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Current Perspectives Conference

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A call for papers regarding a scholarly conference on the issue of Miscarriages of Justice can result in some unexpected contributions regarding the breadth of content, individual experience, and history with this issue. No matter the perspective there was a passion in all the eventual conference presentations coming from practitioners, researchers, and scholars all heeding the imperative to examine the quality of justice systems.

The offerings represented two broad notions of miscarriages of justice. The first theme could stem from errors in the outcomes of a system of justice. The advent of DNA testing has for the first time in human history provides a broad external check on the validity of the output of a system of justice. An overriding concern is whether the errors in the outcomes merely reflect the results of a few bad actors within the system, or systemic failings. The systemic concerns segue into the second broad theme of this Conference, concerns with procedural justice which are no less profound. The examination of the system's offers of procedural justice dealt with those procedures that seem unconnected with correct trial outcomes, such as police abuse of the power of arrest, and the quality of the procedures used even in the prosecutions of particularly notorious defendants.

Over 65 presentations were made at this Conference, which represented the work of over 80 individuals from over 50 academic and non-academic institutions. The international nature of the Conference was evident in that individuals coming from a half dozen countries beyond the U.S. and three continents presented papers. Around 1500 individuals attended the various panel and plenary sessions of the Conference.

My only regret with the Conference was that I was unable to bottle up and be able to share the many positive compliments made by the many visitors to the UCM campus. Many noted the pleasing aesthetics of the campus grounds and the Union facility, the quality of our many students who provided invaluable assistance at the Conference as well as in the planning prior to this event, and the generous nature of the staff who work with campus facilities and the University Union. I want to express my gratitude to all the UCM individuals and offices whose invaluable assistance allowed for this moment to reaffirm the basic fact that UCM can be very impressive.

This Conference was inspired by and dedicated to the memory and spirit of Irma Garcia. Her passion for justice and her scholarly enthusiasm make her loss that much sadder for her fellow students and her instructors at the University of Central Missouri.

Don Wallace
Director
Institute of Justice & International Studies
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Message from the Editor

It has been an honor to serve as editor for volume number 7 of the Journal. It is an exciting time here at the university, and the Journal shares this excitement with its elevation to peer-reviewed status. I am pleased to have been given the opportunity to take part in this debut edition. Any journal publication is the product of numerous hours of work by numerous individuals, and this is no exception. First, I wish to thank the contributing authors for their efforts and commitment. All were quite cooperative with feedback regarding drafts, corrections, and minute details (and all in time to meet the deadline!). Second, I would like to thank the individuals who gave of their time and energy to review articles and offer comments. Without reviewers, there is no "peer-review." Third, thanks to my fellow faculty members here at UCM. Many graciously offered to review manuscripts, offer advice, or just give moral support during our fledgling peer-review process. The Institute conference is always a stimulating experience here on campus; I am pleased that the Journal can serve as an outlet for such a variety of work, and on such an important topic. Again, many thanks to all who made this volume of the Journal a success!

Lynn S. Urban
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THE JOURNAL OF THE INSTITUTE OF JUSTICE AND INTERNATIONAL STUDIES is a multi-disciplinary, peer-reviewed journal devoted to the dissemination of information regarding a wide variety of social issues, both national and international, and a wide variety of research and presentation techniques.

MANUSCRIPTS

Manuscripts are typically the outcome of a presentation by the author at the academic conference hosted by the Institute each spring. These manuscripts should be submitted via email to wallace@ucmo.edu. Only original, unpublished manuscripts not under consideration by other journals will be considered. Articles to be considered for publication should be double-spaced, no longer than 20 pages, include an abstract of 50—100 words, contain no hyperlinks, smart tags, or other electronic notation. Submissions should follow either the APA style as in the *Publication Manual of the American Psychological Association,* 5th ed, or the Uniform System of Citation, 18th ed. Any figures should be in excel or other Word-compatible format.

CONVICTING THE INNOCENT:
WHY IT IS NOT JUST AN ISOLATED OCCURRENCE

Rodney Uphoff
University of Missouri School of Law

Address to the Miscarriages of Justice Conference: Current Perspectives
University of Central Missouri, February 19, 2007

Jimmy Ray Bromgard was 18 years old and charged with raping an 8 year-old little girl in Billings, Montana.[1] He had a defense lawyer representing him who had contracted with the county to handle all the indigent defendants in that county. His contract lawyer faced a serious challenge. The little girl said that Jimmy Ray Bromgard was in fact the rapist and there were some hairs found at the scene that purportedly matched his. Like a number of the people who subsequently were exonerated by DNA, Jimmy Ray Bromgard had a lawyer who did virtually nothing to defend him. He did no investigation, hired no expert to challenge the forensic evidence, did no opening statement, filed no suppression motion, and, at the end of the trial, did no closing argument. Not surprisingly, Jimmy Ray was convicted. He would spend the next 15 years in prison before DNA evidence demonstrated that he had absolutely nothing to do with the crime. He was totally innocent.

Jimmy Ray Bromgard is just one of the many wrongfully convicted DNA exonerees who has been freed in the last decade. The questions that I am addressing here: How common is this problem of wrongful convictions? Is it, as some of the defenders of this system say, just an isolated event; just an aberration that occurs from time to time? Or do these exonerations show, as I and others believe, that our system is significantly flawed? Is our system broken in many respects such that there are far more people in prison today who are innocent of any crime than most people are willing to admit?

On television, if one gets charged with a crime, an aggressive lawyer will do an investigation, will challenge the state's witnesses, and the state's evidence. If the adversary system works as it is supposed to, then an innocent person, defended by a good lawyer, will not be wrongly convicted. Unfortunately in the United States, the quality of the indigent defense lawyers varies significantly from jurisdiction to jurisdiction and, in many jurisdictions, the quality of the indigent defense services is dismally low. So what does that mean for most indigent defendants?

If one is fortunate enough to be arrested in a state like Wisconsin, that in 2002 spent over 67 million dollars on indigent defense, one might receive a very competent defense. That assumes that the defendant is poor enough to qualify for a public defender. In Wisconsin, most indigent defenders have the time and ability to raise an

[1] See also Innocence Project, Case Profiles: Jimmy Ray Bromgard, http://www.innocenceproject.org/Content/61.php (last visited December 17, 2008).

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effective defense, as well as access to expert witnesses, and to investigators. Thus, an indigent defendant has a fair chance to defend himself or herself.

By comparison, in Missouri in 2002, this state spent less than 32 million dollars on the defense of indigent cases, about half of what was spent in Wisconsin. Missouri spent much less even though Missouri is a larger state with more cases. It also has the death penalty, unlike Wisconsin, and a significant portion of the public defenders' budget in Missouri goes toward the defense of capital cases. In Oklahoma in 2002, just over 24 million dollars was spent on indigent defense. In Oklahoma the death penalty is sought in many murder cases, so as in Missouri, a significant percentage of the defense budget is allocated to the defense of these cases. Not surprisingly, the quality of justice for indigent defendants in Oklahoma and Missouri is often not very good.

There are many different systems for delivering indigent defense services in the United States. In this talk, I am going to focus primarily on indigent defense services because over 80% of people charged in criminal courts in the United States are represented by a court-appointed lawyer or indigent defender of some sort. There are different kinds of indigent defenders. Jimmy Ray Bromgrad was represented by a contract lawyer. This is a lawyer who agrees to handle all of the cases or a percentage of the cases in a particular county for a set fee.

I worked in Oklahoma for 10 years teaching at the University of Oklahoma College of Law. I was appointed to the Oklahoma Indigent Defense System Board and we awarded contracts to lawyers around the state. In 2005, the average contract lawyer in Oklahoma received $197 per case to provide representation. In several Oklahoma counties, the contract lawyer received less than $100 per case. If, like Jimmy Ray Bromgrad, you were charged with a serious crime in Oklahoma—say rape, a crime for which one could spend 20, 30, 40 years, or even life in prison—and your defense lawyer was being paid only $100 per case, then how much work is that lawyer likely to do? Consequently, if the lawyer does little work, then how much justice is an indigent defendant likely to receive in Oklahoma? Simply put, not much.

Or take the case in Louisiana of Johnny Lee Bell, charged with a second degree murder.[2] Bell's lawyer testified at a hearing raising ineffective assistance of counsel, that she spent eleven minutes with the defendant before his murder trial. Eleven minutes. Needless to say, she did not spend any time going out to look for witnesses or doing any legal research. When an attorney is paid $100 per case or has hundreds of cases to manage, that lawyer has little time to spend on research or investigation. So the quality of justice in states like Oklahoma, Louisiana, and unfortunately, Missouri, is very uneven. If a defendant is well-to-do, then the defendant can afford a quality lawyer. Much of the time, although not all of the time, well-heeled defendants will receive good representation.

A member of the working poor, however, is likely to get the absolute worst representation. Consider Larry McVay, who was charged with robbery in South Carolina. Larry made $182 a week. He had no savings account, no checking account, no other assets; he lived off his $182 a week, but he was charged with robbery and was facing a prison sentence.[3] Under South Carolina law at the time, a person making more than $125 a week was ineligible for a public defender. So Larry had to go out and try to hire a lawyer. He got two quotes, one for $5,000 and one for

[2] *State v. Bell*, 2004-1183 (La. App. 3 Cir. 3/2/05); 896 So. 2d 1236.
[3] *United States v. McVay*, 32 Fed. Appx. 661 (4th Cir. 2002).

$10,000—that was the going rate for a robbery charge. Moreover, criminal defense lawyers want their money up front. They are generally not going to start working on a case unless at least half of that fee is paid up front because they know they are going to have some collection problems down the road if they go to trial and the client loses. Since Mr. McVay could not come up with anything even close to $5,000 or $10,000, he showed up for trial without counsel. He was told he must represent himself. McVay then did what most people do when they are faced with the prospect of representing themselves, he pled guilty. After being sentenced, McVay later tried to get that sentence overturned on the grounds that he was wrongly denied access to counsel. He lost. He was ineligible for appointed counsel because he made too much money—$182 a week. Sadly, there are thousands of Larry McVays in courtrooms across the United States.

In Wisconsin, it is estimated that about 10,000 to 20,000 people a year fall into that exact category as Larry McVay. That is, they have some, but not really enough money to hire competent counsel. Yet they are supposed to go out and retain counsel. If they do not hire competent counsel, they either have to represent themselves at trial or plead guilty. Most of them simply plead guilty.

I would like to explore now the first of several myths about the criminal justice system, myths which I think are at the root of why it is that our system gets it wrong much more often than we care or dare to admit. The first myth is that every defendant in America receives the effective assistance of counsel. The reality, however, is that Jimmy Ray Bromgard and thousands of other defendants do not receive effective assistance of counsel. They do not receive the effective assistance of counsel because their lawyers have so many cases or are paid so little that, in turn, they do very little. This is true in some jurisdictions regardless of whether the defendant is represented by a contract lawyer or a public defender. In some of these under-funded jurisdictions, the public defender has so many cases—like Johnny Lee Bell's lawyer in Louisiana—that counsel can only spend less than a half an hour with her client before trial. No lawyer can go in and effectively represent a defendant at trial, particularly in a serious felony charge if the lawyer has not done any investigation, done any pre-trial motions, or done any preparation before trial. Quite simply, the representation will not be effective. As a result, the rights that we hold as so precious, the right to cross-examination, the right to call witnesses, the right to a jury trial—all of these rights are dependent on having a lawyer who will enable the defendant to exercise those rights. If one does not have a lawyer, a competent lawyer, then these rights are meaningless.

Equal under the law. We have all heard that phrase—equal under the law. How are Jimmy Ray Bromgard and O.J. Simpson equal under the law? Quite frankly they are not. There are too many Jimmy Ray Bromgards across the United States. That is not to say that some people do not receive wonderful representation from public defenders. Indeed, there are some terrific public defender programs with dedicated, highly skilled defenders. In a well-funded jurisdiction, public defenders have access to expert witnesses and the ability to have an investigator go investigate the case so that many defendants receive excellent representation. Unfortunately, as I have already indicated, there are too many jurisdictions where the public defender program or the contract lawyer system is hopelessly under-funded. Under those circumstances, it is preposterous to proclaim that every defendant receives effective assistance of counsel.

The second myth is that the police properly collect, handle, preserve, and analyze forensic evidence. The reality is the police in most jurisdictions bear little resemblance to the detectives and investigators portrayed on the television program CSI. There are too many instances where the police go to the scene and—either because of lack of training or lack of resources—do not collect the evidence that might make a critical difference. I am reminded of *Arizona v. Youngblood*.[4] Larry Youngblood was charged with sodomizing a young boy. Larry was picked out of a photo array, convicted at trial and ultimately spent over seven years in prison before DNA exonerated him. In the Youngblood case, he had a very good lawyer and that good lawyer did a competent job of cross-examining the young victim of that particular crime. But it is really hard to cross-examine effectively a young boy and be able to persuade the jury that this horrific crime was not perpetrated by the man that the little boy points to and says "that is the man who did it." That kind of identification testimony, even for a good lawyer, is very difficult to overcome. Yet there was some forensic evidence in Youngblood's case that the police had collected at the scene that might have made the jury's task far easier. Unfortunately, one of the police officers failed to refrigerate that evidence, so it spoiled. Given the state of scientific testing at the time in the 1980s, there was no other forensic evidence that could be analyzed. After the trial, Mr. Youngblood's lawyer took that case up to the Arizona Court of Appeals and that court said the failure on the part of the police to properly preserve this critical evidence was negligence, and the case should be dismissed against Mr. Youngblood. Subsequently, on appeal to the United States Supreme Court, the conviction was reinstated. The Supreme Court reversed the Arizona Court of Appeals, refusing to micro-manage the police. The Court held that unless the defense could show that the police in bad faith, purposely lost the evidence, the conviction should not be overturned. Justice Stevens, a judge whom I generally respect greatly, wrote a concurring opinion stating he was concerned that the police lost the forensic evidence and indicated, that in some cases, such a failure may be so significant that it warrants the reversal of the conviction. But in this case, however, the evidence against Mr. Youngblood was, at least according to Justice Stevens, overwhelming. Thus, he agreed to reinstate the conviction.

Years later, after DNA testing became more sophisticated, the evidence in the Youngblood case was re-examined. There was a bit of semen that could now be tested, not on the item of clothing that was not refrigerated, but another item of evidence. That evidence when analyzed, exonerated Mr. Youngblood. Not only did it exonerate Mr. Youngblood, but ultimately that evidence showed that another man was the perpetrator of the crime against this young boy. What is disturbing to me, as somebody who writes about and has worked in the criminal justice system for over 30 years, is that the United States Supreme Court adopted a standard that essentially excuses the police department from negligence. Instead of demanding that the police exercise due care with critical evidence, the Court approved a standard that tolerates police negligence. In Youngblood, not only did police negligence contribute to an innocent man spending seven years in prison for a crime he did not commit, but equally important, police incompetence enabled the real perpetrator to stay on the streets committing more offenses.

When we talk about exonerations and when we talk about the need for systemic reform, we are not just talking about making sure that innocent people are not wrongly

[4] *Arizona v. Youngblood*, 488 U.S. 51 (1988).

convicted. Systemic improvements are also needed to ensure that we catch the real perpetrators who may otherwise continue to terrorize the community. In the Youngblood case, the failure to properly preserve critical evidence was simply inexcusable. We have to develop ways to make sure that the police do a better job collecting and preserving evidence.

We should bear in mind, however, that the Missouri Highway Patrol estimates that it can get DNA evidence in only 5% to 7% of criminal cases. Which means, in a case like Larry Youngblood's, if there was not any DNA evidence, Mr. Youngblood would have stayed in prison for a lot longer for a crime he did not commit. That, unfortunately, is one of the harsh realities of our present criminal justice system.

Eyewitness identification is an absolutely critical part of our system. We rely on such evidence in case after case after case and yet too often it can lead to horrible miscarriages of justice, as in Youngblood. That reality does not mean that we ought to abandon the use of eyewitness identification testimony. That is wholly unrealistic. We have to rely on such evidence. Nonetheless, we have to find ways to minimize wrongful convictions that occur at an alarming rate. Indeed, absent DNA evidence, fewer wrongful convictions would be corrected and more wrongful convictions would occur because of misidentifications. So we have to take steps to improve our identification procedures.

The other thing about myth number two is that most people wrongly assume that the crime labs in the United States are highly competent. Sadly, anyone who has studied crime labs in the United States knows that there are far too many examples of crime lab fraud and incompetence. It is an area that demands significantly more resources if we are to ensure that the kind of problems that occurred in Houston, Oklahoma City, West Virginia, to name a few where there have been horrific problems, do not continue to repeat themselves.

The third myth is that cross-examination will produce the truth. If one has a lawyer who has not adequately prepared, that lawyer cannot rely effectively on cross-examination. It is just not going to work. Allow me to talk briefly about a case involving Ronald Cotton. Ronald Cotton was charged with raping two young women, one a college student by the name of Jennifer Thompson. I was at a conference at Harvard about six or seven years ago and Jennifer Thompson came to this conference along with the police chief of Burlington, North Carolina, where she had been a crime victim. Jennifer Thompson without a doubt was one of the most compelling speakers whom I have ever heard. She sat there in a room about twice as big as this, with law enforcement officials, lawyers, law professors, citizens, and told us how she was raped as a college student and the rape took over an hour. She described how she felt while this man was raping her and how she concentrated on every little detail, memorized his face, memorized every physical feature because she said, "If I live I want to make sure this sucker spends the rest of his life in prison."

She lived. She picked this guy out—Ronald Cotton, high school football star, without any prior criminal record—and she ultimately convinced the jury that Ronald Cotton was her assailant. The police detective, now police chief, who investigated that case told the conference, that in all of his years on the police force, he had never heard a more powerful witness. She was absolutely sure of her identification and he had no doubt she had the right man. With such a witness, it did not matter if the best lawyer in America was cross-examining this witness, it would not have made any difference to the jury. The jurors were going to come back with a guilty verdict because she was that convincing. Ronald Cotton spent ten and a half years in prison

before DNA evidence exonerated him. Jennifer at that conference talked about her own feelings when she reached out to Ronald Cotton many years later and apologized for the harm she had mistakenly caused him. Ultimately, the DNA was linked to another man who did not look at all like Ronald Cotton.

As I listened to her speak and thought of the trials that I had been involved in cross-examining witnesses, I was humbled. The system should be humbled by the power of that story because it does not matter in some cases how good a defense lawyer is, that lawyer is not going to prevent an injustice, like the injustice in that case. That is one reason why myth three—cross-examination will produce the truth—is just that, a myth. Indeed, in Ronald Cotton's case, cross-examination proved meaningless. Without DNA evidence, he would have been in prison for most of his life for crimes he never committed. It is so important, therefore, that we spend money and invest money in properly collecting and preserving evidence.

Myth four is that innocent people do not confess. A number of the DNA exonorees were convicted based on so-called confessions that DNA evidence subsequently showed were false confessions. I have talked with people who have experienced what it feels like to be in an interrogation like David Vasquez endured. Vasquez, a 38 year old, not terribly bright guy, was falsely told by the police that his prints were at the murder scene.[5] Police in this country can falsify information in an attempt to get somebody to confess. Police in the UK and in a number of other countries, however, are not permitted to lie to a suspect. David Vasquez ultimately gave a dream confession. That dream confession eventually was deemed a real confession by the police and David Vasquez, on the advice of counsel, pleaded guilty rather than going to trial. David Vasquez was innocent, but he pled guilty because it was a way to save himself from the death penalty. He did so because the plea-bargaining system in this country imposes enormous pressure on defendants.

The plea-bargaining system in this country essentially puts people in a box and it says to them, "Plead guilty and there will be a significant discount. Go to trial, if it is a death penalty case, and you will get the death penalty." In a serious, non-capital case, the suspect will be told the punishment will be a much longer time in prison if there is no guilty plea. Assume a defendant has a lawyer who spent only eleven minutes with the defendant or a lawyer who has done zero investigation even though the lawyer has been given the names of various witnesses. But the lawyer has not talked to any of them. Assume now that trial is about to start. Who would run the risk of going to trial either facing the death penalty or a much longer sentence in prison with a lawyer who is woefully prepared? Won't most defendants take the advice of the lawyer, who has done no work, to plead guilty? Plead guilty, because you will lose at trial and spend even more time in prison. There are in this country thousands of people who plead guilty under those circumstances. They would be foolish not to do this. Certainly it does not matter if they are innocent or not.

Take for example, an Oklahoma high school teacher, with no prior criminal record, accused of fondling one of his high school students. He is charged in an Oklahoma court, facing 40 or 50 years in prison, which he would likely receive if he goes to trial and loses. Because he is a high school teacher, he does not qualify for a public defender. So he and his family get together $50,000, by mortgaging their house, selling property so that they can hire a good lawyer. After spending all that money, is

[5] For more information about the Vasquez case, see National Institute of Justice, U.S. Department of Justice, *Convicted by juries, exonerated by science: Case studies in the use of DNA evidence to establish innocence after trial* (1996).

the defendant still going to risk trial on a case where it is the defendant's word against the student's word? There are no other witnesses and the District Attorney is offering a plea bargain with probation. Under those circumstances, even though the defendant will be forfeiting his teaching position and career, few defendants—albeit innocent—are going to run the risk of spending 40 or 50 years in prison. That is our plea-bargaining system. Even with a good lawyer, innocent people do decide to plead guilty. If you do not have a good lawyer, then it is even harder to make that decision to go to trial.

Arthur Lee Whitfield, charged with two rapes, decided to go to trial on the first rape charge, over his defense lawyer's recommendation, because he said "I am innocent. Both women who picked me out said that the assailant had no facial hair. I have had a beard; my family will testify that I have had a beard. My family also will testify that I was home the night of the rape."[6] He went to trial. Despite the glaring inconsistencies in the victim's identification, and despite the fact that his family testified he was home at the time of the crime, Arthur Whitfield was convicted. He was given 45 years in prison. Facing the second charge, Arthur Whitfield decided that going to trial again might not be such a good decision. Because the plea offer was for only 18 years, he plead guilty. After serving 22 years in prison, Arthur Whitfield was exonerated of both rapes. Twenty-two years in prison for crimes he did not commit.

Another such case involves Nicholas Souder, an 18 year old facing charges in Georgia.[7] Souder had an appointed lawyer. Unfortunately, his appointed lawyer died. So when Souder shows up for trial without a lawyer, the judge insists that Souder represent himself. The judge explained the options: plead guilty for a 10 year sentence or go to trial and likely get 45 years. Souder did what most 18 year-olds would do given that choice, he pled guilty. Innocent people do plead guilty in this country. Souder finally got the help of a public defender and after serving six years in jail, ultimately got his day in court with a competent lawyer. He was promptly acquitted of the charge.

I have no doubt that our plea-bargaining driven criminal justice system produces erroneous convictions. I am very confident the number is higher than many defenders in the system would say. I am absolutely convinced that number is much higher than it should be largely because of the poor quality of indigent defense services in many parts of this country. There is some evidence that I think strongly supports my contention. In 2005, the state of Virginia sampled a group of prison inmates in cases where they discovered DNA samples that had not been tested. When they tested that DNA evidence, they discovered an error rate of 6%. That is, 6% of the people that they tested turned out to be completely innocent and had been wrongfully convicted.

There is a second piece of evidence. From 1989 to 1996, in the early stages of DNA testing, the FBI crime lab was receiving samples of DNA to test from police labs and departments across the country. There were approximately 10,000 samples sent in. These were samples of men who either had been arrested and who the police believed to be the culprit or they had already actually been charged with the offense. Out of the 10,000, about 60% or 6,000 matched the suspect. So, 60% of the time the suspect was in fact confirmed by the DNA testing. About 20% of the time or about 2,000 cases the sample was inconclusive. There was some problem that precluded the FBI from obtaining a conclusive result. In over 20% of the samples, however, the

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[6] Whitfield's case is described at Innocence Project, Case Profiles: Arthur Lee Whitfield, http://www.innocenceproject.org/Content/291.php (last visited December 17, 2008).

[7] For more information about the Souder case, see Uphoff, *supra* note 1, at 800-01.

suspect was excluded as the perpetrator. That means in over 20% of the cases the non-forensic evidence pointed to the wrong man. Since 1996, that number has held constant in further testing. The frightening lesson is that without the DNA exclusion many of these suspects would have been charged and, given the way our system works, many would have been convicted.

Recall that only in 5% to 7% of the cases there are DNA samples collected. If the criminal justice system produces that kind of error rate in the cases with DNA, it is reasonable to assume that in the non-DNA cases that error rate is going to stay fairly constant. Thus, because we are relying on the same kind of evidence, primarily eyewitness identification testimony, in cases without the correcting influence of DNA evidence, the likelihood of erroneous convictions is significant. That is why I am very confident that our system needs to adopt meaningful reforms. I believe we have an obligation to improve our criminal justice system if, indeed, we are committed to real justice in this country. Our criminal justice system can—and should—perform better.

REFLECTIONS ON A FEW REFORMS

Thomas P. Sullivan
Jenner & Block, LLP

Address to the Miscarriages of Justice Conference: Current Perspectives
University of Central Missouri, February 19, 2007

I have been practicing law for about 54 years in Chicago. During 4 of those years I was a prosecutor, and during 50 I have been defending criminal cases. So I have been on both sides, but chiefly for the defense. I would like to talk to you about some of the reforms that have been recommended to alleviate certain serious problems in our criminal justice system.

I believe that most police and prosecutors are intelligent, honorable people who are not trying to frame innocent people. We all make mistakes, and an under funded system will lead to mistakes. We should not get our attitudes skewed so we are prejudiced against police, any more than we want the police to be prejudiced against us if they arrest us for something we did not do. There are problems and there are solutions. One of them is to properly fund the police departments, the prosecutors and the public defenders.

In the year 2000, the 13th person who had been convicted and sentenced to death in Illinois was exonerated; we are now up to 17. In Illinois, death penalty cases represent less than 2% of the felony cases, felonies being major crimes. When Governor Ryan in 2003 took all of the men off death row, there were about 160; applied to the total number of exonerees, that makes about a 10% rate. If one applies that rate to the total number of people in jail in Illinois, it yields a frightening number: one out of every ten persons in a cell in Illinois should not be there! But I believe it is not that high.

The advent of DNA has been miraculous for the criminal justice system, because it provides us with a method of knowing for certain in many cases whether or not the person suspected or indicted committed the crime. But most crimes do not involve any DNA evidence. If someone walks into a store, shoots the clerk and runs out, there is no DNA. You have a bullet, and perhaps fingerprints, that is about it. The other thing to bear in mind is that most crimes do not ever get prosecuted. Of those that are prosecuted, most defendants plead guilty because they are guilty. And most who go to trial are convicted. The conviction rate of the cases that are indicted is over 90%. I want to put these statistics in some kind of framework, to show you that we are not filling our jails with innocent people.

But there are enough innocent people and enough flaws in the system to cause deep concern. That is why back in 2000, Governor George Ryan—who now himself has been convicted and is facing a long term in jail—imposed a moratorium on death sentences, and appointed a commission to study ways in which the capital punishment system in Illinois could be made more accurate, fair and just. There were

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14 of us. We studied the system for two years, and we submitted our report in 2002, containing 85 recommendations for how the system could be improved.

In my opinion, the single most important recommendation of the 85 had nothing to do with capital punishment. Number 83 said that, to the extent applicable, the reforms suggested should be adopted for non-capital as well as capital cases—that is, the other 98% of felony prosecutions. The small number of capital cases diverts attention disproportionately from the vast majority of cases involving so many people.

A great deal of emotion and money is spent on capital punishment. It costs far more to put somebody to death than it does to put him or her in jail for life. Death cases arouse so much emotion and so much controversy that at the end of the day you have to wonder whether capital punishment is worth the cost, not only to the system, but to the victims and their loved ones. Capital cases are reviewed so carefully and so extensively that the victims' families often have to come back and testify again, facing the person that caused the worst problem they ever had in their lives.

According to our study, in Illinois it took more than 12 years from the day the jury declared a death sentence until the time that the sentence was carried out. One can easily question the kind of deterrent effect expected from a system like that.

There were four different problems identified that led to most wrongful convictions: eyewitness identifications, false confessions, testimony of jailhouse informants (so called "snitch testimony"); the fourth is a phenomenon called "tunnel vision" or "confirmation bias," that all humans are subject to in many contexts. It leads to many arguments with parents and spouses. When we think we know what happened, we look for the evidence to support our view, and reject evidence to the contrary.

One of the Commission's major recommendations with respect to eyewitness identification—the single most prevalent cause of wrongful convictions—is to use administrators who do not know who the police suspect is among those shown in the lineup or photo spread. In the eyewitness identification area, the usual way is to present to the witness six people in a lineup or six photographs. Most now are by photographs, and it's moving to computers. Usually the administrator of the lineup or photo spread knows which of the six is suspected by the police to be the person who committed the crime. That is a defective system, because the administrator might either deliberately or inadvertently hint to the witness which is the suspect. We need not assume that an administrator's influence is conscious or deliberate in order to see the value of a "double blind" recommendation, in which neither the witness nor the administrator knows the identity of the suspect—both are blind as to the identity of the suspect.

It is well established that people have natural propensities to test their hypothesis in ways that tends to bias the evidence towards confirming the hypothesis. You can think in your own experience how you tend to do that. A confirmation bias in human reasoning and behavior is the seed that gives birth to the self-fulfilling prophecy phenomenon, in which a person's assumption that a phenomenon will happen leads to behaviors that tend to make the phenomenon happen. The use of procedures in which the person collecting the evidence is unaware of the correct answer is an effective protection against this powerful phenomenon.

The administrator should tell the witness that he does not know who the suspect is—or if he does know, that the witness should not assure he knows; that the perpetrator may not be in this lineup; that the witness is not required to make an identification; and that even if the witness does not make an identification, the

investigation will continue. Those four instructions, plus a blind administrator, should help to reduce the number of mistaken eyewitness identifications.

The other thing that has been suggested is that the lineups and photo spreads be done sequentially rather than simultaneously. In a sequential showing, the persons or photos are shown one by one, and the witness' degree of certainty is recorded for each before going to the next. The phenomenon in simultaneous procedures is a tendency on behalf of many people to identify as the perpetrator the person or photo that most resembles their recollection of the person who was the perpetrator—a relative judgment. In sequential showings, the witness must use individual judgments. Use of double blind sequential procedures is a reform that is being considered by law enforcement agencies throughout the United States.

Another issue is the phenomenon of false confessions. It is my opinion that most people confess because they are guilty. Most confessions are true. But people sometimes confess to things they did not do. We know that, because many of the convictions that have been undermined by DNA evidence involved people who confessed. It is a real phenomenon, particularly with people who are interrogated over several days, or those of lesser intelligence, or who are worn down when police lie to them about having their fingerprints, or having a witness to the crime who can identify the suspect. Most courts in the United States permit police lying about available evidence in order to induce confessions.

Recording of custodial interviews by the police, either by video or audio, from the *Miranda* warnings to the end, is one of the major reforms being put in place throughout the United States today. It will not stop police lying, because they are permitted to do that in most states. But it ought to stop coercion, physical abuse, promises of leniency or short sentences—the sorts of things that are not permissible interrogation tactics.

The chief beneficiaries of recording interrogations are the police themselves. When police do not record, defendants often claim that they were not given the *Miranda* warnings, or were abused, or did not confess or make damaging admissions. The result is a courtroom swearing match between the police and the defendants, the former suspects.

Recordings are a simple solution. If there are investigators who do not give *Miranda* warnings, or ignore requests for a lawyer, or use coercive tactics, or testify falsely as to what the suspect said or did, they will be found out and dealt with appropriately; they cannot be detectives anymore. Conversely, suspects' false claims of not having received the *Miranda* warnings, or claims of coercive tactics, go out the window. So this reform works both ways.

The third recommendation relates to jailhouse snitches. The Illinois Commission recommended that in capital cases, before a prosecutor is permitted to put on evidence by a witness who was in jail with the defendant who claims that the defendant made a confession or admission, there must be a pretrial hearing, outside the presence of the jury. The state has to convince the judge by a preponderance of the evidence that it is reliable testimony. That law was passed. As far as I can tell, in Illinois since that statute has been put in place there has only been one hearing. Perhaps prosecutors have stopped using that kind of questionable testimony, because they have been alerted to the wrongful convictions resulting from false testimony given by jailhouse informants.

The fourth recommendation is to teach police, prosecutors, and judges about the phenomenon of tunnel vision and confirmatory bias. As I said, I am a fan of police.

But I think that, particularly among detectives, who are the ones investigating crimes, after they have been in the profession for 15 to 20 years, many become overly confident in their ability to solve crimes, and they become subject to tunnel vision that kicks in confirmation bias. That is dangerous.

There should be an effort to make certain that police and prosecutors do not shut their minds to evidence that their suspect may not be the perpetrator. Further, they should follow all leads, including those that indicate their suspects' innocence. If they find evidence that is contrary to the notion of their suspects' guilt, they should disclose that to the defense lawyers.

Many of the difficulties in the criminal justice system are tied to money. If really fine people cannot be hired as police, this will be paid for in other ways. Departments must have honorable and intelligent people doing these jobs.

In addition to training police and lawyers, there should be training of judges. They are trying these serious felony cases, and they need training, too. To reduce the numbers of appellate reversals, judges are needed who are well versed in the law and in conducting trials in an efficient, impartial manner.

Another recommendation for reform is that the forensic laboratories be placed in independent state agencies, not answerable to the chief of the state police departments. There have been serious questions about the quality of work being done at some forensic labs. It appears that confirmatory bias has affected some scientists. Independent agencies will increase public confidence in the results, by not having them within the state police departments, but instead in properly funded independent departments. Unfortunately, that recommendation of the Illinois Commission has not been adopted.

Laboratory backlogs can also be a problem. One state run lab in Illinois had a huge backlog, particularly in testing DNA samples. The state lab outsourced a portion of the testing to an outside lab. About a year and a half later it was found that 25% of the results reported by the outside lab were inaccurate, with the result that all of the samples that had been sent to the outside lab had to be re-tested. This created a statewide backlog at the end of 2005 of over 3,000 DNA samples. This experience shows that outside labs as well as state labs require constant oversight and periodic verification of results.

The reforms I have discussed are being proposed throughout the United States, and are being pushed in state legislatures by organizations who are interested in improving criminal justice. To their credit, many of the police and sheriff's departments have stood behind these recommendations. They are not interested in convicting the wrong person. When that occurs, there is a double injustice, because the real perpetrator is still free.

A case that happened in Illinois involved a young engaged couple, white, who were abducted by four African American men, some years ago. They were taken to an abandoned home, the woman was raped by all four men, then both were killed. Within a few days the police arrested four men, who became known as the Ford Heights Four.

Two of the Ford Heights Four received the death penalty, and two received long prison sentences. Years later, a journalism professor at Northwestern University was teaching a class that involved examining these convictions. A student went to the file, and found a report of a statement taken by two police officers a few days after the crime from a witness who identified the actual perpetrators. No rational explanation has ever been given as to why the report was not revealed or why the police or

prosecutors did not pursue the lead. The journalism student and investigators located three of the four actual perpetrators; the fourth had died. One was in jail for killing somebody else. Two confessed. The three were convicted and sent to jail, and the Ford Heights Four were released. A judgment of $32 million was entered against the City of Chicago for the years in jail the four had endured. One of the Ford Heights Four, who was on death row for 17 years, died shortly after his release.

I realize it is impossible to achieve perfection, to always convict the guilty, and to always exonerate the innocent. We humans make mistakes, regardless of the effort and honesty we devote to our work. But although we will make mistakes, we can reduce the errors by enacting some of these reforms, and by properly funding our system. In an article, which will be published in the Richmond Law Review,[1] I elaborate on these points to greater extent.

[1] Sullivan, Thomas. Efforts to improve the Illinois capital punishment system: Worth the cost? 41 *U. Richmond L. Rev.* 935 (2007).

PRESUMED GUILTY:
INNOCENCE AND THE DEATH PENALTY

Sean O'Brien
Public Interest Litigation Clinic

Address to the Miscarriages of Justice Conference: Current Perspectives
University of Central Missouri, February 20, 2007

I want to preface my remarks by giving you some personal perspectives about the innocence revolution that has been brought about by DNA. It has really changed the way that defense lawyers and prosecutors think about wrongful convictions and about the criminal justice process. But it has not changed it enough.

The criminal justice system is something that we all use. As innocent citizens, we depend on it for protection. As the accused, we depend on it to exonerate us if we are innocent, convict us if we are guilty and to rehabilitate us if we take the wrong path in life. As victims of crime, we depend upon it to solve crimes and punish wrong-doers; we hope it will restore us to our prior state of peace and prosperity.

We depend on other public institutions to keep us safe when we use things like trains and airplanes and automobiles. Typically when an airplane falls out of the sky, we will see whole armies of people who will take it apart nut by nut, bolt by bolt, until we find the part that went wrong and then we will ground all those airplanes until we figure out how to reengineer the process so that it does not happen again. That makes sense because if we were making parachutes, we certainly want them all to work. The failure rate for parachutes should be as close to zero as we can possibly get. Why should we not be equally concerned with our criminal justice system?

I want to focus on capital litigation, which is the only process in the democratic world in which litigation can result in the intentional taking of a healthy human life. I will give you some broad overviews. There are two lists of exonerees that you will hear about. There is the list of DNA exonerees that was developed through the efforts of the innocence projects that are cropping up around the country. There is another list of people who have been on death row who have been exonerated. Only relatively few of these exonerations were accomplished with DNA technology. I want to examine both lists and show you a few things to illustrate what we are learning from DNA.

This graph (Figure 1) shows the type of offenses that were involved in the first 81 DNA exonerations:[1]

Based on the first 81 DNA exonerations, the most common case of exoneration involves charges of rape. There is a logical, scientific explanation for that; the perpetrator of a sexual assault typically leaves behind incriminating genetic material. And so rape is in many ways the easiest of wrongful convictions to correct due to the

[1] Barry Scheck & Peter Neufeld, *Actual innocence,* Appendix 1, New American Library (2000)

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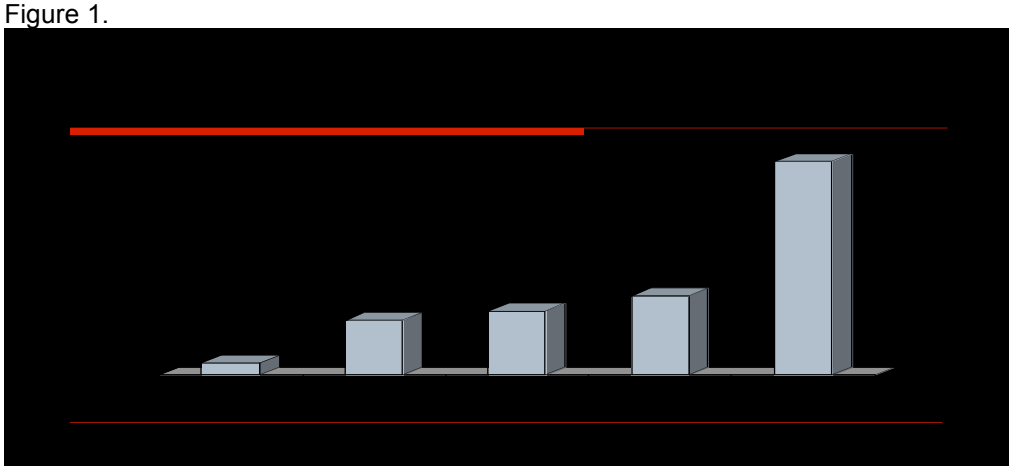
DNA left behind. Unfortunately, in a lot of other cases, there is not an unambiguous exchange of body fluids between the perpetrator and the victim. No DNA evidence is left at the scene.

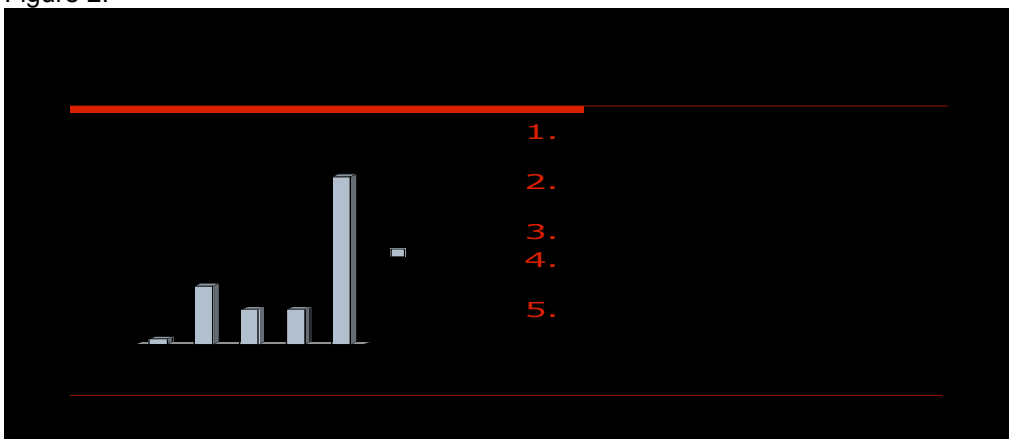
Figure 1.



You will note that 70 of the first 81 exonerations involved rape offenses, but that the addition of the assault, kidnapping, homicide, and robbery offenses totals far more than 81 cases. Occasionally DNA can help us in a homicide case. Some of the homicide exonerations involved rape-murder charges, so that there was genetic material to test. Similarly, there is a significant overlap with assault and kidnapping. Innocent prisoners were cleared of assault, kidnapping, homicide, and robbery because the perpetrator also sexually assaulted the victim.

DNA exonerations also enable us to examine those cases to determine what factors lead to wrongful convictions. This graph (Figure 2) identifies common sources of error discovered in the first 130 DNA exonerations:[2]

Figure 2.



[2] Innocence Project Web Site, http://www.innocenceproject.org/understand/, last visited August 14, 2007.

Even with DNA there is the occasional mistake in the lab. DNA is no more reliable than the process by which it is collected, labeled, preserved and tested. A mislabeled or contaminated DNA sample can have devastating consequences, so that false DNA inclusions or exclusions have contributed to three wrongful convictions.

A surprising number of DNA exonerations involve people who confess to crimes they did not commit. Typically we tend to think of confessions as the most reliable kind of evidence. Interrogation theory and practice teaches law enforcement officers that absent physical torture, a person will not confess to a crime he or she did not commit. That simply is not an empirically proven fact. And in fact, in many cases, interrogation techniques demonstrate that with people of limited intellect, sophisticated psychological interrogation techniques will produce a confession, regardless of whether the confession is true or reliable.

We have had two of those cases in Missouri: Johnny Lee Wilson, from Aurora, and Melvin Lee Reynolds from St. Joseph. Both men with relatively high functioning, mid-range mental retardation, gave videotaped confessions to murders that they did not commit. They were exonerated only when the actual perpetrator came forward and gave a confession that, unlike these gentlemen's confessions, matched the physical evidence at the scene of the crime. False confessions plague the system at a fairly high rate.

"Snitch" is a criminal defense lawyer colloquial term for informants, people who make agreements with the prosecution to testify. Sometimes they are co-defendants. Sometimes they are jail cellmates. Sometimes they are just prisoners looking for an opportunity, looking for a "bigger fish" on the docket to testify against so they can get out from under charges that they are facing. They can be very, very sophisticated. If you read the Kansas City Star, over the past weekend there was a fairly in-depth article by Mike McGraw about the Kansas City firefighters' homicide case. It took the prosecutors years to develop a case and get a conviction. They were so frustrated. The way the investigation in that case began was that notices were put up in county jails and prisons, advertising rewards for people to come forward and give information that could lead to the arrest and conviction of persons responsible for this horrible crime in which the firefighters were murdered. The result was the entire case was based on snitch testimony. People who came forward made deals or got cash rewards in exchange for their testimony. In a number of these cases there is an unholy alliance that can develop between law enforcement and people who take advantage of this strong desire to solve an infamous crime. A defendant facing a long prison sentence will find somebody who is wanted more. This defendant bargains away a jail sentence and helps put away somebody else in prison in his place.

In Los Angeles, Clarence Chance and Benny Powell were exonerated after serving 17 years in prison, after being convicted on the basis of testimony of a fellow who was a professional snitch. This professional has explained how in more than 30 cases, he was able to escape prosecution on serious felony charges by offering to become an informant and testify against other people in the jail who allegedly made jailhouse confessions to him. He would have his girlfriend call the tips hotline and provide some information about the crime, pretending that she was a witness. Then the snitch would concoct an admission for another inmate that included that detail. The police would be convinced his statement was true since it included information from the anonymous call—information supposedly known only to the police and the perpetrator. Prosecutors, operating in good faith, get taken in by this sophisticated

approach.[3] Snitches have become a serious contributing factor to false convictions and they are used probably with greater frequency in capital prosecutions. In assessing innocence cases, we have learned to look at these various factors as "red flags" that justify further investigation.

Another significant factor contributing to wrongful convictions is microscopic hair evidence. When I first started practicing law in 1980 as an assistant public defender, they had just come out with technology that prosecution experts claimed could help solve crime. By looking at hairs under a microscope and looking at a sample of less than 50 people, they categorized hair characteristics and then used probabilities based on extrapolations from that sample. If one in ten people has red hair and one in ten people has curly hair, then a curly red hair could be narrowed down to one in a hundred people. More factors, such as thickness or texture, supposedly narrowed the source of the hair even further. With these additional characteristics, the probabilities could become one in 5,000, which sounds like an impressive number to a jury.

Prosecutors and law enforcement will also use forensics to bolster eyewitness identification. In the 1980s, the admissibility of microscopic hair evidence was challenged in the beginning as simply bad science. It is inaccurate, and it has not been empirically tested or proven. DNA evidence is showing us that in cases of exoneration, more often than not, hair and fiber evidence is wrong. It would be more accurate to toss a coin. But in 60% of the exoneree cases in which hair and fiber evidence was used to implicate the defendant, they were incorrect inclusions. But just as often there were incorrect exclusions. Dennis Fritz was convicted because microscopic hair evidence was used to corroborate what was otherwise a shaky case. The expert testified not only that hairs at the scene of the crime that likely belonged to the killer "matched" hair samples taken from Dennis Fritz and Ron Williamson, but could not have come from Glenn Gore, a key prosecution witnesses. However, later mitochondrial testing of that hair proved that it was in fact Glenn Gore's hair.[4] Where a case is based on microscopic hair evidence, the defense should examine more closely the other evidence in the case.

The most frequent cause of wrongful convictions is mistaken identification. I assume that the vast majority of these cases, if not all of them, involve a totally honest but mistaken identification by the witness. It is an easy mistake to make. There must be care taken in eyewitness identifications. Lineups and photo arrays are not the gold standard for doing this. A witness is invited to make a relative judgment, "pick out the suspect who looks most like the person who attacked you." In many of these cases when there is a cold DNA hit on the actual perpetrator, sometimes the resemblance is absolutely amazing. We are working a case right now in the Innocence Project in Kansas City of a fellow named Ricky Kidd and we have developed another suspect. Ricky's sister thought that the photograph we had laying out on the table was her brother. Actually it was the person we believe to be the perpetrator of that crime.

The Cardozo Innocence Project has identified factors that contribute to wrongful convictions. It is no secret that these cases often involve police misconduct, prosecutorial misconduct, defense lawyer incompetence and junk science. We will find those factors in various combinations in almost every case of wrongful conviction.

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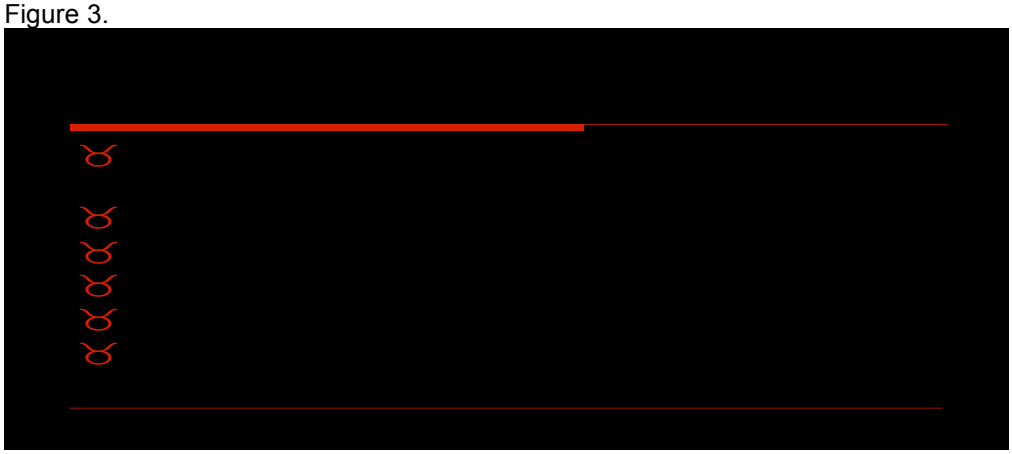
[3] See Stolberg, Judge Apologizes, Frees Two Men in 1973 Murder*, The Los Angeles Times*, March 26, 1992, p. A-1.

[4] See Grisham, *The innocent man*, Double Day, (2006).

This graph (Figure 3) shows the types of police misconduct involved in the first 74 DNA exonerations:[5]

Figure 3.



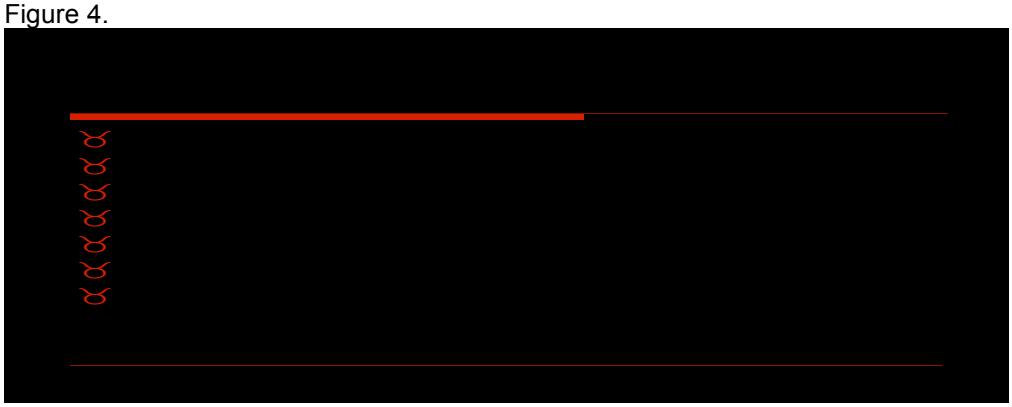
For police misconduct, suppression of exculpatory evidence is the most common. There will be evidence in the file that the prosecutor or a police officer may conclude is inconvenient to their theory of the case, so sometimes police detectives will not send it across the street to the prosecution. If the prosecution gets it, they will not turn it over to the defense lawyer and they will come up with some legal theory that would allow them to do that, and so the jury does not get to hear it. These factors effectively short-circuit the adversarial process. Suggestive identification procedures, such as showing the defendant's photograph repeatedly before exhibiting the defendant in a line-up, is the most common. In 11% of the exonerations, there was actually a fabrication of evidence, where the police literally make up evidence, or other people with motive make up evidence. So there are a number of factors that contribute.

That same pool of cases revealed that prosecutorial misconduct contributes to a significant number of wrongful convictions:[6] prosecutorial misconduct includes the suppression of exculpatory evidence, but improper closing arguments play a tremendous role in many of these cases (Figure 4). This has been given inadequate credit for influencing jury behavior, but it certainly can. Ernest Willis was exonerated after serving three years on death row in Texas on arson evidence that turned out to be incorrect science. There are certain floor finishes that if they get so hot, they will flash a room and look like somebody poured gallons of accelerant on the floor. But really it is just the stuff put down to varnish the floors to make them look pretty. It gets hot and explodes. It looks like arson. After experts reexamined the scene, they realized that the fire that killed Willis' family was not arson at all. At trial, the prosecutor called Willis "a cold blooded monster, devoid of empathy or feelings of any kind," and argued that he was Satan incarnate. Later that same prosecutor dismissed

[5] Innocence Project Web Site, http://www.innocenceproject.org/understand/Government Misconduct.php, last visited August 14, 2007.
[6] Ibid.

all charges against Willis explaining, "he simply did not do the crime. . . I'm sorry this man was on death row for so long and there were so many lost years." [7]

Figure 4.



I want to talk about the application of these factors to death row cases. Death penalty cases are unique. There is a famous line from the US Supreme Court in a case called *Woodson v. North Carolina*[8] in which the Supreme Court observed that death is different. Death is more different from a sentence of life than a sentence of life is different from a sentence of a year or two. It is final. It can never be corrected. The qualitative difference requires, according to the Supreme Court at that time in 1976, what used to be referred to as "super due process." The right to counsel, the right to effective representation, the right to resources; all have subsequently become pretty much a hollow promise in terms of due process and the death penalty.

When we talk about exonerees, there are two lists that are floating around (Figure 5). The first one deals with DNA exonerations in all types of cases. However, this list does not include people like Ted White Jr., who was exonerated after the state's case just blew up when it was finally examined closely by an aggressive defense.[9] So, there are many people who are convicted and innocent who are not included when we are talking about just DNA exonerations. There is another list, 123 death row exonerations. There is a little quibbling about whether or not there have really been 123 innocent people sentenced to death and then released.[10] But this list is based on actual litigation experience in which a prisoner was tried, convicted and sentenced to death and then was granted a new trial on an appeal or in a post-conviction proceeding, and then at the retrial was acquitted or charges were dismissed by the prosecution. There are two exceptions: a couple of guys in Florida were given a plea bargain to time served on second degree murder. Freddie Pitts and Wilbert Lee walked out of the courthouse saying, "You know it is the darndest thing, ten years ago we said we did not do it and they put us on death row, today we said we did it and they let us go."

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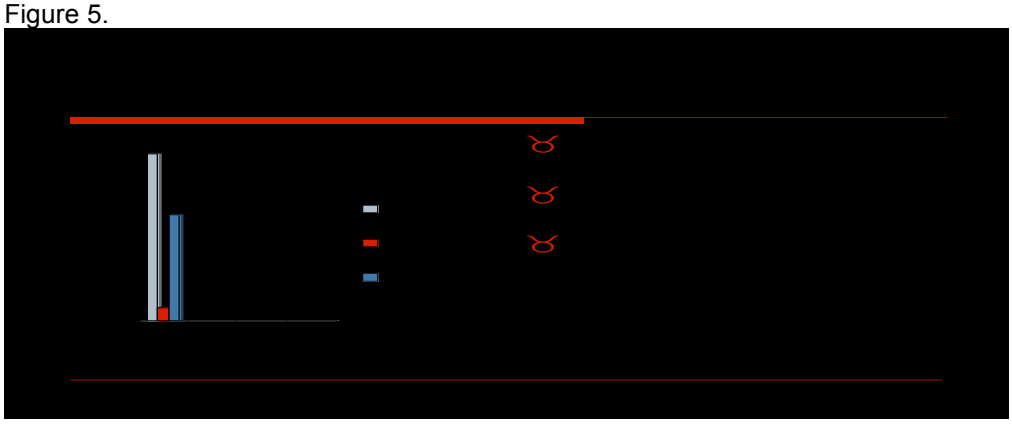
[7] Welsh S. White, *Litigating in the shadow of death: Defense attorneys in capital cases*, p. 65, University of Michigan Press, Ann Arbor (2006).

[8] *Woodson v. North Carolina,* 428 U.S. 280 (1976).

[9] Joe Lambe, Former Lee's Summit man acquitted of sex abuse*, The Kansas City Star*, February 8, 2005, A-1.

[10] Death Penalty Information Center Web Site, http://deathpenaltyinfo.org/article.php?scid=6&did=110, last visited August 14, 2007.

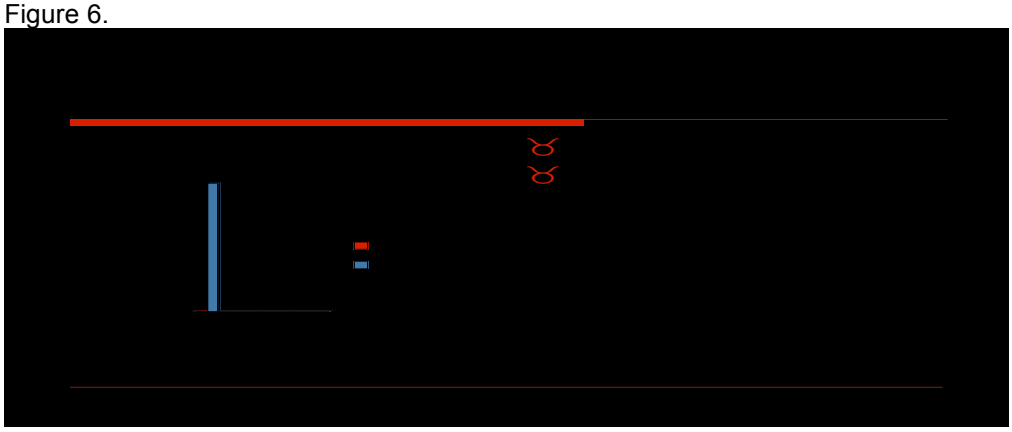
Figure 5.



Empirically the best number we can come up with are people who are actually acquitted. There are a number of other defendants who have been given sentencing relief because of questions about their guilt and there may be innocent people among those. It is conceivable there are guilty people among those 123 death row exonerees. It is possible. It would not violate the laws of physics for that to have happened. But we are also learning that there are innocent people among the people who have been executed. There are undoubtedly some innocent people who remain on death row. So, I have a fairly high level of confidence that 123 is not a misleading number. Of that 123, only 15 of the death row exonerations are based on DNA:[11]

The other exonerations were obtained the old fashioned way—shoe leather, knocking on doors, talking to witnesses, looking at tried and true forensic science methods like fingerprints and other types of physical evidence—that is, through methods other than DNA evidence.

Figure 6.



[11] Ibid.

There are a couple of things I think are important from these facts. First is that DNA is not the cure-all for problems in our criminal justice system. If you look at non-sex offense cases, DNA can give us the difference between guilt and innocence in a very small number of cases in which the defendant is actually innocent. In all of these other 108 cases, these are innocent people for whom DNA testing had little or no benefit. And that is important to understand. I want to illustrate another point here:

For the non-capital DNA exonerations (Figure 6), there are 194, and we have 1.2 million prisoners in the United States. With 194 exonerees for 1.2 million prisoners, it does not seem that significant of a number, although I personally am convinced that in every prison in this country there are a handful of people who do not belong there. But when you look at the numbers, it does not seem like a huge amount. Compare death row exonerations; it is a little higher number.

Our current death row population, as of the close of 2006, is 3,344 people. There have been 123 exonerations (Figure 7).[12] But if looked at in a different way, comparing the number of exonerations to the number of executions, the percentage grows a little higher (Figure 8).

Figure 7.

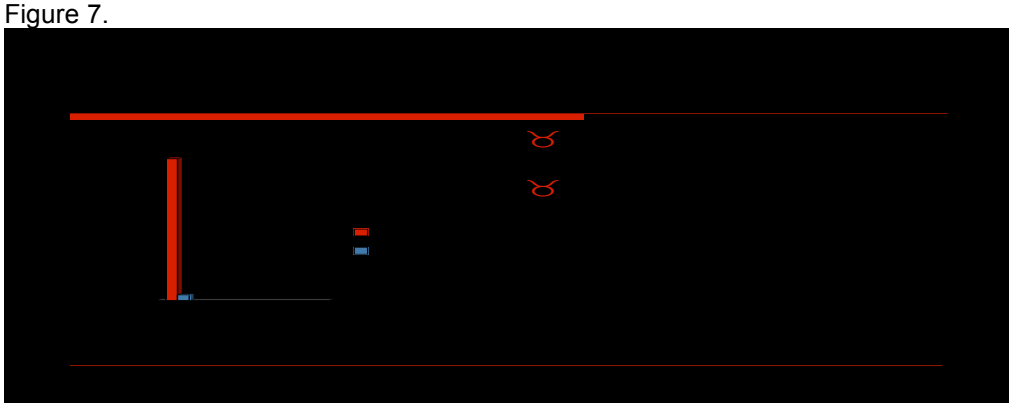
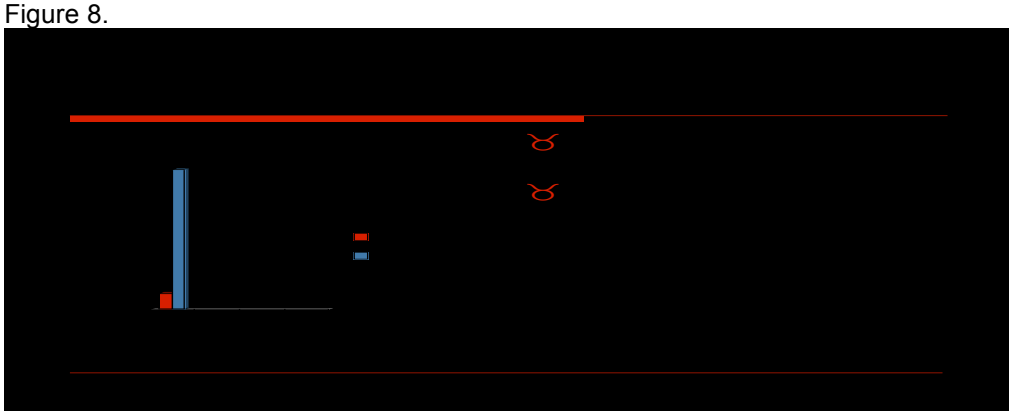


Figure 8.



[12] Death Penalty Information Center Web Site, http://deathpenaltyinfo.org/article.php?scid=6&did=110.

As of today, there have been 123 exonerations versus 1,062 executions. It starts to register as something that is statistically significant. Exonerations exceed 10% of the total number of executions. For every nine people we execute, we are letting one person go because he or she was wrongly convicted. This may vary from one jurisdiction to the other. There are two states in the country, Illinois and Idaho, which have exonerated more prisoners than they executed. Projecting out the same ratio to non-capital prisoners, there would be a couple hundred thousand innocent people in our prisons. I am not sure that is the case. Even as jaded as I am as a defense lawyer, I would find that hard to believe. But there is something going on in these numbers.

Why is it that there is such a high percentage of death penalty cases that involve exoneration? It is something that I think bears some empirical research by scholars into that difference. We can hypothesize a little bit on things that contribute to this. There is a very good book, published in January of 2006 by a law professor at University of Pittsburgh School of Law, Welsh S. White, called *Litigating in the Shadow of Death*. He interviewed a number of death penalty defense lawyers across the country, and looked at the death penalty system and the skill, diligence, and resources required to defend a death penalty case. He considered the extent to which the quality of defense counsel contributes to the arbitrary pattern of imposing the death penalty. He includes a couple of chapters on innocence, and the various factors that work to increase the number of innocent people who get sentenced to death. The first is plea bargaining. In a capital case it is highly unlikely that the prosecutor will offer a plea bargain that would result in a sentence of less than life, usually life without parole. I think it happens occasionally, but it is rare that a person who is innocent would agree to plead guilty to a sentence of life without parole. If you were innocent, you probably would not do that. Thus an anomalous situation is created where a guilty person can avoid the death penalty through a plea bargain where an innocent person likely would not. Guilty people are less likely to roll the dice than innocent people.

The other thing that happens in the death penalty is that we have a process called "death qualification" of the jury. This was the subject of many studies in the late 1960s, which I think could bear some updating and repeating empirically. These studies involved the use of shadow juries in infamous capital cases where one jury was death qualified and other shadow juries were not. The verdicts from these shadow juries were examined. The results of these studies have been the subject of two, at least two, Supreme Court decisions. One is *Witherspoon v. Illinois*[13] in 1968 and the other is *Lockhart v. McCree*[14] which came down in 1986.

The way that the death qualification process works is that the prosecution asks jurors their views on the death penalty, and then is allowed to strike from the jury people who have conscientious scruples against the imposition of the death penalty. The legal standard for this has been the subject of debate. It has been tweaked a little bit. But in practical application it boils down to this: if a person is squeamish about pulling the switch, that person does not get to serve on a capital jury. Even if a juror generally favors the death penalty, but expresses reluctance actually to impose it, he or she can be removed from the jury. The biasing effects of this selection process have been studied in various ways.

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[13] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).
[14] *Lockhart v. McCree,* 476 U.S. 162 (1986).

Right now I have a good friend who is defending a capital case in Atlanta, Georgia. He is in his tenth week of jury selection, where all they are talking about for ten weeks is the death penalty. They will spend two days talking about the other things like the presumption of innocence and their ability to consider the evidence, but I think all of those jurors come out of that process believing that this is a case about capital punishment. This is not a case about guilt or innocence. The jury selection process has them brought in one at a time and questioned for sometimes as long as an hour or two for just one juror. While this person is being questioned about the death penalty there are hundreds of other jurors waiting down the hallway. They are thinking about the death penalty. There is a biasing effect from that process, in and of itself. It effectively brainwashes jurors into thinking that this is a case about the death penalty. Before they have even heard opening statements, the death penalty is all that is being talked about.

The other thing that happens with the death qualification process is that by excluding people who have qualms about the imposition of the death penalty, instead of taking the jurors out of a random sampling of the middle of the ideological spectrum, the jurors are taken from the political right, the pro-prosecution and the anti-civil libertarian side of the equation. One ends up with jurors who, by attitude, belief, and affiliation, are law enforcement friendly. The psychological studies that were done by Professor Hans Zeisel of Northwestern University in Chicago showed that a death qualified jury was substantially more likely than a regularly selected jury to find a defendant guilty.[15]

In more recent studies, exit polling of capital juries established that death qualified juries tend to have an opposite view of what they are told in the jury instruction about things like presumption of innocence and burden of proof. A majority of them believe that if the defendant offered an alibi defense, he had to prove his alibi beyond a reasonable doubt. Every trial court to hear evidence of Professor Zeisel's and others' research and have found that the process of death qualification is so biasing that a conviction from such a jury violates due process of law because those jurors cannot presume the defendant innocent. That is where the title of my presentation comes from, "Presumption of Guilt." It is a part and parcel of the death penalty that I think dramatically undermines the reliability of the process.

The other common problem with the death penalty is inexperienced defense attorneys. Again referring back to Professor White's book, he describes three types of lawyers. There are the good, the bad, and the ugly. There are very experienced capital defense lawyers who understand the dynamics of death qualified juries and try to adapt their litigation and investigative practices accordingly. There are experienced criminal defense lawyers who think, wrongly, that their experience translates into the ability to defend a capital case. They make decisions instinctively based on their experience in non-capital cases, which is wrong. They fail to account for the fact that death qualified juries think differently. They believe differently. Their thought processes are different and your burden of proof is much higher and you have to adapt your litigation strategies accordingly. These lawyers, probably more often than not, in representing an innocent client will overestimate the chances of acquittal. They will underestimate the chances of conviction. They become so inappropriately confident that they fail to prepare for the punishment phase of trial, which is what

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[15] See *Witherspoon v. Illinois,* 391 U.S. at 517, n. 10, and Susan D. Rozelle, The principled executioner: Capital juries' bias and the benefits of true bifurcation, 38 *Ariz. L. J.* 770 (Fall 2006).

happened in Joe Amrine's case.[16] All the lawyer did in the penalty stage of his trial was to put Joe on the witness stand and have him deny his guilt. Nothing annoys a jury more than telling them that the decision that they just deliberated over and arrived at was wrong. That makes them mad. They come back with a death sentence because the lawyers do not understand that these cases are different.

The other factor involved in death penalty cases is that for the most part they involve unspeakable crimes. The Amrine case involved a prison killing in the maximum security unit. What should be done to somebody who commits a murder inside of a prison? He is already doing time. There is a strong pressure to execute such a defendant. More often the case may involve a crime that was committed in a particularly heinous or brutal fashion, such as dismemberment or sexual assault. The other thing that makes death cases qualitatively different is that frequently they are in the media. The Kansas City firefighters' case was in the media frequently over that ten years, with everyone wondering when will there be a prosecution? The political pressure to solve these terrible crimes is very high. So corners are cut. Advertisements are put up in county jails for witnesses. All of those factors, while they exist to one degree or another in non-capital cases, exist to a very high degree in capital cases. Those risks can be seen in virtually every one of the innocence cases that have been cropping up over the last few years.

The one population that does not get closely examined are people who have been executed in cases in which there was some question about their guilt at the time of the execution, but the execution nevertheless went forward because there simply was not enough "juice" to stop the execution. The execution warrant creates kind of a hydraulic pressure to be carried out. It is like shifting a high-speed freight train to a different track once it builds up a head of steam. It is very difficult to stop. In each of these cases, while there were questions at the time of their executions, they went unresolved for many years until in the last two or three years reporters at various institutions or newspapers decided to investigate and see if there really was anything to the claim of innocence.

I do not know how you pronounce somebody innocent once he has been executed. I do not know what the standard is. In some of these cases, the prosecutors are expressing confidence in guilt. In two cases, in the Carlos de Luna case in Texas and the Larry Griffin case in Missouri, prosecutors have reopened the trial investigation. In Griffin, I think they are seriously looking at the possibility of a new prosecution of the correct offender. I think you would agree that there is substantial reason to believe that an innocent person was executed.

This issue hits close to home for me because my law partner, Kent Gipson, represented Larry Griffin. And so Kent and I together had to tell him that his last appeal was denied, that Governor Carnahan was not going to grant clemency and that he was going to be executed within the hour. I have represented death row inmates and I have had a number of clients executed and where I had to break that news to them. Typically the client will thank you for your efforts and encourage you to go on and keep up the good fight. Larry was different. We were not getting the usual encouragement. He was quite angry and when Kent said, "Larry I think we did what we knew how to do." Larry replied, "Well whatever you did was not enough!"

[16] See Lee Hill Kavanaugh, Freed After 26 Years*, The Houston Chronicle,* August 3, 2003, p. A-3.

Larry was charged in a drive-by shooting of a fellow by the name of Quintin Moss in St. Louis. Quintin was a drug dealer, ran a drug house and he had been involved in some bad conduct and was in fact the police department's chief suspect in the homicide of a fellow by the name of Reggie Griffin, who was Larry's brother, the father of Larry's nephew. When Larry was arrested initially as a suspect in Quintin Moss's case, he literally said "You know, I would have killed the son of a bitch if I could find him. But I did not find him and I did not do it. Not that I did not want to." Larry was prosecuted on the basis of the testimony of a fellow named Fitzgerald who identified Larry as the killer. Fitzgerald was presented as a good citizen who was in the neighborhood. He was a white fellow in a predominantly black suburb of St. Louis. He testified that his car had broken down and he was fixing it. He saw a car come around the corner and gunshots fired from the car upon Quintin Moss and another fellow by the name of Wallace Connors. Moss was killed. Connors was shot in the buttocks—still has a bullet in his body from that drive-by shooting. Connors had a warrant for his arrest. He was taken into custody and extradited to Texas where he served a sentence. The police did not interview him. There was a cursory interview at the beginning, but then as soon as he was shipped off to Texas, nobody went back to interview him, including the defense lawyers. He was paroled from Texas, shortly after the crime in the early 1980s, and we lost track of him.

Larry was executed before the days of the Internet. Now it is pretty easy to find people, but it was much more difficult then. We did not find Connors. In 1993, Larry was in danger of imminent execution when my partner, Kent Gipson, was appointed to represent him. Larry's previous lawyer did absolutely no investigation outside the trial court record. In the process of investigating, Kent discovered that Fitzgerald was not a standup citizen who happened to be in the neighborhood. He was a person who was involved in the killing of a police officer in Boston, testified against his partners in crime, and relocated to St. Louis in the federal witness protection program. He was a heroine addict. Rather than driving through the neighborhood and breaking down, he actually was walking out of the methadone clinic across the street. So, the police sanitized their one and only eyewitness.

It was an eyewitness case, so they had the eyewitness plus motive. Fitzgerald's true background was a fairly compelling piece of evidence, and Kent filed a habeas corpus petition asking to reexamine this case. Fitzgerald talked to Kent and he said that police showed him a photograph of Larry Griffin and told him that he was their prime suspect. Fitzgerald told Kent that when he identified Larry's photograph, he was simply following the officers' lead. He refused to recant his in-court identification of Larry. He stood by that. Another piece of evidence came to us quite by happenstance. A fellow by the name of Kerry Caldwell was driving along with a burned-out taillight in his car when a police officer pulled him over. In the back of Caldwell's car was a cache of automatic weapons, so the police officer took him into custody on numerous firearms charges. He was looking at a long prison term, so he made a deal to turn state's evidence against other people who were involved in this drug ring. He admitted that he was a hit man and that he killed a number of people. He was given immunity from prosecution in exchange for his testimony against several people who were accused of several homicides in the course of drug trafficking. Kent read the St. Louis Post-Dispatch about Caldwell's testimony which named several people he had been involved in killing. One of the victims Caldwell named was Quintin Moss. Furthermore, the car that was used in the drive-by shooting was found during the investigation in the Griffin case. Weapons were found

in the car, which ballistics matched to the bullets that were found in Quinton Moss's body. The car was registered to Ronnie Thomas, who was the defendant in the organized crime case in which Kerry Caldwell was testifying.

We thought that Caldwell's confession plus the partial recantation by Fitzgerald would be enough to stop Larry's execution. After all, Caldwell's story was backed up by the physical evidence, which included the murder weapon found in Thomas' car. We had looked for Wallace Connors and could not find him. To make a long story short, the federal judge applied what we cynical defense lawyers call the "universal rule of snitches." This rule is that the judge will believe these snitches only when they testify for the government. The same snitches are never believed when they testify for the defendant. But here the same witness who had given the same testimony, on which a jury sent three people to prison for life without parole, was rejected by the federal judge who said he was unbelievable because he had been immunized; Caldwell had nothing to lose by coming to court and giving that testimony on Larry's behalf. Larry was executed based on that. Governor Carnahan took the position that he should not second-guess the courts since the court adjudicated the issue of innocence, he was not going to explore it any further and so Larry's execution went forward.

In a subsequent investigation by Terry Ganey, a very gifted writer and investigator and journalist in Columbia, who teaches at the School of Journalism, looked into the case.[17] He found Wallace Connors living in California. Connors had cleaned himself up, had a good job, stable family and still has the bullet in his body. Connors was at the scene and he saw the shooting. He was not aware that Larry Griffin had been executed for the murder. He was wondering why nobody had ever contacted him because he saw the murder. He saw the shooter. He named the shooter. It was not Larry Griffin. Larry was not in the car. When this investigation is added to the other evidence, I think that makes a fairly high likelihood that Missouri has executed at least one innocent person. That took a lot of time and effort on the part of a journalist who became interested in that case.

I think there are other cases that are worthy of that kind of exploration. Roy Roberts was executed for stabbing a prison guard during a prison riot. Roy weighed 300 pounds. His name did not surface in the investigation until weeks later when a guard thought he might have seen him holding the victim while another inmate stabbed him. There are serious questions about Roy Roberts' guilt.

Maurice Byrd was convicted for a gruesome homicide in Pope's Cafeteria in St. Louis in which the victims were lined up in the freezer and shot through the eyes. In spite of an alibi defense, Byrd was convicted on the testimony of a snitch who was let out of jail the day that Byrd was sentenced to death, and a hypnotized witness who picked Byrd out of a photo spread. The snitch ended up going back to Georgia and he is now serving a life sentence in Georgia for having committed a robbery, where he took the victims to the cooler in a convenience store and shot them through the eyes. Maurice Byrd was executed for the St. Louis crime. That is one that deserves investigation.

The other is Winfred Stokes, executed for the murder of a woman that he allegedly followed home from a bar. The Missouri Supreme Court refused to allow the defense to introduce evidence that the victim had sought a protective order against her abusive boyfriend. Neighbors had called police because the boyfriend had tried to

[17] Terry Ganey, After execution, case is reopened*, St. Louis Post-Dispatch*, July 12, 2005, A-1.

stab her. She was relocated to a secret apartment. The abusive ex-boyfriend's fingerprints were found on a letter written to her by her lawyer and mailed to her new secret address. I think that case warrants further investigation.

In conclusion, it is obvious that DNA technology has taught us some valuable lessons about the criminal justice process. Some of those lessons we already knew, or should have known, such as the risk inherent in eyewitness and informant testimony, the dangers of coercive interrogation techniques, and the unreliability of junk science. We are learning that witnesses, judges, jurors, prosecutors and defense attorneys are no less prone to human error than the rest of us. It would be a mistake, however, to think that DNA has solved those problems. As the experience in the death row exonerations has shown us, DNA technology is capable of solving only a small percentage of crimes and wrongful convictions. It is not a panacea for what ails our criminal justice system; DNA is more accurately viewed as a thermometer that is telling us that the system is not as healthy as we thought. Unfortunately, while science is telling us that we should be giving criminal convictions greater scrutiny, politicians continue to push legislation restricting the right to counsel, and shrinking the power of the courts to review and correct capital convictions.

Perhaps the greatest obstacle facing innocent prisoners is the absence of any constitutional right to counsel after the prisoner's first appeal. Prisoners sentenced to death have a statutory right to counsel throughout the appeal process, which could be yet another explanation for the relatively high rate of exoneration in those cases. But for innocent prisoners who are serving lengthy sentences, perhaps even life without the possibility of parole, there is no publicly-funded legal services program available. They are on their own. It is the knowledge that there are innocent people in prison with no access to counsel that has spurred the creation of programs such as the Midwest Innocence Project, which will work in partnership with UMKC (the University of Missouri at Kansas City) School of Law and University of Missouri School of Law and Journalism School in Columbia. Faculty at all three schools will supervise law students and journalism students, who will screen and investigate prisoner claims of actual innocence and attempt to free the wrongly convicted. The urgent needs of innocent prisoners present a compelling educational opportunity for the next generation of legal leaders. I urge you to support this important project.

HARMFUL ERROR: HOW PROSECUTORS CAUSE WRONGFUL CONVICTIONS

Steve Weinberg
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Address to the Miscarriages of Justice Conference: Current Perspectives
University of Central Missouri, February 20, 2007

Journalists generally do a very bad job when it comes to covering law enforcement in general and an especially bad job covering prosecutors. So I want to talk about how a better job by journalists can be a partial remedy to so many of the problems in the system.

I am going to talk a little bit about the path that I took to writing about some of these problems. It is unusual and instructive in its unusualness and suggests how maybe others can find that path later. I have been a journalist for a long time, 40 years, within newspapers and then writing for magazines. All the while I have been interested in criminal justice issues.

Most journalists, when they think about the criminal justice system simply do not think about prosecutors as flawed individuals or as corrupt individuals. They think about prosecutors as people who work very hard to do good for the greater society. And that is true of most prosecutors, as far as I know. But there is a larger percentage of prosecutors who are incompetent or more venal than most journalists realize. And that has been a big part of the problem. Prosecutors have escaped scrutiny. I call them the last sacred cow of journalism.

Investigative journalism is thriving in this country. It is not as prevalent or as skilled as it should be, but it is more prevalent and more skilled than it has ever been before and it is getting better all the time.

After being a somewhat incompetent journalist myself, because I was really blind to a lot of the problems in the criminal justice system that I was writing about, I finally got an awakening: slowly, gradually, because I had the good fortune to be offered a job that brought me to the middle of Missouri.

The association, Investigative Reporters & Editors (IRE), is an organization of about 5,000 journalists around the country and increasingly around the world whose specialty is ferreting out corruption and misconduct and incompetence. That group is based in Columbia, Missouri, about an hour and a half drive from here. I was very involved in IRE from its beginning in 1976. In 1983, I was offered the job of running IRE day-to-day, and for seven years, day in and day out, I ran that group.

During those seven years I would get calls from journalists asking for help. These calls tended to come in patterns—calls about nursing home investigation, calls about corrupt government agencies, calls about businesses polluting the environment. But one category of call that I started noticing more and more, almost every week, some journalist somewhere was calling me about prosecutors who did not seem to be doing their job very well and sometimes appeared to be putting innocent people in prison.

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These calls were coming before DNA was prevalent in prosecution and defense work, so we did not have a really clear picture yet of what was going on in the wrongful conviction world. Because until DNA came along, it was very, very difficult to know sometimes if somebody was innocent or guilty no matter how hard you investigated. One could tell that a trial might be unfair, but an unfair trial does not automatically equate to actual innocence.

Those calls from journalists suggested a pattern prompting me to learn more about the world of prosecutors. It is important of course to know about all aspects of the criminal justice system if you are a journalist or a lawyer or a defendant or anybody else involved with the system. It became increasingly clear to me that prosecutors are the least covered portion of the criminal justice system by most journalists and the most poorly covered portion when they were covered at all because of this preconception that they would not do wrong—that they are sworn to uphold justice. As I began educating myself about the world of prosecutors I came to realize that prosecutors are the linchpin of the criminal justice system and certainly the linchpin when it comes to wrongful prosecutions and wrongful convictions.

Why do I say that? Of course the police play an important role. Of course defense lawyers play an important role. Of course judges play an important role. Of course forensic laboratories play an important role. But a prosecution cannot go ahead without the prosecutor. Prosecutors are the most important cog in the system. First of all, they have to make the charging decisions after the police make an arrest. After they make the charging decision, someone ends up as an accused individual. Very few cases that are charged actually go to trial. That is true across the country. In the average jurisdiction only 5% of cases go to trial, which means prosecutors effectively are juries and judges all by themselves behind closed doors in 95% of the cases that are charged. That is a gigantic power that is very rarely examined. It is safe to assume that when deals are cut before trial—call them plea bargains—sometimes people who are innocent are pleading guilty, because the alternative sure looks lousy.

