expertise. This means that the verdict as such had been correct but that the sentence should have been reduced or a treatment order imposed. In 3 out of 4 cases where the defendant had initially been convicted of homicide (attempt in 3 cases), a new psychiatric expertise led to the acceptance of the petition. The fourth case concerned a case where multiple children were killed and the accused was exonerated in only one of the five murders. The conviction in this case rested largely on one eyewitness identification. The petition of revision was granted because the convicted could show that another person looking similar to him could be the real perpetrator of the crime. Moreover, two forensic science experts could present some evidence that the bite marks found on the victim's body were more likely to belong to this other person. Nevertheless, the forensic science expert from the first trial was still convinced that the convicted was the owner of the bite marks. Because of the other murders, this exoneration did not lead to the reduction of the life sentence imposed after the first trial. Beside eyewitness error – one

57. In 230 cases, the motion for retrial has been filed in favor of the defendant; in only 6 cases, it has been filed against the defendant.

58. Killias, *supra* note 8, at 151.

59. In 56 cases (or 78.9 percent), the petition was accepted because new evidence could be presented. In 9 cases, the reason was that a second court decision was in contradiction with the cancelled one, and in 2 cases, the defendant had been convicted twice for the same facts.

of the leading sources of wrongful convictions – this case illustrates how the progress of technology in forensic sciences can lead to a different conclusion, as well as the dangers of taking into account the opinion of a single expert. In about one third of the admitted motions for retrial, the court had convicted a factually innocent person,[60] mostly due to perjury by victims of crimes against sexual integrity, or, in other cases, because of witnesses misidentifying persons or false confessions by the defendant that he later repealed.[61] In the research, no exonerations due to DNA evidence were found.

In sum, wrongful conviction of a factually innocent person plays a minor role. In the majority of cases, the sentence imposed by the court was too high because a reduced criminal responsibility of the convicted had not been recognized and hence not been taken into account.

2. Penal Order

As stated above, 159 penal orders have been overturned in ten years. In 116 cases, the convicted defendant had filed the petition for revision, while in 41 cases, the prosecution had asked for a new trial.[62] This means that in at least 25 percent of the cases, the proceedings had been initiated by the prosecution. In 136 cases, a new trial was granted because new evidence could be presented. In 11 cases, a second court decision was in contradiction with the cancelled one, and in 6 cases, the defendant had been convicted twice for the same facts.

In 93 cases, the offender had originally been found guilty of a traffic violation. In 19 cases, the defendant had been convicted of a criminal code offense, whereas the majority concerned minor thefts. In 113 cases, the defendant had been sentenced to a fine. In 80 cases, fines were 500 Swiss francs or less (approximately $525), and in 6 cases above 1,000 Swiss francs. In 15 cases, the defendant had been sentenced to an unsuspended sentence, and in 30 cases, a custodial sentence was suspended. In 31 cases the sentence was less than one month, and in 15 cases, above one month but below six months.

In 54 cases, wrongful identification (e.g. confusion of names as a result of insufficient investigation by the police or through the behavior of the accused who gives a wrong identity to the police) played a role in

60. Overall, in about 50 percent of the cases, the accepted petition of revision led to a reduced sentence, and in about 20 percent of the cases it led to another outcome (e.g. harsher sentence, influence on the decision of expulsion of foreigners convicted in Switzerland). *See* Killias et al., *supra* note 56, at 43.

61. Information is based on those cases for which the source of wrongful conviction could clearly be identified. In 49 cases the reason that led to the conviction was unknown.

62. This number includes petitions filed by public prosecutors and examining magistrates.

mistaken convictions. Moreover, false testimony contributed in 17 cases, and false confession in 3 cases, to the conviction of an innocent person. In 85 cases, the source of wrongful conviction could not be clearly identified. However, in the majority of these cases, the police and prosecutors have been negligent in their inquiry.[63]

Based on the available opinions, the granting of the petition of revision led to a reduced sentence in 21 cases, led to a harsher sentence in 1 case, and resulted in an acquittal in 109 cases.

In sum, whereas wrongful convictions by penal order mainly concern factually innocent defendants, revisions of verdicts and/or sentences where a court trial had taken place often involve the discovery, after a new psychiatric examination, of some mental problem not identified before and ultimately lead to a reduced sentence or a treatment order.

E. Limits of the Study

The conditions for filing a motion for retrial are quite restrictive. A very high burden must be met before such a motion is accepted (i.e. presenting new evidence). As a result, the research is unable to provide the exact number of wrongful convictions in Switzerland. However, the study gives important information about the sources of wrongful conviction and indicates where mistaken convictions are most likely to occur.

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63. The following examples shall illustrate the importance of complete and accurate reports for the prosecutor in order to avoid the conviction of innocent persons:

(1) *X* was caught driving above the speed limit on motorways and sentenced by penal order to a fine of 120 Swiss francs (approximately $125). *X* didn't make opposition. The public prosecutor issued the penal order, although the vehicle registration plate wasn't clearly readable. It was assumed that the car was from the canton of Bern (BE), but it could also be from the canton of Geneva (GE) (The Swiss car number plates consist of a two letter code for the canton followed by up to 6 numerical digits). In addition, the person that could be identified on the photo taken by the speed camera was a woman and not *X* (who was male). The petition of revision was granted.

(2) *Y* was caught driving 125 km/h in an 80 km/h zone and sentenced by penal order to a fine of 750 Swiss francs (approximately $785). *X* filed a motion for retrial based on the fact that the speed limit at the relevant place was 100 km/h (and not 80 km/h). The police report transmitted to the prosecutor assumed that due to road works the speed limit had been reduced from 100 to 80 km/h. Although the police knew from different sources that no road signs had been installed, this circumstance was not mentioned in the police report. The petition of revision filed by *X* was admitted.

(3) While police conducted a speed trap, *X* was caught driving above the speed limit on motorways. He was fined by penal order to 450 Swiss francs (approximately $470). *X* filed a petition of revision. It turned out that *Y* was the person driving the car at the critical moment and that he presented the identity card of *X* to the police officer. The petition of revision filed by *X* was admitted.

F. Risk of Wrongful Conviction Inherent in the Penal Order Proceedings

Various factors specific to the penal order proceedings contribute to the risk of wrongful conviction:

Investigation: The investigation is often not conducted with the required diligence. There is no obligation to hear the defendant, even if a custodial sentence is imposed. The prosecution bases its decision solely based off of the police accounts, which can be inaccurate or incomplete. It is also possible that the prosecution expects the defendant to object in case of his innocence.

Prosecution: The fact that it is the prosecutor who issues the decision without any control (e.g. a judge) may contribute to the risk of wrongful conviction.

Form and time limit to make opposition: Defendants have the right to object in writing within 10 days if they do not agree with the decision of the prosecutor. The short time limit to make objection, as well as the written form, may be a barrier to exercise this right.

Defendant's behavior: Different reasons can explain why defendants miss the deadline to make opposition or fail to exercise this right. Due to functional illiteracy, the defendant might not understand the instructions about the right to appeal. In fact, about 16 percent of the Swiss population is unable to understand a text of some complexity.[64] Further reasons for not contesting the decision include indifference, ignorance of the law, and fear of unfavorable outcome, such as costs of the procedure.

V. FORENSIC EXPERTISE

A. Accreditation and Storage of Evidence

To provide a high degree of accuracy and reliability in forensic expertise, all genetic units and most toxicology units of the Swiss Institutes of legal medicine (Basel, Bern, Geneva, Lausanne, St. Gallen, Zurich) have been accredited according to ISO/EN 17025 since 2004.[65]

64. PHILIPP NOTTER ET AL., LESEN UND RECHNEN IM ALLTAG. GRUNDKOMPETENZEN VON ERWACHSENEN IN DER SCHWEIZ: NATIONALER BERICHT ZU DER ERHEBUNG ADULT LITERACY AND LIFESKILLS SURVEY 6, 19 (2006).

65. ISO/IEC 17025 specifies the general requirements for the competence to carry out tests and/or calibrations, including sampling. It covers testing and calibration performed using standard methods, non-standard methods, and laboratory-developed methods. Laboratories use ISO/IEC 17025 to implement a quality system aimed at improving their ability to consistently produce valid results. It is also the basis for accreditation from an accreditation body. Since the standard is about competence, accreditation is simply formal recognition of a demonstration of that competence.

In the research on wrongful convictions in Switzerland between 1995 and 2004, no conviction of innocent persons has been discovered due to the mishandling of scientific evidence, even though the Swiss institutes of legal medicine were not accredited at that time. This might be the consequence of not storing items of physical evidence over a long period. Certainly, the strength of the accreditation lies in its transparency and traceability.

In theory, physical evidence should be kept indefinitely. In practice however, such evidence is usually destroyed once a judgment has become definitive and legally binding. For practical reasons, the labs do not have the available resources to store all exhibits. Once the forensic science expert has delivered his report, the institute of legal medicine in Bern, for example, provides for storage of 6 months, or 3 years in cases of homicide and sexual offenses. In the interest of justice however, at least for misdemeanors and felonies, items of physical evidence should be preserved over extended periods.

B. DNA Analysis

In Switzerland, a central DNA profile database (CODIS: Combined DNA Index System) was established on July 1, 2000, for a test period of four years under a temporary legal regulation. During the test period, only DNA profiles of suspects associated to crimes that were specified in a legal ordinance were entered into the database. The catalogue contained crimes like homicide, assault, kidnapping, sexual offenses, theft, drug offenses, arson, and participation in criminal organizations.

Based on that experience, the DNA Profiles Act (DNA-Profil-Gesetz) and the corresponding implementing regulation (DNA-Profil-Verordnung) became effective on January 1, 2005. Hence, the national DNA database was set into routine operation. Criteria for entering DNA profiles into the database were no longer based on a catalogue. Rather, CODIS stores DNA profiles of offenders, suspects, and crime scene traces. The legal criterion for the inclusion of a convicted or suspected person in the DNA database is the maximum punishment the law allows for a crime.[66] Furthermore, missing or unidentified persons and relatives of dead or missing persons can be entered.

All samples taken by the police are given a unique 10-digit identification number so that the suspects' names are never revealed to lab employees.[67] The DNA sample is analyzed through one of the six

66. The DNA database includes misdemeanors as well as felonies. Misdemeanors (Vergehen) are actions with a threat of imprisonment of up to three years. Felonies (Verbrechen) are actions punishable with imprisonment of more than three years.

67. For more information about the whole procedure, see Marco Strehler et al., *Swiss federal*

licensed DNA laboratories (Basel, Bern, Geneva, Lausanne, St. Gallen, Zurich). All genetic units of the Swiss Institutes are accredited according to ISO/EN 17025. To prevent mismatches in the DNA profiling of traces and samples acquired through a buccal swab, laboratories rely on a second independent analysis.

The protection of the right of privacy is of highest importance. In DNA analysis, only noncoding DNA is used. The DNA database is strictly separated from the database containing personal and case data. The DNA profile will only be linked with the corresponding names and case information if a database inquiry has resulted in a hit. The DNA profiles of convicted persons are kept for a variable time, depending on the offense. Other DNA profiles are removed when a person is not charged or is acquitted. The biological sample is destroyed after analysis, or not later than 3 months after reception by the lab.

As of December 2012, the database contained 145,284 personal profiles and 41,920 crime scene samples.[68] About 1.5% of the Swiss population is stored in the DNA profile database.

While the use of a DNA database is praised when used to catch a murderer or a rapist, it is also frequently vilified as an infringement of privacy and civil liberties. Since under the new law even DNA samples from suspects of misdemeanors can be taken, critics argue that the power of the police is too wide.[69] However, the entry of misdemeanors into the DNA database proved to be important for the clarification of more serious crimes.[70]

VI. CONCLUSIONS

Over time Swiss public prosecutors have gained more and more power. Now they play a central role in the criminal justice system. With the introduction of the CCrP on January 1, 2011, the examining magistrate has been eliminated with the consequence that the public prosecutor is responsible for conducting investigation in the preliminary proceedings and representing the prosecution service in criminal court.

DNA profile information system, 1239 INTERNATIONAL CONGRESS SERIES 777 (2003); Cordula Haas et al., *A new legal basis and communication platform for the Swiss DNA database*, 1288 INTERNATIONAL CONGRESS SERIES 734 (2006).

68. SCWEIZERISCHE EIDGENOSSENSCHAFT, FEDERAL DEPARTMENT OF JUSTICE AND POLICE, http://www.ejpd.admin.ch/content/ejpd/en/home/themen/sicherheit/ref_personenidentifikation/ref_dna-profile/ref_die_datenbank.html (last visited May 8, 2013).

69. SWISS.INFO.CH, INTERNATIONAL SERVICE OF THE SWISS BROADCASTING CORPORATION, http://www.swissinfo.ch/eng/index/DNA_testing.html?cid=7860352&itemId=7860348 (last visited May 8, 2013).

70. Cordula Haas et al., *Die schweizerische DNA-Datenbank: Rückblick auf sechs erfolgreiche Jahre*, 60 KRIMINALISTIK 558, 563 (2006).

Furthermore, the vast majority of cases are no longer handled through ordinary proceedings but by way of summary proceedings. All procedural rules applicable in the ordinary proceedings are significant safeguards against wrongful convictions. The right to be heard, and in particular the full disclosure of the prosecutor's file in a given criminal case, may prevent the conviction of innocent people. A simplified procedure, such as the abridged proceedings, still requires a decision by the judge. However, the court hearing in this kind of procedure provides restriction on prosecutorial power of a much lesser degree. The penal order proceedings, in which the prosecutor usually only bases his decision on the police report, is particularly inclined to produce wrongful convictions. The use of the penal order proceedings, originally designed for petty offenses punishable with a fine, has widely expanded. The prosecutor can impose a custodial sentence of up to six months and this—in case the defendant does not object to the decision—without judicial control. As a consequence, the penal order proceeding is not limited to petty offenses anymore but extends into criminal acts of some gravity, such as misdemeanors. This rule is rather critical since these kinds of proceedings tend to produce wrongful convictions and since the majority of defendants are convicted in this way.

IMPRISONED BEFORE BEING FOUND GUILTY: REMAND DETAINEES IN SOUTH AFRICA

Jeremy Gordin[*] *& Ingrid Cloete*[**]†

> "Conditions for awaiting trial prisoners are much worse than for sentenced offenders. You just sit in your cell and rot. You eat and you sleep, you eat and you sleep and you try to sleep, sleep, sleep. People live like that awaiting trial for years."[1]

Thus, Bridget Makhonza recounts her experience as a remand detainee (RD) in Johannesburg Prison, where she spent more than three years behind bars before eventually being acquitted. Makhonza's case is simply one among many. In August 2010, more than two thousand RDs had been in prison for more than two years, some having spent more than seven years in prison awaiting trial.[2] When one considers that all RDs are to be presumed innocent until proven guilty[3] and that an estimated sixty-five percent of those who are detained awaiting trial are eventually acquitted,[4] it becomes apparent that to refer to the South African criminal "justice" system, is, at present, a misnomer.

Innocence Projects around the world concern themselves with the plight of those who have been imprisoned for crimes they did not commit. Generally, this means fighting for the exoneration of people who have been wrongfully convicted. In South Africa, however, the problem is less an issue of wrongful *conviction* as such, and more one of lengthy periods of incarceration of people who have *yet to be convicted*. Although South African law recognizes that accused persons are to be treated in accordance with the presumption of innocence, the reality is

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1. Bridget Makhonza, *I Will Always Carry the Scars*, SATURDAY STAR, Feb. 19, 2011, at P15, *available at* http://witsjusticeproject.files.wordpress.com/2011/03/makhonza-and-raphaely-write-for-the-saturday-star.pdf.

2. *Briefing by the Justice, Crime Prevention and Security Cluster Departments to the Parliamentary Portfolio Committee on Correctional Services on Remand Detainees*, PARLIAMENTARY MONITORING GROUP (2010), *available at* http://www.pmg.org.za/files/docs/101103jcps.ppt [hereinafter *Briefing by the Justice*].

3. S. AFR. CONST., 1996 § 35(3)(h).

4. *Presentation by Legal Aid South Africa to the Portfolio Committee on Correctional Services*, LEGAL AID S. AFR. (2010), *available at* http://www.pmg.org.za/files/docs/101103legalaid.ppt.

that a startling number of people are incarcerated in South Africa—in terrible conditions and for long periods of time—before even having been found guilty. It is for this reason that the Wits Justice Project focuses its energy on issues relating to these people: South Africa's remand detainees.

I. WHAT IS A REMAND DETAINEE?

Penal Reform International describes remand detainees as follows: "Prisoners in pre-trial detention, or on remand, are those who . . . are awaiting legal proceedings. They are also known as untried or unconvicted prisoners."[5] RDs, then, are people who have been arrested and charged but whose trials have not been completed. RDs are people who have not yet been found guilty.[6] Yet in South Africa, RDs are held in custody because they either have been refused bail or cannot afford bail. In May 2010, RDs comprised roughly a third of South Africa's prison population—a staggering 49,030 people.[7] It has been calculated that two in five RDs will eventually be acquitted.[8] Thus, of those people presently awaiting trial in South Africa's prisons, about 22,000 are likely to be set free. RDs are incarcerated although they are technically "innocent" of any wrongdoing, and deprived for weeks, months and sometimes years of liberty, education, and the opportunity to make a living.

Ironically, accused persons in South Africa are, legally speaking, well protected. Section 35(3)(d) of the South African Constitution provides that detained persons have their trial begin and conclude without unreasonable delay. Furthermore, section 12 protects the right not to be detained arbitrarily or without just cause. In addition, section 342A of the Criminal Procedure Act[9] purports to protect accused persons from unreasonable trial delays by providing for action courts make take to eliminate such delays. However, there is a significant gap between the legal position and reality.[10] Further, RDs as a group are ill-equipped to vindicate their rights. They are, on the whole, poor and uneducated members of society, unaware of the law's protections, labeled by an unsympathetic society as criminals, and entirely dependent on

5. *Pre-trial Detention*, PENAL REFORM INT'L, http://www.pri.ge/eng/Pre-trialDetention.php (last visited May 15, 2012).

6. Jeremy Gordin, *Waiting for Godot: Awaiting Trial Detainees in South Africa*, 1 NEW S. AFR. REV. 412 (2010).

7. Deon Hurter van Zyl, JUDICIAL INSPECTORATE FOR CORRECTIONAL SERVICES ANN. REP. FOR THE PERIOD OF 1 APR. 2009 TO 31 MARCH 2010, http://www.pmg.org.za/files/docs/101116jics.pdf.

8. Gordin, *supra* note 6 at 413.

9. Criminal Procedure Act of 1977, No. 51 (S. Afr.).

10. Gordin, *supra* note 6 at 410.

overworked legal aid lawyers for advice. Therefore, at present, the law's protections are inadequate to protect the rights of RDs in a meaningful way.

II. WHY ARE SO MANY PEOPLE DETAINED WHILE AWAITING TRIAL?

Under International Law, people awaiting trial may be detained pending trial only in exceptional circumstances. There must be reasonable grounds to believe the person committed the alleged offense and a real risk of the person absconding, posing a danger to the community, or interfering with the course of justice.[11] The South African Constitution also provides for a general right to be released on bail.[12] However, in South Africa, about a third of all remand prisoners who are granted bail are unable to afford the amount set, effectively excluding people from being released on bail on grounds of poverty.[13] Others are legally excluded from bail because of the seriousness of their alleged crimes. Additionally, bail hearings themselves are often postponed,[14] and it is clear that the right to bail does not do enough to keep accused persons out of prison pending trial.

According to the Judicial Inspectorate of Prisons, there is at present an over-reliance on pre-trial detention:

> Should an accused not be in a position to pay or to guarantee payment of bail and release on warning is inappropriate, it is suggested that increased use could, and should, be made of placement under supervision of a probation officer or correctional official in accordance with the provisions of section 62(f) of the Criminal Procedure Act.[15]

It seems then, that South Africa's RD problem begins with an over-reliance on pre-trial detention. Although alternative measures are available to ensure that an accused person appears at his trial, the courts tend to resort to detention as the default position.

III. LIFE AS A REMAND DETAINEE

South Africa's prisons are notorious for their horrifying conditions. According to the report of the Inspecting Judge of Prisons, the average

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11. Mark Shaw, *Reducing the Excessive Use of Pretrial Detention*, OPEN SOCIETY JUST. INITIATIVE, 1–2 (2008), *available* at http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial_20080513/Justice_Initiati.pdf.

12. S. AFR. CONST., 1996 § 35(1)(f) (providing that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions).

13. Shaw, *supra* note 11, at 29.

14. Gordin, *supra* note 6, at 416.

15. Van Zyl, *supra* note 7, at 18.

level of occupation of South Africa's prisons is 139%.[16] Nineteen correctional centers are considered "critically" overcrowded, with occupation levels of 200% and over. Medium A (the RD prison) in Johannesburg, for example, is 246% overcrowded. This means that a structure designed to hold 2,630 men has in it 6,480 men. In a communal cell designed for 80 men, there are 200. This means that about half of them have to sleep on the floor and that 200 men have to use two shower heads and one toilet. Overcrowding brings with it a host of other problems. For example, the strain on other prison infrastructure, such as kitchens, hospitals, electricity usage and water reticulation is increased. Overcrowding also contributes to the levels of violence in prisons, as warders are less able to monitor inmates, and the competition for scarce resources heightens tension among inmates.

At the nineteen critically overcrowded centers, on average 33,749 people are detained, 17,458 of whom are RDs.[17] This means that 52% of the prisoners in the most overcrowded correctional centers are RDs. The conditions under which they are detained are clearly unacceptable. In fact, the Inspecting Judge starkly states that "the conditions . . . are shockingly inhumane and do not remotely comply with the requirements set forth in [section] 35(2)(e) of the Constitution."[18]

In some centers, the effects of overcrowding are mitigated by allowing inmates to spend large parts of the day outside their cells, working or engaging in recreational or rehabilitation programs. However, RDs have no access to rehabilitation or work programs, and are often incarcerated in overcrowded cells for up to 23 hours a day.[19] In Johannesburg Correctional Centre, for example, staff shortages mean that RDs are not even allowed their one hour's exercise each day, as there are insufficient prison officials to provide adequate supervision. This exacerbates the effects of even slight levels of overcrowding. According to Van Zyl J: "The fact that awaiting-trial detainees, who have not yet been convicted by a court of law on the charges against them but are nevertheless detained under such inhumane conditions, creates a serious ethical dilemma which warrants urgent attention."[20]

Essentially, under the status quo, the people who are being incarcerated in the most inhumane conditions are those whose guilt has not yet been established. In a letter to the newspaper *The Star*, Marion

16. Van Zyl, *supra* note 7, at 11.

17. Van Zyl, *supra* note 7, at 12.

18. Van Zyl, *supra* note 7, at 11. Section 35(2)(e) provides that everyone who is detained has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

19. Van Zyl, *supra* note 7, at 13.

20. *Id.*

Goldberg, mother of RD Lawrence Goldberg asks, "What kind of prison system affords more rights to convicted prisoners than it does to those who are innocent until proven guilty?"[21] In a society that ostensibly values the presumption of innocence, this situation is unacceptable.

A. "Wear Plastic Bags over Your Feet": Laurence Cramer's Story[22]

Laurence Cramer was arrested for contempt of court on July 16, 2008, and was taken to Johannesburg Prison, also known as Sun City, as a remand detainee. In the admissions area, Cramer was told, "You will be locked up with career criminals, murderers, rapists, and gangsters. You will be attacked, stabbed, sodomized—and you can try and fight, but when five men come at you, in the night, in the yard, every day, you will give in to what they want: being tough is what it takes to survive Sun City. Get a lawyer to get you out of here."

Cramer was given an orange overall, no socks, and no jersey. A warder told him he would get a jersey, blanket, toothbrush, and soap. Cramer received none of those things. His fellow inmates gave him useful advice, such as: "Wear plastic bags over your feet in the shower—these guys like to shit in the shower. Ask your family to send cigarettes and phone cards. You can use these to trade with—a place to sleep, a blanket, protection."

On his first night Cramer found himself in a cell designed for twenty; there were fifty-six prisoners in the cell. It was about 20m by 5m, with a toilet area to one side. This consisted of one toilet (no toilet paper), a urinal, two shower heads, and two basins. Because there were so many of them, prisoners showered from two o'clock to five o'clock in the morning, thus making it difficult to sleep. Of course, wrote Cramer, because everyone had been fed at the same time, everyone wanted to use the one toilet at the same time.

Once they were locked in, in the late afternoon, out came the marijuana and Mandrax. Thirty-four of the fifty-six slept on the icy floor, so jammed in that they could not sleep on their backs. Cramer had no cup or bottle so could not access water—and all around him heaved and coughed. The smell of the cell with the smoke, stale sweat and bad breath was nauseating. In the middle of the night, Cramer was woken by an emissary of a group of men gathered in the toilet area. Cramer realized this could be trouble for him and that he was, in all likelihood,

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21. Jeremy Gordin, *Goldberg Trial Saga Draws to a Close*, SATURDAY STAR (Feb. 26, 2011), http://www.journalism.co.za/index.php/administrative-affairs/189-wits-journalism-new/wjppublishedcases/3918-goldberg-trial-saga-draws-to-a-close.html.

22. Laurence Cramer, *Time to Kill*, MAIL & GUARDIAN (Aug. 14, 2009), http://mg.co.za/article/2009-08-14-time-to-kill.

about to be raped. He attacked the man, and luckily, Cramer's cell mates helped him and the group of men in the toilet area did not intervene. (Cramer, it should be noted, is an ex-special forces soldier.)

Cramer's family had him released urgently, and he was out by six in the evening on the day after he went in. Most other RDs do not have such luck or families with money and know-how.

IV. DURATION OF DETENTION WITHOUT TRIAL

On 17 August 2010, 2,006 RDs had been awaiting trial for more than 24 months.[23] This is clearly unreasonable, considering that, on average, most criminal cases take only 5 days of actual court time. According to the Legal Aid Board, approximately 65% of the cases it defends are withdrawn after a few months.[24] Add to this the fact that the majority of postponements are in order to allow for further investigations, and it becomes clear that many RDs are detained unnecessarily, on charges that are unlikely ever to be proved.

One of the primary reasons for the delays is that many people are arrested by the South African Police Service on insufficient grounds.[25] Arrestees are then detained to await the outcome of their trials. The Judicial Inspectorate of Prisons found that charges are frequently withdrawn after the accused has been detained for, on average, three months; in cases that do proceed to trial, many are found not guilty for lack of evidence.[26] Other factors that contribute to the delays include poor representation, a lack of the proper documentation, lost documents, and long postponements caused by an overburdened police-force and court system.

There is, and has been for some time, a considerable backlog of cases, particularly in the lower courts—the district and regional courts. In November 2006, a specific Case Backlog Reduction Project Intervention was implemented in order to identify which areas required focused attention with additional capacity. However, the system remains clogged, and as more people are arrested but fewer trials completed, the system is becoming ever more congested.[27]

The latest statistics on remand detainees according to the Justice, Crime Prevention, and Security cluster departments show that over two thousand RDs have been in prison awaiting trial for more than two

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23. *Briefing by the Justice*, *supra* note 2.

24. Presentation by Legal Aid South Africa to the Portfolio Committee on Correctional Services, *supra* note 6.

25. Van Zyl, *supra* note 7, at 16.

26. Van Zyl, *supra* note 7, at 16–17.

27. Gordin, *supra* note 6, at 417.

years.[28] 1,516 have been imprisoned for two to three years; 488 for three to five years; 73 for five to seven years and three for more than seven years. Even more worrying is that, since 2009, there has been an increase in the number of people awaiting trial for more than two years in South Africa's prisons.

REMAND DETAINEES IN DETENTION FOR 24 MONTHS AND ABOVE				
>2–3 Years	>3–5 Years	>5–7 Years	>7 Years	Total
1516	488	73	3	2080

As section 35(3)(d) of the Constitution safeguards the right of arrested, accused or detained persons to have their trial begin and to conclude without unreasonable delay, the question that arises is how long an RD must spend in prison before the delay becomes unreasonable. At present, section 342A of the Criminal Procedure Act leaves the determination of a "reasonable time" to the courts.

Section 342A(1) reads as follows: "A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness." The section then goes on to cite various factors, which the court must take into account when determining whether or not a delay is unreasonable. The factors include the reason for the delay, prejudice resulting from the delay, and whether or not either party can be blamed for the delay. However, the number of RDs detained for more than two years shows that this option is not always available. The question of what constitutes an "unreasonable" delay is open to interpretation and is largely left to the discretion of the presiding officer.

A. Three Years to Be Acquitted: Lawrence Goldberg's Story[29]

Lawrence Goldberg and his wife, Margarita Reed, were arrested and charged with fraud in April 2008. They spent close to three years in prison before eventually being acquitted. The couple, who had left London in 2007 to live in South Africa, had been arrested in March 2008 on allegations that they had fraudulently misrepresented their financial position to Investec Bank, defrauding the bank in the process.

Ultimately, the court held that the prosecution had failed to adduce

28. *Briefing by the Justice*, *supra* note 4.

29. Gordin, *supra* note 21.

evidence on which any court could reasonably convict the couple. But, although the regional magistrate eventually closed the state's case, it was three years before the couple was released. Goldberg described his thirty-four months in detention as "pure, unadulterated hell." Goldberg, previously a mentally and physically strong person, had been at the bottom depths of depression during his time in prison, especially during the early days of his incarceration, stating:

> "In the beginning, in 2008, I was deserted by everyone except my own family and Margarita. The trouble is that when *allegations* are made against you, no one remembers that you are innocent until proven guilty. Everyone assumes that the allegations are true and that the stories going around that have been out by your accusers, are true." Goldberg said he had been suicidal. "I wanted to kill myself. I cried like a baby at the drop of a hat. I lost 20 kg in weight. I was completely traumatized—in my first three months, I had no clothes, no money, nothing."

Initially held with sixty-nine others in a cell meant to hold forty-four, one night Goldberg awoke from sleep. He was sleeping on his side, to find his hands tied, his legs held open, and his body being held in a spread-eagled position. A gang of men were trying to rape him. He managed to free one hand and to hit out, but not before a broom handle had been rammed into his rectum. Goldberg was also assaulted a number of times by gangs—he is missing about half his teeth. Lawrence's younger brother, Mark, said, "A man and his wife were incarcerated for nearly three years because the state simply couldn't come up with enough evidence. A child was separated from her parents, and a mother lost out on her child's teenage years. Why is the South African justice system so unjust?"

V. SOLUTIONS

The obvious solution to South Africa's RD problem, it seems, would be to release on bail as many RDs as possible.[30] Provided that the detainees are not accused of crime serious enough to warrant pretrial detention and do not pose a flight risk or a risk to the administration of justice, this would be one way of alleviating the problem. Minister of Justice Jeff Radebe commented on March 4, 2010, at a parliamentary media briefing given by the Justice, Crime Prevention and Security cluster group that a newly-appointed ministerial task team in the Department of Correctional Services (DCS) would conduct an audit of certain categories of offenders so as to alleviate overcrowding. Furthermore, Radebe said, DCS officials had been mandated to put into

30. Gordin, *supra* note 6, at 422.

action the "controlled release" of RDs who had been given bail of R1,000 or less but had been unable to pay it. Whether all or any of these changes will indeed happen, and how quickly, in an environment in which the amelioration of harsh conditions for RDs and other prisoners is not a government priority—and in which "fighting crime" *is* one—remains to be seen.

Besides releasing RDS on bail where possible, numerous other suggestions have been made. Muntingh,[31] for example, has recommended that the SAPS avoid unnecessary arrests for minor offenses—a sentiment echoed by the Inspecting Judge.[32] Further, Muntingh suggests that cases be properly screened to ensure there is a *prima facie* case. The habit of postponing cases "for further investigation" needs to end.[33]

A. The Correctional Matters Amendment Bill

In an effort to reduce the time RDs spend in jail awaiting trial, new legislation has recently been enacted which aims to better regulate the situation of RDs in South Africa's prisons. The Correctional Matters Amendment Act sets two years as the maximum period of incarceration for remand detainees.[34] However, this does not necessarily mean that all detainees who have been in prison awaiting trial for longer than two years will have to be released. The Act does allow for the extension of this two-year period; however, this may be done only if the head of the relevant prison refers the case to court, and the court orders that the period of incarceration be extended. If the case is still delayed by the courts, the case must be referred back to the courts on a yearly basis.

Although the Act is to be welcomed as a positive step, it must be noted that the Department of Correctional Services can only do so much to eradicate the problem of RDs in South Africa's prisons. The DCS cannot control the length of court processes—and if the problems in the other branches of the criminal justice system persist, it is uncertain whether or not the proposed legislative changes will actually lead to a

31. Lukas Muntingh, *The Prison System*, CRIMINAL (IN)JUSTICE IN SOUTH AFRICA: A CIVIL SOCIETY PERSPECTIVE (2009) at 210–13.

32. Van Zyl, *supra* note 7.

33. Muntingh, *supra* note 31.

34. Correctional Amendment Act 5 of 2011 § 49(g); *see also id.* § 1 (defining a detainee by stating, "[A] person detained in a remand detention facility awaiting the finalisation of his or her trial until being convicted or acquitted, inclusive of the period during which the conviction or acquittal are subject to review or appeal, if such person has not commenced serving such sentence or is not already serving a prior sentence . . . .").

reduction in the trial delays for RDs.[35] If, for example, cases are routinely referred back to court in order to extend the maximum period of detention, the legislation will have little effect on the problem. Whether or not the Act will in fact have any meaningful effect on the delays suffered by RDs, remains to be seen.

VI. CONCLUSION

An important factor in bringing about change in the remand detention system is increasing public awareness of the problem—and increasing public pressure on the relevant organs of government to institute change. The problem, however, is that the public is largely unconcerned about the plight of RDs. In February 2011, a South African newspaper reported the story of a man who had been in prison awaiting trial for five years.[36] In a country with a history of resistance to prolonged detention without trial, one would expect such news to spark the fires of public outrage. However, the tone of public comment on the article was, on average, unconcerned. One reader summarized public opinion neatly by commenting, "I don't care how long the case takes and I believe that he committed those crimes. Stay in jail whether you are guilty or not." RDs may be innocent in the eyes of the law; but the eyes of the average South African see a different picture entirely.

In a society where violent crime is rampant, it is perhaps understandable that there is little sympathy in South Africa for anybody perceived to be a criminal.[37] The perception that there cannot be smoke without fire is widespread and hampers attempts to mobilize civil society to bring about change in the criminal justice system. Thus, one of the most important tasks of the Wits Justice Project is making the public believe that not every person who is arrested is guilty.

The problems with remand detention in South Africa are numerous and deeply ingrained. Director of Johannesburg Medium A, Willie Pretorius, says, "We do our best but I'm forced to contravene the law every day. I could be charged with not complying with the Correctional Services Act, the Criminal Procedure Act and the Labour Act. It's not possible to exaggerate the reality of these circumstances." At present, it is clear that the presumption of innocence has little real meaning for many accused persons in South Africa. Detained for long periods of

35. Tizina Ramagaga *The Conditions of Awaiting Trial "Prisoners" Look Set to Improve in South Africa*, INST. FOR SEC. STUD. (Mar. 7, 2011), http://www.polity.org.za/article/the-conditions-of-awaiting-trial-prisoners-look-set-to-improve-in-south-africa-2011-03-07.

36. Ananias Ndlovu & Carolyn Raphaely, *Accused Being Punished Before Being Found Guilty*, SOWETAN (Jan. 19, 2011), http://journalism.co.za/index.php?option=com_content&Itemid=100104&catid=160&id=3817&view=article.

37. Gordin, *supra* note 6, at 415.

time in shocking conditions, remand detainees are effectively punished before being found guilty. Although various laws provide for extensive protection for the rights of remand detainees, in reality, the legal standards are simply not met—nor does it seem that compliance is likely to happen in the near future. As Pretorius puts it, "We respect human rights—but sometimes we just can't comply."

WRONGFUL CONVICTIONS IN POLAND

Adam Górski & Maria Ejchart**†*

I. RE-OPENING AND CASSATION AND THEIR POSSIBLE ROLE IN THE EXONERATION PROCESS

Poland's criminal justice system embodies both ordinary and extraordinary means of appeal. Ordinary appeals can be used against invalid judgments on both a violation of law (be this substantive or procedural, *error iuris*) and facts (*error factum*). Violation of facts—that is, failure to prove them properly—should be indicated directly in an appeal, in order to be considered by a court of appeal.

As far as extraordinary means of appeal are concerned, parties to a criminal process have two avenues for questioning a valid judgment: a cassation appeal against the law and petition for overturning the criminal process. The cassation system in Poland is not designed as an extraordinary remedy for those that were actually, factually innocent. On the contrary, facts are explicitly excluded from cassation grounds. Thus, it is only possible to correct a wrongful conviction if a violation of facts is a result of a violation of particular procedural provisions concerning the law of evidence and not only the general rules of evidence, such as free assessment of the evidence or the immediacy principle. Thus, merely observing that a free assessment of the evidence or the immediacy principle has been violated without arguing for violation of specific provisions will not be successful. This violation must be flagrant and have a strong potential influence on convictions (though a causal link need not be proven). The result of filing a cassation appeal might thus be an acquittal by the ad quo court that convicted a person if evidence provisions have been clearly violated and if, in correcting these violations, a court reaches another conclusion, quashing conviction.

To re-establish facts in a criminal process, however, parties must file a petition for overturning the criminal process. Filing a petition for overturning a criminal process is possible for a number of reasons, of

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which "new facts or evidence" are naturally designed for overturning wrongful convictions. New facts or evidence, as grounds for overturning a criminal process in Poland, cannot lead to the conviction of someone adjudicated as guilty. New facts or evidence should indicate that the convicted party has not committed the crime because of the lack of act or because the act was not a criminal offense or punishable by statute. It is worth mentioning that new facts or evidence are subject to often diverse interpretation made both in legal doctrine and by Poland's Supreme Court. New facts and evidence should not be unknown to parties to a criminal process. In line with a convincing interpretation new facts and evidence can be subject to the attention of parties to a criminal process when they were not initially considered. The latter opens the way to exoneration quite broadly.

Another ground for overturning a criminal process that leads to the exoneration of the innocent is that of *propter criminis*. Criminal proceedings must be overturned if a crime committed in liaison with a criminal process gives justified reason to assume that the process may have had an influence on a verdict (not just a conviction).[1] The causal link between the committed crime and the outcome of the proceedings need not, therefore, be proven. However, the liaison between a committed crime and criminal process must be clear, though the law does not specify the nature of a perpetrator, nor does the law offer a list of offending crimes. Obviously, though, crimes against the system of justice are at stake. False testimony constitutes the vast majority of all crimes against the justice system. However, false accusations can also give rise to exoneration pursuant to the reopening of a criminal process. Rather importantly, however, and in line with the presumption of innocence, such a crime is to be stated in a valid conviction unless another form of a court's verdict is required by law or the respective criminal proceedings are suspended.

II. EMPOWERMENTS AND MAJOR ACTIVITY OF INNOCENCE CLINIC

The Helsinki Foundation for Human Rights (HFHR), the largest and most experienced non-governmental organization (NGO) in Poland, confirmed the importance and significance of the problem when the HFHR established a program called the Innocence Clinic, which focuses on cases of individuals who have been wrongfully accused or convicted in criminal proceedings.

The Innocence Clinic has been operating since 1999 and is currently

1. See art. 540 of the Polish Code of Criminal Procedure of 06 June 1997, Journal of Laws 89, position 555.

the only institution in Poland dealing with the problem of wrongful convictions and miscarriages of justice. The program was created as a law clinic and was included in the didactic program of Warsaw University, with students of legal faculties as its participants.

Individuals, whether or not they are accused, challenging the indictment or convicted in criminal proceedings, who challenge the accusations or trial verdict, can have their cases directed to the clinic. Within the clinic's scope of interest are cases involving wrongful conviction and, under a wider interpretation, cases involving a miscarriage of justice.

The Innocence Clinic thoroughly analyzes each case by researching the court files, interviewing the accused or convicted, and cooperating with their defense team. From among the cases examined, participants choose those in which they determine that the evidence gathered is insufficient to deliver a guilty verdict, or in which the court's consideration of evidence is questionable pointing terms of respecting the proceeding's principles (e.g., a presumption of innocence and the *in dubio pro reo* principle) or the right to a fair trial. In only such cases as these does the clinic take action. Therefore, the program takes an interest in the cases of individuals who are actually innocent, having not committed the crime of which she was accused or convicted, and cases of persons who are legally innocent, where the evidence gathered is insufficient for a conviction and the court is obliged to acquit the accused under the principle of *in dubio pro reo*. The clinic deals with cases at every stage of criminal proceedings, though the clinic's activities differ depending on the stage of the proceedings and on available opportunities to gain knowledge about the case and the possibility of litigation. At the stage of preparatory proceedings, NGOs are extremely limited in their capacity to take action, as the law does not provide any formal possibility to participate. The Helsinki Foundation for Human Rights has, however, developed a series of such procedures that it uses in practice. These include monitoring of court sessions in preparatory proceedings, particularly those relating to pre-trial detention. The procedures also include presenting an amicus curiae brief to the court, analyzing the merits of detention, and preparation of or support for a complaint concerning the length of a court proceeding, if warranted. However, an NGO would obviously have no opportunity to provide any evidence, so its actions at this stage are extremely limited.

At each stage of the proceedings, but especially in the preparatory proceedings, it is particularly important to establish close cooperation with the defense attorneys of suspects and accused individuals, as they constitute the main source of knowledge on the case.

Opportunities to influence the judicial stage of the proceeding are much broader. An NGO can obtain the court's permission for access to the court files for the case, a widely used practice. Further, Article 90 of the Code of Criminal Procedure provides the opportunity for organizations to participate as social representatives in criminal proceedings if there is a need to protect the public interest or an important individual interest, particularly concerning the protection of human rights and freedoms. The law provides that a social representative may attend public hearings, take the floor and present statements in writing.

Based on these broad legal rights, the HFHR developed the practice of submitting an amicus curiae legal opinion to the court. The submission of such an opinion in a wrongful conviction case is undoubtedly the strongest, most serious, and most complete presentation of the program's position of the case and a possible interpretation of the evidence. The goal of these opinions is to gather and present to the court the Supreme Court's jurisdiction concerning the essential issue. In some briefs, part of the clinic's opinion is considered like that of an expert.

The court is not obliged to take an NGO's opinion into account, but the program's practice confirms the efficacy of this measure. NGOs have an impact on the final shaping of the court's decision, which speaks to the professionalism and high social confidence placed in the NGO, whose primary goal is to care for the rule of law and its appropriate use. These actions also serve to increase confidence in the courts and judiciary by encouraging the belief that courts properly assess cases. In its opinions, the program, therefore, does not explicitly refer to assessing the guilt of the accused but instead represents only the public interest in ensuring a fair trial.

The power of social organizations in criminal proceedings extends to inclusion of the submission of statements at the final stage for the defense, before the court delivers its judgment.

During appeal proceedings, social organizations have similar opportunities, subject only to the rules and restrictions of this stage of the proceedings.

Some recent controversy of the status of amicus curiae opinion concerns the program's participation in the cassation stage of a case before the Supreme Court (the only cassation court in Poland). During a recently completed case covered by the Innocence Clinic, the Supreme Court expressed doubt as to whether the opinion amicus curiae submitted—containing an evaluation of the judiciary proceedings as well as the violations that occurred during preparatory proceedings—is an excessive interference in the sphere of adjudication, which is

reserved for the court. The Supreme Court expressed the opinion that the NGO's position in the case should be formulated similar to a cassation. In the program's opinion, however, presenting a quasi-cassation distorted the purpose of the amicus curiae institution, which aimed to assist a court in deciding a particular case.

The program also deals with completed cases in which the only possibility for altering the verdict is to overturn the original criminal proceedings. The basis for overturning proceedings is, as described above, the disclosure of new facts or evidence that were unknown to the court and to the parties at the previous stage of proceedings. The Innocence Clinic does not have the ability to search for new evidence, but if such evidence comes to light (e.g., the emergence of a new essential witness), the clinic formulates a petition to overturn the proceedings on behalf of the convicted person.

The program can also have an impact on completed proceedings by requesting so-called extraordinary cassation, which according to the law, can be lodged by the Attorney General or the Ombudsman (Human Rights Defender). In such situations, the basis of an NGO's possible action is a request to these institutions containing an analysis of the case.

During the twelve years of the Innocence Clinic's operation, several hundred cases have passed through the clinic's doors. The clinic took the actions described above in several dozen of these cases as a result of serious doubts concerning the correctness of the conviction.

III. DEFINITION AND THE CURRENT SITUATION IN POLAND

By discussing wrongful convictions in Poland we must depart from narrow and rather exact definition of wrongful convictions, as primarily convictions changed into exonerations by reopening of criminal proceedings. There is still no research performed in this field in Poland, and even if such research existed, it would not reveal the whole phenomenology of the problem. At present there are also no official statistics covering issue of wrongful convictions. There is also no government agency monitoring the issue for the purpose of a law amendment. The only comparable statistics that exist concern compensation cases which by no means reveal the scale of the problem.

Instead, it would be much better to canvass practitioners with a questionnaire, which is still being developed. Researchers are currently using techniques to interview practitioners and—the most fruitful element—to examine cases in legal clinics. In their experience, bringing a case to reopen a trial is not a common occurrence. To give an example, in 2010 the practice of the Innocence Clinic run by the Helsinki Foundation of Human Rights found that out of the sixty cases

examined, only ten cases involved legal steps being taken. Of these, there were only a couple of reopenings, and in only one case was a person acquitted. All this encourages one to examine wrongful convictions not from the context of reopening, but rather as a phenomenon to be observed in legal clinics. This is what the authors consider to be their major task.

As to the current state of the legal studies in this field, the apparent interest in the subject of wrongful convictions has not resulted in empirical examination of the issue. Out of a mere two articles covering this subject in the Polish legal journals,[2] only one of them includes empirical analysis by interviewing twenty defense lawyers. Some articles deal with the somewhat special problem of politically motivated wrongful conviction in the Communist Era and also address the specific way of dealing with them after political change in Poland.[3]

Although wrongful conviction is the subject of interest of professionals in the field of criminalistics and criminal lawyers alike, no one has effectively promoted this topic to date.

IV. WRONGFUL CONVICTIONS AND FEATURES OF OUR CRIMINAL JUSTICE SYSTEM: WHERE ERRORS ARE LIKELY TO OCCUR AND WHY?

Before examining the subject, it must be stressed that both practical problems and systemic problems will be examined. Indeed it is often hard to separate the two. The assumptions made are based on interviews with practitioners and the already mentioned examination of cases in legal clinics. Some of the conclusions are drawn from the first Helsinki Foundation conference of that subject held in 2010 at Warsaw University.[4]

Poland's criminal justice system is by and large divided into two main stages: preparatory proceedings and the judicial phase.[5]

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2. Anna Sowa, *Przyczyny pomyłek sądowych* [*Causes of Judicial Mistakes*], PALESTRA 1–2 (2002); J. Widacki & A. Dudzińska, *Pomyłki sądowe. Skazania osób niewinnych przez sądy w Polsce* [*Miscarriage of Justice. Conviction of Innocent Persons by the Courts in Poland*], PALESTRA 11–12 (2007).

3. *See* W. Pływaczewski, Adam Górski, & Andrej Sakowicz, *Wrongful Convictions in Poland: From the Communist Era to the Rechtsstaat Experience*, *in* WRONGFUL CONVICTION. INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 273 (C. Ronald Huff & Martin Killias, eds., 2008).

4. The conference can be seen at *Konferencja pt. "Pomyłki sądowe w postępowaniu karnym"—24 czerwca, 2010 r.*, WYDZIAŁ PRAWA I ADMINISTRACJI http://www2.wpia.uw.edu.pl/text8683, Koferencja_pt___Pomylki_sadowe_w_postepowaniu_karnym__-_24_czerwca_2010_r_.html (last visited 08.10.2012).

5. On phases of criminal procedure in Poland, see STANISLAW WALTOŚ, PROCES KARNY. ZARYS SYSTEMU [CRIMINAL TRIAL. OUTLINE OF THE SYSTEM] 479–584 (2009). On structure of criminal proceedings in Poland, see WOJCIECH DAJCZAK, ANDRZEJ J. SZWARC, & PAWEL WILIŃSKI, HANDBOOK OF POLISH LAW (2011).

Preparatory proceedings are by definition inquisitorial, while the judicial phase is adversarial (which as we will soon learn, does not exclude exceptional evidence initiative by the court). Both phases are governed by the same rules of evidence. These rules include the truth principle, the free assessment of evidence, and the immediacy principle.

A. Preparatory Proceedings

Poland's system of preparatory proceedings differs markedly from the common law model. Collecting evidence is almost entirely the role of the state, and the role of other actors is extremely limited. This means that the quality of evidence largely depends on how prosecutors and the police act in their roles, as well as to the quality of investigations, especially the quality of experts. At this largely inquisitorial stage, no private collection of evidence exists, so the defense questions only the findings of the state. Therefore, the expert opinion commissioned and presented by state cannot be challenged by private expert opinion. Given the example of medical malpractice, an expert opinion presented by the prosecutor cannot be questioned by a private expert opinion presented by the defense throughout the whole criminal process. The private expert opinion can serve only as "information on evidence."

At this stage of the proceedings, a prosecutor is not obliged to reveal all her evidence to the defense, which may practically exclude an effective defense and discourage defense lawyers from active participation at that stage.[6] One may say that despite all the guaranties given in legal texts, the suspect and then the accused are poorly served with information by the criminal justice system at preparatory stages in a manner comparable to a kind of blind date situation.[7]

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6. It was recently discussed whether or how far this obligation exists with regard to access to files justifying provisional arrest. On that discussion see Piotr Kardas, *Z Problematyki Dostępu do akt Sprawy w Postępowaniu w Przedmiocie Zastosowania Tymczasowego Aresztowania* [*With Issues of Access to the File in the Proceedings in the Application for Provisional Arrest*], CZASOPISMO PRAWA KARNEGO I NAUK PENALNYCH 2 [J. OF CRIM. L. AND PENAL SCI. 2] (2008); Piotr Kardas & Paweł Wiliński, *O Niekonstytucyjności Odmowy Dostępu do akt Sprawy w Postępowaniu w Przedmiocie Tymczasowego Aresztowania* [*The Unconstitutionality of the Refusal of Access to the File in Respect of Provisional Arrest*], PALESTRA 7–8, 23–36 (2008). Recently, the Constitutional Tribunal declared that the access to files with this regard is required by the Constitution itself and contrary statutory provision is void. In its verdict of 3.06.2008 (K 42/07) the Constitutional Tribunal of Poland declared that arbitrary disclosure of materials justifying provisional arrest is unconstitutional. Subsequently, the statute law was changed, but it is still doubtful if it meets constitutional standards with this regard, allowing for some discretion in disclosing provisional arrest files to the parties.

7. On defense rights in preparatory proceedings in general see TOMASZ GRZEGORCZYK, OBROŃCA W POSTĘPOWANIU PRZYGOTOWAWCZYM [DEFENDER IN THE PREPARATORY PROCEEDINGS] (1988); P. Kardas, *Problematyka prawa do obrony w postępowaniu przygotowawczym*, *in* TRESTNE CINY SUVISIACE S CINNOSTOU OZBROJENYCH SIL A OZBROJENYCH ZBOROM (J.Madliak, J.Mihalov eds. 2009); CEZARY KULESZA, EFEKTYWNOŚĆ UDZIAŁU OBROŃCY W POSTĘPOWANIU KARNYM W

The latter systemic problem is especially apparent in medical malpractice cases and, most of all, in child abuse cases. It is noticeable that the opinion of a psychologist at the preparatory stage, combined with the statements of abused children and their mothers, very often determines the case. In such cases, the course of the proceedings leading to conviction largely depends on our understanding of free assessment of evidence and to some degree our understanding and scale of the immediacy principle.

1. Case of K.S.: The Expert's Prejudgment Opinion About Guilt

One example of a case where a psychologist's opinion, presented by the prosecutor during the preparatory proceedings, determined the guilt of the accused is that of K.S., who was accused of the sexual abuse of his two daughters, aged five and three. The accusation was based on the testimony of his ex-wife, given during a pending divorce proceeding. The girls were interviewed in the presence of a psychologist who concluded, on the basis of his observations, that the girls had been sexually abused. The psychologist went beyond the acceptable range of opinion, stating, "[M]ost likely, the children had been sexually abused by their father." The other evidence in this case was the testimony of the girls' mother and grandparents.

During the first proceeding, the court acquitted the accused by recognizing that there was insufficient evidence that the father had committed the abuse. On appeal, however, the court referred the case for retrial due to insufficient consideration of all evidence. In reconsidering the case, the first-instance court dismissed the defense's motion to appoint a team of experts from a scientific institute to question the opinion presented by the prosecutor; the court found that the gathered evidence, including the psychologist's written opinion, was sufficient to convict K.S., who was sentenced to six years' imprisonment.

The court of appeals upheld the verdict. In cassation proceedings, however, the Supreme Court held that the lower courts violated the principle of immediacy by basing its judgments on the psychologist's opinion without hearing it directly. After five years of proceedings, three of which K.S. had spent in prison, the process started again.

B. "Special Witness" and False Allegations

Under the rules of evidence, free assessment of evidence is an

PERSPEKTYWIE PRAWNOPORÓWNAWCZEJ [EFFICIENCY OF DEFENDER PARTICIPATION IN CRIMINAL PROCEEDINGS IN COMPARATIVE LEGAL PERSPECTIVE] (2005).

unlimited principle in the Polish legal system. Theoretically, finding the truth requires no corroboration of evidence at all. However, in one of its judgments, the Supreme Court has introduced several obligations regarding the corroboration of evidence.[8] It is still a contentious issue as to whether this judgment is contrary to free assessment of evidence or not. Those duties refer to above all to the following pieces of evidence: (1) anonymous witnesses; (2) crown witnesses (procedurally and substantively);[9] and (3) self-accusations, as well as allegations, which should be examined with special scrutiny.

The gravity of this jurisprudence is self-explanatory and has huge importance because false allegations and testimony are a more common occurrence in types of cases involving special witnesses. In spite of that, in the practice of certain legal clinics, there are cases where the confessions of crown witnesses are not at all corroborated.

In one such case, a conviction was secured on the basis of the false allegation of a crown witness and the testimony of another witness who stated that he saw the suspect in town on the given day.

1. Case of A.S. and U.L.: False Witness Allegation

By far, the Innocence Clinic's most common cases are those in which the sole or primary evidence is a false witness allegation. These cases involve imputing the commission of a crime on the factually innocent person. The examples below are of cases in which an anonymous witness chose to give testimony and cooperate because of personal gain.

One such case is a multi-threaded criminal proceeding called "the Octopus," described in the Polish media in 2006–2007 as a success for the public prosecutor's office. In this case, many were accused, mostly of bribery, entirely on the basis of a witness testimony that was later determined to be false. The witness was a woman who had been repeatedly sentenced for fraud. In exchange for her cooperation with the prosecutor's office and in return for giving false testimonies, she was granted multiple postponements on the execution of custodial sentences.

The prosecutor proposed to repeal a judge's immunity on the basis of

8. See, for example, judgments cited in KATARZYNA BORATYŃSKA, ADAM GÓRSKI, ANDRZEJ SAKOWICZ & ANDRZEJ WAŻNY, KODEKS POSTĘPOWANIA KARNEGO. KOMENTARZ [CODE OF CRIMINAL PROCEDURE. COMMENT] 417 (2007).

9. Polish criminal justice system includes two kinds of crown witnesses. A "procedural" crown witness is regulated in a respective statute. His testimonies are rewarded with impunity, whereas snitches of a "substantive" crown witness have an impact on the imposed penalty. See regulation of "substantive" crown witness in art. 60.3-4 in the Polish Substantive Criminal Code, Dziennik Ustaw [Journal Of Laws] 88, position 553, with subsequent changes. As to regulation of procedural crown witness, it is envisaged in a special "Crown Witness Statute" Dziennik Ustaw [Journal of Laws] 114, position 738.

this witness's testimony, which resulted in the start of criminal proceedings against the judge. The witness had testified that in 2000, the judge accepted a bribe in return for issuing a favorable sentence against an offender. The disciplinary court evaluating the evidence set aside the judge's immunity, finding that the witness's testimony showed a high degree of probability that the judge had committed a crime. In 2007, the Supreme Court examined the case on appeal and stated that the decision to set aside the judge's immunity should be well-reconsidered and proceeded through a thorough assessment of the evidence. The court stressed that the witness's testimony was inconsistent and that, because of her background and personality, she could not be considered reliable. The Supreme Court disagreed with her accusations regarding the judge.

Based on the testimony of the same witness, the prosecutor also accused two psychiatrists of accepting a financial benefit—the equivalent of $150—in exchange for providing a favorable medical opinion six years earlier that had allowed the perpetrator of a car accident to avoid imprisonment. The court used the witness's testimony, being the only evidence, as the basis for its decision to hold both psychiatrists in pretrial detention for over twelve months.

After four years, the court discontinued the proceedings in the case because of the low social harm of the crime (the value of the gift accepted by the doctors was re-assessed to be $10). The court also stressed that the testimony of just one witness, who was herself not very credible, raised some doubts about the guilt of the accused.

As the result of an appeal lodged by the prosecutor, the court of appeals referred the case for retrial. Proceedings began again in May 2011.

C. The Discussion on Reparatory Proceedings Continued: Who Does the Job and How It May Affect the Main Proceedings

In preparatory proceedings, the role of prosecutors may be purely formal. There is no special investigative police and some officers simply make irreversible mistakes at crime scenes in evidence gathering, or refuse to act at all. Many mistakes are made at accident scenes. The 2003 criminal procedure reform, which greatly increased the investigative powers of the police, can, for example, be regarded as a mistake. If we combine this with the fact that a large part of evidence material is simply reproduced (read out from protocols) at trial, the result requires no further explanation. This is where the immediacy principle comes into play.

The immediacy principle may be the most abused principle in

Poland's criminal process. The acceptable exceptions to this principle are already significant and should not be extended any further. Poland's system of appeal largely excludes a holistic revision of the case in the second instance. It is possible, therefore, that a case can return several times after an invalid judgment has been repeatedly appealed. This may last several years, as is evidenced by some cases examined in the legal clinics. The solution to the problem of duration of criminal process is paradoxically associated with breaking the immediacy principle in terms of basing assumptions on written protocols. This solution, paradoxically, would not result in a greater number of exonerations, which may be the first impression.

The latest draft amendments to the Code of Criminal Procedure give back prior investigative powers to the prosecutors. This is a good development, but it should go along with more emphasis given to the immediacy principle at the judicial stage of the proceedings.

Moreover, the execution of real investigative powers by the prosecutor should go hand in hand with making a single person responsible for the whole job of investigating, filing the accusation act, and supporting it in the court proceedings to the greatest possible degree. At present there is actually no evident personal responsibility for the indictment and it is pointless to explain how it affects wrongful convictions. Anonymous mistakes are easier to bear and collective guilt is easier to cope with than the alternative.

D. Judicial Phase: No Private Expert Opinion and Exceptional Evidence Initiative by the Court

Private documents are excluded if they are produced for the sake of criminal proceedings.[10] That effectively excludes private experts. Despite what has already been mentioned, however, it is important to highlight one other factor that is likely to produce mistakes: the court's exceptional initiative in collecting and proving evidence at the judicial stage. As a rule, the parties request evidence. A court's initiative serves the truth principle where there is no sufficient initiative to reveal the truth. Of course, this initiative may eventually result in both a conviction and an acquittal (and so it was formulated), but this is a rather pure theory. In reality, the initiative is used mostly when the prosecutor is not active enough in supporting her accusation, and the judge has intimate conviction of a person's guilt. If an accusation is

10. Recent discussions on that exclusionary rule were analyzed in a book by ANTONI BOJAŃCZYK, DOWÓD PRYWATNY W POSTĘPOWANIU KARNYM W PERSPEKTYWIE PRAWNOPORÓWNAWCZEJ [PRIVATE EVIDENCE IN CRIMINAL PROCEEDINGS IN COMPARATIVE LEGAL PERSPECTIVE] (2011), referring broadly to the work of Innocence Projects.

based on experts' opinions, indication or allegation made in preparatory proceedings, the inability of the parties to produce its own private expert opinion at trial, combined with the court's inner conviction, may result in a failure of both the truth and not preserving the principle of equality of arms. In this regard, Poland's criminal justice system has much in common with certain other systems.[11]

E. Fast-Track Court Proceedings

Another issue deserving of our attention are the Polish equivalents of plea-bargaining: sentencing without trial and fast-track trial.[12] In both cases, the truth principle fully applies and one cannot make a deal as to the fact or legal classification but only as to the punishment.[13] Truth should be established beyond doubt in preparatory proceedings in line with all the procedural rules. A judge deciding without trial must base the conviction on evidence gathered at the preparatory stage. Where there is any doubt, the case should be subject to the usual judicial proceedings. Sentencing without trial can be applied in rather minor cases, which is possible when a crime is punishable with a custodial sentence of no more than ten years. The usual offenses that are sentenced that way include thefts, car accidents, driving under the influence of alcohol, and fraud. Economic fraud is also quite typical for a fast-track court proceeding. In such cases the suspects may have an interest in reducing their appearances in court (perhaps to keep their reputations intact). The difficulty in determining the scope of the problem in fast-track trials is of course, that after settlement, there is usually little interest in determining the truth. Needless to say, there are no such cases in legal clinics. With all the system of guaranties built into our model of fast-track sentencing and the academic accuracy of it, defense lawyers highlight this as the main source of wrongful convictions. There are several reasons for this. The first one is the already mentioned interest of the accused. Additionally, for overloaded criminal justice systems, with all the importance of producing proper

11. Similar arguments are presented by Chrisje Brants, *The Vulnerability of Dutch Criminal Procedure to Wrongful Conviction*, *in* WRONGFUL CONVICTION, INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 172 (C. Ronald Huff & Martin Killias, eds., 2008).

12. The issue has recently been widely discussed in the European literature by Gwladys Gilliéron. *See* GWLADYS GILLIÉRON, STRAFBEFEHLSVERFAHREN UND PLEA BARGAINING ALS QUELLE VON FEHLURTEILEN [PENAL ORDERS AND PLEA BARGAINING AS A SOURCE OF WRONGFUL CONVICTIONS] 147–62 (2010).

13. For an overview of Polish regulation see SLAWOMIR STEINBORN, POROZUMIENIA W POLSKIM PROCESIE KARNYM. SKAZANIE BEZ ROZPRAWY I DOBROWOLNE PODDANIE SIĘ ODPOWIEDZIALNOŚCI KARNEJ [POLISH AGREEMENT IN A CRIMINAL TRIAL CONVICTION WITHOUT A HEARING AND VOLUNTARILY SUBMIT TO CRIMINAL LIABILITY] (2005).

statistics, fast-track sentencing is very tempting. There is no more evidence produced to the court and the judge is free to assess the truth based on the prosecutor's material, according to the judge's intimate conviction. Defense lawyers thus play a crucial role in encouraging a suspect to take what is offered. Needless to say, that is where most false confessions occur.

The typical error model contributed to fast-track trials lies in the fact that the accused may choose to plead guilty to a list of charges, including crimes that were never committed.

V. A NEW EMERGING EUROPEAN PROBLEM: WRONGFUL CONVICTIONS AND THE CROSS BORDER EUROPEAN CRIMINAL PROCESS

Over the past few years, the member states of the European Union have undergone a process of far-reaching legal integration, as far as criminal law and procedure is concerned. This process of European integration in criminal matters comprises many aspects of substantive and procedural criminal law. It has received unprecedented attention from legal scholars across Europe.[14] Although there is no federal European criminal law, the EU forms a unique legal space of criminal justice with many consequences in the area of wrongful convictions. The simplified extradition, the European arrest warrant (EAW), makes it very easy for a member state to have a requested person surrendered. The EAW system does not sufficiently protect an individual against a jurisdiction that is likely to produce wrongful convictions in general or in a particular case. This situation may occur under the classical extradition regime, as the notion of flagrant denial of fair trial usually barred extradition. If that were the case, then we should presume that this likelihood of wrongful conviction in general is greater in some countries and that would mean an unacceptable assessment of the criminal justice system, which some would rightly call prejudicial. However, the EAW system is quicker than extradition and more frequently adopted. This is because it is the courts and not Ministers of Justice that cooperate and because many classical principles, such as non-extradition of nationals and dual criminality have been abolished. As a result of the EAW, an accused may be in a jurisdiction where she has less chance of a proper defense.

The EAW procedure is deemed to be primarily automatic, based on mutual recognition and mutual trust.[15] It does not make an assessment

14. For further references on the issue of European criminal law see ADAM GÓRSKI, EUROPEJSKIE ŚCIGANIE KARNE. ZAGADNIENIA USTROJOWE [EUROPEAN CRIMINAL PROSECUTION. SYSTEMIC ISSUES] 447–91 (2010).

15. Mutual recognition of judicial decisions of EU member states has long been regarded as a

of which jurisdiction is better to prosecute. It will more often be the case that a short-term resident will be tried for a crime according to the principle of territoriality of the state of residence and not according to principle of nationality back in the resident's home country. This choice seems proper in terms of the truth principle, although it also includes the possibility of prejudice against a person tried in a foreign legal environment. Applying the nationality principle is usually advantageous for the defendant, mostly because almost all the evidence must be transferred from the place of residence, which makes the criminal process and establishing the truth much more complex.

The EAW however, only opens the discussion, and its major point is the European *ne bis in idem* principle.[16] Over the past eight years the European Court of Justice has developed case law on when the European *ne bis in idem* principle applies.[17] The European application of that principle is very broad and comprises even some prosecutorial pre-trial decisions and assumes a mutual recognition and trust that the trial has been fair. Thus, it automatically includes an export and recognition of a wrongful conviction (as well as wrongful exonerations). However, theoretically, it also makes it impossible to open a process to prove one's innocence in another country. So the result will be that the convicted has to insist on re-opening a process in the country of conviction, despite the fact that the accused may have little or nothing more to do with that country and may not be familiar with its legal system. This of course substantially reduces one's chances to prove herself innocent.

The latter problem would be reduced, provided that criminal information and legal aid in the EU were improved. However, information on convictions and instruments of legal aid in evidence gathering in the EU do not come up to a satisfactory standard. The lack of optimal instruments of transnational evidence gathering in the EU also has an impact on the actual inequality of arms and thus on the rights of defendants across the EU. The new, speedy instruments of transnational evidence gathering in the EU, such as the European

"cornerstone" of judicial cooperation in criminal matters in the EU. The principle has now been incorporated into the Lisbon Treaty and is likely to shape future legal arrangements in European criminal law. *See* point 3.3.1 of the Hague Programme, STRENGTHENING FREEDOM, SECURITY AND JUSTICE IN THE EUROPEAN UNION (2005/C 53/01). *See also* art. 67 of the Treaty of Lisbon, *available at* http://europa.eu/lisbon_treaty/full_text/index_en.htm (visited 17.08.2012).

16. Until recently, valid judgment based on the same fact in one Member State of the EU was no impediment to sentencing the same person twice in another Member State. Now, the protection against double jeopardy is introduced in the whole EU and may, with all differences, be compared to the protection now existing in the US.

17. On that issue widely, ANDRZEJ SAKOWICZ, ZASADA NE BIS IN IDEM W PRAWIE KARNYM 329-97 (2011).

evidence warrant, are designed for prosecutors and judicial authorities and have strengthened their investigative powers without giving the defense the equal right to obtain evidence from abroad. This is a systemic problem, which in effect, is likely to produce wrongful convictions in the recently changed legal circumstances.

In addition, one more future EU arrangement should have an impact on the subject discussed. EU member states will soon be obliged to take into account previous convictions in other EU member states, as they consider their own convictions with regard to recidivism or organized crime sentencing.[18] It is not clear how valid exoneration abroad pursuant to the reopening of criminal proceedings, will influence a valid conviction, after taking into account a wrongful conviction in another country. It is doubtful if any systemic European remedy to deal with that problem will be revealed.

V. RECAPITULATION

The above sketch describes our criminal justice system and may be seen as a little gloomy, more so than the everyday practice appears to be. However, it was not our task to give an appraisal of criminal law and practice but rather to search for ways to improve the system.

In order to recapitulate, it should be noted that the issue of wrongful convictions in Poland can be solved only partly through legislative amendments. Allowing evidence from private expert opinion would be one desirable change. Nevertheless, the problem is in the mentality of some judges, who too often unconsciously adopt the role of a prosecutor.

Poland's membership in the EU, as much as the membership of any other country, forces us to ask further questions. We regard those transnational, unanswered European issues that may increase the danger of a wrongful conviction, or at least multiply the effects of wrongful convictions, as a discussion opener.

18. According to framework decision of 24 July 2008, 2008/675/WSiSW, OJ L.220/32 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:220:0032:0034:EN:PDF (08.10.2012).

CHINESE WRONGFUL CONVICTIONS: DISCOVERY AND RECTIFICATION

Huang Shiyuan[*]†

I. INTRODUCTION

Many wrongful conviction cases have been rectified recently in China. It is undoubtedly very important to find the causes of these erroneous cases and reform the Chinese criminal judicial system to prevent miscarriages of justice from happening again. But no matter how hard we try, some wrongful convictions are inevitable. So it is also very important to establish an effective mechanism to discover and rectify erroneous cases.

In this Article, I discuss how Chinese wrongful convictions have been discovered and rectified and make suggestions for how to establish a more effective mechanism in China to discover and rectify erroneous cases. When I studied how Chinese wrongful convictions have been discovered and rectified, I selected twenty-six widely reported, officially acknowledged wrongful convictions as my objects of research. These wrongful convictions include the cases of: Chen Jinchang, Chen Shijiang, Du Peiwu, Hao Jinan, Huang Yaquan, Li Detian, Li Huawei, Li Jie, Liu Qian, Meng Cunming, Pei Shutang, Qin Junhu, She Xianglin, Sun Wangang, Teng Xingshan, Wang Haijun, Wang Junchao, Wen Chongjun, Wu Daquan, Wu Hesheng, Xu Jibin, Xu Jingxiang, Yang Mingyin, Yang Yuzhong, Zhao Xinjian, and Zhao Zuohai.

Part II of this Article discusses the evidential basis for the rectification of the twenty-six wrongful conviction cases. Fourteen cases were corrected because the real perpetrators were found. In six cases, the courts of retrial asserted that the inculpatory evidence was insufficient to prove the guilt of the convicted. The other six cases were rectified because of the reappearance of the alleged murder victims, new expert testing, or witness perjury. No effective conviction was overturned as a result of new DNA testing in China. Some of these cases were corrected easily, but others were corrected with great difficulty.

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Part III discusses the organizations that make the rectification of wrongful convictions possible. Generally speaking, courts, procuratorates, congresses, Politics and Law Committees (PLCs), and media all played an important role in the rectification of wrongful convictions. Certainly, many wrongful convictions have been rectified mainly because of the involvement of one of these organizations.

Part IV makes suggestions on how to establish a more effective mechanism in China to discover and rectify erroneous cases. In China, the procuratorates are reluctant to present protests against wrongful convictions to courts, and courts are reluctant to retry, on their own initiative, the wrongful conviction cases, even if there is strong evidence proving the innocence of the convicted. PLCs and congresses sometimes successfully prompt courts to rectify wrongful convictions, but their role in the rectification of wrongful convictions should be eliminated because their involvement is unprofessional and undermines judicial independence. China should establish Criminal Case Review Commissions, drawing heavily on the Criminal Case Review Commission of the U.K. and the Public Inquiries of Canada, with some significant modifications. Further, China should establish innocence projects, copying the Innocence Projects of the U.S. These independent and professional organizations will help to prompt courts to rectify erroneous cases.

II. THE EVIDENTIAL BASIS FOR RECTIFICATION OF WRONGFUL CONVICTIONS

In the twenty-six wrongful conviction cases, three cases were rectified because the alleged murder victims turned up alive, one because new testing by experts showed that the convicted was not the real perpetrator, two because witnesses admitted that they perjured themselves against the convicted, six because courts found that there was insufficient inculpatory evidence, and fourteen because the real perpetrators were found.

A. The Reappearance of the Alleged Murder Victims

In three cases, the men convicted of murder were proved to be innocent when the alleged victims turned up alive. These wrongful convictions were rectified easily and quickly because the errors were so obvious and sensational, and because the media reported them widely.

In the first case, in 1998, Zhao Zhenshang's nephew reported to the police that his uncle had been missing since 1997 and that he suspected that Zhao Zuohai, who lived in the same village with Zhao Zhenshang,

killed him. On May 8, 1999, a beheaded body was found near the village. Zhao Zuohai was coerced into making a confession and convicted of murder in 2003. On April 30, 2010, Zhao Zhenshang reappeared in the village. He said that he had a fight with Zhao Zuohai and fled after the fight because he feared that Zhao Zuohai would kill him. Henan Province Higher People's Court overturned Zhao Zuohai's conviction on May 8, 2010. One day later, Zhao Zuohai was exonerated.[1]

In the second case, on January 20, 1994, Zhang Zaiyu, She Xianglin's wife, disappeared. Her relatives suspected that she had been murdered by She. On April 11, 1994, a corpse was discovered in a pond. Zhang's relatives identified the corpse as Zhang. In 1998, She was sentenced to fifteen years imprisonment for murdering Zhang. On March 28, 2005, Zhang returned to her hometown. On March 30, Jingmen City Intermediate People's Court threw out She's conviction and ordered that Jingshan County People's Court retry the case. She was released from prison on April 1 and was declared to be innocent on April 13.[2]

In the third case, a corpse was discovered in Mayang County of Hunan Province in 1987. The police found that Shi Xiaorong, a maid at a hotel of Mayang County, went missing at the same time. Shi's sister told the police that the discovered corpse was Shi. Teng Xingshan, a butcher, was sentenced to death for Shi's murder and was executed in 1989. Four years later, Shi turned up alive in her hometown in Guizhou province. She had been abducted and trafficked to Shandong province in 1987. Teng Xingshan's wife heard about this in 1994 but did not petition to the court to overthrow the conviction. At the end of 2004, she told her daughter Teng Yan that the victim had reappeared. When Teng Yan asked her mother why she did not tell her earlier, her mother said that "we are so poor and I am afraid to engage in a lawsuit against the government."[3] On December 12, 2004, Teng Yan applied to Tenghua City Legal Aid Center for legal assistance, and the center appointed a lawyer to help her present a petition to Hunan Province Higher People's Court. The court held a meeting late into the night to discuss the case on the day it received the petition. In the following half year, relevant government agencies of Hunan made thorough investigations in more than ten cities and counties in seven provinces. On July 8, 2005, Hunan

1. *Zhao Zuohai bei Wuzui Shifang* [*Zhao Zuohai Was Exonerated*], JINGHUA SHIBAO (Beijing), May 10, 2010, *available at* http://epaper.jinghua.cn/html/2010-05/10/content_546910.htm.

2. *Hubei she Xianglin "Shaqi" an: Yuanan shi Zemyang Xingcheng De?* [*The Murder Wife Case of She Xianglin of Huibei Province: How the Innocent Person Was Wrongfully Convicted*], YAHOO!, http://news.cn.yahoo.com/05-04-/361/2ap4l.html (last visited Oct. 6, 2011).

3. Chen Tuo, *Nongmin 17 Nian Qian yin Sharen Suishi bei Qiangjue Beihairen Reng Zaishi* [*A Farmer Was Executed 17 Years Ago for Murder and Mutilation and the Victim Is Still Alive*], MINZHU YU FAZHI SHIBAO (Beijing), Feb. 13, 2006, *available at* http://news.qq.com/a/20060213/000867.htm.

Province Higher People's Court declared that Teng Xingshan had been innocent.[4]

B. New Testing by Experts

Only one of the twenty-six cases was rectified through new expert testimony; the case was rectified quickly. In Xu Jibin's case, three medical experts retained by the police concluded that Xu's blood type matched the semen collected at the crime scene. Xu was convicted of rape in 1991 and released after completing his sentence in 1999. In early 2006, an attorney suggested that Xu ask other medical experts to do a blood test for him. Several experts retained by him examined Xu and found that his blood type was type O. Since the blood type of the semen left at the crime scene was type B and the testimonies of the three experts retained by the police played a vital role in his conviction, Xu presented a petition to Hebei Province Higher People's Court. The court ordered Handan City Intermediate People's Court to handle the case, and the latter overthrew Xu's conviction and ordered Quzhou County People's Court to retry the case. On July 28, 2006, Xu was declared to be not guilty.[5]

It is not surprising that this wrongful conviction was rectified quickly because the testimony of new experts clearly showed that the convicted was innocent.

C. Witness Perjury

Two convicted persons, Pei Shutang and Li Detian, were found to be innocent because the codefendant or the alleged victim admitted that each had committed perjury. The rectification of these convictions was very difficult, because the courts disfavored the recantation of the testimonies and gave little probative value to it. The Pei Shutang case, which involves witness perjury, is discussed below.

On March 8, 2006, Li Detian was sentenced to twelve years imprisonment for committing mayhem with four other men. In December, 2006, Li met one of the four codefendants in prison. This codefendant told Li that it was Zhang Baoyu and Cai Shulan who provoked him and the other three codefendants to commit the mayhem; Zhang Baoyu and Cai Shulan also asked them to tell the police that Li was the instigator. On September 25, 2008, Li Detian was declared to be

4. *Cuo sha Teng Xingshan* [*Teng Xingshan Was Wrongfully Executed*], XIAOXIANG CHENBAO (Changsha), June 9, 2008, *available at* http://www.xxcb.cn/show.asp?id=913519.

5. *Fazhi Zaixian: Xuezheng* [*"The Rule of Law Online": Blood Evidence*], YANGSHI, *available at* http://news.sina.com.cn/s/2006-09-19/163411050148.shtml.

innocent by the Liaoning Province Higher People's Court.[6]

D. Insufficient Evidence

In the cases of Chen Shijiang, Liu Qian, Meng Cunming, Sun Wangang, Wen Chongjun, and Xu Jingxiang, there was no new evidence showing that the convicted persons were innocent; however, the courts of retrial claimed that there was insufficient evidence to prove the crimes, so the courts overturned these convictions. The rectification of all of these cases was difficult. The process of the rectifications of the Chen Shijiang case, the Meng Cunming case, the Sun Wangang case, and the Xu Jingxiang case is discussed below. It is no surprise that when there is no new evidence, a judge is reluctant to overthrow a conviction just because his opinion on whether there is sufficient inculpatory evidence is different from the judge who made the conviction.

E. Finding the Real Perpetrator

The other fourteen wrongful convictions were corrected because the real perpetrators were found.

Some wrongful convictions were corrected because real perpetrators who were detained for other crimes confessed to the previous crimes. In one case, Du Peiwu, a police officer of Kunming City Police of Yunnan Province, was convicted of shooting dead two police officers, his wife, and Wang Junbo in 1999. On June 17, 2000, Yang Tianyong was arrested for other reasons by the Kunming City Police, and the police found in Yang's house a pistol belonging to Wang Junbo that was used to kill the two police officers. Yang Tianyong confessed that he robbed Wang of his pistol and killed him and Du's wife with it.[7] Having obtained the evidence, Kunming City Police reported this case immediately to Kuming City PLC, which ordered that the police, the procuratorate, and the court of Kunming City work together to investigate the case. On July 7, Yunnan Province PLC called a conference of the officials from Kunming City PLC and Kuming City

6. Huo Shiming & Zhang Guoqiang, *Bei Xuangao Wuzui de Qianqianhouhou Liaoning Jiuzheng Yiqi Xingshi Yuanan* [*The Whole Story of the Exoneration: A Wrongful Conviction Was Rectified in Liaoning Province*], FAZHI RIBAO (Beijing), Sept. 28, 2008, *available at* http://unn.people.com.cn/GB/14748/8119469.html.

7. *See* Guo Guosong & Zeng Min, *Shishang Haiyou Baoqingtian ma—Du Peiwu de "Siqiu Yishu" Cuirenlexia* [*Is There Still a Justice Bao: The Letters of Dui Peiwu Written on Death Row Move People to Tears*], NANFANG ZHOUMO (Guangzhou), Aug. 24, 2001, *available at* http://news.sohu.com/36/45/news146364536.shtml; Peng Xiancai & Shi Jiasan, *Dui Peiwu Cuoan de Qianqianhouhou* [*The Whole Story of the Wrongful Conviction Case of Dui Peiwu*], DIANCHI CHENBAO (Kunming), Nov. 8, 2000, *available at* http://unn.people.com.cn/GB/channel23/176/842/200011/08/6165.html.

Police and decided to rectify the Du Peiwu case as soon as possible. On July 11, Yunnan Province Higher People's Court declared that Du was innocent.[8]

In a second case, Hao Jinan was convicted of murdering Liu Yinhe in 1998. At two a.m. on April 11, 2006, several police officers who were patrolling found three men walking in a suspicious manner. When the officers approached them, the men fled. One of them wanted to jump into a river but fell to the bank and broke one leg. The officers caught him and found in his pocket a screwdriver that was used to burgle. They took him to the hospital and took care of him. One month later his heart was touched by the officers' kindness, and he confessed that he was one of the perpetrators that killed Liu Yinhe.[9]

Chinese police officers generally believe that some suspects probably have committed other crimes aside from the ones under investigation, so they not only try their best to solve the crimes under investigation, but also other crimes.

The Zhao Xinjian case was corrected because police caught the real perpetrator under pressure from the victim and the defendant. In this case, a young girl was raped and killed in the Bozhou City of Anhui Province in 1987. The police summoned Li Weifeng and collected his hair. He fled, but his hair and the hair left at the crime scene were sent to the laboratory of the Ministry of Public Security for testing. The results showed that they matched. Zhao Xinjian was arrested because his clothes were found at the crime scene. He received a death sentence with reprieve. The relatives of the victim insisted that he should be sentenced to the death penalty and be executed at once. The relatives of Zhao believed that he was innocent and should be freed from prison. Both sides presented petitions to local authorities. These petitions attracted the attention of the director of the Bozhou City Public Security Bureau. He ordered his subordinates to catch Li Weifeng. After Li Weifeng was caught, he confessed to the rape and murder.[10]

In the Yang Mingyin case, the real perpetrators were caught because the suspect in another case told investigators that it was they who committed the crime. Yang Mingyin was convicted of murdering a couple in 2000. In 2005, Zhang Ming was detained for embezzlement of public funds. Investigators told him that he would probably be sentenced

8. Xiancai & Jiasan, *supra* note 7.

9. *Henan Nongmin Mengyuan Ruyu 10 Nian zao Xingxun Bigong Pizang bei Zha* [*A Farmer of Henan Province Has Been Wrongfully Imprisoned for 10 Years and One of His Spleens Was Resected as a Result of Torture*], ZHONGGUO QINGNIAN BAO (Beijing), Dec. 26, 2007, *available at* http://news.163.com/07/1226/09/40KJSOFQ0001124J.html.

10. Li Guangming, *Anhui Bozhou Jiuzheng yi qi Yuanan* [*A Wrongful Conviction Was Rectified in Bozhou City of Anhui Province*], FAZHI RIBAO (Beijing), Nov. 6, 2006, *available at* http://legal.people.com.cn/GB/42733/5001936.html.

to five years imprisonment, but that if he could produce important leads for solving other cases, his sentence would be commuted to a lighter punishment. He told the investigators that Zhu Faquan, Tian Zhong, and Li Yong murdered the couple. Zhu Faquan and Zhang Ming were relatives. One day when drinking together, Zhu had admitted the crime to Zhang.[11]

In some cases the real perpetrators were found because they surrendered themselves to the police. One example of this is the case of Qin Junhu and Lan Yongkui. In June 2000, Qin Junhu and Lan Yongkui were convicted of murdering a teacher. When Lan was detained in jail waiting for trial, Ya Hansheng, who was charged with larceny, was detained in the same jail. They were detained together for three months. Lan was older than Ya and often helped him when Ya was bullied by other prisoners. Lan often told Ya that he was innocent. As one of the real murderers (the other one was Qin Jian), Ya was moved by Lan's help and felt guilty for Lan's detention. He also knew that, because Qin Jian frequently committed crimes, Qin would be caught by the police sooner or later. All of these factors made Ya confess the murder when his sentence for larceny was completed in August 2000.[12]

In the Wu Daquan case and the Wang Junchao case, the wrongfully convicted man met the real perpetrators in prison and persuaded them to confess to the police.

In 2007, Wu Daquan was convicted of murdering a woman with Shi Biyao. After Wu Daquan had been in prison for one year, he met Ban Cunquan, who had actually killed the woman with Shi Biyao and was put into prison for another murder. Wu Daquan persuaded Ban Cunquan to confess to the police.[13]

In 1999, Wang Juncao was convicted of raping his ten-year-old niece. In prison, he met Wang Xueshan, who was convicted of raping another young girl. Wang Xueshan asked him whether he was Wang Junchao. Wang Junchao denied it out of distrust of the stranger. Wang Xueshan then said that it was not Wang Junchao who had raped his niece. Wang Junchao reported this to the official of the prison. Under investigation, Wang Xueshan confessed that he had raped Wang Junchao's niece. He

11. Li Yin & Yang Jiang, *Hunan Nongmin qu da Cheng Zhao Shinian Yuanyu hou bei Ruanjin* [*A Farmer of Huan Province Received House Arrest After Being Wrongfully Imprisoned for Ten Years as a Result of a Coerced Confession*], XINMIN ZHOUKAN (Shanghai), Sept. 27, 2006, *available at* http://news.163.com/06/0927/13/2S1F51U900011SM9.html.

12. Jiang Guibin & Qu Dan, *Xingxun Bigong Zaocheng de Yuan jia Cuoan* [*A Wrongful Conviction as a Result of Coerced Torture*], GUANGMING RIBAO (Beijing), Feb. 4, 2005, *available at* http://www.gmw.cn/content/2005-02/04/content_177726.htm.

13. Liu Gang, *Wu Daquan: Ruo bu Ouyu Zhenxiong, wo hai Mengyuan Yuzhong* [*Wu Daquan: I Would Still Be in Prison if I Had Not Come Across the Real Perpetrator*], XIN JING BAO (Beijing), Nov. 15, 2010, *available at* http://society.people.com.cn/GB/13209669.html.

said that, after he had committed the crime, his conscience was troubled and that he repented having done it.[14]

Of the fourteen cases, some cases, such as the Du Peiwu case, were rectified quickly. But most of them, such as the Wang Haijun case which is discussed in detail below, were rectified only with great difficulty.

As DNA technology has become widely used in the identification of corpses in present-day China, the possibility of the misidentification of a corpse is very small, as will be the possibility of rectifying a wrongful conviction as a result of reappearance of an alleged murder victim. Although "finding the real perpetrator" is the main evidential basis for correcting erroneous cases so far, it is mere coincidence that the wrongfully convicted person meets the real perpetrators in prison. Furthermore, with the strengthening of the rights of the suspects (especially the right not to be tortured), it is unlikely for the police to obtain a confession from a person—arrested for one crime—that the person had also committed another crime. As for witness perjury, it led to the correction of only two of the twenty-six wrongful conviction cases. With more and more witnesses being called to trial and subjected to cross-examination in China, witness perjury is less likely to be an evidential basis for correcting wrongful convictions. Although six wrongful conviction cases were rectified because the courts of retrial claimed that the inculpatory evidence was insufficient, there is no doubt that this kind of rectification will not occur frequently. When no new evidence is found, judges are generally reluctant to overturn an effective conviction just because they and the judges who made the conviction have different opinions on whether the inculpatory evidence is sufficient.

There is only one case that was rectified because of new expert testing. Although most of the physical evidence of the alleged wrongful conviction cases probably has been lost or destroyed, there may still be some evidence (including DNA evidence) which is well preserved. If the police agree to use independent labs to test the evidence at the request of the convicted, maybe many wrongful convictions, especially those in which DNA evidence is preserved but DNA testing was not conducted, will be corrected. It should be noted that there have been 273 postconviction DNA exonerations in the United States through September 26, 2011,[15] but not one in China.

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14. Jing Changshui, Yang Wanzhou & Zhang Huijun, *Henan yi Liqi Xingan Qidong Zaishen Chengxu* [A Strange Criminal Case Was Brought Up for Retrial], FAZHI RIBAO (Beijing), Aug. 12, 2005, *available at* http://news.sohu.com/20050812/n226654666.shtml.

15. *Know the Cases*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited Sept. 26, 2011).

III. ORGANIZATIONS THAT MAKE THE RECTIFICATION OF WRONGFUL CONVICTIONS POSSIBLE

Nearly all of the twenty-six wrongfully convicted persons insisted that they were innocent. They presented petitions to courts, procuratorates, police officers, PLCs, and congresses. Most of them paid a high price for the exoneration of the wrongful conviction. Their relatives helped them to present petitions.

The case of She Xianglin provides a case in point. She presented petitions when he was imprisoned and asked his relatives to present petitions for him whenever he met them on visiting days. His mother was detained for several months by police for not ceasing to present petitions, and she passed away shortly after she was released from jail. His brother was detained for more than forty days for presenting petitions and was intimidated into stopping.[16] Clearly, all of this occurred before the alleged "victim" turned up alive.

Generally speaking, because there are no independent and professional organizations, like the Criminal Cases Review Committee of the U.K. or the Innocence Projects of the U.S., that can help them, wrongfully convicted persons in China can seldom produce strong evidence to support their petitions. Even if they can, only when these petitions gain the attention of at least one of the influential organizations might the wrongful convictions be rectified. When the courts pay attention to the petitions of particular wrongfully convicted persons, the convictions will *probably* be rectified. When the procuratorates, congresses, or PLCs give attention to a wrongful conviction and ask a court to rectify it, the wrongful conviction *possibly* will be rectified because these organizations, especially the PLCs, have great influence on the decisions of courts. Finally, the media sometimes plays an important role in the rectification of wrongful convictions.

A. Courts: The Pei Shutang Case

According to Articles 205 and 206 of the Criminal Procedure Law, if the president of a court at any level finds that the effective judgment of his court is wrong, he shall refer the judgment to the adjudication committee. If the adjudication committee decides that the case should be retried, a new collegiate bench shall be formed for the retrial. If the Supreme People's Court finds that the effective judgment of a court at any level, or if a court at a higher level finds that the effective judgment

16. Zhang Li, *Yurenjie zhe Tian, ta "Wuzui Chuyu"* [*On April Fool's Day He Was Exonerated*], NANFANG ZHOUMO (Guangzhou), Apr. 7, 2005, *available at* http://www.southcn.com/weekend/top/200504070009.htm.

of a court at a lower level, is wrong, it shall retry the case or demand that a court at a lower level retry the case.

In practice, when an effective conviction is overturned, whether or not the police officers, the prosecutors, or the judges who originally handled this case committed misconduct, they probably will face sanctions. The sanctions may include the decrease of salary, demotion, and even criminal punishment. In order to maintain good connections (*guanxi*) with the police officers, prosecutors, and judges who handled this case and the police, procuratorates, and courts to which they belong, the courts that have received the petitions of the convicted probably will not overturn a conviction even if they believe that the convicted should be exonerated.

It is worth noting that the Supreme People's Court and the courts at the provincial level are more likely to rectify wrongful convictions. These courts, especially the Supreme People's Court, are more detached than the courts at lower levels, because courts at their levels are less likely to be the courts that originally tried the erroneous cases. Thus there is no need to give way to pressure from the police, the procuratorates, or the courts that originally handled the case. A relevant case to consider on this point is that of Pei Shutang.

Pei Shutang, an official of Wuwei City Bureau of Culture in Gansu Province, was convicted of raping a young woman in his office and sentenced to seven years imprisonment in 1986. The alleged victim did not appear in court, but she told the police that Pei had raped her; the records of her statement were presented to the court and played a vital role in convicting Pei. Pei appealed, but his appeal was rejected on March 21, 1987. On the same day, Yin Ping, Pei's defense attorney, obtained a record of a statement in which the victim claimed that she had been forced by her husband and Pei's direct superiors to fabricate stories to implicate Pei in the alleged crime. Yin Ping then presented petitions to Wuwei City Intermediate People's Court, Wuwei City People's Procuratorate, Gansu Province Higher People's Court, Gansu Province People's Procuratorate, and the Supreme People's Court, asking for retrial of the case, but all of these petitions were rejected.[17]

From 1986 to 2010, Pei wrote 3,007 petitions and sent them to relevant government agencies at all levels. Before he was released in 1993, his wife also presented petitions for him. After he was released, he went to Wuwei City, Lanzhou City (the capital of Gansu Province), and Beijing to present petitions. The alleged victim left Wuwei City before Pei was released from prison. Pei went to many cities to find her, but

17. Ma Guoshun & Wen Jie, *Yige Mingyuan zhe de 25 Nian Shensu Lu* [*25 Years of Petition of a Wrongful Convicted*], GANSU RIBAO (Lanzhou), Jan. 28, 2011, *available at* http://gsrb.gansudaily.com.cn/system/2011/01/28/011873009.shtml.

failed. In October 2000, the alleged victim found Pei and gave him a letter in which she repented for what she had done to him. She told Pei that the director and deputy director of Wuwei City Bureau of Culture disliked him and promised that if she perjured herself against him, they would help her and her husband find jobs. Her husband then forced her to perjure herself. Offering the letter of the alleged victim, Pei presented petitions to the Supreme People's Court many times, but in vain. In May 2007, Pei took the alleged victim with him to present a petition to the Supreme People's Court, and finally it worked. On February 17, 2009, the Supreme People's Court ordered Gansu Province Higher People's Court to retry the case. On December 11, 2009, Gansu Province Higher People's Court ordered Wuwei City Intermediate People's Court to retry the case. On August 31, 2010, Wuwei City Intermediate People's Court ordered Liangzhou County People's Court to retry the case. On January 27, 2011, Liangzhou County People's Court declared that Pei Shutang was not guilty.[18]

B. Procuratorates: The Sun Wanguang Case, the Meng Cunming Case, and the Xu Jingxiang Case

According to Article 129 of the Constitution of the People's Republic of China (China's Constitution), the people's procuratorates are legal supervision organs of the state. In order to ensure the correct implementation of laws, when they find that an effective judgment of a court is wrong, they should present a protest to the court against the judgments.

According to Articles 205 and 206 of the Criminal Procedure Law, if the Supreme People's Procuratorate finds that the effective judgment of a court at any level is wrong, or if a procuratorate at a higher level finds that the effective judgment of a court at a lower level is wrong, it shall present a protest to the court at the same level against the judgment. Then the court shall form a collegial panel to retry the case.

In practice, the procuratorates seldom present protests against effective convictions. As mentioned above, when an effective conviction is overturned, the police officers, prosecutors, and judges who originally handled the case will probably assume responsibility for it. In order to maintain good relations with them, the procuratorates rarely present protests against effective convictions. Even if the procuratorates intend to present protests against a conviction, they will probably communicate with the courts before doing so. Generally speaking, protests always result in the overthrow of effective convictions, because if a court insists

18. *Id.*

during prior communications that the convicted is guilty, the prosecutor will not present protests.

In three of the twenty-six cases, the procuratorates presented protests against wrongful convictions to courts; the courts retried these cases and declared in each that the convicted was not guilty.

In the first case, Sun Wangang was arrested for murdering his girlfriend, Chen Xinghui, by Qiao County Police in Yunnan Province in 1996. Two years later he was sentenced to the death penalty with reprieve by Yunnan Province Higher People's Court. He and his relatives insisted that he was innocent and presented petitions against the conviction to relevant government agencies of Yunnan Province, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Justice, and the National People's Congress, but all in vain. On June 30, 2002, Qiao County Police broke up a gang involved in robbery, rape, and murder. The relatives of the investigators told someone else that the leader of the gang, Li Maofu, confessed the murder of Chen Xinghui. Sun's father told Sun the news in a letter, and Sun wrote the information in his petitions and sent them to relevant government agencies. At the beginning of 2003, Chen Zhendong, director of the Prison and Detention Department of the Supreme People's Procuratorate, received the petition from Sun and immediately demanded that Yunnan Province People's Procuratorate review it. On June 20, 2003, Yunnan Province People's Procuratorate began to investigate the case and found that although Li Maofu was not the real perpetrator of Chen Xinghui's murder, Sun Wangang was probably wrongfully convicted. On September 18, 2003, Yunnan Province People's Procuratorate suggested that Yunnan Province Higher People's Court retry the case. Yunnan Province Higher People's Court retried Sun Wangang on January 15, 2004 and declared him to be not guilty on February 10, 2004.[19]

In the second case, Meng Cunming was convicted of rape in 1995 by Zhangjiakou City Intermediate People's Court of Hebei Province. He insisted that he was innocent, and his father helped him present petitions to Hebei Province People's Procuratorate. At the end of 1997, Hebei Province People's Procuratorate ordered that Zhangjiakou City People's Procuratorate review the case. On June 11, 2004, Zhangjiakou City Intermediate People's Court decided to retry the case. On September 14,

19. *"Sixing fan" Sun Wangang bei Xuangao Quzui* [*The Condemned Sun Wanguang Was Declared to Be Innocent*], JIANCHA RIBAO (Beijing), Sept. 2, 2008, *available at* http://www.jcrb.com/zhuanti/fzzt/nwya/rwwz/200809/t20080902_68758.html.

2005, Meng was declared to be not guilty.[20]

In the third case, in 1992, Xu Jingxiang was arrested for robbery by Luyi County Police in Zhoukou City, Henan Province. Li Chuangui, an investigator of the case, reported to the leaders of Luyi County Police that the case could not be transferred to prosecutors yet because there was still not enough evidence to prove Xu's guilt. In July 1993, a leader of Luyi County Police received a report alleging that Li Chuangui concealed some inculpatory evidence from the Xu case. In November, 1993, Luyi County People's Procuratorate charged Li with concealing inculpatory evidence, but Luyi County Court found him not guilty. Luyi County People's Procuratorate then presented a protest to Zhoukou Intermediate People's Court, who rejected the protest.[21]

Xu was indicted for robbery by Luyi County People's Procuratorate in 1996 and found guilty by Luyi County People's Court in March 1997. In November 1997, Zhoukou City People's Procuratorate requested that Henan Province People's Procuratorate present a protest against the effective verdict of Li. Jiang Hansheng, a prosecutor for Henan Province People's Procuratorate, reviewed all the documents and files from the Li case and the Xu case and found that the inculpatory evidence was insufficient. Henan Province People's Procuratorate then demanded that Zhoukou City People's Procuratorate present a protest against Xu's conviction to Zhoukou City Intermediate People's Court. Zhoukou City People's Procuratorate presented the protest, and Zhoukou City Intermediate People's Court demanded that Luyi County People's Court retry the case. Luyi County People's Court found Xu guilty again. Xu appealed the conviction, and Zhoukou City Intermediate People's Court upheld the conviction. On May 13, 2003, Henan Province People's Procuratorate presented a protest against the conviction to Henan Province Higher People's Court. On January 10, 2005, Henan Province Higher People's Court dismissed the conviction and demanded that Luyi County People's Court again retry the case. On March 7, 2005, Henan Province People's Procuratorate demanded that Luyi County People's Procuratorate withdraw the indictment against Xu. On March 15, 2005, Xu was released from prison.[22]

The rectification of the above three cases all involved the Supreme People's Procuratorate or People's Procuratorates at provincial levels. In

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20. Li Yanhong, *Nanzi Zaoyu Qiangjian Ruyu Niunian* [*A Man Convicted of Rape Was Wrongfully Imprisoned for Nine Year*s], YANZHAO DUSHI BAO (Shijiazhuang), July 20, 2007, *available at* http://news.sina.com.cn/s/l/2007-07-20/021912237000s.shtml.