For the cases that go to trial, it is mostly out there in the open, but there are a lot of things, it turns out, that go on during the course of a trial that are not necessarily public. Journalists need to do a better job of examining these non-public trial events.

I decided to continue helping other journalists as much as I could, but that I needed to educate myself about the process better, with an emphasis on the role of prosecutors. There is a separate federal system with U.S. attorneys and a local system in this country with 2,341 elected prosecutors. These local jurisdictions have a lot in common, but depending on the state and on the county there are many differences as well. Within these local jurisdictions it is not just the elected prosecutors. There are the assistant district attorneys they hire. In most jurisdictions journalists do not even know who they are, even their names. And yet these people have tremendous authority and tremendous power to do good or harm.

At the beginning of my education on prosecutors and miscarriages of justice, I went to the National District Attorneys Association, told them what I was doing and got the predictable line, “Well sure there are wayward prosecutors, just like there are wayward journalists, but it is such a minuscule problem.” Here is my take on what is and what is not minuscule when it comes to prosecutors. Many prosecutors disagree with me. But if there is one child in Missouri who dies from food poisoning after eating at a fast food restaurant, usually the authorities kick into gear. They really take that one death seriously. If a plane crashes and the injuries are fatalities, usually the

authorities take that seriously and they examine the system and try to figure out what went wrong. Yet those are minuscule numbers—one death from food poisoning in a fast food restaurant, one plane crash out of millions of flights. Even one death from food poisoning is too much. Even one plane crash is too much. I think everybody agrees with that.

I have talked to a lot of prosecutors at length; somehow they have this mindset that a hundred or two hundred or three hundred or four hundred wrongful convictions are not too much. That is a perfectly understandable and defensible error rate. And I say it is not. The rate is probably much higher. What about the wrongful charging decisions? What about innocent men and women who never get to trial, but take a guilty plea of some sort? We have no idea how large those numbers are.

To get a better understanding of these issues I started at the micro level. I decided to do as thorough a job as humanly possible on one case just to see how much journalistic effort it would take to arrive at the truth. Guess what? It took a long time. I did a retrospective case where the case was closed; the inmate had been freed from prison after an arduous, awful journey. In attempting to learn everything about that case and looking at all the documentation, everybody opened their files to me on the case. I received a huge amount of cooperation. It took me two years working almost full time to try to figure out what had really happened.

That is depressing because very few newsrooms, whether we are talking about newspapers or magazines or television or whatever, are going to allow their journalists two years or even two months to try to find the truth in a case of an alleged wrongful conviction. I tried to come up with some plan to spread the word among journalists about the size of the problem and some of the solutions.

Further, I decided to do something that is very uncharacteristic for journalists, which is seeking a lot of money to do the job right. I put together a task force of journalists and other researchers to show the big picture, in the hope that once the big picture became clearer, a lot of journalism organizations would make the decision that this should be a priority in their own circulation or viewership areas.

We worked through an organization called the Center for Public Integrity. It was the brainchild of Charles Lewis, who was a producer at *60 Minutes,* the CBS television newsmagazine. He had this dream that investigative journalism could be done large scale on a regular basis and expose systemic corruption in all kinds of subject areas. He was not particularly interested in criminal justice when he started the Center for Public Integrity in Washington, DC. By the time I approached Charles Lewis, the Center for Public Integrity had a good budget and the largest team of investigative journalists ever assembled in one place.

Eventually I persuaded Charles Lewis to branch out into criminal justice with mine being the first project looking at prosecutorial misconduct. With funding from CPI the assembled team put together a report, which came out four years ago now, called *Harmful Error: Investigating America's Local Prosecutors*. This is available on the Center for Public Integrity website, www.publicintegrity.org.

For this report we decided to let the system speak for itself as much as possible, rather than presumptuous journalists deciding what is or is not prosecutorial misconduct. We decided to let judges and other insiders make that decision for us. The report searches back to 1970, a somewhat arbitrary but sensible date because it

was seven years after *Brady v. Maryland,*[1] maybe the most important prosecutorial misconduct decision by the Supreme Court.

Then we took it up to the present day. We searched for every reported appellate opinion, and that of course means we had to leave out a lot of unreported appellate opinions, which essentially eliminates California since almost every appellate opinion there is unreported, a separate scandal itself. We looked at every reported appellate opinion that used the phrase "prosecutorial misconduct" or some derivative phrases. That gave us a starting point of about 12,000 appellate opinions, without looking at the federal system. We were looking at prosecutorial misconduct among local prosecutors.

We were looking at all 2,341 local jurisdictions that had generated appellate opinions that addressed the issue of prosecutorial misconduct. That is a lot of appellate opinion to read, and judges and their clerks are not necessarily the best writers, but we got through them all and categorized them and then started doing some follow-up to put names and faces on these cases.

The biggest revelation we had, from all of that, was the one that I kind of expected. Prosecutorial misconduct is far more prevalent than most prosecutors will ever tell you. Is it prevalent in every prosecutor's office, all 2,341? Probably not. Are most prosecutor's offices more clean than dirty? Probably so. But we found some real pockets of prosecutorial misconduct that no fair-thinking person could ignore. Probably the most out of control single prosecutor in the whole country was in St. Louis, and we opened our big report with him. I interviewed him, I spent time with him. I let him have his say, of course; that is what journalists do. But there was just no getting around that he had been the subject of 25 appellate opinions on the ground of prosecutorial misconduct. These are only the ones we know about.

We also did some case studies. I spent a lot of time in San Diego. The San Diego County District Attorney's Office has been one of the most controversial in the country for many decades, but also one of the most transparent. I felt like I would get quite a bit of cooperation and I did. So I did a case study of that office and some of the egregious cases from San Diego that no one could deny, but also some of the efforts to try to make it a cleaner place. We did some other case studies to try to illustrate in human terms all these numbers we were finding.

So this is a report, *Harmful Error: Investigating America's Local Prosecutors.*[2] I could go on and on about the specific types of prosecutorial misconduct that we found. If there are questions about that, of course I will answer them.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *Harmful error: Investigating America's local prosecutors* is the first ever national examination of local prosecutors' conduct in all types of criminal proceedings. The groundbreaking book reveals that local prosecutors in many of the jurisdictions across the nation have stretched, bent or broken rules to win convictions. Pulitzer Prize winning journalist Anthony Lewis applauded the book as "by far the best thing I have ever seen on or near the subject of prosecutorial misconduct. It is painful but essential reading." Since 1970, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges, reversing convictions or reducing sentences in more than 2,000 cases. In thousands more, judges labeled prosecutorial behavior inappropriate, but upheld convictions using a doctrine called "harmless error." The book shows how prosecutors' misconduct led not only to the conviction of innocent individuals who were later exonerated, but also resulted in guilty defendants having their convictions overturned and being placed back on the street. The Center found that many prosecutors were cited multiple times for misconduct. These prosecutors give recidivism—a word usually used to describe those they work to put behind bars—a disturbing new meaning.
Harmful error: Investigating America's local prosecutors, The Center for Public Integrity, http://www.publicintegrity.org/pm/default.aspx (accessed June 27, 2007).

COPS ON THE MAKE: POLICE OFFICERS USING THEIR JOB, POWER, AND AUTHORITY TO PURSUE THEIR PERSONAL SEXUAL INTERESTS

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Address to the Miscarriages of Justice Conference: Current Perspectives
University of Central Missouri, February 20, 2007

In my research at the University of Missouri-St. Louis in the Criminology/Criminal Justice Department, my emphasis has been on police deviance and today I want to talk specifically about police sexual misconduct. When one speaks about a miscarriage of justice, I generally think about someone who has been wrongly punished for a crime. But I want to address miscarriages of justice a little more broadly. Some scholars believe that anyone who falls victim to any misconduct by the police is experiencing a miscarriage of justice. There does not have to be any arrest by the police for an individual to experience a miscarriage of justice, only to experience being victim of some police deviant behavior. Given the fact that police have a position of power and authority, and they frequently have opportunity, this occurs quite frequently.

Specifically my talk is on police sexual misconduct (PSM). In researching on this particular topic for about four years now, my hope is to advance academic understanding and knowledge about PSM. Ultimately I hope to assist law enforcement in the control of this behavior and to inform the public that this sort of thing is occurring. The truth is, the public is grossly misinformed and does not believe that police sexual misconduct is a major issue.

When I began looking at this issue I found there was not a lot of research out there on this topic. In searching for a definition of police misconduct, I really did not find one. There is a definition for police sexual violence, but not for sexual misconduct in general. Because I wanted to look at all varieties of police sexual misconduct, not just the violent ones, I had to develop my own definition of PSM. That definition reads as follows:

> Any behavior by a police officer whereby an officer takes advantage of his or her unique position in law enforcement to misuse their authority or power to commit a sexually violent act or to initiate or respond to some sexually motivated cue for the purpose of personal, sexual gratification. This behavior may involve physical contact, verbal or written communication, or a sexually implicit or explicit gesture directed toward another person, or behavior not necessarily directed toward another person but that would likely be considered inappropriate sexual conduct that violates general principles of acceptable behavior common to law enforcement.

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This all-encompassing definition allows me to examine all varieties of police sexual misconduct, including the very violent ones like rape, sexual assault, sex with a juvenile, to less serious behaviors such as consensual sexual behavior. The paucity of research on this topic included a lack of knowledge about the prevalence of this behavior and the causes of this behavior, as well as its controls. And most of the existing research focused primarily on police sexual violence, so what little research there was tended to focus on the more serious behaviors. Most of the researchers acquired their data from cases that had been officially exposed through the media or through the courts. Having been a police officer, I concluded that this was only the tip of the iceberg. If we are limited to data from cases exposed by the media and the courts, there is much that is being missed.

The previous research seemed to focus on the issue that there appeared to be a cultural, organizational, and structural support for this behavior. So this contradicted the notion that it was just some rogue officers out there; individuals who were taking advantage of their position of power and authority, taking advantage of their opportunities to capitalize on their sexual gratification. The previous research seemed to suggest that PSM also received cultural support from fellow officers, even those that did not engage in this behavior. There was also structural and organizational support from the police agencies and departments. This contradicts the so-called rotten apple theory, which has dominated law enforcement for a long time saying that most police misconduct, not just sexual misconduct, is of the variety where it is the rogue officer involved, and that most officers are not involved. It is just individuals every once in awhile who are engaging in this behavior. But, if it were structurally, organizationally, and culturally supported, this would contradict this view.

Overall, the previously existing research was showing that PSM does appear to be relatively common and there does appear to be, since the late 1990s, a growing awareness among scholars that this is a problem, which needs to be addressed. What I hope to do is expand on previous research and assess the extent that PSM is a problem, and whether there is cultural and structural support for PSM. To paraphrase Feeney (1986), I also wanted to find out the nature of this behavior as well as the extent of this behavior. Feeney (1986) suggested that in order to do this, the researcher must go to the people who engage in deviant behavior. Thus, I interviewed police officers about their views regarding police sexual misconduct, and identified cases not exposed through institutional settings like the courts and the media. In addition, I wanted to discover the views of police officers on what they would call sexual misconduct, what they believed sexual misconduct was, and how much of this behavior was going on. Ultimately, with this information some attempt was made to determine how best to control this behavior.

PSM encompasses a continuum of behavior, a broad ranging continuum ranging from very serious behavior, like rape and sexual assault, sex with a juvenile, these are all very serious acts that if anybody was caught committing them would lead to long in prison sentences. There is a wide variety of other factors as well. Less serious crimes include inappropriate touching of suspects or rubbing up against someone in a pat-down search or touching them inappropriately and unnecessarily.

Unjustified traffic stops by themselves are included. This is typically a male behavior. My research and most of the previous research suggest that it is primarily males engaging in this behavior. Further, males primarily targeting females for this behavior. In unjustified traffic stops, where the officer pulls over someone who appears attractive, an officer may do this just to get a better look at them, just to “go

fishing" is the phrase that refers to this activity. But pulling someone over is actually a detention and it is illegal to detain someone without a valid reason. In some cases the officers were detaining people lawfully subsequent to a traffic violation. But, the officer may have followed the individual for several blocks before the traffic violation and with the hope of catching them doing that, so that they could get a better look at the driver or some other people in the vehicle.

Then there is the less serious misconduct, which is primarily consensual sex with people who are willing participants while the officer is on duty. Whether or not this is a crime, is beside the point. Most people would share the opinion that police officers are not paid to have sex on duty. So at the very least this violates accepted standards of conduct. This includes just flirting on duty. Again, police officers are not paid to flirt on duty. Certainly there is a certain amount of acceptable behavior where police officers are human like everybody.

It is pretty difficult to gather information on any deviant police misconduct. First of all, most of it is a hidden misbehavior. Many of these officers hide this behavior, not only from the public and their superiors, but also from their fellow officers. Sex crimes in general tend to be significantly underreported. Victimization surveys indicate that as much as 60% to 70% of all rapes are unreported. If a person were raped by a police officer; although my research does not really reflect upon this, that person is probably even more reluctant to report it. So it may be 80% or 90% of rapes by police officers are unreported. There is not enough research to adequately address this issue. Many victims fear retaliation.

Conversely victims may be unaware that they have been victimized. This can happen when the person is pulled over by a police officer ostensibly for speeding. But then the officer lets the person go, that person will drive off and never even know the motive behind that traffic stop. The officer may have been pulling them over for their own sexual interest, but did not get the desired welcoming response.

My study involved three different samples and used survey and interview data. It was all from the St. Louis Metropolitan area, and there were four counties represented. Sample 1 was survey and interview data, the other two samples were just interview data and used a snowball or chain-referral method where I went to some police officers that I knew personally and interviewed them about their views on this topic, and then I asked them to refer other police officers, who in turn referred other police officers, thus the snowball or chain-referral method. Ultimately, I interviewed 40 police officers, in this first sample, about their views on sexual misconduct.

Sample 2 involved only interviews of 20 police chiefs. Of the departments represented in the first sample, letters were sent to those police chiefs because I hoped to interview them to see if there were any discrepancies between what their officers were telling me and what they might tell me. In sample 3, I interviewed 20 female police officers and again I used a chain-referral sample where I went to officers that I knew and asked them to refer female officers that might be willing to participate in my research.

In considering sex and police, one must observe that the research suggests that sex in the general workplace is fairly common. Gutek (1985) suggested that 80% of workers report some sexual experience at work and it varies in nature and degree. Some work environments are openly sexual, others are very restrictive. The issue is problematic sex. When sex becomes criminal, or nonconsensual, it becomes a problem. When people misuse their power, authority, or position, that is a problem

because they are misusing their position of authority and trust for personal, sexual gratification.

What influences police officer sexual misconduct? My research suggests that there are three factors involved. The first one is their own personal morals and values. Police officers told me that this is a significant factor that influenced whether or not they will engage in or refrain from any sort of sexual behaviors on duty. This is often referred to as value-predisposition behavior and it is what people bring with them to a job or any new environment. These personal ideas, morals, or values, are often based upon one's family, education, religion, and socio-economic status. But beyond what police bring with them, they also develop morals and values from the police culture. Thus, police officers will enter the job with a certain idea about what is moral and ethical. Then once they are there for a while, sometimes these ideas change based upon what they are learning from their fellow police officers and from the police culture.

This second factor is the police culture, a very strong culture. Many work environments have an identifiable culture. What research has found for a number of years is that the police culture is exceptionally strong. This is in part, because they are isolated, tending to work abnormal hours, and to associate exclusively with other police officers. This culture leads to a sense of solidarity, where police feel obligated to support one another. Further there is the sense that it is a dangerous job, to some extent it is. There is this belief, and to some extent it is true, that the officer next to the other officer might have to save that officer's life at some point. So this builds on this notion of solidarity, resulting in many police officers who live by a code of silence where they do not inform against the police even in some cases of very serious conduct.

Of the agencies represented in my study, none of them had a formal policy addressing police sexual misconduct. This itself may not be significant. But when officers were asked whether or not a "sexual behaviors" policy was mentioned at all in any of their departmental rules and regulations, most of them were uncertain and speculated this might be in the general code of conduct. However, the numerous codes of conduct from these police departments mentioned nothing specific about sexual behaviors. This is a problem. In addition, very few of these officers were being taught in the police academy about inappropriate sexual behaviors on the job and the opportunities that would present themselves to officers. They were not being trained by field training officers and it was not being mentioned in field training. With in-service training, received after becoming official police officers, very few officers said that they had received any information at all.

I asked these officers to define PSM behavior, and many were not able, indicating they did not know. Further, to identify how much of this behavior occurs, of the first sample, 40 officers, I asked them to make estimates in particular categories of how much of this behavior is occurring. The estimates were based on what they observed in the past year and that was extended throughout the officer's entire career. These 40 officers reported 20,582 incidents of sexual misconduct. They concluded that there were about 39 incidents per year, per officer, not that they engaged in this behavior themselves but that they reported having knowledge of these incidents. With the outliers removed, that figure dropped down to 29, still a significant amount of misconduct.

This is not sporadic behavior. Every one of these officers, including the police chiefs and the female officers, said that this behavior is common, and goes on all over

the place. To some extent, some of this behavior is consensual. A notion of "groupies" came up frequently. That there are women out there following police officers around because they are attracted to them, was mentioned by all the police officers including the chiefs and the female officers. The female officers said there are not many male "groupies," but there are a lot of female "groupies" for the male officers. Around 60% of this behavior involved nonsexual contact, voyeuristic behavior, and contacts with crime victims. This could be considered criminal, but not very seriously criminal. Considering an illegal pat-down search, where the officer is getting some personal, sexual gratification. The people who are being searched may tell themselves that is what a police officer has authority to do. Thus, many of them are unaware that they are being violated.

Ultimately, only about 3% of the incident reports by police officers involved sex with juveniles. A sexual shakedown is basically trading sex for leniency by the officer. None of the officers, which seems unusual, reported any knowledge of a rape or a serious sexual assault. Yet that does not mean that none of these forms of PSM are occurring. It could be that no reports are made of serious assault because the officer's definition of what is consensual. It may have been that a rape occurred, but the officer has told himself that it was consensual. However, the victim may have given in because the officer wears a gun and a badge.

Officers may have intentionally underreported rapes and sexual assaults, because to admit to know about a class A felony and not do anything about it, is problematic. It could be, however, that there were just far fewer incidents of a serious nature occurring out there. But if one assumes for the sake of argument, about 3% of officers are engaging in very serious sexual misconduct, with about two million officers nationwide, that means about 60,000 officers are out there using their position of power and authority to engage in serious sexual misconduct, which includes rape and sexual assault.

One of the things that became very prevalent when I interviewed the female officers was the issue of sexual harassment. In the first sample of 40 officers, only 5 of them were females and 2 or 3 of them mentioned sexual harassment. None of the other 35 officers, the male officers, said anything about sexual harassment other than the fact that they had a policy. With the other sample of officers, 75%, 15 of those 20 female officers reported having been sexually harassed on the job. Of that 15, only 2 officially reported. The majority stated that reporting just was not done. As one female officer said, "You know what…you just take it like a man." They learn to handle it themselves, and consider that it is the nature of police work. A female officer does not want to be known as a little girl—the feminine one that complains about things.

Ultimately cultural learning theories were implicated in the data as they have been in previous research. Cultural learning theory states that people learn behavior from others, including criminal behavior. Cultural learning theories also suggest that there are deviant subcultures that exist in some cases. Some cultures that exist within the broader culture and share some views and ideas with the broader culture, but on some issues they disagree. That appears to be the case here where some officers believe that it is acceptable to engage in this behavior, that it is part of the world cultural view that police officers have.

Not all police officers are engaging in police sexual misconduct, especially the serious variety, especially the criminal variety. But there are enough where it is becoming a serious issue that needs to be researched in more depth. But what I have

found from my research was most of those officers who do not engage in those behaviors indicated they would not inform on another officer for doing it, unless the conduct amounted to rape or sexual assault. For the less serious variety of PSM, female officers would also not report this. Some female officers indicated a desire to report but believed they could not remain employed as a police officer. However, it needs to be remembered that the less serious PSM can involve criminal behavior, and it is tolerated because of a strong cultural code that exists in policing. Even the police chiefs also agree that with regard to the less serious sexual misconduct they did not think their officers would report that behavior, either. They did express the hope that they would report the more serious behavior, however. When I asked the police chiefs whether they had a specific policy for sexual misconduct, none of them could produce it. A couple of them assumed incorrectly that there was a specific policy in their codes of conduct. In fact, in my research of other police departments outside the St. Louis metropolitan area, I found only one agency, a state police agency, that even mentioned police misconduct in their code of conduct. Though it was not a specific policy that targeted sexual misconduct.

Also implicated in the data is this notion of routine activities theory by Cohen and Felson (1979), which basically stated that for a crime, or, in this case, deviance, to occur there must be a motivated offender. Though people are motivated to engage in sex, not all people are motivated to be engaged in criminal sex, but there is that motive and especially if the culture is supporting this behavior. Secondly, there appears to be many suitable targets associated with police behavior, in that a lot of people are out there that police can prey on. These officers work in situations where they can emphasize and take advantage of their power and authority, their positions as police officers. Finally, since there is a lack of capable supervision, police officers usually work alone. They have supervisors, but in many situations supervision can be avoided for an entire shift. These three factors can come together—motive with plenty of opportunity, and suitable targets, in some cases willing targets.

So how does this behavior get controlled? My research and other research suggest that though PSM is common, there is not very much being done about it. Only when they are forced to address these issues will police administrators be actively engaged and then they will condemn it. But, simply condemning the behavior is not the same as proactively working to reduce it. Ultimately it is a hidden behavior. For these serious acts of PSM the behavior is hidden in that although there are examples in the literature that suggest this is sometimes group behavior, where rapes and sexual assaults occur and involve more than one police officer, usually these acts I believe are more individualistic.

In addition, the behavior is subjectively defined. Especially if there is no rule or regulation that explicitly defines these behaviors. Officers in the research struggled to provide a definition of PSM that was not overly broad and vague, indicating they did not have a good grasp of what police sexual misconduct is. In addition, with the abundance of opportunity to engage in PSM, it appears to be culturally, organizationally, and structurally supported.

Typically the best way to control police behavior historically has been through internal and external means. With regard to internal means, the less formal means, these are policies, rules, and regulations. The external means tend to be laws and much of this behavior is against the law, not just for police officers but for everyone. Whether the internal means work depends on the quality of the personnel, the quality

of supervision, the system of accountability and discipline, and, then ultimately, the police culture.

With regard to external controls, criminal liability, civil liability, and citizen oversight are options. The media can play a significant role, as can academia in getting more research about this. Criminal liability, not just for police sexual misconduct, but for most types of police misconduct, will result in only the most serious cases (murder, rape, drug dealing) getting brought to the attention of the courts. There is not much of it ever being criminally prosecuted. Most police deviants are not caught, they work in seclusion, they work under a cover of darkness, they have the opportunity to engage in this behavior without being observed and the victims are reluctant to report it primarily out of fear.

Many prosecutors are unwilling to prosecute police officers, not just for sexual violence, but for any sort of misconduct. They have a relationship with the police that they want to keep on good terms. There was one study that showed in Los Angeles County, several hundred cases of police sexual misconduct alone were sent to the prosecutor's office over a series of three or four years, and only about 20 of them were prosecuted. Even though the study indicated that there was ample evidence to go forward with the prosecution. Ultimately whether or not criminal prosecution is effective might rely on a concept referred to as the tipping point by Tittle and Rowe (1973), this notion that officers are not going to stop engaging in some sort of deviant criminal behavior until they think that it is likely they will be apprehended and punished for it. At least at this stage, from a criminal prosecution standpoint, it does not really appear that the tipping point exists at a low level. So only when it is a very serious crime and there is ample evidence does it appear that the tipping point was reached. As one officer in the research said, "I do not believe officers are really concerned about minor criminal things…they do not believe they will be caught, and if they are caught, not much will be done about it anyway."

Currently civil liability is pursued more often in police sexual misconduct, in particular sexual violence cases, than is criminal liability. The chiefs in the research suggest that PSM is a significant civil liability for their departments and for their cities, and police sexual violence is more likely to be handled civilly than criminally according to Kappeler and Vaughn (1997). But some research also suggests that civil liability is simply considered a cost of doing business and many police administrators, and even some police officers, say it is just part of the job and just accept it.

Citizen oversight (that is outside review), Goldstein (1975) observed, is essential, yet most police departments do not have a system of citizen review. Further, its effectiveness has not been tested adequately. There is a system of citizen review called the police auditor system where a fulltime employee of the government is assigned to oversee police actions, policies, and organizational issues. They deal with less individual behaviors as opposed to organizational and structural behaviors. But this is relatively new and untested; although some prominent scholars in policing believe it shows promise.

The media can also play an important role, if they take an active interest in taking on sexual misconduct. One usually only hears about those really serious cases that make it to the courts.

Research also will play a significant role, and this is where academia can play a significant role in informing people more about this phenomenon. There is not much research out there on police sexual misconduct. My research needs to be replicated in

other areas of the country. Because mine was an exploratory study, it may be problematic to infer and generalize to other parts of the country.

So far we have learned that PSM is common. Police officers are saying it and most of the research suggests it. It appears to be embedded in this larger social issue of service professionals, taking advantage of their positions of authority and power to exploit victims for their own personal sexual interests. It also does not appear to be isolated to individuals, but it appears to be culturally, structurally, and organizationally supported. No single approach is likely going to help control this behavior. It will likely take things like policies to be enacted by all police departments. The Commission on Accreditation for Law Enforcement Agencies, an organization that accredits police departments could be instrumental in making sure that the police practice constructive policies.

Police supervision could play a key role, being more diligent and taking notice that this behavior is occurring. My interviews with sergeants, lieutenants, and police chiefs demonstrate that these officials know this is happening. Under a crime specific approach, controlling rape and sexual assaults among police officers will be different than controlling consensual sex by police officers. So enacting one remedy will not result in having all PSM better controlled. This will take an individual approach; in that controlling rape is going to be different than controlling consensual sex. Increased victim reporting could happen if the system was not so intimidating to file a complaint against police officers. This would help make it less onerous on the victims, but also assist in gaining the confidence of people.

In conclusion, implementing the cultural, organizational, and structural changes necessary to control police behavior will not be easy. Many previous efforts, the Knapp Commission, the Mollen Commission, and community policing programs, appear to be going this way. Explicit policies on sexual harassment are not very successful even where they have existed for numerous years. Despite attempts to control it, sexually harassing behavior still continues in police work. As Skogan (2003) pointed out, police have a remarkable ability to wait out efforts to reform them. Changes in this form of police deviance will not happen overnight, but there are new tools and strategies available that can enhance the control of this behavior. Ultimately it will take a commitment, especially from police chiefs and high-ranking officials and especially among first line supervisors, sergeants, as well as change in the police culture.

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THE RIGHT TO A FAIR TRIAL IN EUROPE? – PROCEDURAL GUARANTEES UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Address to the Miscarriages of Justice Conference: Current Perspectives
University of Central Missouri, February 20, 2007

I. Introduction

The right to a fair trial is a legal cornerstone of democratic societies, whose importance can hardly be overstated. The aim of this contribution is to provide the reader with an—admittedly short—overview over the protection and the enforcement of this right in Europe. The European Convention on Human Rights[1] in combination with its additional protocols is the main international instrument guaranteeing the application of Human Rights in Europe. It had been concluded under the auspices of the Council of Europe in 1950 and entered into force in 1953. The Convention has now 46 Member States; its territorial scope ranges from Lisbon (Portugal) in the west to Vladivostok (Russian Federation) in the east. The ECHR is widely regarded as being the world's most effective system for the protection of human rights[2] and its legal system applies to common as well as to civil law jurisdictions. The Council of Europe is legally distinct from the European Union, although the legal orders of the two organizations are not totally separated from the other, as can be inferred from art. 6 (2) TEU.[3]

The Convention is secured by a court mechanism. The European Court of Human Rights,[4] which is located in Strasbourg, France, is the final arbiter in all cases concerning breaches of the Convention and according to art. 34, 35 ECHR individuals are entitled to have recourse to it after the exhaustion of the applicable national remedies. The Court is extremely successful and, on the flipside of the coin, totally overburdened. In 2006, 50,500 applications had been filed and the Court rendered 1,560 judgments, a 40% increase from the previous year.[5]

The rights enshrined in the Convention are mostly drawn from the first half of the Universal Declaration on Human Rights,[6] which is a non-binding resolution of the General Assembly of the United Nations.[7] The Convention rights are much more elaborated than the sister provisions of the Universal Declaration and legally

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1 European Treaty Series no. 5, hereinafter referred to as "ECHR."
2 BUERGENTHAL, T., SHELTON, D., & STEWART, D. INTERNATIONAL HUMAN RIGHTS, 3rd ed. 2002, 139.
3 Art. 6 (2) TEU reads inter alia: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950" […].
4 Hereinafter "ECtHR."
5 The judgments and more information on the system can be found on the ECHRs website www.echr.coe.int.
6 SMITH, R., INTERNATIONAL HUMAN RIGHTS, 2nd ed. 2005, p. 94; BUERGENTHAL *et al. supra* note 2 at 139.
7 GA Res. 217A (III).

enforceable.[8] The increasing international relevance of the Convention stems from its effective system of judicial protection and the vast case-law of the Court on the embodied human rights.[9]

II. Miscarriages of Justice and Procedural Rules

In the general public opinion, justice and its (eventual) miscarriage is usually connected with provisions of substantial criminal law like murder and homicide. The procedural rules governing the fairness of a (criminal) trial are not so much in the focus of the public opinion, yet of equal if not overriding relevance. Procedural rules are generally the domain of lawyers and their impact on the outcome of a case is sometimes difficult to grasp. Due to the conduct of a criminal trial in compliance with these rules, their effect on the outcome, and the criminal liability of a person, is enormous. Despite that, these rules are usually not considered as taking part in the safeguarding of the criminal process, like the strict prohibition of retroactive application of criminal laws (art. 7 ECHR) and ruling by analogy,[10] which is limited to substantial criminal provisions. Hence, it is in certain circumstances possible to change the procedural law, despite its effect on the sentence of the case at stake, retroactively and, resulting from this, the criminal procedural law at the time of trial is not necessarily identical with the procedural law at the time when the crime had been committed.

The compensation for miscarriages of justice is expressly mentioned in art. 3 AP VII[11] to the European Convention on Human Rights and will be briefly discussed at the end of this article.

The basic provision guaranteeing the right to a fair trial in Europe is art. 6 of the European Convention on Human Rights. Art. 6 ECHR is subdivided into three paragraphs, whereby only one paragraph applies to civil and criminal proceedings, the latter paragraphs apply exclusively to criminal cases and will be addressed in depth. The provision is of central and overriding importance for the protection of Human Rights under the Convention[12] and the most invoked one.[13] The provision will be analyzed in due course.

III. The Right to a Fair Trial—Art. 6 (1) ECHR

The general right to a fair trial is embodied in art. 6 (1) ECHR.[14] The scrutiny of the provision will thereby be focused on the rules concerning the criminal process.

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[8] SMITH, R. & VAN DEN ANKER, C. HUMAN RIGHTS, 2005, p. 113.

[9] SMITH, *supra* note 6 at p. 94.

[10] ICJ, *Arrest Warrant*, ICJ-Rep. 2002, p. 3 et seq.; Dissenting Opinion *Guillaume*, para. 17, p.44.

[11] Additional Protocol No. 7, a separate international treaty, which had been ratified by OVEY, C. & WHITE, O. EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed. 2002, p. 139; see generally: *SMITH & VAN DEN ANKER*, *supra* note 8 at p. 130.

[13] In 2006, of the 1,560 rendered judgments 994 concerned art. 6 ECHR.

[14] The provision reads:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

1. Definition of a Criminal Charge

First, the notion of a "criminal charge" has to be determined. According to the well-established case-law of the ECtHR, the Convention has to be interpreted in an autonomous way, whereas similar expressions in the national laws of the Member States are not decisive for determining the wording of a provision, but can be taken into account.[15] The reason for this is the achievement of a uniform approach throughout Europe and to limit the sovereignty of states for circumventing the provisions of the Convention by classifying offences as administrative or disciplinary.[16] As a result, the member states of the Convention lack the sovereign power to prescribe in a definite way, which kinds of national legal processes cannot be regarded as "criminal." Such a definition would only be binding upon the national courts, but not for the ECtHR.

In the much discussed[17] *Engel* case of the ECtHR, which concerned disciplinary actions against members of the armed forces, the Court set criteria for the determination of a criminal charge. The criteria include the nature of the offence charged, the severity of the sanction at stake (especially loss of liberty, a typical criminal charge, yet also the deterrent and punitive character of the state's measure), and the group to whom the legislation applied (no small and closely defined groups, criminal law has to be of widespread applicability).[18] The national classification of the matter has to be taken into account, but is not decisive. Yet, if under national law a matter has been defined as being criminal, it will fall under the notion of a criminal charge and has to live up to higher standards than civil or administrative charges.

2. Application in Time

The application in time of art. 6 ECHR begins with the charging of a person with a criminal offence by state officials. Otherwise the provision would be unable to fully protect the human rights of the accused. A charge is the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence,[19] thus the right to a fair trial is applicable before a case is sent for trial. Art. 6 ECHR normally requires that a lawyer is present at the initial stages of police interrogation.[20] Moreover, the provision is applicable for the whole proceedings at issue, including appeals and the determination of a sentence.[21] Proceedings after the sentence do not fall within the ambit of art. 6 ECHR.

3. Requirements of a Fair Hearing

According to the ECtHR, the effect of art. 6 (1) ECHR is to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision.[22]

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[15] See, *Engel*, ECtHR, judgment of 8 June 1976, para. 82.
[16] OVEY & WHITE, *supra note 12 at* p. 141.
[17] For an overview see TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS, 2005, p. 18 et seq.
[18] Examples for criminal charges include UK prison boards (*Campbell and Fell*, judgment of 28 June 1984), minor offences under German law (Ordnungswidrigkeitenrecht, see *Öztürk*, judgment of 21 February 1984). Problematic are contempt of court-cases and EC competition law cases.
[19] *Eckle*, ECtHR, Judgment of 15 July 1982, para. 73.
[20] *Öcalan*, ECtHR, Grand Chamber, judgment of 12 May 2005, para. 131.
[21] *Eckle*, ECtHR *supra* note 19, para. 76, 77.
[22] *Kraska*, ECtHR, judgment of 19 April 1993, para. 30.

From this general statement, the Court has developed a number of special rights. The first one is the equality of arms,[23] which requires a fair balance of powers in the trial between the parties in criminal (and of course civil) proceedings[24] and, strongly connected to it, the adversarial principle. In the view of the Court, the criminal process has to be adversarial in nature, i.e. that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observation filed and the evidence adduced by the other party.[25] This requires that the prosecution should disclose to the defence all material evidence in their possession for or against the accused.[26]

Restrictions of the right of the defence are possible, but they have to be strictly necessary.[27] Thus, restrictions due to national security and witness protection laws are possible, but under a strict scrutiny. Another implicit feature of a fair hearing is the requirement of a reasoned decision.[28] In criminal cases this means that the national court is obligated to pay attention to the evidence brought forward by the defence.[29] Other ingredients of the right of a fair trial are appearance in person and the effective participation in proceedings.

The principle of equality of arms demands that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his or her opponent.[30] Another layer is the right of the accused to communicate with his lawyer out of the hearing of third parties. This right to communicate with a legal representative out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and is especially enshrined in art. 6 (3) ECHR.[31] If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.

Not specified in the Convention is the number and length of visits by the accused person's lawyer, because art. 6 (3) does not specify the right to defend oneself. Thus, the contracting parties have the competence and the choice of how to fulfill the obligation. Yet, for determining the question whether a fair trial has been achieved, the Court has to look at the entirety of the domestic proceedings.[32]

Other features of the right to a fair trial, which, due to a limitation in space, cannot be elaborated further in this article, include the right to a reasoned decision, the right to appear in person in front of a court, and the effective participation in the proceedings.

5. Independent and Impartial Tribunal Established By Law

Art. 6 ECHR mentions explicitly that everyone is entitled to a fair and public hearing within a reasonable time by an independent an impartial tribunal established by law.

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[23] *Neumeister*, ECtHR, judgment of 27 June 1968, para. 22.
[24] *See* OVEY & WHITE, *supra note 12 at* p. 156.
[25] *Rowe and Davis*, ECtHR, judgment of 16 February 2000, para. 60.
[26] *Id.*
[27] *Id.* at para. 61.
[28] *Van de Hurk,* ECtHR, judgment of 19 April 1994, para. 40.
[29] OVEY & WHITE, *supra note 12 at* p. 158.
[30] *Öcalan*, ECtHR, Grand Chamber (fn 20), para. 141.
[31] See infra under no. "III".
[32] *van Kück*, ECtHR, judgment of 12 June 2003, para. 55 et seq. This is at least the case if the Court finds no specific breach of a right explicitly granted in art. 6 ECHR.

Independent and impartial tribunal. The term "tribunal" does not necessarily refer to a court, the ECtHR understands it in a rather broad way.[33] Decisive is not the label attached to the institution in question, but its tasks.[34] According to this understanding, also non-judicial bodies like a regional or military commission could fulfill the requirements. Independence means the lack of subordination to any other organ of the state, while impartial means that the judge is not biased in favor of any party.[35]

The relevant tribunal has to be objectively as well as subjectively independent and impartial. Subjective means, whether the personal conviction of a judge in a particular case raises doubts. A good example for this is the membership in a human rights organization of a member in the first Pinochet case in front of the British House of Lords.[36] This mistake led to a retrial of the case. Also, the involvement of a judge in pre-trial stages of the process can hamper the impartiality of the tribunal. Objective means that the structure and appearance of a court has to be in a non-biased way.

In the last years, the ECtHR put a special emphasis to the participation of military judges, which sit as members of a court. The impartiality is generally not hampered by the military ranks of the judges, but as long as a judge is in the ranks and under the supervision of a superior, this may influence the outcome of the proceedings.

The question whether a court is seen to be independent does not solely depend on its composition when it delivers its verdict. In order to comply with the requirements of art. 6 ECHR regarding independence, the court at stake must be considered independent at each of the three stages of a criminal proceeding, namely the investigation, the trial, and the verdict. This can be illustrated with the following example. If a military judge has participated in one or more interlocutory decisions that continue to remain in effect in the criminal proceedings concerned, the accused has reasonable cause for concern about the validity of the entire proceedings. The participation of the military judge must influence the verdict.

Established by law. A tribunal is established by law, if it is—at least to a certain degree—regulated by an act of parliament,[37] which satisfies the general requirements of precision and foreseeability.[38] A statute is not necessary. This requirement would have been under a certain scrutiny, if the Court would have held the applications of Slobodan Milosevic and Saddam Hussein as admissible.

6. Public Hearings and Judgments

Public hearings offer protection against arbitrary decisions and build confidence by allowing the public to see justice being administered. It can only be limited for the protection of certain groups, like juveniles, which are expressly mentioned in the text of the Convention.

The judgment shall be pronounced publicly. Yet, the form of publicity to be given to a judgment must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of art. 6 (1) ECHR.[39] The

[33] *Belilos*, ECtHR, judgment of 29 April 2004, para. 64.
[34] TRECHSEL, *supra* note 17 at p. 48.
[35] *Id.* at pp. 49, 50.
[36] *See* House of Lords, *Pinochet II*, judgment of 15 January 1999.
[37] *Coëme*, ECtHR, judgment of 22 June 2000, para. 98.
[38] *Amann*, ECtHR, judgment of 16 February 2000, para. 76.
[39] *Pretto*, ECtHR, judgment of 8 December 1983, para. 26.

reading out of a judgment in public is not necessary. It is enough if the judgment had been made public.[40]

7. Judgments Within a Reasonable Time

In criminal cases, the "reasonable time" begins to run as soon as the accused is officially notified of an allegation that he has committed a criminal offence. This may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted, or the date when preliminary investigations were opened.[41] The period to be taken into consideration lasts until the final determination of the case, and therefore includes appeal or cassation proceedings.[42] The reasonableness of the length of proceedings is assessed in the light of all the circumstances of the case, having regard in particular to the complexity of the issue, the conduct of the parties, and what was at stake for the applicant.[43] A number of cases in this respect originate in Italy, which has been frequently unable to bring its judicial system in accordance with the Convention.

8. Appeals

Art. 6 (1) ECHR does not include the right to an appeal, although if an appeal procedure is provided by domestic law it must conform with the requirements of the provision.[44]

The right to an appeal has been laid down in art. 2 AP VII. The provision provides inter alia that "(e)veryone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which may be exercised, shall be governed by law." Interestingly, the right to appeal can be restricted by offences of a minor character, as they are prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. Decisions from non-judicial organs are not covered. The relationship of art. 2 AP VII to art. 6 ECHR is rather unclear, because the exact interpretation of the term "criminal offence," as used by art. 2 AP VII, is still discussed. In question is explicitly if it can be seen identical as the terms "criminal charge" or "criminal offence" in art. 6 (1) and (2) respectively.[45] According to the author's view, this understanding of the art. 2 AP VII is favorable because it would lead to a homogenous legal system and a full protection of the individual.

IV. Special Guarantees of the Criminal Process—Art. 6 (2) and (3) ECHR

Art. 6 (2) and (3) ECHR entail special guarantees for the accused in a criminal process.[46] Paragraph 2 is concerned with the presumption of innocence, while

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[40] *Axen*, ECtHR, judgment of 8 December 1983, para. 31, ECtHR, *Pretto*, judgment of 8 December 1983, para. 30 et seq. Extremely critical to the interpretation of the Court: TRECHSEL, *supra* note 17 at p. 132.

[41] *Eckle*, ECtHR *supra* note 19 para. 73.

[42] OVEY & WHITE, *supra* note 12 at p. 167.

[43] *Id.*

[44] *Delcourt*, ECtHR, judgment of 17 January 1970, para. 25.

[45] TRECHSEL, *supra* note 17 at p. 363. France and Italy made reservations insofar that the provision only applies to (national) criminal proceedings.

[46] The provisions read:

paragraph 3 deals with special rights of the accused. In an overview, the most important features of these rights will be shown.

The term "everyone charged with a criminal offence" has to be seen identical as the notion of a "criminal charge" in art. 6 (1) ECHR. Yet, art. 6 (1) applies during the whole criminal proceedings, including sentencing a person, while the paragraphs (2)[47] and (3)[48] are only applicable in certain procedural stages. The five rights enumerated in paragraph (3) are considered as establishing the minimum standard to be followed in criminal proceedings. In its case-law the ECtHR stated clearly that certain unlawful police methods of investigation, like the incitement to commit a crime[49] and the relying on unlawful activity for gaining evidence,[50] fall within the scope of the provision.

1. The Principle of Non Self-incrimination, Including the Right to Silence

The principle of non self-incrimination includes *the right to remain silent* and the *presumption of innocence*, as laid down in art. 6 (2) ECHR. The rationale of the right to remain silent and the principle against self-incrimination lies in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice.[51] The right not to incriminate oneself presupposes that the prosecution in a criminal case should seek to prove its case against the accused without resorting to evidence obtained through coercion or oppression in defiance of the will of the accused.[52]

Using this formula, the Court drew a distinction between the right to remain silent, which is protected by art. 6 (2) ECHR, and the use in criminal proceedings of material which might be obtained from the accused without his will and through the use of compulsory powers, like documents acquired pursuant to a warrant, or blood samples and bodily tissues for DNA testing, which is not inconsistent with art. 6 ECHR.

Further, art. 6 (2) ECHR is not merely concerned with the burden of proof.[53] It also prohibits the authorities from saying or doing anything which indicates that they believe a person is guilty of an offence, unless or until guilt is proven.[54] Hence, the authorities are compelled to be extremely cautious in revealing information about an accused to the public.

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(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
(3) Everyone charged with a criminal offence has the following minimum rights:
a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b) to have adequate time and facilities for the preparation of his defence;
c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[47] *Janosevic*, ECtHR, judgment of 23 July 2002, para. 96 et seq.
[48] OVEY & WHITE, *supra note 12 at* p. 172.
[49] *Teixeira de Castro*, ECtHR, judgment of 9 June 1998, para. 36.
[50] *Khan*, ECtHR, judgment of 12 May 2000, para. 35. The police had installed a hidden listening device in a hotel.
[51] *Saunders*, ECtHR, judgment of 17 December 1996, para. 22.
[52] OVEY & WHITE, *supra note 12 at* p. 175.
[53] *Id. at* p. 180.
[54] *Id at p. 180*.

Some connected rights to the right to remain silent are embodied in para. 3 of the provision. An accused must be notified promptly of the charges against him, art. 6 (3) a) ECHR. This right is usually connected to the right of interpretation, as embodied in art. 6 (3) e) ECHR. If the accused does everything for not receiving the notification, he lost his right under art. 6 (3) a) ECHR.

2. Legal Assistance and Time and Facilities to Run a Defence

The right of legal assistance is also applicable in pre-trial proceedings, because absence of representation could affect the fairness of the proceedings as a whole. In the famous John Murray case (a British terrorist case), the Court ordered that the denial of access to a lawyer in the first 48 hours of police questioning constituted a violation, despite the fact that the right to see a lawyer in the early stages of police investigation is not absolute and can be restricted. In the case at stake, Mr. John Murray had been charged with terrorism, but the national British law permitted an inference of guilt to be drawn from the applicants' silence under police questioning. So, the refusal of a lawyer deprived him of a fair trial.

Art. 6 (3) d) ECHR grants a number of rights in respect to witnesses. The provision applies in the adversarial (witnesses are cross-examined by the parties) as well as in the inquisitorial system (witnesses are examined by the court), and ensures that the right to hear witnesses is given within the legal system at stake. Problematic are cases of anonymous witnesses, where the Court draws a distinction between private persons and police officers.[55]

V. Outreach of Art. 6 ECHR

Special recognition deserves the "outreach" of the right of a fair trial to other provisions of the Convention. According to the established case-law of the Court, if art. 6 ECHR has not been respected by the authorities of a Member State this can as well lead to a violation of other provisions enshrined in the Convention. The *Öcalan* case may serve as an example. In its interpretation of art. 3, the prohibition of torture, the Court's Grand Chamber relied on the conditions on which the death penalty had been issued against Mr. Öcalan. Especially, the Court had found that the applicant was not tried by an independent and impartial tribunal within the meaning of art. 6 (1), and that there had been a breach of the rights of the defence under art. 6 (1) taken together with art. 6 (3) b) and c) ECHR, as the applicant had no access to a lawyer while in police custody and was unable to communicate with his lawyers out of the hearing of officials. Further, restrictions had been imposed on the number and length of his lawyers' visits to him, he was unable to consult the case-file until an advanced stage of the proceedings, and his lawyers did not have sufficient time to consult the file properly.[56]

The death penalty has thus been imposed on the applicant following an unfair procedure which cannot be considered to conform to the strict standard of fairness required in cases involving a capital sentence. Moreover, he had to suffer the consequences of the imposition of that sentence for nearly three years.[57] In capital punishment cases, state parties have an imperative duty to observe rigorously all the

[55] *Id at* p. 186 et seq.
[56] *Öcalan*, ECtHR *supra* note 30, para. 173.
[57] *Id.* at para. 174.

guarantees of a fair trial.[58] The named circumstances led not only to a violation of art. 6 ECHR, but also of art. 3 ECHR.

VI. Additional Protocol VII[59]

The AP VII to the Convention entails a number of additional procedural rights in respect of the criminal process, like the right to an appeal.[60] Special importance deserves the right against double jeopardy and the right to compensation following a miscarriage of justice. Unfortunately, only a limited number of Member states have ratified the protocol.

The protection against double jeopardy shall prohibit the repetition of criminal proceedings that have been concluded by a final decision.[61] The importance of this right can be inferred from paragraph 3, which basically states that even in times of war, the Member States cannot enact a law for the derogation from the prohibition. Insofar, art. 4 AP VII is regarded as an absolute prohibition. The protection against double jeopardy has been further elaborated in other conventions which had been concluded under the auspices of the Council of Europe, namely, the European Convention on Extradition,[62] the European Convention on the International Validity of Criminal Judgments,[63] and the European Convention on the Transfers of Proceedings in Criminal Matters.[64]

Compensation for a Miscarriage of Justice

Art. 2 AP VII deals with compensations for miscarriages of justice. The provision is applicable:

> (W)hen a person has by final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the state

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[58] UN Human Rights Committee, Earl Pratt and Ivan Morgan v Jamaica, Communication No. 210/198, U.N. doc. Supp. No. 40 at 222, decision of 6 April 1989, para. 15; HRC for BiH, *Boudella* et al., decision of 11 October 2002, para. 284.

[59] Additional Protocols are international treaties in their own right, hence every member state has to ratify them before they could granted legal force within the respective country. This is sometimes a rather burdensome process, i.e. Germany has not ratified the Additional Protocol VII until now.

[60] *See supra* discussion at note 44..

[61] *Gradinger*, ECtHR, judgment of 23 October 1995, para. 53. The text of art. 4 AP VII paragraph (1) and (2) reads:

> (1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.
>
> (2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. […]

[62] European Treaty Series no. 24.

[63] European Treaty Series no. 70.

[64] European Treaty Series no. 73.

> concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

The provision is extremely narrowly drafted.[65] It is intended to cover only the clearest of cases of miscarriages of justice, where the accused was not at fault for the miscarriage[66] and was also innocent; mitigating factors are not enough.[67] The text does not give any indication to the nature and the amount of the compensation.[68] Moreover, it is rather unclear as to the exact meaning of the term "according to the law." Consensus seems to be reached that the Member States of the Convention are obliged to enact the relevant legislation, but they enjoy in regard to the content of the legislation a large degree of discretion.

VII. Conclusion

The overview has shown that the protection of the right to a fair trial under the European Convention on Human Rights is effective. The Convention establishes a strong system, which in accordance with the case-law of the European Court of Human Rights, has to be interpreted independently and autonomously from the national systems. As a result, the Member States' legal system has to be in line with the provisions of the ECHR and not vice versa. This achievement of the Court in its jurisprudence led to the extreme success of the Convention and the overburdening of the Court. Despite this practical outcome, the jurisprudence deserves full support. Without an autonomous interpretation the protection of the right to a fair trial would be far from homogenous among the different Member States' of the Convention and the individual would be left "in the hands of the state." A result that would contravene the ECHR's objective and purpose. By transferring the function of a watchdog, the Member States' competence to act freely had been limited for the greater good of human rights protection.

A critical approach has been taken against the existing loopholes of the Convention, e.g. the rather limited compensation issue for miscarriages of justice. The protection can only go so far as the Member States grant rights under the ECHR. The definition of a common approach to a certain problem is often cumbersome and time-consuming and always in the best interest for the concerned individual. For the goal of an all-encompassing protection of the individual it would be advisable, if the Member states are not reducing the scope of a provision but widening it as far as possible. In doing this, they would work in the best interest of the Convention, the protection of the individual. Yet, overall, the Convention system is working very well and is achieving its aims.

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[65] OVEY & WHITE, *supra* note 12 at p. 197.
[66] *Id.* at pp. 175, 197.
[67] TRECHSEL, *supra* note 17 at p. 378.
[68] Trechsel opines that the compensation has to be of a pecuniary nature and must be substantive, *see* TRECHSEL, *supra* note 17 at p. 379.

MISCARRIAGES OF JUSTICE IN INQUISITORIAL AND ACCUSATORIAL LEGAL SYSTEMS

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Address to the Miscarriages of Justice Conference: Current Perspectives
University of Central Missouri, February 21, 2007

Before I begin, I would like to make two points. We should realize that in an overwhelming majority of cases, technical evidence is absent. In only somewhere between 2 and 3 percent of the cases, technical evidence like DNA traces or fingerprints or bullet comparisons, is present for the convictions. In an overwhelming majority of the cases, the conviction is based solely on witness evidence. If one examines the sub-sample of miscarriages of justice, of course in a majority there are errors by witnesses. Generally for humans our perception and our memory of events are very good. They need to be because they are essential for our survival. If we did not have such good perception and memory, we would not be here today; there would not be a human race. Despite having wonderful powers of perception and memory, often they fill with special circumstances of criminal cases because, for example an investigator comes up and starts asking questions about things witnesses never really think about like number plates of cars, or the color of the eyes of the robber. So to observe a miscarriage of justice in a high percentage of cases because of witness statements is not a surprise because they are so important.

Additionally it should be recognized that all evidence has a margin of error. A witness has such, but so do fingerprints and DNA evidence also have, a margin of error. If all the evidence in a criminal case is added together, there always remains some margin of error. A fact-finder, a jury or a judge, wants to be certain before a person is convicted. So with every decision in a criminal court, there is a risk of convicting the innocent. The risk may be small, the risk may be large, but there is always a risk. And the difference between a good criminal justice system and a bad criminal justice system is not that in a good criminal justice system there are no miscarriages of justice. A good criminal justice system can only take care of the risk, minimizing it as much as possible. But the risk can never be completely avoided.

In this introduction about Dutch law, there are two things essential to observe. Most of the Netherlands, two-thirds of the country, is below sea level. For instance the Amsterdam airport is some 20 feet below sea level. Dikes are essential for survival of the country, but dikes need maintenance. Dikes sometimes break, and if that happens, a collective effort of the whole community is required to repair the breach in the dike. So we have a long tradition of getting together and joining forces. That represents one basis of Dutch law. The other basis is that we are a trading

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nation from very long ago. For success in this business it is not very sensible to quarrel with everybody. What trading people prefer to do is settle, find compromises. So what we have in Dutch society is a collective effort to find compromises, that is basically what happens in law because Dutch society is made up of groups of people who could be very much incompatible—Socialists, Liberals, Communists, Catholics, Protestants. Still the country must be run and the dikes have to be kept intact and we have to trade. So there is a long tradition of finding compromise, compromise in government, compromise in how we do things, but also compromise in law. For instance, if you look at American contracts, it is usually very thick, very detailed with a lot of articles, specifying what parties cannot do and should do. In Dutch law, there is usually one page for a contract, even if it involves millions of Euros, or there could be just a shake of hands. Because if the matter goes to court, the judge will ask, "What did you mean when you made a contract? What do you want to achieve? And what is reasonable in the present state of your contract?" Judges hardly look at details in written contracts. The same compromising nature occurs in Dutch criminal law.

One can distinguish criminal law systems in the world roughly in two kinds of systems: inquisitorial systems and the adversarial systems. Basically, England and its former colonies use the adversarial system and the rest of the world is inquisitorial. The basis of the adversarial system is to have two parties who have to be somewhat equal, the prosecution and defense, and have a battle in front of a judge. The judge has a more or less neutral role, being a referee if there is a conflict, while these parties are discussing their case. In inquisitorial systems, it is completely different. The judge is running the show; the judge is doing the investigation. There of course is a prosecutor, but with a completely different role than the prosecutor in the United States. Further, the defense also has a different role. For instance, if witnesses are questioned in court, it is done by the judge primarily, not by the parties. Where does this system come from? It is simple, it comes from Roman law and all European countries have adopted some kind of version of Roman law. The Dutch version comes from the French occupation in the end of the 18th and the beginning of the 19th century. So we have a different version, for instance, than what the Germans have. We even have a somewhat different system from what is seen in Belgium or Denmark.

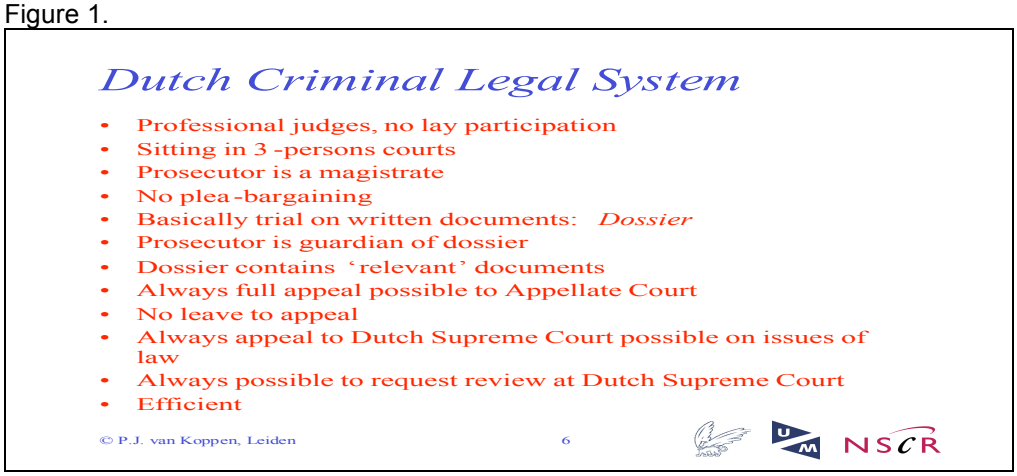
The Dutch system is the most inquisitorial among inquisitorial systems and provides a good baseline to understand how such a system works. It is expected of course with both systems that the end is to serve justice for the individual who is prosecuted for a crime. Under the American legal system, the goal is a fair trial. In the Netherlands, we do not so much bother about fair trial, as opposed to seeking the truth. An American lawyer would say in the efforts to attain a fair trial the truth is sought, but indirectly through the goal of a fair trial. In the Netherlands we are mainly seeking the truth to the extent that all kinds of rules that govern procedures for a fair trial are much less important.

Because we have this Dutch compromising nature, the trial is much more aimed at implementing policy. I will give you some examples. While in an American trial, it is much more aimed at individual conflicts and the best example is what Bryce called the "American creed" saying the individual has sacred rights, the source of political power is the people, all governments are limited by law and the people, local governments are preferred to national governments, the majority is wiser than the minority, and the less government the better. So in the end, it boils down that there is an emphasis on individual rights and duties. I call this the John Wayne version of justice. In the movie, "Alamo," John Wayne's character observes, "There is right and

there is wrong, you gotta do one or the other, you do one and you're living, you do the other and you'll be walking around, but you're dead as a beaver hat." Or shortly said, "First shoot then think about justice."

In the Dutch version, it is completely different (see Figure 1). We do not have any lay-participation in the system, there is no jury. Of course in other civil legal systems there is lay-participation. In Germany, with major criminal cases, there are courts of three people, the chair being a lawyer, and the two assessors are laypersons. In the Belgium version of the jury trial, there are 12 laypersons deciding on the guilt of the suspect and in the second phase, the 12 lay jurors and the three justices of the court together decide the punishment. These jury trials in Belgium only happen when the prosecution goes for a life sentence. Nowhere in Europe is there a death penalty.

Figure 1.



Professional judges undergo special training. One can become a professional judge in the Netherlands with five years of law school and after that, six years of special judicial training. Part of the training consists of various courses. My colleagues and I conduct many of the courses about the psychology of law and witnesses. With this specialized training, the judges do not need to relearn at a trial the scientific knowledge regarding witnesses. This underscores a big disadvantage with jurors since they do not have this information. We place much trust in our professional judges. Of course the essence of a jury system is distrust, distrust in government. The main function of the jury is to protect this defendant against the unlimited power of the government. But we do not think we need a jury, we prefer professional judges.

In major crime cases judges always sit in a panel of three and their discussions in chambers are in secret. Secret by law so we never have anything like dissenting opinions. The prosecutor is completely different from the American prosecuting attorney. A prosecutor must come to an independent judgment before he is allowed to prosecute a case. Under this practice it sometimes happens that the prosecutor asks for an acquittal. This may seem bizarre for an American audience. A simple case is prepared by a junior prosecutor, and the prosecutor who oversees the evidence might disagree with the police and the junior prosecutor. But because the

summons to trial has been served; and the trial is scheduled, the prosecutor asks for an acquittal. This is a consequence of the basic form of Dutch trial.

The Dutch trial is not a discussion between the prosecution and the defense. It is a discussion between gentlemen in black robes who are judges and prosecutors and defense attorneys. There is a gentleman-like discussion among people in black robes over the head of the suspect—"What are we going to do with this poor guy who committed these two robberies?"—The suspect has a very, very minor role in the whole proceedings. In fact, now days it is not gentleman-like because most of the participants are women—the majority of prosecutors, of attorneys, and of trial judges are women. Since the prosecutor is a magistrate, he cannot as an equal party negotiate with the defense, we do not have any plea-bargaining. The prosecutor decides whether to prosecute or not, independent of what the defense might think. The consequence is that every case goes to trial, and more important in every case, the evidence is reviewed. Of course it is more thoroughly done if there is discussion about the evidence than in cases where there is no discussion about the evidence and the only question is "Is he going to get two or four years of imprisonment?"

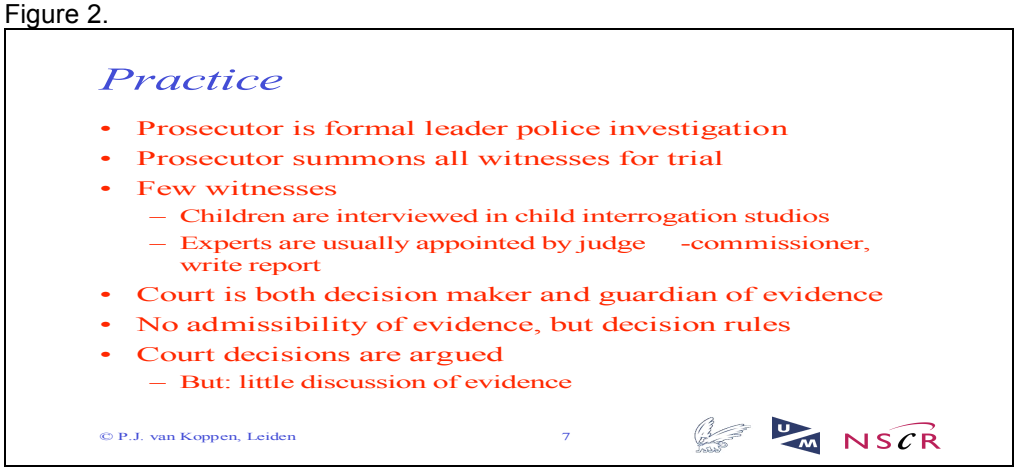
All this is done in writing. The essence of Dutch trial is what we call the dossier in which all documents are entered, documents entered by the police, by the experts, and by the defense. At the start of trial, there is usually a complete dossier and the trial itself is, in most cases, not more than just discussing what is in the dossier. Rarely are there witnesses at a trial. In a sense this is a disadvantage that courts cannot question witnesses themselves.

But it is a big advantage because having witnesses in court is a little frivolous. Suppose I have been a witness to a robbery and two years later, or even a year later the trial is scheduled. The day of the robbery I gave an extensive statement to the police, which was recorded by the police, written down in a document, put into the file. What would be a better statement? My fresh memory the day of the robbery or my degraded memory, influenced by all kinds of stories told by others who are reading in newspapers or discussing with other witnesses a year later at trial? Probably the better answer is the original memory. Further, lawyers are very pompous people generally, in the sense that they think they have powers not possessed by ordinary people. One of these powers is the ability to determine whether somebody is lying or not. Even judges believe they have this ability. But, there is no such special ability. The essence is we cannot see whether somebody's truthful or not. So it is a bit naïve to have somebody at trial. Furthermore, working on the written documents alone is a lot more efficient than having all these witnesses. A robbery trial may last a quarter of an hour and a murder trial half an afternoon in the Netherlands, not always, but in many cases.

But of course there are problems because we know police officers and prosecutors can be biased. The central role of the prosecution in the whole Dutch criminal trial is that he is the guardian of the dossier. The prosecutor must take care that all relevant documents are entered into the dossier. Of course there is discussion of relevancy. For instance, some prosecutors think that only elements in the dossier that are really relevant are the elements that are damaging for the suspect. Exculpatory evidence is sometimes left out of the dossier for that reason. Further, there may be other suspects in the case, but they get released. Although left out of the dossier it can be highly relevant to know whom the police suspected at other stages of the investigation.

So the central figure in a trial is the prosecutor and that only works if you can trust the prosecution. But in a Dutch compromising system, we usually trust our officials. Actually most officials can be trusted but there are some very disagreeable individuals. Further, there is always a full appeal to a court of appeal. A defendant does not need leave to an appeal like in the United Kingdom. Both prosecution and defense can appeal any decision of the trial court and it happens in about 30% of the cases. The appellate court will completely review the case in usually a more relaxed way because they have a lighter caseload than the trial courts. Further, the judges are usually brighter; the discussion is on a little higher level than at the trial. Then there is an appeal available to the Supreme Court, but it only examines issues of law and it happens regularly, though there may be six or seven requests of the Supreme Court to review a case, it may be denied outright. This creates a highly preventive effect from appellate courts against miscarriages of justice. There are many cases in which the trial courts convicted and the appellate courts acquitted with good reason. This two-stage procedure is a measure, which works to prevent miscarriages of justice. The trial court knows that there can always be an appeal. If the appellate court basically reverses what the trial court did, the trial court will be embarrassed. This also has a preventive effect.

Figure 2.



What is now happening in practice? Formally the prosecutor is the head of the police investigation; usually in minor cases is that only formal (see Figure 2). But in major cases, prosecutors in fact are the head of police investigations. Furthermore, a judge commissioner is the one who initiates the investigation. For some things the police want to do, a judge commissioner's approval is necessary. For instance with the tapping of phones, it has to be ordered by a judge commissioner. In the Dutch inquisitorial system the prosecution summons the witnesses to trial. Under this bizarre rule a defense attorney must ask the prosecutor to summon defense witnesses and may have to argue against the prosecution in order to have these witnesses at trial. The prosecution can argue that it is not in the interest of the defense to have a certain witness at trial. An appeal to a denial of a witness can be made to the full court. But what happens in practice is that in most cases the court orders the

witness to be called but then postpones the case for three months because of the caseload. This becomes a gamble for the attorney either to argue that the witness is so important that the delay is worth it or to hope to get an acquittal without this witness. There are some witnesses who never come to trial and these are children. We have a special provision in our country where they are interviewed in what we call children-friendly interviewing studios. With specially trained police officers, these are videotaped and become the child's evidence for the remainder of the trial. In very rare cases, they sometimes are interviewed again. In even rarer cases they are interviewed by a judge-commissioner.

The guardian of the evidence in American courts is the judge. The judge in American court decides whether evidence is admissible or not. If deemed inadmissible, the jury will not see it as evidence. But a judge as a decision maker and a fact-finder, as we have in the Netherlands and other inquisitorial systems, it is inconsistent to ask the judge about admissibility, since the judge has already seen it. But in an inquisitorial system there are decision rules about evidence. With some decision rules the court cannot use certain types of evidence, for instance, evidence based on illegal searches and seizures. Thus, questions about evidence are moved from the beginning of the trial to consider admissibility (as in the U.S.), to the end to consider decision-making. The use of judges can be advantageous since jurors only have to pronounce guilty or not guilty and ordinarily do not have to explain anything. While in a Dutch court, judges have to give a written decision and they have to argue what evidence they used for that decision. The problem is that it is degraded enough through long practice that the judges only mention the evidence that supports the decision of the court and do not discuss the contrary evidence. There can be curious decisions, where there might be six witnesses who say the defendant did not do the crime, but one witness who says otherwise. It can happen that the court will side with the one witness, ignore the other six, and not explain why the court thinks these six witnesses are unreliable.

Allow me to discuss a case about the Schiedan Park murder, because it is a high profile miscarriage of justice in the Netherlands. Kees Borsboom was convicted by the court of appeals to what effectively was a life sentence. Then, one year later, there was a review by the Dutch Supreme Court for one simple reason—the real killer had made a spontaneous confession and demonstrated he had a lot of intimate knowledge about the crime. Further, his DNA matched all kinds of samples found at the scene of the crime.

Why was Borsboom convicted? On a sunny June day, Nienke and her friend, Maikel, a 10-year-old boy, were playing in the park near their home (see Figure 3). Believing it might be time for dinner, they asked about the time of a man at the children's farm in the park, where he replied that it was a quarter past five. They walked here because they left their bicycles a distance away. Then they are called by a man who grabs them by their necks. He takes them over a bridge, through bushes, a distance of some 90 meters. In the bushes he orders them to undress, tries to undress them himself and then strangles both of them with the shoelaces from the army boots worn by Maikel. The shoelaces are 180 centimeters long, very long shoelaces. In the process, he kills Nienke and Maikel pretends he is dead and survives. The killer leaves and then Maikel steps out of the bushes with the shoelace still on his neck and the boot dangling on the shoelace. He walks back over the

bridge and finds a taxi driver standing there. The taxi driver stops a man coming by on a bicycle and asks to use his cell phone to call the police. Borsboom, the bicyclist, is a pedophile. Sometime before the murder, he had met a boy in the very same park and offered to pay for sexual acts. This boy ran home. After the murder of Nienke, this boy saw Borsboom again in the park and again ran home this time to collect his father, who is a police officer. In the confrontation Borsboom apologizes and admits that he is in therapy for his pedophilia. A meeting is arranged at the police station. But, the police officer discovers that Borsboom is one of the witnesses in the Nienke case. From that moment on, Borsboom became the prime and only suspect. Incidentally, the taxi driver who had been standing by the bridge is also a pedophile. In fact, there were some seven more pedophiles in the park at the very moment of the murder. However, one of the basic, underlying arguments against Borsboom was that being a pedophile and in the neighborhood, he must have killed Nienke.

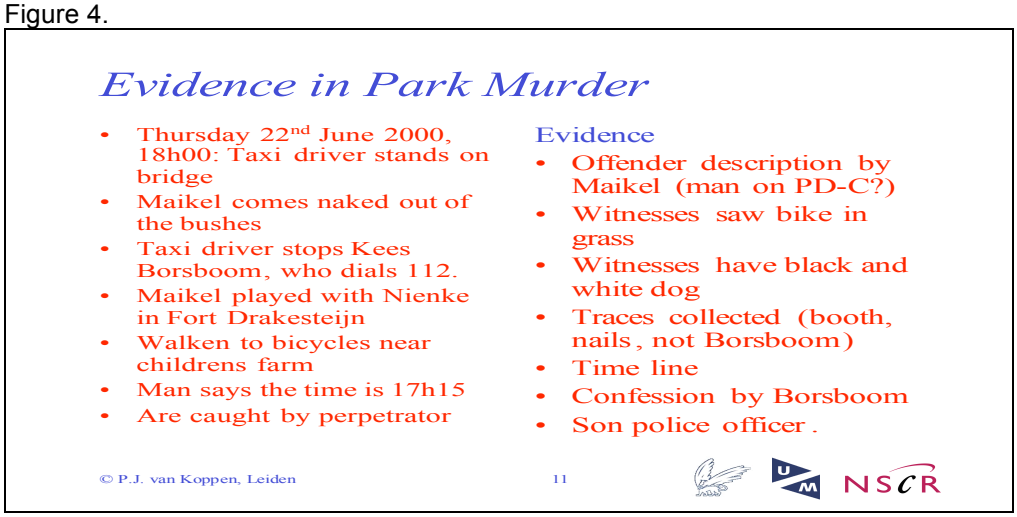
Figure 3.

Maikel was not only strangled, but also stabbed, and he was in the hospital for two days. While in the hospital he made two statements, providing much detail of the events (See Figure 4). One of the things he noted was that this killer, a very white man with a blue cap, had a very peculiar face. He had a very dirty face, with open sores. This description did not fit Borsboom at all. After the attack Maikel had come out of the bushes and saw Borsboom and in this statement he provided a description of Borsboom, where at no point did he ever say this person, who had phoned the police, was the same man who just strangled him. This simple fact is completely overlooked by both the trial and appellate courts.

Further overlooked is the fact that Borsboom did not have the time to commit the crime. He was working at a company a little further away from this park, where at the end of the working day is when the employees put their containers in trucks. There were two trucks that day and they had instruments that record the speeds, times, and other driving information. It can be determined exactly when these two trucks left this company, eighteen minutes after five o'clock. It takes, for a strong bicyclist, 11 minutes to ride through the park. So the earliest Borsboom could have been there is 5:30. But at that point in time, there were two fellows who were standing near bushes, looking at the unguarded bicycles of these two children. They were walking their dogs

and this is known because another witness who had to punch his clock for leaving his work and was heading home on a bicycle had described the two witnesses. Further, one of the witnesses has a black and white dog and Maikel, lying in the bushes, described a black and white dog passing by. So at the time, Borsboom was said to be taking these two children to the bushes, there were two witnesses standing there and they never reported anything about a guy taking two children into the bushes. So we can be quite sure Borsboom was innocent.

Figure 4.



But after very long interrogation sessions, Borsboom made a confession. He made a very detailed confession and the problem is that this confession was so much different from the detailed description given by Maikel of the whole events and Maikel was the only real eyewitness, that it could not possibly be a true confession.

Now why did this case go wrong? Because there has been an inquiry into the case, we know in great detail what went wrong. For instance, the technical detectives at the scene of the crime made almost every conceivable mistake imaginable. Within an hour they had placed Nienke's body in a body bag. On a warm day putting a warm body in a body bag is the worst mistake an evidence technician can commit. All the traces of evidence will be mingled.

Despite this there was a lot of DNA evidence at the scene of the crime, such as on the shoelaces that were used as a strangulation weapon. There was DNA evidence on the bare shoulder of Nienke, placed there after she had been undressed. The same DNA was on the boot. However, on the direction of the prosecutors, the state laboratory that processed this DNA evidence withheld it. The finding made by the laboratory of no DNA evidence of Borsboom was lied about in court. Of course if prosecutors start lying, the whole system falls down. Not only in the U.S., but especially in the Netherlands, because the prosecutor is the guardian of the dossier. Further, the real perpetrator, Wik Haalmeijer, prior to making his confession to the murder of Nienke committed two very vicious rapes of older women.

Now what kind of effect could produce miscarriages of justice in the Netherlands? Of course there are the same factors as everywhere. These include incompetent

police officers, police officers who fall into confirmation bias, and the low quality of the defense. The defense attorney for Borsboom was very young and this was his first big case. The largest problem is that these cases are very complicated. The dossier or case file contains a mixture of a lot of irrelevant data and some relevant data. It becomes a large cognitive problem to separate the irrelevant from the relevant data.

But these are things that happen everywhere. What might be special about the Dutch case that leads to miscarriages of justice could be the very essence of the Dutch trial. The compromising nature and a huge trust placed in all the officials might cause miscarriages of justice. We do not distrust the police and the prosecution enough. Another causal factor may be that all written documents are derivates from what is really said by witnesses or suspects and do not really reflect what they did say.

My final conclusion derives from comparison of the number of discovered miscarriages of justice in the United States and in the United Kingdom to the number of miscarriages of justice we have in the Netherlands—in the last 50 years about 20. We have so fewer miscarriages of justice than you have in the United States or in the United Kingdom that there must be factors in our system that protect more against miscarriages of justice. The examination of these factors is one the areas of my current research. This presentation constitutes a halfway report.

ENFORCING THE RIGHT TO COUNSEL: CAN THE COURTS DO IT? THE FAILURE OF SYSTEMIC REFORM LITIGATION

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Abstract

In 2003 and 2004, the indigent defense system in Massachusetts came to a grinding halt. The legislature did not adequately fund the system, and money ran out to pay the assigned counsel attorneys. Assigned counsel rates had remained stagnant for 20 years. Attorneys in Boston began refusing new cases.[1] In the western part of the state more than 50 people sat in jail unrepresented by attorneys.[2] The legislature consistently failed to correct the problem. Frustrated with legislative inaction, the attorneys used civil litigation to try to ensure an adequately funded indigent defense system and effective assistance of counsel for all defendants.

Ineffective assistance of counsel is often a product of poorly funded, poorly staffed and poorly trained indigent defense systems. Traditionally, claims of ineffective assistance of counsel are raised in post-conviction proceedings. If relief is granted, it comes too late for the defendant and does little to reform a broken system. Systemic litigation emerged as an alternative to seeking post-conviction relief in the 1980s. This article examines the strategies of systemic litigation and the outcomes, with a specific focus on the Massachusetts experience. Part I of this article explains the failure of the post-conviction process. Part II examines the claims raised in civil litigation and the relief sought. Part III details the Massachusetts experience in implementing a successful court order. Part IV concludes that civil litigation does little to reform broken systems, and that a new standard for determining ineffective assistance of counsel is needed to secure lasting reform.

Enforcing the Right to Counsel: Can the Courts do it? The Failure of Systemic Reform Litigation

Part I—The Failure of *Strickland*

In 1982, Norman Lefstien's report to the American Bar Association on indigent defense revealed a woeful lack of resources, training, and oversight.[3] This report, and others, called into question the ability of states to provide effective assistance of counsel. As the 20th Anniversary of *Gideon v. Wainwright*[4] approached, legal and social science researchers began to conclude that *Gideon* alone was unable to secure

1 Kathleen Burge, Ending 2-Day Standoff, Lawyers Now Accepting New Cases, *Boston Globe*, March, 10th, 2003, at B3.
2 Jonathan Saltzman , Two Sides Dispute Figures On Unrepresented Defendants, *Boston Globe*, Sept. 7th 2004, at B3.
3 Norman Lefstein, *Criminal Defense Services For the Poor* (1982).
4 G*ideon v. Wainwright*, 377 U.S. 335 (1963)

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the right to effective assistance of counsel.[5]

The Supreme Court agreed, and in 1984 decided *Strickland v. Washington*[6] and its companion case *United States v. Cronic*.[7] In *Strickland,* the Court recognized:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[8]

Despite that recognition, The Court went on to articulate a test for ineffectiveness that few defendants have been able to meet:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[9]

Legal scholars quickly surmised that the *Strickland* standard limited the indigent's right to challenge the quality of their counsel.[10] Twenty years of *Strickland* analysis has not proved them wrong. The prejudice prong has been the most cumbersome for defendants to overcome. In *Hernandez v. Wainwright* [11] the defendant was represented by an attorney who drank heavily during the trial. The defendant, however, could not prove that if the attorney was sober, the result would have been different. Similar results have been found where the attorney was suffering from Alzheimer's,[12] and recently there was a heated debate on whether or not a defendant had to prove that an awake attorney would have provided a different result than the one that slept through his death penalty trial.[13]

Strickland focuses on the performance of the individual attorney during the trial. If the systemic conditions that contribute to the failure of the attorney are considered, however, the defendant still must show that the result of the trial would have been different. Indeed Justice O'Connor states in *Strickland,* that the purpose of the

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[5] Arnold R. Rosenfeld, The Right to Counsel and the Provision of Counsel for Indigents in Massachusetts: The Hennessy Era, *Mass.L.Rev*, 74, 148 (1989). Pauline Holden & Steve Balkin, Performance Evaluation for Systems of Assigned Service Providers, 9 *Eval. Rev*., 547-573 (1985). Pauline Holden & Steve Balkin, Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel, 76 *J. Crim. L. & Criminology*, 176-200 (1985).

[6] *Strickland v. Washington*, 466 U.S. 668 (1984).

[7] *United States v. Cronic*, 466 US 648 (1984).

[8] *Strickland*, 466 U.S. at 692.

[9] *Id*. at 698.

[10] Chester Mirsky, Systemic Reform: Some Thoughts on Taking the Horse Before the Cart, 14 *New York University Review of Law and Social Change* 243 (1986). Victoria Kendrick, Uncompensated Appointments of Attorneys for Indigent Criminal Defense: The Need for Supreme Court Standards, 14 *Southwestern University Law Review* 389 (1984). Richard Wilson, Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases, 14 *New York University Review of Law and Social Change* 203 (1986). Charles Ogletree & Randy Hertz, The Ethical Dilemmas of Public Defenders in Impact Litigation, 14 *New York University Review of Law and Social Change* 23 (1986).

[11] *Hernandez v. Wainwright*, 634 F.Supp. 241 (S.D. Fla. 1986).

[12] *Dows v. Wood*, 211 F.3d. 480 (9th Cir, 2000).

[13] *Burdine v. Johnson*, 231 F.3d. 950 (5th Cir, 2001).

decision was "not to improve the quality of legal representation."[14]

In *Strickland's* companion case, *Cronic*, the attorney was given 25 days to prepare for a case that the government investigated for four and a half years and generated thousands of documents. Again, the defendant could not show that had the attorney been given more time, the result of the trial would have been different.[15] The Court did indicate that there may be times that prejudice can be presumed if counsel is totally absent or otherwise prevented from providing effective assistance.[16] The trial counsel in *Cronic*, however unprepared, was not prevented from providing effective assistance.

When a *Strickland* claim is successful, it comes after years of incarceration for the defendant and results in yet another trial. The *Strickland* analysis looks to the past, and generally precludes prospective claims of relief. Indeed there is only one successful documented case of such a prospective claim. In *State v. Peart*, one of two public defenders for that section of the New Orleans trial court carefully planned out the claim. Before trial, the attorney filed a motion arguing that he was unable to provide the constitutionally required services because of excessive caseloads, lack of funds, and lack of support staff.[17]

The trial judge ordered a hearing on the matter. During the hearing, evidence was presented that the attorney (one of the two assigned to that trial section) was handling 70 active felony cases at the time of his appointment to Mr. Peart. The attorney stated that his clients are routinely incarcerated for 30 to 70 days before he was able to see them, and that there were no funds for expert witnesses or a library for the office.[18]

The trial court found the entire system unconstitutional, and ordered the legislature to fund the system. The government appealed. The Louisiana Supreme Court reversed the trial court, but did find that not all defendants were receiving indigent defense services. The Supreme Court remedy was to declare that all representation in that court was presumptively ineffective, and to force a hearing on the matter in each case as it was raised. The government had the burden of proving that counsel was effective.[19] The legislature quickly responded by funding the system.[20]

Although *Peart* could be viewed as a success, the case illustrates some of the tensions in systemic *Strickland* litigation. First, it turns out that Mr. Peart was not likely to benefit from the new rebuttable presumption of ineffectiveness.