21. Zhao Limin, Zhao Fang & Zhang Hongliang, *Xu Jingxiang Chonghuo Ziyou de Qianqianhouhou* [*The Whole Story of the Exoneration of Xu Jingxiang*], JIANCHA RIBAO (Beijing), Apr. 13, 2005, *available at* http://club.kdnet.net/dispbbs.asp?id=3167112&boardid=1&page=1&1=1#3167112.

22. *Id.*

the Sun Wanguang case, the Supreme People's Procuratorate demanded that Yunnan Province People's Procuratorate review the case. In the Meng Cunming case, Hebei Province People's Procuratorate demanded that Zhangjiakou City People's Procuratorate review the case. In the Xu Jingxiang case, Henan Province People's Procuratorate demanded that Zhoukou City People's Procuratorate present a protest against Xu's conviction to Zhoukou City Intermediate People's Court. The reason why the Supreme People's Procuratorate and the People's Procuratorates at provincial levels are more likely to present protests is that, as the Supreme People's Court and the People's Court at provincial levels, they probably did not handle these cases before and need not give in to pressure from the police, the procuratorates, or the courts at the lower levels that had handled these cases before.

C. The Politics and Law Committee: The Chen Jinchang Case and the Huang Yaquan Case

PLCs form a functional branch of the Chinese Communist Party Committee at all levels. Their responsibilities include implementing the Chinese Communist Party's policy in legal affairs; nominating judges and prosecutors; and solving disputes among police, procuratorates, and courts. Once a PLC decides that a conviction should be overturned, a court will always retry the case and overturn the conviction.

For instance, in one case, Chen Jinchang was arrested in 1995 by Fuyuan County Police in Yunan Province and then convicted of murdering Fan Zefang. In May 1997, Fuyuan County Police arrested Zhang Rongdong for another crime, but Zhang mentioned that he had killed Fan two years earlier. Fuyuan County Police reported this to Fuyuan County PLC. The PLC organized a special team whose members came from the police, the procuratorate, and the court of Fuyuan County to investigate the case. In December 1997, the team concluded that Chen was innocent and that Zhang was the real perpetrator of the murder. On February 17, 1998, Chen was retried and found to be not guilty by Yunnan Province Higher People's Court.[23]

In a second case, on July 17, 2001, Hainan Province Higher People's Court convicted Huang Yaquan, Huang Shengyu, and Hu Yadi of murdering Guo Taihe and sentenced them to the death penalty with reprieve. On December 30, 2001, Hu Yadi told Sanya City People's

23. Fang Sanwen, Zhao Jianwu & Zhang Ainong, *Wugu Qingnian qu da Cheng Zhao bei pan Sixing Yunnan Teda Yuanan Jiujing Ruhe Shouchang* [*An Innocent Young Man Was Tortured to Confess and Sentenced to Death Penalty, Who Knows How the Serious Erroneous Case Ends*], NANFANG ZHOUMO (Guangzhou), May 15, 1998, *available at* http://simon7217.blog.163.com/blog/static/20028200571649220/.

Procuratorate that it was Huang Changqiang and Huang Kaizheng, not Huang Yaquan or Huang Shengyu, who had killed Guo Taihe with him. Sanya City People's Procuratorate reported this to Hainan Province People's Procuratorate, and the latter demanded that the former investigate without delay. Later, Hu Yadi told the interrogators that his cousin, Hu Yawen, was involved in the case, too. The investigators then questioned Hu Yawen and he confessed. On April 8, 2002, Hainan Province People's Procuratorate requested that Hainan Province PLC demand that Hainan Province Police find and arrest Huang Changqiang and Huang Kaizheng as soon as possible. Hainan Province PLC did as requested, but the police did not take effective measures to track down the two escaped suspects. On February 25, 2003, the Hainan Province People's Procuratorate made the same request to Hainan Province PLC. On March 5, 2003, Hainan Province PLC called a meeting of the leaders of the police and the procuratorate and ordered the police to do all they could to arrest the two escaped suspects. On July 29, 2003, Huang Kaizheng, who had escaped for ten years, was arrested. On September 1, 2003, Hainan Province Higher People's Court overthrew the convictions of Huang Yaquan and Huang Shengyu.[24]

In the Chen Jinchang case, the police reported to Fuyuan County PLC that they had arrested the real perpetrator, which showed that the police were willing to correct the wrongful conviction; the PLC simply organized a special team to investigate the case. But in the Huang Yaquan case, the police were not willing to arrest the real perpetrators, and without the pressure from Hainan Province PLC, the wrongful conviction probably would not have been corrected.

D. Congresses: The Chen Shijiang Case

Articles 2 and 3 of China's Constitution stipulate that all power of the state belongs to the people, and the organs through which the people exercise state power are the National People's Congress and the local people's congresses at different levels. The administrative, judicial, and procuratorial organs of the state are created by the people's congresses, to which they are responsible and by which they are overseen.

The convicted persons who insist on their innocence, along with their relatives, often present petitions against their effective convictions to the

24. TIM, *Hannan Sheng Wanning Xian Huang Yaquan Huang Shengyu Guyi Sharen An* [*The Murder Case of Huang Yaquan and Huang Shengyu of Wanning Couty, Hainan Province*], TIM Shequ [TIM Community] Apr. 14, 2007, http://tm9mt.blog.sohu.com/42030039.html; *Zhongshen pan Sihuan Zaishen pan Wuzui Qiong yi 10 Nian Chen Yuanan Zhong Zhaoxue* [*A Man of Hainan Province Who Was Sentenced to the Death Penalty with Reprieve 10 Years Ago Was Declared to Be Innocent in a Retrial*], HAINAN TEQU BAO (Haikou), Jan. 7, 2004, *available at* http://www.hq.xinhuanet.com/hainan/2004-01/07/content_1466778.htm.

congresses at various levels. When a congress asks a court to review a conviction in an exceptional case, the court usually will review the case and decide whether to retry it. Only one of the twenty-six cases was rectified in this way.

On March 23, 2001, Chen Shijiang was convicted of murdering Xu Meizhi by Yantai City Intermediate People's Court in Shandong province. Chen appealed, and Shandong Province Higher People's Court upheld the conviction. In the next five years, Chen's mother went to Beijing and Jinan (capital of Shandong Province) dozens of times to present petitions for her son. Shandong Province Higher People's Court demanded that Yantai City Intermediate People's Court review the case on December 23, 2003, but the latter rejected Chen's application for retrial in June 2004. In 2004, the National People's Congress Standing Committee demanded that Shandong Province People's Congress Standing Committee supervise the handling of the case. On March 8, 2005, the Internal and Judicial Affairs Committee, a special committee of Shandong Province People's Congress Standing Committee, suggested that Shandong Province Higher People's Court retry the case. On April 18, 2006, Shandong Province Higher People's Court retried the case and declared that Chen Shijiang was not guilty.[25]

Although wrongful convictions might be rectified in exceptional cases due to the involvement of congresses, the involvement itself undermines judicial independence to some extent. Furthermore, in practice, most of the involvement of congresses is arbitrary and unprofessional because the overwhelming majority of the members of congresses have no knowledge or experience with any aspect of the criminal justice system.

E. Media: The Wang Haijun Case

The media has played an important role in the correction of many wrongful convictions. The case of Wang Haijun provides a case in point. Without the help of the media, this erroneous case probably would not have been corrected.

Wang Haijun was arrested for murdering his wife by Panshi City Police in Jilin Province in 1986. He was sentenced to fifteen years imprisonment by Panshi County People's Court in 1987 and was released in 1998 after serving his sentence. In June, 2001, Yantai City Police in Shandong Province arrested Jin Taizhi for killing four persons

25. Liu Zhuo & Qi Chongzhun, *Jianqing Muqin ba Nian Shangfang: Wo er Wuzui Qiang xia liu Ren* [*A Tough-Minded Mother Petitioned for 8 Years: My Son Is Innocent and Should Not Be Executed*], FAZHI ZHOUBAO (Beijing), July 3, 2006, *available at* http://news.163.com/06/0703/12/2L40794300011229.html.

in Shandong Province. Under interrogation, Jin confessed that he was also the murderer of Wang Haijun's wife, and his account of the murder matched the crime scene. Hearing the news from Yantai City Police, Jilin City Police in Jilin Province sent police officers to investigate. After interrogating Jin four times, these police officers refused to conclude that Jin had killed Wang's wife. Wang also heard this news. He retained two lawyers to help him collect evidence and present petitions. The lawyers went to Yantai City and obtained Jin's case files and then presented petitions with Wang against his conviction to many relevant government agencies. In 2003, Panshi County PLC organized a special team, whose members included leaders of the police, the procuratorate, and the court of Panshi County, to investigate the case. But the team made no conclusion. Responding to Wang's petition, Panshi County People's Court held a hearing in 2004, but the result of the hearing was to dismiss the petition. Finding that it was impossible to have his conviction rectified just through presenting petitions to relevant government agencies, in April 2005 Wang asked for help from *New Culture Daily*, a popular local newspaper. After investigating the case thoroughly for nearly three months, the newspaper's reporters found many reasonable doubts related to Wang's conviction. They then presented petitions with Wang to relevant government agencies of Jilin City. The director of Jilin City PLC paid much attention to the petition and, in June 2005, organized a special team to investigate the case. On July 29, 2005, Wang was finally declared to be not guilty by Panshi County People's Court.[26]

It goes without saying that the citizens of the region where a wrongful conviction occurred are generally the most interested in the discovery and rectification of the wrongful conviction. It is thus worth noting that in some cases, such as the case of Hao Jinan,[27] it was not the local newspapers but the newspapers of other provinces that widely reported that the convicted person should be exonerated because of new exculpatory evidence. The reason is that local newspapers are usually controlled to some extent by the local governments, which do not want negative news that occurs in their jurisdictions to be reported by the media. If the freedom of press in China could be strengthened, more wrongful convictions probably would be rectified due to the reports of the media.

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26. Liu Shuang, Wang Zhendong & Gu Ran, *19 Nian sha qi yi an Diaocha* [*The Investigation of a Wife Murder Case that Occurred 19 Years Ago*], XIN WENHUA BAO (Changchun), July 25, 2005, *available at* http://news.sina.com.cn/s/2005-07-25/15476524049s.shtml.

27. Xiao Rui, *Hao Jinan Yuanan Cheng Jiucuo Dianfan* [*"The Wrongful Conviction of Hao Jinan" Becomes "The Model of Rectification"*], XIN JING BAO (Beijing), Feb. 4, 2008, *available at* http://www.360doc.com/content/08/0204/10/142_1026062.shtml.

Although the traditional media, such as newspapers and television, still play an important role in the correction of wrongful convictions, the internet is becoming more and more important. In fact, the internet played a more important role than traditional media in the rectification of many wrongful cases, such as the She Xianglin case, the Teng Xingshan case, and the Zhao Zuohai case.

IV. ESTABLISHING A MORE EFFECTIVE MECHANISM TO DISCOVER AND RECTIFY ERRONEOUS CASES

As discussed above, generally speaking, procuratorates are reluctant to present protests against wrongful convictions to courts, but courts are reluctant to retry, on their own initiative, the wrongful conviction cases, even if there is strong evidence proving the innocence of the convicted. Therefore, China needs some organizations to prompt courts to rectify wrongful convictions. At present, these organizations mainly include PLCs, congresses, and the media. Because the involvement of PLCs and congresses is unprofessional and undermines judicial independence, I suggest that China eliminate their role in the rectification of wrongful convictions. At the same time, I suggest that China strengthen the freedom of press and establish independent, professional organizations to prompt courts to rectify erroneous cases. As for such organizations, China may refer to and learn from the Innocence Projects of the U.S., the Criminal Case Review Commission (CCRC) of the U.K., and the Public Inquiries of Canada, with some significant modifications based on China's unique situation.

China also should reform the current responsibility system. At present, as discussed above, when an effective conviction is overthrown, regardless of whether the police officers, the prosecutors, or the judges who originally handled the case committed misconduct, they will probably face sanctions. Therefore, sometimes they might try their best to obstruct the rectification of the wrongful convictions that they handled. China should stipulate that the police officers, the prosecutors, and the judges should not be disciplined when the convictions that they handled are overthrown as long as they have not committed misconduct.

A. Creating Innocent Projects

In 1992, Barry Scheck and Peter Neufeld started the first Innocence Project at the Benjamin N. Cardozo School of Law at Yeshiva University (Cardozo Law). Since then, seventy-eight Innocence Projects have sprung up in at least forty-three states of the U.S., and three Innocence Projects have been founded in Canada, three in Australia, two

in the U.K., and one in New Zealand.[28] All of these Innocence Projects are independent nonprofit organizations, but they coordinate to share information and expertise. In December, 2000, the Innocence Project at Cardozo Law and the Center for Wrongful Convictions at the Northwestern University School of Law teamed up to form the Innocence Network. At present, more than sixty organizations around the world belong to the Innocence Network.[29]

Some Innocence Projects are affiliated with the offices of public defenders, but most are affiliated with universities. Of those affiliated with universities, most are affiliated with law schools,[30] but some are affiliated with journalism schools, criminology schools, and the like.

These Innocence Projects vary in size, scope, and criteria for case acceptance, but they all review requests from prison inmates and conduct investigations into the requests if it is determined that the requests meet certain review and screening criteria.[31] Through September 2, 2010, 258 wrongful conviction cases had been overturned as a result of the work of the Innocence Project at Cardozo Law alone.[32] In 2010, the work of Innocence Network member organizations led to the exoneration of twenty-nine people around the world who had served a combined 426 years behind bars for crimes that they did not commit.[33]

The reason why Innocence Projects have played an important role in uncovering and remedying wrongful convictions is that they are impartial, professional, and influential. First, Innocence Projects are nonprofit organizations, and virtually all work performed by them is pro bono work, done at no cost to the incarcerated individuals.[34] Therefore,

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28. *Other Projects Around the World*, INNOCENCE PROJECT, http://www.innocenceproject.org/about/Other-Projects.php (last visited Oct. 6, 2011).

29. *How to Help*, INNOCENCE PROJECT, http://www.innocencenetwork.org/how-to-help (last visited Oct. 6, 2011).

30. "Given the wide array of law school cultures and clinical sources, it is no surprise that innocence projects can and do take many different forms. Several schools have largely student-run volunteer projects with minimal faculty supervision, while others have full-fledged in-house clinics directed by faculty members." Daniel S. Medwed, *Actual Innocence: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1100 (2003).

31. As for the relationship between the Innocence Projects and their clients, there are essentially three different models: the "No Representation" Model, the "Full Representation" Model, and the "Limited Representation" Model. *See* Ellen Yankiver Suni, *Ethical Issues for Innocence Projects: An Initial Primer*, 70 UMKC L. REV. 921, 926–30 (2002).

32. Barry Scheck, *Overturning 258 Wrongful Convictions (And Counting)*, BIG THINK, http://bigthink.com/ideas/23055 (last visited Oct. 6, 2011).

33. INNOCENCE PROJECT, http://www.innocencenetwork.org/ (last visited Oct. 6, 2011).

34. Some projects charge for testing, but most do not charge for investigative services and legal representation. *See* Suni, *supra* note 31, at 924–25. For example, the Ohio Innocence Project does not charge inmates for its services, and inmates are usually only required to pay for DNA testing or other expert witness fees. *Ohio Innocence Project*, UNIV. OF CINCINNATI COLLEGE OF LAW, http://teachlaw.law.uc.edu/institutes/
rosenthal/oip.shtml (last visited Oct. 6, 2011).

they have no financial interest in the outcome of their investigation. Compared with the investigations of the lawyers retained by the convicted, not to mention the investigations of the convicted's relatives, the investigations of Innocence Projects generally are deemed to be more reliable. Second, the investigations of the Innocence Projects are conducted by law professors or volunteer attorneys, or by law students who are closely supervised by law professors and volunteer attorneys. The professionalism of the investigations ensures their high quality. Innocence Projects also work closely with experts so that the Innocence Projects can provide courts with strong scientific evidence, mainly DNA. Finally, Innocence Projects maintain a friendly relationship with the mass media, and the wide media coverage of a wrongful conviction case may put some governmental agencies under pressure to investigate and correct wrongful convictions.[35]

There is no Innocence Project in China so far. Chinese law schools may follow their counterparts in the U.S. by starting Innocence Projects to help the convicted people who claim to be innocent. Besides the advantages listed above in rectifying wrongful convictions, Innocence Projects also can provide law students with first-rate educational experiences.

B. Establishing the CCRC

1. The CCRC of the U.K.

In 1997, in response to several notorious wrongful conviction cases, the United Kingdom created the CCRC, an independent public body set up to investigate possible miscarriages of justice in England, Wales, and Northern Ireland.[36] Its main job is to review the cases of those who feel that they have been wrongly convicted of criminal offenses or unfairly sentenced. It considers whether there is new evidence or arguments that may cast doubt on the reliability of an original decision and refers a case back to the appropriate appeals court for reconsideration when it feels that there is a "real possibility" that the decision would not be upheld upon retrial.[37]

According to Section 8 of the Criminal Appeal Act 1995, the CCRC

35. For a discussion of the role that journalists might play in this area, see Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. REV. 803 (2002).

36. CRIM. CASES REV. COMMISSION, http://www.ccrc.gov.uk/index.htm (last visited Oct. 6, 2011).

37. *An Overview of Our Role*, CRIM. CASES REV. COMMISSION, http://www.ccrc.gov.uk/canwe/canwe_27.htm (last visited Oct. 6, 2011).

shall consist of not fewer than eleven members, and the members shall be appointed by the Queen on the recommendation of the Prime Minister. At least one-third of the members shall be persons who are "legally qualified," and at least two-thirds of the members shall be persons having knowledge or experience of any aspect of the criminal justice system.[38]

The CCRC has wide-ranging investigative powers and can obtain and preserve documentation held by any public body. It does not have a similar mandate for materials in the possession of private organizations and individuals, nor does it have the power to carry out searches or make arrests; however, it can appoint an investigating officer, such as a police officer, who does have such power, to work on the CCRC's behalf.[39]

Since its establishment in January 1997, the CCRC has received 13,748 applications, 13,049 of which had been reviewed as of June 30, 2011, and 480 had been referred. Of the referrals, 458 had been heard by the Court of Appeal, and 320 had been quashed.[40] Many scholars have asserted that the CCRC is an admirably effective agency.[41]

The following factors make the CCRC an efficient and powerful organization. First, its independence from any branch of government makes it trustworthy. Second, the fact that most of its members are experts in criminal justice and that it has wide-ranging investigative powers ensures that it can clarify factual issues and then make appropriate decisions.

Barry C. Scheck and Peter J. Neufeld have claimed that, compared to the network of comparatively small and resource-starved Innocence Projects, the CCRC is an impressive, efficient, powerful, and superior institution.[42]

The CCRC has two advantages over Innocence Projects. First, the CCRC is better resourced than Innocence Projects. The funds of Innocence Projects are raised from individuals, foundations, and corporations. For example, the Innocence Project at Cardozo Law receives 45% of its funding from individuals, 30% from foundations, 15% from its annual benefit dinner, 7% from Cardozo Law, and most of

38. Criminal Appeal Act, 1995, c. 35, § 8.

39. Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 100 (2002).

40. *Case Library*, CRIM. CASES REV. COMMISSION, http://www.ccrc.gov.uk/cases/case_44.htm (last visited Oct. 6, 2011).

41. *See* Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 108 (2009); Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 348 (2002).

42. Scheck & Neufeld, *supra* note 39, at 101.

the rest from corporations.[43] The reality is that Innocence Projects are typically under-resourced.[44] Because the CCRC is a public body, it generally need not worry about the source of funds. Second, the CCRC can appoint an investigating officer from another public body to carry out searches and make arrests on the CCRC's behalf. This power helps the CCRC make thorough and effective investigations. Innocence Projects certainly do not have such power. However, it is worth noting that Innocence Projects do not have the problems of inertia and indifference generally found in government organizations.

2. Canadian Public Inquiries

Canadian "Public Inquiries," also known as Royal Commissions or Commissions of Inquiries, were first established more than 160 years ago as a way for sovereignties to conduct independent non-government-affiliated investigations regarding the conduct of public business or the fair administration of justice.[45] Now, the executive branch at all levels of government (federal, provincial, and territorial) of Canada has the power to charter Public Inquiries to have designated persons (frequently judges) investigate public events or issues. Canadian Public Inquiries have investigated a wide range of issues of public concern. Their purpose is to establish the facts and causes of an event or issue and then to make recommendations to the government.

More than ten years ago, two separate public inquiries were chartered to investigate two celebrated postconviction DNA exonerations, those of Thomas Sophonow and Guy Paul Morin.[46] The designated leader of the two inquiries had subpoena power, held hearings, recruited government laboratories or independent experts when necessary, issued reports that dealt with the specific causes of these wrongful convictions, and made policy recommendations about remedies to prevent wrongful convictions in the future.[47]

One problem with the Canadian Public Inquiry is that its investigations must be triggered by a directive from the executive branch. Aside from the danger that the executive branch simply will not

43. *About the Organization*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/How_is_the_Innocence_Project_funded.php. (last visited Apr. 6, 2011).

44. *See* Robert Schehr & Lynne Weathered, *Should the United States Establish a Criminal Cases Review Commission?*, 88 JUDICATURE 122, 122 (2004).

45. Watson Sellar, *A Century of Commissions of Inquiry*, 25 CAN. B. REV. 1,1 (1947).

46. *See* THOMAS SOPHONOW INQUIRY REPORT, *available at* http://www.gov.mb.ca/justice/publications/sophonow/index.html; FRED KAUFMAN, REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN, *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/.

47. Scheck & Neufeld, *supra* note 39, at 100.

charter investigations it does not like, this approach also runs the risk that review of officially acknowledged wrongful convictions will only occur as a response to public pressure.[48]

3. Establishing CCRC in Every Province of China

Obviously, the CCRC and the Public Inquiry are two distinctly different kinds of institutions. They both can address the problem of wrongful convictions, but the job of the CCRC is to investigate possible miscarriages of justice and decide whether or not to refer them to appeals courts for reconsideration, while the job of the public inquiry is to investigate officially acknowledged wrongful convictions, find the causes of the wrongful convictions, and make policy recommendations about remedies to prevent wrongful convictions in the future. The investigations of the CCRC occur before wrongful convictions are rectified, and those of the public inquiry occur after wrongful convictions are rectified.

Although currently operating as two different systems, these two kinds of institutions can be merged as one. I propose the creation of a CCRC (a standing committee, unlike the public inquiries) in each province of China that not only helps to correct wrongful convictions, but also investigates the causes of all the officially acknowledged wrongful convictions that occur in the province (including the wrongful convictions it helps to correct as well as those that it has nothing to do with) and makes reform recommendations.

The future CCRCs of China should be independent from any branch of government. Their members should be appointed by the congresses of the province where they are located, and they should be composed of diverse, respected members of the criminal justice community and the public. They should have the power to obtain documentation held by any other public body, compel sworn testimony, order forensic tests, and appoint police officers to carry out searches or make arrests. These broad powers ensure that the CCRCs can conduct thorough and effective investigations.

If particular convicted persons insist that they were wrongfully convicted, they may ask the CCRC of the province where they were convicted to review their convictions. Upon completion of an investigation, if the CCRC thinks that a conviction is probably wrong, it should refer the conviction to the Higher People's Court of the province for reconsideration.

The CCRC should investigate the causes of all the erroneous

48. *Id.* at 104.

convictions that have occurred in the province where it is located and make reform recommendations. It should deliver a public report on its findings and recommendations to the relevant branches of government; the branch(es) of government should issue a formal written response to the recommendations within a fixed period of time.

The PLC and the congresses should stop accepting petitions from the convicted and ordering the courts to review the cases of these convicted. Any convicted person who claims innocence may present petitions to the courts, procuratorates, the Innocence Projects, and the CCRCs.

CHINESE WRONGFUL CONVICTIONS: CAUSES AND PREVENTION

Huang Shiyuan∗†

I. INTRODUCTION

In recent years, the rectification of some notorious wrongful conviction cases, especially the cases of Du Peiwu, She Xiangling, and Zhao Zuohai, have resulted in unusual heated public debate in China. Public outrage over these high-profile wrongful convictions has seriously undermined confidence in China's criminal justice system and has created new momentum for criminal reforms.

This Article aims to find out the underlying causes of officially acknowledged wrongful conviction cases in China and recommend remedies to prevent such miscarriages of justice from happening again. I have encountered a number of difficulties in researching and analyzing the causes of Chinese wrongful convictions. First, China has not established a case reporting system, so the public has no access to verdicts and other trial documents of erroneous cases. Second, the Chinese government does not publicize comprehensive or disaggregated data on wrongful convictions.

The two primary sources of information used in this Article are newspapers and the Internet. Twenty-six widely reported wrongful conviction cases were selected as the focus of this research. This method of research is statistically problematic because these cases were not chosen at random. But given the difficulties in collecting data on wrongful convictions, it may be the best method available at present.

II. BASIC INFORMATION OF CHINESE WRONGFUL CONVICTIONS

To better understand the causes of wrongful convictions we need to know some basic information about the twenty-six review cases.

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TABLE 1: INFORMATION ABOUT THE WRONGFUL CONVICTIONS

Name	Location	Charge(s)	Sentence	Date of Detention	Date of Release	Reason for Rectification
Chen Jinchang	Yunnan	Murder, robbery	Death penalty with reprieve[1]	05/17/1995	02/17/1998	Actual perpetrator was found
Chen Shijiang	Shandong	Murder	Death penalty with reprieve	12/05/1998	04/18/2006	Insufficient evidence
Du Peiwu	Yunnan	Murder	Death penalty with reprieve	04/22/1998	07/11/2000	Actual perpetrator was found
Hao Jinan	Henan	Murder, robbery	Death penalty with reprieve	01/24/1998	12/2007	Actual perpetrator was found
Huang Yaquan	Hainan	Murder, robbery	Death penalty with reprieve	08/22/1993	09/01/2003	Actual perpetrate was found
Li Detian	Liaoning	Mayhem	12 years	02/29/2004	09/25/2008	Codefendant admitted perjury
Li Huawei	Liaoning	Murder	Death penalty with reprieve	12/19/1986	04/18/2001	Actual perpetrator was found
Li Jie	Sichuan	Murder	Life imprison	09/25/1995	06/16/2003	Actual perpetrator was found
Liu Qian	Hebei	Rape	6 years	04/14/1998	2004	Insufficient evidence
Meng Cunming	Hebei	Rape	9 years	10/31/1995	10/30/2004	Insufficient evidence
Pei Shutang	Gansu	Rape	7 years	08/13/1986	07/1993	Victim admitted perjury
Qin Junhu	Guangxi	Robbery, Mayhem	Death penalty with reprieve	02/27/1999	02/2003	Actual perpetrator was found
She Xianglin	Hubei	Murder	15 years	04/11/1994	04/1/2005	Victim appeared
Sun Wangang	Yunnan	Murder	Death penalty with reprieve	01/03/1996	02/10/2004	Insufficient evidence
Teng Xingshan	Hunan	Murder	Death penalty	12/06/1987	01/28/1989 (executed)	Victim appeared
Wang Haijun	Jilin	Murder	15 years	10/25/1986	08/03/1998	Actual perpetrator was found
Wang Junchao	Henan	Rape	9 years	06/15/1999	08/30/2005	Actual perpetrator was found

1. If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence; if the person who is sentenced to death with a suspension of execution commits no intentional crime during the period of suspension, his punishment shall be commuted to life imprisonment upon the expiration of the two-year period; if he has performed major meritorious service, his punishment shall be commuted to 25 years upon the expiration of the two-year period; if it is verified that he has committed an intentional crime, the death penalty shall be executed upon verification and approval of the Supreme People's Court. *See* CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA, art. 48-50 (1997), *available at* http://www.china.org.cn/english/government/207319.htm.

Wen Chongjun	Guangxi	Rape	5 years	07/10/1989	07/1993	Insufficient evidence
Wu Daquan	Zhejiang	Murder, robbery	Death penalty with reprieve	09/07/2006	10/22/2010	Actual perpetrator was found
Wu Hesheng	Hubei	Murder	Life imprison	04/15/1991	12/23/1999	Actual perpetrator was found
Xu Jibin	Hebei	Rape	8 years	04/1991	07/28/2006	New blood type test
Xu Jingxiang	Henan	Robbery	16 years	04/13/1992	03/15/2005	Insufficient evidence
Yang Mingyin	Hunan	Murder, robbery	16 years	11/06/1996	09/15/2006	Actual perpetrator was found
Yang Yunzhong	Heilongjiang	Murder	Life imprison	12/02/1994	03/11/2002	Actual perpetrator was found
Zhao Xinjian	Anhui	Murder, rape	Death penalty with reprieve	08/07/1998	06/23/2006	Actual perpetrator was found
Zhao Zuohai	Henan	Murder	Death penalty with reprieve	05/09/1999	05/09/2010	Victim appeared

According to the information in Table 1:

(1) The twenty-six wrongful convictions were located in fifteen of the thirty-one provinces in Mainland China, with eight in Eastern China, eleven in Middle China, and seven in Western China.

(2) Among the twenty-six cases, seventeen cases involved murder (five of which also involved robbery and one of which also involved rape), six cases involved rape, two cases involved robbery (one of which also involved mayhem), and one case involved mayhem. It is not surprising that all the cases involved felonies because all the cases were widely covered by media in China and the media is interested in serious crimes, which garner more attention from the public. In addition, when an innocent person is sentenced to a severe punishment, he and his relatives are more likely to present petitions for rectifying the wrongful conviction, and the government is more likely to be concerned with the case and correct the error.

(3) All the innocent men had received severe punishments, including one being sentenced to death, eleven being sentenced to death with reprieve, and two being sentenced to life imprisonment. Comparatively speaking, the sentences of the six men who were convicted of rape were less severe, which resulted in nine, nine, eight, seven, six and five years of imprisonment.

(4) The sentences served by these wrongfully convicted persons span from less than two years to more than fifteen years, with an average of nearly eight years in prison before being exonerated. Teng Xingshan is not counted, because he was executed sixteen years before he was declared to be innocent.

(5) Seven wrongful convictions were rectified after the innocent people had completed their punishment. Teng Xinshan was executed in 1989 and declared to be innocent by the Hunan Province Higher People's Court in 2005.[2] Liu Qian was released upon completion of his sentence in 2004 and declared not guilty in 2007.[3] Meng Cunming was released after serving his sentence in 2004 and acquitted in 2005.[4] Xu Jibin was released after completing his sentence term in 1999 and acquitted in 2006.[5] Wen Chongjun was set free after serving his sentence in 1993 and he received his verdict of "not guilty" in 2006.[6] Wang Haijun was released in 1998 and found not guilty in 2005.[7] Pei Shutang was set free in 1993 and declared to be not guilty in 2011.[8] China holds that the idea of "mistakes must be corrected whenever discovered." As such, when a conviction is found to be erroneous, even if the sentence of the convicted has been completely carried out, it should be rectified. This will not only help with the compensation to the innocent or their heirs, but also eliminate the stigma of conviction upon the families of those wrongly convicted people.

(6) Fourteen wrongful convictions were corrected because the actual perpetrators were found. In three cases, the men who were convicted of murders were proved innocent when the alleged victims turned up alive. Six convictions were overturned because courts ruled that there was not sufficient evidence to prove that those convicted were guilty. Unlike the other twenty cases, these six cases were not "factual innocence" cases, but "legal innocence" cases. Two wrongful convictions were overturned because the codefendant or the alleged victim admitted that they had committed perjury. One wrongful conviction was overturned because a

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2. Chen Tuo, *Cuo Sha Teng Xingshan 17 nian hou Beipan Wuzui* [*Teng Xingshan was Wrongfully Executed and Found Not Guilty 17 Years Later*], http://www.qdh.gov.cn/issue/root/sub/sfj_sfj/sfj_sfj_alzz/20060331/8ac77f232c7c6107012c7db35eb12daf/index.shtml.

3. Li Yanhong, *Hebei yi Xiaohu Bei Pan "Qiangjian Weisui" Ruyu Jiunian Zhaoxue Yuanqing* [*A Youth of Heibei Province Was Exonerated after 9 Years Imprisonment for Attempted Rape*], YANZHAO DUSHI BAO [YANZHAO METROPOLIS DAILY], July 26, 2007, http://news.xinhuanet.com/legal/2007-07/26/content_6433053.htm.

4. Li Yanhong, *Nanzi Zaoyu Qiangjian Ruyu Niunian* [*A Man Convicted of Raping Was Wrongfully Imprisoned for Nine Years*], YANZHAO DUSHI BAO [YANZHAO METROPOLIS DAILY], July 20, 2007, http://news.sina.com.cn/s/l/2007-07-20/021912237000s.shtml.

5. *Fazhi Zaixian: Xuezheng* [*"The Rule of Law Online": Blood Evidence*], YANGSHI [CHINA CENTRAL TELEVISION], http://news.sina.com.cn/s/2006-09-19/163411050148.shtml.

6. Qing Xingwang, *Laoshi "Qiangjianfan" Mengyuan 17 Nian*, [*The Wrongful Rape Conviction of a Teacher Was Rectified Seventeen Years Later*], ZHEJIANG FAZHI BAO [ZHEJIANG LEGAL NEWS], August 30, 2006, http://fzb.zjol.com.cn/gb/node2/node802/node240379/node394807/node394820/userobject15ai5336748.html.

7. Liu Shuang, Wang Zhendong & Gu Ran, *19 Nian Sha Qi Yi An Diaocha* [*The Investigation of a Wife Murder Case Occurred 19 Years Ago*], XIN WENHUA BAO [NEW CULTURAL NEWS], July 25, 2005, http://news.sina.com.cn/s/2005-07-25/15476524049s.shtml.

8. Ma Guoshun & Wen Jie, *Yige Mingyuan Zhe de 25 Nian Shensu Lu* [*25 Years of Petition of a Wrongful Convicted*], GANSU RIBAO [GANSU DAILY], Jan. 28, 2011, http://gsrb.gansudaily.com.cn/system/2011/01/28/011873009.shtml.

more sophisticated.

III. CAUSES OF WRONGFUL CONVICTIONS

TABLE 2: CAUSES OF THE 26 WRONGFUL CONVICTIONS

Name	Torture	False confession	False witness testimony	Problematic expert testimony	Police misconduct in handling exculpatory evidence	Arguments of counsel not being accepted	Extra-judicial factors
Chen Jinchang	√	√	√		√	√	
Chen Shijiang	√	√		√	√	√	
Du Peiwu	√	√		√	√	√	√
Hao Jinan	√	√	√		√	√	
Huang Yaquan	√	√	√		√	√	√
Li Detian			√		√	√	√
Li Huawei	√	√	√	√	√	√	√
Li Jie	√	√			√	√	√
Liu Qian	√	√	√		√		
Meng Cunming	√	√		√	√	√	√
Pei Shutang			√	√	√	√	
Qin Junhu	√	√	√	√	√	√	
She Xianglin	√	√	√	√	√	√	√
Sun Wangang	√	√		√	√	√	
Teng Xingshan	√	√		√	√	√	√
Wang Haijun	√	√					
Wang Junchao	√	√	√	√	√		
Wen Chongjun			√	√	√		
Wu Daquan	√	√	√		√		
Wu Hesheng	√	√		√		√	
Xu Jibin			√	√		√	
Xu Jingxiang	√	√			√		
Yang Mingyin	√	√					
Yang Yunzhong	√	√	√		√	√	
Zhao Xinjian	√	√			√	√	√
Zhao Zuohai	√	√	√		√	√	√

All twenty-six cases involved multiple causes leading to the wrongful conviction. The key causes include torture and false confession, false witness testimony, problematic expert testimony, police misconduct in handling exculpatory evidence, arguments of counsel not being accepted by judges, and extrajudicial factors.

A. Torture and False Confession

1. Torture

Of the twenty-six cases, twenty-two involved false confessions extracted through torture, which is probably the leading cause of these wrongful convictions. Forms of torture in these cases include beating, cigarette burns, electric shocking, painful shackling of the limbs, and subjection to extreme heat or cold.

In the She Xianglin case, She was arrested in April, 1994 for murdering his wife. The police officers were divided into two groups to interrogate She around the clock and She was deprived of sleep for ten days and eleven nights. He was beaten so cruelly that he saw double and could not stand or walk.

In the case of Du Peiwu, Du was stripped of sleep for twenty days and nights in July, 1998. He was forced to kneel down to answer questions. He was beaten, kicked, and hung on doors and windows with handcuffs. His fingers and toes were stricken by an electric baton.

After being arrested for murdering Zhao Zhenshang in 1999. Zhao Zuohai was deprived of sleep for more than thirty days and nights while he was being interrogated. He could not stand after being beaten and kicked brutally. The investigators struck his head with a pistol and a wooden stick, which left a scar on his head. When he felt dizzy, the police officers set off fireworks over his head. A police officer told Zhao that if he did not confess, he would kick him out of a running car and shoot him. The officer claimed that he would not be punished for doing so because he could explain to his supervisor that he shot Zhao because Zhao attempted to flee.

On January 24, 1998, the police arrested Hao Jinan and began to strip and beat him. When the police officers found that Hao had lost consciousness, they poured cold water over him to make him regain consciousness. Later, he was taken to a hospital by the officers of the detention center and one of his spleens was resected because it was seriously injured.

Yang Mingyin was arrested on Nov. 6, 1996 for murdering a couple. He was deprived of food and sleep and subjected to extreme cold in the interrogation. When he was beaten until he lost consciousness, a police

officer used a pair of red-hot tongs to wake him up. When Yang claimed that he was innocent, a police officer gave him a slap in the face while saying that he believed in his innocence. On another day, a police officer pointed a loaded a pistol toward Yang's face, and shouted that he would shoot him if he did not confess. Then the police officer hit Yang on the head with the pistol, which left a permanent scar.

In the case of Zhao Xinjian, Zhao was suspected of murdering a girl on Aug 7, 1998. As soon as he was brought to a police station, nearly ten police officers began to beat him repeatedly. They struck his forehead against a desk and burned him with lit cigarette butts. He was denied food or water for three days and two nights.

After being suspected of robbery, Chen Jinchang was brought to a police station on May 14, 1995. The police tied Chen Jinchang's hands with a water-soaked rope and kicked him to kneel down. They beat and verbally abused him for seven hours. The hands of Yao Zekun, Chen's codefendant, were tied by a water-soaked rope too. When Yao refused to confess, they beat him repeatedly with an electric baton, knocked his head against the ground, and stamped their feet on his head. He was beaten to unconsciousness and cold water was poured on him to regain consciousness. He also got electric shocks, which left scars all over his body. Yao was deprived of water and given just two pieces of bread over five consecutive days and nights.

In the case of Xu Jingxiang, Xu was detained for robbery on April 1, 1991. He was tied up with a rope, and the police officers beat him repeatedly at his feet with a stick and stamped on his anklebones so badly that he lost consciousness. The anklebone on Xu's right foot is still deformed now. After the torture continued for three consecutive days and nights, Xu finally confessed.

Wang Haijun was detained in October, 1986 for murdering his wife. The police directed Wang's inmate to beat him. The inmate tried to persuade him to confess, but he refused. Then the inmate began to beat him brutally. One day, the inmate severely beat his head with a board for more than one hour.

2. False Confession

In the twenty-two cases that involved torture, the suspects all gave false confessions, and the false confession played a substantial role in leading to these erroneous convictions.

According to Article 95 of the Criminal Procedure Law of People's Republic of China (the "Criminal Procedure Law"), the record of an interrogation shall be shown to the criminal suspect for review. When the criminal suspect acknowledges that the record is free from error, he

shall sign or affix his seal to it. In the Sun Wangang case, one interrogation record in which Sun made a false confession played an important role in his conviction, but later the signature of Sun was found to be forged by one investigator. In the Xu Jingxiang case, the signatures of Xu in more than ten interrogation records were forged by one investigator. It is possible that the investigators in these two cases forgot to ask the defendants to sign them, and then forged the signatures to avoid the trouble of asking the defendants to sign it. Maybe these interrogation records were fabricated by the investigators. But it is also likely that the records were not fabricated, and the defendants refused to sign them because their confessions were not true.

To escape continued tortured, the defendants in these cases would generally confess only to what the interrogators told them explicitly or implicitly.

In the case of Li Jie, He Jun, Li's codefendant, was told by the police that two victims were killed by the murderer with a stone. When a police officer asked him the shape of the stone, he made a wide guess and said that it was round. The police officer beat him brutally. Then he said that it was sharp, but was beaten again. At last when the police officer asked him whether one half of the stone was round and the other half was sharp, he knew the answer the police officer wanted, and said "yes." This time he was not beaten.

In the Chen Jinchang case, the interrogators wrote down a "confession" and read it to Yu Zhekun, the codefendant of Chen. After reading each sentence, they paused and ask Yu whether it was true. If his answer was "yes," the interrogators would not beat him. If his answer was "no," he would be beaten brutally. At first he answered "no" to some of the questions. But later he answered "yes" to whatever question they asked to avoid brutal beatings.

In the Wu Hesheng case, Wu was beaten by the police officers until his statement matched the evidence they collected. They fabricated some of the "confession" and asked Wu to sign it. Wu refused at first, but later he could not bear the torture and signed it.

In the case of Zhao Zuohai, the interrogators told Zhao to repeat what they said. If he did not repeat it, he would be beaten. They wrote down what he repeated and said it was his "confession."

In the She Xianglin case, one interrogator asked She the location of the alleged victim's body. Since She did not commit the crime, he could not tell the location. Then the investigator drew a picture of the crime scene, marked the location of the body in the picture, and forced She to copy the picture.

3. Analysis

Torture is illegal in China. Article 43 of the Criminal Procedure Law states that the use of torture to coerce confession and the gathering of evidence by threats, enticement, deception, or other unlawful means is strictly forbidden. According to Article 247 of the Criminal Law, a police officer who extorts a confession from a criminal suspect or defendant by torture shall be sentenced to a fixed-term imprisonment of not more than three years of criminal detention. If injury, disability, or death is caused to the victim, the officer shall be convicted and given a heavier punishment in accordance with the provisions of Article 234 or 232 of the Criminal Law. Articles 234 and 232 prescribe how to punish those who commit mayhem and murder respectively. Article 61 of the Interpretation on Several Issues Regarding Implementation of the Criminal Procedure Law of the People's Republic of China by the Supreme People's Court stipulates that, upon being verified to have been obtained through torture, inducement, intimidation, or deception, the statement of a defendant should not be used as the basis for conviction. Unfortunately these laws are not enforced strictly.

a. Police and Courts Rely too Heavily on Confessions to Solve Cases

To prevent government officers from relying too heavily on confessions to solve cases, Article 46 of the Criminal Procedure Law advises that credence shall not be readily given to confessions; defendants cannot be found guilty if there is only a confession but no other evidence, and that the defendant may only be found guilty if the evidence is sufficient and reliable even without his confession. But in reality, convictions in China are strongly dependent on confessions, and most of the judges often refuse to find the accused guilty if there is no confession by the defendant. As for the police, torture is an effective interrogation technique and helps to solve the cases quickly. They cannot only extract a confession by torture, but also collect other evidence derived from coerced confession. As Professor Cui Min stated, "using substantial amounts of evidence derived from torture and other illegal means (especially the defendant's confession) remains, as before, a principal basis for proving cases."

b. Courts Fail to Give Credence to False Confessions

A prominent example is the case of Dui Peiwu. Du took his shirt off during the first session of his trial to reveal wounds from being beaten, hung by handcuffed wrists, and being tortured with an electric shock baton. But the judges ignored his claim. In the second session, Du

dramatically stripped off his jacket to show the tattered garments in which he had been tortured. The judges ignored his claim again and forbade him from producing evidence in support of his torture.

In two of the twenty-two cases which involved false confession, the defendants did not withdraw their torture statement. In Zhao Zuohai's case, Zhao was tortured into falsely confessing to a murder, but did not retract his confession in his trial. He did not even appeal his conviction. He told a reporter of a newspaper that he did not recant his confession because he was afraid that if he did so he would be beaten again by the investigators. In the case of Wu Daquan, Wu did not disavow his confession because he believed that disavowal made no sense and the court would find him guilty even if he retracted his confession.

c. Torture is Still Tolerated, Even Condoned by the Authorities

In practice, police officers who torture the defendants generally do so with impunity. Only tortures that have caused wrongful convictions or resulted in death or serious injury to defendants are likely to be investigated by the authorities.[9] Torture cases that are prosecuted always result in very lenient penalties. These torturers often receive only suspended sentences, even when the victims are severely injured or killed. On the other hand, most of the torturers get salary increases, cash bonuses, or promotions because they successfully broke the cases.

d. The Systemic Defects of the Criminal Procedure Law Add to the Prevalence of Torture in Criminal Investigations

First, under the Criminal Procedure Law, suspects do not have the right to remain silent or the privilege against self-incrimination. On the contrary, according to Article 93 of the Criminal Procedure Law, the suspects shall answer the investigators' questions truthfully. Second, the suspects are not allowed to have access to counsel while under interrogation. So they do not have attorneys present during interrogations. Third, the police are not required to make audio and video recordings of interrogations. Finally, an overwhelming majority of defendants waiting for trial are held in detention. According to Article 69 of the Criminal Procedure Law, warrantless detention, which does not require approval from prosecutors or judges, can legally last up to 37 days. This means that the police have time to extract confessions from defendants.

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9. Ma Haijian and Li Bingtao, *Procedural Instrumentalism and Torture for Extracting Statements* [Chengxu gongju zhuyi yu xingxun bigong], JOURNAL OF PUBLIC SECURITY UNIVERSITY, 1997, at 37.

B. False Witness Testimony

In fifteen of the twenty-six cases, witnesses made false testimonies. These testimonies, especially the eyewitness testimonies, played a substantial role in convicting the innocent defendants. In the Pei Shutang case, the alleged victim told the police that Pei, an official of the Wuwei City Bureau of Culture of Gansu Province, raped her in his office. In 1987, Pei was convicted of rape. In 2000, the victim admitted to Pei that she had lied to the police, and it was her husband and Pei's bosses who forced her to make perjured testimony. According to her accounts, the director and deputy director of the Wuwei City Bureau of Culture disliked Pei. They promised that if she reported to the police that Pei had raped her, they would help her and her husband find jobs in their office. In 2011, Pei's conviction was overturned.

The "victim" of the Pei Shutang case obviously made false testimony intentionally, although not involuntarily. However in the three cases below, there is no evidence to show whether these witnesses made false identification intentionally. In the Xu Jibin case, the victim claimed that the rapist looked like her neighbor, Xu, although she did not see the rapist clearly because it was dark at the time. In the Liu Qian case, the victim identified Liu as the rapist, and Ma, an eyewitness, alleged that Liu looked like the rapist. In the Wen Chongjun case, the victim claimed that Wen raped her and forced her to be with him for a whole night. These three convictions were all overturned because the courts that retried them held that there was not sufficient evidence to convict the defendants. It is unknown whether these witnesses perjured themselves intentionally.

In five of the twenty-six cases, the police beat, bullied, and/or offered inducement to witnesses to testify against the defendants. In the Zhao Zuohai case, Zhao's wife claimed that the police locked her up in a factory for more than one month and beat her until she "confessed" that the plastic bags with which the victim's body was wrapped came from their house. In the Li Huawei case, the police forced Li's mother to falsely testify that Li told her how he killed his wife. In the Huang Yaquan case, the police beat six teenagers and told them that they would not be allowed to go home until they gave police the name of the perpetrator. With the hints of the police officers, the teenagers falsely testified that Huang committed the murder. In the Hao Jinan case, the police locked Zhang Qingfang in an office and threatened that he would not be allowed to go home unless he made a statement that Hao was the murderer. In the Yang Yunzhong case, Zhang Jingjiang gave the police a testimony favorable to Yang. The police officers believed that he perjured himself, so they coerced him into making a different statement and then arrested him for perjury. He was sentenced to two years

imprisonment.

C. Problematic Expert Testimony

The problems with expert testimony include not submitting physical evidence to experts for examination, and false expert testimony. Half of the twenty-six cases involved problematic expert testimony.

1. Not Submitting Physical Evidence to Experts for Examination

In the She Xianglin case, a relative of Zhang Zaiyu told the police that the rotting corpse found in a pond on January 20, 1994 was the corpse of Zhang who had been missing for more than two months. The police did not use DNA profiling to identify the victim. She Xianglin was convicted of murdering Zhang in 1998, but released in 2005 because Zhang returned to her village. In the Meng Cunming case, the police collected the semen of the rapist from the cotton-padded mattress of the victim, but they did not ask the expert to examine it. Meng was convicted of rape in 1995, and 12 years later declared to be not guilty because the retrial court found that the evidence was insufficient. Similarly, in Liu Qian case, the police collected the blood from the clothes of the victim who told police that it was the blood of the rapist, but did not submit it for testing. Liu was convicted of rape in 1998, but the conviction was overthrown in 2007 because the court of retrial found that there was not sufficient evidence to prove that he was guilty.

2. False "Scientific" Evidence

In some wrongful conviction cases, the expert examination results were proved to be incorrect later, but there were no evidence showing that they intentionally reached the wrong inclusions. In the Xu Jibin case, the three medical experts from the She county police office concluded that the blood type of the semen collected from the scene and the blood sample of Xu were both type B. Xu was convicted of rape. Fifteen years later, several experts from hospitals found that his blood type is type O. The wrongful conviction then was rectified.

On April 20, 1998, the corpses of Wang Xiaoxiang and Wang Junbo were found in a police car. Two days later, Dui Peiwu, Wang Xiaoxiang' husband, was arrested for shooting them. On August 3, 1998, the police used ten police dogs to find whether the odor of the shoes and socks of Du, dust from the collar of Du, and the paper money from the pocket of Du, matched the odor of the brake pedal and accelerator pedal of the police car. The testing found that forty-one out

of forty-three items matched. Dui Peiwu was then convicted of murder. Two year later, Yang Tianyong was arrested for other cases and the police found in Yang's house a pistol which belonged to Wang Junbo and was used to kill Wang Junbo and Wang Xiaoxiang. Yang confessed that he robbed Wang Junbo of his pistol and killed him and Wang Xiaoxiang with it. Yang was arrested and sentenced to death and Du was released from prison.

In the Sun Wangang case, one important reason leading to the wrongful conviction was that the blood sample was not properly preserved. After testing, Li Zhanglin, the expert, concluded that the type the blood of the murder victim and the blood collected from Sun's trousers, sheet, quilt, and blanket was type AB, while the blood type of Sun was type B. In 1998, Sun was convicted of murder. Later Li Zhanglin admitted that when Sun's trousers, sheet, quilt, and blanket and the bloodstained clothes of victim were sent to his laboratory, they were put together, so it is possible clothes contaminated Sun's belongings. In 2004 Sun was declared by Yunnan Higher People's Court to be not guilty because the evidence was insufficient.

The Chen Shijiang case was the only one of the twenty-six cases involving fabricating trace evidence and delivering it for examination. A woman was killed in her house in 1998. There were some shoeprint impressions on her snow-covered yard. The police officers suspected Chen Shijiang to be the murderer, but they found that Chen did not match the shoeprint impressions of the scene. Then the police officers asked Chen to walk on a cement floor without gypsum powder and a cement floor covered with gypsum powder, and submitted the photographs of these shoeprint impressions to the laboratory of the Ministry of Public Security for examination. They told the experts of the MPS that the shoeprint impressions collected from the cement floor covered with gypsum powder were obtained from the victim's yard covered with snow. The experts concluded that the shoeprint impressions of Chen matched those at the crime scene. The report that the examiners issued was sent to the court. In 2001 Chen was convicted of murder. In 2006 Chen was declared not guilty by Shandong Higher People's Court because the evidence was insufficient.

D. Police Misconduct in Handling Exculpatory Evidence

One important factor leading to false convictions is police misconduct in handling exculpatory evidence, which includes failure to collect exculpatory evidence, ignorance of the importance of exculpatory evidence, intentionally concealing exculpatory evidence, and improperly preserving exculpatory evidence. Of the twenty-six wrongful

convictions, police misconduct was found in twenty-two cases. This police misconduct shows that some police officers were incompetent, and their investigations were questionable, cursory, and rushed.

1. Failure to Collect Exculpatory Evidence That Should Have Been Collected

In some of the erroneous conviction cases, the police refused to collect important and reliable alibi evidence. On the night when Liu Yinhe was killed, Hao Jinan had been playing poker with a coal-miner until 11 p.m. Hao asked the investigators to question the coal-miner for an alibi, but they refused. When the crime for which Xu Jingxiang was convicted was committed in the Henan Province, he was working in Shandong province with two men from his hometown. Xu told the police this alibi, but the police officers refused to investigate it.

In the case of Li Jie, Li Jie had a verifiable alibi as well. When the murder of which he was convicted occurred, Li, Huang Daming, and Huang Maoyuan were in a hospital. Li asked police officers to question the two men about this, but his request was rejected.

In the Huang Yaquan case, Huang Yaquan had an airtight alibi for the night when the victim was killed. He went to Huang Daojun's house that afternoon, helped prepare food and drank with more than ten men until 10 p.m. that evening. He told police officers about this alibi, but they did not investigate it.

In some cases the police did not investigate important leads in addition to an alibi. In March 1992, several masked men broke into Liang Xiuge's house and robbed her of money, a bike, and a green sleeveless woolen vest. Xu Jingxiang was arrested because he had the same kind of vest. He claimed to the investigators several times that he bought this vest from a fair, and that Xu Zuguo could prove it. But they did not question Xu Zuguo.

In the Wen Chongjun case, Wen told the police officers that he fell to the ground and bruised himself on the way to attend the ceremonials of ancestor worship. He asked them to investigate the people who were with him at that time, but they refused. Instead, they insisted that he had received these bruises when he was bitten and scratched by the victim when he raped her.

In the Hao Jinan case, the police found a pair of shoes and a bloodstained shirt in Hao's house. The sole prints of the shoes matched the footprints left at the crime scene and the blood type on the shirt – and the blood type of the victim matched as well. Hao told the police officers that Niu Jinhe and Yang Xiaoguo sold the shoes to him and left the shirt at his house. But the police officers did not question them. In

1998, Hao was convicted of murder. Eight years late, the real murders, Nie and Yang, were arrested by the police.

2. Ignorance of the Importance of Exculpatory Evidence

In the Yang Yunzhong case, the police found a pair of bloodstained shoes belonging to Yang. After a serological test, the police found that the blood on the shoes and the blood of the victim were the same blood type. Yang told the police that one month before the murder he fought with a man, and man's blood was on his shoes. When he fought, Zhang Jinjiang was standing nearby. The police officers questioned Zhang and Zhang told them that the blood was from the man who fought with Yang. However, the police claimed that she made a false statement and forced her to give a different testimony.

In some cases, both police officers and judges did not pay adequate attention to evidence favorable to the defendants. On April 27, 1987, a female corpse was found in Mayang County of the Hunan province. The police suspected that she was Shi Xiaorong, a woman who was missing at that time. Investigators sent the skull of the corpse and Shi's pictures to an expert. The expert told them that some parts of the skull did not match that of Shi. However, both the police and the court did not pay adequate attention to these findings. Teng Xingshan was sentenced to death for murdering Shi. In 1993, Shi reappeared in her hometown.

In Zhao Xinjian case, two eyewitnesses who saw the rapist in the bright moonlight told the police that he had a stout and compact build, was just over one and a half meters tall, and did not look like any man from their village. Zhao, by contrast, was thin, well over one and a half meters tall, and lived in the same village with the eyewitness and the victim. In fact Zhao's house was not far from the two witnesses' houses. If Zhao was the rapist, they could have identified him. Li Weifeng, whose appearance matched the descriptions of the two witnesses, was summoned by the police officers for questioning. His hair and Zhao's hair were collected and sent to the laboratory of Ministry of Public Security for testing. Li ran away after being summoned. According to the result of the test, Li's blood type matched the hair collected at the crime scene. The police and the court did not pay adequate attention to this evidence. Zhao was arrested and convicted of murder. Four months late, Li confessed to the rape after being arrested.

Sun Wangang was charged with killing Chen Xinghui. The police officers collected two buttons and a belt buckle at the crime scene. Testing revealed that one button came from Chen, but the other button and the belt buckle belonged to neither Chen nor Sun. Most likely, they were left by the person who killed Chen. The police officers, however,

did not investigate this important lead.

3. Concealing and Improper Preservation of Exculpatory Evidence

In the case of Meng Cunming, the rape victim told the police that the rapist was about five foot-six, had shoulder-length hair, and spoke Mandarin Chinese fluently. But Meng was only five-foot-three, with short hair, and could not speak Mandarin. The record of the testimony of the victim was not presented to the court. Meng was convicted of rape.

In the Qin Junhu case, the police officer asked Qin to point out the crime scene where the robbery was committed, but he made a misidentification. Qin told the police that he sold the beeper, which was robbed, to Wang, but Wang said that he did not buy it from him. The police did not record the misidentification and Wang's testimony in the case file which was transferred to the court later. The police found a shoe at the crime scene, which was just over twenty-seven centimeters long, but Qin wore twenty-four-centimeter long shoes. Because the shoe had not been properly preserved, the shoe was missing later, and could not be presented to the court.

E. Arguments of Counsel Not Being Accepted by Judges

In twenty of the twenty-six cases, the defendants were represented by counsel retained by them or appointed by the courts. The attorneys in nineteen cases claimed that their clients were not guilty and presented reasonable arguments, but their arguments were not accepted by the courts.

In the Meng Cunming case, Meng's defense attorney questioned several of Meng's colleagues, and they all verified his whereabouts at the time the crime was committed. But the court did not accept that alibi.

In the case of Xu Jibin, three medical experts from the She County police office concluded that Xu's blood matched the semen collected from the crime scene. Wang Zhenrong, Xu's counsel, requested that the court appoint other experts to conduct the test, but his request was rejected. In China, the defendant and his counsel cannot appoint experts to conduct examination. If they think the examination of the expert appointed by the police is problematic, they can only ask the police or the court to appoint other experts. Xu was convicted of rape in 1991, and released in 1999 after serving his sentence. In 2005 Xu asked experts from hospitals to do the blood test and these experts found that his blood type did not match the semen from the scene. The wrongful conviction was then rectified.

Although the attorneys of nineteen cases declared that their clients were innocent, they probably could not produce convincing arguments, even though they were competent and effective. In reality, it was hard for them to meet with their clients, collect evidence, or access the evidence gathered by the prosecutors. Therefore, their abilities to prepare an effective defense were substantially weakened. In September, 2000, the Standing Committee of the National People's Congress sent inspection groups to six province-level administrations (Tianjin, Inner Mongolia, Heilongjiang, Zhejiang, Hubei, and Shanxi) to review the implementation of the Criminal Procedure Law over the past three years. They found during the inspections that torture had reached epidemic proportions and that defense attorneys encountered a great deal of difficulty in fulfilling their professional duties.

In practice, lawyers are usually required to obtain approval from police to meet with the suspects, and in many cases, especially during the early stage of investigation, they are denied access to suspects. Even if they are granted such permission, so many restrictions are imposed on the substance of the meetings that they are often rendered meaningless. For example, they are sometimes permitted to meet with their clients only once, and the meeting can last for no more than half an hour. If the meeting occurs at a certain stage of the investigation, the police officers who investigate the case will be present at the meeting and monitor the meeting, which makes the suspects reluctant to discuss the case with their attorney. Generally speaking, it will become less difficult for the defense attorneys to meet with their clients when the police have finished their investigation.

According to Articles 36 and 150 of the Criminal Procedure Law, defense attorneys have no access to any evidence collected by the police during the investigation stage; no access to the physical evidence, documentary evidence, witness testimony, defendant's statement, and crime-scene records. And while they do have access to judicial documents after the prosecutor receives the case from the police to review for prosecution, defense attorneys do not have access to any evidence except copies of "major evidence" after the defendants are indicted by the prosecutors. In sum, defense attorneys' access to evidence collected by the police is excessively restricted.

Article 37 of the Criminal Procedure Law stipulates that defense attorneys cannot collect evidence until the police have finished their investigation and submitted the cases to the prosecutors. In reality, as the Chinese government does not provide witnesses with necessary resources and guarantees of personal safety, defense attorneys have difficulties in calling witnesses to the stand to testify. Even worse, the abuse of Article 306 of the Criminal Procedure Law greatly discourages

defense attorneys from questioning witnesses. Article 306 of the Criminal Procedure Law provides that defense attorneys shall be sentenced to a fixed-term imprisonment of not more than seven years if they coerce or induce witnesses to commit perjury. In practice, some defense attorneys are harassed, intimidated, and even arrested or prosecuted by the police or the prosecutors simply because the witnesses changed their testimony after they met with defense attorneys, thus arousing the suspicion of the police or the prosecutors that defense attorneys had suborned perjury. Sida Liu and Terence Halliday estimated that hundreds of defense lawyers had been prosecuted under Article 306. Although the majority of lawyers prosecuted have been acquitted, the long, demeaning process of investigation is in itself a severe punishment. Liu and Halliday stated that this was why the vast majority of Chinese lawyers do not collect their own evidence in criminal cases.

The courts seldom subpoena witnesses. Fewer than 5% of witnesses in criminal cases appear before the courts. After being read aloud before the courts, the statements of witnesses are used as the basis for decisions. It deprives the defense attorneys of the chance to confront and cross-examine adverse witnesses, thus undermining their ability to represent their clients.

A large percent of defendants in China are too poor to afford an attorney. According to Article 34 of the Criminal Procedure Law, only those who are juveniles, blind, deaf, mute, or face the death penalty have the right to be appointed free counsel by the courts. The not surprising result is that in more than 70% of criminal cases in China, the defendants do not have counsel.

F. Extra-Judicial Factors

1. The Undue Pressure to Solve Cases

The huge pressure on police officers from their leaders to crack highly publicized crimes quickly is another factor causing erroneous convictions. The police leaders often set strict investigation deadlines in major cases, and some investigators have to extort false confessions through torture and even fabricate evidence to meet the deadlines. The salaries and promotions of police officers are tied partly to the case-breaking rate, which also has contributed to wrongful convictions.

In November 2004, the Ministry of Public Security required that local police should solve all homicide cases. Since then, the funds that local police receive from the Ministry of Public Security are in part linked to the breaking rate of homicide cases. This has produced mixed results. In

2005, Chinese police cracked 87.2% of murder cases, which represented a 9% increase over 2003. However, in 2009 in the Henan province, where the rate of solved homicide cases reached 97.55% for that year (and ranked number one in China for the past six years), the police of the Weishi County arrested an innocent man, Liu Weizhong, for murder. Liu was detained on December 24, 2009, and more than 20 days later he was declared to be the murderer, but released because he was insane. In May 2010, the director and the deputy director of the Weishi County police were dismissed for intentionally implicating Liu in the murder.

2. Overwhelming Stress of Cooperation Between the Police, Prosecutors, and Courts

According to Article 7 of the Criminal Procedure Law, the police, prosecutors, and courts should coordinate with one another to ensure the correct and effective enforcement of law. In reality, the police, prosecutors, and courts work together as a team, rather than in a system with checks and balances, in the fight against crime. Judges sometimes join hands with police and prosecutors in making the case against the suspects, acting more like prosecutors than neutral and impartial adjudicators in trial. It is not surprising that the defendants and their lawyers are marginalized within the criminal justice system, and prosecutors almost never lose cases brought to trial. In 2009, 997,872 suspects were tried in China and 996,666 were found guilty, with a conviction rate of over 99.88%. Even when the evidence is insufficient, the court sometimes is reluctant to acquit a defendant of his charge. In the Zhao Xinjian case, although the judges of the Bozhou City Intermediate People's Court in Anhui Province were clearly aware that there was insufficient evidence to prove Zhao's guilt, they still found him guilty, but imposed a lenient sentence. A judge of that court stated that the judges convicted Zhao because if he had been acquitted, the police and prosecutors would have to assume responsibility for it. It is worth noting that courts have a lower status in the hierarchy of government departments than the police. This has also contributed to the reluctance of courts to acquit defendants.

3. The Intervention of the Politics and Law Committee

The Politics and Law Committee is a functional branch of the Chinese Communist Party (CCP) Committee at all levels. Its responsibilities include implementing the Chinese Communist Party's policies in legal affairs, nominating judges and prosecutors, solving disputes among police, prosecutors, and court, and reviewing sensitive

or important criminal cases. The police, prosecutors, and court have the obligation to report their work to the Politics and Law Committee, especially when they have divided opinions on sensitive or important criminal cases (for example, when the court believes that a defendant should be acquitted for insufficient evidence, while the police or the prosecutors believe that the evidence is sufficient and insists that the defendant be convicted). In some extreme cases, the Politics and Law Committee will preside over a "joint office meeting" with the head of the police, the chief prosecutor, and the president of the court to make joint decisions. If the case is not among the most important ones, but needs to be coordinated by the Politics and Law Committee, the deputy head of the police, the vice chief prosecutor, and the vice president of the court will attend the meeting. The police, prosecutors, and court should follow the decisions of the meeting. Nearly half of the heads of the thirty-two provincial Politics and Law Committees in China concurrently serve as the director of the provincial police department. Therefore, to some extent, the decision of the Politics and Law Committees is the same as that of the head of the police. All of these not only undermine judicial independence, but also may lead to wrongful convictions.

In the Li Jie case, the Politics and Law Committee of Yibin City demanded that the court convict all the defendants in this high profile case. Zhang Guozhen, the defense attorney for the defendant Huang Guang, told a reporter that she and other defense attorneys on the case wanted to plead that their clients were not guilty, but the committee criticized them for it and ordered them not to do so. They had to follow the order.

In the Li Huawei case, according to the statement of Ma Sheng, Li's lawyer, the Yingkou City Intermediate People's Court was not sure whether Li was the real perpetrator, so the Politics and Law Committee of Yingkou City called a conference of the head of police, the chief prosecutor, and the president of court and concluded at the meeting that Li was guilty.

She Xianglin was convicted of murdering his wife and sentenced to the death penalty by the Jingzhou City Intermediate People's Court in 1994. He appealed and the Hubei Province Higher People's Court rescinded the conviction and remanded the case to the Jinzhou City Intermediate People's Court for retrial. At the same time the Hubei Province Higher People's Court listed five reasonable doubts about the conviction. In October 1997, the Politics and Law Committee of Jingmen City called a meeting of the president of the Jingmen City Intermediate People's Court and the chief prosecutor of the People's Procuratorate of Jingmen City. Considering that there were still three

reasonable doubts left and the Hubei Province Higher People's Court would overthrow the conviction again if She was sentenced to death penalty a second time, the Politics and Law Committee of Jingmen City decided that She would be tried by the Jingshan County Primary People's Court and sentenced to 15 years in prison to avoid the review by the Hebei Province Higher People's Court. In China, if a defendant is likely to be sentenced to the death penalty or life sentence, the case should be tried at an intermediate people's court and can be appealed to a higher people's court. Otherwise, the case will be tried at a primary people's court and can be appealed to an intermediate people's court, but the judgment of the latter is final and cannot be appealed to a higher people's court. She was sentenced to 15 years imprisonment by the Jingshan County Primary People's Court. She appealed to the Jingmen City Intermediate People's Court, but the appeal was rejected. Then the conviction became final, and She was sent to prison.

In the Zhao Zuohai case, Zhao was arrested for a murder in 1999, but was not indicted until 2002 because the prosecutors thought that there was insufficient evidence to prove his guilt. Then the Politics and Law Committee of Shangqiu City called a meeting of the heads of the police, the prosecutor, and the court of Shangqiu City; it was decided at the meeting that Zhao should be indicted and convicted.

4. The Notion of "Sentencing Lenient Punishment when the Evidence is Insufficient"

According to Article 162 of the Criminal Procedure Law, if the evidence is insufficient, the court should declare the defendant not guilty. But in some wrongful convictions, when the evidence is insufficient, the courts chose to declare the defendants guilty but give them lenient punishment.

She Xianglin was convicted of murdering his wife and sentenced to 15 years imprisonment by Intermediate People's Court of the Jingmen City in 1998, but was released in 2005 because the alleged victim returned to her hometown alive. The president of the Jingmen Intermediate People's Court told the media that this wrongful conviction case taught the judges of the court a lesson. He said that in the past when there was some evidence, but evidence was not sufficient to prove the charge, the judges sometimes would convict the defendant lest the real perpetrator probably be set free.

Sun Wangang was convicted of murdering his girlfriend and sentenced to death with reprieve by the Yunnan Province Higher People's Court in 1998, and was released in 2004 by the same court for lacking sufficient evidence. Liang Zian, the judge of the Yunnan

Province Higher People's Court who overthrew the conviction, told the host on a talk show on China Central Television on April 14, 2004 that if he was the judge who tried this case six years ago, he would have convicted Sun because at that time the popular idea was that when there was some evidence but not sufficient, the court could convict the defendant but give a relatively lighter punishment. He said that if the defendant was not the real perpetrator, he could present his petition and the police could dig up more evidence.

There is some evidence showing that Li Huawei's conviction was based on insufficient evidence. Ma Changsheng, the defense attorney of Li Huawei, asked the vice president of the Yingkou City Intermediate People's Court after Li was sentenced to death with reprieve on December 4, 1989, why the court did not sentence Li to death since they found him guilty of murder. The vice president told Ma that the reason was that there were still some issues to be clarified. Later the real perpetrator was arrested, and Li was released from prison. A leader of the court who asserted that Li should be convicted of murder in 1989 was in charge of rectifying the wrongful conviction. He claimed that when Li was wrongfully convicted, judges did not practice the idea of "acquitting the defendant if there is insufficient evidence."

Zhao Zuohai was convicted of murder and sentenced to death with reprieve by the Shangqiu City Intermediate People's Court in 2002. Eight years later, the alleged victim turned up alive and Zhao was released from the prison. In this case, Yang Songting, a judge of the court, deduced that the reason why Zhao was sentenced to death with reprieve must be that there were some issues to be clarified, because if there was sufficient evidence to prove that he killed the victim and behead him, he should have been sentenced to death according to the policy at that time.

Dui Peiwu was convicted of murdering two police officers (one of them was the deputy director of the Shilin County Public Security Bureau) with a handgun, but was sentenced to death with reprieve in 1999 by the Yunnan Province Higher People's Court because there were several issues to be clarified. Yang Mingying was convicted of robbing and murdering a couple cruelly, but only sentenced to 16 years imprisonment in 2000; obviously he received a lenient punishment because the judges did not firmly believe that he was guilty.

5. Undue Pressure from the Relatives of Victims

In 1998, a 17-year-old girl was raped and killed in a village of Bozhou City, Anhui province. Zhao Xinjian became the main suspect. The Bozhou City Public Security Bureau asked the People's

Procuratorate of Bozhou City to approve its request to arrest Zhao, but was refused because the prosecutors thought that the evidence was insufficient. The victim's grandmother truly believed that Zhao was the real perpetrator. With the support of the locals from her village, she twice went to Beijing and petitioned to the Anhui provincial government, the Public Security Bureau of Anhui Province, the People's procuratorate of Anhui Province, and the Anhui Province Higher People's Court several times, requesting that Zhao be arrested and convicted. This brought great pressure to the law enforcement agencies of the Bozhou City. Zhao was arrested on January 5, 2000. After he was indicted, the victim's grandmother stood in the doorway of the Bozhou City Intermediate People's Court, holding a poster, claiming that if Zhao was not sentenced to death penalty, she would hang herself right in the court. There were many factors that have resulted in the wrongful conviction, and the pressure on the law enforcement agencies from the victim's grandmother probably was one of them.

IV. POLICY RECOMMENDATION FOR PREVENTING WRONGFUL CONVICTIONS

After having researched and analyzed what went wrong in the twenty-six wrongful conviction cases, I intend to offer suggestions on what could be done to prevent similar miscarriages of justice in the future. In fact, in the last few years, China has adopted certain methods to prevent wrongful convictions.

A. Recording Interrogations

To prevent police officers from torturing suspects, some police, the public security authorities of Sichuan Province, Hubei Province, and Zhengzhou City, for example, have required that interrogations in major cases (such as murder), be video recorded since 2005.

B. Excluding Coerced Confessions

Responding to the Zhao Zuohai case, the Supreme Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice jointly issued the Regulations on the Exclusion of Illegally Obtained Evidence in Criminal Cases on June 24, 2010 which stipulates that any confessions obtained through torture shall be exclude at trial.

C. Reform in Death Penalty System

The Criminal Procedure Law promulgated in 1997 includes sixty-eight capital offenses. Its eighth amendment, passed on February 25, 2011, removed thirteen offences, all of which are nonviolent, economic crimes, from the list of crimes punishable by death. It also stipulates that the death penalty should not be imposed on people who are seventy-five or older at the time of their trials, unless they are convicted of crimes involving "exceptional cruelty." These rules would probably help reduce wrongful convictions by decreasing the number of death sentences handed down.

The Supreme Court issued a judicial interpretation on August 28, 2006 which stipulates that as of September 25, 2006, all the second-instance trials of death sentence cases shall be heard in open court rather than by way of documentary reviews. This has also helped reduce the possibilities of wrongful convictions in capital offence cases.

While Article 199 of the Criminal Procedure Law requires the Supreme Court to review all death sentences, the Supreme Court had delegated this power in cases involving certain charges, for example, rape and murder, to provincial higher courts. To decrease the number of death penalties and prevent wrongful convictions, the Standing Committee of National People's Congress passed a resolution on October 31, 2007 to make it mandatory that all death sentences be reviewed and ratified by the Supreme Court. This is an important step in preventing wrongful executions.

Obviously, all the above reforms have helped prevent wrongful convictions, but China still has a long way to go in preventing erroneous convictions. Below are some proposed solutions:

> (1) Revise the Criminal Procedure Law to give suspects the right to remain silent, the privilege against self-incrimination, and the right to have access to lawyers during interrogations. The interrogations of suspects should be video-recorded. These measures would be a huge step forward in decreasing the number of tortured and coerced confession.
>
> (2) Establish an effective mechanism to ensure that allegations of torture are investigated promptly, vigorously, effectively, and impartially. Also, coerced confessions and evidence derived from coerced confessions should be barred from criminal trials.
>
> (3) Allocation of more funds to be used in investigations and provide training to police officers to enhance their professionalism. Some local police do not have resources to investigate criminal cases. Some police officers receive poor training, lack professionalism, and rely heavily on confessions to solve cases.
>
> (4) Stipulate that witnesses should be called to trial and subjected to

cross-examination. This measure will help expose false testimony.

(5) Revise the Criminal Procedure Law to allow more involvement by defense attorneys in the criminal procedure, which would help improve innocent suspects' chances of exoneration.

(6) Incorporation of Article 8 of the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, into the Criminal Procedure Law. This article stipulates that all arrested or detained persons shall be provided with adequate opportunities, time, and facilities to communicate and consult with a lawyer, without delay, interception, or censorship, and in full confidentiality; further, such consultations may be within sight, but not within the hearing, of law enforcement officials.

(7) Implement an adequate and fair discovery system, which allows defense attorneys to access all officially collected information on the cases before trial, and prohibits authorities from deliberately concealing official information from defense attorneys.

(8) Ensure that all defense attorneys be able to perform their professional functions without intimidation, hindrance, harassment, improper interference, prosecution, or punishment.

(9) Strengthen judicial independence. The judges should be free from interference from other government branches, the Politics and Law Committee, or their leaders.

(10) Educate judges on the principle of "acquitting the defendant if there is insufficient evidence," because when there is insufficient evidence, it is better to free the real perpetrator than to convict the innocent people.

V. CONCLUSION

Chinese law stipulates that judges should not use coerced confessions as the basis for convictions, but in practice judges just ignore the rule. Similarly, according to Article 96 of the Criminal Procedure Law, defense attorneys can meet with their clients in custody, but in reality they are usually required to obtain approval from the police to be able to meet with them, and the police often refuse their requests. The gap between the "law in the books" and the "law in action" in the Chinese criminal justice system is so wide that the most important reform is to establish an effective mechanism to ensure that the laws and regulations already on the books be enforced strictly. The strength of the law and regulations can only be realized through implementation and enforcement of these regulations, and they will not have significant impact in practice unless the courts give life to them.

WRONGFUL CONVICTIONS AND RECENT CRIMINAL JUSTICE REFORM IN JAPAN

*Kazuko Ito**†

I. INTRODUCTION

"The Japanese criminal justice system is rather hopeless."[1] This famous diagnosis given by the Japanese criminal law scholar Ruichi Hirano in 1985 provoked a huge sensation among the judiciary because his remark revealed the truth of the Japanese criminal justice system. Even after this remark, the Japanese criminal justice system has been judged as "hopeless" in the context of defendants' human rights and the principle of the "presumption of innocence." The Japanese jury system was suspended before World War II and was never revived. Bureaucracy inhibits the Japanese judiciary so that it keeps courts from taking the role of the "justice for people."

In response to several criticisms toward the Japanese judicial system, the Japanese government commenced a comprehensive judicial reform in 2000.[2] As one of the reform projects, a bill was enacted in 2004 to introduce a quasi-jury system (the so-called *Saiban-in* system) and to

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1. Ryuichi Hirano, *Genkö keijisoshö no shindan* [*Diagnosis of Current Criminal Procedure*], *in* DANDŌ SHIGEMITSU HAKUSHI KOKI SHUKUGA RONBUNSHŪ [COLLECTION OF WORKS TO COMMEMORATE THE SEVENTIETH BIRTHDAY OF DR. SHIGEMITSU DANDO] 407, 407 (Yasuhara Hiraba et al. eds., 1985), *translated in* 22 LAW IN JAPAN 129, 129 (1989).

2. Judge Sabrina McKenna described the Judicial Reform Council as a council created in mid-1999 comprised of law professors, professional attorneys, university presidents, an author, and the Secretary General of the Housewives Association. The mandate of the JRC is "to clarify the appropriate role of the justice system in the twenty-first century, and to investigate and consider fundamental measures necessarily related to the realization of a justice system that is more user-friendly to citizens, allow for participation of citizens in the justice system, considers, improves and strengthens ideals for the legal profession, as well as related reforms and fundamental requirements of the justice system." Sabrina McKenna, *Proposal for Judicial Reform in Japan: An Overview*, 2 ASIAN-PAC. L. & POL'Y J. 20, 132-133 (2001).

revise the Code of Criminal Procedure.[3]

This new system has come into force in 2009. This is the first time since the end of the World War II that Japan has introduced a system of citizens' participation in the court system.

However, although this system includes several progressive aspects, we cannot achieve comprehensive criminal justice reform through the reform process in terms of human rights and the prevention of wrongful convictions of innocent people. This study describes the reality and causes of wrongful conviction as well as the recent criminal justice reform process in Japan. It also argues for the next agenda to prevent wrongful convictions and to incorporate international human rights standards into the Japanese system.

II. OVERVIEW OF THE JAPANESE JUSTICE SYSTEM

A. History

In 1890, Japan set forth its first Code of Criminal Procedure, based on Germany's traditional civil law system.[4] This system didn't employ an adversary system, nor did it incorporate due process or human rights protections. However, in the wake of the elevated democratic movement during the Taishou Era, the Japanese government introduced a jury system in 1928.[5]

Although only men could be jurors, and jury verdicts had only an advisory character, the introduction of the jury system was epoch-making for the modernization of the Japanese criminal justice system. Japan's judiciary employed this jury system until 1943 when the government decided to suspend it.[6] Due to the number of men mobilized during World War II, the government decided that there was no capacity to continue the jury system.

After Japan's defeat in World War II, Japan established the New Constitution, which articulated human dignity, democracy, human rights, and the independence of the judiciary as main principles.[7]

As for criminal procedure, the former Code of Criminal Procedure was modified to incorporate the principle of due process, a fundamental bill of rights, and an adversary model of procedure, all of which were

3. KEISOHŌ [C. CRIM. PRO.] 2004 (Japan).

4. KEISOHŌ [C. CRIM. PRO.] 1890 (Japan).

5. BAISHINHŌ [JURY SYSTEM ACT] 1923 (Japan); Baishinho no Teishi ni Kansuru Horitsu [An Act to Suspend the Jury Act] 1943 (Japan).

6. While some critiques argue this jury system did not establish in Japanese Society, other critiques emphasize its positive aspect.

7. *See* KENPŌ [CONSTITUTION] 1946 (Japan).

influenced by common law.[8]

The new justice system started as a safeguard for human rights and inspired significant public hope. Tadahiko Mibuchi, the first president of the Supreme Court, articulated the following in his inauguration:

> "Under the democratic Constitution, the judiciary must be a thoroughly honest tool for the people. The Constitution demands judges to deny completely their bureaucratic status that they had under the old Constitution."[9]

However, in practice Japan's judicial system ended up far from its aspiration of being the "court for the people" and has found itself deeply hampered by the malady of bureaucracy. The reasons may be analyzed as follows.

The jury system did not revive after WWII, and since that time, all judicial decisions have been made by professional judges without any citizen participation until the *Saiban-in* system was introduced in 2009.

At the same time, most Japanese judges have been appointed from a pool of young legal trainees who had passed the national bar examination only around two years before their appointment. Once such young elites are appointed as judges, they are trained and groomed as professional judges within a career system operated by the Supreme Court, without any social experience and little attachment to society. Elites kept apart from society for the length of their careers can hardly understand the real world, ordinary people's lives, or common sense.

In addition, the Judge-Appointment system has sometimes been managed arbitrarily. In the 1970s, for example, the Supreme Court started rejecting the appointments of many judicial candidates and discriminating against several judges in terms of promotion and compensation because of membership in a lawyer's association that was promoting judicial activism.[10] Such control measures by the Supreme Court had a chilling effect on the entire judiciary.[11]

As a result, the Japanese judiciary lost its initial aspirational vision and became bureaucratic. For example, the percentage of plaintiff victories in lawsuits against the government—which used to be approximately 10% in the late 1960s—dropped to 2%-3% in the period

8. KEISOHŌ [C. CRIM. PRO.] 1948 (Japan).

9. Tadahiko Mibuchi, Inauguration Speech (Aug. 4, 1947).

10. The Youth Lawyer's Association was established by leading Japanese scholars and young lawyers in 1954, and has been promoting judicial activism ever since. In 1971, the Supreme Court started rejecting the appointments of judge candidates who had membership in this association.

11. In addition, the Supreme Court rejected the re-appointment of Judge Yasuaki Miyamoto because of his membership of Youth Lawyer's Association in 1971. In 1994, the Supreme Court rejected the appointment of a legal trainee Fuyuki Kamisaka because of his background such as plaintiff of Constitutional Litigation. In 1998 Supreme Court affirmed the inner punishment toward Judge Kazushi Teranishi because of his participation in a civic meeting against Wire-Tapping Act.

from 1980 to 2000.[12] In criminal justice, the acquittal rate has been decreasing and has become less than 1% in recent times.[13]

B. A Serious Problem in Criminal Justice

After WWII, the Code of Criminal Procedure was drastically revised in 1949 in accordance with the 1946 Constitution. Article 1 of the Code of Criminal Procedure recognized the purpose of criminal justice as both finding truth and guaranteeing human rights. On the basis of the American model, the 1949 Code incorporated the adversary system, due process, and human rights such as the right to remain silence, the right to defense, the right to counsel, and the principle of a presumption of innocence.[14]

According to the Court Act enacted after WWII, the tasks of professional judges include presiding, fact-finding, sentencing, and applying and interpreting statutes in criminal proceedings. According to the law, three judges preside in felony cases; one judge presides in misdemeanor cases.[15]

In spite of the progressive reforms of the Code of Criminal Procedure, the Japanese criminal justice system has been evaluated as "hopeless."

1. Fact-Finding

In Japan, without any citizen participation in trial procedures, only judges had the power to decide guilt until the *Saiban-in* system was introduced in 2009. Although the Japanese Code of Criminal Procedure prescribes the principle of a presumption of innocence,[16] it is very formalistic with little effect in practice. In Japan, astonishingly, the conviction rate is more than 99.0 percent.[17]

Judges tend to rely on the prosecutor's argument. One arguable explanation for this tendency is the frequent exchange of personnel between judges' and prosecutors' offices. Judges sometimes become prosecutors or officers of the Ministry of Justice. We also sometimes find that the conviction judgment runs contrary to common sense. Critics argue that it is natural for judges to trust people within their same bureaucratic circle, rather than the defendants who are usually living in a

12. The Resolution for Judicial Reform, JFBA 39th General Assembly (May 25, 1990).

13. *Id*.

14. KEISOHŌ [C. CRIM. PRO.] 1948 (Japan).

15. SAIBANSHO HŌ [COURTS ACT]1947, art. 26 (Japan).

16. KEISOHŌ [C. CRIM. PRO.] 1948, art. 336 (Japan).

17. Japan Federation of Bar Associations, *Proposal for the Criminal Justice Meeting People's Expectation*, at 4 (July 25, 2000).

completely different society from elites.[18]

2. Structural Problems

Hirano said, "In Western countries, the court is the place where guilty or not guilty is judged, whereas in Japan, the court is the place where guilty is confirmed."[19]

According to Hirano, the root of the problem stems from the focus of criminal justice being on the investigation and interrogation of defendants instead of on trials. This has led to the preeminence of defendant statements as well as an obsession with self-incrimination and long custodial interrogations.

a. Pretrial Interrogation and Custodial Interrogation

If a person is arrested in Japan, the person can usually be detained twenty-three days under the control of police authority.[20] Within these twenty-three days, suspects have been obliged to face interrogation in a confined, locked room with neither electronic monitoring systems nor any Miranda warnings. The attorney is not permitted to attend the interrogation. Continuing an interrogation for more than eight hours is a common practice.

The former Japanese Supreme Court Justice, attorney Masao Ouno, described his experience as a defense attorney of a Tokyo Art University professor in a 1981 case:

> During 16 days from arrest to the end of interrogation, I could meet the professor, my client, only 7 times, each 20–30 minutes, totaling 3 hour 15 minutes. On the contrary, the prosecuting attorney interrogated him all day long every day. The sum of the interrogation totaled 161 hours and 17 minutes, averaging 8 hours and 50 minutes per day. Interrogation ended later than 10pm on 9 days.[21]

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18. Kaku Imamura, ENZAI TO SAIBAN [WRONGFUL CONVICTION AND COURT PROCEDURE] (2012, Kodan sya); Toshiki Odanaka, ENZAI HA KOUSITE TSUKURARERU [THE CAUSE OF WRONGFUL CONVICTION] (1993, Kodan sya); Kenzo Akiyama, SAIBANKAN HA NAZE AYAMARUNOKA [Why Judges Make Wrong Decisions] (2002, Iwanami Shoten).

19. Hirano, *supra* note 1.

20. In accordance with article 60 of the Code of Criminal Procedure, police can restrain suspects within three days by writ of arrest. Judges can issue the writ of pre-trial detention which empowers detention of suspects within ten days upon a prosecutor's request when the danger of escape or manufacture of the evidence can be recognized. This detention can be extended no more than ten days. However, the percentage of the dismissal of writs made by judges has been less than one percent. In 1996, the dismissal of the writ of arrest was 0.02%, and the dismissal of the writ of pretrial detention was 0.31%. *See* Tsuyoshi Takagi, Report for the criminal justice meeting people's expectation, JRC 25 Sess. (July 11, 2000).

21. Ouno Masao & Yasuo Watanabe, *Shine and Shadow of Criminal Justice* (1989) (Yuhikaku).

Such practice undermines a suspect's right to be silent and leads to misconduct and torture, and ultimately to coerced and false confessions.

Confessing is the only way for suspects to escape from prolonged detention and endless interrogations. It is as if suspects themselves are taken hostage by police, and the condition of release offered by police is to "tell the truth," which really means, "confess, no matter whether true or false." Thus, the Japanese criminal justice system is sometimes described as "hostage-taking justice."

b. Misconduct

Police interrogations sometimes entail serious misconduct to force self-incrimination. In many Japanese wrongful conviction cases, exonerated innocent people claimed police misconduct such as verbal violence, intimidation, psychological pressure, coercion, and deceit.[22] Such circumstances naturally force a significant number of false confessions.[23]

c. The Preeminence of Confessional Statements

The Japanese constitution and law provide safeguards to prevent wrongful conviction based on confession.

Article 319 of the Code of Criminal Procedure prescribes the following:

> (1) Confession under compulsion, torture, threat, after unduly prolonged detention or when there is doubt about it being voluntary may not be admitted as evidence.
>
> (2) The accused shall not be convicted when the confession, whether it was made in open court or not, is the only piece of incriminating evidence.[24]

Article 38 of the Japanese Constitution states the same principle.[25] In practice, however, self-incriminating statements made under the foregoing practices have become the main source of evidence for

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22. For instance, the author defended 5 defendants in Chofu Station case. The Supreme Court found indictment was illegal (September 18, 1997), and the Tokyo appeal court found all defendants not guilty (December 12, 2001). All the defendants who once confessed complained police coercion and deceit (5 defendants submitted statements with regard to the interrogations).

23. As for 4 innocent-death cases which the author will discuss later, the period from arrest to confession was 113 days in Saitagawa case, 5 days in Menda case, 5 days in Matsuyama case, and 3 days in Shimada case. In all these cases, defendants were detained in the supplemental detention center where long interrogations were conducted until after midnight and confessions were eventually obtained.

24. KEISOHŌ [C. CRIM. PRO.] 1948, art. 319 (Japan).

25. KENPŌ [CONSTITUTION] 1946, art. 38 (Japan).

convictions in Japan.[26]

As common Japanese practice, until recently, prosecutors submitted an enormous number of statements. Despite the principles prescribed in Article 38 of the Constitution and Article 319 of the CCP, most judges rely excessively on confessions as proof of guilt. Although substantial defendants contend at their trial that their confessions were forced under pressure, intimidation, or deceit, judges find the confessional statement admissible and reliable in most cases.

The preeminence of confessional statement seems to be a pervasive epidemic within the Japanese judiciary. Thus, statements made in police interrogations control the entire criminal justice system, and, as Hirano said, trials become "the place where guilty is confirmed" based on police interrogations.[27]

d. Lack of Disclosure to Defendant

Furthermore, until the revision of the Code of Criminal Procedure in 2004, the Code had no provision that requires the prosecution to disclose evidence, including exculpatory evidence and the defense had no general right to ask the prosecutors for disclosure.[28]

In 1969, the Japanese Supreme Court recognized that courts can order prosecutors to disclose particular evidence to defendants as part of their power of presiding.[29] However, in accordance with this ruling, courts were able to make such orders only under the following conditions:

1) disclosure is especially important for the right of defense and,

2) there is no danger of either destruction of evidence or a threat toward witnesses and,

3) disclosure can be recognized as adequate.

Usually, judges were unlikely to find all of abovementioned conditions fulfilled. In addition, courts recognized that the decision whether a judge should order disclosure or not belongs to the wide discretion of judges.

Under such conditions, Japanese defense attorneys have been having a hard time obtaining affirmative evidence seized by police and in the

26. The United Nations has observed this phenomena and recommended measures be taken to avoid it. U.N. HUMAN RIGHTS COMMITTEE, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Concluding Observations of the Human Rights Committee: Japan, U.N. Doc. CCPR/C/JPN/CO/5 (Dec. 18, 2008).

27. Hirano, *supra* note 1.

28. U.N. HUMAN RIGHTS COMMITTEE, Concluding Observations of Human Rights Committee: Japan, U.N. Doc. CCPR/C/79/Add. 102 (Nov. 19, 1998).

29. Saiko Saibansho [Sup. Ct. 2d Petty Bench] Apr. 25, 1969, (Japan).

control of prosecutors. The history of Japanese wrongful conviction cases clearly shows that one of the main reasons for wrongful convictions was the concealment of exculpatory evidence by prosecuting attorneys. Famous wrongful conviction cases such as *Matsukawa, Oume, Matsuyama, Saitagawa,* and the *Tokushima radio-shopkeeper* cases showed that disclosure of evidence possessed by the prosecutor is a key element in the reversal of wrongful convictions and findings of innocence.[30]

The UN Human Rights Committee accurately described the foregoing Japanese practices and expressed deep concern of the violations of the International Covenant on Civil and Political Rights (ICCPR) in their Concluding Observations in its Sixty-fourth session:[31]

> 21. The committee is deeply concerned that the guarantees contained in Articles 9, 10 and 14 are not fully complied with in pre-trial detention in that pre-trial detention may continue for as long as 23 days under police control and is not promptly and effectively brought under judicial control; the suspect is not entitled to bail during the 23-days period; there are no rules regulating the time and length of interrogation; there is no State-appointed counsel to advise and assist the suspect in custody; there are serious restrictions on access to defense counsel under Article 39(3) of the Code of Criminal Procedure; and the interrogation does not take place in the presence of the counsel engaged by the suspect.
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> 23. The Committee is concerned that the substitute prison system (Daiyo Kangoku), though subject to a branch of the police which does not deal with investigation, is not under the control of the separate authority. This may increase the chances of abuse of the rights of detainees under article 9 and 14 of the Covenant. The Committee reiterates its recommendation, made after consideration of the third periodic report, that the substitute prison system should be made compatible with all requirements of the Covenant. . . .
>
> 25. The committee is deeply concerned about the fact that a large number of the convictions on criminal trials are based on confessions. In order to exclude the possibility that confessions are extracted under duress, the Committee strongly recommends that the interrogation of the suspect in police custody or substitute prison be strictly monitored, and recorded by electronic means.
>
> 26. The Committee is concerned that under the criminal law, there is no

30. Especially, in *Matsukawa* (1949), the prosecuting attorney was concealing a memo written by a third party which showed the defendants' alibi clearly (this famous memo was called *'Suwa memo'*) and this memo turned out to be a key element for the Supreme Court to reverse the convictions and death sentences and acquit all 20 defendants (Sept. 12, 1963).

31. U.N. HUMAN RIGHTS COMMITTEE, Concluding Observations of Human Rights Committee: Japan, U.N. Doc. CCPR/C/79/Add. 102 (Nov. 19, 1998).

> obligation on the prosecution to disclose evidence it may have gathered in the course of the investigation other than that which it intends to produce at the trial, and that the defense has no general right to ask for disclosure of that material at any stage of the proceedings. The Committee recommends that, in accordance with the guarantees provided for in Article 14, paragraph 3, of the Covenant, the State party ensure that its law and practice enable the defense to have access to all relevant material so as not to hamper the right of defense.

In 2008, the Human Rights Committee reiterated its grave concern on criminal justice in Japan in its Ninety-fourth session:[32]

> The Committee notes with concern the insufficient limitations on the duration of interrogations of suspects contained in internal police regulations, the exclusion of counsel from interrogations on the assumption that such presence would diminish the function of the interrogation to persuade the suspect to disclose the truth, and the sporadic and selective use of electronic surveillance methods during interrogations, frequently limited to recording the confession by the suspect. It also reiterates its concern about the extremely high conviction rate based primarily on confessions. This concern is aggravated in respect of such convictions that involve death sentences (arts. 7, 9 and 14).
>
> The State party should adopt legislation prescribing strict time limits for the interrogation of suspects and sanctions for non-compliance, ensure the systematic use of video recording devices during the entire duration of interrogations and guarantee the right of all suspects to have counsel present during interrogations, with a view to preventing false confessions and ensuring the rights of suspects under article 14 of the Covenant. It should also acknowledge that the role of the police during criminal investigations is to collect evidence for the trial rather than establishing the truth, ensure that silence by suspects is not considered inculpatory, and encourage courts to rely on modern scientific evidence rather than on confessions made during police interrogations.

In spite of the Human Rights Committee's grave concern, the practice has continued for more than 10 years. Neither prosecutors nor courts have reviewed their practice.[33] There is almost no implementation of recommendations made by the UN human rights body.

3. Wrongful Convictions

Because of these structural illnesses of Japanese criminal justice, Japan has witnessed significant numbers of wrongful convictions against

32. U.N. HUMAN RIGHTS COMMITTEE, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Concluding Observations of the Human Rights Committee: Japan, U.N. Doc. CCPR/C/JPN/CO/5 (Dec. 18, 2008).

33. Even since 1998, the foregoing practice has not changed.

innocent people.

From 1983 to 1989, four death row cases, *Menda* case, *Saitagawa* case, *Shimada* case and *Matsuyama* case were recognized as wrongful conviction cases by the Japanese court, and four innocent people were exonerated from death row, which called for social rethinking.[34] The defendants spent between twenty-eight and thirty-three years in prison before their vindications.[35] All of the defendants were forced to confess after long, coercive police interrogations. In addition to these cases, Japanese society recognizes at least 50 serious, and famous, wrongful conviction cases in which defendants were finally exonerated in the wake of long struggles.[36]

Nevertheless, wrongful convictions have not ended. The Japan National Relief Association,[37] for example, is currently helping 20 wrongful conviction cases, most of which are defendants sentenced to the death penalty or to life sentences.[38]

I would now like to describe a victim of the foregoing Japanese practices. Masaru Okunishi, 86 years old, has been on death row since 1969 and is a victim of the foregoing Japanese practices.[39]

On March 28, 1961, in a village on the border of Mie prefecture and Nara prefecture in Japan, five women were killed and twelve women injured by poisoned white wine served at a reception of village anniversary meeting held at the village community center.

Although there was no evidence linking Okunishi to this tragedy, he was restrained without any writ of arrest and forced to submit to coercive interrogation in a confined room at the police department. He was subsequently forced into self-incrimination. Once he confessed, he was formally arrested and, led by police officers, was almost daily forced to make false statements that described the details of the crime. Neither a monitoring system nor any *Miranda* warning was provided

34. Menda case (Kumamoto Chihō Saibansho [Kumamoto Dist. Ct.] Jul. 15, 1983, Shō 47 (ta) no. 1, 1090 Hanrei Jihō [Hanji] 21 (Japan)); Saitagawa case (Takamatsu Chihō Saibansho [Takamatsu Dist. Ct.] Mar. 12, 1984, Shō 51 (ta) no. 1, 523 Hanrei Taimuzu [Hanta] 75 (Japan)); Shimada case (Sizuoka Chihō Saibansho [Sizuoka Dist. Ct.] Jan. 31, 1989, Shō 58 (ta) no. 1, 700 Hanrei Taimuzu [Hanta] 114 (Japan)); and Matsuyama case (Sendai Chihō Saibansho [Sendai Dist. Ct.] Jul. 11, 1984, Shō 48 (ta) no. 2, 540 Hanrei Taimuzu [Hanta] 97 (Japan)) are called four innocent cases.

35. From arrest to acquittal, the Menda and Simada cases took thirty-four years, the Saitagawa case took thirty-three years, and the Matsuyama case took twenty-eight years.

36. *See* Zihakuno, *Shinyousei* [*The Credibility of Confession*], SHIHŌKENSYŪZYO [THE LEGAL TRAINING AND RESEARCH INSTITUTE OF JAPAN] (1988) (written by three leading criminal judges and studied 49 exonerated cases where the credibility of the confessions was finally denied).

37. The purpose of the Japanese Civic Organization is to protect human rights, save wrongfully convicted people, and fight suppression.

38. JAPAN NATIONAL COMMITTEE ON RELIEF, http://www.kyuuenkai.gr.jp/.

39. This case is known as the "Nabari Poisoned Wine Murder Case." See Amnesty International, *Japan: 40 years on death row*, AMNESTY INTERNATIONAL, Mar. 27, 2012, *available at* https://www.amnesty.org/en/news/japan-40-years-death-row-2012-03-27.

during the entire interrogation. During his more than thirty days of custodial interrogation, he had not been allowed counsel with an attorney.

Because of his innocence, Okunishi's forced statements were incoherent and lacked objective corroboration. However, relying on the self-incriminating statements, the prosecutor indicted him without any material evidence. Some witness testified that only the defendant had a chance to poison the wine, but these witnesses' statements and testimonies changed over time and were in contradiction with other witness statements. In the wake of the three-year trial, the Tsu District Court, the first-instance court of this case, acquitted the defendant in 1964.[40] The court found that the self-incriminating statements were incoherent and not credible, and that the statements of other witnesses were "the fruits of the prosecutor's great effort."

The prosecutor responded to the trial court verdict by appealing on the claim of an error in fact-finding in accordance with the Code of Criminal Procedure, which allows appeals of not-guilty decisions. In 1969, the Nagoya Appeal Court reversed the trial court's decision, finding the defendant guilty and sentencing him to death.[41] The appeal court declared that both the defendant's statements and the witnesses' statements were credible. In the appellate proceeding, the prosecutor submitted false scientific evidence made by a state-appointed scientist. The appeal court found that this evidence was credible and corroborated the defendant's confession. Although Okunishi appealed the case to the Supreme Court, the Supreme Court affirmed the appeal court's decision in 1972.[42]

Since then, Okunishi, everyday facing the fear of execution, has been claiming his innocence for more than 40 years.[43] In the post-conviction litigations, his defense attorneys have proven that the scientific evidence on which the appeal court relied was falsified. Although there are large amounts of evidence and statements held by the prosecutor, presumably including exculpatory evidences, the prosecutor has not disclosed this evidence at all. As noted above, in Japan, a defendant has no right to demand the disclosure of exculpatory evidence, even if his execution is imminent.

In April 2005, in his seventh post-conviction challenge,[44] Okunishi

40. Tsu Chihō Saibansho [Tsu D. Ct.] Dec. 23, 1964, (Japan).

41. [Nagoya App. Ct.] Sept. 10, 1969, (Japan).

42. Saiko Saibansho [Sup. Ct.] June 15, 1972, (Japan).

43. SHOUKO EGAWA, BUNGEISHUNJYU [THE SIXTH VICTIM] (describing many contradictions of this conviction).

44. The Human Rights Committee of the JFBA recognized Okunishi as a victim of human rights violations and decided to help him as well as create a special committee in 1973. More than twenty attorneys, including the author, set up legal counsel and handled the 5th-7th challenges of post-

finally got an affirmative decision by the Nagoya Appeal Court. Based on new forensic evidence that proved the identification of the poison was erroneous, the court declared that the grounds of Okunishi's conviction were lost and ordered a new trial as well as a stay of execution.[45] The court found that Okunishi's confession was not reliable, and that new forensic evidence raised reasonable doubt as to his guilt.

However, in 2006, based on the prosecutor's appeal, the Nagoya Appeal Court reversed the decision and denied Okunishi's motion for retrial.

The Appeal Court relied extensively on his confession during the police's custodial interrogation, stating "When a suspect confesses a serious crime without any proven coercion, the confession is voluntarily and reliable." The finding shows how seriously Japanese judges believe in confessions obtained during custodial interrogations. Without learning anything from past wrongful conviction such as the *Menda* case, etc., judge believes confession as if myth.

The defense team of Okunishi put in extensive effort to persuade the Supreme Court that even innocent people provide confessions.[46] In April 2010, the Supreme Court remanded the case to the Appeal Court based on grave doubt of the conviction.[47] To date, however, his case is still pending and he is still on death row desperately waiting for a retrial. I wonder who could compensate Okunishi for 50 years of lost life.

This case is only the tip of the iceberg of injustice in Japanese criminal justice. There are many people claiming their innocence in prison and on death row.

IV. INTRODUCTION OF THE *SAIBAN-IN* SYSTEM

A. Comprehensive Reform Proposal

Recognizing the foregoing problems in the judicial system, the Japan Federation of Bar Associations (JFBA)[48] proposed a comprehensive

conviction procedure. JFBA also helped several serious wrongfully convicted defendants to proceed post-conviction litigation as recognition of defendants' innocence.

45. [Nagoya App. Ct.] Apr. 5, 2005, Heisei 14 (o) no. 1, (Japan).

46. The Center on Wrongful Conviction in Northwestern Law led by Professor Steven Drizin submitted the amicus brief arguing the Appeal Court finding on confession is doubtful based on proven false confessions in the United States. The defense team of Okunishi also submitted Japanese translation of the article Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

47. Saiko Saibansho [Sup. Ct. 3d Petty Bench] Apr. 5, 2010 (Japan).

48. The Japan Federation of Bar Associations (JFBA) is an autonomous body comprised of the fifty-two local Bar Associations in Japan and their members, founded in 1949. Its purpose is the

judicial reform in 1999.[49]

The objective of the reform proposed by JFBA was to drastically transform the bureaucratic justice system into a judicial system for the people. In order to realize the democratic reform of the judiciary, the JFBA proposed two major reforms.

First, JFBA proposed a complete reform of the judicial appointment system. The JFBA demanded that judges should be appointed among experienced lawyers who have been practicing for at least ten years in order to change the bureaucratic character of the judiciary. Second, the JFBA proposed to introduce a jury system in order to realize a democratic judicial system.

B. Expectations Toward the Jury System

The introduction of the jury system had become one of the main objectives of Japanese judicial reform.[50] Among several styles of civic participation, Japanese civil society supported a jury system for the following reasons.

First, the jury system was assumed to be the most democratic citizen's participation system. In order to transform the bureaucratic judicial system and realize social change in Japanese society through the judicial arena, the jury system was expected to be a strong tool.

Second, the jury system was expected to be a strong vehicle to reform Japanese criminal justice. If ordinary people participate in fact-finding, trial testimony would naturally become the center of fact-finding rather than the large amounts of statements made in the investigation stages.

Third, it was expected that the presumption of innocence would be taken much more seriously in a jury system than in the current system. In the jury system, judges have no power to intervene in the jurors' fact-finding. Judges must concentrate on presiding over trials to ensure the fair operation of the judicial procedures, and they must instruct jurors about the fundamental principle of the presumption of innocence. It was expected that ordinary people living in the same community as defendants would think twice before convicting them.

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protection of fundamental human rights under the Japanese Constitution and the realization of social justice.

49. JFBA, SHIHOKAIKAKUZITSUGEN NI MUKETE NO KIHONTEKITEIGEN [THE FUNDAMENTAL PROPOSAL TOWARD REALIZATION OF JUDICIAL REFORM] (1999).

50. In early 1990s, the Supreme Court, led by the chief judge Kouichi Yaguchi, started an extensive research of the jury and lay judge systems. Many judges went to the US and European countries to research citizens' participation systems. However, the Supreme Court did not reach the decision to introduce citizens' participation system into Japan and took a rather negative position toward citizens' participation.

C. Commencement of Judicial Reform

1. *Saiban-in* System

In the late 1990s, public criticism against the bureaucratic judicial system was escalating, and civil society called for a comprehensive judicial reform that included civic participation. In response to these demands, the Japanese government commenced comprehensive judicial reform and established the Judicial Reform Council (JRC or the Council) in 1999. The Council consisted of law professors, prominent law practitioners, leader of labor unions, members of business sector, women's organizations, journalists, and other experts. Introduction of a citizens' participation system into the courts was one of the biggest issues for the Council.

On June 12, 2001, the JRC issued its final report in which it proposed the creation of a new citizens' participation system, named the "*Saiban-in* system," into the criminal justice. As a result of national debate on structure of the proposed system, in May 2004, the Japanese parliament has enacted a law to introduce the *Saiban-in* system.[51] The basic structure of the *Saiban-in* system is as follows.

a. Saiban-in

Citizens who participate in the criminal judgment are called "*Saiban-in.*" The citizens who will be summoned as *Saiban-in* are ordinary people elected randomly by an electoral roll. Like American juries, *Saiban-in* are selected among summoned citizens through a *voir dire* process.

*b. Power and Structure of the "*Saiban-in*" Panel*

In principle, three judges and six citizens (*Saiban-in*) constitute a *Saiban-in* panel and together will be involved in the decision-making process of a felony case.[52]

Both fact-finding and sentencing shall be decided by the three judges and the six citizens. Judges and *Saiban-in* have equal votes and equal voices in their deliberation. The verdict shall be decided by a simple

51. SAIBANIN NO SANKA SURU KEIJISAIBAN NI KANSURU HŌRITSU [SAIBANINHŌ] [AN ACT CONCERNING PARTICIPATION OF LAY ASSESSORS IN CRIMINAL TRIALS], (2004) (Japan); K. Anderson and E. Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233–83 (2005), see also Ingram Weber, *The New Japanese Jury System: Empowering The Public, Preserving Continental Justice*, 4 EAST ASIA L. REV. 125, 126 (2009).

52. In exceptional cases, a panel comprised by one judge and four citizens is proposed.

majority rule. However, verdicts against the defendant shall not be decided by a majority formed by exclusively judges or exclusively *Saiban-in*.

The power of legal judgments, interpretations of the law, and the presiding over trial procedure remains with the professional judges.

2. Evaluation of the New System

To be honest, the composition of the *Saiban-in* system was the fruit of compromise.

First, there was serious debate on the structure of the *Saiban-in* system. JFBA proposed the introduction of an American-type jury system. However, the Supreme Court and the Ministry of Justice strongly opposed the introduction of the jury system and insisted on the judge's involvement in the decision-making process. This resulted in the adaptation of a mixed-panel system of judge and citizens instead of a pure jury system.

Second, the number of judge and citizens in the *Saiban-in* panel was another controversial issue. In this regard, the Supreme Court strongly insisted on preservation of the status quo, namely, the involvement of three judges in the panel. On the other hand, civil society insisted on meaningful and autonomous participation of citizens instead of formalistic participation, and thus demanded an overwhelming majority of citizens on a panel, such as a panel consisting of one judge and eleven citizens. After a long political debate, the governmental committee proposed panels consisting of three judges and six citizens, and this proposal was ultimately adopted by the legislature.

The enactment of the *Saiban-in* system is not drastic enough to change the problems of the Japanese criminal justice system and the bureaucracy of the judicial system as a whole.

First, unlike the jury system in the U.S., the *Saiban-in* system can be dominated by judges' strong opinions. It is anticipated that the three judges will carry much influence in the decision-making process of the panel. Thus, citizens might hesitate to articulate their opinions to three professional judges and would be overly influenced by the judges' opinions.

Second, serious human rights problems throughout the criminal justice system have not been solved. During the reform process, civil society and the JFBA demanded to address the root cause of wrongful convictions, such as custodial interrogations, forced confessions, and the preeminence of statement evidence. In particular, civil society demanded the introduction of videotaping an entire custodial interrogation as well as progressive reform of the discovery rules of

evidence. However, following strong resistance of law enforcement against these reforms, the process failed to address these issues.

Third, the *Saiban-in* system is applied only to felony criminal cases. Regarding civil cases, there is no citizens' participation system.

At the same time, the reform process failed to change judges' appointment system, which was one of the two major proposals of the JFBA. The Supreme Court merely started the appointment of limited numbers of lawyers as judges in local civil and family courts.

In this regard, the reform is far from satisfactory from the perspective of democratizing the bureaucratic judicial system as a whole.

3. Suggestions for the *Saiban-in* System

Despite the deficiency of the reform, the new system is a first step towards improving the "hopeless" criminal court system. The common sense of citizens, if properly introduced into the criminal justice system, can be a vehicle for proper fact-finding and a reconsideration of the presumption of innocence. Furthermore, citizens' participation may facilitate a public rethinking of the illness of the criminal justice system and cause future reform of the system. In this regard, critics requested the following in the operation of the system to further the potential of the system.

First, the new system should realize an "autonomous and meaningful participation" of citizens. Judges should not dominate or lead discussion but let ordinary citizens participate autonomously and positively. The judiciary should make the whole criminal process understandable and accessible for ordinary citizens.[53] Judges and attorneys should choose more understandable words in court, modify their bureaucratic and authoritative attitudes, and listen to citizens' opinions with due respect.

Second, citizens' experiences should be utilized to improve the system, such as by changing judges' attitudes toward *Saiban-in* and the courts' treatment of *Saiban-in.* If there is no system to listen to the *Saiban-in*'s voice, the judicial system will never sufficiently improve. If a judge dominates discussion and suppresses the *Saiban-in*'s opinions, nobody can change such practices unless the system introduces a feedback mechanism to hear the *Saiban-in*'s voice. The law requires *Saiban-in* to keep secret the content of deliberation and criminalizes the breach of secrecy;[54] however, the experience of *Saiban-in* should be

53. In this regard, Japan can learn from jury reform in the United States. For instance, the New York State judiciary continues the effort to reform jury instruction in order to make it more understandable for jurors.

54. SAIBANIN NO SANKA SURU KEIJISAIBAN NI KANSURU HŌRITSU [SAIBANINHŌ] [AN ACT CONCERNING PARTICIPATION OF LAY ASSESSORS IN CRIMINAL TRIALS], (2004) (Japan); K. Anderson

opened up as far as possible without threat of penalty.

Third, the fundamental principle of the presumption of innocence should be fully respected in the entire trial process. In order to deliver proper judgment, ordinary citizens shall be fully educated and be requested to adhere to this fundamental principle of criminal justice. Although the Supreme Court of Japan adopted an example of explanation of the rule of judgment for *Saiban-in*, in accordance with Article 39 of *Saiban-in* Law, the term regarding the proof of guilt is ambiguous and no exact explanation of "presumption of innocence" is given. [55] The *Saiban-in* must be given instructions including an explanation of the fundamental principle of "presumption of innocence" both prior to and after trial in open court, just as U.S. jurors are given jury instructions.

V. CRIMINAL JUSTICE REFORM

Introduction of the *Saiban-in* system cannot by itself make the difference in preventing reoccurrences of miscarriages of justice and wrongful convictions. It was expected that the new system would entail comprehensive criminal justice reform.

Indeed, the introduction of the *Saiban-in* system opened the door not only to citizens' participation but also to substantial discussions on criminal justice reform. Along with the enactment of *Saiban-in* Law, the Code of Criminal Procedure was revised in 2004. In the course of the drafting process of the revision, criminal justice reforms were discussed by an expert committee appointed by the government.

Although the civil society groups insisted on a comprehensive criminal justice system reform, the achieved reforms are incomplete and cosmetic. The so-called reforms are far from satisfactory, mainly because of the resistance of the Ministry of Justice and the police. The Supreme Court failed to play a positive role in conducting a thorough reform of the criminal justice system.[56]

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and E. Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233–83 (2005).

55. Article 39 of *Saiban-in* Law stipulates that judges shall explain to *Saiban-in* their power, duty, and all other relevant matters. In accordance with this article, the Supreme Court adopted an example explanation of the rule of judgment.

56. The reason behind the decision was that both the Ministry of Justice and the Supreme Court strongly believed that Japanese criminal justice has operated very well and there is thus no problem to address. They recognize the purpose of judicial reform as "strengthening the system and gaining more public support" rather than resolving the problems of justice system. This reflected the provision of the *Saiban-in* Law, which underscores the purpose of the system, is "to enhance the understanding and trust for justice system of public."

A. Transparency of the Interrogation

As previously explained, forced confession under custodial interrogation is one of the major causes of wrongful conviction in Japan. Thus, critics demanded a sweeping reform to address the problem.

The reform agenda included guarantees of a right to the presence of lawyers in the interrogation room, and shortened durations of interrogations. However, one of the most powerful reform proposals was videotaping entire custodial interrogations. It is reported that the U.K., Australia, Italy, some parts of the U.S., and several Asian countries have achieved this reform, and that this reform changed the culture of interrogation in each of the countries.[57] Thus, the introduction of recording systems into interrogations became a top priority among the agendas of comprehensive criminal justice reform.

Regrettably, because of strong opposition toward introduction of the recording system among prosecutor offices and police departments, audio or video recording systems were not successfully introduced in the course of the CCP's 2004 revision.

However, there is a reasonable concern that ordinary people serving as *Saiban-in* would have enormous difficulty in deciding the admissibility of statements without knowing what is going on during the entire interrogation when the defense alleges abusive interrogation. While "successful operation" of the new system was a common interest in judicial circles, the offices of prosecutors and police could not ignore the concern that ordinary people might have enormous difficulty deciding the admissibility of statements without knowing what went on throughout the interrogation.

In April 2009, after 3 years of test operations, the Supreme Public Prosecutor office commenced partial videotaping of interrogations in all prosecutor offices in Japan for cases that will be decided by *Saiban-in* panels. In April 2009, after 7 months of test operations, the National Police Agency commenced partial videotaping of interrogations in all police offices in Japan for cases that will be decided by *Saiban-in* panels.

In January 2008, the police published a new policy directed to the improvement of interrogations.[58] The new policy includes the establishment of a supervising section over interrogations in national headquarters and in all prefecture headquarters, as well as requiring

57. David. T. Johnson, *You Don't Need a Weather Man to Know Which Way the Wind Blows: Lessons from the United States and South Korea for Recording Interrogations in Japan*, 24 RITSUMEIKAN L. REV. 13 (2007).

58. National Police Agency, KEISATSUSOUSA NI OKERU TORISHIRABE TEKISEIKA SHISHIN [THE GUIDING PRINCIPLES TOWARD APPROPRIATE METHODS OF POLICE SEARCH] (Jan. 2008).

interrogators to make written reports of their interrogations. Also, the new policy exemplified the types of acts during interrogation which may be barred, and prohibited "midnight interrogations" (10pm–5am), as well as interrogations lasting more than eight hours without previous permission from the head of police office.

However, all of these reforms are not enough to change the practice of interrogation. In particular, partial videotaping is misleading and dangerous to fact-finding, since police and prosecutors can arbitrarily select the best parts of an interrogation to persuade a *Saiban-in* panel while hiding coercive or abusive parts. Thus, it is fair to say that partial and arbitrary recording may become a new cause of wrongful conviction.

B. Disclosure

1. New Rule of Disclosure

As explained, until 2004, there were no discovery rules of evidence in the Japanese criminal justice system. However, the introduction of the *Saiban-in* system gave a compelling interest to reform this practice. In order to ensure successful operation of the *Saiban-in* system, the court needed clear rules to avoid time-consuming debate on discovery by parties at the trial. Thus, the discovery rules have become one of the agendas of criminal justice reform.

During the reform process, the JFBA, scholars, and civil society proposed a system requiring prosecuting attorneys to disclose to defendants all evidence in their possession in advance of the trial.[59] On the other hand, the Ministry of Justice and police departments took a strong position against the "all" discovery rule.[60] They insisted that pretrial discovery would facilitate perjury or the intimidation of prospective witnesses.

As a result, the revision of the Code of Criminal Procedure set forth new provisions, Articles 316-14–27 with regard to disclosure (in summary):[61]

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59. JBFA, PROPOSAL FOR THE CRIMINAL JUSTICE MEETING PEOPLE'S EXPECTATIONS (2000).

60. On September 24, 2002, the Ministry of Justice submitted its opinion to the governmental expert committee. The opinion articulated in summary that the purpose of the discovery rule is just to ensure speedy and consecutive trial, and opined that the proposal of full discovery is against this purpose, as well as against the adversarial system. The report therefore concluded that there is no possibility of incorporating the full discovery rule into the Japanese criminal justice system. It also indicated that discovery would facilitate intimidation, perjury, and abuse of witnesses, as well as forgery of evidence.

61. KEISOHŌ [C. CRIM. PRO.] 1949, art. 316-14 -27 (Japan).

(1) Article 316-14

A prosecuting attorney has the absolute obligation of disclosing:

- All material evidences or statements which the prosecuting attorney will submit to trial as proof of guilt,
- The name and address of persons the prosecutor intends to call as witnesses or expert witnesses at trial.
- Relevant written statement which can show the substance of the testimony,

(2) Article 316-15

A prosecuting attorney shall disclose the following information upon the defendant's specific request when the request meets the following two conditions,

[Conditions]

a) it is recognized as important to examine the credibility of the evidence which the prosecuting attorney intends to submit and,
b) the disclosure is adequate in light of the importance and necessity for preparation of defense as well as the extent of possible harmful effect of the disclosure,

[Information]

a) material evidence
b) result of inspection by court, scientific tests and experiments
c) Relevant written statement of witnesses whom the prosecutor intends to call at the trial or whose testimony is related with proof of guilt
d) defendant's statements
e) written document which police officer and prosecuting office are obliged to write with regard to the situation of interrogation toward defendant

(3) Article 316-20

A prosecuting attorney shall disclose the evidence related to the defendant's allegation of the trial, upon defendant's specific request, when the prosecuting attorney recognizes that the disclosure is adequate in light of the importance and necessity for preparation of defense as well as the harmful impact of the disclosure.

(4) Article 316-26

The court shall make order of disclose evidence when it recognizes that the prosecutor does not disclosure the evidence in accordance with the article 314-14, 16 and 20 upon the request of parties.

2. Evaluation

Although the new provisions require prosecutors to disclosure certain

types of evidence to the defense, it is still far from full discovery. According to the abovementioned provisions, the absolute discovery obligation is quite limited, and the conditions allowing discovery are quite vague, enabling a judge to exercise wide discretion in deciding whether to order disclosure through the interpretation of the abovementioned provisions. In particular, there is still no obligation for a prosecuting attorney to disclose exculpatory evidence.

However, if there is no difference between practice under the 1969 Supreme Court decision and the interpretation of above provisions, then there is no meaning to the new provisions. In this regard, the new provisions must be interpreted progressively to broaden the scope of disclosure in the context of the defendant's right to a defense. The 1998 UN Committee shares this opinion.[62]

3. The Supreme Court Decisions Under the New Discovery Rules

Based on defense motions in accordance with the revised Code of Criminal Procedure (CCP), the courts in Japan are actively engaged in discovery rulings and have issued a substantial number of discovery rulings.

Since 2007, the Supreme Court passed three significant judgments[63] in response to motions based on the revised Code. Importantly, in the interpretation of the CCP in these cases, the Supreme Court has broadened the scope of evidence that the prosecutors are required to disclose.

a. Supreme Court Third Petty Bench Decision, 2007.12.25

On December 25, 2007 the Supreme Court handed down a landmark decision that confirmed that memos and notebooks of the police are public documents that are more than just personal notes and, as such, are discoverable documents.

In the case, the defense counsel argued that the confession statement of the defendant was false and unreliable, and requested to disclose "memos and notes made by the police related to the interrogation" as evidence relevant to the defendant's allegation. In response, the prosecutor denied the existence of the memos and notes, as well as denying any general obligation to produce such documents in discovery.

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62. U.N. HUMAN RIGHTS COMMITTEE, Concluding Observations of Human Rights Committee: Japan, U.N. Doc. CCPR/C/79/Add. 102 (Nov. 19, 1998).

63. Saiko Saibansho [Sup. Ct. 3d Petty Bench] Dec. 25, 2007, Hei 19 (Shi) no. 424, (Japan); Saiko Saibansho [Sup. Ct. 3d Petty Bench] June 25, 2008, Hei 20 (Shi) no. 159, (Japan); Saiko Saibansho [Sup. Ct. 1st Petty Bench] Sept. 30, 2008, Hei 20 (Shi) no. 338, (Japan).

The Supreme Court ruled the following:

> [I]t is reasonable that the scope of discovery is not necessarily limited to evidence stored by the prosecutor and includes evidence which is made or obtained in the course of investigation of the said case, stored by public officers as a matter of duty and that the prosecutor can easily obtain.[64]

Recalling that Article 13 of the Rules of Criminal Investigation stipulates that the police need to make and store notes when interrogating the accused, the Court ruled that memos that are made by police officers in charge of an interrogation pursuant to the article and are stored by the investigating authority should be regarded as official documents related to investigation rather than personal records. The Court concluded "these notes would fall within the scope of discovery."[65]

b. Supreme Court Third Petty Bench Decision, 2008.6.25

In a drug case, the defense counsel argued that a urine test result related to the defendant's use of a drug should be inadmissible because the collection of the defendant's urine was coercive, thus making the investigative process illegal. Based on this allegation, the defense counsel requested the discovery of memos made by police regarding the process.

The Supreme Court, following the above-mentioned judgment, ruled that notes made by police officers pursuant to the Article 13 of the Rules of Criminal Investigation and stored by the investigating agency, which records the course of the investigation and other relevant information, would fall in the scope of discovery evidence. The Supreme Court clearly stated that notes made in the course of *all* investigative processes, not only in the course of interrogation, would fall within the scope of discovery.[66]

c. Supreme Court First Petty Bench Decision, 2008.9.30

In this case, the defendant was indicted for robbery based on an eyewitness statement. At the trial, the defense counsel questioned the credibility of the eyewitness's identification of the perpetrator and requested the discovery of the policeman's private notes made in the course of the identification process. Unlike the abovementioned two cases, the note was not official but instead privately purchased by the

64. Saiko Saibansho [Sup. Ct. 3d Petty Bench] Dec. 25, 2007, Hei 19 (Shi) no. 424, (Japan).

65. Saiko Saibansho [Sup. Ct. 3d Petty Bench] June 25, 2008, Hei 20 (Shi) no. 159, (Japan).

66. Saiko Saibansho [Sup. Ct. 1st Petty Bench] Sept. 30, 2008, Hei 20 (Shi) no. 338, (Japan).

policeman in charge and stored at his home.

The Supreme Court concluded that the memos fell within the scope of discovery since "the memos were made in a course of investigation of the crime, actually stored by public officers as a matter of duty, and it is also easy for the prosecutor to obtain the memos."[67]

Thus, this judgment further expands the scope of discovery. First, the Court ordered the discovery of notes and memos regarding the eyewitness's identification process. Second, the Court ordered discovery of notes and memos privately owned by an individual police officer.

4. The Reaction of the Prosecutor's Office

As described, the Supreme Court adopted liberal interpretations of the discovery clause of the CCP. These trends make it possible for defense attorneys to make the process of investigation and interrogation by law enforcement more transparent despite other enormous limitations.

In response to these decisions, the Supreme Public Prosecutor's Office, in the name of the Criminal Affairs Bureau Section Chief, on July 9 and October 21, 2008, sent memos to all District Attorney Offices requesting 1) that the memos in question be handed over to the leading prosecutors of the cases in question, and 2) that the prosecutors properly store the memos for a sufficient period of time.

However, in reality, the Supreme Public Prosecutor's office immediately employed measures to prevent the discovery of memos and notebooks that prosecutors were unwilling to disclose.

a. Memorandum No. 199 and Supplementary Explanation Issued by the Supreme Public Prosecutor's Office on July 9, 2008

The memorandum itself informed all prosecutors and prosecuting office staff members that memos regarding interrogations and interviews can be the objects of discovery and thus should be properly maintained and preserved in the office.

However, there was an attached supplementary explanation, which called upon all prosecutors and prosecuting office staff members to dispose of memos unless there was specific necessity to maintain the memos to prove the circumstances of interrogations.

67. Saiko Saibansho [Sup. Ct. 1st Petty Bench] Sept. 30, 2008, Hei 20 (Shi) no. 338, (Japan).

b. Memorandum No. 296 and Supplementary Explanation Issued by the Supreme Public Prosecutor's Office on October 21, 2008

The memorandum reiterated the policy of Memorandum No. 199 and recalled the Supreme Court Decision of September 30, 2008, which ordered discovery of private memos made and maintained by individual police officers. The memorandum informed all prosecutors and prosecuting office staff members that all memos, including private ones regarding interrogations and interviews, shall be properly maintained in the office.

However, there was again an attached supplementary explanation that again called upon all prosecutors and prosecuting office staff members to dispose of memos unless there was specific necessity to maintain the memo to prove the circumstances of interrogations, further noting that "this policy won't change after the Supreme Court Decision."[68]

c. The Attitude of the Supreme Public Prosecutor's Office

Through the two memoranda, the Supreme Public Prosecutor's Office pretended as if the office were willing to disclose memos and notebooks in accordance with the Supreme Court's decisions; however, the public displays were fake, and, astonishingly, the true policy was just the opposite, as articulated in the attached confidential supplementary explanations. In sum, the Supreme Prosecuting Office encouraged the disposal of "unnecessary" memos related to the processes of interrogation and investigation in order to prevent disclosure through "supplementary explanation"; this actual policy was followed by all prosecutors' offices in Japan. The existence of the "supplementary explanation" was hidden by the Office until revealed in October 2010.

VI. RECENT DEVELOPMENTS

A. Commencement of Saiban-in *System*

1. Concern over the New System

After the enactment of *Saiban-in* law, there was substantial opposition to participation in the criminal justice system among the general public. Polls always showed that a majority of people in Japan did not wish to be summoned as a *Saiban-in*. These negative feelings

68. Supplementary Explanation attached to the Memorandum Issued by the Supreme Public Prosecutor's Office, (Oct. 21, 2008).

included simple resistance to a new burden and hesitation to participate in the serious judgment of defendants, such as sentencing a person to death.

As a response, the Supreme Court made efforts to minimize the *Saiban-in*'s duty such as by shortening the schedule of trial by controlling both parties' argument and proof. In order to finish trials within one week, the court started managing schedules and strongly suggested both parties minimize the time of trial activity and refrain from unnecessary proof. However, such control suppresses the defendant's right to a defense and undermines the values of the criminal justice system, such as protection of the defendant's human rights, finding truth, and preventing wrongful conviction.

It seems the court prioritized the ease of the *Saiban-in*'s burden over the actual purpose of the system—justice, truth, and the protection of the defendant's rights. As such, many lawyers started to express serious concerns on such judicial practices.

B. Practice of the System

The *Saiban-in* system began its operation in August 2009. Since then, *Saiban-in* panels all around Japan have dealt with significant numbers of felony cases. Since most media have covered the operation of the *Saiban-in* system in positive manner, public feeling toward the system has gradually been changing in a supportive way.

One positive aspect of the operation is that several *Saiban-in* panels delivered "not guilty" verdicts based on strict application of the fundamental principle of the presumption of innocence. Although a judge's explanation for the *Saiban-in* on the rule of judgment may not be strict on this fundamental principle, we find that some *Saiban-in* panels fully respect the principle. We also found that the reasons for acquittal in several cases reflect citizens' sound common sense,[69] and such reasoning can rarely be expected of judge's decision.

On the other hand, the short duration of trial (from three days to one week) sometimes causes very serious problems by making it difficult for courts to examine enough evidence and issues of concern. Sometimes, a judge suppresses the defense's demand to examine its own evidence. This practice may undermine the fundamental purpose of the criminal justice system, that is, finding truth, protecting human rights, and preventing wrongful convictions.

69. JFBA, *Comment on Judgment of Acquittal in Saiban-In Trial*, JAPAN FEDERATION OF BAR ASSOCIATIONS(June 23, 2010), http://www.nichibenren.or.jp/en/document/statements0/year/2010/20100623.html.

C. Successive Acquittals and Exonerations

In addition to the new system, Japanese criminal justice experienced another interesting development. Since 2007, false charges leading to wrongful convictions have been revealed in Japan.

1. The *Shibushi* and *Himi* Cases

In the *Shibushi* case (in which all defendants were acquitted in February 2007), the police used various techniques of physical and psychological tortures in order to obtain confessions. In this case, local village people and a politician were arrested for violations of election law, but it turned out the police made up the story of a crime that did not actually exist at all.[70]

In the *Himi* case (in which the defendant was retried and acquitted in April 2007), the defendant was accused of committing a rape and was forced to confess. Based on the confession, the court convicted the defendant. However, it turned out to be a wrongful conviction since the actual perpetrator was later identified.

2. The First DNA Exoneration

The more shocking incident was the *Ashikaga* case, the first DNA exoneration in Japan. In 1991, an innocent man, Mr. Toshikazu Sugaya, was forcibly taken to the police station as the suspect of the rape and murder of a fourteen-year-old. After a severe and long interrogation, he was forced to confess the crime. Based on the confession and an inaccurate and old DNA test result, the court convicted Mr. Sugaya in 1993 and sentenced him to life in prison.

Recently, however, new and sophisticated DNA tests proved that he was not the actual perpetrator; the court granted retrial and acquitted him in March 2010. Mr. Sugaya spent nineteen years in custody for a totally false charge and wrongful conviction; his story should be more than enough to raise public awareness of the danger of forced confessions and wrongful convictions.[71]

3. Review of Serious Conviction Cases

The above trend led to serious judicial review on two serious

70. Norimitsu Onishi, *Coerced Confessions: Justice Derailed in Japan*, N.Y. TIMES, May 7, 2007, *available at* http://www.nytimes.com/2007/05/07/world/asia/07iht-japan.1.5596308.html.

71. Setsuko Kamiya, *All Interrogations Must be Taped: Sugaya*, JAPAN TIMES, Mar. 27, 2010, *available at* http://search.japantimes.co.jp/cgi-bin/nn20100327a5.html.

conviction cases. First, in December 2009, the Supreme Court granted a retrial of the *Fukawa* case. The 1967 charges were for burglary and murder; two men were convicted based on confessions and were sentenced to life in prison. The court found reasonable doubt on the convictions against them and expressed serious doubt as to the reliability of the confessions. In May 2011, a court found the two men not guilty on retrial and acquitted them.

Second, in April 2010, the Supreme Court remanded a case and ordered the Nagoya Appeal Court to undergo an in-depth investigation of the *Nabari* case, in which a death row inmate, Mr. Okunishi, has been claiming his innocence for 49 years since 1961.[72] A villager, Mr. Okunishi was forcibly taken to police and confessed after 40 hours coercive interrogation to poisoning wine that killed several women. As described earlier, although the trial court acquitted him based on reasonable doubt, the confession, and other evidence, the high court convicted him and sentenced him to death based primarily on the confession.

These incidents are followed by the most scandalous incident, the Postal Abuse Case, which has recently been revealed.

4. New Scandal: Postal Abuse Case

In 2009, the former Chief of Equal Employment Opportunity, Children and Families Bureau of the Ministry of Health, Labour, and Welfare, Ms. Atsuko Muraki, was arrested and indicted for violations of the Postal Services Act and fabrication of official documents. The Special Investigations Bureau of the Osaka District Public Prosecutor's Office alleged that Atsuko Muraki had been involved in the illegal use of the special benefit system provided for disability groups by issuing fabricated official documents that certified an inactive organization as a disability group. Although she claimed her innocence and never confessed, her former colleague Mr. Tsutomu Kamimura was also arrested and confessed that he fabricated the document as ordered by Ms. Muraki, his superior.

a. Statement

At the trial, the prosecutor submitted Kamimura's statement as one of the major pieces of evidence. Kamimura testified at the trial that Muraki was not involved in the fabrication, and that his statements were false and forced by the prosecutors. Both Muraki and Kamimura described

72. Saiko Saibansho [Sup. Ct. 3d Petty Bench] April 5, 2010, (Japan).

detailed situations of abusive interrogations committed by the prosecutors in order to extract false confessions.

At the discovery stage, the defense attorney requested the disclosure of memos taken during the course of investigations, to which the prosecution replied that there were "absolutely no memos." However, at the trial, six prosecutors and staff members of the special investigations department testified that "[b]ecause all relevant information was included in witness statements, the memos were disposed of."

The Court criticized the disposal of all the memos relevant to the interrogations, gave due regard to the testimony of Kamimura, and then denied the admissibility of most of Kamimura's statement. Thus, the court denied the admissibility of major pieces of evidence.

On September 10, 2010, the Court then acquitted Ms. Muraki. The Osaka District Public Prosecutor's Office did not appeal the case.

b. Fabrication of Evidence

In the wake of acquittal, it was revealed that the leading prosecutor of the *Muraki* case, Mr. Tsunehiko Maeda, fabricated the case's evidence. The prosecutor fabricated a floppy disk seized by Kamimura's office and updated the final date in order to conform to the prosecutor's scenario at the trial. The floppy disk was not used as evidence and was returned to the defense, who examined it and proved that the disk's final date was changed.

The Supreme Public Prosecutor's Office started investigating the case and arrested the case's leading prosecutor, who admitted to fabricating the data in order to fit the evidence into the prosecutor's story.[73] The Office later arrested the Chief and Vice Chief of the Special Investigations Bureau of the Osaka District Prosecutor's Office.

c. Revealed Policy of Disposal of the Memo

In this case, the Supreme Public Prosecutor's Office, while actively investigating the fabrication of evidence made by Mr. Maeda and others, kept silent regarding the disposal of memos. However, the supplementary explanation that directed the disposal of memos recently came to light.

The Supreme Public Prosecutor's Office deliberately adopted the policy to destroy the "unnecessary" memos in the course of interrogation in order to hide all exculpatory statements and memos

73. *Lead Prosecutor in Muraki Case Arrested*, JAPAN TIMES, Sept. 22, 2010, *available at* http://search.japantimes.co.jp/cgi-bin/nn20100922a1.html.

while preserving only affirmative evidence for prosecutors.

Clearly, this policy puts a defense team into an extremely disadvantageous position and undermines the defendant's rights to access to evidence, which is a prerequisite of a fair trial. The Supreme Public Prosecutor Office could not avoid strong criticism from the public.

d. Summary

The case clearly shows that law enforcement has falsely charged innocent people and has wrongfully convicted them via coercive interrogations and the fabrication of material evidence. The public is shocked by the revelation of the terrible misconduct of prosecutors, escalating criticism on the criminal justice and investigation systems.

D. Public Support for Criminal Justice Reform

Successive exonerations and acquittals are extensively covered by media and attract public attention. All of the above cases involve false and forced confessions as a result of coercive interrogations. In this regard, it becomes clear to the public that the methods of interrogation need drastic changes in order to prevent wrongful convictions. Also, most of the cases involve the withholding of exculpatory evidence or evidence fabrication by prosecutors. In particular, the general public was horrified by the fabrication of evidence in the *Muraki* case.

The cases show a compelling necessity for the introduction of videotaping systems and full discovery of evidence in order to prevent abusive interrogations and the fabrication of evidence. Since people have started to participate to the *Saiban-in* system, people's attention toward the criminal justice system has increased more than ever. People are starting to look carefully at the lessons of wrongful convictions and false charges.

No one wants to be a part of decision-making in a fraudulent criminal justice system that could lead to wrongful convictions. Thus, there is currently a strong trend of public demand for comprehensive criminal justice reform to prevent wrongful convictions.[74] This escalated concern of the people can be a vehicle to change the criminal justice system in Japan.

74. On Oct. 4, 2010, the Mainichi News Paper published a poll indicating that eighty percent of people support the videotaping of an entire custodial interrogation.

E. Next Stage of Criminal Justice Reforms

After the *Muraki* case, the Ministry of Justice set up a review commission regarding the prosecutor's misconduct. The commission issued a final report in March 2011, which includes numerous recommendations for the reform of prosecutorial work, such as the videotaping of entire custodial interrogations of the mentally retarded as well as in certain special cases, such as corruption cases. Upon the publication of the recommendations, the Justice Minister requested the prosecutor's office introduce the videotaping of entire custodial interrogations for cases in which the prosecutor's office is in charge of the entire investigation. The prosecutor's office started the practice in May 2011.[75]

Also, in April 2011, the Ministry of Justice announced the creation of a new study commission on comprehensive criminal justice reform based on the recommendation made by the final report of the above commission. The new commission was set up and started its work in June 2011. In order to achieve a comprehensive criminal justice system to prevent wrongful convictions, I suggest the commission discuss the following issues:

- Introduction of videotaping in entirety custodial interrogation
- Shorten the duration of interrogation
- Eliminate the practices that oblige suspects to endure interrogation[76]
- Introduction of full discovery law (both pretrial and post-conviction)
- Rule of DNA evidence[77]
- Reform of forensic science[78]

VII. CONCLUSION

It is still too early to evaluate the operation of the *Saiban-in* system, but it is fair to say that the introduction of a citizens' participation system opened the door to changes in the problems of Japanese criminal procedure.

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75. *Grillings of Suspect Get Taped in Entirety*, JAPAN TIMES, May 26, 2011, *available at* http://search.japantimes.co.jp/cgi-bin/nn20110526a5.html.

76. This practice is based on authoritative interpretation of the CCP.

77. In Japan, DNA evidence is exclusively used and tested by law enforcement, and it is not preserved for future re-examination of the court and defendants. The process of the DNA test is not recorded and disclosed to the defense. Neither law nor court finding recognizes that defendants have a right to DNA testing for their vindication.

78. In Japan, police labs do most of the scientific testing for criminal cases. There is no independent criminal laboratory. There is no standardized quality control of the forensic evidence.

In order for the system to work for truth and justice, the Japanese judiciary should address unresolved reform subjects, such as whole discovery and the transparency of interrogation based on the painful lessons of wrongful convictions as well as increasing public demand. The new system should separate itself from the poor past practice of the police's obsession with, and pressure for, self-incrimination, which distorts the criminal justice system as a whole.

It is also important to realize independent, impartial, and reliable systems for dealing with forensic evidence such as DNA evidence, as well as to establish the defense's right to have access to all forensic evidence. In order to prevent wrongful convictions, Japan must achieve comprehensive criminal justice reform and remove all causes of wrongful convictions.

It is necessary for Japanese lawyers and relevant experts to make all efforts to develop the new citizens' participation system as a valuable key for justice and human rights, and to achieve a comprehensive criminal justice system.

EMPIRICAL STUDIES OF WRONGFUL CONVICTIONS IN MAINLAND CHINA

HE Jiahong & HE Ran**†*

At all times and in all lands, wrongful convictions are like a spirit that haunts the castle of criminal justice. Wrongful convictions are certainly unexpected disasters to the wrongfully convicted and their families, but hopefully examining the errors that caused those disasters can push the criminal justice system towards civilized progress and productive development. In recent years, as the media has disclosed the wrongful convictions of Shi Dongyu, Du Peiwu, Li Jiuming, She Xianglin, and Zhao Zuohai, wrongful convictions have become a grim and sad topic for the general public in Mainland China (China).[1] Why do wrongful convictions come fast and furious in current China? How can China build up a prevention system and a remedy mechanism for wrongful convictions? With these questions, the authors set up a research project in 2006 and have carried out empirical studies on wrongful convictions ever since.[2] We conducted the research at multiple levels with multiple methods, such as holding seminars and conferences, distributing questionnaire surveys, and analyzing typical cases. This Essay discusses the research results that are related to evidential rules and shares the authors' analysis with the readers.

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1. As for definitions, wrongful cases shall include two basic types: one is convicting the innocent, which is wrongful conviction; the other is acquitting the true criminal, which is wrongful acquittal. Both are making erroneous judgments on criminal cases. This Essay focuses on the first type.

2. The project of "Empirical Studies on Wrongful Convictions" has been undertaken by the Institute of Evidence, School of Law, Renmin University of China. We hereby express our thanks to the Ford Foundation for their financial assistance to this program.

I. TWO INFAMOUS WRONGFUL CONVICTIONS

A. The Murder Conviction of Zhao Zuohai[3]

On February 15, 1998, in Zhaolou Village of Zhecheng County of Henan Province, a villager reported to the public security department that his uncle had disappeared. The uncle, Zhao Zhenshang, was suspected of being murdered and had not been seen since October 30, 1997. Investigators arrested Zhao Zuohai after they learned about a fight shortly before Zhenshang's disappearance where Zhenshang slashed Zuohai. After more than twenty days, Zuohai was released due to lack of evidence.

On May 8, 1999, a local villager found a decomposed corpse with no head and no limbs in a defunct well. Villagers all believed that it was the disappeared Zhenshang. Public security officers again arrested Zuohai as a suspect on May 9. From May 10 to June 18, Zuohai was interrogated continuously and admitted nine times that he had committed the murder. The police, however, were unable to find the missing parts of the corpse. Zuohai once confessed that he had buried the head in his family's graveyard, but the police found nothing after excavating the graveyard. Additionally, the identity of the corpse was still in question. The police had invited experts to conduct DNA tests on four occasions, but they still could not confirm that the corpse was Zhenshang.

On October 22, 2002, the People's Procuratorate of Shangqiu City filed for the prosecution of Zuohai for intentional murder in the Intermediate People's Court of Shangqiu City. On December 5, the Intermediate Court of Shangqiu convicted Zuohai of intentional murder and sentenced him to death. Zuohai did not appeal. On February 13, 2003, the High People's Court of Henan Province confirmed the conviction after reviewing the death sentence.

On April 30, 2010, the "victim," Zhenshang, surprisingly reappeared in Zhaolou Village, which shocked every villager. Zhenshang explained that he ran away after the fight with Zuohai and led a vagabond life in big cities by collecting scraps and running several small businesses. Around that time, he started feeling ill and could hardly maintain his outside life, so he returned to the village to spend the rest of his life there. On May 5, after hearing the report of Intermediate Court of Shangqiu about the case, the High Court of Henan ordered a retrial of the case. On May 7, the Intermediate Court submitted the identification evidence of Zhenshang. On May 8, the retrial commission organized by

3. Discovered and corrected in 2010.

the High Court formally reconsidered the case, agreed it was an obviously wrongful conviction, overruled the conviction, and released Zuohai. On May 9, Zuohai walked out of prison after eleven years of imprisonment. On May 13, Zuohai received a state compensation of RMB 650,000.[4]

B. The Murder Conviction of Shi Dongyu[5]

Late at night on April 5, 1989, a murder occurred in the Youyi Forest Farm of Yichun City in the Heilongjiang Province. Someone killed Guan Chuansheng, a forest fire ranger, on a dirt road north of the farm office by repeatedly stabbing him with a knife. The crime scene investigation revealed a cut in the back center of the victim's overcoat and a corresponding wound in the body with corner angles. Investigators inferred this wound was inflicted by a military bayonet while a single-edge cutting tool made other cuts in the body. The victim had left the farm office for home after 11:00 p.m., when the electricity at the farm had just gone off. Chuansheng was killed around midnight. That night, the oldest son of a neighboring family, Shi Dongyu, who was demobilized from the army nine days earlier, went missing. Investigators soon listed Dongyu as a suspect.

On the afternoon of April 6, after learning that Dongyu had returned home, investigators took him away for interrogation. Dongyu said that on the afternoon of April 5, a friend in the mountains invited him for a drink. He got back after 8:00 p.m. and first went to his fiancée's home for some wedding planning. Dongyu returned home to get some money and then went to the boiler plant after 10:00 p.m. to drink water, smoke, and chat. He went to the railway station in the mountains after 11:00 p.m. and took the 2:00 a.m. train down the mountain. On the morning of April 6, Dongyu went to the county government for his demobilization procedures and finally back to the farm in the afternoon.

Investigators found witnesses to corroborate Dongyu's alibi in that he drank wine, chatted with a friend, and later drank water. According to the owners of the boiler plant, Dongyu left the plant after the electricity went off. Investigation on site clarified that the boiler plant was on the

4. This summary of Zhao Zuohai's case is based on dozens of reports in newspapers and on the internet in China between May and October of 2010. A search for ZHAO Zuohai in www.baidu.com and www.google.com.hk will get the information. *See e.g.*, Wang Jingquiong & Li Yuefeng, *Murder convict set free after 'victim' turns up*, CHINA DAILY (May 10, 2010), http://www.chinadaily.com.cn/china/2010-05/10/content_9826537.htm; Clifford Coonan, *Zhao Zuoahi: Beaten, framed and jailed for a murder that never happened*, INDEPENDENT, (May 14, 2010), http://www.independent.co.uk/news/world/asia/zhao-zuohai-beaten-framed-and-jailed-for-a-murder-that-never-happened-1973042.html.

5. Discovered and corrected in 1995.

roadside between the office and the living area and was not far from the site of the murder. Therefore, investigators believed Dongyu, and the victim walked on the same road at the same time. Additionally, investigators proved by experiment that it would take only twenty minutes to walk from the farm to the railway station. In other words, investigators believed Dongyu had time to commit the murder.

On the night of April 6, investigators searched Dongyu's home and found a bloodied military coat and a single-edge fruit knife with a black plastic grip. The front collar of the coat was torn and was missing three buttons which were found in the pocket. The blood on the coat had O and A blood types and police believed the victim's blood was type A. The knife did not have blood on it, but the blade matched the cut in the corpse. Investigators immediately interrogated Dongyu. At the beginning, Dongyu insisted that he did not kill the victim and explained that the blood on his coat was from his father and his brother when he fought with his brother on April 4. Finally, after continuous interrogations for more than thirty hours, Dongyu admitted he committed the murder of Guan Chuansheng.

On April 18, 1989, the People's Procuratorate of Yichun City approved Dongyu's arrest and charged him with murder. In court, Dongyu recanted his confession and insisted on his innocence. On April 5, 1991, the Intermediate People's Court of Yichun City convicted Dongyu of murder and sentenced him to death with immediate execution. Dongyu appealed, claiming that he did not commit the murder. On May 13, after reviewing the case, the High People's Court of Heilongjiang Province found that some of the facts were unclear and that there was a lack of evidence. The court then overruled the judgment, remanded the case for retrial, and listed several issues for further investigation. These issues included the incomplete match of the killing tool and the cut in the body, the existence of two types of blood in the coat, and the reason for the buttons being in the pocket.

On September 19, 1991, the Intermediate People's Court of Yichun City reopened the session to discuss Dongyu's murder prosecution. Although the prosecutor was unable to provide additional evidence, the court held that the evidence presented satisfied the two basics of the standard of proof—(1) the facts of the case were basically clear and (2) the evidence was basically reliable and sufficient. On December 2, the court convicted Dongyu and sentenced him to death. On January 7, 1992, the Intermediate Court transferred the case to the High Court for review. On February 26, the High Court confirmed the judgment. On August 31, Dongyu was placed in the Beian Prison to serve his sentence.

In April 1994, a burglar, Ma Yunjie, in the custody of the public security bureau of Yichun City, revealed in his written statements that

he wanted to "survive by making contributions." The murder on April 5, 1989 was not committed by Shi Dongyu. The true criminal was Liang Baoyou. In the early morning of April 6, 1989, Yunjie was doing morning exercises near the rail tracks when he saw Baoyou running down the mountain with much blood on his coat. Yunjie asked what happened. Baoyou said that nothing happened and that the blood was from killing a pig. Two days later, Baoyou invited Yunjie for a drink. At the table, Baoyou said that on the night when the electricity went out at the farm, he was waiting at the gate of the farm office to attack Xia Baoxi. After 11:00 p.m., a person of similar height and build walked out of the office. Baoyou followed him and strongly stabbed a spear into the back of his waist. The man turned around, grabbed the dart, and shouted. At that moment, Baoyou saw that the man was not Baoxi but was actually Chuansheng. However, because Chuansheng already recognized Baoyou, Baoyou had no option but to kill him. He took out a knife and stabbed Chuansheng's chest, back, and shoulder blades over ten times. He then ran to Honglin Station and climbed into the Forest Train headed down the mountain.

The High Court of Heilongjiang, the Intermediate Court of Yichun, and the Public Security Bureau of Yichun paid great attention to Yunjie's statement and formed a special reinvestigation team of the "89/4/5" case. The investigators quickly learned that Baoyou was stabbed to death in a fight on October 26, 1990 but that his mother could prove that what Yunjie said was true. The investigators also found some contradictions and gaps in the case file. However, these findings were not enough to overturn the original judgment. If the DNA from the blood on Dongyu's coat was not the victim's blood, however, that would be very persuasive. Through great effort, the investigators finally obtained permission from the victim's family to open Chuansheng's grave and collect the skull and hairs of the victim.

On October 25, 1994, investigators brought the posthumous collections and Dongyu's bloodied coat to Beijing. The Forensic Medical Examination Center of Beijing Public Security Bureau resolved the issue by mere blood type testing—the victim's blood type was AB, but Dongyu's coat had types A and O blood, which were the same types as his father's and his brother's, respectively. Therefore, Dongyu's coat did not have the victim's blood at all. It is a ridiculous and unfortunate example of the Chinese justice system that the medical examiner could not properly identify the victim's blood type as type AB!

On April 12, 1995, the High Court of Heilongjiang Province acquitted Shi Dongyu. On April 22, Dongyu was released and walked out of Beian Prison. The local government finally settled with Dongyu for

RMB 60,000 as compensation and assistance.[6]

II. THE SURVEY OF CAUSES OF WRONGFUL CONVICTIONS

A. Brief Introduction of the Survey

From August 2006 to March 2007, the authors disseminated 2,500 copies of questionnaires in 19 regions, including Heilongjiang province, Liaoning province, Henan province, Hebei province, Shandong province, Sichuan province, Hunan province, Zhejiang province, Jiangxi province, Jiangsu province, Anhui province, Fujian province, Guangdong province, Hainan province, Tibetan Autonomous Region, Uygur Autonomous Region, Beijing, Shanghai, and Tianjin. The authors and assistant researchers received 1,715 valid copies in return. The questionnaires were sent to legal professionals in public security bureaus, people's procuratorates, people's courts, law firms, and justice departments in those areas.

Among the 1,715 respondents, 1,199 were males, 467 were females, and forty-nine were unknown. Of these, 1,659 were of the Han nationality, one of the Dong, seven of the Hui, six of the Manchu, one of the Zhuang, and 41 unknown. Fifty-six had an educational background of high school or below, 356 went to junior college, 1,094 had bachelor's degrees, 120 had master's degrees, one had a doctorate degree, and eighty-eight were unknown. For their majors, 854 had their first major in law, 669 did not, and 194 were unknown; 1,195 had their highest majors in law, 218 did not, and 304 were unknown.

The survey asked twenty-one questions, including: (1) what do you think of wrongful convictions; (2) what type of situations constitute wrongful convictions; (3) what are the main causes of wrongful conviction; (4) at which stages of the criminal process are wrongful convictions likely to occur; (5) what is the relationship between wrongful evidence and wrongful convictions; (6) what do you think about the wrongful convictions accountability system; (7) how can parties avoid wrongful convictions; (8) and how best can wrongful conviction victims be compensated. In the following Part, this essay focuses on results of the two questions that addressed the causes of wrongful convictions and wrongful evidence.

6. GUO XINYANG, HOW CRIMINAL WRONGFUL CONVICTIONS WERE CORRECTED 213–17 (Publishing House of the People's University of Public Security of China 2010). This summary of SHI Dongyu's case is based on the case files of the court. The files have not been published. The reference to the case is in Guo Xinyang's book, COMMENTS AND ANALYSIS OF WRONGFUL CONVICTIONS 213–17, (Publishing House of the People's University of Public Security of China 2011).

B. Causes of Wrongful Convictions

The questionnaire asked a multiple choice question: "According to your work experience, what do you think are the main causes of wrongful convictions?" The possible answers were: (A) unclear laws or rules; (B) fault of the parties; (C) interference by other administrative agencies; (D) public pressure; (E) interference by high-level agencies or superiors; (F) backwardness of current investigative facilities and techniques; (G) insufficient professional qualities of legal officers; (H) investigators bending law for personal interest and extorting confession by torture; or (I) work pressure from the requirement to solve 100% of cases in a timely manner.

In the answers to the question, the respondents, to different degrees, selected all the choices listed above. Among them, 1,074 (63%) picked "insufficient professional qualities of legal officers," 951 (55%) picked "unclear laws or rules," 866 (50%) picked "interference by higher agencies or superiors," 771 (45%) picked "investigators bend law for personal interest and extort confession by torture," 716 (42%) picked "backwardness of current investigative facilities and techniques," 405 (24%) picked "fault of the parties," and only 373 (22%) picked "public pressure."[7,8]

C. Relationship Between Wrongful Evidence and Wrongful Convictions

In the questionnaire, the authors especially designed a question to analyze the relation between evidential mistakes and wrongful convictions. Specifically, the questionnaire asked: "How much influence do you think mistakes in evidence would have in the formation of wrongful convictions in real investigations?" The respondents could pick only one answer, and the selections were: very big, a bit big, a bit small, very small, or none. The answers showed that many of the respondents think evidential mistakes have important effects on wrongful convictions: 1,031 (60.1%) picked "very big," and 538 (31.4%) picked "a bit big," which combined for a total of 91.5%. However, the questionnaire also had four people pick "no effect" and eleven people did not answer this question.

7. The low selection of "public pressure" was unexpected considering how important public pressure has been for wrongful convictions in the past.

8. The authors did not expect this choice to be so highly selected among those questioned.

III. THE SURVEY OF THE RELATIONSHIP BETWEEN SEVEN TYPES OF EVIDENCE AND WRONGFUL CONVICTIONS

A. Brief Introduction of the Survey

From January to March, 2007, seven graduate students of the law school of Renmin University of China went respectively to Beijing, Hebei province, Henan province, Shandong province, and Tibetan Autonomous Region for research. The graduate students combined the questionnaire with interviews and hence increased the reliability of the survey results. The graduate students sent out 140 copies of questionnaires and received 139 back. Among the 139 questioned, thirty-three (24%) were judges, sixty-six (48%) were prosecutors, twenty (14%) were lawyers, and twenty (14%) were policemen. The ages of the respondents were as follows: 45 (32%) were ages 20–29, 69 (50%) were ages 30–39, and 25 (18%) were older than 40. As for gender, 44 (32%) were females and 95 (68%) were males. Besides general questions, the authors also prepared special questions on each of seven types of evidence. Due to page limits, we will discuss the research results regarding two types of evidence that affect wrongful convictions the most: witness testimony and confessions of the accused.

B. Results of the Survey

The survey asked: How much influence do you think mistakes in evidence would have in the formation of wrongful convictions in judiciary practice? Respondents could pick only one of the following choices: (A) very big, (B) a bit big, (C) a bit small, (D) very small, and (E) none. Among the respondents, 66 (47.48%) chose "very big," 55 (39.57%) chose "a bit big," 12 (8.63%) chose "a bit small," 4 (2.88%) chose "very small," no one chose "none," and two respondents did not answer the question.

Legal professionals of different occupations displayed a discrepancy on this question. Although most of those questioned agreed that evidentiary problems are important in the formation of wrongful convictions, judges, prosecutors, and lawyers were more in agreement than the police about its impact. For example, among the 20 police officers questioned, 6 (30%) picked "very big," 6 (30%) picked "a bit big," 7 (35%) picked "a bit small," no one picked "very small," or "none," and one respondent did not answer. Among the 20 lawyers questioned, 6 (30%) picked "very big," 11 (55%) picked "a bit big," one person (5%) picked "a bit small," 1 (5%) picked "very small," nobody picked "none," and one did not answer.

The survey also asked: Which one of the following pieces of evidence do you think is most likely to cause wrongful convictions? Answers included: (A) physical evidence, (B) witness testimony, (C) audiovisuals, (D) testimony of the accused, (E) statement of the victim, (F) expert conclusions, or (G) inspection or examination record. It was a single answer multiple choice question. Among the respondents, 6 (4%) picked "physical evidence," 53 (38%) picked "witness testimony," 7 (5%) picked "audiovisuals," 52 (37%) picked "testimony of the accused," 15 (11%) picked "statement of the victim," 25 (18%) picked "expert conclusions," and no one picked "inspection or examination record." Again, there was a discrepancy in legal professionals of different occupations. More judges, prosecutors, and lawyers deemed witness testimony and testimony of the accused to be the main sources of evidence that cause wrongful convictions, while police showed no preference to the first six types of evidence. Additionally, quite a few judges believe the statement of the victim is most likely to cause wrongful convictions.

The questionnaire also inquired: Which one in the following situations do you think is most likely to cause wrongful convictions? Answer choices included: (A) witness fails to appear in court, (B) perjury, (C) obtain witness testimony unlawfully, (D) witness mistakes in cognition, or (E) judge's mistakes in using testimonies.[9] Among the questioned, 15 (11%) picked "witness fails to appear in court," 87 (63%) picked "perjury," 26 (19%) picked "obtain testimony unlawfully," 23 (17%) picked "witness mistakes," and 24 (17%) picked "judge's mistakes." Judges, prosecutors, police and lawyers hold similar answers to this question, except only that judges and prosecutors concentrated on "perjury," while police preferred "judge's mistakes."

Our survey further asked of respondents: Which of the following do you think can improve the rules of testimony and inhibit the formation of wrongful convictions? Respondents were allowed to give multiple answers. Among the questioned, 69 (50%) chose (A) "strengthen mutual restraint among police, prosecutors, and judges, and keep judges neutral," 52 (37%) chose (B) "reinforce the right to defense and increase the rate of lawyers' participation," 77 (55%) chose (C) "establish the protection system of witness and ensure the rate of witness appearance in court," 45 (32%) chose (D) "improve the discovery system, the cross-examination system, and supporting rules," 21 (15%) chose (E) "adopt the judge controlled free testifying model," 61 (44%) chose (F) "insist on the principle of evidentiary adjudication and the court shall examine

9. The five choices of this question intersect; but it can reflect cognitive attitude of the questioned to these common problems in witness testimony.

all evidence submitted by prosecutors and defenders," and 15 (11%) chose (G) "design reasonable scientific exclusionary rules of illegally obtained evidence, and suppress its negative effect." Judges, prosecutors and lawyers, attached much importance to three choices: (C) "establish the protection system of witness and ensure the rate of witness appearance in court," (F) "insist on the principle of evidentiary adjudication and the court shall examine all evidence submitted by prosecutors and defenders," and (G) "design reasonable scientific exclusionary rules of illegally obtained evidence, and suppress its negative effect." On the other hand, the police did not pay much attention to those three and collectively ignored the "establish the protection system of witness and ensure the rate of witness appearance in court" choice.

Respondents also answered the question: Which one of the following do you think is most likely to cause false testimony of the accused? Of the 139 respondents, 83 (60%) chose (A) "extort a confession by torture," 48 (35%) chose (B) "voluntarily take the rap for others for certain purposes," 10 (7%) chose (C) "the accused is confused," and 16 (12%) chose (D) "the accused wants to be released."

Survey participants also dared to opine on that most unanswerable of questions: Which one of the following do you think is the most serious problem now regarding the confessions of the accused? Surprisingly, 45 (32%) chose (A) "the confession is obtained illegally," 65 (47%) chose (B) "investigators attach too much value to the confessions and despise other evidence," 18 (13%) chose (C) "the accused intentionally conceal true fact in voluntary confessions," and 28 (20%) chose (D) "the accused refuse to admit guilt and the confession is difficult to obtain."

IV. EMPIRICAL ANALYSIS OF FIFTY WRONGFUL CONVICTIONS

A. Brief Introduction of the Case Studies

During the research of the project, the authors of this Essay collected data on roughly one hundred wrongful convictions that occurred in China since the 1980s and analyzed the cause of those cases. Now we will introduce 50 murder convictions selected from them.[10,11]

10. Including the murder conviction of Shi Dongyu in Heilongjiang province, the murder conviction of Ren Zhong in Jilin province, the murder conviction of Li Huawei in Liaoning province, the murder conviction of Li Jiuming in Hebei province, the rape–murder conviction of Qin Yanhong in Henan province, the murder conviction of Chen Shijiang in Shandong province, the murder conviction of Liu Minghe in Anhui province, the murder conviction of She Xianglin in Hubei province, the murder conviction of Teng Xingshan in Hunan province, the murder conviction of Liu Ritai in Fujian province, the murder conviction of Deng Liqiang in Guangxi Zhuang Autonomous Region, the murder conviction of Du Peiwu in Yunan province, the murder conviction of Tong Limin in Chongqing City, the murder

Through analysis, the authors found that almost every wrongful conviction was caused by the intersection of many reasons. Among them, those relating to evidence include the following: false witness testimony, false victim statement, false co-defendant testimony, false confession of the accused, mistaken expert conclusion, misfeasance of investigators,[12] misfeasance of judicial officers,[13] ignorance of evidence of innocence, deficient expert conclusion,[14] and unclear legal provision. Regarding "judge's mistakes in examining and evaluating evidence," it happens in almost every wrongful conviction case, so the authors did not list it as a cause to analyze.

B. Analysis of the Causes

Among the 50 wrongful convictions, 10 (20%) have "false witness testimony," 1 (2%) has "false victim statement," 1 (2%) has "false co-defendant testimony," 47 (94%) have "false confession," 4 (8%) have "mistaken expert conclusion," 48 (96%) have "misfeasance of investigators," 9 (18%) have "misfeasance of judicial officers," 10 (20%) have "ignorance of innocent evidence,"[15] 10 (20%) have "deficient expert conclusion," and 1 (2%) has "unclear legal provision."[16]

C. Problem of Extortion of Confession by Torture

The extraction of confession by torture is closely related to wrongful convictions. Adopting the confession extorted by torture as a basis to decide a case is usually a main cause of wrongful convictions. Of the 50 wrongful convictions, in 4 cases (8%), a court or procuratorate has

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conviction of Wang Xueyi in Gansu province, the murder conviction of Li Julan in Shaanxi province, the murder conviction of Hugejiletu in Inner Mongolia Autonomous Region, the murder conviction of Tan Fuyi in Beijing City, and others.

11. XINYANG, *supra* note 6. The information and materials of those cases are found in news reports and case files. Those files have not been published. The reference to those cases are in Guo Xinyang's book, COMMENTS AND ANALYSIS OF WRONGFUL CONVICTIONS, Publishing House of the People's University of Public Security of China (2011). Guo's book is one of the achievements of our empirical studies.

12. "Misfeasance of investigators" includes extorting confessions by torture, fabricating evidence, and so on.

13. "Misfeasance of judicial officers" includes the prohibition of cross examination in session by judges, the failure to arrange for witnesses to appear before the court, and other similar acts.

14. "Deficient expert conclusion" refers to illegalities in the procedure or form of the conclusion.

15. In fact, almost every wrongful conviction has some kind of ignorance of evidence that may prove the suspect innocent. Here what we especially marked as cases of ignorance of innocent evidence are cases where the defendant's counsel had clearly pointed out to the evidence.

16. The murder conviction of FAN Chengkai in Jilin was caused by an unclear provision in the law on the issue of proper or improper self-defense at that time.

formally concluded that a confession was extorted by torture, 43 (86%) have not been concluded formally by court or procuratorate but conclusions that a confession was extorted by torture is possible, and 3 (6%) do not have the extortion of confession by torture problem. In the first category, investigators in 3 cases have been convicted of the crime of extorting confession by torture. Investigators of the remaining case were held to have extorted confession by torture, but the procuratorate decided not to prosecute. In the second category, the suspects in 21 cases claimed they were tortured until confession during the investigation process, but had no evidence to support the claim. The accused in 7 cases had certain evidence to prove torture, such as scars on their bodies or witness testimony, but the court did not accept the evidence. In one case the prosecutor examined the accused and concluded there were slight wounds caused by torture on his body, but the court did not adopt the conclusion. In 14 cases, the accused confessed during the investigation stage, later recanted the confession, and were finally proven innocent because new evidence of innocence was discovered. Considering the frequent use of torture in investigation of those kinds of crimes, we can infer that previous confessions of the accused were extorted by torture.

V. CONCLUSIONS AND SUGGESTIONS

Wrongful convictions severely impair society. They not only hurt personal interest and cause injustice, but they also damage the public interest, destroy judicial justice, and harm public order. Moreover, wrongful convictions make the public lose faith in the judiciary and even the government! How can China prevent wrongful convictions in criminal justice proceedings? The above empirical research and analysis offer the following suggestions.

A. Evidence Problems Are Main Causes of Wrongful Convictions

In the survey, for the question "Which do you think are main causes for wrongful convictions?" 63% picked "insufficient professional qualities of investigators," 45% picked "investigators bend the law for self-interest and extort confession by torture," and 42% picked "backwardness of current investigative facilities and techniques." The three choices all imply evidential problems. For another question, "How much influence do you think mistakes in evidence could have in the formation of wrongful convictions in real investigation?" a total of 91.5% picked either "very big" or "a bit big." In the 50 analyzed

wrongful convictions, only 2 lacked any evidential problems;[17] all other 48 cases have at least two kinds of evidential problems.

Certainly, there are many causes for wrongful convictions, and some causes seem to have more impact, such as public pressure, interference by higher agencies or superiors, interference by other administrative agencies, and work pressure from the requirement to solve 100% of the cases in a timely manner, etc. But these factors usually operate through evidential problems. For example, the named causes have to manifest themselves through or translate into evidential problems, including extortion of confession by torture and fabrication of evidence. Additionally, the backwardness of current investigative facilities and techniques and the insufficient professional qualities of investigators are also causes for wrongful convictions, but are also manifested by evidential problems. In other words, evidential problems are direct causes for wrongful convictions, while other factors are usually indirect causes.

B. Improving the Exclusionary Rules Is a Top Priority

In the 50 analyzed wrongful convictions, 47 cases have both "false confession of the accused" and torture or possible torture, comprising 94% of the cases. Therefore, of all kinds of evidence, false confession is the primary cause for wrongful convictions, and torture is a main cause of false confession. There is a causal relationship between wrongful convictions and illegal evidence collection represented by the extortion of confession by torture. Hence, it is very important for the prevention of wrongful convictions to reinforce the legal acquisition of evidence and to establish reasonable, effective exclusionary rules against illegally obtained evidence.

Illegally obtained evidence means that the evidence is collected or obtained in violation of law. Current Chinese criminal procedure law does not have clear exclusionary rules; however, Article 43 of the Criminal Procedure law says that "[i]t shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means." The Supreme People's Court and the Supreme People's Procuratorate also made some supplemental rules regarding the exclusion of illegally obtained evidence in their judicial interpretations of the Criminal Procedure Law. However, those rules are too general, lack clearly specified provisions,

17. Besides the murder conviction of Fan Chengkai in Jilin province (see footnote 16), in the murder conviction of Ren Zhong in Jilin province, the accused was convicted because of a voluntary confession; but was proved not responsible for the crimes by subsequent forensic psychiatry conclusions.

and lack practical, effective enforcement measures.

Influenced by the wrongful conviction of Zhao Zuohai, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice jointly issued on June 13, 2010, "the Provisions on Issues Concerning the Examination and Evaluation of Evidence in Death Sentence Cases" and "the Provisions on Issues Concerning the Exclusion of Illegally Obtained Evidence in Criminal Cases," effective as of July 1, 2010. The enforcement of the two provisions on criminal evidence was a huge improvement in the Chinese criminal evidence system. For example, the two provisions clarified the procedures required for a court to hold evidence illegal, the assignment of the burden of proof, and the corresponding standard of proof, making operable the exclusionary rules of illegally obtained evidence.

C. Improving the System of Witness Appearance at Court Is Also an Important Measure to Prevent Wrongful Convictions

As set forth above, false witness testimony is also a main cause for wrongful convictions, second only to the extortion of confession by torture and false confessions of the accused. False witness testimony that could cause wrongful convictions usually slips through because there is no effective impeachment of the witness. Therefore, in order to prevent wrongful convictions, it is necessary to emphasize the impeachment of witnesses, which requires the appearance of key witnesses at court.

The appearance of witnesses at court is very important for judicial judgment. In legal proceedings, the trial is the most crucial part, and the judge is the decider of the case. Therefore, it is necessary for the judge to directly examine the evidence at trial. Only through such examinations can the judge form intimate conviction regarding the truthfulness and probative value of the evidence, and accordingly find the real facts and make a fair judgment. If the judge can only indirectly examine the witness testimony of record, it is very hard to make objective and accurate judgments.

Moreover, if witnesses appear at court, the opposing party will have the opportunity to impeach them directly. Such appearances, therefore, will not only prevent preconceptions and prejudice of judicial professionals in examining and evaluating the evidence, but increase the transparency of the trial. It will also protect the legal rights of the parties, especially the right to have the availability of direct impeachment and a fair trial.

Vague and self-contradictory provisions in Chinese procedural laws

related to the appearance of witnesses in court are the main obstacles to current reforms of the witness system. For example, in the Criminal Procedure Law of China, Article 48 provides that "all those who have information about a case shall have the duty to testify." Article 47 provides the following:

> [T]he testimony of a witness may be used as a basis in deciding a case only after the witness has been questioned and impeached in the courtroom by both sides, that is, the public prosecutor and victim as well as the defendant and defenders, and after the testimonies of the witnesses on all sides have been heard and verified.

Thus, it seems that witnesses are required to testify at court. However, Article 157 provides that "the records of interview of witnesses who are not present in court, the conclusions of expert witnesses who are not present in court, the records of inquests and other documents serving as evidence shall be read out in court." This obviously authorizes the non-appearance of witness. In reality, most of the witnesses do not appear in trial, so the law makers have to make the rules flexible. However, these rules then give excuses for the prosecutors and judges to not require witnesses to appear.

This shows that it is urgent to amend procedure law to decrease the non-appearance of witnesses. Specifically, such amendments should include three parts: first, to institute the principle of actual presence and oral testimony in procedure law and clarify which witnesses are required to appear in court; second, to design enforcement measures for the court to compel those witnesses who should appear in court but are not willing; and third, to specify the consequences of a witness who refuses to appear in court, including penalties against the witness and exclusion of his or her pretrial statement. Meanwhile, we should also improve the witness protection system and the witness compensation system.[18]

D. It Is of Crucial Importance to Enhance the Ability of Legal Officers to Collect and to Use Evidence

In our survey of causes for wrongful convictions, 1074 (63%) ranked "insufficient professional qualities of legal officers," first of all causes. It was unexpected that the respondents (judges, prosecutors, lawyers, and police) made such a choice, but it is representative and persuasive. Therefore, it is very important for the prevention of wrongful

18. The Amendment to the Criminal Procedure Law of PRC, which was promulgated in 1979 and revised in 1996, was being deliberated by the Standing Committee of the National People's Congress of PRC as of the writing of this paper. It was passed by the National People's Congress in March of 2012. In the Amendment, those issues of the exclusionary rules against illegally obtained evidence and the non-appearance of witness are addressed.

convictions to improve the skills and abilities of investigators in obtaining and applying evidence.

First, it is necessary to improve the evidence collection ability of investigators. Evidential problems are mainly caused by illegal collection and no corresponding evidential rules. Investigators are not good at collecting indirect evidence such as physical evidence. Second, it is necessary to improve the evidence examination and evaluation abilities of judicial officers. We should improve the relevant rules on evidence verification and strengthen the ability to analyze the probative value of evidence. Last, it is necessary for scholars to continue to research on and share principles and rules of examination and evaluation of evidence so as to increase such skills of legal officers.

The Chinese criminal justice system has a good slogan: "to make no innocent person convicted and to let no guilty person escape." However, such a dream is impossible to realize. In the criminal justice system of any country, wrongful convictions cannot be avoided absolutely. Investigators, prosecutors, and judges can never have direct perception of the facts in any case. The facts all happened in the past, just like the moon in the water and the flower in the mirror—to the legal officers, the evidence serves as the water and the mirror. Legal officers are not gods or omniscient beings. They cannot know everything or go back in time. They can find facts only on limited and insufficient evidence, and they unavoidably make mistakes. We are not exculpating legal officers, but recognizing the inevitability of wrongful convictions and analyzing their causes, so as to minimize the rate of mistakes. We are not making excuses for wrongful convictions, but letting people know the facts of wrongful convictions.

THE IRISH INNOCENCE PROJECT

*David Langwallner**†

It is better that ten guilty persons escape, than that one innocent suffer.[1]

I. ORIGIN AND EVOLUTION OF THE IRISH INNOCENCE PROJECT

The purpose of this Essay is to examine the history, evolution, and role of the Irish Innocence Project and to place the project in the milieu of the regulatory and social relationships that surround influences and impacts upon the project. Thus, it is proposed also to examine the Irish legal framework both constitutional, rights driven, statutory, and case law that either assists or hampers the project as well as canvass prospective legal issues affecting the Irish Innocence project. Of course it will also be necessary to refer to stakeholders in the Irish system, and in this context the Essay will refer in detail to the Irish Police called the Gardaí (sic Gaelic) as well as the role of the Irish state and government and finally the prison service in the way they impact upon the project. The purpose is to provide as full a picture as possible of the Irish project at this stage of its evolution.

The Irish project was set up in September 2009[2] at Griffith College Dublin. The idea for the project resulted from a suggestion made to the present author. I had been teaching clinical legal education at The Kings Inns, the sole present training school for barristers, in Ireland for a period of 5 years when I was appointed Dean of Griffith College Law faculty.[3] In this context, I was asked as to how the school might enhance

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1. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (1769).

2. Though I initially proposed it significantly earlier and a detailed proposal document was finalised in June of that year.

3. Griffith College is Ireland's largest private college and the college provides, inter alia, primary and master's degrees in law. In recent years many graduates of the college have become

the clinical component in the teaching of law. I should also add that the genesis of the project also stemmed from the fact that I am a practicing constitutional and human rights barrister and have always been very interested in human rights and criminal justice issues with a historic background also as a criminal defense lawyer. I have also litigated several major constitutional actions. It goes without saying that I was very aware of the project being established in the U.S. in 1992 by Barry Scheck and Peter Neufeld, though I was not aware in any detail of the Innocence Network at the inception of the Irish Innocence Project.[4]

I made a number of suggestions, most of which have been incorporated in the teaching of various subjects on the syllabus, but one suggestion resulted in a very detailed document being drafted suggesting that an Innocence Project be started in Ireland with the assistance of the college. The overall perspective was that the project would achieve two salutary and interlocking ends, which, in order of priority, are (1) help free innocence people that are either current prisoners or have been released from prison,[5] and (2) inculcate in students clinical skills in a way which made learning law interesting and personally rewarding.[6]

I might add that I now believe that a third worthwhile, and vitally important, skill can be derived, that is developing a human rights consciousness and a passion for justice, necessary perspectives in my view in an increasingly commercial and business driven legal culture, both nationally and internationally.

The college was supportive and agreed to provide, among other things, rooms[7] and conference facilities, which have been useful. There was a wellspring of interest among the student fraternity, and it must be added that we were significantly helped by other projects in the setting up period.[8] We enlisted the aid of, initially, two supervising criminal

successful barristers and solicitors, among other things. Some of those have assisted the development of the project.

4. Though, of course now the Irish project is privileged to be associated with, in effect, an increasingly worldwide human rights movement.

5. The second category of former inmates evolved organically as the project had no conception in advance that it would be contacted by released prisoners who felt hugely aggrieved. These were people largely not motivated by compensation considerations, but out of a visceral desire to clear their name for the monstrous injustice that was perpetrated upon them. It should be added that it is also the case that supporters and relatives of deceased former prisoners anxious to clear their name have also contacted the project.

6. In parenthesis it should be noted as to how difficult in many respects it is to make certain clinical skills interesting. Anyone who has had to teach legal drafting will attest to that fact!

7. Including a secure locked room with a confidential code for the storage of files!

8. Everybody who helped is thanked, but particular gratitude goes to Dr Greg Hampikian of the Idaho Project, formerly of the Atlanta project, for his enormous assistance in April 2009 when the project had been active for a few months and the hugely useful support he provided in streamlining and customising our documentation and structures. We embraced many of his suggestions for improvement.

defense barristers who have become a mainstay of the project.[9] It might be added that, in the four years since, that number of supervising lawyers has risen now to eight.

There was a significant amount of initial interest after careful and select publicizing of the project,[10] and we attracted cases very quickly. It was very discernible, borrowing a vernacular expression and one also used in the law of patent, that we were filling a "long felt want" in Ireland. Since the inception of the project, at various stages, upwards of 60 people have contacted us. As I write, (May 2013) there are some 20 active files.

The project has 12 student case workers drawn now from Trinity, Dublin City University and Griffith College. Such students are carefully selected after a rigorous interview process where many factors are borne in mind and form part of the interview panel's deliberations. It would be too time consuming to mention all the factors we consider, but the two we have found particularly helpful are, firstly, the importance of a human rights commitment, evidenced by a commitment to public service or voluntary work, and, secondly, the display of soft skills. It must be stressed in this later context that we have found it is not necessarily the best academic student who makes the best student caseworker, but the student with the most significant amount of soft skills.

Initially, such caseworkers were drawn exclusively from Griffith College's daytime and night-time students, but in September 2010, the project, at my suggestion, sought to involve students of other institutions. The Dean of Trinity College Dublin, Dr Hilary Delaney, was extremely helpful and supportive, and there are now four students who come from Trinity College Dublin who are caseworkers on the project.[11] More recently, Dublin City University students participate in the project and contribute two caseworkers. Other institutions in the light of recent talks I have had will, in all probability, come on board in fall 2013. My aim and aspiration, which appears as though it will be fulfilled, is to make the project a national, united one composed of different institutional stakeholders though recognizing the support Griffith College has given it.

It should be added that a full time Trinity academic, David Prendergast, was appointed as a supervising lawyer on the project and is the direct point of contact for the Trinity intake of students.

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9. Elaine Finneran BL and Barry Glynn BL.

10. The media in Ireland, as I suspect in most countries, is an unruly horse to ride but we had very favourable coverage from Ireland's paper of record, *The Irish Times*.

11. It would be remiss of me not to thank my colleague and friend Dr Oran Doyle of Trinity who was very helpful in assisting the project in its initial stages.

There is one final layer of the project that needs to be mentioned apart from caseworkers, supervising lawyers, students, and indeed me as Director, and that is the supervisory board of the project. The supervisory board arose as a result of a suggestion by Dr Greg Hampikian, which was acted upon. Greg's idea had to be tailored to an Irish context and, in effect, I set up a board to advise and counsel the project, which has had several substantial meetings thus far. The Board is chaired by a judge of the Irish Supreme Court[12] and different stakeholders in the legal system are also represented—civil rights activists, criminal defense lawyers, professional representatives, including a former chairman of the law society, and noted academics in the field. The board in particular has provided excellent advice including, but not limited to, the question of case progression and the decision taken to progress one particular case back before the Irish courts of which I will say more later.

Finally, the project has a rotating administrator. We have highly detailed procedures and documents in place for dealing with correspondence and a detailed and, recently revamped, questionnaire.

A. A Brief Synopsis of Project Procedures

It might be useful at this juncture to indicate briefly our processes. After an initial contact and acknowledgement, the aforementioned questionnaire is sent out to the client. Once that level of correspondence is received back, a desk top review of the case is conducted for the purposes of determining its admissibility with our criteria. At this stage in the process, several applications have historically been filtered and determined to be inadmissible.

Consider the following examples:

1: A client who does not state in the clearest terms in response to questions on the questionnaire that he is factually innocent. We have had several people contact the project complaining about many things in the conduct of their trial including what is termed in the U.S. ineffective assistance of counsel but simply do not state or indicate in the questionnaire that they are factually innocent. We invariably wrote back several times to the prisoner to clarify whether he or she is factually innocent or not before a file is closed.

2: We have had contact with several people who, although they accept that they did the act and, thus, are guilty of manslaughter, did not, for whatever reasons, have the requisite intent for murder. We have had

12. The second highest court in Ireland and an appellate court, I suspect the nearest U.S. analogy would be the Circuit Court of Appeals. The judge in question, who is also judge in residence at Griffith College and who has been enormously helpful, is Mr Justice Frank Clark.

a lively discussion in respect to such cases, a discussion I understand is mirrored by other innocence projects, and have decided not to accept such cases, subject to one caveat. We have decided that where the lesser offence, in our judgment, is not connected to the offense(s) for which factual innocence is claimed to accept the case.

3: We obviously have to be selective and filter out cases we regretfully conclude we cannot progress.

After the desk top review takes place, the supervising lawyer and caseworkers involved in the process report back to a plenary meeting of the project.[13] At that stage, a general discussion takes place of the case. Caseworkers and lawyers are assigned and the process of the collection of evidence ensues, which in practice often means the procuring of the case file and all relevant transcripts. The project has found by experience that it might be necessary, around this time, to send a letter to the Irish police or to the Garda for the preservation of all relevant evidence.

After all the relevant evidence is procured or as much as can realistically be procured, which may be an arduous process as we shall see in the next Subpart, the object of the exercise is to prepare a final report and if necessary an expert report which will be handed back to the client. As we shall see in the next Part this is necessary because of the ethical vagaries of the Irish system.

B. Uniquely Irish Obstacles and Other Objections to an Innocence Project

Although the project developed a momentum and support, which it has sustained, very quickly there were various objections from what is a conservative, putting it kindly, legal community.

In this context it might be noted that Ireland is a divided profession between barristers and solicitors. A barrister is, in effect and in ideal, a specialist and court room lawyer. A solicitor, in contrast, deals more directly with the public and handles non-litigious matters. Though the distinction, whether viable or not, has become somewhat blurred in recent years with inter alia solicitors advocating at the higher level of the court system. There are significant and imminent reforms as I write afoot in the Irish legal system.

Effectively there were various muted objections. One issue which the project has addressed is that barristers, in most instances, cannot

13. I should perhaps have mentioned it earlier in the paper that there is a plenary meeting of the projects every two weeks where all caseworkers, directors, and supervising lawyers are expected to be present and common substantive issues are discussed. On occasion, outside agencies such as forensics experts will be asked to give submissions to the project at this meeting.

ethically be involved in attempting to generate work from direct access to the client, a practice inelegantly and restrictively called touting.[14] In this context, we determined that since several barristers were involved in the project, once the file was complete and provided a final report, including an expert report if necessary, the report is then sent to the client who contacted the project. If necessary, the report should contain a detailed summary of reasons as to why, in our view, a solicitor of the clients' choosing could be contacted to brief a barrister to bring the matter back into court.[15]

In this fashion, the project is providing only a backup or investigative service to a post-conviction prisoner the system has disposed with. Once that service is provided, to bring the case back into the system, the client must go back to the solicitor in order to brief a barrister. To an American ear, and indeed to many others, this may seem maddeningly tortuous, but the process is arguably necessary given Irish professional ethical restrictions and the need to assuage the sensitivities of those of a conservative disposition in their interpretation of professional ethics.[16]

In full fairness, it should be added that many sensible people accepted that there was no ethical quandary in providing pro bono legal support to those who have, in some sense, been disposed of by the legal process. Indeed, many enlightened people in the Irish bar in particular welcomed the project and saw it as an addition to the Irish legal firmament. Indeed the support among barristers in particular has been deeply gratifying.

It should be noted that there is a wind of change in the Irish legal profession as I write and a new legal regulatory bill being prepared. It is hoped that such reforms and a changes to the legal climate will make it easier for the project to assume representative work but, of course, there will always be a need for close contact with solicitors and barristers who give up their time, pro bono, for the public interest.

A further issue which has taken until recent months to resolve and still, to some small extent, affects the project is the cooperation of the client's former, or in some instances present, solicitors. In essence the project needs access to a full set of trial and pretrial documents, the file in short, and the file is often in the possession of the solicitor or former solicitor. However, a very small minority of solicitors have refused to cooperate and have been, in some instances, either avowedly critical or

14. Whether this is a permissible restriction in this day and age is not the subject of this paper, and I leave it for others to judge. It is certainly, it seems to me, alien to an American sensibility.

15. We will examine the court procedure in the next Part.

16. The conservative nature at times of the Irish profession was best illustrated by a conversation I had with an esteemed colleague who, when discussing the project with me, prefaced his remarks as to the ethical problems the project faced with the somewhat startling assurance that "*Of course we were doing nothing illegal.*" In another instance, one lawyer bizarrely suggested that the project may be incompatible with decisions of the Irish Supreme Court!

suspicious or both of the project. There is no justification, legal or otherwise, for a solicitor to not hand over the file, the file is the property of the client, not the solicitor. Mercifully, these difficulties, which were on occasion time consuming, have been resolved or overcome. The project no longer faces effective hostility in this respect and as the project further beds down any outstanding residual issues, it is hoped that these issues will be resolved.

It must be stressed that many, indeed an overwhelming number of solicitors, have been very helpful in handing over the file to us and ordering the papers and paginating documents. Further, solicitor firms have increasingly accepted project caseworkers on paid internships.

Another issue, important in Ireland, was the question of stakeholder acceptance. We had meetings with the past and current Minister for Justice informing them as to the *raison d'être* of the project. This was deemed particularly necessary in securing access to prisoners in a proper professional legal environment, rather than generic public access. The Irish Ministry for Justice, after several meetings were very supportive and now Innocence prison visits are given the same status, in effect, as ordinary legal visits. The government has a civil servant processing Innocence project prison visit requests.[17]

A further ethical issue then arose which we needed to resolve. If we could have prison visits, could a barrister attend unaccompanied by a solicitor? In effect, the concern was that the bar code of conduct seemed to preclude a prison visit by a barrister without the accompaniment of a solicitor. Some of us took the view that all the code of conduct stated was that a visit in the professional representative capacity qua barrister could not take place without a solicitor. That prohibition did not apply to an innocence project visit which was supervisory for the barrister and educational for the student. Nonetheless, it was believed desirable that the advice of the bar council be sought informally. This was done and, after some hesitation, the practice of supervisory barristers attending prison visits was cleared; though I understand with the proviso that those barristers going on the visit cannot subsequently represent that person in court.[18]

A further issue in general was the cooperation of the prisons. Some prison governors were supportive and after the Minister allowed access, their support grew; though there were some minor glitches in the initial stages of the project, prison visits in particular, including, at times, some

17. It must be stressed that the decision to visit a prisoner is not an automatic one and the project discusses the matter in detail as to whether a visit is necessary in a particular case. It is also comparatively recent as files have to be processed and researched and initial reports submitted.

18. I assume this is the prohibition on a barrister generating his own work as already mentioned though, again, it seems maddeningly tortuous.

confusion as to who precisely we were. At one stage, clarification had to be sought before a perplexed prison official reluctantly granted admission for a visit!

In this context, it must be stressed that after I addressed the prison librarians' annual conference the prison librarians volunteered their support for the following:

> (i): The Irish Innocence Project information material in poster form to be put up on the prison notice board.
>
> (ii): That prisoners, if they request, are referred to the project or supplied with our details.
>
> (iii): With the co-operation of Griffith College, that legal materials and texts be supplied to the prison librarians if they so request, same for the prisoners.

A final crucial issue concerns the Irish Police or Garda. I was involved in an extensive process of lobbying the Commissioner of the Garda for a ruling on whether we could gain access to material they preserve and independently test. Eventually, after much delay and many months, the Commissioner, after an ostensible consultative process, refused our request and indicated if we were to make such an application to preserve and *ab extensor*, test we would have to do so within the framework of an application under the Criminal Procedure Act,[19] which I will momentarily turn to. This refusal, though anticipated, had a certain chicken and egg quality; how can you go back for an application under the Criminal Procedure Act that there has been a miscarriage of justice if you do not have the results of the test? However, we have found a way around this conundrum, which will be further discussed, but, first, let us turn substantively to the miscarriage of justice procedures in our law.

C. Miscarriages of Justice: The Statutory Framework and Principles from the Case Law

1. Statutory Framework and the Criminal Procedure Act

The ultimate purpose and work of the Irish Innocence Project is, of course, to exonerate a serving or former prisoner from a crime they did not commit. In this respect, if the prisoner is a serving prisoner, then the ultimate endgame of the Irish project is to provide a report to the client who, armed with that report, consults a solicitor of his choice with a view to bringing the matter back before the Court of Criminal Appeal under the miscarriage of justice procedure. Thus, the legislative scheme

19. Which deals, as we shall see, with miscarriages of justice.

under the Irish Criminal Procedure Act 1993 is appropriate and needs to be discussed in detail.

The starting point is the Criminal Procedure Act and, in particular, section 2.

From this, it can be appreciated that the engine which propels the Criminal Procedure Act and triggers its application is the production of a new or newly discovered fact which demonstrates that there has been a miscarriage of justice.

Further, it is pellucid from the defined terms of the Criminal Procedure Act that a new fact is a fact known to the convicted person at the time of the trial or appeal proceedings, the significance of which was appreciated by him, where he alleges a reasonable explanation for his failure to adduce evidence of that fact.[20] In contrast, a newly discovered fact is a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact whose significance was not appreciated by the convicted person or his advisors during the trial or appeal proceedings.[21] The act provides that:

> A person
>
> (a) who has been convicted of an offence either—
>
> (i) on indictment, or
>
> (ii) after signing a plea of guilty and being sent forward for sentence under section 13(2)(b) of the Criminal Procedure Act, 1967, and who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and
>
> (b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive, may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.

Thus, the lynchpin of the legislation is that the person claiming to be a victim of a miscarriage of justice has to adduce (and the burden of proof on the balance of probabilities is firmly on the alleged victim of the miscarriage of justice) that a new or newly discovered fact shows that there has been a miscarriage.

Section 3(1) of the Criminal Procedure Act is also of relevance, it

20. Criminal Procedure Act 1993, § 2(3) (Act No. 40/1993) (Ir.), *available at* http://www.bailii.org/ie/legis/num_act/1993/0040.html#zza40y1993s2.

21. Criminal Procedure Act 1993, § 2(4) (Act No. 40/1993) (Ir.), *available at* http://www.bailii.org/ie/legis/num_act/1993/0040.html#zza40y1993s2.

provides that on the hearing of an appeal against conviction of an offence, the Court of Criminal Appeal (C.C.A.) may take the following actions:

> (a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favor of the appellant, if it considers that no miscarriage of justice has actually occurred), or
>
> (b) quash the conviction and make no further order, or
>
> (c) quash the conviction and order the applicant to be re-tried for the offence, or
>
> (d) quash the conviction and, if it appears to the Court that the appellant could have been found guilty of some other offence [substitute a conviction for the lesser offence and sentence accordingly].

Further, section 7 of the Criminal Procedure Act concerns a petition to the Minister for Justice for a pardon under Article 13.6 of the Constitution and again invokes the driver of section 2 in that the applicant has to adduce a new or newly discovered fact to demonstrate that a miscarriage of justice has occurred in relation to the conviction. If the Minister then is of the opinion, after making inquiries, that either no miscarriage has been shown and no useful purpose would be served by further investigation or, disjunctively, that the matters dealt with by petition could be more appropriately dealt with by way of application to the Court pursuant to section 2, the Minister is obligated to inform the petitioner and take no further action. If, however, he thinks differently, he shall recommend to the government that either the President grant a pardon or, pursuant to section 8 of the Criminal Procedure Act, a Committee should be ordered to inquire into and report on the case.

It should be stressed that recently the Irish Innocence Project has asked the Minister for Justice for a pardon in a matter and the Minister is actively considering our detailed submissions in this respect.

Section 9 of the Act is also relevant and it was recently considered in the case of *People (D.P.P.) v. Hannon*.[22] The crux of section 9 is the payment of compensation. The section stipulates that where a conviction has been quashed, where someone has been acquitted on retrial and the court has certified that a newly discovered fact shows there has been a miscarriage of justice, or, lastly, where there has been a pardon and the Minister is satisfied there has been a miscarriage of justice, the Minister shall pay compensation to the convicted person, or, if dead, to his legal

22. *See* D.P.P. v. Hannon, [2009] I.E.C.C.A. 43 (Ir.). It might be noted that many of the cases involve a myriad of different applications to the C.C.A. and Supreme Court. The cases often have many hearings: a court of criminal hearing under Section 2, a hearing on whether a point of law of exceptional public importance is involved, a Supreme Court hearing, and further applications.

personal representatives, unless the non-disclosure of the fact in time is wholly or partly attributable to the convicted person. It might be noted that a person has the alternative option of suing for damages. The quantum of compensation ordered by the Minister can be appealed to the High Court.

Finally, it might be noted that one other statutory provision is particularly important flowing from the case law and that is section 29 of the Courts of Justice Act 1924 which regulates the right of appeal from the C.C.A. to the Supreme Court. It states, in essence, that in order for there to be an appeal from the C.C.A. to the Supreme Court, the C.C.A. or the Attorney General must certify that a case involves an issue of law of exceptional public performance and that it is in the public interest that an appeal be taken by the Supreme Court. Under such certifications, an appeal may be brought to the Supreme Court, the decision of which shall be final and conclusive.

This statutory scheme creates, as indicated, the endgame of the project. In essence, the project wants to establish that a new or newly discovered fact, whether that be a recanted confession or a new DNA test, that was not invoked at the original trial establishes a miscarriage of justice on the basis of factual innocence.[23]

It is now necessary, briefly, to deal with the case law on this Act and the principles to emerge there from.

2. Case Law

There is a detailed jurisprudence on miscarriages of justice which I do not have space to go into. In essence the following principles can be derived from the case law with reference to appropriate authorities. The following points are the crux of how, in fact, the Irish courts interpret miscarriage applications under the Act.[24]

> 1: That the burden of proof, on the balance of probabilities, is on the applicant to show there has been a miscarriage of justice. The burden of proof on the applicant is to establish, as matter of probability, not possibility, that the newly discovered facts would have led to an acquittal.[25]
>
> 2: That the applicant need not establish that a miscarriage of justice has actually occurred before proceeding to quash the conviction.[26]
>
> 3: That the Act operates to provide redress in cases where facts come to

23. It might be noted, as indicated, that the Act also provides a procedure for compensation.

24. I have tried to include them in a form of logical order as they might arise to a judge.

25. D.P.P. v. Pringle, [1995] 2 I.R. 547, *aff'd*, [1997] 2 I.R. 225.

26. D.P.P. v. Nevin, [2010] I.E.C.C.A. 106 (Ir.).

light for the first time after an appeal, which show that there may have been a miscarriage of justice.[27]

4: That s.2 provides redress to an applicant who can point to material which, if it had been available at the trial might—not necessarily would—have raised a reasonable doubt in the minds of the jury.[28]

5: It is up to the court to conduct an objective evaluation of a newly discovered fact to determine *inter alia* whether there has been a miscarriage of justice. In the Kelly litigation, Kearns, J. blends the criteria for the reception of fresh evidence on appeal with the criteria for the reception of new or newly discovered evidence on a miscarriage of justice application. In essence, the learned judge indicates that the court must engage with and evaluate the new evidence to determine whether it would materially affect the decision reached. Was the evidence credible, material and important and would it influence the outcome of the case? The judge indicates that the concept of materiality is read in reference to evidence adduced at the trial and not in isolation and such evidence has to show that it would genuinely enable the defense to raise a doubt such as to render the conviction unsafe.[29]

7: That in order to constitute a fact for the purposes of the application for miscarriage, the fact must be one which was relevant to the trial itself and to the decision made by the trial court and must imply that it is a fact which would have been admissible and relevant in evidence in the trial.[30]

8: That it does not follow because a conviction has been quashed that a certificate of a miscarriage of justice should issue.[31]

9: That the term miscarriage of justice is of wider import than factual innocence and connotes *inter alia* the following:

(i): Where it is established that the applicant was innocent of the crime alleged, Hannon[32] establishes that, in a recantation case, where there has been no untoward state conduct, the applicant is always entitled to a certificate and compensation. A miscarriage of justice is always made out on the basis of factual innocence.

(ii): Where a prosecution should never have been brought in the sense that there was never any credible evidence implicating the applicant.

(iii): Where there has been such a departure from the rules which permeate all judicial procedures as to make that which happened altogether irreconcilable with judicial or constitutional procedure.

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27. *Id.* at 109.

28. *Id.*

29. *See* D.P.P. v. Kelly, [2009] IECCA 56 (Ir.).

30. *Pringle*, [1995] 2 I.R. 547, 552.

31. D.P.P. v. Meleady & Grogan, [2001] 4 I.R. 16 (Ir.).

32. *See Hannon*, [2009] I.E.C.C.A. 43 (Ir.).

> (iv): Where there has been a grave defect in the administration of justice, brought about by agents of the State.[33]
>
> 10: Whether there is a miscarriage or the conviction is unsafe and unsatisfactory cannot be determined by the course taken by the defense at trial. The questions would be how strategically the defense would have been altered.[34]

Thus, as far as the Irish Innocence Project is concerned, the applicant needs to show that he may have been a victim of miscarriage of justice on new or newly discovered evidence that is relevant and admissible. It should be stressed that the term miscarriage of justice, both under the Act and in general, is wider than mere factual innocence. For instance, there can be a miscarriage of justice if a conviction is deemed unsafe. The Irish project takes the view that it can examine other matters that may amount to a miscarriage, such as to render the conviction unsafe, and that might involve technical legal issues as long as the prisoner assures us and we accept that he or she is factually innocent.[35]

It should be stressed that all of these statutory and case law principles are to some extent linked with a rights driven and, in particular, constitutional overlay to which I now turn.

D. The Irish Constitution and Rights Considerations

As well as the miscarriage of justice procedures and cases considered above, the work of Innocence Projects is intimately linked to rights driven considerations either directly or indirectly. To some extent, such rights driven considerations influence the courts in miscarriages of justice applications in Ireland and, in particular, the due process clause of the Irish Constitution Article 38.1.[36] However, there is a general constitutional overlay in the work of projects in terms of the access to evidence and, of course, the access to testing. I propose to deal with all these issues in the following section.

As far as human rights protection in Ireland is concerned, I think it necessary to first understand the relationship between international instruments and the domestic Irish Constitution which color and influence our reception of human rights law. Thus, I propose to deal with the relationship between the Irish Constitution and The European Convention on Human Rights. I also propose at times to relate the

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33. D.P.P. v. Wall, [2005] I.E.C.C.A. 140, 142 (Ir.).