> Ironically, the trial court judgment indicates that at the time of the judgment Peart himself was receiving the effective assistance of counsel guaranteed him by the Constitution. As the trial judge wrote, "each of Mr. Teissier's clients is entitled to the same kind of defense Leonard Peart is receiving . . . We therefore anticipate, although we do not decide, that the State may well be able to rebut the presumption of

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[14] *Strickland v. Washington*, 566 U.S. at 732 (1984).
[15] *United States v. Cronic*, 446 U.S. 648 (1984).
[16] *Id*. at 695 n.25.
[17] *State v. Peart*, 621 So.2d 780, 784 (La 1993).
[18] *Id*. at 784.
[19] *Id*. at 785 n5.
[20] Note, Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 113 *Harv. L. Rev.* 2062 (2000).

> ineffectiveness in the pending rape case against Peart."[21]

Second, although the overworked public defender was able to pull the motion together and challenge the system, it is not reasonable to assume that overworked public defenders or assigned counsel in other jurisdictions have the ability to do so as well. Finally, *Peart* illustrates the potential for a conflict of interest of impact litigation. Mr. Peart received competent representation, but what of the attorney's other clients? The omitted part of the footnote quoted above states:

> That Peart himself could receive effective assistance, while Teissier's other clients do not, reflects the fact that indigent defenders must select certain clients to whom they give more attention than they give to others. When the indigent defenders are able to apply their full efforts, they do generally provide effective assistance of counsel.[22]

Peart was decided 10 years after *Strickland* and the lack of similar cases either before or after points to the difficulty in using *Strickland* as a starting point for systemic change. The literature has favored civil litigation instead. Civil litigation can be argued in terms of due process and fair trials, not in the very narrow framework of *Strickland*.

In response, legal commentators suggested civil remedies to enforce the due process rights of the defendant.[23] Civil litigation, it is argued "recognizes the key role which the judiciary can and must play in resolving issues which have been ignored by both the executive and legislative branches."[24] It was the great hope that civil litigation would result in a definitive standard of effective assistance of counsel. Instead of the broad rights-based language that was hoped for, civil litigation has provided piecemeal declarations and relatively little systemic change. Further, the results of the appellate decisions, when implemented at the trial court level, raise the issue of whether or not the courts are serious about the right to counsel.

Part II—Civil Litigation Strategies

The goal of civil litigation is generally to get a court to rule that the quality of indigent defense services violates the defendant's rights. Systemic litigation against jurisdictions for failing to provide adequate services has exploded in recent years. There is no blueprint for litigation. There are really three parties involved in the litigation: the state, the client, and the attorney. The state, for its failure to adequately provide services is the defendant. The real defendant, that is the name that appears on the caption, can be anyone in the government, depending on how the case is brought and which branch of government has funding responsibility. The client is the beneficiary of the relationship between the state and the attorney. Often, her rights are asserted. In assigned counsel systems, the rights of attorneys are also implicated and can be asserted against the state.

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[21] *State v. Peart*, 621 So.2d at 785n5.
[22] *Id.*
[23] Mirsky, *supra* note 10 at p. 243. Kendrick, *supra* note 10. Wilson, *supra* note 10. Ogletree & Hertz, *supra* note 10.
[24] Wilson, *supra* note 10, at p. 203.

The Rights of the Defendants:

Systemic failure implicates many of a defendant's Constitutional rights. The right to counsel is obviously threatened, but that right is distinct from others. The defendant's due process rights and equal protection rights are also threatened. Further, State Constitutional rights may be broader than those under the Federal Constitution. Finally, statutory schemes may grant an enforceable right as well.[25]

The right to counsel. In *Lavallee v Justices in the Hampden Superior Court,*[26] Mr. Lavallee was one of several indigent criminal defendants who had not been appointed lawyers due to the shortage of lawyers in Massachusetts. The defendants had been arraigned and had bail hearings where bail was denied. In neither procedure is counsel required by law. However, the Supreme Judicial Court noted that the lack of counsel at a bail hearing, even if not required, still infringed on the defendant's right to effective assistance of trial counsel. Counsel has duties prior to trial that affect her performance at trial:

> These duties include interviewing the defendant and witnesses while events are fresh in their memories, preserving physical evidence that may be important to the defense, and locating potential defense witnesses. The effects of the passage of time on memory or the preservation of physical evidence are so familiar that the importance of prompt pretrial preparation cannot be overstated.[27]

In *State v. Peart,* [28] the claim was that the overworked, underpaid, and understaffed attorney could not provide effective counsel. The Louisiana Supreme Court relied on the ABA standards of Criminal Justice to determine if the clients of the overworked, under-funded public defender were receiving effective assistance of counsel. The standards apply to all criminal justice attorneys, but deal with such issues as the workload, investigation, and initial appearances. The court held:

> We know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance. As the trial judge put it, "not even a lawyer with an S on his chest could effectively handle this docket." We agree. Many indigent defendants in Section E are provided with counsel who calmly perform pro forma, especially at early stages of the proceedings. They are often subsequently provided with counsel who are so overburdened as to be effectively unqualified. [29]

Due process. The Fourteenth Amendment due process clause forbids states from denying anyone due process of law. During the incorporation period of the 1960s, the Supreme Court expanded the Fourteenth Amendment due process clause to include most of the procedural rights contained in the Bill of Rights. Procedural due process is violated when the state acts in someway to inhibit the rights of the defendants. The argument is that because the state failed to fund indigent defense, it is interfering with

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[25] For example, a state may statutorily require counsel at arraignment or other hearings not traditionally covered by the constitutional right to counsel.

[26] *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004).

[27] *Id*. at 235.

[28] *State v. Peart*, 621 So.2d 780 (La.1993).

[29] *Id*. at 789.

one of the substantive rights (such as the right to a speedy trial).

Due process also incorporates the notion of fundamental fairness in what is known as substantive due process. This argument was made in Montana where indigent defendants sued the state for failing to "design, administer, fund, and supervise indigent defense programs with sufficient resources."[30] The complaint alleged long pretrial incarceration, lack of resources, lack of attorney contact and insufficient resources, among other flaws. The last proceeding in the case was the judge's order denying the defendant's summary judgment. The court allowed the due process claim to go forward stating:

> [D]ue process and fundamental fairness requires appointment of competent counsel, a thorough initial investigation, an early and detailed interview and consultation, assistance of counsel in any examination, and vigorous adversarial advocacy. [31]

Equal protection. The Fourteenth Amendment also guarantees equal protection under the law. Although these claims are made in “rights of the client” suits, they are tricky. A claim under the Fourteenth Amendment equal protection clause requires that state action, again the failure to adequately fund, interferes with the right of equal protection. Supreme Court jurisprudence has enumerated protected classes. If the aggrieved party is among the protected classes, the government must meet a strict scrutiny test. Poverty is not a protected class. Therefore the government must only provide a rational explanation for why their action causes a disparity. In Montana, the court explained:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[32]

The Rights of the Attorneys:

In assigned counsel jurisdictions, the state pays for the services of attorneys that are independent contractors with the state. This relationship gives the attorneys rights against the state. These rights are economic in nature, but rooted in the Constitution. The main arguments made on behalf of attorneys are: unlawful taking, violation of equal protection and violation of due process.

The takings argument. The Fifth Amendment to the Constitution prohibits the government from taking property without just compensation. The Fourteenth Amendment prohibits states from taking property without due process of law. The takings argument is essentially two pronged: are the services of attorneys property that have been taken and were they taken with due process of law? The Supreme Court has held that there are property interests in intangible property such as trade secrets,[33] contracts,[34] and liens.[35] From this, state and lower federal courts have held

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[30] *White v. Martz*, No. CDV-2002-133 Memorandum and Order on Defendant's Motion to Dismiss at 3, (Montana First Judicial District Court County of Lewis and Clark July 25 2002).

[31] *Id.* at 9.

[32] *State v. Swan*, 199 Mont. 459, 467 (Montana Supreme Court, 1982).

[33] *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986 (1984).

"it follows that an attorney from whom services are demanded and by whom they are given as a property right in his fee for those services which . . . should be based on their just and reasonable value."[36] Just compensation is defined as "such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses."[37] Likewise "the right to practice law has been held to be a property right within the meaning of the due process and equal protection provisions of the Fourteenth Amendment."[38]

The above cases set the stage for the takings argument in assigned counsel jurisdictions. Having established that there is a property right, the taking occurs when states pay paltry hourly rates or put a cap on payment that is not reasonable. For example, in Oklahoma there was a cap for services in death penalty cases of $3,200. The cap was per case, not per attorney. Therefore, if two attorneys worked on a case they were to split the money. Any money expended above and beyond that was to come out of the attorney's private money. In a lawsuit challenging the cap two attorneys submitted that they would have earned $9.47 per hour and $14.61 per hour for their labor, but lost $41.41 and $33.39 per hour in overhead expenses.[39]

Due process. As explained above, an attorney's services are property. The due process clause forbids the taking of property without both substantive and procedural due process of law. The due process clause also forbids the taking of liberty interests, and the right of the attorney to pursue a livelihood is such an interest:

> Liberty, in its broad sense, must consist of the right to follow any of the ordinary calling of life without being trammeled... the right to follow any of the common occupations of life is an inalienable right...It was formulated as such under the phrase "pursuit of happiness" in the declaration of independence...This right is a large ingredient in the civil liberty of the citizen.[40]

Equal protection. It is alleged that by requiring attorneys to serve at rates that do not even cover overhead, the state is creating a subclass of citizens that are forced to carry the states' burdens. The California Appellate Court explained the argument:

> An attorney who is appointed to represent an indigent without compensation is effectively forced to give away a portion of his property—his livelihood. Other professionals, merchants, artisans, and state licensees, are not similarly required to donate services and goods to the poor. As one commentator has noted, it is unfair to put on any working group the burden of providing for the needy out of its stock in trade. No one would suggest that the individual grocer or builder should take the responsibility of providing the food and shelter needed by the poor. The same conclusion applies to the lawyer. The lawyer's stock in trade is intangible—his time fortified by his intellectual and personal qualities, and burdened by his office expenses. To take his stock in trade is like stripping the shelves of the grocer or taking over a

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[34] *Lynch v. United States*, 292 U.S. 571 (1934).
[35] *Armstrong v. United States*, 364 U.S. 40 (1960).
[36] *Bias v. State*, 568 P.2d 1269, 1270 (Okl. 1977).
[37] *Kansas v. Smith*, 242 Kan 336, 383 (Kansas 1987).
[38] *Weiner v. Fulton County*, 148 S.E.2d 143 (Ga.App. 1966).
[39] *Oklahoma v. Lynch*, 796 P.2d 1150, 1154-5 (Oklahoma 1990).
[40] *Wilby v. State*, 47 So. 465, 466-7 (Miss. 1908).

> subdivision of the builder (internal citations omitted).[41]

Equal protection is also raised when a state uses a mixed delivery model. If some jurisdictions within a state rely on a public defender model and others assigned counsel, then the attorneys in the assigned counsel jurisdiction must bear the state's burden. In Kansas, the state had three models of representation: a public defender; voluntary assigned counsel; and mandatory assigned counsel. The attorneys argued that because of the diverse systems only about 35% of the members of the Bar were required to represent indigent defendants.[42] Further, because the state subsidized the public defender overhead but not the assigned counsel, there was differential treatment between indigent defenders.[43]

Success of the Lawsuits:

Criminal defense attorneys are accustomed to turning to the courts to affect broad procedural change. The Warren Court era brought an expansion in the rights of defendants. The cases of that era indicate an understanding by the Supreme Court and lower courts that the poor experience justice differently than the rich, and that the Constitution will not tolerate such a difference. Accordingly, the lawsuits, especially those that assert the rights of the defendants, ask for lasting reforms. For example, the Connecticut lawsuit sought the following relief:

> Issue a preliminary and permanent injunction requiring defendants to provide a statewide indigent defense system which will protect plaintiffs' rights under the Sixth and Fourteenth Amendments to the Untied States Constitution and 42 U.S.C. §1983...and include but not be limited to: a. Placing uniform and appropriate caseload/workload limitations for the appointment of counsel in all cases and directing defendants to increase the number of public defenders to meet caseload/workload standards; b. promulgating and adopting appropriate uniform standards governing the representation of indigents; c. providing an adequate rate of payment for special public defenders consistent with constitutionally adequate quality of representation; d. providing adequate investigative, [expert services to meet] their constitutional and statutory obligations; e. providing adequate conditions in public defender offices, client interview areas, waiting rooms, libraries and courtroom holding areas.[44]

The Connecticut case involved a public defender system that had not seen an increase in funds for attorneys, investigators or support staff for over ten years. The result was crushing caseloads of up to 1,200 to 1,400 per attorney per year.[45] By requesting that the court set maximum case load standards, the suit is asking for a legal declaration that an attorney can only handle so many cases at a time. This means that in the future, the system would automatically be in violation if the

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41 *Cunningham v. Superior Court*, 177 Cal. App. 3d 336, 348-49 (California Court of Appeal 1986).
42 *Kansas v. Smith*, 242 Kan 336, 375 (Kansas 1987).
43 *Id.* at 376.
44 *Rivera et.al. v. Rowland*, No. CV-95-0545629S, Class Action Complaint, at 9 (Super. Ct. D. Hartford 1995).
45 *Id.* at 4.

caseloads went above the maximum. In asking for relief such as this, the lawsuits seek lasting reform.

Yet in the cases where the rights of the defendants are asserted, one finds that there is generally a lack of systemic revision from the courts. Of the eight cases that were brought during the 1990s and early 2000s half resulted in a final judicial opinion, and half were withdrawn after legislative action.[46] The remedies of the half that ended with an opinion are discussed here.

In *State v. Peart,* discussed in infra*,* Mr. Peart presented the court with several reform options. These included asking the court to create a statewide indigent defense plan, ordering the collection of more monies that would be paid into the system, and ordering the legislature to "expend sufficient funds to protect the Constitutional rights of indigent defendants." Presumably the last request would include monies for investigators and other support staff which led to that particular crisis.

The court rejected these suggestions. Instead, the court ordered that if a defendant raised a claim of ineffective assistance, the government, in a hearing, must prove otherwise.[47] If the trial court finds that the presumption has not been rebutted, the prosecution could not go forward until the defendant is appointed counsel.[48]

The court's decision puts the burden back on the trial court. The court's decision does not address the practicalities of the administration of the decision. What happens to the defendant if no counsel can be found to represent her? Does she sit in jail if bail has been denied or is unobtainable? Does the case get dismissed? Although the pronouncement that all defendants in that division were presumptively receiving ineffective assistance of counsel was grand, the mechanism for affording relief leaves much to be desired from both the reformer's view and the defendant's view.

In *In re Order On Prosecution of Criminal Appeals*, a similar bizarre order was handed down. In this Florida case, the public defenders were overwhelmed with appellate cases. There was a backlog of cases waiting to be briefed in the appellate court. The court noted that in one jurisdiction 15% of the defendants completed their sentences before a brief was filed.[49] The source of the problem was "clearly the woefully inadequate funding of the public defenders' offices, despite repeated appeals to the legislature for assistance."[50] Nonetheless, the order from the Florida Supreme Court forbade one office from accepting new appointments. To remedy future delinquent appeals, the Florida Supreme Court ordered that when a backlog exists, the public defender should petition to be relieved from representation.[51] To remedy the delinquent appeals the court held "[w]e believe this situation can only be resolved

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[46] The following cases were withdrawn after legislative action: *White v. Martz*, No. CDV-2002-133 (Montana 2002), *Doyle v. Allegheny County*, GD-96- 13606 (Pennsylvania 1996) *Green v. Washington*, No. 93 C7300 (Illinois 1995), *Bowling v. Lee*, (Superior Court Coweta County Ga. filed Aug. 10, 2001).

[47] *State v. Peart*, 621 So.2d 780, 792 (LA. 1993).

[48] *Id* at 792.

[49] *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender,* 561 So.2d 1130, 1132 n4 (Florida 1990).

[50] *Id*. at 1132.

[51] Interestingly enough, counsel is generally required to decline appointments under the Code of Professional Responsibility. The Supreme Court of Florida apparently was making clear that counsel should follow the rules of conduct and not be swayed by the need for reelection.

by massive employment of the private sector bar on a 'one-shot' basis."[52] The court then suggested that the legislature might consider funding such an operation. The court does not address precisely where these attorneys are going to come from, and assumes that there are enough qualified criminal appellate attorneys to give the defendants effective assistance of counsel. Further, they do not address what happens should the legislature refuse to fund or act quickly enough to ensure a speedy appellate process.

Perhaps the most convoluted and ineffective remedy in a defendant's rights case was in the Massachusetts case of *Lavallee*.[53] Here, defendants were going months without representation. Evidence was presented to the Supreme Judicial Court that the sole cause of the lack of attorneys was the pitifully low wage of $30/hour. Instead of ordering the attorneys be paid just wages,[54] the court ordered the following remedy:

> [W]e conclude that no defendant entitled to court-appointed counsel may be required to wait more than 45 days for counsel to file an appearance, a period of time that approximates the outer limits contemplated by the rules of criminal procedure for the completion of discovery and making decisions about specific defenses in routine cases where counsel is actively involved. . . If, despite good faith efforts by CPCS,[55] no attorney has filed an appearance on behalf on an indigent defendant within 45 days of arraignment, the criminal case against such defendant must be dismissed without prejudice. Similarly, an indigent defendant who is held in lieu of bail or under an order of preventative detention may not be held for more than seven days without counsel.[56]

To dismiss a case without prejudice means that the prosecution can, once an attorney is found, re-file the case. A defendant then still has the case pending, even if she is released. Even 45 days can be too long to wait for an attorney. Witnesses may disappear, leads go cold, and even if there is to be a guilty plea—such resolution is delayed. Meanwhile, the prosecution has identified the witnesses, theories of the case, secured statements, and is well prepared by the time counsel is found for the defendant.

New York had a different experience. In *New York County Lawyers' Association vs. the State of New York and the City of New York*, assigned counsel brought suit alleging that the rates of pay were so low that defendants were being denied counsel. In a trial that had 41 witnesses and 425 exhibits, the court found:

> 1) assigned counsel are necessary; 2) there are an insufficient number of them; 3) the insufficient number results in a denial of counsel, delay

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[52] *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So.2d at 1138.

[53] *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004).

[54] See discussion, supra, on the term "just wages."

[55] Massachusetts operates as an assigned counsel jurisdiction, the Committee for Public Counsel Services (CPCS) serving as the administrative agency for the system. General Law c. 211 D provides in pertinent part that CPCS:

> shall establish, supervise and maintain a system for the appointment or assignment of counsel at any stage of the proceeding, either criminal or noncriminal in nature, provided, however, that the laws of the Commonwealth or the rules of the Supreme Judicial Court require that a person in such proceeding be represented by counsel; and, provided further, that such person is unable to obtain counsel by reason of his indigency.

[56] *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 246 (2004).

> in proceedings, excessive caseloads, and inordinate intake and arraignment shifts; further resulting in rendering less than meaningful and effective assistance of counsel, and impairment of the judiciary's ability to function; and 4) the current assigned counsel compensation scheme . . . is the cause of the insufficient number of assigned counsel.[57]

The court issued a mandatory injunction which raised the rates from $40 per hour for in-court work and $25 per hour for out-of-court work to a flat rate of $90 per hour. Although a victory, the ruling sets a floor. The legislature may not go below that, but there is no guarantee that they will go above it, even when necessary.

What is limiting the courts from ordering sweeping reform is the doctrine of separation of powers. All but one court that has addressed the issue has held back from ordering sweeping reform because of the doctrine. In *Peart* the court stated:

> We decline at this time to undertake...more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance.[58]

In the Florida case the court held:

> Further, while it is true that the legislature's failure to adequately fund the public defenders' offices is at the heart of this problem and the legislature should live up to its responsibilities and appropriate an adequate amount for this purpose, it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function.[59]

And finally in Massachusetts the court held:

> The legislature is keenly aware of the defendants' Constitutional right to counsel, and of the demands that right makes on the public treasury. As the representative branch in charge of making laws and appropriating funds, it will no doubt continue to exercise prudence and flexibility in choosing among competing policy options to address the rights of indigent defendants to counsel…We urge such cooperation in fashioning a permanent remedy for what can now fairly be seen as a systemic problem of a Constitutional dimension.[60]

Only the district court in New York felt differently:

> Forced with 17 years of legislative inaction and proof of real and immediate danger of irreparable Constitutional harm, this Court can no longer wait for the legislative branch to protect the fundamental

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[57] *New York County Lawyers' Association v. The State of New York and The City of New York*, No. 102987/00 at 29 (2003).
[58] *State v. Peart*, 621 So.2d 780, 791 (La 1993).
[59] *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender,* 561 So.2d at 1136.
[60] *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. at 244.

> interests of children and indigent defendants. [61]

The frustration of the trial court is clear in his 37 page opinion. It is unlikely that his order would have withstood appellate scrutiny. Although mention is made of the separation of powers, little analysis is given to the issue. Indeed in the lower court decisions in Peart and in Florida, the trial courts took similar measures. Cases like these are not likely to end at the trial court. It is possible that trial courts may feel that they have more leeway in fashioning a remedy knowing that it will be modified on appeal. In the end, the New York case was appealed, and the parties settled the case for less than the ordered $90 per hour.

The New York case was the only case that argued the rights of the attorneys. It is also the only case that could be considered a success; the implementation was simple, solved the problem (albeit temporarily) and justice marched on. Twenty years ago, legal scholar Richard Wilson reviewed the systemic litigation to date. He concluded:

> A quick review of the aforementioned Constitutional grounds reveals a telling fact about the judicial conscience. Claims which concern the rights of the defendant—the right to counsel, due process or equal protection, are significantly less successful than claims which concern the rights of attorneys.[62]

The same is true today.

Part III—Administering *Lavallee*

Although the practical effects of *Lavallee* on a defendant's right to counsel are clear, the administration of *Lavallee* became a judicial nightmare. There were two main failures in the administration of *Lavallee*. The first was its applicability outside of Hampden County, where the case originated. The second was the trial court's response in Hampden County.

To understand the application of *Lavallee,* it is necessary to go beyond traditional academic journals and court decisions. Qualitative data, in the form of message postings to an internet message group for court assigned defenders in Massachusetts, was read, coded, and re-coded according to grounded theory methodology.[63] The message group started in response to the pay crisis in Massachusetts, and has 270 members. During the month following the *Lavallee* decision, 2,124 messages were posted. The messages quoted below are indicative of the mood, the frustration, and the techniques lawyers used to enforce the decision in trial courts.

Armed with what was thought to be a broad pronouncement of rights, that any defendant held beyond 7 days without bail, or 45 days pending an attorney, the case should be dismissed, attorneys in other counties tried to secure such relief for defendants. The attorneys found they were quickly placed in a rather untenable position. First, in order to assert *Lavallee* rights for other defendants, an attorney had to agree to represent them. Which meant that the *Lavallee* issue was then moot. Attorneys tried for a limited appointment, but trial judges refused the requests.

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[61] *New York County Lawyers' Association v. The State of New York and The City of New York*, No. 102987/00 at 29 (2003).

[62] Wilson, *supra* note 10 at 217.

[63] Anslem Strauss, *Qualitative Analysis for Social Scientists* 23 (1987).

> An attorney stated:
> Attorney X called me from his car, on his cell. He reports that he was not locked up today for contempt. At least one thing went well. The Commonwealth asked for 7 days to file an opposition brief in the case that was set today for hearing on the release of an individual held for more than 7 days. I guess they need to study how to count to 7, whether the fellow held is in fact in custody, or whether Plymouth County is part of the Commonwealth. It sure looks like a stalling tactic to me. And the fellow sits in jail, without an attorney.[64]
>
> Another attorney encountered the following problem:
> When I presented our *Lavallee* motions in Fall River District Court they were denied as well as our procedural motion asking to be able to file a limited appearance, the judge finding CPCS to be the appropriate party to seek such relief. [65]
>
> And in response:
> That really angers me; the appropriate party to seek relief is CPCS??? You have got to be kidding!! The appropriate party is the defendant!! [66]
>
> Another attorney noted the ethical tension created by the ruling:
> I believe that the *Lavallee* decision raises a very interesting ethical issue for court appointed lawyers; namely, whether it is proper to represent someone at inherently unfair rates where that representation will deprive the client, who must be zealously represented, of being released from jail (assuming that he would otherwise be held on bail) and of having his charges dismissed. Is it unethical, even malpractice, to represent someone knowing that it may result in the person not being released and in his not having the charges dismissed? [67]

Because attorneys were prohibited from filing a limited appearance to litigate the issue, the attorneys then began handing out *Lavallee* motions in the jails. Motions were written and distributed to defendants in jail, so that the defendant could file the motion pro se. When the defendants brought the motions on their own, they were told that *Lavallee* did not apply in that county. The trial courts relied on the enabling language of the *Lavallee* decision that set up a specific procedure for Hampden County.[68] As no procedure was specifically ordered for other counties, there was no remedy available. Thus, defendants in the rest of the state sat in jail.

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[64] Posting to http://groups.yahoo.com/group/massprivatecounsel/message/6429. (Aug. 6, 2004) [Identity of poster on file with author].

[65] Posting to http://groups.yahoo.com/group/massprivatecounsel/message/6474. (Aug. 8, 2004). [Identity of poster on file with author].

[66] Posting to http://groups.yahoo.com/group/massprivatecounsel/message/6487. (Aug. 9, 2004). [Identity of poster on file with author].

[67] Posting to http://groups.yahoo.com/group/massprivatecounsel/message/5844. (Aug. 7, 2004). [Identity of poster on file with author].

[68] The Supreme Judicial Court specifically ordered the clerk of Hampden County to prepare weekly lists of those defendants held without counsel. Upon receipt of the list, the presiding judge was to hold a status hearing to determine if the defendant was being held without representation beyond the time limits set forth in the decision. Lavalle at 257-248.

The second problem with the administration of *Lavallee* dealt specifically with Hampden County. The release of pre-trial detainees had begun. To reduce the number of defendants released, Bar Advocates were being assigned cases over their objection, and if they refused, held in contempt. Further, any criminal defense attorney was subject to conscription. As one attorney stated:

> The appointments are being made today and that attorneys are accepting (like they have a choice!) but that the list is comprehensive and includes at least all attorneys who practice criminal law and NOT just Bar Advocates. You do NOT need to be qualified under CPCS to be ordered. [CPCS] suspects that there will be many ineffective assistance claims in the future as a result. [69]

> From another district in Hampden County:
> Judge X in Spfld [Springfield] District CT is going to order us to work. Not the whole Bar just those that have quit the BA [Bar Advocate] program. We will see how many do it. Prior to now I have been sort of calm but this pisses me off and on the matter of principle I will not accept cases short of having to do so to get out of jail.[70]

> Another attorney commented:
> Isn't it interesting that all year long criminal defendants have been languishing for months in jail w/ no lawyer, and the courts, even after *Lavallee*, felt no need to take the drastic step of conscripting lawyers to alleviate the crisis.

> But when 3 drug dealers walk, and the guv and AG and cops stamp their feet, the courts spring into action to protect public safety. Now lawyers are indentured servants to protect the public. [71]

One attorney challenged the conscription ruling. Rosemary Cooper had been assigned a case over her objection. She had not signed a contract to represent people, although she had in the past. Therefore the trial court ordered an attorney who was not required to provide services, to provide services. Taking it up to the Supreme Judicial Court, she argued that such conscription violated her right to equal protection. The court held that she could not be ordered to accept a case at the public counsel rate because she was no longer a Bar Advocate. However, she could be ordered to take a case under Rule 6.2 of the Massachusetts Rules of Professional Conduct. The Rule provides:

> A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
> (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
> (b) representing the client is likely to result in an unreasonable

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[69] Posting to http://groups.yahoo.com/group/massprivatecounsel/message/7026. (Aug. 13, 2004) [Identity of poster on file with author].

[70] Posting to http://groups.yahoo.com/group/massprivatecounsel/message/7254. (Aug. 14, 2004). [Identity of poster on file with author].

[71] Posting to http://groups.yahoo.com/group/massprivatecounsel/message/7123. (Aug. 13, 2004). [Identity of poster on file with author].

> financial burden on the lawyer; or
> (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Justice Spina, in his order in *Cooper*, noted that in the past Massachusetts had recognized the right of attorneys to fair compensation and indicated that the current statutory rate may not have been adequate.[72] He ordered Ms. Cooper to accept assignments, but further ordered the trial court to conduct a hearing to determine what a reasonable rate would be.

The courts in Hampden County also began to change the way they would do business to avoid having to use 6.2 and conscription. Observing a trial court in Hampden County in July of 2005, a commentator noted that courts changed the order that cases were called to get counsel appointed while they were in the courtroom.[73] However, when Rule 6.2 is used, the caseload caps required by CPCS to ensure a manageable workload are avoided. Hence, attorneys can be forced to take cases for which they do not have time for.

But the Massachusetts experience illustrates the practical difficulties in enforcing stop gap measures that courts employ in the defendant's rights cases. The experience under *Lavallee* is telling. Although the courts can use romantic language extolling the virtues of the right to counsel—the actual application of the order makes one question the dedication courts have to effective assistance of counsel.

Part IV—Conclusion

Systemic litigation fails to produce meaningful indigent defense reform. Legislatures cannot be relied upon to act in the best interests of indigent defendants.[74] The courts, therefore, are the appropriate place to seek a mandate for reform. For the mandate to succeed, that is to raise the quality of counsel by adequately funding counsel, a new framework for analysis is needed.

A strong mandate can be achieved if courts can be persuaded to change the *Strickland* analysis. The prejudice prong is the most difficult to meet, and as discussed above, leads to some rather counterintuitive results. Canada has expanded on *Strickland*, and the expansion in Canada lends itself to more lasting reform.

Canada adopted the *Strickland* approach in *Regina v. Joanisse* in 1995. However, prior Canadian case law merged with *Strickland*, and the court's (incorrect) interpretation of American law. After concluding, by citing to concurrences, that American law allows the fairness of the process to be considered, the court held:

> Whatever American law may be, this court's obligation to quash convictions which are the product of a miscarriage of justice requires that it consider the impact of counsel's incompetence on both the reliability of the result, and the fairness of the process by which that

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[72] Memorandum and Judgment After Reconsideration SJ-2204-0377 2005 at 5.

[73] Jason M. Scally, All quiet on the western front*? Massachusetts Lawyers Weekly* (Boston), 22 August, 2005 (http://www.malawyersweekly.com/feature.cfm).

[74] Donald Dripps, Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or Why Don't Legislatures Give a Damn About the Rights of the Accused? 44 *Syracuse L.Rev*, 1079-1101 (1993).

> result was achieved. A reliable verdict may still be the product of a miscarriage of justice if the process through which the verdict was reached was unfair.[75]

The Ontario Court of Appeal in *Joanisse* relied upon a pre-*Strickland* Canadian case, where counsel was impaired throughout a good portion of the trial. In *Regina v. Cook*[76] The court declined to inquire into the reliability of the verdict, stating: "[n]o citation of authority is required for the proposition that justice must not only be done, but must manifestly seen to be done."[77] It is here that the *Joanisse* court draws its major distinction from *Strickland* and *Cronic*. *Cronic* allows for the ineffective claim to succeed only if there is an absence of counsel. Canada rephrases that to allow the claim to succeed if there is an appearance of a miscarriage of justice.

This rephrasing should be adopted by American courts, and could lead to lasting systemic reform. This approach removes the separation of powers barrier that the courts have faced. In civil litigation a remedy must be ordered that requires the legislature to do something and that is where the barrier arises to lasting reform. Within the context of a criminal case, individual relief may be ordered that has systemic value. Any of the cases litigated above would meet the Canadian miscarriage of justice standard. Justice is not "seen to be done" in such conditions. The courts need not fashion a particular remedy. Faced with the choice of having all convictions overturned, a legislative body will act.[78]

In 1984, when *Strickland* was decided, the extent of actual innocents on death row and in the general prison population was not known. The public had not come to terms with the extent of the problems within the criminal justice system that lead to wrongful convictions and other abuses of power. The courts must now take responsibility and recognize that the law surrounding ineffective assistance of counsel claims does little to protect the rights of the defendants, or indeed to instill a sense of security in the public about our system of justice. The proposed standard, focusing on the appearance of fairness, may help restore the grand rights once proclaimed by the courts and realize the full adversarial potential of the criminal courts.

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[75] *Regina v. Joanisse* (1995), C.C.C. (3d), 02, 65 (Ontario Court of Appeal).
[76] *Regina v. Cook* (1980), C.C.C. (2d), 53, 217 (Ontario Court of Appeal).
[77] *Id*. at 224.
[78] Dripps, *supra* note 74.

AN EXPLANATION OF A WRONGFUL DEATH SENTENCE FROM GEORGIA

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Abstract

Wrongful convictions typically signify to many individuals situations in which convicted persons were exonerated based on DNA, the discovery of untruthful testimony, or suppressed evidence. Generally, the persons responsible for wrongful convictions are prosecutors, law enforcement officers, and witnesses. On some occasions, defense attorneys facilitate wrongful convictions through inadequate representation due to a lack of interest, inexperience, or little or no investigation. Many citizens will consider people to have been wrongfully convicted only if they have been completely exonerated or found to be factually innocent. Yet, wrongful convictions can occur as a result of defense attorneys deliberately misrepresenting defendants in courtrooms and/or trial judges who are corrupt or racist. This article discusses an instance of wrongful conviction in the author's life that resulted from intentional legal misrepresentation by defense attorneys and a racist judge. Further, this article discusses why, for the most part, such practices go uncorrected and unacknowledged.

An Explanation of a Wrongful Death Sentence from Georgia

In the last few years, the issue of wrongful convictions has become increasingly interesting to criminal justice professionals, journalism students, and social justice advocates (Huff, 2004; Luna, 2005; Medwed, 2005; Monroe, 2006; Siegel, 2005). As stated by Luna (2005), wrongful convictions occur due to mistaken identity, false confessions, or prosecutorial and police misconduct. Further, some wrongful convictions occur because the defense attorneys are either inexperienced in capital cases, fail to investigate a case properly (Liptak, 2006), or are under the influence of substances during the trial (Gettleman, 2001). Wrongful convictions typically involve cases in which persons who were factually innocent were convicted. For instance, some prisoners have been freed from sexual assault convictions when the DNA in the case failed to support them as the perpetrator (Alexander, 2006; New York Times, 2006; Levy, 2006; Williams, 2006).

In other cases, however, legal corruption may facilitate wrongful convictions, although these cases are more difficult to discern or acknowledge. Recently, the public was able to witness the kind of legal corruption that can help lead to wrongful convictions when an appellate attorney in North Carolina admitted that he intentionally allowed a death row prisoner's appeal time to lapse because he believed that this prisoner deserved to die (Rimer, 2000; Thompson, 2000). Additionally, corrupt judges may facilitate wrongful convictions. In 2007, a New York divorce court judge was sentenced to 3 to 10 years in prison for fixing divorce cases (Brick, 2007). In writing

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about criminal cases, Dibiagio (1998), a former U. S. attorney, discussed the issue of judicial corruption and asked whether all defendants convicted in the courtroom of a judge who had been convicted of fixing trials were entitled to new trials. In *Bracy v. Gramley* (1997), the U. S. Supreme Court ruled that a death row prisoner was entitled to pursue the discovery that his attorney colluded with the trial judge to cover up the fact that the judge had taken bribes to fix other murder cases. In essence, the contention was that Bracy's attorney misrepresented him to deflect attention from the attorney and trial judge, who were fixing other cases. The trial judge was subsequently sent to prison. Thus, Bracy was allegedly sacrificed so that the trial judge could demonstrate that he was tough on crime.

Alexis Stern 9/28/07 12:05 PM
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The purpose of this paper is to describe a wrongful conviction that was obtained by corruption and racism nearly 40 years ago, though the records generated by the criminal justice system have hidden what occurred in 1967 and 1968. This is the case of Rudolph Alexander, Jr. or the *State of Georgia v. Rudolph Alexander*. My case illustrates deliberate misconduct by two defense attorneys who intentionally mishandled my murder defense. I explain how I was deliberately misrepresented, railroaded in the courtroom in 1968 as a juvenile, and sentenced to die in the electric chair, in a trial that lasted a little more than two hours. Moreover, I will explain how this kind of attorney misconduct is covered up when race is involved, and I will discuss the reluctance of the public, including legal officials and academics, to acknowledge this type of wrongful conviction. I offer two theories—cognitive dissonance and the "White code"—to explain the public's reluctance to acknowledge deliberate defense bar misconduct. In addition, Frank (1949), a former federal appellate judge, offers an explanation of the role of appellate courts that helps to account for why some injustices are not disrupted and thus not corrected by the United States' appellate review system.

What Occurred in 1967

First, it is indeed true that I shot and killed another juvenile in September 1967, but this admission is not a confession that I was guilty of murder. There were several incidents leading up to this shooting that make my actions an instance of self-defense. Initially, I was attacked with a box cutter in January 1967, sustaining a serious eye injury that led to legal blindness in my left eye. I was hospitalized and had emergency surgery to save as much eyesight as possible. As a result of this injury, I had to wear an eye bandage from January 1967 to May 1967, broadcasting my injury to everyone. I prosecuted the person responsible for attacking me, and he was convicted of a misdemeanor, jailed for two months, and paid a $500 fine. In July 1967, I had a second eye surgery to remove a cataract resulting from the January injury and had to wear an eye bandage for about a week. Within two weeks of this second surgery, I was attacked by a gang called the "Tornadoes," which had been sending me death threats. The group that attacked me included the person that I ultimately killed. I was shot at and cut with a knife, sustaining a deep gash in my right eyebrow that required several stitches to close. The stated purpose of this second attack was to put out my good eye. One of my younger brothers, who looked like me, was held at gunpoint by one of these gang members who thought my brother was me. It was within this atmosphere that I shot and killed one of the persons who had been part of this second attack.

Alexis Stern 9/28/07 12:05 PM
Comment: Is this what they said? Maybe you could put it more clearly – "members of the gang stated that the purpose of this attack was to put out my good eye."

The actual shooting occurred in a small store; several boys were blocking the door, and the deceased was about three or four feet from me. What prompted my reaction was a verbal threat from someone in the store (i.e., "you are going to get it now") and a sudden move by the deceased. The shooting occurred in September 1967; I had graduated from high school in June 1967. I had no criminal or juvenile record, and I was working at the time in a supermarket as a stock boy. I was 17 years old at this time (Alexander, 2001). These facts are important because they will help to make clear my defense attorney's misconduct.

What the Defense Attorneys Did

My parents hired the most prominent and well-reputed defense attorney in town and paid him in full within 30 days. This attorney's name was Aaron Kravitch, and he had been practicing criminal law for 50 years when my parents hired him. Aaron Kravitch told my parents that the deceased's parents called him the day before and wanted to hire him to prosecute me. Allegedly, he turned them down, but he neglected to inform my parents that he had represented a relative of the deceased in several illegal liquor cases. Kravitch's investigation consisted of his speaking to my parents once or twice in his office. Kravitch never came to the county jail to interview me and never sent another attorney to interview me. On the day of trial, which was about seven months after the shooting, a lawyer appeared named Lionel Drew, who told my parents that Kravitch could not come to trial that day. It should be noted that my father spoke with Kravitch in his office about 4 p.m. the day before the trial, and Kravitch told my father that he would see him the next day in court.

My trial commenced at 10 a.m. on a Tuesday morning. By lunchtime, the following parts of the trial had been completed: (1) jury selection; (2) a motion to suppress; (3) opening statements by the prosecution and defense; (4) presentation of the prosecution's case; (5) presentation of the defense; (6) closing statements by the defense; (7) closing by the prosecution; and (8) the judge's charge to the jury.

I was put on the witness stand with no notice or preparation from the defense lawyer and subjected to cross-examination by the prosecution with no prior assistance. At the time of my trial, a defendant could make an unsworn statement to a jury and thus could not be cross-examined by the prosecutor. But this option was never explained to me, and I was not given any warnings about prosecutorial cross-examination tactics. My girlfriend and a male friend were witnesses, but they were never interviewed before being subpoenaed as witnesses and put on the witness stand. My parents had given Kravitch these two people's names and addresses. They were subpoenaed on this basis alone.

On the witness stand, I was asked by my defense attorney whether I lost a watch. The fact of the matter was that I was robbed of this watch at gunpoint. Later, when I asked Lionel Drew why he did this, his response was "I don't give a goddamn if he took two watches from you, you should not have killed him." In his closing to the jury, Drew stated that I had taken the law into my own hands, he did not know me, and I might be a hoodlum. Drew also raised the issue of the death penalty, saying the jury should not sentence me to death (although the prosecution was not asking for a death sentence). At that point in time, the trial and penalty phase was one process and not bifurcated as it is now.

When my parents saw Kravitch a few days later, he claimed that he had to suddenly go out of town on the evening of my trial. Yet my parents had called his

Alexis Stern 9/28/07 12:05 PM
Comment: Did you say this to him or are you telling the reader this now?

Alexis Stern 9/28/07 12:05 PM
Comment: Can you talk about the significance of this more fully? What is the difference between having lost a watch or having been robbed?

home after I was sentenced to die and his wife stated that he was in his office. Further, one juror worked at the same paper company as my father, and upon learning who my father was, sought him out and told him how I got a death sentence. This juror said that nothing good was said about me by the defense attorney, and if the jury had heard the entire case, I would not have been convicted. Further, this juror told my father that I could easily get a new trial, as an illegal juror had been impaneled to serve. This illegal juror had served on the grand jury that indicted me and discussed information from the grand jury process during the jury's deliberations. I gave this information about the illegal juror to Aaron Kravitch and the trial judge.

Alexis Stern 9/28/07 12:05 PM
Comment: When?

The Defense Attorneys' Misrepresentation

Aaron Kravitch and Lionel Drew engaged in a number of intentional damaging acts to ensure my conviction that almost cost my life. As I stated, I was never interviewed before the day of the trial. The first time I was asked anything was when Lionel Drew asked me about the actual shooting about 45 minutes before the trial, almost eight months after the shooting. I was not told that I would be a witness, and was put on the witness stand with absolutely no preparation, so that I would look bad on cross examination. The other two defense witnesses were not interviewed or prepared, either. A cardinal rule for lawyers in trying a case is never to ask a question of a witness when they do not know the answer. All law schools teach this basic principle.

Most importantly, evidence about my injuries and operations were left out of the trial. This was critical evidence because it would have shown that I had reasons to fear for my safety. On one occasion following my conviction, Drew told me that I should have run when the deceased walked into the store. I responded that the door was blocked. Drew then said that I should have just shot him in the leg. Drew also told me that I should have killed the boy that I pressed charges against instead.

My alleged defense was self-defense, or "fear of a reasonable man." This was just a paper defense for the record. Drew never mentioned self-defense or fear of a reasonable man in his opening statement to the jury, during the trial, or during his closing statement. Evidence of my background, which was positive, was not presented as evidence (i.e., no juvenile record and finishing high school). In Georgia, a jury could, under the law, find reasonable doubt based solely on the character of a defendant, which means a jury could have given me the benefit of the doubt when I said that I feared for my safety. Prosecuting the first attacker was positive evidence on my behalf, and this too was left out of the trial so that I would not be seen as a law-abiding juvenile. Drew wanted the jury to believe that I was a cold-blooded "colored" hoodlum.

Drew's rephrasing my being robbed as having "lost a watch" was an intentional act meant to weaken my case. In *Daniel v. the State* (1939), the Georgia Supreme Court wrote that:

> resistance by armed force of an actual attempt to commit a robbery would be justifiable, because the law said a person is legally justified in killing another in defense of property or person against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, provided the killing was based on the fears of a reasonable man and not revenge.

Because I had been robbed at gunpoint by the deceased and the gang, a defense attorney could have used this point in arguing to the jury. However, Lionel Drew never intended to argue self-defense and only wanted me to have a defense on paper. The Tornado gang was never mentioned at trial, although a competent defense attorney could have argued to the jury that this gang called itself by that name because it represented how quickly they attacked individuals. A few months after my conviction, a story was printed in the newspaper about the Tornado gang, the weapons they had upon arrest, and how they had terrified the community. A police officer joked that he and his fellow officers had reduced the Tornadoes to a "slight breeze."

In Georgia at that time, a person could be legally killed by another person even if the individual is unarmed. Further, Georgia law stated that a person could use force, including deadly force, even if he or she is not under actual attack. The belief that one is about to be attacked, coupled with other circumstances, could justify a killing, according to Georgia law. The defense attorneys knew this and withheld from the jury all the other circumstances that were beneficial to me (e.g., being blinded in one eye, almost blinded in the other eye during a second attack, receiving death threats) because they did not want me to have a viable defense.

When Aaron Kravitch was informed that an illegal juror had been seated and served, Kravitch lied, stating that this was not a legal error. He told me a person could serve on the grand jury that indicted a person, and could serve on the trial jury. A couple of months later, this situation almost occurred again in a murder trial involving a White male defendant, but it was caught after opening statements, and an immediate mistrial was declared. The prosecutor in this case stated that if this case had proceeded and there was a conviction, this defendant would have been entitled unquestionably to a new trial as a matter of law. However, this information in my case was kept quiet by the defense attorneys, and as a result, I was convicted illegally, given a death sentence illegally, and then served illegally almost eight years of a life sentence. I could have been executed based on this illegal conviction. In 2006, I obtained the names of the jurors who served on my jury in 1968 and learned that the illegal juror's name was Dwight L. Bliss. He was the 10th juror seated. Dwight L. Bliss was listed as one of the grand jurors who indicted me in September 1967. The trial judge knew about this illegal juror because I wrote to him and told him. The defense lawyers knew of this illegal juror and kept it quiet while professing that they represented my interests and put up a good defense and a proper appeal for me. Clearly, these lawyers were not representing my interests or protecting my rights under the law.

Alexis Stern 9/28/07 12:05 PM
Comment: Who informed him? "When my father informed Aaron Kravitch…"

Alexis Stern 9/28/07 12:05 PM
Comment: When?

The Trial Judge and His Racism

Many persons believe that a judge serves as a referee in a conflict between the State and the defense to ensure that the trial is fair. In fact, the right to a fair trial encompasses a trial judge who is neutral, detached, and not biased (*Dyas v. Lockhart*, 1983). However, this was not the case with the judge who presided over my trial in 1968, Dunbar Harrison. Dunbar Harrison hated all Black people, not just the so-called Black criminals. He had a White supremacist, Ku Klux Klan attitude and was not ashamed of it. In 1977, Dunbar Harrison was retired but available to preside over cases in other counties. In a capital case that year, he was successfully challenged as unfit to preside over a capital case involving a Black defendant due to racism. A hearing was conducted on Dunbar Harrison's fitness, and he had to take the witness

Alexis Stern 9/28/07 12:05 PM
Comment: So-called by whom? The judge?

Alexis Stern 9/28/07 12:05 PM
Comment: These are like the same thing – choose one as a descriptor and you've made your point.

stand. He testified that he would never invite any Black person to his house as a guest and that he would never vote to admit a Black person to the country clubs of which he was a member. His statements were so racially mean-spirited that the judge who conducted the hearing ordered that a transcript of Dunbar Harrison's testimony be sent to a psychiatrist for evaluation, paid for by the State of Georgia (Savannah Morning News, 1977).

The newspaper only reported a small amount of Dunbar Harrison's testimony while he was on the witness stand. A full transcript of the hearing (Dunbar Harrison hearing, 1977) revealed that Dunbar Harrison additionally said that young Black people did not want to go to school and all they do is walk the streets, and that he would not permit his Black maid to sit at the table with him and drink a cup of coffee. He instructed lawyers not to call any Black person Mr. or Mrs. in his courtroom. This applied to both defendants and witnesses. Dunbar Harrison was asked about a report in which he, during jury selection, was signaling his court deputy who relayed the signal to the prosecutor. When a Black juror was seated, Dunbar became furious and told the prosecutor that he had worked hard to ensure that the young "nigger" on trial did not have any "niggers" on the jury, and if the prosecutor lost the case he did not want this prosecutor in his courtroom anymore. At the Superior Court hearing Dunbar Harrison did not deny signaling the prosecutor and stated that there is nothing wrong with a prosecutor getting help with jury selection, because defense attorneys sometimes receive help selecting a jury. Dunbar only denied threatening the prosecutor (Dunbar Harrison Hearing, 1977). This case could have been mine, because my jury consisted of 11 White jurors and 1 Black juror.

Alexis Stern 9/28/07 12:05 PM
Comment: Seems like a weak connection – are you sure you need this here? You could say something about the possibility that something similar could have happened in your case even if the case they were discussing wasn't yours.

Theoretical Explanations for Disbelief by Social Justice Community

I decided to write my autobiography when I was a second year doctoral student at the University of Minnesota in 1987. I contacted a lawyer in Minneapolis who had some death penalty experience in the South, told him my story, and that I wanted to a write a book about it some day. This attorney, a member of a huge, international law firm, met with me, stated that he would love to see me write the book, and that he would help me get it to a major publisher. He asked me to write a brief synopsis of the book and send it to him. I also sent him the transcript of Dunbar Harrison's hearing, in which Harrison stated how much he despised all Black people. At this time, the "Son of Sam" law (i.e., accused or convicted persons could not profit from movies or books) had just started to be litigated, and it would take several years for the U. S. Supreme Court to hear my case. Thus, there was no rush to write this book until the legal issues were clarified. Unknown to me, however, this Minneapolis lawyer decided not to help me get this book published when he saw the synopsis and Dunbar Harrison's transcript (but he did not have the ethics or professionalism to tell me). He allowed me to think that he would help me if the U. S. Supreme Court ruled the Son of Sam law unconstitutional, which it did several years later. Once the ruling came from the U.S. Supreme Court, he refused to contact me or return a telephone call. I requested the transcript back, but I did not get a response from him.

Subsequently, I contacted over 200 literary agents—who are generally needed to secure a publishing contract. Most of the responses were that they had too many authors or my story did not fit their list. One literary agent publicized that she specialized in stories involving individuals who have overcome tremendous odds in their lives; however, she said no, implying that having a death sentence as a juvenile

and being a full professor at a major university was routine. One literary agent stated that my story was explosive, but he had too many authors to represent me. For these reasons, I self-published my book (Alexander, 2001), although I had no knowledge or skills in publishing a trade story.

I have spoken regularly to students at the School of Social Work at the University of Louisville where my autobiography has been required reading, once at a predominately Black university in my hometown, and once at a national social work conference at the persistence of a colleague who strongly recommended me. However, I have not received any invitations to speak at criminal justice programs, not even the criminal justice programs where I got an A.S. in criminal justice and a B.S. in criminology and corrections. I was not seeking or expecting any type of award from my alma maters, but I had hoped that my name would at least be on the list of potential speakers for these schools. It is not my conviction and death sentence that bother some professionals, but the fact that I have attributed my conviction and death sentence to racism and legal corruption. Many individuals do not want to acknowledge these types of injustices.

Cognitive Dissonance

Two theoretical explanations exist for this rebuff. One is cognitive dissonance. Zetzer (2005) related a phenomenon similar to cognitive dissonance in her discussion of the psychological discordance in her "intimate White environment" involving race, particularly involving African Americans. Cognitive dissonance occurs when an individual holds two contradictory cognitions on the same subject, topic, or person. When dissonance occurs, an individual becomes motivated to reduce or eliminate the dissonance. Wrightsman (1977) states "the presence of dissonance is so psychologically unpleasant that the person subsequently seeks to avoid such situations" (p. 366). When it cannot be avoided, one of three strategies is employed to reduce it. One strategy is to decrease the importance of the dissonant elements. For example, a man who has forgotten his wife's birthday might deemphasize the importance of birthdays, saying that birthdays are overly emphasized or his wife probably would not want to be reminded that she is getting older. A second strategy is to compensate for forgetting the wife's birthday by giving her numerous gifts and attention. The third strategy for reducing dissonance is to change one of the cognitions so that the inconsistency ceases to exist. As an illustration of this strategy, Mills (2007) explained that

> when Thomas Jefferson excoriates the "merciless Indian savage" in the Declaration of Independence, then, neither he nor his readers will experience any cognitive dissonance with the earlier claims about the equality of all "men," since savages are not "men" in the full sense (p. 27).

As another example, one criminal justice professor said I should not be believed because I sent the Minneapolis lawyer my transcript of Dunbar Harrison's hearing without making a copy. Indeed, I trusted the Minneapolis lawyer, but Harrison's transcript is a public document, and it is still available for others to read. Dunbar Harrison's racism is in the public domain for those who want to see, but many persons simply do not want to see it. It is too unpleasant.

Alexis Stern 9/28/07 12:05 PM
Comment: Where? At OSU?

Alexis Stern 9/28/07 12:05 PM
Comment: How is this an example of what you just explained? Be more overt – say which cognition has been altered here – follow the pattern of the Jefferson quote.

Alexis Stern 9/28/07 12:05 PM
Comment: How do you know that this is the reason? Give evidence, or at least your logic here. Something that connects it to the rest of the paragraph on cognitive dissonance: "If we attribute the public's reluctance to directly face Harrison's racism to the mechanism of cognitive dissonance, we can suggest that the topic of racism is, in Wrightsman's words, "so psychologically unpleasant" that people "seek to avoid" dealing with it" (p. 366).

In addition, a growing number of writers have discussed the concept of ignorance and concluded that some individuals want to be ignorant because it serves a social purpose. Here, ignorance is not meant to be a pejorative term but a state of not knowing. It is the opposite of the sociology of knowledge. Hence, a sociology of ignorance exists. Sullivan and Tuana (2007) noted that ignorance is typically thought of as a gap in knowledge, and the gap can be closed by being educated. Individuals cannot know everything due to limited time and resources. The ignorance referred to above is just one type of ignorance. Sullivan and Tuana (2007) stated that

> Sometimes what we do not know is not a mere gap in knowledge, the accidental result of an epistemological oversight. Especially in the case of racial oppression, a lack of knowledge or an unlearning of something previously known often is actively produced for purposes of domination and exploitation. At times this takes the form of those in the center refusing to allow the marginalized to know: witness the nineteenth-century prohibition against black slaves' literacy. Other times it can take the form of center's own ignorance of injustice, cruelty, and suffering, such as contemporary white people's obliviousness to racism and white domination (p. 1).

In a way, cognitive dissonance produces ignorance as well. Related to ignorance is the concept of collective social memory, which requires an understanding of collective amnesia, for indeed, they go together insofar as memory is necessarily selective—out of the infinite sequence of events, some trivial, some momentous, we extract what we see as the crucial ones and organize them into an overall narrative. Some memory is then inscribed in textbooks, generated and regenerated in ceremonies and official holidays, concretized in statues, parks, and monuments (Mills, 2007, p. 29).

What Mills and others contend is that we want to forget some things so that we can be ignorant. Mills (2007) calls this "deliberate forgetting." History is replete with examples of atrocities and massive injustices being forgotten and some individuals becoming incensed when reminded of their existence. For instance, King Leopold II's campaign to procure rubber led to the extermination of 10 million people in the Belgian Congo. This holocaust has been completely purged from the collective memory of Belgian society, aided by the extensive destruction of records. When a newspaper in the Congo printed a story about this holocaust, the Belgian Ambassador was horrified at the "slander" of his country (Mills, 2007). Massive and gross injustices are simply forgotten, and many individuals do not want to hear about such injustices.

The White Code

The other theoretical explanation for my slighting is what I call "the White code," which is connected to the ways in which White privilege is protected (Jensen, 2002; Rothenberg, 2002). Namely, the White code says that when race is involved and a Black person is accusing a White person of serious wrongdoing, then it is the duty of other Whites not to substantiate, acknowledge, or assist publicizing White wrongdoing. Three examples from my situation reflect this proposition. First, at the time of the hearing conducted to decide if Dunbar Harrison was fit to preside over a trial involving an African American, I was an undergraduate student in criminal justice in Savannah,

Georgia. I was taking a course on criminal procedure, which was taught by a prosecutor employed in the prosecutor's office. When the story came out in the newspaper about Dunbar Harrison, this prosecutor stated that it was common knowledge around the courthouse that the judge did not like Black people. However, no one could say anything publicly about him because the judge's attitude and views were off the record. Freed to speak then because the judge was on the record, this prosecutor related in class that night some additional virulent, racist comments that he had heard the judge make. This prosecutor's refusal to speak out publicly against Harrison is an illustration of the White code.

Second, in 2003, I spoke to a standing-room-only audience in my hometown at Savannah State University covered by the news media. An African American reporter for the newspaper interviewed me, and during my speech, I called the trial judge in my case a Ku Klux Klansman. Although the judge was dead and his racism was known to most people, the editor for the newspaper initially killed the article about my speech, and nothing was published after three days. Upon returning to Ohio, I wrote a letter to the CEO for the corporation that owned the newspaper and told him that one of his newspapers had engaged in censorship. The reporter then called me, taking the blame by saying that he had been sick and this was why there was no article. The reporter stated that the editor wanted proof that the judge was in the Klan; I responded that the judge's attitude made him a Klansman. An article was published about two weeks later, minus the Klan reference.

Alexis Stern 9/28/07 12:05 PM
Comment: Which newspaper?

While the editor may have believed that he was following journalistic protocol, he was not. Unbeknownst to me, the person I had been convicted of killing had a relative that worked for the newspaper; the family had lobbied against permitting me to speak at the university, as well. The newspaper promised the family an opportunity to write a rebuttal to my speech, and the deceased's brother sent me a copy of his response by email in advance of its publication. In this rebuttal, the deceased's brother wrote that I had an accomplice, and this accomplice was stabbing and slashing his brother with a knife while I was shooting his brother in the back. Yet, the coroner's testimony failed to report any knife wounds or shots in the back. Further, no one was charged except me. However, the editor did not ask for proof of these assertions by the deceased's brother, even though I had to prove the judge was in the Ku Klux Klan. This is the White code.

Third, the White code worked against me through the Minneapolis lawyer who falsely claimed that he would help me get my book published. He was willing to help me publish my story provided it did not make some White people look bad. He wanted my story to be one in which I admitted that I got on the wrong path and some White people saved my life and put me on the road to being a socially responsible adult. He did not want me to discuss corrupt defense lawyers and a racist judge as being the source of my conviction and death sentence. This Minneapolis attorney could have easily told me that he changed his mind about helping me and returned the transcript of Dunbar Harrison's hearing. Yet, he told me absolutely nothing and ignored my communications to him. The lawyers from Georgia who misrepresented me in 1967 and 1968 knew that because of the White code they were going to be protected by other Whites. Thus, they had no fear about being exposed.

Alexis Stern 9/28/07 12:05 PM
Comment: How? Be more explicit.

Appellate Courts' Unwillingness and Inability to Address Some Wrongful Convictions

Many persons feel that the United States has the best legal system in the world, and that the legal system is slanted towards defendants and against victims. Also, some persons feel that defense attorneys use legal technicalities to exonerate guilty clients. Some persons in academia know that this is not the case (Uphoff, 2006), but they have made themselves believe these cognitions. In addition, one of the more sensitive issues in my situation is that no one wants to believe that a defense attorney would intentionally lose a case. That would be akin to believing that a surgeon would go into an operating room and deliberately botch an operation. More importantly, many people feel that the U.S. appellate court system will overturn unfair convictions and death sentences. There is a strong belief in the United States that when a conviction or death sentence is affirmed on appeal, no major legal errors exist in the case and the person is truly guilty.

In 1949, Judge Jerome Frank, a federal appellate judge, wrote a book entitled, *Courts on Trial: Myth and Reality of American Justice*. Judge Frank wrote that two prominent problems existed in the American judicial system: (1) the belief that appellate courts are more important than trial courts, and (2) the perspective that appellate courts regularly correct mistakes in the trial, sometimes called the "upper court myth." Attacking the upper court myth, Frank declared that citizens have been led to believe that trial courts are less important than appellate courts, and those appellate courts are the heart of the legal system. According to Frank (1949), this myth leads citizens to believe that having trial judges who are fair, conscientious, and honest is not important because appellate courts, through their legal rules, determine outcomes. Tied to this myth is the view that appellate courts can and will safeguard litigants against the trial judges' mistakes concerning the facts of a case. However, when a conflict exists in oral testimonies, the appellate courts will ordinarily accept the fact finder's (i.e., the judge's or jury's) conclusion about the facts. Appellate courts will reject those findings only when it appears that the trial judge was incompetent, unfair, and dishonest. As Frank (1949) stated:

> Such matters, however, show up in such a record in but the tiniest fraction of cases. Because of the inherent subjectivity of the trial judge's decisional process, his deliberate or unintentional disregard or misunderstanding of honest and trustworthy oral testimony is ordinarily hidden from the scrutiny of the upper court (p. 223).

In fact, trial judges and trial courts make decisions that may be unfair, but are not disturbed upon appellate review[1] (Bonner, 2001; Cummings, 1989; Frontline, 2001).

Circuit Judge Ilana Diamond Rovner of the Seventh Circuit Court of Appeals supported Judge Frank's propositions in a dissenting opinion in *Bracy v. Gramley* (1996). In this dissenting opinion, she noted that the United States Constitution, States' Constitutions, the rules of evidence, and over 200 years of case law confers a full panoply of rights to individuals charged with crimes. However, in the final analysis

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[1] See *Ex parte Clarence Lee Brandley*, 1989; *Brandley v. Texas*, 1985; *State of Idaho v. Fain*, 1991; *Nelson v. The State*, 1981; *Nelson v. Zant*, 1991; *Washington v. Commonwealth of Virginia*, 1984—all cases in which the trial judges and trial courts were incorrect but were initially upheld by the appellate courts.

the guarantee of these conferred rights is only as strong as the integrity and fairness of the trial judge (*Bracy v. Gramley*, 1996). In effect, a corrupt and racist trial judge can eviscerate all the rights conferred by federal and state Constitutions, case laws, and the rule of evidence. The trial judge who presided over the trial of Bracy and his codefendant was ultimately convicted of racketeering and corruption and sentenced to 18 years in federal prison. The judge, as a practicing attorney, had arranged for fixes in trials dating back to the 1960s. In the previous 10 years prior to the judge's conviction, 18 other Cook County judges had been convicted of corruption (*Bracy v. Gramley*, 1996). According to Circuit Judge Rovner, cases are not fixed in the courtroom. Instead, cases are fixed in bars, bathrooms, and back hallways. To secure evidence of fixes, one must find individuals who have personal knowledge of these germinated sites of injustices. Judge Rovner wrote:

> I realize, of course, that Bracy and Collins were convicted by a jury, not by Maloney. Jurors have minds of their own; they can and do defy the expectations of the judge. That is but one reason that the jury has been viewed by some as the "the very palladium of free government." But we cannot ignore the influence that the judge retains even in a jury trial. I do not refer so much to the ability of the judge to communicate his opinions to the jury through raised eyebrows, choice of sarcasm, and questioning of witnesses that strays into advocacy, although this happens. I mean the extraordinary ability of the trial judge to shape the trial itself. It is she who decides what evidence the jury may hear, how counsel may behave in front of the jury, what arguments may be made, how they may be made, what legal principles the jury may apply, and even, to a significant degree, who will sit on the jury. Thus, even when the verdict is not entrusted to her, a partial judge retains great influence, if not directly upon the jury, then upon the myriad events that culminate in the jury's decision (*Bracy v. Gramley*, 1996, p. 701).

Continuing to illustrate the shortcomings in appellate review, Judge Rovner wrote:

> Our own ability to monitor the influence of the trial judge, and to discern the taint of partiality, is narrowly circumscribed. Appellate review of the mundane decisions that can make or break a party's case (the exclusion or admission of a key piece of evidence for example) typically is quite limited…In the rare instance that we find error, it is more often than not deemed harmless. Even errors of Constitutional dimension may be labeled benign on review. Theoretically, we could require a more searching review of the record when there is evidence that the trial judge was corrupt, but we would be fooling ourselves to think that even our best efforts would suffice to expose the ways in which the judge's criminal behavior may have tainted the trial…So much goes on the in the courtroom that the written record can never reveal. Why else do we routinely grant so much deference to the trial judge, who sees and hears the witnesses first hand, who supervises the trial from start to finish, who can best gauge the impact of any development upon the jury before him? Our acquiescence in the decisions of the trial court is dictated as much by pragmatism as by principle (*Bracy v. Gramley*, 1996, p. 702).

An Application of These Theoretical Principles to My Case

First, I have no concrete evidence or proof that the trial in which Dunbar Harrison was signaling the prosecutors was my trial. But the composition of the jury was the same. Even if it was not my trial, the events support Circuit Judge Rovner's assertion that a judge can determine who serves on a jury. Regardless of whose trial it was, Dunbar Harrison was said to have not only signaled the prosecutors, but also influenced the summoning of jurors for jury duty. Unquestionably, he was making certain that a number of White "hanging" jurors would be summoned for jury duty; his personal knowledge of them helped to place them on the jury with his signaling. He knew them because he was the only Superior Court judge at that time, and some jurors could serve on three murder and rape cases in one week (trials did not last long at that time).

Further, I filed a habeas corpus case while in prison, challenging my conviction and the role of the defense attorneys. A Superior Court judge, a former prosecutor, rejected my application in about a third of a page. He neglected to write any finding of facts. Then, an appeal was abruptly rejected in a one page decision, and my attorneys were praised by a justice from the Georgia Supreme Court for helping me avoid the death penalty. This justice, in rejecting my appeal, stated:

> Where, as in the present case, the record discloses that employed counsel ably represented the defendant and obtained a reversal of the sentence of death resulting in a new sentence of life imprisonment only being imposed, it cannot be said that such representation was so deficient as to constitute the trial "a farce, or a mockery of justice, or shocking to the conscience" (*Alexander v. Luzier*, 1972, p. 434).

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What the Georgia Supreme Court ignored was that employed counsel did not really save my life. About two months after my trial, the U. S. Supreme Court decided *Witherspoon v. Illinois* (1968), which held that jurors who expressed qualms about capital punishment could not automatically be excluded from jury services. In cases where this automatic exclusion occurred, those defendants who had been sentenced to death were entitled to a new sentencing and their sentences were changed from death to life imprisonment. My lawyer had nothing to do with *Witherspoon*, and this decision had a national impact. To understand the flaw in what the Georgia Supreme Court Justice wrote about employed counsel saving my life, one should consider *Furman v. Georgia*, which was decided by the U. S. Supreme Court on June 29, 1972, and outlawed the manner in which the death penalty was then imposed. Suppose a defense attorney indeed rendered ineffective assistance of counsel in a case tried on June 1, 1972. One could not say that because this defendant was not executed, the defense attorney provided adequate representation. If the defense attorney rendered ineffective assistance of counsel on June 1, 1972, it would still be ineffective assistance on June 29, 1972 or January 1, 2007. A lawyer who provides ineffective assistance of counsel renders both the conviction and sentence unconstitutional.

I was the only witness at my habeas corpus hearing, during which I testified that I was not interviewed before my initial trial, nor were the two defense witnesses. I revealed that I was called a hoodlum by my defense attorney in closing to the jury when I had no juvenile record, I was robbed of a wrist watch that my defense attorney claimed I lost, and the attorney my parents hired did not come to my trial. I also testified that prosecutors were not asking for the death penalty and the death penalty was raised initially by the defense attorney. This evidence went uncontradicted, and

the State of Georgia did not put on a single witness in the habeas corpus hearing or present any documentary evidence or affidavits that challenged anything I said. Thus, "the record" did not show that I was ably represented, as the Georgia Supreme Court Justice wrote. Anyone who read this one-page decision would quickly conclude that my habeas corpus case was meritless, which is what the Georgia Supreme Court Justice wanted.

Supportive of my case also is Frank's (1949) declaration that a trial judge is more important to justice than an appellate judge, and some trial courts' abuses are not revealed by the records of the cases. The judge in my case, Dunbar Harrison, was pressured and relieved from presiding over a capital case involving an African American defendant in 1977 due to his racism. Millard Farmer, the defense attorney in this case, asked Harrison about a case in which Harrison interfered in the summoning of jurors and was signaling his court deputy, who, in turn, signaled the prosecutor to assist the prosecutor in selecting a hanging jury. Dunbar Harrison never denied this accusation when he was on the witness stand. The information that Millard Farmer used did not come from a transcript of a trial in which Dunbar Harrison presided. Instead, this information was passed on to him. But the real issue here is that some occurrences in the courtroom are not going to be put in a trial transcript, shielding it from scrutiny by others, including appellate judges. Trial judges determine what information is put in a transcript, and they frequently state that certain information would be excluded or taken out of the record. In this case, Dunbar Harrison's signaling was safe from written disclosure. Without a doubt, what he was doing in this particular case was a violation of due process of the Fourteenth Amendment to the United States Constitution, but no appellate judge or court would know what really went on at trial. This is what Judge Frank meant when he wrote that trial judges were more important to justice than appellate judges (Frank, 1949).

Conclusion

The purpose of this paper was to reveal how I was deliberately misrepresented by paid defense attorneys in order to facilitate my conviction, and subsequently this misrepresentation resulted in my conviction and death sentence. Further, my intent was to show why my charges against these corrupt officials were dismissed and why it has been difficult for individuals to acknowledge legal corruption and racism. For some individuals, cognitive dissonance is a factor, and for other individuals it is old-fashioned racism. Even if neither cognitive dissonance nor racism is a factor, then Judge Frank's words from 1949 provide an explanation.

Appellate courts make decisions, for the most part, based on the record, but the record can be manipulated and slanted against a defendant, as Circuit Judge Rovner stated. Moreover, appellate courts often cannot determine whether someone is guilty and certify a trial as fair and free of major errors. In my case, the appellate court never knew that an illegal juror sat on my jury. The information about Dwight L. Bliss provides proof that although an appeals court will affirm a conviction, the appellate court does not know whether evidence has been hidden, and an appeals court affirming a conviction certainly does not mean that serious legal errors did not exist in the case. Injustices still can occur and wrongful convictions can be obtained.

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STUDENT ATTITUDES TOWARD THE POST-CONVICTION REVIEW PROCESS IN CANADA

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Abstract

This study assessed whether criminal justice students, most of whom want to work in the criminal justice system (e.g., policing, corrections, law), differ from other university students in relation to their attitudes toward the post-conviction review process in Canada. A closed-ended survey was developed and administered to participants in a Canadian university. Overall, students felt that wrongful convictions are a problem in the Canadian criminal justice system. Although most students supported a number of specific suggestions that could potentially improve the identification and rectification of wrongful convictions (e.g., independent review boards), criminal justice students tended to agree more strongly than their peers. In addition, female students tended to be more concerned about issues relating to wrongful conviction than male students. Specific findings and possible implications are discussed.

Student Attitudes toward the Post-conviction Review Process in Canada

The fallibility of the criminal justice system exists as a result of the obvious fact that it is run by humans who, by their very nature, make mistakes. Regardless of how effective a criminal justice system is at addressing the factors that contribute to wrongful conviction, they are an inherent part of all criminal justice systems and will inevitably occur.

The exact number of wrongful convictions cannot be determined. Instead, researchers rely on frequency estimates. In the United States, wrongful convictions have been estimated to occur in 0.5% of all convictions (Huff, Rattner, & Sagarin, 1996). Ramsey and Frank (2007) report that prosecutors and law enforcement personnel believe that wrongful convictions occur very rarely (0.5%-1%), whereas defence lawyers consider wrongful convictions to be a larger problem (4%-5%). Although there is relatively little research on wrongful conviction in Canada (Denov & Campbell, 2005), there is no evidence to suggest that wrongful convictions in Canada occur less frequently.

Researchers in the United States have identified several systemic factors that contribute to wrongful conviction: eyewitness misidentification; prosecutorial misconduct; false confessions; in-custody informants; junk science; ineffective defence counsel; racial discrimination; police tunnel vision; perjury; and police misconduct (Bedau & Radelet, 1987; Scheck, Neufeld, & Dwyer, 2000; Westervelt & Humphrey, 2001). While there has been little scholarly research into the causes of

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wrongful conviction in Canada, public inquiries have identified the same factors in Canadian cases of wrongful conviction (see Cory, 2001; Kaufman, 1998; Royal Commission on the Donald Marshall Jr. prosecution, 1989).

Despite reform and policy that attempt to address these factors, wrongful convictions continue to occur. Thus, it is a government's system of redress that demonstrates its commitment to addressing the problem of wrongful conviction. The desire and ability of a government to effectively identify and rectify its mistakes is the means by which its commitment to justice may be judged.

The Post-Conviction Review Process in Canada

Currently, sections 696.1 to 696.6 of the Canadian Criminal Code (R.S.C. 1985, c. C-46) set out the law and procedures governing applications for post-conviction review in Canada. These sections give the Minister of Justice (who is also the Attorney General of Canada) the power to review a conviction to determine whether a miscarriage of justice (i.e., wrongful conviction) may have occurred.[1] Before applying to have a conviction reviewed by the Minister, the applicant must have exhausted all levels of judicial review or appeal. In addition, applications must be based on evidence that is "new" (evidence that was not examined by the trial court or evidence that the applicant did not become aware of until all proceedings were over) and "significant" (evidence that is reasonably capable of belief, relevant to the issue of guilt, and capable of having affected the trial verdict) (Scullion, 2004). Regulations governing applications for conviction review also require that the applicant provide copies of all documents and transcripts related to pre-trial, trial, and appeal proceedings (see Regulations, S.C. 2002, c. 12, s. 71).

In most cases, applications to the Minister of Justice are reviewed and investigated by the Criminal Conviction Review Group (CCRG), a branch of the Department of Justice. If, however, an application is based on a matter that was prosecuted by the Attorney General of Canada,[2] lawyers independent of the CCRG will conduct all stages of the conviction review process. The process begins by assessing whether an application contains all the necessary information and documentation. Once this stage is complete, a "preliminary assessment" is conducted to determine whether the application is in fact based on new and significant evidence. If the application does not meet these criteria, the application will be screened out prior to proceeding to the investigation stage (Department of Justice, 2005a).

The purpose of the "investigation stage" is to verify the information provided by the applicant. To assist the Minister of Justice in conducting the investigation, section 696.2(2) of the Criminal Code gives the Minister the power to subpoena a witness to testify or produce evidence. The Minister has the authority to delegate this power to the CCRG or the independent lawyer(s) responsible for conducting the investigation. The investigation stage may involve: (1) interviewing or examining witnesses; (2) carrying out scientific tests; (3) obtaining other assessments from forensic and social

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1 These sections also apply to individuals found to be dangerous offenders or long-term offenders under part XXIV of the Canadian Criminal Code.

2 The Attorney General of Canada is responsible for prosecuting offences in violation of any Act of Parliament outside the Criminal Code in all provinces and territories. In addition, the Attorney General of Canada is responsible for prosecuting Criminal Code offences in the Yukon, the Northwest Territories, and Nunavut.

scientists; (4) consulting police agencies, prosecutors and defence lawyers who were involved in the original prosecution and/or appeals; or (4) obtaining other relevant personal information and documentation (Department of Justice, 2005a).

Upon completion of the investigation, the CCRG or independent lawyer(s) will prepare an investigation report summarizing all of the information gathered. Copies of the investigation report are sent to both the applicant and the Attorney General for the province or territory responsible for the prosecution. This allows the applicant and Attorney General to submit any comments they might have. After these submissions have been received, the CCRG or independent lawyer(s) may conduct further investigation based on these comments. The CCRG or independent lawyer(s) conducting the review then create a final investigation report and prepare their recommendations. Their recommendations and advice are then sent to the Minister.

The Minister also receives advice on the application from an independent "Special Advisor," currently the former Chief Justice for the Province of Quebec. The Special Advisor provides advice at all stages of the review process (Department of Justice, 2005a). For example, if the CCRG decides to terminate an application during the preliminary stage of the assessment, the Special Advisor may suggest to the Minister that the review process continue. In addition, the Special Advisor reviews the investigation report, any submissions or appended material, and the recommendations of the CCRG or independent lawyers. The Special Advisor then reports to the Minister with independent recommendations and advice on how the application should be decided.

After considering the recommendations made by the CCRG and Special Advisor, if the Minister believes "there is a reasonable basis to conclude that a miscarriage of justice likely occurred" (Section 696.3(3) C.C.), she or he may order a new trial, refer the matter to the court of appeal, or dismiss the application. The Minister may also, at any time, refer a question to the court of appeal for its opinion.[3]

Criticisms

Costs are prohibitive. Regulations governing applications for ministerial review require that they be accompanied by copies of all documents related to pre-trial, trial, and appeal proceedings (see Regulations, S.C. 2002, c. 12, s. 71). This requirement is extremely prohibitive, as the number of pages in these documents is so many that they often fill numerous bankers' boxes (personal communication, August 20, 2007). According to senior legal counsel for a provincial legal aid plan, applicants are required to pay up to $1.50 per photo copy for the documents they submit along with their application (personal communication, December 5, 2006). Consequently, the costs associated with making an application to the Minister are often beyond the reach of the applicant.

Limitations of legal aid. Currently, if an individual wishes to obtain legal assistance in making an application for ministerial review, they must either pay for it themselves or apply for legal aid from the province or territory in which they live. Inquiries into receiving legal aid assistance for a post-conviction review application have revealed that only some provinces and territories will consider such a request.

[3] If the Minister of Justice so chooses, she or he may also refer the case to the Supreme Court of Canada under section 53(2) of the Supreme Court Act (R.S., 1985, c. S-26). Finally, the Minister of Justice, under the authority of section 748(2) of the Criminal Code (R.S.C. 1985, c. C-46) may request that the federal cabinet grant a free or conditional pardon to any person who has been convicted of an offence.

Those who were willing indicated there are stringent criteria. For example, similar to the requirement for making an application for ministerial review, an application for legal aid may not be considered unless the applicant can demonstrate, amongst other criteria, that "new" and "significant" evidence does in fact exist (personal communication, December 5, 2006). Often incarcerated and, thus, unable to conduct their own investigation, it is unreasonable to expect that an applicant can fulfill this requirement on their own. As a result, volunteers from organizations, like the Association in Defence of the Wrongly Convicted (AIDWYC) and other innocence projects at Canadian law schools, are often left with the burden of uncovering new evidence and providing legal assistance.

Evidentiary burden is too high. The requirement that applications for post-conviction review be based on "new" and "significant" evidence has been criticized by advocates for the wrongly convicted (see the AIDWYC, 1999) and others in the legal community (see Braiden, 2000) as being overly restrictive. They assert that, at times, trial counsel (competent or not) refrain from introducing evidence at trial as part of their trial strategy. Therefore, in denying the submission of evidence that was available at trial, but not used for strategic reasons, the criteria suggests that the applicant was responsible for their conviction. Numerous lawyers surveyed by Braiden (2000) claim that this requirement seriously limits the current legislation's ability to identify and rectify its mistakes.

Ineffective. Braiden (2000) discovered that the Minister of Justice intervened only 17 times from 1898 to 1953—an average of less than once every three years. Between 1960 and 1997, the Minister intervened 20 times (Braiden & Brockman, 1999). For these years, however, it is unknown how many applications for ministerial review were actually made. Data from the 1980s and early 1990s reveals that of 236 applications,[4] there were only three interventions—a less than 2% intervention rate (Braiden, 2000).

Thus, interventions by the Minister are few and far between. According to AIDWYC (1999), the Minister intervenes in about only 1% of all applications. While they admit that this low number may reflect the integrity of applications, it also demonstrates that the process may not be the most effective means for addressing wrongful convictions.

Lengthy delays. Reviews and investigations conducted by the CCRG are characterized by inordinate and unjustified delays (AIDWYC, 1999). For example, it took 10 years for the Minister to make a decision in relation to Donald Marshall Jr.'s application. David Milgaard had to wait 23 years (AIDWYC, 1999). Although the CCRG legitimizes these delays by claiming that investigations take time and that every time the applicant submits additional evidence more time is needed, critics argue that these delays are inexcusable (Braiden & Brockman, 1999). Moreover, even when investigations have been completed and recommendations and advice have been provided to the Minister, decisions may take up to an additional three to five years (Braiden & Brockman, 1999). Indeed, as Toronto lawyer Daniel Brodsky stated, applications submitted to the Minister "move about as briskly as a snail with arthritis" (Donham, 1991 p. 21).

Conflict of interest. In Canada, the Minister of Justice is also the Attorney General. In addition to the responsibilities of Minister, then, this individual also supervises the

[4] Although we know the number of applications made between 1980-1991, information relating to the number of interventions made from 1980-1982 and from 1987-1988 is not available; thus, these years are excluded from the numbers reported above.

prosecution of violations of federal statutes (other than the Criminal Code) in all provinces, as well as the prosecution of all federal offences (including the Criminal Code) in the territories (Department of Justice, 2005b). Not surprisingly, advocates for the wrongly convicted believe that the role of the Attorney General—who is the Minister of Justice—is incompatible with the role of reviewing claims of wrongful conviction (see AIDWYC, 1999).