34. The first statement is contained in *People D.P.P v. Gannon*, [1997] 1 I.R. 40, 47.

35. Such as a fundamental failure of due process which is dealt with in the next Part.

36. IR. CONST., 1937, art. 38(1) ("No person shall be tried on any criminal charge save in due course of law."). In these simple words the courts have established a multitude of emanations of due process which are discussed in detail in the text.

material to a U.S. Constitutional culture to show agreement and at times doctrinal dissonance between the two cultures.

1. Bunreacht Na HÉireann

The Irish Constitution (or in the Gaelic, Bunreacht Na HÉireann) dates from 1937, though there was an earlier 1922 document. The constitutional structure, similar to the U.S. Constitution and Bill of Rights, provides for a system of judicial review and various rights driven clauses that judges derive either textually from the document or have read into the document (the so called unspecified rights is also an aspect of U.S. Constitutional culture as I understand it and is referred to as the unenumerated rights).[37] The crucial rights clauses are Article 40–45 and Article 38.[38] It must be noted that many of those articles which we shall look at deal with human rights issues that affect Innocence Projects. In short, we cannot assess from an Irish perspective the role and functions of the Irish Innocence Project without assessing the relevant constitutional stipulations.

As indicated, where relevant, I will also try and translate Irish Constitutional considerations into U.S. Constitutional terms and cite analogous case law.

2. The European Convention on Human Rights

It must also be noted that Ireland is a signatory to the European Convention on Human Rights, a comprehensive human rights charter.[39] In 2003, the convention became part of our domestic law. It is now possible to take proceedings in the Irish Courts alleging a breach of the Convention.[40] However, the Convention has been incorporated in an impoverished and indirect manner. It sits somewhere below Constitutional rights and in the event of a conflict between the two, the Constitution prevails. To many this is a sub-constitutional level of

37. A terminology also used in an Irish constitutional context.

38. *See* IR. CONST., 1937. Among the more important rights, Article 38 deals with trial in due course of law/due process; crucial for innocence project, Article 40.1—Equality; Article 40.3—life, as well as the clause where the unspecified rights are grafted onto the Constitution; Article 40.4—Liberty; Article 40.6—Expression, Association and Assembly; Article 41—Family Rights; Article 42—Education rights; Article 43—Property rights; and Article 44—Religion.

39. *Id.* Crucial clauses include Article 40—the right to life; Article 3—the prohibition against torture and inhumane and degrading treatment; Article 5—liberty; Article 6—fair trial, arguably the crucial clause as far as innocence projects are concerned; Article 8—privacy and family life; Article 9—Religion; and Article 10—expression.

40. It is of course, as we shall see, still also possible to take an Irish case after you have exhausted all local remedies to the European Court of Human Rights.

incorporation. Further, the incorporation is not retrospective[41] and some judges have hinted that it sits no higher than ordinary legislation.[42]

In practical terms, the result of incorporation is that advocates can raise Convention case law domestically and some, but not all, Irish judges will mold the constitutional case law in accordance with Convention cases, though the Irish Supreme Court is not necessarily supportive of this practice. In practice, I have had, when citing Convention case law, substantially different reactions from Irish judges. Some sympathetic, some not so sympathetic. The facility whereby an Irish judge can shape Irish constitutional law in accordance with Convention criteria has been termed the interpretative obligation.[43]

Further, an Irish court can also declare Irish law to be incompatible with the Convention, though this approach is toothless in that the incompatible provision of Irish law still stands.[44] Ireland also recognizes the right of individual petition to the Convention and interstate applications so an individual or state can take Ireland to the European Court of Human Rights. In this capacity, there have been several instances of Ireland being found in breach of the convention, some of which we will refer to. The practice of the Irish government in general terms is to invariably alter (often after a delay) Irish law if it is found by the European Court of Human Right to be in breach.

The Act incorporating the Convention into our domestic law is short and comprises only nine sections with the European Convention on Human Rights and Fundamental Freedoms (and protocols thereto) fully contained in five schedules at the end of the Act.[45]

Under section 2 of the Act, courts are obliged to interpret Irish law in a manner compatible with the Convention "in so far as possible." This

41. *See* Cosma v. Minister for Justice Equality & Law Reform, [2006] I.E.S.C. (Ir.). I litigated a case which, to some extent, turned on the fact that the proceedings had been instituted (well before the hearing date) prior to the incorporation of The European Convention into domestic law. The judge thus took a markedly different approach and, from our point of view, negative approach to the relevance and applicability of Convention case law.

42. *See* McD v. L, [2007] I.E.S.C. 81 (Ir.) (demonstrating unequivocally and in a hugely unappealing and unappetising manner, the restrictive attitude of the Irish courts towards the interpretation of the convention).

43. *See* McD v. L, [2007] I.E.S.C. 81 (Ir.). In refusing to follow convention case law under Article 8 recognising the unmarried father and family, the Chief Justice reiterated that Ireland was a dualist state and indicated that the so called interpretative obligation under Section 2 of the European Convention Act 2003 does not allow for autonomous claims based purely on the Convention.

44. *See* Foy v. An t-ArdChláraitheoir&Ors, [2007] I.E.H.C. 470 (Ir.). A declaration of incompatibility issues, but the provision of Irish law stands most cogently illustrated in this case where, inter alia, McKechnie, J., found that the Irish practice of refusing to allow transsexuals the right to change their birth registrar violated Article 8 of the Convention, but the learned judge did not, as he could not, strike down the provision of Irish law.

45. European Convention on Human Rights (Act No. 20/2003) (Ir.), *available at* http://www.irishstatutebook.ie/2003/en/act/pub/0020/index.html.

has been termed, as aforementioned, an interpretative obligation but the structure of the section seems to suggest that a clearly conflicting provision of Irish law trumps the convention.

Under section 3, every "organ of the State" (meaning every organ of the State other than the courts, President and the Oireachtas) is required to perform its functions in a manner compatible with the ECHR and can be sued if it fails to comply with Convention obligations.

Courts must, under section 4 of the Act, take "judicial notice" of the Convention and decisions of the European Court of Human Rights (Strasbourg) and the European Commission on Human Rights. In effect, they are obliged to consider and take into account decisions of the ECHR, but are not bound in any fashion to follow them.

Under Section 5a, "declaration of incompatibility" of Irish law with the ECHR can be made by the High Court or Supreme Court. Such declarations can be accompanied by an award of damages. However, this remedy is available only if no other legal remedy is "adequate or available." The effect of a declaration of incompatibility is merely that the Taoiseach (Prime Minister) or appropriate government minister lays (presents and mentions) the decision before the Dail (the main house of parliament). No new vote on the legislation is required and the legislation is still valid unless it has separately been declared unconstitutional.

Thus, baldly stated, there are two routes available if a litigant wants to invoke the Convention:

> 1: The Domestic Route: Ask an Irish Court to mould Irish Law in accordance with the Convention or declare an act incompatible with the Convention or sue a state body for a convention breach.
>
> 2: The International Route: Exhaust all remedies in the Irish courts and go to the European Court itself in Strasbourg, though that may take upwards of 5 years.

Ireland has also signed other human rights instruments such as the United Nations Civil and Political Covenant and recognizes the right of individual petition to the Human Rights Committee but has not incorporated the covenant into our domestic law. There have been instances where Ireland has been taken to the human rights committee of experts.[46]

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46. *E.g.*, Kavanagh v. Governor of Mountjoy Prison, [2002] I.E.S.C. 13 (Ir.). The accused had been sent to the Special Criminal Court under Section 47 by the D.P.P. The applicant brought his case to the UN Human Rights Committee arguing that his trial before the Special Criminal Court violated his rights under Art 26 of the UN Covenant, which provides for equality before the law and the committee upheld his complaint in that: "No reasons are required to be given for the decisions that the Special Criminal Court would be "proper," or that the ordinary courts are "inadequate," and no reasons for the decision in the particular case has been provide to the committee. Moreover, judicial review of the

3. The Irish Innocence Project: Crucial Applicable Rights

It must be stressed that the Irish Innocence Project deals with DNA and non-DNA cases and accepts cases only if the applicant indicates he is factually innocent. In that context, the project will look at a constitutional or convention violation, and thus a breach of the applicant's human rights, where the applicant indicates he is factually innocent. Of course Convention and Constitutional issues affect a project in a myriad of different ways, not least access to evidence for testing and privacy and data retention issues, both of which are vitally important for the work of projects and we will look at in detail.

i. Due Process

As far as the Irish Innocence Project is concerned, the crucial initial clause is the aforementioned Article 38.1 of the Bunreacht which, worth quoting again, states that "no person shall be tried on any criminal charge save in due course of law."

These simple words have been elaborated upon by the Irish Judiciary to create, in effect, a substantive due process clause for those suspected of having committed a criminal offence. Thus, the issues that affect due process lawyers under the U.S. Constitution likewise affect Irish lawyers.

In general terms, the important early case is *State (Healy) v. Donoghue*,[47] per O'Higgins, C.J., where in a consideration of general principles the judge indicated that:

> [I]t is clear that the words due course of law in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with concepts of justice, that the procedures applied shall be fair, and that the person accused shall be afforded every opportunity to defend himself. If this were not so the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights.[48]

It is now necessary to turn to specific aspects of due process relevant for Innocence Projects and also to relate that to Convention case law, which is primarily located in Article 6 of the Convention and the fair trial clause. Given the inherently vast nature of due process, I am focusing only on those aspects that singularly or at a tangent, in my view, affect Innocence Projects.

DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances."

47. State v. Donoghue, [1976] IR 325 (Ir.).

48. *Id*. at 349.

A: The Obligation to Preserve Evidence and To Conduct Inquiries

With regard to the Irish Innocence Project, an important recent constitutional innovation is the important constitutional obligation to preserve relevant evidence and conduct enquiries. In *Braddish v. DPP*,[49] video evidence allegedly showing the applicants engaged in the course of robbing premises was disposed of by the Gardaí (police) and was not available for trial. The respondent argued that that the applicant had signed an inculpatory confession and that the unavailability of the videotape simply hampered the prosecution and did not hinder the defense. The Supreme Court held that the failure to preserve such vital evidence violated the guarantee to fair procedures and in effect due process.

In *Dunne v. DPP*[50] that obligation was extended to seek out as well as preserve the evidence. In *Bowes v. DPP*,[51] Hardiman, J., indicated that the duty to preserve potentially important evidence was not an open ended one and could not "be interpreted as requiring the gardai to engage in disproportionate commitment of manpower and resources in an exhaustive search for every conceivable kind of evidence." Such a duty, the judge indicated, "must be interpreted realistically on the facts of each case."

In *Scully v. DPP*[52] it was stressed that it was the securing of relevant evidence and, in *McFarlane v. DPP*,[53] the Supreme Court split in circumstances where fingerprints and photographs had been taken and then the items on which those prints and photographs were taken were lost. The majority of the justices, led by Hardiman, J., saw nothing untoward in the introduction into evidence of a fingerprint or a photograph, the dissenting Judge Kearns thought, not unreasonably, it would hamper the defense in conducting their own inspection and finding what they may. Finally, in *Savage v. DPP*[54] the Supreme Court also advised that it was best practice for the Garda to inform a suspect of the intention to destroy.

It might be noted that there are also several judicial dicta to the effect that it would be advisable for the solicitor for the applicant to write to the Gardaí asking them to preserve all relevant evidence at the earliest opportunity and thus there was a burden on the applicant not to delay. In light of this recent Constitutional doctrine, the Irish Innocence Project

49. *See* Braddish v. D.P.P., [2001] 3 I.R. 127 (Ir.).
50. Dunne v. D.P.P., [2002] I.E.S.C. 27 (Ir.).
51. Bowes v. D.P.P., [2003] I.E.S.C. 9 (Ir.).
52. Scully v. D.P.P., [2005] I.E.S.C. 11 (Ir.).
53. McFarlane v. D.P.P., [2006] I.E.S.C. 11 (Ir.).
54. Savage v. D.P.P., [2008] I.E.S.C. 39 (Ir.).

has sent out a series of letters to the relevant divisions of the Garda asking them to maintain the preservation of evidence in appropriate cases.

The convention under Article 6 is noticeably silent thus far on this issue.

1. Preservation of Evidence Post Conviction

A crucial question affecting all Innocence Projects is the preservation of evidence post-conviction for independent testing purposes. The cases aforementioned concerned with the preservation of evidence in the Irish legal system do not appear to countenance the possibility of access to material evidence after a final appeal, or at least there is no direct engagement of the issue in the existing case law and there is a kind of constitutional, and indeed statutory, void in this respect.

This is in direct contrast to both the USA and the UK. In the latter the preservation of material evidence is governed by the Criminal and Procedure Act 1996 where all material that may be relevant must be retained at least until the convicted individual is released from custody. Of course, in the USA there is the Justice for All Act 2004 which allows for greater federal funding for post-conviction DNA testing and, hence, has promoted the preservation of material evidence by the State for post-conviction testing.[55]

In this context an important consideration is that the legal platform for the establishment of a DNA database in Ireland is imminent, with the expectation of the Criminal Justice (Forensic Evidence and DNA Database System) Bill passing through parliament in the coming months.[56] The Irish Innocence Project has attempted to highlight, by intensive lobbying, a serious omission in the Bill with regard to the preservation of biological material from crime scenes. The Law Reform Commission (LRC) wrote the report on which most of the recommendations for the DNA database were instituted, however, the LRC's recommendation for the retention of crime scene material has been ignored in the Bill. The LRC argued that:

> [T]he retention is principally as a safeguard in the event that an individual convicted of the offence to which the sample relates alleges that a miscarriage of justice has occurred and wishes to challenge the veracity of the original evidence.[57]

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55. It is my definite understanding that in practice, some of the Irish police or Garda do preserve post-conviction evidence at least until a serving prisoner is released.

56. The bill at time of writing has lapsed and will need to be reintroduced by the new government.

57. THE LAW REFORM COMMISSION, CONSULTATION PAPER ON THE ESTABLISHMENT OF A DNA

As with the issue of disclosure, the idea that material should be preserved to allow for the possibility of testing after conviction does not appear to prevail in the Irish courts. Or at least it has been up till now absent from the constitutional conversation.

As I understand it, a right to post-conviction testing is the practice in many states in the U.S.,[58] though it is not sanctioned as a federal right. This issue of post-conviction testing is indeed highly contentious in the American courts. Recently, as I understand, in *Osborne* the appellant was attempting to establish a constitutional right to post-conviction testing under the Due Process clause.[59] This putative right was rejected in a highly contentious 5–4 decision, but on March 7th, 2011 in *Skinner v. Switzer*,[60] as I understand it, the Supreme Court did establish that a prisoner could challenge *inter alia* as a constitutional matter the adequacy of an individual states provision for post-conviction testing.

As far as Ireland is concerned, in my view, a similar argument for a constitutional due process right to post conviction testing was viable in our jurisdiction. Such a right, in my view, goes hand in glove with an obligation on the Garda to preserve and retain evidence at least whilst a prisoner is still serving time. In this context, the Irish courts could extend the principles in *Braddish*,[61] where the Supreme Court held that the failure to preserve such vital evidence violated the guarantee to fair procedures to a right to preserve post-conviction material, at least as far as a serving prisoner is concerned. The courts could then link such a right to a right to post conviction testing. All of this could be accomplished within the rubric of Article 38.1, the trial in due course of law clause, and due process clause.

Thus, as far as Irish due process law is concerned, a challenge, in my view, was viable in principle to establish as emanations of due process.

(1) The right to post conviction access to evidence

(2) The right to post conviction preservation of evidence and

(3) The right to post conviction testing of evidence

The project prepared a case[62] and, at my suggestion and that of Dr Steve O'Donoghue who prepared an internal report, sought the expert

DATABASE (2004), *available at* http://www.lawreform.ie/_fileupload/consultation%20papers/cpDNADatabase.pdf.

58. All 50 states now endorse the right to post-conviction testing.

59. Dist. Attorney's Office v. Osborne, 129 S.Ct. 238 (2009).

60. Skinner v. Switzer, 131 S.Ct. 1289 (2011).

61. Braddish, [2001] I.E.S.C.45 (Ir.).

62. I would like to thank the three caseworkers involved in this case Dr Steve O'Donoghue, Edward Matthews, and Audrey Brown Gallen for their trojan and, in some instances (Ed and Audrey), continuing work and involvement in this case.

advice of Dr Greg Hampikian as to whether this case could benefit from more advance DNA testing. Ed and Audrey then prepared a closing report and the project collectively agreed that the matter be referred back to solicitors (Garret Sheehan and Co.[63]) and counsel instructed.

This case is very much ongoing in the Irish courts and, as I write, a leave for judicial review application was successful in the Irish High Court and a fully-fledged judicial review constitutional case on access to evidence is being fought.

I now turn briefly to the other due process issues of relevance, though less compelling than the right to post conviction testing.

B. The Right to Silence

In the United States the Fifth Amendment, as I understand it, contains a specific privilege against self-incrimination, which is binding on the individual states via the due process clause of the 14th Amendment. Thus, a statute compelling someone to give answers to police questions would be unconstitutional unless it gave immunity to that person.[64] Further, comment by the prosecution or the judge on an accused person's failure to testify has been held to violate the guarantee.[65] In contrast the Irish domestic jurisprudence on the point is much less protective of the right.

1. The Irish Constitutional Position on The Right to Silence

In *Heaney v. Ireland*,[66] the Supreme Court upheld the constitutionality of section 52 of The Offences Against the State Act, which made failure to account for one's movements when requested to do so under that Act a punishable offence.

O'Flaherty, J., located the right to silence in Article 40 as a corollary to the freedom of expression conferred by that Article but indicated that:

> [I]t is clear that the right to freedom of expressions is not absolute. It is expressly stated in the Constitution to be subject to public order and morality. The same must be true of its correlative right—the right to silence.[67]

The Irish courts have also upheld the constitutionality of drawing inferences, e.g., from marks on clothes; though an inference cannot be a ground for conviction in the absence of other evidence, only proper

63. Who I want to thank for taking this case and extend my thanks also to counsel in this respect.

64. *See* Counselman v. Hitchcock, 142 U.S. 547 (1892).

65. Griffin v. California, 380 U.S. 609 (1965).

66. Heaney v. Ireland, [1996] 1 IR 580 (Ir.).

67. *Id.* at 589.

inferences can be drawn. The Irish courts have also indicated that the right was not absolute and might be qualified by the State in its pursuit of the maintenance of public order, so long as the privilege was affected as little as possible. Finally, they have suggested, doubtfully, that legislation may validly require a person to answer questions which tend to incriminate him and the answers to such questions would be admissible in criminal proceedings against the individual.

2. The Position under the Convention

It might be noted that *Heaney* was taken to the European Court of Human Rights[68] where the European Court found that, rather than a restriction on the right to silence, Section 52 constituted an abolition of the right to silence, which was not justified by any emergency or consideration of public order. The essence of the finding in *Heaney* is contained in the following extract:

> Accordingly, the Court finds that the "degree of compulsion" imposed on the applicants by the application of section 52 of the 1939 Act with a view to compelling them to provide information relating to charges against them under that Act in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent.[69]

The court also concluded the following:

> The Court, accordingly, finds that the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention.
>
> It concludes, therefore, that there has been a violation of the applicants' right to silence and their right not to incriminate themselves guaranteed by Article 6 § 1 of the Convention.[70]

The European Court has also decided that evidence obtained compulsorily in a civil process may not be used to threaten or to institute criminal proceedings against that person.[71] The European Court has also considered the drawing of inferences from the silence of an accused. In *John Murray v. United Kingdom*[72] the court opined:

> On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on

68. Heaney v. Ireland, App. No. 34720/97, Eur. Ct. H.R. (2001).

69. *Id.* at 55.

70. *Id.* at ¶¶ 58, 59.

71. Weh v. Austria, App. No.38544/97, Eur. Ct. H.R. (2004). This case summarises the present position of the ECHR on silence and is a useful authority.

72. John Murray v. United Kingdom, App. No. 18731/91, Eur. Ct. H.R. (1996).

> the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations, which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.
>
> Whether the drawing of adverse inferences from an accused's silence infringes Article 6 (art. 6) is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.[73]

As far as an Innocence Project is concerned, there may very well be serving prisoners alleging factual innocence who have been convicted under the domestic understanding of the right to silence which the European Court has frowned upon and which could be challenged. I am informed that in practice though, where somebody has given evidence compulsorily in a civil process, the Garda do not, given the Convention case law, recycle that evidence for a criminal investigation but build their evidence from base zero. I am also informed that prosecutions under Section 52 of the OSA which criminalizes silence are in practice not instituted, though the Act has not been repealed. Though of course, all of the above has to be read in the light of the supremacy of the Constitution to the Convention and the aforementioned impoverished manner of incorporation of the Convention.

Thus the possibility exists that a factually innocent prisoner could exist who claims they have been convicted on the basis of violations of the right to silence, particularly in the light of Convention case law. Particularly troublesome might be a historic admission where the Garda conduct an interview with no solicitor present.

C. Access to Legal Advisers

1. The Irish Constitution on Access to Legal Advice

The leading case on access to legal advice is *People (DPP) v. Healy*.[74] That case firmly established the right of access to a solicitor in respect of a person in Garda custody as a constitutional right, as opposed to a legal right. The suspect had a right to be told of the arrival of his solicitor and a right to immediate access. However, In Ireland access

73. *Id.* at ¶ 47.

74. *See* D.P.P. v. Healy, [1990] 2 IR 73 (Ir.).

means reasonable access, an accused is not entitled to have his solicitor sit in on interviews as decided in *Lavery v. Member in Charge*.[75]

The Supreme Court decided that a "solicitor is not entitled to be present at the interviews. Neither was it open to the respondent, or his solicitor, to prescribe the manner by which the interviews might be conducted, or where."[76]

Moreover, *People v. Buck*[77] established that the questioning of a suspect pending the arrival of a solicitor is not constitutionally forbidden.[78]

2. The Convention

All of the above is arguably contrary to the jurisprudence of the ECHR in *Averill v. United Kingdom*[79] where the court opined that "the concept of fairness enshrined in Article 6 requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of police interrogation."[80]

The Court clarified their position further recently in *Salduz v. Turkey* and, in the crucial part of the holding, indicated that "[n]ational laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defense in any subsequent criminal proceedings . . . ."

Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" (see paragraph 51 above) Article 6 § 1 requires that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police, unless it is demonstrated, in the light of the particular circumstances of each case, that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction—whatever its justification—must not unduly prejudice the rights of the accused under Article 6. The rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.[81]

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75. Lavery v. Member in Charge, [1999] 2 IR 390 (Ir.).

76. *Id.* at 396.

77. *See* D.P.P. v. Buck, [2002] I.E.S.C. 23 (Ir.).

78. In practice, the Irish Garda tell me they phone for a solicitor and then wait approximately 45 minutes. If a solicitor has not appeared in that time, they conduct the interview. Of the many I have talk with, 45 minutes is the constant refrain. It might be noted in Ireland, unlike in the UK, there is no duty solicitor scheme.

79. Averill v. United Kingdom, App. No. 36408/97, Eur. Ct. H.R., (2001).

80. *Id.* at ¶ 59.

81. *Id.* at ¶¶ 52–55.

Thus the position, as a matter of Convention law, somewhat baldly is that in other than exceptional circumstances, the accused is entitled to have access to a lawyer prior to being interviewed, and certainly if admissions were made prior to a lawyer being present. It is important to stress that only exceptional circumstances, not as in Ireland where an administrative practice would, warrant the deprivation of a lawyer.

As far as the Irish Innocence Project is concerned, if there are prisoners who are factually innocent and have been convicted as a result of an interview without a solicitor being present, there is a strong convention argument that Irish law should be changed to reflect the convention decisions. However, given the approach of the Irish Supreme Court towards the interpretative obligation, it is possible, in my view, ultimately, that you would have to take a case against Ireland to the ECHR to win such an argument.

D. Evidence Unconstitutionally Obtained/The Exclusionary Rule

1. The Irish Constitutional Position

The general rule was laid down in *People (Attorney General) v. O'Brien*.[82] It is as follows: evidence obtained as a result of a deliberate breach of a constitutional right should be excluded, unless there are extraordinary excusing circumstances, which justify its admission. Further, subsequent cases have established that if the act which amounts to a denial of a constitutional right is deliberate, it is immaterial whether the individual Garda is aware he is acting in violation of the Constitution. To hold otherwise would be to place a premium on ignorance of the law and the Constitution. Thus, the Irish Courts do not accept the so called good faith exception in *United States v. Leon*.[83] This position was firmly articulated in the case, *People (DPP) v. Kenny*.[84]

In that case Finlay CJ said:

> [T]he correct principle is that evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach . . . was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances . . . .

Detection of crime and conviction, no matter how important, cannot outweigh the unambiguously expressed constitutional obligation, as far

82. People v. O'Brien, [1965] IR 142 (Ir.).

83. *See* United States v. Leon, 468 U.S. 897 (1984).

84. D.P.P. v. Kenny, [1990] 2 IR 110 (Ir.).

as practicable, to vindicate the personal rights of the citizen.[85]

Finlay, C.J., pointed out to exclude only evidence obtained by a person who knows he is violating a constitutional right would be to impose a negative deterrent only, an absolute protection rule, however, incorporates an additional positive encouragement to acquaint oneself with the personal rights of the citizen. In another case, *Healy*,[86] McCarthy, J., explicitly rejected the good faith submission and opined that:

> [A] violation of constitutional rights is not to be excused by the ignorance of the violator, no more than ignorance of the law can ensure to the benefit of a person who . . . is presumed to have intended the natural and probable consequences of his conduct. If it were otherwise, there would be a premium on ignorance.[87]

Examples of acts which have been held to violate the constitutional rights of an accused person, and thus render evidence inadmissible, are as follows, failure to allow reasonable access to a solicitor, unconstitutional deprivation of liberty following the expiry of a lawful period of detention, violation of the right to inviolability of the dwelling (Article 40.5) by proceeding on the basis of a warrant with an inherent defect. It might be noted that oppressive questioning will also be a ground for exclusion. In *DPP v. Lynch*,[88] the Supreme Court held that the sustained questioning of the accused over a 22 hour period, coupled with the denial of access to his family or the opportunity for rest or sleep all amounted to such circumstances of harassment and oppression as to make it unjust and unfair to admit statements.

2. Accidental or De Minimis Mistakes

In *DPP v. Balfe*,[89] Murphy, J., distinguished *O'Brien* and *Kenny*, thus, a search warrant that innocently, but vitally, inaccurately describes premises, which may be searched on the basis thereof, is not without operative effect. Property seized in innocent reliance thereon may be admissible, but where a warrant is made without authority it has no value in law, however innocent the mistake. Thus, de minimis mistakes are constitutionally acceptable.

85. *Id.* at 134.

86. D.P.P. v. Healy, [1990] 2 I.R. 73 (Ir.).

87. *Id.* at 89.

88. *See* D.P.P. v. Lynch, [1982] IR 64 (Ir.).

89. *See* D.P.P. v. Balfe, [1998] 4 IR 50 (Ir.).

3. Extraordinary Excusing Circumstances

In O'Brien, the case that coined the phrase, Walsh, J., gave examples of what might amount to extraordinary excusing circumstances, rendering evidence admissible which would normally be inadmissible as obtained in breach of the Constitution. These include the need to rescue a victim in peril or to prevent the imminent destruction of vital evidence. In *Shaw*,[90] the chance of finding a victim alive was such an extraordinary excusing circumstance to justify the lengthy detention of the accused, (per Griffin, J.) or for admitting the appellants' statements (per Walsh, J.). In *Lawless*,[91] the police, in a manhole beside the flat, found seventeen packets of heroin. These packets had apparently been flushed down the lavatory as the police were entering the house. The court considered that this fell into the category of the need to prevent the imminent destruction of vital evidence. Mere eagerness on the part of the police to extend their investigations into offences other than those in connection with circumstances the person was originally submitted to questioning for, does not amount to an extraordinary excusing circumstance sufficient to justify detention.[92] A remarkable extension of the principle is found in *Freeman v. DPP*[93] where the gardaí, having chased subjects, followed them into a private dwelling where they found stolen property.

4. The Convention

The position under the Convention is contained in *Schenk v. Switzerland*,[94] which indicates that:

> While Article 6 (art. 6) of the Convention guarantees the right to a fair trial; it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk's trial as a whole was fair.

The Convention, whilst examining whether the overall trial was fair, primarily leaves it for the member state.

As far as the Irish Innocence Project is concerned, it is unlikely that such issues would not have been addressed at the actual trial or an

90. D.P.P. v. Shaw, [1982] IR 1 at 26 (Ir.).

91. People (D.P.P.) v. Lawless, Unreported, Court of Criminal Appeal, Nov. 28th, 1985.

92. (1985) 3 Frewen 30.

93. Freeman v. D.P.P., [1996] 3 I.R. 565 (Ir.).

94. Schenk v. Switzerland, App. No. 10862/84, Eur. Ct. H.R. (1988).

appeal; but the exclusionary rule is broad and a contention of some fresh evidence of a constitutional breach, fused with an averment of factual innocence certainly invokes the jurisdiction of the project in principle.

In my view, there potentially would be the basis for the ultimate overturning of a conviction as a miscarriage of justice on due process criteria as long as, of course, the prisoner stipulates they are factually innocent.

E. Right to an Interpreter

An issue that is appearing time and time again in Irish Innocence Project cases is the absence of an interpreter. There is no conclusive Irish case that resolves the issue, though a judge accepted, in a case presented, that there was such a right in custody and then conclusively ruled it had not been violated!

Under the Convention, this principle was first announced in *Kamasinski v. Austria*[95] as deriving from Article 6, though unsuccessful on the facts. It would seem in principle from *Kamasinski* that the right to an interpreter applies not just at trial but in custody and in particular at interview.

In Ireland, this is potentially an important due process issue for the Innocence Project. Given the increased amount of non-nationals in the state, these issues again would presumably be dealt with in trial, but if such an issue were not adequately dealt with and there was an assertion of factual innocence, then the jurisdiction of the project is invoked.

F. Disclosure

The issues surrounding the disclosure of evidence in a criminal case are well exemplified by the Paul Ward case, *Ward v. Special Criminal Court*.[96] Here, the prosecution withheld documents from the defense on the grounds of the potential of a danger to a third party from the disclosure of the documents. In the end, the Special Criminal Court[97] agreed that the court would be shown the documents and would rule on whether to disclose or not disclose to the defense. Hence, in the Irish courts, there is judicial inspection of the documents before a decision is made with regard to disclosure.

The jurist Ní Raifeartaigh also remarks how this decision is undertaken "where the judicial authority making the decision has, at the time of the initial decision on disclosure, no knowledge of the defense

95. Kamasinski v. Austria, App. No. 9783/82, Eur. Ct. H.R. (1989).

96. *See* Ward v. Special Criminal Ct., [1998] 2 I.L.R.M. 493 (Ir.).

97. An emergency court that is an anomalous and deeply disturbing feature of Irish law.

that will be put forward at the trial."[98]

With regard to the ECHR, the same writer concludes that while there:

> [I]s a general right of disclosure pursuant to Article 6(1), this right of disclosure is not absolute and is subject to competing rights such as national security, the need to protect witnesses who are at risk of reprisals, and the need to keep secret police methods of investigating crime. Secondly, only such measures restricting the rights of the defense as are strictly necessary will be permissible. Thirdly, any difficulties caused to the defense by a limitation on its rights must be counterbalanced as far as possible by appropriate procedural measures. It is perhaps important to emphasize that in such applications, the European Court does not attempt to second-guess the domestic court as to whether disclosure should have been ordered or not on the particular facts of the case. What is, however, of concern to the European Court is whether the procedures comply with the principle of equality of arms envisaged by Article 6(1). It may help to think of the Court's examination as being one directed to "process" rather than "outcome" in this context.[99]

Similar to the issues surrounding the preservation of evidence, the possibility of the disclosure of exculpatory evidence post-trial does not appear to have arisen in the Irish courts. This is in direct contrast to the USA where Stevens, J., dissenting judgment in *Osborne*, quoted from *Imbler v. Pachtman* to the effect, "[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."[100]

No such direction from the Irish courts appears to have been forthcoming thus far.

II. THE RELEVANCE OF THE PRIVACY RIGHT AND THE STORAGE AND RETENTION OF PRIVATE INFORMATION

A. The Constitution

1. Ireland

The unspecified right to privacy was recognized in the context of the right to access contraceptives for married couples in *McGee v. AG*.[101] It has been extended to a myriad of different contexts, sexual rights,

98. UnaNi Raifeartaigh, *The Eur. Convention on H.R. and the Irish Crim. Just. System*, JUD. STUD. INST. J. 22 (2004).

99. *Id*. at 23.

100. Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976).

101. McGee v. Attorney Gen, [1974] IR 284 (Ir.).

transexuality, journalistic intrusions, as well as surveillance techniques. From an Irish Innocence Project point of view, a crucial question is whether it will be applied to the storage and retention of information.

As aforementioned, the establishment of a DNA database in Ireland the Criminal Justice (Forensic Evidence and DNA Database System) Bill which was about to come into law has been delayed and perhaps temporarily shelved. The Irish Innocence Project is currently lobbying Parliament regarding this serious omission in the Bill concerning the preservation of biological material from crime scenes. As mentioned earlier, the Law Reform Commission (LRC) urged the same, but their advice has been ignored.

The crucial and arguably unwelcome authority from an Innocence project perspective, in many respects, is *S & Marper v. United Kingdom*.[102] The European court considered the retention of DNA, fingerprints and cellular samples. As far as cellular samples were concerned the court noted that:

> The Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.[103]

This is a noted example of how a human rights case can cut against the interests of an innocence project. Far from being against storage in many circumstances, Innocence Projects welcome the same. It will be interesting to see how the Irish courts react to *Marper*. In particular, an issue I have separately written on, there is the extent to which the right to privacy post-Marper curtails the right to retain DNA samples of non-convicted persons. An Irish Act is imminent (but then again has been for a while) and will try to deal with these concerns, though there is a possibility that litigation may have to ensue to clarify the law and assist The Irish project.

102. S. & Marper v. United Kingdom, App. Nos. 30562/04 & 30566/04, Eur. Ct. H.R. (2008).
103. *Id.* at ¶¶ 105,125.

2. Treatment in Custody: The Right to the Protection of One's Health: Bodily Integrity/Inhuman and Degrading Treatment and Torture

In *Ryan v. AG*,[104] the Irish Supreme Court upheld the judgment of Kenny, J., that one of the unenumerated rights protected by Article 40.3 of the Irish Constitution was the right to bodily integrity. However, the Irish Supreme Court went on to say that the State had the duty of protecting the citizens from dangers to health in a manner not incompatible or inconsistent with the rights of those citizens as human persons.

In the subsequent case of *State (C.) v. Frawley*,[105] Judge Finlay, though in refusing the application, held that the right to bodily integrity did not just apply to legislation as Ryan seemed to indicate, but also operated to prevent acts or omissions of the executive which, without justification, would expose the health of a person to risk or danger, including persons in prison. The question was: Had the executive failed in its duty?

The issue of torture and inhuman and degrading treatment is more extensively canvassed in the jurisprudence of the European Court of Human Rights under Article 3 of the Convention where the jurisprudence of the court establishes the following propositions:

> (i) Ill treatment must attain a particular or minimum level of suffering before it is classified as inhuman.
>
> (ii): To be degrading, the humiliation or debasement must attain a particular level.
>
> (iii): Torture must have a particular intensity of suffering.

The particular intensity of suffering required for torture has been made out by rape, persistent and aggravated beatings, electric shock treatment, and the bastinado.

As far as inhuman and degrading treatment is concerned, a useful disquisition is contained in the Isle of Man Birching case, *Tyrer v. UK*.[106] The Court indicated that "it remains true that the suffering occasioned must attain a particular level before a punishment can be classified as "inhuman" within the meaning of Article 3.[107]

The court then went on to consider the degrading issue:

> In the Court's view, in order for a punishment to be "degrading" and in breach of Article 3 (art. 3), the humiliation or debasement involved

104. *See* Ryan v. Attorney Gen., [1965] I.R. 294 (Ir.).

105. *See* State v. Frawley, [1976] I.R. 365 (Ir.).

106. Tyrer v. United Kingdom, App. No. 5856/72, Eur. Ct. H.R. (1978).

107. *Id.* at 29.

> must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph. The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.[108]

On the facts of the case the court concluded:

> [V]iewing these circumstances as a whole, the Court finds that the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of "degrading punishment" as explained at paragraph 30 above. The indignity of having the punishment administered over the bare posterior aggravated to some extent the degrading character of the applicant's punishment but it was not the only or determining factor.[109]

The court has also indicated that mental suffering from, for example, racism can make out degrading treatment**.**

In *Wainwright v. UK*,[110] the court indicated in a summary of general principles on ill treatment that:

> Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim. In considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his personality in a manner incompatible with Article 3. Though it may be noted that the absence of such a purpose does not conclusively rule out a finding of a violation.[111]

Thus the court does not agree with the conclusion of the Irish domestic court in *Frawley* that in order to make out inhuman or degrading treatment or torture there need be an evil purpose.

4. Oppressive Questioning

The Constitution prohibits interrogation that is oppressive as a fundamental violation of due process. Evidence obtained as a result of such practices will be excluded, absent extraordinary excusing circumstances. In particular, the courts have frowned on the practice of extracting a confession out of an accused by lengthy questioning without

108. *Id.* at 30.

109. *Id.* at 35.

110. Wainwright v. United Kingdom, App. No. 12350/04, Eur. Ct. H.R. (2006).

111. *Id.* at 41.

a break. In *People (DPP) v. McNally*,[112] convictions based on 40 hours of continuous questioning were quashed by reason of such oppression. In *DPP v. Lynch*,[113] the Supreme Court held that the sustained questioning of the accused over a 22 hour period, coupled with the denial of access to his family or the opportunity for rest or sleep all amounted to such circumstances of harassment and oppression as to make it unjust and unfair to admit statements.

In *People (AG) v. O'Brien*,[114] Kingsmill Moore, J., (Lavery and Budd, J.J., concurring) said obiter that to countenance the use of evidence extracted or discovered by gross personal violence would involve the State in moral defilement.

Furthermore, provisions now exist for the electronic recording of all interviews, and, although notable provisos do allow exceptions to this practice, the superior courts have shown a growing impatience with the police force where recording is not available.[115]

Finally, it should be noted that the Criminal Justice Act 1984, (Treatment of Persons in Custody un Garda Siochana Stations) Regulations 1987, regulates in a detailed fashion many aspects of the treatment of a suspect in custody, including the mandatory custody record, access to medical attention, and the conduct of interviews. While a breach of these regulations does not automatically exclude evidence, they are designed to provide added protections to a suspect in custody.

As far as Innocence Projects are concerned then, the treatment of a suspect in police custody can invoke constitutional and convention considerations, as long as such matters were not dealt with at trial. Again, fresh evidence would be required of a police practice in order to invoke the jurisdiction of the project. Thus, in principle, where there is inhumane degrading treatment or oppressive questioning which was not adequately dealt with at trial or an appeal (though this is unlikely) coupled with a statement of factual innocence then the jurisdiction of the Project is invoked.

5. Human Rights and Prisoners

The above concludes a survey of the various rights that could apply to prisoners but, given that an Innocence Project typically represents serving prisoners, a crucial question is, are prisoners invested with

112. *See* People v. McNally, [1981] 2 Frewen 83 (Ir.).

113. *See Lynch*, [1982] IR 64 (Ir.).

114. *See* People v. O'Brien, [1965] IR 142 (Ir.).

115. Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations 1997; *see also* Rattigan v. D.P.P. [2008] I.E.S.C. 34 (Ir.).

constitutional or Human Rights and if so, to what extent?

In *Shaw v. Murphy*[116] the United States Supreme Court indicated that incarceration does not divest prisoners of all constitutional protections.

Likewise, in *State (Richardson) v. Governor of Mountjoy Prison*,[117] Barrington, J., indicated that a convicted prisoner could be released by habeas corpus in at least some cases:

> If a court were convinced that the authorities were taking advantage of the fact that a person was detained, consciously and deliberately to violate his constitutional rights or to subject him to inhuman or degrading treatment, the court must order his release. Likewise, if the court were convinced that the condition of a prisoner's detention were such as to seriously endanger his life or health, and that the authorities intended to do nothing to rectify these conditions, the court might release him. The position would be similar if the conditions of the prisoner's detention were such as to seriously to threaten his life or health, but the authorities were, for some reason, unable to rectify the conditions.[118]

Further, Barrington, J., opines that that "[t]here is no iron curtain between the Constitution and the prisons in the Republic either."[119]

The judge held that convicted prisoners continue to enjoy a number of constitutional rights, including the right of access to the courts, and the judge reserved for a further occasion the question as to whether a prisoner charged with an alleged breach of discipline is ever entitled to consult a solicitor.

In other cases, prisoners have been accorded the right to communicate with journalists in some instances and have been recently in Ireland, as a result of an ECHR decision, accorded the right to vote.

In my view, these dicta are welcome and critical from an Innocence Project point of view if we wish to establish a prisoner's constitutional right to post conviction testing. The Irish courts are at least receptive to constitutional rights being applied to prisoners.

Of course, in the U.S. in *Osborne*, as aforementioned, a 5–4 decision of the U.S. Supreme Court refused a right to post-conviction testing under Due Process. From our point of view, more noticeable is the dissent of Stevens, J., where the eminent judge indicated that:

> The fact that nearly all the States have now recognized some post-conviction right to DNA evidence makes it more, not less, appropriate to recognize a limited federal right to such evidence in cases where litigants are unfairly barred from obtaining relief in state courts . . . [and post-

116. Shaw v. Murphy, 532 U.S. 223, 228–29 (2001).

117. [1980] ILRM 82.

118. *Id.* at 90–91.

119. *Id.* at 90. A quote endorsed in the prisoners' rights case of Gilligan v. Governor of Portlaoise Prison, Unreported, High Court, 12th Apr. 2001 (Per McKechnie, J).

> conviction testing was consistent with] . . . recent trends in legal ethics recognizing that prosecutors are obliged to disclose all forms of exculpatory evidence that come into their possession following conviction.

The judge concluded pithily and exactly in terms one would welcome from an Irish court that:

> In sum, an individual's interest in his physical liberty is one of constitutional significance. That interest would be vindicated by providing post-conviction access to DNA evidence, as would the State's interest in ensuring that it punishes the true perpetrator of the crime. In this case the state has suggested no countervailing interest that justifies its refusal to allow Osborne to test the evidence in its possession and has not provided any other non-arbitrary explanation for its conduct. Consequently, I am left to conclude that the State's failure to provide Osborne access to the evidence constitutes arbitrary action that offends basic principles of due process.

In the United Kingdom, Dr Naughton has linked the right to access DNA testing after conviction with, *inter alia*, the Article 5 right to liberty and Article 3 prohibition against torture and inhumane and degrading treatment. I concur and add that Article 6 on access to a fair trial is also relevant.

III. CRITICAL OBSERVATIONS

The above constitutes a survey of the principles from the case law and the conclusions and insights from the jurisprudence of the appellate courts on miscarriages applications and interpreting the nuances of Irish Constitutional and European Convention law. In this Part of the article, I want to highlight first some potential problems about the approach of the appellate courts and some potential issues that might dominate future jurisprudence. Finally, I shall conclude with some perspectives on how overall practices may be improved to assist in exonerating those imprisoned falsely who claim to be victims of injustice.

First, the jurisprudence of the appellate courts in *Kelly*,[120] in particular in the area of opinion evidence, would seem to shy away from embracing these opinions as new or newly discovered facts.[121] This could pose significant difficulties in the area of forensic retesting of physical or biological evidence, the interpretation of which relies on the opinions of forensic experts. For example, the use of DNA to exonerate

120. *See* D.P.P. v. Kelly, [2009] IECCA 56 (Ir.).

121. In particular, the judgment in *Kelly* previously dealt with, where the Court asserted that "for expert opinions to be admissible as newly discovered facts, the state of scientific knowledge as of the date of the trial must be invalidated or thrown into significant uncertainty by newly developed science."

convicted individuals has been crucial in the investigation of miscarriages of justice, especially in the United States. In particular, exonerations have occurred as a result of more advanced DNA testing. The acid question for an Irish court will ultimately be the extent to which more advanced DNA Testing constitutes either new or newly discovered evidence for the purposes of a miscarriage of justice application.

In Northern Ireland, the more sensitive low copy number DNA profiling was originally rejected as evidence in *R. v. Hoey*,[122] however, it was recently accepted under certain conditions in England in *R. v. Reed & Reed*.[123] Another sensitive and specialized DNA profiling technique, Y-STR profiling, has also been readily accepted in American courts.[124] In Ireland, we currently use the standard S.G.M. test; however, our State Forensic Laboratory does not carry out other more advanced and sensitive techniques. Indeed, given the reluctance to embrace expert evidence as new or newly discovered facts in the light of *Kelly*, it remains to be seen how our appellate courts would accept expert opinion presenting more sensitive DNA profiling that casts doubt on the safety of a conviction.

Second, the area of ineffective legal counsel has been brought up in the C.C.A. in *McDonagh*[125] and *Murray*.[126] Although the applicants in these cases were unsuccessful on the facts, the principle that ineffective legal counsel could be grounds for granting a miscarriage of justice certificate has been accepted. In *McDonagh* the C.C.A. indicated that, in exceptional circumstances, the conduct of a trial and steps taken preliminary to the trial by the legal advisors of an accused would give rise to an appeal, consistent with the requirement of the Constitution that no person was to be tried on any criminal charge "save in due course of law" and that the conduct of the defense may in certain circumstances, either at the trial or in the steps preparatory thereto, be such as to create a serious risk of a miscarriage of justice.

In *Murray* Geoghegan, J., indicated as follows:

> There is no doubt that as a matter of law and in exceptional circumstances a conviction may be quashed by the Court of Criminal Appeal on the grounds that a miscarriage of justice may have arisen from incompetent handling of the defense at the trial. Cases in support of that proposition have been cited but it is not necessary to review them. It is

122. *See* R. v. Hoey, [2007] N.I.C.C. 49 (N. Ir.).

123. R. v. Reed, [2009] E.W.C.A. Crim. 2698 (Eng.).

124. *See* Shabazz v. State, 592 S.E.2d 876 (Ga. Ct. App. 2004).

125. D.P.P. v. McDonagh, [2001] 3 IR 201 (Ir.).

126. D.P.P. v. Martin Murray, [2005] I.E.C.C.A. 34 (Ir.).

well known that that is the legal position.[127]

Accordingly, the issue of ineffective legal counsel may in the future become a more prevalent feature of miscarriage of justice cases. Indeed, it is one of the major issues leading to findings of a miscarriage of justice in the United States and is frequently invoked by Innocence projects where, of course, there is also a claim of factual innocence. The dicta in *Murray* and *McDonagh* are timorous and tentative in nature and do not address what the rather opaque phrase exceptional circumstances entails.

It might be noted that in the U.S., as I understand the case law, a test for ineffective assistance of counsel within the rubric of due process has evolved in a series of cases. In the leading case of *Strickland v. Washington*,[128] the Supreme Court indicated that a lawyers assistance is ineffective if it "so undermined the functioning of the adversary process that the trial cannot be relied upon as having produced a just result."[129]

The court also indicated that the burden of proof is on the defendant to show his lawyer was ineffective and the court will presume, absent proof to the contrary, that the lawyer was effective. In order to demonstrate ineffective assistance, a defendant must show that his lawyers' performance fell below the required standard and was ineffective due to serious mistakes and that said mistakes prejudiced the defendant's case. In this context, prejudice means that the result of the trial would have been different but for those mistakes.

It is to be hoped as the case law progresses so to will the Irish courts evolve such comprehensive and sophisticated standards.

Third, an area which appears not to have been canvassed before the Irish Courts in detail, is wrongful conviction as a result of false confessions. The International Innocence Network has long since recognized not only the possibility, but propensity, of false confessions giving rise to wrongful conviction and, as such, this is a currently inadequately explored area in our jurisprudence.[130] Historically, in Ireland, one could be convicted on the basis of confession evidence alone; it was left to the judge's discretion as to whether he warned the jury about the absence of any corroborative evidence. That said, following a number of high profile miscarriage of justices which came to light in Ireland and England in the late 1980's, the legislature intervened in this area, by virtue of s. 10 of the Criminal Procedure Act 1993. The Act provides that "[w]here at a trial of a person on indictment

127. *Id*.

128. Strickland v. Washington, 466 U.S. 668 (1984).

129. *Id*. at 686.

130. Richard P. Conti, *Psychology of False Confessions*, J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. (1999).

evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration."

Essentially, in Irish criminal law, this provides that a jury must be warned that the absence of corroborative evidence must be in their minds where confession evidence is the main or sole plank of the prosecution case and is unsupported by exterior evidence.[131] It remains the case that the false confession is an under canvassed area of our miscarriage of justice jurisprudence.

A further set of issues concerns recantation cases, of which the Irish project has attracted several. Such cases pose enormous problems in getting a witness to recant (given among other things the consequences they might suffer) as well as issues for caseworkers and field work. A useful line of inquiry we have found is to procure evidence from other witnesses which tends to shows that the evidence on which the accused was convicted was fabricated.

In general, several reforms could be introduced to assist in unearthing miscarriages of justice. In this context there is the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010 (DNA Bill), which is now lapsed and up to the present government to revive. Although the DNA Bill is to be welcomed, there are nonetheless flaws in it as drafted. Although a majority of the provisions in the DNA Bill have been drafted upon the recommendations of a Law Reform Commission (L.R.C.) Report on the establishment of the DNA database, some do not fully accord with the recommendations in that Report. Most importantly, it should be noted that this Report recommended the indefinite retention of biological material from a crime scene: "the retention is principally as a safeguard in the event that an individual convicted of the offence to which the sample relates alleges that a miscarriage of justice has occurred and wishes to challenge the veracity of the original evidence."[132] However, the DNA Bill is silent on this issue. In this context, it is urged that the DNA Bill reflect the need to indefinitely preserve biological material found at the crime scene.

Further, it is tolerably clear that the preservation of evidence remains problematic and the procedures in place by the authorities are piecemeal at best.[133] Thus, on the facts of the aforementioned *Conmey*, it is evident

131. D.P.P. v. Connolly, [2003] 2 I.R. 1 (Ir.).

132. REPORT ON THE ESTABLISHMENT OF A DNA DATABASE, LAW REFORM COMMISSION, 78 (2005).

133. To the best of my knowledge, many Garda preserve, as a matter of practice, all relevant evidence until a prisoner is released, but there is no compulsion on them to do so and practices may vary. This is in direct contrast to both the U.S. and the U.K. In the latter, the preservation of material evidence is governed by the *Criminal and Procedure Act 1996* where all material that may be relevant must be retained at least until the convicted individual is released from custody. In the U.S., there is the

that the authorities may not retain documentary evidence in a manner which one would expect, and indeed they may be retained in a manner which makes them inaccessible, or in the case of physical or biological evidence might render further testing impossible, or irrevocably tainted. This is an area which begs regulation and reform. Thus, documentary, physical, and other evidential materials must be retained in an appropriate manner, and failure to regulate in this area may well negate any possibility of exonerating a wrongly convicted person. This is a potentially burgeoning area of jurisprudence.

One final point of particular concern to innocence projects, as mentioned, is the need for the Irish courts to evolve a right to post-conviction testing, as is the practice in all states in the U.S.,[134] though it is not sanctioned as a federal right as previously mentioned.

In this context, as was mentioned, the Irish courts could extend the principles in *Braddish v. DPP*,[135] where the Supreme Court held that the failure to preserve such vital evidence violated the guarantee to fair procedures to a right to preserve post-conviction evidence, at least as far as a serving prisoner is concerned, within the rubric of Article 38.1, the due process clause.

Thus, as indicated, as far as Irish due process law is concerned, a challenge is now in being: which in the final analysis should establish

(1) the right to post conviction access to evidence.

(2) the right to post-conviction preservation of evidence and

(3) the right to post-conviction testing of evidence.

Whether such prospective challenges before an Irish court will succeed is another matter entirely. If such a set of principles were established, and we should know in the coming months, the Irish Innocence Project will have undertaken a quantum leap in its evolution.

Justice for All Act 2004 which allows for greater federal funding for post-conviction DNA testing and, hence, has promoted the preservation of material evidence by the State for post-conviction testing.

134. All 50 states now endorse the right to post-conviction testing.

135. *See* Braddish v. DPP, [2001] 3 I.R. 127 (Ir.).

BUILDING INSTITUTIONS TO ADDRESS MISCARRIAGES OF JUSTICE IN ENGLAND AND WALES: 'MISSION ACCOMPLISHED'?

Carole McCartney & Stephanie Roberts**†*

ABSTRACT

The revelation of miscarriages of justice can lead a criminal justice system to a crisis point, which can be capitalized upon to engineer legal reforms. In England and Wales, these reforms have included the establishment of three bodies: the Court of Criminal Appeal, the Criminal Cases Review Commission, and the Forensic Regulator. With differing remits, these institutions are all intended to address miscarriages of justice. After outlining the genesis of these bodies, we question whether these three institutions are achieving their specific goals. This Article then outlines the benefits accrued from the establishment of these bodies and the controversies that surround their operation. At present, both individually and collectively, these institutions represent a partial solution to miscarriages of justice. However, this Article argues that calls for a greater focus upon "actual" innocence made in light of this partial success are misguided. Such a refocusing may have the unintended consequence of fostering a climate where miscarriages of justice flourish. The rights of all suspects need protection, and due process concerns have the concomitant benefit of protecting the innocent from wrongful conviction. A blinkered approach to "miscarriages" will not necessarily assist the wrongfully convicted and may even increase their number.

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I. INTRODUCTION

The aim of any criminal justice system should be to ensure the guilty are convicted and the innocent acquitted, and that this is done in a lawful and just manner. Yet there are a multiplicity of ways in which miscarriages of justice[1] may occur. The criminal justice system in England and Wales, like many other countries, has endured periodic crises upon the revelation of wrongful convictions. Such crises have often resulted in legal reforms. This Article outlines three: (1) the creation of the Court of Criminal Appeal in 1907, (2) the CCRC in 1995, (3) and the Forensic Regulator Unit in 2007. These bodies each have an explicit remit to prevent or correct miscarriages of justice. While England and Wales cannot claim, "mission accomplished" with regard to addressing miscarriages of justice, the creation of these three institutions, with refinement and proper resourcing, deserves appreciation. By examining their genesis and remit, judgments regarding the effectiveness of these institutions can be made, permitting an appraisal of arguments as to whether there should be a greater emphasis on innocence within the appellate process.

A glance at the recent history of criminal justice in England and Wales shows a familiar pattern of crisis and reform. The Court of Criminal Appeal[2] was founded at the start of the twentieth century amid "heated press opinion, high profile individual cases of miscarriages of justice, a Royal Commission, and a public inquiry."[3] This series of events bears a striking similarity to those culminating in the creation of the Criminal Cases Review Commission (CCRC) after a similar crisis in confidence and a Royal Commission at the end of the twentieth century. The CCRC was not the only progeny of the 1993 Royal Commission on Criminal Justice. Although enduring a much longer and more turbulent gestational period, the office of the Forensic Regulator was also fashioned as a direct response to the same crisis and high profile miscarriages of justice, albeit with a remit aimed at prevention rather than cure.

While the Court of Appeal and CCRC both have enabling legislation that provides a straightforward encapsulation of their mission and

1. While there remains some residual debate over the nomenclature, this article uses the phrase "wrongful conviction" to indicate the conviction of the factually innocent, and the phrase "miscarriage of justice" to encompass a broader category including those who may be factually guilty but were convicted unlawfully or in contravention of principles of justice. Reforms in England and Wales have always targeted this broader category which is both necessary and in the interests of justice.

2. The Court of Criminal Appeal became the Court of Appeal (Criminal Division) in the Criminal Appeal Act 1966. Therefore, the phrases "Court of Criminal Appeal" and "Court of Appeal" refer to the same court; the term used is dependent on the time period being referred to.

3. RICHARD NOBLES & DAVID SCHIFF, UNDERSTANDING MISCARRIAGES OF JUSTICE 50 (2000).

operation, the Forensic Regulator has no statutory basis, making discernment of powers and responsibilities more problematic. However, all three pose similar problems when it comes to gauging their effectiveness. While the Court of Appeal and CCRC produce statistics, which give an indication of throughput, these are woefully inadequate when measuring their successes in ensuring miscarriages of justice are corrected. The Forensic Regulator Unit not only has a more oblique remit with no relevant statistics produced, it has also been operational for significantly less time, making evaluation more problematic. However, observations over the intentions of the regulator and the tools at its disposal can be determined and its effectiveness at preventing miscarriages of justice postulated. This article will detail the genesis of each institution, outlining its role and operation before considering some of the criticisms aimed at each and evaluating its effectiveness in addressing miscarriages of justice. We start with the oldest institution, the Court of Criminal Appeal.

II. THE COURT OF CRIMINAL APPEAL

The Court of Criminal Appeal's creation has been described as "the product of one of the longest and hardest fought campaigns in the history of law reform."[4] It took approximately thirty-one Parliamentary bills[5] between 1844 and 1906 before the Court of Criminal Appeal was created, with judges being the most vocal opponents.[6] There are various reports from the period that reveal that the judiciary did not object to their decisions being reviewed in relation to sentences or questions of law, but that they were clearly very hostile to an appeal system based on errors of fact.[7] Official reports generated from various enquiries into alleged wrongful convictions between 1844 and 1906 show that judges were reluctant to accept that innocent people were convicted.[8] This attitude of denial contributed to the delay in setting up the court.[9]

4. JUSTICE COMMITTEE, CRIMINAL APPEALS 6 (1964).

5. This is an approximate figure because different sources suggest different numbers but this is the figure listed in the *Return of Criminal Appeal Bills* (1906) H.L. 201.

6. See ROSEMARY PATTENDEN, ENGLISH CRIMINAL APPEALS 1844-1994 (1996) at 22–27.

7. The views of the judges can be ascertained in the following reports: COMMISSIONERS ON CRIMINAL LAW, SECOND REPORT ON THE CRIMINAL LAW (1836), CMND 343; COMMISSIONERS ON CRIMINAL LAW, EIGHTH REPORT ON THE CRIMINAL LAW (1845) PARL. PAP, VOL XIV; HOUSE OF LORDS SELECT COMMITTEE, REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF LORDS ON AN ACT FOR THE FURTHER AMENDMENT OF THE ADMINISTRATION OF THE CRIMINAL LAW (1848) CMND 523; ROYAL COMMISSION ON THE LAW RELATING TO INDICTABLE OFFENCES, REPORT OF THE ROYAL COMMISSION ON THE LAW RELATING TO INDICTABLE OFFENCES (1879), CMND 2345.

8. *See* SELECT COMMITTEE REPORT (1848) *Id.*: Baron Parke, p.4; Lord Denman CJ, p.44; Lord Brougham, p.49).

9. This view was also shared by the press. THE TIMES, Feb. 2, 1860 ("We believe that in our

Prior to the creation of the Court of Criminal Appeal, the Home Secretary[10] had the power to grant a pardon to those suspected of being wrongly convicted under the prerogative of mercy. It was believed that a Court of Criminal Appeal was then unnecessary as injustice could be rectified via this procedure.[11] The unsatisfactory nature of this process, however, was illustrated by the cases of Adolf Beck and George Edalji.[12] The Home Office rejected sixteen attempts by Adolf Beck, who had been mistaken for the real culprit, to have his convictions for defrauding women in 1896 and 1904 reviewed. Widespread press coverage led to an inquiry after Beck's innocence had finally been confirmed.[13] The case of George Edalji added fuel to the flames. Edalji was wrongly convicted of maiming horses in 1903. He had an alibi and the crimes had continued while he was in prison awaiting trial. Edalji was eventually pardoned after a campaign that included a petition of 10,000 signatures being sent to the Home Office and newspaper articles written by the author Sir Arthur Conan Doyle. These cases and others[14] showed that whilst the pardon power could remedy injustice, an appeal process that allowed for errors of fact to be reviewed was also needed. The Government responded to this mounting pressure by setting up the Court of Criminal Appeal in the Criminal Appeal Act 1907.

Although the Court of Criminal Appeal was established to remedy wrongful convictions of the factually innocent, it has often been opined that it has never fulfilled the function intended for it. Difficulties have stemmed from its function in deciding appeals on factual error grounds where the appellant is arguing he or she did not commit the crime, necessarily forcing the Court of Appeal to trespass on the role of the jury. The difficulty arises when determining how far it is allowed, or should be allowed, to do this. The Court of Appeal has been accused of adopting too restrictive an approach to its role of correcting miscarriages of justice. Three main complaints have been levelled at the court: that too much deference has been shown to the jury verdict;[15] that there has

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Courts of Justice innocent men never are convicted. If at long intervals some singular exception occurs to this universal rule, it is only an exception, which by its extreme rarity proves the rule.").

10. The Home Secretary is Secretary of State for the Home Department which is a Government Department responsible for some areas of the English and Welsh criminal justice system, notably the police. The other Government Department with responsibility for law and order is the Ministry of Justice.

11. PATTENDEN, *supra* note 6, chapter one.

12. For details of Beck and Edalji, see C.H. ROLPH, THE QUEEN'S PARDON 36 (1978); PATTENDEN, *supra* note 6, at 27–30.

13. BECK INQUIRY, REPORT OF THE COMMITTEE OF INQUIRY INTO THE CASE OF ADOLF BECK (1904) CMND 2315.

14. See PATTENDEN, *supra* note 6 at 30 n.215 for other examples.

15. *See* R.E. ROSS, THE COURT OF CRIMINAL APPEAL (1911); D. Seaborne Davies, *The Court of Criminal Appeal: The First Forty Years*, 1 J. SOC'Y PUB. TCHRS. L. 425 (1951); MICHAEL KNIGHT

been undue reverence to the principle of finality;[16] and that the court is motivated by the fear that "opening the floodgates" to a deluge of appellants would see the court flounder, ensnared by tight resource and budgetary constrictions.[17] These factors have undoubtedly had an influence on the Court's working practices and were fundamental in establishing the Court as one of *review* rather than *rehearing*. This has led to problems, particularly for those pleading factual innocence.

Leave[18] of the Court is generally required to appeal, the test being whether the appeal is *reasonably arguable*.[19] As Spencer has noted, this is "a process which lends itself quite well to the detection of procedural and legal errors, but much less well to dealing with the problem that the trial court, without breaking any of the rules, just reached the wrong result."[20] Whilst the appeal judge may be able to determine from the transcript of the summing up whether the trial judge was biased, or whether he misdirected the jury on the law, determining whether the appellant is factually innocent requires more investigation. As the judge reviews the case on paper and usually does so in his evenings and weekends, carrying out his normal judicial functions during the day, there is the potential for many miscarriages of justice to be missed. This process means that very few appeals get through the leave filter and only a small fraction of those that do are appeals based on factual innocence.

The Court suffers from a lack of resources, which is why the leave filter is important as the only control the Court has over the number of cases appearing before it. Spencer has cited the heavy workload of the Court as the main reason for its problems in determining factual innocence appeals. He states:

> This institutional overcrowding . . . is the reason, of course, that defendants who are convicted in the Crown Court need leave in order to

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CRIMINAL APPEALS (1970); K. Malleson, *Review of the Appeal Process*, RCCJ Research Study No. 17 (1993); TUCKER COMMITTEE, REPORT OF THE DEPARTMENTAL COMMITTEE ON NEW TRIALS IN CRIMINAL CASES (1954), CMND 9150; JUSTICE COMMITTEE, *supra* note 4; DONOVAN COMMITTEE, REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON THE COURT OF CRIMINAL APPEAL (1965) CMND 2755 [hereinafter DONOVAN COMMITTEE REPORT]; RUNCIMAN ROYAL COMMISSION ON CRIMINAL JUSTICE CHAPTER TEN (1993) CMND 2263 [hereinafter RCCJ].

16. *See* K. Malleson, *Appeals Against Conviction and the Principle of Finality*, J.L.S. 151 (1994); PATTENDEN, *supra* note 6 73–74; BOB WOFFINDEN, MISCARRIAGES OF JUSTICE 322 (1987); P. Hill, *Finding Finality*, 146 NEW L.J. 1552 (1996).

17. *See* RCCJ, *supra* note 15, at 162–78; J.R. Spencer, *Does Our Present Criminal Appeal System Make Sense?* CRIM. L. REV. 677 (2006).

18. A legal term generally translating as "permission."

19. Lord Justice Auld, Review of the Criminal Courts, chapter 12, ¶ 73 (2001). Available at http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/ (last accessed 30 November 2012). This process is usually conducted by reading a transcript of the judge's summing up, along with Counsel's advice on appeal, copies of the trial documents, a list of witnesses and the indictment and record sheet.

20. Spencer, *supra* note 17 at 684.

> appeal. And it is the reason why the Criminal Division of the Court of Appeal, like the Court of Criminal Appeal before it, has always done its best to avoid getting involved in appeals that turn on disputed facts, and particularly those that require the hearing of witnesses: one of the consequences of which is that the defendant is in a weak position to appeal where he was wrongly convicted (as against convicted in proceedings vitiated by an error of procedure or of substantive law). Appeals on the basis of "I simply didn't do it!" are particularly time consuming, and if the Court of Appeal were obliged to handle anything but a trivial number of them, this would seriously retard the task of dealing with appeals against sentence: a task that must be given high priority, if the court is to hear the appeal before the sentence is served.[21]

The problem of resources has been a recurring issue and impacts on the working practices of the Court, as it does on all parts of the criminal justice system. But it is not just a heavy workload that causes problems; the Court's review function also causes difficulties for the factually innocent. This function was summed up by Blom-Cooper, who stated that "[t]he Court of Appeal cannot substitute itself for the jury and re-try the case. That is not its function. It must oversee the fairness of the trial and satisfy itself that there was evidence on which the jury could properly convict."[22] If the Court's role is merely to assess the fairness of the trial and whether the prosecution had satisfied the burden of proof and the jury was able to convict, it is very difficult for injustice to be rectified. It precludes the Court from delving too deeply into factual issues and the merits of a case. The difficulties the review function has caused can be illustrated by those appeals that are based on factual error grounds where, at its most simplistic level, the appellant is arguing he or she did not commit the crime. These are generally the "lurking doubt" and fresh evidence grounds of appeal.

The Criminal Appeal Act 1907 gave the Court wide powers to quash a conviction where the verdict was unreasonable or could not be supported by the evidence. The approach the Court adopted can be illustrated by the case of *R v McGrath*.[23] The then Lord Chief Justice, Lord Goddard summed up the attitude of the Court when he said the Court was:

> [F]requently asked to reverse verdicts in cases in which a jury has rejected an alibi, but this court cannot interfere in those cases in the ordinary way, because to do so would be to usurp the function of the jury. Where there is evidence on which a jury can act and there has been a

21. *Id.* at 693.

22. LOUIS BLOM-COOPER, THE BIRMINGHAM SIX AND OTHER CASES: VICTIMS OF CIRCUMSTANCE 8–9 (1st ed. 1997).

23. R v. McGrath, (1949) 2 All ER 495.

> proper direction to the jury this court cannot substitute itself for the jury and re-try the case. That is not our function.[24]

This approach was perceived to be a restrictive one and an illustration of deference to the jury verdict. As a result, the Donovan Committee, set up to review the Court's working practices, recommended in 1966 that "the verdict . . . was unreasonable and contrary to the weight of the evidence" ground should be replaced by giving the Court the power to allow an appeal where the verdict is "unsafe or unsatisfactory."[25] The Committee felt that the advantages to be gained by this change were that the safeguards for an innocent person wrongfully convicted would be increased.[26] This change was enacted in the Criminal Appeal Act 1966 and consolidated in the Criminal Appeal Act 1968.

The aim of Parliament in enacting the unsafe and unsatisfactory ground was to impose on the Court a duty to form its own opinion about the correctness of a conviction, notwithstanding the fact that no criticism could be made of the conduct of the trial. The Court appeared to do this shortly after the enactment of the 1968 Act in the case of *R v Cooper*,[27] which created the lurking doubt ground of appeal. This requires the Court to form its own subjective opinion about the evidence in the case. Lord Widgery stated:

> [I]n cases of this kind the Court must ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.[28]

Despite the enactment of the unsafe and unsatisfactory ground and Lord Widgery's seemingly liberal interpretation of it, the review function continues to hamper the criminal division's approach in those appeals where there is no procedural or legal irregularity and no fresh evidence. Malleson's study[29] of the first 300 appeals of 1990 revealed that the principle of lurking doubt was directly or indirectly raised in 10 of the 281 appeals that were finally decided. She concluded that the Court appears to regard the principle as a last resort for those cases where no criticism can be made of the trial, yet concern about the justice of the conviction still lingers.

Malleson's research was carried out for the Royal Commission on

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24. *Id*. at 496.
25. DONOVAN COMMITTEE REPORT, *supra* note 15, at ¶ 150.
26. *Id.*
27. R v. Cooper, (1969) 1 Q.B. 267.
28. *Id*. at 271.
29. Malleson, *supra* note 15.

Criminal Justice (RCCJ), which was established on the day the Birmingham Six were freed[30] and it proposed reforms to the appeal process with the aim of restoring public confidence. The Commission discussed the lurking doubt ground and stated that they "fully appreciate[d] the reluctance felt by judges sitting in the Court of Appeal about quashing a jury's verdict" as "the jury has seen all the witnesses and heard their evidence; the Court of Appeal has not."[31] The majority recommended that there should be a single ground of appeal which was whether a conviction "is or may be unsafe." The Government rejected the words "or may be" preferring the test to be simply "is unsafe" which was enacted in the Criminal Appeal Act 1995.[32] In their response to the RCCJ, the Government stated that the concept of lurking doubt was incorporated into the unsafe ground.[33] This was confirmed by an update of Malleson's research by Roberts using the first 300 appeals of 2002 which revealed that the principle of lurking doubt was referred to directly or indirectly in seven of the 300 appeals with one allowed and six dismissed or refused.[34] Therefore, although lurking doubt has arguably been incorporated into "unsafe," the position under the Criminal Appeal Act 1995 is not markedly different to that under the Criminal Appeal Act 1968 with the Court continuing to adopt a restrictive approach to these appeals despite the recommendations of the RCCJ.

Although the general consensus has been that the reluctance of the judges to usurp the role of the jury has inhibited their use of the lurking doubt ground of appeal, the RCCJ report highlighted the deficiencies of the Court's review function. This was illustrated by the late, former Court of Appeal judge Sir Frederick Lawton, who stated:

> The court does not re-try cases . . . . It has to proceed on the basis that findings of fact implicit in the jury's verdict are the facts of the case. It can only disregard them if there is new evidence, or the findings of the jury were perverse, or the court has a lurking doubt. Reading a transcript of evidence is not conducive to raising a lurking doubt.[35]

This explains why very few lurking doubt appeals manage to get

30. This case and the RCCJ report are discussed *infra*.

31. RCCJ, *supra* note 15, at 171–72 ¶ 46.

32. This is the current test the Court has to quash convictions. Section 2(1) of the Criminal Appeal Act 1995 states that the Court of Appeal (a) "shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case."

33. LORD CHANCELLOR'S DEP'T, ROYAL COMMISSION ON CRIMINAL JUSTICE: FINAL GOVERNMENT RESPONSE (1996).

34. S. Roberts, *The Royal Commission on Criminal Justice and Factual Innocence: Remedying Wrongful Convictions in the Court of Appeal*, 1 JUST. J. 86 (2004).

35. Frederick Lawton, *Judgments Without Prejudice*, THE TIMES, Oct. 23, 1990.

through the leave filter and why they are generally unsuccessful,[36] thus curtailing the opportunities for those who are factually innocent to overturn their convictions.

Although it may have been the intention of Parliament that the Court of Criminal Appeal would take an active role in reassessing evidence, giving the Court wide powers under section 9 of the Criminal Appeal Act 1907 to adduce fresh evidence, the Court imposed its own restrictions: the evidence had to be credible and relevant to the issue of guilt; the evidence had to be admissible; and the evidence could not have been put before the jury.[37] Whilst these criteria were partly due to deference to the jury verdict and the principle of finality, the third restriction directly relates to the review function. In 1966, the Donovan Committee acknowledged that if fresh evidence were admitted, there would be a risk that the Court would on occasions find itself retrying a case, which was "a function which Parliament did not intend it to discharge."[38] The Committee recommended that additional evidence should be received if it was relevant and credible, and if there was a reasonable explanation for the failure to place it before the jury.[39] These recommendations were the subject of a late amendment to the Criminal Appeal Act 1966 which then became Section 23 of the Criminal Appeal Act 1968. The RCCJ also heard evidence from a variety of witnesses about problems relating to fresh evidence appeals and made various recommendations later incorporated into Section 23 of the Criminal Appeal Act 1968 by Section 4 of the Criminal Appeal Act 1995.

The Court now has the power to hear fresh evidence where this is "necessary or expedient in the interests of justice"[40] and must have regard to four factors: (a) whether the evidence appears to the Court to be "capable of belief;" (b) "whether . . . the evidence may afford any ground for allowing the appeal;" (c) whether the evidence would have been admissible in the lower court on an issue which is the subject of the appeal; and (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.[41] There is evidence to suggest, however, that the Court's attitude towards fresh evidence appeals since the Criminal Appeal Act 1995 remains unchanged.[42]

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36. For a further discussion on the problems of lurking doubt appeals specifically, see L. Leigh, *Lurking Doubt and the Safety of Convictions*, CRIM. L. REV. 809 (2006) L. James, *Criminal Appeals and the Lurking Doubt* 154(49) J.P. 780 (1990).

37. These principles from the early cases are summed up in R v. Parks, (1961) 1 W.L.R. 1484.

38. DONOVAN COMMITTEE REPORT, *supra* note 15, ¶ 132.

39. *Id*. ¶ 136.

40. Criminal Appeal Act, 1968, c. 19, § 23 (U.K.).

41. Criminal Appeal Act, 1968, c. 19, § 23(2) (U.K.), as amended by Criminal Appeal Act, 1995, c. 35, § 4 (U.K.).

42. *See* Roberts, *supra* note 34.

Fresh evidence appeals illustrate the complexity of the relationship between the Court and the jury. The Court defers to the jury verdict because an appeal is not a rehearing of witnesses (the jury is meant to be in a better position to draw inferences regarding witness testimony than the Court of Appeal), and the task of deciding whether a defendant is factually guilty is legally given to the jury. The review function also hampers the Court of Appeal from assessing fresh evidence as the Court is assessing whether the jury *could* have convicted and not whether it *should* have convicted. Yet the Court of Appeal's deference to the jury verdict is difficult to comprehend in fresh evidence appeals, because the Court is deciding on evidence never put before a jury. How should it then decide on guilt when this is not within its defined role? A lack of clarity on this issue compounds the difficulties that face the factually innocent and explains why so few fresh evidence appeals are brought before the Court and why so few are successful, forcing the innocent to frame their appeals in technicalities or procedural irregularities.

The resulting emphasis on procedural and technical appeals does assist those factually innocent appellants who have such irregularities or "due process" failures in their case. Due process arguments thus have an important role to play in providing factually innocent appellants with grounds of appeal. The problem arises when factually innocent appellants do not have due process failures to argue or when these arguments are unsuccessful in gaining relief. Such appellants are then forced to negotiate the flaws of fresh evidence appeals or locate a new procedural irregularity to try again. This is not an easy task even though the creation of the CCRC was heralded as the "solution" to such issues. This body was intended to have the power and resources to undertake investigations and possibly locate new facts (admissible fresh evidence) or shed new light on previously argued facts, capabilities that the Court of Appeal does not have. These capabilities, however, have meant that the relationship between the Court of Appeal and the CCRC has proved to be difficult, as those cases sent to the Court of Appeal via the CCRC can accentuate the very difficulties that the Court of Appeal has in handling fresh evidence appeals. The CCRC itself has also been subject of criticism in relation to its ability to deal with factually innocent appellants, particularly because the origins of the CCRC also lay in crisis following the revelation of a series of high profile wrongful convictions.

III. THE CRIMINAL CASES REVIEW COMMISSION

The origins of the CCRC lay in continued failures of Home Secretaries to use their powers wisely as well as frustrations with the

remit and operation of the Court of Appeal. The Home Secretary was given an additional power by Section 19 of the Criminal Appeal Act 1907 to refer a case back to the Court of Appeal for determination of the prerogative of mercy. The Criminal Justice Act 1948,[43] however, severed the link between the referral power and the prerogative of mercy, which left the Home Secretary with the power to grant a pardon or to refer a case to the Court of Appeal for determination. The Home Secretary also had the option of commissioning an inquiry into a case, which was carried out independently from the Court. Section 19 of the 1907 Act became Section 17 of the Criminal Appeal Act 1968, allowing the Home Secretary to refer a case to the Court "if he thinks fit."

The problems associated with this process were highlighted in 1975 when the then Home Secretary Roy Jenkins referred the *Lattimore*[44] case back to the Court of Appeal. This was the first of a number of cases during the 1970s where the appellants were believed innocent. Three young boys, Colin Lattimore, Ahmet Salih, and Ronnie Leighton, were convicted of crimes leading to the death of Maxwell Confait, and after leave to appeal was refused, a campaign was launched on their behalf.[45] Their convictions were subsequently overturned and an inquiry into the case found serious police malpractice during the investigation.[46] The publicity surrounding this case contributed to calls for a Royal Commission on Criminal Procedure (RCCP), which made a subsequent legislative recommendation to codify police powers, leading to the Police and Criminal Evidence Act 1984.

During the 1970s there was also hostility to references by the Home Secretary to the Court of Appeal, illustrated by the notorious case of *Cooper and McMahon.*[47] Cooper, McMahon, and another man Murphy were convicted of murder. The case went to appeal in February 1971 and was dismissed. The case was referred back to the Court, and in November 1973 Murphy's conviction was quashed. Home Secretary Roy Jenkins then referred the case of Cooper and McMahon back to the Court in 1974, and the case was rejected. After public disquiet and media concern escalated, the case was referred back to the Court again in 1976, and failed, while a fifth referral to the Court was rejected by Lord Widgery. A month after publication of a book on the case by Ludovic Kennedy, the Home Secretary William Whitelaw remitted

43. Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 49, § 38(6) (U.K.).

44. R v. Lattimore, (1976) 62 Cr. App. R. 53 (U.K.).

45. *See* CHRISTOPHER PRICE & JONATHAN CAPLAN, THE CONFAIT CONFESSIONS (1977).

46. HENRY FISHER, REPORT OF AN INQUIRY BY THE HONOURABLE SIR HENRY FISHER INTO THE CIRCUMSTANCES LEADING TO THE TRIAL OF THREE PERSONS ON CHARGES ARISING OUT OF THE DEATH OF MAXWELL CONFAIT AND THE FIRE AT 27 DOGGETT ROAD, LONDON SE6 (1977).

47. WOFFINDEN, *supra* note 16.

Cooper and McMahon's sentences, and they were released from prison. However, the case was referred back to the Court of Appeal for the sixth time in 2003; the convictions were finally quashed, but by then both had died.[48]

The cases of Laszlo Virag and Luke Dougherty also raised concerns. In 1974, a free pardon had been given to Virag, and Dougherty's conviction had been quashed by the Court of Appeal. The Home Secretary announced in the House of Commons that, in view of the serious questions raised by these two cases, he had appointed a committee, headed by Lord Devlin, to look into the law and Home Office procedures. The report, published in 1976,[49] was highly critical of the Home Office's practices in the Virag case, which had meant a two-year delay in his release because of the "serious misjudgment of the importance of the case by the officer who first dealt with it, coupled with the fact that officers in the Division were under exceptional pressures due to staff shortages."[50]

There continued to be disquiet about Home Office procedures into the 1980s. A series of television programmes about wrongful convictions were broadcast on the BBC in April 1982, featuring individuals who had petitioned the Home Office for referral to the Court of Appeal. These BBC programmes, entitled Rough Justice, provoked a great deal of interest, including from the House of Commons Home Affairs Committee.[51] The Committee heard oral evidence concerning these cases and others from Home Office officials, representatives of the human rights organisation JUSTICE, and the Criminal Bar Association (CBA). The Home Affairs Committee subsequently reported that both JUSTICE and the CBA had suggested that the chances of a successful petition to the Home Secretary might sometimes depend less on the intrinsic merits of the case than on the amount of external support and publicity it was able to attract. The report referred to Lord Devlin's proposal in 1976 for an independent review tribunal, stating that the proposal had been rejected by the Home Office on the grounds that the existence of a body would have detracted from the Home Secretary's freedom to reach decisions and that it would in practice operate as "another court above the Court of Appeal."[52]

Meanwhile, the Court of Appeal continued to be hostile to Home

48. R v. Cooper [2003] EWCA Crim 2257.

49. DEVLIN COMMITTEE, REPORT OF THE DEPARTMENTAL COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES (1976) HC 338.

50. *Id.* ¶ 6.17

51. HOUSE OF COMMONS HOME AFFAIRS COMMITTEE, SIXTH REPORT, MISCARRIAGES OF JUSTICE, (1981-82) HC 421.

52. *Id.* ¶ 12.

Secretary references, and calls persisted for an independent review tribunal. On June 16, 1988, a motion was debated in the House of Commons to establish an independent review body, but it lost by 121 votes to 45.[53] The real catalyst for change proved to be the cases of the Guildford Four and the Birmingham Six.

The "Guildford Four," wrongly believed to be members of the Irish Republican Army (IRA), had been convicted of the murders of five people in 1975 who died in the Guildford and Woolwich pub bombings. Their first appeal just two years later was heard after convicted IRA terrorists confessed to carrying out the pub bombings. This appeal failed. The case garnered a great deal of public interest, featuring in a number of books and television programmes, and the Home Secretary referred their case back to the Court of Appeal in 1989 after a persuasive campaign by a number of Members of Parliament, House of Lords peers, and two former Law Lords, Devlin and Scarman. New evidence showed confession evidence had been fabricated, and the Director of Public Prosecutions stated that the Crown no longer wished to maintain the convictions.[54] The Court of Appeal consequently quashed the convictions. The "Birmingham Six" were also believed to be part of the IRA and were similarly convicted of murder in 1975, this time for the Birmingham pub bombings. They had two failed appeals in 1976 and 1988, and as a result of public pressure surrounding this and the Guildford Four case, the Home Secretary referred the case to appeal in 1991. The Director of Public Prosecutions again stated that the Crown no longer wished to maintain the convictions, but the Court of Appeal heard the appeal in full. After hearing evidence that confessions had been tampered with and that there were serious flaws in the forensic evidence, the Court quashed the convictions.[55]

A number of other "Irish terrorism" convictions were overturned at this time, including those of the "Maguire Seven." The Home Secretary referred this case to appeal in 1990, and the convictions were overturned largely on the basis of nondisclosure of evidence and the discrediting of forensic evidence. They had all served their sentences by this time and one of them, Giuseppe Conlon, father of Gerard Conlon, who himself was one of the Guildford Four, had died.[56] The conviction of Judith

53. B. Woffinden, *The Independent Review Tribunal*, NEW L.J. 1108–09 (1989).

54. *See* WOFFINDEN, *supra* note 16; GERRY CONLON, PROVED INNOCENT: THE STORY OF GERRY CONLON OF THE GUILDFORD FOUR (1990); PAUL HILL & RONAN BENNETT, STOLEN YEARS: BEFORE AND AFTER GUILDFORD (1990); Clive Walker, *Miscarriages of Justice in Principle and Practice*, *in* MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR 31 (Clive Walker & Keir Starmer eds., 1999); NOBLES & SCHIFF, *supra* note 3.; PATTENDEN, *supra* note 6.

55. *See* BLOM-COOPER, *supra* note 22; WOFFINDEN, *supra* note 16; CHRIS MULLIN, ERROR OF JUDGMENT: THE BIRMINGHAM BOMBINGS (1986).

56. *See* ANNIE MAGUIRE & JIM GALLAGHER, WHY ME? (1994).

Ward, who had been tried in 1974 for the twelve deaths resulting from the bombing of a British Army coach, was also overturned in 1992 after forensic evidence was discredited and a large amount of material never disclosed to the defence was discovered. Her confessions were also deemed unreliable due to mental incapacity.[57]

The case of the Guildford Four led to an inquiry by Lord Justice May.[58] Such an inquiry was time-consuming (taking four and a half years), expensive, and of course hugely embarrassing to the government and law enforcement authorities. The government clearly did not desire a thorough inquiry, then, into each further miscarriage of justice as they came to light, so the Birmingham Six and Judith Ward cases were never examined in any depth. Although a Royal Commission on Criminal Justice (RCCJ), chaired by Lord Runciman, was announced as a direct response, the Commission did not confine itself to the issues set out in the terms of reference and instead took an expansive view of their remit, extending almost to the entire criminal process.[59] As previously discussed, the RCCJ reporting in 1993, recommended changing the Court of Appeal's powers to quash convictions and amending the fresh evidence provisions in Section 23 of the Criminal Appeal Act 1968. The major change however, was the recommendation that a new body should be created to consider alleged miscarriages of justice, to supervise their investigation if further inquiries are needed, and to refer cases to the Court of Appeal. The CCRC was subsequently created in the Criminal Appeal Act 1995 and began work on April 1, 1997.

The principal reason for establishing a new body was the need for decisions to be made independently of the executive. To ensure this, the Criminal Appeal Act provides that the CCRC "shall not be regarded as the servant or agent of the Crown."[60] However, the Commission's connection with the Government is not completely severed, as the Commissioners are appointed by the Queen on the recommendation of the Prime Minister.[61] One-third of the Commissioners must be legally qualified[62] and at least two thirds of the members of the Commission "shall be persons who appear to the Prime Minister to have knowledge or experience of any aspect of the criminal justice system."[63] The Commission is also reliant upon the Ministry of Justice for resources

57. *See* JUDITH WARD, AMBUSHED (1993).

58. SIR JOHN MAY, REPORT OF THE INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE CONVICTIONS ARISING OUT OF THE BOMB ATTACKS IN GUILDFORD AND WOOLWICH IN 1974 (1990) H.C. 556.

59. RCCJ, *supra* note 15, at 162–78.

60. Criminal Appeal Act, 1995, c. 35, § 8(2) (U.K.).

61. *Id.* § 8(4) (U.K.).

62. *Id.* § 8(5) (U.K.).

63. *Id.* § 8(6) (U.K.).

and the Ministry sets the terms and conditions of the Commission members' employment.

Under the Criminal Appeal Act, the Commission has the power to require an "appropriate person" from the public body that carried out the original investigation to appoint an investigating officer to carry out inquiries.[64] Where the public body was a police force, the appropriate person will be the Chief Constable of that force.[65] This has proved controversial. Malet has argued that the Act takes a very trusting attitude towards the police by leaving the police to examine their own failings.[66] A related problem is that the police must finance the cost of the reinvestigation. The majority of investigations and case reviews are undertaken by CCRC Case Review Managers, who write a report and make a recommendation that is sent to Commissioners to review. If the case is to be rejected (i.e., not sent for a further appeal), then a Commissioner alone can review the report and decide. A panel of three Commissioners is required to decide that the case should be referred back to the Court of Appeal.

Eligibility for review depends on whether the application arises from a conviction in England, Wales, or Northern Ireland. Only in exceptional circumstances can a case be referred without the applicant having exhausted the normal appeals process. To refer a case to the Court of Appeal, the Commission is given statutory guidance under Section 13, which states that there must be a "real possibility" arising from an argument or evidence that was not raised during the trial or at appeal, or from "exceptional circumstances,"[67] that the conviction or sentence would not be upheld.[68] The exceptional circumstances, a late insertion after a lengthy campaign, remain defined on a case-by-case basis. These statutory provisions appear more restrictive than the power the Home Secretary had to refer cases "if he thinks fit." It is difficult to define what *real possibility* means but the late Supreme Court judge, Lord Bingham, stated that a real possibility "plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty."[69]

While the CCRC is widely accepted to be an improvement on the

64. *Id.* § 19(1) (U.K.).

65. Criminal Appeal Act, 1995, c. 35, § 22(4) (U.K.).

66. D. Malet, *The New Regime for the Correction of Miscarriages of Justice*, Part 2 159(44) J.P. 735 (1995) at 736.

67. Criminal Appeal Act, 1995, c. 35 (U.K.).

68. *Id.* at 13(1)(a), (b) (U.K.); Criminal Appeal Act 1995, 1995, c. 35, § 13(2), (U.K.) (explaining that the Commission may require the Chief Constable to appoint the investigating officer from his own force or another.).

69. R v. CCRC Ex Parte Pearson, (2000) 1 Cr. App. R. 141, 149.

Home Secretary's reference procedure, there are major difficulties in assessing its performance. The Commission receives 800 to 1000 applications annually and refers around 4 percent of completed cases to appeal. It is argued that a 4 percent referral rate is too low, but it remains problematic to state that more cases *should* be referred without examining them in more detail; it is also difficult to provide anything more than anecdotal evidence, emanating from those who have been rejected, that more cases should be referred back to appeal. It is clear that the Commission is referring far more cases than the Home Office, which referred 67 cases between 1980 and 1993,[70] but this is to be expected given the increased budget and manpower. If the Commission's referral rate were not significantly better than the Home Office, then serious questions would have to be asked about its competence. In crude statistical terms, Nobles and Schiff calculated that in 2006–2007, the Commission made a contribution of 0.058 percent to the total successful appeals against conviction and sentence.[71] If using these figures to measure the Commission's contribution to remedying wrongful convictions and sentences, the contribution appears insignificant.

The Commission's "success" rate at the Court of Appeal has also been the subject of controversy. As of May 2013, there were 528 CCRC referrals to the Court of Appeal, and 498 had been heard. Of those, 341 had been quashed and 145 had been upheld.[72] This represents a success rate of 60.8 percent of those appeals heard by the Court (341/528). When calculated in terms of cases that have been closed (15,199), the Commission has won a further appeal in just over 2 percent of eligible cases. The difficulty for the Commission is if the success rate at appeal is too high, it appears that the Commission has set a prohibitive threshold for referral by sending only those certain to win. However, if the successful appeal rate is too low, then it appears that the Commission is sending weak cases with little chance of success, irritating the Court of Appeal. This balancing act was outlined in a memorandum to the House of Commons Justice Committee:

> The Commission has accordingly had to tread a careful line between not, automatically, referring all but the most threadbare cases (so as not to

70. PATTENDEN, *supra* note 6.

71. Richard Nobles & David Schiff, *After Ten Years: An Investment in Justice? in* THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT 151, 152–53 (Michael Naughton ed., 2010). This figure is based on 33 referrals which succeeded at the Court of Appeal out of 2000 successful appeals against conviction and sentence. The 0.058 per cent figure is the total successful Commission referrals (33) out of 57,000 people found guilty and sentenced in the Crown Court.

72. *See* the CRIM. CASES REV. COMM'N *Case Library* which is available on the Ministry of Justice website at http://www.justice.gov.uk/about/criminal-cases-review-commission/case-library (last accessed 27 June 2013).

> burden the courts with a mass of hopeless appeals) and not being so cautious as to refer only those cases where it judges the applicants prospect of success on appeal is more or less assured.[73]

There are other areas where the Commission has been criticised and these criticisms can be divided into two broad areas. The first is its working practices and backlog of cases; the second is its lack of focus on those who are factually innocent.

Since the Commission's inception, it has been besieged by problems of funding, delays, and backlogs.[74] Initially, the Commission was a victim of its own success as large numbers applied; additionally, 279 cases were transferred from the Home Office, which were prioritised by the Commission. The First Report of the Home Affairs Select Committee in 1998–1999, which scrutinised the work of the Commission, reported that there was a two-year delay before cases were reviewed.[75] As a result of this backlog, the Commission was given an enlarged budget of £1.28 million to increase the number of Case Review Managers from twenty-eight to forty during 1999–2000 and to fifty during 2000–2001. The move proved to have an impact on cases awaiting review, which dropped from 1,208 in May 1999 to 211 by March 31, 2004.[76] However, the Commission's funding was reduced from £7.8 million in 2004 to £5.75 million in 2005, which coincided with the largest increase in applications for five years. This prompted the then Chairman Professor Graham Zellick to report in the 2005–2006 Annual Report that due to budget restraints, backlogs and waiting times had increased.[77]

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73. *See* CRIMINAL CASES REVIEW COMM'N, MEMORANDUM, 2009, H.C. 343 (U.K.), *available at* http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/343/9031004.htm (last accessed 28 November 2012).

74. *See* A. James, N. Taylor & and C. Walker, *The Criminal Cases Review Commission: Economy, Effectiveness and Justice*, CRIM. L. REV. 140 (2000); R. Nobles & D. Schiff, *The Criminal Cases Review Commission: Reporting Success*, 64 MOD. L. REV. 280 (2001); Clive Walker & Carole McCartney, *Criminal Justice and Miscarriages of Justice in England and Wales*, *in* WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 183 (C. Ronald Huff & Martin Killias eds., 2008).

75. HOME AFFAIRS COMMITTEE, FIRST REPORT: THE WORK OF THE CRIMINAL CASES REVIEW COMMISSION, 1998-9, H.C. 106 (U.K.), available at http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmhaff/106/10602.htm (last accessed 27 November 2012). The CCRC was originally under the remit of the Home Office and therefore subject to the scrutiny of the Home Affairs Select Committee. It is now under the remit of the Ministry of Justice and so under the scrutiny of the House of Commons Justice Committee.

76. CRIMINAL CASES REVIEW COMM'N, ANNUAL REPORT & ACCOUNTS, 2003–2004, H.C. 9 (U.K.). Available at: http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccrc.gov.uk/CCRC_Uploads/2003%20-%202004_AnnualReport.pdf (last accessed 1 December 2012).

77. CRIMINAL CASES REVIEW COMM'N, ANNUAL REPORT & ACCOUNTS, 2005-2006, H.C. 1290 (U.K.). Available at: http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccrc.gov.uk/CCRC_Uploads/Annual%20Report%202005%20-%202006.pdf (last accessed 1 December 2012).

In a bid to streamline, the Commission changed its working practices in 2006, which are set out in its annual report. These changes appear to be having a positive impact on the Commission's backlog despite further reductions in funding. In giving evidence to the House of Commons Justice Committee on March 10, 2009, the current Chairman, Richard Foster, stated that there were seventy-eight cases waiting to be allocated to a case review manager (down from 225 in March 2006) and that complex cases now had a twenty-week wait (down from twenty-one months in 2005). He stated that quicker allocation of cases had reduced the backlog and that approximately eighty-five percent of cases were resolved within twelve months.[78] However, the reduction in funding has also led to a reduction in Case Review Managers of thirty percent over the period 2005–2011, a cut necessary to prevent a projected funding gap of £1.8 million by 2010–2011. The reductions have also forced the Commission to cut the number of Commissioners from sixteen to eleven. Unless funding increases (which is highly unlikely), the Commission runs the risk of struggling to keep waiting times and backlogs in check, with cases potentially cursorily reviewed and possibly rejected too swiftly.

The Commission has further been criticised for its lack of focus on factual innocence. These criticisms largely relate to its role which is to 'review the cases of those that feel they have been wrongly convicted of criminal offences, or unfairly sentenced. We consider whether there is new evidence or argument that may cast doubt on the safety of an original decision.'[79]

This perceived lack of focus on innocence was explained by former Chairman Professor Graham Zellick who stated that:

> [T]o deal only with people who are innocent—even if they could be identified—would not . . . widen our role, but would greatly narrow it . . . . What of the principle of legality, of due process and of the integrity of the criminal justice process? We think these things are rather important, as does the Court of Appeal.[80]

The Court of Appeal has the power to overturn convictions if it considers the conviction to be "unsafe." There are currently two interpretations of unsafe: that a factually innocent person has been wrongly convicted, or a factually guilty person has been convicted but

78. *Examination of Witnesses*, JUSTICE COMMITTEE, Q6 & Q7, *available at* http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/343/9031001.htm (last accessed 1 December 2012).

79. *See* CRIMINAL CASES REVIEW COMM'N: OUR ROLE (OVERVIEW), http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccrc.gov.uk/about/about_27.htm (last accessed 2 December 2012).

80. Graham Zellick, Letter to the Editor, THE GUARDIAN, June 20, 2005.

there has been a serious procedural or legal error or illegality.[81] The Court's approach is summed up in *R v Hickey and others*, where Roch LJ stated:

> This court is not concerned with the guilt or innocence of the appellants; but only with the safety of their convictions . . . . [T]he integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials.[82]

The Commission can refer a case where there is a real possibility that it will not be upheld, which means it refers cases under both interpretations of unsafe. Its work is thus not restricted to just those who maintain innocence and as a result, the Commission's approach has been criticised:

> The CCRC's dependence on the criteria of the appeal courts has the knock-on effect that its reviews are merely safety checks on the lawfulness or otherwise of criminal convictions, as opposed to the kind of in-depth inquisitorial investigations . . . that seek the truth of the claims of innocence by alleged victims of miscarriages of justice in the way that was expected by the RCCJ.[83]

As a result of this perceived reluctance of the CCRC to involve itself in "innocence" claims, Naughton states that there is then a need for a body that, "unlike the CCRC, is not bound to the criteria of the appeal courts and is sufficiently resourced and empowered so that it is not dependent on government,"[84] although he does not explain how such a body would be funded or operate. In defence of the CCRC's position, David Jessel, a former CCRC Commissioner, has responded that:

> [F]ewer innocent people would be freed if the legal criterion was provable innocence rather than unsafety of conviction, if only because it is so damnably difficult to prove. Is this what the campaigners want? If so, be careful what you wish for . . . . [T]o consider the safety of a conviction provides a sterner test for the system and a more useful one for the innocent individual than any test for factual innocence alone ever could.[85]

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81. For a discussion on the two interpretations of unsafe, see S. Roberts, *'Unsafe' Convictions: Defining and Compensating Miscarriages of Justice*, 66 MOD. L. REV. 441 (2003).

82. Court of Appeal, unreported, transcript 30 July 2007.

83. Michael Naughton, Conclusion, *in* THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT? 233 (Michael Naughton ed., 2010).

84. *Id.* at 225.

85. David Jessel, *Innocence or Safety: Why the Wrongly Convicted are Better Served by Safety*, THE GUARDIAN, Dec. 15, 2009, *available at* http://www.guardian.co.uk/uk/2009/dec/15/prisons-and-probation (last accessed 2 December 2012); *See* Hannah Quirk, *Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer*, 70 MOD. L. REV. 759 (2007).

There are a number of points to be made in relation to this. The Court of Appeal has always proven more receptive to appeals based on procedural or legal errors ("due process" failures) than those based on factual innocence as previously discussed. Therefore, if the Commission believes there is a greater chance of success with a procedural or technical ground of appeal, then it is going to increase its chances of success when referring on that basis. This benefits those who are factually innocent, those who are most often seriously hampered by the "invisibility" of their innocence: "[I]nnocence is not something that exists, out there, to be touched, felt, or measured, any more than guilt."[86] To demand proof of factual innocence as a threshold for appellants would raise the bar to a prohibitive level and would inhibit further the CCRC—particularly at their initial stage of review. This is where procedural and legal issues are critical, as these are often visible on the face of documents and materials initially reviewed, rather than buried deep in a case, requiring significant investigation to uncover. Downgrading the importance of due process arguments would be unworkable in practice, and it should be the role of an appellate court to uphold the integrity of the trial process and protect the right to a fair trial, which is conducted according to law, regardless of guilt or innocence.

Applications relying on a claim of factual innocence often do not have a legal or procedural error, or if they did, those arguments would have been made at the first appeal. The difficulty then arises in locating fresh evidence. Whilst the CCRC can be criticised for taking too restrictive an approach when deciding that evidence would not pass the fresh evidence provisions in Section 23 of the Criminal Appeal Act 1968,[87] many of the CCRC's problems are in fact created by the approach of the Court of Appeal. This is, of course, exacerbated by the subservient position of the Commission in relation to the Court of Appeal. If the Court takes a restrictive approach to fresh evidence, then it is understandable to some extent that the Commission will also. A simple solution is to abolish the fresh evidence restrictions in Section 23 of the Criminal Appeal Act 1968, which would give the Commission more flexibility. This would also allow compelling evidence of factual innocence that was available at the trial and the first appeal to be referred back to the Court.

Whilst the Commission can perhaps be criticised for being too

86. R. Nobles & D. Schiff, *Guilt and Innocence in the Criminal Justice System: A Comment on* R (Mullen) v Secretary of State for the Home Department, 69 MOD. L. REV. 80, 91 (2006).

87. *See* Campbell Malone, *Only the Freshest Will Do*, *in* THE CRIMINAL CASES REVIEW COMM'N: HOPE FOR THE INNOCENT? 107, 109 (Michael Naughton ed., 2010).

cautious in its relationship to the Court of Appeal,[88] there is little point in having a body such as the CCRC referring cases without regard to the powers and procedures of the Court of Appeal. Therefore, it is perhaps better to look to reforming the Court of Appeal to make that institution more receptive to factual innocence claims. An alternative solution, as Naughton suggests, would be to make more use of the pardon power, which the Minister of Justice may still exercise when convinced of a person's innocence.[89] A pardon removes the punishment for the crime, which is obviously beneficial to those imprisoned; however, there is the potential for creation of a "two-tier" appellate system, with a Court of Appeal rectifying procedural and legal errors and the Minister of Justice dealing with cases of factual innocence. This takes us full circle to the constitutional problems that led to the removal of the Home Secretary's referral power and the creation of the CCRC. The pardon power also does not remove the conviction, which only the Court of Appeal has the power to do. This is illustrated by the notorious case of Derek Bentley who was executed for murder in 1953. After a prolonged campaign by his sister, he was eventually pardoned in 1993, but his case had to return to the Court of Appeal in 1998 before the conviction was finally overturned.[90] Therefore, making more use of the pardon power is not necessarily a solution to these problems.

The CCRC was not the only progeny of the 1993 Royal Commission on Criminal Justice. While the creation of the CCRC could be considered a relatively swift and necessary reaction to the failings of the appellate process, there was also consideration of the causes of the miscarriages of justice that had necessitated the Royal Commission. The so-called Irish terrorism wrongful convictions had brought to the fore the issue of expert evidence and flawed forensic science. Many of the cases had been characterised by an early reliance upon false test results stating that the individuals had been in contact with explosives. The RCCJ looked then at the issue of forensic science and the use of experts during the criminal process and found that there were no real checks and balances in place to prevent reliance upon flawed forensic science or charlatans. This prompted recommendations that were preventative in nature, although these reforms were to take considerably longer to be acted upon.

88. *See* R. Nobles & D. Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal*, CRIM. L. REV. 173 (2005); Walker and McCartney, *supra* note 74.

89. The Home Secretary previously had the power to grant a pardon but the power now rests with the Minister of Justice.

90. R v. Bentley (deceased), [2001] 1 Cr. App. R. 21.

IV. THE FORENSIC REGULATOR UNIT

There is an obvious risk of wrongful convictions with reliance upon unsupervised or unregulated scientists, or upon unscientific techniques. During an investigation a "false positive" can inculpate an innocent individual, while a "false negative" may mean a perpetrator will go undetected and can continue offending. Poor scientific and professional standards thus destabilises public confidence in forensic science and consequently has an impact upon confidence in the criminal process. During the massive expansion of forensic science provision in England and Wales in the last fifty years, there have been a series of reports commenting upon the provision, as well as the regulation, of forensic services.

Given that many of the major miscarriages of justice of the 1980s and 1990s had at their core flawed forensic evidence, the RCCJ looked into the provision of expert and scientific evidence, making thirteen recommendations specific to forensic science. Of these, the establishment of an oversight body was deemed a priority. The Report recommended the creation of a Forensic Science Advisory Council (FSAC) to serve as the regulator for the forensic science community. Such a Council could be a mechanism for ensuring scientific standards, integrity, and continuity of provision of forensic science to the criminal justice system. A report into serious contamination at a military forensic explosives laboratory by Professor Caddy in 1996[91] also recommended the creation of an "Inspectorate of Forensic Sciences" and advocated the registration of individuals as forensic practitioners. Reforms were not initiated, however, until the 1999 establishment of the Council for the Registration (CRFP).

The CRFP was established to give the courts a single point of reference on the competence of forensic practitioners. It was to promote public confidence in forensic practice in the United Kingdom through publishing a register of competent forensic practitioners; ensuring that registered practitioners stayed up to date and maintained competence; and disciplining registered practitioners who did not meet the required standards of "safe, competent practice."[92] The CFRP register was welcomed as an important step in ensuring that those presenting themselves at court as expert witnesses were competent to fulfil that

91. BRIAN CADDY, ASSESSMENT AND IMPLICATIONS OF CENTRIFUGE CONTAMINATION IN THE TRACE EXPLOSIVES SECTION OF THE FORENSIC EXPLOSIVES LABORATORY AT FORT HALSTEAD (1996).

92. Applicants were required to provide details of their qualifications and experience, references from colleagues and users of their services, and declarations about their past and future conduct. An assessor from the relevant specialty reviewed a sample of their recent cases against competence criteria developed in association with professional bodies. Registration was granted for four years, submitting annual returns.

role. However, it stopped far short of bringing rigorous scrutiny to bear upon forensic science, and problems with flawed forensic and expert evidence continued. For example, in February 2007, Gene Morrison was jailed for appearing in numerous court cases as a forensic psychologist. Working on over 700 cases from 1977, he was found guilty of perverting the course of justice and perjury. He had earned over a quarter of a million pounds for reports that were often cut-and-pasted from the internet. His "qualifications" had been purchased from sham universities over the internet.[93] In the light of financial difficulties, lack of stakeholder support, and the failure to prevent such problematic "experts," the CRFP was closed in 2009.

The failures of forensic science were still causing considerable concern throughout the short lifespan of the CRFP, whose remit was too restricted to have much impact upon forensic science failures. In 2002, four youths had been put on trial for the murder of a schoolboy named Damilola Taylor. All four were acquitted, leading to a reexamination of the police investigation and forensic exhibits, during which significant blood spots and fibres were found that had been overlooked during initial examination. A major inquiry ensued, concluding that "human failures" had led to the omission of vital bloodstains.[94] A House of Commons Science and Technology Select Committee 2005 report, *Forensic Science on Trial*, made sixty recommendations on the regulation of forensic science, the training of scientists, and other pertinent issues, calling for the Government to establish a "Forensic Science Advisory Council" to oversee and regulate the forensic science market and provide independent and impartial advice on forensic science. After consultation, the government decided that a named individual would become a "Forensic Regulator," emulating other regulatory structures, with the responsibility of overseeing the quality of forensic science in England and Wales.

The first Forensic Regulator was appointed in 2007 and was tasked with establishing and monitoring quality standards, including those applying to national forensic science intelligence databases, and ensuring the accreditation of suppliers of forensic services. The Regulator's Manual[95] sets out requirements for all forensic science service providers, and the Regulator oversees accreditation (via the UK

93. *Fraudulent forensic expert jailed*, BBC NEWS (Feb. 17, 2007), http://news.bbc.co.uk/2/hi/uk_news/england/manchester/6386069.stm. In 2009, he was also found guilty on several charges relating to the rape and sexual assault of at least six young girls. *Bogus Forensic Scientist Jailed for Child Rape*, BBC NEWS (Dec. 11, 2009), http://news.bbc.co.uk/2/hi/uk_news/england/manchester/8407395.stm.

94. Alan Rawley and Brian Caddy, DAMILOLA TAYLOR: AN INDEPENDENT REVIEW OF FORENSIC EXAMINATION OF EVIDENCE BY THE FORENSIC SCIENCE SERVICE (2007).

95. Still in draft form and requiring detailed appendices.

Accreditation Service (UKAS)) using the international laboratory testing ISO17025 standard for all laboratories that supply forensic services. While reliance upon ISO17025 has been widely seen as appropriate, the standard is not specific to a forensic laboratory, necessitating supplementary standards and modifications to tailor the standard to forensic science.[96]

On the one hand, the introduction of a Regulator was presented as creating an oversight body for forensic science providers in the UK based on ISO standards and "a light touch" in steering forensic service providers. However, with a lack of "teeth" and with gaps in regulation, accreditation may prove to be superficial, although the lack of a statutory basis and enforcement powers have not yet been deemed a hindrance requiring remedial legislation. Even with UKAS appending supplementary standards onto ISO17025 to make it forensic specific, it is unlikely that any standard can regulate every aspect of a forensic practitioner's work. Oversight of crime scene examination and evidence retrieval remains very difficult, if not impossible, particularly where police personnel are working without external supervision. Over half of forensic science services (measured by cash value) in England and Wales are delivered within police forces' own scientific support services, with this set to increase. These services are not yet subject to the same quality standards regimes as apply to commercial providers. Yet different standards increase the risk of flawed results being relied upon or challenged in the courts.

At present few of the scientific processes delivered by police scientific support services are subject to accredited quality standards, yet the closure of the Forensic Science Service (FSS) in the UK and the budgetary crisis in the public sector are seeing police personnel increasingly carrying out forensic processes. A parliamentary report into the closure of the FSS in March 2012 has warned that the government did not sufficiently consider the wider implications for the criminal justice system of such a closure, and remarks upon the "in-house" provision of forensic services by the police directly:

> It is an issue of great concern that many police laboratories are not accredited to the same quality standards as the FSS and private sector providers . . . . We are of the view that the transfer of work from the FSS to a non-accredited police or private laboratory would be highly undesirable, as it would pose significant and unacceptable risks to criminal justice. The role of the Forensic Science Regulator is vital and we urge the Government to bring forward proposals to provide him with

96. The Forensic Regulation Unit, Manual of Regulation, December 2008, 9.16 (p38).

> statutory powers to enforce compliance with quality standards.[97]

The use of personnel directly employed by the police or working alongside police in shared premises, for example, has been denounced by all reports looking into forensic science. Indeed, high-profile miscarriages of justice in England and Wales were tainted by the suspicion that the police had too easily influenced scientists who were undertaking testing and reporting results. The UK Forensic Regulator's Codes of Practice for individual forensic practitioners states that all practitioners be governed by the principles of "independence, impartiality and integrity," but as Glidewell LJ stated in the Judith Ward appeal:

> For lawyers and judges a forensic scientist conjures up the image of a man in a white coat working in a laboratory, approaching his task with cold neutrality, dedicated only to the pursuit of scientific truth. It is a sombre thought that the reality is sometimes different . . . . Forensic scientists employed by the government may come to see their function as helping the police. They may lose their objectivity.[98]

The Forensic Regulator insists that "organisational structures" do not hinder the goals of independence, impartiality, and integrity, but this is optimistic perhaps, if a scientist is employed by, or working directly alongside, the police. While one would wish to believe in the integrity of all law enforcement and forensic science personnel wherever they may be situated, only naivety would lead one to rely upon it.

Thus, there is still a heavy reliance upon the integrity of the individual, and keen and capable supervision of their work. Yet even forensic scientists concede that forensic science "is not sufficiently well developed as a profession to have the full characteristics of a profession in place."[99] The expansion of the private forensic science market has also raised the possibility of increasing the number of "cowboys" or "charlatans": (dishonest, or incompetent practitioners) and "cherry pickers" (companies or scientists who will undertake only 'profitable' forensic services and eschew the longer, more complex and costly forensic investigations). Practitioners may face pressures that are supposedly balanced by professionalism of the scientist, but they may feel under duress from customers who demand "useful" results; otherwise, materials can be sent to other providers, or payment for tests that produce "no results" can be withheld. Along with most of the public sector in the UK, the Regulator also faces serious resource restrictions.

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97. SCIENCE AND TECHNOLOGY COMMITTEE, THE FORENSIC SCIENCE SERVICE, 2010-12, H.C. 855, at 3 (U.K.).

98. LJ Glidewell in R v. Ward [1993] 1 W.L.R. 619 at 674.

99. S. Willis, *Forensic Science, Ethics and Criminal Justice, in* HANDBOOK OF FORENSIC SCIENCES 523 (J.G. Fraser and Robin Williams eds., 2009).

Failings in the provision of expert evidence have taken place against a backdrop in the UK of the privatisation of forensic science provision, leading to even greater need for robust regulation. There is a clear need in a deregulated market for forensic science to avoid "bargain basement" forensic services that cut corners. While economic dire straits may make savings on scientific support attractive, the consequences of "cut-price" forensic services or experts should be obvious. Indeed, the UK is already witnessing the return of "in-sourcing" of police scientific support services. It does not require much trawling of the historical record to recount that the influence of police over "experts" was often at the root of flawed expertise in high-profile miscarriages of justice. With the police in charge of forensic evidence during an investigation, there is a need for accountability, with transparency paramount.

V. CONCLUSION

That wrongful convictions can have an enduring impact upon the criminal justice system is not a revelation. As this article has shown, the wrongful convictions of the factually innocent have played a significant part in achieving large-scale law reform in England and Wales. But both the CCRC and the Court of Appeal suffer from similar criticisms; despite owing their creation to the wrongly convicted factually innocent, both have proved to be deficient at identifying and correcting factual innocence claims.

For the Court of Appeal, this deficiency is evidenced by the difficulties faced by those arguing fresh evidence or lurking doubt appeals. The Court's approach to these appeals is not surprising given its lack of resources, its willingness to uphold jury verdicts in order to retain confidence in them, and the restrictions placed upon it by its review function. Consequently, its preference for due process appeals is easy to understand given that the task of assessing whether due process has been followed is much easier compared to trying to assess whether a person is factually innocent. Appellants, guilty or innocent, are then often forced to frame their appeals in technicalities. While assisting those who have due process failures, this lack of focus on innocence means that for those who do not have due process failures, fresh evidence and lurking doubt appeals will remain rare and difficult. An appeal process that allows the appeal court to assess whether the jury *should* have convicted rather than whether it *could* have convicted may provide an answer to these problems.

These problems associated with the Court also impact on the CCRC. While it is accepted that the CCRC is an improvement on the previous government machinery for referring cases back to appeal, criticisms

remain that it too has proven deficient in a number of areas. Its funding and the number of applicants have caused significant difficulties. Yet whilst there are criticisms in terms of its referral rates, and its success at the Court of Appeal, evidence of these problems remains anecdotal and there is no reliable method by which to gauge whether more cases *should* have been referred back to the appeal courts. If it is true that the Commission has prioritised procedural and technical grounds of appeal over those of factual innocence (and there is no empirical evidence to support this) then it is somewhat understandable that the Commission in its subservient role will sensibly refer those cases that are more likely to be successful. This is not necessarily the Commission's fault, and we would argue that critics should be recalibrating their aim and seeking to reform the Court's illiberal approach to fresh evidence (and therefore factual innocence) appeals.

A further valid criticism of it though is in respect of mission failure. The CCRC has not taken up (some may argue, due to lack of resources) the systemic role that was envisaged by the RCCJ. The Royal Commission did not inquire into the specific causes of individual cases of wrongful conviction, even though it was established in light of several high profile appeals. Instead, it took a much broader view and interpreted the Terms of Reference as seeking reforms that could prevent future miscarriages of justice.[100] The CCRC was given a similar role—to use its knowledge, gained via case-work, to recommend systemic reforms that could prevent future miscarriages.[101] However, it can be argued that the CCRC has yet to fulfil this part of its remit. It has become too "bogged down" by individual casework, and while it has contributed to criminal justice policy, it could do much more than it currently does in this respect. The CCRC then is undoubtedly an improvement on the Home Office in seeking to address miscarriages of justice in the Court of Appeal, but there does not appear to be any quantifiable evidence that it has achieved anything by way of prevention. If the CCRC is unwilling or unable to accept this wider remit, then this "slack" should be picked up by another body. This potentially explains the rise in Innocence Projects in England and Wales, which provide a platform in which innocence arguments can be heard and calls for reform made.[102]

100. Of course, many have argued that the RCCJ failed in this mission itself.

101. It was stated in the RCCJ report, *supra* note 15 chapter ten ¶ 22, that 'we think it is important that the [Commission] should also be able to draw attention in its [annual report] to general features of the criminal justice system which it had found unsatisfactory in the course of its work, and to make any recommendations for change it thinks fit.'

102. For a discussion on the relationship between Innocence Projects and the CCRC in England and Wales, see S. Roberts and L. Weathered, The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission, 29(1) OXFORD J. LEGAL STUDIES 1 (2009).

The legal engineering then undertaken in England and Wales in creating the Court of Appeal and the Criminal Cases Review Commission has resulted in two bodies that seek to overturn miscarriages of justice, albeit with only partial success, with both in need of reform and extra resourcing if they are going to succeed and take a preventative role, too. The only significant body that has a wholly preventative remit (which has no real role—as yet—in overturning miscarriages of justice) is the Forensic Regulator. However, the preventative role of the Regulator is seriously limited by under-resourcing and a lack of powers. It may also yet lead to a false sense of security with legal professionals relying upon the validity and veracity of scientific evidence that in effect is still poorly regulated.

The forensic market in England and Wales remains in turmoil, with serious limitations to any guarantees that forensic evidence will not play a role in any future miscarriages of justice. Placing the Regulator on a statutory footing may assist, but unless the Regulator is given a considerably widened remit and strong powers in conjunction with legal reforms that limit the admission of flawed scientific evidence into the courts, then this body will fail to have a critical impact upon miscarriages of justice.

The Forensic Regulator holds only a detached position with respect to the criminal process. However, the Regulator was appointed in light of miscarriages of justice as a preventative measure, yet it has resulted in only a partial attempt to guarantee no further convictions will be marred by flawed science. Many other developments in the forensic science market are presently working against this aim and could be increasing the risk of miscarriages of justice. The result could be that the Court of Appeal and CCRC are going to be put under greater strain in the future because the body trying to prevent miscarriages of justice is hamstrung by a lack of powers and limited remit, and developments in the criminal justice process in the previous decade have seen due process protections diminished and risks of flawed evidence increased.

England and Wales has then turned to incremental reforms to try and maintain, or strengthen due process protections. Yet the "law and order" rhetoric has most often triumphed, resulting in the diminishment of due process protections. This contrasts with the U.S., where work on exonerations has expanded to include policy formation and lobbying, which has led to significant policy and legislative changes across many states to protect the innocent from conviction. In England and Wales the route taken concentrates upon due process instead of "innocence." This in itself is not to be criticised, because the pursuit of justice is assisted by such due process protections and encompasses justice for the guilty at the same time as protecting the innocent. Due process is important for

maintaining the integrity of the criminal justice system and securing public confidence. It does, however, entail difficulties for those innocent individuals who may fall through the many cracks, as the system still functions poorly to assist them postconviction. While there could be modifications to current bodies and processes to make them more conducive to recognising and swiftly addressing miscarriages of justice, we suggest the bodies remain focussed on due process because of the extra benefits offered by this approach. The rights of the guilty matter, too, and due process protections also protect the innocent. There must not be a blinkered focus on the innocent; it is far better to concentrate efforts on seeing that all individuals are being convicted lawfully: "This razor focus on the wrongful convictions of people who had nothing to do with the crime dilutes the spectrum of other reasons why people are wrongly convicted."[103]

It appears in this instance, that the phrase "mission accomplished" can be attributed the same meaning as that surely intended by President George W. Bush on the deck of the USS *Abraham Lincoln* aircraft carrier during the Iraq War. England and Wales have made significant advances and have made commendable progress in addressing miscarriages of justice. However, there is still much to achieve, and it may take years and further turmoil before the institutions are optimised and their operations refined. Until such time, perseverance with reform efforts and vigilance remain essential to ensure that miscarriages of justice do not continue to blight the criminal justice system.

103. E. Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083 (2011).

CRIMINAL PROCEDURE REFORM: A NEW FORM OF CRIMINAL JUSTICE FOR CHILE

*Claudio Pavlic Véliz**†

I. INTRODUCTION

A large number of Latin American countries—not just Chile—have undergone a process of social change. In the case of Chile, the reform of its criminal legal procedures has been related to the need for the country to join the globalized world.

This initiative dovetailed with the interests of law scholars and academics, who considered Chile's criminal justice system to be completely obsolete.

Chile's criminal procedure was already obsolete by the time the initiative was passed into law with a recommendation that it be replaced as quickly as possible.[1]

This old criminal justice system remained in effect for nearly 100 years.

These ideas were expressed very succinctly in this message the Executive Branch presented to the Chilean Congress along with the proposed Code of Criminal Procedures for its approval in 1995: "While the system of administration of justice in Chile was fundamentally designed and established in the middle of the nineteenth century, and it has remained wholly unchanged since that time, Chilean society has

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1. *See generally* James M. Cooper, *Competing Legal Culture and Legal Reform: The Battle of Chile*, 29 MICH. J. INT'L L. 501 (2008) (discussing the tension between Chilean culture and the need for legal reform); Rafael Blanco, Richard Hutt & Hugo Rojas, *Reform of the Criminal Justice System in Chile: Evaluation and Challenges*, 2 LOY. U. CHI. INT'L L. REV. 253–69 (2005) (tracking the history and characteristics of Chilean criminal reform); James P. Carey, *Reflection on Criminal Justice Reforms in Chile*, 2 LOY. U. CHI. INT'L L. REV. 271 (2005); *see also* Hugo Rojas, *Cambios Sociales y Cambios Juridicos en Chile: Construyendo Nuevos puentes Entre Sociologia y Derecho en la Promocion del Realismo Juridico Latinoamericano*, 13 BERKELEY LA RAZA L.J. 453 (2002); John Henry Merryman, *Law and Development Memoirs I: The Chile Law Program*, 48 AM. J. COMP. L. 481 (2000) (discussing the author's experience in the Chile Law Program).

been transformed both economically and politically."[2] This reform process was implemented through the promulgation of laws that established a program for gradual implementation following a specific schedule that began in December of 2000, and culminated in June of 2005, when the new criminal justice system took effect in the entire country.

In the Latin American context, the phenomena described are the direct and indirect origins of the reform processes of the justice systems, and they have found two main individual routes to that end. The first route was adopting clauses included in international agreements, primarily free trade agreements and the second route was driven from university classrooms and by academic publications.[3]

This Essay will briefly explore the new criminal procedures in Chile, their context, and their successes and remaining challenges. Part II of this Essay examines the impact of political decisions to go forward with the transition of the Chile's criminal justice sector from one that operates within the inquisitorial system to one that embraces the adversarial system. In Part IIA, the weaknesses in the inquisitorial system are explored. In Part IIB, this Essay explores the criminal procedure reform process in Chile and the changes that were implemented. In Part IIC and Part IID, respectively, the principles of the reform are explored and the roles of different participants are explained. In Part IIE, the paradigm shift that has occurred in Chile is explored briefly. In Part III, this Essay examines the unintended consequences of the criminal procedure reform, and in Part IV, this Essay concludes by exploring how wrongful convictions still take place in Chile. This Essay also concludes with the call to action: Chile, like all Latin America, needs to embrace new technologies to help the wrongfully accused and convicted be freed from unjust imprisonment.

II. THE REFORM OF THE CHILEAN CRIMINAL JUSTICE SYSTEM

The motives that drove the reforms had the virtue of providing good arguments for the entire political spectrum to be able to agree to support the criminal justice reforms; some in order to improve the country's economic integration into a globalized world, and others in order to improve the laws protecting constitutional and legal rights,

2. Message of His Excellency, the President of the Republic of Chile, Initiating a Bill to Establish a New Code of Criminal Procedures, No. 110-331, (June 9, 1995).

3. Alfredo Fuentes-Hernandez, *Globalization and Legal Education in Latin America: Issues for Law and Development in the 21st Century*, 21 PENN. ST. INT'L L. REV. 39, 44–45 (2002) (discussing the issues that Latin American Law schools face in improving the institutions for which they will work).

strengthening respect for human beings and their rights.[4] In the message cited above, this idea is expressed as follows: "Through modernization of the administration of justice, we seek to strengthen consolidation of the democratic rule of law and of the model of economic development."[5]

A. Weaknesses in the Inquisitorial System

The system of criminal procedures in effect in Chile until the reform, the vestiges of which still persist for prosecution of any crimes that occurred prior to the time the reform took effect, which is in effect in the entire country as of June of 2005, is based, according to the assertions contained in the first chapter of the book by Professors Horvitz and López, authors of the most important work written in Chile regarding the criminal procedures reform, on that the Criminal Procedures Code of 1906 was instituted,

> substantially preserving the structure of the inquisitorial criminal procedures established during the XIII century, in Books III and VII of the Seven-Part Code, and which was introduced to Latin America (from Spain) during the Colonial period and which continued in effect after the emancipation process of the XIX century.[6]

The structural characteristics of the old inquisitorial process resulted in slow processes in the context of exceedingly bureaucratic proceedings. The existence of a written file was the equivalent to a trial. The junior staff made many important decisions—not the judge. The results among the public were lack of trust in a system that was not very transparent and that left areas outside of the control of judges, open for corruption. Another critical effect was that because of the very long duration of proceedings, at the mid-nineties almost 60% of those incarcerated were awaiting sentencing.[7]

The system did not provide objective conditions of impartiality because the judge performed the functions of deciding if there was cause to initiate a criminal investigation, directing the investigation by issuing direct orders to police, then evaluating the results of the investigation and deciding whether or not to bring charges. In the event a decision was made to file charges and after allowing an opportunity for a purely

4. *See generally*, STEVEN LOWENSTEIN, LAWYERS, LEGAL EDUCATION, AND DEVELOPMENT: AN EXAMINATION OF THE PROCESS OF REFORM IN CHILE (1992); ROLANDO MELLAFE ET AL., HISTORIA DE LA UNIVERSIDAD DE CHILE (1993).

5. *Id.*

6. MARÍA INÉS HORVITZ LENNON & JULIÁN LÓPEZ MASLE, DERECHO PROCESAL PENAL CHILENO, TOMO I, 18 (2004).

7. CRISTIÁN RIEGO & MAURICIO DUCE, PRISIÓN PREVENTIVA Y REFORMA PROCESAL PENAL EN AMÉRICA LATINA, EVALUACIÓN Y PERSPECTIVAS 156 (2009).

formal defense, an evidentiary period was initiated, which was practically non-existent as the results of the written investigation file were considered sufficient. Finally, it was the same judge that issued a ruling convicting or absolving the accused of the crime.

In the opinion of the authors of the work cited above, this confusion of functions,

> began to be unsustainable as constitutional texts and international human rights accords signed by Chile and in effect in national law enshrined, with binding force for legislators, the principles and guarantees of due process recognized as universal standards.[8]

This adds a new motive to the catalog of grounds for change in the criminal justice system.

There was no agency responsible for representing the interests of the community or protecting victims and witnesses. Nor were there attorneys trained to provide legal defense for the accused, should the accused be unable to pay for an attorney, as law students completing their legal internships performed function of public defender.

Having worked in the old criminal justice system for twelve years, this author can attest that it worked well for the judges and litigators, both for criminal prosecution and punishment of crime, and it also worked well for criminal defense, but there were tremendous structural challenges to overcome, which was achieved with great effort on the part of the judges and attorneys who worked in this area. Thus, it is always important to consider the impact of the participants in the process and the use they make of all available tools. A justice system may be theoretically perfect and fail to provide its benefits to society due to the failings of those charged with performing the primary functions the justice system entails.

B. New Criminal Procedures

A new oral procedures system has been adopted in which proceedings—both those of the litigants for presenting motions and arguments and those of the judges when issuing their rulings—are conducted orally. The significance of implementation of this system means important advantages, such as the public nature of proceedings, transparency in judicial proceedings, which ultimately leads to democratic legitimization of the criminal justice system. This change began with the promulgation of a law containing the Code of Criminal Procedures for Chile, which began to be implemented in December

8. MARÍA INÉS HORVITZ LENNON & JULIÁN LÓPEZ MASLE, DERECHO PROCESAL PENAL CHILENO, TOMO I, 18 (2004).

2000.

C. Principles of the Reformed Criminal Procedures

There are a number of achievements and features that have been institutionalized as part of the criminal procedure reform. The first is the creation of oral proceedings for criminal matters. The participants in preliminary hearings and the parties to trial must present their allegations and arguments orally. Witness and expert testimony must also be presented orally at trial. There is also a new feature of impartiality that has come with the separation of the functions of investigating, filing charges and judging, which were previously confused with the role of the criminal judge. As a result, there is a newly implemented set of adversarial proceedings. In this new trial process between parties the judge must treat them as equals, the Public Ministry represents the public, and the defense attorney represents the defendant.

There has been some concentration in the judicial system as all evidence is presented during an oral, public trial; judges rule immediately to convict or to absolve. Moreover, there is a higher premium on immediacy. The presence of the Judge is a requirement for the validity of all proceedings. Transparency is an important feature of the new criminal procedure system now implemented in Chile. The general public, members of the family of the accused and of the victim, as well as members of civil society, can attend trials.

There is a bent on efficiency: alternative mechanisms are incorporated into the ruling in order to conclude criminal proceedings through procedural mechanisms generally called alternative resolutions (*salidas alternativas*). These diversion and alternative sentencing options increase problem solving in the criminal law.

Alternatives to sentencing during an oral trial have been incorporated into the criminal justice system in order to make conflict resolution more efficient, without necessarily going all the way through to sentencing at trial. For this purpose, formerly non-existent mechanisms have been incorporated into the system, such as conditional suspension of proceedings (similar to probation), the abbreviated proceeding (similar to the plea bargain), and the reparative agreement. The latter requires that, in the case of a minor crime in which the primary damage is to property, the victim may waive criminal prosecution in exchange for payment of an amount of money, or the accused can made an action with authorization of the judge of guarantee.

There is a possibility of implementation of other alternative forms of conflict resolution in criminal matters that did not exist prior to the

advent of the reform process. Criminal Mediation, intended to facilitate meetings between victims and perpetrators in order to reach agreements to implement one of the alternative resolutions set forth in procedural law, particularly the reparative agreement and conditional suspension of the proceedings. Drug Treatment Court, a special court that hears cases in which the defendants have been arrested by police and charged with committing a crime as the result of a drug addiction. The classic example is a person who commits a property crime in order to obtain money to buy another dose of an addictive illegal drug.

D. Participants in the New Process

There were a number of new institutions created for the purpose of implementing the reform: Courts of Oral Proceedings in the criminal area, and Courts of Guarantee in the Judicial Branch, the Public Ministry as an autonomous agency of the government, and the Office of the Public Defender in Criminal Matters. They are all tied to the Executive Branch through the Ministry of Justice.

The Courts of Guarantee are presided over by single judges who hold preliminary hearings during the investigation stage, which includes authorization for prosecutors to conduct proceedings that affect the rights of citizens, such as search warrants and wire taps. The Courts of Oral Proceedings operate with a panel of three judges who hear oral proceedings and make rulings. The judges have the freedom to weigh the evidence presented by the parties during the hearing and the obligation to justify their decisions. This evidence may be from witnesses, experts, documents, and material evidence.

The Public Ministry is organized as a National Prosecutor and eighteen Regional Prosecutors, with close to 647 prosecutors, plus 375 lawyers[9] who act as prosecutors' assistants and who perform certain functions of the prosecutors. The Public Ministry Act defines the function as follows:

> The Public Ministry is a senior, autonomous agency, whose function is to exclusively direct the investigation of events that constitute crimes, both those that prove punishable conduct and those that tend to prove the innocence of the accused, and, as appropriate, to bring criminal action on behalf of the public in the manner set forth by law. It shall also be responsible for implementing measures designed to protect victims and witnesses.[10]

9. Comité Puesta en Marcha, "Dotación Ministerio Público, Informe Nov. 2004 para implementación 5ª Etapa.

10. Law No. 19.640, art. 1, (1999), *available at* http://www.leychile.cl/N?i=145437&f=2010-10-08&p=.

In order to meet this objective, the Public Ministry shall coordinate with police, who must follow the instructions directed to them by prosecutors, and the Public Ministry has at their disposal the cooperation of state agencies that have a role in investigating crime, such as the Legal Medical Service. The new justice system also preserves the victim's opportunity to take part in the criminal proceeding as the complainant. The victim of the crime may be represented by an attorney which allows the victim to exercise the rights conferred upon him by the procedural laws.

The Criminal Public Defender is an institutionalized public service that is functionally decentralized and geographically distributed. The Criminal Public Defender is an independent legal entity with its own budget, tied to the executive branch by way of oversight by the President of the Republic through the Ministry of Justice. The Criminal Public Defender is made up of a national defender, sixteen regional defenders, 145 institutional defenders and approximately 350 defenders who are hired for specific periods of time (generally three years) to provide service in criminal defense. Their work is subject to oversight and evaluation by the Criminal Public Defender.[11]

E. Paradigm Shift in the Process

A fundamental change that has had a major impact on the approach to the work of lawyers in Chile is the effect of implementation of the new criminal proceedings to center the discussion of the litigation.

Both in the investigation stage as well as during oral trial, on the facts of the case, in order to influence the court stance regarding absolution or conviction, with the discussion regarding application of the law and criminal doctrine being relegated to second place.

The structure of the process implies the need to establish firmly the contentions regarding the facts of the case presented by the parties through the evidence submitted at trial. While thorough knowledge of criminal law and criminal doctrine must be part of the case preparation, the discussion regarding application of the law takes place once the first objective is achieved, which is preparation of the case and presentation of evidence.

This phenomenon, which constitutes a dramatic change in the way criminal prosecution is conducted, requires that trial attorneys learn new forms of litigation in order to be well prepared for the challenges of oral trials. Thus, chief among the tasks of those responsible for implementing the change in the justice system is to facilitate and to encourage the

11. DEFENSORÍA PENAL PÚBLICA, DEFENSORÍA EN CIFRAS 2010 16 (2011).

adequate training of the participants, judges, prosecutors, and defenders in the skills of oral litigation.

III. UNINTENDED CONSEQUENCES OF THE REFORM PROCESS

There were those who supported the reform thinking, erroneously, that a renovated and more efficient criminal justice system would lead to a reduction in crime. That is not a result that can be expected from a system designed to prosecute those individuals responsible for committing crimes and, after following due process, to impose a criminal penalty when applicable. The criminal justice system begins its functions when the crime has already been committed, so that, while the criminal justice system certainly has a relative effect on the person punished, the criminal justice system does not have the effect of limiting all the elements that come into play in the commission of a new crime. Thus, the effect of the criminal justice system on crime rates is very limited.

Anti-reform movements have emerged in many countries that have managed to reform the reforms—reducing due process guarantees and increasing the authority of police and prosecutors. Many countries believe that these measures can make the criminal justice system into an effective tool for increasing public safety and reducing crime.

IV. THE PROBLEM OF WRONGFUL CONVICTIONS IN CHILE

Chile changed its inquisitorial criminal justice system in December 2000, which by this time, was completely obsolete. During the inquisitorial system the chances of wrongful convictions were very high. The change to an adversarial system improved principles and elements of criminal procedure that lowered the incidence of wrongful convictions, but challenges remain. Chile has a public defense office that provides a good criminal defense service to the people that require it—those with few resources or who can afford a private lawyer. The Chilean Government, which according to the constitutional rule that provide for a legal defense to each person that requires it, created and organized the Public Defender Office (Defensoría Penal Pública) by Law in 2000. This change created a new institution as part of the criminal procedure reform that attended the return to democracy and enhanced legal rights including the right to a defense, the right to be presumed innocent, and the right to hear and to rebut the evidence being used against a defendant.

Public criminal defense established standards and a code of ethics of criminal defense to maintain the best standards in the professional

practice of defenders, yet there is a risk that a criminal defender's poor performance can still lead to wrongful conviction. For the origin for wrongful convictions, we need look only at eyewitnesses' misidentification and then the false confessions, which this Essay will refer to below. This problem in Chile is related with the bad procedures of the police officers who do not have rules or protocols for eyewitness identification and bad practice for examination of suspects. The police continue to have problems in adjusting their performance protocols to prevent eyewitness misidentification and coercive and excessively long interrogations. There are also problems with the relationship between prosecutors and the police. When police do not act within the confines of the law, the prosecutors tell the judges that the police acted in conformity with the law, rather than telling police to improve their performance.

Recently the police and the Public Ministry developed protocols regarding eyewitness identification, but it does not appear that the police have developed protocols dealing with false confessions. In Chile there are, like most other countries in the world, false confessions. Chile has procedural law rules that guarantee that false confessions not occur, but despite these safeguards, false confessions do, unfortunately, occur. Yet they occur, primarily for two reasons: (1) personal circumstances of the accused such as the power of suggestion, their age (young or old), anxiety, conditions of mental handicap, difficulties in memory, and (2) external circumstances, like police conduct, excessive pressure (which you in the Anglo–Saxon world call "duress"), typified by long periods of confinement and examination by police officials. These are the conclusions of a 2005 University of Concepción, Chile study, *Estudio Autoincriminación Falsa en el Proceso Penal Oral*, prepared for our Public Defender Office.

For example, Chile has decided a criminal case in which there was a sentence of not guilty for a man accused of killing and robbery. The reason for that sentence was that there was a false confession. This occurred in the court in La Serena, City, in the oral trial course in 2008. Another issue is that related to hearsay, Chilean judges have accepted that rule most of the time, particularly when a police officer hears the history related by the accused without the public defender being present. Often, courts give too much credit to information provided by police and are unduly reliant on this information.

Chile does not have a special government agency for this particular purpose, but has a procedural tool called the "recurso de revisión"[12] to

12. Article 473 of Chilean Criminal Procedure Code (Act) established the requirements to present the "Recurso de revision." These requirements are: Legitimacy for review. The Supreme Court may, extraordinarily, reverse any final decision on which someone was convicted for a crime or

obtain a reversal of a conviction. This functions as a kind of appeal that permits the review of a conviction without a deadline. This special appeal is possible only in cases of certain circumstances established by law. The prerequisites are very difficult to accomplish. In that way, the most common situations in which the Supreme Court has found wrongful convictions are for misdemeanors because the real perpetrator gave the name of another person.

Defense lawyers have a difficult job fighting the police agencies—both the national preventive police (the Carabineros) and the Investigation Police (Policía de Investigaciones or PDI)—and the public prosecutors, because these law enforcement agencies have the assistance of almost all of the government's agencies. For example, the police have the assistance of experts in areas like medical, psychiatrist, psychologist and more.

An example is a case in which the Public Defender Office is currently defending 8 jail guards. We must pay $34,000 for an expert to recreate and testify about the dynamic of the fire in a jail that resulted in eighty-one dead inmates. We do not have a problem about access to defense counsel during trial. Chile has a very strong problem related to post-conviction defense. First, the public defender office must provide this kind of criminal defense services, but the public defenders do not have the budget for a team of lawyers and paralegals to fully exercise this duty, making the provision of a robust defense, at times, difficult, for all clients. The same problem of underfunding does not affect the public prosecutor's office.

Two years ago, we started a pilot program employing contract lawyers and paralegals for post-conviction defense in one region of the country with funding from an international financial aid agency. This year we hope to expand the program to four additional regions and we hope that the government provides funding for this important area of defense. This will create a space for an Innocence Project in Chile, something on which we are working to achieve.

misdemeanor, invalidating such decision in the following situations: a) When, under opposing judgments, two or more persons are serving time for the same crime that could not have been committed but only by one person; b) When a person is serving time as the perpetrator, accomplice or accessory to the murder of a person whose existence is established after conviction; c) When a person is serving time for a sentence based in a document or testimony of one or more persons, provided that the document or the testimony have been declared false by final judgment in a criminal case; d) When after conviction, any fact or unknown document is uncovered or becomes available during trial, with such a nature that it is enough to establish innocence of the convicted person, and e) When the judgment is pronounced as a consequence of corruption or bribery of the judge or one or more judges who took part of its pronouncement, whose existence has been declared by final judgment. CHILEAN CRIMINAL PROCEDURE CODE, art. 473 (2000).

PREVENTION OF WRONGFUL CONVICTIONS: NORWEGIAN LEGAL SAFEGUARDS AND THE CRIMINAL CASES REVIEW COMMISSION

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Wrongful convictions happen in all countries. Miscarriages of justice are a normal and expected consequence of imperfect procedures of investigation, prosecution, and court trials, and they are ordinarily conceived as exceptional and unacceptable events.[1] Wrongful convictions may be overturned and a case may be reopened when new evidence or circumstances surface. When a case is reopened, our confidence in a just legal system is supported. However, too many reopened cases suggest too many wrongful convictions. This is a threat to the legitimacy of the justice.

According to Ogletree and Sarat, wrongful convictions are not random mistakes but rather "organic outcomes of a misshaped larger system that is rife with faulty eyewitness identifications, false confessions, biased juries, and racial discrimination."[2] Similar descriptions of wrongful convictions by US authors are US biased; they originate within the US justice system, which is in many respects different from the systems in many European countries, and very different indeed from the justice systems in the Nordic countries.[3] The reasons for wrongful convictions in countries such as Norway are not

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1. RICHARD NOBLES & DAVID SCHIFF, UNDERSTANDING MISCARRIAGES OF JUSTICE (1st ed. Oxford Univ. Press 2000).

2. CHARLES HAMILTON HOUSTON INST. SERIES ON RACE AND JUSTICE, WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2009).

3. ELIZABETH F. LOFTUS, *Foreword* to FORENSIC PSYCHOLOGY IN CONTEXT: NORDIC AND INTERNATIONAL APPROACHES XV (Pär Anders Granhag ed., 2010); Ulf Stridbeck & Pär Anders Granhag, *Legal Procedures in the Nordic Countries and in the USA: A Comparative Overview*, *in* FORENSIC PSYCHOLOGY IN CONTEXT: NORDIC AND INTERNATIONAL APPROACHES 14-35 (Pär Anders Granhag ed., 2010).

errors of justice on a system level, rather it is failure to detect or present evidence that might have changed the outcome of the original trial. The ability to reopen wrongful conviction cases is typically based on evidence from new medical or psychiatric experts, another person's confession, new medical findings, new witness statements, or new expert witness testimonies. The Norwegian justice system has a number of built-in safeguards against miscarriages of justice, and claimed wrongful convictions are evaluated by an independent administrative body, the Norwegian Criminal Cases Review Commission (NCCRC). The NCCRC has the power both to investigate and decide on the reopening of criminal cases. This paper seeks to briefly review the Norwegian legal safeguards and the role of the NCCRC.

I. LEGAL SAFEGUARDS

We believe wrongful convictions to be associated with an absence of legal safeguards, leading to a higher frequency of wrongful convictions in societies with few legal safeguards. Below we will briefly describe the Norwegian legal safeguards in the investigative phases of the crime and during trial, in light of the American system.

A. Investigation

Norwegian criminal investigators – the police – are supposed to be neutral, looking for both inculpatory and exculpatory evidence with regard to a suspected perpetrator. For example, the principal purpose of an interrogation of a suspect is to obtain information, not to obtain a confession. The Reid technique's nine steps of interrogation,[4] as described by Inbau et al., are supposed to result in "an accusational interaction with a suspect, conducted in a controlled environment, designed to persuade the suspect to tell the truth."[5] The Reid technique is abandoned. In Norway investigators are not allowed to lie or manipulate the suspect, polygraph tests are not conducted by the police during the investigation, and the results of polygraph tests, if conducted privately by the defense, are not allowed in the court. As is the practice in Great Britain, all interviews should be taped. The documentation of

4. In short the nine steps are direct positive confrontation, shift the blame away from the suspect to some other person, discourage the suspect from denying his guilt, move towards the confession, reinforce sincerity to ensure that the suspect is receptive, move the theme discussion towards offering alternatives. If the suspect cries at this point, infer guilt, pose the "alternative question," giving two choices for what happened; one more socially acceptable than the other, lead the suspect to repeat the admission of guilt and document the suspect's admission. FRED E. INBAU ET AL., ESSENTIALS OF THE REID TECHNIQUE: CRIMINAL INTERROGATIONS AND CONFESSIONS (1st ed. 2005).

5. *Id*. at 3.

the interview might be important both in the court of appeals and at a later stage when the NCCRC reviews the case. False confessions cannot be completely avoided, but legal safeguards practiced in Norway, such as defense attorneys provided at public expense, a focus on information-gathering during the investigation, and videotaped interviews, may minimize the risk of false confessions. In Norway, very few cases of false confessions have been documented.[6]

B. Prosecutors

In Norway, prosecutors are appointed. After a public announcement of vacant positions, the Director of Public Prosecutions selects the prosecutor, who will be appointed by the King in Council. Prosecutors are in this sense independent as they do not have to consider re-election; because of this, there is no personal benefit to prosecuting as many as possible.

To obtain an indictment, prosecutors are supposed to have strong and objective reasons to believe that the court will convict the accused. Personal beliefs or firm convictions of guilt are not sufficient to go to trial; the prosecutor is not encouraged to "go fishing." The role of the prosecutor is to establish the truth, not to obtain a conviction. On one hand, he has to ensure that the guilty person is held accountable, but on the other hand, he has to ensure that innocent persons are not brought to trial. Groundless prosecution is an offence.

C. Plea Bargaining

Plea bargaining is not part of the Norwegian justice system. All criminal cases are tried before a judge, and there is no way to circumvent a court decision. Pleading guilty in order to get a minor sentence is not an option. However, if a person charged with a crime has made an unreserved confession, the court is expected to take the confession into account when passing the sentence. In addition, if there is an unreserved confession, together with clear evidence for guilt, there is an option of a fast track trial, but still in front of a judge.

6. *See* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (2003); Gisli H. Gudjonsson & Jon Fridrik Sigurdsson, *False Confessions in the Nordic Countries: Background and Current Landscape*, *in* FORENSIC PSYCHOLOGY IN CONTEXT: NORDIC AND INTERNATIONAL APPROACHES 94 (Pär Anders Granhag ed., 2010).

D. Human Rights

The European Convention of Human Rights (ECHR)[7] is the umbrella of Norwegian legislation; it is "stronger" and has more impact than the UN Convention on Civil and Political Rights.[8] Central to the European Convention of Human Rights is "the principle of fair trial"[9] including "equality of arms". One of the grounds for reopening a case in Norway is:

> "[W]hen an international court or UN human rights committee has in a case against Norway found that
>
> a) the decision conflicts with a rule of international law that is binding on Norway, and it must be assumed that a new hearing should lead to a different decision, or
>
> b) the procedure on which the decision is based conflicts with a rule of international law that is binding on Norway if there is reason to assume that the procedural error may have influenced the substance of the decision, and that a reopening of the case is necessary in order to remedy the harm that the error has caused."[10]

E. Adversarial Process

In the Nordic countries, there is an adversarial process, whereas in central and southern Europe, for example France, Italy, and Spain, the criminal process is inquisitorial. In Norway, the prosecutor and the defense are equal in the courtroom, and the parties in the Norwegian criminal trials are more active than other European countries during the hearing of the evidence. Norwegian judges, on the other hand, are compared with the judges in Central Europe inactive as far as seeking the truth; they play no part in the investigative process, they are not as active as in an inquisitorial process, and they are expected to hear both sides of a case without interfering.

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7. Convention for the Protection of Human Rights and Fundamental Freedoms, (commonly known as the European Convention on Human Rights [hereinafter ECHR]) is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force in 1953.

8. United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 172.

9. ECHR, *supra* note 7, at art. 6

10. NORWEGIAN CRIM. P. ACT § 391 (1981), *available at* http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf.

F. Judges

Judges at all levels in the judiciary system, including the High Court, are nominated by an independent professional legal search committee following a public announcement of vacant positions, and are appointed for life, i.e. to the retirement age of 70 years. Like the prosecutors, they do not have to worry about re-election. This is important both for the perceived independence of judges and for the public confidence in just court proceedings. Following appointment, Norwegian judges are educated in a series of courses including a mini-course on eyewitness psychology; there is a standard Norwegian textbook on eyewitness psychology on every judge's office bookshelf.[11] This may be a reason why Norwegian judges surpass US judges in their knowledge of factors affecting the reliability of eyewitness testimony.[12]

G. Lay Judges

The Norwegian courts consist of both lay people and legal educated judges. The lay people – lay judges – are always in majority in the courts, except in the Supreme Court, which consists exclusively of lawyers. In the district courts, they are part of a mixed panel of one professional and two lay judges.[13] In the court of appeals, lay judges either form a jury of ten in cases with a penalty of more than six years imprisonment,[14] or four lay judges serve in a mixed panel with three professional judges.[15] In all panels the votes of the lay judges carry the same weight as the votes of the legally qualified judges. All court districts have a pool of lay judges, appointed by the local Government for four years. Thus, each lay judge may serve on several trials during that period. Interestingly, there are actually two pools, one with male and one with female members, because in all cases there has to be an equal number of male and female lay judges.[16]

H. Defense Attorneys

A suspect has the right to a defense attorney at public expense in cases with a sentence of more than six months imprisonment.[17] In minor

11. SVEIN MAGNUSSEN, VITNEPSYKOLOGI [WITNESS PSYCHOLOGY] (1st ed. 2004).

12. Svein Magnussen et al., *What Judges Know About Eyewitness Testimony: A Comparison of Norwegian and US Judges*, 14:3 PSYCHOL. CRIME AND L. 177 (2008).

13. NORWEGIAN CRIM. P. ACT § 276 (1981).

14. *Id.* § 352.

15. *Id.* § 332.

16. *Id.* § 355.

17. *Id.* § 100.

cases, the suspect still has the right to a defense attorney, but on his own expense. The defense has the right to submit evidence and request additional (or better) police investigations,[18] and has access to investigative documents during the formal investigation.[19]

I. Expert Witnesses

Expert witnesses are, as a rule, appointed by the court, serving as objective or neutral experts in the case, rather than being "hired guns" by the parties.[20] However, both the prosecutor and defense may recruit additional experts. The experts appointed (and paid for) by the parties have a somewhat different status than those appointed by the court; they are witnesses rather than experts, and generally their testimony carries less weight in the court. However, in some cases an expert appointed by one of the parties is given the status of a court appointed expert during the trial. In Norway, the practice of appointing neutral experts is considered superior to the "battle of experts" in US courts.[21] But interestingly one US scientist, serving as an expert witness in a high-profile murder case that has busied the Norwegian courts for more than 50 years, expressed the opposite view.[22] His point was that since science (and scientists) is never completely objective, the court has to hear experts from both sides. The US argument assumes that the court – the judge – is able to distinguish science from junk science. The available evidence suggests they are not.[23]

J. Burden and the Standard of Proof

The burden of proof rests on the prosecutor. In Norwegian criminal trials there is supposed to be a high standard of proof with regard to the question of guilt. One estimate is that the standard is over 96%, which is slightly higher than the US standard of 90% confidence.[24] However,

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18. *Id.* §§ 265, 266.

19. *Id.* § 242.

20. *Id.* § 138.

21. Pål Grøndahl, Ulf Stridbeck & Cato Grønnerød, *The Truth and Nothing but the Truth: Court-Appointed Forensic Experts Evidence with Testifying and their Perceptions of Legal Actors in Criminal Courts*, 24:2 A JOURNAL OF FORENSIC PSYCHIATRY & PSYCHOL. 192 (2013).

22. *Fredrick Fasting Torgersen*, WIKIPEDIA, http://en.wikipedia.org/wiki/Fredrik_Fasting_Torgersen (last visited Nov. 27, 2012).

23. Margaret Bull Kovera et al., *Assessment of the Commonsense Psychology Underlying Daubert: Legal Decision Makers' Abilities to Evaluate Expert Evidence in Hostile Work Environment Cases*, 8 PSYCHOL. PUB. POL'Y & L. 180 (2002); Bradley D. McAuliff et al., *Can Jurors Recognize Missing Control Groups, Confounds and Experimenter Bias in Psychological Science?*, 33 LAW AND HUM. BEHAV. 247 (2009).

24. Stridbeck & Granhag, *supra* note 3; *see also* Dorothy K. Kagehiro, *Defining the Standard of*

such differences are probably spurious as empirical studies show that many lay judges are willing to convict on a much lower estimated probability of guilt.[25]

The Norwegian system allows free presentation of evidence and witnesses in court by both the prosecution and defense. Eyewitnesses are obviously important in many cases, but an analysis of the cases reopened by the NCCRC suggests that wrongful eyewitness memory is not a main factor in producing wrongful convictions. Conversely, in the US, eyewitness errors—mistaken identification—occurs in more than 75% of wrongful convictions.[26] However, the difference in statistics is probably not real as the NCCRC considers all criminal cases, whereas the majority of Innocence Projects focus on DNA cases such as murder, rape, and serious physical assault. Innocence Project-type cases occur in Norway[27] however, eyewitness testimony alone is not sufficient for a conviction in Norwegian courts as corroborating evidence is required.

The Norwegian police guidelines for eyewitness identification were formulated in 1933, and will in 2013 be substituted by procedures supported by scientific research: double blind procedures (research has shown that the risk of misidentification is sharply reduced if the administrator of a photo or live line up is not aware of who the suspect is), and sequential rather than simultaneous line-ups (research has shown that presenting lineup members one-by-one (sequential), rather than all at once (simultaneous), decreases the rate at which innocent people are identified). It has also been shown that witnesses tend to choose the person who looks the most like – but may not actually be – the perpetrator when the lineup is presented simultaneously. It is important that the suspect is not standing out (the suspect should not be the only member of his race in the lineup, or the only one with a tattoo or with facial hair), he should not be subjected to a "show up" identification (single person lineups without options should be avoided), and there should be "may or may not"-statements (the person viewing a lineup should be told that the perpetrator may not be in the lineup) and confidence statements (immediately following the lineup procedure, and the eyewitness should provide a statement, in his own words,

Proof in Jury Instructions, 1 PSYCHOL. SCI. 194 (1990).

25. Svein Magnussen, Dag-Erik Eilertsen, Karl-Halvor Teigen & Ellen Wessel, *The Probability of Guilt in Criminal Cases: Do People Care About Being "Beyond Reasonable Doubt"?* ("accepted pending revision" in Applied Cognitive Psychology).

26. *Understand the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Nov. 27, 2012).

27. Cecilie Rachlew & Asbjørn Rachlew, *"Ja, han ligner – tror jeg." – Om utpeking av gjerningsmenn* [*"Yeah, He Looks Like – I Think." How to Identify Culprits*], 9 TIDSSKRIFT FOR STRAFFERETT [NORWEGIAN J. OF CRIM. L.] 153 (2009).

articulating the level of confidence in the identification).[28] When the new procedures are implemented the Norwegian identification procedure will be research-based.

K. Legal Safeguards – Summary

Wrongful convictions are mostly associated with the loss of legal safeguards. The fight against wrongful convictions must start where the wrongful convictions are produced. Some institutions and practices are difficult to change, but others are not. We summarize this section with the following recommendations: Prosecutors and judges should be appointed rather than elected, a high standard of proof should be maintained, free production of evidence should be allowed, expert witnesses should be appointed by the court rather than being "hired guns," plea bargaining should be limited, and a strong rule about objective police investigation should be implemented.

II. THE NORWEGIAN CRIMINAL CASES REVIEW COMMISSION

In the present paper we report some facts and figures from the Commission's short history and try to relate those topics to this special issue of the Cincinnati Law Review. When considering the figures we report, it must be remembered that Norway is a small country in terms of a population with 5 million inhabitants. Only 3,500 people are imprisoned each day. Annually, the number of murder cases is less than 30, manslaughter cases less than 40, convicted rape cases less than 80, and narcotic cases around 5,500. Sentences are fairly liberal, and maximum imprisonment is 21 years (life time imprisonment was exchanged with 21 years imprisonment in 1981) and the death penalty is not an option today (ended in 1902, Civil Criminal Code, and in 1979, Military Criminal Code). As an alternative to imprisonment for a specific term, there is preventive detention.[29] This was the sentence the convicted in the Norwegian July 22 case got. Preventive detention has a time limit of 21 years, but it may be extended five years at a time. Just before the prison sentence is ending, the prosecutor may ask the court for an extension of the sentence if the convicted is still considered dangerous to society and there is a serious risk of relapse. The practical consequence may be prison for life. The grounds for using preventive detention is that it is a serious violent crime, with a high possibility that

28. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photo Spreads*, 22 LAW AND HUM. BEHAV. 603 (1998); *see also* INNOCENCE PROJECT, www.innocenceproject.org (last visited Nov. 27, 2012).

29. NORWEGIAN CIVIL PENAL CODE § 39c (1902).

the convicted person will commit such a crime again, and a time limited sentence is not enough to protect society.

Following the examples of England (see paper in current issue by John Weeden) and Scotland, Norway established the NCCRC in 2004. The NCCRC is a combination of an Innocence-type project, well-known in the US and an appeals court, where the responsibility for further investigation and the power to decide on reopening reside within the same administrative body. For clarification it should be noted that, in the US, an innocence commission is a criminal justice *reform* commission, whereas the commissions in England, Scotland, and Norway have the legislative power to reopen cases, have public financing, and accept all types of criminal cases. The characteristics of the NCCRC are:

- Centralized expertise
- Independence, i.e. separation between the courts and the government
- Uniform decisions
- Safe financing from the state
- Mixed competence; both legal and non-legal members of the Commission
- Has the power to get documents and files from all official bodies
- Has its own law enforcement expertise
- May order the police force to investigate new evidence
- May appoint defense attorneys

We have elsewhere presented the background and the function of NCCRC.[30] Briefly, the NCCRC has five voting members including the chair person, three members from the legal profession, and two lay members. Except for the chair person, who has a full-time position and is appointed for a period of seven years, the members of the Commission serve on particular cases and are appointed for a period of three years with the possibility of a second term. All cases that qualify for review are decided by the Commission in plenary sessions, and reopening is decided by simple majority vote. The NCCRC has an administrative staff of eleven persons, including two investigators with police training and seven legally trained investigators. The NCCRC also has the power to recruit extra police investigators on particular cases, as it did in the *Moen* case discussed in part III. Members of the NCCRC are not politically appointed, and the Commission is, within the confines of the Norwegian legislation, supposed to operate completely independent of the political and legal systems, including High Court rulings in particular cases.

When a convicted person files for reopening, the NCCRC takes care

30. Ulf Stridbeck & Svein Magnussen, *Opening Potentially Wrongful Convictions – Look to Norway*, 58:2 CRIM. L. Q., CAN. 267 (2012).

of the investigation and looks at the evidence in favor of the petitioner. In some cases, a lawyer has been recruited by the convicted person at their own expense. However, during the post-conviction process, the petitioner may have a defense attorney at public expense, at the discretion of the NCCRC. In 2012, the NCCRC appointed a defense counsel in 30 cases, while a defense counsel was appointed in 33 cases in 2011, and in 28 cases in 2010.[31] The NCCRC is also authorized to appoint expert witnesses.[32] Since its establishment, the NCCRC has appointed expert witnesses in the fields of forensic medicine, forensic psychiatry, forensic toxicology, photogrammetry, finance, fire technicalities, vehicle knowledge, and traditional forensic science. In 2012, the NCCRC appointed 15 expert witnesses in 6 cases.[33]

A. Wrongful Convictions Identified by NCCRC

Anyone may file for the reopening of a case. Convicted persons filed 86% of the cases received by the NCCRC from 2004-2012, and 14% were filed by the prosecution authority.[34] The NCCRC is obligated to provide guidance to any person who petitions for the reopening of a case, and the assistance of an attorney is in principle not needed.[35] In some cases, relatives of the convicted person or other persons with a personal involvement submit the petition. There is no limit with regard to the date of the original conviction of cases considered by NCCRC; cases have been reviewed and reopened where the convicted was deceased, and have even included cases dating back to the Second World War. In some cases the prosecution authority later discovered that the convicted person was mentally insane at the time of the criminal offence and should not have been convicted according to Norwegian law, and filed for reopening (14% of the petitions).[36]

As part of the case review by the NCCRC the prosecution authority is invited to comment on the application for reopening (the principle of contradiction). They oppose reopening in 23% of the cases. Most often the prosecution agrees to reopening (41%), but frequently they see no

31. NORWEGIAN CRIMINAL CASES REVIEW COMMISSION ANN. REP. (2012), *available at* www.gjenopptakelse.no.

32. NORWEGIAN CRIM. P. ACT § 398b (1981).

33. NORWEGIAN CRIMINAL CASES REVIEW COMMISSION ANN. REP. (2012), *available at* www.gjenopptakelse.no.

34. Ministry of Justice and Pub. Sec., *Etterkontroll av kommisjonen for gjenopptakelse av straffesaker [Evaluation of the Criminal Cases Review Commission]*, (2012) (report from a Government appointed working group chaired by Professor Ulf Stridbeck) [hereinafter *Evaluation of the Criminal Cases Review Commission*].

35. NORWEGIAN CRIM. P. ACT § 397 (1981).

36. *Evaluation of the Criminal Cases Review Commission*, *supra* note 34, at 33.

grounds for reopening or have no comments (36%).[37] Support of innocence by the prosecution depends on the evidence. When the NCCRC has reopened a case, it is referred for retrial to a court district other than the district that imposed the original conviction. The reopened cases are supposed to be treated like any other criminal case referred to the court. The outcome of the new trials shows that 82% of the reopened cases led to a complete exoneration and 17% of the cases led to part exoneration.[38]

As of 2012, the NCCRC received 1,523 petitions and 1,399 of the cases have been concluded. Of the cases reviewed by the Commission in plenary session, a total of 182 cases were reopened (15%) and 293 were (25%) were disallowed. The remaining 704 cases were dismissed by the chair/vice chair as not qualifying for review according to the criteria for reopening specified by the Norwegian legislation.[39] Figure 1 shows the distribution of reopened cases across the type of criminal offence. The most frequent categories are crimes of gain, violence, drugs, and sexual abuse of children, where new medical expert testimonies and analysis of the quality of the child interviews undermined the original conviction.

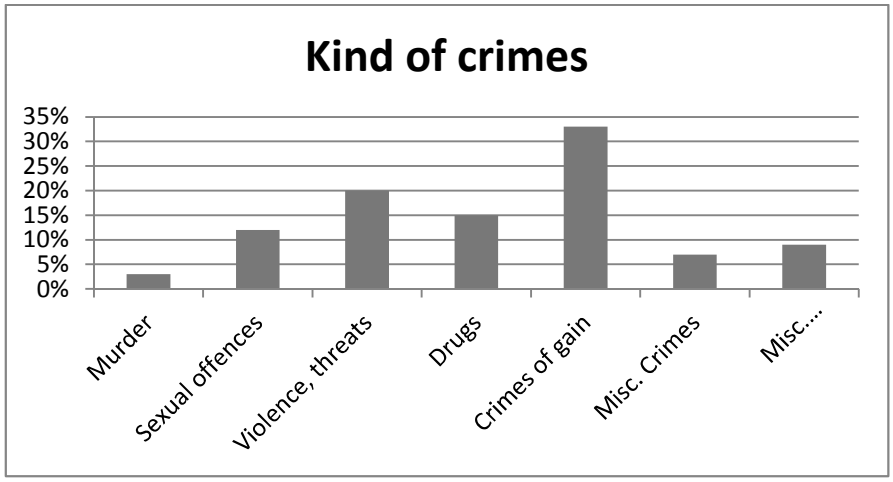

FIGURE 1. CASES REOPENED BY NCCRC 2004-2012, N = 182[40]

37. *Id.* at 35.

38. *Id.* at 36.

39. NORWEGIAN CRIMINAL CASES REVIEW COMMISSION ANN. REP. (2011), *available at* www.gjenopptakelse.no.

40. Based on NORWEGIAN CRIMINAL CASES REVIEW COMMISSION ANN. REP. (2012), *available at* www.gjenopptakelse.no.

B. Access to DNA Testing and Legal Records

Fingerprints and biological material for DNA analysis may be secured from persons who are suspected or convicted of any criminal act which may result in imprisonment.[41] DNA may be obtained, if necessary by force, when it can be done without risk or considerable pain.[42] A person who receives a penalty for a criminal act, which by law can lead to imprisonment, is registered in the Identity Register when the court decision is final or the case is closed. Before the final court decision, DNA can be registered temporarily in the Register of Investigation.[43] The registration of DNA profiles is authorized in the Prosecution's Instructions. The national databases for fingerprints and DNA profiles are administrated by the National Bureau of Crime Investigation.

In reopening cases, the NCCRC has access to these registers. The NCCRC is responsible for ensuring that all relevant information on the case emerges. "The Commission shall on its own initiative ensure that the case is as well clarified as possible before it decides whether the petition shall be allowed . . . The Commission may obtain information in such manner as it deems appropriate."[44] This means that they have the power to obtain documents and files from all official bodies. Since the NCCRC controls its own working procedures they can order DNA analysis or legal records as needed. To this day (June 20, 2013), DNA has been a reason for reopening in only one case in Norway.

Reports from medical experts have to be approved by the *Commission of Forensic Medicine*, which makes external quality assurance of all forensic expert assessments made in criminal cases. In Norway there has been a National Commission of Forensic Medicine since 1900. The Commission acts as a guiding body in questions of forensic medicine, including forensic psychiatry. Every expert in forensic medicine must send to this Commission a copy of the written report he will make to the court or to the prosecution authority."[45] The Commission will then examine the reports received. If it finds substantial defects, it shall bring them to the attention of the court. The Departments of Justice and Commerce in the US announced the launch of a National Commission on Forensic Science on February 15, 2013.[46]

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41. NORWEGIAN CRIM. P. ACT § 160 (1981).

42. *Id.* § 160a.

43. Register of Investigation is an official government agency.

44. NORWEGIAN CRIM. P. ACT § 398 (1981).

45. *Id.* § 147.

46. *Promise and Peril: The National Forensic Science Commission*, CRIME LAB REPORT, http://crimelabreport.com/library/pdf/2013%200228,%20National%20Commission.pdf (last visited March 14, 2012).

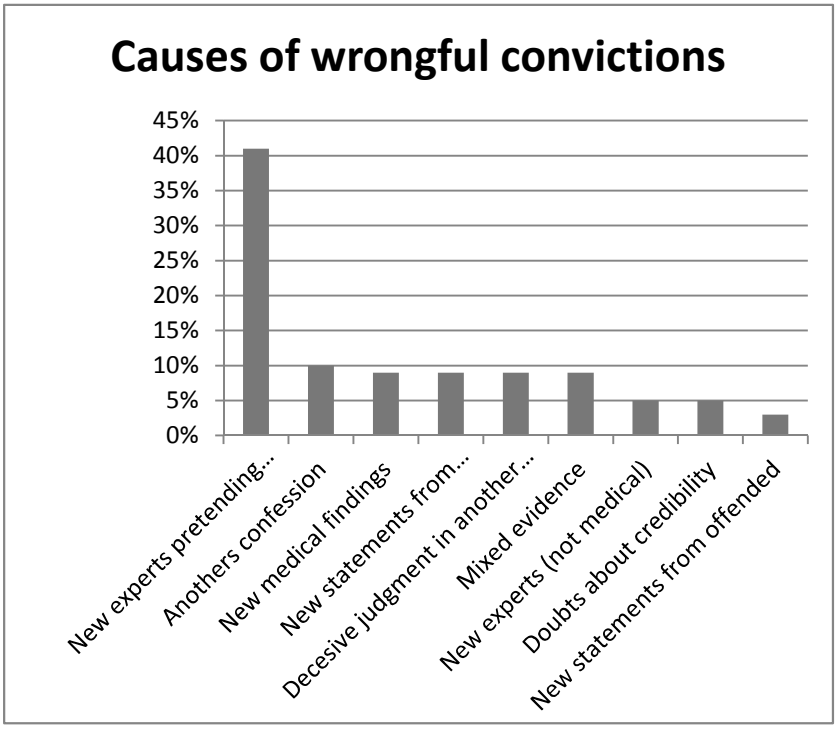

FIGURE 2. CAUSES OF WRONGFUL CONVICTIONS 2004-2009, N=58[47]

C. Causes of Wrongful Convictions

Figure 2 summarizes the reasons for reopening cases by the NCCRC. Note that the category "New experts pretending insanity" accounts for more than 40% of the cases. In Norway a person with a psychiatric diagnosis implying a psychotic disorder is not considered legally responsible for her actions and cannot be legally prosecuted. The question of sanity is a part of *mens rea*. Often new evidence in the cases reopened by the NCCRC are new expert reports stating that the person convicted was probably suffering from a psychosis at the time for the crime. In these cases there is an *actus reus* without a complete *mens rea* – *actus non facit reum nisi mens sit rea.* This is the same observation as in Switzerland (see paper in current issue by Gwladys Gilliéron). In most of these cases the person actually committed the crime, but should not have been legally prosecuted. Leaving out the category "insanity," which relates to legal responsibility for a crime rather than innocence,

47. Jane Dullum, *Justisfeil i straffesaker [Error of Justice in Criminal Cases]*, Institut for Kriminologi og rettssosiologi [Dep't of Criminology and Soc. of L.], UNIV. OF OSLO 32 (2010), *available at* http://www.jus.uio.no/ikrs/forskning/aktuelle-saker/2010/Dullum_materie_20100521_web.pdf. [last visited June 20, 2013].

the most frequent proof of wrongful convictions comes from another's confession, new medical evidence, and new witness statements.

Nobles and Schiff make a principal distinction between people who have been convicted of offences they did not actually commit and convictions that were flawed because some part of the process that produced those convictions did not operate as it should.[48] They distinguish between a concern with truth and a concern with the process. Most of the cases from the last years reopened in Norway belong to the latter. They are based on *formal wrongs*, discovery of new psychiatric examinations of some mental problems not identified before (40%), or *procedural wrongs*, lack of justification for the appeal refusal (22% of the reopened cases).[49] The convicted person in both kinds of cases is the actual culprit.

D. Compensation

The exonerated person receives compensation according to the CPA Chapter 31, Compensation in Connection with a Prosecution, section 444 which states:

> "Unless it is otherwise provided by section 446, a person charged is entitled to compensation by the State for any financial loss that the prosecution has caused him a) if he is acquitted … A convicted person is also entitled to compensation for financial loss due to execution of a sentence that exceeds any sentence imposed after the case has been reopened."[50]

and section 445, which states:

> "even if the conditions for compensation prescribed in section 444 are not fulfilled, the person charged shall, if it appears to be reasonable, be awarded compensation for financial loss resulting from special disproportionate damage that the prosecution has caused him."[51]

In the most serious one, the Moen case, the compensation was $3.5 million.

III. TWO HIGH PROFILE CASES

Even in countries with well-developed legal safeguards, wrongful convictions happen. The idea of establishing an independent criminal

48. NOBLES & SCHIFF, *supra* note 1.

49. These figures are from the years 2010 and 2011, see *Evaluation of the Criminal Cases Review Commission*, *supra* note 34, at 33.

50. NORWEGIAN CRIM. P. ACT § 444 (1981).

51. *Id.* § 445.

cases review commission may be traced to a few high profile cases of miscarriages of justice. Perhaps the infamous *Liland* case was the proverbial straw that broke the camel's back and opened the gate for the NCCRC.[52] The Liland case was a murder trial which has become known as *the* high profile miscarriage of justice case in Norway. It dates back to December 1969, when two men were found killed with an axe in the small Norwegian town Fredrikstad. In 1970, Per Liland was convicted of the two killings. He was sentenced for life with 10 years supervision. The Supreme Court ruled against a retrial in 1976. Having served the sentence, he was released and in 1993 he petitioned for the reopening of his case. Despite resistance from the prosecution, the case was reopened and Mr. Liland was acquitted by the Court of Appeals in 1994. The new evidence in the case consisted of new expert witnesses identifying the time of the killings at a much later time than earlier presumed, on a day when Mr. Liland had an alibi. He received monetary compensation (more than $2.4 million) in 1995. He died in 1996.

The *Moen* cases are about the killings of two young women.[53] Fritz Moen had multiple handicaps – he was deaf, dumb, and disabled (his right arm was lame), and had an IQ in the lower range. In 1978 he was convicted of raping and killing a 20-year old woman. Moen was arrested the day after the body was found. Moen claimed to have an alibi, which was confirmed by witnesses. There was no technical evidence and no witnesses to the killing. However, Moen was subjected to intense and lengthy questioning across several weeks. He had no interpreter during the first interrogation. Unfortunately, Moen undermined his alibi by giving different explanations. He provided contradictory statements, sometimes denying and sometimes admitting the crime, but his statements were often inconsistent with evidence of the crime and the crime scene. Nevertheless, in 1978 Moen was convicted and sentenced to 20 years imprisonment, in addition to 10 years supervision. Following appeal to the Supreme Court the sentence was reduced to 16 years imprisonment.

Two years before this case there was an unsolved murder case in the same area. In 1976 a girl was found killed in the same town. The *modus operandi* was the same as in the first Moen case. During the first police interrogation Moen had no defense attorney. A number of interviews followed and during the seventh interview, the police claimed he confessed, this time without an interpreter. In 1981 he was convicted of

52. *Liland Affair*, WIKIPEDIA, http://en.wikipedia.org/wiki/Liland_Affair (last visited Nov. 27, 2012).

53. Hans Sherrer, *Exonerated of Two Murders, Fritz Moen Posthumously Awarded $4 Million*, JUSTICE DENIED: THE MAGAZINE FOR THE WRONGLY CONVICTED, Spring 2008, *available at* http://justicedenied.org/issue/issue_40/moen_i-40.pdf.

the second killing and received 5 years imprisonment in addition to the 16 years for the first murder. That made 21 years imprisonment total, which is the maximum sentence in Norway. An appeal was denied.

Moen was released in 1996, having served 18 years. A few years later a private investigator took his case. A petition was delivered to the Court of Appeals, pointing both to irregularities in Moen's confessions and exculpatory biological evidence. The petition was dismissed in 2002. He appealed to the Supreme Court. The Appeals Committee in the Supreme Court opened one of the cases where there was no match between Moen's blood type and the semen, but did not open the other case. He was exonerated of the reopened case in 2004. A new petition was delivered to the newly established Criminal Cases Review Commission in 2004. The year after the petition was delivered, Moen died. During the time his case was under review by the NCCRC, another man confessed on his death bed to having killed two young women; the confession was received by a priest and two police officers. He died the very next day. NCCRC investigated the case and found the confession to be convincing. The man's movements at the time of the murders matched the case facts, and witness statements regarding his behavior in the years that followed gave the picture of a very troubled man. The NCCRC also pointed to severe misunderstandings and miscommunication between the interpreters and the court in the case, casting doubt on Moen's alleged confession. As there were clear similarities between the murders, it must have been the same perpetrator, i.e. not Fritz Moen (since he had been exonerated of the first crime). The case was reopened and the Court of Appeals exonerated Moen posthumously in 2006.

Two weeks after the exoneration, the Norwegian Parliament appointed a commission with a mandate to investigate the causes of Moen's wrongful convictions and evaluate whether changes were needed in the criminal justice system to avoid similar wrongful convictions in the future. In 2008 Moen posthumously received $3.5 million in compensation. The Minister of Justice acknowledged the injustice saying, "I will tender an unqualified apology and regret in regard to Fritz Moen and those who were close to him, for the injustice he was subjected to."[54]

V. CONCLUSIONS

The creation of the NCCRC has made the reopening of cases visible and transparent, which also has made it more open to criticism, as

54. www.aftenposten.no (April 18, 2008) [last visited June 20, 2013].

compared to a court based system. The NCCRC has not been without critics. Two cases in particular have received considerable media attention. The NCCRC's twice refusing to reopen a murder case that has busied the Norwegian courts for more than 50 years has been attacked by individuals who disagree with the decision on grounds that the NCCRC's evaluation of the evidence is flawed.[55] As long as there is new evidence not presented previously, there is no limit to the number of times a case may be filed with the NCCRC. In a high-profile international spy case dating back to 1985 (the Treholt case),[56] the media almost unanimously criticized the NCCRC, not because of disagreement with the decision not to reopen the case, but because the proceedings of the NCCRC were not open to the public.

The NCCRC has currently been under evaluation by an independent working group.[57] The main conclusion from the evaluation is that the NCCRC works well and has confidence and credibility but needs some minor changes:[58]

- More transparency. The NCCRC should have public hearings on matters of public interest more often.
- Fewer minor cases. "Harmless" criminal cases (less than six months imprisonment) shall not be reopened if it has been ten years since the case was closed.
- Defense attorneys should be represented in the Commission.
- Research competence should be represented among the lay members.
- A more liberal approach should be taken when appointing defense attorneys.
- Strengthening of the commissioners' independence. The case workers shall not propose the commissioners' decision, as they do today. This is the responsibility for the commissioners to decide. There is a need for a better distinction between the commissioners and the case workers.
- Strengthening of the law enforcement expertise among the case workers.

55. *Fredrick Fasting Torgersen*, WIKIPEDIA, http://en.wikipedia.org/wiki/Fredrik_Fasting_Torgersen (last visited Nov. 27, 2012).

56. *See Trial and Conviction of Arne Treholt*, WIKIPEDIA, http://en.wikipedia.org/wiki/Treholt#Trial (last visited Nov. 27, 2012).

57. *See Evaluation of the Criminal Cases Review Commission*, *supra* note 34.

58. *See also* Ulf Stridbeck, *The Norwegian Criminal Cases Review Commission Evaluated*, THE WRONGFUL CONVICTIONS BLOG, http://wrongfulconvictionsblog.org/2012/11/22/the-norwegian-criminal-cases-review-commission-evaluated/ (last visited June 13, 2013).

A. Improvements to Avoid Wrongful Convictions

As we have described the basic Norwegian legal safeguards – adversarial process, a high standard of proof, free production of evidence, appointed prosecutors and judges, providing defense attorneys at public expense, requirements of objective investigation, an information-gathering focus during the investigation, court appointed expert witnesses and videotaped interviews – and on top of that the independent NCCRC, there should be no need for any groundbreaking improvements to avoid wrongful convictions. Some improvements have recently been suggested by the evaluation working group. But one important reform, not mentioned by the evaluation group, is the recent decision to audio record the trial, as is the practice in some other countries, like Sweden. Documentation of what was said both during the police interview and on the witness stand in the courtroom is important. The system of recording during the police interview is more or less being practiced. The next step is recording in the courtrooms. Recordings may be very useful both during the appeal and when the NCCRC reviews the case looking for new evidence. Recording the courtroom to assist the NCCRC in evaluating claims of bias and misconduct of judges and counselors is as important as monitoring the professional conduct of the police investigator while doing interviews. Many of the cases reviewed by NCCRC are based on claims of misconduct or bias in court by counselors or judges, and currently such claims are impossible to evaluate without recording.

WRONGFUL CONVICTION IN AUSTRALIA

*Lynne Weathered**†

I. INTRODUCTION

Australia's criminal justice system is modern and sophisticated. A combination of common law and legislative provisions in each state aims to find an appropriate balance between police investigative powers and individual liberty. Similarly, many mechanisms exist in an attempt to ensure the fundamental right to a fair trial in Australia's adversarial system. Appellate avenues enable consideration of potential errors at trial and judges are concerned to correct miscarriages of justice. The system is good, but it is by no means perfect. One of the areas where the Australian criminal justice system lags behind the United Kingdom, Canada, Norway and the United States is in facilitating the effective investigation and correction of wrongful conviction. While a relatively small number of demonstrated wrongful convictions have occurred in Australia, there are undoubtedly others yet to be uncovered and rectified. More unfortunately, there are wrongful convictions that will never be corrected, and even for those no longer in prison, the pain and stigma of a wrongful conviction can last a lifetime.

In the United States, the work of innocence projects and other organizations have highlighted the problem of wrongful conviction for over twenty years.[1] The number of DNA exonerations in the United States has grown at a rapid pace. According to the Innocence Project website, between 1989 and 1999 there were sixty-seven DNA exonerations. This number increased to 234 in the thirteen years from 2000 to 2012. In 1995, a Criminal Cases Review Commission (CCRC) was established for England, Wales, and Northern Ireland to address the

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1. Reportedly 307 exonerations occurred between 1989 and 25 May 2013. *See* INNOCENCE PROJECT, http://www.innocenceproject.org/index.php. Other early organizations to undertake this wrongful conviction work include Centurion Ministries, Inc., founded by Jim McCloskey in Princeton, New Jersey in 1983. *See* http://www.centurionministries.org/about/ (last visited 3 December 2012).

problem of wrongful conviction.[2] Norway has also now established a CCRC. Canada edged closer to its own CCRC style body when, in 2002, Canada expanded its pardon avenues and subsequently established the Criminal Conviction Review Group to investigate and refer wrongful conviction claims to Canadian courts.[3] Australia, on the other hand, has remained largely resistant to reform of its investigation and correction of wrongful conviction.

That is not to say no change has occurred. In New South Wales and Queensland, DNA innocence testing has been introduced in either legislative or guideline form. In 2013, South Australia passed legislation allowing for a second or subsequent post conviction appeal if the court is satisfied that in the interests of justice, fresh and compelling evidence should be considered. However, it is unclear why such reform has been sluggish in its appearance and further, why there has not been more significant reform in this area across the country. Whatever the reason, the relative stagnation in this area has ultimately impacted the Australian system's ability to address, with adequacy, the needs of those who are convicted but are innocent. The problem of wrongful conviction is now being more widely acknowledged at an international level.[4] While the prevalence of wrongful conviction may differ, no one country is immune to the problem, certainly not Australia.

To broadly address some of considerations in regard to wrongful conviction in Australia, this Essay begins by briefly outlining the structure of the Australian criminal justice system. This Essay then considers aspects of Australia's criminal justice processes that may influence the prevalence of wrongful conviction. Then, this Essay discusses some known cases and causes of wrongful conviction. In its final Part, this Essay details a number of difficulties associated with the currently available mechanisms for the investigation and correction of wrongful conviction, and makes some recommendations in this regard.

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2. *Criminal Cases Review Commission*, MINISTRY OF JUSTICE, http://www.justice.gov.uk/about/criminal-cases-review-commission (last visited May 25, 2013).

3. *Criminal Conviction Review*, DEPARTMENT OF JUSTICE CANADA, http://www.justice.gc.ca/eng/pi/ccr-rc/index.html (last updated Apr. 30, 2013).

4. For example, twenty countries were represented at the 2011 Innocence Network in Cincinnati, Ohio. Nancy Petro, *Wrongful Conviction and Innocence Work Have No Boundaries*, THE WRONGFUL CONVICTIONS BLOG (Nov. 1, 2012), http://wrongfulconvictionsblog.org/2012/11/01/wrongful-conviction-knows-no-boundaries/. Examples of international perspectives on wrongful conviction include: MIRANDA JOLICOEUR, INTERNATIONAL PERSPECTIVES ON WRONGFUL CONVICTIONS: WORKSHOP REPORT, NAT'L INST. OF JUSTICE, 2010, *available at* http://www.nij.gov/nij/topics/courts/sentencing/international-perspective-on-wrongful-convictions.pdf; C. RONALD HUFF & MARTIN KILLIAS, WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE (2008); BIBI SANGHA ET AL., FORENSIC INVESTIGATIONS AND MISCARRIAGES OF JUSTICE (2010).

II. SOME FACETS OF THE AUSTRALIAN CRIMINAL JUSTICE SYSTEM

Following colonization (and the controversial classification of Australia as a 'settled' country) Australia's criminal justice system was—both substantively and procedurally—inherited and adapted from England. Australia today remains a common law nation with an adversarial criminal justice system. Australia's constitution, the Commonwealth of Australia Constitution Act 1900, in combination with the state and territory constitutions, provide the boundaries under which the six states, two territories, and the federal government can legislate in regard to criminal matters. The Commonwealth Constitution provides the federal government with extremely narrow areas of jurisdiction to legislate with regard to criminal matters. Specifically, the Commonwealth Constitution requires that criminal matters fall within the specific categories of section 51 of the Constitution, which includes areas such as importation and exportation of drugs. As such, criminal law is largely a matter for each state or territory to determine. The states have an extremely wide ambit to legislate criminal law and are, essentially, empowered to make laws for the "peace, welfare and good government" of the state.[5] Therefore, the states and territories fundamentally govern the criminal justice system in Australia, though in areas where there is conflict, federal law will prevail.

A. Over-Representation of Indigenous Australians

The over-representation of Aboriginal and Torres Strait Islanders in Australian prisons is an unfortunate feature of Australia's criminal justice system. Australia's population is approximately 23 million. As of June 2010, the prison population was approximately 29,700.[6] While representing approximately 2.5% of the Australian population,[7] Australia's indigenous population represents almost 26% of the prison population.[8] This over-representation is a long-standing problem. Moreover, recent statistics show that just over half of the juvenile prison

5. QUEENSLAND CONSTITUTION, 2001, OFFICE OF THE QUEENSL., PARLIAMENTARY COUNSEL (May 18, 2012), *available at* http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/ConstofQA01.pdf.

6. AUSTL. BUREAU OF STATISTICS, PRISONERS IN AUSTRALIA, 2010—PRISONER SNAPSHOT, 4517.0 (2010), *available at* http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0 (follow "Prisoner characteristics, Australia"; then follow "Prisoner snapshot").

7. AUSTL. BUREAU OF STATISTICS, NATIONAL ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL SURVEY, 4714.0 (2008), *available at* http://abs.gov.au/AUSSTATS/abs@.nsf/mf/4714.0/ (follow "Population Context").

8. AUSTL. BUREAU OF STATISTICS, PRISONERS IN AUSTRALIA 4517.0 (2009), *available at* http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/A570D4363D75FE30CA257687001D5128/$File/45170_2009.pdf.

population is indigenous, with indigenous juveniles being "28 times more likely than non-indigenous juveniles to be detained in a juvenile justice centre."[9]

While the reasons for the over-representation of Aboriginal and Torres Strait Islanders are wide-ranging and complex, one contributing factor has been their incarceration for minor crimes, commonly known as the "trifecta"—offensive language, resisting arrest, and assaulting a police officer.[10] The outcome of imprisonment can be devastating. Deaths in custody have been a disturbing feature of the criminal justice system.[11] Australia no longer has the death penalty,[12] but death has nevertheless too often resulted following incarceration. In 1987, a major inquiry into the deaths of ninety-six Aboriginal and Torres Strait Islander people who died while in police custody, resulted in the Indigenous Deaths in Custody 1989–1996 Report, which many hoped would herald a much greater understanding of this problem and instigate reforms aimed at reducing it.[13] More recent statistics demonstrate that the problem persists.[14]

B. Investigative Practices

Earlier official inquiries into police practices in Australia uncovered systemic and deep-rooted corruption within some of its police forces.[15] In Queensland, the Fitzgerald Inquiry had far reaching implications for the police force and criminal justice system. The inquiry ultimately resulted in the then police commissioner, Sir Terrence Lewis, being convicted and jailed on corruption charges, and the former Premier of Queensland, Sir Joh Bjelke-Petersen, being charged, though not

9. NATALIE TAYLOR, AUST. INST. OF CRIMINOLOGY, JUVENILES IN DETENTION IN AUSTRALIA, 1981–2007, 05 AIC MONITORING REPORT 6 (2009).

10. OFFICE OF THE ABORIGINAL & TORRES STRAIT ISLANDER SOC. JUSTICE COMM'R INDIGENOUS DEATHS IN CUSTODY 1989–1996, (1996).

11. *Id.*; *see also* QC ELLIOTT JOHNSTON, ROYAL COMM'N INTO ABORIGINAL DEATHS IN CUSTODY (1991), *available at* http://www.austlii.edu.au/au/other/IndigLRes/rciadic/.

12. *Crimes Legislation Amendment* (*Torture Prohibition and Death Penalty Abolition) 2010* (Cth) (Austl.).

13. *See* Jens-Uwe Korff, *Royal Commission into Aboriginal Deaths in Custody*, CREATIVE SPIRITS, http://www.creativespirits.info/aboriginalculture/law/royal-commission-aboriginal-deaths-in-custody.html (last visited Aug. 6, 2011).

14. *See* AUSTL. INST. OF CRIMINOLOGY, PRISON CUSTODY DEATHS 1982–2003 (2005), *available at* http://www.aic.gov.au/publications/current%20series/cfi/81-100/cfi088.aspx.

15. *See, e.g.*, JRT WOOD, ROYAL COMM'N INTO THE N.S.W. POLICE SERVICE, FINAL REPORT, (1997); G. A. KENNEDY, ROYAL COMM'N INTO WHETHER THERE HAS BEEN ANY CORRUPT OR CRIMINAL CONDUCT BY W. AUSTL. POLICE OFFICERS, INTERIM REPORT, (2002); G. E. FITZGERALD, COMMISS'N OF INQUIRY INTO POSSIBLE ILLEGAL ACTIVITIES AND ASSOCIATED POLICE MISCONDUCT, REPORT (1989) [hereinafter FITZGERALD INQUIRY].

convicted, of giving perjured evidence to the inquiry.[16] Importantly, the inquiry resulted in significant legislative reform, implemented into the state, in respect to policing practises, namely the Police Powers and Responsibilities Act. This act outlines and consolidates both police powers and the limitations or safeguards that accompany those powers. The act aims to find an appropriate balance between providing sufficient powers to allow police to fully investigate crime in modern society, while ensuring fairness and protecting fundamental rights of individuals exposed to those policing powers.

The Fitzgerald Inquiry exposed one former police practice that would have contributed to wrongful convictions in this country: that of "verballing"—the fabrication of confessions supposedly made by the defendant, either verbally or in writing. Presented against the defendant in court, the jury was then faced with believing the police officer or the defendant before them. Among the reform measures recommended and implemented following the Fitzgerald Inquiry was the requirement to audiotape or videotape police interviews with suspects—a measure the Innocence Network calls for to help prevent false confessions. Queensland legislation in this area generally demands that, where practicable, the whole of the interrogation, including the warnings given to suspects, be recorded and not just the confession. For example, section 436 of the Police Powers and Responsibilities Act (Qld) 2000, states:

> Recording of questioning etc.
>
> This section applies to the questioning of a relevant person.
>
> The questioning must, if practicable, be electronically recorded.
>
> If the person makes a confession or admission to a police officer during the questioning, the confession or admission is admissible in evidence against the person in a proceeding only if it is recorded as required by subsection (4) or section 437.
>
> If the confession or admission is electronically recorded, the confession or admission must be part of a recording of the questioning of the person and anything said by the person during questioning of the person.[17]

This requirement now typically applies throughout Australia and was often welcomed by police, who were then able to utilize the video recordings in court to support the accusations against the defendant, to

16. The Crime and Misconduct Commission provides a concise summary of events surrounding the Fitzgerald Report. *See* CRIME & MISCONDUCT COMM'N QUEENSLAND, THE FITZGERALD INQUIRY (1987–89) (2011), *available at* http://www.cmc.qld.gov.au/asp/index.asp?pgid=10877; FITZGERALD INQUIRY, *supra* note 15.

17. *Police Powers and Responsibilities Act 2000* (Qld) section 436.

dispute claims of police malpractice made against them, or both. While this reform is likely to have significantly reduced the problem of verballing and the related issue of false confessions, this reform does not eliminate either possibility. Research has uncovered many reasons why people may falsely confess, reasons that may have nothing to do with whether or not the interrogation is being recorded. Moreover, there are always times prior to the police interview, or breaks in the police interview, that remain susceptible to threats, to inducements, or even to verballing itself. For example, in *Coates v. The Queen*, unrecorded confessions were allegedly made to police officers while the suspect was on a "toilet break."[18] There was no reference to the alleged confession in any of the tape-recorded interviews that followed the break. By a four–three majority, the confession was excluded by the Australian High Court.[19]

Disturbingly, undercover "Mr. Big" operations—whereby police create situations or stage criminal activity to obtain or induce confessions from suspects—have recently crept into Australian investigative practices.[20] This is concerning, as Canadian experience of this activity has highlighted the potential unreliability of evidence gained in this manner.[21]

A 2009 Queensland Crime and Misconduct Commission report, *Dangerous Liaisons: A report arising from a CMC investigation into allegations of police misconduct* (Operation Capri), noted concern over another recent technique used for confession extraction, consisting of prisoners being given leave from prison for "private time" with their wives or partners, in exchange for admitting to unsolved crimes.[22]

III. CASES AND CAUSES OF WRONGFUL CONVICTION

In August 1980, a baby girl disappeared from a family campsite in outback Australia. Her torn and bloodied jumpsuit was later found. Her frantic parents told of how a dingo took their baby girl from their campsite tent; however, suspicion immediately fell upon the parents, in particular the baby's mother, Lindy Chamberlain who was charged with her baby's murder. Dinner table conversations around Australia

18. Nicholls v. The Queen, Coates v. The Queen, [2005] HCA 1, 7 (Austl.).

19. *Coates*, [2005] HCA 1 (Austl.).

20. *See, e.g.*, Tofilau v. The Queen, [2007] HCA 39 (Austl.).

21. For more information on Mr. Big operations in Canada, see *Kyle Unger: Five Year Wait Over, Another Wait Begins*, 10 ASS'N DEFENCE WRONGLY CONVICTED 14 (2009); MR. BIG (Eagle Harbour Entertainment 2009).

22. CRIME & MISCONDUCT COMM'N QUEENSLAND, DANGEROUS LIAISONS: A REPORT ARISING FROM A CMC INVESTIGATION INTO ALLEGATIONS OF POLICE MISCONDUCT (OPERATION CAPRI) 22–26 (2009).

revolved around whether or not Lindy Chamberlain had killed her child. The nation was divided as to the parents' guilt or innocence. No doubt the extensive media coverage at the time, conveying Lindy Chamberlain as acting other than as a grieving mother should, played a role in her conviction. More damning at trial, though, was the scientific evidence presented against Ms. Chamberlain.[23] A forensic biologist testified at the Chamberlain trial that a significant amount of fetal blood was present in the Chamberlain's car. This blood—a central feature of the prosecution theory of how and where Lindy Chamberlain killed Azaria—was later found to be a "sound deadening compound," which is a fluid used in car batteries.[24] The inquiry also found significant support for the proposition that a dingo had taken the baby.[25] Lindy Chamberlain and her husband, Michael, who was also convicted as an accessory after the fact, ultimately had their convictions quashed six years later, following a Royal Commission inquiry and recommendation.[26] However it was not until June 2012, almost thirty-two years after the incident, that a fourth inquest finally resolved the matter with an official finding from the Coroner that a dingo was responsible for the baby's death.[27]

To date, the vast majority of wrongful conviction research into causative factors contributing to the conviction of the innocent has stemmed from the United States, in particular because of the comparatively large number of DNA exonerations there. These exonerations have enabled an insight into just how innocent people can be convicted of a crime of which they had no part. Caution needs to be applied before automatically attributing these same causative factors to Australia. While both criminal justice systems operate on common law adversarial foundations, some marked differences, such as cultural, procedural, trial, evidential difference, and appeal aspects of each criminal justice system, are likely to impact the causation factors at play. For example, the honourable Mervyn Finlay QC, while noting that any number of miscarriages of justice is too many, suggested that Australia could expect remarkably fewer wrongful convictions than in the United States. Some of the reasons cited were that:

> [O]ther things in the Justice system are not equal, eg:
>
> Unlike in NSW, most American trial Judges and all prosecutors are

23. *R v. Chamberlain*, Transcript of proceedings, (1982) 69 FLR 445 (NT) (Austl.).

24. T.R. MORLING, ROYAL COMM'N OF INQUIRY INTO CHAMBERLAIN CONVICTIONS, REPORT (1987).

25. *Id.*

26. *Re Conviction of Chamberlain* (1988) 93 FLR 239 (Austl.).

27. *See As it happened: Azaria Chamberlain inquest*, ABC NEWS (last updated June 14, 2012, 10:17AM), http://www.abc.net.au/news/2012-06-12/azaria-chamberlain-inquest-findings/4065466.

> elected.
>
> Most of the United States do not require the videotaping of alleged confessions . . . .
>
> There is generally a higher level of legal aid available to persons accused of crimes in NSW than in the States of America.[28]

Clearer similarities within criminal justice systems, including conviction rates, procedural protections, evidential, trial, and appeal provisions exist between the criminal justice systems in Australia, England, and Canada. Interestingly, at this early stage of causal comparative analysis, several of the systemic causes of wrongful conviction coming out of the United States appear to be reflected in the exonerations in England, Canada, and Australia. In Australia, for example, withholding of exculpatory evidence,[29] faulty scientific evidence,[30] and false confessions[31] have all contributed to the known cases of wrongful convictions. No doubt the differences in the manner of investigation and prosecution, among other things, in the various international jurisdictions will have a major impact on the likely causes of wrongful conviction in each country. However, at this stage one must at least entertain the possibility that many of the same causes are applicable at an international level, albeit to differing statistical degrees. While these causes may occur less often in Australia as compared to the United States, there is also the potential that some factors might be equally or more problematic in Australia.

For example, false confessions and false admissions are known to be a major contributor to wrongful convictions in the United States, found in approximately 25% of the DNA exonerations to date. Despite the procedural safeguards in Australia—for example, those found in the Police Powers and Responsibilities Act, which determine how long a suspect can be questioned and require that the questioning be recorded in some fashion (audio or video)—the Australian criminal justice system also has another factor integrated into the false confession and admission dynamic that may make it more problematic when it comes to some members of our Indigenous population. "Aboriginal English," being a language variant on Standard English, and a cultural

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28. MERVYN FINLAY QC, REVIEW OF THE NSW INNOCENCE PANEL 14 (2003).

29. *See* Mallard v. The Queen, [2005] HCA 68 (Austl.); Button v. The Queen, [2002] WASCA 35 (Austl.).

30. *See Re Conviction of Chamberlain*, (1988) 93 FLR 239 (Austl.); MORLING, *supra* note 24.

31. *See generally* JOHN BUTTON, WHY ME LORD! (1998); *Murder He Wrote Part 1 (*Austl. Broad. Corp. television broadcast July 29, 2002); *Murder He Wrote Part 2 (*Austl. Broad. Corp. television broadcast Aug. 5, 2002); ESTELLE BLACKBURN, BROKEN LIVES (2002); Button v. The Queen, [2002] WASCA 35 (Austl.); Condren v. R, (1991) 49 A Crim R 79; Mallard v. The Queen, [2005] HCA 68 (Austl.).

phenomenon known as "gratuitous concurrence," (defined as an indigenous cultural reaction to agree with white people, particularly to agree to statements made and questions posed by white authorities, such as police) may increase the risk of false confessions. Eades, who has undertaken extensive research in this regard, describes gratuitous agreement in part as an Aboriginal person's way of being socially obliging and amenable, believing this will result in a better relationship between the parties.[32]

Aboriginal English may result in a misunderstanding between parties, particularly in a police interview. A misunderstanding is even more likely if combined with gratuitous concurrence.[33] Other cultural specific, non-verbal communication differences can also be interpreted as guilt, such as silence or the avoidance of eye contact.[34] These issues are not limited to interaction with police but extend into the courtroom.[35] The criminal justice system has acknowledged the potential for miscarriages of justice to occur due to these differences and has implemented measures to address them to some extent. Procedurally, police are required to ensure a support person or legal aid officer be contacted before any questioning of Aboriginal Australian persons.[36] Other courtroom measures include those outlined in the *Equal Treatment Benchbook, Supreme Court of Queensland*.[37] However, considering that false confessions are, generally speaking, a significant causal factor in the United States, and recognizing these additional cultural and linguistic pitfalls for some members of the Aboriginal community in the context of the criminal justice system, false confessions should remain an area of particular concern within the context of wrongful conviction in Australia.