Although lawyers independent of the CCRG conduct investigations in matters that were prosecuted by the Attorney General, the final investigation report is submitted to the Minister of Justice (the same individual responsible for the supervision of the original prosecution). Moreover, when matters are investigated by the CCRG—who work within the department responsible for federal prosecutions—they may be subject to a prosecutorial bias. As noted by Braiden and Brockman (1999), whether or not Department of Justice officials are partial or impartial in their decisions, it is imperative that justice appears to have been achieved. Any perceived conflict of interest, whether well-founded or not, undermines the integrity of the process (Rosen, 1992).

Student Attitudes and Criminal Justice

To our knowledge, this study is the first to investigate student attitudes toward the post-conviction review process. Past research has focused primarily on the attitudes of criminal justice majors in the areas of: punitiveness (Lambert, 2004; Lane, 1997; Mackey & Courtright, 2000); capital punishment (Farnsworth, et al., 1998; Lambert, et al., 2006; Payne & Coogle, 1998); victimization and fear of crime (Dull & Wint, 1997); hate crimes (Miller, 2001); electronic monitoring (Payne and Gainey, 1999); inmate culture (Hensley, Tewksbury, Miller, & Koscheski, 2002); gun control (Payne & Riedel, 2002); gays and lesbians (Cannon, 2005); juvenile justice (Benekos, Merlo, Cook, & Bagley, 2002); and crime in general (Giacopassi & Vandiver, 1999; Tsoudis, 2000; Vandiver & Giacopassi, 1997). Our work extends this student attitude research into the realm of the post-conviction review process in Canada.

There is very little research on attitudes toward wrongful conviction in general. In Canada, the only existing research in this area appears to have been conducted by the Angus Reid Group (1995). They found that 65% of respondents felt that the Canadian justice system should “increase its efforts to deal with people who claim they have been wrongly convicted,” whereas 30% felt that “wrongful convictions happen so rarely that the justice system should carry on the way it always has” (p.76). In addition, they found that 90% of respondents believed the government should compensate individuals who have been wrongly convicted. Our study adds to the research on attitudes toward wrongful conviction in Canada by investigating student attitudes toward the post-conviction review process.

Gender Differences in Attitudes toward Criminal Justice

The data from the 1999 Canadian General Social Survey revealed a number of gender differences in attitudes toward the criminal justice system (Tufts, 2000). In relation to sentencing, men and women differ in their attitudes toward sentencing adult offenders, but not young offenders. With adult offenders, differing offences cause differing gender reactions, though it is not the case that one gender is more punitive than the other. Regarding other aspects of the criminal justice system, women tend to hold more positive attitudes toward the police than men. On the other hand, men tend

to hold more positive attitudes toward criminal courts than women. In addition, men tended to rate prison and parole systems more positively than women (Tufts, 2000). This paper seeks to expand this literature on gender differences and attitudes toward the criminal justice system by investigating gender differences in student attitudes toward the post-conviction review process.

The Current Study

The purpose of this study was to assess student attitudes toward the post-conviction review process in Canada. To build on past research looking at student attitudes toward issues in criminal justice, we wished to investigate differences between criminal justice and non-criminal justice majors and to explore potential gender differences. This work will contribute to the growing body of research on wrongful conviction. To our knowledge, this is the first study to investigate attitudes toward the post-conviction review process.

Based on the current legislation set out in sections 696.1 to 696.6 of the Canadian Criminal Code (R.S.C. 1985, c. C-46), we created survey questions that described certain aspects of the process or particular alternatives that advocates have suggested for improvement. Although most university students are unlikely to be familiar with this legislation, we wanted to assess how they felt about these discrete aspects and to investigate whether students enrolled in differing majors had differing opinions. In particular, the survey was designed to investigate the attitudes of male and female criminal justice and non-criminal justice majors toward the criteria for making an application for ministerial review and their confidence in the government to review and address claims of wrongful conviction. An additional item was included to assess whether students believed that wrongful conviction was a problem in the Canadian criminal justice system.

Criminal justice majors are exposed to the strengths and weaknesses of the criminal justice system in general. Based on these educational experiences, we expected criminal justice majors to be more sensitive to the issue of wrongful conviction and the post-conviction review process in particular. We had three main hypotheses: (1) that criminal justice majors would be more likely than non-criminal justice majors to view wrongful conviction as a problem in the Canadian criminal justice system; (2) that criminal justice majors would be more critical of the post-conviction review process than non-criminal justice majors; and (3) that criminal justice majors would have less confidence in the government to review alleged claims of wrongful conviction.

In terms of gender differences and attitudes toward the Canadian criminal justice system, varying results have been found. Sometimes men have more positive attitudes than women and sometimes women have more positive attitudes than men. Thus, the goal was to explore gender differences, but no specific gender predictions were made.

Method

Participants

Three hundred and sixty-nine undergraduate students (231 female and 138 male) from a small Canadian university volunteered to participate in the study (see Table 1).

Of these students, 47.2% (*n* = 174) were criminal justice majors, whereas 52.8% (*n* = 151) were not. Non-criminal justice majors consisted of students from nursing, science, engineering, commerce, and business programs. Participant ages ranged from 18 to 47 (*M* = 21.54, *SD* = 4.60). Seventy-two percent of participants self-identified as White, whereas the remaining participants self-identified with various other ethnicities. For the purposes of analyses, however, there were insufficient numbers of any particular ethnicity (other than White); thus ethnicity was not explored. The criminal justice and non-criminal justice majors seem relatively similar in the demographics assessed (see Table 1). As an incentive, all participants had the opportunity to be included in a draw for a $100 HMV music store gift certificate.

Table 1.
Participant characteristics.

		Criminal Justice	Non Criminal Justice
Age	Mean	21.06	21.97
Race	White	71.9%	70 %
	Non-White	28.1%	30%
Sex	Male	38.5%	36.4%
	Female	61.5%	63.6%

Materials

The data comes from a larger web-based survey of student attitudes and opinions about wrongful conviction, which included items related to knowledge of the factors that cause wrongful conviction, general attitudes toward wrongful conviction, and attitudes toward the post-conviction review process. For each question, participants were asked to indicate the number that best represented how they felt about each item, where 1 = "strongly disagree," 2 = "disagree," 3 = "neither disagree nor agree," 4 = "agree," and 5 = "strongly agree." Within this survey, seven items were relevant to the current study. The first item assessed whether or not students believed that wrongful conviction is a problem in the Canadian criminal justice system: "Wrongful convictions are not a problem in the Canadian criminal justice system" (reverse coded).

The other six items were designed to measure student attitudes toward specific aspects of the post-conviction review process in Canada. These items can be divided into three main themes: (1) criteria for making an application to the Minister ("A wrongful conviction case should only be reviewed if new and relevant evidence arises;"[5] "I believe that an individual should be personally responsible for acquiring and paying for copies of all required transcripts and trial documents in order to apply for a review of their conviction"), (2) confidence in the government to review wrongful convictions ("Wrongful conviction applicants need an impartial, non-government, third-

[5] Although the actual phrase is "new and significant evidence," we were concerned that students might not know what constituted "significant" evidence. As our survey was going to a wide variety of students (from nursing majors to engineers), the wording was changed to "new and relevant evidence" as this captures the essence of the original wording but is phrased in a way that non-legal experts can understand.

party to review their cases" [reverse coded]; "I believe the government is capable of reviewing wrongful conviction cases in a non-biased manner;" "I believe that the Canadian criminal justice system wants to avoid taking responsibility for wrongful convictions" [reverse coded]), and (3) legal assistance ("Those who claim to have been wrongfully convicted and wish to apply for a review of their conviction should be appointed a lawyer to assist them").

Procedure

Participants were recruited using posters, campus radio announcements, and university student e-mails. On average, participants required approximately 20 minutes to fill out the online questionnaire.[6] Afterwards, participants were thanked for their participation, provided with written feedback, and directed to additional resources relating to wrongful convictions.

Results

To assess participant attitudes toward the post-conviction review process, a 2 (program of study: criminal justice vs. non-criminal justice) x 2 (gender: female vs. male) between-participants multivariate ANOVA was conducted on the seven relevant survey questions. See Table 2 for a frequency distribution of student responses to each item.

Are Wrongful Convictions a Problem?

Overall, students believed that wrongful conviction is a problem in the Canadian criminal justice system *(M* = 4.00*, SD* = 0.74). However, criminal justice majors (*M* = 4.12, *SD* = 0.75) differed significantly from non-criminal justice majors (*M* = 3.90, *SD* = 0.71), such that criminal justice students believed that wrongful conviction was a bigger problem than non-criminal justice students, F (1,354) = 9.77, $p < .01$.

Criteria for Making an Application to the Minister of Justice

Overall, students tended to respond relatively neutral when asked whether wrongful convictions should only be reviewed if new and relevant evidence arises (*M* = 3.09, *SD* = 1.10). In contrast, students disagreed that applicants should be responsible for paying for the costs associated with applying for a review of their conviction (*M* = 2.35, *SD* = .95). No significant differences in responses were found.

Confidence in the Government to Review Wrongful Convictions

Overall, students did not have much confidence in the government's ability to review wrongful convictions. Students tended to disagree that the government is capable of reviewing claims of wrongful conviction without bias (*M* = 2.85, *SD* = 1.00). In addition, students tended to agree that wrongful conviction applicants need an impartial non-

[6] The participants were recruited from a technological, laptop-based university and, thus, were accustomed to online surveys. For example, teacher evaluations are conducted solely online and students access most of their course material through a web-based system.

government third-party to review their cases (*M* = 3.77, *SD* = .84) and that the criminal justice system wants to avoid taking responsibility for wrongful convictions (*M* = 3.43, *SD* = .88).

Table 2.
Frequency distribution (in percentages) of student responses.

Item	Strongly Disagree	Disagree	Neither / Nor	Agree	Strongly Agree
Wrongful convictions are not a problem in the Canadian criminal justice system	22.8	59.2	14.1	3.3	0.5
A wrongful conviction case should only be reviewed if new and relevant evidence arises	4.6	33.0	19.9	33.2	9.3
I believe that an individual should be personally responsible for acquiring and paying for copies of all required transcripts and trial documents in order to apply for a review of their conviction	17.5	44.4	24.7	12.3	1.1
Wrongful conviction applicants need an impartial, non-government, third-party to review their cases	0.3	8.8	21.6	52.6	16.7
I believe the government is capable of reviewing wrongful conviction cases in a non-biased manner	7.7	32.7	29.7	26.4	3.6
I believe that the Canadian criminal justice system wants to avoid taking responsibility for wrongful convictions	1.4	13.3	33.1	43.9	8.3
Those who claim to have been wrongfully convicted and wish to apply for a review of their conviction should be appointed a lawyer to assist them	0.5	4.6	16.1	62.7	16.1

There were also significant differences in the students' responses. Although all students tended to agree that wrongful conviction applicants required an impartial third-party to review their cases, females (*M* = 3.87, *SD* = .77) agreed significantly more than did males (*M* = 3.60, *SD* = .92), *F* (1,354) = 10.00, *p* < .01. Moreover, when asked whether they believed that the government was capable of reviewing wrongful convictions in a non-biased manner, females (*M* = 2.74, *SD* = .99) disagreed significantly more than did males (*M* = 3.03, *SD* = 1.01), *F* (1,354) = 8.03, *p* < .01, and criminal justice majors (*M* = 2.69, *SD* = 1.02) disagreed significantly more than did

non-criminal justice majors (*M* = 2.98, *SD* = .97), *F* (1,354) = 5.26, *p* < .05. A marginally significant interaction revealed that, overall, female criminal justice students were the least likely to believe that the government could review wrongful conviction cases without bias, *F* (1,354) = 3.06, *p* < .08 (see Table 3).

Table 3.
Mean responses to "I believe the government is capable of reviewing wrongful conviction cases in a non-biased manner"

	Female		Male	
Program of Study	*M*	*SD*	*M*	*SD*
Criminal Justice	2.50	0.95	3.00	1.07
Non-Criminal Justice	2.94	0.98	3.06	0.96

In addition, females (*M* = 3.54, *SD* = .85) agreed more strongly than did males (*M* = 3.28, *SD* = .90) that the Canadian criminal justice system wants to avoid taking responsibility for wrongful convictions, *F* (1,354) = 8.09, *p* < .05. Criminal justice majors (*M* = 3.55, *SD* = .92) were also marginally more likely to agree with this item than non-criminal justice majors (*M* = 3.35, *SD* = .83), *F* (1,354) = 3.49, *p* < .06.

Legal Assistance

Overall, students tended to agree that those who claim to have been wrongly convicted should be appointed a lawyer to assist them in making an application for a review of their conviction (*M* = 3.90, *SD* = .74). No significant differences in responses were found.

Discussion

Between 1989 and 2003, 340 people in the United States were exonerated of crimes for which they were originally convicted (Gross, Jacoby, Matheson, Montgomery, & Patil, 2005). These numbers have generated a great deal of interest in the problem of wrongful conviction and have highlighted the need for reforms that will prevent and rectify miscarriages of justice. Indeed, over 40 law schools in the United States now have innocence projects that investigate and litigate claims of innocence (see Findley, 2006).

We were interested in how university students would react to current Canadian practices and suggested reforms. To begin, the issue of whether or not students considered wrongful conviction to be a problem in the Canadian criminal justice system was assessed. Findings revealed that university students agreed that wrongful conviction is a problem. In addition, as hypothesized, criminal justice majors believed that wrongful conviction was more of an issue than did non-criminal justice majors. As these students are our current or future voters (and many criminal justice students, in particular, wish to find careers in the criminal justice system) these findings are encouraging.

When asked whether wrongful convictions should only be reviewed if new and relevant evidence arises, students, overall, responded neutrally. A further look at the

data, however, seemed to suggest that students were divided on this issue (see Table 2). It appears that roughly equal numbers of students agreed and disagreed with this item, averaging out to a neutral response.

It may be that students who agreed with the new and relevant evidence requirement were unaware that if evidence was available at trial, but not presented to the court, it cannot later be used as grounds for post-conviction review. That is, some students may not be familiar with the rules of evidence and, in particular, the evidentiary burden in post-conviction proceedings. If this is true, students—especially criminal justice students—may require further knowledge surrounding appellate rules and procedures and should be made aware of the fact that many wrongful convictions go undetected because of the rigidity of these rules (Braiden, 2000). In contrast, these students may support the principle of finality. That is to say, once an individual has exhausted all levels of judicial appeal, their case should only be reviewed in exceptional circumstances.

The students who disagreed may wish to ensure that every conviction is sound, reconsidering the same evidence multiple times if necessary. In addition, as lawyers may choose to strategically withhold evidence during trial, removing the "new and significant evidence" component would allow such previously un-presented evidence to affect the decision to review a conviction. Of course, these students may not have considered the impact and strain this potential change may put on the criminal justice system.

When queried about whether applicants should be responsible for paying the costs associated with producing trial transcripts and other documents related to their trial and appeal proceedings, students disagreed. It seems that students could sympathize with applicants on this specific requirement, perhaps because they too are required to photocopy materials and meet other mounting costs associated with their education. If students had knowledge of the actual expense associated with producing copies of the overwhelming number of documents (often tens of thousands of pages), they would likely be shocked.

Furthermore, when asked whether legal counsel should be appointed to assist those who are applying to have their conviction reviewed, students agreed. Even without knowledge of the specific process and difficulties therein, students assume that applicants will need legal advice and assistance. The current system, however, does not appoint a lawyer to assist applicants in the post-conviction review process. Instead, the burden falls to non-profit organizations, volunteers, and lawyers who provide pro bono legal assistance. But, as Alistair Logan notes, justice should not depend on the charitable tendencies of others (see Kennedy, 2004). Thus, students—regardless of their program of study and without awareness of these compounding issues—seem to agree (unknowingly) with advocates and legal scholars that the current procedure for post-conviction review is inadequate.

In regards to confidence in the government, students tended to disagree that the government was capable of reviewing wrongful convictions without bias. A further look at the data (see Table 2), however, revealed that 30% of students agreed that the government could review the cases in a non-biased manner, whereas 40.4% disagreed and 29.7% neither agreed nor disagreed. In contrast, when asked if they felt that wrongful conviction applicants needed an impartial non-government third-party to review their cases, 79.3% agreed, 9% disagreed, and 21.6% neither agreed nor disagreed. Thus, more students agreed that a non-government body, rather than a government body, should review claims of wrongful conviction. In response to

whether the Canadian criminal justice system wants to avoid taking responsibility for wrongful convictions, the majority of students agreed (52.2%), whereas only a few disagreed (14.7%). It appears that some students did not wish to accuse the government of being biased, yet most students do feel that the government wants to avoid taking responsibility for its mistakes.

In support of our hypothesis, criminal justice majors reported less confidence in the government than non-criminal justice majors. Like advocates for the wrongly convicted, students (and criminal justice students in particular) appear to believe that the current review mechanism is not sufficiently independent of the Department of Justice. An overwhelming majority of students agreed that an impartial non-government body—not the Minister of Justice—should be responsible for handling wrongful conviction applications. If students were aware of the specific roles of the Minister and the CCRG, if they knew that recommendations made to the Minister are not released, and if they realized that the reasons for a Minister's decision (and whether or not she or he followed the recommendations received) have never been made public, they would probably be even less confident in the way the current process operates.

Interestingly, our findings revealed that females have less confidence in the government than males. Females disagreed more strongly than males that the government was capable of reviewing wrongful convictions without bias, they were more likely than males to believe that an impartial non-government third-party was necessary to review claims of wrongful conviction, and females were also more likely than males to believe that the criminal justice system wanted to avoid taking responsibility for wrongful convictions. This is in line with other research that has found women to be more critical of the criminal courts (Tufts, 2000). Further exploration into the role of gender and criminal justice issues seems warranted.

In Conclusion

According to Roberts (2004), public confidence is critical to the functioning of the criminal justice system. A lack of confidence in the government may result in radical demands for change in the way that criminal justice is administered. As these students are already reporting negative attitudes in relation to the post-conviction review process, perhaps further education about wrongful conviction would push these students to become a voice for change.

Most universities in Canada do not have a formal course dedicated to wrongful conviction. Already, without knowledge of the details, the students in this research believe a non-government third party is necessary to review cases of wrongful conviction and they believe that the government is attempting to avoid responsibility for its mistakes. What might students think—or do—if they knew more of the details of the post-conviction review process?

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MISCARRIAGES OF JUSTICE: EYE OF THE BEHOLDER

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Abstract

The "miscarriage of justice" is in the eye of the beholder. Some view the reversal of a death penalty conviction as a miscarriage in that it demonstrates a failure somewhere in the system. Conversely, others see this as an example of the system working, arguing that a wrongful conviction was discovered and corrected. This paper investigates these different perspectives through an analysis of statements reported in newspapers in response to death penalty reversals. Death penalty reversals were identified for a 10 year period, 1997—2006, and news articles reporting the reversals were then read and coded. Content analysis of statements by prosecutors, defense attorneys, defendants, and victims' families reveal different patterns regarding the legal system, the nature of the crime, and the character of the defendant. We find, especially with regards to prosecutors, that commitment to a position appears to alter one's interpretation of death penalty reversals.

Miscarriages of Justice: Eye of the Beholder

The United States has demonstrated an ambivalent relationship with the death penalty over the past half century, as capital punishment has walked a Constitutional and political tightrope. A de facto, and then Constitutional, moratorium in the 1960s and 1970s was followed by reauthorization, adoption, and use in the 1970s and 1980s, but at the same time, states sought to make death more palatable. After a decade of rather enthusiastic application, increasingly states have returned to questioning whether the death penalty can be fairly applied. One reason for the reexamination of the death penalty is the demonstrated fallibility of the criminal justice system, coupled with a reluctance to tolerate a miscarriage of justice in assessing an irreversible penalty: "death is different" (e.g., Abramson, 2004).

Because it is different, the death penalty has attracted a lot of attention from state legislatures, the public, litigators, and courts. In this paper, we study the reported reaction to reversals of death sentences and death penalty convictions. Theoretically, there are two broad categories of sentiments. One group would argue that a death penalty reversal demonstrates that the judicial machinery is functioning properly. Mistakes are likely to happen through clerical errors during investigation, misguided information, or simple human error throughout the entire process. But, this group holds that since these mistakes are eventually reversed, the system is working as it should when it corrects errors. For example, Dawson (2005) asserts,

> Each time a convicted person is exonerated by post-conviction proof of actual innocence, two consequences ensue: First, the event shows that

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> the criminal justice system, while far from broken, is fallible because it is run by humans. Second, it shows that humans within the system, operating in good faith, can jointly correct some of these mistakes. The process of exoneration through post-conviction proof of innocence should be thought of not as an external challenge to the criminal justice system but rather as a necessary and integral part of it (p. 29).

A similar sentiment was expressed recently by Justice Antonin Scalia, concurring in *Kansas v. Marsh* (2006):

> Remarkably avoiding any claim of erroneous executions, the dissent focuses on the large numbers of *non*-executed "exonerees" paraded by various professors. It speaks as though exoneration came about through the operation of some outside force to correct the mistakes of our legal system, rather than *as a consequence of the functioning of our legal system.* Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success (pp. 2535-36; emphasis in original).

A second major category of sentiments is that reversals reveal systemic shortcomings that plague the system, such as racially biased jurors, prosecutorial misconduct, or untruthful witnesses. In *Marsh* (2006), for instance, Justice David Souter dissented not from the death penalty per se, but from a Kansas statute requiring the death penalty when aggravating and mitigating factors are in "equipoise." Souter stated,

> …the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences… (p. 2544).

What to make of Constitutional errors and exonerations also has been the subject of an extended scholarly debate between Liebman, Fagan, and West (2000a, b) and Latzer and Cauthen (2000a, b). Responses to a reversal should reveal where each actor in the system stands on this issue. Before turning to an examination of reactions, however, we first survey the political and legal landscape that has produced ambivalence toward a penalty that the majority favors, so long as it is applied sparingly.

Death Penalty: Off-Again, On-Again

Following several years of a de facto moratorium, in *Furman v. Georgia* (1972) the Supreme Court overturned the death penalty as then applied. Death penalty abolitionists were disappointed several years later when the Court announced that the death penalty was not per se unconstitutional. The *Furman* Court had found fault in a lack of standards that made the death penalty "so wanton and so freakishly imposed" (Stewart, concurring, p. 310). Four years later, in *Gregg* and companion cases**,** the justices upheld statutes that appropriately channeled juror discretion. While the justices demanded that discretion be guided, such as by consideration of aggravating

and mitigating circumstances, they did demand discretion for juries, striking down two statutes that required automatic imposition of the death penalty (*Woodson v. North Carolina*, 1976; *Roberts v. Louisiana*, 1976).

This need for discretion, but channeled discretion, has produced contradictory requirements (Liebman, 2007) and again demonstrates the ambivalence toward the death penalty and its operation. Many critics of the death penalty argue that the misuse of discretion by police, by prosecutors, and by jurors, creates too much potential for miscarriages of justice. One of the more notable arguments was that the discretion has permitted racial discrimination in decisions to seek, and to assign, the death penalty. A study of Georgia's death penalty in the post-*Gregg* years found evidence that the race of the murder victim was strongly linked to death sentences, with murderers of Whites more likely to receive death than murderers of Blacks (Baldus, Woodworth, & Pulaski, 1990). However, the Supreme Court rejected the use of the statistical patterns to demonstrate a denial of equal protection, requiring that the petitioner demonstrate that he personally had been a victim of unequal treatment (*McCleskey v. Kemp*, 1987).

McCleskey was among the last Constitutional challenges to the operation of the death penalty. Additionally, the Supreme Court's emerging conservative majority told the lower federal courts in no uncertain terms to end their oversight of state death penalty laws, given the "state's strong interest in proceeding with its judgment" (Chemerinsky & Caminker, 1992; *Gomez v. District Court*, 1992, p. 654). The door to executions was thrown wide open. Yet the same year *McCleskey* was decided, scholarly research had begun to document the numerous ways in which the death penalty process was flawed (e.g., Bedau & Radelet, 1987). And, shortly thereafter, DNA evidence began to demonstrate more convincingly the inaccuracy of criminal justice procedures.

By the end of the 1990s, wrongful convictions became well known. In 1999 the Nebraska Governor vetoed a legislatively adopted moratorium. In early 2000, in the wake of investigations that resulted in more death row inmates being freed than executed, Illinois Governor George Ryan established a moratorium in his state (CNN, 2000). Before he left office three years later, Ryan commuted 156 death penalty sentences. Although Illinois looked to be an outlier for a couple of years, increasingly states have questioned whether the penalty can be fairly applied at all. In addition to Illinois, New Jersey has formally adopted a death penalty moratorium and in 11 other states, the death penalty is on hold or under the review of courts (Lithwick, 2007). Missouri, for instance, is one of the 11 states that is presently experiencing a de facto moratorium, although recent court decisions appear to have resolved legal challenges in the state's favor (Patrick, 2007; Weinstein, 2007; Wittenauer, 2007). Borne out of advances in DNA science and specifically the Illinois moratorium, the innocence movement has grown exponentially in the last five years, in response to numerous erroneous convictions. As a result, finding a fix for wrongful convictions has become a serious policy concern (Zalman, 2006).

Wrongful Convictions: Carriage or Miscarriage?

Opponents of the death penalty have long held that it is arbitrary and capricious, the standard under which it was suspended in *Furman*. Research on the death penalty since its authorized reinstatement in *Gregg* demonstrates that convictions and sentences can be wrongly handed down for numerous reasons. A "miscarriage of

justice" can occur at a seemingly infinite set of points throughout the judicial process. The literature has identified three distinctive points of concern. The special circumstances surrounding death penalty cases further complicate the discussion and demonstrate the heightened possibility of a miscarriage of justice

A first area of concern is in the detection and apprehension of the true perpetrator. The brutality involved in these crimes often puts added pressure on police to quickly determine the culprit. In this haste, suspects can be fabricated (Gross, 1996). Additionally, the prevalence of false confessions is surprisingly high: Gross, Jacoby, Matheson, Montgomery and Patil (2005) report of the 205 exonerations for murder they studied that 20% involved false confessions. Eyewitness misidentification (50%) and perjury (56%) are two other highly reported causes of false convictions: the true killers are more likely to lie and point the finger elsewhere in capital cases (Gross et al., 2005).

A second concern for scholars of wrongful convictions is prosecutorial discretion. Gross (1996) argues that due to the high stakes involved in capital cases, prosecutors are less likely to dismiss a case, even if the evidence is weak and the accused possibly innocent. Liebman (2000) agrees:

> by parceling out substantial political and other rewards to trial-level officials on a strictly per-death-sentence basis, while enabling them to displace the costs of faulty death sentences onto others, the current death penalty system encourages those officials to generate as many death verdicts as they can, even in marginal or inappropriate cases, often through corner-cutting and manipulation (p. 2155).

One specific form of manipulation discussed in the literature is prosecutors withholding favorable evidence (Gross, 1996; Liebman, Fagan, West, & Lloyd, 2000; Moran, 2007; Walker, 2006).

A third major area of concern is the lack of a fair playing field for defense counsel. Committed defense counsel, with sufficient resources, face the obstacle of a jury pool that is restricted to those who are "death qualified" (Gross, 1996). Of course, many defense counsel are not committed, nor in possession of sufficient resources, and the Supreme Court has established a low threshold for "effective" assistance of counsel; even so, one major cause of death penalty reversals is the ineffectiveness of the state-provided defense counsel (Liebman et al., 2000; Uphoff, 2006). In general, states fail to adequately compensate capital case defenders or experts, leaving attorneys that lack the experience and resources to effectively defend one's life (Walker, 2006).

Thus, while the Supreme Court has indicated that juror sentencing discretion is required, the entire process prior to a case being submitted to the jury is rife with discretion. While discretion might be considered an important element of political judgment, in the case of the death penalty the concern is that it leads to consideration of improper criteria, such as obtaining a conviction, rather than whether justice is done in the immediate case. Such concern is bolstered with the exoneration of persons housed on death row.

This paper seeks to understand views of capital case reversals after the decision. Particularly, while prosecutors are charged with ensuring that justice is carried out, career ambitions and personal pride might lead them to view reversals as a loss, as opposed to the system correcting a mistake. How prosecutors feel about reversals could be correlated with a major miscarriage of justice—prosecutorial misconduct.

Given the decision of whom to prosecute and for what crimes, prosecutors are extremely powerful within the system. As part of this power the prosecutor has a certain amount of freedom and opportunity to bend the rules of law to secure a conviction. Ethical rules governing prosecutors are vague, and assume that all prosecutors genuinely strive for justice and fairness in all proceedings. Also, prosecutorial misconduct is not strictly punished (Joy, 2006). Since prosecutorial misconduct seems dependent on the attitudes of prosecutors, their attitudes toward reversals are important.

Methodology

To survey the responses of the various participants in capital case reversals, we used LexisNexis and searched major U.S. newspapers from 1997-2006 for two necessary terms: "death penalty" and "reversed." All articles that reported on a death penalty reversal or exoneration were identified and read for their content. Background on each case was gathered from each article, including the case title, when the crime was committed, what was reversed (the sentence only, or the conviction) and whether the reversing court was state or federal. We paid particular attention to two factors. First, we wanted to know the reason for the reversal. Second, we wanted to know the reported reaction of interested participants, focusing especially on prosecutors and defense attorneys.

To identify the reaction of interested participants, we read the news reports for all statements or quotes. Every quote reported in the article was recorded and further coded along various dimensions discussed below. We then identified a range of "interested participants." These included the defense counsel, the defendant or a family member, a member of the victim's family, and the prosecutor. Given the lengthy nature of some death penalty litigation, some articles reported statements by both a former prosecutor, who tried the case, and a current prosecutor. Additionally, several articles included responses from the state's attorney general. Finally, we recorded statements by other interested parties, including law professors and organizations such as the American Civil Liberties Union.

This methodology is a form of emergent content analysis. While we began the analysis with ideas of what relevant categories would be, we revised these categories to accommodate the responses that we found (Neuendorf, 2004). Our central interest was to determine how these parties viewed the reversal, and we coded thematically (Mannheim, Rich, Willnat & Brians, 2005; Neuendorf, 2004). Two main reasons for reversal are procedural (or legal) error, and evidentiary problems. Legal error includes trial court rulings or instructions, and effectiveness of counsel. Evidentiary reversals were based on items such as DNA evidence, recanting of witness testimony, and withheld evidence. One naïve assumption is that virtually all parties would celebrate a decision that determined a person had been wrongly convicted. Under this framework, a reversal would be a carriage of justice, and defense and prosecutors alike, as officers of the court, would be happy to have a wrong righted. Students of law and courts, and students of policing and prosecution understand, however, that political actors often have personal commitments. From this perspective, parties that have invested time and resources into a case would not be enthusiastic about having that case overturned. Indeed, they might view the appeals court decision as the miscarriage of justice. For instance, Gross et al. (2005) state,

> …prosecutors are exceedingly reluctant to reverse judgments or reconsider closed cases; when they do—and it's rare—it's usually because of a compelling showing of error. Even so, some state officials continue to express doubts about the innocence of exonerated defendants, sometimes in the face of extraordinary evidence (p. 525).

Gross and Matheson (2003) found similar commitments to the guilt of an exonerated person by families of victims.

We recorded statements of five main types. The party might make a statement identifying a miscarriage at either 1) the trial or 2) the appeal, or a carriage of justice at 3) the trial or 4) the appeal. The fifth type was a more neutral statement, either about the person exonerated, or a statement on the victim. Since we believe that the actors have commitments, the coding means different things for the different actors, and we have different expectations about the likely frequency of each type of statement.

Given our focus on reversals, we would not expect any statements on a miscarriage on appeal, or the corollary, a carriage of justice at the trial by the defense. Similarly, the prosecutor would be expected to consider the initial verdict appropriate (carriage at trial) and the overturning of the verdict a miscarriage on appeal. The prosecutors, however, may also term what is, to them, a legal loss, as a carriage of justice. Thus, we might expect them to embrace the appellate court ruling, and by implication, a prosecutor may indicate that justice was not done at the trial. Especially given that many exonerations take years, if not decades, a prosecutor who was not involved in the initial case would have more of an interest in the present integrity of the office than a commitment to the overturned case. However, we do not expect this last category of statements to be common, given the commitments that we addressed above.

Reporting Practices

This study is limited in that only statements reported on by the media are examined. Accordingly, understanding what and how the media reports on capital cases is essential. Since news reporters generally follow a pattern and system when collecting information and writing stories, one would expect trends to appear. Literature on this topic does provide insight into how reporters and editors make such judgments. One of the most important factors of news reporting is that the newspapers selected are all privately owned businesses. These papers seek to create profit by selling more papers. To sell more papers, writers and editors turn to personalized, graphic stories, as opposed to objective stories that explain broad concepts (Bennett, 1996; Graber, 2006).

For example, if a death sentence is overturned, a newspaper is more likely to report on the graphic details of the crime, or the family members of the victim, in place of the legal roots of the decision. Therefore, it should be expected that many of the statements collected will inaccurately inflate emotions. Moreover, since reactions by the parties involved are often more engaging than a court's decision and opinion, stories tend to be more reaction-based, which can skew the coverage. "Reaction-oriented coverage," argues Haltom (1998, p. 94), creates inaccuracies in the stories that shape public understanding of the legal process. For instance, in discussing coverage of investigations and trials, Haney (2006) argues the media tends to

demonize the accused, present criminals as people that cannot be rehabilitated, and over-emphasize the gory details of the most heinous crimes, under-emphasizing criminal backgrounds and the various social factors in play. Since the sentencing process in capital cases is unique because it asks jurors to determine the defendant's state of mind, jurors are especially susceptible to these emotional influences, "which, in turn, increases the frequency with which miscarriages of justice occur" (Haney, 2006, p. 145).

In addition, structures of news reporting may distort the coverage. First, writers follow a pattern in reporting, following the same steps for different stories, which leads to a reliance on official sources. This way, official sources become the dominant voices in stories, possibly shaping the story to enhance their own credibility while discrediting other parties (Bennett, 1996). To increase accuracy and ensure reporting speed, reporters are pressured to use direct quotes from official sources (Haltom, 1998). Moreover, individual attorneys tend to develop a working relationship with reporters, with hopes of spinning the coverage in their favor (Paletz, 1999). The necessity of speed in the newsroom and the unique structures of the judicial branch could also lead to an obscured story. The importance of speed in the media forces reporters to follow standardized norms. In turn, reporters habitually rely on the same sources, covering only one aspect of the story, and are not allowed time or room for deeply investigative journalism (Bennett, 1996; Haltom & McCann, 2004; Paletz, 1999). Once a decision has been released, reporters are flooded with responses from the many parties, particularly interest groups (Paletz, 1999). With a high premium on speed and the multitude of responses, reporters only become more likely to fall into the normalized practices and follow the routine of news reporting, which can be at the sacrifice of deep investigative coverage. Due to the high newsworthiness and emotional attraction of death penalty cases, these factors of news reporting should only be amplified in the sample.

Thus, in looking at reactions to reversals, we are necessarily studying mediated reports. One form of mediation is the framing of the story: Bandes (2004) asserts that when reported, reversals are typically portrayed as tricks played by clever defense attorneys to set free a clearly guilty criminal. Another form of mediation is the selection of the quotes to incorporate into a story. In a study of victims' families responses in the media, Gross and Matheson (2003) state, "Strictly speaking, we can talk only about what they are reported to have said, which may tell us as much about reporters and their editors as it does about the families of murder victims" (p. 486-87). Given this restriction, though, the authors assume that distinct patterns in responses allow for certain broad generalizations about the respondents' state of mind.

Data

The LexisNexis search revealed 46 news reports of cases over a 10 year period. When we eliminated reporting on duplicate defendants, and stories that were not a reaction to a court decision, we were left with 41 separate cases. Table 1 summarizes characteristics of these cases.

In a majority of the cases, the conviction was overturned (56%). Further, in most of the cases, the reason for the reversal was procedural (58.5%). These reasons included jurisdictional issues, and challenges to the judge's sentencing authority. We were a little surprised that the procedural outweighed the evidentiary, because we expected in the timeframe under study that DNA testing would play a larger role.

Unsurprisingly, more than 80% of the cases were from state courts. To illustrate just how slow the machinery of death works, nearly two thirds of the reversals came 11 or more years after the initial conviction.

Table 1.
Characteristics of death penalty cases overturned, as determined from news articles (N = 41).

What was overturned	Reason for overturning	Court overturning	Years after conviction
Conviction: 23	Evidentiary: 19	State: 33	1-10: 12
Sentence: 18	Procedural: 24	Federal: 8	11+: 23

Reported Reactions

As expected, the most frequently reported reaction was from prosecutors**,** which follows from the literature describing how reporters depend on official sources. Including prosecutors, former prosecutors, and other representatives of the legal system, namely the attorney general, 32 statements were recorded in 29 cases, as seen in Table 2. Defense attorneys were the second-most quoted parties, with their views being reported in 22 cases, or 54%. The victim's family was quoted in 10 stories, while the defendant, or a defendant's family member, was quoted in 6. Three stories reported a judge's comments, drawn from the opinion, and eight stories quoted an additional party. All of these were parties committed to abolishing the death penalty or professors involved in innocence projects. This relatively low number of reported statements makes use of inferential statistics problematic, but we can explore further our expectations of reactions.

Table 2.
Percent of articles quoting particular party in death penalty reversals

Party	Percent articles quoting (N = 41)
Prosecution	71%
Defense	54%
Victim's family	24%
Other	20%
Defendant/defendant's family	15%
Judge	7%

Table 3 classifies these recorded statements as to whether a party believed justice was served. Our expectation of defense counsel statements is borne out: these hard fought cases have resulted in some of the few victories defense counsel experience in appellate litigation. Of the 22 statements made, 4 (18%) were relatively neutral, speaking not about the case but the future plans of the client. The remaining 82% spoke in some form to a wrong being righted, a carriage of justice. Of these, 44% (N = 8) made a statement about a miscarriage at the trial, and 56% (N = 10) made statements about a carriage of justice on appeal. The distinction between a miscarriage at the trial and a carriage on appeal lies within the general tone of the defense's statements. A negative statement that speaks of wrongdoing is a miscarriage at the trial, while a statement of victory or the system functioning correctly is assumed to be a carriage on appeal. For example, the following two statements were coded as a miscarriage at trial: "This was a concerted effort of a small number of people in the police department, the crime lab and the prosecutor's office to misdirect this whole case" (Pierre, 2001, p. A3); and, "It shouldn't have happened. It happened because people that all of us trust…police, prosecutors, the system… failed" (Furst, 2001, p. 1A). In contrast, statements such as the following were coded as a carriage at appeals: "You're always surprised when you win because when you do criminal defense work, you don't win very often…"; and "That was our goal," she said, "to get him off death row" (Young, 2003, p. A1).

Table 3.
Prosecutors' and defense attorneys' reactions to death penalty reversal

	Carriage at trial	Miscarriage at trial	Neutral	Carriage on appeal	Miscarriage on appeal
Prosecuting Attorney (N = 32)	12.5%		22%		53%
Defense Attorney (N = 22)		44%	18%	56%	

Prosecutors are the parties with the mixed motives in this study. On the one hand, sometimes the conviction being reversed was one they had secured, and thus they have a vested interest. On the other hand, as officers of the court, and the reputation of their office over the long run, they have at least a nominal interest in fairness. Of the 32 statements made by any prosecutor, a full 65% (N = 21) suggested either that the outcome of the trial was correct, or that the outcome of the appeal was incorrect: The trial had been a carriage of justice (N = 4; 12.5%) or that the appeal had been a miscarriage of justice (N = 17; 53%). In seven cases (22%) the comment was neutral on the issue of mis/carriage; several of these included statements about the victim. Statements about systemic errors or directly about the defendant as an individual were coded as a miscarriage on appeal. This category included statements such as, "[This is] a highly unusual procedural move that belies an extremely activist court that is taking over the sentencing from the bench" (Bergman, 2003, p. B1); and "We should live under the rules of the Supreme Court until they're overturned, not use

legal Ouija boards," Nixon said. "And I don't believe that Chris Simmons' life would have been turned around by one more birthday party" (O'Neill, 2003, p. B1).

Conversely, statements that reaffirm guilt at the trial level or comment on the original proceedings were coded as a carriage at trial. One example is, "We feel the original jury verdict was a just and fair verdict," Jansen said Monday. "Personally and professionally, we're satisfied that we tried and convicted the right person" (Morton, 2001, p. 1). Finally, four reported statements suggested that the appeals system demonstrated a carriage of justice in righting a wrong, or, more gently suggested that the system was fallible, and that there may have been a miscarriage of justice at the trial. For instance, the following statement was coded as a carriage on appeal because it describes the system as functioning properly, carrying out justice: "Justice requires the action we have taken today. It also requires that we do everything we can to solve this case" (Bonner, 2001, p. 11). While there were two of each of these comments, it is noteworthy that one of each was reported in one case, an exoneration based on DNA 19 years after the initial conviction.

It is also revealing to examine the types of statements by the reason for the reversal. Seven of the reversals were based on DNA evidence. In three of these stories, no prosecutorial reaction was reported, while in two the reaction focused on the victim and the now unsolved case. In one case, reported above, the prosecutor embraced a carriage of justice, but in the remaining cases, the prosecutor's reaction focused on the bad character of the exonerated defendant.

What happens when the grounds for reversal becomes more disputable? Other common reasons for reversal are weak evidence, including the recanting of testimony, and the judgment of an appellate court that the trial court had followed inappropriate procedures. Nineteen of the reversals were for reasons coded as procedure, and 15 of these reported a reaction of a prosecutor. In two thirds of these (N = 10) the prosecutor made a comment that suggested the appellate decision was a miscarriage of justice. An additional two stories (13%) reported that the trial had been a carriage of justice, while in three cases, or 20% of the stories recording a reaction, the prosecutor's statement was neutral on the issue of mis/carriage. Similarly, when it is the sentence and not the initial conviction that is overturned, prosecutors might be expected to have a greater stake in the case, as the court has not disturbed the conviction. We recorded 12 statements in 18 cases involving the overturning of a sentence, and in two thirds of these (N = 8) the prosecutor made a statement suggesting that there was a miscarriage on appeal. The other four statements were neutral as to mis/carriage, such as the prosecutor's office having to decide how to proceed now that the sentence has been overturned

Conclusion

Justice is in the eye of the beholder. Our review of reversals of death penalty convictions and sentences reveals that interested parties make statements that reflect those interests. While the small number of cases makes statistical analyses problematic, the relationships that we would expect to find have been borne out. Prosecutors are committed to their jobs and their offices, and the work they produce. Seeking the death penalty is a costly exercise that requires commitment; a court overturning a conviction or a sentence challenges the commitment and effort they have invested.

Still, it is remarkable to us that the stories under review here predominantly occurred after widespread attention was brought to the systemic problems of the machinery of death. The Illinois moratorium and later commutation of sentences by Governor Ryan in the shadow of numerous exonerations received national headlines in 2000. Several years later, state legislatures and courts continue to tinker with the machinery of death. For many, the numerous reversals and exonerations demonstrate that the system is fraught with error. Liebman et al. (2000) for instance, state:

> It may be that capital sentences spend so much time under judicial review precisely because they are persistently and systematically fraught with alarming amounts of error, and that the expanding production of death sentences may compound the production of error (p. 1844).

Does this mean there are many miscarriages of justice? Not all agree; just recently, the Supreme Court confronted this position and a majority of justices rejected it. Justice Scalia concluded the miscarriage was not the punishment of the innocent, but quite the opposite:

> Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free (*Kansas v Marsh*, *2006,* p. 2539).

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TWENTY YEARS OF FEDERAL CRIMINAL SENTENCING

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Abstract

This paper presents the philosophical beginnings of determinate sentencing for criminal offenders, legislative creation of the United States Sentencing Commission, development by the Commission of the Federal Sentencing Guidelines, and implementation of mandatory guidelines by the federal judiciary. It then discusses several legislative and Constitutional issues that have affected federal sentencing (primarily over the last 20 years) resulting in the Supreme Court declaration that the Federal Sentencing Guidelines are voluntary, not mandatory. The author concludes with some discussion of the current confusing sentencing situation and possible solutions.

Twenty Years of Federal Criminal Sentencing

Empirical studies show that well managed guidelines make sentencing more predictable and consistent; guidelines should classify offenders and offenses in reasonable ways, authorize sentencing that makes sense to most of the judges and prosecutors who must apply them, and allow for flexibility of individualized cases for special circumstances or application of rehabilitative and incapacitation capacity consideration (Tonry,1993). The Federal Sentencing Guidelines did not do this. This paper is concerned with the legislative and Constitutional matters that have affected federal criminal sentencing over the last two decades and highlights current unrest in criminal sentencing.

Since 1987, Congress, with the support of the Supreme Court, has required that offenders sentenced federally use a strict and detailed set of sentencing guidelines created by the United States Sentencing Commission (USSC). Federal parole was abolished, although the United States Parole Commission still exists. During the last two decades Congress has intervened in sentencing with one of the most notable changes being legislation requiring mandatory minimum sentences. The U.S. Sentencing Commission (2006) continues to provide data and to revise the guidelines, presenting yearly revisions to Congress. With one notable exception regarding cocaine, the legislature has accepted these revisions. Judges generally continue to follow the prescribed guidelines, and federal probation officers continue to make sentencing recommendations based on their investigations of the case and the sentencing guidelines.

In January 2005, in the case of *United States v. Booker,* the Supreme Court declared the federal guideline system unconstitutional and further decided the guidelines were advisory. There were problems in the system pre-*Booker* such as mandatory minimum sentences, the length of some drug sentences, and the rigidity in

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criminal history rules, which needed to be addressed. The *Booker* decision has now added to the complexity and increased the confusion surrounding the guidelines.

This paper discusses the federal guidelines from a historical and current perspective primarily through reviewing documents from the USSC, court decisions, judicial opinions, legislation, and opinions from practitioners and researchers. During part of the 20 year period under consideration, the author was a Commissioner on the U.S. Parole Commission (USPC), served as Chair of the USPC and thus for a year and a half as an ex-officio member of the USSC. This post within the U.S. Department of Justice has thus provided knowledge based on years of experience, specifically between 1983 and 1996.

Pre Guideline History

For two-thirds of the 20th century, criminal sentencing was indeterminate with judges and parole boards making decisions about sentences and time served. This model was offender-based and concerned with rehabilitation. Between 1972—1976, the United States Parole Commission (2003) (known as the Board of Parole until 1976) initiated the first guideline system in order to provide a method for structuring and controlling parole decision-making. The establishment of the federal parole guidelines in 1976 attempted to provide a balance between unstructured discretion and a fixed and mechanical approach; the system was intended to promote openness and enable public assessment of parole decisions (Getty, 2000).

In the early 1970s politicians and others were concerned about judicial sentencing decisions which seemed random and closed. For example, in 1973 Judge Marvin Frankel authored *Criminal Sentences: Law without Order*, a book in which he criticized the indeterminate federal sentencing system for "unruliness, the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory" (Luna, 2004, p. 4). His proposed remedy was the establishment of a commission on sentencing to develop rules that would provide direction for trial courts in determining appropriate punishments.

According to *Washington Post* articles, the beginning of federal sentencing reform dated to a 1975 party hosted by Senator Edward M. Kennedy (D-Mass.) in which Judge Frankel and some criminal justice scholars inspired the Senator to lead a charge in Congress to reform sentencing. Senator Kennedy proposed legislation for the next seven years until finally in 1984 during the last hours of the 98th Congress, the Sentencing Reform Act (SRA) passed as a rider to a general crime control bill (Getty, 2000).

Creation of the Guidelines, 1984—1987

The SRA established an independent judicial agency, the United States Sentencing Commission, consisting of seven members appointed by the President and confirmed by the Senate. Stipulations included that the commission consist of no more than four members from the same political party and with three commissioners as judges. The Act further ended indeterminate sentencing, eliminated federal parole, and required judges to set a specific term to be served in full after allowing for a small (15%) reduction for "good behavior." Between passage of the SRA in 1984 and implementation in 1987, the Sentencing Commission created the Federal Sentencing Guidelines to achieve uniformity and a reduction in unwarranted disparity. The

guidelines set out a range of possible punishment for each crime and allowed judges to choose the appropriate level of severity based on the facts of each case. This determinate, offense-based system abandoned the rehabilitation model and supported the "tough on crime" philosophy of the 1980s.

Realizing that releasing inmates to the community after service of 85% of their given sentence without parole was unrealistic, the commission later created an additional one to five year sentence of supervised release to be served in the community. Decision-makers in an indeterminate sentencing system are a few (less than nine) parole commissioners, whereas in a determinate system over 678 federal judges make decisions; in both systems federal probation officers supervise those who are released (Rehnquist, 2005).

According to a report by the Sentencing Commission,

> The Sentencing Reform Act of 1984 ushered in a new era of sentencing in federal courts. Prior to implementation of the SRA, federal crimes carried very broad ranges of penalties, and federal judges had the discretion to choose the sentence they felt would be most appropriate. They were not required to explain their reasons for the sentence imposed, and the sentences were largely immune from appeal. The time actually served by most offenders was determined by the Parole Commission, and offenders, on average, served just 58% of the sentences that had been imposed. The sentencing process, a critical element of the criminal justice process, was opaque, undocumented, and largely discretionary. Because of its impenetrability to outside observers, there was a sense that the process was unfair, disparate, and ineffective for controlling crime (United States Sentencing Commission, 2004).

It is notable that since 1976 the Parole Commission has provided reasons for decisions outside the parole guidelines (United States Parole Commission, 2003).

Implementation of the Guidelines

The first 15 months after implementation of the guidelines were described as a period of "extraordinary litigation." About 200 judges invalidated the guidelines in whole or in part; some courts refused to implement them, whereas about 120 judges upheld their constitutionality (Getty, 2000). In the case of *Mistretta v. U.S.*, the Supreme Court, with only Scalia dissenting, said the SRA was Constitutional. The Supreme Court majority stated that although Congress can not generally delegate its legislative power to another branch of government, in this case the judicial branch, Congress can obtain assistance from other branches.

For years, the guidelines were unpopular, especially with judges who had lost power and scholars who studied the system. For example, in 1990 a Federal Courts Study Committee report received testimony from 270 witnesses including judges, prosecutors, defense attorneys, probation officers, and federal officials, with only four individuals expressing support of the guidelines. These four were the U.S. Attorney General and three members of the USSC. A 1992 poll found more than half of all federal judges believed that the federal guideline system should be completely eliminated, while a 1997 survey concluded that more than two-thirds of federal judges viewed the guidelines as unnecessary (Getty, 2000). Basically, many federal judges saw the sentencing guidelines as a power grab by the legislative branch. As former Attorney General Ed Meese explained "A major cause of the federalization of criminal

law is the desire of some members of Congress to appear tough on crime, though they know well that crime is fought most effectively at the local level" (Reynolds, 2005).

Between 1987 and 2005

The Sentencing Reform Act of 1984 changed the role of trial and appellate judges, prosecutors and defense attorneys, and federal probation officers. Other changes stem from subsequent legislation and executive branch policies. Changes in sentencing patterns include an increase in the length of federal sentences, especially for drug offenders, and a shift to incarceration away from probation resulting in a dramatic increase in the Federal Bureau of Prisons population. Process changes include a decrease in the number of federal trials, because more offenders agreed to plea bargain. Dissatisfaction with the guidelines and with the current system (which is not the one envisioned when Congress passed the SRA) continues, with only federal prosecutors, who now dominate the federal sentencing process, liking the system (Miller, 2004).

More specifically, changes include: increased prison populations and draconian drug sentences, the Sentencing Commission serving as a mini legislature, relevant conduct provisions, passage of mandatory minimum sentences, further restrictions of judicial power, charge and sentence bargaining, increasing guideline complexity, and uncertainty about success of supervised release.

One of the effects of determinate guideline systems is that the United States incarcerates more offenders per capita than any other country in the world. Most scholars agree that increasing prison populations are a matter of policy changes, not increased crime. "Changes in sentencing law and policy not increases in crime rates, explain most of the six-fold increase in the national prison population" (Sentencing Project, 2007, p.1). These changes have impacted racial disparities in sentencing, increased the use of mandatory minimum sentences, and required offenders to serve more prison time. Federally 55% of the current prison populations are drug offenders. Since the Federal Guidelines were created during the height of the "war on drugs" policies, they are particularly draconian about drug offenders and offenses. In developing sentences for drug trafficking offenders, the Commission was heavily influenced by passage of the Anti-Drug Abuse Act of 1986, which created five and ten-year mandatory minimum penalties. The time served by federal drug traffickers was over two and a half times longer in 1991 than it had been in 1985, hovering just below an average of 80 months (United States Sentencing Commission, 2004).

Currently, almost 7 million offenders are under correctional control with 2.5 million incarcerated (Bureau of Justice Statistics (BJS), 2006). While crime rates have been decreasing since 1992, prison populations have continued to increase, although at a decreasing rate. Criminal sentencing has increasingly been federalized. For example, the percentage of federal prisoners incarcerated for drug offenses jumped from 17.8% in 1984 to 60.7% in 1995. (Reynolds, 2005).

Each year the USSC submits revisions of the Federal Sentencing Guidelines to Congress. According to the SRA, if Congress does not respond to the Sentencing Commission's proposed revisions, these revisions are included in the guidelines and a new manual of about 1,800 pages is printed and distributed. Only once, when the Commission recommended decreasing the sentencing differences between crack and powdered cocaine, did Congress disagree with the recommended revisions. Thus, the

Commission acts as a mini legislature or as Supreme Court Justice Antonin Scalia said in his dissent in *Mistretta v. U.S.* as “a sort of junior varsity Congress.”

The federal guidelines rate crack cocaine as 100 times more serious than powdered cocaine, whereas the Parole Commission guidelines had rated these equally. In 1992 the U.S. Sentencing Commission proposed to rate crack at 10 times the severity of powdered cocaine; however, Congress intervened this time and refused to accept a recommendation of the USSC. Powdered cocaine is considered a drug of the wealthy whereas crack cocaine is a poor man’s drug used primarily by minorities; thus, this disparity was, and still is, considered by many as racially biased (Sherman, 2007). According to a report by the Sentencing Project (1997), defendants convicted of crack possession in 1994 were 85% Black. The USSC voted again in April 2007 to amend the Federal Sentencing Guidelines for crack cocaine offenses (Greenhouse, 2006); however, Congress has yet to change the 100 to 1 ratio.

According to the Sentencing Commission (2004),

> The many, sometimes overlapping provisions in the federal criminal code create the potential that similar offenses will be charged in many different ways. To better reflect the seriousness of each offender’s actual criminal conduct, and to prevent disparate charging practices from leading to sentencing disparity, the original Commission developed guidelines that were based to great extent on offenders’ real offense behavior rather than the charges of conviction alone (p. *v*).

This system of "relevant conduct" and the modified real offense allows for consideration of real offense facts, facts beyond those directly related to the offense of conviction. Most sentencing authorities agree that this radical policy that requires judges to consider real-offense sentencing information helped make the Federal Sentencing Guidelines overly rigid and complex. The real offense policy contributed directly to the Supreme Court's decision in *United States v. Booker* (2005), a decision that changed the guidelines from mandatory to advisory.

According to the Sentencing Commission, the guidelines achieved certainty of punishment or “truth-in-sentencing” by the abolition of parole and punishment, and they also became more severe.

> The proportion of probation sentences declined, use of restrictive alternatives such as home confinement increased, and the rate of imprisonment for longer lengths of time climbed dramatically compared to the pre-guidelines era. While mandatory minimum penalties had some direct and indirect effects on these trends, careful analysis of sentencing trends for different types of crimes demonstrates that the sentencing guidelines themselves made a substantial and independent contribution (United States Sentencing Commission, 2004, p. 2).

The 2003 Feeney Amendment to the Protect Act significantly restricted federal judges’ ability to impose sentences outside of the guidelines. The amendment required a district’s chief judge to submit a written explanation, with supporting documents such as the pre-sentencing report and plea agreement, to the Sentencing Commission within 30 days of a judge imposing a lenient sentence. Upon request, the Commission must pass along this data to the Justice Department and to the judiciary committees in both chambers of Congress (Christensen, 2005). Thus, this amendment further increased prosecutorial power.

Before guidelines, about 90% of offenders accepted a plea agreement with 5% going to trial and 5% electing trial before a judge. Currently, 97% of cases in federal court enter into plea agreements with prosecutors without a judge or jury weighing an offender's fate (Lynch, 2005). The real offense sentencing system, which allows prosecutors and judges to add years of prison time to a person's sentence based on information not presented to the jury and thus not proven beyond a reasonable doubt, is regularly used to convince offenders to plead guilty and not risk a trial.

Another argument against the guidelines is that they are too complex. The sentencing table consisted of 258 boxes as compared to the 32 boxes of the U.S. Parole Commission guideline system. The yearly instructions for the Sentencing Commission's table are about 1,800 pages long.

Twenty years after the implementation of the determinate sentencing system, the U. S. Parole Commission still exists and is responsible for the few remaining "old law" (pre- guideline) cases. Over the years Congress has given this agency additional responsibility. For example, when the District of Columbia prisoners were transferred to the Federal Bureau of Prisons, they were entitled to parole and thus became the responsibility of the USPC.

Under the federal determinate system, there are two sentences given for convicted felons. The incarceration sentence, less 15% good time, will be served in prison under the control of the Bureau of Prisons and the supervised release sentence of one to five years to be served in the community under judicial control, with Federal Probation Officers carrying out the orders of the court. The recidivism rates under the supervised release system are more divergent than those under the parole system, because the parole system was national. The supervised release system is implemented in 94 judicial districts with numerous judges in each. Little research has been done on recidivism rates under supervised release because the data is difficult to obtain, but in that done by this author looking at the 1994—1998 years, the recidivism rates of parole and of supervised release in the aggregate were similar. However, the recidivism rates for "supervised releasees" vary significantly among the districts (Getty, 2000).

Recent Changes

Recent Supreme Court Cases

Gradually criminal justice professionals became accustomed to the guidelines and to the political situation which supported the tough-on-crime philosophy of the 1980s with long sentences for criminals and use of the prescribed guidelines. Fast forward to June 2004 when the Supreme Court found in *Blakely v. Washington,* 542 U.S. 296 (2004), that the sentencing guidelines in the State of Washington were unconstitutional, because they allowed a judge to enhance criminal sentences based on facts other than those decided by a jury or confessed to by a defendant.

Because the federal guidelines were similar, the Court decided in *United States v. Booker*, 543. U.S. 320 (2005), that the federal guidelines were unconstitutional for the same reasons. On February 28, 2003, Booker was arrested after police officers found 92.5 grams of crack cocaine in his duffle bag. He later gave a written statement to the police admitting to selling an additional 566 grams of crack cocaine. In 2003, a jury in the U.S. District Court for the Western District of Wisconsin found Booker guilty of

possessing with intent to distribute at least 50 grams of cocaine base. The federal guidelines provided for a sentence of 10 years to life. At sentencing, the judge found by a preponderance of the evidence that the defendant had distributed 566 grams over and above the 92.5 grams that the jury had found and that he had obstructed justice. With the judge's findings, the guidelines increased to 30 years to life, and the judge sentenced him to the 30 year minimum. Booker appealed to the U.S. Court of Appeals for the Seventh Circuit claiming that the sentencing guidelines violated his Sixth Amendment rights as the judge was able to find facts, other than his criminal history, that determined his sentencing range absent the findings of the jury.

The Court affirmed Booker's conviction but found the guidelines violated the Sixth Amendment as interpreted in *Blakely* and reversed Booker's sentence. In other words, the Court held that "the Guidelines were not guidelines in any meaningful sense of the word as long as they required judges to find facts that had consequences pre-ordained by the United States Sentencing Commission" (Gertner, 2006). The Court delivered two important opinions in the 118 page decision, both by a five to four majority. First, the Court held that the sentencing guidelines violated a criminal defendant's Sixth Amendment right to trial by jury insofar as they permit imposition of a sentence based on facts found by a judge and not a jury. In the other opinion, written by Justice Breyer, the Court remedied this violation by rendering the guidelines advisory.

More recently, in January 2007, the Supreme Court by a 6 to 3 vote held that California's determinate sentencing law violated John Cunningham's right to trial by jury because the judge alone had elevated his sentence to the maximum allowable (*Cunningham v. California,* 05-6551 2007). Former police officer John Cunningham, was convicted by a jury in California of sexually abusing his young son. The judge found six aggravating factors and sentenced him to the maximum allowable sentence of 16 years. He appealed the sentence length but the Court of Appeals upheld the length. The issue of whether the judge's sentence violated his "right to jury trial" stems from the 2004 *Blakely* decision in which the court said that "any fact that increases the penalty for a crime beyond the prescribed statute maximum must be submitted to a jury and proved beyond a reasonable doubt." The California Supreme Court denied Cunningham's petition for review and he appealed to the U.S. Supreme Court.

The Claiborne and Rita Cases

On November 4, 2006, the U.S. Supreme Court granted certiorari in two cases which could have clarified the law surrounding federal sentencing guidelines. The cases, *Claiborne v. United States,* 06-5618 (2006), and *United States v. Rita,* 06-5754 (2006), were selected from dozens of similarly themed appeals to address the issue of the reasonableness of sentence lengths below and within the guidelines and clarify the direction of federal sentencing now that the guidelines had been declared advisory.

The judge in the *Claiborne* case imposed a sentence outside the recommended Federal Sentencing Guidelines. According to the guidelines, 21 year old Mario Claiborne of St. Louis faced a range of 37 to 48 months in prison after pleading guilty in 2005 to two cocaine-related offenses. However, District Judge Carol E. Jackson imposed a sentence of just 15 months, calling even this excessive for a person with no prior record and a small quantity of cocaine. The U. S. Circuit Court of Appeals in St. Louis ruled in 2006 that the judge's proposed 15 month prison term was too lenient.

On June 4, 2007, the Supreme Court stated that the judgment of the Court of Appeals for the Eighth Circuit was vacated as moot, because the petitioner Mario Claiborne died on May 30, 2007.

The case of Victor Rita raises issues that are on the other side of the Claiborne case. Rita, a retired Marine and former federal worker, was convicted of making false statements in a federal investigation of the sale of machine gun kits. His sentence of 33 months was within the guidelines but he appealed citing his poor health and unblemished record. The Fourth Circuit denied his appeal saying that sentences within the guidelines are presumed to be reasonable. On June 21, 2007 the Supreme Court affirmed the judgment of the Court of Appeals.

The Court agreed to hear the same sentencing issue it was considering before the death of Mario Claiborne, the issue of whether it is unreasonable, absent special circumstances, for a federal judge to choose a sentence below the guideline ranges. The new case *Gall v. U.S.,* 06-8498 will be considered during the court term beginning October 1, 2007 (Denniston, 2007).

Selected Comments on the Guidelines—post-*Booker*

The U.S. Department of Justice finds the 2006 data issued by the USSC to be troubling because three problem trends are emerging post-*Booker*: 1) an increase in judge-made sentences imposed outside the ranges established by the Sentencing Guidelines; 2) shorter sentences for certain types of offenses; and 3) increased geographic and racial disparity in sentencing (United States Department of Justice, 2006).

According to the Commission, appellate courts are ruling in the same manner as pre-*Booker* and considering the reasonableness of a district court judge's decision. However, the New York Council of Defense Lawyers (2006) (who filed amicus briefs in the Supreme Court Cases of *Rita* and *Claiborne*) compiled 1,515 post-*Booker* review cases and found that the courts of appeal are applying reasonableness in a manner inconsistent with the statutory text. The appellate courts have affirmed all within and above guideline sentences while reversing nearly all below-guideline sentences appealed to the government.

Currently, the Commission is still focusing on sentencing uniformity and claims that the guidelines embody all purposes of sentencing. The USSC has issued statistics about judicial "conformance" with the guidelines and has authored several publications which have been made available to Congress. According to a report by the Sentencing Commission, most judges in most cases continue to sentence according to the now "advisory" guidelines. In fact, about 67,999 people were sentenced last year with the average sentence length of 58 months, one month longer than the average in 2006. The rate of sentences below the guidelines has increased, but only a little from 9% to 15%. Prosecutors appeal below guideline sentences occasionally, and according to the Sentencing Commission Report, in the 21 appeals in 2006, the appellate court reversed 15 of the circuit court decisions.

The Justice Department finds troubling trends; the Sentencing Commission reports data indicating the federal courts have been spending the last 24 months deciding how to interpret the *Booker* decision. The circuits have split in their opinions; thus, "one clear effect of *Booker,* then, is to produce a greater degree of regional non-uniformity in sentencing practices" *(*McConnell, 2006).

As District Judge Nancy Gertner (2006) wrote, announcing that the guidelines are advisory doesn't make them so. No matter what they are called they are still influential. She believes that judges will still use a concept called "anchoring," a strategy used to simplify complex tasks. Before *Booker,* the USSC's focus was guideline enforcement and over time judges became clerks. As she wrote, the commission became the regulator and judges the regulated (Gertner, 2006).

Supreme Court Justice Breyer, who wrote the opinion making the guidelines advisory, was the original U. S. Sentencing Commissioner who co-authored the guidelines. The chair of the USSC, William Wilkens, the other co-author, had been a clerk for Senator Strom Thurmond and was a district judge in South Carolina. Following his service to the Sentencing Commission, he received an appointment to the Fourth Circuit Court of Appeals where he now serves as Chief Justice. Of the five justices who supported the decision making the guidelines advisory, two (Justices O'Connor and Rehnquist) are no longer on the court. The two newest justices Alito and Roberts were not involved with the *Booker* decision but affirmed the circuit court in the Rita case (Greenhouse, 2006).

Two of the foremost current authorities on federal sentencing, law professors Douglas Berman of Ohio State University and Frank Bowman of University of Missouri–Columbia, debated about the future of federal sentencing during 2006 in *Legal Affairs*. Professor Berman's idea about the future of federal sentencing is to allow the advisory guideline system to continue while the Sentencing Commission and others assess its efficacy and fairness. He advocates waiting. He writes that since one of the guidelines' worst features, the real-offense sentencing, has been eliminated, at least the system's legitimacy should increase in the eyes of defendants, practitioners, and others (Berman & Bowman, 2006).

Bowman's idea is that the Sentencing Commission has been studying the post-*Booker* operation of the federal system and has reached conclusions (or had since this debate began in January 2006) (Berman & Bowman, 2006). He says the guidelines are legally relevant and even dominate in some federal jurisdictions, but the rate of compliance had declined by 11% from 72% to 61% overall, but in some districts has fallen 90%. Thus, disparity has not improved and has probably gotten more significant. The upward surge in sentencing length evident pre-*Booker* has stopped. The decrease in compliance is due almost entirely to judicial action whereas the guideline departures before *Booker* were at the request of prosecutors.

In an article about the failure of the federal sentencing guidelines, Bowman (2005) writes that the vision for the Commission was never fully realized, but in recent years has collapsed. He explains how the basic structural features of the SRA and the guidelines, in combination with decisions made by the Commission, Congress, the Judiciary, and the Department of Justice have shifted the institutional balance of power. The shift of power has been toward politicians in Congress and the Department of Justice. In individual cases, the shift has moved to the prosecutor away from the judge. Professor Bowman argues that since the guidelines are fundamentally flawed, the response to *Booker* should be reform. Bowman is advocating change now (Bowman, 2005).

Possible Actions

According to a January 9, 2007 article in the *New York Times,* Federal sentencing laws that require lengthy mandated prison terms for certain offenses are expected to

come under fresh scrutiny as Democrats assume control of Congress (Clemetson, 2007). She writes that judges are eagerly awaiting change since they say the automatic sentences determined by Congress strip judges of discretion and result in excessive punishments especially for low-level offenders. Interestingly William W. Wilkens, former chair of the USSC and guideline co-author, says "with the changing of the guard, there should at least be some discussion" (Clemetson, 2007). According to this article the Senate Judiciary Committee has no immediate plans for hearings (Clemetson, 2007).

The House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security is debating sentencing laws. In June hearings on mandatory minimum sentencing, the Subcommittee chair stated that sentences are too long, especially drug sentences which may be more draconian than murder. In an article about the hearings, the reporter quotes Subcommittee Chair Robert C. Scott (D-VA) saying "One of the glaring problems is the imposition of mandatory minimums that shock the conscience and violate common sense" (Lerman, 2007). In his testimony the Honorable Paul G. Cassells, Judge Judicial Conference of the United States, said when in Utah he recently in one day sentenced a murderer to 22 years in prison and a first-time offender, who carried a gun he didn't use or display during a marijuana deal, to 55 years. The Judge stated, "Judges aren't given the opportunity to assess the specific circumstances of individual cases" (Lerman, 2007).

The Department of Justice will seek restoration of the pre-*Booker* system, using a topless guideline approach and Congress will pass something similar to this unless the Supreme Court erects roadblocks by taking a case that applies the *Blakely* and *Booker* standards to minimum sentences. Then the Justice Department and Congress would be forced to accept the post-*Booker* advisory system or look at a different sentencing system entirely.

As previously stated, the Supreme Court has agreed to hear the case of *Gall* next term about the reasonableness of below guideline sentences. The Court also agreed to hear the issue of the long-standing dispute over the wide disparity in punishment between crack cocaine and cocaine powder offenses *Kinbrough v. U.S.,*06-6330 (Denniston, 2007).

Ideally, the author favors a return to an indeterminate system because it is offender-based, but realizes that in the current political "tough on crime," sentence-based environment, this is not a viable option. This author suggests, however, that researchers with access to the supervised release data study the goals for and success of the current supervised release system. This author agrees with testimony of Paul Rosenzweig (2005), that without legal restraint, the current advisory guideline system won't work either Constitutionally or politically. Unless restricted by the Supreme Court, Congress will and can continue to be expansive and punitive and will pass more mandatory minimum guidelines. Since the Sentencing Commission has been studying guidelines and the system post-*Booker* for several years, the USSC should create and recommend to Congress a workable sentencing system. Such a system would be less complex by combining and limiting the criminal offenses and reducing the number of offender characteristics that serve as enhancement factors.

As Bowman (2005) stated in closing the year-long debate with Berman, some institution must reconfigure the guidelines. He says Congress lacks the expertise; the Department of Justice has the expertise but not the motivation; and the judiciary doesn't do legislation. The USSC could, but continues to just gather data. "But without the engagement and leadership of the Commission,…the significant prospects of

significant positive change in federal sentencing are, frankly, a little bleak" (Berman & Bowman, 2006, p. 13). The author agrees that the USSC will not recommend a re-worked, more appropriate, revised guideline system, and the only probable solution to the confused federal sentencing situation is with the courts.

Conclusions

Several current issues have been presented in this paper. Since criminal sentencing, especially at the federal level, is in as much turmoil now as 20 years ago, it is again time for concern and debate about what is just sentencing and who should be responsible. The issues of determinate sentencing and the tough on crime philosophy will be debated again now that the mandatory federal guidelines are voluntary. The future of the federal guidelines must become clearer.

The existence or demise of federal parole is related to the debate about federal criminal sentencing, but supervised release instead of parole will probably continue and recidivism rates should be studied. Is the current, generally longer prison sentence with an additional sentence of supervised release reducing the recidivism rates? Is longer better or just more desirable politically?

The issue of the disparity of crack versus powdered cocaine will be debated by Congress and maybe even resolved equitably; the Supreme Court will consider the issue. As stated in the introduction, criminal sentencing, whether determinate or indeterminate, should classify offenders and offenses in reasonable ways that make sense to professionals who implement the system and allow for flexibility of individual cases for special circumstances or application of rehabilitative and incapacitation capacity consideration. The future of federal sentencing will probably be determined by the Supreme Court rather than Congress, the Justice Department, or the Sentencing Commission, and hopefully the new system will allow judges to judge and consider offenders more.

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INCARCERATED WOMEN AND DRUG ABUSE: AN INTERNATIONAL PERSPECTIVE

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Abstract

The climate of domestic drug policy in the United States as it pertains to both women and men at the beginning of the 21st century is the criminalization mode of regulation—a mode that is based on the model of addiction as a crime and one that is used to prohibit the use of currently illegal drugs. In Canada, drug policy is based mainly on the harm reduction model, a policy or program directed towards decreasing the adverse health, social, and economic consequences of drug abuse without requiring abstinence from such use. As a response to the problem of drug abuse, the United States national drug policies have emphasized punishment over treatment and, as argued in this paper, have had a disproportionate impact on women. Using a comparative analysis between these two societies, this paper considers the ramifications of these two regulatory modes through women's perspectives. This paper seeks an answer to the question: "Using an international perspective (i.e., Canada and the United States), is American drug policy directed toward women who abuse drugs a miscarriage of justice?"

Incarcerated Women and Drug Abuse: An International Perspective

The criminalization mode of regulation—a mode that is based on the model of addiction as a crime—is the domestic drug policy in the United States. Such a mode of regulation entails tough enforcement, and is the centerpiece of American drug policy in terms of rhetoric, budget, and substance (Boyum & Reuter, 2005). Drug policy in Canada is based mainly on a harm reduction model that operates with the assumption that some people who engage in high-risk behaviors are unwilling or unable to abstain. Rather than having abstinence goals set for them, clients in such programs take part in a goal-setting process, an approach that has been shown to correlate consistently with retention and success (Sobell, Sobell, Bogardis, Leo, & Skinner, 1992). Using a comparative analysis between these two societies, this paper considers the ramifications of these two regulatory modes through women's perspectives, thus combining my two interests, drug policies and women who are addicted to drugs.

I begin with an overview of the problem and significance of women's drug abuse in both the United States and Canada. I then continue with a discussion of the two modalities as they relate to women's experiences: the criminalization model and the harm reduction model. I conclude by arguing in opposition to the criminalization model as, in my view, such a mode of regulation is more harmful to women and, therefore, results in a miscarriage of justice[1] (Wellisch, Anglin, & Prendergast, 1994; Women's Prison Association, 2004).

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The Problem and Significance of Women's Addiction in the United States and Canada

Substance abuse continues to afflict both Canadian and American society to a great extent (Adrian & Kellner, 1996; Substance Abuse and Mental Health Services Administration (SAMHSA), 2000), resulting in serious consequences for those afflicted and for their families (Abbott, 1995). For example, in the United States, approximately 41.6% of women ages 12 or older reported using an illicit drug at some point in their lives (SAMHSA, 2006). Among pregnant women aged 15 to 44, 4% reported using illicit drugs while pregnant (SAMHSA, 2004). Approximately 38% of female high school students reported using marijuana (Centers for Disease Control (CDC), 2004), and of the 22,000 persons who died of drug-induced causes in 2001, 34% were female (CDC, 2004). In terms of alcohol use among American women, 77.6% of women age 12 and older reported ever using alcohol, while 60% reported past year use and 45.1% reported using alcohol in the past month (SAMHSA, 1999).

In the United States, of the 670,000 individuals admitted to emergency departments for drug related health problems, some 308,000 were women. This represents a 22% increase from 1995 (SAMHSA, 2004). Women also accounted for 30% of the nationwide admissions to all forms of drug treatment during 2002 (SAMHSA, 2004). Additional data show that more than half of treatment admissions for sedatives in 2002 involved women (SAMHSA, 2004). About 30% of the approximately 40,000 new HIV infections occur among women (CDC, 2001). In 1992, women accounted for an estimated 14% of adults and adolescents living with AIDS in the 50 states and the District of Columbia (CDC, 1998). By the end of 2005, this proportion had grown to 23% (CDC, 2005). Overall, the direct and indirect costs of drug abuse totaled more than $294 billion (U.S. dollars) in the United States in 2001 (Office of National Drug Control Policy (ONDCP), 2001).

Substance abuse among Canadian women continues to be a serious issue as well (Adrian & Kellner, 1996). In the 1994 *Canada's Alcohol and Other Drugs Survey* (Statistics Canada, 1996), 10% of men and 4.9% of women reported using cannabis in the past year while in the 2004 *Canadian Addiction Survey,* this increased to 18.2% of men and 10.2% of women. (Adlaf, Begin, & Sawka, 2005). In a 2002 *Canadian Community Epidemiology Network on Drug Use* (CCENDU) national report, the percentage of female drinkers increased in Canada, most pronouncedly among 20-to 24-year-olds. Since the 1970s, studies have found that Canadian women drinkers consume less alcohol and drink less frequently than men who drink. For example, in 2004 more women (74.2%) than men (53.4%) reported drinking no more than one or two standard drinks on a single occasion in the past year. However, alcohol is the most common substance used by women and its use has been on the rise over the past decade (Adlaf et al., 2005). Among Canadian women who were pregnant, 17–25% reported drinking alcohol during pregnancy. A larger proportion of women than men (23% versus 17%) reported using at least one mood-altering prescription drug; although, in the general population, women are half as likely as men to be current users of cannabis or any other illegal drug. Women are less likely than men to report legal problems but are more likely to report harm to home life as a result of their substance abuse (Dell & Garabedian, 2003).

In Canada, of the 18,124 cumulative AIDS cases in adults, 7.9% occur among women. The proportion of AIDS cases among women (relative to all reported AIDS

cases in adults for which gender and age are known) has increased over time from 5.6% before 1992 to 8.3% in 1995 and peaked at 16.4% in 1999. In 2001, the proportion of AIDS cases among women remained at 16% (Center for Infectious Disease Prevention and Control, 2003). From 1996 to 2001, injection drug use as a risk factor for HIV decreased substantially for females (from 51% in 1996 to 32% in 2001) and remained relatively stable for males (from 29% in 1996 to 22% in 2001) (Health Canada, 2002a). Needle-exchange and harm-reduction programs in Canada report significant use by women: for example, women comprise 35% of the approximately 6,000 registrants of the Vancouver Needle Exchange and were represented in the same proportion in the cohort of injection drug users involved in the Vancouver Injection Drug Use Study (VIDUS). Approximately 20% of injection drug users recruited in Montreal for an observational study of risk behaviors and HIV infection were women (Bruneau, Lamothe, Franco, Lachance, Desy, & Soto, 1997).

A report entitled, *The Costs of Substance Abuse in Canada 2002*, funded by the Canadian Center for Substance Abuse (Rehm, Baliunas, Brochu, Fischer, Gnam, Patra, Popova, Sarnocinska-Hart, & Taylor, 2006) and more than 10 other Canadian institutions, investigated the impact of substance abuse on Canadian society. It estimated the effects of tobacco, alcohol and illegal drugs in terms of death, illness and economic costs in 2002. The study revealed that substance abuse places a significant burden on the Canadian economy. It has both a direct impact on health care and criminal justice costs, and an indirect toll on productivity resulting from disability and premature death. Although the study did not use a gender breakdown, it did show that the total annual cost of substance abuse in Canada is $39.8 billion (CAD dollars) (based on 2002 data)—a cost of $1,267 to each Canadian. The study reveals that: legal substances (tobacco and alcohol) account for almost 80% of the total cost of substance abuse (79.3%); illegal drugs make up the remaining 20.7%; tobacco leads the way with a cost of $17 billion (42.7%); alcohol accounts for $14.6 billion (36.6%); and, illegal drugs account for $8.2 billion (20.7%) (Rehm et al., 2006).

The cost of substance abuse among both women and men is high in both personal and social terms for both the United States and Canada in the 21st century: totaling more than $294 billion (U.S. dollars) in the United States versus the cost in Canada of $39.8 billion (CAD dollars). Obviously, the costs are radically different between the two societies despite the disproportion in population (302 million in the United States versus 33 million in Canada). The public's belief in an ever-growing drug problem has fuelled the prohibitionist reaction to drug use (and the user) in the United States. Such a view assumes that illicit drug use is a morally corrupt behavior; therefore the control of such immoral behavior is necessary, requiring a strong law-enforcement apparatus and a drug policy that declares war on drugs and heavily punishes drug users (Cheung, 2000).

Canada's drug policy is based mainly on the harm reduction model and its public health principles which do not require abstinence from drug use. Such a model has proven to be cost-effective in dealing with drug abuse. For example, it increases social and financial efficiency by interrupting the transmission of infectious disease at a lower cost, rather than waiting to treat complications of advanced illness at a much higher cost (Drucker, 2006). Not only do harm reduction measures save human life and improve its quality by allowing drug users to remain integrated in society, but they also economically benefit communities (see Holtgrave, Pinkerton, Jones, Lurie, & Vlahov, 1998; Laufner, 2001; Lurie & Drucker, 1997).

However, how women who are addicts are treated is vastly different between these two societies, and how they are dealt with is dependent on the current modality. The next discussion centers on these two modalities as they relate to women's experiences: the criminalization model and the harm reduction model. Highlighted in this overview is how women are impacted through these two approaches.

The Criminalization Model

Criminalization refers to the fact that all existing laws prohibiting currently illegal drugs are enforced. Individuals caught possessing or trafficking drugs are charged, given criminal records, fined, and/or incarcerated (Haden, 2002). As Boyum and Reuter (2005) argue, the number of drug offenders in the United States under incarceration has grown tenfold since 1980, but there is strikingly little evidence that increased punishment has significantly reduced drug use. The "war on drugs" is now used to describe laws, policies, and practices that prohibit and harshly punish the use, possession, and/or sale of drugs deemed illegal or controlled. This drug war costs a great deal to fight—over $12 billion in 2004 alone—and has led to no measurable decline in illegal drug use. In 1959, as today, drug addiction was treated as a crime. Addicts could not seek and obtain treatment, and were subjected to police harassment, arrest, and incarceration. These punitive attitudes toward drug use and abuse have intensified over the last half-century, leading to the drastic increase in the number of women (as well as men) caught in the net of the war on drugs (Lapidus, Luthra, Verma, Small, Allard, & Levingston, 2007).

Nationally in the United States, there are now more than eight times as many women incarcerated in state and federal prisons and local jails as there were in 1980, increasing in number from 12,300 in 1980 to 182,271 by 2002. Between 1986 and 1999, the number of women incarcerated in state facilities for drug related offenses increased by 888%, surpassing the rate of growth in the number of men imprisoned for similar crimes. When all forms of correctional supervision—probation, parole, jail, state and federal prison—are considered, more than one million women are now behind bars or under the control of the criminal justice system (Bloom, Johnson, & Belzer, 2003), comprising 7% of the United States prison population (Owen, 2006). More than 71% of all female arrests are for drug-related offenses. Moreover, there was a 96% increase in female drug arrests between 1985 and 1996, far exceeding the 55% increase in male arrests during this same period (Federal Bureau of Investigation (FBI), 1998).

Obviously, although men still outnumber women in prison for drug offenses, the gap seems to be closing. For example, women convicted for drug offenses increased by 40%, outpacing convictions for men. Between 1980 and mid-2003, the number of women in state and federal prisons has risen nearly eightfold—from 12,000 to almost 98,000 (Harrison, Allen, & Beck, 2005), showing a rise of 108% compared to male prisoners—77% (Owen, 2006). In addition, almost one million women are on probation or parole (Bureau of Justice Statistics (BJS), 2004). The chance of a woman going to prison in her lifetime in 2001 was 1.8% compared to .3% in 1974, a six fold increase (BJS, 2004).

Women are significantly disadvantaged while in prison. For example, sexual abuse is a major issue. Exacerbating the problem, around 70% of guards in women's correctional facilities are men. These guards are responsible for monitoring female prisoners at all times and in all places, including showers and bathrooms. This

partially accounts for high numbers of rape, sexual assault, extortion, and groping during body searches (Amnesty International, 1999).

The imbalance of power between inmates and guards involves the use of direct physical force and indirect force based on the prisoner's total dependency on officers for basic necessities and the guard's ability to withhold privileges. Some women are coerced into sex for favors such as extra food or personal hygiene products, or to avoid punishment (Amnesty International, 2007). Sexual violence or the threat of violence is widespread throughout prisons, but relatively few studies have been able to document its precise prevalence. This is understandable, as due to fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff, victims are often reluctant to report incidents to correctional authorities (Beck & Hughes, 2005).

However, the Bureau of Justice Statistics (BJS) completed a recent study (Beck & Hughes, 2005) showing that among victims of abusive sexual contacts, women were over-represented compared with the general inmate population. Females comprised 46% of victims of abusive sexual contacts in state prisons, and 28% of the victims in local jails. This is the first-ever national survey of administrative records on sexual violence in adult and juvenile correctional facilities. Although data are limited to incidents reported to correctional authorities during 2004, the survey provides an understanding of how administrators respond to such violence (Beck & Hughes, 2005). Ironically, what is considered a crime outside of prisons is effectively ignored by the system, or at worst condoned as a reality of prisoner life. Guards use physical assaults, threats of stopping visitations by children and other family members, and sentence extensions in order to retaliate against and deter women from reporting abuse (Amnesty International, 1999).

About 20% of children of incarcerated mothers end up living with their fathers, about 60% live with grandmothers, and about 10—15% are put into foster care (Amnesty International, 1999). Incarcerated women can lose their children. The Adoption and Safe Families Act of 1997 terminates parental rights to a child who has been in foster care for 15 out of the previous 22 months in the United States. The vast majority of incarcerated women will therefore lose their children if they have to put them in foster care (Taifa, 2002). Obviously, incarceration imposes many adverse effects on the mother-child bond, along with development of children born to female offenders. It is important to acknowledge that the separation of the child from the mother can be a traumatic event for many children of all ages if their mother is sentenced to incarceration. This is due to the fact that women were more likely to have been primary caretakers of their children prior to incarceration, thus their absence can place unique strains on their families. The trauma associated with the separation can impose emotional, psychological, and physical problems on these children (Bloom, 1993; Goff, 1999). Bloom (1993) argues that children of incarcerated women often struggle in school, with interpersonal relationships, and are at a far greater risk for delinquent behavior and future incarceration than children whose mothers are not incarcerated.

Many former prisoners in the U.S. are also denied public support and services, increasing the chance that they will return to prison. Anyone convicted of a drug-related felony is prohibited from receiving cash and food stamps or living in public housing. This makes it difficult for women convicted of drug felonies to support themselves and their children (Allard, 2002).

Women drug offenders are disproportionately represented in the criminal justice system, resulting in longer mandatory sentences normally reserved for serious and violent crimes (Owen, 2006). Women are seemingly disadvantaged more by the system than are men. For example, women in state prisons in 2003 were more likely than men to be incarcerated for a drug offense (29% vs. 19%) or property offense (30% vs. 20%); in 1997, 65% of women in state prisons were parents of minor children, compared to 55% of men; approximately 37% of women and 28% of men in prison had monthly incomes of less than $600 prior to their arrest; nearly a quarter of women in state prisons have a history of mental illness; nationally 3.6% of women in state and federal prisons were HIV positive in 2000, compared to 2% of men; and more than half of the women in state prisons have been abused, 47% physically abused and 39% sexually abused (with many being survivors of both types of abuse) (BJS, 2000). Many authors argue that this results in a gendered effect of the imprisonment binge (Bloom et al., 1994; Bush-Baskette, 1999; Mauer, Potler, & Wolf, 1999; Owen, 1999; Women's Prison Association, 2004).

This section has provided an overview of the criminalization of substance abuse among women in the United States. The following discussion centers on the use of the harm reduction model in Canada and how Canadian women who are incarcerated are affected.

The Harm Reduction Model

Harm reduction is defined as: “a policy or program directed towards decreasing the adverse health, social, and economic consequences of drug use without requiring abstinence from drug use” (Riley & O’Hare, 2000, p. 1). Further, harm reduction is a non-judgmental response that meets users “where they are” with regard to their substance use rather than imposing a moralistic judgment on their behaviors. As such, the approach includes a broad continuum of responses, from those that promote safer substance use, to those that promote abstinence (Thomas, 2005). Harm reduction is a term that refers to a specific set of approaches and corresponding policies that underlie those approaches to reduce risks for people who use drugs and/or engage in behaviors that put them at risk. Increasingly harm reduction is deemed to be a realistic, pragmatic, humane and successful approach to addressing drug problems of individuals and communities. Harm reduction programs operate with the assumption that some people who engage in high-risk behaviors are unwilling or unable to abstain (Thomas, 2005).

Although harm reduction is new in North America, it is not new to other parts of the world. Amsterdam has had needle exchanges in operation since the early 1980s and methadone programs have been available since the 1970s. The police in both Germany and the Netherlands focus enforcement efforts toward harm reduction. Many cities in Australia, United Kingdom, Switzerland, Germany and the Netherlands have facilities known as injection rooms with Switzerland opening its first injection room in the late 1980s (Stimson, 2007).

At the conceptual level harm reduction maintains a value-neutral and humanistic view of drug use and the user, focuses on problems rather than on use per se, neither insists on nor objects to abstinence, and acknowledges the active role of the user in harm reduction programs. At the practical level the aim of harm reduction is to reduce the more immediate harmful consequences of drug abuse through pragmatic, realistic and low-threshold programs. At the policy level harm reduction generates a patchwork

quilt of middle-range policy measures that match a wide spectrum of patterns of drug abuse and problems and can sometimes be accommodated by the existing larger drug policy framework. Examples of the more widely known harm reduction strategies are needle exchange programs, methadone maintenance programs, outreach programs for high-risk populations, law-enforcement cooperation, prescription of heroin and other drugs, tolerance zones where users can inject drugs in a hygienic environment, alcohol programs such as server intervention and tobacco programs ranging from control of smoking in public places to the use of nicotine gum and patches (Stimson, 2007).

In 1987, the Canadian government adopted harm reduction as the framework for Canada's National Drug Strategy (Riley & O'Hare, 2000). The framework of the harm reduction model incorporates four pillars as it tries to balance public order and public health: prevention, treatment, enforcement, and harm reduction (MacPherson, 2001). The approach responds to those who need treatment for addiction, while clearly stressing that public disorder, including the open drug scene, must be stopped.

The main objective of harm reduction is to mitigate the potential dangers and health risks associated with the behaviors themselves. Another objective of harm reduction is to reduce harm associated with, or caused by, the legal circumstances under which the behaviors are carried out (such as the prohibition of a substance or act, which causes people to take certain behaviors "underground" into an environment where the risk of harm or exploitation is increased).

Harm reductionists contend that no one should be denied services, such as healthcare and social security, merely because they take certain risks or exhibit certain behaviors that are generally disapproved of by society as a whole, or its laws. Further, harm reduction seeks to take a social justice stance in response to behaviors such as the use of illicit drugs, as opposed to criminalizing and prosecuting these behaviors. Often, harm reduction advocates view the prohibition of drugs as discriminatory, ineffective, and counter-productive. Among other arguments, they point out that the burden placed on the public health system and society as a whole from cannabis use and other illegal drugs is relatively low (MacPherson, 2001).

Coupled with the harm reduction model is the safe injection room which is a legally sanctioned, supervised facility designed to reduce the health and public order problems associated with illegal injection drug use. The first and only safe injection site in North America opened in Vancouver, British Columbia, Canada, in September 2003, called *Insite*. Safe injection rooms provide sterile injection equipment, information about drugs and health care, treatment referrals, and access to medical staff. Some offer counseling, hygienic and other services of use to itinerant and impoverished individuals. Evaluations of safe injection rooms generally find them successful in reducing injection-related risks and harms, including vein damage, overdose and transmission of disease. They also appear to be successful in reducing public order problems associated with illicit drug use, including improper syringe disposal and publicly visible illegal drug use (MacPherson, 2001).

Another project currently underway in Canada is the heroin maintenance project in Vancouver, British Columbia, called the NAOMI (North American Opiate Medication Initiative) Project. Some 100+ long-term heroin addicts who have not been helped by available treatment options are taking part in the NAOMI trials. The program enrolled its first participants in February 2005 in Vancouver, and in June 2005 in Montréal. The intent is to eventually enroll 470 participants (NAOMI, 2005).

Although some access to harm reduction strategies has been promoted in general society in Canada, a divide between what is available and what is advocated continues to exist within the prison system (Rehman, Gahagan, Dicenso, & Dias, 2004). So how are Canadian women who are drug offenders affected by all this?

In 2006 in Canada, there were 909 federal women offenders, either incarcerated or on conditional release: 44% (401) were incarcerated while 56% (508) were on conditional release (Correctional Service of Canada (CSC), 2006). As of 2001, the majority of drug offenders were men (94.1%), while there were 342 (5.9%) cases of a woman offender for whom a drug offense was listed (Motiuk & Vuong, 2002).

The Prison for Women (P4W), in Kingston, Ontario, housed all women offenders far from their home communities and in a maximum-security environment since its opening in 1934. However, it was an institution that had a violent culture perpetuated by correctional officers (Marron, 1996). Eventually, the Honorable Louise Arbour, a justice on the Supreme Court of Canada, conducted an inquiry into wrongdoing in the prison, notably gangs of men brutally strip searching women in segregation (Faith, 1999). As a result, the recommendations from *Creating Choices*, the 1990 report of the Task Force on Federally Sentenced Women, resulted in the closure of the P4W and the opening of five regional institutions and one healing lodge across Canada: the Okimaw Ohci Healing Lodge, Maple Creek, Saskatchewan; Nova Institution for Women, Truro, Nova Scotia; Joliette Institution, Joliette, Quebec; Grand Valley Institution for Women, Kitchener, Ontario; Edmonton Institution for Women, Edmonton, Alberta; and the Fraser Valley Institution for Women, Abbotsford, British Columbia (CSC, 1990).

In theory, Canada's prison strategy requires a "correction plan" that is individually developed for each woman entering prison. Components of the plan include education, addiction and medical treatment, parenting classes, and three months of training in nontraditional jobs. In addition, all inmates are given intensive psychological testing and spend several hours a week in anger-management, behavior-modification, cognitive-therapy and domestic-violence-prevention programs (CSC, 1990).

Yet, such programs for Canadian women offenders are not without critics. The original plan for women's prisons was for them to be caring, empowering and supportive facilities in which punishment would no longer be the guiding principle (Faith, 2004). Faith (2004) argues that the CSC had adopted a progressive and decarcerative rhetoric but since that time has regressed to its former ways: "the correctional practices of the CSC remain conservative and punitive" (p. 281). Faith (2004) states that "abuses continue: illegal strip searches, lack of legal counsel, inappropriate classification, segregations, and the transfer of women to men's prisons" (p. 281). The argument can be made that the CSC "in practice traveled full circle in reentrenching correctionalism in the women's system" (Faith, 2004, p. 286).

Further, harm reduction is listed as a "theoretical influence" in CSC's recent effort to modernize programs for substance-using female prisoners in Canada (CSC, 2002). The main argument against promoting harm reduction measures for substance abusers within the criminal justice system is that it would send the "wrong message" and make substance use more socially acceptable. In spite of this challenge, harm reduction policies and programs have found their way into some criminal justice settings in Canada.

For example, in recent years the CSC has attempted to respond to the special needs of women offenders. The *Aboriginal Offender Substance Abuse Program* (AOSAP) is currently being implemented as a pilot project as well as the *Women*

Offender Substance Abuse Program (WOSAP) which was implemented in June 2003; every women's institution offers the WOSAP to women who are assessed as having a moderate to high need for substance abuse intervention (CSC, 2007). The *Methadone Maintenance Treatment Program* is available for offenders who meet the program criteria, and Intensive Support Units are in place for offenders who are committed to living a drug-free lifestyle while incarcerated (Health Canada, 2002b).

Discussion

As I have attempted to show in this paper, substance abuse among women is a major health, legal, economic, and social issue in both Canada and the United States (Adrian & Kellner, 1996; Campbell, 2000; Goode, 1999). Such abuse among women has serious implications both for society and for women struggling with their addictions. This paper has provided some insights into the experiences of women who are incarcerated in both the American and Canadian penal systems. For example, Canada's drug enforcement policy, without mandatory minimum sentences or a national war on drugs, means that Canada has a lower incarceration rate for women than the United States. Without as many drug arrests, Canada's crime rate is much lower than America's. Obviously, with less crime comes less cost to the government charged with arresting, housing, and feeding women inmates, plus fewer ex-convicts in the general population.

Many critics argue that the failures of the war on drugs should lead the United States to adopt more humanistic approaches such as harm reduction efforts that involve treatment and education (McShane & Williams, 2006), perhaps similar to what Canada provides. Riley and O'Hare (2000) argue that the objective standpoint offered by the harm reduction model is helpful in getting beyond the rhetoric of the war on drugs since harm reduction focuses on objective (and non-judgmental) information about drugs and their effects. The harm reduction model also helps to reduce the conflict between the drug user and the community, as it tries to erase the boundaries between these two groups, and by providing the drug user the opportunity to be more a part of the community. The emphasis on getting many different members of the community involved helps to give drug users the feeling that they are helping to solve a serious problem, which benefits them and the community. The argument can be made that problems caused by drug abuse cannot be separated from the physical, social, and policy environment in which they occur. Policies that are intended to reduce drug related harms are most effective in supportive environments. Without adequate education and treatment, it is not possible to decrease the cost of the war on drugs.

Overall, several authors argue that the lack of gender-specific services in the United States remains a serious defect in the rehabilitation and treatment field (McShane & Williams, 2006; Owen, 2004; Wellisch et al., 1994). The vast majority of imprisoned women have a need for substance abuse services, but a relatively small percentage receives any treatment while incarcerated (Owen, 1999) due to cost and the limited number of spaces in subsidized programs. Available treatment is often not adequate to meet the manifold needs of this population (Peugh & Belenko, 1999).

Canada could also do much more for women incarcerated for drug abuse: as Faith (2004) argues, the original plan for women's prisons was for them to be caring, empowering and supportive facilities in which punishment would no longer be the guiding principle. This has not been the case. Even though the CSC has attempted to

put more programs in place, only the future will tell if this agency will remain conservative and punitive (Faith, 2004) in its approach.

Conclusion

The purpose of this paper was to outline the differences between Canada and the United States in how they treat incarcerated women drug offenders, and to argue that the American approach is more detrimental to women, thus constituting what I view as a miscarriage of justice. My aim in this paper was to seek an answer to the question: "Using an international perspective (i.e., Canada and the United States), is American drug policy directed toward women who abuse drugs a miscarriage of justice?" As Hardin (2000) notes, no issue has had more impact on the criminal justice system (in the United States) in the past two decades than the national drug policy. The war on drugs that was declared in the early 1980s has been a primary contributor to the enormous growth of the prison system in the United States, and since that time has affected all aspects of the criminal justice system. As a response to the problem of drug abuse, national drug policies have emphasized punishment over treatment and have had a disproportionate impact on low-income communities, minorities, and women.

Critics from both nations have argued that changes need to be made in each country's drug policies and dialogues will undoubtedly continue. The claim can be made that overall there are no ideal drug policies, just more humane and less harmful ones. With that idea in mind, I argue that Canada's approach to drug abuse as a health problem and not a criminal one seems to be the least harmful. In Canada, the disease of addiction is not treated as a criminal justice issue, but as a public health problem. Harm reduction principles and strategies are designed to minimize the destructive consequences of illicit drug use and other behaviors that may pose serious health risks. Individuals are able to receive treatment in a somewhat safe and respectful environment and, oftentimes, they can do this in a climate in which they are valued and treated with dignity. Perhaps, in doing so, programs that impact women who are incarcerated for drug abuse in Canada can and will make a difference in their lives. Perhaps, too, women who are affected by the drug problem will be able to reclaim their humanity and their rights in a more humane fashion, and will not experience what I term in the American system, a miscarriage of justice, an act that is unfair and/or improper.

Endnote

[1] A miscarriage of justice is a wrongful conviction. It means that an innocent person has been erroneously convicted of a crime that he or she did not commit. In many instances, this results in long and difficult years of incarceration (Bellemare & Finlayson, 2004). In this paper, I define the term "miscarriage of justice" to describe a legal act that appears to be clearly mistaken, unfair, and/or improper.

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GROWING MEDIA AND LEGAL ATTENTION TO SEX OFFENDERS: MORE SAFETY OR MORE INJUSTICE?

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Abstract

Proposed new legislation addressed at policing sex offenders continues to spread throughout the United States. The fear of releasing convicted sex offenders from prison back into society without supervision has captured the attention of the state and public. The mainstream media, together with politicians in both parties, is pressing for these measures and the public generally supports these efforts. Politicians are aware that when a paroled offender commits a crime, particularly a paroled sex offender, the media blames legislators responsible for their release. Elected officials seen as "soft on perverts" will inevitably pay a political price. This paper provides evidence that the United States is in the grip of a media fixation and collective moral panic about sex offenders, and argues that many of the new legal remedies emerging from false fears, false assumptions, and hysteria are ineffective, costly, and an affront to civil liberties. Most troublingly, this context sets the stage for future miscarriages of justice, as individuals (including juveniles) accused of even minor sex crimes are subject to a rush to judgment, an inability to get a fair trial, and harsh, long-term penalties that can be disproportionate to the severity of the crime.

Growing Media and Legal Attention to Sex Offenders: More Safety or More Injustice?

Research Questions, Hypotheses, and Methods

This paper asks the research questions of whether media coverage of sex offenses is excessive relative to their incidence, and whether newly enacted sex offender legislation is politically motivated rather than data-driven. To address the first research question, I examine the frequency of major newspaper coverage of sex offenders in the context of incident-based and self-reported sex offenses over the past two decades. Using the LexisNexis (2007) news database, I examined the frequency of news headlines with the terms "sex offender" and "sex predator" between 1996 and 2006. In order to analyze the rate trends of both reports and self-reports of rape, sexual assault, and child sexual abuse, I present crime statistics and survey data from the Federal Bureau of Investigation, the Bureau of Justice Statistics, and the Crimes against Children Research Center.

To address the second research question, I analyze the policies and the accompanying political context of legal remedies aimed at addressing sex offenses and punishing sex offenders. The legal initiatives studied in this paper are state civil commitment laws, focusing on the debate surrounding the passage of the 2007 New York law, and the 2006 federal Adam Walsh Act requiring community notification and website registration for all types of sex offenders. This paper hypothesizes that an

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intensified and increasing focus by the media allows for the easy passage of problematic new legislation that challenges basic civil liberties and democratic principles, as well as sound criminal justice research about sex offenders. This paper seeks to assess and disaggregate the complex relationship between political interests and research findings and data about sex offenders, public safety, and civil rights.

History and Context of Sex Offender Hysteria

A number of journalists and academics have recognized that sex offenders are the victims of hysteria in the United States. Journalist Debbie Nathan has detailed a concerning pattern of wrongful convictions for sex crimes against children during the 1980s hysteria about sexual abuse in daycare centers. She explains that the current ideology of the child protection movement emerged around 1970 because of fear that children were at increasing risk for perversity and abuse:

> In 1970, *The New York Times* reported that the "plump red apple that Junior gets from a kindly old woman down the block…may have a razor blade hidden inside." By 1972, many kids were not allowed to trick-or-treat; three years later *Newsweek* warned that several children were dead and hundreds more injured by viciously doctored Halloween candy. A few years later, kiddie porn was the new threat. In 1977, NBC reported that "as many as two million American youngsters are involved in the fast-growing, multi-million dollar child pornography business…" and "police say the number of boy prostitutes may be as high as half a million" (some 10 percent of all male adolescents in the entire country). Then, in the early 1980s, following the New York City disappearance of Etan Patz, the kidnapping and slaying of Adam Walsh, and the murders of 28 Atlanta schoolchildren, the missing children's movement emerged. Crusaders began describing a stranger abduction problem of astonishing proportion: U.S. Representative Paul Simon offered House members a "conservative estimate…50,000 children abducted by strangers annually," and a leading child-search organization said 5,000 of these children were murdered each year. (Nathan, 1990, p. 156).

Nathan points out that research and data have undermined these reports–there was no threat from Halloween candy (only one child was ever killed by Halloween candy, and that was by his own father), little threat of kiddie-porn (even before the 1978 federal law making it illegal, between 5,000 and 7,000 kids were involved in the industry–after 1978, the number dropped even more dramatically), the majority of missing children are runaways and throwaways and most kidnappings are committed by a non-custodial parent. Nathan notes that despite the reality of these statistics, "[M]uch of the American public is convinced that molesters, sadists, kidnappers, and pornographers are major threats to our kids" (Nathan, 1990).

Since 1990, fears and anxieties about child safety and sex offenders have continued to grip the public imagination and have been closely followed in the media. One of the most detailed and closest socio-historical analyses of the subject is *Moral Panic: Changing Concepts of the Child Molester in Modern America*, by Philip Jenkins (1998). A professor of history and religious studies at Pennsylvania State University,

Jenkins argues that a paralyzing, exaggerated fear of pedophiles has surfaced in the last decade, and places it in a more lengthy social and historical context, noting that

> images of the sex offender have changed dramatically and cyclically over time…originating in the Progressive era, the imagery of the malignant sex fiend reached new heights after World War II, only to be succeeded by a liberal model over the next quarter century…We can see that the stereotypical sex offender who provided a nightmare image in the 1940s had become a semi-humorous figure two or three decades later (1998, p. 2-3).

Jenkins also discusses how in the 1960s, sex offenders were viewed as mild-mannered misfits and losers rather than cause for profound terror and fear.

Other theorists, such as John Pratt, also assert that since the 1970s, in the U.S. and other English-speaking countries, child sexual abuse emerged as a serious social problem and a "normative feature in the lives of many" rather than a series of small and isolated incidents (Pratt, 2005, p. 263). Pratt (2005) points out that there are a number of significant changes contributing to the construction of child sexual abuse as a profound social problem, including a greater sense of long-term damage resulting from abuse, new types of abuse, professionals defining and treating the problem, and a sense that it can happen to any child, at any place, and at any time. Pratt (2005) concludes that the primary reason that child sexual abuse is viewed as being so serious and pervasive in the current period is because of a changing perception of children and purity in a culture of fear, writing, "children have come to have an exceptional value which continually seems under threat from a series of dangers triggered by the fears and insecurities characteristic of the age of anxiety" (p. 266).

Jenkins (1998) explains that waves of hysteria and irrationality concerning child molesters work to the benefit of politicians, who reap rewards when they are perceived to be fighting an evil and widespread threat. Legislation, he argues, also reflects shifting public attitudes about sex offenders. He points out that extreme laws were passed during earlier panics, noting that legislation passed during panic about sex offenders is likely to prompt Constitutional concerns and backlash:

> Once the initial furor passed, numerous cases demonstrated the absurd or unjust effects of the laws. Mounting opposition from legal, judicial, and libertarian sources resulted in the acts being overturned or becoming inoperative. The panic atmosphere surrounding the passage of the laws itself produced a reaction, and rhetoric that once sounded plausible came to seem overblown, even ludicrous (Jenkins, 1998, p. 12).

I examine here how media coverage of sex offenses relates to the most recent cycle of state and federal sex offender laws, and attempt to disaggregate the extent to which these new laws are the result of moral panic and political opportunism, as in earlier periods, or if they are rooted in the realities of sex offender research.

Media Coverage of Sex Offenders and Rates of Sex Offenses

This paper hypothesizes that there has been an increase in media coverage of sex offenders during the past decade unrelated to a corresponding increase in sex offenses. An analysis of news headlines from the LexisNexis database shows that

media coverage of sex offenders and sex offenses has been increasing since the early 1990s and shows no sign of decline. The data in Table 1 show that news stories with "sex offender" or "sexual predator" in the title increased seven-fold between 1991 and 2006. These terms indicate that the news article most likely relates to either a crime or law relating to a sex offender or sexual predator, and, additionally, because these terms can prompt fear and panic because they are associated with predatory behavior. An analysis of these particular terms also relates to the hypothesis that the public sees these terms in newspapers with increasing frequency, and in turn becomes convinced that sex offenders and sexual predators are a growing threat.

Table 1.
Frequency of "sexual predator" and "sex offender" in headlines, lead paragraphs, or terms of U.S. newspapers, 1991—2006

Year	Frequency of "sexual predator"	Frequency of "sex offender"
1991	107	536
1992	96	789
1993	167	1,019
1994	452	1,760
1995	453	2,336
1996	913	4,123
1997	1,710	5,010
1998	2,131	6,096
1999	2,227	7,116
2000	1,400	4,795
2001	1,575	5,802
2002	2,273	7,098
2003	2,113	8,699
2004	2,040	9,645
2005	3,501	15,822
2006	5,006	15,558
Source: LexisNexis, 2007.		

This analysis finds that the number of all news stories with the term "sexual predator" in the headline, lead paragraph, or terms in U.S. newspapers increased from 107 in 1991 to 5,006 (a factor of almost 50) in 2006. Table 1 also shows that the number of all news stories with the term "sex offender" in the headline have also increased substantially, growing from 536 to 15,558 (or 30 times) in 2006.

This table indicates that stories about sex offenders and sexual predators have been increasing substantially since 1991. One obvious explanation for the dramatic increase in media coverage in sex offenders and sexual predators is a corresponding increase in instances of sex offenses. However, Table 2 illustrates that survey and incident-based reports of rape and child sexual abuse declined significantly during this same period.

Columns 1 and 2 in Table 2 show that rates of rape, according to both official and

self-report data, declined between 1990 and 2005 (self-report and incident-based data for rape is only available through 2005). Self-reports of rape decreased from 1.7 per 1000 individuals 12 and over to .5 per 1000 (a decrease of over 30%), and reported instances of forcible rape decreased from 41.2 per 100,000 individuals of all ages to 31.7 (a decrease of over 25%) (Bureau of Justice Statistics, 2007). Column 3 shows that rates of child sexual abuse decreased from 2.3 per 1,000 children to 1.2 (a decrease of almost 50%) between 1991 and 2003 (rates of child sexual abuse in this report are reported only through 2003) (Crimes Against Children Research Center, 2004).

Table 2.
Rates of sex offenses in the United States, 1991—2005

Year	Self-Reports of Rape (Rate per 1,000, age 12 and over)	Reported Incidents of Rape (Rate per 100,000, all ages)	Reported Incidents of Child Sexual Abuse (Rate per 1,000 children)
1991	2.2	42.3	2.3
1992	1.8	42.8	2.3
1993	1.6	41.1	2.2
1994	1.4	39.3	2.1
1995	1.2	37.1	1.9
1996	0.9	36.3	1.8
1997	0.9	35.9	1.7
1998	0.9	34.5	1.5
1999	0.9	32.8	1.3
2000	0.6	32.0	1.2
2001	0.6	31.8	1.2
2002	0.7	33.1	1.2
2003	0.5	32.3	1.2
2004	0.4	32.4	not available
2005	0.5	31.7	not available

Source Bureau of Justice Statistics, 2007; Crimes Against Children Research Center, 2004.

The increasing frequency of news stories and legislation relating to sex offenders, and the corresponding decrease in sex offenses, makes it clear that the national news media has increasingly focused on this topic for reasons other than an increase in incidents. News stories are thus not a response to more sex offenses, but rather to increasing public interest (because stories about sex offenders are interesting or titillating), and/or to increasing political or legislative attention. The relationship is cyclical, because political figures respond to the media interest in sex offenders with new and innovative legal responses, and at the same time, the media responds to legal initiatives with further media coverage.

Increasing Legislative and Political Attention to Sex Offenders

As media coverage of sex offenders has increased and sex offense incidents have decreased, advocates have pushed for new and more extreme policy responses and new and extreme statements and assertions about sex offenders. Advocates such as John Walsh (the father of abducted and murdered child Adam Walsh), the founder of the National Center for Missing and Exploited Children, has made passing sex offender laws his life mission. In July 2006, the Senate passed the Adam Walsh Child Protection and Safety Act. George Bush held a press conference to announce the bill and appeared with John Walsh. The bill creates a national sex offender registry closing loopholes in the current system. Walsh has been an articulate and outspoken advocate of increasing legislation aimed at sex offenders. He has said he believes all sex offenders should be put in prison for life without the possibility of parole. In 2005, Walsh issued a press release urging legislators to pass new sex offender legislation. It warned that, "legislators must revamp our current laws in order to provide a more comprehensive way of tracking down the hundreds of thousands of child sexual predators who live among us" (Walsh, 2005, ¶ 3). Statements like this suggest that predatory sex offenders saturate our communities, and that the public is at imminent risk without new and tough legislation.

Currently, many states are extremely aggressive in their efforts to monitor those convicted of any type of sex offense and have initiated programs such as global tracking systems to locate sex offenders on parole or probation. Residence restrictions for sex offenders are on the books in many states and cities. In Florida, legislation requires sex offenders seeking emergency shelter during a hurricane to notify shelter operators of their sex-crime history. The rhetoric that lawmakers and advocates use to promote these laws is frightening. They imply that sex offender registries, public notification, and civil commitment legislation will directly result in a decrease in violent sex offenses. In Texas, some elected officials, including the current Republican Lieutenant Governor, have proposed the death penalty for repeat sex offenders. A Texas housing developer is building "sex offender free subdivisions, and a national website lists homes for sale that have no registered sex offenders living within a half-mile radius" (Axtman, 2006, p. 1). A proposed law would require sex offenders to have green florescent license plates (Reuters, 2007).

Nicholas Lehmann notes that popular conservative talk-show host Bill O'Reilly routinely devotes entire programs to the crimes of sex offenders—or those who are not tough enough on them. Most statements made by politicians or advocates about extreme sex offender policies are presented without criticism or question, though occasionally the rhetoric reaches a point where even the mainstream media cannot help but respond. In July 2006, according to the *Washington Post*, John Walsh told a FOX-TV news photographer at a gathering of TV critics that "people who molest children should have chips embedded in the rectum that would explode if they violate their parole" (de Moraes, 2006, ¶ 1). The author of the piece observes that when Walsh said this, "a couple dozen speechless TV critics looked on," and that the FOX-TV news photographer

> was relieved of his responsibilities for the rest of the day for monopolizing Walsh's onstage time with their interesting exchange about child-tracking technology, sex-offender-tracking technology—"pervert alert," the photographer called it—and a comparison of repeat

> molesters to rabid dogs that need to be put down (de Moraes, 2006, ¶ 4).

Statistics about sex offenders are often exaggerated by those in public office to gain support for new laws, and terms such as "growing problem" are used to suggest that the problem is worsening. Former Attorney General Alberto Gonzalez announced a new policy aimed at targeting internet sex predators. He claimed that 50,000 child sex predators are online at any given moment—a statistic that cannot be confirmed or documented, yet which is commonly used: 50,000 was the same number cited as the number of children abducted by strangers each year in the 1970s. There is evidence that the number of children being solicited online is declining (McCollam, 2007).

The Politics of a New York State Initiative

In New York State, local and state legislators have responded to the national climate of sex offender hysteria by proposing numerous new legal initiatives targeting sex offenders, including the passage of controversial civil commitment legislation, approved by the state legislature in March 2007. Currently, 19 state legislatures and the District of Columbia have civil commitment laws for post-prison confinement of sex offenders. These laws are relatively new: the first civil commitment law was passed in 1990, in Washington State. The impetus for many of these laws was the inability of parole boards to detain sex offenders once they served full sentences, even if the offenders were deemed by psychologists and therapists as being "highly likely" to re-offend. New York State legislators passed a bill similar to the laws existing in these other states. Political officials in New York and elsewhere have been making sex offender legislation a key focus of criminal justice platforms, and versions of a New York civil commitment law for sex offenders have been proposed since 1993.

Like many laws rooted in the victim rights movement, the most recent push for civil commitment legislation in New York was partially motivated by a high-profile, extremely disturbing violent crime. A convicted rapist, released after serving his full sentence, murdered a woman in a mall parking garage in Westchester in June 2005. He claimed to have killed the woman because she was white, and he was subsequently convicted of murder as a hate-crime. This incident generated enormous media coverage for understandable reasons, including the involvement of a paroled, racist defendant with obvious mental disorders. The New York civil commitment bill is popularly called "Connie's Law," after the woman murdered in this incident, and advocates for such laws cited her murder as evidence of the immediate need for civil commitment legislation.

There have been other substantial efforts in New York to promote additional legislation designed to limit sexual re-offenses. For example, in July 2006, the Governor's office announced that henceforth, Level II sex offenders (in addition to those categorized in the higher Level III category) will appear on the searchable NYS sex offender registry website. This website allows those using it to find out if they are living near anyone convicted of a serious sex offense. Level I offenders, classified at low-risk for re-offense, must also register for a period of 20 years and are subject to public-notification provisions, but they are not currently searchable on the NYS Sex Offender Registry website (although one can learn details about all levels of sex offenders via a 1-800 number posted on the website). Additionally, local law enforcement agencies in New York State are entitled (though not required) to release

information on sex offenders of all levels (including Level I) residing in the community to "entities with vulnerable populations related to the nature of the offense" (New York State Division of Criminal Justice Services, p.1). In spite of the already strict laws in New York State regarding policies for convicted sex offenders, and policies that regulate every aspect of the offender's post-carceral life, politicians in New York recently passed a civil commitment bill. Governor Spitzer, a Democrat, claims the New York bill will become a national model, because it includes mental health treatment and supervised release for sex offenders. However, as a *New York Times* examination of civil commitment policies noted, following the passage of the New York bill, that most laws such as this that emerge after high-profile crimes, there is little evidence that the programs work, that they apply to only the most violent offenders, or that they are cost-effective (Davey & Goodnough, 2007).

Political officials and candidates are often outspoken on the issue of sex-offender legislation. In an analysis of the politicization of sex crimes, Ingrid Drake (2007) observes that, "it is hard to find a campaign anywhere—for Attorney General, Senate, or School Board—where one candidate is not pronouncing that another candidate has been too soft on pedophiles" (¶ 2). Jeanne Pirro, for example, is a New York politician who focused her career and her 2006 campaign for Attorney General on the problem of sex offenders, emphasizing the need for increased laws to catch and convict them. She cites the protection of innocent victims as her main concern. As one New York political blogger, Jason Horowitz (2007) notes, "Jeanine Pirro talks a lot, and we mean a lot, about all the sex offenders and pedophiles she locked up in her days as Westchester District Attorney" (¶ 1). On her campaign website, a statement of her qualifications highlighted her role as a fighter for civil commitment legislation in Albany, noting that the legislation will control "violent sexual predators predisposed to molest, rape, or kill again," and states that she has been "an unrelenting proponent of civil confinement legislation" (Pirro, 2006). In September, 2006, Pirro referred to civil confinement for sex offenders as "the most important public safety issue of our time." Asked whether it is more important than terrorism, she replied, "Terrorism, obviously, is an overwhelmingly important issue for safety in New York. But as it concerns families, there isn't a family that I come across that isn't concerned about children going to school and possibly being abducted or confronting a sexual predator" (Cooper, 2006, ¶ 1).

Comments by former New York Governor Pataki also reveal the passion and rhetoric underlying sex-offender legislation. After his successful extension of the sex offender registration laws, he noted:

> …we must do even more to give every parent and family the tools to protect their children and families. This most recent expansion is certainly another step in the right direction, but there is still much work to be done. We have strengthened Megan's Law significantly, but I would still like to see every single sex offender searchable on the Internet, so that parents can have the peace of mind to find out if anyone who has been designated a sex offender lives in their area (Pataki, 2006, ¶ 3).

Chauncey Parker, former New York State Director of Criminal Justice Services, uses the same argument when he asks:

> Are we supposed to wait and see if they go back and molest another child and then put them back into prison? I think government needs to

> have a reasonable response in these circumstances…If there is a sexually violent predator who is such a risk to others that they are going to molest or rape again, what do the people expect government to do (Vlahos, 2006, ¶ 9)?

Headlines also encourage an attitude of fear and hysteria, using words like "perverts" and "predators" to characterize sex offenders. *Newsday*, a New York paper primarily serving Long Island's Nassau County, calls the civil commitment program an obviously sound policy requiring little analysis, and like other papers uses the incendiary term "sexual predator" to describe all types of sex offenses. Headlines in a local paper announce: "NY is putting 8,000 more pervs on the web." The story explains:

> New Yorkers will be able to get photos and home addresses of thousands more Megan's Law sex fiends on the Internet as a result of a deal struck yesterday by lawmakers. The legislation, passed last night as lawmakers scrambled to close this year's session, adds more than 8,000 "moderate-risk" perverts. Another key feature of the measure is that police will now be able to tell neighbors about "low risk" creeps—branded as Level 1s—living near them (Mahoney, 2006, ¶ 1 - 3).

In other states, local media also characterize sex offenders as "pervs;" for example, a Boston Herald headline similarly announced "Lawmaker's bill to better track pervs languishes" (Heslan, 2006, p. 18).

Facts and Research about Sex Offenders and Sex Offender Treatment

An immediately troubling aspect of all legislative bills aimed at decreasing sex offenses is the dearth of research or data to support their suppositions. The laws cover all varieties of sex offenders, including sex offenders accused of non-contact crimes (e.g. viewing pornography or engaging in sexually explicit conversations on the internet), consensual sex between minors, and statutory rape. Statutes implicitly assume that all sex offenses are the same, and registries and websites frequently do not provide specific details about offenses. The provisions of the Adam Walsh Act apply to offenders aged 14 and over, meaning that sex offenders who committed their crimes as minors are also subject to lifetime consequences. Sex offenses committed by youths are a growing concern in the United States, yet these young offenders often have unique needs and can be quite responsive to treatment. In fact, the majority of those who sexually abuse children are juveniles and individuals under 30 (Chaffin, Bonner, & Pierce, 2003). However, these new laws ignore their special status as minors, and could place them in facilities, for lengthy periods, with the most violent adult offenders. In states such as Texas, the crime that used to be called statutory rape, and often involved consensual sex between a minor and a young adult, is now called "sexual assault of a child" and is punished by 2 to 20 years and lifetime registration as a sex offender.

Most research shows that recidivism rates for sex offenders vary from 3% to 13%, rates that are much lower than for most other offenses (Lotke, 2006). The majority of sex offender legislation focuses on limiting so-called "stranger danger," yet most perpetrators of child sexual abuse are not strangers to their victims. Studies demonstrate that the percentage of strangers convicted of sex offenses against

juveniles is only 7% per year; thus, over 90% of juvenile victims know their abusers (U.S. Department of Justice, 2000).

Most of the new policies are also expensive, and one civil commitment proposal in New York includes the need to build a $130 million, 500-bed specialized, secure facility upstate to house sex offenders after release from prison. On the other hand, intensive supervision and community treatment programs, shown to be effective ways to treat and manage sex offenders, cost only $5,000 to $15,000 per year. Further, research shows that sex offenders can be treated and rehabilitated, but that leaving them in costly mental health facilities for long periods is not efficient mental health treatment. In Virginia, not one civilly committed offender has ever been released, although each inmate goes through an annual review process—suggesting that treatment and rehabilitation are not the goal of civil confinement programs. Despite evidence that sex offender treatment can result in rehabilitation without high costs, civil confinement programs focus not on the potential for treatment and cure, but merely on permanent removal from society. One New York-based coalition, opposing civil commitment, including the New York Civil Liberties Union (NYCLU) notes that the legislation "will lead to a flawed approach to preventing sex crimes, the NYCLU argues, but would embrace as a matter of public policy the mistaken idea that individuals with psychiatric disabilities are sexually dangerous" (NYCLU, 2007, ¶ 4).

Jonathan Gradess, Executive Director of the New York State Defenders Association, points out that the civil commitment bill "threatens an enormous diversion of state funds while undermining more successful proven techniques to protect public safety" (NYCLU, 2006, ¶ 8). The New York City Bar Association also issued a statement questioning the Senate version of the bill, noting that it appears to have been development without "careful legal analysis," warning "politicians who legislate only with the sensational TV news stories in mind will err in locking away individuals with no mental illness or propensity for violence" (Plevan, 2006, ¶ 11).

Legislation often focuses on keeping convicted sex offenders away from schools and playgrounds, even though one important study found that residence restrictions do not prevent crimes nor increase public safety (Levenson & Cotter, 2005). Judith Levine (2006), a journalist, explains in an editorial responding to Vermont's sex offender policies:

> Offender websites and community notification of neighbors, landlords and employers, coupled with requirements that registrants report their every move to the police, do the opposite. The U.S. Justice Department names "lifestyle instability" as a big contributor to re-offending (¶ 19).

Levine quotes Robert Longo, a therapist and former director of Vermont's Safer Society Program, who points out:

> You ban somebody from the community, he has no friends, he feels bad about himself, and you reinforce the very problems that contribute to the sex abuse behavior in the first place. You make him a better sex offender (Levine, 2006, ¶ 19).

Levine (2006) notes that Vermont's low recidivism rate is due to current policies involving sex offender treatment rather to harsh prison sentences. Currently, New York has the fewest roadblocks of any state for parolees, but the existing re-entry network for offenders will be challenged by increases in post-release restrictions.

Grassroots groups working to prevent child sex abuse are also critical of

draconian legislation aimed at sex offenders. These groups, according to an analysis by Ingrid Drake (2006), often focus on community organizing and education campaigns to encourage prevention and reporting of child sex offenses. They find these approaches more effective than criminal justice responses. Drake (2006) notes that in Virginia, a $6 million initiative by the Attorney General will fund mandatory minimum sentences, GPS technology for offender monitoring, improvements in the online sex offender database, and residence restrictions—yet the initiative includes no funding for community-based and grassroots organizations working on sex offense prevention, or for public education. Additionally, Drake (2006) interviewed advocates who worry that increasing criminalization decreases the likelihood of reporting, because it is most often friends or family members who discover (and experience) sex abuse. Thus, they fear that if they report sex abuse will their loved ones will receive long prison terms rather than treatment and rehabilitation .

Former Governor Pataki (2006) was a main proponent of much New York sex-offender legislation; he regularly noted that New York achieved enormous reductions in crime since his taking office, and, that New York was the "safest large state in the nation." In 2007, data shows fewer sex offenders per capita in New York than in Wisconsin (National Center for Missing and Exploited Children, 2007), suggesting that current treatment programs and criminal justice policies in New York are working.

Currently, New York and many other states offer no treatment to sex offenders in prison. The American Psychiatric Association recommends in-prison treatment for sex offenders suffering from a diagnosable sexual disorder, because research shows that treatment is linked to lower recidivism rates. For politicians concerned about recidivism rates for sex offenders, providing funding for in-prison psychiatric treatment policies makes sense. However, advocating funding for mental health or social service treatment of any kind for prisoners elicits negative responses from the public, who view prisoners as unworthy of limited public funds.

Civil Liberties and New Sex Offender Legislation

Profound Constitutional concerns also emerge from civil commitment, long-term and lifetime registration, and community notification laws. Most obviously, these laws mandate control of sex offenders after they have served full prison sentences. This undermines core principles of the jury, trial, and sentencing system, because it reassesses punishment meted out in an earlier and finalized court decision. Civil commitment, registration, and community notification laws suggest that sentences given to sex offenders are lenient, thoughtless, and qualitatively different from sentences given to other offenders. In their analysis of pending New York State civil commitment legislation, Katsavdakis and colleagues (2006) call for legislators to focus on existing research instead of pandering to politics and fear. They note that political rhetoric and scare tactics have resulted in the passage of problematic legislation such as the New York Rockefeller Drug Laws, explaining that these laws,

> …first enacted in 1973 ostensibly to target drug dealing kingpins. . . ensnared low level sellers/users and paved the way for a bevy of other mandatory sentences for other crimes. Despite evidence of the efficacy of drug treatment, and despite a shift in public opinion that supported treatment over incarceration, it was not until 2004, that even modest reform of these harsh and ineffective laws were enacted. The lesson of the Rockefeller Drug Laws—the relative ease of enacting

> these laws and the incredible challenge in undoing them—dictates that caution be used in the creation of civil commitment and other draconian "one size fits all" approaches to people who commit sex offenses in New York State (Katsavdakis, Weissman, & Rosenthal, 2006, p. 5).

The most problematic effect of these laws is their undermining of fundamental civil liberties. In 2002, the Supreme Court ruled that in order to justify civil commitment, states must prove that offenders remain dangerous and likely to re-offend, and that they also have a psychological diagnosis indicating that a "serious difficulty in controlling behavior" contributed to the original crime and persists *(Kansas v. Crane*, 2002). This Constitutional limit on civil commitment places the burden on the states, and critics of the ruling note that this gives the states more power, enabling them to freely pass civil commitment legislation. Legal scholars argue that this ruling is problematic because it implies that the person is not responsible for his or her behavior because he or she is mentally ill, and, as Ellen Byers notes, "the court has not explained why psychiatric evidence, which is distrusted in general, should serve as a justification for the death penalty or preventive commitment when there is abundant evidence of its unreliability" (Byers, 2004, p. 460).

Others have argued that these laws place the defendant in double jeopardy and violate due process, since the defendant has already completed state-sanctioned punishment for the very crime that is now the justification for civil commitment (Price, 2005).

Even community-notification laws are considered by some legal analysts to be cruel and unusual punishment because they single out sex offenders for stigma and shame. Those convicted of arson, manslaughter, and drug trafficking do not trigger community notification, even though recidivism rates for those crimes are significantly higher than for sexual offenses. Again, though, these laws are directed at sex offenders, and thus do not prompt criticism or close analysis, arguably because the public views these criminals with fear and revulsion that may not be justified by the facts. In one case, an 18-year-old convicted of second-degree rape after having sex with a 13-year-old girl (whom he believed to be 16), now must register as a child sex offender for life and is subject to community-notification laws. Charles Carpenter (2006) uses this case to highlight the unconstitutionality of community-notification laws. He notes that a plan to protect the community in fact undermines due process and functions as a "punitive scheme" that is "designed to shame."

Mental-health treatment can prevent recidivism, and advocates for therapeutic jurisprudence argue that treating sex offenders in specialized courts or outpatient programs can be immensely effective and Constitutionally sound. Other alternative policy options include specialized sex offender re-entry courts, which can evaluate risk, manage treatment, and closely monitor sex offenders upon release. These courts are significantly cheaper than inpatient psychiatric facilities (La Fond & Winnick, 2003). Other studies have found that cognitive-behavioral treatment reduces sex offender recidivism (Hanson, Gordon, Harris, Marques, Murphy, Quinsey, & Seto, 2002; Losel & Schmucker, 2005). Delivering longer minimum sentences, or lifetime probation or parole, are obvious ways to avoid the dilemmas created by civil-commitment laws.

Civil policies aimed at sex offenders are emerging in other states, suggesting an unprecedented crossover of criminal and civil punishment. In one particularly disturbing policy development, a 2006 Ohio law creates a "civil registry" for sex offenders, allowing suspected sex offenders to be publicly identified and tracked even

if there are no criminal charges involved (Coolidge, 2006). This law passed in the Ohio State Legislature with almost no national media coverage or public outrage. The law allows attorneys or alleged victims to seek to place an alleged offender on the registry, and present evidence and testimony to a judge. If the judge determines beyond a preponderance of the evidence that abuse happened (rather than beyond a reasonable doubt, as in a criminal case), the alleged offender is placed on the civil registry, which lists the abuser's name, address, and photograph online. The alleged offender is also subject to the same registration, notification and residency restrictions of sex offenders with a criminal conviction. An alleged sex offender is subject to placement on the civil registry even if the statute of limitations for facing charges or a lawsuit has passed.

Conclusions

Most victims do not report sex offenses, and most sex offenders never wind up in prison. Extreme policies like the Adam Walsh Act and civil commitment, which are very costly, discourage the exploration or implementation of interventions aimed at detecting and preventing sexual abuse. Such policies also allow politicians to ignore other social policies that might decrease incidents of sexual abuse, because they are already invested in supporting expensive, dramatic initiatives that seem comprehensive and hard-hitting. As noted earlier, it can be difficult and often impossible to overturn legislation passed during times of moral panic, even when it is viewed by the majority as being absurd and unjust. The new laws are particularly frightening in light of the legal realities of increasing restrictions and time limits for defendants to appeal convictions, implemented in recent decades with the intent to decrease lengthy death penalty appeals.

Civil libertarians are currently overwhelmed with a range of issues, including the unlawful detainment of prisoners at Guantánamo, the unauthorized wire-tapping of American citizens, the P.A.T.R.I.O.T. Act's revision of accepted Constitutional limitations, the President's arrogation of new executive privileges, and so on. In comparison, the rights of convicted sex offenders, a thoroughly despised group, are not of great concern. However, psychiatric detention bears a close resemblance to preventive detention. Both originate in the flawed idea that we can calculate with reasonable confidence the probability that someone will commit a crime in the future. Leaving aside the ethical and legal problems of detaining people for crimes they *might* commit, there are no reliable methods for determining future criminality.

The mainstream media considers sex offenders and suspected terrorists as unworthy of rational response or individual consideration, and both are similarly subject to violations of due process and civil rights. Those who defend the rights of these two populations are often dismissed as traitors, perverts, un-American, and anti-family. Yet protecting the rights of the accused is the very basis of the Constitution and the rule of law.

In some cases, sex offender registries have encouraged violence—in Maine in 2006, a troubled young man used the registry to find the addresses of convicted sex offenders, then shot and killed two in their homes. One of the men shot was a 17-year-old who had a relationship with his 15-year-old girlfriend, which had resulted in his publication as a sex offender. Among prison populations, sex offenders are often kept in protective custody because they are at high risk of being attacked by other inmates. Sex offenders are aware that being a murderer is a much less threatening

and offensive crime among prison populations. In a Massachusetts prison in 2003, defrocked priest John J. Geoghan, an elderly convicted child molester, was beaten to death by another inmate while in protective custody (Butterfield, 2003). Such cases highlight the unwillingness of the state to protect this population.

Politicians are paralyzed by the media hysteria surrounding sex offenders, and cannot question any initiatives that appear aimed at protecting the public from these "monsters." Only a small number of media outlets, including *The New York Times*, have suggested that these policies are Constitutionally questionable and of little or no real benefit. It is thus crucial for criminologists, social scientists, researchers, and legal scholars to focus on the question of how best to protect the public from sex offenders while respecting Constitutional rights. The relentless coverage of sex offenders creates conditions ripe for false allegations, because the American public believes that violent and predatory sex offenders lurk on every corner. An ongoing study funded by the National Institute of Justice, one of the few ever conducted on the impact of community notification, unsurprisingly finds that the decline of sex offenses in New Jersey started in 1991, three years *before* the much-heralded passage of the very expensive and widely adopted community notification policy known as Megan's Law (Wood, 1994). It will be interesting to see if this recent study (still unpublished) will deter politicians from proposing new and more comprehensive community notification law policies, even in the face of evidence that they do not lower the incidence of sex offenses, but instead scare any parent who receives notice that a sex offender lives nearby.

The question of public safety cannot overwhelm the right to due process. The examination of policies aimed at sex offenders must not elicit rage, hysteria, and condemnation. Only through research, analysis, and debate can sound criminal justice policy emerge. Fear is an effective but dangerous tool used by the media and politicians to win audiences, readers, and votes. Yet researchers and analysts must be able to ask and answer questions without fear of retribution. Our collective goal is to stop the persistent and widespread social problem of sexual abuse. It is therefore crucial to study what works and what does not, and to make policy recommendations and enact laws based on sound data and research.

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IMPACT OF THE INNOCENCE REVOLUTION ON MISSOURI'S DEATH PENALTY SYSTEM: HAVE THE COURTS REDUCED THE POSSIBILITY OF EXECUTING THE INNOCENT?

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Abstract

Recent reforms to legal procedure in Missouri's Death Penalty System by the federal and state courts were assessed to determine whether or not they have reduced the possibility of executing an innocent person. Attributing the procedural reforms to the innocence revolution, all of Missouri's death penalty cases for two sets of years were evaluated for their potential to give rise to the conviction of the innocent considering procedural constraints at the time of the decision: one from the pre-innocence revolution years of 1989—1993 and one from the innocence revolution years of 2000—2004. The results show the courts have only partially reformed an error-prone death penalty system which still possesses the risk of executing an innocent person.

The Impact of the Innocence Revolution on Missouri's Death Penalty System: Have the Courts Reduced the Possibility of Executing the Innocent?

Some of the most significant changes on the state level to the death penalty's bifurcated trial system came in November of 2003 when the Illinois Legislature passed into law a series of reforms to prevent the possibility of executing an innocent person (McDermott, 2003). The new Illinois law provides the Illinois Supreme Court with greater power to throw out unjust verdicts in death penalty cases, bars the prosecutor from bringing the death penalty into cases based on a single witness, includes the opinion of the trial judge in the death penalty appeals process, provides death penalty defendants more access to pre-trial evidence, and heightens disclosure procedures in which "snitch" and accomplice evidence may be introduced against a defendant (Illinois S.B. 472, 2003). The Illinois reforms came in response to a state wide moratorium on the use of the death penalty and were based on the results of a state wide study of its death penalty system created in 2000 by then Governor George H. Ryan after legal activists helped win the release of 13 innocent defendants from Illinois' death row.

Fearing that flaws in their own state death penalty system could give rise to the execution of an innocent person, state legislators across the nation began calling for similar studies and moratoriums. In all, 14 official state commissions were created to study problems in the administration of the death penalty with 3 states enacting both a moratorium and funding a state-wide study (Dieter, 2004). Many states followed Illinois' lead in enacting legislative reforms of their death penalty system based on the completed results of their state-wide death penalty study (Death Penalty Information Center, 2007a). Missouri, however, has not followed the national trend to enact

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legislation, fund a state study, or issue a moratorium to reform its death penalty system. Rather, death penalty reform in Missouri has taken place through a series of decisions by the federal and Missouri state courts (O'Neil, 2003). The Missouri Supreme Court went from an average of overturning two death sentences per year (between 1977, when the death penalty was reinstated, and 1996) to overturning 18 of 61 death penalty cases it heard between 1997 and 2001 (O'Neil, 2003). From 2002 to 2004, enjoying a Democratic majority for the first time in years, the Missouri Supreme Court overturned death sentences in 21 of the 43 death penalty cases it heard (Lieb, 2005; Young, 2002). Furthermore, the Missouri Supreme Court has released three defendants from Missouri's death row due to innocence; Clarence Dexter in 1999, Eric Clemmons in 2000, and Joe Amrine in 2003 (O'Neil, 2003). Statewide, there have only been 14 death sentences given out since 2000, which represents approximately a 50% drop in the number of death sentences given out each year in Missouri since 1980 or shortly after it reinstated the death penalty (Death Penalty Information Center, 2007b).

Despite the number of overturned death penalty cases in Missouri, no known study has mapped out the court's procedural reforms or assessed their ability to prevent the execution of an innocent person. This study will chart Missouri's current death penalty legal procedure and compare it with pre-reform death penalty legal procedure to examine the extent of reform in Missouri since reinstatement. The research presented here will be descriptive in that it will provide detailed explanations of changes in the legal procedure surrounding Missouri's death penalty system since reinstatement of the death penalty in 1977. It will be causal in its attempt to determine how wrongful convictions arise in Missouri. Due to the recent judicial activity in Missouri's death penalty cases, the hypothesis for the study is that Missouri has reduced the risk of executing the innocent since it reinstated the death penalty in 1977.

Methodology

This study is based on Lofland and Lofland's (1995) model of qualitative research which involves the three step process of: (I) collecting data; (II) focusing or asking scientific questions about the data; and (III) analyzing or developing a social science analysis of the data.

Stage I: Collecting Data

The data for this project comes from three primary sources: (1) the Missouri Trial Judge Reports (TJRs), a legally required questionnaire to be completed by the trial judge in all Missouri death penalty eligible cases and filed with the Office of the Supreme Court of Missouri; (2) the opinions of state and federal appeals brought forth by the death defendants selected for study; and (3) newspaper reports on the cases selected for study. To gather the data for study, first, the TJR file listing of all Missouri death eligible cases was used to identify suitable death penalty cases for study. The Office of the Supreme Court of Missouri separates their TJR file into three categories; successful death penalty cases, unsuccessful death penalty cases, and first degree murder cases.

Two samples of Missouri death penalty cases were drawn from the TJR file for comparison; one from the pre-innocence revolution years of 1989—1993 and one from the innocence revolution years of 2000—2004. To distinguish between the two

samples, 2000 was selected to signify the year when the innocence revolution began to affect Missouri death penalty decisions. The year 2000 was selected because it is the first year which the number of death sentences in Missouri dropped by 50% (Death Penalty Information Center, 2007b), by 2000 Missouri had begun releasing defendants from death row due to actual innocence (two), and 2000 is the year Governor Ryan of Illinois shocked the nation by declaring a moratorium on executions. Since it takes approximately two years after the completion of a criminal trial before a corresponding appellate opinion is published by the Missouri State Courts, using 2000 as the cut off year leaves 2004 as the last year available for data collection, providing a five year "innocence revolution period" from which reliable data could be obtained, or from 2000 to 2004.

Next, the five year time span of 1989 to 1993 was selected as the pre-innocence years for study because national statistics indicate that the years 1989 to 1993 involved the least amount of death penalty convictions in Missouri, making it most similar numerically to the 2000—2004 time period (Death Penalty Information Center, 2007b). In addition, there was almost no awareness of innocence issues in Missouri during the years 1989 to 1993.

Due to the large number of death eligible cases not involving the death penalty in the TJR file, two random samples of 20 cases were drawn from the non-death penalty but death eligible cases for each set of years. Twenty was selected because it is similar to the number of successful and unsuccessful death penalty cases being considered for the years under study. In all, data were collected from 76 cases that took place during the years 1989—1993, which included 35 successful death penalty cases, 21 unsuccessful death penalty cases and 20 first degree murder cases. Data were collected from 42 cases that took place during 2000—2004, which included 14 death penalty cases, 8 unsuccessful death penalty cases and 20 first degree murder cases. The data drawn from the cases was supplemented with newspaper reports of the cases drawn from an internet search engine.

Stage II: Focusing or Asking Scientific Questions about the Data

To identify wrongful convictions and the prevalence of factors leading to a wrongful conviction in the cases under study, a table of wrongful conviction factors was constructed from existing wrongful conviction studies. During this stage of analysis, each case selected for study was examined to identify and record the type of errors found by the appeals court. Table 1 lists the wrongful conviction factors and types of evidence that gives rise to a wrongful conviction used to analyze the cases.

Stage III: Analyzing or Developing a Social Science Analysis of the Data

To answer the research question of whether the likelihood of executing the innocent is less today than before the innocence revolution, first, all cases from both sets of years involving the conviction on an innocent person were identified and analyzed. Second, all cases were analyzed to identify the prevalence of wrongful conviction factor errors. Third, death penalty legal procedure "maps" for both sets of years were constructed based on the court rulings regarding the wrongful conviction factor errors. Major death penalty decisions that affected legal procedure from cases not considered in the study were used to further map out current Missouri death penalty legal procedure. Lastly, Missouri's current legal procedure in death penalty cases was assessed for its

ability to prevent the execution of the innocent.

Table 1.
Wrongful conviction factors: A list of the type of evidence proven to result in convictions of the innocent

Wrongful Conviction Factor	Type of Evidence
I. Faulty Scientific Evidence	A. Hair analysis (non-DNA)
	B. Blood analysis (non-DNA)
	C. Faulty crime lab procedures
	D. Biased crime lab personnel
II. Ineffective Assistance of Counsel	A. Allows faulty hair, blood, and crime lab evidence to be admitted
	B. Does not conduct proper investigation
	C. Background and motives of snitches and accomplices not checked
	D. Exculpatory evidence not found
III. Prosecutorial Misconduct	A. Using inflammatory rhetoric
	B. Arguing facts outside the record
	C. Personalization to the jury
	D. Arguing killing of defendant justified
	E. Weighing the value of defendants' life with victims'
	F. Direct and indirect character attacks
	G. Mishandling of physical evidence
	H. Failing to disclose exculpatory evidence
	I. Threatening, badgering, or tampering with witnesses
	J. Using false or misleading evidence
	K. Harassing, displaying bias toward, or having a vendetta against the defendant or defendant's counsel
	L. Improper behavior during Grand Jury proceedings
IV. Mistaken Eyewitness Testimony	A. Defense counsel does not properly question witness for doubt
	B. Police line-up procedures in identification not scrutinized
V. Police Misconduct	A. Tunnel vision or confirmatory bias
	B. Use of snitches
	C. Giving deals to accomplices to testify
	D. Obtaining a false confession
	E. Obtaining a coerced confession
	F. Manufacturing evidence
	G. Overlooking exculpatory evidence

Results

Conviction of the Innocent

Three cases ended in the conviction of the innocent out of the sample of 76 death penalty and death eligible cases from the pre-innocence revolution years, 1989—1993. Two of these three cases involved the death penalty and one was a non-death penalty first degree murder case. Only one non-death first degree murder case ended in the conviction of the innocent out of the 42 death eligible cases that took place during the innocence revolution years of 2000—2004. This finding supports the hypothesis that the courts have reduced the possibility of executing the innocent in Missouri death penalty cases.

The Cases

The first death penalty case ending in the conviction of the innocent for the years 1989—1993 involves Clarence Dexter. Wrongful conviction factors in Dexter's case include police misconduct, the use of faulty scientific evidence by the prosecutor, and trial judge errors. Dexter was accused of shooting his wife to death after she returned home from work. Dexter called the police after finding his wife's body in the garage of their family home upon returning home from the grocery store. Despite producing receipts from the grocery store with the time recorded showing he was in the store's check out line at the time of the murder, Dexter could not convince police of his innocence, who continued to question him illegally in violation of his *Miranda* rights at the crime scene. At trial the judge allowed the police to testify on comments Dexter made to them after they violated his *Miranda* warnings. The prosecutor then convicted Dexter on a case based on evidence derived from faulty blood and hair analyses (*State v. Dexter*, 2002).

The second death penalty case ending in innocence involves Leamon White. In April of 2006, after the U.S. Court of Appeals for the Eighth Circuit overturned his death sentence, White pleaded innocent but admitted that Missouri prosecutors had enough evidence to try him for second degree murder in exchange for his immediate release from prison. White had been sentenced to death by a jury in 1989 and had served 17 years in prison, mostly on death row. Wrongful conviction factors present in White's case include an improper police investigation, mistaken eyewitness identification, and ineffective assistance of counsel. White and two co-defendants were convicted of murdering a man they were attempting to buy crack cocaine from by slitting his throat, tying him up and then leaving him to suffocate in a closed apartment with a gas stove turned on. Two other adults and two children were tied up and left in the same apartment, but survived. However, the jury only heard the testimony of the two surviving adults who misidentified White as the killer. The jury never heard the testimony of the two children, that the killer spoke with a Jamaican accent, or that evidence showed a Jamaican named "A.J." was seen with the two co-defendants earlier in the day, because White's trial attorney failed to properly investigate the case. To make matters worse, during the appeals process, White was abandoned by his court appointed appeals attorney and missed the deadline for filing his Rule 29.15 post-conviction appeal which contained his ineffective assistance of counsel claims showing his innocence. In three appeals to the Missouri Supreme Court, the court refused to admit into evidence the testimony of the two children and

other exculpatory evidence because the evidence had been introduced in a post-conviction appeal filed after the Rule 29.15 deadline. Finally, the U.S. Court of Appeals for the Eighth Circuit overturned White's death sentence on a federal habeas review, ruling that White's Constitutional right to counsel had been violated for failure to conduct a proper investigation at trial (*White v. Bowersox*, 2000).

The third wrongful conviction case from the years 1989 to 1993 involved James Massey, who was convicted of first degree murder in 1990 in a non-death trial. Factors common to wrongful convictions present in Massey's case include an improper police investigation, eyewitness misidentification, trial judge error, and an overzealous prosecutor. In August of 1990, a jury found Jimmy Massey guilty of first degree murder for shooting another man to death at 4:00 p.m. in the afternoon largely based on the testimony of two eyewitnesses. Massey, who had a full leg cast on at the time, claimed he was at a residence about two miles away watching his children at the time of the murder. At trial, Massey was not allowed to present two witnesses who could testify they were with him at the residence at the time of the murder. The trial judge, upon a motion by the prosecutor, ruled that the two alibi witnesses could not testify because of a violation of pre-trial discovery rules, which occurred because Massey's attorney gave the prosecutor the wrong address for the two witnesses eight days before the trial. The prosecutor's investigator discovered the error about a week before trial and located the two alibi witnesses, but the prosecutor did not report the discrepancy to the court until shortly before trial. On appeal, a Missouri Court of Appeals reversed the verdict, finding the trial judge's ruling too harsh and the prosecutor's conduct ethically suspect (*State v. Massey*, 1993).

The fourth case of actual innocence came after 2000 when James Boyd, then 16, was convicted of first degree murder in a non-death case for stabbing another teen to death. Boyd's case involved an improper police investigation, an overzealous prosecutor, and an overly stringent trial judge. Boyd and the victim were with three other males at the time of the stabbing, who all struck plea bargains with the prosecutor in exchange for testifying against Boyd. The trial judge, however, refused to hear expert testimony that would show Boyd suffers from Asperger's syndrome, a disease that makes it physically impossible to overpower and stab another person to death. In overturning Boyd's conviction in 2004, the Missouri appeals court noted that the verdict was suspect because no physical evidence was presented that linked Boyd to the murder and that all the testimony against him was accomplice evidence by the other teens who struck plea bargains in exchange for their testimony (*State v. Boyd*, 2004).

Analysis of the Verdicts

The four cases involving actual innocence all involved "tunnel vision," a term to describe a confirmatory bias that the police develop during the course of an investigation. The police believe that one of the suspects did the crime to the point that their bias obviates an objective evaluation of whether or not others may be guilty (Illinois Commission, 2002). Evidence that "tunnel vision" biased the investigation is that the real killer was not investigated or found in any of the four cases. In Dexter's case, there was no investigation of anyone who could have known that the side door to the garage where the killing took place was always left open. In White's case, the Jamaican A.J. was never investigated, and no other person was investigated in either Massey's or Boyd's case. This is consistent with the 2002 Illinois Commission's

finding that all 13 of the Illinois death penalty cases that resulted in the release of an innocent person from death row was the result of police "tunnel vision" (Illinois Commission, 2002). Also, procedural rulings in each of the four Missouri cases prevented the defendant from presenting exculpatory evidence to prove their innocence. This finding is consistent with the theory that excluding evidence from trial is a major factor contributing to wrongful convictions (see Givelber, 1997).

Prevalence of Wrongful Conviction Factors in Death Penalty Cases

The results also show that there were fewer errors in Missouri death penalty trials that took place from 2000 to 2004 than those taking place from 1989 to 1993. This finding supports the hypothesis that the courts have reduced the possibility of executing the innocent in Missouri since the onset of the innocence revolution, because court errors are common in wrongful convictions (see Scheck, Neufeld, & Dwyer, 2003). For the years 2000—2004, 3 of the 14 successful death penalty convictions were overturned, all because of trial judge errors. One of the three defendants was re-sentenced to death. Considering error overlap, the three errors resulted in four procedural errors. For the years 1989—1993, 12 of the 35 successful death penalty trials were overturned because of trial errors. In all, 16 errors were found in 12 cases, including 6 instances of ineffective assistance of counsel, 5 instances of prosecutorial misconduct, and 4 instances of trial judge errors. Only 2 defendants were re-sentenced to death in subsequent trials. Considering error overlap, the 16 errors resulted in 26 procedural errors. See Table 2 for a summary of the procedural error findings.

The most important finding from the years 1989 to 1993 is that two of the cases resulted in a wrongful conviction as a death eligible crime. In James Butler's case, a legal technicality is the only difference between his case and a case of actual innocence. Butler ended up pleading guilty to second degree murder for the killing of his wife after the Supreme Court of Missouri overturned his 1991 death sentence in 1997 because of ineffective assistance of counsel. Butler's counsel failed to uncover that Butler had a nephew with a drug problem and a history of robbing relatives. The body of Butler's wife was found with two bullet holes and without a valuable wedding ring she always wore. Most people associated with the case believe that Butler's nephew killed Butler's wife while robbing her of the wedding ring. Butler, who was known to argue with his wife over money, may have helped his nephew rob his wife by providing him information on her whereabouts. If Butler helped his nephew, he would be guilty of second degree murder because his wife was murdered in the course of a felony for which he had a part (*State v. Butler*, 1997). Butler's case is similar to the cases involving the conviction of an innocent discussed above, in that evidence of tunnel vision is present during the initial investigation, and due to his counsel's failure to properly investigate the case, it proceeded to trial without the evidence necessary to exonerate Butler.

Jahn Henri Parker was also found not to have committed a death eligible crime. Parker was given the death sentence in 1992 for killing his girlfriend to prevent her from testifying against him at an upcoming probation hearing. The Missouri Supreme Court ruled that Parker's defense counsel was not ineffective and refused to overturn Parker's death sentence even though the court found that Parker's counsel failed to discover that Parker's probation hearing had been canceled (because he struck a plea bargain with the prosecutor before the murder). The cancellation of Parker's probation hearing negated the only aggravating factor in the case, meaning he did not

commit a death eligible crime. In 1999, the Eighth Circuit Federal Court of Appeals overturned Parker's death sentence based on ineffective assistance of counsel (*Parker v. Bowersox*, 1999).

Table 2.
Procedural Errors in Missouri Death Penalty Cases:
1989—1993 and 2000—2004.

Number of Errors 1989-1993		Number of Errors 2000-2004
	Investigation and Arrest	
5	Pre-Trial Hearings	1
	1st Appearance	
	Preliminary Hearing	
	Arraignment	
	Pre-Trial Issues	
1	Judicial Impartiality	0
1	Charges	0
1	Self-Representation	0
1	Guilty Plea	0
0	Venue	1
2	Discovery	1
0	Voir Dire	0
	Presentation of the Case	
7	Guilt Phase	0
1	Charging of the Jury	0
0	Jury Deliberations	0
4	Penalty Phase	0
2	Sentencing	1
0	State Appeal	0
0	Proportionality Review	0
1	State Post-Conviction Appeal	0
0	State Habeas Corpus	0
0	Federal Habeas Corpus Review	0
0	Clemency	0
Totals: 26		Totals: 4

Comparing Legal Procedure in Missouri's Death Penalty System Between the Years 1989 to 1993 and 2000 to 2004

Police Error

1989—1993. The police failed to conduct a proper investigation in 5 of the 35 cases where the defendant was sentenced to death. Two of the five cases involved actual innocence (discussed above) and two cases involved the wrongful conviction as a death eligible crime (discussed above). The fifth case involved Shirley Jo Phillips, who had her 1992 death sentence overturned in 1997 by the Supreme Court of Missouri because the police withheld evidence relevant to the penalty phase of her trial. Phillips was given the death penalty for murdering and dismembering the body of the wife of a retired minister. It turned out that her son, who was never charged in the killing, told a key witness on audio tape that it was he, and not his mother, who dismembered the body. The tape was placed in the desk drawer of a policeman who went on sick leave before the trial. After the trial the police officer delivered the tape to the prosecutor claiming that he forgot to report the key evidence (*State v. Phillips*, 1997).

2000—2004. Only 1 of the 22 death penalty cases involved a police error. Cecil Barriner was given the death penalty in 2002 for raping and murdering the daughter and elderly mother of his ex-girlfriend. There was a dispute whether or not Barriner raped his girlfriend's daughter before killing her. The rape charges stemmed from hair evidence found at the crime scene. Convinced that someone planted the hair evidence to obtain the additional rape charges and the resulting death penalty, the Supreme Court of Missouri overturned Barriner's death sentence. At a re-trial in 2004 Barriner was sentenced to life without parole (*State v. Barriner*, 2003).

Pre-Trial Hearings

In Missouri, pre-trial hearings consist of a first appearance, a grand jury or preliminary hearing, and an arraignment. At the preliminary hearing, the prosecutor presents the initial case against the defendant. At that time, the defendant has the opportunity to present jurisdiction issues regarding proper venue, trial judge impartiality, and self-representation, but the defendant may present these issues at any time during the pre-trial process. The defendant enters his or her plea during the arraignment. Earlier cases established that if the state waives the death penalty the prosecutor cannot seek the death penalty upon retrial (*State ex rel Patterson vs. Randall*, 1982), but that the state can seek the death penalty in a second trial if they were unsuccessful in obtaining the death penalty at the first trial (*State ex rel. Westfall v. Mason*, 1980). Below, pre-trial issues that have come up in death penalty cases are discussed.

Pre-trial issue: Judicial impartiality 1989—1993. Judicial impartiality was the main issue in Herbert Smull's 1992 death penalty conviction. The trial involved a Black defendant, a White victim, an all-White jury and a White judge who was quoted in the newspapers as having made racially questionable remarks shortly before trial. Smulls appealed several rulings of the trial judge on racial grounds. The Missouri Supreme Court remanded the case back to the St. Louis County Judicial Circuit three times in

an effort to find an unbiased judge to review the rulings of the trial judge. On remand for the third time, apparently the Missouri high court was satisfied with the ruling of a St. Louis County judge who again did not find any racial bias in the trial judge's rulings. Finally, in 2006, convinced that no St. Louis County Judge had fairly reviewed Smulls' claims, the Federal Eighth Circuit Court of Appeals reversed Smulls' death sentence and remanded the case to a federal district court to determine if the trial judge made unbiased voir dire rulings (*Smulls v. Roper*, 2006).

Judicial Impartiality 2000—2004. No errors found.

Pre trial issue: Charges 1989—1993. The Supreme Court of Missouri overturned Willie Simmons' 1989 death sentence in 1991 because the trial judge allowed the prosecutor to improperly try Willie Simmons for two murders at the same time in order to obtain a death sentence.

Charges 2000—2004. No errors found.

Pre trial issue: Self representation. Self-representation is a Constitutional right, but not a good trial strategy. Not trained in law, virtually every client who chooses to represent themselves loses at trial. Missouri has a particular problem with defendant's choosing self-representation in death penalty cases.

Self representation 1989—1993. Two defendants were sentenced to death after they represented themselves at trial, Robert Schafer in 1993 and Jerry Lee Wise in 1991 (*State v. Wise*, 1994; *Shafer v. Bowersox*, 2003). Schafer plead guilty and his death sentence was overturned by the U.S. Court of Appeals for the Eighth Circuit because of trial judge errors in the guilty plea protocol. Wise was executed in May of 1999.

Self representation 2000—2004. David Zink represented himself and was given the death penalty in 2004 (*State v. Zink*, 2005). In May of 2007 the Supreme Court of Missouri overturned the death sentence of Gary Black because the trial judge did not allow Black to voluntarily exercise his Constitutional right to represent himself at trial. In denying Black his request to dismiss his counsel, the trial judge told Black:

> I think you're less qualified than your attorney. As far as I know you have not been to law school and have not defended criminal cases, you're not licensed to practice law, and so I would assume that assigned counsel is more capable than you of representing you (*State v. Black*, 2007, p. 152).

Pre trial issue: Guilty pleas. When a defendant pleads guilty he gives up his or her right to a jury trial and is sentenced by a trial judge. The problem is that the defendant risks that the trial judge will deliver an arbitrary application of the death penalty because the decision will reflect the sentencing philosophy, racial, and socio-economic views of one person (*Ring v. Arizona*, 2002). While the U.S. Supreme Court forbade trial judges from sentencing defendants to death in *Ring*, the decision does not apply to guilty pleas because the defendant voluntarily gives up his or her right to a jury trial.

Guilty pleas 1989—1993. Five defendants out of the 35 given the death penalty during the years 1989—1993 plead guilty and were sentenced to death by a judge. Roderick Nunley and Michael Taylor plead guilty, were sentenced to death in 1991, and are still on death row (*State v. Nunley*, 1996; *State v. Taylor*, 1996). Bert Hunter plead guilt and was sentenced to death in 1989 (*State v. Hunter*, 1992) as was Gary Lee Roll in 1993 (*State v. Roll*, 1997). Hunter and Roll were both executed in 2000. Robert Schafer plead guilty and was sentenced to death in 1993 (*Shafer v. Bowersox*, 2003), but Schafer had his death sentence commuted. Out of the 20 defendants who did not have their death sentences overturned from the years 1989—1993, 4 were sentenced to death after pleading guilty, for a rate of 20%.

Guilty pleas 2000—2004. One defendant, Gary Beach, plead guilty in 2002, but the judge sentenced him to life without parole (Campbell, 2002).

The most significant change in accepting guilty pleas in Missouri death trials came 2001 when the Eighth Federal Circuit Court of Appeals overturned Schafer's 1993 death sentence after finding his guilty plea was not knowingly, intelligently, or voluntarily made. Schafer was charged with two counts of murder and placed in a county jail in 1990. For more than a year, nothing was done on his case. During this time, Schafer found life unbearable, alleging that correctional officers could not protect him from repeated sexual assaults from his cell mate. An assistant public defender finally started representing him in February of 1992, but Schafer, who had a history of mental problems, was so distraught from his jail experience he fully confessed to shooting two men to death while he and an accomplice robbed them. Although the prosecutor notified Schafer and the court that ballistics evidence conflicted with Shafer's confession and indicated that Shafer's accomplice and not Schafer did the shootings, Shafer still wrote a letter to the trial judge saying he wanted the death penalty. Convinced by experts that Schafer was competent, in a 2 hour hearing the trial judge accepted Schafer's request for self-representation and his guilty plea, and found evidence supporting five aggravating factors in sentencing him to death. In overturning his death sentence, the federal court of appeals specified an elaborate protocol Missouri judges must go through regarding defendants who want to plead guilty at death trials (*Shafer v. Bowersox*, 2003).

Pre trial issue: venue 1989—1993. No errors.

Venue 2000—2004. The Missouri Supreme Court overturned Kenneth Baumrak's 2001 death sentence because they did not think he could obtain a fair trial in St. Louis County. In 1992, Baumrak killed his wife and wounded several court personnel in a well-publicized shooting spree at the same courthouse where his death penalty trial was held (*State v. Baumruk*, 2002). The Missouri Supreme Court ordered a new trial to take place in nearby St. Charles County which ended in February 2006 with the jury sentencing him to death once again.

Pre trial issue: Discovery 1989—1993. In 1992, The Missouri Supreme Court overturned Joseph Whitfield's 1989 death sentence because the prosecutor violated pre-trial discovery rules by notifying the defense on the morning of the trial of three additional witnesses and two new pieces of evidence. The Missouri Supreme Court ruled that the defense did not have time to properly respond to the new evidence and

that prosecution's use of the evidence mislead the jury, denying Whitfield a fair trial (*State v. Whitfield*, 1992). Discussed above, the Supreme Court of Missouri overturned Shirley Jo Phillips' 1992 death sentence because the prosecutor withheld pre-trial evidence from the defendant until after trial (*State v. Phillips*, 1997).

In cases from other years, the Eighth Circuit Federal Court of Appeals overturned Eric Clemmons' conviction and death sentence because Clemmons was not allowed to cross examine a witness based on what the witness said during a pre-trial deposition due to counsel not notifying Clemmons of the deposition (*Clemmons v. Delo*, 1997). The Supreme Court of Missouri overturned Luther Wells' death sentence in 1991 because his counsel failed to discover a letter that pointed to his innocence (*State v. Wells*, 1991).