Conversely, other known causes of wrongful conviction frequently occurring in the United States may be less prevalent in Australia. In the United States, eyewitness identification is the leading contributor to wrongful convictions, being involved in up to 75% of DNA

32. *See* DIANA EADES, ABORIGINAL ENGLISH AND THE LAW, COMMUNICATING WITH ABORIGINAL ENGLISH SPEAKING CLIENTS: A HANDBOOK FOR LEGAL PRACTITIONERS (1992); ABORIGINAL & TORRES STRAIT ISLAND SOCIAL JUSTICE COMM'R, AUSTL. HUMAN RIGHTS COMM'N, SUBMISSIONS OF THE ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER ON COMMON DIFFICULTIES FACING ABORIGINAL WITNESSES (2005), *available at* http://www.humanrights.gov.au/legal/submissions_court/amicus/giblet_aboriginalwitnesses20mar07.html.

33. *Id*.

34. *Id.*

35. *Id.*; *see also*, CRIMINAL JUSTICE COMM'N, ABORIGINAL WITNESSES IN QUEENSLAND'S CRIMINAL COURTS (1996).

36. *See Police Powers and Responsibilities Act 2000* (Qld) section 420.

37. SUPREME COURT OF QUEENSL. EQUAL TREATMENT BENCHBOOK (2005).

exonerations.[38] Research is required, however, before assuming the same is true for Australia.[39] Social science research in the United States and elsewhere has suggested that new procedures for collecting eyewitness identification, such as incorporating double-blind sequential showing of photographs, will significantly reduce the possibility of incorrect identifications while maintaining a similar degree of correct identifications. Such measures should be incorporated into Australian police practices.

The problem of verballing, as discussed earlier, was involved in the convictions of three brothers in Western Australia, Ray, Peter, and Brian Mickelberg, who were convicted of stealing over half a million dollars worth of gold bullion from the Perth mint in Western Australia in 1982.[40] In 2002, a former police officer admitted to fabricating the evidence used to convict them.[41]

The following three cases: Easterday, Button, and Mallard, further highlight causes of wrongful conviction in Australia. This Essay more fully explores the Mallard case, being the most recent of these three.

A. The Easterday Case

In 1993, three amateur gold prospectors were convicted of defrauding a gold mining company out of six million dollars. It was alleged that Clark Easterday, Len Ireland, and Dean Ireland had "salted," or tampered with, their soil tests. Specifically, the prosecution alleged that the defendants placed gold dust in their soil sample, resulting in a false reading of the proportion of gold contained within the soil.[42] Always protesting their innocence, each of the men served thirteen months of three and one-half year terms in prison before having their convictions

38. *Understand the Causes—Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Aug. 10, 2011).

39. Some research in this area is being undertaken. For example, *see Ms Serena Nicholls*, GRIFFITH UNIV., http://www.griffith.edu.au/criminology-law/griffith-law-school/research/research-higher-degrees/events/colloquia/colloquium-1-2011/colloquium-1-2011-schedule/serena-nicholls (last visited May 25, 2013).

40. *See* Andrew Rule, *How the West Was a State Where Police Ran Wild*, AGE (June 15, 2002), http://www.theage.com.au/articles/2002/06/14/1023864347078.html; Charlie Brady, *Mickelberg hopes to untie the stitch*, GREEN LEFT WEEKLY (Feb. 12, 1992), http://www.greenleft.org.au/node/2222; Selina Day & Liza Kappelle, *Brothers Plan Appeal No. 8 after Police Confession*, AGE (June 12, 2002), http://www.theage.com.au/articles/2002/06/11/1022982845280.html; Mark Russell, *Conscience Come Clean*, COURIER MAIL, June 13, 2002; Mickelberg v. The Queen, [2004] WASCA 145 (Austl.); Jayne-Maree Sedgman, *Mickelberg Brothers Speak Out*, AUSTL. BROADCASTING CORP. ONLINE (July 6, 2004), http://www.abc.net.au/pm/content/2004/s1148083.htm.

41. *Id.*

42. Ross Coulthart, *Karpa Gold Fall Guys*, SUNDAY (May 18, 2003), http://sgp1.paddington.ninemsn.com.au/sunday/cover_stories/article_1276.asp?s=1.

quashed in March of 2003.[43] This followed, among other things, the discovery that the Crown had withheld important stock exchange documents from the defence and the court at trial.[44] These stock exchange documents indicated that other people, not exclusively the defendants, may have financially benefited from the salting and insider trading.[45]

B. The John Button Case

Approximately forty-six years ago, John Button was celebrating his nineteenth birthday with his girlfriend, Rosemary Anderson, before things took a tragic turn. Following an insignificant quarrel, Anderson left the house to walk home. Button went looking for her and discovered her wounded by the side of the road, having been hit by a car. Anderson later died in hospital.[46]

Button was tried for murder and convicted of manslaughter. Although his prison term lasted just less than five years, the consequences of that conviction—including an inability to travel overseas to see his mother or attend her funeral after she died, remained for almost four decades.[47] Button took almost forty years prove his innocence, despite a known and convicted serial killer, Eric Edgar Cooke, providing a detailed confession to police not long after Anderson's death and Cooke subsequently repeating his confession moments before he was hanged for the other murders he committed.[48] A false confession contributed to Button's wrongful conviction, and Button has spoken about the traumatic police interrogation that led to his signing of the confession. The Court of Appeal of Western Australia finally overturned John Button's conviction in early 2002, and in 2003, John Button eventually received some financial compensation.[49]

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43. Selina Day, *WA—Trio's Gold Fraud Conviction Quashed*, AAP GEN. NEWS (Mar. 28. 2003); *see also* Easterday v. The Queen, [2003], WASCA 69.

44. Easterday v. The Queen, [2003] WASCA 69.

45. Coulthart, *supra* note 40.

46. BLACKBURN, *supra* note 31.

47. *See* BUTTON, *supra* note 31; *Murder He Wrote Part 2*, *supra* note 31.

48. BLACKBURN, *supra* note 31. This was at a time when Australia still incorporated the death penalty. As noted in *Broken Lives*, John Button was in the prison yard, when Eric Cooke was hanged and the prisoners knew the time of the execution, as the sound made all the rooftop pigeons take flight.

49. Button v. The Queen, 35 [2002] WASCA 35 (Austl.). The wrongful conviction of John Button was explored in *Murder He Wrote Part 2*, *supra* note 31; *see also* BUTTON, *supra* note 31. Further, compensation was awarded to another exoneree in June 2011, Darryl Beamish, a deaf-mute who was also wrongly convicted for a murder for which Eric Edgar Cooke was responsible. *See* Beamish v. The Queen, [2005] WASCA 62; Amanda O'Brien, *$425k Payout 'Miserly' for Deaf-Mute's Jail Hell*, AUSTRALIAN (June 3, 2011), http://www.theaustralian.com.au/national-affairs/k-payout-miserly-for-deaf-mutes-jail-hell/story-fn59niix-1226068250577; Kathryn Shine, *Cleared at Last After*

C. The Andrew Mallard Case

Pamela Lawrence was murdered in her Perth jewellery shop, having been beaten on the head with a blunt object. Andrew Mallard, already known to police for petty crime, became a prime suspect early in the investigation, despite the little, if any, evidence to arouse such targeted suspicion. As part of the on-going investigation, the police established an undercover operation. Mallard was befriended by an undercover officer, "Gary," who secretly recorded their conversations but these conversations in no way implicated Mallard as being involved in the murder. However, during an official police interview undertaken at a time in which it appears Mallard's mental health was impaired, Mallard hypothesized about how the victim was killed and "confessed" at times to the murder. This, among other evidence presented by the police and prosecution, including Mallard's drawing of the murder weapon (the wrench), resulted in his conviction for murder. Mallard spent twelve years in prison before being exonerated when he successfully appealed to the High Court.[50]

Mallard's fight to prove his innocence was a long battle. Mallard's initial appeal was rejected. He was later able to return to the Western Australia Court of Appeal via a reference of the attorney general, however, he was again unsuccessful at this appeal. Mallard was fortunate however, to then be one of a relatively small number of criminal matters to be heard by the High Court of Australia.[51] There, his conviction was finally overturned. Despite the corrected conviction, the prosecution still initially considered Mallard the prime suspect. The prosecution decided, however, not to retry the case when subsequent investigations discovered evidence implicating another man who was already in prison, and who committed suicide shortly after receiving this news.[52] Following this series of events, the Corruption and Crime Commission of Western Australia (CCC) officially investigated the matter.

While the CCC investigation focused, as their ambit required, on

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44 years, AUSTRALIAN, Apr. 2, 2005.

50. Mallard v. The Queen, [2005] HCA 68 (Austl.).

51. For example, figures available from the High Court of Australia library show that in the 2009/2010 financial year, there were 57 criminal law applications for a hearing in the High Court and of those, 9 were successful (16%).

52. CORRUPTION & CRIME COMM'N, REPORT ON THE INQUIRY INTO ALLEGED MISCONDUCT BY PUBLIC OFFICERS IN CONNECTION WITH THE INVESTIGATION OF THE MURDER OF MRS PAMELA LAWRENCE, THE PROSECUTION AND APPEALS OF MR ANDREW MARK MALLARD, AND OTHER RELATED MATTERS 133-136 (2008); *see also* Amanda Banks, *Suicide Note Left by Convicted Murderer*, AUSTRALIAN, May 23, 2006; Amanda Banks, *Jailed Murder Suspect Dead*, AUSTRALIAN, May 20, 2006.

whether there had been misconduct by the public officials in the case, the CCC identified key aspects as to why this wrongful conviction occurred. For example, the CCC report found that the police had requested an expert report be amended so that the portion of the report relating to saltwater testing of Mallard's clothes (which determined that Mallard had not rinsed his clothes in the river as Mallard claimed the murderer would have done in order to remove any traces of blood), be excised. Further, the CCC found that the prosecution proceeded with the case based on Mallard's drawing of a wrench as the murder weapon, despite evidence showing that the injuries to Lawrence could not have been inflicted by such a wrench.[53]

The CCC noted aspects of the police investigation that were improper and amounted to "misconduct." For example, the CCC discovered that some witnesses the police interviewed on a number of occasions changed their statements during the course of the investigation. The later statements strengthened the case against Mallard, but the police included only the final statements in the brief of evidence. Further, the police did not supply the earlier statements to the defense.[54] The CCC commented in their executive summary:

> [43] The Commission is satisfied that the changes were brought about either by persistent and repeated questioning and/or by deliberately raising doubts in the witnesses' minds until they became confused, uncertain or possibly open to suggestion, and demonstrates a pattern which cannot have been an accident or coincidence.[55]

The CCC's comments in this case suggest that the problems regarding the eyewitness identification were more attributable to the police interplay with the witnesses and their evidence, rather than with the original eyewitness identification.[56] The wrongful conviction also involved tunnel vision, as can be noted through various points of the CCC report:

> 6.7 Andrew Mallard as a Suspect
>
> [178] By the beginning of June 1994, Andrew Mallard was under active investigation. All the available material points to him being, at that time, the only person actively being considered responsible for the homicide. The investigation files do not reveal any other person who had been interviewed in a formal manner and under criminal caution. The various detectives in their evidence before the Commission, said that there were other "persons of interest," but they appear to have all been written off or

53. REPORT ON THE INQUIRY INTO ALLEGED MISCONDUCT, *supra* note 52, at 83–84.

54. *Id.* at xxii–xxiv and at 85–100.

55. *Id* at xxii.

56. *Id.* at 98–100.

> discounted by about 1 or 2 June.
>
> [179] On the other hand:
>
> - there was no forensic evidence linking Andrew Mallard to the crime;
> - he had denied committing the offence, and had said nothing by way of admission;
> - he had given a variety of different accounts for his movements upon the assumption that he had to account for a period of 90 minutes, in circumstances where he was being interviewed in a psychiatric hospital and was demonstrating quite fanciful behaviour; and
> - the murder weapon had not been identified. Not only had no weapon been found, but some of the injuries to the deceased's skull had a distinctive shape and contained traces of something blue.
>
> [180] The various police witnesses denied Mr Mallard was already a suspect at that stage and sought to draw a distinction between the use by them of the terms "suspect" and "person of interest," maintaining that in police jargon a "suspect" meant a person in respect of whom there was sufficient evidence to charge, and that other persons being investigated were merely "persons of interest[.]" The Commission rejects this supposed distinction…
>
> [324] If, as they now claim, the police officers had doubts, the appropriate course was to review all the material and all the witness' statements to see if there could be anyone else who might be a possible suspect, and to re-examine the evidence they had to see if any possible leads had been overlooked. This is the very thing they did not do, but rather they focused their efforts on seeking to build a case against Andrew Mallard, and the manner in which they did it reflects no credit on the police involved.
>
> [351] The only weapon specified by Mr Mallard in his alleged confession was shown to have been incapable of inflicting the injuries to Mrs Lawrence. This alone therefore cast grave doubts on the reliability of his confession, yet its significance was either overlooked or ignored. This was not the only test where results which did not advance the case against Mr Mallard, or which tended to exonerate him, were cast aside.[57]

Full disclosure of evidence is vital for a fair trial, as the wrongful convictions discussed in this Essay demonstrate. The CCC inquiry also noted that despite statutory requirements demanding full disclosure, there appears to be a continuing problem in this regard.[58] The Mallard

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57. *Id.* at 38, 77, 83.

58. *Id.* at 108–09. The CCC also reported the following:

> 8.4 A Continuing Problem
>
> [476] Disclosure has continued to be a problem notwithstanding the 1993 Guidelines. Section 42 (1) of the Criminal Procedure Act 2004 which commenced on 2 May 2005, set out in statutory form, those items which the Prosecution must disclose to the defence prior to the trial. It includes:

case alone involves a myriad of relevant contributing causal factors to wrongful convictions, including many known to occur elsewhere: a false confession, withholding of exculpatory evidence, official misconduct, tunnel vision, and eyewitness identification.[59]

While the number of exonerations that have occurred in Australia are greater than those discussed in this Essay, this number does not justify robust claims regarding systemic causes. The cases do, however, enable insight into the problem and allow initial consideration as to what similarities or differences appear to be operational. Australian cases to date reflect, at least to some degree, those systemic causes known to cause wrongful convictions in other countries, such as the United States, Canada, and England. If and when more exonerations occur, Australia will have the opportunity to explore more fully the causal factors contributing to wrongful convictions. For further exonerations to occur, however, expanding the current corrective mechanisms is required. In a catch-22 situation, one reason for the comparatively small number of exonerations to date is likely, at least in part, due to the lack of investigative and corrective mechanisms for wrongly convicted people.

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a) a copy of every statement . . . by any person who may be able to give evidence that its relevant to the charge, irrespective of whether or not it assists the prosecutor's case or the accused's defence . . . .

e) a copy of every other document or exhibit which may assist the accused's defence.

[477] The same year the DPP issued a fresh Statement of Prosecution Policy and Guidelines 2005, to give effect to the statutory requirements, Paragraphs 111 and 112 expressly required the police to furnish to the Office of the DPP . . . .

[A]ll other documentation, material and other information held by any police officer concerning any proposed prosecution witness which might be of assistance or interest to either the prosecution or the defence, and to certify that such had been done.

[478] Notwithstanding this, problems continued, and by letter dated 7 December 2006, the current DPP, Robert Cock QC, wrote to the Commissioner of Police advising that in a number of recent prosecutions relevant material had not been disclosed to the defence, let alone to the prosecutor, prior to trial. He went on to explain in some detail the nature and extent of the obligations of the Police in respect of disclosure. He also attached a list of "Items not Commonly Disclosed" which included, "all typed or handwritten statements of witnesses both signed and unsigned, including draft statements and statements of witnesses not included in the brief, any and all negative enquiries from potential witnesses, any and all negative results of any forensic testing, running sheets (including those of surveillance and undercover operations) and any photo boards shown to witnesses including negative and incorrect identifications[.]"

[479] By a General Broadcast to all police on 17 January 2007, authorised by the Deputy Commissioner Specialist Services, police were reminded of their obligations in this regard and the DPP's list of "Items not Commonly Disclosed" was set out in full.

[480] There can no longer be any excuse for police to claim they are unaware of their obligations relating to disclosure. Whether police are currently fulfilling their obligations in this regard, the Commission is unable to say; but if they understand and comply with their obligations as described, there should be no further problems in this regard." *Id.*

59. *See generally* REPORT ON THE INQUIRY INTO ALLEGED MISCONDUCT, *supra* note 52.

IV. CORRECTION OF WRONGFUL CONVICTION

Australia's trial and appeal provisions were adopted from England in the early 20th century. Australia's criminal procedure processes have naturally evolved; however, England's originating influence remains particularly evident in the appeal and pardon provisions still operative in Australia. Wrongful conviction applicants in Australia remain heavily reliant on the traditional pardon provisions for access back into the courts of appeal. England moved away from this over a decade ago, with the creation of the Criminal Cases Review Commission. As such, modern Australia is more reliant on now usurped English provisions to correct wrongful conviction than England itself. This old framework is not conducive to identifying and correcting wrongful convictions.

Innocence projects have operated in Australia for over ten years now. With a prison population of approximately 30,000, it is not expected that Australia will see the volume of exonerations as have occurred in the United States. Other differences, such as the comparatively shorter sentencing periods in Australia, will also impact innocence project activity and the likelihood of exonerations occurring, particularly exonerations occurring prior to release. Statistics from the Innocence Project in the United States show the average time spent in prison before exoneration is thirteen years.[60]

One of the major hurdles for innocence project work in Australia, however, is the legal framework within which projects operate. When the Griffith University Innocence Project commenced operation in 2001, the rights, or lack thereof, regarding prisoner access to information, biological material, and DNA testing were ambiguous at best. This led to a long and exhaustive process of requests, meetings, and submissions, from which it became clear that numerous obstacles prevented effective investigation of wrongful conviction claims. Access to basic information—as simple and seemingly uncontroversial as whether biological evidence existed in an applicant's case for potential DNA testing—was not forthcoming. The experience ultimately confirmed an essential need for reform.

Discovery of information vital to uncovering a wrongful conviction is difficult, as there are no powers available to projects to access such information. The system tends to shut down following the exhaustion of a defendant's appeal. Further, the absence of a framework for the wider discovery of documents and the limited availability of mechanisms for DNA innocence testing will no doubt result in the inability for some ever to prove their innocence.

60. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/351.php (last visited Aug 10, 2011).

Some advances have been made. Queensland introduced DNA innocence testing guidelines into its criminal justice system in August 2010, following years of lobbying by the Griffith University Innocence Project.[61] These guidelines for the first time in Queensland, enable an outlined procedure and process for DNA based wrongful conviction claims. However, the limited measures specified within the guidelines fail to provide the opportunity for a full range of potential DNA innocence cases to be properly investigated and resolved.

New South Wales is the only Australian state with DNA innocence testing legislation. The state's initial foray into this area was the creation of an Innocence Panel, which was short-lived when it was shut down not long after its commencement following DNA testing in a high profile case which excluded the applicant.[62] Under the ambit of the police department, the then-New South Wales police minister John Watkins, stated the Panel's suspension was required due to insufficient "checks and balances to protect anyone other than the applicant."[63]

Subsequently, in 2006 legislation was adopted by New South Wales to facilitate DNA innocence testing to applicants.[64] In essence, this legislation gives convicted people the opportunity to make an application to the Panel if "the person's claim of innocence may be affected by DNA information obtained from biological material specified in the application."[65] The Panel has referral powers to the court of appeal if the Panel considers that there is "reasonable doubt as to the guilt of the convicted person."[66] It is a positive reform, in that it introduced into Australia the first DNA innocence testing legislation, but concerns about its effectiveness have also been expressed. These concerns include the restrictions and limitations contained within the Act, which make it available to only a small number of convicted persons who have been convicted of the most serious offences.[67]

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61. QUEENSLAND DEPT. OF JUSTICE & ATTORNEY-GEN., GUIDELINES FOR APPLICATIONS TO THE ATTORNEY-GENERAL TO REQUEST POST-CONVICTION DNA TESTING (2010), *available at* http://www.justice.qld.gov.au/__data/assets/pdf_file/0008/58283/dna-guidelines-august2010.pdf.

62. *Stateline NSW: Innocence Panel Lost* (Austl. Broad. Corp. television broadcast Aug. 15, 2003), *available at* http://www.abc.net.au/stateline/nsw/content/2003/s926344.htm.

63. *NSW Innocence Panel, Which Reviews Criminal Cases Using DNA Evidence, Suspended*, PM (Austl. Broad. Corp. television broadcast Aug. 11, 2003), *available at* http://www.abc.net.au/pm/content/2003/s922027.htm.

64. In October 2006, the New South Wales Parliament passed the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* (NSW) [hereinafter the DNA Act] and the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 69* (NSW).

65. *Crimes (Appeal and Review) Act 2001 120*, § 89 (2).

66. *Id.* § 94 (1).

67. *See, e.g.*, *DNA Review Panel a 'Toothless Tiger,'* ABC NEWS ONLINE (Oct. 19, 2006), http://www.abc.net.au/news/newsitems/200610/s1768341.htm. For a fuller discussion regarding the restrictive nature of the NSW DNA Innocence Testing provisions, see Lynne Weathered & Robyn

The potential for incorrect interpretation, cross-contamination, and laboratory errors, among other things, seems ignored in both the New South Wales and Queensland DNA testing provisions. Queensland allows testing only where Profiler Plus was not already used (which has been used for many years in this state). The NSW legislation applies only to convictions prior to 2006. The situation in Victoria in December 2009 highlighted the need for DNA innocence testing, despite investigative DNA testing having already been utilized. The conviction of a schoolboy for rape was corrected when it was discovered the DNA evidence against him, being the only condemning evidence in that case, had likely been contaminated.[68] For months following that revelation, no DNA results were allowed in court with a temporary moratorium placed on the results' use.[69]

Most recently, South Australia debated whether to create a CCRC style body. While that Bill was turned down following its second reading in June 2011,[70] the issue was then referred to the South Australian Legislative Review Committee (LRC). While the LRC concluded against the establishment of a CCRC at this time, it nevertheless determined that better post-conviction review processes were required.[71] To this end, the LRC proposed the establishment of a Forensic Review Panel to "enable the testing or re-testing of forensic evidence which may cast reasonable doubt on the guilt of a convicted person, and for these results to be referred to the Court of Criminal Appeal."[72] The proposed Panel was not taken up in South Australia, but would have been a significant step in the right direction, though fall short of a CCRC in that it is restricted to forensic issues.

South Australia has however adopted another of the LRC's recommendations, establishing a second or subsequent statutory right of appeal if the court is satisfied that it is in the interests of justice to consider fresh and compelling evidence.[73] This is an important

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Blewer, RIGHTING WRONGFUL CONVICTIONS WITH DNA INNOCENCE TESTING: PROPOSALS FOR LEGISLATIVE REFORM IN AUSTRALIA IN AUSTRALIA, 11 FLINDERS J. L. REFORM 1 (2009).

68. FRANK H.R. VINCENT, VICTORIAN DEPARTMENT OF JUSTICE, REPORT: INQUIRY INTO THE CIRCUMSTANCE THAT LED TO THE CONVICTION OF MR FARAH ABDULKADIR JAMA § 2006-10 (2010).

69. Milanda Rout & Rick Wallace, *Police Put Ban on DNA Evidence*, AUSTRALIAN (Dec. 10, 2009), http://www.theaustralian.com.au/news/nation/police-put-ban-on-dna-evidence/story-e6frg6nf-1225808820951; Steve Butcher, *DNA Doubts Force Review of Cases*, AGE (Nov. 26, 2009), http://m.theage.com.au/national/dna-doubts-force-review-of-cases-20091125-jrtf.html; Milanda Rout, *DNA in the Dock*, AUSTRALIAN (Dec. 11, 2009), http://www.theaustralian.com.au/news/features/dna-in-the-dock/story-e6frg6z6-1225809214024.

70. *See Criminal Cases Review Commission Bill 2010* (SA) (Austl.).

71. LEGISLATIVE REVIEW COMMITTEE, REPORT OF THE LEGISLATIVE REVIEW COMMITTEE ON ITS INQUIRY INTO THE CRIMINAL CASES REVIEW COMMISSION BILL 2010 81 (2012).

72. *Id.* at 84.

73. *See Statutes Amendment (Appeals) Act 2013* (SA) (Austl.).

additional avenue as new evidence of innocence will almost always come to light following (and often many years after) the applicant's appeal right has been exhausted and an appellant generally has only one opportunity to appeal at the state level and no right for fresh evidence to be heard in the High Court, regardless of the strength of the fresh evidence.[74] Wider reform is necessary, as the effective investigation and correction of wrongful conviction cases in Australia has been generally fraught with difficulties and obstacles, and while these continue to exist, the chance for many convicted but innocent people to prove their innocence is limited, as further explained below.

A. Preservation of Evidence

Preservation of evidence is generally a cornerstone of recommended DNA innocence testing legislation.[75] Yet, for the most part in Australia, the destruction of evidence is often required once the appeal has been heard. Preservation of evidence is not mentioned within the Queensland post-conviction DNA testing guidelines. As already demonstrated in the United States, many wrongful conviction applicants will be unable to prove their innocence because the evidence upon which DNA testing could take place no longer exists. Reform is required to ensure DNA samples and crime scene evidence that contain biological material are retained and properly stored. Also, reform is necessary to enable future DNA testing and the subsequent use of this evidence in court proceedings. If the United States can manage the preservation of evidence with a prison population of over two million, surely Australia, with a tiny percentage of that number in prison, can adopt measures to preserve appropriate evidence.

B. Discovery Powers

Access to information is the essential starting point for the proper investigation of wrongful conviction claims. In Australia, a significant amount of information is likely to be available from the applicants themselves, including the trial transcript, committal transcript, and brief of evidence, among other things. However, accessing additional

74. Lynne Weathered, *Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia*, *Current Issues in Criminal Justice*, 17 (2) J. OF THE INST. OF CRIMINOLOGY 203 (2005); Lynne Weathered, *Does Australia Need a Specific Institution to Correct Wrongful Convictions?*, 40 (2) *AUSTRL. AND N. Z. J. OF CRIMINOLOGY* 179 (2007).

75. *Fix the System: Model Legislation—Model Statute for Obtaining Postconviction DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/fix/Model-Legislation.php (last visited Aug. 10, 2011).

documents relevant to the initial case investigation, or potentially undisclosed exculpatory material, is difficult to uncover, as no real discovery rights exist beyond the traditional legal avenues.

Discovery powers, such as those given to the CCRC in the United Kingdom, would significantly increase the opportunity for proper investigation of cases. One of the key beneficial aspects of having a CCRC style body introduced would be the associated investigatory powers that enable the discovery of relevant material and documents, thereby allowing for a significantly more comprehensive investigation of claims of wrongful conviction.

Sadly, this is lacking in the post-appeal Australian criminal justice system. Currently, innocence projects or others can work for many years on wrongful conviction applications, where ultimately there may be no evidence available for DNA testing. Prior to the introduction of the DNA innocence testing guidelines in Queensland in August 2010, it took almost seven years for the Griffith University Innocence Project to be told if evidence existed in two matters they were investigating.[76] Unfortunately, the Queensland DNA Guidelines have not fully rectified this situation, as applications need to be sent to the attorney general showing how DNA innocence testing can provide evidence of innocence prior to the government deciding whether to undertake a search for evidence that may still exist. If such evidence is available, no Australian state offers rights to ensure that testing will take place.

C. DNA Innocence Testing

The Queensland DNA guidelines and the NSW legislation offer criteria under which a decision will be made as to whether DNA testing will occur. This significantly improves the situation compared to other states, where the process remains undefined and ambiguous. If the LRC recommendations for a Forensic Review Panel had been enacted in South Australia, it would have allowed for DNA and other scientific testing. At the date of writing, there have been no post-appeal DNA exonerations in Australia. The former absence, in any state, of any real framework for DNA innocence testing as outlined above and the continued difficulties in accessing relevant information are significant reasons as to why no DNA exonerations have occurred in Australia to date.

The case of Frank Button,[77] convicted of the rape of a teenage girl,

76. Lynne Weathered, *Invisible Innocence: It Happens Here Too*, 32 GRIFFITH REV. 189, at 195 (2011).

77. The Queen v. Button, [2001] QCA 133.

perhaps best illustrates the difficulties of obtaining an exoneration. Sometimes referred to as Australia's only DNA exoneration, Frank Button's conviction was overturned in his first appeal, bringing him within the traditional appeal avenues and, therefore, outside the definition of wrongful conviction as used in this Essay. Despite the potential of highly probative DNA evidence being available before trial, that testing was inconclusive; the spermatozoa tested from the complainant's swabs failed to reveal a DNA profile of the donor.[78] Through the insistence of Button's appellate counsel, additional DNA testing was undertaken prior to appeal.[79] This additional testing included a bed sheet, not originally tested, which did not contain Button's DNA.[80] Further testing of the complainant's swabs proved that donor of the sperm was not Button, but the same person as the donor of the sperm on the bed sheet. Button's conviction was quashed.[81]

The court of appeal described this case as a "black day in the history of the administration of criminal justice in Queensland."[82] Importantly—for the purpose of understanding the position of wrongful conviction applicants in Australia—Frank Button's situation would have been daunting if the DNA retesting had not taken place prior to his appeal. That is, Button would have exhausted his one appeal right to the court of appeal. Additionally, he would not be entitled to a further appeal beyond the limited prospect of presenting a significant legal argument to be heard in the High Court or through being referred back to the court of appeal via a pardon application. Unfortunately for Button, he would have no new evidence to support a pardon application. Button would have difficulty satisfying the terms of the Queensland DNA guidelines, as DNA testing using Profiler Plus had already been undertaken, even though it did not initially provide a profile. If this occurred in another Australian state (outside of New South Wales), Button would have had no procedural framework or rights to access DNA innocence testing. Without the infrastructure allowing him DNA innocence testing, there would be no new evidence of innocence upon which to base a pardon petition, and in all likelihood, Button would have languished in prison.

Continuing with such a system is not reflective of a society that acknowledges and is committed to correcting, wrongful convictions.

78. *See* CRIME & MISCONDUCT COMM'N, FORENSICS UNDER THE MICROSCOPE: CHALLENGES IN PROVIDING FORENSIC SCIENCE SERVICES IN QUEENSLAND (2002).

79. *Id.*

80. *Id.*

81. *Id.*; *see also* The Queen v. Button, [2001] QCA 133.

82. The Queen v. Button, [2001] QCA 133.

D. Limited Appeal Avenues

As alluded to earlier, there are limited appeal options for wrongful conviction claimants.[83] One appeal to a state appellate court is often all that is available. Australia's highest court, the High Court of Australia, has determined it is unable to hear fresh evidence, even if that were compelling evidence of innocence such as DNA. Recent research highlights that Australia's appeal system, through its lack of processes and avenues for wrongful conviction claimants, may breach article 14 of the *International Covenant on Civil and Political Rights*.[84] In order to ensure compliance with international obligations and more adequately provide fair processes for wrongful conviction applicants, the Australian Human Rights Commission, in a submission to the LRC, stated:

> The current system of criminal appeals in Australia for a person who has been wrongfully convicted or who has been subject to a gross miscarriage of justice to challenge their conviction may not be fully compatible with the right to a fair trial as set out in ICCPR article 14(5).
>
> In the absence of a national body, the establishment of a South Australian Criminal Cases Review Commission is one mechanism by which South Australia could ensure compliance with international human rights standards.[85]

The new appeal avenue introduced in South Australia is therefore a major step forward in better providing appellate access for wrongly convicted people. Such a measure should be similarly adopted across the country. More significant reforms in regard to our post-conviction review processes and mechanisms would better still meet international obligations. The creation of the CCRC in England and Wales has not solved the problem of wrongful conviction, and indeed, there are a number of criticisms regarding the organization.[86] The CCRC has

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83. For a more comprehensive discussion surrounding appeal avenues for the wrongly convicted, please see Lynne Weathered, *Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia, Current Issues in Criminal Justice*, 17 (2) J. OF THE INST. OF CRIMINOLOGY 203 (2005); and Lynne Weathered, *Does Australia Need a Specific Institution to Correct Wrongful Convictions?*, 40 (2) *AUSTRL. AND N. Z. J. OF CRIMINOLOGY* 179 (2007).

84. Bibi Sangha and Robert Moles, *Mercy or Right? Post-Appeal Petitions in Australia*, 14 *FLINDERS L.J.* 293 (2012); Bibi Sangha and Robert Moles, *Post-Appeal Review Rights: Australia, Britain and Canada*, 36 (5) CRIM. L.J. 300.

85. AUSTRALIAN HUMAN RIGHTS COMMISSION, INQUIRY INTO THE CRIMINAL CASES REVIEW COMMISSION BILL 2010 7 (2011) *available at* https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/20111125_criminal_case_review.pdf (last visited May 25, 2013).

86. To review some of the considerations, concerns and criticisms of the CCRC, see, e.g., THE CRIMINAL CASES REVIEW COMM'N, HOPE FOR THE INNOCENT? (Michael Naughton, ed., 2009); Robert Schehr & Lynne Weathered, *Should the United States Establish a Criminal Cases Review Commission?*, 88 JUDICATURE 122 (2004); Lynne Weathered & Stephanie Roberts, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review*

however, significantly impacted on the ability of wrongful conviction applicants to have their cases more thoroughly investigated through the CCRC's wide investigative powers. A distinct increase in referrals to the courts of appeal has occurred since the introduction of the CCRC. If such a body is created in Australia, lessons could be learned from the criticisms of the English model, and moreover, attention could be given to specific Australian issues such as the over-representation of Aboriginal and Torres Strait Islanders in our prisons. It should be remembered however, that there is no one solution to the problem of wrongful conviction and eternal vigilance by everyone involved in the criminal justice system will always be required.

V. CONCLUSION

Acknowledging that wrongful convictions occur does not undermine a criminal justice system. In contrast, acknowledging wrongful convictions can demonstrate a real commitment to the ideals of justice if active reform is undertaken to address the problem. All criminal justice systems have flaws. Australia has its own examples of wrongful conviction that demonstrate its vulnerability to many of the causative factors known to occur in overseas nations. While the Australian system does have many front-end measures that may reduce the likelihood of wrongful convictions occurring, it has not sufficiently updated the post-appeal investigative and corrective measures to allow for those wrongful convictions that do occur, to be more easily identified and corrected.

Australia's current legal environment creates real obstacles to the investigation of wrongful conviction claims. In particular, Australia generally creates unnecessary difficulties by failing to provide a framework which would enable wider discovery of documents and evidence, greater access to DNA innocence testing or other forensic testing, and additional appeal avenues to correct potential miscarriages of justice. Reform measures need to address these obstacles. The creation of CCRC— empowered to fully investigate and to refer claims to courts of appeal—is the most comprehensive way to do so. The relatively few updated measures for the correction of wrongful conviction is, perhaps, now a significant differentiating feature of Australia's criminal justice system compared to that of England.

In recent times, some welcome measures have been introduced in Queensland, with the introduction of DNA innocence testing guidelines, in New South Wales, through their DNA innocence testing legislation

Commission, 29 OXFORD J. LEGAL STUD. 43 (2008); Richard Nobles & David Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal*, CRIM. L. REV. 173 (2005).

and through the South Australian legislation enabling a second appeal. While these may be limited in scope, they all present a step forward and better address the problem of wrongful conviction than other states in Australia, where virtually no updating of mechanisms for the correction of wrongful conviction has occurred. Resistance to implementing wider more effective measures to identify and correct wrongful convictions is not demonstrative of the modern, responsive criminal justice system otherwise existing in Australia. Hopefully, the future will see increased measures adopted throughout the country, aligning Australia more closely to international developments designed to investigate, uncover, and correct, wrongful convictions.

THE CRIMINAL CASES REVIEW COMMISSION (CCRC) OF ENGLAND, WALES, AND NORTHERN IRELAND

*John Weeden**†

I. THE HISTORY

On 21 November 1974 two bombs, left in plastic shopping bags, went off in crowded public house bars in Birmingham, the second biggest city in the United Kingdom. The same year in Guildford, a smart suburban town to the south west of London, another "pub bomb" was detonated.[1] No warnings were given.[2] On both occasions the pubs were full of drinkers.[3] 21 people were killed in Birmingham and 7 died in Guildford. Many more were seriously injured.[4] There was a public outcry, the Irish Republican Army (IRA) was effectively the only suspect, and these attacks on the UK mainland were seen as an egregious example of the dangers posed by the IRA to the British government and its citizens.[5]

There was immense pressure for the police to catch those responsible and restore public confidence.[6] In relation to the Birmingham bombings, 6 Irishmen were arrested that same evening, just as they were about to board a ferry for Ireland. They had travelled from Birmingham by train, leaving the city at about the time of the bombings. Similarly swift arrests were made concerning the Guildford bombings, this time 4 Irishmen. Both sets of detainees were interviewed at length and confessed their involvement. Pictures of them were published in the newspapers and they became the most hated people in the country. All

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* CB, Commissioner.

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1. Sir John May, *Report of the Inquiry into the Circumstances Surrounding the Convictions Arising out of the Bomb Attacks in Guildford and Woolwich in 1974, Final Report* (1993-94 HC 449).

2. In Birmingham, a warning was transmitted by telephone but arrived only six minutes before the bombs exploded and omitted to name the locations; *see* Sean O'Neill, *The Man Behind the Pub Bombs in Birmingham that Killed 21*, THE TIMES, Nov. 18, 2004.

3. *Id.*

4. *Id.*

5. This suspected IRA activity prompted, as Clive Walker argues, Parliament to pass the first of the draconian Prevention of Terrorism Acts in 1974 – *see* CLIVE WALKER & KEIR STARMER, MISCARRIAGES OF JUSTICE, A REVIEW OF JUSTICE IN ERROR, 47 (Blackstones, 1999) and CHRIS MULLIN, ERROR OF JUDGMENT: THE TRUTH ABOUT THE BIRMINGHAM BOMBINGS, 3-11(4th ed., 1997).

6. *Id.*

were duly convicted of murder, receiving sentences of life imprisonment. They had not been well treated by the police, as became clear later,[7] and they were to fare no better in prison at the hands of their fellow inmates.[8]

These two groups of prisoners became known as 'the Birmingham 6' and 'the Guildford 4.' Gerry Conlon, who was one of the Guildford 4,[9] presented at the Cincinnati conference in April 2011. They attracted some distinguished campaigners who argued their innocence,[10] claiming that their confessions had been beaten out of them or fabricated, and that the nitro-glycerine that had been found on the hands of the Birmingham 6 must have come from something other than explosives.[11] They appealed to the Court of Appeal (Criminal Division) but to no avail. Campaigners then started down the long road of trying to get the case returned to the Court of Appeal. At that time the only route was a referral from the Home Secretary.[12] During this journey some surprising judicial attitudes became public. The well-known and highly respected judge Lord Denning, in an article for a national news magazine, 'The Spectator,' indicated that he thought that it would have been better if the Birmingham 6 had been hanged, so as to avoid all the damaging campaigns in support of the men and against the criminal justice system.[13] This was particularly controversial given that Lord Denning had sat in the Civil Division of the Court of Appeal in proceedings brought by the men against the Chief Constables of the West Midlands and Lancashire police forces in which they claimed damages for the injuries they had suffered in police custody. During the course of his judgment of one of those cases, *McIlkenny v. Chief Constable of the West Midlands*[14] Lord Denning said:

> "Just consider the course of events if this action is allowed to proceed to trial. If the six men fail, it will mean that much time and money will have been expended by many people for no good purpose. If the six men win, it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and

7. This topic was discussed at some length in MULLIN, *supra* note 5.

8. MULLIN, *supra* note 5, at 140-148.

9. ROBERT KEE, TRIAL AND ERROR, 177 (2nd ed., 1989); LJ Devlin & LJ Scarman, *Justice and the Guildford Four*, THE TIMES, Nov. 30, 1988; GERARD CONLON, PROVED INNOCENT (1990).

10. Amongst them, Chris Mullin, Labour MP for Sunderland, and author of ERROR OF JUDGMENT, *supra* note 5, and Sir John Farr, Conservative MP for Harborough. Patrick Cosgrave, *Obituary: Sir John Farr*, THE INDEPENDENT, Nov. 5, 1997.

11. WALKER, *supra* note 5, at 47.

12. LAURIE ELKS, RIGHTING MISCARRIAGES OF JUSTICE? TEN YEARS OF THE CRIMINAL CASES REVIEW COMMISSION, 11 (2008).

13. A. N. Wilson, *'England, his England,'* THE SPECTATOR, Aug. 18, 1990.

14. McIlkenny v. Chief Constable of the West Midlands [1980] 2 All ER 228.

> were improperly admitted in evidence and that the convictions were erroneous. That would mean that the Home Secretary would either have to recommend they be pardoned or he would have to remit the case to the Court of Appeal. This is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further."[15]

We all know now that the English criminal justice system had not lived up to its reputation. There was indeed an 'appalling vista.'

It was some years after Lord Denning's remarks, and following persistent campaigning, that the Home Secretary of the day was eventually persuaded to refer the two cases back to the Court of Appeal. After 16 years of imprisonment, the Birmingham 6 and the Guildford 4 finally had their convictions quashed in 1992. Evidence had been obtained that the police had indeed seriously mistreated those arrested, had used violence to force confessions and had grossly misled the court. Furthermore, in the case of the Birmingham 6, the Crown's forensic evidence was shown to have been faulty – it turned out that the traces of nitro-glycerine on the hands might well have come not from explosives but from the finish on the particular brand of playing cards used by the Birmingham 6 on their train journey that evening.[16] The campaigners were ecstatic, but the country, let alone the government, was thoroughly embarrassed, and public confidence in the criminal justice system was shattered.[17]

Lord Runciman was appointed to head up a Royal Commission to investigate what had gone wrong and to make recommendations on future practice. He found that the Home Secretary could not properly be the person to decide whether cases should be referred back to the Court of Appeal. The Home Secretary was, after all, also responsible for the police and the prisons, and in Lord Runciman's view such an arrangement was incompatible with the constitutional concept of separation of powers.[18] The small Home Office department then dealing with alleged miscarriages of justice had been notoriously slow[19] and had only referred 4 or 5 convictions a year out of 700 applications. The Home Office was reactive only to points put to it. It did not go out to investigate or consciously look for new grounds of appeal.[20]

The Royal Commission proposed a new statutory organisation to take

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15. *Id.* at 240.

16. MULLIN, *supra* note 5, at 324-325.

17. VISCOUNT RUNCIMAN OF DOXFORD, ROYAL COMMISSION ON CRIMINAL JUSTICE, ch. 1, para. 22 (HMSO Cm 2263, July 1993).

18. *Id.* at ch. 11, para. 9.

19. Home Affairs Committee, *Miscarriages of Justice*, (1981-82 HC 421).

20. This number representative of figures between 1981-1988. VISCOUNT RUNCIMAN OF DOXFORD, *supra* note 17, at ch. 11, para. 5.

over the Home Secretary's responsibilities in this regard: a Criminal Cases Review Authority.[21] This proposal later led to the formation of the Criminal Cases Review Commission, or CCRC. The CCRC was created by the Criminal Appeal Act 1995[22] and, despite its government funding, is an independent statutory body designed to investigate alleged or suspected miscarriages of justice in England, Wales and Northern Ireland. Most importantly, it has the power to refer convictions and sentences back to the Court of Appeal.[23]

The CCRC is located in Birmingham, deliberately away from the seat of government in London. By statute it should have 11 Commissioners appointed by the Queen on the recommendation of the Prime Minister,[24] but due to a reducing budget it has had only 9 Commissioners for the last 12 months.[25] The Commissioners make all the final decisions on cases, and are supported by a total staff of around 85. The majority of the Commissioners and caseworkers are lawyers and have a wide range of experience of the criminal justice system. It was the first organisation of its kind in the world and remains the largest. There are only 2 countries that have followed suit, Scotland[26] and Norway,[27] although a bill to establish a fourth such body is currently before the Parliament of South Australia.[28] The CCRC has now been in existence for over 14 years and in that time has dealt with some 13,000 cases and referred 480 of them to an appeal court. Most involved serious offences including murder, sexual assault and drug supply. Of the appeals which have to date been dealt with by those courts, the relevant conviction has been quashed – or the sentence varied – in approximately 70% of cases.[29]

From the modern perspective it perhaps seems obvious that simple justice requires wrongful convictions to be acknowledged and rectified. On the same basis, it is clear that, whereas public confidence in our criminal justice systems may be jolted by the occasional revelation that

21. *Id.* at ch.11, para. 11.

22. CRIMINAL APPEAL ACT, (1995) c.35. (Gr. Brit.).

23. *Id.* at s.9.

24. *Id.* at s.8(3).

25. *Criminal Cases Review Commission Annual Report 2010/11* (2011) 1225 HC 24.

26. Further information on the Scottish Commission, set up in 1999, can be found at www.sccrc.org.uk.

27. Further information on the Norwegian Commission, set up in 2004, can be found at www.gjenopptakelse.no.

28. More information on this can be sourced from the office of the Hon. Ann Bressington MP, the politician responsible for introducing the Bill. At the time of writing this article, the Criminal Cases Review Commission Bill is currently undergoing a second reading, the debate on which has been adjourned. A good starting point for research is provided by the press release at www.netk.net.au/CCRC/MediaRelease.pdf.

29. For the full statistics, please see the Commission's website, which publishes updated statistics regularly at http://www.ccrc.gov.uk/cases/case_44.htm.

an error has been made and (only belatedly) rectified, public confidence in those systems will wholly disappear if we attempt to pretend that such errors simply cannot and do not occur. Although the UK does not have to grapple with the particular complications of the death penalty *vis-á-vis* miscarriages, there is no doubt that people have always been – and always will be – wrongly convicted for a variety of reasons in every civilised society. It is essential to recognise this and have a mechanism to address it. The CCRC is that mechanism for England, Wales and Northern Ireland. It is necessarily independent, not only of Government, of the police, of the prosecuting authorities and of the Courts, but also independent of the applicant. An applicant to the CCRC is just that – an applicant and not a client. The Commission is not a campaigning organisation and at no stage acts for an applicant. If it decides to make a referral, the Commission (once it has served a Statement of Reasons which sets out its findings and conclusions) drops wholly out of the picture – leaving it to the applicant and his or her lawyers to pursue the appeal in the court.

Although the jurisdiction of the CCRC extends to Magistrates' Courts offences, its workload mainly relates to the more serious offences tried in the Crown Courts from which appeals lie to the Court of Appeal (Criminal Division).[30] This paper does not seek to deal with the Magistrates' Court jurisdiction.

II. THE PROCESS

The CCRC is a creature of statute, and the test it has to apply when deciding whether or not to refer a case back to the Court of Appeal involves a series of statutory hurdles set out in the Act which established it. There normally has to have been an unsuccessful first appeal. If a reference is to be made, the Commission has to conclude that there is a 'real possibility' that the conviction or sentence will not be upheld by the appeal court. Furthermore, save in exceptional circumstances, the Commission can only refer a case to the Court of Appeal on the basis of evidence or argument not previously raised at trial or on appeal – there must be 'something new.'

Section 13 of the Criminal Appeal Act 1995 sets out the position:

> s.13 "Conditions for making of references
> (1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12B unless—
> (a) the Commission consider that there is a real possibility that the

30. *See* ELKS, *supra* note 12, at 264. The author points out that, in the period from its inception to December 2007, only 6.6% of all applications involved summary convictions in the Magistrates' court.

> conviction, verdict, finding or sentence would not be upheld were the reference to be made,
> (b) the Commission so consider—
> (i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, or
> (ii) in the case of a sentence, because of an argument on a point of law, or information, not so raised, and
> (c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.
> (2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it."

If there has already been an appeal, which is normally the situation, the Commission is the 'last chance saloon' for the individual. The only way their case can return before the appeal court for a second time is if the CCRC refers it. Any Innocence Project or other group that has been working on a case must, therefore, seek to persuade the Commission to refer it. However, once a case is referred by the Commission the appellate court has no option but to hear that appeal – even if it might prefer not to.

As the Commission is required to assess what the appeal court will do if a referral is made, it is inevitably and inextricably linked by current statute to the test which will be applied by the Court of Appeal in any appeal. That test is set out in the 1968 Criminal Appeal Act[31] and is, quite simply, whether or not the conviction is 'safe.' There is no mention of the word 'innocence,' and this 'safety' test can clearly be satisfied in circumstances where there is no new evidence which establishes factual innocence. Importantly, the test can be satisfied if new evidence raises sufficient doubt about guilt and/or where issues arise as to matters which have fallen foul of what might sensibly be referred to as 'due process' or 'procedural fairness.' Such issues would include, for example, where there has been misdirection by the trial judge to the jury, the non-disclosure of vital information, or wholly inadequate legal representation at trial.

The principles involved were perhaps best set out in the judgment in the case of *Hickey*[32] in 1997, the year in which the CCRC opened its doors for business. The Court of Appeal declared what its own focus and concerns were:

> "This court is not concerned with guilt or innocence of the appellants, but only with the safety of their convictions. This may, at first sight, appear

31. CRIMINAL APPEAL ACT (1968) c. 19, s.2(1)(a).

32. R v. Hickey, [1997] EWCA Crim. 2028.

> an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for the courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair, if it is distracted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened." (per Roch LJ)[33]

A few critics completely misunderstand the Commission when it echoes the words in *Hickey* by indicating that it is not concerned with guilt or innocence.[34] Of course the Commission cares about factual innocence. Nothing is more likely to lead to a reference by the Commission than compelling new evidence of factual innocence. The Commission will look for such evidence whenever and wherever it is sensible and practical to do so but evidence of that type is, unfortunately, rarely discoverable. Although campaign groups and journalists understandably focus on the convictions of those who they believe to be innocent, the Commission has a wider remit. It works to overturn not only the wrongful convictions of those who others believe to be innocent, but also the wrongful convictions of those who only may be innocent (though others doubt it) and even, indeed, of those who, though they seem clearly guilty, have been convicted only after substantial systemic error or wrongdoing.

Very few people who are convicted of an offence can hope to prove their factual innocence and many victims of miscarriages will lack supporters who believe in them. Their 'victimhood' is not diminished by that fact nor can it be assumed that their applications to the Commission are in consequence less meritorious. The Commission makes no apology for concerning itself not only with the convictions of those who others consider to be factually innocent, but rather with all wrongful convictions and with the need to keep the system 'clean' and, by doing so, to reduce the risk of injustices in the future. Furthermore, the Commission's reviews of cases, whatever the result may be for an individual, are an important assurance of the general integrity of the criminal justice system.

Some critics have expressed disapproval of the 'real possibility' test.[35] However, approaching the matter from an objective perspective, would it not be completely unrealistic if the Commission was able to refer convictions to appeal courts where there was no real possibility

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33. *Id.*

34. For specific criticisms of the Commission, see MICHAEL NAUGHTON, THE CRIMINAL CASES REVIEW COMMISSION, HOPE FOR THE INNOCENT? (2009) and Michael Naughton, *Justice on Trial: Why 'Safety in law' may Fail the Innocent – The Case of Neil Hurley*, THE GUARDIAN, Feb. 11, 2010.

35. Naughton, *supra* note 34; *see also* Bob Woffinden, *The Criminal Cases Review Commission has Failed*, THE GUARDIAN, Nov. 30, 2010.

that those convictions would be quashed? In any event, any change to the requirement for the Commission to apply the real possibility test can only come from amendment of the Criminal Appeal Act 1995, which is a matter for parliament.

The Commission is not a court or tribunal and it does not hold oral hearings but deals mainly with written submissions. If the Commission is contemplating turning a case down a draft statement of the reasons for doing so is sent out to allow the applicant and his/her lawyers time to make further representations as to why the Commission should change its mind. Sometimes it does. These statements of reasons are lengthy documents, often stretching to hundreds of paragraphs. Wherever possible they are written in a way that is as comprehensible to the applicant, who does not necessarily have legal representation or the best education, as to the Court of Appeal. The Commission will not only look at the submissions an applicant makes but will also consider the papers generally. It has regularly found referral grounds that applicants never knew they had – sometimes because the Commission has been able to obtain documents that the defence were not able or allowed to see at the trial.

When the Commission refers a case for a second appeal the Crown is again represented by the Crown Prosecution Service (CPS) and sometimes by the same lawyer who prosecuted at the trial and/or who represented the Crown at the first appeal. In a minority of cases the reasons for referral have been so persuasive that the CPS will not contest the appeal, but in most cases they do so and argue that the conviction remains safe. The final decision on whether a conviction is upheld is of course for the court itself. If it is quashed then a retrial can be directed by the appeal court, but this occurs in relatively few cases.

Applicants can apply to the Commission again and again – but they must have new evidence or argument each time. That can often be a difficult task to satisfy, particularly in respect of charges which go back a long way. A group of "Care Homes" cases has thrown up particular problems in these areas.[36] These homes were usually run by local authorities for orphans or, more commonly, children with behavioural problems. They were boarding establishments with live-in staff. Towards the end of the 1990s there were numerous police investigations around the UK into allegations that in the 1960s, 1970s and 1980s headmasters and other teachers or care staff at those homes had been sexually and physically abusing the children there. Those children, by then in their 30s and 40s, had made complaints about their treatment in

36. For an expression of the difficulties and complexities within these types of cases, see Faye Wertheimer, *History Revision*, THE GUARDIAN, Nov. 29, 2006.

the homes. Numerous former staff were taken to trial on indecent assault and rape charges and many were convicted. Some pleaded guilty. The difficulty was, at least for those who were innocent, that there was little evidence they could rely on to show that the complainants were wrong. Sometimes they could not even remember the child in question, often colleagues of the time who might have been able to assist had died, and all the records of the home, which could have shown when staff were on leave or when a particular trip took place, had been long since destroyed. In addition to these factors, the majority of complainants, all of whom had had a poor start to their lives, by the time of the trial tended to have accumulated numerous previous convictions as adults, including convictions for dishonesty. These were usually adduced as evidence, and yet many juries still convicted and the teachers and carers, most of whom had long retired, went to prison. New evidence in such circumstances is very hard to come by.

III. THE POWERS

In order to refer a case, the Commission will usually have to be satisfied that there is some genuinely *new* evidence or argument available to the applicant. It is therefore vital that it has – and utilises – the extensive investigatory powers set out by the Criminal Appeal Act 1995.

Under section 17 of the Act the Commission is entitled to obtain any material held by any public body, regardless of any obligation of secrecy or confidentiality which that body may owe, whether by statute or otherwise. That means that the Commission can and does obtain files and other material (whether or not confidential or covered by Public Interest Immunity) not only from the Courts, the police and the prosecuting authority, but also from bodies such as prisons, the Ministry of Defence, the Security Services, the body dealing with police complaints, the National Health Service, Social Services and so on. Section 17 reads as follows:

> 17. "Power to obtain documents etc.
>
> (1) This section applies where the Commission believe that a person serving in a public body has possession or control of a document or other material which may assist the Commission in the exercise of any of their functions.
>
> (2) Where it is reasonable to do so, the Commission may require the person who is the appropriate person in relation to the public body—
>
> (a) to produce the document or other material to the Commission or to give the Commission access to it, and

> (b) to allow the Commission to take away the document or other material or to make and take away a copy of it in such form as they think appropriate, and may direct that person that the document or other material must not be destroyed, damaged or altered before the direction is withdrawn by the Commission.
>
> (3) The documents and other material covered by this section include, in particular, any document or other material obtained or created during any investigation or proceedings relating to—
>
> (a) the case in relation to which the Commission's function is being or may be exercised, or
>
> (b) any other case which may be in any way connected with that case (whether or not any function of the Commission could be exercised in relation to that other case).
>
> (4) The duty to comply with a requirement under this section is not affected by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) which would otherwise prevent the production of the document or other material to the Commission or the giving of access to it to the Commission."

The Commission cannot sensibly reinvestigate every aspect of every case which comes before it. It does, however, make extensive use of its investigatory powers and will, in virtually every case, use them to obtain relevant material from public bodies. The powers were used over 1700 times in the last year.[37] Extensive though these powers are, they are subject to limitations which the Commission has long been attempting to overcome. In particular, for years the Commission has been pressing for the power (already enjoyed by the Scottish CCRC) to obtain material from private bodies, as well as a new and appropriately qualified right to require witnesses to answer its questions. The need for such powers has grown as functions have been transferred from the public to the private and/or charitable sectors and as concerns about data protection have led to increased concerns about confidentiality. The desirability of transnational investigatory powers has also become ever more apparent as the years have passed. There must always be a much greater chance that a wrongful conviction will be overturned by even the most conservative and recalcitrant of appeal courts if the Commission can present that court with compelling new evidence of 'unsafety.' The Commission would welcome any alteration in the present arrangements which would make it easier for it to find such evidence.

37. This statistic was obtained using an internal CCRC system interrogation. For further information, see the website, *supra*, or contact the Commission directly.

IV. SOME FEATURES THAT HAVE REDUCED MISCARRIAGES

Although police misconduct probably provided a common reason for miscarriages in the initial post-war decades, the situation was much improved by the passing of the Police and Criminal Evidence Act 1984,[38] known as 'PACE.' This made compulsory the tape-recording of interviews of suspects (with the defendant entitled to a copy tape), and introduced the concept of custody officers who were responsible for a suspect's welfare at a police station and were not part of the investigating team. Identification parade procedure was closely prescribed and also required to be run by an officer unconnected with the investigation. The PACE reforms, now well over 25 years old, were a major step forward in fairness and propriety in police investigation, substantially reducing the number of courtroom challenges to confessions and to identifications at formal parades. Undoubtedly PACE has helped to reduce the risk of miscarriages of justice.

Another aspect of the English system, when compared to the US and some other criminal justice systems, and which may also be responsible for reducing the potential for miscarriages, is the fact that the criminal justice system in England and Wales, with only cosmetic differences in Northern Ireland, is essentially a federal system where the main players are independent of any political influence. Neither the local Chief Constable of Police, nor the Director of Public Prosecutions (who runs the CPS) nor the judge at the trial or appeal court is elected. No aspect of their appointment has any connection with their political affiliation and they would not hold their posts without being highly experienced in their field.

Furthermore, it is well recognised that the English process is far more open from the defendant's viewpoint than in many other jurisdictions, both before and after the trial. Pre-trial disclosure has to take place in accordance with various guidelines, including those within the case of *Hickey*.[39] These require that, subject to some minor exceptions, information must be disclosed by the police and prosecution to the defendant if it would assist him to make his best possible case.[40] This obligation even extends after conviction, and if the authorities later come into possession of information that might assist in overturning a conviction then they are obliged to disclose it to the individual. If there is a reasonable request from a convicted person for the provision of an

38. POLICE AND CRIMINAL EVIDENCE ACT (1984) c.60.

39. R v. Hickey, [1997] EWCA Crim. 2028.

40. The rules were laid out by the Criminal Procedure and Investigations Act (1996) c.25, s.3. Additionally, the Code of Practice introduced by s.22 provides detailed principles on how the prosecution should consider disclosure issues.

exhibit from the trial, such as an item of clothing which could be subjected to DNA testing, then assuming the item is still available (and it should be in any serious case) the police must allow access to it for such a purpose.

V. SOME EXAMPLES OF CCRC WORK

In addition to obtaining and examining material the Commission will often take many other steps in its review of a case. The following give a flavour of the Commission's work.

The Commission may arrange for 'new' witnesses to be interviewed – perhaps about the incident giving rise to the conviction or, not infrequently, about post-trial admissions or retractions that witnesses are alleged to have made and which are said to be inconsistent with their trial evidence.

The Commission may arrange for new expert reports to be prepared, for example:

- a report from a paediatric pathologist in a 'shaken baby' case which deals with recent developments in the relevant science[41];
- a report about the significance of evidence of firearms discharge residue (as was obtained in the *Barry George* case[42] – a man who was convicted of shooting dead a popular female TV presenter – where it became apparent that the finding of a single particle of Firearms Discharge Residue would no longer be considered to be of probative value[43]);
- a report about developments in thinking as regards the medical findings that are, or are not, suggestive of child sex abuse,[44] or;
- a report from a psychologist on the reliability of the confession evidence in a particular case.[45]

The Commission has arranged for crime scene reconstructions or for further expert tests to be carried out – such as the reconstruction of a car driving into a river, DNA analysis of blood or semen samples, or in one case how long a murder victim's self-winding watch would have kept going after all movement of its owner's dying body had stopped.

Confession statements may also be undermined by uncovering the findings of disciplinary enquiries into the behaviour of the police

41. R v. Clark, [2003] EWCA Crim. 1020; R v. Faulder, [2005] EWCA Crim. 1980.

42. R v. George (Barry), [2007] EWCA Crim. 2722.

43. *Id.*

44. Prompted by the 2008 Royal College of Paediatrics report entitled *The Physical Signs of Child Sexual Abuse*, the Commission arranged for further reports to be prepared – leading to the cases of *R v. Cooper*, [2010] EWCA Crim. 1379; *R v. Mockford*, [2010] EWCA Crim. 1380; and R v. Aston, [2010] EWCA Crim. 3067.

45. R v. Kenyon, [2010] EWCA Crim. 914.

officers who took them, reports on the psychological state of the defendants themselves, or in one case by the discovery that the defendant had in fact been in prison when one of the offences to which he had confessed had been committed.

The credibility of a complainant in a sex case may be damaged beyond repair – as it was in the case of *Warren Blackwell*[46] – by the discovery that the complainant had made numerous similar allegations of indecent assault against other men which had proved, on investigation, to be wholly unfounded. In that particularly disturbing case, the Commission established that the complainant had on one occasion been seen by her adult daughter punching herself and banging her head against a wall before alleging that she had been assaulted, and had on another occasion claimed that an attacker had scratched the word 'HATE' on her stomach – an allegation which was quickly determined to be false when it was noticed that the word had in fact been written backwards **'**ETAH' – i.e. in mirror-writing.[47]

Sometimes the enquiries made will produce evidence which undermines - or at least casts serious doubt on - the prosecution case at trial. Sometimes, however, they will do the opposite and point strongly to the defendant's guilt – as a DNA test did in the notorious case of *Hanratty*,[48] who had been hanged in the 1950s when the UK still had the death penalty and who many had been convinced was innocent.

VI. THE CCRC AND THE UK INNOCENCE NETWORK

As to our interaction with the UK Innocence Network, it is excellent experience for the undergraduates to become involved in such cases under supervision. As indicated earlier, the legal position is that any case worked on by a UK Innocence Project must come through the CCRC in order to get back to the appeal court. A well-presented application from an Innocence Project can be very helpful. It is essential that the submissions dovetail in to the legal framework outlined above – i.e. the need for a judgment to be made by the CCRC as to a 'real possibility,' that judgment inevitably being one which takes account of the appeal court's own test of 'safety.' It must be remembered that time spent on issues which have no chance of success under the applicable regulations may simply delay the potential referral of a case back to the appeal courts: closer liaison can help to achieve this.

46. R v. Blackwell, [2006] EWCA Crim. 2185.

47. *Id.*

48. R v. Hanratty, [2002] EWCA Crim. 1141.

VII. CONCLUSION

The CCRC is proud of what it has achieved in fourteen years, but is by no means complacent. Miscarriages will continue to occur and survive first scrutiny by the Court of Appeal. The Commission is lucky to have a dedicated staff. It is particularly fortunate to have extensive powers to assist it in fulfilling its task, and appreciates the advantages that it has over many other organisations in this respect.

In conclusion, the Commission has always subscribed to the sentiments expressed by Baroness Helena Kennedy QC:

"When we no longer feel rage at injustice, we will have lost our humanity and our claims at living in a civilised society."[49]

49. Baroness Helena Kennedy QC, *Sudden Unexpected Death in Infancy*, 15 (September 2004) (Report of a working group convened by the Royal College of Pathologists and the Royal College of Paediatrics and Child Health).

DEVELOPING A PEOPLE-CENTERED JUSTICE IN SINGAPORE: IN SUPPORT OF PRO BONO AND INNOCENCE WORK

*Cheah Wui Ling**†

I. INTRODUCTION

The past few years have witnessed a subtle but significant reconfiguration of Singapore's criminal justice landscape. At various official levels there has been the promotion and development of a more people-centered justice that recognizes and protects different individuals impacted by the criminal process, such as the accused person and victims, while subjecting the acts of criminal justice agencies to greater judicial scrutiny. In the past, foreign and local commentators have often criticized the Singapore state's predominantly utilitarian approach to criminal justice on the basis that it prioritized governmental objectives of crime control and efficiency over the accused person's rights.[1] Local criminal law don, Michael Hor, has previously observed how such utilitarian objectives have resulted in individual rights being passed over for the sake of "administrative efficiency," as evidenced by the enactment of broad "drift-net" criminal laws and the giving of broad discretionary power to investigative and prosecutorial agencies.[2] Another prominent local academic, Thio Li-ann, has formerly criticized the Singapore judiciary's deference to governmental decisions and its unwillingness to scrutinize such decisions rigorously, despite their

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1. For a good overview of two sides to the debate surrounding Singapore's approach to criminal justice, see Chan Sek Keong, *The Criminal Process—the Singapore Model*, 17 SING. L. REV. 433 (1996) [hereinafter *Singapore Model*]; Michael Hor, *The Presumption of Innocence—A Constitutional Discourse for Singapore*, 1995 SING. J. LEGAL STUD. 365.

2. Michael Hor, *Singapore's Innovations to Due Process*, 12 CRIM. L. F. 25, 28 (2000).

impact on fundamental individual liberties.[3]

Contemporary developments in Singapore reflect a distinct change in approach towards crime and criminal justice. First, there has been an attempt to identify and to recognize the rights and interests of different non-state actors impacted by the criminal justice system, such as the accused person and victims. These endeavors aim at ensuring the fair treatment of all those affected by the criminal justice process, by considering their specific concerns and circumstances. Second, there has been increased judicial scrutiny of prosecutorial and investigation practices, with an emphasis on ensuring accountability and integrity. While the government may use criminal justice to secure important objectives, democratic and constitutional ideals require its implementation—especially given its far-reaching implications on individual liberties—to be subject to scrutiny and exacting standards.

This Essay describes and critically evaluates these developments by historically situating them within Singapore's constitutional landscape. It highlights how legal representatives will play an ever more important role in securing justice for accused persons. As Singapore's courts exercise more scrutiny over cases, it becomes crucial for accused persons to have access to skilled and committed legal representatives who bring all relevant facts and legal arguments to the attention of the court concerned. Access to effective legal representation will ensure that the accused person's circumstances are fully considered by the court, and the possibility of mistakes—such as wrongful convictions—are avoided. There is, therefore, a need to ensure that all accused persons have access to competent legal representation and assistance regardless of the nature of the crimes charged and the accused's socio-economic background. This applies not only at the pre-trial, trial, or appeal stages of the criminal justice process, but also at the post-appeal stage. Previously undiscovered facts or mistakes made may emerge only with time, long after the case has exhausted all avenues of appeal.

Currently, in Singapore, the need for legal representation for accused persons in criminal cases is met by private lawyers on a paid or pro bono basis. Accused persons who cannot afford legal representation have access to a number of pro bono initiatives run by private lawyers with support from the government. The front-end demand for criminal legal aid is primarily met through pro bono programs run by the Law Society of Singapore (Law Society) and the Association for Criminal Lawyers of Singapore (ACLS). In a separate initiative that focuses on the back-end of the criminal process, law students from the National University

3. Thio Li-ann, *An "i" for an "I" Singapore's Communitarian Model of Constitutional Adjudication*, 27 H.K. L.J. 152, 160 (1997).

of Singapore (NUS) have established a student-run Innocence Project (NUS IP). This Essay examines and evaluates these on-the-ground justice initiatives. In brief, it argues that these initiatives—which foster a culture of service in the legal community and go towards building a professional identity based on such a commitment to service—must be encouraged.

II. TOWARDS A PEOPLE-CENTERED JUSTICE: RECENT DEVELOPMENTS IN SINGAPORE

The city state of Singapore has received much praise for her efficient legal system and low crime rate.[4] In the past, emphasis was placed on resolving cases in a timely and capable manner. There has, however, been a distinct reorientation of objectives at all judicial levels. In 2009, the Chief District Judge of the Singapore Subordinate Courts publicly announced that the courts would move towards developing a "service-centric" culture which aims "to serve our court users better." He explained that the courts had previously adopted a "court-centric culture" that facilitated "effective case management" and "cleared our backlog of cases." A "service-centric culture" would focus on improving "service standards, physical infrastructure and processes" to meet the needs of court users.[5] This Essay's reference to a "people-centered justice" aims to capture this change, which emphasizes meeting the needs of those impacted by the criminal justice system. The Singapore Chief Justice, in a 2010 speech entitled "Access to Quality Justice for All," highlighted the need to focus on meeting the needs of indigent persons.[6] He affirmed that the judicial system should maintain its quick and effective processing of cases to maintain "the confidence of the public in the ability of the judiciary to deliver justice fairly and quickly."[7] In other words, the quick resolution of cases is to meet the public's expectation to effective and timely justice, rather than administrative goals. Efficiency is not valued as an end goal in itself, and may need to give way to more important objectives. For example, the Singapore Chief Justice has acknowledged that though the

4. See, for example, *Subordinate Courts Singapore: Greater Heights New Horizons, Annual Report 2011* 48-54, *available at* app.subcourts.gov.sg/subcourts/page.aspx?pageid=4469; *Subordinate Courts Singapore: Serving Society, Annual Report 2009* 41–44, *available at* www.courtexcellence.com/pdf/SubCourts_AR09.pdf.

5. *Id*.

6. Chief Justice Chan Sek Keong, *Keynote Address by the Honourable Chief Justice Chan Sek Keong*, SUBORDINATE COURTS WORKPLAN (Feb. 26, 2010), http://app.subcourts.gov.sg/Data/Files/File/Workplans/Workplan2010/CJ's%20Keynote%20Address%20Feb%202010.pdf [hereinafter *2010 Chief Justice Keynote Address*].

7. *Id.* ¶ 37.

formalized discovery system introduced by the 2010 Criminal Procedure Code (CPC) will result in more work for governmental agencies, it is, nevertheless, desirable as it will ensure a "lower risk of injustice" and "higher sense of procedural fairness."[8]

The recent developments examined in this section may be understood as reflecting the progressive development of a people-centered approach to justice that is characterized by two main features: (1) a thorough and precise evaluation of the case or context at hand which takes into account the interests of various stakeholders, including the accused person and victims; (2) a critical identification and assessment of the acts and practices of criminal justice agencies. This change in approach has been cultivated on a gradual and topic-specific basis, and is transformative rather than revolutionary in nature. There have been no radical changes made to Singapore's constitutional or legal framework; instead, change has been gradually introduced through ordinary legislation and judicial interpretative. This Part first provides an overview of the main legal provisions governing the rights of accused persons in Singapore; it then goes on to explain recent legislative and judicial developments.

A. Laws Governing the Rights of the Accused

Singapore takes a firm approach, aimed at deterrence, towards crimes that are viewed as particularly harmful to its social order. A number of her criminal laws have been criticized as being overly harsh to the accused due to the severity of punishments imposed and the shifting of evidential burdens through the use of presumptions. For example, the Misuse of Drugs Act (MDA) provides that upon establishing that the accused person possesses a certain amount of drugs, it is then for the accused person to show, on a balance of probabilities, that he was not engaged in drug trafficking.[9] Prior to 2012, such a drug trafficking conviction carried with it the mandatory death penalty (MDP). Defendants have repeatedly challenged the constitutionality of the MDA's use of presumptions and its mandatory death penalty. As early as in 1981, the Privy Council held in *Ong Ah Chuan v. PP* that the MDA's presumptions are not unconstitutional, observing that "[p]resumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to

8. Chief Justice Chan Sek Keong, *Opening of Legal Year 2011: Response by The Honourable Chief Justice*, SING. ACAD. L. ¶ 6 (Jan. 7, 2011), http://www.sal.org.sg/Lists/Speeches/DispForm.aspx?ID=86 [hereinafter *2011 Chief Justice Response*].

9. Chapter 185, Section 17, Misuse of Drugs Act. Enacted 1973, Revised 2008.

society like addictive drugs, explosives, arms and ammunition."[10] The constitutionality of the MDP was most recently considered, and upheld, by the Singapore Court of Appeal in the 2010 case of *Yong Vui Kong v. Public Prosecutor*.[11] As explained further below, in 2012, the Singapore legislature amended the MDA to alleviate some of its harshness.

In its 2011 Universal Periodic Review report to the UN Human Rights Council, the Singapore government defended Singapore's use of the death penalty, highlighting that it applies "only for the most serious crimes," "sends a strong signal to would-be offenders," and has a "deterring" effect.[12] There has been increased public debate and discussion on this issue in Singapore due to certain high profile cases, and several home-grown civil society groups have criticized the state's maintenance of the mandatory death penalty.[13] In 2009, when consulted by the authorities on amendments to the Criminal Procedure Code (CPC), the Law Society included in its recommendations a proposal that sentencing courts be given the discretion to impose life imprisonment in lieu of the death penalty in appropriate and necessary circumstances.[14] Such public discussions are likely to increase, particularly as the authorities have sought to adopt a more consultative style of governance and encourage citizens' active participation in public life.[15] The Singapore government has conducted a number of consultative exercises before introducing important legislative amendments, and local civil society groups have called for such exercises to be organized more frequently and on a more formal basis.[16] It remains to be seen if public

10. Ong Ah Chuan v. Public Prosecutor, [1981] 1 A.C at 671(Sing.).

11. Yong Vui Kong v. Public Prosecutor, [2010] 3 SLR 489 (Sing.).

12. This has been the consistent position taken by the Singapore government in international forums. NATIONAL REPORT FOR SINGAPORE'S PERIODIC REVIEW ¶ 120 (2011) [hereinafter SINGAPORE UPR REPORT], *available* at www.mfa.gov.sg/upr/process.html.

13. The NGO MARUAH "recommends that the Government review the scope of capital offences, so as to ensure that the death penalty is imposed only in the most serious of crimes; the death penalty not be used in the context of group crimes, where the accused person has not personally intended to commit murder; all instances of the mandatory death penalty be immediately repealed and replaced with a discretion to impose the appropriate sentence up to death." SUBMISSION OF MARUAH (WORKING GROUP FOR AN ASEAN HUMAN RIGHTS MECHANISM, SINGAPORE) in response to Singapore's Universal Periodic Review, MARUAH ¶ 8; *see also*, JOINT SUBMISSION OF COSINGO (COALITION OF SINGAPORE NGOS) (AWARE, Challenged People's Alliance and Network (CAN!), Deaf and Hard of Hearing Federation, Humanitarian Organization for Migration Economics; MARUAH, People Like Us, Singaporeans for Democracy, Transient Workers Count too) in response to Singapore's Universal Periodic Review ¶ 17, *available* at http://maruah.org/upr/.

14. THE LAW SOC'Y OF SING., REPORT OF THE COUNCIL OF THE LAW SOCIETY ON THE DRAFT CRIMINAL PROCEDURE CODE BILL 2009 (2009) [hereinafter LAW SOCIETY CPC CONSULTATIONS], *available at* www.lawsociety.org.sg, at 58.

15. For an example of recent published public opinion on the death penalty, *see* Bryan Chow, *Let Courts Decide on Death Sentence for Minors*, STRAITS TIMES (Sing.), Aug. 29, 2011.

16. For example, consultations were undertaken with respect to the 2010 Criminal Procedure Code (CPC) and the 2011 amendments of the Employment Agencies Act. Consultations were also

opinion on criminal justice issues will influence or moderate the deterrent approach taken by the authorities in certain areas of the criminal law.

Given the severity of a significant number of Singapore's criminal laws, it becomes all the more important for an accused person to be guaranteed certain substantive and procedural rights throughout the criminal process. Article 9 (1) of the Singapore Constitution expressly states that no one is to be "deprived of his life or personal liberty save in accordance with law."[17] The phrase "in accordance with law" has been judicially interpreted to include common law principles of natural justice. For example, in the case of *Haw Tua Tau v. Public Prosecutor*, the Singapore judiciary held that a "fundamental" natural justice rule in the area of criminal law is that one should not be punished for an offence "unless it has been established to the satisfaction of an independent and unbiased tribunal" that the individual committed the offence.[18] Singapore courts have not attempted to define, comprehensively, what would amount to a principle of natural justice. In 2010, the Singapore Court of Appeal in *Yong Vui Kong v. Public Prosecutor* addressed apparent inconsistencies in previous cases to reaffirm that Article 9's guarantee of life and personal liberty by "law" includes fundamental principles of natural justice and, therefore, should not be read in a formalistic or positivist manner.[19]

Article 9 (2) of the Constitution states that where "a complaint is made to the High Court or any Judge thereof that a person is being unlawfully detained, the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him."[20] The Supreme Court of Judicature Act further elaborates on this power of the High Court to issue an "order for review of detention."[21] This order was formerly known in Singapore as the writ of habeas corpus. The Constitution also requires that where "a person is arrested and not released, he shall, without unreasonable delay, and in any case within 48 hours . . . be produced before a Magistrate." This enables the judge concerned to determine the reasons for the individual's detention and inquire into his

undertaken in preparing for Singapore's Universal Periodic Review. *See* SINGAPORE UPR REPORT, *supra* note 12, ¶ 2. Civil society actors have welcomed this and have indicated their desire for more "interaction" during these exercises. Imelda Saad, *Singapore's Human Rights Record under UN Scrutiny*, CHANNEL NEWSASIA (Feb. 25, 2011), http://www.channelnewsasia.com/stories/singaporelocalnews/view/1113004/1/.html.

17. SINGAPORE CONSTITUTION, art. 9(1).

18. Haw Tua Tau v. Public Prosecutor, [1981] 2 MLJ 49 (Sing.).

19. Yong Vui Kong, *supra* note 11, ¶¶ 18–19.

20. SINGAPORE CONSTITUTION, art. 9(2).

21. SUPREME COURT OF JUDICATURE ACT, First Schedule. Ch. 32, O. 54, R. 1 (Sing.).

or her well-being. As will be further explained below, this constitutional provision was recently amended to allow a detainee to be produced before the court "by way of video-conferencing link (or other similar technology) in accordance with law."[22] In other words, a detainee no longer needs to be brought to court in person.

Upon being arrested, the individual is guaranteed certain rights pursuant to the Constitution. Article 9 (3) of the Constitution requires the individual to be "informed as soon as may be of the grounds of his arrest" and permitted "to consult and be defended by a legal practitioner of his choice."[23] The individual's right to counsel has, in particular, been subject to much debate, which will be considered in greater detail below. Singapore courts have consistently held that the right to counsel is not "immediate" in nature; rather, it is to be exercised in "reasonable time" and in view of investigative needs. A denial of counsel for up to two weeks has been deemed to be constitutional.[24] Singapore courts have further held that there is no positive obligation to inform an accused of his right to counsel.[25] The executive has defended and justified the right's present scope, as striking "a balance between the rights of the accused and the public interest in ensuring thorough and objective investigations."[26]

Some rights that are commonly deemed important to the accused person are not explicitly recognized in Singapore's Constitution; instead, they are set out in ordinary legislation. The primary piece of legislation governing criminal procedure in Singapore is the CPC. Section 22 (2) of the CPC recognizes the accused person's right to

22. SINGAPORE CONSTITUTION, art. 9(2).

23. SINGAPORE CONSTITUTION, art. 9(3).

24. Jasbir Singh v. PP, [1994] 2 SLR 18 (Sing.). In the 2006 case of *Leong Siew Chor v. Public Prosecutor* the Singapore Court of Appeal held that the denial of counsel for 19 days after arrest was "justifiable in the circumstances" and was a "question of balancing an accused person's rights against the public interest that crime be effectively investigated." The court noted the statement concerned had been taken five days after the accused person's arrest. Leong Siew Chor v. Public Prosecutor, [2006] SGCA 38 (Sing.).

25. Rajeevan Edakalavan v. PP, [1998] 1 SLR 815 (Sing.). In the 1998 case of *Rajeevan Edakalavan v. PP*, the Singapore High Court held that the Constitutional right to counsel is "a negative right" because the Constitution's text states that an accused "shall be allowed" access to counsel but does not require the accused to be informed of his right to counsel. The court refused to find a positive obligation to inform the accused of this right, noting that to do so would "be tantamount to judicial legislation."

26. K Shanmugam, vol. 87, Sing. Parl. Rep., May 19, 2010. The Minister of Law also cited a recent police study that showed that more than 90% of arrested persons are released within 48 hours to prevent unnecessary remand. Since 2006, the police have implemented an "access to counsel" scheme that grants the accused access to counsel before the remand period ends. The government has argued that affording immediate access to counsel may result in, at least in some cases, the individual being advised not to cooperate with the police. In deciding when counsel should be afforded, there needs to be consideration of law enforcement interests as well as the "public interest in making sure that the statements taken are taken in a process with integrity and the statements represent the truth."

silence.[27] However, the CPC also provides that the court may draw "such inferences as may appear proper," including an adverse inference if the accused elects not to give evidence in certain circumstances.[28] The ability to draw such an inference has been challenged as being in contravention of natural justice principles referred to in Article 9 of the Constitution.[29] However, its constitutionality was affirmed by the Privy Council on the basis that such an inference did not create a "compulsion" at law; rather it only provided the accused with a "strong inducement" to give evidence.[30]

Apart from protective rights explicitly set out in the Constitution and ordinary legislation, Singapore's courts have also exercised discretionary judicial powers to protect the accused when the individual circumstances of the case demand so. For example, in the 2008 case of *Yunani bin Abdul Hamid v. PP*, the Singapore High Court exercised its powers of revision to order a retrial as it was more than a decade before the accused was charged, pled guilty, and was convicted.[31] This significant lapse of time was held to have compromised the accused person's ability to conduct his defense and contributed to pressuring him to plead guilty. As a result, the case was sent by the Singapore High Court back to the lower courts for a retrial. Singapore courts have also dismissed overly delayed prosecutorial appeals. In *PP v. Saroop Singh*, the Singapore High Court dismissed an appeal by the prosecutor because 17 years had passed since the offence.[32] In deciding whether to exercise its discretion, the High Court is to consider various factors such as which party was responsible for the delay and whether a fair trial is possible.

B. Judicial Developments: A More Inquiring and Critical Approach in Criminal Matters

Over the past few years, the Singapore judiciary has had the

27. CRIM. P. CODE § 22(2) (2010) (Sing.) (stating that a person questioned by the police "shall be bound to state truly what he knows of the facts and circumstances of the case, except that he need not say anything that might expose him to a criminal charge, penalty or forfeiture.").

28. *Id.* § 291(3) (when the court calls on an accused to give evidence and the accused "refuses to be sworn or affirmed" or "having been sworn or affirmed, without good cause refuses to answer any question," the court "may draw such inferences from the refusal as appear proper." Section 291 (6) states that the power to draw an inference will not apply "if it appears to the court that his physical or mental condition makes it undesirable for him to be called on to give evidence." It notes that this inference "does not compel the accused to give evidence on his own behalf" and that the accused "will not be guilty of contempt of court" if he chooses not to give evidence.).

29. Haw Tua Tau v. Public Prosecutor, [1981] 2 MLJ 49 (Sing.).

30. *Id.*

31. Yunani bin Abdul Hamid v. PP, [2008] 3 SLR (R) 383(Sing.).

32. PP v. Saroop Singh, [1999] 1 SLR (R) 241(Sing.).

opportunity to revisit and reconsider a number of the accused person's rights. In doing so, the courts have adopted a more critical approach in assessing and protecting the interests of those impacted by the criminal justice process. Courts have also closely interrogated the actions of the police and the prosecution, measuring these against legal standards and criticizing mistakes made. It is worth recalling for comparative purposes that Singapore's courts have not always taken such an interrogative approach, even when dealing with constitutional liberties. Writing in 1997, Thio criticized Singapore's courts for failing to actually engage in a "balancing" of individual liberties against national interests, and for giving a "presumptive right to statist or "community" interests."[33] By deferring to and accepting the executive's evaluation or characterization of a particular situation without independently examining it, Thio argued that Singapore's courts were adopting a "categorical" approach—as opposed to a "balancing" approach— when dealing with questions of constitutional rights.[34] In 2012, Thio noted that "in certain areas," Singapore courts are showing "a more holistic orientation in paying more attention to the fundamental right in question […]"[35] One of these "certain areas," where change has been experienced, is the area of criminal justice.

To highlight the Singapore judiciary's change in approach, it may be useful to compare two cases—one earlier and one recent—which attend to the question of when an accused person should be afforded the right to counsel. As mentioned earlier, based on current official interpretations of the Singapore Constitution, an accused person does not have an immediate right to counsel. This right may be exercised in reasonable time, taking into consideration investigative needs. In the 1994 case of *Jasbir Singh and another v. Public Prosecutor*, the Singapore Court of Appeal summarily held that a two-week wait in the case of the accused was reasonable in nature without considering the actual facts of the case or the actual investigative needs.[36] Without closely examining why two weeks had been necessary for investigative purposes, the court simply concluded that "[t]here is a world of difference between "within a reasonable time" and "immediately;" and, in our view, two weeks in the present case was a reasonable period of

33. Thio, *supra* note 3, at 160. For an alternative to "balancing" in criminal justice issues, see Melanie Chng, *Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010* 23 SINGAPORE ACADEMY OF LAW JOURNAL (2011) 23.

34. *Id.* at 163.

35. THIO LI-ANN, A TREATISE ON SINGAPORE CONSTITUTIONAL LAW at 631 (2011). See also, generally, Thio Li-ann and David Chong Gek Sian, *The Chan Court and Constitutional Adjudication – "A Sea Change into Something Rich and Strange?"* in THE LAW IN HIS HANDS – A TRIBUTE TO CHIEF JUSTICE CHAN SEK KEONG (Chao Hick Tin et al. eds., 2012).

36. Jasbir Singh, [1994] 2 SLR 18, ¶ 49 (Sing.).

time."[37] In the 2008 case of *Tan Chor Jin v. Public Prosecutor*, the Singapore Court of Appeal affirmed that the constitutional right to counsel "cannot be said to be untrammeled or enduring and/or unwaivable right." It went on, however, to note that in deciding whether an accused has "waived" his right to counsel, a "holistic approach" is to be adopted and "the competing interests (if any) of other concerned parties" considered as well as "whether any undue unfairness or prejudice" was caused to the accused.[38] Importantly, the court held that this presupposes "that the accused has already been given an opportunity to avail himself of his right to counsel."[39] The court went on to consider the facts of the case and the actions of the different parties before concluding that the accused person's right to counsel had not been contravened. The decision is noteworthy for the court's willingness to identify and evaluate the interests of the accused person as well as that of other concerned parties.

Apart from recognizing the interests of the accused person, Singapore's courts have increasingly recognized the interests of victims by directing the accused person to make compensation to the victim concerned. In the 2010 case of *Public Prosecutor v. AOB*¸ where the accused person had punched the victim in the face when the victim had intervened orally as the former slapped his daughter in public, the Singapore High Court decided to order the accused person to pay compensation to the victim though this had not been raised or considered by the lower court. In doing so, the court observed that compensation orders "are particularly suitable and appropriate for victims who may have no financial means or have other difficulties in commencing civil proceedings for damages against the offender."[40] In a different case, *ADF v. Public Prosecutor*, which concerned the physical abuse of a domestic worker, the Court of Appeal noted that such compensation orders do not aim to punish the accused but aim to ameliorate difficulties faced by the victim. The court considered the particular circumstances faced by domestic workers: "When allegations of domestic maid abuse come to light and are investigated, the typical victim would often be left without income for some time. Recovering the lost income through the civil process may be difficult given that the victim might be unfamiliar with Singapore and the legal process here, and might wish to return to her home country speedily."[41] The court's

37. *Id*.

38. Tan Chor Jin v. PP, [2008] 4 SLR 306, ¶ 54.

39. *Id.* ¶ 68.

40. Public Prosecutor v. AOB, [2011] 2 SLR 793, ¶ 23. The author would like to thank Adrian Loo and Prem Raj for bringing this case to the author's attention.

41. ADF v. Public Prosecutor, [2010] 1 SLR 874, ¶ 158.

role in compensating victims has been strengthened by the 2010 CPC which requires judges to consider whether compensation should be made by the accused to victims if the former is convicted of the crime.[42]

The work and practice of criminal justice agencies have come under judicial scrutiny of late, and their roles and responsibilities have been examined and delineated by Singapore's courts. In the 2011 case of *Muhammad bin Kadar and another v. Public Prosecutor*, the Singapore Court of Appeal held that the prosecutor has a common law duty to disclose certain evidence in addition to what is required under statutory law.[43] Any failure to do so which renders a conviction unsafe will result in an overturning of the conviction concerned.[44] The court additionally went on to emphasize that the duty of the prosecutor is "not to secure a conviction at all costs;" rather, he or she "owes a duty to the court and to the wider public to ensure that only the guilty are convicted."[45] Specifically, the court noted that the prosecutor's "freedom to act as adversary to defense counsel is qualified by the grave consequences of criminal conviction."[46] In a separate 2010 case, the Singapore High Court made a number of observations regarding the work of the Health Sciences Authority (HSA), which is the statutory body charged with drug testing duties. It stressed the need for the HSA to ensure that its internal procedure complied with the law and that a lack of human or other resources does not justify a failure to comply strictly with legal requirements.[47] In another 2010 case, the Singapore Court of Appeal criticized the work done by the prosecution's expert as falling short of recognized standards.[48]

In these recent cases, Singapore's courts have identified a plurality of social actors with rights or responsibilities that should be recognized during the criminal justice process. There is always the danger that

42. CRIM. P. CODE § 359(1) (2010) (Sing.).

43. Muhammad bin Kadar v. Public Prosecutor, [2011] SGCA 32 (Sing.). For an overview of the case and its holdings, see Chen Siyuan, *The Prosecution's Duty of Disclosure in Singapore: Muhammad bin Kadar v. Public Prosecutor,* 11:2 OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL (2012) 207.

44. *Id.* ¶ 120.

45. *Id.* ¶ 200.

46. *Id.* ¶ 109.

47. Lim Boon Keong v. Public Prosecutor, [2010] SGHC 179, ¶¶ 41–42. As a follow-up to this case, the Singapore Court of Appeal has studied the HSA's urine-testing procedures in a separate case, concluding that they meet all legal standards. *Appeal Court Finds HAS Urine-Testing Procedures Adequate*, STRAITS TIMES (Sing.) (Aug. 11, 2011, 10:00PM), http://sglinks.com/pages/1360206-appeal-court-finds-hsa-urine-testing-procedures-adequate.

48. Ong Pang Siew v. Public Prosecutor, [2011] 1 SLR 606, ¶ 72 (Sing.). Singapore courts have exerted increased scrutiny over the prosecutor's case and evidence, resulting in convictions on a lesser charge or convictions being overturned. See also Eu Lim Hoklai v. Public Prosecutor, [2011] 3 SLR 167 and Azman bin Mohamed Sanwan v. Public Prosecutor [2012] 2 SLR 733. The author would like to thank Chen Siyuan for highlighting these two cases.

recognized "societal interests" may too easily trump the interests of the individual or serve as proxies for administrative or bureaucratic objectives, such as efficiency. It is, therefore, important for different interests to be clearly identified and assigned their appropriate value and weight. It should also be borne in mind that not all interests impacted by the criminal justice process have the same consequences or are of equal value. The accused person's position is significantly different from that of others involved in the criminal justice process. Given the fact that the accused person's fundamental liberties are at stake, extra care should be taken to ensure that the accused is treated fairly. The accused person's interest in liberty is of a constitutional nature, and should be accorded due respect and protection.

C. Legislative Developments: Developing an Individualized Justice for the Accused Person

Before 2012, Singapore imposed the mandatory death penalty (MDP) on those found guilty of drug trafficking pursuant to the Misuse of Drugs Act (MDA). In 2012, changes to the MDP were introduced. The death penalty would no longer be mandatory in certain cases. In general, to qualify for this, an accused person would have to fulfill two conditions. First the accused person concerned must be a mere courier, as opposed to being involved in the supply or distribution of drugs.[49] Second, the Singapore Public Prosecutor must certify to the court concerned that "in his determination" the accused person has "substantively assisted" the Singapore Narcotics Bureau "in disrupting drug trafficking activities within or outside Singapore."[50] Alternatively, the accused person must show he was suffering from "such abnormality of mind" that "substantially impaired his mental responsibility" for the offence concerned.[51] In the former case, where the Public Prosecutor issues the certificate required, the court may decide to sentence the person to life imprisonment along with a minimum of 15 strokes of the cane.[52] In the second case, involving abnormality of mind, the court may sentence the accused person to life imprisonment.[53] In this same year, the Singapore Penal Code was also amended to restrict the mandatory death penalty for murder to cases of intentional murder.[54] These amendments mean that Singapore's courts will now have an important

49. Misuse of Drugs Act, § 33B (2)(a) & § 33B (3)(a).

50. Misuse of Drugs Act, § 33B(2)(b).

51. Misuse of Drugs Act, §33B(3)(b).

52. Misuse of Drugs Act, §33B(1)(a).

53. Misuse of Drugs Act, §33B(1)(b).

54. Penal Code, § 302(2).

role in deciding whether the death penalty should apply in cases of drug trafficking and unintentional murder.

The new 2010 CPC also introduced changes enhancing the discretionary role of courts. The CPC has been praised by all sides for introducing several community-based sentences (CBS) as alternatives to traditional forms of punishment. This enables the court concerned to tailor its response to the individual circumstances of the case. CBS are intended to apply to situations presenting rehabilitative potential, such as regulatory offences, younger offenders, and offenders with specific and minor mental conditions. The new CPC recognizes five types of CBS orders: (a) a mandatory treatment order (MTO); (b) a day reporting order (DRO); (c) a community work order (CWO); (d) a community service order (CSO); and (e) a short detention order (SDO).[55] A court may pass a CBS order comprising of one or more of these orders. In its Universal Periodic Review report, Singapore affirmed that it "believes strongly in the rehabilitation and reintegration of prisoners."[56] While Singapore continues to maintain severe punishments for crimes deemed to be of particular social harm, such as drug trafficking, the CBS framework demonstrates the taking of a softer and case-specific approach when dealing with less serious offences.

This general move towards enhancing judicial discretion and individualized decision-making has also been affirmed by the executive. In 2012, the Minister of Law confirmed the government's position of giving more discretion to courts over sentencing. He went on to note that mandatory sentences "are and should remain an exception."[57] It is noteworthy that the Minister qualified his position by stating that judicial discretion in sentencing would be provided for only "[w]here possible, where practical, where it is realistic and where it does not substantially impact our crime control framework."[58] During 2012 parliamentary debates about the appropriate scope of judicial discretion in cases of drug trafficking, the Minister rigorously defended the limited judicial discretion afforded by MDA amendments, emphasizing that such discretion should not be broadened in a way that undermines the deterrent effect of the death penalty.[59] Regardless, such steps in giving the judiciary more discretion over sentencing matters highlight the ever more important role played by legal representatives in the criminal justice process.

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55. Criminal Procedure Code, § 336. For an overview of these sentences and the objective of this scheme, see THE CRIMINAL PROCEDURE CODE OF SINGAPORE, 501–04 (Jennifer Marie et al. ed., 2012).

56. SINGAPORE UPR REPORT, *supra* note 12, ¶ 125.

57. K. Shanmugam, vol. 89, Sing. Parl. Rep., Nov. 14, 2012.

58. *Id.*

59. *Id.*

Lawyers are best positioned to identify and bring relevant facts and legal arguments to the attention of judge. The new CPC strengthens the role played by lawyers by formalizing and defining certain duties of disclosure between the prosecution and the defense. Prior to this, the prosecution would be legally required to disclose certain documents only if the case was heard before the High Court.[60] For summary cases heard at the Subordinate Courts level, discovery was generally an informal process, limited in nature and governed by practice.[61] The 2010 CPC specifies the documents that are to be exchanged between the defense and the prosecution as well as the order in which they are to be presented, in cases before the Subordinate Courts as well as the High Court. The court may decide to discharge the defendant if the prosecution fails to meet their discovery obligations, and it may decide to draw an adverse inference against the defendant if the defense fails to meet theirs.[62] After the defendant indicates his or her desire to claim trial in either the District Court or the High Court, the prosecution is required to serve a "case for the prosecution" comprising the charge, a summary of facts, the names of prosecution witnesses, a list of exhibits, and any statement made by the defendant to the police that the prosecution intends to use.[63] Upon receipt of these documents, the defendant must then supply a "case for the defense" composed of the defense's summary of facts, the names and particulars of defense witnesses, and explanations of any objections made to issues of fact or law raised by the prosecution.[64]

The scope of these new discovery rights and obligations was influenced by expediency concerns as well as the interests of witnesses. When introducing the CPC in parliament, the executive was questioned on why discovery rights apply only to cases heard before the High Court and most cases heard before the District Court instead of applying to all cases. The minister-in-charge explained that the Subordinate Courts deal with around 250,000 charges a year.[65] Parliamentary questions were also raised as to why the discovery process did not include access to prosecutorial witness statements. This exclusion was defended by the

60. Criminal Procedure Code (Former Version), § 150 (Sing.).

61. In practice, the prosecution discloses only the charge specifying the nature of the offence, the police's first information report, the arrest report, the defendant's shorter cautioned statement and a pathologist's report. Amarjeet Singh, *Equality of Arms—the Need for Prosecutorial Discovery*, L. GAZETTE 3 (2005) *available* at http://www.lawgazette.com.sg/2005-9/Sep05-feature3.htm.

62. Criminal Procedure Code 2010, § 169 (Sing.).

63. *Id.* § 162.

64. *Id.* § 163 (Sing.). In addition to these statutory duties, the prosecution would also have common law discovery obligations towards the accused, as confirmed by the Court of Appeal in *Muhammad bin Kadar v. PP* [2011] 3 SLR 1205 at ¶ 113.

65. K. Shanmugam, vol. 87, Sing. Parl. Rep., 19 May, 2010.

government as necessary because witnesses may be unwilling to come forward if they are aware that their statements are supplied to the accused. There were also concerns that witnesses may be threatened by the accused person.[66]

Alongside legislative developments aimed at ensuring justice for the accused person, officials continue to emphasize the importance of maintaining the efficiency of Singapore's criminal justice system. For example, the Singapore Constitution permits the police to detain an individual up to 48 hours, beyond which police must apply for a court order.[67] Prior to 2010, the application process required the arrested person to be presented before the court. In 2010, the Constitution was amended to permit individuals to be presented before the court via video link. This change was argued to "enhance the management and security of the arrested person" as well as "lead to more efficient use of limited manpower resources."[68] In parliament, several legislators voiced concerns about how this change may render an arrested individual more vulnerable to police abuse as the judge may not be able to assess accurately whether the individual has been abused if he or she is not physically before the court.[69] The minister-in-charge responded by explaining that the accused person would be "in a separate room" without any police officer present. The accused person would have a "full visual of the court, of the public gallery, of the judge, of his defense lawyer, and of the prosecution . . . . In fact, he will have a sharper view of everyone." The minister went on to assure Parliament that "there is no question that the judge will not be able to see if a person in custody is under duress."[70]

III. FRONT-END PROCESSES: ENSURING LEGAL REPRESENTATION THROUGH PRO BONO EFFORTS

In order for a court to deliver individualized and differentiated justice, it needs to know and understand all the facts relevant to the individual's case. Having skilled and conscientious counsel makes a substantial difference as to whether an accused person's story is fully placed before a court. The CPC's formalized disclosure procedure and the Singapore Court of Appeal's recognition of common law disclosure duties increase the potential impact of effective legal representation by enhancing

66. *Id.*

67. SINGAPORE CONSTITUTION, art. 9.

68. Wong Kan Seng, vol. 87, Sing. Parl. Rep., Apr. 26, 2010.

69. Sylvia Lim, vol. 87, Sing. Parl. Rep., Apr. 26, 2010.

70. Wong Kan Seng, vol. 87, Sing. Parl. Rep., Apr. 26, 2010.

access to prosecutorial evidence.[71] Singapore's legal community has welcomed the official authorities change in approach to criminal justice issues. The ACLS, a local association of criminal lawyers, has lauded recent legislative and administrative initiatives of the Minister of Law and the Attorney General. It has further observed that Singapore courts have demonstrated "greater sympathy and compassion for the plight of the less privileged."[72] The ACLS has in turn called upon the criminal bar to "rise to the occasion" in recognition of the important role played by defense lawyers in ensuring the "stability and integrity of the criminal justice system" through the defense of accused persons.[73]

As explained above, in Singapore, the right to counsel is not immediately exercisable upon arrest. It is subject to investigation needs. There is also no legal obligation to inform the accused of this right. The narrow scope of this right in Singapore reflects a general trust in the investigative and prosecutorial authorities. Such trust in the authorities, as well as its risks, has been recognized by the Singapore Court of Appeal, which observed: "All in all, it seems that public policy is in favor of trusting the integrity of the police, and this gives them a certain freedom to conduct their investigations more effectively and efficiently . . . However, such an approach comes with certain inherent risks."[74] In contrast, defense lawyers have at times been viewed by the authorities with a certain level of distrust. During a 2010 parliamentary debate, the Minister of Law defended existing limits to the right to counsel, noting that if access to counsel was given immediately, "At least, in some cases, the advice would be 'don't cooperate with the Police.'"[75]

The Law Society has suggested that Article 9 (3) of Singapore's Constitution, which requires access to counsel to be granted "as soon as may be" should be interpreted literally.[76] While public interest may at times require access to be reasonably denied, this should be an exception rather than the rule. The Law Society recommended that when the accused person states that he or she wishes to exercise his or her right to counsel, he or she should be given up to two hours to contact a lawyer during office hours.[77] Investigative authorities should start interviewing

71. Criminal Procedure Code; Muhammad bin Kadar v. Public Prosecutor, [2011] SGCA 32 (Sing.).

72. *Editorial: A Golden Age?* Pro Bono, Association of Criminal Lawyers of Singapore, 7, No. 1, Feb. 2011 at 1.