Discovery 2000—2004. No errors found.

Pre trial issue: Voir dire. Charges of racism in Missouri death penalty trials focus on the jury selection stage of trial, or voir dire. In Missouri death penalty trials, prosecutors and defense attorneys can have jurors dismissed in two ways: (1) challenges for cause and; (2) preemptory strikes. A "challenge for cause" means that the attorney wants the juror removed because his or her "opinions or beliefs preclude them from following the law" (§ 494.470 R.S.Mo 2006). In addition to challenges for cause, in a Missouri death penalty trial each side has nine preemptory strikes, which allows either attorney to strike any juror without a reason (§ 494.480 R.S.Mo 2006). However, the U.S. Supreme Court ruled in *Batson v. Kentucky* (1986) that the Equal Protection Clause prevents the dismissal of a juror on the sole basis of race. Thus, if the defense thinks that the prosecution is exercising a preemptory strike because of that juror's race, the defense can make a "Batson challenge," requiring the prosecutor to provide a race-neutral explanation for the strike (*State v. Cole*, Mo banc 2002). Criticizing Batson challenges, Missouri Supreme Court Justice Michael A. Wolff commented that protections are illusionary. Wolff maintains that most attorneys use racial profiling to select jurors and it is not hard for an attorney to think of some reason to strike a juror when in reality they are making a racial strike (*State v. Smulls*, 2002).

Voir dire 1989—1993 and 2000—2004. No case was overturned because of a Batson challenge for the years studied.

Recently, both the Federal and the Missouri Supreme Court have been examining voir dire more closely. The Missouri Supreme Court overturned Vincent McFadden's death sentence in 2006 because of improper Batson challenges (*State v. McFadden*, 2006). Also, in 2006 the Supreme Court of Missouri overturned the penalty phase of Terrance Anderson's death trial because his counsel failed to object to a juror who made biased remarks in favor of using the death penalty during voir dire (*Anderson v. State*, 2006). In 2002, the Missouri Supreme Court overturned the penalty phase of Randall Knese's death trial because two pro-death penalty individuals were allowed on the jury after Knese's defense attorney failed to read questionnaires they filled out during voir dire indicating their bias (*Knese v. State*, 2002). Discussed above, the Eighth Circuit Federal Court of Appeals overturned Herbert Smulls' 1992 death sentence in 2006 after finding the trial judge made improper Batson challenge rulings (*Smulls v. Roper*, 2006). In 2001, The Eighth Circuit Federal Court of Appeals also

voided William Weaver's conviction and death sentence because the prosecutor improperly used peremptory strikes against two Black jurors (*Weaver v. Bowersox*, 2001). In other decisions involving voir dire errors, Louis Clark had his death sentence set aside in 1998 by the Missouri Supreme Court because the trial judge refused to allow his attorney to question the venire on "age of the victim" (*State v. Clark*, 1998). In 1991, the Missouri Supreme Court overturned James Schnick's conviction and death sentence because the trial judge did not allow enough potential jurors in the jury pool (*State v. Schnick*, 1991), and in 1990 the Supreme Court of Missouri set aside Nile Wacaser's death sentence because the trial judge did not strike a juror because of cause (*State v. Wascaser*, 1990).

Trial and Sentencing

Opening statements, body of the case and closing arguments 1989—1993. Walter Storey had his 1991 death sentence overturned by the Missouri Supreme Court in 1995 for prosecutorial misconduct during trial (*State v. Storey*, 1995), and Faye Copeland had her 1990 death sentence overturned in 2000 by the Eighth Circuit Federal Court of Appeals because of inflammatory remarks by the prosecutor throughout the trial (*Copeland v. Washington*, 2000). The defense counsel in both cases was cited for ineffective assistance of counsel, for failing to object to the prosecutorial misconduct. In addition, Ed Reuschler had his 1991 death sentence set aside by the Missouri Supreme Court in 1997 because his defense counsel did not properly investigate his case (Akers, 1997). In the actual innocence cases discussed above, the prosecutor was cited by the Supreme Court of Missouri in Clarence Dexter's case for improperly bringing in evidence in violation of Dexter's *Miranda* rights (*State v. Dexter*, 1997), and the Eighth Circuit Federal Court of Appeals set aside Leamon White's death sentence because his counsel did not properly investigate the case. In the two cases involving the wrongful conviction of a defendant for a death eligible crime discussed above, the Missouri Supreme Court set aside James Butler's 1992 death sentence in 1997 because his defense counsel did little in the case (*State v. Butler*, 1997), and the and Eighth Circuit Federal Court of Appeals set aside Jahn Henri Parkers death sentence because his counsel did not properly investigate his case (*White v. Bowersox,* 2000; *Parker v. Bowersox*, 1999).

Presenting the case 2000—2004. No attorney errors found.

In other cases, in 2001 the Supreme Court of Missouri overturned Robert Driscoll's conviction and death sentence because of aggressive prosecutorial tactics during the presentation of the case (*State v. Driscoll*, 2001); overturned Leon Taylor's death sentence in 1997 because of improper remarks the prosecutor made during trial (*State v. Taylor*, 1997); overturned Gary Black's conviction and death sentence because his counsel failed to impeach key witnesses during the guilt phase of the trial (*Black v. State*, 2004); overturned the conviction sentence of Danny Wolfe in 2003 because his counsel failed to test hair samples (*Wolfe v. State*, 2003); and in 1985 overturned Walter L. Harvey's conviction and death sentence because of nonparticipation by his defense counsel (*State v. Harvey*, 1985). The Eighth Circuit Federal Court of Appeals overturned Kenneth Kenley's death sentence in 1991 after finding the public defender (just out of law school) did not properly prepare for trial (*Kenley v. Armontrout*, 1991), and James Chambers death sentence in 1990 when his

counsel failed to call a witness to the stand who could prove Chambers acted in self-defense (*Chambers v. Armontrout*, 1990). In actions at trial involving trial judges, in 1996, the Missouri Supreme Court overturned Walter Barton's death sentence because the trial judge refused to allow defense counsel to make an argument on behalf of Barton (*State v. Barton*, 1996).

Charging the jury 1989—1993. The Supreme Court of Missouri overturned Jeffery Ferguson's 1992 death sentence in 1994 for failing to properly instruct the jury on whether or not he deliberated before murdering a 17 year old female.

Charging the jury 2000—2004. No errors found.

In other years, The Eighth Circuit Federal Court of Appeals overturned Doyle Williams' death sentence because the judge did not instruct the jury about the difference between capital and first degree murder (*Williams v. Armontrout*, 1989). In 1984, the Supreme Court of Missouri overturned James Chambers' death sentence because the trial judge failed to give a self-defense instruction to the jury (*State v. Chambers*, 1984).

The penalty phase 1989—1993. In 1993, the Missouri Supreme Court reversed the penalty phase of Maria Isa's 1991 death sentence because the trial judge failed to give instructions to the jury to distinguish Maria's crime from her husband's (who she was being tried jointly with for the murder of their daughter). In 2003, the Eighth U.S. Circuit Court of Appeals overturned Vernon Brown's death sentence for the 1985 murder of Synetta Ford because the trial judge refused to allow a letter on Brown's behalf from his step-brother to be admitted into evidence during the penalty phase of the trial. Brown, however, was executed in May of 2005 for another murder. As discussed above, Walter Storey and Faye Copeland had both the guilt and penalty phase of their trials overturned because of aggressive prosecutorial tactics and the failure of their defense counsel to object (*State v. Storey*, 1995; *Copeland v. Washington*, 2000).

The penalty phase 2000—2004. No errors found.

In cases from other years, the Missouri Supreme Court overturned the penalty phase in Brandon Hutchinson's and Ernest Lee Johnson's trials because defense counsel failed to properly investigate and present evidence of impaired mental functioning (*Hutchinson v. State*, 2004; *Johnson v. State*, 2003); overturned the penalty phase of Rufus Ervin's trial because the defense failed to fully investigate the case and bring in relevant evidence for the jury to consider (*Ervin v. State*, 2002). The Missouri Supreme Court also overturned the penalty phase of Carmen Deck because the trial judge failed to instruct the jury on mitigating evidence (*Deck v. Missouri*, Mo. banc 2002); of Bobby Joe Mayes and Walter Storey for failing to instruct the jury to not draw an adverse inference from the defendant not testifying (*State v. Mayes*, 2001; *State v. Storey*, 1999); of Bernhard Rhodes because of improper remarks made by the prosecutor (*State v. Rhodes*, 1999); of Kenneth Thompson because the trial court allowed a witness to improperly testify regarding the defendant's violent past (*State v. Thompson*, 1999); of Shelby Gene Debler because the trial judge allowed extensive evidence of an unconvicted crime (*State v. Debler*, 1993); of Reginald Griffin for

admitting evidence of a crime against the defendant that was committed by another person (*State v. Griffin*, 1993); and of Virginia Twenter because counsel failed to fully investigate the defendant's relationship with other family members (*State v. Twenter*, 1991).

On the federal level, in 2005 the U.S. Supreme Court overturned Carman Deck's death sentence because he was held in shackles during his penalty phase hearing, holding that a defendant in a death trial cannot be in shackles during the guilt or penalty phase of a death trial (*Deck v. Missouri*, 2005). In 1999, the Eighth Circuit Federal Court of Appeals overturned the penalty phase of Daryl Shurn because the prosecutor made an improper argument (*Shurn v. Delo*, 1999); of Emmitt Foster in 1994 because counsel failed to inform him of his right to testify (*Foster v. Delo*, 1994); of Steven Parkus in 1994 because the prosecutor withheld records that were material to his mental state at the time of the crime (*Parkus v. Delo*, 1994); and of Frederick Lashley in 1992 for failing to inform the jury of the significance of the defendant's lack of any criminal record (*Lashley v. Armontrout,* 1992).

Sentencing 1989—1993. Antonio Richardson had his 1993 death sentence commuted to life without parole by the Supreme Court of Missouri because the trial judge sentenced them to death in violation of the U.S. Supreme Court ruling in *Ring v. Arizona* (2002) mandating that only juries can impose the death sentence when a trial is held (Ganey, 2003).

Sentencing 2000—2004. Deandra Buchannan had his 2002 death sentence commuted to life without parole because of *Ring v. Arizona* (2002) (*State v. Buchanan,* 2003).

State and Federal Appeals

Post-Conviction appeals. Post-conviction appeals in Missouri must be filed according to Rule 29.15 filing deadlines or the Missouri courts will not consider them (Mo. Rule 29.15 (b) (f) 1988).

Post-Conviction appeals 1989—1993. As discussed above, through three appeals, the Missouri Supreme Court refused to hear Leamon White's ineffective assistance of counsel showing his innocence because it was part of an amended post-conviction appeal filed shortly after the Rule 29.15 deadline. During White's three appeals, the Supreme Court of Missouri did devise limited relief for defendants who file late Rule 29.15 post-conviction appeals, ruling that the defendant's Rule 29.15 appeal is still valid if a defendant's attorney was the sole reason he missed the deadline. However, the Missouri Supreme Court still refused to hear White's amended 29.15 claim because White's late filing could not be attributed to abandonment by his defense counsel. The Eighth Circuit Federal Court of Appeals finally overturned White's death sentence for ineffective assistance of counsel in 2005 (*White v. Roper*, 2005).

Post-Conviction appeals 2000—2004. No errors.

In other Rule 29.15 cases, in 1991 the Missouri Supreme Court allowed Clennell Sanders to present his late Rule 29.15 claim in an amended motion because the late filing was solely the fault of his attorney (*Sanders v. State*, 1991), and in 1990 the

court allowed Samuel Smith his 29.15 appeal after finding the late filing was due to the actions of prison authorities (*Smith v. State,* 1990).

Proportionality review 1989—1993 and 2000—2004. No errors found.

Missouri law requires that the Missouri Supreme Court conduct a proportionality review for every death sentence to ensure that the death sentence is in proportion to previous death sentences (§ 565.032 R.S.Mo. 2006). Not mandated by the U.S. Constitution, the Missouri Supreme Court has only struck down one death sentence on proportionality grounds since it began such reviews when it declared Terry Lee McIlvoy's death sentence disproportionate in 1982, after judging the defendant to have a minimal juvenile record, low grades, a low I.Q. and was a follower of another person who perpetuated the murder scheme and was given a life sentence (*State v. McIlvoy,* 1982).

State habeas corpus review 1989—1993 and 2000—2004. No errors found.

The Missouri Supreme Court outlined the guidelines for a state habeas corpus claim in a death penalty case in 2003 when they overturned Joe Amrine's death sentence after he showed clear and convincing evidence of actual innocence. The court ruled a death penalty habeas corpus claim must: (1) show cause for failing to raise the claim in a timely manner and prejudice from the Constitutional error asserted; or (2) a show actual innocence by the preponderance of the evidence (*State ex rel. Amrine v. Roper*, 102 S.W.3d 541 Mo. banc 2003).

Federal habeas corpus review 1989—1993. Discussed above, the Eighth Circuit Federal Court of Appeals overturned five Missouri death penalties on habeas corpus review: White (2004) and Parker (1999) had their death sentences overturned due to ineffective assistance of counsel; Copeland (2000) had both the guilt and penalty phases of her trial overturned because of aggressive tactics by the prosecutor; Schafer (1999) had his guilty plea overturned and is serving a life without parole sentence, and Brown (2003) because of an improper trial judge ruling.

Federal habeas corpus review 2000—2004. No cases were overturned on federal habeas corpus review.

The most significant federal habeas corpus ruling delivered by the U.S. Supreme Court came in 1995 when it overturned Lloyd Schulp's Missouri death sentence based on actual innocence. In *Schulp*, the Court ruled that a defendant who was convicted and sentenced to death in state court can avoid the procedural bar to habeas corpus claims by producing new and reliable evidence showing that a Constitutional violation of "convicting the actually innocent 'probably resulted'" (*Schlup v. Delo*, 1995).

Clemency 1989—1993. Missouri has spared only one defendant from death row due to clemency, when in 1999 Governor Mel Carnahan granted the Pope's request not to execute Darryl Mease who was scheduled to be executed the day of the Pope's visit to St. Louis. Mease had received his death sentence in 1990.

Clemency 2000—2004. No commutations.

Summary and Conclusions

A comparison of cases involving innocence and the death penalty between the years 1989—1993 and 2000—2004 clearly supports the hypothesis that the Missouri Supreme Court and the federal courts have reduced the possibility of executing the innocent since the onset of the innocence revolution. Of the 35 defendants sentenced to death in Missouri from 1989—1993, 2 defendants were released from death row because of innocence and 2 defendants were found not guilty of death eligible crimes and re-sentenced accordingly, while no defendants sentenced to death from the years 2000—2004 have been found innocent or wrongly convicted of death eligible crimes. All appeals from death sentences given out between 2000—2004 have been heard by the Missouri Supreme Court since it obtained its Democratic majority in 2002, indicating the permanency of the death sentences given out during those years.

A comparison of the legal procedure involved in death penalty cases between the pre-innocence revolution years of 1989—1993 and the innocence revolution years of 2000—2004 demonstrates how Missouri has moved from a death penalty system plagued by error that may give rise to the conviction of the innocent to a death penalty system with much less error and no convictions of the innocent. Both the Missouri Supreme Court and the Eighth Circuit Federal Court of Appeals have made procedural rulings that have strived to eliminate prosecutor misconduct and ineffective assistance of counsel in Missouri's death penalty cases. Penalty phases are no longer being routinely overturned, voir dire procedures are being closely examined, strict protocols for judges to follow have been instituted in hearings involving both guilty pleas and self-representation issues, rulings of circuit county judges are being more closely examined, and a remedy for Rule 29.15 post-conviction appeal violations has been devised to allow evidence that was previously excluded at trial to be admitted. New state habeas corpus guidelines have been devised to supplement existing federal habeas corpus guidelines to allow exculpatory evidence not admitted at trial into the case to prevent the execution of an innocent person.

Despite the court rulings, the possibility of executing the innocent still exists in Missouri. Without any safeguards to prevent police "tunnel vision," appellate court rulings are all that prevents the execution of the innocent. Appellate court safeguards, however, retain an element of subjectivity. In the rule 29.15 remedy, it is the courts that determine whether or not the defendant had proper cause to file the form late, in state and federal habeas corpus claims, it is the courts who judge whether or not the new evidence sufficiently indicates innocence, and it is the courts who determine whether or not guilty plea and self-representation protocols are sufficient. Prosecutorial misconduct and ineffective assistance of counsel are only found if the courts determine the jury would have reached a different verdict.

Consider Marlin Gray's case, the last man Missouri executed. Gray was one of the four Black defendants charged with the murder of two White women in the highly publicized "Chain of Rocks Bridge" murders. After all four men raped and robbed the women and robbed their male cousin, two of Gray's accomplices, Reginald Clemons and Daniel Winfrey, forced the two women and the man down a manhole into the Mississippi River 50 feet below, where the women subsequently drowned. However, before the manhole incident occurred, Gray and Antonio Richardson had walked to the end of the bridge. Gray would have been guilty of second degree murder if he raped the women but did not intend to kill them.

The prosecutor charged Gray with first degree murder and sought the death penalty based on evidence that showed he acted as an accomplice to his co-defendants. The main evidence against Gray was a confession he made to the police shortly after the murder. At trial, Gray tried to recant his confession, claiming that the St. Louis police beat him to force the confession from him. Adding credibility to Gray's story, the victim's male cousin in the case was originally a suspect in the murders. He won a civil lawsuit worth $150,000 against the St. Louis police after they beat him physically to force him to make incriminating statements in the same case. Gray also claimed that the prosecutor in the case, Nels Moss, was withholding evidence of the police beating and forced confession. Nels Moss has been cited by The Center for Public Integrity, who completed a nation-wide study on prosecutorial misconduct, for being "a recidivist breaker of the rules by which prosecutors are supposed to operate" (Shinkle, 2003). During the penalty phase, Moss had argued facts outside the record when he derogatorily described Gray as the type of person who leads White middle-class females around. Moss personalized his death penalty argument to the jury when he made an analogy to the Manson murders, claiming that Gray had the same type of power over his co-defendants as Manson, coercing them to commit the murders while he walked away. The Missouri Supreme Court did not condone the prosecutor's remarks, but they did not think they prejudiced Gray, so no prosecutorial misconduct was found. No appeals court considered any evidence of police or prosecutorial misconduct. Gray was executed on October 26, 2005. He maintained his innocence through death, and in his last statement said he was "lynched" by Missouri (Brown, 2005).

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A POTENTIAL CAUSE OF MISCARRIAGES OF JUSTICE: AN EMPIRICAL REVIEW OF INVESTIGATION TECHNIQUES

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Abstract

Many people criticize China's criminal justice system, focusing on the issues of torture and violations of the suspects' human rights. This paper is based on analysis of 123 police investigation case files, and tries to review criminal investigation by Chinese police from the perspective of the techniques used in the investigations, which could be potential causes of miscarriages of justice. The initial empirical data in the paper will contribute to the literature, offer avenues for further research, and the results have value for those who develop training programs for China's judicial personnel.

A Potential Cause of Miscarriages of Justice: An Empirical Review of Investigation Techniques

In China, criminal procedure is defined as the methods and principles for the public security organs, the prosecution, and the court to investigate crime, find suspects, prosecute and try cases, and implement judgments. It includes five stages: case filing, investigation, prosecution, trial, and execution of sentence. The different judicial authorities carry out different duties at each stage. According to China's Constitutional Law[1] and Criminal Procedure Law (CPL),[2] Public Security[3] is responsible for the duty of investigating crime; the prosecution carries out the duty of prosecuting the crime, has partial responsibility for investigating cases that were conducted by state officers, and supervises other judicial organs. The judiciary is in charge of the trial.

According to the law[4] the public security organ is responsible for the government, which it is a part of, and is directed by, the government and its higher authorities. The prosecution is responsible for the same level of the People's Congress and is directed by its higher authorities. The court is responsible for the same level of the People's Congress, and there is no direct leadership between the court and its higher authorities, but a supervision relationship.[5]

The public security organ has extensive discretionary power. Except the decision to arrest and the decision to prosecute that need to be approved by the prosecution at

[1] Articles 127, 129, 131 and 135 of the Constitution Law.
[2] Article 3 of Criminal Procedure Law (CPL).
[3] Police.
[4] Article 3 of the organization management law of the Public Security Organ, Article 10 of the Organic law of the People's Prosecution and Article 16 of the Organic law of the People's Court.
[5] This means that the higher authorities of the court could not directly interfere with the court's judgment, and they could only change the judgment of the court through the procedure of second instance and the procedure for trial supervision.

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the same level, all other decisions, such as detaining a suspect and extending a duration of detention are made by the public security organ itself without interference. All custody houses, detention centres, collecting posts and drug rehabilitation centres are components of the public security organ.[6]

In the rhetoric of criminal procedure in China, the investigation by the police is expected to be based on the intelligence gathered by detectives and their investigation activities, such as uncovering reliable evidence and sending the case to the prosecution on the sufficiency of the evidence.[7] The investigation stage is expected to be undertaken by the investigation section, which is responsible for filing a case after securing that an offence really happened in law, investigate who committed the offence, and the facts of the crime.[8] Further delineated in the CPL is the process of investigation from proof to interrogation.[9] The techniques of investigation stipulated by the CPL include interrogating the suspect, questioning the victim, questioning the witnesses, inquest and examination, search and seizure of physical and documentary evidence, expert examination, and wanted orders.[10] The definition of investigation by academics, therefore, is restricted within these eight kinds of investigative techniques and five coercive measures.[11] Academic writers simply introduce and explain what the law as written regulates, and the actual practice of investigation is not discussed.

The public's perception of the effectiveness of investigation is influenced by three elements in America: the media image, the historical stereotype, and the critical stereotype.[12] It is the truth in China as well. On the one hand, popular TV series mythologize the investigative abilities of the police. On the other hand, the law textbooks usually teach law students that the main task for investigation is to collect evidence (for guilt or innocence), discover the facts of the crime, and catch suspects,[13] without telling the students what happens in reality, merely what the law says about what should be done. An idealistic picture is created for ordinary people and law students: the police use investigative and detective skills to find the suspect, all on the basis of *legal* measures and procedures. In reality the police do get a lot of evidence from the techniques. For instance, finding the marks of crime through "inquest and examination," such as fingerprints or blood samples of the suspect, conducting "expert evaluations" by specialists, or through questioning victims/witnesses to find the clues about the identity of the suspect. Finally, the person should be charged only on solid evidence. This reality also limits the academic research in China, as most of the legal debates focus on the law on the books, as well as how to make the legal rhetoric more logical or possible on paper, rather than actual practice.

In recent years, many cases involving miscarriages of justice have been disclosed by China's media, most related to torture by the police and wrongful convictions. They

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6 Article 9 of the organization management law of the Public Security Organ.
7 Articles 89 and 129 of CPL.
8 Articles 83 and 89 of CPL.
9 See Article 46 and 43 of CPL.
10 See Article 91 to 123.
11 Zuo, Wei-ming, Investigation, in *The Criminal Procedure Science* (1996), edited by Fan, Cong-yi, Beijing: The China University of politics and law, p.266-267. Ye, Qing (ed.，2004), *Criminal Procedure Science*, Shanghai: Shanghai People Press, p.225.
12 Greenwood, Peter, W., Chaiken, Jan, M., and Petersilia, Joan (1977), *The Criminal Investigation Process,* Lexington, Mass: D. C. Health, p.9.
13 Ibid.

shake the public confidence in the quality of police investigation. The following two cases are the most famous wrongful convictions.

(i) Du, Peiwu case

In 1998, Du's wife was found shot to death, along with her lover. Du was under suspicion by the police and was detained. When the case was transferred to the court, the court convicted Du for intentional homicide and gave the death penalty, even though Du testified in the court hearing that he was tortured by the police and made a false confession during the investigation stage. Du appealed to the Higher Court and this court changed the sentence to two years suspension of the execution of the death penalty. In 2000, the local police cracked a big criminal gang; the leader of the gang confessed that he killed Du's wife and her lover. The gun used to kill the two victims was found in the gang leader's office cabinet.

(ii) She, Xiangling case

In 1994, a woman's body was found in She's village. She's brother-in-law went to identify the dead body and told the police that the woman was his younger sister, who was She's wife and had been missing for a couple of months. The police detained She on murder and charged him later. She was sentenced to the death penalty in the initial trial, but appealed to the Higher Court. The Higher Court returned the case to the initial court and required a retrial of She's case, on the reason of insufficient evidence. The initial court finally changed She's sentence to 12 years in prison. In 2005, after 7 years in prison, She's wife came back home.

There are many implications to understanding the police investigation techniques used in these two cases, such as torture, forced confession, and the weakness of other evidence collected. Similar cases have also happened around the world. These wrongful convictions challenged the public's trust in police investigation.

There are many reports that criticize the police for torturing suspects and violating the human rights of the suspects in China. This paper tries to review police crime investigation from the angle of the investigation techniques, to determine whether there are common problems within the police investigation techniques which may interfere with justice. No published articles could be found that examine police investigation techniques using an analysis of police case files in China. This paper will contribute to the literature regarding investigation techniques, as well as further police-training programs in China.

The Public Perception and the Reality of Investigation in the USA and UK

Since the 1960s in the USA, UK, Canada, and Australia,[14] the empirical research related to the function of police investigation has shown a different picture comparing historical and popular images, that the police play a relatively unimportant role in

[14] McConville, Mike, and Baldwin, John,(1981), *Courts, Prosecution and Conviction*, Oxford: Clarendon Press, p 146-147. In this book, the authors also quoted some empirical studies in US during 1960s and 1970s which had similar research findings. Bottomley, Keith, A. (1981), *Understanding Crime Rates: Police and Public Roles in the Production of Official Statistics*, England: Gower Publishing Company Limited, p102.

identifying the suspect.[15] Research shows that police heavily rely on the information from victims and members of the public to trace and apprehend the suspects, and collect evidence against them.[16] The public perceives the role of the police as comparatively minor in the discovery and detection of crime; and forensic examination is not an expected event during the investigation.[17] Instead, it is interrogation[18] that solves the crime. Moreover, in the UK, McConville's team discovered that "in pursuance of their chosen goals, the police participate in the construction of evidence to create the social and environmental conditions which enable them to do this in the circumstances most favourable to them," but not by seeking "the truth" in an impartial setting.[19]

The Objective of the Research

Gudjonsson said "all judicial systems, whether adversarial or inquisitorial, are inherently fallible."[20] The results of the wrongful conviction of innocent persons are not only from the failed application of due process, but also as a result of wrongful police practice.[21]

In China, some Chinese scholars have criticised that the operation of police investigation is based on interrogation to prove the case fact. For example, one of the leading professors in China in criminal procedure, Fan, Cong-Yi pointed out that "investigation units usually interrogated the suspect immediately after getting some crime clues, then used what the suspect said to collect other evidence."[22] In 2000, a survey conducted by Chen's team disclosed that the police investigation relied solely on the suspect and interrogation.[23]

This paper analyzes how the investigators started their investigation, what kinds of investigation techniques were adopted, and the nature and the value of the prosecution's evidence, in order to disclose the actual investigative techniques used by police in the field, and discuss whether there is any potential for miscarriages of justice.

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[15] See in USA, Greenwood, *et al., supra* note 9 at p. 41; In UK, for example, Mawby, R. (1979), *Policing The City,* Farnborough: Saxon House, pp109-32**.** McConville & Baldwin, *supra note 11 at* pp 149. Zander, M. (1979), The Investigation of Crime: A Study of Cases tried at the Old Bailey, *Criminal Law Review*, April 1979, p.203-19.

[16] See Zander, *supra* note 12 at pp.203-219**;** Greenwood, *et al., supra* note 9 at p.12. Pollock-Byrne, J. M (1998), *Ethics in Crime and Justice: Dilemmas and Decisions*, (3rd, edition), Washington: Wadsworth Publishing Company, pp. 135-136. Griffiths, C. & Verdun-Jones, S. (1994), *Canadian Criminal Justice*, Toronto: Harcourt Brace, p70, 71. Cunneen, Chris & White, Rob (1995, *Juvenile Justice:An Australian Perspective*, Oxford: Melbourne, p202-203.

[17] Greenwood, *et al., supra* note 9 at p.189. McConville & Baldwin, *supra note 11 at* pp 148.

[18] McConville, Mike, Sander, Andrew and Leng, Roger (1991), *The Case for the Prosecution: Police Suspects and the Construction of Criminality*, London and New York: Routledge, p.57.

[19] *Id. at*, p.6.

[20] Gudjonsson, Gisli H (2003), *The Psychology of Interrogations and Confession: A Handbook***,** Chichester, West Sussex, England ; Hoboken, N.J. : Wiley, p153.

[21] Belloni, Frank and Hodgson, Jacqueline (2000), *Criminal Injustice: An Evaluation of the Criminal Injustice*, London: Macmillan Press Ltd, p2.

[22] Fan, Cong-yi (2000), Investigation, in *Research On Implementation Problems of Criminal Procedure Law*, Chen Guang Zhong (ed., 2000), Beijing: China Legal System Press, p.101.

[23] Chen, Wei-dong (ed., 2001), *Xing Shi Su Osng Fa Shi Shi Qing Kuang Diao Cha* (A Survey of Implementation Problems of Criminal Procedure Law*)*, Beijing: China's legal Press.

The Research Methodology

This research is based on an empirical review of 123 police investigation cases filed in two research sites in China between 2002 and 2004. There were 70 investigation case files in site I, which were minor cases and in the basic court,[24] 53 investigation case files were examined in site II, which were serious cases and tried in the intermediate court.[25] In site I, the total number of cases that went to trial was about 490 to 500; in site II, the total number of the cases that went to trial was about 250, thus the records examined represent about 14% and 21%, respectively, of the total cases filed at each site. All of the case files were selected randomly. The number of case files was decided by the duration at the field site. The investigation case files examined were cases that were documented and recorded by the investigators and transferred to the prosecution for review and to approve an initial prosecution. These files are also an important source of information for judges and defence lawyers to know the truth of the cases.

The Present Research Findings

Restricting the Freedom of the Suspect

The CPL regulates that only active criminals or major suspects under certain conditions may be initially detained according to law, and those criminal suspects who meet these legal conditions shall be arrested.[26] All of the criminal procedure law textbooks in the leading law school teach students to understand detention and arrest in this way, regulated by the CPL.

The investigation case files found that in a majority of cases, the police adopted administrative measures to restrict the freedom of the suspects first, and then interrogate them. After the suspect made a confession, the police would adopt the criminal detention measure, and arrest them later. Therefore, adopting the administrative detention measure to obtain the suspect's confession was the most important investigation technique in the real operation of the police investigation.

Restricting the freedom of the suspect by administrative measures. The People's Police law stipulates that the police have the power to question and check the suspected person, and take the person to the police station for questioning for a number of reasons. The police may detain the individual if the person is charged with a crime or suspected at the scene of committing the offence, if the suspect's identity is unclear, or if the suspect is carrying stolen goods.[27]

The CPL and the criminal procedure law textbooks always ignore these administrative detention measures of the police. The criminal law textbooks usually teach law students about the investigation stage, which is limited within what the CPL

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[24] Article 19 of CPL: The basic court shall have jurisdiction as courts of first instance over ordinary criminal cases; however, those cases which fall under the jurisdiction of the People's Courts at higher levels as stipulated by this law shall be exceptions.

[25] Article 20 of CPL: The Intermediate courts shall have jurisdiction as courts of first instance over the following criminal cases: (i) cases endangering State security; (ii) ordinary criminal cases punishable by life imprisonment or the death penalty; and (iii) criminal cases in which the offenders are foreigners.

[26] Articles 61 and 60 of the CPL.

[27] See Article 9 of the People's Police Law.

regulated.[28] Various academic debates and discussions of criminal justice reform in the past also focused on what the CPL has regulated about the investigation stage, rather than the use of the administrative detention.

The present research found that investigative practices in both sites were quite different from the CPL regulations and the academic textbook descriptions (see Table 1). Only 3% (2 out of 70) of cases in site I and 64% (34 out of 53) of cases in site II followed the textbook description. In all other cases, after the person was identified as having committed a crime, the police would then use administrative detention to hold the suspect at the police station for interrogation.

Table 1 shows that in site I, 66% of the suspects (46 out of 70) were forced to accept coercive interrogations (Liu Zhi Pan Wen*).*[29] Most were kept at least 24 hours, some over 24 hours. The proportion in site II was 36% (19 out of 53). This percentage is lower than what was found by Chen's team (93%, or 283 out of 302).[30] During this period, the most important job for the police officers was to interrogate suspects. Normally it was undertaken in the police station, but in site I, the case files showed that almost all of the suspects in this area (especially when the suspect was a migrant and without a job) were first put into the "detention and investigation" station to be interrogated. Since this technique is not regulated by the CPL, these suspects do not have the rights empowered by the CPL, such as being informed of the right to have a lawyer. In addition, the officer can decide to detain the suspect, without the approval of a supervisor.

Table 1.
The incidence of coercive measures outside the CPL

Categories	Site I[31]		Site II	
	N=70	%	N=53	%
Coercive interrogation	46	66	19	36
Shelter and investigation	22	31	0	0
The coercive interrogation of the CPL	22	31	34	64

Table 1 also shows that in site I another technique was employed by police but is not included in the textbooks nor the CPL or the People's Police Law, namely "shelter and investigation" (Shou Rong Shen Cha).[32] Some 31% of suspects (22 out of 70)

[28] The investigation stage regulated by the CPL includes three parts: case filing, the eight kinds of investigation methods, and the end of investigation. Any law textbook will explain the legal aspects of investigation, such as those mentioned above, Fan *supra* note 8, at pp. 266-295; Ye, *supra* note 8 at p. 225-261.

[29] Article 9 of the People's Police Law

[30] Chen, *supra* note 20, at p.11.

[31] Some of the suspects were under coercive interrogation first, and then transferred into "detaining and investigating."

[32] "Shelter and investigation" is an administrative measure, which means the police have the power to coercively shelter any person who roams about or begs, and sends them back home. It was originally issued by the State Council in 1962 for the purpose of controlling the population of the city and preventing the people in the countryside from coming to the city. On 12 May, 1982, the State Council issued "The measures about sheltering and repatriating the vagrants and beggars in the city." In this administrative regulation, the beggars and those who sleep in the street and do not have a stable place to live were incorporated into the objective to shelter and

were being coerced using this technique of shelter and investigation. The information in the case files also showed that both of them were migrants.[33] In the west, many scholars found that the police used their discretion to stop, search or arrest people according to the race, gender, age, or other non-legal factor; this could happen in the operation of shelter and investigation as well. In the present research, some of the people who were identified as migrants in the police records in fact had a temporary job and an accommodation (as documented in other parts of the file). In one case, the suspect was charged with raping the victim when the victim came to his company to look for a job. In the file, photos showed that the suspect had raped the victim at his home. These demonstrated that the policemen knew exactly where the suspect lived and worked, and also his ID card as evidence of his identity in the case file. Therefore, there was no reason to send this man to the station for "sheltering and repatriating," but the police did. The detention was justified by the police by merely filling in the form that the suspect did not have an identity.

In site II, there were no cases in which the suspected persons were placed under shelter and investigation. The reason was that the Sun, Zhigang case in March of 2003 led the State Council to abolish the measure of shelter and investigation in June of 2003, and the research in site II was carried out in 2004. [34]

Moreover, the findings above are in line with Chen Wei-dong's research, namely that most initial interrogations did not take place according to the CPL's methods for interrogating suspects, but as a result of using coercive interrogation under the Police Law (Liuzhi Panwen).[35] This measure is not included in the criminal procedure law textbooks, and also usually does not figure in academic debates on reforms of the Criminal Procedure Law. Because it is not regulated by the CPL the law itself empowers the police with such discretionary power, and the police have adopted such processes that violate the rights of the suspect. As McBarnet argued, police practices are perfectly lawful and offend due process values, "because legal structure, legal procedure, legal rulings, not legal rhetoric, govern the legitimate practice of criminal justice, and there is quite simply a distinctive gap between the substance and the ideology of the law."[36]

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repatriate. The nature of the "shelter and investigation" was changed from a simple administrative measure for solving the problem of city roaming and begging, to a coercive measure for maintaining public security. Prior to the 1996 revised CPL, it was widely used by the police in dealing with criminal investigation, and was criticized that its operations were abusive and seriously violated human rights. For example, Gu, Anran (the former director of the Legal Affairs Committee of the NPC Standing Committee) disclosed that during its operation, the shelter and investigation unit had caused considerable violations to individual human rights and the construction of democracy and legality (see Gu, Anrong 1996, *The Litigation, Arbitration, and State Compensation of the New China*, Beijing: Law Press, p11). But in fact, the police still kept the "shelter and repatriate" units as an administrative measure. Shelter and repatriate was used on San Wu Reyuan (the person without the three necessary cards, namely ID card, City A's local working card, and City A's local temporary living card). Because this measure does not have a time limitation for restricting a person and it is totally controlled by the public security organ without external supervision, it was used by the police when they dealt with criminal cases as well.

[33] One of the judges stated that all migrants who were without 3 cards (ID card, City A's local working card and City A's local temporary living card) would be likely to be sent to the "collecting and repatriating" station.

[34] On 17 March, 2003, Sun, Zhigang in Guangzhou was sheltered by the police. After three days, he was found dead in the shelter station. This event caused the State Council to abolish the measure of shelter and investigation in June of 2003.

[35] Article 9 of People Police Law.

[36] McBarnet, D. (1981), *Conviction: Law, the State and the Construction of Justice*, London: The Macmillan Press Ltd, p. 156.

Restriction on freedom of the suspect by the coercive measures of the CPL. Apart from the available techniques outside the CPL, the police also have available restrictive techniques within the CPL, such as criminal detention and arrest. This technique gives the advantage to the investigator to restrict the suspect in order to get a confession. The present research shows that the investigators used coercive measures to legally restrict the suspects in both of the research sites (see Table 2).

The figures in Table 2 show that criminal detention measures were adopted for 96% (67 out of 70) of the suspects in site I, and for 88% (59 out of 67) of those cases, there was an extension of criminal detention. In site II, this proportion is 91% (48 out of 53) subject to criminal detention, with 92% (44 out of 48) of those cases receiving an extension of criminal detention. In site I, almost all of the 67 persons, after the adoption of criminal detention, were then arrested. In the end, 61 out of 67 (91%) of the detained individuals had their arrest approved by the prosecution. Thus, the total percentage of those arrested in site I was 87% (61 out of 70) In site II, the police applied for authorization of arrest for 46 out of 48 (96%) of the detained individuals; the prosecution approved all of them. This shows that the police preferred to adopt the most serious techniques in order to restrict the freedom of the suspects.

Compared to the issues above, the use of the lighter compulsory measures (such as summons, bail, and residential surveillance) was very low in both research sites. According to the case files, there were no cases where the measures of summons or residential surveillance were used for either site. The technique of bail was rarely used as well. In site I, there were just 4 persons in 70 (6%) who were given the "guarantee and waiting trial" measure. The proportion of bail in site II was 13% (7 out of 53), two of them were transferred from criminal detention; the other five persons were decided by the investigation authorities themselves based on the minor nature of the offence.

The findings above are quite similar to Chen Wei-dong's survey, where he pointed out that 80% of suspects were found to be subject to criminal detention, and among them, 65% were given extended detention. One hundred percent of the detained suspects were subject to arrest.[37]

Table 2.
The coercive measures (CPL)*

Categories	Site I		Site II	
	N=70	%	N=53	%
Summon	0	0	0	0
Bail	4	6	7	13
Residential surveillance	0	0	0	0
Criminal detention	67	96	48	91
Arrest	61	87	46	87

*Note: Totals do not equal the N, and percentages do not equal 100 due to the fact that each suspect may receive more than one "measure" for the same case.

[37] Chen, *supra* note 20, at pp. 13-14.

In 1967, American scholars Reiss and Bordua pointed out that the police, in order to reduce the pressure from the public, will arrest a suspect.[38] Studies conducted during the 1970s and 1980s by scholars in the USA and UK support this.[39] Compared to Western countries, in China the police officers seem to have more power and coercive techniques to restrict the suspected persons for interrogation.

The Result and Value of Interrogation

During the period of detaining the suspect, the main work of the police is interrogating the suspect. These interrogation records constituted the main portion of the files examined. The present research findings found that 100% of the suspects were interrogated in both field sites. There could be no doubt that interrogation was the center of the investigation stage□

The figures in Table 3 further show that 93% (65 out of 70) of the suspects in site I made a full confession, and 96% (51 out of 53) of the suspects in site II. Three percent (2 out of 70) of the suspects made a partial admission in site I, and 2% (1 out of 53) in site II. There were only 4% (3 out of 70) of the suspects who denied the charge in site I, and 2% (1 out of 53) in site II.

The percentage of full confessions was higher than the research findings from Britain. For example, Softley's study in 1979 found that half of the suspects made confessions; more than two thirds gave information which would help to secure a conviction.[40] The rate was increased in Bryan's research in 1997. In his sample, he found that 88.1% (342 in 400) of the detainees who were formally interrogated by the police made either partial or full confessions of guilt.[41] In both Phillips and Brown's study in 1998 and Bucke, Street, and Brown's research in 2000, the rate of confession was 55%.[42]

Table 3.
The outcome of interrogation

Outcome	Site I		Site II	
	N=70	%	N=53	%
Full Confession	65	93	51	96
Partial Admission	2	3	1	2
Denied	3	4	1	2

[38] Reiss, Jr, Albert J. and David J. Bordua (1967), Environment and Organization: A Perspective on the Police, in Bordua, David, J (ed., 1967), *The Police: Six Sociological Essays*, London: John Wiley & Sons, Inc., p36.

[39] Bottomley, *supra* note 11, at p. 52;. Greenwood, *et al., supra* note 9 at p118. Silberman, Charles, E. (1966), *Criminal Violence, Criminal Justice*， NewYork: Random House, p138.

[40] Softley, P.(1980), *Police Interrogation: An Observational Study in Four Police Stations*, Royal Commission on Criminal Procedure, Research Study No 4., London: H. M. S. O.,p.94.

[41] Bryan, Ian (1997), *Interrogation and Confession: A Study of Progress, Process and Practice*, Aldershot: Ashgate, p291.

[42] Phillips, C. and Brown, D., with the assistance of Goodrich, P., and James, Z. (1998), *Entry Into the Criminal Justice System: A Survey of Police Arrests and Their Outcomes*, Home Office Research Study No. 185. London: Home Office, p72. Bucke, *et al., supra* note 39 at p.34.

In fact, the CPL itself states it is the duty of the suspect to answer the investigators' questions truthfully, except for those questions un-related to the case.[43] This means that suspects do not have the right of silence in police stations in China. Some research shows that even in those countries which have empowered the suspects with the right to silence, the suspects still tend to answer the police questions. For example, in the UK, the percentage of suspects that confessed in Phillips and Brown's study in 1998[44] is 77%, and in Bucke, Street, and Brown's study in 2000 84% confessed.[45] Obtaining the suspects' confession may be part of the reason for a higher rate of interrogation in the field sites.

It was found in the present research that in all of the investigation case files of both research sites, a majority of the confessions were recorded in handwriting by the police officers, and the suspect signed his/her name on the end line of each page with their fingerprint on the last page. It was very regular that all of the suspects wrote the same sentence: "all of the above I have read, and it is true," signed their name, and left a red color fingerprint.

Moreover, all interrogations followed a similar pattern and this gave the impression to any reader that police interrogations were standardized, routine, and unproblematic in character. The following is the normal structure of how interrogation evidence is presented as having been acquired:

The suspect was asked the basic questions regarding the crime: Who? What? When? Where? How? Crimes involving drugs asked about the drug suppliers, suspects were asked whether he/she had any accomplices, and if so, details on these individuals. Other questions covered criminal history of the suspect and the suspect's knowledge of the commission of any other crimes by any other person.

It should be noted, however, that the very standardization of interrogation reporting might well be designed to hide reality rather than reveal it. It is likely, for example, that the police use different methods on different suspects, depending upon how co-operative they are or what other information they possess. It is also the case that some suspects are subjected to prolonged interrogation and some alleged that they were tortured or subjected to improper treatment. Standardized reporting will tend to disguise all such practices and present interrogation as an unproblematic, and indeed, bureaucratic encounter with the suspect, making it more difficult to challenge.

The normal structure of the police interrogation records did show that the police interrogations served a variety of purposes in addition to that of obtaining a confession. For example, they could be helpful in obtaining evidence against alleged accomplices, in recovering stolen property, in solving other crimes, in identifying drug suppliers, in removing weapons, or even in exonerating innocent suspects. It was regarded as a source for identifying accomplices and other unreported or undetected crimes. That is why the technique of interrogation has been shown as the main task for police officers at this period, and why it was the main contents of the case files. This supports McConville and Baldwin's research in 1981,[46] where they summarised these same collateral purposes of interrogation.

The value of the confession in the present research is shown in Table 4. The most significant value of a suspect's confession was to provide evidence helpful to the

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[43] Article 94 of the CPL.
[44] Phillips & Brown, *supra* note 36, at p.31.
[45] Bucke, *et al., supra* note 39 at p31.
[46] McConville & Baldwin, *supra note 11 at* pp. 142-144.

prosecution (77% [54 out of 70] of the cases in site I and 96% [51 out of 53] of the cases in site II).

The proportion of "exposing other's offence" is 41% (29 out of 70) in site I, and 49% (26 out of 53) in site II. What is behind this figure is that, for example, of the 26 people who exposed another's offence in site II, 25 of them were accomplices to the crime. Only one exposed a separate offence. In this case, the figure here only suggests that the testimony of accomplices was a very important source in joint-criminal cases, but not important as an initial source for police to solve the crime. This is quite different from McConville and Baldwin's finding, in which they stated that the claim that interrogation plays a major role in identifying alleged accomplices has been greatly exaggerated, since there was only 7.6% in their sample.[47]

Table 4.
The value of the suspect's confession*

Type	Site I		Site II	
	N=70	%	N=53	%
Offer details of offence	54	77	51	96
Offer related evidence of the crime	19	27	7	13
Expose own other offence(s)	1	1	9	17
Expose other's offence	29	41	26	49
Partial offer own offence	0	0	1	2
Denied	3	4	1	2

*Note: Totals do not equal the N, and percentages do not equal 100 due to the fact that each suspect may contribute more than one "value" to the police.

The proportion of individuals to "offer related evidence of the crime" is 27% (19 out of 70) in site I, and 13% (7 out of 53) in site II. The figure here is not the highest; moreover, only four of the suspects offered information to help the police officers find weapons, another three related information on the location of the scene, his/her clothing, the victim's items, or stolen goods. It seems that confessions did not give much help on the issue of "offering related evidence of the crime."

Other Investigation Techniques

The CPL regulates the eight kinds of investigation techniques, except interrogating the suspect which was discussed above. Others include:[48] (i) questioning witnesses, (ii) questioning victims, (iii) searches, (iv) seizures of physical and documentary evidence, (v) expert conclusion, (vi) inquest and examination, and (vii) wanted orders. Except for interrogating the suspect, the other seven kinds of investigation techniques used by the police are shown in Table 5.

Comparing eight kinds of investigation techniques in CPL, with the exception of interrogating the suspect, the present research found "questioning the witness or victim" was a technique frequently adopted by police. The proportion was 93% at site I

[47] McConville & Baldwin, *supra note 11 at* p.151.
[48] See sections II, III, IV, V, VI, VII and VIII of chapter Investigation of the CPL.

(65 out of 70), and 92% at site II (49 out of 53) (see Table 5). Sometimes the information about the "crime" provided by the citizen was vague; even so, the police still took action. Even though the police may not have filed the case, they did use investigation techniques, such as detaining the persons identified by civilians and interrogating them. For example, in one case, a staff-member of the hotel where the suspect lived with his partners reported to the police that there were some people from Jiang Xi Province who were behaving "suspiciously." Actually, according to the record, there was no solid information as to whether these people had committed or were committing a crime, but it still lead the police into taking action without any charge. The police first caught the individuals and searched the rooms of the hotel where the suspects lived. Through interrogation the police discovered their crimes and filed the case. It was shown that the police were heavily reliant on the information provided by civilians.

Table 5.
Other investigation techniques used*

Types	Site I		Site II	
	N=70	%	N=53	%
Questioning witness/victim	65	93	49	92
Search person	16	23	13	25
Seizure of physical and documentary evidence	44	63	28	53
Expert Conclusion	40	57	42	79
Inquest and examination	5	7	25	47
Wanted order	0	0	0	0
Others	0	0	1[49]	2

*Note: Totals do not equal the N, and percentages do not equal 100 due to the fact that police may utilize more than one technique per suspect (case).

The proportion of cases that used "expert conclusion"[50] was high as well. This technique was used 57% (40 out of 70) in site I, 79% (42 out of 53) in site II. The scope of this category was expanded by police to include many forms. The following items are included in the category:

(i) Culpability and mental capacity of the suspect
(ii) Extent of victim's injuries
(iii) Estimate of property value
(iv) Accident reconstruction or postmortem examination
(v) Toxicology report
(vi) Non-negligent manslaughter or first degree homicide crimes
(vii) DNA analysis report
(viii) Fingerprint analysis report

[49] Case CFAL-0314, the principal evidence was retransferred from a foreign country's investigation organ, as the suspect committed the crime in another country.

[50] There is no identification of science investigation in the CPL or police practice; the most similar method to the science investigation is "expert conclusion."

Behind this higher rate, through analyzing the contents of the evidence in the files, it was found that most of the results of this measure were related to the degree of penalty in the future, but bore no relation to the identification of the suspect and the circumstances to prove the facts of the case. Moreover, in fact, all of these were not scientific investigations, except fingerprint identification, and there was only one case in site II where a suspect was identified by his fingerprint. None of the other cases in either site included forensic evidence such as fingerprint or DNA analysis of a victim or suspect. This finding is in line with Western research, which shows that forensic and expert evidence is of little evidential impact.[51] It seemed that the police deliberately exaggerated "scientific evidence" in order to make the cases appear strong.

The method of "inquest and examination" shows large differences between the field sites. There were very few cases of an inquest examination in site I, as the proportion was 7% (5 out of 70). In site II, however, the proportion was much higher, as it was 47% (25 out of 53). The reason for this large difference between the two field sites was because this technique was used in the offences of intentional injury, traffic violations, murder, and other serious crimes. These were charged as a serious crime (except traffic violations), and were tried in the intermediate courts, such as at site II. According to the information in the case files, this consists of an examination of the scene of the crime by police officers or forensic experts (taking photographs, looking for weapons, blood, hair, or examining the body). The result is a photo or drawing of the scene of the crime, or examination of the injury of a victim. Therefore, inquest and examination could not offer any clues on suspect identification, such as finding any blood or testing it, finding fingerprints or footprints and linking them to an individual, as the movies and detective stories describe. Instead only a picture to show where the dead person was and a description of the crime scene are obtained. In other words, "inquest and examination" provided general evidence about the crime rather than specific evidence about the alleged criminal.

In addition, Table 5 shows that the proportion of "seizure of physical and documentary evidence" in site I is 63% (44 out of 70), and 53% (28 out of 53) in site II. This technique was used to search the suspect's home and workplace in order to find the instrument or proceeds of the crime. The rate of "search person" was 23% (16 out of 70) in site I, and 25% (13 out of 53) in site II. In a majority of cases the files showed that the police carried out searches, but did not as a matter of routine record the search in the form of a police statement detailing when the search took place and with what results, even though the lists of seized property showed that the police officers did conduct a search.

Within financial crime case files, the police would use the method of "inquiring bank." In the samples, 7% (5 out of 70) of cases in site I, and 47% (25 out of 53) in site II used this method. The difference in these percentages between the research sites was again because site II was an intermediate court which had the jurisdiction to try more serious financial offences.

The investigation case files also documented some techniques adopted outside the CPL. For example, "suspect identify scene" was used in certain cases (especially for a theft offence) where the suspect might be required to take the police to identify the scene, or the place where the instrument or proceeds were discarded. In some

[51] McConville & Baldwin, *supra note 11 at* p. 19.

cases a photo is made where the suspect would often be in the picture, pointing to the place, with a short statement signed and dated by the suspect.

The Value of the Prosecution Evidence

The identification of the suspect. The figures in Table 6 show that for the 123 investigation case files sent to the courts for trial, 70% (49 out of 70) of the suspects in site I were directly identified or described by civilians (victims or witnesses), and 53% (28 out of 53) in site II. This finding is in line with that of Western researchers. McConville's team in the UK found that "civilians initiated police action or identified the suspect in 57.9% of all of arrests."[52]

The different percentages between the two research field sites were due to the category of crime. In site II, many of the cases were intentional homicide, in which the victims were dead or no witnesses were on the scene. In all of these cases, the citizen information caused the police to catch the suspects directly and restricted their freedom without any further investigation, such as systematically investigating forensic evidence.

In addition, informants were another important source for some specially charged crimes such as drugs, pornography, and forgery. The proportion in this category is 16% (11 out of 70) in site I, 6% (3 out of 53) in site II. The difference between the two sites was because there were fewer such crimes in site II than in site I. As Table 6 shows, 10% (7 out of 70) of suspects in site I, and 26% (14 out of 53) in site II were identified by another suspect or accomplice. All of these were cases involving joint crimes.

As Table 6 shows, 10% (7 out of 70) of suspects in site I, and 25% (14 out of 53) in site II were identified by another suspect or accomplice. All of these were cases involving joint crimes. In both of the research sites, the identification of the suspect by another suspect was only found where the suspect only played a role in identifying the current accomplices, but did not have an effect on identifying another's crime from a different incident. The role of the identified suspect on the identifying of other suspects who were not accomplices shows no effect in the present research. This finding is quite different from the finding by McConville and Baldwin in the UK, as they found that the suspect did not play an important role in identifying accomplices.[53] However, in the USA in the late of 1970s, Greenwood, Chaiken and Petersilia[54] point out that most of the clearances achieved by detectives resulted from linking a suspect already in custody to other offences.

Nevertheless, these findings are in line with other Western scholars[55] that indicate the effectiveness of police in identifying suspects is extremely weak. The figures in Table 6 show that there were only 3% (2 out of 70) of the cases in site I in which the suspects were identified by the police through investigation, 6% (3 out of 53) in site II. There only was one case (1%) to be found that the suspect was identified as a result of police-initiated action (stop and search) in site I; none in site II. The forensic identification of the suspect by police has no function, at least in these research sites,

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[52] McConville, *et al., supra* note 15 at p.19.
[53] McConville & Baldwin, *supra note 11 at* p.151.
[54] Greenwood, *et al., supra* note 9 at p25.
[55] Greenwood, *et al., supra* note 9 at p. 41. Bottomley, *supra* note 11, at p.43. Blake, J. A. (1981), The Role of Police In Society, in McGrath, William, T. and Mitchell, Michael P. (1981), *The Police Function in Canada*, Toronto: Methuen, p78. Griffiths & Verdun-Jones, supra note 13, at p. 71. S.

since only one case (1%) was found in site II where the suspect was identified by forensic identification. There were three cases investigated by the police in which the suspects were identified through tracing their mobile phones. This agrees with the Baldwin and McConville finding in the UK: "forensic evidence was either not available or was unimportant in 95% of all cases within the sample and, in the other 5%, it was buttressed by supplementary incriminating evidence."[56] Table 6 also shows that 8% (4 out of 53) of suspects voluntarily surrendered in site II; none were found in site I.

Table 6.
The method for initially implicating the suspect

Method	Site I		Site II	
	N=70	%	N=53	%
Directly identified by victim/witness	29	41	21	40
Description provided by victim/witness	20	29	7	13
Informant	11	16	3	6
Other suspects identified	7	10	14	26
Investigation	2	3	3	6
Police stop and search	1	1	0	0
Voluntary surrendered	0	0	4	8
Forensic identification	0	0	1	1

The value on proving the case facts. As it has been shown in the sections above, except for confessions, a majority of other kinds of evidence were only related to the circumstances of the crime scenes or the degree of the damage of the crime.

Conclusion

Before giving a brief conclusion, it must be pointed out that there are some limitations in the present research. For example, the sample is small; therefore, the findings may not be representative of other locations. Moreover, there were no observations or interviews. It is unknown if interrogations were conducted by the police legally or not; and whether what was actually documented in the case files actually occurred. But even with this limitation, the review of the police case files shows:

(i) The main work for the police in the investigation stage was to interrogate the suspects.

For these cases, investigation heavily relied on interrogation. Interrogation, therefore, remained the central investigative strategy of the police. The police saw the suspect as a person who could provide evidence about the crime as well as the possible evidence about accomplices or other crimes. It is just in line with some

[56] Baldwin, John and McConville, Mike (1980), Confessions in Crown Court Trials, Royal Commission on Criminal Procedure, Research Study No. 5, p19.

Western scholars' empirical research in the last century. In the USA, Greenwood and Chaiken disclose that "investigators spent the majority of their time gathering evidence on suspects in custody rather than on identifying suspects."[57] In 1991 in the UK, McConville and his colleagues found that the interrogation is the centre of the system of investigation and also the trial.[58] They also pointed out that the police spent most of their time on interrogation.[59] It was confirmed by the research of another British scholar Ian Bryan[60] in 1997.

（ii） The investigation techniques of the police were weak to prove the guilt of the suspects. Police heavily relied on the victim or witness to identify the suspect, and the confession of the suspect was the main source for information regarding case facts. The physical evidence and scientific evidence did not play a more important role than witnesses in proving the case facts.

In the USA, the President's Crime Commission pointed out in 1967 that physical evidence and other forensic science mechanisms were not being used frequently in the investigation and adjudication of criminal offences.[61] In the UK, Leng pointed out that police rarely seek evidence other than from eye-witnesses, the victim, and the suspect himself.[62] But in the present research, the data above shows that the police do use various investigation actions. This is very different from the western scholars' findings mentioned earlier, that the police did little work on collecting other evidence. On the other hand, the nature of these various kinds of evidence collected by the police (with the exception of the confession of the suspect) is indirect evidence. A majority of the time the evidence only related to the degree of punishment, or the circumstances of the case, but did not relate to the identification of the suspect. It seemed that the confessions of suspects were the only kind of evidence used to corroborate their guilt after citizens identified them and the police detained them.

The general nature of the investigation is accomplished "in pursuance of their chosen goals, the police participate in the construction of evidence to create the social and environmental conditions which enable them to do this in the circumstances most favourable to them," but not seeking "the truth" in an impartial setting.[63] When the nature of the investigation relies heavily on the interrogation, especially for the purpose of gaining a confession, it must be easy to lead the investigators to torture the suspects. Zuo, Wei-min pointed out that in the practice, some of the investigators had a strong motivation to prove and control the investigation during the interrogation; they did torture the suspects especially when the suspects had a hard attitude and denied the crime. He further claimed that there was not enough supervision during the process of police interrogation, and normally the investigators conducted the interrogation secretly.[64] This has been reported in Chen Weidong's research.[65]

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[57] Greenwood, *et al., supra* note 9 at p.189.
[58] McConville, *et al., supra* note 15 at,p.57.
[59] McConville, *et al., supra* note 15 at p.67.
[60] Bryan, *supra* note 35, at p.297.
[61] Quoted from Greenwood, *et al., supra* note 9 at p.144.
[62] Leng, R. (1992), The Right to Silence in Police Interrogation, *RCCJ Research Study No. 10*, London: HMSO.
[63] McConville, *et al., supra* note 15 at p.6.
[64] Zui, Wei-ming (1999), *The Research on the Problems of Criminal Procedure*, Beijing: Chinese University of Politics Science and Law Press.

Another scholar, Kong Yi, questioned 61 police officers, with 47.54% of the respondents answering that they were often harsh with suspects. Only 11.48% of the respondents answered that they never committed any harsh action with a suspect. The average rate of clearing the crime was 52.21% in his survey and the respondents thought that the rate would decrease to 37.13% without the torture as a method to solve the case.[66] The use of torture has also been shown in the Du Peiwu case and She Xiangling case. Moreover, the lack of other kinds of reliable evidence to identify the suspects and prove the case facts may lead the investigators to construct the cases to prosecute, and use what the suspect said to take other measures in order to strengthen the constructed cases. All of these factors could be potential causes among the cases that may lead to a wrongful conviction.

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[65] Chen, *supra* note 20, at p. 42.
[66] Kong, Yi, *Prevent Torture*, http://www.bianhu66.com/xingshilunwen/1486_6.html.

RACE AND THE CASE FOR THE PROSECUTION: THE UNITED KINGDOM MEDIA PORTRAYAL OF RESEARCH FINDINGS

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Abstract

To date, the majority of the research evidence suggesting that ethnic minorities are disadvantaged relative to Whites at different stages of the criminal justice process is based on police action on the one hand, and on the other, court practice—in terms of custodial sentencing. Until this study, the performance of the independent State or Crown Prosecutors in relation to defendants from different ethnic groups had not been comprehensively examined. The study found a number of statistically significant differences in outcomes for the two largest ethnic groups (Black and Asian defendants) relative to comparable cases involving White defendants. Secondly, the study produced a number of important—but mixed—findings. Those at the initial stage of the prosecutor's decision-making process appeared to be encouraging for the Service, while some further down the line suggested cause for concern. The main findings of the study generated immense interest from the British media, government, the Crown Prosecution Service, and various legal and community groups, all of whom put their own particular spin on the results, and all are reported in this paper.

Race and the Case for the Prosecution: The United Kingdom Media Portrayal of Research Findings

In recent years, there has been growing interest in the position of ethnic minorities in the criminal justice system in Britain. One of the most important issues for those engaged in the administration of criminal justice is the avoidance of discrimination against any person on the grounds of race. The responsibility of Central Government in this area was recognised specifically in the 1991 Criminal Justice Act, section 95(1)(b), which obliges the Home Secretary to publish information relating to the position of ethnic minorities and women within the criminal justice system each year (see Home Office 1992, 1995). Moreover, the Royal Commission on Criminal Justice (1993) recommended that ethnic monitoring should be conducted routinely by all agencies in the criminal justice system, and that further research on ethnic minorities and the criminal justice system should be conducted.

Previous research (e.g., Mhlanga, 1997) concentrated on police action and court practice. However, the current study set out to examine decisions made by the Crown Prosecution Service (CPS) in relation to young offenders and the influence, if any, of ethnic factors. The CPS was set up in 1986, in order to act as an independent body in processing cases in which a charge had been laid by the police, and to select those for which a prosecution would be prepared. Prior to 1986, this function was undertaken by the police; the introduction of the CPS by the Prosecution of Offences Act in 1985 was welcomed by many individuals and organisations concerned about

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criminal justice issues and about its administration. Clearly, the CPS has a pivotal role in ensuring the effectiveness, efficiency and fairness of the criminal justice system, since the Service acts as the system's gatekeeper. This study was therefore undertaken against the above background, and was designed to enhance our knowledge of CPS decisions and the part played by ethnic factors. It was also hoped that the findings of the study would help to demonstrate the extent to which CPS decisions were/are fair and effective and would provide a benchmark against which any developments in the ethnic monitoring of CPS decisions could be measured.

Methodology

The aim of the study was to examine decisions made by the CPS in relation to defendants under age 22 from different ethnic backgrounds, in relation to the prosecution of cases in the youth, magistrates' and Crown courts. Clearly, the factors most likely to influence CPS decision-making are legal criteria, such as the nature and seriousness of the offence; strength, reliability and admissibility of evidence; and guidelines relating to the public interest. Having eliminated the effects of these factors, the study went on to look at the effects of previous cautions, previous convictions, plea and police bail, and any further effect due to race, gender, age, socio-economic status, and area of domicile. The objective was to discover the extent to which CPS decisions were fair when both legal and non-legal factors had been taken into account.

The focus on young offenders aged 22 and below helped to make the project manageable, and also allowed the examination of the extent to which the CPS operates as an additional sifting or diversionary mechanism for young offenders. Although the CPS should not avoid prosecuting simply because of the defendant's age, the Code for Crown Prosecutors (1994) states that the interests of a youth must be considered when deciding whether it is in the public interest to prosecute, given the very serious harm to the prospects of a young adult that the stigma of a conviction can cause. In view of this, young persons will sometimes be dealt with without going to court.

After an initial pilot study, the main project extended the survey to include sample data from all the then 13 CPS Areas in England and Wales. A sample of 6,144 young offenders whose cases were finalised by the CPS between 1 September and 31 October 1996 was drawn from 22 CPS branches across the 13 CPS Areas. The targeted branches are shown in Appendix 1. The coverage of all 13 Areas ensured that the study included offenders in regions of both relatively high and relatively low ethnic minority concentration. However, the branches themselves were selected as being the locations with the highest proportion of ethnic minorities in the appropriate CPS Area, in order to ensure sufficient numbers for analysis. The London locations were those with an ethnic minority population of 29% and over.

Salient Characteristics of the Sample of Cases

The information on race supplied to the CPS on the police MG3 form uses a 4-point classification (Asian, Black, White, and other minority defendants), based on visual appearance; this was adopted for both the pilot study and the main study in the absence of a more refined breakdown. The police also supplied other demographic,

socio-economic, and recidivism data. Other records such as victim or witness statements were a further source of data where available.

The majority of defendants charged by the police during the relevant period of the study were White (75.5%). However, their representation was below their general population estimate of 82.9%. It should be noted that this comparison is made with the general population in the sample areas, which had been specifically chosen to represent the greatest concentrations of minority ethnic individuals in their respective CPS Areas. The proportions of cases dealt with for both Asian (11.9%) and Black (10.8%) defendants exceeded those of their actual presence in the population (10.4% and 3.9% respectively). The proportion of cases for other minority defendants (1.8%) was lower compared to their representation in the general population of 2.8%. The finding of an over-representation of Black defendants and an under-representation of White defendants charged by the police, corresponded with findings from previous research (Berry, 1984; Hood, 1992; Jones et al., 1986; Martin, 1985; Mhlanga, 1997; Norris et al., 1992; Smith, 1983; Stevens & Willis, 1979).

As mentioned above, the other characteristics of defendants were: gender, age, socio-economic status, CPS geographical area, principal offence charged, offences taken into consideration, previous cautions, previous convictions, plea and police bail status.

Analysis

The method of analysis involved examining the influence of a set of factors on (i) CPS discontinuance of cases on evidential grounds (ii) CPS discontinuance of cases on public interest grounds (iii) CPS reduction of police charges (iv) CPS recommendation to caution or to bind over defendants (v) the likelihood of a case reaching trial / plea stage (vi) cases committed to the Crown Court by the CPS for trial (vii) CPS decision to withdraw cases, because prosecutors offered no evidence at court (viii) magistrates' court acquittals, and (ix) Crown Court acquittals.

Sophisticated statistical techniques were used to estimate the odds or likelihood of receiving any of the above outcomes for defendants from a particular racial group, while simultaneously taking into account the influence of the other salient characteristics of each case mentioned above. In this way, it was possible to establish the variables with the most statistically significant influence on the probability of receiving each of the above outcomes.

The specific multivariate analysis of the data involved using a Generalized Linear Interactive Modelling (GLIM 3.77) software package. It is a statistical modelling tool for specifying and fitting statistical models to data. It assesses goodness of fit and displays the estimates and predicted values from the model. The statistical models that GLIM can fit are known as "generalized linear models," and these include linear regression, analysis of variance, log-linear, probit, and logit. The logit model technique was the one used in this analysis. Compared with the other models logit is the most suitable for binary responses, that is, when the dependent variable is dichotomous, such as propensity for a case to be discontinued as opposed to being prosecuted.

Results

(i) Cases Discontinued Because of Insufficient Evidence

The analysis began with an examination of the association between the CPS' propensity to discontinue cases because of insufficient evidence from the police and the racial classification of the defendants, controlling for the influence of gender, age, socio-economic status, CPS geographical area/branch, type of offense allegedly committed, whether or not there were any offenses taken into consideration (TICs), previous cautions or warnings, previous charges or convictions, and whether or not the defendant received police bail following a charge. Only a small proportion of cases contained all relevant information, thus a final sample of N = 410 was obtained (out of a total of 5,501 cases). However, the saturated model predicted that socio-economic status factors and previous charges or convictions were not significantly associated, either positively or negatively, with CPS decisions to discontinue cases because of insufficient evidence at the 0.05 level. As is usual, a significant parameter is taken to be one with a t-value outside the -1.96 to 1.96 range.[1] Those factors were excluded in the final model that was adopted. Although gender was also initially found to have been insignificant it was included in the final models in order to assess the treatment that women received when compared to that of their male counterparts, in compliance with the requirement of section 95(1)(b) of the Criminal Justice Act 1991. Similarly, police bail was included in order to ultimately assess the extent to which the CPS exercised their independence from the police.

As shown in Appendix 2, the coefficient estimates are presented in relation to a set of reference attributes. In this instance, the "paradigmatic" set of attributes are for White defendants, men, those aged between 18-21, from London, charged with primary offenses of theft and handling stolen goods, no TICs, had received a caution or a warning in the past, and had been given police bail in connection with the current offense. The constant parameter estimate of -3.203 or 0.041 (anti log) is given as the estimated $\log_e$ odds of being discontinued on evidential grounds as opposed to being dealt with by way of other CPS decisions for people in the sample with this set of attributes, whilst the coefficients in the model associated with the other factors represent the increase or decrease in the $\log_e$ odds from this category. The reference category associated with each variable is set to zero. Positive parameter estimates refer to an increase in the odds of cases being discontinued compared to the reference category, whilst negative parameter estimates refer to a decrease in the odds of cases being discontinued compared to the reference category.

Clearly, race, age, area, type of primary offense allegedly committed, TICs, no previous cautions and an unknown record of previous cautions all played an important, albeit complex, part in the determination of a CPS decision to discontinue cases on evidential grounds. So that in relation to the association between the racial classification of the defendant and the CPS decision to discontinue cases on evidential grounds controlling for gender, age, area, type of primary offense allegedly committed, TICs, previous cautions, and type of police bail, the model predicted a negative and highly significant constant (*t*-value = -14.822). This means that cases

[1] t-values are derived from dividing the parameter estimates by their standard error.

pertaining to White defendants in the model were significantly less likely to have been discontinued on evidential grounds, but were significantly more likely to have been dealt with by way of other CPS decisions, such as being prosecuted, as it would be expected.

However, as shown in Appendix 2, the model estimates suggest that when compared to the odds (0.041, or p = 0.039) of being discontinued because of insufficient evidence for White defendants, the odds for such a discontinuance in respect to Asian defendants of similar description increased significantly by a factor of 1.500, to become 0.041 x 1.500 = 0.061 or p = 0.058 (t-value = 2.472). Although the increase in the odds by a factor of 1.756, to become 0.041 x 1.756 = 0.072 or p = 0.067 for a discontinuance on evidential grounds in relation to defendants belonging to racial groups classified as "other" was higher, it was statistically insignificant (t-value = 1.599). Similarly, the increase in the odds by a factor of 1.390, to become 0.041 x 1.390 = 0.057 or p = 0.054 for a discontinuance on evidential grounds in relation to Black defendants was insignificant, although nearly significant (t-value = 1.920).[2] Table 1 reports the significant differences regarding racial background and insufficient evidence, as well as significant differences regarding race for all analyses.

Table 1.
Significant differences by race for all analyses (controlling for all other factors of interest)

Action taken	Racial classification showing significant difference
Insufficient evidence	Asian
Public interest	Black
Reduced charges	none
Caution or warning recommendation	none
Proceed to trial	none
Proceed to Crown Court trial	Asian
Case withdrawn (NEO)	none
Case dismissed in magistrates' or youth court	Asian, Black

It can be seen that, although there were racial differences in the likelihood of being discontinued on evidential grounds as described above, the probability that the CPS pursued this course of action was below 7% when all the other factors were controlled for. In over 93% of cases, defendants were dealt with by way of other CPS means. However, the overall result demonstrates that cases belonging to all ethnic minority defendants in the model were more likely to have been discontinued on evidential grounds when compared to their White counterparts, and that the likelihood for such a discontinuance increased significantly with respect to Asian defendants, irrespective of the influence of other factors considered in combination with each other.

[2] The probability value is derived from odds divided by 1 plus odds (odds / 1 + odds).

(ii) Cases Discontinued on Public Interest Grounds

The next analysis involved examining the relationship between the CPS' propensity to discontinue cases on public interest grounds and race, controlling for the influence of gender, area, type of primary offense allegedly committed, TICs, recidivism or the number of previous charges or convictions, type of plea, and type of police bail (final N = 242 out of a total of 5,501 cases). In an earlier saturated model, age, socio-economic status, TICs, and previous cautions were found to be insignificant in influencing such an outcome, either positively or negatively. It should be noted that in cases involving CPS decisions to discontinue cases on public interest grounds, CPS prosecutors must take account of the public interest *after* they have considered the evidence. So the cases in that analysis were limited to those which had passed the evidential test.

The model estimates for the analysis involving cases that were discontinued on public interest grounds and those relating to subsequent analyses discussed below were displayed in exactly the same manner as those in the analysis involving discontinuances on evidential grounds shown in Appendix 2. So that the model estimates relating to the effect of the racial classification of the defendant on discontinuances on public interest grounds when all the other explanatory factors of interest had been taken into account suggested that cases pertaining to White defendants were highly significantly less likely to be discontinued on public interest grounds, but significantly more likely to have been dealt with by other CPS means, as it would be expected (*t*-value = -13.914). However, the model does predict that Black defendants were significantly more likely to have been discontinued on public interest grounds compared to their White counterparts (*t*-value = 2.172) (see Table 1). In connection with Asian defendants, the increase in the odds of being discontinued in this way was not significant (*t*-value = 0.079). On the other hand, cases involving racial groups classified as "other" were found to have been insignificantly less likely than their White counterparts to be discontinued on public interest grounds (*t*-value = -0.525). The probabilities of receiving such an outcome were 0.017, 0.011, 0.010 and 0.007 for Black, Asian and White defendants and those classified as belonging to "other" racial groups, respectively.

(iii) Cases With Police Charges Reduced by the CPS

Once cases have passed both CPS evidential and public interest tests, the next CPS decision to be examined is charge reduction. The proper application of the Code for Crown Prosecutors will inevitably mean that the CPS frequently alters the charges brought by the police. There are, in the main, two reasons that have been put forward for the alteration of charges. First, it has been argued by McConville, Sanders and Leng (1991) that charges tend to be downgraded not as the result of any independent scrutiny of the case by CPS lawyers, but in response to the defense signaling non-acceptance of the case as constructed by the police. However, the results of the present study suggest that CPS lawyers did scrutinize cases independently. Second, the official view is that much of the alteration of charges which occurs is a response to uneven charging practice by the police (Crisp & Moxon, 1994; CPS, 1997).

The analysis in this study involved examining the relationship between the CPS' propensity to reduce police charges and the racial classification of the defendant, controlling for the influence of gender, socio-economic status, area of domicile, type of

primary offense allegedly committed, TICs, and type of police bail (final N = 175 out of a total of 5,517 cases). Age, socio-economic status, TICs, and previous cautions were found to be insignificant in influencing such an outcome, either positively or negatively, in an earlier saturated model.

The model data showed that, in connection with the racial classification of the defendants, White defendants were significantly less likely to have had the charges leveled against them by police reduced by the CPS, but significantly more likely for the CPS to have upheld the classificational charge, as it would be expected (*t*-value = -11.196). However, both Asians and those belonging to racial groups classified as "other" minority defendants were found to have been less likely than cases involving White defendants to have had charges against them reduced, although the decrease in the odds of receiving such an outcome was insignificant (*t*-values = -0.947 and -0.551, respectively).

On the other hand, only cases belonging to Black defendants were found to have been more likely than White defendants to have had charges against them reduced, although the increase in the odds was not significant (*t*-value = 0.943) (see Table 1). The probabilities of receiving such an outcome were 0.052, 0.042, 0.032 and 0.028 for Blacks, Whites, Asians and "other" minority defendants, respectively.

(iv) Cases Recommended by the CPS to Receive a Caution or a Warning

The next analysis looked at potential associations between decisions by the CPS to recommend a caution or a bind over and the various explanatory factors, such as gender, socio-economic status, area of domicile, type of primary offense allegedly committed, previous cautions, recidivism or previous charges or convictions, and type of police bail (final N = 123 out of a total of 5,517 cases). In an earlier saturated model, age and TICs were found to be insignificant in influencing CPS decisions to recommend cautions, either positively or negatively.

In relation to race, the model estimates suggested that when all factors are controlled, White defendants were significantly less likely to have been recommended by the CPS as suitable for cautioning or binding over in order to keep the Queen's Peace as opposed to being dealt with by other means, as it would be expected (*t*-value = -9.751). However, both Asian and Black defendants were found to have had increased odds of receiving a caution or a bind over recommendation from the CPS compared to their White counterparts, although the increase was not significant (*t*-values = 1.345 and 1.828, respectively). On the other hand, "other" minority defendants were less likely to receive a CPS recommendation to caution or to bind them over to keep the peace (*t*-value = -0.591). The probabilities of receiving such an outcome were 0.038, 0.034, 0.022 and 0.012 for Black, Asian, White and "other" minority defendants, respectively. Thus the highest probability of being recommended for a caution or a bind over, at 0.038, was found to have been amongst cases pertaining to Black defendants, although not at significant levels (see Table 1).

(v) Cases Proceeding to Trial or Plea

The following analysis involved those cases which had passed both evidential and public interest tests and where a caution or bind-over had not been recommended, and thus the case proceeded to trial or plea. Factors that were taken into account in the analysis were racial classification of the defendant, their gender, age, area of

domicile, type of offense allegedly committed, TICs, recidivism or previous charges or convictions, type of plea, and type of police bail (final N = 4,720 out of a total of 5,517 cases). In an earlier saturated model, socio-economic status and previous cautions were found to be insignificantly associated with CPS decisions to prosecute defendants, either positively or negatively.

In relation to race, the model estimates showed that White defendants were highly significantly more likely to have been prosecuted as opposed to being dealt with by way of other CPS decisions, such as being discontinued, as it would be expected (*t*-value = 17.179).

However, all ethnic minorities in the model were found to have been less likely to be prosecuted compared to their White counterparts, although the decrease in the odds was not statistically significant (*t*-values = -0.382, -1.662 and -0.776 for Asian, Black and "other" minority defendants, respectively) (see Table 1). The probabilities of being prosecuted were 0.988, 0.987, 0.984 and 0.983 for White, Asian, Black and "other" minority defendants, respectively. Although there were differences in the probabilities of being prosecuted between the various racial groups in the model, it can be seen that the margin of difference between them was very small. It should also be noted that the proportion of minority cases that was dropped initially by the CPS was higher than that of the White defendants. Moreover, all defendants were more likely to progress to the trial / plea stage than to be dealt with by way of any other CPS decisions.

(vi) Cases Committed to the Crown Court for Trial

The next analysis encompassed an examination of the association between cases which were committed to a higher court (the Crown Court) for trial as opposed to being dealt with summarily in a lower court, and the racial classification of the defendant, controlling for the influence of gender, age, socio-economic status, area of domicile, type of offense allegedly committed, TICs, previous cautions, recidivism or previous charges or convictions, type of plea, type of police bail, and whether or not a charge had been reduced (final N = 487 out of a total of 5,081 cases). The analyzed cases included all cases with indictable-only offenses, those where magistrates' or the lower courts declined jurisdiction, cases where defendants elected to be tried in the Crown Court before a judge and jury, cases that were eligible for either court, and cases committed to the Crown Court by the CPS.

The model estimates on the effect of the racial classification of the defendant on decisions to commit cases to the Crown Court for trial showed that cases relating to White defendants were found to be highly significantly less likely to have been committed to the Crown Court, meaning that such cases were significantly more likely to have been considered as suitable for a summary trial in a lower court, or to have been dealt with by other CPS means, as it would be expected (*t*-value = -11.128). However, when compared to White defendants just described above, it was found that Asian defendants were significantly more likely to have been committed to the Crown Court for trial (*t*-value = 2.383) (see Table 1).

On the other hand, there was an insignificant difference in the odds of cases being committed to the Crown Court in connection with "other" minority and Black defendants (*t*-values = 0.971 and -1.127, respectively). The probabilities of receiving such an outcome were 0.073, 0.069, 0.048 and 0.039 for cases involving Asian, "other" minority defendants, White and Black defendants, respectively.

(vii) Cases Withdrawn at Court with No Evidence Offered (NEO)

Cases withdrawn at court by the CPS were analysed next. These were cases withdrawn because the CPS was not in a position to offer the evidence (NEO), in spite of the initial decision to prosecute. The analysis involved examining the association between the decision to withdraw cases (NEO) and the racial classification of the defendant, controlling for the influence of gender, area, type of primary offense allegedly committed, recidivism or previous charges or convictions, and type of police bail (final N = 128 out of a total of 5,388 cases). In an earlier saturated model, age, socio-economic status, TICs, and previous cautions were found to have been insignificantly associated with CPS decisions to withdraw cases (NEO) at court, either positively or negatively.

In relation to the effect of the racial classification of the defendant on decisions to withdraw cases at court because no evidence was available at the court hearing, the model estimates suggested that cases for White defendants were significantly less likely to have been withdrawn (NEO) at court, but significantly more likely to have been proceeded with on the basis of the available evidence, as it would be expected (*t*-value = -10.902). However, cases belonging to both Asian and Black defendants were found to be more likely than their White counterparts to have been withdrawn (NEO) at court, although the increase in the odds of receiving such an outcome was not statistically significant (*t*-values = 0.489 and 0.551, respectively). On the other hand, there was an insignificant decrease in the odds of withdrawals (NEO) at court with respect to "other" minority defendants (*t*-value = -1.069) (see Table 1). The probabilities of receiving such an outcome were 0.025, 0.024, 0.021 and 0.007 for Black, Asian, White and "other" minority defendants, respectively.

It can also be seen that cases with the highest probability of being withdrawn (NEO) at court, at 0.025, were for Black defendants. However, all cases were far less likely to have been withdrawn (NEO) at court than to have been dealt with by way of other CPS decisions.

(viii) Cases Dismissed in the Magistrates' and/or Youth Courts

The final analyses were concerned with examining cases dismissed in the courts because of insufficient evidence. Clearly, acquittals in the courts on evidential grounds imply that such cases should have been discontinued earlier by the CPS. Thus, the following analysis involved examining the association between acquittals in the magistrates' and/or youth courts and the racial classification of the defendant, controlling for the influence of gender, age, area, type of primary offense allegedly committed, TICs, and type of police bail (final N = 511 out of a total of 5,517 cases).

In relation to race, the model estimates showed that cases belonging to White defendants were significantly less likely to have been acquitted in the magistrates' courts as opposed to being dealt with by other means, as it would be expected (*t*-value = -14.975). However, when compared to the above described White defendants, it was discovered that both Asian and Black defendants were significantly more likely to have been acquitted (*t*-values = 4.161 and 3.306, respectively) (see Table 1). On the other hand, there was an insignificant decrease in the odds of receiving an acquittal with respect to "other" minority defendants (*t*-value = -1.444). The probabilities of receiving such an outcome were 0.111, 0.100, 0.068 and 0.031 for

Asian, Black, White and "other" minority defendants, respectively. Thus, the highest probability of acquittals in the magistrates' and/or youth courts, at 0.111, was found to have been amongst cases for Asian defendants.

(ix) Cases Dismissed in the Crown Court

The final analysis involved looking at Crown Court acquittals in a similar way, but, in view of the small numbers of acquittals in the Crown Court, only a limited analysis was carried out. Nonetheless, this again found that Asian, Black and "other" minority defendants were more likely than their White counterparts to have been acquitted in the Crown Court, although insignificantly so.

Discussion

The aim of this study was to examine the decisions made regarding defendants of different ethnic classifications who came to the notice of the CPS between 1 September and 31 October 1996, in the light of the ongoing debate about whether the criminal justice system discriminates against members of ethnic minorities. Earlier research had suggested that ethnic minorities receive harsher treatment from the police and the courts, but until this study, information relating to decisions made by the CPS had been lacking. The unique and comprehensive set of data provided in this study showed that there were some ethnic differences in the way that defendants were treated by the CPS during the relevant period.

Interpreting the meaning and significance of differences in the treatment of ethnic minority groups at each stage of the CPS decision-making process is no easy matter. A difference between some minority groups and Whites that remained even after taking into account the influence of a wide range of legal and non-legal variables might be taken to suggest that the CPS systematically treated such groups favourably. However, some lawyers denied this possibility on the grounds that they are bound solely by the evidential and public interest tests, and that race is not a legally relevant variable. To this they also added that they did not see defendants before reaching their decisions, and that, until recently, the case papers gave no indication of race or ethnicity.

An alternative view of the findings could be that the CPS were performing their required independent role in selecting cases appropriate for prosecution, and that the differences observed in the treatment of ethnic minority defendants reflected differences in the quality of cases received by the Service. That is to say, one possible interpretation is that the CPS were downgrading, or even rejecting outright, cases where the police had shown bias against minorities. It is not possible, on the current data, to distinguish between the two alternatives, and further research, involving detailed studies of individual matched cases, would be needed to decide.

What is not in dispute, however, is that the police got it wrong in some cases involving Asian and Black defendants. The CPS corrected some, but not all of these errors, since a statistically significant proportion of Asian and Black defendants were acquitted in the courts because of insufficient evidence. Apparently those cases should never have been prosecuted in the first place.

The United Kingdom Media Portrayal of the Research Findings

The results of the study were first made available to the media at a Press Release conference that had been called by the CPS itself. The following excerpts are from selected media clippings. The headline from the major television channels and the British Broadcasting Corporation (BBC) radio, which was reproduced by the *New Law Journal* said that:

> Asian, Black, and other minority defendants often receive more favourable outcomes from CPS lawyers' decisions than their White counterparts. This is one of the conclusions of an independent report, *Race and Crown Prosecution Service Decisions*, published last week (In the News, 1999, p. 1546).

It can be seen that the bias here from television and radio was very much on emphasizing that minority groups were treated more favourably, which went against the grain. As the BBC Radio 5—Midday News presenter put it:

> The Crown Prosecution Service may be discriminating in favour of ethnic minorities, according to a new report… (Government Information & Communication Service (GICS), 1999).

Viewing the results of the study as "…com[ing] as a surprise to a lot of people" the reporter continued to say that:

> All the publicity [surrounding ethnic minorities and the criminal justice system] has been negative. [But] here we have an important part of the system, the Crown Prosecution Service, that you're [reference to me, the researcher] saying is very much not racist (GICS, 1999).

Although the study clearly set out to discover differences in CPS casework outcomes on the basis of the racial classification of the defendants, attributing such differences to systematic racism or not on the part of the CPS organization as a whole would have, at that time, required further evidence. Much more intensive research of a qualitative nature was needed, such as the independent investigation of the CPS' race equality and diversity issues conducted by Sylvia Denham (2001).

A further BBC News Online: UK article with a headline entitled "Race, Discrimination and the CPS" reported that:

> The research into decisions taken by the Crown Prosecution Service appears to fly in the face of widely-held views that racism and discrimination permeate the criminal justice process at all levels. Here we have a study which largely absolves the CPS of blame, and suggests that any problem of bias lay with the police. This is the favoured conclusion of the author, Dr. Bonny Mhlanga, a criminologist from the University of Hull (Peel, 1999).

Furthermore, an earlier BBC News Online: UK article had put up the following headline on its website—"Prosecutors 'easier on minorities' White defendants are 'treated more harshly'" (British Broadcasting Corporation (BBC), 1999).

Although my report concluded that part of the problem was bias from the police, it never "absolve[d] the CPS of blame." In fact, the study did mention that the CPS should have acted more proactively in sifting more cases involving Black and Asian

defendants that were eventually thrown out of the courts because of insufficient evidence. The difference in the acquittal rate between White and minority defendants had been found to have been statistically significant. Certainly the assertion that "Prosecutors [were] easier on minorities" and that "White defendants are treated more harshly" cannot be found anywhere in my report.

The newspapers, both national and local, also ran their stories on the study giving their own particular slant to the findings. Clippings from selected newspapers are quoted here. For example, The (London) *Independent* (2000) reported on its website that:

> The popular perception that Black and Asian defendants stand a greater chance of being convicted by the courts has been turned on its head by new research published last week.

The *Independent*'s conclusion on its website is clearly misleading given the study's finding of a significantly higher acquittal rate in the courts affecting both Black and Asian defendants relative to comparing cases involving White defendants. However, its broadsheet version published on October 15, 1999, headlined "Police Race Bias Forces CPS to Drop Ethnic Cases" was much more balanced in its account than its website version. The broadsheet account read:

> The Director of Public Prosecutions said yesterday that racial bias among police officers was forcing crown prosecutors to throw out a disproportionate number of cases involving Black and Asian defendants…The CPS will be discussing the findings of the report with the Association of Chief Police Officers (Burrell, 1999).

The *Express* was even more balanced in its reporting of the findings of the study. Its broadsheet account published on October 15, 1999, with the headline "The Police Tactics That Give a Clue to Race Bias" read:

> Disturbing evidence of police racism has emerged in a major study to test hidden bias in the criminal justice system. The independent examination of thousands of criminal cases shows that the police are more likely to press ahead with weak cases or excessive charges if the suspects are Black or Asian (Taylor, 1999).

On the other hand, the *Telegraph*'s perspective published on its website on October 15, 1999, was that the "Study clear[ed] the CPS of bias against ethnic minorities." It went on to say that:

> A widespread perception that members of the ethnic minorities receive harsher treatment from the criminal justice system is countered by research findings yesterday that they are not treated unfairly by the Crown Prosecution Service (Shaw, 1999).

However, the following statement from the *Telegraph* was a far more accurate reflection of what the study report said. It read:

> The research report, Race and Crown Prosecution Service Decisions, said the findings indicated that the CPS was performing its proper independent role in selecting appropriate cases for prosecution and downgrading or rejecting cases where the police had brought inappropriate charges against minorities (Shaw, 1999).

Finally, the Crown Prosecution Service itself also made a statement through its Press Release on October 14, 1999, which is now published on its website with the headline "CPS Casework Decisions Treat Minority Groups Fairly, Says Report." The statement said:

> The CPS does not discriminate unfairly against ethnic minority groups when making casework decisions, an in-depth study has shown. A report by Dr. Bonny Mhlanga of the University of Hull shows that, while there are differences in the treatment of offenders from different backgrounds and different areas of the country, there is no evidence of unfair discrimination against ethnic minorities.

Furthermore, the Director of Public Prosecutions (DPP) (2000) himself said in his letter to the Attorney General that:

> In October 1999, Dr. Bonny Mhlanga of the University of Hull reported on his three year study of the decision-making process of the Service…His report was very positive, and indicated that there was no evidence of unfair discrimination against ethnic minorities in our decision-making process.

What is lacking, of course, from the CPS Press Release statement, as well as from the DPP's letter to the Attorney General is the acknowledgement that the prosecutors failed to drop a significant proportion of cases involving minority groups from prosecution that were eventually dismissed in the courts due to insufficient evidence.

Conclusions

It is clear that there has been a big difference between the researcher, on the one hand, and the media and the CPS, on the other, in the way in which each of these groups interpreted the meaning and significance of the results of the study. To the researcher, this was a huge wake-up call and learning process into the way the media and politicians put a particular spin on research findings. He hopes that the experience should help to equip him (and other researchers) to respond more cautiously to media coverage of research results in the future.

It should also be noted that the Director of Public Prosecutions appointed an independent investigator, Sylvia Denman, to investigate and advise on the specific issue of race equality in the CPS in "a concerted effort to deal with equality and diversity issues within the Service" (DPP, 2000). Her report, *Race Discrimination in the Crown Prosecution Service—Final Report* (2001), makes a number of recommendations for improvement in how the department deals with its Black and minority ethnic staff. In the same report she does mention the study *Race and Crown Prosecution Service Decisions* and says that in the context of "institutional racism and prosecution decisions"

> …the report by Dr. Bonny Mhlanga of the Centre for Criminology and Criminal Justice at Hull University, *Race and Crown Prosecution Decisions* (1999) is often cited as having given the CPS a "clean bill of health" in relation to prosecution decisions…However, [Dr. Mhlanga] also notes that "one possible interpretation is that The CPS are

> downgrading, or even rejecting outright, cases where the police have shown bias against minorities." Further, Dr. Mhlanga's finding that Black and Asian defendants are more likely to be acquitted after trial in the Crown Court or magistrates' court prima facie suggests that the CPS may discriminate against ethnic minority defendants (Denham, 2001, p. 9).

Furthermore, the Denham (2001) report concludes the section on institutional racism and prosecution decisions by stating that:

> It follows that the Mhlanga report (together with Barclay and Mhlanga's subsequent paper) provides no grounds for complacency in relation to the possibility of discrimination in the prosecution process. The widespread belief that the Mhlanga report "cleared" The CPS is, in part, a function of the interpretation which it was given by the CPS upon its publication. The CPS' press release of 14th October 1999 states, categorically, that "The CPS does not discriminate unfairly against ethnic minority groups when making casework decisions, an in-depth study has shown." This misleading summary of the Mhlanga report would appear to have engendered unwarranted complacency (Denham, 2001, p. 9).

Finally, it could be argued that the rather defensive response from the CPS (as well as other criminal justice agencies and public service organizations) and the media may be a function of their desire to fend off accusations of institutional racism in their practice, particularly in the wake of the recent Stephen Lawrence Inquiry, its findings and recommendations. In this regard, there are some compelling reasons for including the media and public perceptions of the research findings of this study in this paper. It is indeed not surprising that they had something to say about the findings, given the fact that crime, law enforcement or policing and criminal justice issues have always been the staple parts of the mass entertainment media. According to Reiner (1997) the proportion of news devoted to these issues has tended to increase over time. At the same time, the mass media representations of the issues, including deviance and disorder, has also been a perennial cause of concern (Reiner, 2002). For instance Livingstone (1996) has argued that media representations have significant consequences, not only in terms of "how the media make us act or think, but rather how the media contribute to making us who we are" and in influencing policy (p. 31-32).

However, the sources of news production must be seen as threefold, namely (i) the political ideology of the press (ii) the elements of "newsworthiness," and (iii) structural determinants of news-making. In connection with the political ideology of the press, it has been suggested that the majority of newspapers have a more or less overtly conservative political ideology, and individual reporters are aware of this whatever their personal leanings (Reiner, 2002). In so far as the elements of newsworthiness are concerned, it has been argued that the news content is generated and filtered primarily through reporters' sense of newsworthiness. In other words, what makes a good story that their audience wants to know about, rather than any overtly ideological considerations. The core elements of this are immediacy, dramatization, personalisation, titillation, and novelty (Chibnall, 1977; Ericson, Baranek, & Chan, 1987; Hall, Critchley, Jefferson, Clarke, & Roberts, 1978). Lastly,

structural determinants of news-making have been defined as the police and the criminal justice system controlling the information on which crime reporters rely, giving them a degree of power as essential accredited sources (Reiner, 2002). This means that such institutional sources as the police and the CPS become the "primary definers" of crime news, which tends to be filtered through their perspective. The suggestion is that this structural dependence of reporters on their regular sources

> …permits the institutional definers to establish the initial definition or *primary interpretation* of the topic in question. This interpretation then "commands the field" in all subsequent treatment and sets the terms of reference within which all further coverage of the debate takes place (Hall, et al. 1978, p. 58; Lawrence, 2000, chapter 3).

It appears that all the three types or sources of news production discussed above were at play vis-à-vis the reporting of the findings of this study.

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Appendix 1
CPS Areas / branches and the proportion of ethnic minorities in the population

CPS Area	Branch(es)	Ethnic Minorities as % of total population in selected age range	Ethnic Minorities as % of total population*
North	Tyneside	3.1	1.8
Yorkshire	Bradford	28.4	8.2
Mersey/Lancashire	North & South Liverpool	5.8	3.8
Humber	South Yorkshire	5.4	2.9
North West	Manchester A, C, & D	10.7	5.9
East Midlands	Leicestershire	17.1	11.1
Wales	South Glamorgan	8.0	4.8
Midlands	Birmingham 1, 2 & 3	35.9	14.6
Anglia	Bedfordshire (Luton)	16.8	9.9
Severn/Thames	Berkshire	12.2	7.6
South West	Bristol	9.1	2.8
London	Brent, Harrow & Uxbridge	40.2	44.8
London	Barking & Stratford	58.1	42.3
London	Highbury	46.7	33.6
London	Ealing & Hounslow	42.3	32.3
London	Barnet & Haringey	41.0	29.0
South East	Guildford	4.4	2.8

*Source: 1991 Census Data

Note for Appendix 2: The parameter for the first level of each variable is set to 1
* = odds expressed in multiplicative form or as the parameter estimate anti log
** = significant *t*-value
Scaled deviance = 2712.7 at cycle 5
d.f. = 5464 from 5,501 observations

Appendix 2

Term	Description	Estimate	S.Error	Odds*	*t*-value
Constant		-3.203	0.2161	0.041	-14.822**
RACE(1)	White	-	-	-	-
RACE(2)	Asian	0.4057	0.1641	1.500	2.472**
RACE(3)	Black	0.3292	0.1715	1.390	1.92
RACE(4)	Other	0.5632	0.3523	1.756	1.599
GEND(1)	Men	-	-	-	-
GEND(2)	Women	-0.2188	0.1927	0.804	-1.135
AGE(1)	18 - 21	-	-	-	-
AGE(2)	14 - 17	0.3301	0.1161	1.391	2.843**
AGE(3)	Under 14	0.6245	0.2779	1.867	2.247**
AREA(1)	London	-	-	-	-
AREA(2)	Bradford	0.7123	0.2071	2.039	3.439**
AREA(3)	N & S Liverpool	0.3040	0.2536	1.355	1.199
AREA(4)	South Yorkshire	0.1585	0.2870	1.172	0.552
AREA(5)	Manchester	0.2463	0.2300	1.279	1.071
AREA(6)	Leicestershire	-0.2941	0.2923	0.745	-1.006
AREA(7)	South Glamorgan	0.05266	0.2711	1.054	0.194
AREA(8)	Birmingham	0.1290	0.1931	1.138	0.668
AREA(9)	Luton	0.5305	0.2706	1.700	1.961**
AREA(10)	Berkshire	0.7493	0.2429	2.116	3.085**
AREA(11)	Bristol	0.3719	0.2800	1.451	1.328
AREA(12)	Tyneside	-0.03931	0.2646	0.962	-0.149
AREA(13)	Guildford	0.7605	0.2564	2.139	2.966**
POFF(1)	Theft / HSG	-	-	-	-
POFF(2)	Road traffic	-0.4136	0.2080	0.661	-1.989**
POFF(3)	Burglary	0.3143	0.2004	1.369	1.568
POFF(4)	Vehicle offences	0.01143	0.2329	1.012	0.049
POFF(5)	Violent	0.1802	0.2150	1.198	0.838
POFF(6)	Criminal damage	0.6340	0.1961	1.885	3.233**
POFF(7)	Drugs	-1.203	0.4306	0.300	-2.794**
POFF(8)	Threatening beh	0.3306	0.2550	1.392	1.297
POFF(9)	Disorderly conduct	-2.770	0.8402	0.063	-3.297**
POFF(10)	Robbery	0.4284	0.2585	1.535	1.657
POFF(11)	Affray / violent dis	0.8936	0.2492	2.444	3.586**
POFF(12)	Sexual	0.8902	0.3402	2.436	2.617**
POFF(13)	Fraud / forgery	0.4785	0.4572	1.614	1.047
POFF(14)	Other summary	-0.1053	0.2674	0.900	-0.394
TICS(1)	No TICs	-	-	-	-
TICS(2)	Yes TICs	-0.6824	0.1181	0.505	-5.778**
PCTN(1)	Yes prev cautions	-	-	-	-
PCTN(2)	No prev cautions	0.5012	0.1290	1.651	3.885**
PCTN(3)	PCTN not known	0.8097	0.1530	2.247	5.292**
POLB(1)	Yes police bail	-	-	-	-
POLB(2)	No police bail	0.04740	0.1839	1.049	0.258
POLB(3)	POLB not known	-0.09139	0.1469	0.913	-0.622

THE ABUSE OF "CHARACTER" EVIDENCE IN AMERICAN CRIMINAL TRIALS

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The deep tendency of human nature to punish, not because our defendant is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court.

John H. Wigmore, 1984, p. 127

The Abuse of "Character" Evidence in American Criminal Trials

Introduction

On September 28, 2004, Jay's girlfriend, Chris, was the passenger in Jay's car as they traveled down a rural county route. Jay informed the police that, without any apparent reason, Chris un-clicked her seatbelt and opened the door slightly. Confused by what she was doing, he grabbed the seatbelt, and then reached over attempting to close her door. While Jay was braking, Chris repeated her efforts and "rolled out" of the vehicle. This episode took 1.95 seconds according to a reconstruction expert. Chris survived in a coma for 10 days, before passing away. The trauma leading to her death was a single injury to the right rear of her skull. There was also an abrasion on her right rear shoulder. There was no evidence of a struggle, suggesting Jay might have pushed her from the vehicle, but the evidence strongly demonstrated Chris's injuries and death resulted from her exiting Jay's moving vehicle. An expert estimated the vehicle was traveling about 13 miles per hour when Chris "rolled out." There was no weapon determined. A large pool of blood on the roadway was consistent with where her head came to rest. Other blood evidence and "drag marks" were consistent with Jay pulling Chris back into the car and rushing her to the hospital. Chris succumbed to her injury 10 days later. Jay was arrested and charged with "open murder," about 10 weeks later. Open murder allows the prosecutor to avoid specifying a "degree" of murder until the conclusion of trial proofs. Here, the jury considered murder in the "first degree."

A State Police toxicologist testified that Chris had high levels of three substances (cocaine, marijuana, and amphetamines) in her system at the time of the accident and these "can distort the perception of time and space and kind of impairs the information processing" (IV Tr 36). This provided a reasonable explanation for her outlandish behavior. Several witnesses testified about Chris's bizarre behaviors, drug usage, and self-destructive acts (i.e., slashing wrists) in the weeks just prior to the accident. A close friend thought Chris might be suicidal.

The prosecution argued the fatal blow occurred at Chris's house, several miles away from the accident scene, and then Jay discarded her injured body on the

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roadway. They then contended, having a change of heart, Jay removed her body from the road and transported her to the local hospital. This was pure speculation with no evidence to support their version, to-wit: there was no blood or struggle evidence at Chris's home, thoroughly examined by the crime lab. Second, the bleeding occurred entirely on the stated roadway, with no serology evidence suggesting an alternate crime scene. Rather, the prosecution argued Jay lied about the speed at which Chris exited the vehicle. This "speed issue" was a slight of hand, devious tactic, concocted by the police and prosecutor. Jay had told them, several times, the initial speed prior to braking was an estimated 40 miles per hour. Taking a portion of his statement out of context, they fabricated "the lie," stating Jay told them 40 miles an hour was the vehicle speed when Chris exited. If so, Chris would have exhibited more injuries. The prosecutor stated, "My theory of the case is simply put as, if he's a liar, he's a killer" (VI Tr 51). As stated by Ramsey (2003), "Suspects, inexperienced and knowing they have done nothing wrong, can be putty in the hands of experienced criminal justice officials who, convinced of their guilt, will guide them to arrest and conviction" (p. 81). In December 2005, Jay was convicted of second degree murder and sentenced from 18—60 years in prison.

This case is currently on appeal; therefore, actual names are avoided. Numerous issues are before the Michigan Court of Appeals including: (1) judicial error—the court improperly denying the motion for a directed verdict of acquittal on the premeditation charge—first degree murder, (2) judicial error—the court, over an objection, permitting a deputy to state his opinion that the victim did not "jump from the vehicle" and the defendant was a liar, (3) ineffective assistance of defense counsel, on many levels (4) prosecutorial error—improperly shifting the burden of proof and "vouching" for the "superior knowledge" of the prosecution's witnesses, and (5) prosecutorial error—the abuse of "character evidence" testimony.

This paper addresses the latter issue regarding the abuse of "character evidence." The Questions & Answers are taken directly from the trial transcripts. Following each witness exchange is a *comment* section, intended to briefly describe the legal impropriety and the prejudicial impact from each witness encounter. Wrongful convictions can only be understood in a case-specific context, an analysis which requires thorough, line-by-line review of testimony. Accordingly, this article addresses specific testimony relating to "character."

"Character" Evidence—Historical Overview

The potentially damning nature of "character" evidence has long been recognized, having solid precedent in common law. In *People v. White* (1840), Justice Verplanck said:

> The rule and practice of our law, in relation to evidence of character, rests on the deepest principles of truth and justice. The protection of the law is due alike to the righteous and unrighteous. The sun of justice shines alike for the evil and the good, the just and the unjust. Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proven guilty. The admission of a contrary rule, even in any degree, would open a door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the operation of prejudices as to religion, politics,

> character, profession, manners, upon the minds of honest and well-intentioned jurors (p. 574).

In 1876, Justice Cushing ruled:

> The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of a trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all should not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing he is not worthy of painstaking and care... (*State v. Lepage,* 1876, p. 296)**.**

Under the common law of England, "in order to prove his guilt, it is not permitted to show his former character, or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question" (*People v. Shay*, 1895, p. 508). "This policy of the Anglo-American law is perhaps more or less due to the inborn sporting instinct of Anglo-Normandom—the instinct of giving the game fair play..." (Wigmore, 2003, p.127).

Martin (2003) states:

> If the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life. The result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted by that affirmative evidence which the law of this country requires (Martin as cited in Wigmore, 2003, pp.125-126).

Even if relevant to the issue, character evidence "is excluded for reasons of policy and humanity; because although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine" (Martin as cited in Wigmore, 2003, pp.125-126).

The disfavor for receiving proof of the character of a person as evidence that on a particular occasion he acted in keeping with his disposition is strongly felt when the state seeks to show that the accused is a bad man and thus more likely to have committed the crime. The long-established rule accordingly forbids the prosecution, unless and until the accused gives evidence of his good character, to initially introduce evidence of bad character of the accused. It is relevant, but in a setting of a jury trial the danger of prejudice outweighs the probative value. "The danger is the highest when character is shown by other criminal acts, and the rule about the proof of other crimes is but an application of the wider prohibition against the initial introduction by the prosecution of evidence of bad character" (Cleary, 1954, p. 447).

Current Legal Overview

All states and the federal courts employ "rules of evidence," restricting many forms of testimony including character evidence. Remarkably similar across jurisdictions,

evidence must first meet the standard of "relevance." If relevant, a determination must be made that its "probative" value outweighs its "prejudicial" nature. The applicable Michigan Rules of Evidence (MRE) state:

MRE 401: *Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence*.

MRE 403: *Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading a jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.*

MRE 404 (a): *Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.*

MRE 404(b): *Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case*.

Commonly referred to as "bad acts" evidence, its admissibility requires: first, the prosecutor must offer the "prior bad acts" under something other than a character or propensity theory. Second, the evidence must be relevant under MRE 401 and 402. Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Fourth, the trial court, upon request, may provide a limiting instruction to the jury, under MRE 105. These factors are reiterated in *Huddleston v. United States* (1988).

"The prosecution in a criminal case may sometimes use the defendant`s bad character as relevant; but it is not allowed to evidence that character (as a proposition to be proved) by specific acts of misconduct" (Wigmore 2003, p. 121). In *People v. Robinson* (1983), the court said the "bad acts testimony denied the defendant a fair trial because it may have led the jury to convict him because he was, at least, unsavory and also may have diverted the jury from an objective appraisal of the defendant's guilt or innocence for the crimes charged."

In *People v. Duncan* (1977), the court noted that prosecutors have a duty to see that defendants receive a fair trial while attempting to convict those guilty of crimes. The prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). "Logical relevance is the 'touchstone' of the admissibility of uncharged misconduct evidence" (*People v. VanderVliet*, 1993, 74-75). No "exceptions" have application to this case. Even a curative instruction to the jury may not eliminate the prejudicial effect of the remarks (*People v. Crawford,* 1998; *People v. Stanaway,* 1994).

Preface to the Trial Testimony

With rare exception, defense counsel failed to object to the evidence discussed below. Except for a motion hearing regarding B. J. reading her daughter's (the victim's) letter, defense counsel never mentions "bad-acts" or MRE 404(b); he never objects to victim's "good character" traits under MRE 404(a). The few objections offered were based on "speculation" or "redundancy" rules. The requirements of *VanderVliet*, supra, are never met. With the exception of the above-stated letter, the below statements were never preceded by notice from the prosecution. There were no considerations of relevance, nor weighing of the prejudicial vs. probative effects. No curative jury instructions were ever requested or given to the jury.

The first inquiry is always relevance. If irrelevant, the testimony is simply inadmissible. If relevant, its "probative" value versus the "prejudicial" impact on the jury is then balanced under MRE 403. These determinations are to occur out of the jury's presence. Prosecutors are required to provide advance notice of the intended testimony, so an objective ruling can be made. This ruling then creates a record for appellate review. Implicit is the notion that the prosecutor recognizes the potentially impermissible nature of the proffered testimony and follows the rules accordingly—"the instinct of giving the game fair play" (Wigmore, 2003, p. 127).

Trial Testimony

B. J., the victim's mother, testified that she knew Jay very little and that Jay told her about the accident while at the hospital. Over objection, B.J. is permitted to read portions of a letter written by her daughter to the defendant. The letter is undated. She reads:

> Each night you drink…You go to S.A.'s (ex-wife) after work and do house work and yard work while I try to keep up on my own at the house…you threaten me that you'll just go to town because you don't want to drink alone or you're already drunk and want some pills. (II Tr 45).

Comment: Defense did not object to her reading the letter. However, at a pretrial hearing the prosecutor wanted the entire letter admitted under Rule 803, a hearsay exception. The defense argued it was an attempt to introduce prejudicial character evidence in violation of Rule 404(b). The judge expressed a hearsay concern. However, he permitted the above portions. Nothing was discussed regarding its admissibility under MRE 404(b). The letter characterizes the defendant as a threatening drunk and drug user. It also suggests, along with later testimony, that he is cheating on Chris, having an intimate relationship with his ex-wife. Additionally, coming from the mother's lips, it intentionally elicits maternal sympathy. The prosecution never argued motive or any other "exception" to its admission. The testimony lacked relevance. Even if relevant, its prejudicial effect clearly outweighed any probative value.

Q. Did you or your husband have any reason to suspect that he had done something wrong at that point?

A. You don't want to believe somebody could do something like that.

The prosecutor asked more about her thoughts on that subject when defense counsel objected based on "speculation." The objection was sustained (II Tr 39), but the prosecution continued uninterrupted anyway.

Q. And you didn't think the defendant would do that?
A. That's what I thought at the time (II Tr 40).

The prosecutor then asked about any interaction between B.J.'s husband, T.J. and Jay. She said that after the accident, they were all at Chris's house and her husband "asked him to leave three times" (II Tr 41).

Comment: *Somewhat subtle, the prosecutor asks for B.J.'s opinion as to whether Jay would harm their daughter. B.J. has no basis to make that assessment. She lived hours away and had little contact (twice in the past year) with her daughter or Jay. It might be relevant if she had personal knowledge. She did not. Under MRE 701, she is not an expert, therefore unqualified to offer such an opinion. Rather, it is highly prejudicial; suggesting the family knows Jay harmed their daughter.*

The prosecutor continues, asking B.J.:
Q. You made the comment or inference that you would have expected him (Jay) to be there (hospital) more often; is that safe to say?
A. Our pastor…had talked to his pastor and said it would be a good idea if Jay did not, if Jay were not at the hospital (II Tr 52).

Comment: Again no relevance, but highly suggestive of wrongdoing. Now, God`s agent is the messenger. No "motive, plan, or scheme" was ever argued by the prosecution. In other words, there was no evidence offered that Jay had reason to kill. This is a skilled, seasoned prosecutor. The questions, and answers, are calculated—offered with total disregard for the "rules."

Lt. G.H. took a formal statement from Jay. He was not familiar with the case, having just returned from time off. Lt. G.H. was asked by the prosecution:
Q. Mr. D. (defense counsel) didn't want to ask you right out your opinion, but after the interview, what was your opinion?
A. That he was not telling the truth about the incident.
Q. You don't think she jumped out of the car?
A. No.

Defense counsel objected on grounds of "speculation." The court overruled the objection, saying "we'll accept the response from the witness." The prosecutor then asked:
Q. Is it your opinion that Chris jumped out of the car?
A. No.

On cross examination, defense counsel asked:

Q. So, you listened to what he had to say, and you formed your own opinion about what happened?
A. Yes.
Q. And you don't think he was telling the truth?
A. That's correct.
Q. Based on no other evidence. Just on what he told you.
A. Fourteen years in the police department, yes.
Q. Fourteen years of police experience?
A. Taking statements from people (II Tr 169).

Comment: Lt. G.H. is not qualified to offer an opinion on truthfulness, the jury's ultimate assessment. Lie detectors are not even permitted in criminal cases. He was unfamiliar with the case and lacked medical or accident reconstruction expertise. The prosecutor knows this. The judge should know the "rules." This is an intentional act by the prosecutor and extremely prejudicial and damaging beyond repair. A self-proclaimed expert police interrogator opines that Jay is a liar. Destroying the defendant`s veracity, with the court's indulgence, is most fatal. There is no basis for the court to permit this opinion evidence.

Following is a series of four witnesses, all co-workers of Chris. None have a relationship with Chris outside the office, nor have they met Jay. MRE 404(a) and (b), in combination, does not permit bolstering the victim`s character or denigrating the defendant, unless an exception exists. The prosecution never "offered" the testimony pursuant to established precedent. Thus, the court never made determinations of relevance or "weight." The testimony was not objected to and the court never intervened, sua sponte.

E. G. was asked by the prosecution:
Q. What kind of employee was she?
A. She was a very good employee. The best example I can give is she won an award, called "The Simply Super Service Award."
Q. …were there problems with her being late?
A. Never.
Q. Problems with her being unkempt, badly dressed?
A. She used to appear—she would always come in really nice looking, nicely dressed. Then the last I would say probably six weeks, she started just wearing t-shirts, blue jeans, stuff like that.
Q. Did she miss a lot of work?
A. No (III Tr 18).
Q. Did she appear to be a drug user to you?
A. No, she did not.
Q. Why do you say that?
A. Because she was never late (III Tr 21).
Q. What about her being suicidal?
A. Absolutely not (III Tr 21-22).

E.G. had never met Jay; yet, the prosecutor asked:
Q. Did you form an impression regarding what their relationship was like?
A. …at the end, her behavior said she was afraid of him (III Tr 20).

Comment: This is the flip side of MRE 404(b). MRE 404(a) involves bolstering the "character" of the victim, Chris. She was portrayed as an award-winning employee, very responsible, well-groomed, and punctual. No relevance again, meaning does this testimony assist the jury in determining whether a murder occurred? Totally lacking expert qualifications, she is able to proclaim that Chris was not suicidal or prone to using drugs. Of course, this was also totally in opposition to the victim's toxicology report and the testimony of those who knew her "away from work"—confirmed evidence possessed by the prosecution.

N. B., a second co-worker was asked by the prosecution:
Q. What kind of worker was she?
A. She was a wonderful worker. I trained her. I never was with anyone who learned so quickly and was so friendly, I mean, all the good adjectives (III Tr 26).
Q. Was she the kind of person to show up late?
A. Never. She was very dependable.
Q. Miss a lot of work?
A. No.
Q. I'm assuming she did take some time off here and there?
A. Actually, the last few weeks she took more time off than normally, but…
Q. Do you know why?
A. Most of it had to do with the defendant (III Tr 27).
Q. And you and she talked about the relationship between…
A. Somewhat, yes.
Q. And I'm not going to ask you specifics of what was talked about, but what was your impression of the relationship based on those conversations?
A. …I was told, because of drugs, and she repeatedly said she wished, she wished she could get him off drugs (III Tr. 29).
Q. What about her being suicidal?
A. No. I think she was frustrated because she was having problems with the defendant. But I never considered her anywheres near suicidal (III Tr 29).

No objections were tendered to any of the above.

Comment: This really portrays Jay as a serious drug user. It is based on hearsay and speculation. The witness lacks personal knowledge. Therefore, she cannot be cross-examined as to the truth of the statements. Wigmore (2003) warned of the dangers of hearsay and opinion, coupled with character evidence. The witness is permitted to opine that Chris's recent absences were Jay's fault. She is provided "expert" status regarding Chris's propensity for suicide. Again, Chris is portrayed as a wonderful worker, friendly, and very dependable. This is designed to mislead the jury. It lacks relevance to the alleged murder and has no probative value. Rather, it prejudices jurors against the accused.

C. H., a third co-worker was asked by the prosecutor:
Q. What kind of worker was she?
A. She was a very hard worker. She was busy.
Q. How would she dress for work?
A. She dressed fairly well.

Q. Did that change at some point, how she dressed?
A. Yeah, I would say in the last month that she worked there, um, she started to dress down more, wear more t-shirts (III Tr 37).
Q. During the last month or whatever where this change was, was some of that due to the relationship?

Here, defense counsel offers a rare objection saying, "It calls for speculation" (III Tr 37). The court agrees but the prosecutor continues, eliciting the same information—just phrasing the question differently:

Q. Based on any observations that you made during that time?
A. She told me on several occasions that she was stressed and that Jay had a bad drug problem and she's tried to work through it with him and tried everything…she wanted to get him out of the situation that he was in here, and away from people he was doing drugs with (III Tr 38).

The prosecution then asked his opinion on Chris being suicidal.
Q. What about her being suicidal, any impression that way?
A. Chris was always a confident person. She always had a goal in everything she did, and it didn't seem like something she would do (III Tr 38-40).

This witness was further allowed to say that Chris was worried about a relative's kids being in the presence of the defendant and two others, because "they were on a bad drug spree or…a three-way trip" (III Tr 41). C. H. continued to state, on cross examination, that Chris said "her boyfriend Jay is an alcoholic and she (Chris) thought that she could fix them for some reason, kind of the guys she was attracted to" (III Tr 43). The prosecutor continued with this witness saying:
Q. You said something that she liked to fix them. Is that regarding boyfriends?
A. Yeah, boyfriends. It seemed that everybody she was attracted to had either a drug problem or an alcohol problem and she was determined to try to straighten them out (III Tr 45-46).

Comment: Chris is a very busy, hard worker—a very confident individual who would not contemplate suicide. She is Mother Teresa, trying desperately to salvage another wayward soul who is progressing toward damnation because of drugs and alcohol. "It seemed" these are "the kind of guys she was attracted to," permits the witness to offer her opinion about Chris's male relationships based on speculation, which is classic hearsay. The witness did not know any of Chris's companions. She was a co-worker, period. Hearsay cannot be cross-examined. Thus, the defendant lacks the ability to confront his accuser under the Sixth Amendment. There is no way of ascertaining the truth. Additionally, none of Chris's alleged statements are admissible under the "dying declaration" hearsay exception.

W. M., the final co-worker witness, was asked by the prosecution:
Q. Do you know the defendant Jay?
A. I knew him in high school and I knew him as Chris's boyfriend.
Q. And at the beginning, what was your impression of how the relationship was?
A. Not good at all.
Q. Even at the beginning?

A. Even at the beginning, knowing Jay from high school.
Q. Well, what about near the end?
A. It went downhill from the beginning (III Tr 47).
Q. Did Chris ever seem suicidal to you?
A. Never.
Q. What about using drugs?
A. None, never that I was aware of (III Tr 49).

Comment: The witness is permitted to put a cloud on Jay's character going back to high school, 20 years prior. It is vague and without relevance. Even when evidence of criminal convictions is warranted, rarely are events beyond 10 years considered relevant. The non-suicidal opinion and the drug-free Chris characterization is more of the same. In combination, consider the purposes for which these four witnesses were offered—to bolster the victim's character and denigrate the defendant's. All are clearly calculated.

K. M., a friend of both Jay and Chris testified to the prosecutor:
Q. You know who S.A. is?
A. Yes I do.
Q. The defendant was friends with S.A., his ex-wife?
A. Um, I would say they were friends. They were on-and-off friends. I would say, on-and-off friends, on-and-off lovers. On-and-off, I'm not sure because I didn't spend any time with Jay and S.A. together.

Comment: This was denied by S.A. when she testified, saying "we were just friends." The inference is that Jay is a womanizer and cheating on Chris. The prosecutor places inference upon inference, suggesting Jay was cheating on Chris, which played a part in her death. That does not meet the test of "logical relevance." Evidence of motive was never offered. The court was never asked to make a relevance determination, nor asked to weigh its probative value.

R. U., a friend of the victim, was asked by the prosecution:
Q. Didn't you tell the officer that he had dated two other women and even his ex-wife, S.A., during the time that he and Chris were on and off?
A. Yeah, yes.
Q. Okay. So is that true to your knowledge?
A. (nod head)
Q. Is that a yes or a no?
A. Yes, that's…yes (III Tr 103-104).

Comment: Not only does the testimony lack relevance, it suggests there is something wrong with dating someone else. The relationship between Jay and Chris was not steady or continual. They were not married or engaged, but they simply dated. Again, he is cheating on poor Chris; therefore, he must have killed her.

S.S., a friend and platonic roommate of Jay up to the day preceding the accident was asked by the prosecutor:
Q. Why did he move?
A. He was angry at me.

Q. Why?
A. Um, I had gotten a phone bill in the mail for $400 and I made the assumption that he made it.

Comment: Jay is now a chiseler too, an angry one. He skips out on his debts. The background behind that bill was left hanging as a "misunderstanding." There was never any indication Jay was a threat to S. S. or anyone.

S. A., defendant's ex-wife. The prosecutor asked:
Q. Okay. You at some point helped him clean the blood from his car after he got out?
A. I did.
Q. And you're very supportive of him?
A. Yes. I would support Jay in any instance, because he's a decent human being (III Tr125).

Comment: The Sheriff's Department bumbled the investigation of Jay's car. They impounded and released the vehicle twice prior to arresting Jay. After it was released to him, S.A. helped clean up the inside, because it was bloody from him transporting Chris to the hospital. The inference is that S.A. conspired with Jay to destroy evidence. Remember, Jay had no knowledge he was going to be arrested and charged. It impeaches S. A.'s credibility regarding her stated relationship with Jay and prejudices him irreparably as cleaning up the crime scene. The prosecutor knew of the police mishandling of the evidence, which proved harmless anyway. Subsequent testimony indicated the crime lab was able to detect blood evidence in the vehicle which corroborated Jay's statement to police.

The photographs (shown by the prosecutor during his closing argument): He posted separate photos of the defendant and the victim on a large overhead screen. The victim's photo was from her former modeling days. The defendant's was from his jail booking (i.e., mug shot).

Comment: Clearly this was calculated to violate both MRE 404(a) and (b). Certainly it totally lacks relevance to the alleged killing. A mug shot characterization suggests guilt more than the proverbial "thousand words"—the face of a killer. It was presented without objection or court intervention, which is extremely prejudicial.

A Summation of Trial "Character" Testimony

Wigmore (2003) warned of "the deep tendency of human nature to punish, not because our defendant is guilty this time, but because he is a bad man." He noted that it "cannot fail to operate with any jury, in or out of court." Jay was the "personification of evil." He was a lying killer, with serious alcohol and drug problems, even displayed in the presence of young children. Jay was cheating on Chris, with his ex-wife and others. He was dangerous and scary—as portrayed in the photo displayed at "closing." Chiseling on his debts and participating in destruction of evidence, this character assassination went back 20 years.

The victim is portrayed as a beautiful former model, hard-working, responsible, and friendly. She chooses her male friends believing she can save them from all their human frailties. In two words: Mother Teresa—only better looking! The question is obvious. What is its relevance to murder? "Any jury" would be apt to punish him. It's "the deep tendency of human nature."

Relevant Research Findings

The Prosecutor*:*

Under the vast umbrella of "prosecutorial misconduct" numerous subcategories exist. In their work on DNA exonerations, Scheck et al. (2000) cite these "wrongful conviction" factors relative to prosecutors: suppressing exculpatory evidence, knowingly using false testimony, fabricating evidence, coercing witnesses, making false statements to the jury, and engaging in improper closing arguments (Scheck, Nuefeld, & Dwyer, 2000, p. 265). Improper use of "character" evidence is not specifically mentioned, although it may coexist with many of the cited categories. The literature seldom identifies character evidence as a primary culprit in wrongful convictions.

However, in their study of non-DNA cases in the English, French, and American systems, Brandon and Davies (1973) state: "In the cases we have come across, the main problems (with wrongful imprisonment) arise from two categories of inadmissible evidence: hearsay, and the accused previous record or bad character" (p. 77), consistent with the above testimony. Jay's right to a fair trial, under our Sixth Amendment, was irreparably harmed. The "drug" references refer to criminal activities which, even if based upon actual convictions, would be inadmissible. Character assaults regarding unproven bad acts provide an additional dilemma, beyond their prejudicial nature—their "truth" is unknown. To rectify, it forces the defense to respond. Called "shifting the burden" [of proof], the defense is placed in an untenable position. To rebut, they must produce contrary evidence, while legally having no burden to proof. If the defendant is the only source of rebuttal, it creates a Fifth Amendment crisis, since defendants have the absolute right to stay off the witness stand in the American system.

Defense counsel's obvious lack of objections to the continual prejudicial testimony significantly contributed to the onslaught. The defense does not necessarily know the nature of testimony in advance and may not immediately grasp its intended purpose. Rules pertaining to "discovery" vary among states. Many only require prosecutors to provide defense with police reports, names of witnesses, formal witness statements, and exculpatory evidence, if requested. The defense is not legally privileged to the prosecutor's strategy. Hence, nothing in advance of trial necessarily suggests forthcoming character evidence. This is precisely the essence of the notice and hearing requirements under MRE 404. The "hearing" forces the prosecution to explain, in advance, the relevance of the proposed offering. The defense can then state their objections and the court can make a determination. If relevant, the court can weigh the probative versus prejudicial aspects of the evidence, concurrently providing a record for appellate review.

Prosecutors are well aware of the impact this evidence has on a jury, and realize they are more likely to benefit than lose from its presentation. (Gershman, 1997, p. 430). Intuition alone suggests that unethical behavior by prosecutors is not

necessarily inadvertent. The above questions and answers show a calculated and continual effort to damage the defendant's character and embellish the victim's persona—in defiance of the rules of evidence. One can visualize the preparation and rehearsal of testimony for court. The ABA (1982) Standards for Criminal Justice indicate that "falsely representing to the jury that certain facts exist, is more reprehensible than suborning perjury" (sec. 3-3.11). By representing that unproven bad act conduct as the truth, the prosecution not only prejudices the fact-finding process but undermines their role of seeking justice. When they know that testimony is artificial, they are suborning perjury.

Prosecutors are also aware that professional discipline is lax. Case reports "do not adequately describe the extent of such misconduct because so much of the prosecutor work is conducted secretly and without supervision" (Humes, 1999, p. 529). Documenting the astonishing absence of actions taken by either grievance committees or appellate courts against prosecutorial misconduct is not difficult. Despite the recognized frequency of misconduct by prosecutors in arguments to the jury, Ramsey (2003) found only one decision involving a disciplinary proceeding against a prosecutor (p. 95). In contrast, prosecutors who defy standards are "released" of their duties in the Netherlands (van Koppen, 2007).

The Judge:

In Jay's case, the lack of judicial intervention in the face of countless obvious rule violations, raises additional "justice" concerns. In numerous crucial situations, the trial judge permitted prosecution witnesses to opine as experts, expressing damaging opinions beyond their level of knowledge or expertise. These violations would cause any reasonably competent attorney or judge to pause, as if to say, "Why would the judge permit that?"

Perhaps even more noteworthy was the total lack of judicial intervention throughout the trial. Although this article only portrays a portion of the tainted testimony, clearly it indicates judicial indifference to fairness and due process. Judicial error associated with wrongful convictions may be the result of bias, incompetence, or indifference. "Often wrongful convictions occur because judges allow incompetent defense attorneys, overzealous prosecutors and police, and questionable forensic evidence to permeate the courtroom" (Ramsey, 2003, p. 101-2). Judicial incompetence was noted in a recent Illinois Governor`s Commission on Capital Punishment. Following an extensive study of wrongful convictions, one noteworthy recommendation was to require judges to be trained in the rules of evidence (Sullivan, 2007). Many judges are simply not competent to govern a trial.

The "complicity" of judges in this process of wrongful convictions has been researched by many including Sherrer. Calling them "political creatures," Sherrer believes judges are "the most crucial actors" in the process of wrongful convictions. He notes:

> Judges are often thought of by lay people and portrayed by the broadcast media as impartial, apolitical men and women who possess great intelligence, wisdom, and compassion, and are concerned with ensuring that justice prevails in every case. Reality is far different from that idealistic vision (Sherrer, 2003, p.539).

Vincent Bugliosi, the former Los Angeles Deputy District Attorney and Charles Manson prosecutor, states that "every judge in this country is only a thinly veiled politician in a black robe" (Sherrer, 2003, p. 540). In essence, politics often guide their decisions, rather than the law.

The American System:

A phenomena: "The worse the crime, the less evidence required to convict."
– Sullivan (2007)

Westervelt (2002) states:

> The paradigmatic case of wrongful conviction often begins with a heinous unsolved crime and pits an unpopular accused, assisted by inadequate defense, against a determined prosecutor zealously seeking a conviction to resolve community concern. Little evidence is available, but the police are able to gather enough to warrant a trial. A trial resulting in a conviction restores order and the case is over…A marginalized suspect who can be made to bear public fear and loathing is a necessary element of most cases of wrongful conviction (Westervelt, 2002, citing Martin, p. 85).

Vague ethics rules provide prosecutors with ambiguous guidance. Their vast discretion coupled with limited accountability, results in only rare sanctions for malfeasance. "Prosecutorial misconduct often takes place because prosecutors are in pursuit of the noble cause; often a prosecutor feels the end justifies the means, if a 'bad guy' is removed from the streets" (Crank & Caldero, 2000, p.133). This is precisely the danger of "bad act" evidence cited by Wigmore, supra.

Another explanation is offered by van Koppen for American prosecutorial malfeasance, contending the goal of adversarial systems is to seek fair play, not to ascertain truth. "We merely pay lip service to the truth seeking ideal" (van Koppen, 2007). Our justice system does not reliably protect the innocent. The system is not primarily designed to do a superior job of ascertaining the truth...but no one suggests it *is* their focus. The filtration system stops working when the prosecutor decides to proceed to trial against the accused. From this point forward, the fate of the innocent depends on the extent to which our adversarial system either can or does express a particular concern for assuring the innocent will be acquitted (Stacy, 1991).

What is the extent of this justice dilemma? "Prosecutorial misconduct involves the purposeful use of illegal or unethical tactics in order to gain a conviction" (Ramsey, 2003, p. 95). Allen stated, "Minimizing prosecutorial excesses is one of this country's great unsolved problems in criminal law administration" (Gershman, 1997, p. 455). "Acts of misconduct by prosecutors are recurrent, pervasive, and very serious" (Humes, 1999, p. 529). Citing Huff, Ramsey states,

> If we had to isolate a single "system dynamic" that pervades a large number of these cases, we would probably describe it as police and prosecutorial overzealousness…their willingness to believe, on the slightest evidence of the most negligible nature, that the culprit is at hand (Ramsey, 2003, p. 82).

The Appellate Process:

Prosecutors proceed to trial exempt from punishment or loss. They are almost totally immune from civil or professional liability for their misdeeds. With negligible legal responsibility for their bad acts, the only remedy lies with the appellate process to reverse their tainted convictions. However:

> …the judiciary's increased tolerance of prosecutorial excesses, notably the expanded use of "harmless error" review, and the decline of supervisory power, makes it easier to preserve convictions, but also has a more sinister consequence—in encouraging prosecutors to engage in misconduct to win convictions…The judiciary's failure to set meaningful standards for competent defense advocacy results in more and more instances of defense ineffectiveness, which makes it easier for prosecutors to win (Gershman, 1997, p. 411-2).

The "harmless rule" has been described as "insidious" for the way it insulates prosecutors from appellate sanction for flagrant Constitutional, as well as non-constitutional, violations (Gershman, 1997, p. 424). The lack of supervisory control tacitly informs prosecutors that they can weigh the commission of evidentiary or procedural violations, not against legal or ethical standards, but rather against the unlikely prospect the appellate courts will act upon their misconduct (Gershman, 1997, p. 424). Steele says, the increasing incidence of prosecutorial misconduct suggests that it has become "normative to the system" (Gershman, 1997, p. 454).

A second appellate dilemma exists. Our system disdains factual review, focusing on legal processes. Justice Oliver Wendall Holmes once corrected a litigant saying, "This is a court of law, young man, not a court of justice" (Yant, 1991, p. 11). Sherrer (2003) refers to this as the "irrelevance of innocence" (p. 539). This paper does not allow sufficient time or space to outline all relevant "facts," but at the risk of appearing self-serving, we believe we have been able to "factually" prove the defendant's innocence—beyond any doubt. Critical fact-based questions, dealing with malice, premeditation, and the corpus delicti of the crime, exist. Factual issues are troublesome to appellate courts and appellate counsel, because they require extensive review. The intricacies of the case must be understood and the appellate court does not view themselves as triers-of-fact. Their focus is on procedure.

The "lack of attention to the details of an appeal and the minimal amount of firsthand knowledge an appellate judge has about the merits of the majority of their cases is only known by a few legal insiders" (Sherrer, 2003, p. 554). "A person's innocence is discounted by judges for the simple reason that it is not a Constitutional issue. The Constitution only guarantees that procedural formalities are to be followed. It does not guarantee that the outcome of those procedures will be correct or fair" (Sherrer, 2003, p. 549). In *Herrera v. Collins* (1993), the federal court said "innocence is irrelevant." Thus, when the trial courts bind-over and convict on insufficient factual evidence, which should have never gone to a jury, appellate review is also abominably deficient.

> New federal laws and Supreme Court rulings have sharply limited the number of federal appeals allowed in criminal cases. The Supreme Court also created a standard that requires near-absolute proof of innocence before a conviction could be overturned for "factual"

> reasons—not even the strongest of doubts are enough in the absence of "legal" and "procedural" errors in the case (Humes, 1999, p. 343).

In this case, conversations with a court appointed appellate counsel parallel Sherrer's findings. Appellate counsel boldly stated the appellate court would not be interested in "insufficiency of the evidence," i.e., factual, arguments. Rather, counsel only sought procedural flaws. Conversations with him strongly suggested that he had not "studied" the case. Why take time to truly understand factual intricacies if you are not going to derive issues from them? Clearly, the appellate courts have sent a message to appellants: Only present us with procedural questions. It is catastrophic that an appellant, although innocent by "fact," must base his freedom on procedure, rather than truth.

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HOW TO REDUCE THE INCIDENCE OF WRONGFUL CONVICTION: CURRENT PERSPECTIVES OF CRIMINAL JUSTICE PRACTITIONERS

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Abstract

Drawing on a sample of 1,500 Ohio criminal justice professionals (police, prosecutors, defense attorneys, judges), we examine respondents' perspectives regarding the frequency of "system errors" (i.e., professional error and misconduct suggested by previous research to be associated with wrongful conviction), and wrongful felony conviction. Sixty percent of the 798 Ohio criminal justice professionals who responded to the 53-item survey answered the survey's single open-ended question, "In your opinion, what steps could be taken by criminal justice professionals to reduce the incidence of wrongful conviction?" Based on a frequency analysis, results indicate that respondents primarily perceive a need for:(1) improved professionalism/increased sanctions for unethical behavior, (2) better training, (3) increased resources [time, money, and personnel], (4) more thorough investigations, (5) changes in rules of discovery regarding full disclosure, (6) improved witness identification techniques, and (7) improved forensic technologies and protocols. Over 300 verbatim quotes from respondents regarding how system error might be reduced are included.

How to Reduce the Incidence of Wrongful Conviction: Current Perspectives of Criminal Justice Practitioners

The wrongful conviction of innocent people in the United States is a problem which has historically received scant attention from criminal justice practitioners. In the process of doing their jobs, police officials, prosecutors, defense attorneys, and judges tend to deliver wrongfully convicted individuals to correctional agencies with very little indication that they believe system errors can and do occur. It is likely that this demeanor stems from a belief that Constitutionally mandated checks and balances make it unlikely or impossible that an innocent person could be convicted; wrongful convictions, therefore, must be either non-existent or rare. Even when confronted with evidence that a mistake has been made—that an innocent person may have been convicted of a crime—often those involved in the criminal justice process continue to deny that such a thing could happen (Sheck, Neufeld, & Dwyer, 2000). This type of practitioner ethos was pointed out in Yale law professor Edwin M. Borchard's (1932) pioneering book on wrongful conviction *Convicting the Innocent*. In the book's preface Borchard (1932) refers to a Massachusetts district attorney's reported comment that "Innocent men are never convicted. Don't worry about it, it never happens in the world. It is a physical impossibility" (p. *v*). Borchard

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responded to this comment by presenting 65 case-studies of individuals who had been wrongfully convicted.

The perceptions, beliefs, and attitudes of the criminal justice practitioners who are on the "front-line" in the criminal justice system are of great importance to the subject of wrongful conviction. Police officials, prosecutors, defense attorneys, and judges are the individuals who make the day-to-day decisions concerning the administration of justice and, in a large part, their perceptions influence their actions. Sociological research confirms the importance of perception in determining action. Huff, Rattner, and Sagarin (1996) note:

> …as pointed out by a long line of prestigious sociologists, from Simmel and Thomas to Merton and Goffman. How people perceive a phenomenon will be one of the determinants of how they act: Perception is a cause of behavior and a key to its understanding (p. 56).

In sum, if criminal justice practitioners do not perceive wrongful conviction to be a significant problem, they are unlikely to take the actions necessary to reduce its incidence. Given their importance, it is imperative to know and understand the attitudes, beliefs, and perceptions of criminal justice practitioners if the incidence of wrongful conviction is to be reduced. Many questions need to be answered. For example: Do these practitioners believe that wrongful convictions occur and, if so, how often? Do they believe wrongful conviction is a problem of little significance, or do they believe it is a significant problem? Are they aware of the factors research has indicated contribute to wrongful conviction? What solutions might they suggest? Answers to these types of questions should be helpful to policymakers and administrators who desire to reduce the incidence of wrongful conviction.

Perceptions of the Extent of the Problem

The first in-depth research into the perceptions, beliefs, and attitudes of criminal justice officials concerning the frequency of wrongful conviction was conducted by Rattner in 1983 when he surveyed 353 Ohio criminal justice practitioners asking them, among other things, to estimate how often they believed wrongful felony conviction occurred in the United States. The surveyed group included a sample of Ohio common pleas court judges, county prosecuting attorneys, county public defenders, county sheriffs, and chiefs of police. Two hundred twenty nine members of the surveyed group (64%) responded to the questionnaire. Examination of the survey data revealed estimates of the frequency of wrongful conviction that ranged from zero to 5% of all felony convictions. Thirty six percent of respondents believed that wrongful felony conviction "never" occurred and 6.5% believed that wrongful felony conviction occurred in 1% to 5% of all cases; the majority of respondents (56.8%) believed that wrongful felony conviction occurred more than "never" but in "less than one percent;" most responses hovered around the 1% mark. Huff, Rattner, and Sagarin (1996) analyzed the survey data and felt justified in selecting the mid-point between "never" and "one percent" (i.e., one half of one percent) as a representative measure of the respondent's "average" estimate of frequency.

Perceptions of the Extent of the Problem—Twenty Years Later

In the two decades that have passed since Rattner's 1983 survey there has been a great deal of new information dispersed in both the popular media and professional journals addressing issues concerning the prevalence of wrongful conviction and factors associated with its occurrence. Much of this new information results from revelations disclosed by modern forensic science techniques—especially through the increased use of DNA technology. Application of these modern forensic techniques have led to the release of numerous wrongfully convicted individuals from prisons—many from death row. As of May 17, 2007, The Innocence Project (2007) reported on its website the exonerations of 201 wrongfully convicted individuals. Gross et al. (2004) found an additional 183 cases of exonerations of defendants convicted of serious crimes since 1989 where evidence other than DNA was used to declare a defendant not guilty of a crime for which he or she had previously been convicted.

As these known cases of wrongful conviction were uncovered and studied, a better understanding of the factors associated with the phenomenon of wrongful conviction emerged. Believing that this new information might have increased the awareness of criminal justice practitioners and affected their perceptions of the prevalence of wrongful conviction, Ramsey (2003) replicated, in part, Rattner's 1983 study. Ramsey (2003) surveyed 1,500 Ohio criminal justice practitioners. Seven hundred ninety eight respondents (53.2%) completed and returned the questionnaires. In total, respondents to the Ramsey (2003) survey perceived that wrongful convictions occur in the United States between 1% and 3% of the time for all felony convictions. Interestingly, the perceived frequency of wrongful conviction varied with group affiliation. For example, prosecutors and law enforcement personnel perceived the least error (0.5%--1%), while defense attorneys perceived the most error (4% --5%). Judges perceived the national error rate to be between 1% and 3%.

Comparison of Rattner's (1983) findings with Ramsey and Frank's (2007) findings reveals a noteworthy change in the perceptions of criminal justice practitioners regarding the frequency of wrongful conviction. The Rattner (1983) data suggested that criminal justice practitioners, in total, perceived a wrongful conviction rate of 0.5%, while the Ramsey and Frank (2007) data suggest that practitioners now perceive the rate to be between 1% and 3%. The validity of this apparent change in perceptions over the past 20 years is reinforced when the data is analyzed in greater depth. For example, while 36.8% of the respondents to the 1983 survey believed that wrongful conviction "never" occurred, only seven-tenths of one percent (0.7%) of the 2003 surveyed respondents believed this to be true. Similarly, practitioner perceptions of the prevalence of wrongful conviction also increased in the other categories. In the 1983 survey the majority of respondents (56.8%) selected the "more than never, but less than one percent" category, while only 34.5% of the 2003 surveyed respondents selected the same category. Also, while only 6.5% of the 1983 respondents believed wrongful conviction occurred in 1% or more cases, 64.7% of the 2003 respondents selected the 1% or more category—an almost ten-fold increase. Finally, when looking at the "more than 5%" category, no respondents to the 1983 survey believed that the wrongful conviction rate was more than 5%, while 22.7% of the 2003 respondents believed this to be the case. In sum, a comparison of the response data from the Rattner (1983) study and the Ramsey and Frank (2007) study indicates that, over the past 20 years, criminal justice practitioners have gained an

increased awareness of the problem of wrongful conviction and increased perceptions of how often it occurs.

What Can Be Done to Reduce the Incidence of Wrongful Conviction?

It is logical to believe that those practitioners who work in the criminal justice system on a day to day basis—often with many years of experience—might be in an excellent position to provide ideas to policymakers and administrators concerning how the incidence of wrongful conviction might be reduced. Four hundred seventy nine of the 798 respondents (60%) to the Ramsey (2003) survey answered the open-ended question: "In your opinion, what steps could be taken by criminal justice professionals to reduce the incidence of wrongful conviction?" Following are the overall conclusions of an analysis of the surveys (for complete methodology see Ramsey & Frank, 2007) regarding the seven most frequently proffered recommendations (many of the respondents provided suggestions in more than one category). The verbatim comments of respondents are included in the Appendix.

1. Improved Ethics and Professionalism

One hundred forty two of the 479 respondents (30%) were concerned about a lack of professionalism among some criminal justice practitioners and made recommendations concerning accountability and the need for increased professionalism. Representative samples of comments made by members of the various groups who responded to the questionnaire can be found in the Appendix (1A).

2. Better Training of Criminal Justice Practitioners

In conjunction with the concern for increased professionalism were numerous comments regarding training issues. One hundred seventeen of the 479 respondents (24%) suggest the need for more and improved training for all criminal justice practitioners. Representative samples of comments made by members of the various groups who responded to the questionnaire can be found in the Appendix (2A).

3. More Resources (Time, Money, and Personnel)

Ninety eight of the 479 respondents (20%) suggested that the incidence of wrongful conviction could be reduced if more resources (time, money, and personnel) were made available to criminal justice practitioners and their agencies. Representative samples of comments made by members of the various groups who responded to the questionnaire can be found in the Appendix (3A).

4. More Thorough Investigations

Ninety of the 479 respondents (19%) said they believed that more thorough investigations would reduce the incidence of wrongful conviction. A few representative comments made by members of the various groups who responded to the questionnaire can be found in the Appendix (4A).

5. Change Rules of Discovery/Full Disclosure/Not Withholding Exculpatory Evidence

The fact that this issue was ranked 5th among the concerns of criminal justice practitioners may be an artifact of the Ohio survey. Discovery issues may be more of a problem in Ohio than in other states where more complete discovery is available to defense attorneys. Forty six of the 479 respondents (10%) suggested that the incidence of wrongful conviction could be reduced if the rules of discovery would be changed to allow the defense more access to the fruits of the state's investigation. Most of the recommendations concerning the discovery phase came from defense attorneys and judges. A few comments were offered by police officials. No prosecutor addressed the issue of discovery. Representative samples of comments made by members of the various groups who responded to the questionnaire can be found in the Appendix (5A).

6. Witnesses Identification

Issues revolving around the topic of witness identification (or mis-identification) were a concern for 33 of the 479 respondents (7%) who responded to the open-ended question asking for recommendations on how the incidence of wrongful conviction could be reduced. Some representative comments and recommendations provided by the respondents are included in the Appendix (6A).

7. Forensics and Technology

Twenty nine of the 479 respondents (6%) who answered the survey's open-ended question stated concerns about limited access to various areas of technology—especially in the area of DNA forensics. Some representative comments are included in the Appendix (7A).

Summary and Policy Implications

Comparison of the Ramsey 2003 survey data with the data from Rattner's 1983 survey indicates that criminal justice practitioners, over a 20 year period, have increased perceptions regarding how frequently wrongful conviction occurs. Despite the positive and helpful comments and suggestions made by the great majority of the respondents to the Ramsey (2003) survey, some of the negative comments indicate that not all criminal justice practitioners see wrongful conviction as being a significant problem; nor do they believe that much can be done to reduce the number of wrongful convictions that do occur. This attitude is nothing new. One of the respondent's to Rattner's (1983) survey commented:

> I am deeply disappointed that my old university is even remotely involved in this type of venture. Aren't there more pressing topics in this world that your efforts can be funneled to? (p. 52).

Likewise, a respondent to Ramsey's (2003) survey commented,

> It would be nice, for once, if academics such as yourself could initiate research projects that actually help those of us engaged in the everyday work of the criminal justice system (p. 211).

There were also, however, many responses that suggested that criminal justice practitioners were indeed concerned about the problem of wrongful conviction, and wanted to assist in improving justice in the criminal justice system. The fact that 60% of the Ramsey (2003) survey respondents took the time to offer written suggestions regarding how the criminal justice system might be improved indicates the level of concern and willingness to help. One judge wrote,

> Proving or considering guilt is not a moral issue (that's for God); it is always a legal issue. It is a test of the people's or government's ability to properly prosecute the indicted or accused. Our forefathers intended the criminal justice process to be difficult so innocent persons would not be prosecuted. The law should always be a check or a governor on the police power of the state. Thank you for your vigilance!

Encouragingly, there was consensus and unity regarding the response to one question in the Ramsey (2003) survey; when criminal justice practitioners were asked what they believed was an "acceptable" level of wrongful conviction, the majority of respondents from every group believed that the only acceptable level was between "zero" percent and "less than one half percent." This consensus is meaningful because these same respondents, in total, perceived the actual level of wrongful conviction in the United States to be between one and three percent of all felony convictions. Even when the perceived frequency was broken down by group affiliation, no group believed that wrongful felony conviction occurs in the United States in "less than one half percent" of all felony cases (see Ramsey & Frank, 2007).

In sum, the data suggest that a gap now exists between what criminal justice practitioners believe is an "acceptable" frequency of wrongful conviction and what they believe is the "actual" frequency of wrongful conviction. It appears, therefore, that a favorable environment exists within the criminal justice community where procedural and systematic changes such as those suggested by respondents to the Ramsey (2003) survey might be considered and implemented by policymakers and administrators. While it is doubtful that wrongful convictions can ever be completely eliminated, there is substantial belief that its incidence can be reduced—as indicated by the multiple recommendations of the survey respondents. It is our hope that the research community will utilize the quotes and recommendations as listed in the Appendix in further research regarding wrongful conviction. Ultimately these recommended changes in criminal justice system policies and procedures could reduce the incidence of wrongful conviction and improve our system of justice.

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Appendix

A1. Improved Ethics and Professionalism

Police

"Hopefully I have never convicted an innocent person. I have never perjured myself in court, even if it meant losing the case. I would rather see 1,000 guilty people go free than to convict one innocent person. We are all familiar with *Miranda*. Do we need other safeguards, such as time frames on interrogations, hours of rest for defendants between interviews, etc.? I personally feel if you wear a person down enough, they will confess to almost anything. I also feel most defendants do not totally understand the system nor their rights even though they are advised of the same. Most people committed to my jail are poor and lazy. That is why they thieve. Sometimes the correctional facility is a much better environment than they have at home. Many times the educational level and intellect is very low. Does law enforcement tend to out-fox this type of individual to get confessions? Do "quota systems" have anything to do with wrongful convictions? Written or unwritten, they exist. When I was attending classes at ____ University, the prof asked the question how many of us would lie under oath. Over half said yes if they thought a conviction was going down the tubes. Also, these officers were of the opinion if the suspect was lying, they had the right to lie. Perverted thinking, yes. My way of thinking, no. Too many times, arrests are made because of an old grudge. Our enforcement must be fair and unbiased."

"Never compromise integrity for a conviction."

"The rate of misconduct is also small, but unacceptable. When misconduct on the part of the government is demonstrated strong sanctions should be applied."

"Ethical representation of clients on the part of defense lawyers."

"Vigorously stress ethical values and lawful action."

"Better ethics training at all levels—The conviction or arrest is not an end goal."

"I think he best way to avoid wrongful convictions lies with the honesty of the people involved in the investigation. The system has many levels of review and every case should be carefully reviewed at each level of the system. Intelligent, experienced, and honest professionals must be in place from the very start of an investigation to the final verdict."

"Proving innocence should be rewarded as a victory by police and prosecutors."

"More accountability on a local level by all segments of the criminal justice system."

"Ensure personnel throughout the criminal justice system are qualified and of strong morals and

ethics."

"Do the right thing always."

"Prosecuting attorneys are 'graded' on conviction rates. Young prosecutors appear pressured to get some type of conviction. Emphasis must be placed on the truth."

"As for police officers, unfortunately they may exaggerate in an attempt to prove their case. Of course, no one likes to be wrong, especially in the public eye."

"Disciplinary action should be taken against attorneys and police for wrongful conduct."

"Reduce the pressure on prosecutors to maintain a high conviction rate—In my experience, young prosecutors place convictions as their highest personal priority. Most will tell you it greatly impacts their future."

"More dedicated peace officers with a greater degree of integrity."

Prosecutor

"First and foremost, personal integrity. For me that means as a prosecutor, not condoning improper or sloppy police investigation and not withholding exculpatory evidence, using tainted I.D.'s., i.e. 'looking' at the evidence."

"Prosecutors have a duty not only to prosecute the guilty, but to make sure that substantial justice is done. This includes weeding out those cases where people have been wrongfully charged or over-charged."

"Accreditation, certification, and college degrees for police."

"Annual certification for attorneys who want to practice criminal defense law."

"Special certification requirements for defense detectives and attorneys."

"If this is really a problem in some jurisdictions, increased efforts to educate assistant prosecutors of their ethical responsibilities to seek the truth, not convictions, would be appropriate."

"Focus on justice versus number of criminals 'collared' or indicted."

"In terms of lawyers—their conduct should be inextricably be tied to their licenses; prosecutors and defense attorneys alike."

"Prosecutor has to be willing to tell police and victims when there is insufficient evidence."

Defense

"Judges willing to litigate cases fairly without punishing defendant for going to trial."

"Follow the law. The law is clear: A person is innocent until proven guilty. No matter what crime or how bad or disgusting the alleged crime is, a person must be treated as an innocent person. Our system is to protect the innocent. If a guilty person beats the system and 'gets off,' our system still works because an innocent person was not convicted. The guilty and victims are secondary. The innocent (presumption of innocence) is primary. Thus, if we will follow the law, innocent persons will not be found guilty. The value of a person must come first. If we have this attitude, less innocent persons will be convicted."

"Remain credible, have integrity, be thorough and complete."

"Reward complete and thorough investigations and not convictions."

"Prosecutor must be willing to tell victims that there is no basis to prosecute."

"Prosecutors should stop using convictions as a measure of job performance."

"Institute disciplinary rules prohibiting prosecutors from making or announcing or commenting on criminal cases."

"Less pressure to plea bargain when person and his attorney feels he is wrongly accused. Defense attorneys often have some feel if the person most likely is being wrongly accused. But prosecutors bend is to get a plea regardless of whether defense attorney truly feels evidence supports exoneration. First step would be to get ethical prosecutors where record of win/loss or plea does not drive decisions. Where are prosecutors that really seek justice? Attitude is plea or win at all costs."

"I believe the system is only as good as the people who uphold it. Choose those to uphold it who have the upbringing that allows them a conscience."

"Some public defenders are excellent—they're concerned, good lawyers. Others are public defenders because they're offered insurance or nepotism, etc. Those attorneys need more supervision."

"Minimum standards of proficiency for the criminal bar. This can include instructions and training for new attorneys."

"Stricter supervision of prosecutors' offices."

"Real sanctions for withholding evidence and/or failing to seek and disclose evidence by State."

"Prosecutors and police officers need to be sanctioned when they commit or suborn perjury. This will not happen in the foreseeable future, and it will not ever happen until the judiciary, the legislature, and the public abandon the idea that any means necessary are OK so long as an accused is convicted. They have pre-determined guilt and believe ends justify the means."

"Merit and performance evaluations of attorneys and prosecutors and judges; legal ombudsmen at trials/pretrials etc. to evaluate quality of legal system."

"The process of police turning one defendant against another is rampant."

"Better scrutiny of police tactics and severe punishment for police or prosecutorial misconduct—including criminal liability."

"Swift discipline of police officers, and extinguish the perception of automatic credibility of officers which is a complete 'farce'."

"Examine closely the top 20% of officers making the most arrests—almost all police dishonesty is within this group."

"Reinforce with judges the idea that 'presumption of innocence' is not just a phrase to be repeated meaninglessly at arraignment and during jury instructions."

"Reduce 'competition' among police. Do not reward solely on basis of number of convictions. Give incentives to establish truth, not to obtain conviction. Police too often 'shade' testimony to 'win', e.g. traffic searches upheld by courts because of safety of officers. Officers immediately begin to 'recite' their 'safety' factors—not because of genuine fear but to uphold a dubious search. EVEN MORE ALARMING—some police outright lie, commit perjury, or 'forget' anything helping the defendant—and the prosecutors and the courts TOLERATE it, look the other way. This is INEXCUSABLE."

"In regards to the judiciary and prosecutors—to make decisions and rulings based on the law rather than use political considerations to form their decisions. Ohio needs to go to a merit-based or other way of selecting the judiciary. Until judges feel safe making rulings on criminal justice issues free and without political pressure, the public will continue to receive political decisions and rulings and not receive the fair and just rulings that they deserve."

"Cure prosecutorial misconduct by reversals on appeal—not mere criticism. In criminal appeals, state appellate courts at all levels are too result-oriented, and misuse the harmless error rule and other devices to avoid reversing unjust convictions."

"Aggressively prosecute and terminate police officers who lie."

"Far too many defense attorneys are just too lazy or scared to try a case, or are not competent to do so. These types count on plea bargaining, rather than litigation."

"Specific sanctions for withholding discovery evidence."

"Police officers frequently overcharge at the blessing of prosecutors to give the prosecutors ability to plea bargain. Defendants are thus unduly influenced to plead to a lesser offense."

"The problem is not wrongful conviction, it is overcharging of defendants with crimes which gives prosecutors the advantage in plea bargains. They charge 5 and drop 3 to get to the real issue."

"Detectives should be better educated and differently motivated so that they: (a) appreciate the Constitution and the legal system, (b) view their role as protecting and serving the community rather than locking up as many people as possible."

"Have top police and State officials change 'win at any cost' culture/mentality within their departments."
"The system has to be changed to not be so biased against the accused. Most judges are merely acting as prosecutors in the modern court setting."
"Where private counsel is court-appointed, make mandatory CLE requirements in criminal and trial work."
"Treat the suppression of any exculpatory evidence by police or prosecution as felony and prosecute with the same vigor."
"Special oversight prosecuting attorney division to evaluate police conduct."
"Greater police accountability for their actions with regard to overcharging, coercive statements, and revisionist recollection of facts."
"Police suppressing exculpatory evidence varies from jurisdiction to jurisdiction. The problem is particularly egregious where I currently practice."
"Error resulting from judicial bias is getting to be a very serious problem. The vast majority of today's judiciary show a very strong pro-prosecutor bias, and in fact, are bought and paid for by the law-enforcement lobby. Nobody dares to say this in public."
"Prosecutorial emphasis needs to switch back to the idea that they are representing the 'State' and not the 'victim.'"
"Extremely harsh sanctions for the police officers and prosecutors that withhold evidence or otherwise engage in misconduct. They are not even slapped on the wrist today, and are often rewarded."
"Cops and prosecutors are conviction-oriented as opposed to doing justice."

Judges
"Prohibit prosecutorial misconduct—Reverse convictions when it happens."
"Personal consequences for failure to turn over exculpatory evidence."
"Ethical training mandated for prosecutors."
"Higher professional standards for defense attorneys, prosecutors, and judges handling felony trial work."
"Criminal justice professionals should be more mindful of their oath to do the right thing rather than always worrying about winning the case."
"Continue to push for professionalism and emphasize ethics in the criminal justice system."
"Value professional ethics in prosecutors as opposed to winning at all costs."
"Strict enforcement of prosecutorial misconduct and redefining it in a stricter manner."
"Integrity of judges, prosecutors, and defense counsel is a co-priority with legal skills and preparation for every case."
"The judge is primarily responsible (for wrongful convictions) as the judge controls the proceedings and enforces the rules for a fair trial. The judge also has the power to set aside a questionable verdict or grant a mistrial because of misconduct or unfair gamesmanship. However, fair trial also assumes that the prosecutor and defense counsel are competent and will act honestly and professionally."
"More objective evaluation, more interest in truth, less interest in winning and conviction rates."
"Tighten up prosecutorial misconduct."
"Need to attract caring professionals in all areas of criminal justice—including prosecutors, defense counsel, and judges."
"To more fully understand that a criminal case is truly a search for the 'truth' and to be aware that wrongful convictions can, and sometimes do, occur. All professionals should be vigilant to prevent such injustices."
"Prosecutors must focus on fairness—not winning."
"Appointed defense bar must maintain higher standards."

"Be more concerned about justice and less concerned about obtaining and affirming convictions."
"Quit using 'tough on crime' as a political philosophy and as a law enforcement motto."
"Stop prosecutor from pushing his assistant 'to win at all costs' irregardless of justice."
"Prosecutors need to be better prepared, less over-indicting, and realize the abuses of their power and be held accountable."

A2. Better Training of Criminal Justice Practitioners

Police

"Better training throughout the criminal justice system."
"More training in 'law schools' on criminal law as well as principles, tactics, and responsibilities of prosecuting attorneys. I have been told by every attorney I've asked that they receive zero instruction during law school on how to be a prosecutor and very little instruction on criminal law."
"Insure greater competency of defense attorneys—Many appointed counsel just go through the 'motions' and, in fact, do not file any motions. Their preparation time is not adequate and in many cases their knowledge and experience is inadequate. May help to have higher compensation for cases."
"More training for police, prosecutors, judges, and attorneys."
"Continuous training at all levels."
"Better training made available to rural police officers."
"Require mandatory training and certification of individuals assigned to evidence collection."
"Increased judicial qualifications."
"Training for police officers in the area of evidence collection."
"Train, educate."
"The rate of unintentional error can be reduced through training and added resources—but it will never be eliminated."
"Educate, educate, educate—from the ground up on investigative procedures."

Prosecutor

"Maintain or increase CLE training required for prosecutors, judges and defense attorneys; also maintain or increase police training—especially about two or three years <u>after</u> the officer completes his basic police academy training."
"Better educated individuals."
"Properly trained law enforcement, public defenders, and prosecutors."
"Maintain mandatory continuing legal education training, e.g. classes through the National College of District Attorneys or the Ohio Prosecuting Attorneys Association."
"Each participant maintain a high degree of continuing education, and approaching their functions in a professional manner to ensure adequate, competent, performance of their function in the criminal justice system."
"Setting minimum requirements of training and continuing legal education for criminal defense Attorneys—particularly in death-penalty cases nationwide."
"Minimum requirements of continuing training hours (annually) for police officers in general and detectives in particular regarding identification procedures, forensic evidence collection, and securing statements, in addition to others."

Defense

"Proper police training in areas of police purpose and duties."
"Better training for police officers; more mandatory investigation; reduce incentives based on conviction rate."
"Better mentoring, training for newer attorneys—particularly in smaller counties such as I am in."

"Defense attorneys should make greater efforts to refine skills and focus on criminal defense. General practitioners rarely practice criminal defense well."
"Have adequate training of public defenders and court appointed attorneys."
"Better training for defense attorneys and for judges who are without trial experience and often succumb to pressures exerted by the political arm of the prosecutor's office."
"Better training for court appointed defense counsel and access to the same resources available to prosecutors."
"Too many court appointed defense attorneys are not well qualified—often very new to profession."
"Better supervision and training of police officers."
"Better police training—especially with regard to following consistent investigatory procedures."
"Educate police officers on the consequences of wrongful convictions."
"Better training and mentoring programs for new law graduates."
"Real and meaningful education and training of police officers—including broad-based liberal arts programs."
"Increase ability of defense attorneys to challenge the reliability of scientific evidence."

Judges
"Better instructions in law school about attorney's obligation to vigorously represent his or her client and of the ethical responsibilities of both prosecutor and defense counsel (should be significant part of the introductory criminal law course)."
"Improved continuing education programs for police with regard to their ethical responsibilities, their duties to respect Constitutional rights and investigative methods and resources."
"Law enforcement persons are receiving inadequate education on many Constitutional issues."
"Ensure adequate training of defense attorneys—mentor with experienced defense counsel."
"Better educate judges to potential for wrongful conviction from prejudicial evidence (e.g., from prior convictions)!"
"Frequent seminars for prosecutors in proper trial procedure. Most reversals on merit, i.e. guilt or innocence are prosecutorial."
"Better training of police regarding collection of evidence."
"More training of police personnel in the law and Constitutional safeguards."
"Strengthen defense bar by education paid for by state."
"Better selection and training of police officers."
"Specific training in sensitivity to wrongful conviction."
"Better recruitment and training of police officers."