73. *Id.*

74. Muhammad bin Kadar v. Public Prosecutor, [2011] SGCA 32, ¶ 58 (Sing.).

75. K. Shanmugam, vol. 87, Sing Parl. Rep., May 19, 2010.

76. LAW SOCIETY CPC CONSULTATIONS, *supra* note 14 at 16.

77. *Id.* at 21.

the accused person only after he or she has consulted with counsel.[78] Presently, the authorities are not required to inform accused persons that they have such a right to counsel. Accused persons need to be informed of their rights so that they can make an informed judgment as to whether, and as to how, they would like to exercise these rights. The Law Society noted that it is "counterintuitive" to state that an accused person has a right to counsel without requiring him or her to be informed of this right, and how he or she "can go about contacting a lawyer."[79] Accordingly, the Law Society proposed that arresting officers be required to inform accused persons of this right, verbally or in writing.[80]

A. Recognizing the Contributions of Defense Counsel in Singapore

While there have been no constitutional or legislative efforts to amend or expand the right to counsel, Singapore authorities have increasingly sought to acknowledge and recognize the important role played by defense counsel.[81] Singapore's courts have, in a number of cases, formally recorded their praise and appreciation of the dedicated work done by defense counsel on behalf of their clients. In the case of *XP v. Public Prosecutor*, where the accused person's conviction was overturned on appeal on the basis that the prosecution had failed to prove their case beyond reasonable doubt, the Singapore High Court formally recorded its "appreciation to counsel for the commendable industry they have so ably demonstrated in the preparation and presentation of their respective cases."[82] The judge went on to state, "[w]hile I have not accepted a number of points made by counsel, I have nevertheless found most of them helpful in arriving at my final determination."[83] Similarly, in the *Kadar* case, where the accused person also had his conviction overturned, the Singapore Court of Appeal's judgment officially recognized the defense counsel's "impassioned advocacy" and "commendable conscientiousness," crediting him "for placing on the record of proceedings many of the facts we have referred to above."[84] It is undeniable that defense lawyers play an important role

78. *Id.* at 23.

79. *Id.* at 20.

80. *Id.*

81. The Singapore Attorney General has observed through his dialogues with defense counsel that "this segment of our profession has been under-appreciated and should be encouraged." Attorney General Sundaresh Menon, *Speech of the Attorney General Sundaresh Menon SC*, Opening of Legal Year 2011, Jan. 7, 2011, ¶ 10 [hereinafter *2011 Attorney General's Speech*].

82. XP v. Public Prosecutor, [2008] 4 SLR (R) 686, ¶ 100 (Sing.).

83. *Id.*

84. Muhammad bin Kadar v. Public Prosecutor, [2011] SGCA 32, ¶ 207 (Sing.).

in protecting their client's rights and interests. The Singapore Chief Justice has noted how defense counsel bear a "crucial responsibility" in defending their clients against "the forensic might" of the state's prosecutorial and investigative services.[85] By clearly presenting the relevant facts and laws, legal representatives assist the court in its decision making process.

In the not so distant past, defense counsel in Singapore used to observe, worryingly, "a growing perception of distrust" between the prosecution and defense counsel.[86] In a 2011 speech, the Singapore Attorney General noted that the "successful administration of criminal justice rests on the collaborative efforts" between the prosecution and the criminal bar.[87] Informal and formal efforts have been made by the official authorities and private practitioners to build new collaborative relationships. The Minister of Law and the Attorney General have both made efforts to meet with the legal community to understand more fully their concerns and initiate mutual projects.[88] For example, during the drafting of the CPC, the Ministry of Law consulted with various members of the legal community, including the Law Society and the ACLS.[89] The Law Society and the ACLS both submitted detailed consultative reports on the draft CPC to the government.[90] A number of these proposals were eventually taken onboard and incorporated into the final draft adopted by parliament. The Ministry of Law has engaged defense counsel on issues such as police investigative skills and recidivism rates.[91] A number of joint projects have been undertaken at the Attorney General's Chambers, including the formulation of a joint code of conduct for the prosecution and the defense.[92] This joint code of practice aims to "promote a smooth conduct of criminal proceedings in a spirit of mutual respect and cooperation."[93]

These efforts take place against the Singapore legal community's concern that it is increasingly difficult to persuade younger lawyers to practice and form an expertise in criminal law. In Singapore most defense counsel come from small to medium-sized law firms. The fees received by defense lawyers are significantly lower than that

85. *2011 Chief Justice Response*, *supra* note 8, ¶ 8.

86. Wendell Wong, *New Beginnings: Towards a Spirit of Camaraderie*, LAW GAZETTE, Dec. 27, 2011.

87. *2011 Attorney General's Speech*, *supra* note 81, ¶ 8.

88. *A Golden Age*, *supra* note 72, at 1.

89. *Id.*

90. LAW SOCIETY CPC CONSULTATIONS, *supra* note 14; *Feedback on the Proposed Amendments to the Criminal Procedure Code*, Association of Criminal Lawyers of Singapore, Feb. 28, 2009.

91. *A Golden Age*, *supra* note 72, at 1.

92. *Id.*

93. *2011 Attorney General's Speech*, *supra* note 81, ¶ 9.

commanded by their colleagues practicing commercial law. As observed by the Singapore Attorney General, these lawyers predominantly serve "the average Singaporean." Singapore's Chief Justice has similarly underscored the need to encourage younger lawyers to get involved in criminal practice, which does not pay as well as commercial work. Apart from meeting an essential public need that largely impacts ordinary citizens, a highly qualified and committed criminal bar contributes to the maintenance of a fair criminal justice system. The Attorney General has noted that "a vibrant Criminal Bar" is essential to maintaining "public confidence in the criminal justice system."[94]

B. Criminal Legal Aid and Pro Bono Efforts

Such official recognition of the important role played by defense counsel has been accompanied by an encouragement of on-the-ground pro bono initiatives. These initiatives play an important role in ensuring that all individuals, regardless of their economic circumstances, have access to legal representation. In 2010, the Singapore Chief Justice noted with concern that accused persons represent themselves in about one-third of criminal cases.[95] The Singapore Attorney General and the Singapore Chief Justice have both emphasized the importance of, and the need to promote, pro bono criminal legal work among private practitioners.[96] Indeed, to meet this need for legal representation, the Chief Justice has considered consulting the Law Society on the feasibility of reviving the "dock brief" system, based on which the court may appoint any lawyer who is available and who happens to be in court to represent an indigent.[97]

In Singapore, the state provides legal aid for civil cases but not for criminal cases.[98] As explained by the authorities, this aims to avoid the "paradoxical" situation whereby "public funds should be used to defend an accused person which the State has decided ought to be charged in court and use public funds at the same time to get him off."[99] More

94. *Id.* ¶ 4.

95. *2010 Chief Justice's Keynote Address*, *supra* note 6, ¶ 6.

96. *2011 Chief Justice's Response*, Opening of Legal Year 2011, *supra* note 8, ¶¶ 9, 10.

97. *2010 Chief Justice's Keynote Address*, *supra* note 6, ¶ 2.

98. The Legal Aid Bureau, which is part of the Ministry of Law, provides pro bono legal advice on civil matters to individuals who satisfy a financial eligibility test. In general, the Legal Aid and Advice Act provides that only those with a disposable income of not more than $10000 a year and a disposable capital of not more than $10000 a year satisfies this means test. The Director is given discretion under the Legal Aid and Advice Act to provide certain deductions if the applicant is facing "hardship." However, it should also be noted that section 8 (3) of the Legal Aid and Advice Act authorizes the Director to "refuse legal aid if it appears to him unreasonable that the applicant should receive it in the particular circumstances of the case." Legal Aid and Advice Act, Ch. 160, § 8(3).

99. Jayakumar, Sing., *Parliamentary Debates*, vol. 64, July 7, 1995.

recently, the Singapore Chief Justice explained that an across-the-board state-funded criminal legal aid may "be a social burden on the taxpayer if given too liberally to all indicted defendants."[100] Due to tax implications, there is a need for "a sensible balance" to be struck.[101] This balance, struck as of now, limits the state's provision of criminal legal aid to capital offences through the Legal Assistance Scheme for Capital Offences (LASCO). LASCO is, however, not based on statute.[102] Under this scheme, all defendants who face the death penalty in the High Court are automatically entitled to legal representation by volunteer lawyers on the LASCO's Register of Counsel.[103] As of 2011, there are 200 lawyers on LASCO's Register.[104] Defendants who face serious "non-capital" charges pursuant to the Corruption, Drug-trafficking, and Other Serious Crimes (Confiscation of Benefits) Act may also be afforded legal representation. Defendants are not subject to either a means or a merits test under this scheme.

Presently, the bulk of criminal legal aid in Singapore is provided by two pro bono schemes run by the Law Society and the ACLS. The Law Society established its Criminal Legal Aid Scheme (CLAS) in 1985. CLAS deals with offences falling within a list of specific statutes,[105] and does not deal with cases involving the death penalty. It also provides representation in Community Court cases.[106] To qualify for aid under

100. Chief Justice Chan Sek Keong, Speech at Dinner of the Legal Assistance Scheme for Capital Offences (LASCO), *reproduced in* Pro Bono, Association of Criminal Lawyers of Singapore, Feb. 2011, ¶ 2.

101. *Id.* ¶ 5.

102. LASCO Request Form, *available* at http://app.supremecourt.gov.sg/data/doc/ManagePage/84/LASCO%20Request%20form.pdf; LASCO Guidelines for Assigned Counsel, http://app.supremecourt.gov.sg/data/doc/ManagePage/84/LASCO%20Guidelines-Assigned%20Counsel.pdf.

103. Under the LASCO scheme, defendants are represented by two counsels: one lead and one assisting counsel. Volunteer lawyers who do not have sufficient years in practice or who have not had enough experience in criminal trials may seek permission from the Supreme Court Registrar to appear as Junior Assisting Counsel. In collaboration with the Law Society, the Supreme Court has undertaken two developments aimed at improving the quality of legal representation provided under LASCO. First, a LASCO selection panel comprised of representatives of Singapore Senior Counsel, the Law Society of Singapore, and the Supreme Court will "oversee and approve" the placement of counsel on the LASCO Registrar of Counsel. Second, the Law Society will extend and develop legal support services to assist LASCO counsel. *See Supreme Court Launches New Initiatives for the Legal Assistance Scheme for Capital Offences (LASCO): Enhancing the Standards of the Criminal Bar and Providing Greater Support for LASCO Counsel*, Singapore Supreme Court, May 20, 2011.

104. *Id.* at 4.

105. These are the Arms & Explosives Act; the Arms Offences Act; the Corrosive & Explosive Substances & Offensive Weapons Act; the Dangerous Fireworks Act; the Enlistment Act; the Explosive Substances Act; the Films Act; the Miscellaneous Offences (Public Order and Nuisance) Act; the Misuse of Drugs Act; the Penal Code; the Prevention of Corruption Act; the Undesirable Publications Act; the Vandalism Act; Sections 65(8) and 140(1)(i) of the Women's Charter; and the Misuse of Computer Act.

106. For further information on the Singapore Community Court, which is part of the Singapore Subordinate Court, see http://app.subcourts.gov.sg/criminal/page.aspx?pageid=10819.

CLAS, the accused must not intend to plead guilty and must claim trial.[107] CLAS is open to all nationalities, but applicants are subject to a means test. If an accused is found to have been dishonest when providing information to CLAS, legal representation will be withdrawn. Accused persons are required to fill out an application form that includes personal and offence-related particulars, and complete a means test. Receipt of this application form is then followed by a CLAS interview. Two weeks upon receiving the application form and all relevant documents, a volunteer lawyer will be assigned by CLAS to represent the accused person. CLAS maintains a list of private practitioners who are called to the bar in Singapore and who have agreed to volunteer on CLAS cases. While the volunteer lawyer does not charge for his or her legal services, he or she has the discretion to ask the assigned accused person to pay for administrative expenses.

In 2005, a group of Singaporean lawyers who specialize in criminal defense established the Association of Criminal Lawyers in Singapore (ACLS). When the ACLS was first established, it was primarily intended to serve as a forum where its members could engage in public debate on criminal legal issues.[108] It started providing pro bono legal services when approached by the authorities to assist in Community Court cases. Currently, ACLS members provide pro bono legal representation in cases referred to the ACLS by the Singapore Subordinate Courts, specifically the Community Court and the Bail Court. The organization's members deal with about 100 pro bono cases a year, out of which approximately 80% are referrals from the Community Court.[109] Its pro bono program is structured on a more informal basis as compared to that run by CLAS. The organization maintains a roster of members based on which pro bono cases are assigned.[110] It does not independently administer a means test; instead, ACLS pro bono cases are based on court referrals. ACLS members note that the court referral system has relieved them of the need to administer a means test, which requires a considerable amount of time and expertise.[111] This system of court referrals also functions as a merits-based control mechanism. The judiciary has been very supportive of ACLS pro bono work, and ACLS members recognize that such support has been crucial to facilitating much of their pro bono efforts.[112]

107. http://www.lawsociety.org.sg/public/you_and_the_law/criminal_legal_aid_scheme.aspx.

108. Interview with ACLS leaders, 29 July 2011.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

D. Developing a Service-Oriented Legal Profession

Many Singapore lawyers who are active in pro bono work explain their involvement in value-based terms.[113] Such a responsibility is justified because the legal community retains a monopoly on legal services, and it reflects a professional identity based on service.[114] In seeking to promote pro bono work, its advocates have also emphasized the instrumental benefits of pro bono work to individual lawyers and law firms.[115] Pro bono work gives younger lawyers or those with no previous exposure in a particular legal area a chance to gain legal expertise and courtroom experience. Law firms with formal pro bono programs may stand a higher chance of attracting and recruiting law school graduates who wish to work for a firm that is socially conscious and also gives them an opportunity to do pro bono work. There continues to be debate as to how best to translate pro bono aspirations into reality, such as whether pro bono work should be made mandatory or remain voluntary in nature. In Singapore, it was suggested in parliament that pro bono be made part of continuing professional development.[116] Most appear to be of the opinion that pro bono involvement should remain voluntary.[117] Since 2012, the Singapore Institute of Legal Education has been working with Singapore's two law schools to make pro bono involvement a mandatory part of law school education.[118]

Providing indigent accused persons who cannot afford legal counsel with criminal legal aid is essential to treating the individual with dignity. Most individuals confronted with the criminal justice system find it foreign and overwhelming. The stakes for these individuals are higher than those faced with civil proceedings. In such cases, legal representation should not be seen as merely protecting the accused person's interests. It plays the additional and important role of treating individuals confronted by the weight and consequences of the criminal process with dignity, by ensuring that they are assisted by knowledgeable and effective counsel throughout the process. It is important that accused persons feel that they are being treated fairly by the criminal process. Ensuring access to legal representation, regardless

113. For an overview of the main reasons in favour of pro bono in the US context, including the debate for and against mandatory pro bono requirements, see Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Students*, 67 FORDHAM L. REV. 2415, 2418–25 (1998).

114. *Id.* at 2419.

115. *Id.* at 2420.

116. Michael Palmer, Sing. Parl. Rep. Mar. 9, 2011.

117. *Id.*

118. Chief Justice Chan Sek Keong, *Opening of Legal Year 2012: Response of Chief Justice Chan Sek Keong*, Sing. Acad. L. ¶ 8 (Jan. 6, 2012), http://www.sal.org.sg/content/PR_speeches.aspx.

of the accused person's social or economic status, is therefore necessary and important.

As mentioned above, in Singapore, legal representation for indigent accused persons continues to be predominantly provided for through voluntary pro bono efforts. As observed by legal scholar Richard Abel, there are a number of different mechanisms by which important services may be provided in society: the government, the market, philanthropy, or self-help.[119] Each mechanism brings with it unique advantages and disadvantages. Depending on philanthropy for the delivery of an essential public good—like justice—may not guarantee a supply that is adequate or regulated. State provision of such services guarantees security and quality.[120] On the other hand, state monopolies may result in bureaucratic waste or inefficiency.[121] The choice between philanthropy or the state need not be mutually exclusive. For example, the case referral system established between ACLS and the Community Court is based on a cooperative relationship between the state and a private initiative. Such a case referral system helps the ACLS save on the costs required to establish and administer a means test. One possible disadvantage of this system is that only cases deemed deserving by the court will be referred to ACLS for legal aid. In light of its success thus far, more creative collaborations between the state and private initiatives should be explored. The state's guarantee of legal aid and access to justice need not take the form of establishing and running an independent legal aid scheme. The authorities may indirectly support private initiatives by providing financial funding or infrastructure. Such state involvement in the provision of legal aid is important for practical as well as normative reasons. Justice is a public good and to the extent that it requires equal access to legal representation, it is essential for the state to invest, directly or indirectly, in criminal legal aid. By doing so, the state signals its commitment to ensuring that accused persons are treated with dignity.

IV. BACK-END PROCESSES: CRIMINAL REVISION AS A "SAFETY NET"

The pro bono initiatives described above focus on criminal defense. Neither the Law Society nor the ACLS run programs which focus on the back-end of the criminal justice process, specifically cases which have

119. Richard L. Abel, *State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 295 (Robert Granfield & Lynn Mather eds., 2009).

120. *Id.* at 299–300.

121. *Id.* at 299.

exhausted all avenues of appeal.[122] Such back-end review plays a limited but important ex post facto role by addressing injustices which have slipped through the system, such as cases of wrongful conviction. It is premised on two important assumptions: first, it acknowledges the fallibility of human decision-making and institutional structures; second, it commits itself to securing a just outcome for the accused person regardless of time that has elapsed. Front-end legal defense and back-end review are in fact complementary. In particular, front-end processes do not accommodate factual discoveries that come to light after the appeals process has been concluded.

In general, the ordinary Singaporean retains a high level of trust in the Singapore judiciary and civil service. This has contributed to the popular perception that there is a very low risk of wrongful convictions by the Singapore criminal justice system. According to a public perception survey conducted by the Subordinate Courts in 2006, 95% of respondents were of the opinion that "there was trust and confidence in the fair administration of justice in Singapore," 96% "agreed that the courts administered justice fairly to all regardless of actions by or against individuals, companies or the government," and 97% "agreed that the courts administered justice fairly to all regardless of language, religion, race or social class." As observed by some local commentators, Singapore has put in place a number of safeguards—such as stringent corruption laws that guard against abuse of power—which differentiate it from other jurisdictions and which ensure a low risk of wrongful convictions.[123] At this point, it should be noted that while such safeguards may ensure a low risk of wrongful convictions, they do not guarantee the complete absence of wrongful convictions. The Singapore High Court, through the criminal revision process that will be further explained below, has reviewed and dealt with a number of wrongful conviction cases. While such cases are far and few compared to the number of cases actually processed by Singapore's courts, they demonstrate that mistakes may be made by a system that generally works with integrity and accuracy.

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122. Criminal Procedure Code 2010, § 374(4) (Sing.). The procedure for criminal appeals is set out in the CPC. According to Section 374 of the CPC, an appeal "may lie on a question of fact or a question of law or on a question of mixed fact and law." A convicted person may make an appeal "against his conviction, the sentence imposed on him or an order of the trial court." The Singapore court system consists of the Supreme Court, which is composed of the High Court and the Court of Appeal, and the Subordinate Courts. For cases in which the High Court exercises original jurisdiction, an appeal may be made to the Court of Appeal. If original jurisdiction is exercised by the Subordinate Courts, an appeal may be made to the High Court. Cases which have exhausted this appeals process will generally have recourse only with the clemency procedure, which is a political rather than legal avenue.

123. *See generally* Chen Siyuan & Eunice Chua, *Wrongful Convictions in Singapore: A General Survey of Risk Factors*, 28 SING. L. REV. 98 (2010).

Indeed, due to the paucity of empirical research on this matter, public perception of the rarity of wrongful convictions in Singapore is not based on fact. Even if such rarity is proven, because a criminal conviction so seriously impacts an individual's life, the infrequency of wrongful convictions cannot justify inaction. There is a need for society to put in place measures that address the possibility of wrongful convictions. This is particularly so when the appeals process is clearly not structured to deal with errors that emerge only over time. Overseas research has identified a number of common causes of wrongful convictions, including bad lawyering, mistaken eyewitness identifications, faulty forensic evidence and false confessions.[124] Empirical research on this issue in Singapore is in its nascent stages, and further efforts are required to identify and assess the risk factors that are applicable in Singapore's context. Two important papers on this topic have recently been published in Singapore. In one of these, local commentator Audrey Wong, explains how the lack of adequate or effective legal representation has contributed to cases of wrongful conviction which were reviewed by the High Court.[125] Academic commentators, Chen Siyuan and Eunice Chua, note that "the risk of wrongful conviction in Singapore is probably not high because of the strong values and high standards that have been worked into the system," such as Singapore's tough approach to corruption.[126] All three commentators, however, stress that further research on this issue is necessary and propose improvements to the system. These pioneering and insightful works have been crucial to starting academic discussions on the issue, and have set the stage for future locally-based research efforts. Contextual studies are important as the causes of wrongful convictions may differ from country to country. In other words, the risk factors which operate overseas may not be applicable to Singapore. There needs to be more context-specific research before conclusions can be made on the state of wrongful convictions in Singapore.

Recent judicial and legislative attempts to define and emphasize the responsibilities of various criminal justice agencies reflect an increased

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124. Krieger sets out a list of common factors contributing to wrongful conviction in the US: inaccuracy of eyewitnesses, perjured testimony, prosecutorial misconduct, inadequate defense representation, police misconduct and the pretrial criminal procedural process. Steven Krieger, *Why Our Justice System Convicts Innocent People and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333, 310 (2011). In his empirical study based on the exoneration of individuals in the US based on post-conviction DNA testing, Garrett notes that the main types of evidence leading to wrongful convictions are mistaken eyewitness identifications, faulty forensic evidence, informant testimony and false confessions. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 112 (2008).

125. Audrey Wong, *Criminal Justice for All? Wrongful Convictions and Poverty in Singapore*, 28 SING. L. REV. 67 (2010).

126. Chen & Chua, *supra* note 123, at 122.

awareness of, and concern over, the possibility of system imperfections. Due to the high level of trust built into the system and the extensive powers afforded to criminal justice agencies within the criminal process, mistakes may go undetected for a long time and may have particularly serious consequences. In a recent case, the Court of Appeal observed that the legal framework applicable to the recording of statements by police officers "statutorily assume[s]" that police officers of a certain rank are "competent" and "will discharge their obligations conscientiously."[127] This level of confidence that is invested in the authorities "comes with certain inherent risks."[128] To counteract this, Singapore courts have demonstrated—particularly in recent cases—a willingness to scrutinize the conduct and practices of various agencies to prevent any injustice to the individual. For example, in the *Kadar* case, the Singapore Court of Appeal affirmed that it would take a "firm approach" to exclude statements taken with procedural irregularities if this has caused the prejudicial value of the statement to outweigh its probative value.[129] In the same case, the Court of Appeal laid down a number of common law principles on the disclosure of prosecutorial evidence.

A. Dealing with Wrongful Conviction Through Criminal Revision

Cases of wrongful conviction in Singapore have been dealt with by the Singapore High Court through its powers of criminal revision. These revisionary powers are relatively unusual and should be distinguished from the appeals procedure. The latter is not expressly recognized in Singapore's constitution but is set out in ordinary legislation. At this point, it should be noted that the Singapore judiciary is composed of the Supreme Court, which includes the Court of Appeal and the High Court, and the lower Subordinate Courts. In general, the High Court exercises original jurisdiction in "more serious offences" such as "murder, culpable homicide not amounting to murder, drug trafficking, arms offences, kidnapping, rape, and carnal intercourse."[130] For cases in which the High Court exercises original jurisdiction, an appeal may be made to the Court of Appeal. If original jurisdiction is exercised by the Subordinate Courts, an appeal may be made to the High Court.

According to Section 374 of the CPC, an appeal "may lie on a question of fact or a question of law or on a question of mixed fact and law." A convicted person may make an appeal "against his conviction,

127. Muhammad bin Kadar v. Public Prosecutor, [2011] SGCA 32, ¶ 58 (Sing.).

128. *Id.* ¶ 58.

129. *Id.* ¶ 60.

130. http://app.supremecourt.gov.sg/default.aspx?pgID=1362.

the sentence imposed on him or an order of the trial court." However, the right to appeal is limited in nature. Section 375 states that "an accused who has pleaded guilty and has been convicted on that plea in accordance with this Code may appeal only against the extent or legality of the sentence." The appeal procedure is set out in further detail in the CPC. For example, Section 377 requires a notice for appeal to be lodged by the appellant within 14 days with the Registrar of the original trial court.

In addition to undertaking appeals, the Singapore High Court has powers of revision in criminal matters. This process is set out in Section 23 and Section 26 of the Supreme Court of Judicature Act which recognizes that the High Court may "exercise powers of revision in respect of criminal proceedings and matters in subordinate courts" and "call for and examine the record of any criminal proceeding before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of that subordinate court."[131] The CPC recognizes and further elaborated on this revisionary power.[132] Local academic commentators have observed how this revisionary power of the High Court over lower courts may be historically explained.[133] During the colonial era, lower court judges may not be legally trained and the High Court's revisionary powers were intended to address any errors made by lower court judges. Due to this, some commentators have characterized these revisionary powers as "paternal" in nature.[134] Even if the High Court's revisionary powers were historically intended to deal with the limitations of lower courts, it performs an important and necessary corrective function today. As explained above, the right to appeal is governed by strict deadlines while mistakes or injustices may emerge only with time.

As recognized by the High Court in *Yunani*, the High Court's power of criminal revision was legislated to "ensure that no potential cases of serious injustice are left without a meaningful remedy or real redress."[135] Indeed, it held that the court would "fail in its constitutional duty . . . if it remains impassive and unresponsive to what may objectively appear to be a potentially serious miscarriage of justice."[136] The Singapore High Court has emphasized that the criminal revision process is not intended

131. Section 400 of the CPC elaborates on the procedure for such revision. Criminal Procedure Code 2010, § 400 (Sing.); Supreme Court of Judicature Act, §§ 23, 26 (Sing.).

132. Sections 400-404, CPC.

133. Tan Yock Lin, CRIMINAL PROCEDURE ¶¶ 3904-4000, (2006).

134. *Id.*

135. Yunani bin Abdul Hamid v. PP, [2008] 3 SLR (R) 383(Sing.).

136. *Id.*

to act as a "backdoor appeal," and is to be used "sparingly" and in instances of "serious injustice."[137] It should be noted, however, that the High Court's power of criminal revision is relatively narrow as it is only applicable to proceedings heard and decided upon by the Subordinate Courts which deal only with crimes that involve sentences below ten years.[138] Decisions of the High Court on criminal review are also not subject to appeal. Criminal review by the High Court may not be the only way by which Singapore's courts can reconsider cases that have exhausted the appeals process. The Singapore Court of Appeal has observed that if it encounters, in the future, "an actual situation where new evidence is discovered," it then would have to consider the question of whether it has "an inherent jurisdiction," in light of previous precedent and the facts of the case, to review its own decision so as to address "any miscarriage of justice."[139]

B. The Establishment of an Innocence Project by NUS Law Students

In 2010 a group of students from the NUS Faculty of Law decided to establish the NUS Innocence Project.[140] Innocent Projects (IPs) have been established overseas based on a variety of models.[141] Apart from studying and reviewing individual cases, many IPs engage in research and policy recommendations.[142] Most are philanthropic or law school-based initiatives, but states have also established commissions with a similar function. For example, the UK's Criminal Cases Review Commission is an independent statute-based body whose members are appointed by the Queen on the advice of the Prime Minister.[143] It receives and reviews cases and has the power to refer a conviction to the Court of Appeal if there is a "real possibility" that it will not be upheld.

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137. *Id.*

138. Section 7 & 8, CPC.

139. *Yong Vui Kong v. PP* [2010] 2 SLR 192 at para. 13. See generally Goh Yihan, *The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of their Exercise*, Singapore Journal of Legal Studies (2011) 178. See also the Court of Appeal's observations on such inherent jurisdictional powers in Re Nalpon Zero Geraldo Mario [2013] SGCA 28.

140. For the official website of the NUS Innocence Project, see http://sginnocenceproject.com/. As explained in the website, upon completing a preliminary assessment and investigation of cases, the NUS IP brings applications to lawyers from the Law Society and ACLS. Upon further discussion and investigation, if necessary, the lawyers may decide to take on the case on a pro bono basis.

141. For a comparative review of the different types of Innocence Projects, see generally Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT L. REV. 89 (2010).

142. *Id.* (Roach notes that IPs generally conduct a mix of these functions but argues that IPs need to be structured differently according to whether they are intended to function according to an "error-correction model" or a "systemic reform model").

143. *See generally* CRIMINAL CASES REVIEW COMMISSION, http://www.ccrc.gov.uk/about.htm (last visited May 15, 2012).

Apart from the CCRC, there are various independent IPs operating in the UK, such as Bristol University's IP.[144]

Some independent IPs are established as clinical programs within law schools where law students work on cases under the supervision of clinical or permanent faculty, and may be able to do so for credit.[145] Others exist as independent organizations which provide placement opportunities for volunteers and law students.[146] Some newer programs are inter-disciplinary in nature, and some are housed in journalism schools. Most focus solely on claims of factual innocence that are based on new evidence,[147] though some scholars have highlighted the need for reforms not to focus solely on factually wrongful convictions but to take a broader approach that includes due process concerns.[148] In terms of techniques, IPs in the US generally specialize in DNA or non-DNA work. It is generally accepted that courts are more easily persuaded by DNA evidence. However, due to the incorporation of DNA testing into investigative procedures, non-DNA investigations will become more important in the future.

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144. *See* BRISTOL INNOCENCE PROJECT, http://www.bristol.ac.uk/law/aboutus/law-activities/innocenceproject/index.html (last visited May 15, 2010).

145. Many of the US IPs are based in law schools and take the form of clinical programs. See for example, WISCONSIN INNOCENCE PROJECT, http://www.law.wisc.edu/fjr/clinicals/ip/student_info.html (last visited May 15, 2012) (University of Wisconsin Law School); OHIO INNOCENCE PROJECT, http://www.uc.edu/foundation/resources/for_volunteers/information_you_canuse/_jcr_content/MainContent/download_2/file.res/wp-oip.pdf (last visited May 15, 2012) (University of Cincinnati College of Law); CALIFORNIA INNOCENCE PROJECT, http://www.californiainnocenceproject.org/site/index.php?option=com_content&view=article&id=1&Itemid=10 (last visited May 15, 2012) (California Western School of Law).

146. For example, the Mid-Atlantic Innocence Project is a non-profit organization which has its own permanent staff and which works with volunteer lawyers and students. MID-ATLANTIC INNOCENCE PROJECT, http://www.exonerate.org/about-2/ (last visited May 15, 2012).

147. Cincinnati Law School's IP assists individuals who "claim to be actually innocent of the crimes for which they were convicted" and that have "new evidence, whether newly discovered or that can be developed through investigation, supports the inmate's claim of innocence." *Ohio Innocence Project*, U. CINCINNATI COLLEGE L., http://teachlaw.law.uc.edu/institutes/rosenthal/oip.shtml (last visited May 15, 2012). Bristol University's IP takes cases of individuals that involve of factual innocence, as opposed to claims of a procedural miscarriage of justice; who have exhausted the normal appeals process; and who have no legal representation, or whose solicitors have granted permission for us to assist. *University of Bristol Innocence Project*, U. BRISTOL L. SCH., http://www.bristol.ac.uk/law/aboutus/law-activities/innocenceproject/index.html (last visited May 15, 2012).

148. Addressing the UK system where the Criminal Case Review Commission (CCRC) is to review and refer cases to the Court of Appeal where there is a "real possibility that it would not be upheld." The standard applied by the Court of Appeal is whether the conviction is "unsafe." Naughton notes how a focus on factual innocence has led to understanding "miscarriages of justice" purely from a factual innocence perspective. He argues for a broader understanding of the term "miscarriage of justice" that includes errors amended at the appeals level as well as procedural irregularities. Michael Naughton, *Redefining Miscarriages of Justice: A Revived Human-Rights Approach to Unearth Subjugated Discourses of Wrongful Criminal Conviction*, 45 BRIT. J. CRIMINOLOGY 165 (2005); *see also*, Hannah Quirk, *Identifying Miscarriages of Justice: Why Innocence in the UK Is Not the Answer*, 70 MOD. L. REV. 759 (2007).

From its very beginning, the NUS IP has been conceptualized and managed by students with support from their academic advisors. For its first two years, the NUS IP focused on formulating its mission, making partnerships, training its members, and establishing internal procedures. It started reviewing cases in August 2012, and held an official launch on 17 May, 2013.[149] Like most IPs, the NUS IP focuses on cases of factual innocence which have exhausted all avenues of appeal. The students of NUS IP explain that in doing so, they aim to serve as a "safety net" in an area that is yet to be addressed in a systematic way by official or non-official programs.

Starting public discussions on the possibility of wrongful convictions has been particularly important, given the scarcity of empirical research in this area. The NUS IP has organized talks by legal practitioners and non-legal experts working in the area of criminal justice to raise awareness and initiate discussions on this issue among students and faculty members. In addition to awareness-raising, NUS IP students have focused on building relationships with external stakeholders. This initially posed some challenges due to the relatively unknown topic of wrongful convictions, which they tried to address by explaining their objectives to the legal community and relevant criminal justice agencies.[150] By emphasizing that they aim to serve as a "safety net" in a cause that is shared by other actors in the justice system, the IP students were gradually able to build relationships with state and non-state bodies. Establishing and maintaining a good working relationship with state agencies, such as the prosecution, is necessary for pragmatic reasons. Unlike the US and other countries, Singapore does not have access to information laws that enable individuals to obtain data from state agencies, though the government has released increasing amounts of unclassified information and statistics to the public.[151]

The NUS IP students have also focused on undertaking research of an empirical nature. The experience of overseas IPs may serve as useful guides, but the factors contributing to wrongful convictions may differ from one country to the next. These factors are seldom purely legal in nature and require familiarity with other disciplines, such as forensic science or psychology. Due to the lack of secondary empirical literature

149. The launch was widely reported by the Singapore media, also receiving attention in Malaysian media. Ian Poh, *New NUS student-led initiative to give "safety net of last resort" to those in jail*, Straits Times, May 17, 2013; *Student help the "innocent,"* The Star, May 19, 2013.

150. Telephone Interview with NUS IP Student Leader 2 (May 6, 2011).

151. The advantages and disadvantages of having freedom of information laws was raised and debated in parliament in 2011. Pritam Singh, vol. 88, Sing. Parl. Rep., Oct. 20, 2011. The government observed that other countries having such laws incorporate "important exceptions to information access," but also noted that these laws should be studied. Yaacob Ibrahim, vol. 88, Sing. Parl. Rep., Oct. 20, 2011.

on wrongful convictions, the NUS IP has spearheaded a number of research projects.[152] These research projects are designed by students with the involvement and supervision of interested faculty and external practitioners. Apart from generating the practical knowledge required for innocence work, such collaborative projects raise awareness of the issue among the legal community.

C. Nurturing a Culture of Service among Law Students

A NUS IP student leader explained that he decided to join IP because "I can see how I can apply the law in a way to help people, or that will make a difference to people."[153] To nurture and develop such a commitment and a culture of service at an early stage, law student initiatives such as the NUS IP should continue to be actively encouraged. A commitment to service and justice for the less fortunate are values that need to be inculcated early on in a lawyer's career. Once the pressures of work set in, lawyers seldom have the resources or incentive to put time aside for non-law firm related work such as pro bono projects. Very often—as observed by Singapore lawyers who are active in pro bono work—the only exposure that lawyers have to the real life problems of ordinary persons is through pro bono internships or social justice initiatives undertaken during their student days.[154] Such exposure may inspire some to pursue careers in criminal justice.[155] Even if a student chooses not to take up such a career, being exposed to the real life legal problems of ordinary people will educate and sensitize young future lawyers to the law's on-the-ground impact. Such an understanding of the law, even if not directly relevant to the lawyer's day-to-day work, is essential to building a legal community that is sensitive to, and that prioritizes, the law's commitment to building a more just society. Positive student experience may lead to a willingness to continue being involved in pro bono in the future.[156] Another NUS IP student leader observed how her IP experience enabled her to get to

152. Examples of topics examined are DNA testing, reasons for cases being overturned at the appeals stage, and policing guidelines.

153. Telephone Interview with NUS IP Student Leader 2 (Sept. 9, 2010).

154. Telephone Interview with ACLS Leaders (July 5, 2011).

155. A student leader of NUS IP notes that his experience with IP has inspired him to practice criminal defense. Telephone Interview with NUS IP Student Leader 2 (Sept. 9, 2010).

156. Based on empirical research material and a survey of how US law school pro bono programs are structured with the view of identifying the kind of law school experience that may lead to continued pro bono involvement on the part of graduating students, Rhodes cautiously concludes that: "From the limited evidence available, the safest generalization seems to be that positive experience with pro bono work as a student will at least increase the likelihood of similar work later in life." Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2435 (1999).

know others with a similar passion for public interest work. She believes that the opportunity to work with and get to know others who are like-minded and knowing that one is not "alone" will be instrumental to her future involvement in public interest legal work.[157]

Apart from contributing to building a law student culture based on service, student-run projects such as the NUS IP provide law students with the opportunity and space to learn a variety of legal and non-legal skills. Faculty supervisors of IPs overseas have highlighted the unique and important learning opportunities afforded by such projects to students.[158] Unlike other clinical programs, IPs bring students beyond courtrooms into the field of investigations. Students obtain a better appreciation of the criminal justice system as a whole. They learn about the importance of details and facts, the value of patience and meticulousness, and the meaning of ethics and justice—as opposed to merely substantive law or procedure.[159] In addition, due to the student-run nature of the NUS IP, students involved learn skills that go beyond simple lawyering. Students take charge of conceptualizing the project's objectives and its work-plan. Such visionary and creative exercises require students to think outside the box. They are also in charge of day-to-day operations, such as the organization of events and the establishing of relations with external stakeholders. This teaches them organizational and administrative skills. More importantly, due to the NUS IP's relatively flat structure, students have had to learn how to work together in groups and reach difficult decisions through discussion and debates. For example, a NUS IP student leader noted that she has learned how to deal with different "working styles" and "interpersonal relationships."[160]

As explained above, the NUS IP sees itself as serving as a "safety net." Instead of positioning themselves in opposition to the system, NUS IP students view themselves as working towards a goal that is shared by

157. Telephone Interview with NUS IP Student Leader 3 (May 6, 2011).

158. Writing from a US perspective, Findley highlights some of the pedagogical benefits of the IP clinical learning experience which distinguishes it from other legal skills clinical programs: an appreciation of the importance of facts and the learning of investigative skills, the importance of paying attention to detail, being "thorough" and "skeptical," legal ethics, an appreciation of justice issues, an critical awareness of how the criminal justice system operates and decision making skills. Keith A. Findley, *The Pedagogy of Innocence*, 13 CLINICAL L. REV. 1101, 1111–35 (2006). In the context of UK IPs and establishing a UK IP network, Naughton & McCartney note that the group investigations undertaken by volunteers and students in IPs develops "their skills of investigation" and "foster[s] in-depth understanding of appellate procedures." It also provides opportunities for "unrivalled team-working" and "valuable interaction with the community." In addition, such experiences nurture in future lawyers healthy "skepticism" as well as "a real commitment into ethical practice and *pro bono* work." Michael Naughton & Carole McCartney, *The Innocence Network UK*, 7 LEGAL ETHICS 150 (2004).

159. *Id.*

160. Telephone Interview with NUS IP Student Leader 1 (Sept. 9, 2010).

other actors within the legal system, namely, the prevention of wrongful convictions and the improvement of the legal system.[161] This conception of the criminal process as a truth-finding mechanism has similarly been articulated at the official level. For example, the Minister of Law has stated that Singapore's criminal justice procedure should aim at, among others, establishing a "system for arriving at the truth."[162] Preventing and addressing wrongful convictions is a goal shared by all who subscribe to the criminal process's truth-seeking function. Opinion as to what this entails or what are the most appropriate means may differ, and there should be space for such differences to be articulated by those interested and involved. The prevention of wrongful convictions is an objective that is shared by criminal justice agencies as well as non-state initiatives, such as NUS IP. While encouraging mutual understanding and a good working relationship is important, the independence of each organization should be maintained and respected.[163]

V. CONCLUSION: SITUATING PRO BONO AND INNOCENCE EFFORTS WITHIN A PEOPLE-CENTERED JUSTICE

This Essay has analyzed the Singapore authorities' recent change in approach towards criminal justice, which has resulted in a more empathetic consideration of the accused person's situation. Legislative amendments and judicial cases have focused on tailoring justice and punishment to the facts of individual cases. Such an individualized justice involves more comprehensive inquiry into the facts of a case and the circumstances of the accused person. More rigorous judicial oversight has also been exercised over the acts and practices of criminal justice agencies, so as to ensure that mistakes are identified and justice is done. In light of these developments, legal representatives of accused persons have an increasingly important role to play. Effective legal representation ensures that the facts and legal arguments relevant to an individual case are heard and considered by the court. There is a need to ensure that all accused persons, including those who are indigent, have access to reliable legal representatives. This Essay has evaluated a number of pro bono initiatives started by lawyers and law students in

161. Telephone Interview with NUS IP Student Leader 2 (May 6, 2011).

162. K. Shanmugam, vol. 87, Sing. Parl. Rep., May 18, 2010. The Minister of Law set out certain "key principles" underlying Singapore's criminal justice process: "(1) Every person is presumed innocent. One is guilty only upon conviction by a Court. While we have specific exceptions in the law to this approach, the presumption of innocence is fundamental. (2) The procedure that is set out must be fair, and (3) the procedure must provide a system for arriving at the truth."

163. Interview with NUS IP Student Leader 0 (6 May 2011), The student leader recognized the importance of working with other stakeholders, such as the Attorney General's Chambers, but also the need to maintain the independence of NUS IP.

Singapore to meet this need for criminal legal representation. There are important reasons why these pro bono efforts should be supported and encouraged. Apart from contributing to the building of a legal culture based on service, these initiatives play a significant role in securing justice as a public good.

In the process of examining these pro bono efforts, this paper has pointed out a number of challenges faced by lawyers and students involved in pro bono work. The new CPC has leveled the playing field somewhat between defense counsel and the prosecution, by explicitly requiring crucial information to be exchanged between the prosecution and defense counsel. This, along with the Singapore judiciary's recognition of common law disclosure duties, has put defense counsel in a better position to defend their clients and put their stories forward. In 2013, the Singapore Attorney General's Chambers and Law Society co-launched a code of practice.[164] The code commits both parties, including the prosecution, to a set of best practices, including maintaining the integrity of evidence and informing the court of all relevant decisions and laws "whether the effect is favorable or unfavorable towards the contention for which they argue."[165] Prosecutors and defense counsel are also required to draw the court's attention to "any apparent errors or omissions of fact or law or procedural irregularities."[166] While this does strengthen the accused person's position by committing the prosecution, along with defense counsel, to certain best practices, the code itself expressly notes that non-compliance does not create any right to initiate disciplinary action or judicial review.[167]

Furthermore, as mentioned above, access to defense counsel remains subject to a "reasonable time" standard. It should be noted that the ordinary person on the street is often overwhelmed or ignorant of the criminal legal process. This may lead to false confessions or statements under stress, even in the absence of improper pressure. Cases and research have undermined the popular belief that only guilty individuals confess.[168] Many may inaccurately "confess" due to panic and stress. Allowing accused persons quicker access to defense counsel, who can then advise his or her client of the process and what to expect, may in fact lead to more accurate fact-finding. This need to ensure that the public is educated on their rights and the criminal legal process has in fact been recognized. The Law Society and the Attorney General's

164. Code of Practice, *supra* note 83.

165. *Id.*, section 6 and 5, respectively.

166. *Id.*, section 5.

167. *Id.*, para. 2.

168. See, for example, Adam Cohen, *Why Innocent Men Make False Confessions*, February 12, 2013, Time, http://ideas.time.com/2013/02/11/why-innocent-men-make-false-confessions/.

Chambers have worked together to produce a Pamphlet of Rights, which is to be issued in 2013 and made available widely to the public.[169]

There is also a need to develop the legal framework governing the back-end review of criminal cases. As mentioned above, the High Court's power of criminal revision applies only to cases heard before the Subordinate Courts, though the Court of Appeal has indicated that it may be able to reconsider a case, post-appeals, if new evidence is discovered showing that there is a reasonable doubt that the conviction was correct in law.[170] It may be useful for parliament to adopt legislation providing for such a possibility, given the reality that mistakes or facts crucial to the defendant's case may be discovered only after the appeals process has been exhausted, through no fault of the defendant. In addition, there is a need to legally provide for the preservation and access to criminal evidence for testing and analysis. The Registration of Criminals Act regulates the taking of body samples, the testing of DNA by investigatory authorities, and DNA registration in a database.[171] But it does not provide for access to evidence by interested persons, which would be necessary for DNA testing purposes. The ability to obtain and analyze "old" preserved evidence is crucial for post-appeal cases. Access to such evidence could be arranged through informal procedures, but having access provided for by law guarantees certainty and procedural clarity. Adopting such laws should not necessarily be taken to indicate a general lack of trust in the authorities. Access to DNA evidence and DNA testing has resulted in the detection and overturning of significant numbers of wrongful convictions overseas. The goal of preventing wrongful convictions is one that is shared by the courts, the prosecution, and defense counsel alike.

An additional question, which requires further study and analysis, is whether using pro bono efforts to meet the demand for legal representation is adequate or sustainable in the long run. Lawyers in Singapore have resisted attempts to make pro bono work mandatory.[172] Even lawyers who are actively involved in pro bono are skeptical about making pro bono mandatory.[173] Forcing unwilling lawyers to take on

169. President of the Law Society Lok Vi Ming, *Opening of Legal Year 2013: Address by the President of the Law Society*, Sing. Acad. L. ¶ 29 (Jan. 4, 2013).

170. *Yong Vui Kong v. PP* [2010] 2 SLR 192 at para. 13.

171. For an overview of this law, see Monjur Jader, Stella Tan Wei Ling, and Sabrina Kuan Ling Li, *The Use of DNA Forensic Evidence in Criminal Justice*, 29 SINGAPORE LAW REVIEW (2011) 35.

172. Joyce Lim, "Compulsory pro bono work? Some reject idea," 15 December 2012, The Straits Times, available at: http://www.asiaone.com/News/Latest%2BNews/Singapore/Story/A1Story20121212-389055.html.

173. Daniel Chia, "Pro bono work should come from the heart," 17 December 2012, The Straits Times, available at: http://www.straitstimes.com/premium/forum-letters/story/pro-bono-work-should-come-the-heart-20121217.

criminal cases on a pro bono basis may not be in the best interest of the indigent accused person. It may be time for the Singapore authorities to consider establishing a public defense office to provide legal representation to accused persons in criminal cases. It is possible to address conflict of interest concerns through institutional and personnel arrangements. By guaranteeing legal representation to indigent accused persons, the Singapore state will send an important message to the general public. If justice is to be a public good accessible to all, its pursuit cannot be left solely or primarily to the efforts of private lawyers. The state, as society's ultimate guarantor of public goods, should play a bigger role in guaranteeing access to justice. By doing so, the state will signal to the accused person that it stands alongside him or her, even as it calls him or her to account before the law.

WRONGFUL CONVICTIONS IN CANADA

*Kent Roach**†

I. INTRODUCTION

An awareness of the alarming reality of wrongful convictions in both Canada and other criminal justice systems led the Supreme Court of Canada in 2001 to overturn prior jurisprudence that allowed Canada to extradite fugitives to face the death penalty.[1] The Court decided that extradition to face the death penalty would generally violate the principles of fundamental justice in the Canadian Charter of Rights and Freedoms.[2] The Court stressed that DNA would not be available in all cases,[3] and that even "a fair trial does not always guarantee a safe verdict."[4] This case presents a challenge to all courts and policy-makers to do better in responding to the risk of wrongful convictions.[5] It is also a reminder that all criminal justice systems that use the death penalty run an unacceptable risk of executing an innocent person.

Another measure of the recognition of the reality of wrongful

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1. United States v. Burns, 2001 SCC 7(Can.). Before this decision, Canada had extradited fugitives to face the death penalty in the United States. *See* Re Ng, [1991] 2 S.C.R. 858 (Can.); Re Kindler, [1991] 2 S.C.R. 779 (Can.). Note that all Supreme Court of Canada decisions are available at http://scc.lexum.org/en/index.html.

2. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 § 7 (U.K.), *reprinted in* R.S.C. app. II, no. 44 (Can.).

3. The Court noted that many miscarriages of justice revealed by the Criminal Cases Review Commission in England and Wales did not depend on DNA testing and concluded, "[T]hese cases demonstrate that the concern about wrongful convictions is unlikely to be resolved by advances in forensic sciences, welcome as these advances are from the perspective of protecting the innocent and punishing the guilty." *Burns*, 2001 SCC 7, at ¶¶ 116.

4. *Id.* at 98. In reference to the David Milgaard case, the Supreme Court stated: "Milgaard was represented by able and experienced counsel. No serious error in law or procedure occurred at the trial. Notwithstanding the fact that the conviction for murder followed a fair trial, new evidence surfaced years later."

5. *See* Kent Roach, *The Protection of Innocence Under Section 7 of the Charter*, 34 SUP. CT. L. REV. 249 (2006) for a detailed critical evaluation of the Court's performance on various innocence issues.

convictions is that since 1986, provincial governments in Canada have made discretionary decisions to call seven different public inquiries into notorious wrongful convictions.[6] The findings and recommendations of these commissions of inquiry provide a unique and important source of information about Canadian wrongful convictions. They also provide a partially implemented reform agenda to prevent wrongful convictions. The federal government in Canada has unfortunately been resistant to implementing the recommendations of the provincial inquiries into wrongful convictions, even though criminal law and procedure is exclusively a matter of federal jurisdiction in Canada.

Canada has a legal system that is similar to the United States, with a constitutional bill of rights enforced through an adversarial system. On the other hand, the Canadian system is staffed only by appointed judges and prosecutors, and has much more centralized policing and forensic science systems than in the U.S. The Canadian system has wide rights of appeal and generous tests for the admission of fresh evidence. It has many similarities to the British system. Canada, like Australia, however, retains a system where petitions to re-open cases after appeals have been exhausted must be granted by elected politicians, unlike the independent commission in England and Wales.

The first part of this Essay will examine what is known about the number of wrongful convictions in Canada. Much depends on the somewhat murky definition of a wrongful conviction. Even if there was agreement about such a definition, the ultimate number of wrongful convictions is unknowable, given that efforts to discover wrongful convictions in Canada, as in the United States, have been focused on the most serious cases, namely those involving homicide and sexual assault, or both. That said, the Canadian experience is of interest because in recent years an increasing number of wrongful convictions arising from

6. ROYAL COMM'N ON THE DONALD MARSHALL JR. PROSECUTION, DIGEST OF FINDINGS AND RECOMMENDATIONS (1989) [hereinafter MARSHALL INQUIRY]; COMM'N ON PROCEEDINGS INVOLVING GUY PAUL MORIN, REPORT (1998) [hereinafter MORIN INQUIRY]; MANITOBA JUSTICE, INQUIRY REGARDING THOMAS SOPHONOW (2001) [hereinafter SOPHONOW INQUIRY]; ANTONIO LAMER, LAMER COMM'N OF INQUIRY PERTAINING TO THE CASES OF RONALD DALTON, GREGORY PARSONS AND RANDY DRUKEN, REPORT AND ANNEXES (2006) [hereinafter LAMER INQUIRY]; PATRICK J. LESAGE, REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL (2007) [hereinafter DRISKELL INQUIRY]; EDWARD P. MACCALLUM, REPORT OF THE INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD (2008) [hereinafter MILGAARD INQUIRY]; STEPHEN T. GOUDGE, REPORT OF THE INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY (2008) [hereinafter GOUDGE INQUIRY]. Most of the reports of these inquiries are available on the internet. On the Canadian inquiries see Kathryn Campbell, *Policy Responses to Wrongful Conviction in Canada: the Role of Conviction Review, Public Inquiries and Compensation*, 41 CRIM. L. BULL. 145 (2005); Kent Roach, *Inquiries and the Processes of Accountability*, *in* ACCOUNTABILITY FOR CRIMINAL JUSTICE 268, 268–93 (Stenning ed. 1995). Some of the Canadian inquiries have attracted international attention. See, for example, ST. OF ILL., REPORT OF GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002), which relied heavily on the Canadian Morin Inquiry.

guilty pleas have been discovered. This phenomenon suggests that the unknown number of wrongful convictions may be much larger than many have appreciated. In other words, wrongful convictions may result not only from contested trials, but from the majority of cases in which accused plead guilty.

The next part of this Essay will explore two case studies of wrongful convictions to provide an overview of the main causes of wrongful convictions, as well as the two main legal mechanisms for overturning wrongful convictions. The first case study is the Donald Marshall Jr. case. Marshall was as a young Aboriginal man from Nova Scotia, imprisoned eleven years for a murder he did not commit. The Marshall case was the subject of the first public inquiry into a wrongful conviction in Canada. The inquiry first raised awareness about wrongful convictions and it also made important recommendations about how to prevent them in the future. The second case study will examine the case of Tammy Marquardt, a young single mother from Ontario who was imprisoned for thirteen years for the murder of her two and one-half year old son, on the basis of erroneous forensic pathology expert testimony that the cause of her son's death was asphyxia.

These two case studies illustrate the two main ways that wrongful convictions are revealed in Canada. Marshall's murder conviction was overturned after the federal Minister of Justice granted his petition for a new appeal on the basis of fresh evidence and after Marshall had exhausted appeals all the way to the Supreme Court of Canada. Marquardt's wrongful conviction was overturned when the Supreme Court of Canada granted her leave to make a late and normally out of time appeal. The Supreme Court remanded the case to the Ontario court of appeal. The court of appeal then held that the murder conviction was a miscarriage of justice, in light of new forensic pathology evidence that the cause of death was not asphyxia but unascertained. A new trial was ordered, but the prosecutor withdrew charges and the trial judge apologized for what happened to Marquardt.

The two case studies demonstrate some of the strengths of the Canadian system in recognizing wrongful convictions, including a fairly liberal approach to late appeals, the availability of bail pending appeal, the reception of a wide range of fresh evidence, and the willingness of Canada's unelected prosecutors at times to agree to the reversal of convictions on the basis of new evidence. At the same time, an important weakness of the Canadian approach to reversing wrongful conviction is the maintenance of a system in which an elected politician, the federal Minister of Justice, has responsibility for re-opening cases after appeals have been exhausted. The slow, adversarial and risk adverse nature of this petition procedure will be examined. The federal

government has refused to implement recommendations made by six different public inquiries that an independent body patterned after the Criminal Cases Review Commission (CCRC) for England and Wales be created. Another weakness the two case studies reveal is the haphazard Canadian approach to the recognition of and compensation for wrongful convictions. Compensation for wrongful convictions in Canada is formally based on factual innocence, but there is no legal mechanism for determining factual innocence.

Having examined the strengths and weaknesses of the legal mechanisms for overturning wrongful convictions, this Essay will examine the main causes of wrongful convictions and the role that police, prosecutors, defence counsel, judges, and juries play in wrongful convictions. The most important reform to prevent wrongful convictions is likely the Supreme Court of Canada's 1991 recognition of a broad constitutional right of the accused to disclosure of all relevant information the prosecution possesses.[7] Many pre-1991 wrongful convictions in Canada might have been prevented had such broad rights of disclosure been respected.[8] The Court's decision was inspired by the vision of the prosecutor as an official concerned with ensuring justice, rather than winning. It also responded to the refusal of the federal government to amend the Criminal Code to require disclosure as recommended by the commission of inquiry into Marshall's wrongful conviction.

The role of the police in wrongful convictions will be examined, with attention to the findings of various inquiries about tunnel vision. The failure of the Criminal Code to regulate police interrogation and identification procedures will be critically examined. Although the Supreme Court has recognized that the dangers of false confessions should influence the admissibility of confessions,[9] there are limits to judicial regulation of interrogation procedures. For example, Canadian courts continue to allow testimony from jailhouse informers,[10] and allow prolonged stings and interrogations of vulnerable suspects that create risks of false confessions.[11] The courts also allow eyewitness

7. R. v. Stinchcombe, [1991] 3 S.C.R. 326 (Can.).

8. For examples of "historical" wrongful convictions that might have been prevented by full disclosure see Re Truscott, 2007 ONCA 575 (Can.) (overturning 1959 murder conviction in part on the basis of undisclosed material); Re Walsh, 2008 NBCA 33 (Can.) (overturning 1975 murder conviction in part on the basis of undisclosed material); Re Phillion, 2009 ONCA 202 (Can.) (overturning 1972 murder conviction in part on the basis of undisclosed material); R. v. Henry, 2010 BCCA 462 (Can.) (describing 1983 sexual assault convictions that were overturned in part on the basis of undisclosed material). Note that many of these decisions are available at http://www.canlii.org/en/.

9. R. v. Oickle, 2000 SCC 38 (Can.).

10. R. v. Brooks, 2000 SCC 11 (Can.); R. v. Hurley, 2010 SCC 18 (Can.).

11. R. v. Singh, 2007 SCC 48 (Can.); R. v. Spencer, 2007 SCC 11 (Can.); R. v. Grandinetti, 205

identifications to be made despite improprieties in obtaining such identifications[12] and concerns about the lack of probative value of courtroom identifications.[13] The courts allow police to be civilly sued for negligent investigations, but the absence of established standards makes it difficult to establish police negligence.[14] The Parliament of Canada has jurisdiction over all criminal law and procedure throughout Canada, but has unfortunately failed to regulate police interrogation and identification procedures.

Forensic evidence has played a role in many Canadian wrongful convictions and the findings of various inquiries and related judicial decisions will be examined. In 2007, the Supreme Court held in a 4–3 decision that post-hypnosis identifications should not be admitted, because of their unknown reliability and the risk of wrongful convictions.[15] This decision presents a potential for Canadian courts to place stricter reliability-based restrictions on the admissibility of expert evidence, including unreliable forensic evidence. At the same time, various inquiries have made many important recommendations about reforming the practice of the forensic sciences. Many of these recommendations have been implemented, though the tendency has been to do so on a discipline-by-discipline basis in particular provinces.[16]

The Essay will also explore the role of defence lawyers in Canadian wrongful convictions. Canada's constitutional standard of ineffective assistance of counsel, based on *Strickland v. Washington*,[17] is not particularly effective in reducing the risk of wrongful convictions. Canada has remained too wedded to restrictive rules of jury secrecy, despite some evidence that jurors have contributed to wrongful convictions.[18] The Essay will also examine the role of judges in wrongful convictions, including the performance of appeal courts in Canada and their refusal to adopt a "lurking doubt" standard for reversing convictions.[19]

The last part of this Essay will examine compensation for the wrongfully convicted, including the steps that Canada has taken to comply with Article 14(6) of the International Covenant on Civil and

SCC 5 (Can.); R. v. Sinclair, 2010 SCC 35 (Can.).

12. Mezzo v. The Queen, [1986] 1 S.C.R. 802 (Can.).

13. R. v. Hibbert, 2002 SCC 39 (Can.).

14. Hill v. Hamilton Wentworth Police, 2007 SCC 41 (Can.).

15. R. v. Trochym, 2007 SCC 6 (Can.).

16. Although criminal law and procedure is a matter of exclusive federal jurisdiction in Canada, the administration of justice is subject to provincial jurisdiction.

17. 466 U.S. 668 (1984) followed in R. v. G.D.B., 2000 SCC 22 (Can.).

18. R. v. Pan, 2001 SCC 42 (Can.).

19. R. v. Biniaris, 2000 SCC 15(Can.); R. v. W.H. 2013 SCC 22.

Political Rights with respect to compensation. There is no statute governing compensation and restrictive administrative guidelines are often ignored in practice. Although Canadian governments formally require factual innocence for compensation, there is no legal mechanism for establishing factual innocence in Canada.

II. THE NUMBER OF WRONGFUL CONVICTIONS IN CANADA

It is extremely difficult, if not impossible, to determine the number of wrongful convictions in Canada. One reason is ambiguity about what constitutes a wrongful conviction.[20] Another reason is an unwillingness of the legal system to make determinations of innocence. Yet another reason is that there is simply no way to determine how many wrongful convictions occur, but remain undetected.

Most recognized wrongful convictions in Canada, as in the United States,[21] arise in homicide or sexual assault cases, even though these cases constitute only a small percentage of all criminal cases and convictions. These identified wrongful convictions may be the proverbial tip of the iceberg in the wider universe of criminal cases. Such concerns have increased in Canada, because a number of recently

20. Wrongful convictions especially in the context of DNA exonerations and public and media discourse are sometimes limited to those who have been proven to be factually innocent. *See* BARRY SCHECK, ET AL., ACTUAL INNOCENCE (2001). In many cases, however, it may not be possible to make definitive conclusions about factual innocence. In British-influenced systems, the term miscarriage of justice includes not only the conviction of the innocent, but convictions that are improper and overturned on appeal. For various approaches to the definitional issue see Clive Walker, *Miscarriages of Justice in Principle and Practice*, *in* JUSTICE IN ERROR 37 (Walker and Starmer eds., 1993) (containing a broad definition of miscarriage of justice by including rights violations and detention under unjust laws); MICHAEL NAUGHTON, RETHINKING MISCARRIAGES OF JUSTICE BEYOND THE TIP OF THE ICEBERG (2007) (explaining that miscarriages of justice are broadly defined to include all successful appeals); Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN. ST. L. REV. 967 (2005) (containing a narrower definition of miscarriage of justice to include those who should not be detained under the liability rules of the relevant legislation); Michael Naughton, *The Importance of Innocence for the Criminal Justice System*, *in* CRIMINAL CASES REVIEW COMM'N, HOPE FOR THE INNOCENT? 31 (Naughton ed., 2010) (focusing on claims of "factual innocence"). This Essay will not enter into this important definitional debate but will, consistent with Canadian legal practice, define wrongful convictions somewhat more broadly than cases of proven factual innocence given the difficulty and impossibility of establishing factual innocence in many cases lacking DNA evidence as well as the reluctance of the Canadian system to make determinations of factual innocence. *See* Re Milgaard, [1992] 1 S.C.R. 875 (Can.); Re Truscott, 2007 ONCA 575 (Can.) (examples of courts not finding innocence in cases widely accepted as convictions of the innocent); Re Mullins-Johnson, 2007 ONCA 720 (Can.) (a criminal appeal court determining it had no jurisdiction to make determinations of "factual" innocence).

21. Samuel Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005) (4% of exonerations in cases that did not involve murder or rape); SAMUEL GROSS AND MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989-2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 18. *available at* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (18% of exonerations in cases that did not involve murder or rape).

revealed wrongful convictions stem from cases where the accused pleaded guilty.[22] The fact that those who plead guilty may be innocent suggests that the potential pool of the wrongfully convicted has increased from those who are tried and convicted to the much larger numbers who decide to plead guilty. Defendants often plead guilty in response to incentives such as reduced sentences that the state offers. They also plead guilty because of the practical difficulties of defending oneself against the state's much greater resources.

The criminal justice system in Canada does not generally recognize factual innocence. There is also no consistent definition of what constitutes a wrongful conviction. Canadian appellate courts can overturn convictions on a number of grounds, including not only error of law, but also that the guilty verdict is unreasonable, that it cannot be supported by the evidence, or that "on any ground there was a miscarriage of justice."[23] In addition, the Minister of Justice can re-open convictions after appeals have been exhausted on the ground that "there is a reasonable basis to conclude that a miscarriage of justice likely occurred."[24]

The term miscarriage of justice is not defined in legislation, but has been broadly defined by courts to include cases

> where there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of the conviction in serious doubt. In these cases, the miscarriage of justice lies not in the conduct of the trial or even the conviction as entered at trial, but rather in maintaining the conviction in the face of new evidence that renders the conviction factually unreliable.[25]

Miscarriages of justice are not limited to cases of proven or factual innocence, and include both cases where there have been unfair trials or the reliability of the conviction is in serious doubt. Justice Kaufman, in an important report advising the Minister of Justice whether to re-open a conviction, has stressed that a miscarriage of justice would occur either if an innocent person was convicted or if new evidence could reasonably

22. R. v. Marshall, 2005 QCCA 852 (Can.) (explaining a case where a mentally disabled person who was falsely accused confessed and pleaded guilty to sexual assault, but was later exonerated by subsequent DNA evidence); R. v. Hanemaayer, 2008 ONCA 580 (Can.) (explaining a case in which the conviction of an innocent person for breaking and entering, and committing assault and assault with threatening to use a weapon was overturned after a guilty plea had been entered); R. v. Sheratt Robinson, 2009 ONCA 886 (Can.); R. v. C.F., 2010 ONCA 691; R. v. C.M., 2010 ONCA 690 (Can.); R. v. Kumar, 2011 ONCA 120 (Can.); R. v. Brant, 2011 ONCA 362 (Can.) (describing cases where parents pled guilty to reduced homicide in their child's death in the face of forensic pathology evidence later shown to be unreliable).

23. Criminal Code of Canada, R.S.C. 1985, c. C-46 s.686(1).

24. *Id*. s.696.3(3)(a).

25. Re Truscott, 2007 ONCA 575, ¶ 110 (Can.).

have affected the verdict. In the latter circumstances, "it would be unfair to maintain the accused's conviction without an opportunity for the trier of fact to consider new evidence."[26] Thus convictions in Canada can be both re-opened and quashed on grounds short of proven innocence. This is a strength of the Canadian system, given the practical difficulties of establishing innocence in a definitive manner.

The issue of what constitutes a wrongful conviction in Canada is further complicated because appeal courts have decided that they lack statutory jurisdiction to make findings and declarations of factual innocence.[27] At the same time, however, they do make findings of miscarriages of justice, sometimes describe cases as wrongful convictions, and have made apologies to the accused in cases where long standing convictions have been overturned on the basis of new evidence and where the innocence of the person is generally accepted in the media and elsewhere.[28] Canadian appellate courts also enter acquittals, as opposed to ordering new trials, in cases where they are convinced that no reasonable jury could convict[29] and also in old cases where they conclude that the accused would probably be acquitted at a hypothetical new trial.[30]

Not all those who are recognized in the media or the courts as wrongfully convicted will necessarily obtain an acquittal. In the case of Romeo Phillion, the Ontario Court of Appeal, in a divided 2–1 decision, overturned his 1972 murder conviction. The Court of Appeal did not enter an acquittal because of its conclusion that a hypothetical jury at a new trial could reject his alibi evidence and still accept what he claims were his false confessions.[31] The prosecutor's subsequent decision to withdraw the murder charges, but not to offer any evidence so that Phillion could receive a not guilty verdict, was upheld as consistent with constitutional guarantees of fundamental fairness.[32] At the same time, the media and innocence projects widely acknowledge Phillion as a wrongfully convicted and innocent person. The recognition of innocence and exoneration is a political, social, and scientific process that the criminal justice system does not fully support.[33]

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26. HON FRED KAUFMAN, REPORT ON THE STEPHEN TRUSCOTT APPLICATION ¶ 164 (Sept. 2004).

27. R. v. Mullins-Johnson, 2007 ONCA 720 (Can.).

28. *Id*.

29. R. v. Hinse, [1997] 1 S.C.R. 3 (Can.); Re Walsh, 2008 NBCA 33 (Can.).

30. Re Truscott, 2007 ONCA 575 (Can.); R. v. D.R.S. 2013 ABCA 18 (Can.).

31. Re Phillion, 2009 ONCA 202, ¶ 244 (Can.).

32. R. v. Phillion, 2010 ONSC 1604 (Can.).

33. Kent Roach, *Exonerating the Wrongful Convicted: Do We Need Innocence Hearings*, *in* HONOURING SOCIAL JUSTICE 55–84 (Beare ed., 2009). For arguments about differences between legal and media understandings, see SCHIFF & NOBLES, UNDERSTANDING MISCARRIAGES OF JUSTICE: LAW, MEDIA AND THE INEVITABILITY OF CRISIS (2000). For arguments that declarations of innocence should

Although factual innocence is not generally recognized in the Canadian criminal justice system, it is formally required for payment of compensation. Federal and provincial guidelines for compensation require factual innocence, even though criminal courts do not make such findings. Section 748(3) of the Criminal Code provides that when the Governor-in-Council grants a free pardon "that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted." This provision suggests that a free pardon may be a means to recognize innocence in Canada. In 1992, the Supreme Court indicated that a free pardon would be the appropriate remedy if David Milgaard satisfied the very high standard of establishing his innocence beyond a reasonable doubt.[34] Milgaard did not satisfy this high standard at the 1992 reference. He was only exonerated and paid $10 million in compensation in 1997 after a DNA exclusion. The Milgaard case stands as a reminder of the difficulties of establishing innocence in the Canadian legal system, especially in cases where there is no DNA or other scientific evidence that is accepted as definitive.[35]

Pardons are an awkward and arguably inappropriate device to recognize an accused's innocence.[36] One problem is the connotation of pardons with mercy. Another problem is that the federal Cabinet, and not the courts, grants pardons. A public inquiry in Canada recommended three women be given free pardons because they killed in legitimate self-defence. The Cabinet, however, refused to grant the free pardons because of concerns about public safety and the lack of compassionate grounds that were not related to the question of guilt or innocence.[37]

Another measure of the number of wrongful convictions in Canada is the number of public inquiries, appointed by governments, into such

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be available in Canadian law, see Christopher Sherrin, *Declarations of Innocence*, 35 QUEENS L.J. 437 (2010).

34. Reference re Milgaard, [1992] 1 S.C.R. 866 (Can.); *see also*, Re Therrien, 2001 SCC 35, ¶ 121 (Can.) (recognizing the distinct nature of the free pardon). In the Milgaard reference, the Supreme Court recommended that Milgaard should receive a new trial. It also indicated that it would be open to the prosecutor not to proceed and to issue a prosecutorial stay and suggested that Milgaard should receive a conditional pardon if he was convicted at a new trial. The prosecutor did issue a stay while publicly maintaining his belief in Milgaard's guilt until Milgaard's 1997 DNA exoneration.

35. Before the Ontario Court of Appeal held it had no jurisdiction to make declarations of factual innocence, it decided that it could not declare Stephen Truscott to be innocent and speculated that it would be difficult to make any such declarations in the absence of DNA evidence. Re Truscott, 2007 ONCA 575, ¶ 264 (Can.) ("The appellant has not demonstrated his factual innocence. To do so would be a most daunting task absent definitive forensic evidence such as DNA. Despite the appellant's best efforts, that kind of evidence is not available.").

36. They are used less frequently in Canadian wrongful conviction cases than American cases where 68 of 250 DNA exonerations obtained a pardon. BRANDON GARRETT, CONVICTING THE INNOCENT 230 (2011).

37. Gary Trotter, *Justice, Politics, and the Royal Prerogative of Mercy: Examining the Self-Defence Review*, 26 QUEENS L.J. 353, 392 (2001).

matters. Since 1986, seven public inquiries have been appointed. These inquiries generally are headed by sitting or retired judges. They take a few years to examine and hold public hearings into wrongful convictions and to make recommendations for their prevention.[38] Public inquiries are appointed at the discretion of the provincial governments and have only been appointed in a minority of all cases in which wrongful convictions have been recognized. The inquiries are generally only held when wrongful convictions have received sustained media attention, thus creating pressures on governments to respond by appointing an inquiry.

Canada's leading innocence project, the Association in Defence of the Wrongfully Convicted (AIDWYC), at present lists forty-three cases of wrongful convictions, starting with the 1959 conviction of Stephen Truscott. Eighteen of these cases are listed as exonerations.[39] The eighteen exonerations recognized by AIDWYC are all homicide cases, except two that involved sexual assault and one that involved a break and enter. The profile of recognized wrongful convictions in Canada is closer to the profile of wrongful convictions in the United States[40] than the United Kingdom.[41] In other words, the vast majority of recognized wrongful convictions in Canada, like the United States, involve homicide or sexual assault. As such, the North American cases do not represent the wider range of cases that the CCRC has referred back to the court of appeal and the convictions that have been overturned in England and Wales.[42] The fact that recognized wrongful convictions in Canada are generally limited to homicide or sexual assault cases suggests that many wrongful convictions may remain undetected in less

38. THE ROYAL COMMISSION ON THE DONALD MARSHALL JR. PROSECUTION (1989); THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998); THE INQUIRY REGARDING THOMAS SOPHONOW (2001); THE LAMER COMMISSION OF INQUIRY PERTAINING TO THE CASES OF RONALD DALTON, GREGORY PARSONS AND RANDY DRUKEN (2006); REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL (2007); REPORT OF THE INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD (2008); REPORT OF THE INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY (2008). MARSHALL INQUIRY, *supra* note 6; MORIN INQUIRY, *supra* note 6; SOPHONOW INQUIRY, *supra* note 6; LAMER INQUIRY, *supra* note 6; DRISKELL INQUIRY, *supra* note 6; MILGAARD INQUIRY, *supra* note 6.

39. *Case Overview*, ASSOC. IN DEF. OF THE WRONGFULLY CONVICTED, http://www.aidwyc.org/AIDWYC_Cases.html (last visited Nov. 26, 2011) [hereinafter AIDWYC] (containing an international website lists 73 cases from Canada); *see also* Hans Sherrer, *Wrongfully Convicted Database Index*, FORE JUSTICE, http://forejustice.org/db/location/innocents_l.html (last visited Nov. 26, 2011).

40. *See, e.g.*, Samuel Gross et al, *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); BRANDON GARRETT, CONVICTING THE INNOCENT (2011).

41. LAURIE ELKS, RIGHTING MISCARRIAGES OF JUSTICE: TEN YEARS OF THE CRIMINAL CASES REVIEW COMMISSION (2008).

42. DNA exonerations may be slightly less important in Canadian than American profiles with 7 of the 19 exonerations recognized by AIDWYC involving DNA. *See* AIDWYC, *supra* note 39.

serious cases. Cases other than murder and sexual assault have been overturned in England and Wales, suggesting that an independent review commission in Canada might help discover more wrongful convictions.[43]

How many wrongful convictions in Canada are never detected? Even if the error rate resulting in wrongful convictions in Canada was exceedingly small,[44] there may be large numbers of undiscovered wrongful convictions, given that about 90,000 criminal court cases result in a person being sentenced to custody in Canada each year. An error rate of only 0.5% would result in approximately 450 wrongful convictions a year. Two-thirds of cases in adult criminal court result in convictions on the basis of guilty pleas, but given the recent evidence of innocent people making both irrational and rational decisions to plead guilty,[45] it cannot be assumed that all those in Canada who plead guilty actually are guilty. The prosecution terminates most of the remaining third of criminal cases. Only 3% of cases result in an acquittal,[46] suggesting that criminal trials only reject a very small percentage of all prosecutions.

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43. At the same time, some of the cases where convictions were quashed after a CCRC referral may not be accepted by all as wrongful convictions and the North Carolina Innocence Inquiry Commission which has a mandate restricted to claims of proven factual innocence has referred comparatively fewer cases than the CCRC. *See* BIBI SANGHA, ET AL., FORENSIC INVESTIGATIONS AND MISCARRIAGES OF JUSTICE 351–56 (2010); *see also* Kent Roach, *The Role of Innocence Commissions: Errors Discovery, Systemic Reform or Both?*, 85 CHI-KENT L. REV. 89 (2010).

44. *See* C.R. Huff, *Wrongful Convictions and Public Policy*, 40 CRIMINOLOGY 1 (2002) (applying a similar methodology to much larger numbers of felony convictions in the United States).

45. For an example of an irrational decision to plead guilty by a mentally disabled accused who provided a false confession see R. v. Marshall, 2005 QCCA 852 (Can.). For an example where the accused who had already served 8 months in pre-trial custody may have made a rational decision to plead guilty to break and enter and assault after being wrongfully identified in court and being offered a sentence of two years less a day see R. v. Hanemaayer, 2008 ONCA 580, ¶ 18 (Can.), where Rosenberg J.A., stated, "[T]he court cannot ignore the terrible dilemma facing the appellant. He has spent eight months in jail awaiting trial and was facing the prospect of a further six years in the penitentiary if [he] was convicted. . . . The justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence." Note, in Canada those serving sentences of two years and more serve them in federal penitentiaries and those serving less than two years serve their sentences in provincial correctional institutions. *See* R. v. Kumar, 2011 ONCA 120, ¶ 34 (Can.) (recognizing the "powerful inducement" of a guilty plea in a child death case where the prosecutor withdrew a murder charge and a father who pled guilty to criminal negligence causing death received a 90 day sentence and was able to maintain custody of his other children and avoid deportation); *see generally* Joan Brockman, *An Offer You Can't Refuse: Pleading Guilty when Innocent*, 56 CRIM. L.Q. 116 (2010).

46. In total, the adult criminal courts dispose of almost 400,000 cases a year involving 1.1 million charges. Jennifer Thomas, *Adult Criminal Court Statistics 2008/2009*, 30 JURISTAT. 4 (2010), *available at* http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11293-eng.pdf. More recent data has found just under 86,000 cases resulting in custody in Canada in a year but that the median custodial sentence was 30 days. Mia Dauvergne *Adult Criminal Court Statistics 2010/2011*, 28 (2012), *available at* http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11646-eng.pdf. Most people serving a sentence of a few months or less would not have the incentive to contest a wrongful conviction.

In summary, there is an increasing recognition of the reality of wrongful convictions in Canada, with many cases being recognized as wrongful convictions. A number of recent wrongful convictions, stemming from guilty pleas, suggest that the incidence of wrongful convictions among the majority of accused who pled guilty may be higher than previously appreciated. The Canadian criminal justice system only acquits about 3% of cases that are prosecuted, again suggesting that the criminal trial only infrequently protects the innocent. It is simply impossible to determine how many wrongful convictions occur but remain undetected. Most discovered wrongful conviction cases in Canada, as in the United States, are homicide or sexual assault cases and generally require much time and pro-bono assistance to reveal. This again suggests that there may be many undiscovered wrongful convictions in Canada.

III. TWO CASE STUDIES OF WRONGFUL CONVICTIONS

The following case studies examine one of the oldest recognized wrongful conviction in Canada—the 1971 conviction of a seventeen year old Aboriginal man Donald Marshall Jr. for a murder that he did not commit, and one of the most recently recognized wrongful convictions—the 1995 murder conviction of a twenty-one year old woman, Tammy Marquardt, for the killing of her son. Marshall served eleven years in jail and Marquardt served thirteen years in jail.

A. The Wrongful Conviction of Donald Marshall Jr.

Donald Marshall Jr. was convicted in 1971 of the murder of Sandy Seale in the Nova Scotia community of Sydney. The seventeen year-old Aboriginal man was known to the local police and the lead investigator badgered three teenaged witnesses until they eventually testified at Marshall's preliminary inquiry that they saw Marshall stab Seale in a park. In reality, Roy Ebsary had stabbed both Marshall and Seale. None of the witnesses' prior inconsistent statements that they had not seen Marshall stab Seale were disclosed to the accused. At the time, there was no right to disclosure and disclosure was voluntary. The prosecutor in the case often provided disclosure, but Marshall's lawyers did not even ask for disclosure. Two of the witnesses attempted to recant their false testimony at trial, but the judge disallowed full cross-examination about why one witness had recanted out of court. The judge seemed to assume that the recantation may have been related to threats from Marshall, even though Marshall had been denied bail and was imprisoned. Another witness at first declined to testify at trial that

Marshall had stabbed Seale, but eventually did so after his prior testimony to that effect at a preliminary inquiry was read to him as a prior inconsistent statement.

Marshall testified at his trial before an all-white, all-male jury that a man who fit Ebsary's description had made racist remarks about both Marshall and Seale, who was African-Canadian, and stabbed them both. Marshall was not allowed to ask prospective jurors questions about racial bias, as he would be now,[47] and one of the jurors explained the verdict later to a reporter through racist assumptions.[48] The commission of inquiry that subsequently examined Marshall's wrongful conviction did not examine the jury's verdict, despite the fact that the conviction depended on them finding the testimony of witnesses, who reluctantly lied and said they saw Marshall stab Seale, more credible than Marshall's testimony that he did not stab Seale, and the possibility that the jury might have been influenced by irrelevant evidence such as Marshall's "I hate cops" tattoo and the testimony of Seale's grieving parents.

Marshall's own lawyers, though well paid by Marshall's Indian band, conducted no independent investigation and may have believed that Marshall was guilty, in part because Marshall was Aboriginal.[49] Marshall was also not well represented at his first appeal, with his lawyers not raising legal errors, such as the prevention of a full cross-examination of a recanting witness, errors that the inquiry subsequently found would have prevented his wrongful conviction. Marshall's lawyers also unsuccessfully argued to the court of appeal that the lesser offence of manslaughter should have been left to the jury,[50] something that was inconsistent with Marshall's constant claims of innocence. A three-judge panel of the Nova Scotia Court of Appeal unanimously dismissed Marshall's appeal, and the Supreme Court of Canada subsequently refused to grant leave to appeal.

Ten days after Marshall's conviction, James McNeil told the police that his companion Ebsary, and not Marshall, had killed Seale. Unfortunately, this new evidence known to both police and prosecutors was not disclosed to the accused at the time. It was, however, eventually used as new evidence to reverse Marshall's conviction. Because his appeals had been exhausted, Marshall had to petition the federal Minister of Justice for the mercy of the Crown. He obtained an order for a new appeal in 1982, but only after the Chief Justice of Nova Scotia

47. R. v. Williams, [1998] 1 S.C.R. 1128 (Can.).

48. Kent Roach, *Inquiries and Processes of Accountability*, *in* ACCOUNTABILITY FOR CRIMINAL JUSTICE 268, 268–93 (Stenning ed., 1995).

49. MARSHALL INQUIRY, *supra* note 6, at 77.

50. R. v. Marshall, (1972) 8 C.C.C. (2d) 329 (Can.).

had expressed reservation about hearing the case as a simple reference, which would have meant that Marshall would not bear the burden of proof or face the possibility of a new trial.[51] Marshall was granted bail pending this new appeal.

In 1983, the Nova Scotia Court of Appeal quashed Marshall's murder conviction after considering new evidence, including McNeil's testimony that he was with Ebsary when Ebsary stabbed Seale. The prosecutor in the case agreed that an acquittal should be entered, though he was pressured by his superiors not to do so. At the same time, the court of appeal blamed Marshall for his wrongful conviction. The court of appeal stated that Marshall had perjured himself by not admitting that he and Seale had intended to rob Ebsary and concluded that "any miscarriage of justice is, however, more apparent than real."[52] Although legal errors played a role, Marshall's wrongful conviction was factually based. Both the jury that convicted him and the Court of Appeal that eventually overturned his conviction simply refused to believe that Marshall was telling the truth, despite the existence of other evidence that supported the truth of his statements.

The inquiry subsequently criticized the court of appeal for defending the justice system at Marshall's expense and for allowing a person who had been attorney general and ultimately responsible for Marshall's prosecution to sit as a judge on the appeal. The inquiry, however, lost a court battle to have the judges on the reference explain themselves on the grounds that such questioning would interfere with judicial independence.[53] The five court of appeal judges who sat on the reference were subsequently found by the Canadian Judicial Council, composed of judges, to have engaged in misconduct, but not misconduct that warranted their removal from the bench.[54] Marshall attempted to sue the police, but his case was dismissed when he could not post security for costs. He subsequently received $225,000 plus interest in compensation.

A 1989 inquiry into Marshall's wrongful conviction contributed to his official exoneration, with a report that included a refutation of the court of appeal's conclusion that Marshall had been engaged in robbery. The inquiry recommended that the Criminal Code be amended to require the prosecution to disclose useful information to the accused. Parliament did not act, but the Supreme Court cited the Marshall case and the inquiry's

51. MARSHALL INQUIRY, *supra* note 6, at 115. Governments in Canada can refer questions to courts in part because of the absence of a case and controversy requirement in the Canadian constitution.

52. R. v. Marshall, (1983) 57 N.S.R. (2d) 286 (Can.).

53. Mackeigan v. Hickman, [1989] 2 S.C.R. 796 (Can.).

54. C.J. MCEACHERN, ET AL., REPORT TO THE CANADIAN JUDICIAL COMMITTEE (1990), *available at* http://cjc-ccm.gc.ca/cmslib/general/conduct_inq_HartJonesMacdonald_ReportIC_199008_en.pdf. For articles, many that are critical of this decision, *see* The Symposium, 40 U. NEW BRUNSWICK L.J. 262 ff. (1991).

report in a 1991 case that created a broad constitutional right for the accused to receive disclosure of all relevant and non-privileged information in the prosecution's possession.[55] The inquiry also recommended that an appointed Director of Public Prosecution supervise all prosecutions and that the law school in Nova Scotia promote the training of both Aboriginal and African-Canadian minorities, both reforms that were subsequently implemented. The inquiry also recommended that an independent review mechanism be available to re-investigate alleged cases of wrongful convictions, but this recommendation has not been implemented.

B. The Wrongful Conviction of Tammy Marquardt

Tammy Marquardt, a twenty-one year-old woman and single mother, was convicted of murder in 1995 for killing her two and one-half year old son. Her son had a history of epileptic seizures and had, at Marquardt's request, temporarily been placed in the custody of child welfare officials. Marquardt consistently denied killing her son. Marquardt's lawyer attempted to question prospective jurors about whether they might be prejudiced by the allegations of child killing, but the trial judge did not allow such questions to be put to prospective jurors, concluding that he was "not persuaded that there is a reasonable potential for the existence of partiality in the minds of the proposed jurors based upon all of the material before the court including the very nature of the charge itself."[56] Potential jurors are not as readily questioned in Canada as in the United States about whether they may be biased against the accused.

The main evidence at trial against Marquardt came from the testimony of Dr. Charles Smith, a pathologist who testified that the cause of her son's death was asphyxia and cited petechial haemorrhages and brain swelling as evidence in support of his opinion.[57] The defence called no medical evidence to challenge this testimony, but argued that the child's death might have been caused by an epileptic seizure.

Forensic pathologists subsequently found flaws in Dr. Smith's work in this, and other child death cases. They found his work flawed in twenty of forty child death cases that they reviewed, and a subsequent

55. *Stinchcombe*, [1991] 3 S.C.R. 326.

56. R. v. Marquardt (1995), 44 C.R. (4th). 4th 353, ¶ 910 (Ont.Ct. (Gen.Div.)).

57. Dr. Smith testified "his findings were "consistent with" suffocation with a soft object, a pillow, a plastic bag or if someone held his nose and mouth closed and he was suffocated that way. He discounted seizure as a cause of death as he had no evidence "of that at all." In particular, he testified that "you don't have evidence of asphyxia" from sudden and unexpected death in epilepsy (SUDEP). However, he allowed that he was not an expert on this condition and the opinion of a pediatric neurologist would be better than his opinion on that issue. R. v. Marquardt, 2011 ONCA 281, ¶ 9 (Can.).

inquiry found that Smith's work was not adequately supervised, and frequently not subject to adequate adversarial challenge in court. In Marquardt's case, the reviewing forensic pathologists found that asphyxia was not supported in the evidence as the cause of death, which in their view was unascertained, with a fatal epileptic seizure not being excluded. The inquiry also found that Dr. Smith saw his role as supporting the prosecution, as opposed to providing impartial expert evidence. Dr. Smith also made inappropriate references to his personal experience and irrelevant, but prejudicial, factors about the families of deceased children and used inappropriate language when he testified.[58]

Marquardt appealed her conviction to the Ontario Court of Appeal, but the appeal was dismissed in 1998. The appeal did not challenge Dr. Smith's evidence but rather suggested that the trial judge erred by not relating the evidence to a possible manslaughter verdict. This ground of appeal implicitly suggested that Marquardt might be guilty, but should have been convicted of a lesser form of homicide. This feature of both the Marquardt and Marshall cases suggests that defence lawyers may not have been as attentive to their client's claims of innocence as they should. As in the Marshall case, the manslaughter argument raised by Marquardt's lawyer on appeal was not successful, with the court of appeal correctly stressing that the only defence raised at trial was that her son died through natural causes or accident.[59]

In a number of other cases involving Dr. Smith, parents accepted plea bargains to lesser forms of homicides to avoid the mandatory sentence of life imprisonment that follows a murder conviction in Canada.[60] Both with respect to guilty pleas and appeals, the Canadian criminal justice system does not provide sufficient protections for accused to persist in

58. GOUDGE INQUIRY, *supra* note 6, at 162, 183, 188.

59. The Court of Appeal concluded that the manslaughter "verdict was tenuous . . . . The only defence advanced at trial was accident. The trial judge properly directed the jury that if they had a reasonable doubt that the death was accidental, the appellant was entitled to an acquittal. The appellant, in her extensive and detailed testimony, gave no evidence capable of supporting a manslaughter verdict either on the basis of a loss of control or excessive use of force to quiet the child. The appellant denied being angry, denied being under any special stress due to her relationship with her husband, denied any need to discipline the child, denied having had a black-out, in short denied being in any kind of mental state that would support a lack of intent. There was no other physical or circumstantial evidence to suggest that the appellant lacked the requisite intent at the time of the death. On the other hand, the medical and other evidence strongly suggested at least an intent to cause bodily harm that the appellant knew was likely to cause death and was reckless whether death ensued or not. It was sufficient that the intent and the act of suffocation coincided at some point." R. v. Marquardt, (1998) 124 C.C.C. 3d 375, ¶ 6–7 (Can.).

60. For examples of guilty pleas being subsequently overturned in cases involving Dr. Smith see R. v. Sheratt Robinson, 2009 ONCA 886 (Can.); R. v. C.F., 2010 ONCA 691 (Can.); R. v. C.M., 2010 ONCA 690 (Can.); R. v. Kumar, 2011 ONCA 120 (Can.); R. v. Brant, 2011 ONCA 362 (Can.) (parents pled guilty to reduced homicide in the child's death in the face of forensic pathology evidence later shown to be unreliable).

claims of innocence. Both Marshall and Marquardt would have spent less time in jail if they had pled guilty to manslaughter, even though both were innocent. In some respects, the Canadian criminal justice system penalizes accused for persisting in claims of innocence.

Marquardt never appealed to the Supreme Court of Canada because she had been denied legal aid funding. In 2009, after the revelations and inquiry into Dr. Smith, she appealed to the Supreme Court with notice of fresh evidence relating to the unreliability of Dr. Smith's testimony at trial. In a short summary judgment, the Supreme Court of Canada granted the leave to appeal out of time and remanded the case to the Ontario Court of Appeal to consider the fresh evidence. The prosecution did not oppose this motion.[61]

A judge of the court of appeal granted Marquardt bail, pending the hearing of appeal, thus releasing her from thirteen years of imprisonment.[62] In 2011, the Ontario Court of Appeal considered the fresh medical evidence and found that it "shows that Dr. Smith made several significant errors that could have misled the jury and led to a miscarriage of justice."[63] The errors included finding asphyxia on the basis of non-specific petechial haemorrhages and stating that the autopsy excluded epilepsy as a cause of death. The court of appeal held that in light of the new evidence, the conviction was a miscarriage of justice. It did not acquit Marquardt, but instead ordered a new trial, in part because it did not accept expert testimony that epilepsy was the cause of death, as it was outside the scope of expertise of two pediatric neurologists who gave portions of the fresh evidence.[64] The Crown subsequently withdrew the murder charge with the trial judge expressing regret for what had happened.[65] The government has offered $250,000 in compensation,[66] but Marquardt is understandably seeking more, given both her thirteen years in prison and her loss of contact with two other sons who the state subsequently put up for adoption after she was wrongfully convicted.

61. Tammy Marie Marquardt v. Her Majesty the Queen, 2009 Can LII 21729 (SCC), *available at* http://canlii.ca/t/23dkg.

62. She was granted parole at one time, but it was subsequently revoked.

63. Marquardt, 2011 ONCA 281, ¶ 16.

64. *Id.* ¶ 21.

65. Tracey Tyler, *Murder Charges Withdrawn Against Mother Wrongfully Convicted of Killing Son, 2*, TORONTO STAR, June 7, 2011, *available at* http://www.thestar.com/news/crime/2011/06/07/murder_charges_withdrawn_against_mother_wrongfully_convicted_of_killing_son_2.html.

66. Kevin Connor, *Wrongfully Accused Mom to Get $250,000*, OTTAWA SUN, Aug. 11, 2010, *available at* http://www.ottawasun.com/news/Canada/2010/08/10/14982991.html.

IV. THE LEGAL MECHANISMS FOR OVERTURNING OLD CONVICTIONS ON THE BASIS OF NEW EVIDENCE

The above case studies represent the two major methods for overturning wrongful convictions in Canada. In Marshall's case, a new appeal was ordered as a result of a petition to the federal Minister of Justice and Marshall was granted bail pending that appeal. In Marquardt's case, the Supreme Court granted an appeal out of time and remanded the case back to the Ontario Court of Appeal to hear fresh evidence. Marquardt was granted bail pending this appeal which considered the fresh evidence and overturned a conviction. The Court of Appeal ordered a new trial but the prosecutor withdrew the charge.

Canadian courts are relatively generous in allowing both appeals out of time and new evidence to be admitted, especially in cases where the prosecutor consents to such procedures. This procedure has been used with the prosecutor's consent to reverse convictions, often from guilty pleas, in a series of child death cases where new evidence demonstrated that the conviction based on the evidence of pathologist Charles Smith was flawed. Although due diligence is a formal prerequisite for the admission of new evidence, Canadian courts have consistently held that this requirement should not stand in the way of a correction of a miscarriage of justice.

Another important mechanism for recognizing wrongful convictions in Canada is the ability of courts to grant bail to a person pending a new appeal or even pending a petition to the Minister of Justice to order a new trial or a new appeal.[67] For many of the wrongly convicted in Canada, such bail decisions are their first breath of freedom and their first official recognition that they have been wrongfully convicted.

A. Appeals

Canada has a unitary criminal court system, but one that has fairly wide appeal rights that can assist in the overturning of wrongful convictions. The accused has a right to appeal to the provincial court of appeal on any ground that raises a question of law alone. The accused can also appeal questions of mixed law and fact and other matters with the leave of the court of appeal, which generally hears appeals in panels

67. Bail pending appeal is governed by s.679 of the Criminal Code and can be ordered in cases where the ground of appeal is not frivolous and detention is not necessary in the public interest. For an example of the use of this power in a miscarriage of justice case see R. v. Parsons, (1997) 124 C.C.C.(3d), 92 (Can. Nfld. C.A.). For examples of bail being granted pending the Minister of Justice's decision whether to re-open a case and order a new trial or a new appeal see R. v. Phillion, [2003] O.J. No. 3422 (Can. Ont. Sup. Ct. of Just.); R. v. Driskell, 2004 MBQB 3 (Can.); R. v. Unger, 2005 MBQB 238 (Can.); Ostrowski v. The Queen et al., 2009 MBQB 327 (Can.).

of three judges.[68] The appeal court can assign publicly funded counsel to assist in the appeal when it is desirable in the interests of justice.[69] The accused has a right to an additional appeal to the Supreme Court of Canada on any question of law on which an appeal court judge dissents.[70] The Supreme Court can also hear appeals on matters of national importance, but denies the vast majority of such applications without written reasons. Various rules of courts provide time limits for the accused to give notice of appeal, but appeal courts have a statutory right to extend time[71] and have done so after decades of delay in cases where the accused presents fresh evidence as a reason for a delayed appeal. In cases involving possible wrongful convictions, appeal courts have also granted their discretion to hear moot appeals involving dead accused.[72] Canada does not have a tradition found in the United States of statutes of limitations barring appeals or the admission of fresh evidence.

The court of appeal can allow an appeal from the conviction on the basis of 1) legal error that is not harmless[73] or 2) the conviction is unreasonable or cannot be supported by the evidence or 3) any ground that there was a miscarriage of justice.[74] The Ontario Court of Appeal has characterized the accused's appeal rights, combined with the power to admit fresh evidence and hear evidence from witnesses under s.683 of the Criminal Code "in the interests of justice," as "broad rights of appeal." It has stated that "the broad rights of appeal, the power to receive fresh evidence, and the court's wide remedial powers are all designed to maximize protection against wrongful convictions."[75] This statement was made in the course of a ruling in which the accused sought disclosure of material related to Dr. Smith, a pathologist whose faulty work led to the appointment of the Goudge Inquiry and the recognition of a number of wrongful convictions. The Supreme Court

68. Criminal Code of Canada, R.S.C. 1985, c.C-46 s.675.

69. *Id*. s.684. Neither this section nor the Charter provides an automatic right to have assistance of state funded counsel. R. v. Robinson, (1989), 51 C.C.C.3d 452 (Alta.C.A.); R. v. Baig (1990), 58 C.C.C.3d 156 (B.C.C.A.), leave refused 60 C.C.C.3d vi (S.C.C.).

70. Criminal Code of Canada, R.S.C. 1985, s.691.

71. Criminal Code of Canada, R.S.C. 1985, s.678.

72. R. v. Smith, 2004 SCC 14, ¶47 (Can.) (discussing R. v. Jette, (1999) 141 C.C.C.3d 52 (Can. Que. C.A.) in which an appeal was allowed and a stay of proceedings entered in a case where fresh evidence was admitted suggesting that the accused's statements had been extracted involuntarily and that perjured testimony about the accused making an incriminating statement to an informant had been introduced at trial).

73. In what is commonly called "the proviso," the Court of Appeal can dismiss an appeal under s.686(1)(b)(iii) in cases where, even though the trial judge made an error of law, the Court of Appeal "is of the opinion that no substantial wrong or miscarriage of justice has occurred."

74. Criminal Code of Canada, R.S.C. 1985, s.686(1)(b)(iii).

75. R. v. Trotta (2004), 23 C.R. (6th) 261, ¶ 24 (Ont. C.A.).

eventually ordered a new trial in the *Trotta* case, despite the Crown's argument that a conviction could be sustained without Dr. Smith's testimony given the pattern of child abuse. The Supreme Court held that it was:

> [N]either safe nor sound to conclude that the verdicts on any of the charges would necessarily have been the same but for Dr. Smith's successfully impugned evidence. To attempt at this stage to insulate the effect of Dr. Smith's evidence on one count from its possible effect on the others would amount to an unwarranted exercise in appellate speculation.[76]

The Court ordered a new trial, but one of the accused was convicted of manslaughter at the retrial. The Supreme Court's concern about the safety of the first guilty verdict may respond to criticisms that, unlike in Britain or Australia, the Canadian Criminal Code does not specifically authorize appeals due to concerns about the safety of verdicts.

Justice Kaufman, in his commission of inquiry report on the Guy Paul Morin case, recommended that consideration should be given to changing the powers of the court of appeal so that they could "set aside a conviction where [there exists] a 'lurking doubt' as to[] guilt . . . ."[77] He found that appellate courts implicitly, and in a few cases explicitly, considered the safety of verdicts when determining whether a conviction was reasonable or cannot be supported by the evidence. He stressed the following:

> [A]n appellate court can overestimate the importance of seeing or hearing the witnesses. A substantial part of credibility is the internal consistency of a witnesses' testimony (however well or badly that witness presents) and its consistency with other known facts. If the record produces a lurking doubt or a sense of disquiet about the verdict of guilt, should an appellate court not be empowered to act upon that sense after fully articulating those aspects of the record that have produced that doubt? No doubt, many appellate judges who sense a potential injustice do this—sometimes indirectly—through their determination of whether there was a legal error at trial. With respect, a disquieting conviction may compel an appeal to be allowed on the most esoteric misdirection relating to a point of law that only legal scholars might appreciate. It is well arguable that a slightly broadened scope for appellate intervention permits the Court to do directly what some judges now do indirectly. It recognizes the most important, though not exclusive, function of a criminal appellate court: to

76. R. v. Trotta, 2007 SCC 49, ¶ 14(Can.). This decision reversed an earlier one of the Ontario Court of Appeal that had upheld the conviction on the basis that "there was cogent, if not overwhelming, evidence that Paolo was a battered child and that Marco was his abuser." R. v. Trotta, (2004), 190. C.C.C. (3d) 199, ¶ 31 (Can.) and on the basis that the Crown had provided overwhelming evidence that the child was abused during his eight month life and that "there will never be a perfect trial." *Id*. at ¶ 98.

77. MORIN INQUIRY, *supra* note 6, at 1176.

> ensure that no person is convicted of a crime that he or she did not commit.[78]

Despite this recommendation, s.686 of the Criminal Code has not been amended to allow convictions to be reversed on the basis of a lurking doubt or even the British ground of safety, though courts of appeal continue, as in the *Trotta* case, to make reference to the safety of convictions.

In *R. v. Biniaris*,[79] the Supreme Court was asked to adopt the lurking doubt standard. In that case, the Court upheld a murder conviction, even though the Crown pathologist changed her testimony after having consulted with the defence pathologists to the effect that the accused's actions in stomping on the deceased did not cause the victim's death. Justice Arbour for the Court rejected the lurking doubt standard, stating:

> It is insufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence. This "lurking doubt" may be a powerful trigger for thorough appellate scrutiny of the evidence, but it is not, without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of a jury. In other words, if, after reviewing the evidence at the end of an error-free trial which led to a conviction, the appeal court judge is left with a lurking doubt or feeling of unease, that doubt, which is not in itself sufficient to justify interfering with the conviction, may be a useful signal that the verdict was indeed reached in a non-judicial manner. In that case, the court of appeal must proceed further with its analysis.[80]

The Court did, however, state that appellate courts should examine convictions "through the lens of judicial experience which serves as an additional protection against an unwarranted conviction."[81] The Court also indicated that an appellate court could overturn a conviction as unreasonable on the basis of a mix of objective and subjective factors.

Appellate courts are more likely to find convictions unreasonable in the majority of Canadian cases where a judge alone tries the accused and the appeal court can review the trial judge's reasons for convicting,[82] as

78. *Id*. at 1187–88.

79. 2000 SCC 15.

80. *Id*. at ¶ 38.

81. *Id*. at ¶ 40.

82. *Compare*, R. v. Burke, [1996] 1 S.C.R. 474 (Can.) (reversing a historical indecent assault conviction on the basis of the judge's reasoning), *with* R. v. Francois, [1994] 2 S.C.R. 827 (Can.) (upholding a historical rape conviction rendered by a jury). The Supreme Court has recently affirmed that judge's verdicts will be subject to more searching reasonableness review because "judges, unlike juries, give reasons for their findings which the appellate court may review and consider as part of its reasonableness analysis. However, this expanded reasonableness review entered by trial judges do not apply to reasonableness review of a jury verdict." R. v. W.H., 2013 SCC 23, ¶ 26. The differences of appellate review of judges alone and jury convictions was narrowed in R. v. Beaudry, 2007 SCC 5 (Can.) where the majority of the Court upheld a judge alone conviction stressing that the issue was

opposed to the minority of cases in Canada which are tried before a judge and jury.[83] The Supreme Court has confirmed its deference to jury verdicts when it recently held that an appellate court had erred in reversing a jury's conviction in a historical sexual assault because of the judges' concerns about inconsistencies in the complainant's account of the case. The Court specifically warned that the reviewing court must not "act as a '13th juror' or simply give effect to vague unease or lurking doubt based on its own review of the written record or find that a verdict is unreasonable simply because the reviewing court had a reasonable doubt based on its review of the record."[84] The Court recognized that "appellate review for unreasonableness of guilty verdict is a powerful safeguard against wrongful convictions" but nevertheless insisted that it "must be exercised with great deference to the fact-finding role of the jury. Trial by jury must not become trial by appellate court on the written record."[85]

Another ground for allowing appeals from convictions is "on any ground that there was a miscarriage of justice." "In every case, if the reviewing court concludes that the error, whether procedural or substantive, led to a denial of a fair trial, the court may properly characterize the matter as one where there was a miscarriage of justice."[86] In such cases a new trial is the minimal remedy that the appellate court must order. There may also be a miscarriage of justice where the trial judge misapprehended evidence on matters of substance rather than detail, but only if such matters are material to the verdicts and the error plays "an essential part not just in the narrative of the judgment but 'in the reasoning process resulting in a conviction.'"[87]

The miscarriage of justice ground for allowing an appeal is of particular importance in cases where new evidence is admitted on appeal. In its *Truscott Reference*,[88] the Ontario Court of Appeal commented that on appeals that consider fresh evidence:

> [S]ection 686(1)(a)(iii) is the only provision that is potentially relevant. It allows an appellate court to grant an appeal 'on any ground there was a

whether the conviction was reasonable, not the trial judge's reasons. This case is a step backward in overturning wrongful convictions because as the minority emphasized it is dangerous to uphold a conviction based on bad or illogical reasoning.

83. Accused in Canada only have a constitutional right under s.11(f) of the Charter to be tried before a jury if they face five years imprisonment or more and even in such circumstances most accused elect under the Criminal Code to be tried by judge alone. *See* M.L. Friedland & Kent Roach, *Borderline Justice: Choosing Juries in the Two Niagaras*, 31 ISRAEL L. REV. 120 (1997).

84. R. v. W.H., 2013 SCC 22 at para 27. (Can.).

85. *Id.* at ¶ 32.

86. R. v. Khan, 2001 SCC 86, ¶ 27 (Can.).

87. R. v. Loher, 2004 SCC 80, ¶ 2 (Can.).

88. 2007 ONCA 575 (Can.).

> miscarriage of justice'. This power can reach virtually any kind of error that renders the trial unfair in a procedural or substantive way. The section has been applied on appeals where there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of the conviction in serious doubt. In these cases, the miscarriage of justice lies not in the conduct of the trial or even the conviction as entered at trial, but rather in maintaining the conviction in the face of new evidence that renders the conviction factually unreliable.[89]

Appeals on grounds of miscarriages of justice in Canada thus allow convictions to be quashed both on the basis that the trial was not fair and on the basis that new evidence places the reliability of the conviction in serious doubt. This decision demonstrates the flexibility of the legal term miscarriage of justice and its ability to include, but not be limited to, cases of factual innocence.

The most common grounds of appeal are not, however, that the verdict is unreasonable or constitutes a miscarriage of justice, but rather that trial judges erred in law in either their reasons or instructions to juries. Even if an appeal court finds an error of law, it can sustain a conviction if it concludes "no substantial wrong or miscarriage of justice has occurred."[90] In other words, the trial judge's errors of law can be held to be harmless to the guilty verdict. The proviso at least requires the appellate court to address its mind to the question of whether there has been a miscarriage of justice. The proviso or harmless error rule can be applied to even major errors of law, but "only if it is clear that the evidence pointing to the guilt of the accused is so overwhelming that any other verdict but a conviction would be impossible."[91] A new trial should be ordered after a finding of an error of law unless there is no reasonable possibility that the verdict would have been different.[92] In cases where the error of law was the exclusion of exculpatory evidence, any reasonable effect that the evidence could have had on the jury should be considered.[93] In cases where the error of law was the inclusion of inadmissible evidence, the appeal should be allowed and a new trial ordered if there is any possibility that a trial judge would have had a reasonable doubt about the accused's guilt on the basis of the admissible evidence.[94]

In a recent case, the Supreme Court split 5-4 and held that the trial judge's admission of prejudicial investigative hearsay without a limiting

89. *Id.* at ¶ 110.

90. Criminal Code of Canada, R.S.C. 1985, c. C-46 s.686(1)(b)(iii).

91. Khan, 2001 SCC 86, ¶ 31.

92. R. v. Bevan, [1993] 2 S.C.R. 599 (Can.).

93. R. v. Wildman, [1984] 2 S.C.R. 311 (Can.).

94. R. v. S (P.L.), [1991] 1 S.C.R. 909 (Can.).

instruction to the jury was a harmless error in a case where the accused alleged that the police had inadequately investigated an alternative hypothesis that loan sharks had attempted to murder the victim. The majority held that the admission of the investigating officer's opinion that the accused was guilty did not result in a substantial wrong or miscarriage of justice. In contrast, the dissenting judges concluded that the Crown had not discharged its onus that there was no reasonable possibility that the legal error did not make a difference to the outcome of the case.[95] Unfortunately, the Court did not advert to American studies finding that appeal courts had found legal errors to be harmless in 38% of cases of DNA exonerees.[96] There is a danger that appeals are not as effective as they should be in detecting wrongful convictions.

The prosecutor in Canada can appeal an acquittal, but only on the basis that the acquittal was based on an error of law.[97] In at least one case, a prosecutor's successful appeal from an acquittal resulted in a wrongful conviction. In that case, the Crown successfully appealed Guy Paul Morin's original acquittal of murder on the basis that the trial judge had erred in law by inviting the jury to apply the reasonable doubt standard to each piece of evidence.[98] The Commission of Inquiry into Morin's wrongful conviction recommended that the Criminal Code be amended to require the Crown to demonstrate that the verdict likely would have been different had the trial judge not made the error of law.[99] The Supreme Court has subsequently held that an error of law must be reasonably thought to have a material bearing on the acquittal. That said, the prosecutor does not have to establish that the verdict would necessarily have been different to receive an order for a new trial after a successful prosecutorial appeal from an acquittal.[100] The relatively broad appeal rights enjoyed by accused in Canada are balanced by the ability of the prosecutors to appeal acquittals.

B. Fresh Evidence on Appeal

Section 683 of the Criminal Code provides courts of appeal with broad powers to consider fresh evidence. The court of appeal can also order production of things and provide for the examination and cross-

95. R. v. Van, 2009 SCC 22 (Can.).

96. BRANDON GARRETT, CONVICTING THE INNOCENT 201 (2011) (involving 62 of 165 cases with written decisions); *See also* Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 108 (2008) (an earlier study finding 32% of exonerees).

97. Criminal Code of Canada, R.S.C. 1985, c. C-46 s.676.

98. R. v. Morin, [1988] 2 S.C.R. 345 (Can.).

99. MORIN INQUIRY, *supra* note 6, at 1188.

100. R. v. Graveline, 2006 SCC 16 (Can.).

examination of witnesses before the court of appeal or other body. The test for the admission of fresh evidence is that the evidence must:

> (1) bear on a decisive or potentially decisive issue;
> (2) the evidence must be credible;
> (3) the evidence, if believed, could affect the result; and
> (4) the evidence should generally not have been obtainable at trial by due diligence.[101]

Courts have consistently held that the due diligence requirement should not be applied as strictly in criminal as in civil cases. The Supreme Court made clear that the due diligence requirement was not essential and must yield where a miscarriage of justice would otherwise result.[102] In a recent case, the Supreme Court allowed the accused to admit as fresh evidence a forensic dentist's opinion that an injury to an accused convicted of sexual assault was not a bite mark, even though the accused conceded that the new evidence could have been obtained by due diligence at trial. The Court stressed that "it would be unsafe to uphold the convictions" given the closeness of the case and the fact that a police officer was allowed at trial to provide his opinion that the injury was the result of a bite mark.[103]

The court of appeal can also appoint a special commissioner to inquire and report back on matters, including scientific matters that cannot "conveniently be inquired into before the court of appeal."[104] This provision is an interesting inquisitorial aspect of the appellate process in Canada that has been used in at least one wrongful conviction case.[105] The addition of inquisitorial aspects to the adversary system could in some cases help prevent or remedy wrongful convictions by demonstrating an official commitment that the state should take efforts to discover the truth.[106]

C. DNA

DNA has played a decisive role in revealing many wrongful convictions in Canada, particularly those involving hair analysis and sexual assault or murder. At the same time, however, the Supreme Court of Canada, in holding that it would be unconstitutional to extradite a person without assurances that the death penalty would not be applied,

101. Manhas v. The Queen, [1980] 1 S.C.R. 591 (Can.).

102. G.D.B, 2000 SCC 22, ¶ 37.

103. R. v. J.A.A, [2011] 1 S.C.R 628, ¶14(Can.).

104. Criminal Code of Canada, R.S.C. 1985, c. C-46 s.683(1)(e).

105. R. v. Nepoose, [1992] 125 A.R. 28, 29 (Can.).

106. Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. INT'L L. & COM. REG. 387, 430–32 (2010).

has rightly stressed that DNA will not be available in many potential wrongful conviction cases.[107] DNA evidence can reveal flaws in the criminal justice system that result in wrongful convictions, but it is not a panacea for the problems of wrongful convictions.

The Criminal Code allows judges to grant warrants to obtain DNA samples and to collect DNA samples from an expanding list of convicted offenders.[108] There are provisions that limit the use of such DNA samples to the investigation of designated offences and that provide for destruction of the DNA sample after an acquittal or dismissal of charges.[109] The focus of this legislation and the DNA data bank containing over 200,000 convicted offender profiles and over 65,000 crime scene profiles[110] is on crime control though it may also preserve DNA evidence that will be critical in revealing wrongful convictions.

There are no specific provisions in the DNA legislation, as there are in the American Innocence Protection Act,[111] that provide for a person who has been convicted to have access to DNA samples. At the same time, an appeal court under s.683(1) of the Canadian Criminal Code could order the production of DNA material as evidence relating to proceedings, and trial judges would likely have similar powers. In many cases, prosecutors consent to the testing of evidence that may contain DNA. Disputes and delays do occur and they can delay the discovery of wrongful convictions.

The Morin Inquiry recommended that protocols for DNA testing be developed between prosecutors and defence lawyers and that material be retained for such testing. The inquiry also approved of the development of a national DNA data bank, but did not recommend statutory entitlement to DNA testing for those claiming to be wrongly convicted.[112] The Milgaard Inquiry found that the RCMP lab missed discovering DNA material that could have led to Milgaard being more quickly exonerated for murder.[113]

The lack of specific statutory regulation of post-conviction DNA testing is another example of statutes in Canada failing to make

107. Burns, 2001 SCC 7, ¶ 109 (quoting Peter Neufeld's testimony to Congress).

108. Criminal Code ss.487.04-487.0911(Can.).

109. Criminal Code ss.487.08-487.09 (Can.).

110. The labs that process DNA are run by the RCMP with separate provincial forensic science labs in the largest provinces of Ontario and Quebec. The data bank provides statistics on over 19,000 offender hits but not on whether the bank has ever produced exonerations. *See National DNA Data Bank*, ROYAL CANADIAN MOUNTED POLICE, http://www.nddb-bndg.org/images/stats_e.pdf (last visited Nov. 7, 2011).

111. Pub L. No. 108-405, 118 Stat. 2260 (2004) (codified at 42 U.S.C. 13701).

112. MORIN INQUIRY, *supra* note 6, at 395–96.

113. MILGAARD INQUIRY, *supra* note 6, at 808–11.

adequate acknowledgement of the possibility of wrongful convictions. It may also demonstrate a faith that unelected prosecutors will generally consent to DNA testing or that judges will exercise their powers, including those relating to the admission of fresh evidence on appeal, to ensure that evidence that may contain DNA will be tested. Some commentators have argued that Canadians have historically demonstrated greater trust of those who hold state power than Americans[114] and this may help explain the lack of a statutory entitlement to DNA evidence that is provided in most American jurisdictions.

D. Appellate Discretion to Enter an Acquittal or to Order a New Trial

If the accused is successful on the appeal, the appellate court has discretion to enter an acquittal or to order a new trial. The choice between these two remedies can have a profound effect on the wrongfully convicted. An acquittal means that the accused has been found not guilty and the presumption of innocence has been restored, whereas a new trial order may either place the accused in continued jeopardy or result in a prosecutorial stay of proceedings, which may produce residual stigma in the case of an accused who has previously been convicted.

There is a long but not invariable practice of entering acquittals in cases where the accused likely suffered a miscarriage of justice. The Manitoba Court of Appeal entered an acquittal after Thomas Sophonow's third trial, in part because he had already faced three trials and served close to four years in jail, and because the identification evidence in the case was not reliable.[115] In *R. v. Hinse*, the Supreme Court of Canada set aside a stay of proceedings the Quebec Court of Appeal entered in a case of a thirty-year-old wrongful robbery conviction. It entered an acquittal on the basis that the "evidence could not allow a reasonable jury properly instructed to find the appellant guilty beyond a reasonable doubt."[116] In *Re Truscott*, the Ontario Court of Appeal held that while it might normally order a new trial, an acquittal was appropriate given that a new trial on the 1959 murder was not possible, a prosecutorial stay would impose continuing stigma on Truscott, and it was more probable than not that Truscott would be acquitted at a hypothetical new trial.[117]

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114. SEYMOUR MARTIN LIPSET, CONTINENTAL DIVIDE (1990); DAVID JONES AND DAVID KILGOUR UNEASY NEIGHBORS (2007).

115. R. v. Sophonow, (1985) 38 Man. R. 2d 198, 202 (C.A.).

116. [1997] 1 S.C.R. 3, ¶ 2.

117. Re Truscott, 2007 ONCA 575, ¶ 265.

In other miscarriages of justice cases, courts of appeal have been able to conclude that an acquittal should be entered because no reasonable jury would convict the accused. The New Brunswick Court of Appeal in *R. v. Walsh,* after hearing new evidence from a variety of witnesses and examining archival material that should have been disclosed to an accused who had served twenty-seven years imprisonment on a murder charge, entered an acquittal. It stressed that the prosecutor had agreed that the fresh evidence should be admitted, that there was a miscarriage of justice, and that a new trial was not feasible.[118] The Court of Appeal concluded that:

> [I]n view of the fact we have a complete record, we have considered the entire case as it was presented to the judge and jury. We have also considered the fresh evidence. On the evidence as it now stands, the trial record as augmented by the fresh evidence, we are of the opinion that no reasonable jury could convict Walsh of murder.[119]

In the William Mullins-Johnson case, an acquittal was also entered, with the agreement of the Crown, after the court of appeal had considered fresh pathological evidence indicating that the cause of the death of Mullins-Johnson's niece was undetermined and that the medical evidence did not support the original conviction of murder and sexual assault.[120]

The practice of entering acquittals is not invariable. The Ontario Court of Appeal refused to enter an acquittal when overturning a 1972 murder conviction in Phillion's case. The court of appeal stated that a new trial was necessary because "depending on how the fresh evidence were to unfold at a new trial, it would be open to a jury to reject the defence of alibi and conclude, essentially on the basis of the appellant's confessions," that the accused was guilty. It concluded that "substituting a verdict of acquittal on the basis that the fresh evidence is 'clearly decisive' of innocence is not a tenable position."[121] Phillion had not established under the *Truscott* test that it was more probable than not

118. Re Walsh, 2008 NBCA 33, ¶ 96 (Can.).

119. *Id.*, ¶ 91.

120. Re Mullins-Johnson, 2007 ONCA 720 (Can.). For other wrongful convictions stemming from Dr. Smith's flawed forensic pathology testimony where the Court of Appeal entered an acquittal, see R. v. Sheratt Robinson, 2009 ONCA 886 (Can.); R. v. C.F., 2010 ONCA 691 (Can.); R. v. C.M., 2010 ONCA 690 (Can.); R. v. Kumar, 2011 ONCA 120 (Can.); R. v. Brant, 2011 ONCA 362 (Can.). For a historical case in which the prosecutor conceded that "Given the Crown's submissions, it is open to the Court to conclude that as matters stand today, no reasonable jury could convict. In the event that such determination is made, the appropriate remedy is to enter acquittals on the counts at bar." R. v. Henry 2010 BCCA 462, ¶ 10 (Can.). For another wrongful conviction involving a mistaken identification where the prosecutor consented to the entry of an acquittal see R. v. Webber, 2010 ONCA 4 (Can.).

121. Re Phillion, 2009 ONCA 202, ¶ 244 (Can.).

that he would be acquitted at a hypothetical new trial, even though there was new alibi evidence that "may well have left the jury in a state of reasonable doubt . . . ".[122] One judge dissented in this appeal, and would have upheld the conviction. As in *Truscott*, a new trial was impossible given the age of the events and the prosecutor subsequently decided to withdraw the charge. As discussed above, the Ontario Court of Appeal refused to enter an acquittal when it overturned Marquardt's murder conviction, though the prosecutor subsequently withdrew the murder charges.

E. Prosecutorial Conduct at New Trials

If a new trial, as opposed to an acquittal, is ordered in a case of a suspected miscarriage of justice, the prosecutor has the option of 1) conducting a new trial, or 2) issuing a prosecutorial stay of proceedings, 3) withdrawing charges, or 4) of calling no evidence. The previously convicted person only receives a formal acquittal if no evidence is called. Prosecutors have been surprisingly reluctant to follow this approach. In many miscarriage of justice cases, they have simply stayed proceedings. In response to recent criticisms of this practice, the more recent trend is towards withdrawing charges.

The Lamer Inquiry concluded that a prosecutorial stay "may leave an impression with the public that the charge is merely being 'postponed' or 'the authorities,' in a broad sense, still believe in the validity of the charge. That impression is likely to be magnified where, as in this case, the accused had already been convicted and spent years in prison prior to his successful appeal."[123] Similarly, the Driskell Inquiry expressed concerns that a prosecutorial stay leaves "a residual stigma" and is not an appropriate remedy when the Minister of Justice has ordered a new trial under the petition procedure. It recommended that the preferable course in most cases of a suspected miscarriage of justice is for the prosecutor to call no evidence so that the accused receives an acquittal and is protected by double jeopardy provisions from further prosecutions for the alleged offence. Prosecutorial stays should only be entered by the Attorney General personally and if there is still an active investigation of the formally convicted person.[124] A third commission of inquiry recognized that a prosecutorial stay in 1992 in Milgaard's case "left him with significant stigma" that was not dispelled until DNA exonerated him in 1997, but that it was nevertheless a reasonable

122. *Id*. at ¶ 246.

123. LAMER INQUIRY, *supra* note 6, at 317–18.

124. DRISKELL INQUIRY, *supra* note 6, at 129–39.

decision.[125] The Milgaard commission also endorsed the recommendations of the Driskell Inquiry about the limited use of prosecutorial stays in cases of suspected miscarriages of justice.

In light of these criticisms, prosecutors have become more reluctant to enter stays in miscarriages of justice cases. The new trend in cases such as Marquardt seems to be to withdraw charges, a practice that, like the stay, does not result in a formal acquittal. The prosecutor similarly withdrew charges in the Phillion case, discussed above. Phillion challenged this decision, arguing that he was entitled to an acquittal once his 1972 murder conviction had been reversed on the basis of new evidence. The subsequent challenge to the prosecutorial withdrawal failed, with the judge emphasizing the important role of prosecutorial discretion.[126] In the end, Canadian victims of wrongful convictions may not always receive a formal acquittal,[127] let alone a finding of factual innocence from the criminal justice system that is formally required for compensation.

F. Petitions to the Federal Minister of Justice When Appeals are Exhausted

If a person's appeals have been exhausted, the only means to re-open a case is to petition the federal Minister of Justice, who is an elected official who also serves as the Attorney General of Canada.[128] This power has been used in a number of high profile cases, including that of Marshall examined above. Nevertheless, it is a second best approach because the ultimate decision-maker is an elected politician. In addition, there are frequent delays that accompany the petition process in part because of the onus it places on the petitioner to present new evidence and full records of the case and in part because of the investigations that are conducted to advise the Minister of Justice. The petition process has the potential to trigger investigative powers that can be exercised by the Minister of Justice or his or her designate. However, the petitions have

125. MILGAARD INQUIRY, *supra* note 6, at 336.

126. Phillion, 2010 ONSC 1604 (Can.).

127. Kyle Unger was, however, acquitted after the Manitoba prosecutor called no evidence after a new trial for murder was ordered after DNA revealed that a hair used to convict him did not belong to Mr. Unger. A previous Manitoba Inquiry had criticized the use of a prosecutorial stay in another case where hair comparison evidence was refuted by DNA testing. *Kyle Unger Acquitted of 1990 Killing*, CBC NEWS (Oct. 23, 2009), http://www.cbc.ca/news/canada/manitoba/story/2009/10/23/mb-unger-acquitted-manitoba.html.

128. Kerry Scullion, Criminal Conviction Review Group, Dept. of Justice, Can., *Wrongful Convictions and the Criminal Conviction Review Process pursuant to Section 696.1 of the Criminal Code of Canada*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 189 (2004); *see also* Peter H. Howden, *Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post-Appellate Conviction Review Process*, 21 WINDSOR Y.B. ACCESS JUST. 569 (2002).

been characterized as adversarial and reactive by the six commissions of inquiry that have all recommended that the procedure for petitions be replaced by giving an independent body, similar to the CCRC used in England and Wales, power to either refer cases for new appeals or new trials.

The power of the Minister of Justice to re-open a case after appeals have been exhausted is based on the royal prerogative of mercy. It was recognized in Canada's first Criminal Code enacted in 1892, which provided:

> 748. If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such court as he may think proper.

In 1955, the provision was re-worded to indicate the Minister could direct a trial or a new appeal in his discretion, as opposed to cases where the Minister "entertains a doubt." The former "doubt" standard both provided more statutory guidance to the Minister and accorded with basic principles of criminal justice, which require guilt to be proven beyond a reasonable doubt.

In Canada, the provincial attorneys general conduct most criminal prosecutions, but the Attorney General of Canada has some prosecutorial responsibilities, for example, with respect to drug and terrorism prosecutions. In addition, the Attorney General of Canada prosecutes all offences in Canada's three northern territories. In recommending that an independent and permanent commission, such as the CCRC, replace the petition process, a number of commissions of inquiry have noted that the federal Minister of Justice is in a perceived and sometimes real conflict of interest in deciding whether to refer a criminal conviction back to the courts. The Milgaard Inquiry documented a lack of transparency in the petition process, which saw Milgaard's petition originally denied but then granted after the intervention of the Prime Minister. As the inquiry detailed, the Prime Minister and the Minister of Justice both claimed responsibility for having the petition ultimately granted, underlining a lack of transparency about how petitions are decided.[129]

Until amendments in 2002, the petition procedure was explicitly tied to applications for the mercy of the Crown. The relevant provision simply granted the Minister the discretion to order a new trial or to refer the case to the court of appeal either as a new appeal or on specific

129. MILGAARD INQUIRY, *supra* note 6, at 373-376.

questions. There were no legislated rules to govern the Minister of Justice's exercise of discretion. Nevertheless, the courts held there was some duty of fairness that required the Minister to "conduct a meaningful review" and provide the occupant with "a reasonable opportunity to state his case."[130] At the same time, the courts warned that the petition procedure was not an appeal on the merits, there was no general right to disclosure of all material the Minister considered in making his or her decision and that the duty of fairness was less than applied in judicial proceedings.[131] Courts consistently deferred to Ministerial decisions not to grant petitions.[132]

In 1994, Minister of Justice Allan Rock announced a number of principles that guided his decision-making under the petition procedure. He emphasized that the petition remedy was extraordinary and not intended to allow the Minister to substitute his opinion for that of the court or jury or to create a fourth level of appeal. Petitions should ordinarily be based on new matters that the courts had not considered. The Minister would assess the reliability and significance of new evidence the applicant placed before the Minister. Although an applicant does not have to establish innocence to be successful, the applicant would have to establish that a miscarriage of justice likely occurred.[133] The reactive nature of this enterprise was demonstrated in the Milgaard Inquiry when it heard the following from a formal federal official:

> Q: . . . A convicted person can't come to you and say "look, I'd like you to investigate, I'm innocent, I don't know what went wrong but would you people please go and investigate this and find out why I was wrongfully convicted"?
>
> A: We would say to that person "that is not the role of the department or of the Minister." Certainly, if you've been through the process, sat in on your trial, heard the evidence, you're in the best position to identify to us what it is you say constitutes wrongful – or what the errors were and why they constitute a miscarriage of justice.
>
> Q: And what you are telling us, then, it would be incumbent upon Mr. Milgaard and/or his counsel to identify significant grounds that might provide a basis for a remedy under Section 690?

130. Thatcher v. Canada, [1997] 1 F.C. 289 at 297 [12].

131. Id. at ¶ 12–13.

132. *Id.*; W.R. v. Canada (Minister of Justice), [1999] FC 1059; Bonamy v. Canada, (Att'y Gen.) 2001 FCT 798; Daouluv v. Attorney General, (Canada), 2008 FC 544; Bilodeau v. Minister of Justice, 2008 QCCS 1036, [2008] J.Q.no.2098., *affirmed in* Bilodeau c. Canada (Ministre de la Justice), 2009 QCCA 746, [2009] J.Q. no 3472.

133. Patricia Braiden & Joan Brockman, *Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code*, 17 WINDSOR Y.B., ACCESS JUST. 3, 9–10 (1999).

A: Yes.[134]

In other words, the Minister of Justice and his or her staff would react and evaluate new evidence that was put before them by a convicted person, but they would not conduct proactive investigations to determine if new evidence, not known to the convicted person, existed.

The 1994 principles established a number of significant hurdles for an applicant to pass before the Minister of Justice orders that the courts reconsider a conviction. The first hurdle was to produce new evidence; the second hurdle was to convince the Minister of Justice that the new evidence was relevant and reliable and the third hurdle was to convince the Minister of Justice that an extraordinary remedy of a new trial or appeal was necessary because a miscarriage of justice likely occurred. These principles have now largely been codified in the 2002 reforms.

In 2002, the prerogative of mercy provisions were replaced with a new procedure under ss. 696.1-6 of the Criminal Code. The new procedures were designed to make the petition process more transparent by providing the Minister of Justice with legal standards for making his or her decisions. The most important provision is s. 696.3(3)(a), which provides that the Minister is to direct a new trial or an appeal "if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred." This standard seems higher than the comparable English standard. The CCRC will refer a case for a new appeal if there is "a real possibility" that the conviction would not be upheld if referred to the court of appeal.[135] A reasonable likelihood is a higher standard than a real possibility. As discussed above, the Canadian legislation does not define a miscarriage of justice, but courts have interpreted it in a manner similar to the English standard that focuses on the safety of convictions as opposed to proven innocence.

Justice Kaufman, in his exhaustive report for the Minister of Justice in connection with Stephen Truscott's application under this new provision, stressed that a miscarriage of justice would occur both if the conviction of a factually innocent person was established, but also if new evidence could reasonably have affected the verdict. In the latter circumstances "it would be unfair to maintain the accused's conviction without an opportunity for the trier of fact to consider new evidence."[136] In reversing Truscott's conviction, the Ontario Court of Appeal subsequently indicated that a miscarriage of justice would include both trials that have been unfair and trials "where there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of

134. MILGAARD INQUIRY, *supra* note 6, at 358.

135. Criminal Appeal Act, 1995 c 35 s. 13; *see also* R. v. CCRC ex parte Pearson, [1999] 3 All E.R. 498 (Can.).

136. F. KAUFMAN, REPORT ON THE STEPHEN TRUSCOTT APPLICATION, ¶ 164 (2004).

the conviction in serious doubt."[137] In other words, a miscarriage of justice is a broad term. It can apply to both an unfair trial and a trial where the factual reliability of the conviction is in doubt.

In deciding whether to re-open a conviction by ordering a new trial or a new appeal, s. 696.4 instructs that the Minister of Justice shall take into account all matters that the Minister considers relevant, including:

1. whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;
2. the relevance and reliability of information that is presented in connection with the application; and
3. the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

This section codifies many of the principles contained in Minister of Justice Rock's 1994 statement. It does not require that new evidence or new matters be presented, but as a practical matter this is almost always required, given that the petition procedure is not intended to be a further level of appeal. Indeed, the federal Department of Justice's website presents the need for new matters to be presented as a requirement.[138]

The internal procedures that are used to decide an application are: (1) a preliminary assessment to determine whether there are new matters that provide an air of reality to the claim of a miscarriage of justice; (2) an investigation in which counsel within the department verifies the information, collects new information, and makes a recommendation to the Minister; (3) preparation of an investigative summary that is disclosed to the applicant for comments; and (4) the preparation of final legal advice for the Minister of Justice's decision. There is a special advisor within the department who offers advice at various stages of the investigation. The Milgaard Inquiry, however, concluded that the post-2002 changes have not changed the "reactive" nature of the process

137. 2007 ONCA 575, ¶ 110 (Can.).

138. "An application for ministerial review must be supported by 'new matters of significance'—generally new information that has surfaced since the trial and appeal and therefore has not been presented to the courts, and has not been considered by the Minister on a prior application. Only after a thorough review of the new matters of significance will the Minister be in a position to determine whether there is a reasonable basis to conclude that a miscarriage of justice likely occurred." DEPT. OF JUST., CAN., ANNUAL REPORT, ADDRESSING POSSIBLE MISCARRIAGES OF JUSTICE (2008), *available at* http://www.justice.gc.ca/eng/pi/ccr-rc/rep08-rap08/02.html; DEPT. OF JUST., ANNUAL REPORT, APPLICATIONS FOR MINISTERIAL REVIEW—MISCARRIAGES OF JUSTICE (2010), *available at* http://www.justice.gc.ca/eng/pi/ccr-rc/rep10-rap10/index.html. But for arguments that a conviction will be reviewed by the Criminal Cases Review Group within the Department of Justice even if an applicant does not identify a new matter see Narissa Somji, *A Comparative Study of the Post-Conviction Review Process in Canada and the United Kingdom*, 58 Crim. L.Q. 136, 167 (2012).

because it still relies on the applicant identifying new evidence.[139]

The 2002 changes allow the Minister of Justice to appoint individuals to investigate claims of wrongful conviction. Those individuals must be retired judges, members of the bar, or those with similar qualifications. They have powers to take evidence, issue subpoenas, and compel people to give evidence.[140] These powers are broad and, unlike the English CCRC, include a power to obtain documents from private persons. These delegated authorities, however, only make recommendations to the Minister of Justice about whether a conviction should be referred back to the courts and they do not make the actual referral decision.

From November 2002, when the new provisions came into force, to March 31, 2012, the Minister of Justice has made decisions on eighty-seven applications. Most applications were closed after a preliminary assessment on the basis that there were no grounds for further investigation. The remaining applications went to investigation, with thirteen of those cases (15% of total applications) being referred back to the courts. These statistics suggest that the Minister of Justice refers a greater percentage of applications (15% compared to 4%) to the courts than the English CCRC. At the same time, however, the CCRC receives many more applications each year than the Canadian Minister of Justice.[141]

The federal Minister of Justice is more risk adverse than the CCRC in the cases it decides to refer back to the courts. In twelve of the thirteen cases that the Minister has referred since 2002, the applicant has received a favourable remedy resulting in freedom.[142] In contrast, over a third of the cases referred by the CCRC to the court of appeal are not overturned on appeal. This significant difference could be explained by a number of factors. One is that the Canadian Minister has to apply a more difficult standard of a reasonable likelihood that a miscarriage of

139. MILGAARD INQUIRY, *supra* note 6, at 364.

140. Criminal Code of Canada, R.S.C. 1985, c. C-46 s.696.2.

141. The Criminal Case Review Commissions receives about 1,000 applications each year whereas the Canadian Minister of Justice receives about 20 a year. See Graham Zellick, *Facing up to Miscarriages of Justice*, 31 Man.L.J. 555, 556 (2006); Narissa Somji, *A Comparative Study of the Post-Conviction Review Process in Canada and the United Kingdom*, 58 Crim. L.Q. 136, 188 (2012).

142. The prosecutor stayed proceedings when the Minister ordered a new trial in the cases of Steven Kaminski (sexual assault); Darcy Bjorge (stolen property); Daniel Wood (murder); James Driskell (murder); and L.G.P. (sexual assault). The prosecutor withdrew murder charges against Romeo Phillion. Acquittals were obtained in the cases of Steven Truscott (murder); William Mullins-Johnson (murder); Andre Tremblay (murder); Erin Walsh (murder); Kyle Unger (murder); and D.R.S (sexual assault). Rodney Cain, originally convicted of second degree murder, was convicted of manslaughter at the new trial ordered by the Minister of Justice. See Kent Roach, *An Independent Commission to Review Claims of Wrongful Convictions: Lessons from North Carolina?*, 58 Crim. L.Q, 283, 290 (2012). This is an updated count that includes the recent entry of an acquittal of sexual assault on a Minister of Justice's reference in R. v. D.R.S., 2013 ABCA 18. (Can.). The new evidence in this case was a recantation by the complainant who was nine years old at the time of the allegations.

justice has occurred, whereas the English CCRC applies a slightly lower standard of a real possibility that the conviction will not be sustained if a new appeal is heard. Another possible factor is that the Canadian Minister is a politician with direct responsibilities for the criminal justice system, whereas the members of the CCRC are independent appointees. The many hurdles that the Canadian petition procedure imposes on applicants results in a much smaller number of applications than the CCRC model in England and Wales. The Canadian applications are, however, more likely to be referred back to the courts. In almost every case where the Minister of Justice makes a referral, the courts or prosecutors agree that a conviction cannot be maintained. In contrast, the courts uphold convictions in a significant minority of cases that the CCRC refers back to the courts.

The 2002 legislation does not provide guidance about how the Minister of Justice is to decide between ordering a new trial or a new appeal. In recent years, the Minister of Justice's preferred remedy is to refer a case for an appeal, as opposed to a new trial. A new appeal is especially useful in historical cases, where a new trial is not possible and will only result in a prosecutorial stay or withdrawal of charges. As discussed above, appeal courts can consider new evidence and even hear testimony or appoint special commissioners to inquire into defined matters. Starting with the 2007 *Truscott* reference, the courts of appeal have also been willing to decide whether an acquittal is more probable than not at a hypothetical new trial and, if so, enter an acquittal. The trend towards relying on new appeals as opposed to new trials also mirrors the practice where the CCRC must refer a case to the court of appeal and is not able to direct a new trial. The Royal Commission on the Marshall case, however, criticized the use of an appeal remedy because it places the onus on the accused and could result in a new trial. At the same time, however, the order of a new trial in a number of miscarriage of justice cases resulted in prosecutorial stays that, as discussed above, have been criticized by other inquiries for imposing a residual stigma on those who have been previously convicted in serious cases.

There have been many criticisms of the delay in processing petition applications, which in some cases can take years. Clive Walker and Kathryn Campbell have concluded that even after the 2002 reforms, the Canadian petition procedure remains "cumbersome, onerous and lengthy" and "ultimately ineffective for most wrongly convicted individuals."[143] In a number of cases, the courts have responded to this

143. Clive Walker & Kathryn Campbell, *The CCRC as an Option for Canada: Forwards or Backwards?*, *in* THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT? 191 (M. Naughton ed., 2010). They conclude that while an independent commission such as the CCRC would be

delay by granting an applicant bail pending the Minister of Justice's final decision.[144] This is an important act of judicial creativity to respond to delays in the petition procedure and the plight of the wrongfully convicted.[145]

G. Summary

The two major methods of overturning wrongful convictions in Canada are the use of appeals, including appeals out of time and appeals in which fresh evidence is introduced, and petitions to the Minister of Justice for a new trial or appeal once all appeals have been exhausted. As outlined above, Canada has a relatively generous appeal structure. Convictions can be overturned if the guilty verdict was unreasonable, based on an error of law or if it constitutes a miscarriage of justice broadly defined to include both unfair and unreliable verdicts. Courts are also relatively generous in allowing appeals out of time and accepting fresh evidence on appeal. At the same time, however, the Canadian courts will not overturn convictions simply because there is a lurking doubt about guilt. They are more deferential to convictions by juries than convictions by judges sitting alone. They can also uphold convictions based on legal error if they determine that the error is harmless because no substantial wrong or miscarriage of justice has occurred.

The second method for overturning convictions is less generous and more demanding. It requires an applicant who has exhausted all appeals to convince the Minister of Justice, an elected politician with responsibility for a minority of all Canadian criminal prosecutions, that a miscarriage of justice likely has occurred. The Minister of Justice will only order a new appeal or a new trial as an extraordinary remedy and, generally, on the basis of new evidence. The Minister of Justice retains this power despite recommendations by six inquiries that the Minister's powers be transferred to an independent commission, as is the case in England and Wales, Scotland, Norway, and North Carolina.[146] Relatively few convicted people apply to the Minister of Justice,

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an improvement in Canada, that a Canadian version of the CCRC should play more of a policy and inspectorate role than the CCRC and take a more holistic approach to the criminal justice system. *Id*. at 203–04.

144. R. v. Phillion, [2003] O.J. No. 3422 (Can. Ont. Sup. Ct. of Just.); R. v. Driskell, 2004 MBQB 3 (Can.); R. v. Unger, 2005 MBQB 238 (Can.); Ostrowski v. The Queen et al., 2009 MBQB 327 (Can.).

145. The Criminal Code only explicitly authorizes the grant of bail pending appeal and not pending a decision of the Minister of Justice under s.696.1-6. *See* Criminal Code of Canada, R.S.C. 1985, c. C-46 s.679.

146. *See generally* Kent Roach, *The Role of Innocence Commissions*, 85 CHI.-KENT L. REV. 89 (2010).

perhaps because of the difficulty of producing new evidence that will satisfy the Minister. It can take years for the Minister to make a decision, especially if there is an investigation. Fortunately, the courts have mitigated the effects of this delay in some cases by granting applicants bail pending the Minister's decision. The Minister of Justice refers about 15% of all applications back to the courts, either for a new trial or a new appeal. The Minister of Justice is quite risk adverse in exercising his or her discretion because in all but one case since 2002, the referred cases have been cases with compelling new evidence that resulted in either courts entering acquittals or prosecutors staying or withdrawing charges.

V. CAUSES OF AND REMEDIES FOR WRONGFUL CONVICTIONS

The best information about the causes of wrongful convictions in Canada, as well as the most frequent source for proposals about how to prevent wrongful convictions, come from the seven public inquiries that have examined particularly notorious wrongful convictions. As will be seen, these inquiries have, at various times, examined the role of all major criminal justice actors in wrongful convictions. They have also made many recommendations about how to decrease the risk of wrongful convictions. Provincial governments, responsible for the administration of criminal justice, have appointed all the inquiries. Many of the inquiries' unimplemented recommendations have been made to the federal government. It should be recalled that the federal government in Canada has exclusive jurisdiction over the rules of criminal procedure and criminal evidence.

A. The Police: The Problem of Tunnel Vision

The police play a critical role in almost all wrongful convictions. In the Marshall case discussed above, the police virtually framed Marshall, using oppressive tactics against young and unstable witnesses until they were prepared to perjure themselves and falsely testify that they saw Marshall stab Seale. The local police also persisted in their belief that Marshall had to be guilty, even after a companion of the real killer came forth shortly after Marshall's 1971 conviction and told them that Marshall was innocent.

Many commissions of inquiry that have examined wrongful convictions have found that the police were subject to "tunnel vision" in which they prematurely settled on a person as a suspect, did not adequately explore other hypotheses, and interpreted ambiguous, and even contradictory evidence, as consistent with the accused's guilt. The

inquiry that examined Guy Paul Morin's wrongful conviction found that the investigators settled on him as the prime suspect in part because they considered him "odd." The Commission of Inquiry recommended that police be trained about the dangers of tunnel vision, which it defined as "the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one's conduct in response to the information."[147]

In the Thomas Sophonow case, the accused was reluctant to disclose his alibi to the police for fear that they would investigate it in a manner so as to discredit it. The police eventually investigated the alibi in an unsatisfactory manner. The police provided positive feedback to eyewitnesses who identified the suspect, they told the suspect information that would only be known to the killer, and they attempted to bolster their case by using evidence from unreliable jailhouse informers. The same police force, however, eventually undertook the re-investigation that, a decade later, cleared Sophonow of the murder. The inquiry recommended that a double blind procedure be used for eyewitness identifications, that jailhouse informers not be used, that exhibits and notebooks be retained for disclosure to the accused, that interviews involving alibi witnesses be videotaped, and that the police receive annual lectures or courses on the dangers of tunnel vision.[148]

A Newfoundland inquiry found that the police had engaged in tunnel vision in two cases where there were subsequent DNA exonerations. In one case, the police quickly decided that the accused was responsible for his mother's death, questioned witnesses in a manner suggestive of his guilt, and exaggerated the importance of evidence consistent with guilt and minimized the importance of evidence inconsistent with guilt. The commission also found that noble cause corruption – the sense that noble ends can justify any means – heightened the distorting effects of tunnel vision. It recommended recording interviews in major cases, using independent operators for polygraphs, and having independent prosecutors carefully review the case developed by the police. The commission also recommended that courts be more prepared to direct a verdict of acquittal in weak cases that were prosecuted.[149]

Not all inquiries that have examined wrongful convictions have found that the police engaged in tunnel vision. The inquiry into Milgaard's case found that "tunnel vision, negligence and misconduct have been alleged but not shown,"[150] even though it also found that a polygraph

147. MORIN INQUIRY, *supra* note 6, at 1134.

148. SOPHONOW INQUIRY, *supra* note 6.

149. LAMER INQUIRY, *supra* note 6.

150. MILGAARD INQUIRY, *supra* note 6, at 304.

operator pressured young people to support Milgaard's guilt. The inquiry found no tunnel vision, even though the police did not focus on the real perpetrator who had committed similar crimes in the same area where Milgaard was wrongly alleged to have murdered a young woman. This inquiry's approach underlines the danger of seeing tunnel vision as a form of misconduct rather than a systemic problem, especially in cases where the police are investigating a high profile crime.

Although Canadian inquiries have frequently identified tunnel vision, they have yet to develop effective remedies to counteract this complex process within policing organizations. The inquiries have recommended that superiors regularly review police investigations and that police officers receive better training, but they have not developed organizational solutions that would counter common presumptions of guilt in policing.[151] The inquiries have also not recommended institutional reforms, such as those relating to building quality control units or contrarian devils advocates within police forces.[152]

The inquiries have tended to stress remedies that are external to police forces as a means to counteract police tunnel vision. These remedies include full disclosure to the accused of all relevant information the police hold, review of cases by independent prosecutors, decreased use of jailhouse informers to shore up weak cases, and increased judicial use of the directed verdict of an acquittal. A report on behalf of all prosecutors in Canada has stressed that prosecutors can counteract police tunnel vision by exercising independent, quasi-judicial discretion in deciding whether to proceed with the case. The report also suggested that, where feasible, prosecutors separate from those that advised the police during the investigation should review charges. Second opinions, case review, and contrarian thinking should be encouraged within the prosecutor's office.[153] These prosecutorial checks are especially important because tunnel vision may be difficult to detect at the trial stage. There are restrictions on calling evidence at trial that indicates a third party may have been responsible for a crime.[154] In addition, an accused who alleges tunnel vision at trial opens the door for the state to respond with prejudicial hearsay evidence to support the police's

151. Dianne Martin, *The Police Role in Wrongful Convictions: An International Comparative Study*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 77 (Westervelt & Humphrey eds. 2005).

152. John Epp, *Penetrating Investigative Practice Post Morin*, 31 U.B.C. L. REV. 95 (1997); Bruce MacFarlane, *Convicting the Innocent: A Triple Failure of the Justice System*, 31 MAN. L.J. 403 (2006).

153. FTP HEADS OF PROSECUTIONS COMM. WORKING GROUP, CAN. DEPT. OF JUSTICE, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE 35-41(2004). See also FTP HEADS OF PROSECUTIONS COMM., THE PATH TO JUSTICE 54 (2011).

154. Grandinetti, 2005 SCC 5.

investigation.[155]

B. The Police: Identification Procedures

As in the United States, flawed identifications are a leading cause of wrongful convictions in Canada. The Sophonow Commission focused on the frailties of eyewitness identification and recommended the use of a double blind identification system, and the sequential and recorded presentation of at least ten photos in photo line-ups. Although some police forces follow these recommendations as best practices, there are no legislated identification procedures in Canada. Without legislative guidance, many of the police oriented reforms to prevent wrongful conviction depend on individual police forces voluntarily implementing reforms. Exclusive federal jurisdiction over criminal law and procedure may have inhibited legislative experimentation of the type available in Australia or the United States where the states can enact their own criminal law reforms sometimes in response to local wrongful convictions.

The Supreme Court of Canada held in 2007 that police forces can be sued for negligent forms of investigation. Nevertheless, the Court held that the police were not negligent in a case where an Aboriginal man, Jason Hill, was wrongfully convicted and imprisoned for twenty months for a robbery he did not commit. Mr. Hill was identified in a twelve person photo line-up that included him and eleven Caucasian foils and was conducted after Mr. Hill's photo had been released to the media. The identification procedure was also not conducted in a double blind manner and was conducted on two witnesses at the same time. Although the police did not engage in good practices as measured by today's standards, the Court concluded that there was no negligence because the flawed photo line-up did not breach standards that applied in 1995 when the false identification was obtained.[156] The Court also found no negligence, even though the police did not attempt to halt the prosecution when similar robberies continued after Hill's arrest.[157] Even if there is more success in subsequent cases, civil litigation is an indirect, diffuse, and uncertain means of ensuring that the police use proper identification procedures compared to legislated standards.

155. Van, 2005 SCC 5.

156. *Hamilton Wentworth Police*, 2007 SCC 41, ¶ 78.

157. The Court concluded, "This was not a case of tunnel-vision or blinding oneself to the facts," in part because in 1995 "awareness of the danger of wrongful convictions was less acute than it is today. There was credible evidence supporting the charge." *Id.* at ¶ 88.

C. The Police: Interrogation Procedures

The Supreme Court has recognized that false confessions are a cause of wrongful convictions. The Court stressed that one of the purposes of the traditional common law rule that requires the prosecution to prove beyond a reasonable doubt that confessions obtained by persons in authority are voluntary is to protect against the danger of false confessions.[158] At the same time, however, the Court refused to exclude confessions taken after a prolonged interrogation that caused the accused much emotional distress, in part because of his fear that the police would interrogate his fiancé.[159] The Court made the questionable assumption that "false confessions are rarely the product of proper police techniques."[160] It also ruled that while recording of confessions was advisable, a failure to record an interrogation did not render a confession inadmissible.[161] Serious concerns have been raised that the test for determining whether a confession is voluntary is not sensitive enough to characteristics of the accused, such as mental disabilities or instabilities and drug withdrawal, which could help produce false confessions.[162]

The Supreme Court has held that confessions are still admissible even if the accused has asserted his preference to remain silent[163] and made numerous requests to see his lawyer, so long as the suspect has been afforded a reasonable opportunity to contact a lawyer. The Court also held that there is no constitutional requirement that a defence lawyer be present during an interrogation.[164] These cases suggest that courts are often reluctant to exclude confessions perhaps because of fears of preventing the police from obtaining legitimate confessions and perhaps because of the severity of exclusion as a remedy. In addition, the courts are even more reluctant to exclude confessions that may be false because of personal characteristics, such as a mental disability. The leading case suggests that statements from the accused are admissible as long as they have a basic operating mind.[165] The courts have admitted confessions from people with significant mental disabilities because they have concluded that the police have acted properly in the

158. Oickle, 2000 SCC 38.

159. *Id.* at ¶ 104.

160. *Id.* at ¶ 45.

161. *Id.* at ¶ 46.

162. Christopher Sherrin, *False Confessions and Admissions in Canadian Law*, 30 QUEENS L.J. 601 (2005).

163. Singh, 2007 SCC 48.

164. Sinclair, 2010 SCC 35.

165. R. v. Whittle, [1994] 2 S.C.R. 914 (Can.).

interrogation process.[166]

The Canadian courts have attempted to encourage the police to videotape interrogations, but they have stopped short of requiring such recording as a pre-requisite to admission.[167] This presents a danger that a false confession may ring true because it includes "hold back" information only known to the real perpetrator and the police. Parliament has not legislated any recording requirements, or indeed any other procedures, for interviewing adults.[168] As with identification procedures, this means that only the courts enforce the rules designed to prevent false confessions. As suggested above, courts are reluctant to exclude confessions even if they are obtained after intense interrogations or from those with significant mental disabilities or mental health issues.

Even the limited protections against false confessions, the voluntariness rule and the right to counsel offer are not available when suspects do not know that they are speaking to police officers. Police forces in Canada have frequently engaged in expensive, prolonged, and sophisticated "Mr. Big" operations, where they pose as criminals and hold out a lucrative life style to a suspect if they admit to committing a crime as a prerequisite to joining the fake criminal organization. The intensity of some of the operations can be seen as a form of tunnel vision in cases where the police are convinced of the suspect's guilt, but do not have enough independent evidence to convict. There is also a danger that the suspect may be given hold back information known only to the perpetrator during these operations, which are not always recorded or are recorded selectively. The Supreme Court has held that the confessions rule does not apply to these operations.[169] Other courts have refused to admit expert evidence about the dangers and mechanisms of false confessions in Mr. Big cases.[170] One recent case, however, has excluded confessions obtained through an intensive "Mr. Big" operation, in large part because of the risk of a wrongful conviction based on unreliable evidence.[171]

A Mr. Big operation has been associated with at least one wrongful

166. Kent Roach & Andrea Bailey, *The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law From Investigation to Sentencing*, 42 U.B.C.L. REV. 1, 12-28, (2009) (outlining cases where judges have accepted statements that may have been influenced by brain injuries caused by fetal alcohol spectrum disorder).

167. Oickle, 2000 SCC 38.

168. The Youth Criminal Justice Act ss.25-26, 146 does provide some additional safeguards relating to the right to counsel and the right of a parent to be present, but does not require the recording of interrogations of young persons.

169. R. v. Hodgson, [1998] 2 S.C.R. 449 (Can.); Grandinetti, 2005 SCC 5 (Can.).

170. R. v. Osmar, 2007 ONCA 50 (Can.); R. v. Bonisteel, (2008) BCCA 344 (Can.); R. v. Jeanvenne, 2011 ONSC 7244.

171. R. v. Hart, 2012 NLCA 61, ¶¶ 168, 213, 260 (CanLII), *available at* http://canlii.ca/t/fsr1k.

conviction. Kyle Unger was convicted of a brutal murder on the basis of hair comparison evidence, testimony from a jailhouse informer, and confessions he made during a Mr. Big operation. His conviction was affirmed in 1993, with the Manitoba Court of Appeal refusing to exclude the confession obtained from the Mr. Big operation.[172] In 2005, Unger was granted bail pending his successful application to the Minister of Justice to re-open his conviction. The judge who granted bail noted that the hair comparison was disproved by DNA. The judge also expressed concerns about the reliability of the confessions obtained in the Mr. Big Operation. The judge observed that Unger, who was unemployed, in part because he was suspected of the killing, confessed to the killing only after "being wined, dined, and shown large sums of money."[173] The Minister of Justice subsequently ordered a new trial, at which Unger was acquitted, but the government has refused to provide compensation because of his confessions made during the Mr. Big operation, even though the details of those confessions have been proven to be false. Mr. Unger is now suing police and prosecutors involved in his wrongful conviction.[174]

D. Prosecutorial Conduct: The Independent and Quasi-Judicial Role of Prosecutors

Prosecutors in Canada are all appointed officials who do not stand for election. They are supposed to be interested in seeing that justice is done. In other words, they should not be simple adversaries concerned with obtaining a conviction.[175] Both the Marshall and the Lamer Commissions of Inquiry called for the creation of independent Director of Public Prosecutions systems as a means to re-enforce the independence of prosecutors. Such systems now exist in both provinces, as well as in other provinces and at the federal level. Any communication from the Attorney General, who is an elected politician who sits in Cabinet, to the Director of Public Prosecutions would have to be published and disclosed. The Director of Public Prosecutions holds office in good behaviour for a guaranteed term. The Lamer Commission stressed that independent prosecutors should serve as a check on police investigations and tunnel vision that could result in wrongful

172. R. v. Unger, 1993 CanLII 4409 (MB CA), *available at* http://canlii.ca/t/1pfk2.

173. R. v. Unger, 2005 MBQB 238, ¶¶ 17–19.

174. *Unger Won't Get Compensation: Minister*, CBC NEWS (Oct. 23, 2009), http://www.cbc.ca/news/canada/manitoba/story/2009/10/23/mb-compensation-unger-chomiak-manitoba.html; *Kyle Unger files 14.5 million wrongful conviction suit*, CBC News (Sept, 21, 2011), *available at* http://www.cbc.ca/news/canada/manitoba/story/2011/09/21/kyle-unger-wrongful-conviction-lawsuit.html.

175. R. v. Boucher, [1955] S.C.R. 16 (Can.).

convictions.

Canada's reliance on appointed prosecutors who have autonomy from political interference allows prosecutors, in some cases, to agree to procedures designed to correct wrongful convictions. For example, the prosecutor in the 1983 Marshall appeal persisted in making a joint submission that Marshall's 1971 murder conviction should be quashed, despite receiving some resistance from higher officials. In many of the cases stemming from the flawed forensic pathology of Dr. Smith, the prosecutor has agreed to appeals out of time, the admission of fresh evidence, and the quashing of convictions. There are a number of non-DNA cases where Canadian prosecutors have agreed not only to the quashing of a wrongful conviction, but the entry of an acquittal.[176]

The quasi-judicial role of the prosecutor as a Minister of Justice manifests itself not only in the treatment of individual cases but in systemic matters. In some provinces, prosecutors have agreed to conduct proactive audits of cases involving suspect forms of evidence or the involvement of criminal justice actors that have played a role in wrongful convictions. Such audits are a promising alternative to reliance on the adversarial system as a means to discover wrongful convictions. Prosecutors in Canada have also taken some proactive responsibility on policy matters relating to wrongful convictions. A national task force of prosecutorial officials issued a lengthy report in 2004 based in large part on the findings of Canada's inquiries into wrongful convictions. This report was also supported by scholarship by Bruce MacFarlane, Q.C., who was the most senior civil servant in Manitoba responsible for justice.[177] The same national task force of senior prosecutors issued a revised version of the report in 2011.[178] Canadian prosecutors deserve praise both for recognizing wrongful convictions in many individual cases and for taking a policy interest in the prevention of wrongful convictions.

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176. R. v. Henry, 2010 BCCA 462 (Can.); R. v. Webber 2010 ONCA 4 (Can.).

177. MacFarlane's work was subsequently published. Bruce MacFarlane, *Convicting the Innocent: A Triple Failure of Criminal Justice*, 31 Man.L.J.403 (2006).

178. FTP HEADS OF PROSECUTIONS COMM. WORKING GROUP, CAN., DEPT OF JUSTICE, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE 35-41 (2004), *available at* http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf; FPT HEADS OF PROSECUTION, THE PATH TO JUSTICE: PREVENTING WRONGFUL CONVICTIONS (2011), *available at* http://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/ptj-spj-eng.pdf. But see Christopher Sherrin, *Comment in the Report on the Prevention of Miscarriages of Justice*, 52 CRIM. L.Q, 140 (2007) for some criticism of the prosecutors report. In their latest report, the prosecutors consider prior criticisms of their earlier report but still disapprove of expert evidence on the frailties of eyewitness identification while conceding that such expert knowledge can be used in the training of police and prosecutors. They also continue to recommend that only interrogations in cases of considerable violence be recorded. THE PATH TO JUSTICE 76, 94 (2011). To its credit, the new report does discuss the problem of the innocent pleading guilty and states that "the Subcommittee wishes to reiterate that all participants in the criminal justice system must be vigilant to guard against creating an environment in which innocent people are induced to plead guilty." *Id.* at 207.

E. Prosecutorial Conduct: Disclosure

An important factor in many wrongful convictions has been the failure of prosecutors to disclose all relevant material in their possession. As discussed earlier, the Marshall Commission of Inquiry found that a failure of the Crown to disclose inconsistent statements made by lying witnesses was an important factor in Marshall's wrongful conviction. In addition, a companion of the real killer told the police that Marshall was not the killer shortly after Marshall's conviction—but this critical information was not disclosed by either the police or the prosecutor to Marshall or his lawyer. In response to these findings, the Commission of Inquiry recommended that Parliament amend the Criminal Code to place a continuing statutory disclosure duty on the prosecution. As is, unfortunately, often the case, legislative reform to minimize the risk of wrongful convictions was not a priority and Parliament has yet to enact a statutory code of disclosure. Indeed, Parliament's actions in this area have only sought to place limits on the disclosure of therapeutic records of complainants in sexual assault cases.[179]

In 1991, the Supreme Court of Canada decided the landmark case of *R. v. Stinchcombe*.[180] Justice Sopinka, for a unanimous Court, stated:

> The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the Donald Marshall, Jr., Prosecution*, Vol. 1: *Findings and Recommendations* (1989) (the "Marshall Commission Report"), the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (Vol. 1 at p. 238).[181]

The Court based the broad disclosure obligation placed on the prosecutor (frequently called the Crown in Canada) on the idea that the prosecutor was not a pure adversary and was interested in ensuring justice rather than winning. The new constitutional rule of disclosure was broader than the statutory rule the Marshall commission proposed because the new rule applied to all relevant information regardless of whether it was classified as exculpatory or inculpatory and regardless of

179. This legislation was upheld under the Charter in R. v. Mills, [1999] 3 S.C.R. 668 (Can.).

180. [1991] 3 S.C.R. 326.

181. *Id.*

whether it related to a person that the prosecutor proposed to call as a witness. The only exceptions the Court recognized were for evidentiary privileges, such as the informer privilege and the timing of the disclosure. Finally, the Court made clear that the duty of disclosure was a continuing one.

Subsequent decisions have continued to define disclosure rights broadly to include relevant material that might open up lines of inquiry for the accused.[182] The obligation to disclose relevant information also entails a duty to preserve such information.[183] In 2003, the Supreme Court observed that the idea that disclosure was simply "an act of goodwill" and not a right, "played a significant part in catastrophic judicial errors" that resulted in wrongful convictions.[184] A 2009 decision has affirmed that the police have a duty under *Stinchcombe* to disclose relevant material to the Crown prosecutor and that, in some cases, the duty may extend to disciplinary records of a police officer.[185] In that case, the Court also indicated while the accused must request disclosure, the Crown must disclose not only the evidence it will introduce but "any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence" so long as it is "not clearly irrelevant, privileged or its disclosure is otherwise governed by law." The Crown's duty may require it to obtain relevant information from other state agencies. Finally, "the Crown's obligation survives the trial and, in the appellate context, the scope of relevant information therefore includes any information in respect of which there is a reasonable possibility that it may assist the appellant in prosecuting an appeal."[186] The experience of wrongful convictions and a desire to prevent them has decisively shaped the Supreme Court's approach to constitutional disclosure obligations.

F. Jailhouse Informers

Jailhouse informers with incentives to lie have played a role in a number of wrongful convictions. The Morin Inquiry found that two jailhouse informers used to bolster the murder prosecution against Morin were utterly unreliable. It stopped short of recommending a complete ban on the use of jailhouse informer. Instead, the Inquiry recommended that a committee of senior prosecutors approve any use of jailhouse informers, a reform that was subsequently introduced in

182. R. v. Dixon, [1998] 1 S.C.R. 244 (Can.); R. v. Tallifer, 2003 SCC 70 (Can.).

183. R. v. La, [1997] 2 S.C.R. 680 (Can.).

184. Tallifer, 2003 SCC 70, ¶ 1.

185. R. v. McNeil, [2009] S.C.R. 66 (Can.).

186. *Id.* at ¶ 17–18.

Ontario and some other provinces. The Sophonow Inquiry took a bolder approach and recommended a general rule that jailhouse informers not be allowed to testify, a recommendation the Lamer Inquiry also approved.[187] The Supreme Court has, however, not followed this recommendation and has allowed jailhouse informers to testify without even a mandatory rule that warnings about their unreliability be given.[188] In a subsequent case, however, the Court allowed new evidence that was inconsistent with a jailhouse informer's testimony to be introduced under its fairly liberal approach to the admission of new evidence.[189] As in the false confession and identification contexts, the Supreme Court has been reluctant to exclude evidence, even though evidence from jailhouse informers has, in the past, contributed to wrongful convictions.

G. Defence Lawyers and Ineffective Assistance of Counsel

Ineffective assistance of counsel can also play a role in wrongful convictions. The Marshall Commission criticized Marshall's lawyers for not requesting disclosure or conducting their own investigations. The Goudge Inquiry into forensic pediatric pathology stressed the need for lawyers to be adequately trained and funded to deal with complex issues of forensic pediatric pathology. Guilty pleas were entered in many of the cases involving Dr. Smith, the defence in those cases may not have been prepared to rebut the flawed forensic pathology evidence offered by the state, even though the accused maintained their innocence.[190] These cases, and other cases involving wrongful convictions arising out of guilty pleas,[191] raise issues of whether it is competent and ethical for a defence lawyer to enter a guilty plea on behalf of a client who maintains his or her innocence, so as to receive a lighter sentence than will be imposed should the client be convicted after the completion of a trial.

187. SOPHONOW INQUIRY, *supra* note 6; LAMER INQUIRY, *supra* note 6, at 22.

188. Brooks, 2000 SCC 11. The Court did, however, provide subsequent guidance about the ability of trial judges to give warnings about why some forms of testimony should receive special scrutiny and why it may be dangerous to convict on the basis of such unconfirmed testimony. R. v. Khela, 2009 SCC 4, ¶ 37.

189. Hurley, 2010 SCC 18.

190. For an example of an early case where Dr Smith testified but the accused was acquitted after a middle class family mortgaged its home and put on a defence containing multiple experts from around the world, see R. v. M(S.), 1991 O.J. 1383 (Can.) (discussed in the GOUDGE REPORT, *supra* note 6, at 12).

191. Hanemaayer, 2008 ONCA 580. Note that there is increasing recognition in the United States of wrongful convictions arising from guilty pleas. See SAMUEL GROSS AND MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989-2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 8 (2012) *available at* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (8% of 873 recorded exonerations between 1989 and 2012 involving guilty pleas).

They also raise questions about the dangers of leaving the acceptance of guilty pleas to the discretion of trial judges. There are no special rules in Canada to limit the ability of trial judges to accept guilty pleas from those who maintain innocence or to require the judge to conduct a more searching examination of the factual basis of the guilty plea.[192] Ineffective assistance of counsel combined with judicial passivity in accepting guilty pleas dramatically increases the risk of wrongful convictions.[193]

In *R. v. G.D.B.*,[194] the Supreme Court recognized that the right to effective assistance of counsel was a principle of fundamental justice protected under s.7 of the Charter. The Court held that this right would only be violated if counsel's conduct was unreasonable and incompetent and if the conduct resulted in a miscarriage of justice. The Court followed the oft-criticized United States Supreme Court decision of *Strickland v. Washington.*[195] Following that decision, there is a strong presumption that counsel's conduct is reasonable. Moreover, the court will not even determine the reasonableness of defence counsel's conduct unless the accused can demonstrate that the alleged incompetence resulted in a miscarriage of justice. The Court added, "miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised."[196] In the result, the Court found that counsel had made a tactical decision not to use a tape where the complainant stated the accused had not sexually abused her. The Court held that the defence counsel's failure to use the tape did not affect the reliability of the conviction. Canadian accused have not enjoyed much success in subsequent claims of ineffective assistance of counsel.[197]

H. Forensic and Other Expert Evidence

A number of wrongful convictions in Canada have been caused by

192. The leading Supreme Court precedent, rendered long before the recognition of wrongful convictions, maintains that trial judges have discretion whether to accept guilty pleas over a strong dissent by Laskin J. that trial judges should determine the factual basis and voluntariness of the guilty plea. Adgey v. The Queen, [1975] 2 S.C.R. 426 (Can.).

193. For a very disturbing example where the Supreme Court accepted a guilty plea to non-capital murder in a case where the defence lawyers at trial maintained that he did not understand the mind of the Aboriginal accused, see Brosseau v. The Queen, [1969] S.C.R. 181 (Can.).

194. 2000 SCC 22.

195. Strickland v. Washington, 466 U.S. 668 (1984).

196. *R. v. G.D.B.* 2000 SCC 22, ¶ 28.

197. Dale E. Ives, *The 'Canadian' Approach to Ineffective Assistance of Counsel*, 42 BRANDEIS L.J. 239 (2003).

faulty forensic evidence.[198] There are two main ways to respond to such dangers. One is by reforming the production of the state's forensic evidence. The other is for the courts to take steps to ensure that the forensic evidence used in the trial is reliable.[199]

The Commission of Inquiry into Proceedings against Guy Paul Morin in its 1998 report found that Ontario's Centre for Forensic Science had made numerous mistakes in the production of hair and fibre evidence that purported to link Morin to a murder before his DNA exoneration. Before the inquiry, Crown prosecutors had assumed that the Centre was infallible. The Commission, however, found problems in contamination of evidence and the misuse of published research.[200] The Centre for Forensic Science, which is the central crime laboratory in the province of Ontario, undertook many reforms in response to the findings and recommendations of the Morin inquiry.[201] A decade later, a similar inquiry was held in the neighbouring province of Manitoba when hair comparison evidence was again refuted by DNA testing. The Manitoba Inquiry heard that the Royal Canadian Mounted Police labs had stopped conducting hair comparison evidence in light of more advanced DNA testing, but stopped short of recommending that such hair comparison evidence be inadmissible. It also did not recommend that the crime laboratories be separated from the police. Finally, it suggested that it did not have jurisdiction to order a national audit of cases that relied on hair comparison evidence, even though the province of Manitoba had conducted such an inquiry.[202]

Many of the same themes found in the Morin inquiry, which focused on hair and fibre comparison evidence, re-emerged a decade later when the Ontario Commission of Inquiry into Forensic Pediatric Pathology (the Goudge Inquiry) recommended similar reforms to the practice of forensic pathology. The Goudge Inquiry found problems in the lack of forensic training of pathologists, including Dr. Smith, and a lack of supervision of his work and testimony. Medical doctors who were supposed to supervise Dr. Smith did not have the adequate training in

198. *See generally* BIBI SANGHA, ET AL. FORENSIC INVESTIGATIONS AND MISCARRIAGES OF JUSTICE 241–322 (2010).

199. For an evaluation of the balance between these two mechanisms, see Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic and Medical Evidence*, 61 U. TORONTO L.J. 343 (2011).

200. MORIN INQUIRY, *supra* note 6 , at117-118.

201. Jeffrey Manishen, *Wrongful Convictions, Lessons Learned: The Canadian Experience*, 13 J. CLINICAL FORENSIC MEDICINE 296 (2006) (the reforms included post-conviction DNA testing of hair "matches," recording of preliminary reports, increased training, new protocols for reports and complaints, documentation of contamination, monitoring of courtroom testimony and the creation of an advisory board and a quality assurance unit).

202. DRISKELL INQUIRY, *supra* note 6 , at 174-185.

forensic pathology to do so. The Goudge Inquiry stopped short of recommending that Ontario move from a coroner's system to one where forensic pathologists were fully responsible for death investigations. Subsequent to that inquiry, the chief forensic pathologist was given increased funds and powers to supervise the conduct of forensic autopsies and reports. These reforms included the creation of an oversight counsel and the maintenance of a registry of qualified forensic pathologists.[203] The follow up to this Commission demonstrates that forensic pathology can be reformed within a coroner's system. At the same time, it is unfortunate that those who allowed Dr. Smith to provide unreliable expert evidence ignored many of the earlier recommendations of the Morin Inquiry with respect to report writing, quality assurance, and the monitoring of court-room testimony. The fragmented nature of the forensic sciences presents a danger that they will only be incrementally reformed on a discipline-by-discipline, jurisdiction-by-jurisdiction basis in response to notorious wrongful convictions.[204]

Both the Morin and Goudge Inquiries recommended that trial judges should be more vigilant in excluding expert evidence that does not satisfy threshold reliability standards, regardless of whether the science could be characterized as novel or not. The Goudge Inquiry also emphasized that experts should not be allowed to testify outside of their area of recognized expertise.[205] It stopped short, however, of recommending that the state's expert evidence should, consistent with criminal justice values, be held to a higher standard of demonstrable reliability.[206] Canadian courts apply tests for expert evidence that are influenced by *Daubert*.[207] They have moved away from admissibility tests that focused on general acceptance and whether experts have special knowledge through education or experience, to tests that require

203. *Act to amend the Coroner's Act* S.O. 2009 c.15.

204. Kent Roach, *Forensic Science and Miscarriages of Justice: Some Lessons from Comparative Experience*, 50 JURIMETRICS 67 (2009).

205. For a troubling case involving the multidisciplinary child abuse and neglect team that Dr. Charles Smith worked with and in which the Supreme Court deferred to a trial judge's decision to allow a burn expert to testify about child abuse and a child abuse expert to testify about burns see R. v. Marquard, [1993] 4 S.C.R. 223. For critical discussion see GOUDGE INQUIRY, *supra* note 6, at 473–74.

206. As proposed in Gary Edmond, *Pathological Science? Demonstrable Reliability and Expert Forensic Pathology Evidence*, *in* PEDIATRIC FORENSIC PATHOLOGY AND THE JUSTICE SYSTEM (Roach ed., 2008); *see also* Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic and Medical Evidence*, 61 U. TORONTO L.J. 343 (2011). This proposal has drawn criticism on the basis that it would be unfair to impose a higher burden on the prosecutor and that the reasonable doubt standard for conviction adequately controls for the reliability of forensic evidence. See Kenneth Chasse, *Junk Science by Way of a Higher Burden of Proof*, 16 CAN. CRIM. L.Rev. 323; Nayha Acharya, *Law's Treatment of Science: From Idealization to Understanding*, 36 Dal. L.J. 57 (2013). For our replies see Gary Edmond and Kent Roach, *Comment*, 16 CAN. CRIM. L.Rev. 357 (2012); Gary Edmond and Kent Roach, *Trial by Theory*, 36 Dal. L.J. 57 (2013).

207. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

that the expert opinion evidence be necessary in assisting the trier of fact and that it be subject to peer review and testing.[208] The Supreme Court has stressed that science that might be accepted in a clinical setting to treat a patient, may have too high an error rate to justify its use as forensic evidence in criminal proceedings.[209] There is a new emphasis in Canada on 'evidence' as opposed to 'experience' based expert scientific opinion. The Ontario Court of Appeal, in the 2007 Stephen Truscott appeal, for example, disregarded two opinions offered by a forensic pathologist and an entomology expert about the time of death because they were only based on the admittedly considerable experience of the Crown's experts and did not engage with the scientific literature.[210]

In 2007, the Supreme Court in a 4–3 decision in *R. v. Trochym*, excluded post-hypnosis testimony of a witness who purported to provide eyewitness identification.[211] The majority stressed the importance of determining the threshold reliability of the evidence and started its judgment by noting that recent wrongful convictions had confirmed "the need to carefully scrutinize evidence presented against an accused for reliability and prejudicial effect, and to ensure the basic fairness of the criminal process."[212] In deciding that post-hypnosis testimony should be excluded, the Court was not deterred by the fact that it had been accepted in previous cases and might not be characterized as novel science, noting that "the admissibility of scientific evidence is not frozen in time."[213] The court stressed that what was 'most troubling' about post-hypnosis evidence was:

> [T]he potential rate of error in the additional information obtained through hypnosis when it is used for forensic purposes. At the present time, there is no way of knowing whether such information will be accurate or inaccurate. Such uncertainty is unacceptable in a court of law.[214]

The majority of the Supreme Court in *Trochym* demonstrated an appropriate concern about the risk of wrongful convictions and the risk of relying on evidence of unknown reliability. This decision could potentially lead to the exclusion or qualification of expert evidence provided by experience based forensic sciences, especially those based on comparisons and pattern recognition. The Goudge Inquiry

208. R. v. Mohan, [1994] 2 S.C.R. 9 at 19; R. v. L.-J., [2000] 2 S.C.R. 600 (excluding various forms of novel science offered by the accused).

209. R. v. L.-J. [2000] 2 S.C.R. 600.

210. Re Truscott, 2007 ONCA at 165–69, 313–14.

211. [2007] 1 S.C.R. 239.

212. *Id.* at 1.

213. *Id.* at 31.

214. *Id.* at 55.

recommended that trial judges should, following *Trochym*, determine the threshold reliability of expert forensic evidence and that legal aid funding and training of defence counsel and judges be increased to achieve this objective.[215]

In a more recent case, the Ontario Court of Appeal has affirmed that trial judges have discretion to exclude expert evidence that otherwise satisfies the criteria for admissibility because of concerns about its threshold reliability and possible prejudicial effect. Nevertheless, the Court of Appeal found that the trial judge had erred by excluding evidence the prosecution offered from a sociologist about the meaning of a tear drop tattoo on an accused charged with a gang-related murder. The Court of Appeal stressed that the trial judge's concerns about the unknown error rate and lack of a random sample for the sociologist's research was inappropriate given the nature of sociology. At the same time, the Court of Appeal regulated the content of the expert evidence by prohibiting the expert from testifying that the tattoo meant the accused killed someone. The accused was, however, subsequently convicted of first degree murder after the sociologist testified that the tattoo meant either that he had either killed someone or someone close to the accused had died when they had not.[216] A critical question is whether similar concerns about the impossibility of determining precise error rates will allow forensic sciences to continue to be used in the absence of basic research on the validity of the experience based opinions drawn by fingerprint and handwriting analysts. If this occurs, judicial admissibility decisions will not provide a strong incentive to reform the forensic sciences. Much will depend on the steps that various provinces and laboratories take to ensure the reliability and quality of forensic evidence the prosecution offers.

I. Judges and Juries

Judges are appointed and not elected in Canada. As in the Marshall case, the decisions of trial judges to admit or exclude evidence can play an important role in wrongful convictions. The Supreme Court has

215. GOUDGE INQUIRY, *supra* note 6, chs. 17-18.

216. R. v. Abbey, 2009 ONCA 624; *see Man convicted 4 years after acquittal*, TORONTO STAR, Mar. 29, 2011. For criticisms of the Court of Appeal's approach in *Abbey* and arguments that the expert evidence did not satisfy the necessity standard for admissibility see Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic and Medical Evidence*, 61 U. TORONTO L.J. 343, 392-396. For findings that cases such as *Abbey* are not unusual and that courts in Australia, Canada, the United Kingdom, and the United States have all been reluctant to exclude expert evidence because of reliability concerns see Gary Edmond, et al., *Admissibility compared: The reception of incriminating expert opinion (i.e., forensic science) evidence in four adversarial jurisdictions*, U Denv. Crim. L. Rev (forthcoming).

deferred to the discretion of trial judges to admit expert evidence, even when experts may have strayed from their area of expertise.[217] More recently, it has indicated that trial judges should be more active in determining the threshold reliability of evidence, including expert evidence.[218] Trial judges should help ensure that qualified experts are not allowed to give evidence outside of the realm of expertise. Restrictions on the admissibility of expert evidence can, however, work to the disadvantage of the accused who may be wrongfully convicted. Canadian courts remain reluctant to allow the accused to call expert evidence on the frailties of eyewitness identification[219] or false confessions.[220] One of the reasons why Tammy Marquardt faced the possibility of a new trial was that the Court of Appeal discounted testimony by neurologists that her son may have died from an epileptic seizure because of the limits of their expertise.[221]

Trial judges have much discretion in deciding whether to accept a guilty plea. In light of recent wrongful convictions that have been revealed after guilty pleas, trial judges should be more active in determining whether there is a factual basis for a guilty plea. The National Judicial Institute of Canada provides an intense three day training session for trial judges on the causes and dangers of wrongful convictions. Judges have also made creative decisions in allowing possible victims of wrongful convictions to be released on bail pending the Minister of Justice's decision to re-open their case after appeals have been exhausted.[222]

Public inquiries have been reluctant to criticize juries for the role they have played in wrongful convictions. Although juries are used infrequently in Canadian criminal cases, they are mandatory in murder cases, unless the accused and the prosecutor both agree to a bench trial. The jury that convicted Donald Marshall Jr. was all white and was not screened for possible bias against Marshall because he was Aboriginal. Moreover, one of the jurors subsequently explained the guilty verdict on the basis of racist stereotypes about both Marshall and the African-Canadian victim. Canadian courts now allow potential jurors to be

217. R. v. Marquard, [1993] 4 S.C.R. 223 (allowing child abuse experts to testify about burns and burn experts to testify about child abuse). The Goudge Commission noted some of the dangers of this approach and that the Court now takes a more rigorous approach to the admissibility of expert evidence. GOUDGE INQUIRY, *supra* note 6, at 473–74.

218. R. v. Trochym, [2007] 1 S.C.R. 239.

219. R. v. McIntosh, (1997) 117 C.C.C.(3d) 385 (Ont.C.A.); R. v. Woodard, 2009 MBCA 42.

220. Re Phillion, 2009 ONCA 202.

221. R. v. Marquardt, 2011 ONCA 281 at ¶ 21.

222. R. v. Phillion, [2003] O.J. No. 3422 (Ont. Sup. Ct. of Just.); R. v. Driskell, 2004 MBQB 3; R. v. Unger, 2005 MBQB 238; Ostrowski v. The Queen et al., 2009 MBQB 327 (Can.).

questioned about possible racist bias.[223] Canadian courts, however, carefully regulate the questions that can be put to prospective jurors. Tammy Marquardt was not allowed to question prospective jurors about whether they would be biased against her because she was charged (and wrongfully convicted) of killing her young child.[224] The Supreme Court has upheld the absolute secrecy of jury deliberations even in the face of allegations of racist statements from jury members.[225] The role of juries in wrongful convictions, especially those involving accused from minority communities and allegations of horrific crimes, remains an important but understudied topic. This is especially so given the Supreme Court's clear statements that appellate courts should defer to convictions entered by juries, especially those based on credibility determinations.[226]

The Marshall commission criticized the appeal court that heard Marshall's first appeal for not examining legal errors the trial judge made that were apparent in the transcripts but that Marshall's lawyers did not argue on appeal. It recommended that appeal courts be more proactive with respect to errors that might contribute to wrongful convictions.[227] This raises interesting questions about the balance between adversarial approaches that rely on party presentation of the issues and more judge-centred inquisitorial approaches. Appeal courts also have the power to appoint commissioners to gather new evidence to assist on appeals. Although such inquiries have been conducted in at least one wrongful conviction case,[228] the appointment of such commissioners are rare. Appeal courts also have the power to appoint publicly funded counsel to assist with appeals.

Canada has a unitary court system that in most cases only allows the accused one appeal as of right and does not allow collateral challenge by way of habeas corpus. The Canadian system allows much less scope for successive challenges than the American system. This approach is, however, mitigated by the fact that Canadian courts appear to be more willing to entertain appeals out of time and to admit fresh evidence on appeal than most American courts. A related factor is that unelected Canadian prosecutors more frequently consent to measures to correct wrongful convictions than their American counterparts.[229]

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223. R. v. Williams, [1998] 1 S.C.R. 1128.

224. R. v. Find, [2001] 1 S.C.R. 863.

225. R. v. Pan, [2001] 2 S.C.R. 344.

226. R. v. W.H., 2013 SCC 22.

227. MARSHALL COMMISSION, *supra* note 6, at 87.

228. R. v. Neepose, 1992 ABCA 77.

229. Kent Roach, *Less Procedure, More Justice? A Comparison of Canadian and American Wrongful Convictions*, *in* WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS 283-308 (C. Ronald Huff

At the same time, the Canadian appeal system has frequently failed to detect wrongful convictions. For example, the Ontario Court of Appeal dismissed William Mullins-Johnson's appeal from his wrongful conviction for the murder and sexual assault of his four-year-old niece. The majority of the court held that the trial judge had adequately instructed the jury about the accused's defence that no crime had been committed. Borins, J.A., however, dissented on the basis that the trial judge did not adequately instruct the jury about the weakness of the evidence that the child victim had been sexually assaulted.[230] The Supreme Court, sitting only as five judges, dismissed Mullins-Johnson's subsequent appeal after an oral hearing but without bothering to provide written reasons.[231] In hindsight, the appeal process failed to prevent a wrongful conviction that was only reversed after the Minister of Justice ordered a new appeal on the basis of new pathology evidence that suggested that a sexual assault did not occur and that the cause of the victim's death was unascertained.[232]

The Supreme Court of Canada has been more sympathetic to the danger of wrongful convictions than the United States Supreme Court. The Canadian Court's two most important decisions with respect to wrongful convictions was its recognition of a broad constitutional right to disclosure in the 1991 case of *R. v. Stinchcombe*[233] and its 2001 decision holding that the risk of wrongful convictions would now require Canada to seek assurances that the death penalty would not be applied before extraditing fugitives.[234] Its 2007 decision excluding post-hypnosis testimony because of its unknown reliability[235] also has promise in minimizing the risk of wrongful convictions from unreliable evidence. The Court has also recognized the ability of people to bring civil suits with respect to malicious prosecution[236] and negligent police investigation.[237]

The Supreme Court's performance on other issues, especially those relating to the admissibility of evidence that may be unreliable, has been less robust. It has neither prohibited nor even required mandatory warnings about testimony from jailhouse informers despite their

& Martin Killias eds., 2013).

230. R. v. Mullins-Johnson, [1996] 112 C.C.C. (3d) 117 (Ont.C.A.).

231. R. v. Mullins-Johnson, [1998] 1 S.C.R. 977.

232. R. v. Mullins-Johnson, 2007 ONCA 720.

233. [1991] 3 S.C.R. 326.

234. United States v. Burns & Rafay, [2001] 1 S.C.R. 283.

235. R. v. Trochym, [2007] 1 S.C.R. 239.

236. Nelles v. Ontario, [1989] 2 S.C.R. 170; Proulx v. Quebec, [2001] 3 S.C.R. 9; Miazga v. Kvello Estate, [2009] S.C.C. 51.

237. Hill v. Hamilton Wentworth, [2007] 3 S.C.R. 129.

frequent use in wrongful conviction cases.[238] It has adopted a strict test for ineffective assistance of counsel without apparent recognition that a very similar test has been widely criticized in the United States.[239] It has allowed in-dock identifications to continue, even while conceding the minimal probative value of such judicial "show-up" identifications.[240] The Court has rejected the idea that convictions should be overturned because the appellate court has a lurking doubt about guilt and stressed the need to defer to convictions entered by juries;[241] it has allowed prejudicial investigative hearsay to be used to counter claims that police investigations are tainted by tunnel vision;[242] it has restricted the admission of evidence of third parties who may be responsible for crimes;[243] it has allowed confessions to be admitted after intense interrogations despite the dangers of false confessions;[244] and it has not prevented intense Mr. Big stings despite the risk that they may result in false confessions.[245]

There is also a danger that the federal Parliament has deferred to uneven judicial regulation of police practices such as identification and interrogation procedures even though legislative regulation would be more comprehensive and likely more effective in changing police and prosecutorial conduct.[246] Parliament has rejected a number of reforms proposed by provincial inquiries to decrease the risks of wrongful convictions. For example, it has refused to follow the recommendations of six inquiries that the petition procedure to the federal Minister of Justice be replaced by applications to an independent commission with investigative powers. In recent years, Parliament has almost uniformly pursued "tough on crime" and "victims rights" agendas and has demonstrated little concern about wrongful convictions. Indeed, its record is worse than that of the American Congress that has enacted some measures to facilitate DNA evidence retention and testing. Parliament's record is also worse than the record of some state legislatures that have enacted reforms in response to wrongful convictions, including the creation of the North Carolina Innocence Inquiry Commission to respond to claims of factual innocence and various state laws to regulate police identification procedures.[247]

238. R. v. Brooks, [2000] 1 S.C.R. 237; R. v. Hurley, [2010] 1 S.C.R. 637.

239. R. v. G.D.B., [2000] 1 S.C.R. 520.

240. R. v. Hibbert, [2002] 2 S.C.R. 445.

241. R. v. Biniaris, [2000] 1 S.C.R. 381; R. v. W.H. 2013 SCC 22.

242. R. v. Van, [2009] 1 S.C.R. 716.

243. R. v. Grandinetti, [2005] 1 S.C.R.27.

244. R. v. Oickle, [2000] 2 S.C.R. 3.

245. R. v. Hodgson, [1998] 2 S.C.R. 449; R. v. Grandinetti, [2005] 1 S.C.R.27.

246. CRAIG BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION (1993).

247. Robert J. Norris et al., *'Than That One Innocent Suffer': Evaluating State Safeguards*

VI. COMPENSATION FOR WRONGFUL CONVICTIONS

The lack of a legislative response in Canada to wrongful convictions is also seen with respect to compensation. Canada, unlike many American states and the United Kingdom, does not have legislation designed to implement the requirement under Article 14(6) of the International Covenant on Civil and Political Rights to provide compensation for victims of miscarriage of justice. In an attempt to discharge this mandate, Canadian federal and provincial governments issued guidelines in 1988 to provide for compensation. Unfortunately, these guidelines are quite restrictive and require statements either from an appellate court or from the executive in a free pardon that the person seeking compensation did not commit the crime. The guidelines exclude compensation for family members of the wrongfully convicted. They limit compensation for non-pecuniary losses to $100,000.[248] They allow reductions on pecuniary loss of earnings on the basis of "benefits received while incarcerated" and lack of due diligence or "blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction."[249]

Fortunately, most voluntary awards of compensation have not followed the restrictions in the federal-provincial guidelines. For example, awards have included compensation for family members adversely affected by wrongful convictions and damages for non-pecuniary damages well in excess of the $100,000 cap. The highest amount of compensation has been $10 million to David Milgaard who spent 23 years in prison for a murder he did not commit. Thomas Sophonow and Clayton Johnson each received $2.5 million. The Ontario government recently awarded Stephen Truscott $6.5 million after his 1959 murder conviction was overturned and the Ontario Court of Appeal acquitted him in 2007. Compensation was paid even though the Court of Appeal did not declare Truscott factually innocent and subsequently held that it did not have jurisdiction to make such findings. In addition, Mr. Truscott's wife, who suffered with him for the 38 years he was on parole and lived under an assumed identity, received $100,000. A retired judge who recommended this award to the government suggested that the ex gratia payment was justified even though Mr. Truscott would likely not be able to establish fault at a civil trial and his factual innocence could not be established in the absence of

Against Wrongful Convictions, 74 Albany L.Rev. 1301 (2011).

248. This cap is based on a 1978 judicial cap on non-pecuniary damages in physical injury cases. Andrews v. Grand and Toy, [1978] 2 S.C.R. 229.

249. FEDERAL PROVINCIAL GUIDELINES—COMPENSATION FOR WRONGFULLY CONVICTED AND IMPRISONED PERSONS (1988). These guidelines have been under review by governments for a number of years.

DNA. He also observed that "many if not most of the awards of compensation"[250] made in the last 20 years have departed from the restrictive federal provincial guidelines.

Although some compensation payments paid to victims of wrongful convictions in Canada are generous, others are not. Donald Marshall only received about $250,000 for 10 years of imprisonment, but this was increased after a public inquiry exonerated him. Almost thirty years later, the Ontario government offered Tammy Marquardt the same modest sum despite her 13 years of imprisonment. Such an offer of compensation to Marquardt is difficult to justify, especially because the same government compensated William Mullins-Johnson, who served 12 years in prison, with a $4.25 million settlement and both Marquardt and Mullins-Johnson were wrongfully convicted on the basis of Dr. Smith's flawed forensic pathology testimony.[251] No compensation has been offered to others such as Romeo Phillion and Kyle Unger on the basis that they made false confessions.

Under the Canadian system, a person who brings a civil action will be responsible for the other side's legal costs if they are unsuccessful. The prospect of such adverse costs awards, along with delays in civil litigation, may deter those who are wrongfully convicted from suing the state even if they have lawyers prepared to work pro bono or on a contingency basis. Canadian courts have imposed their own caps on non-pecuniary damages, such as pain and suffering and loss of family time.[252] Civil litigation brought by the wrongly convicted has encountered problems based on statutes of limitation,[253] a reluctance to recognize a cause of action for negligent as distinct from malicious prosecution,[254] and the imposition of qualified immunity doctrines when damages are sought for violation of constitutional rights under the Canadian Charter of Rights and Freedoms.[255] All of these factors help explain why most compensation cases are resolved out of court. One notable exception is the case of Rejean Hinse who, in 1961, was wrongfully convicted of robbery. In 1997, the Supreme Court finally acquitted him. Represented by counsel acting pro-bono he obtained an $8.6 million award against the federal government in 2011, 50 years

250. Hon. Sydney Robins QC, *In the Matter of Stephen Truscott Advisory Opinion on the Issue of Compensation*, at 21 (Mar. 28, 2008), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/robins_report.pdf.

251. News Release, Payments offered to victims of flawed pediatric pathology, Aug. 10, 2010, *available at* http://www.attorneygeneral.jus.gov.on.ca/english/news/2010/20100810-goudge-nr-en.pdf.

252. Andrews v. Grand and Toy, [1978] 2 S.C.R. 229.

253. Baltrusaitis v. Ontario (Attorney General), 2011 ONSC 532 (Can.).

254. Barton v. Nova Scotia (Attorney General), 2013 NSSC 121 (Can.); Henry v. British Columbia (Attorney General), 2012 BCSC 1401 (Can.).

255. Henry v. British Columbia (Attorney General), 2013 BCSC 665 (Can.).

after his wrongful conviction.[256] The enactment of legislation or compulsory guidelines to govern compensation in Canada might reduce the disparity in awards, but also likely lead to less generous payments in the most egregious cases.

VII. CONCLUSION

This Essay has provided an overview of wrongful convictions in Canada. There has been increasing recognition of wrongful convictions over the last 20 years, but the precise number of wrongful convictions in Canada remains elusive given ambiguities about what counts as a wrongful conviction. As in the United States, most acknowledged wrongful convictions are found in homicide and sexual assault cases. It is impossible to know how many undetected wrongful convictions have occurred in other types of cases, including cases where the accused has pled guilty. An increasing number of wrongful convictions have been recognized in Canada in the last five years where the accused pled guilty, often to avoid a harsher sentence. These cases support the idea that recognized wrongful convictions are only the tip of the iceberg because they reveal that wrongful convictions can occur in the vast majority of criminal cases where the accused makes a seemingly voluntary decision to plead guilty. Even very low error rates would produce significant number of wrongful convictions given the number of convictions.

There are two main ways that old convictions are overturned in Canada, namely appeals out of time or a petition to the Minister of Justice. In practice, fresh evidence is generally necessary for either mechanism to be successful. Canadian courts do not strictly enforce time limits for appeals or the discovery of fresh evidence. In the guilty plea and other cases, Canadian courts have allowed out of time appeals, sometimes with the consent of the prosecution, and have overturned convictions after appeal courts have considered the new evidence. Canadian prosecutors, who are not elected, have frequently consented to appeals out of time, the admission of fresh evidence, and the overturning of wrongful convictions.

In cases where appeals have been exhausted, a petition to the federal Minister of Justice must be made and that elected politician can order a

256. *Hinse v. Quebec*, 2011 QCCS 1780. Hinse also sued the provincial Quebec government but they settled out of court for $4.5 million. The case is also significant because in 1997 Hinse persuaded the Supreme Court to enter an acquittal in his case, reversing a stay of proceedings originally ordered when his 1964 conviction was overturned in 1991 after he had served five years in jail and ten years on parole. *R. v. Hinse*, [1995] 4 S.C.R. 597; *R. v. Hinse*, [1997] 1 S.C.R. 3; *Quebec man wins largest award for wrongful conviction*, GLOBE & MAIL Apr. 15, 2011.

new trial or a new appeal if he or she concludes that a miscarriage of justice likely occurred. In cases where the Minister has ordered a new trial, prosecutors often stay or withdraw charges given the age of the case, but such actions deprive the previously convicted person of an acquittal, let alone a finding of innocence which is generally necessary for compensation. In cases where the Minister orders a new appeal, appeal courts consider the fresh evidence and decide whether the conviction now constitutes a miscarriage of justice defined to include both the conviction of the innocent, unfair trials, and unsafe convictions. Appeal courts, however, do not make determinations of factual innocence. In some cases, the appeal court will order a new trial and in other cases the appeal court will enter an acquittal.

The willingness of Canadian courts to accept fresh evidence without undue emphasis on whether the accused could have obtained the evidence at trial and their willingness to grant bail to free suspected victims of wrongful convictions pending an appeal, or even pending the Minister of Justice's petition decision, are two of the greatest strengths of the Canadian system in responding to wrongful convictions. At the same time, relatively few people apply to the Minister of Justice to re-open cases. Since 2002, the Minister has ordered new trials or appeals in 15% of all applications. In all but one of these thirteen cases, the result has been the undoing of the conviction either through the court entering an acquittal or prosecutors withdrawing or staying the charges. This suggests that the Minister of Justice only grants remedies in cases where there is compelling new evidence that the previously convicted person is not guilty.

The seven public inquiries held in the last 20 years have examined the causes of wrongful convictions. They include police error, including tunnel vision; inaccurate eyewitness identifications sometimes facilitated by improper identification techniques and feedback; false confessions sometimes facilitated by improper police interrogations; the use of unreliable witnesses, especially jailhouse informers; lack of full disclosure by the prosecutor; inadequate defence assistance; and faulty forensic evidence.

Canada has taken some steps to remedy these causes of wrongful convictions. The Supreme Court declared a broad constitutional right to the disclosure of all relevant and non-privileged evidence held by the prosecutor in recognition that non-disclosure had caused wrongful convictions. It also declared that the risk of wrongful convictions in all justice systems make it unsafe to extradite a fugitive without assurances that the death penalty will not be applied. Some provinces have responded to wrongful convictions by improving the identification procedures used by the police and the practice of forensic sciences.

Some provinces have even conducted pro-active audits in cases involving suspect forms of evidence to determine the existence of wrongful convictions.

At the same time, there is much work to be done to lessen the risk of wrongful convictions in Canada and to improve remedies for the wrongly convicted. The federal Parliament has refused to exercise its exclusive jurisdiction over criminal law and procedure to regulate identification and interrogation procedures to minimize the risk of false identifications and false confessions. In turn, the courts have often been unwilling to exclude evidence even when the police used techniques associated with false identifications and false confessions. The appellate courts have refused to overturn convictions when they have a lurking doubt about guilt. The federal Parliament has also refused to follow the recommendations of six public inquiries that the federal Minister of Justice's powers to order new trials or appeals be given to an independent commission that could take a more proactive approach to the investigation of suspected wrongful convictions. Parliament also has not legislated a procedure to allow the wrongly convicted to obtain compensation. The wrongly convicted must demonstrate factual innocence in order to obtain compensation under restrictive administrative guidelines, but Canadian courts refuse to make determinations of factual innocence.