3A. More Resources (Time, Money, and Personnel)
Police
"Smaller case loads and increase in investigations by prosecutors and defense attorneys."
"More officers—so there is more time for each case."
"Money obviously has a great deal to do with the outcome of a trial."
"Higher pay for local prosecutors (usually part-time) to insure quality in that position."
"Larger budget for public defender's investigation."
"Provide law enforcement agencies proper resources to allow for thorough investigations."
"I think most errors occur due to overly heavy workloads on police officers and prosecutors. More of both will allow for better investigations."
"More judges and prosecutors to relieve overwhelmed court dockets."
"Prosecutors should be better compensated—their caseloads are often unmanageable."
"More manpower to ensure the ability to conduct more thorough investigations from the very beginning."

"Better staffing so that the time and effort necessary to completely investigate will minimize error."
"Greater resources so that more evidence can be processed. Labs are woefully understaffed and slow the process."
"Caseloads across the board (i.e. police, prosecutors, and defense attorneys) are high and difficult to manage effectively."
"Funding made available for smaller agencies so that more in-depth investigations can occur."

Prosecutor
"More resources would allow criminal justice professionals to maintain smaller caseloads giving them more time for each case. Hopefully this would alleviate errors made in good faith."
"Training and funding to attract and maintain qualified officers."
"More funding for "The Innocence Project" and other such programs."
"Decrease caseload of prosecutors, defense attorneys, and judges."
"More funding for public defenders."
"Everyone needs more time. With more time less errors will be made."
"The biggest problem I see is that all of us—at every step—have so darn many cases that it is sometimes very difficult to do the job you know needs to be done. We are a smaller jurisdiction and my personal philosophy has always been to give the defendant the benefit of the doubt if the police haven't done everything they could have or everything I've asked them to do. I believe my oath requires this."
"Ensure that prosecutors have adequate resources and skills to appropriately screen cases."
"The state government must be committed to provide the <u>funding</u> with a mandate to require much greater police training in the proper investigation of felony crimes. Inadequate police investigation develops a greater likelihood that the truly guilty go free or innocent people are wrongfully convicted. If an adequate and full investigation occurs from the beginning, all the other risks inherent in the criminal justice system relating to the possibility of a wrongful conviction would be significantly reduced."
"My experience would lead me to believe the caseload of all involved would be the largest contributor to wrongful conviction. When there is not sufficient time to prepare, no one wins."
"More personnel—i.e. smaller caseloads for each prosecutor, public defender, and judge."
"Education and more financial resources for police and prosecutors to spend more time on each case."

Defense
"I take court appointed cases. I don't get enough dollars to investigate these as I would like a private investigator (should be obtained) to get court records, view/photograph scenes, do criminal record searches, etc."
"Alleviation of heavy caseloads in the single most effective means for promoting justice in our overburdened system. Jurists, public defenders, and prosecutors alike are suffocating under an avalanche of cases. The cold reality is that the court and defense attorney simply do not have the time or resources to devote to an individual case. As a result, adequate preparation and investigation are routinely neglected. In my opinion, more time per case correlates to increased preparedness, investigation, and generally improved representation. Public defenders in my office average approximately 300 cases per year. This is far in excess of the generally accepted limit of 200 cases per year, per attorney."
"Much more money is needed for indigent defendant's attorneys to hire investigators and experts. I believe too many cases are lost because of poor investigation and no experts."
"Increase budget for investigation costs—and make granting of these costs mandatory in such Cases—mandatory where certain conditions are met by defendant."
"More resources spent on indigent defendant and investigators are available so there is an even playing field."

"The problem is that 80% of criminal defendants have appointed counsel. The state is not going to put out the funds to beat itself."
"Public defenders should have sufficient funds to hire experts, and to investigate and defend."
"Police officers do occasionally get sloppy and arrest the wrong person. It would be nice if we could make police more thorough and objective, but the reality is that our system relies on defense lawyers to make sure justice is done. Unfortunately it is rare for a lawyer to have the resources necessary to properly investigate and defend. In other words, sadly, justice requires money."
"Less crowded docket to test more issues and try cases."
"Public defender's offices should be mandated in all counties with funding equal to criminal division of county prosecutor."
"Less of a workload/caseload for public defenders."
"Additional funding to properly pay competent defense attorneys and provide expert assistance in way of investigators and other professionals as case dictates."
"One major factor is the limited resources of a defense attorney appointed by a court. Public is not willing to provide equal resources to defense attorneys."
"Give public defenders and defense attorneys access to experts on same level as state."
"Pay public defenders/appointed counsel reasonable fees. Abolish absurd caps on payments to defense attorneys—$750 for a felony! Can't even pay overhead."
"Better investigative resources for appointed counsel."
"Have investigators available for the defense."
"The defense attorney does not have the support staff the prosecution has. The playing field is not balanced since the legwork must be done by the defense attorney him/herself."
"Everyone in the process has a very large burden of cases. Reducing the volume of cases will better serve all areas of criminal justice—and the public. This means more lawyers, officers, and judges—or fewer criminals."
"In my opinion, paying indigent assigned counsel more would enable the attorney to do a better job. The pay to a defense attorney is the same whether he/she accepts on behalf of a client a plea bargain or has a week- long trial."
"More prosecutors to reduce 'cattle call' justice."
"Need for public defender investigator (full-time) for each county."
"Higher pay for public defenders so they can take the time necessary to prepare for and defend their clients."
"Bring defense bar to parity with prosecutors regarding financial resources for experts, investigations, travel, forensic analysis of evidence."
"There are too many cases and too few players. This will not change."
"Mandatory appointment of counsel immediately upon arrest."
"Since a large percentage of wrongful convictions occur in cases with poor defendants, many of whom do not have access to private counsel, more funding for legal aid and public defenders (or court appointments) would help them get more complete representation."

Judges

"Better funding of public defenders and court appointed defense counsel."
"Prosecutors need to focus on more important cases, by more intense investigation and trial preparation. Many are overburdened by lesser felony cases that they are not prepared for trial thus—errors on the most serious felonies."
"Enhanced public funding for court appointed defense and related costs."
"Resources for investigation by indigent defendants."
"Adequate funding for defense counsel to challenge forensic evidence."
"Better funding for defense attorney investigations (on par with prosecuting attorney resources)."

"The tools are available to improve upon reducing the rate of wrongful conviction. However, the overwhelming volume of cases imposed upon the courts in certain jurisdictions within certain time spans without adequate investigation and/or preparation by law enforcement, prosecutors, defense counsel and the courts, will always impact upon a perfect system. Leadership by professionals in the respective fields will affect the wrongful conviction rate."

"Time and number of cases increase the chance of wrongful conviction. Need to have enough criminal justice system professionals for the amount of indictments. Mistakes happen when people work under too much pressure or on the edge. The sheer number of cases in a large metropolitan jurisdiction drives the people and system."

"Pay criminal defense attorneys more so as to increase the quality of presentation."

"Reduce case loads on police, defenders, and prosecutors—resulting in more time for judicial consideration of defendant's cases."

4A. More thorough Investigations

Police

"Law enforcement investigators absolutely need to build their investigation on factual information only. Many experienced and inexperienced investigators form an opinion at the onset of their investigation and develop their fact base on their preconceived opinions. The facts need to speak for themselves."

"Better prepared public defenders and prosecutors."

"Cops should not only work to determine who is guilty but also who isn't. We rarely work to prove a suspect is innocent only to preclude them as a suspect."

"I feel public defenders do not prepare their cases adequately."

"Work as diligently to clear a person as one would to convict a person."

"Take more pride and interest in doing a more efficient job and not rush to judgment in any circumstance."

"Have prosecutors to work hard on cases, regardless of how long it takes. Criminal justice is no more difficult than any other work. The quality of the product is only as good as the quality of the worker!"

"More thorough, in-depth, investigations."

"Take the appropriate time on each case."

"More diligence on part of law enforcement (investigation) and greater competence/preparation of cases by prosecutor and defense attorneys."

"A proper, unbiased, and complete investigation of a case."

"Careful casework followed by having the evidence take you where it leads. DO NOT FORM CONCLUSIONS WITHOUT FACT!"

"The greatest chance of error would lie with the agency performing the investigation."

"Not getting tunnel vision. Looking at all the evidence."

"More investigation time and assistance from prosecuting attorney's office."

"Greater objectivity by the police."

"Thorough investigation by police—every lead must be examined."

"Investigations conducted by competent investigators (police and prosecutors)."

"Thorough, proper investigation of reported offenses, to include corroboration of witness identifications and testimony."

"Demand from prosecutors that police investigations be thorough and complete prior to indictment."

"Avoid paradigms and tunnel vision."

"Place less emphasis on winning a case just for the sake of winning. Make the best case possible on fact and realize criminal justice professionals are human beings and that we cannot make cases when the facts are just not available."

"Take more time on cases—It is my opinion that everyone is in a hurry."
"Investigate until you are completely sure."
"Aggressively investigate information received with respect to wrongful conviction."

Prosecutor
"Thorough investigation."
"All people involved in the criminal justice system need to investigate and prepare better."
"Raise the bar at the investigative level."
"We try and shore up police investigations before grand jury and/or an arrest so there is more time to evaluate the evidence for proper charges."
"False confessions are not uncommon, but are easily fettered out with proper investigation and not ceasing investigation just because of a confession."
"Take the time for a thorough deliberate investigation."
"Continue to focus on better investigations. Laziness on the part of any party can result in a wrongful conviction."
"Poor attention to detail always creates problems—innocent getting convicted and guilty going free."

Defense
"Thorough police investigation."
"Changes in the criminal justice system would have to begin with a mind-set change in law Enforcement—from the present policy of targeting a 'likely suspect' and marshalling the evidence to support his conviction—to an actual factual investigation."
"Police look for evidence that fits their existing theory of guilt."
"Prepare the case as if a relative was on trial."
"Dedicated defense counsel willing to investigate, research, and properly defend their client."
"Better preparation every step of the way."
"The system needs to stress hard work from everyone—from police, defense attorneys, prosecutors, and judges. People are not doing a thorough job."
"More thorough police investigations including looking beyond the obvious."
"Inadequate investigation by police with tunnel vision."

Judge
"No substitute for exhaustive preparation."
"Better investigation by police and prosecutors <u>prior</u> to filing charges."

5A. Change Rules of Discovery/Full Disclosure/ Not Withholding Exculpatory Evidence
Police
"Force inclusion of <u>all</u> evidence and information uncovered by <u>both</u> prosecution and defense while investigating the case—whether it helps or hinders their position. After all, this is supposed to be about uncovering the <u>truth</u>, not who wins or loses."
"Prosecutors suppressing exculpatory evidence has been documented at the federal level on several occasions."
"Usually suppression of exculpatory evidence by police officials is due to ignorance."

Defense
"Full disclosure of police file to defendant."
"A former prosecutor, now a judge, is favorable to the prosecutor. Especially in a high profile case,

with news media coverage, the judge favors the prosecution. Defense attorneys, now judges, give the best decisions. We must change, and I mean must change the criminal discovery procedure which favors the prosecution."

"I would like to be personally contacted because I believe the criminal discovery procedure favors the prosecution. I can tell you versions that would curl your hair—straighten it if it is curly—put hair on your head if you are bald. Truth is stranger than fiction. I personally took great time and thought into this survey; I have represented the indigent for 40 years as court-appointed counsel."

"Revamp discovery rules to require prosecution to reveal more."

"Full disclosure of pre-sentence investigations to prosecutors and defenders. Many wrongful sentences occur when allegations are not subject to challenge."

"The rules of discovery are an embarrassment to the right of a defendant to a fair trial. The defendant is forced to blindly go to trial with a small fraction of disclosed evidence. This is the most significant source of wrongful conviction, followed closely by overzealous police and prosecutors."

"Require full disclosure by prosecutors and police—jail for failure to provide all evidence."

"Providing access to all information, police reports."

"Greater enforcement of discovery time frame by prosecutors to comply with discovery demands and requirement that evidence not disclosed within three weeks of trial be suppressed from admission."

"Make the prosecutor give open discovery and stop hiding evidence."

"Police should provide full disclosure of all physical evidence, recorded evidence, and witness statements produced at pretrial. Prosecutors should provide open full discovery; they should allow the defense attorney to read and copy their file. Judges should play an active role in pretrial with discovery deadlines in all cases."

"Force open discovery of prosecution and police files."

"Rewrite and/or modify rules of criminal procedure to allow for greater and more expansive pre-trial discovery (effort recently defeated by Ohio Prosecuting Attorney's Association)."

"Another example is the State not turning over exculpatory evidence—I think this is a much more frequent error—but prosecutor may not consider the case from defense perspective or think to ask police officials."

Judges

"Full disclosure of state's evidence, including police files."

"Open discovery."

"Expand discovery rules to force prosecutors to reveal much more of their case."

6A. Witnesses Identification

Police

"Make sure there is evidence and not just a witness."

"I firmly believe witnesses are less than 50% accurate and often less than 30% accurate."

"It is my experience that DNA results usually suggest eyewitness testimony has been faulty."

"Not to depend too much on witness testimony though that is what juries want."

"Most problems with cases surround the victims and witnesses. A lot of victims or witnesses failure to be honest are a lot of the problem. The same way defendants get off by lying witnesses, they are also convicted by lying witnesses. Police officers have little choice in supporting victims if they don't know or can't prove they are lying. Police officials like to have scientific evidence because it cuts down on the lies told them. It's just not always available."

"I was involved in the investigation, arrest, and conviction of an individual on a robbery complaint. No confession was ever obtained. Subject was convicted/found guilty by jury and sentenced to 8 years. Almost a year later an informant provided information contradictory to what our investigation had provided. We followed up on the information and subsequently freed the subject. We were able to

identify the responsible party. However, he was never charged. All our witnesses had identified the wrong individual. It should be noted that both parties looked nearly identical with respect to build, height, weight, hair, and eyes. They could have passed as twins. They did not know one another either."

Prosecutor

"Corroboration of eye-witness testimony should be required by prosecutor prior to bringing charges."

Defense

"In death penalty cases eyewitness testimony should never be sole basis of conviction."
"Less suggestive I.D. procedures and less reliance on stranger I.D."
"The courts need to catch up to the scientific community in the area of eyewitness identification. The case law in this area needs to be rewritten. Possibly the rules of evidence should be changed as well."
"Most lineups and photo ID situations could also be more accurate if overseen by both prosecutor and defense counsel. Time is not always of the essence for these ID procedures."
"Double-blind sequential photospread; Videotape police/suspect contact."
"Eyewitness identification procedures should be made consistent with modern psychological study results regarding eyewitnesses."
"More use of video and audio tapes by police—taping everything, not just the parts they want."
"Learn to mistrust eyewitness identification."

Judge

"I would like to see more use of expert testimony to debunk myths about eyewitness testimony."
"Allowing expert evidence as to the problems with eyewitness identification."
"Police should get pre-approval of photo array before I.D., from prosecutor or magistrate."
"Electronically record all witness statements."
"Video and/or audio record of all police contacts with suspects in entirety."

7A. Forensics and Technology

Police

"Availability of technology at all levels—not just high profile or death-penalty cases. I believe most wrongful convictions occur at lower levels of the criminal justice system."
"I think video surveillance cameras will be playing an ever increasing role in providing evidence and hopefully causing wrongful conviction percentages to drop."
"In every case scientific evidence should always be used as a method to collaborate (or discount) accounts and confessions."
"Accelerate the turn-a-round of DNA evidence collected."
"More DNA samples would greatly reduce the chance an innocent person is convicted and significantly improve the odds that the police will quickly solve the crime."
"Defense need to use private labs for second opinion on evidence for clients to check for error."

Prosecutor

"Greater and more sophisticated use of scientific/forensic investigative techniques."
"Employ modern investigatory techniques and scientific testing as much as possible to eliminate any reasonable doubt."
"Quicker, and cheaper, access to DNA and other forensic testing."

Defense

"Mandatory videotaping of all police interrogations, social worker interviews, etc."

"Videotaping of all portions of a witness/defendant's statements."
"Videotape police interrogations, searches with warrant, police stops, and *Miranda* warnings."
"Mandatory use of video cameras on police cruisers and for all police interviews of defendants at police station."

Judge
"Equal access to forensic labs for indigent defendants."
"More resources for forensic labs and people."
"I think greater care could be taken in the consideration of forensic evidence. I am particularly offended by allowing DNA expert to tell a jury that, in effect, there is less than one chance in a billion that a defendant is guilty when blind tests of the testing service show a 5% error rate. The quoted odds assume an error-free test, but the jury is not aware of that assumption, and its implications."
"The gathering of evidence at a crime scene (or lack thereof) together with insufficient scientific testing by prosecutors result in sloppy and unfair prosecutions."
"Defendants accused of serious crimes should have forensic experts available for defense."

SETTING THE RECORD STRAIGHT: CRIMINAL JUSTICE AT NUREMBERG

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Abstract

Since the conclusion of the International Military Tribunal at Nuremberg in 1946, it has been criticized greatly for its creation and implementation. Most common arguments include victor's justice and retroactive law. Since the creation of the *ad hoc* international criminal tribunals in 1993 and 1994, Nuremberg has been greatly written and debated. This article addresses the historical evolution of the first international criminal trial, its major criticisms and legal validity, and its effect within the contemporary international legal community.

Setting the Record Straight: Criminal Justice at Nuremberg

The International Military Tribunal (IMT) at Nuremberg was the first international trial in history which held Nazi war criminals individually responsible for their crimes during World War Two. Adolf Hitler's closest conspirators found themselves charged with crimes and judged by the international community. The ruthless Nazi regime was responsible for the destruction of approximately six million Jews in the worst genocide in history. The Nuremberg trial continues to be controversial within academia, particularly since international criminal trials have recently been emerging, beginning with the International Criminal Tribunal for the Former Yugoslavia in 1993.

The International Criminal Tribunal for the Former Yugoslavia was created by the United Nations Security Council in response to ethnic cleansing in the Balkans. It was quickly followed by the International Criminal Tribunal for Rwanda, created in response to a massive genocide in 1994. Since then, there have been multiple internationalized (hybrid) tribunals created, as well as the permanent International Criminal Court which sits in The Hague. All of these tribunals have been influenced by the IMT. However, 60 years later Nuremberg is still haunted by critics who argue against the legality of the tribunal.

Though Nuremberg is seen positively by the general public, most legal positivists view it negatively for several reasons. First, the Tribunal was established by the victorious Allies of the Second World War, who were never prosecuted for their own atrocities. Moreover, many consider the IMT nothing more than "victor's justice" since the Allied victors of World War Two established the Tribunal, made the rules, and prosecuted the losers.

Second, there were two serious legal issues with the procedural law at Nuremberg. First, the defendants could not question the legitimacy of the trial. This was stated clearly in the London Charter, which was the statute to the IMT. Second, there was no appellate process to question the accuracy of judgments after verdicts were handed down. Therefore, basic legal rights in national courts were not provided for the defendants at Nuremberg.

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Third, two of the three crimes within the jurisdiction of the Tribunal were not established by custom or treaty and were considered to be *ex post facto*, also known as retroactive law or law after-the-fact, which violates the basic principles of legality, *nullum crimen sin lege* and *nulla poena sin lege*. Victor's justice and the retroactivity of law at Nuremberg haunt the IMT the most. Taking these critiques into consideration we are left with the question: Was justice served at Nuremberg or was it a miscarriage of justice?

I begin this paper by describing the crimes committed by Adolf Hitler and his National Socialist (Nazi) Party prior to and during the Second World War. In addition to *jus cogens* crimes, which are the most serious crimes that shock the conscience of the international community, i.e. war crimes and crimes against humanity, violations of the Treaty of Versailles (which was signed by the Germans and Allied powers after the First World War) are also considered. The second part of this paper depicts the chronology of the establishment for an international criminal tribunal to prosecute major war criminals after the war ended, beginning with the first call for trials at the Saint James Conference.

The London Conference is then thoroughly described (where the Allied victors of the Second World War negotiated and debated how the IMT would proceed, and the rules that would govern it). The last part, prior to the conclusion, analyzes the substantive and procedural law to determine the IMT's standard legal procedure under customary international law, and to determine if such a tribunal, along with its substantive law, violated the basic principles of legality and should be treated as a miscarriage of justice.

This study is qualitative, based on documentary and archival research from primary and secondary sources. Such sources include the official transcripts from the IMT, the London Charter, and several books and articles which have been written on Nuremberg. Other sources include personal communication through interviews of current leading international legal scholars, including a former Nuremberg prosecutor.

Crimes of War

After the First World War came to a close, and war criminals escaped justice for the most part as a result of the farce Leipzig Trials, the international community seemed to be turning in a new direction concerning the law of war. Though economies throughout the world were struggling, a new idea of peace was growing stronger throughout the international community. The League of Nations had been formed along with its court, the Permanent Court of International Justice, to decide international disputes between states in lieu of armed conflict. These were the result of Woodrow Wilson's "fourteen points" in the attempt to prevent future wars through diplomacy (Maguire, 2000).

The latter 1920s and early 1930s saw national economic growth starting to increase and life for the average individual in the United States and Europe was getting better, with one exception, Germany. Germany was struggling from the loss of war and sanctions imposed by the Treaty of Versailles (the peace treaty which was signed by Germany and the Allied powers of World War One), which stipulated conditional restraints, i.e. limiting Germany's army to 100,000 personnel (Treaty of Versailles, Article 163). Also, an agreement was made that Germany would prosecute its nationals for crimes committed during the war rather than creating an

international criminal tribunal under Article 227 of the Versailles Treaty. These trials were the Leipzig Trials.

The Leipzig Trials were a farce, since many Germans were not prosecuted, or if prosecuted and convicted, served very light sentences (if any at all). Adolf Hitler, a German army officer in the First World War, protested against the national prosecutions of German war criminals at the trials in Leipzig. He met Herman Göring, a German fighter pilot in World War One, at one of these anti-prosecution protests (Bass, 2000). Göring shared the same views as Hitler and Rudolf Hess, an anti-Semite with whom Hitler had developed a strong friendship.

Hitler soon developed a following which spoke out against war crime prosecutions of Germans, and all other sanctions imposed from the Treaty of Versailles. Germans were fighting against each other internally and support for the National Socialist (Nazi) movement began to grow. Adolf Hitler, the group's leader, was arrested in 1924 (Bauer, 2001). While imprisoned, he and Rudolf Hess wrote the infamous *Mein Kampf*, which strongly describes Hitler's views for a greater Germany.

During the late 1920s and early 1930s anti-European propaganda grew within Germany and internal fighting lessened. Germans began to share the view that Germany as a whole was a victim through the Treaty of Versailles imposed by the Allied powers. As a result of this shared victimization and the charismatic leadership of Adolf Hitler, the Nazis came to power in Germany in January 1933 (Bauer, 2001).

From the time Adolf Hitler gained power, the Treaty of Versailles was consistently violated as the German army grew way beyond the imposed restrictions. Elihu Root, the United States Secretary of State during the 1907 Hague Conference, considered Germany to be the great disturber of world peace for consistently arguing against an international tribunal to resolve disputes between states (Maguire, 2000). Secretary Root had no idea what the future would hold. Throughout the late 1920s and early 1930s, Hitler was a great leader who led Germany to regain her pride and participation in international affairs. Moreover, while Hitler and his National Socialist Party produced positive results, Germany's army became a powerhouse with a purpose. The world soon realized the purpose.

On September 1, 1939, Germany invaded Poland initiating World War Two, 30 years after World War One ended. During the next two years, Nazis attempted to eliminate Jews and control most of Europe. British Prime Minister Winston Churchill delivered a speech in August 1941, where he stated, "The whole of Europe has been wrecked and trampled down by the mechanical weapons and barbaric fury of the Nazis...As his armies advance, whole districts are exterminated" (Power, 2002, p. 29, quoted from Churchill & Gilbert, 2000, pp. 1099-1106). On October 25, 1941, both President Franklin Roosevelt and Prime Minister Churchill warned Germany that Nazi killings of French hostages would only sow the seeds of hatred, and that a major goal of the war was now to bring retribution (Harris, 1999; Taylor, 1992).

Calls for a Trial

On January 13, 1942, nine Nazi-occupied states came together at the St. James Palace in London, to discuss retribution against Germany for invading their countries. These states affirmed their intentions to bring Nazi war criminals to justice through a judicial process by signing the St. James Declaration (Inter-Allied Information Committee, 1942; see also Harris, 1999; Maguire, 2000; Marrus, 1997; Taylor, 1992). Franklin Roosevelt followed with his own declaration of judicial punishment on August

21, 1942, stating that it will be the United States' goal once victory is achieved. A few weeks later:

> …on September 8, 1942, British Prime Minister Winston Churchill declared that "those who are guilty of the Nazi crimes will have to stand up before tribunals in every land where their atrocities have been committed in order that an indelible warning may be given to future ages" (Marrus, 1997, p. 19).

These declarations were followed by the simultaneous declaration on October 7, 1942, from the United States and Great Britain that a United Nations War Crimes Commission would be created to investigate and hold "ringleaders" responsible for the organization and implementation of war crimes (United Nations War Crimes Commission (UNWCC), 1948; see also Marrus, 1997; Taylor, 1992).

The United Nations War Crimes Commission was established the following year on October 20, 1943. At this time the Soviet Union showed its intention not to be in synch with the United States and Great Britain by not participating, and giving its own declaration on October 15, 1942, thus establishing its own war crimes commission, the Soviet Extraordinary State Commission to Investigate War Crimes (Marrus, 1997). The Soviets had their own idea of judicial process and punishment through bogus trials that always found the accused guilty. The Soviets eventually came on board and on December 17, 1942, the Allied powers, including the Soviet Union, reaffirmed their intentions to punish Nazi war criminals one last time (Marrus, 1997).

Throughout the Second World War, there were meetings between the countries concerning how German war criminals should be punished for their atrocities. Though most countries, in particular the United States, Great Britain, and the Soviet Union, disagreed how punishment should be enforced, there was universal agreement that there should be definite retribution and not just warnings followed by weak national prosecutions, as in the case at the end of World War One with the bogus Leipzig Trials.

As the Allied powers began winning the war and the idea of prosecuting German war criminals began to look like it might become reality, an internal struggle within the United States government evolved. The United States Secretary of Treasury, Henry Morgenthau Jr., delivered a memorandum to Franklin Roosevelt stating that Germany should be stripped of its industries and turned into a pure agricultural state after the executions of German war criminals. Morgenthau had good reason not to favor prosecutions of war criminals since his father, Henry Morgenthau Sr., former United States Ambassador to the Ottoman Empire during World War One, witnessed the Armenian Genocide go unpunished.

Morgenthau was not about to have a repeat of the mockery trials in Leipzig, and he was not the only one in favor of punishing war criminals without trial. Franklin Roosevelt and Winston Churchill both initialed Morgenthau's memorandum on September 15, 1944 (Bass, 2000; Harris, 1999; Maguire, 2000; Taylor, 1992), which included strong deindustrialization of Germany and the punishment of higher Nazi officials without trials. Winston Churchill, Franklin Roosevelt, and Joseph Stalin wanted a certain justice through executions.

Contrary to Morgenthau's views, Secretary of War Henry L. Stimson insisted that a trial should be held and urged Franklin Roosevelt to prosecute German war criminals (Harris, 1999). Stimson explained that the whole German people should not be punished. This was the exact reason why Germans followed Hitler in the first

place. Stimson "argued that vindictive peace treaties 'do not prevent war' but 'tend to breed war'" (Maguire, 2000, p. 90). Moreover, by executing presumed war criminals without trial, the Allied powers would imitate the war crimes of the Germans (Maguire, 2000).

Stimson pushed for a tribunal with a criminal procedure that included the basic principals of the United States Bill of Rights (Maguire, 2000), which is the first ten amendments of the United States Constitution, declared ratified on December 15, 1791 (Angle, 1954). This was a big move by Stimson. It was unpopular at the time to argue that Nazi war criminals, who planned, developed, and carried out the most systematic genocide in history, had rights to a legal defense by facing their accusers through a fair and impartial international trial.

Great Britain put up the biggest fight against an international tribunal and advocated summary executions. Britain insisted that prosecutions would take too long and would be unfair to the defendants. This was obviously a weak argument as they could not validate how mass executions would be fairer. The British spokesman, Lord John Simon, insisted that an international tribunal was impractical since the crimes of the Nazis were a political question and not a legal one (Maguire, 2000), and that if trials were to be held in determining guilt, there would be no need to prosecute higher-ranking officials such as Hitler, Himmler, Göring, Goebbels, and Ribbentrop, since their guilt had already been established (Marrus, 1997).

At the end of the day, thanks to Stimson's persistence along with Morgenthau's plan being leaked to the press resulting in popular dissent, Roosevelt took sides with the Secretary of War. Franklin Roosevelt died on April 12, 1945; however, prosecution plans were already underway. President Harry S. Truman made no doubt that he wanted an international military tribunal to prosecute the major Nazi war criminals (J. F. Murphy, personal communication, November 17, 2006; Taylor, 1992).

On May 2, 1945, President Truman officially designated Associate United States Supreme Court Justice Robert H. Jackson to represent the United States at the London Conference and lead the way in developing the London Charter, establishing an international tribunal to prosecute Nazi war criminals on America's behalf (Harris, 1999). On May 8, 1945, Germany surrendered bringing an end to Word War Two in Europe.

London Conference

One June 3, 1945, the British Ambassador to the United States invited the Secretary of State to send delegates to London for meetings concerning an international trial to prosecute Nazi war criminals (Harris, 1999). The first meeting took place on June 26, and the conference aimed to achieve two goals. First, to develop an agreement between Great Britain, France, the Soviet Union, and the United States to participate in an international tribunal and, second, to develop a statute to legally guide the tribunal. The agreement and treaty were named the London Agreement and the London Charter, respectively (Harris, 1999). The London Agreement, which included the Charter, was signed on August 8, 1945.

It was obvious from the outset that different views were shared in regards to how the Tribunal should be framed. The first international criminal trial would combine continental law and common law. Within continental legal systems, there are no juries and the judge plays a significant role in trials: he/she investigates the crimes and questions witnesses. Without the issue being totally resolved, the outcome had the

Tribunal aligned more with the common law system as it included the dominant adversarial element between the prosecutors and defense attorneys. Judges acted as fact finders, with a majority vote for guilt required for conviction.

A prosecutor was appointed by each Allied state and acted as a committee to decide which defendant would be charged with what crime (Harris, 1999). The crimes included within the London Charter were "crimes against the peace," "war crimes," and "crimes against humanity," respectively, which were defined under Article 6 as such:

> (a) *Crimes against the peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
> (b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan (London Charter, Article 6).

International Military Tribunal

On November 20, 1945, the first international criminal trial commenced; however, prior to its start the defendants made efforts to invalidate the IMT on the basis that it had no juristic foundation. Though many customary and conventional laws of war were violated, no international conference or treaty ever criminalized any of the acts that the Nazi leaders were being prosecuted for. For example, there has never been an international criminal code and at the time there had never been any United Nations criminal conventions or a prior international criminal tribunal which prosecuted these crimes as precedent. Further, if any of the acts were to be interpreted as criminal, there was no procedural law established to guide prosecutorial proceedings.

Today many legal positivists agree with the aforementioned arguments. Most importantly, Nuremberg violated *nullem crimen sin lege* and *nulla poena sin lege*, and therefore the holdings were invalid. The fact that the judges were all from countries of the Allied victors clearly established a conflict of interest. It is ethically appropriate

that judges are to remove themselves from cases if they have a prior relationship or connection with one of the parties, as this creates a conflict of interest. Judges are humans, too and capable of holding biased views when forming an opinion; therefore, Nuremberg created a huge conflict of interest against the defendants. The fact that the authors of the London Charter, the prosecutors, and the judges were all from the Allied states, has created the argument for victor's justice.

Justice Jackson and the others at the London Conference foresaw these arguments against the tribunal. Therefore, the first sentence of Article 3 of the London Charter states, "Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel." It is very interesting that the authors of the Charter, who also happened to be the prosecutors, included themselves in the inability to challenge the tribunal or the members. There would be no challenges concerning the validity of the tribunal on the part of the prosecutors, regardless, since they were the authors of the tribunal's statute. The Allied victors knew that the argument of validity against the tribunal was strong and developed Article 3 only to prevent the defense from challenging the validity of the tribunal.

Twenty-three years after Nuremberg, Herbert Packer (1968) differentiated between two major views concerning criminal courts. The first is the crime control model, which argues that truly guilty persons should be prosecuted even if legal rights have been violated. The second view is the due process model, which argues that legal rights of the defendant should be protected even at the cost of truly guilty persons going free without criminal prosecution. The belief that Nuremberg was appropriate and its verdicts were valid aligns with the crime control model. Despite serious legal problems with the International Military Tribunal's statute, including its validity and authority, the hierarchy responsible for the worst genocide in history was prosecuted.

In addition to the arguments of the tribunal's validity, all charges under Article 6 of the Charter have been argued by positivist legal scholars as retroactive law, *ex post facto*. However, the weakest *ex post facto* argument is "war crimes," Article 6 (b) of the London Charter. There were several treaties concerning international humanitarian law (the law of war) from Geneva and The Hague. The 1899 and 1907 Hague Conventions were the most important, specifically Hague Convention IV, "respecting the laws and customs of war on land" (Hague Convention, 1907; see also Detter, 2000; Maguire, 2000; Roberts & Guelff, 2005; Schabas, 2004; Watkins & Weber, 2006). Hague Convention IV consisted of 56 articles prohibiting acts by belligerents during war on land.

The problem arises that these prohibited acts were only considered to be unlawful and not criminalized. The Hague Conventions were treaties, not a criminal code. Further, there was no procedural law stating how persons were to be dealt with when violating the prohibited acts. It was customary to hold national trials, but there had never been an international tribunal. This was the problem the Allied powers of World War One faced when calling for an international tribunal to prosecute Wilhelm II, the ex-Kaiser of Germany, and others who were guilty of crimes during the First World War. Unfortunately, this issue was not resolved prior to Nuremberg.

The ex-Kaiser was indicted by the Allied powers (with the exception of the United States) after World War One, since the responsibility for the war rested first on Germany and Austria who "declared war in pursuance of the policy of aggression, the concealment of which gives to the origin of this war the character of a dark conspiracy

against the peace of Europe" (Commission, 1919). Therefore, the charge of "crimes against the peace," Article 6(a) of the London Charter, had some legal basis, including the 1928 Treaty of Paris whose goal was to outlaw war, and the 1928 International Treaty for the Renunciation of War as an Instrument of National Policy, also known as the Kellogg-Briand Pact. Unfortunately, as mentioned above, the act of initiating war may have been considered unlawful but only to signed parties to the aforementioned treaties. Moreover, there was no criminalization of aggressive war, nor any criminal procedure established. The London Charter criminalized aggressive war and prosecuted individuals after the act had been committed, hence *ex post facto*.

"Crimes against humanity" is the most damaging charge at Nuremberg when determining the legal validity of the IMT. The term had been used by Russia, France, and Great Britain in the May 1915 warning against the "Young Turks" that:

> In view of these new crimes of Turkey against humanity and civilization, the Allied governments…will hold personally responsible [for] these crimes all members of the Ottoman Government and those by their agents who are implicated in such massacres" (UNWCC, 1948, p. 35; see also Bass, 2000; Cryer, 2005; Dadrian, 1989; Jorgensen, 2000; Maogoto, 2004; Power, 2002; Schabas, 2000; Wise, Podgor, & Clark, 2004).

Other than this instance, it was customary not to interfere with other state issues that did not cross borders as the sanctity of sovereignty was valued greatly since the Treaty of Westphalia in 1648, ending the Thirty Year War and the supremacy of the Holy Roman Empire (Kittichaisaree, 2001).

If there is truth of Nuremberg going too far, it is that "crimes against humanity" was charged against the defendants for crimes committed against Germans within German borders. Both "war crimes" and "crimes against the peace" had some requisite of international element to argue in favor of the charges. However, crimes against humanity (a charge with very little history) were charged against the defendants in violation of the principles of legality, within a court which was developed by the Allied victors, and with judges that had conflicts of interests with the trial. Certainly if this would occur within any contemporary developed state it would be a miscarriage of justice.

Conclusion

The prosecution of the major war criminals at the IMT has been unfairly criticized, though the arguments have merit. It is always easy to find flaws in hindsight. The reality of Nuremberg is not victor's justice or *ex post facto*, but a major contribution to international law. In common law legal systems, case precedent strongly influences legal arguments when interpreting statutory law. In defense of Nuremberg, case precedent was established to prosecute individuals, including superiors, for crimes committed during war. This was established within the Treaty of Versailles Articles 227-230, signed by Germany at the Paris Peace Conference.

The Treaty of Versailles resulted in the infamous Leipzig Trials, since Germany agreed to prosecute its nationals with the Allied powers' approval. However, most of the international legal community agrees this was a farce. Nevertheless, Leipzig established case precedent, that individuals could be prosecuted at the hands of the victorious, since the Allied powers had approved of national trials rather than creating

an international criminal tribunal, which the Treaty of Versailles stipulated under Article 227. The argument that Nuremberg was victor's justice is still present; however, it has weakened since case precedent was established 30 years prior.

Furthermore, without a neutral international criminal tribunal, who else would have the authority to prosecute? No one. It is only reasonable that the states who sacrificed the most had the authority to hold any criminals accountable through prosecutions with minimum legal safeguards. Finally, the most important precedent that Leipzig established was to not trust the Germans to prosecute their own. The accused at Nuremberg were the leaders of their state who would not have been prosecuted at all for their participation in systematic murders. Victor's justice was criminal justice which led to international criminal accountability at a time when it was much needed.

The argument against Nuremberg regarding *ex post facto* is also weak. As mentioned above, since the Leipzig Trials, there were multiple treaties that attempted to outlaw war itself and this was also the initial point to form the League of Nations. The fact that there was a League of Nations for diplomacy, treaties attempting to outlaw war, and precedent to prosecute for crimes committed during war in the Versailles Treaty, the *ex post facto* argument quickly diminishes regarding "crimes against the peace" and "war crimes," Article 6(a) and (b) respectively, of the London Charter.

The charge of "crimes against humanity," Article 6(c) of the London Charter, was the strongest *ex post facto* argument. The fear was that if Nazi leaders were not prosecuted at Nuremberg for crimes against their own people, then these crimes would have gone unpunished. This is the purpose of international criminal law. In order to be prosecuted successfully at the state level, policy regarding prosecution of war crimes, and particularly crimes against humanity and genocide, must exist at a state level. Otherwise, it is the responsibility of outside states to hold superiors individually responsible, particularly if the territorial state where the crime was committed or the state of the perpetrator's nationality is unable or unwilling. This is referred to as the Concept of Obligations *Erga Omnes* (Jorgensen, 2000; Ragazzi, 2002), under universal jurisdiction.

Are we to ignore children who are beaten and tortured in our neighbor's house? No. So there is no reason to ignore people being tortured or killed in neighboring countries. Since the world is much smaller as a result of globalization, we are all neighbors. Nuremberg established this legal precedent of prosecuting persons for *jus cogens* crimes against persons within their borders. As William A. Schabas has stated, international criminal law is not necessary to prosecute *jus cogens*. Horrific state crimes such as murder and rape should shock the conscience of all persons. However, they are usually prosecutable at the state level. The purpose of international criminal law is to prosecute the persons within a state who would otherwise not be prosecuted as a result of his or her position within that state (W. A. Schabas, personal communication, June 28, 2007).

The Allied victors knew that the concept of crimes against humanity was problematic, therefore in order for the crimes against humanity to come under the jurisdiction of the IMT, it was required "that they be perpetrated 'in execution of or in connection with' war crimes or crimes against the peace" (Cassese, 2003). Therefore, since persons could not be charged with crimes against humanity without already being charged with war crimes or crimes against the peace, the *ex post facto*

argument can go either way. However, it is easily noticeable that the Allied victors foresaw this issue.

As mentioned above, critics will always find reasons to fault historical events. Should there be criticisms of Nuremberg? Yes. We can only progress by correcting our mistakes. However, when attacking Nuremberg with victor's justice or *ex post facto*, the critics are taking it too far. Nuremberg was much needed at the time for the development of international criminal law. Without it we may very well not have had the International Criminal Tribunal for the Former Yugoslavia and for Rwanda or the International Criminal Court. Nuremberg, in its time, was as good as it could have been. It was an example of criminal justice rather than a miscarriage of justice.

One reason why Article 227 of the Treaty of Versailles was not enforced (which would have created an international criminal tribunal to prosecute war criminals) is that World War One was the "war to end all wars." If this was in fact the case, there may not be a great demand since there was the Permanent Court of International Justice under the League of Nations. However, after a second world war within less than a half century, the need for the adjudication of criminal responsibility was imminent.

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THE CUMULATIVE EFFECTS OF RACIAL DISPARITIES IN CRIMINAL PROCESSING

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Abstract

Data from the *State Court Processing Statistics Series* was used to analyze the cumulative effects of racial and ethnic disparities in criminal processing of men who are charged with felony drug offenses in large urban counties from 1990 to 2002. Estimating a series of models, I find not only that Black and Latino men receive less beneficial sentencing decisions than White men with similar legal characteristics, but also that these disparities are produced through a combination of direct and indirect effects. More particularly, I find that Black and Latino men are less likely to be granted non-financial release, more likely to be denied bail, and are given higher bails than White men with similar legal characteristics; that Black and Latino men are more likely to be adjudicated as felons than White men with similar legal characteristics; and that sentencing outcomes are determined by a combination of current case characteristics, prior record, economic resources and networks, and racially disparate processing—both indirectly through pretrial incarceration and level of adjudication,and directly during sentencing decisions.

The Cumulative Effects of Racial Disparities in Criminal Processing

Racial disparity in punishment has a long history in the United States; Blacks have been disproportionately incarcerated since shortly after the Civil War (Curtin, 2000) and racial disparities increased again during the last quarter of the 20th century (Beckett, 1999). Currently, Blacks are 600% and Latino/as are 50% more likely than Whites to have ever been imprisoned—and disparity is not limited to prisons. Blacks are almost three times more likely than Latinos and five times more likely than Whites to be in jail (Bureau of Justice Statistics (BJS), 2006). In 1997, 1 out of every 11 Blacks living in the U.S. was under some form of correctional supervision, compared to 1 out of 50 Whites (BJS, 1998). When this disparity is combined with current "prison boom" levels of criminal justice intervention, the results are disastrous; by 2001, almost 17% of Black men had been imprisoned at some time in their life. Looking toward the future, the Bureau of Justice Statistics (2003) predicts that if imprisonment rates remain unchanged, one in three Black men born in 2001 will go to prison at some point during his life.

While racial disparity in punishment is acknowledged, scholars disagree about its sources. Almost undoubtedly, disparity is the result of the interactions between race-salient criminal laws,[1] differential offending,[2] differential policing,[3] and differential

[1] For example, federal sentencing guidelines penalties for crack are dramatically more punitive than are those for powder cocaine. Also, many state codes include sentencing enhancements for crimes committed in public housing (Schlesinger, 2006).

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criminal processing.[4] The questions remain, however, as to how much each of these pieces contributes to total disparity and how disparity generated at one criminal processing stage affects the production of disparity at later stages.

Racial Disparities in Punishment Outcomes

Early studies, from the 1920s to the 1970s, generally examined the effects of race on punishment outcomes and found that Black men received more punitive criminal justice outcomes than White men. However, when later studies—conducted in the 1970s and 1980s—added variables for prior record and offense seriousness, the effects of race and class often disappeared or decreased. As a result, many scholars wrote that the "discrimination thesis" had been disproved and that what appeared to be effects of racial discrimination were actually the effects of legally relevant variables that are correlated with race, such as prior record (Blumstein, 1982; Chiricos & Waldo, 1975; Hagan, 1974; Kleck, 1985; Langan, 1985).

Since this time, several new developments have occurred that help to show where discrimination exists and why it was invisible in these earlier studies. Four of these developments are examining non-sentencing processing decisions, separating processing decisions into their composite parts, dividing analyses by offense types, and controlling for county level demographics.

While there are still few studies that examine pretrial processing decisions, studies that have examined this stage of criminal processing find consistent and substantial evidence that Black and Latino defendants receive less beneficial pretrial decisions than do White defendants with similar legal characteristics, regardless of the primary charge crime type (Demuth, 2003; Schlesinger, 2005). The available evidence suggests that disparities at this stage of criminal processing may be larger and more consistent than disparities in sentencing.

Startlingly, over a quarter of the individuals incarcerated in the U.S. are being held in local jails, and over half of these individuals are being held pending trial (BJS, 2001b). Even if they are later found not guilty, or given a non-custodial sentence,[5] these individuals experience terms of incarceration that may lead to many of the deleterious effects associated with post-trial incarceration: a decreased likelihood of employment, depressed wages, a decreased likelihood of marriage, and an increased likelihood of recidivism (Pager, 2003; Western & McLanahan, 2000; Western & Pettit, 2000). Focusing on sentencing decisions may obscure this important moment of disparate punishment.

When scholars separate the sentencing decision into two parts, the decision to incarcerate and sentence length, such studies find that while there are rarely racial differences in sentence length once legal variables are controlled for, Blacks are more

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[2] Whites are disproportionately arrested for tax fraud, embezzlement, and insider trading (and many other types of white-collar crime). Further, although these crimes cost more money per capita than all street crime combined (Delgado, 1984; Reiman, 2004), sentences for these crimes are, on average, shorter than sentences for even nonviolent street crime. Blacks are disproportionately arrested for street crime—violent and nonviolent.

[3] Studies find that police target Black communities, crimes more likely to be committed by Blacks, and Blacks themselves (Beckett, Nyrop, & Pfingst, 2006; Schafer et al., 2006).

[4] Research shows that Blacks and Latinos receive less favorable criminal processing decisions than Whites with similar legal characteristics (Crawford, 2000; Kautt & Spohn, 2002; Schlesinger, 2005).

[5] Non-custodial sentences are those that do not require incarceration; they include probation, fines, and suspended sentences.

likely to be sentenced to incarceration than Whites with similar legal characteristics (Chiricos & Bales, 1991; Nobling, Spohn, & Delone, 1998; Petersilia, 1985; Spohn & Cederblom, 1991; Spohn, Gruhl, & Welch, 1981; Spohn & Holleran, 2000; Steffesmeier, Ulmer & Kramer, 1998). One possible explanation for this finding rests on the distribution of discretion. While judges have wide discretion when deciding whether or not to incarcerate an individual convicted of a crime, sentencing ranges are often "recommended" if not mandated, leaving judges little room to adjust sentences for a given offense.

Studies that look at the effects of race on sentencing by offense category have found that being Black or Latino is more harmful for offenders charged with certain offenses than with others. For example, the most consistent and substantial evidence of disparate processing is among defendants charged with drug offenses (Blumstein, 1982; Spohn & Cederblom, 1991; Steffensmeier & Demuth, 2000).

Studies that examine the effects of county level demographics, such as economic inequality between Black and White populations, find that sentencing disparities are more substantial and consistent in some counties than others and that this is linked to the demographics of those counties. For instance, Blacks face the most discrimination in sentencing decisions in counties where the percent Black and economic inequality are both low (Bridges & Crutchfield, 1988; Crawford, 2000; Crawford, Chiricos, & Kleck, 1998).

Finally, studies have begun to examine the treatment of Latino/as. Studies that have included Latinos frequently find that their ethnicity affects criminal processing (Hebert, 1997; Holmes & Daudistal, 1984; LaFree, 1985; Spohn & Holleran, 2000; for negative finding see Spohn et al., 1981). In fact, some theorists claim that, at least during some processing stages, Latino/as receive less beneficial criminal processing decisions than Blacks (Demuth, 2003; Schlesinger, 2005; Steffensmeier & Demuth, 2000, 2001). Additionally, when ethnicity is not considered, this not only obscures ethnic disparities in criminal processing, it also acts to obscure racial disparities since Whites and Latino/as are often included in the same category. Specifically, if both Latino/a and Black defendants receive criminal justice decisions that are less beneficial than those that white defendants receive, including Latino/as in the "White" category will make the White-Black gap in criminal processing appear smaller than it actually is. As such, it is imperative that scholars begin to include Latino/a defendants and analyze the effect of their ethnicity when examining disparities in criminal processing.

While all of these advances help students of punishment and racism to understand when disparities in criminal processing happen and what external conditions affect the likelihood of disparate processing, no known study has combined these insights to examine how disparities in punishment outcomes are produced through disparities that accumulate throughout successive stages of criminal processing. In order to uncover the cumulative effects of disparate processing, this study draws on several methodological advances of earlier studies: it examines several stages of criminal processing—pretrial decisions and outcomes, adjudication decisions, and sentencing decisions; disaggregates each of these decisions into their composite parts; focuses on individuals charged with felony drug offenses; uses fixed effects models to control for county level demographics; and includes White, Black, and Latino defendants.

Data

The data used for this analysis is the *State Court Processing Statistics, 1990 – 2002: Felony Defendants in Large Urban Counties (SCPS)*. The SCPS tracks a sample of felony cases filed in 65 of the nation's 75 most populous counties until their final disposition or until 1 year has elapsed from the date of filing. This dataset—which contains a representative sample of state felony cases in large metropolitan counties in the years 1990, 1992, 1994, 1996, 1998, 2000, and 2002—provides detailed information on prior record and offense severity, a comprehensive list of common offenses, several measures of demographic characteristics, and a nationally representative sample of adequate size. This study is limited to an analysis of Black, White, and Latino men who are charged with felony drug offenses.[6] After dropping observations for all female defendants, "other race" male defendants, defendants for whom information on legal variables was missing, and defendants not charged with drug offenses, the sample includes 36,709 defendants.

Dependent Variables

There are eight dependent variables for this study. The first three are legal decisions that affect pretrial incarceration: the decision to deny bail, the decision to grant a non-financial release, and bail amount. The next two are pretrial processing outcomes: whether defendants given bail are able to post bail and pretrial incarceration. The sixth is the level of adjudication and asks whether the offender was adjudicated at a felony level. The final two are sentencing decisions: sentenced to incarceration and sentence length.

Studies that examine whether an offender was released or detained pretrial rather than the legal decisions that affect pretrial incarceration (Chiricos & Bales, 1991; Spohn et al., 1981) do not disaggregate the effects of discrimination from the effects of socio-economic status. While the pretrial incarceration results for defendants who are either given non-financial release or denied bail are completely determined by these legal decisions, most defendants are given financial requirements for release. Some of these defendants are able to post bail while others are not. Thus, in addition to the three legal decisions that influence pretrial incarceration, the economic resources and networks of defendants also influence release. The effects of these resources and networks can be seen when examining whether defendants given financial requirements for release are able to meet those requirements and, more broadly, whether defendants are released or detained pretrial. Both of these outcomes result from the interaction of legal decisions—the denial of bail, the granting of non-financial release, and the setting of bail amount—and the economic networks and resources of the defendants.

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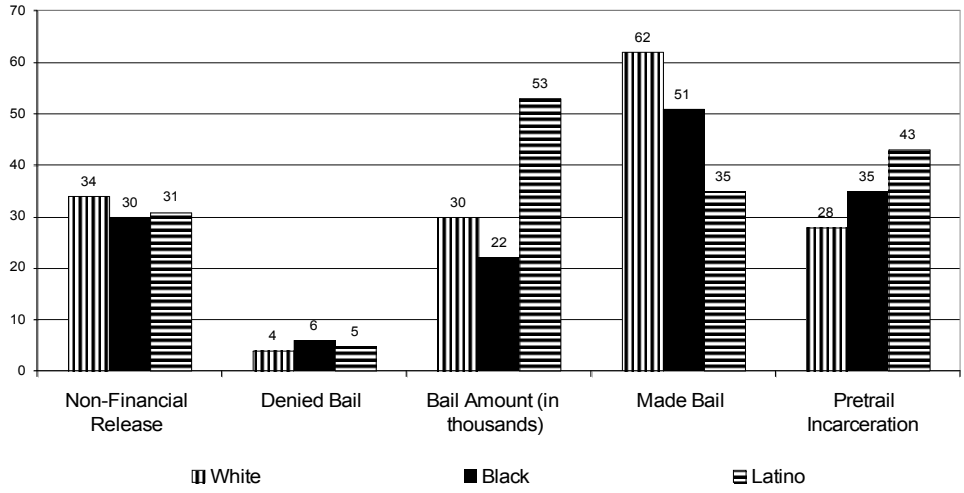
[6] The effect of the defendant's race on criminal processing varies by sex (Curran, 1983; Daly, 1989; Spohn & Holleran, 2000; Steffensmeier & Demuth, 2000); further, previous research finds that women are treated more leniently than men by the criminal justice system (Gruhl, Welch, & Spohn, 1984; Kruttschnitt & McCarthy, 1985; Spohn & Spears, 1997; Steffensmeier, Kramer, & Streifel, 1993; Steury & Frank, 1990). For these reasons, it would be imprudent to combine both groups in the same sample; an analysis that includes both men and women would need to explain the differences found between the two groups, as well as explore the interactions between race and gender. This is beyond the scope of the current paper.

Figure 1.
Pretrial decisions of defendants charged with felony drug offenses in large, urban counties from 1990 to 2002, by race



Note: Data for this figure are from the State Court Processing Survey, 1990 – 2002.

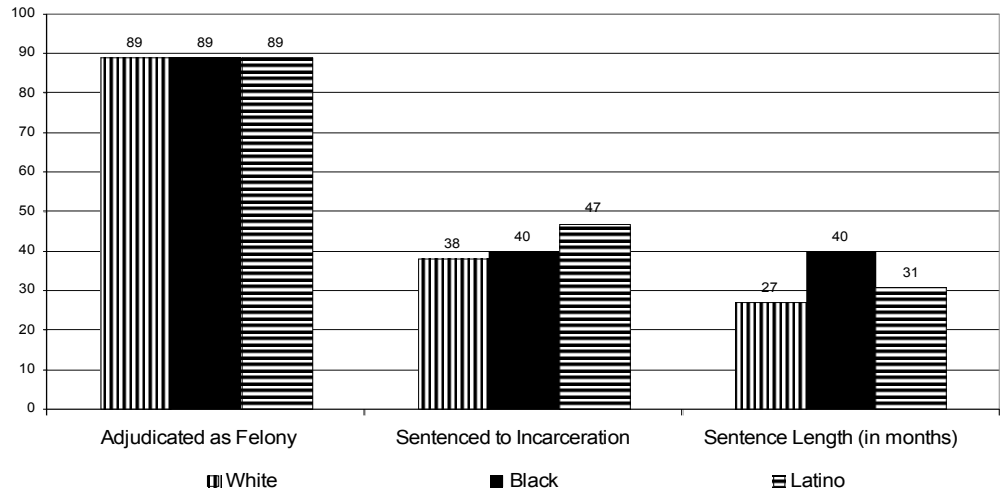
White drug defendants are the most likely to be granted a non-financial release, the least likely to be denied bail, and receive bail amounts between those of Black and Latino drug defendants[7] (see Figure 1). More specifically, while 34% of White defendants charged with felony drug offenses receive non-financial releases, only 30% of Black drug defendants and 31% of Latino defendants receive these releases. Similarly, while 4% of White drug defendants are denied bail, 6% of Black drug defendants and 5% of Latino drug defendants are denied bail. Finally, while White drug defendants receive average bails of $30,000, Black drug defendants receive bails that average $22,000, and Latino drug defendants receive bails that average $53,000. In addition, White drug defendants are the most likely to be able to post when given a bail: 62% of Whites granted bail post, compared to 51% of Blacks and 35% of Latinos. As a combined result of receiving the most beneficial pretrial decisions and also having the most extensive economic resources and networks—as reflected in the ability to post bail—White drug defendants are substantially less likely than Black or Latino drug defendants to be jailed pretrial. Twenty eight percent of White drug defendants are incarcerated pretrial, compared to 35% of Black drug defendants and 43% of Latino drug defendants.

While all of the individuals in the SCPS data were charged with felonies when they were arrested, 11% of men originally charged with felony drug offenses were adjudicated as misdemeanants—this percent is constant across racial groups (see Figure 2). In contrast, White offenders are the least likely to be sentenced to

[7] t-tests reveal all of these differences to be statistically significant.

incarceration and, when sentenced to incarceration, receive the shortest sentences.[8] In particular, 38% of White drug offenders compared to 40% of Black drug offenders and 47% of Latino drug offenders are sentenced to incarceration. When sentenced to incarceration, White drug offenders receive sentences that average 27 months, while Black drug offenders receive sentences that average 40 months, and Latino drug offenders receive sentences that average 31 months.

Figure 2.
Sentencing decisions of offenders convicted of drug offenses in large, urban counties from 1990 to 2002, by race



Note: Data for this figure are from the State Court Processing Survey, 1990 – 2002.

Independent Variables

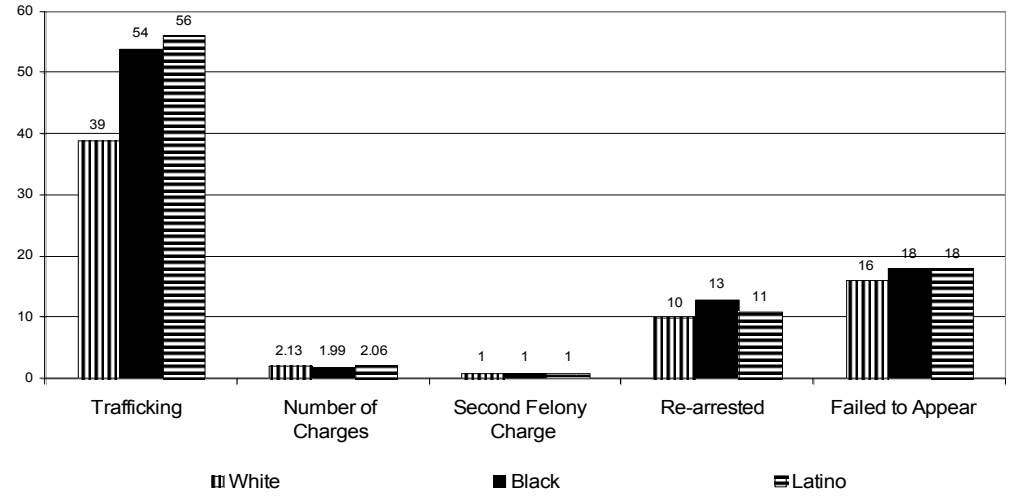
Explanatory variables include both extra-legal and legal variables. The data set contains over a dozen measures of offense seriousness and prior record. The variables included in the models are the ones that best predict each of the dependant variables. The models all include dummies for the race of the defendant, whether the charge was for trafficking or possession, whether the defendant had an active criminal justice status when arrested, whether they were charged with a second felony, the total number of charges, age and age squared (to account for the curvilinear effect of age), whether the defendant had a prior felony conviction, a prior misdemeanor conviction, or no prior convictions, whether the defendant had ever been imprisoned before, and both county level and year fixed effects. The pretrial models also control

[8] t-tests reveal no significant differences in the mean values for "adjudicated as felony" across racial groups. However, both Blacks and Latinos are significantly more likely to be sentenced to incarceration than Whites. Finally, t-tests show that the differences in sentence lengths between Blacks and Whites, but not between Latinos and Whites, is significant.

for whether the defendant had previously failed to appear for a court appearance, while the sentencing models also control for whether the defendant was rearrested while awaiting sentencing.

The extra-legal variables are race, ethnicity, and age. Of defendants in the sample, only 22% are White, 48% are Black, and 30% are Latino. Defendants in all three racial and ethnic groups average approximately 30 years old: White defendants have a mean age of 31, Blacks of 29, and Latinos of 28.

Figure 3.
Current offense and case characteristics of defendants charged with felony drug offenses in large, urban counties from 1990 to 2002, by race



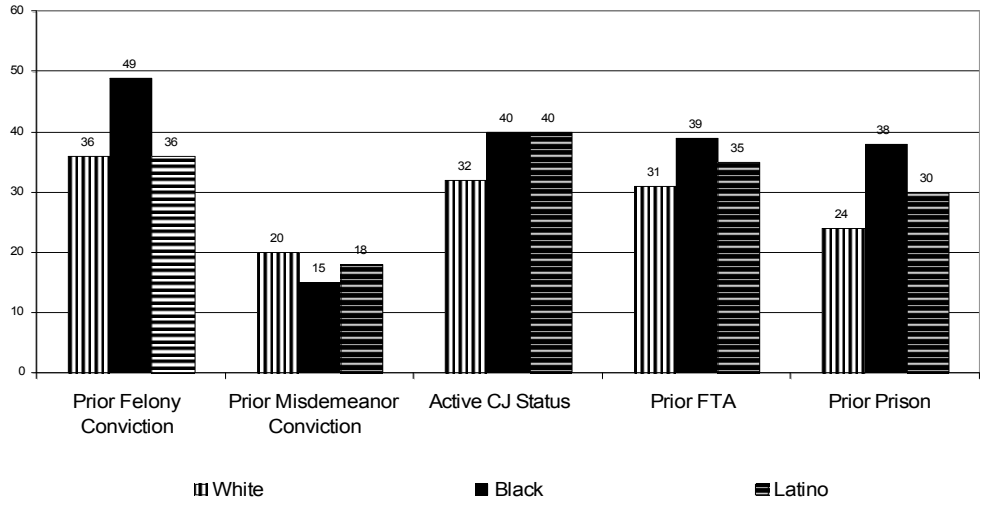
Note: Data for this figure are from the State Court Processing Survey, 1990 – 2002.

Legal variables include those that describe the current offense and case characteristics and those that describe the defendant's prior record (see Figure 3). Looking at current characteristics first, White defendants are least likely to be charged with a trafficking arrest, to be rearrested while awaiting trial, or to fail to appear for a court appearance than either Black or Latino defendants. The only current case characteristic for which White defendants score highest is the number of charges: Whites are charged with an average of 2.13 offenses, Blacks with an average of 1.99, and Latinos with an average of 2.06. There are no racial differences in the percent of defendants charged with a second felony; in fact, only 1% of White, Black, or Latino drug defendants have a second felony charge.[9]

[9] t-tests show that both Black and Latino felony drug offenders are significantly more likely to be charged with trafficking than are White felony drug offenders. In addition, Black offenders are significantly more likely than White or Latino offenders to be rearrested while awaiting trial. Although the difference between the numbers of charges White, Black, and Latino drug offenders have is small, t-tests show this difference to be significant. There are no other significant differences for case characteristics.

Turning our attention to defendants' prior records, Blacks are the most likely to have a prior conviction and their prior convictions are the most likely to be felony convictions (see Figure 4). More particularly, 56% of Whites, 64% of Blacks, and 54% of Latinos have prior convictions. Moreover, Whites are the least likely to have an active criminal justice status (to be on probation or parole or to be awaiting adjudication on another charge), the least likely to have failed to appear for a court case for a previous charge, and the least likely to have spent time in prison.[10] Overall, Blacks are arrested for more serious crimes and have more considerable prior records; as such, racial disparity in criminal processing will seem greater without these controls.

Figure 4.
Prior record of defendants charged with felony drug offenses in large, urban counties from 1990 to 2002, by race



Note: Data for this figure are from the State Court Processing Survey, 1990 – 2002.

Models

To understand how racial disparities in punishment outcomes are produced, it is necessary to examine both direct and indirect effects of racially disparate processing. To do this, the study estimates a series of models. The first set of models employed estimates of the association between being Black or Latino and the likelihood of being sentenced to incarceration and sentence length, while controlling for current case characteristics and prior record. Next, these models are re-estimated, first with a

[10] t-tests show that Blacks are significantly more likely to have prior felony convictions than Latinos or Whites; that Blacks and Latinos are significantly more likely than Whites to have had active criminal justice status when they were arrested, and to have failed to appear for a previous court date. Finally, Blacks are significantly more likely than Whites or Latinos to have been imprisoned prior to the current arrest.

control for whether the offender was released or detained pretrial, then with an additional control for whether the offender was adjudicated as a felon. These six models examine whether the racial disparities found at the sentencing stage are generated, in whole or in part, by disparities in earlier processing decisions.

If sentencing disparities are generated by disparities in pretrial incarceration or adjudication level, the next question that arises is whether these earlier disparities are themselves the result of disparate criminal processing. In order to answer this question, one set of models that examines racial disparities in level of adjudication and another set of models that examines racial disparities in pretrial processing are estimated. These models estimate the association between being Black or Latino and being adjudicated as a felon with and without controlling for pretrial incarceration. This will help to answer, first, if racial disparities in level of adjudication among defendants with similar legal characteristics exist, and second, if and to what extent these disparities are generated through disparities in pretrial incarceration.

The final set of models examines the association between being Black and Latino and pretrial decisions and outcomes.[11] Knowing that racial differences in the likelihood of being detained pretrial help produce racial disparities in sentencing outcomes is not enough. In order to understand the cumulative effects of racially disparate processing, it is necessary to know whether racial differences in pretrial incarceration are themselves produced in part by disparate processing—as opposed to by either legally relevant characteristics of the defendants or by differences in the ability to post bail. In year i and county j, the effects of race on non-financial release, denied bail, made bail, pre-conviction incarceration, and sentenced to incarceration can be estimated as:

$$\text{logit}\,(p_{ij}) = x'_{ij}\beta+\theta_{ij}$$

while the effects of race on bail amount and sentence length can be estimated as:

$$\log(Y_{ij}) = x'_{ij}\beta+\theta_{ij}$$

Following each model, a post-regression Wald Test was estimated in order to establish whether the difference in the coefficients for 'Black' and 'Latino' is significant. While the regressions estimate whether Blacks or Latinos are treated differently from Whites, the Wald Tests estimate whether Blacks and Latinos are treated differently from each other.

Taken together, the results from these three sets of models answer the following questions: Are Black and Latino men who are charged with felony drug offenses more likely to be sentenced to incarceration than White men with similar legal characteristics? Among defendants sentenced to incarceration for drug offenses, do Black and Latino men receive longer sentences than White men? If disparities exist in the likelihood of being sentenced to incarceration or in sentence length, to what extent are these disparities the result of racial differences in the likelihood of being detained pretrial or adjudicated as a felon? To what extent are disparities in pretrial

[11] Studies that examine whether an offender was released or detained pretrial rather than the legal decisions that affect pretrial incarceration (Chiricos & Bales, 1991; Spohn et al., 1981) do not disaggregate the effects of discrimination from the effects of socio-economic status. While the justice system may obligate defendants to meet comparable financial requirements in order to be granted release, the economic resources and networks of the alleged offenders will determine if they are able to meet those requirements. Thus, identical treatment by the justice system does not guarantee identical pretrial incarceration outcomes.

incarceration the result of disparate processing decisions? To what extent are disparities in level of adjudication the result of disparate processing decisions?

Findings

Employing models that control for offense seriousness, current case characteristics, and prior record, this study finds that Black and Latino offenders are more likely to be sentenced to incarceration and are given longer sentences than White offenders with similar legal characteristics. As Models 1 and 4 in Table 1 show, Black offenders have odds of being sentenced to incarceration that are 34% higher and, when sentenced to incarceration, receive sentences that are 17% longer than White offenders with similar legal characteristics. Latino offenders have odds of being sentenced to incarceration that are 45% higher and, when sentenced to incarceration, receive sentences that are 35% longer than White offenders with similar legal characteristics. A post-regression Wald Test reveals no significant difference between Black and Latino's likelihood of being sentenced to incarceration, but reveals that the difference between Black and Latino's sentence lengths is, in fact, statistically significant (chi-square = 10.42; $p < .002$).

However, while these models control for offense seriousness and prior record they do not control for prior processing outcomes. Studies that analyze the effects of pretrial incarceration on sentencing decisions find that this detention affects both the decision to incarcerate and sentence length (Albonetti, 1989; Clark & Henry, 1997; Nobling et al., 1998; Spohn & Cederblom, 1991; Unnever, 1980). In addition, studies that examine racial disparities in pretrial processing find that Black and Latino defendants are given less favorable pretrial decisions than are White defendants (Demuth, 2003; Schlesinger, 2005). When looked at together, these two sets of findings suggest that racial disparities in the pretrial stage may be responsible—either wholly or in part—for the racial disparities found in sentencing. In fact, as Models 2 and 5 in Table 1 show, defendants who are incarcerated pretrial are four times as likely to be sentenced to incarceration and, when sentenced to incarceration, receive sentences that are 86% longer than defendants who were released. However, the direct association between being Black or Latino and sentencing outcomes remains. Controlling for pretrial incarceration, Black offenders have odds of being sentenced to incarceration that are 17% higher and receive sentences that are 11% longer than White offenders with similar legal characteristics and Latino offenders have odds of being sentenced to incarceration that are 22% higher and receive sentences that are 22% longer than White offenders with similar legal characteristics. Similar to the post-regression results for Models 1 and 4, post-regression Wald Tests reveal no significant difference between Black and Latino's likelihood of being sentenced to incarceration. However, they do reveal that the difference between Black and Latino's sentence lengths—controlling for pretrial incarceration this time—is still statistically significant (chi-square = 4.97; $p < .026$).

Finally, studies that examine whether race is associated with prosecutorial assistance find that White offenders are most likely and Latinos are least likely to receive prosecutorial assistance (Steffensmeier & Demuth, 2000). This suggests that White offenders might be more likely than Black or Latino offenders to have their charges dropped from felony to misdemeanor level. If this is true, the level of adjudication may be responsible for all or part of the racial disparities in sentencing outcomes. As Models 3 and 6 in Table 1 show, offenders who are adjudicated as

felons have odds of being incarcerated that are three and a half times higher and, when sentenced to incarceration, receive sentences that are 80% longer than offenders who are adjudicated as misdemeanants. Strikingly, controlling for the level of adjudication actually increases the association between race and being sentenced to incarceration and mitigates the association between race and sentence length only modestly.

When controlling for offense seriousness, prior record, pretrial incarceration, and level of adjudication, the analysis finds that Black offenders have odds of being sentenced to incarceration that are 20% higher and receive sentences that are 7% longer than White offenders with similar legal characteristics. Similarly, the analysis finds that Latino offenders have odds of being sentenced to incarceration that are 29% higher and receive sentences that are 20% longer than White offenders with similar legal characteristics. Once again, post-regression Wald Tests reveal no significant difference between Black and Latino's likelihood of being sentenced to incarceration, but reveal that the difference between Black and Latino's sentence lengths—even when controlling for pretrial incarceration and level of adjudication this time—is statistically significant (chi-square = 7.02; $p < .008$). These findings suggest a direct effect of disparate processing on sentencing outcomes that systematically disadvantages Black and Latino offenders.

In addition, these findings may suggest indirect effects of disparate processing on sentencing outcomes—through pretrial incarceration and/or level of adjudication. In order to test for the presence of these indirect effects, models that examine the association between being Black or Latino and being adjudicated as a felon are estimated next. As Table 2 shows, Blacks and Latinos are more likely to be adjudicated as felons than are Whites; moreover, while being incarcerated pretrial is also associated with being adjudicated at a felony level, racial differences remain after controlling for this prior case outcome. As Model 1 in Table 2 shows, Black offenders have odds of being adjudicated at a felony level that are 50% higher and Latino offenders have odds of being adjudicated at a felony level that are 40% higher than White offenders with similar legal characteristics. Additionally, as Model 2 in Table 1 shows, individuals who are incarcerated pretrial have odds of being adjudicated as felons that are 23% higher than those who are released. Once this prior case outcome is controlled for, Black offenders have odds of being adjudicated as felons that are 45% higher than Whites, and Latino offenders have odds of being adjudicated as felons that are 34% higher than Whites. Legal variables are particularly poor at explaining this case outcome. Post-regression Wald Tests reveal no significant differences in the level of adjudication between Black and Latino offenders.

Finally, the analysis turns to pretrial decisions and outcomes. As Table 3 shows, Black defendants have odds of being granted a financial release that are 9% lower and odds of being denied bail that are 44% higher than White defendants with similar legal characteristics; there is no evidence of a difference between Black and White offenders' bail amounts. Latino defendants have odds of being granted a financial release that are 25% lower, odds of being denied bail that are 64% higher, and receive bail amounts that are 26% higher than White defendants with similar legal characteristics. Post-regression Wald Tests reveal significant differences between Black and Latino defendants during non-financial release (chi-square = 15.24; $p < .000$), and bail amount (chi-square = 27.74; $p < .000$), but not during the decision to deny bail.

Table 1.
The cumulative effects of racially disparate processing on sentencing outcomes in large, urban counties from 1990 – 2002

	Decision to incarcerate			Sentence length (in months)		
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Black	1.34***	1.17**	1.20***	1.17***	1.11*	1.07
	(6.08)	(3.17)	(3.41)	(.05)	(.05)	
Latino	1.45***	1.22***	1.29***	1.35***	1.22***	1.20***
	(7.45)	(3.84)	(4.45)	(.05)	(.05)	(.05)
Pretrial	--------	4.00***	3.64***	--------	1.86***	1.80***
Incarceration		(32.84)	(29.16)		(.04)	(.04)
Adjudication	--------	--------	.78***	--------	--------	5.47***
Level			(3.74)			(.06)
Trafficking	1.97***	1.81***	1.95***	2.08***	1.92***	1.77***
	(18.00)	(14.85)	(15.67)	(.04)	(.04)	(.03)
Number of	1.11***	1.09***	1.11***	1.09***	1.09***	1.08***
Charges	(7.29)	(5.91)	(6.73)	(.01)	(.01)	(.01)
Second Felony	1.47	1.16	1.20	.91***	.81	.82
Charge?	(1.07)	(.40)	(.47)	(.32)	(.31)	(.29)
Re-Arrested	1.06	1.63***	1.68***	1.15**	1.62***	1.51***
Pretrial?	(1.12)	(8.78)	(8.36)	(.05)	(.06)	(.05)
Failure to	.54***	0.88**	1.50***	1.04	1.03	1.04
Appear	(12.43)	(2.57)	(6.91)	(.04)	(.04)	(.04)
Prior Felony	1.98***	1.73***	1.70***	1.63***	1.51***	1.51***
Conviction	(13.76)	(10.49)	(9.56)	(.05)	(.05)	(.05)
Prior Misd.	1.15**	1.18**	1.16**	.83***	.84	.85***
Conviction	(2.66)	(2.49)	(2.59)	(.05)	(.05)	(.05)
Active Criminal	1.36***	1.11**	1.08	1.30***	1.20***	1.20***
Justice Status	(7.61)	(2.49)	(1.78)	(.04)	(.04)	(.04)
Prior Failure	1.22***	1.13**	1.50***	1.04	1.03	1.04
to Appear	(4.70)	(2.75)	(9.56)	(.04)	(.04)	(.04)
Prior Prison	1.22***	1.13**	1.15*	1.55***	1.51***	1.51***
	(4.46)	(2.58)	(2.21)	(.04)	(.04)	(.04)
N	15,721	15,721	15,721	7,777	7,777	7,777

Note: Data for this table are from the *State Court Processing Survey, 1990 – 2002.* Odds ratios with Z-scores (absolutes) in parentheses are reported for the logistic regressions and coefficients with standard errors in parentheses are reported for the linear regressions. Sentence length is logged and exponentiated (e^x-1) results are reported; these exponentiated coefficients can be interpreted as "percents."
*p = < .01; **p = < .005; ***p = < .001

Table 2.
Racial disparities in level of adjudication in large, urban counties from 1990 – 2002

	Model 1	Model 2
Black	1.50***	1.45***
	(4.85)	(4.27)
Latino	1.40***	1.34**
	(3.68)	(3.07)
Pretrial Incarceration	--------	1.23**
		(2.71)
Trafficking	2.64***	2.49***
	(13.41)	(12.00)
Number of	1.08***	1.07**
Charges	(3.28)	(2.61)
Second Felony	2.20	1.89
Charge?	(.99)	(.80)
Re-Arrested	1.15	1.15
Pretrial?	(1.45)	(1.44)
Failure to	1.18	1.17
Appear	(1.75)	(1.62)
Prior Felony	1.24*	1.14
Conviction	(2.34)	(1.42)
Prior Misdemeanor	.98	.94
Conviction	(.22)	(.69)
Active Criminal Justice	1.07	1.06
Status	(.91)	(.74)
Prior Failure	.93	.93
to Appear	(.96)	(.92)
Prior Prison	.89	.90
	(.07)	(1.24)
N	15,590	15,590

Note: Data for this table are from the *State Court Processing Survey, 1990 – 2002.* Odds ratios with Z-scores (absolutes) in parentheses are reported for the logistic regressions.
*p = < .01; **p = < .005; ***p = < .001

Examining pretrial incarceration outcomes, the analysis finds Blacks and Latinos have odds of making bail that are less than half those of Whites with the same bail amounts and legal characteristics. Further, Blacks have odds that are 72% higher than Whites, while Latinos have odds of pretrial incarceration that are almost double those of Whites. This suggests—not surprisingly—that Blacks and Latinos have fewer

economic resources and networks than Whites with similar legal characteristics. Wald Tests reveal that Latinos are even less likely to be released pretrial than Blacks (chi-square = 15.24; p < .000). This is ostensibly due not only to their relative disadvantage during the decision to grant non-financial releases, but in the setting of bail amount and their relative lack of economic resources and networks (compared to Black defendants).

Table 3.
Racial disparities in pretrial decisions and outcomes in large, urban counties from 1990 – 2002

	Non-Financial Release	Denied Bail	Bail Amount (logged)	Made Bail	Pretrial Incarc.
Black	.91*	1.44***	1.06	.44***	1.72***
	(1.92)	(3.52)	(.03)	(11.44)	(10.42)
Latino	.75***	1.64***	1.26***	.46***	1.99***
	(5.47)	(4.46)	(.04)	(10.71)	(13.18)
Bail Amt.	--------	--------	--------	.54***	--------
(logged)				(26.95)	
Trafficking	.43***	1.27**	2.04***	1.15**	1.97***
	(20.92)	(3.12)	(.03)	(2.57)	(17.60)
Number of	.89***	1.06*	1.15***	1.06**	1.06***
Charges	(7.47)	(2.11_	(.01)	(2.93)	(4.17)
Second Felony	.19**	3.37*	1.77**	1.08	2.75**
Charge?	(3.00)	(2.17)	(.22)	(.16)	(2.83)
Prior Felony	.53***	1.25*	1.05	.62***	1.94***
Conviction	(12.11)	(2.13)	(.03)	(6.73)	(13.15)
Prior Misd.	1.14**	.54***	.85***	.84*	.92
Conviction	(2.47)	(4.62)	(.04)	(2.27)	(1.55)
Active Criminal	.55***	6.10***	1.10***	.61***	2.23***
Justice Status	(13.43)	(20.25)	(.03)	(8.54)	(19.37)
Prior Failure	.88**	1.16	1.04	.84**	1.18***
to Appear	(2.79)	(1.70)	(.03)	(3.02)	(3.85)
Prior Prison	.73***	1.05	1.23***	.85***	1.39***
	(6.26)	(.60)	(.03)	(2.53)	(7.30)
N	18,625	18,625	10,487	10,487	18,625

Note: Data for this table are from the *State Court Processing Survey, 1990 – 2002.* Odds ratios with Z-scores (absolutes) are reported for the logistic regressions and coefficients with standard errors in parentheses are reported for the linear regressions. Bail Amount is logged and exponentiated (e^x-1) results are reported; these exponentiated coefficients can be interpreted as "percents."
*p = < .05; **p = < .01; ***p = < .001

When considered together, the findings presented in Tables 1, 2, and 3 suggest that Black and Latino defendants face disparate processing at several processing points, and that racial disparities in early processing decisions increase racial disparities in sentencing outcomes. Put differently, it seems that racially disparate processing affects sentencing decisions both directly and indirectly—through pretrial processing decisions and level of adjudication. Tendencies to focus on single processing stages obscure these indirect effects.

Discussion and Conclusion

Research on racial disparities in criminal processing has focused on sentencing decisions. The few studies that examine racial differences in pretrial processing consistently find that Blacks and Latinos receive less beneficial decisions than Whites. However, studies have yet to comprehensively examine how these disparities generated during early stages of criminal processing affect later stages of criminal processing. This study addresses this gap in the literature by estimating a series of models that examine the cumulative effects of racially disparate processing on punishment outcomes of White, Black, and Latino men who are charged with felony drug offenses.

Estimating a series of models, this study finds not only that Black and Latino men receive less beneficial sentencing decisions than White men with similar legal characteristics, but also that these disparities are produced through a combination of direct and indirect effects. More particularly, the findings suggest that Black and Latino men are less likely to be granted non-financial releases and more likely to be denied bail than White men with similar legal characteristics; that Latino men are given higher bails than White men with similar legal characteristics; that Black and Latino men are more likely to be adjudicated as felons than White men with similar legal characteristics; and that sentencing outcomes are determined by a combination of current case characteristics, prior record, economic resources and networks, and racially disparate processing—both indirectly through pretrial incarceration and level of adjudication, and directly during sentencing decisions. Finally, whenever there is a disparity in the treatment of Black and Latino defendants with similar legal characteristics, Latinos always receive the less beneficial decisions.

Several theorists of punishment argue that racial disparities in punishment outcomes are created predominantly or exclusively through differential involvement in crime (Blumstein, 1982; Chiricos & Waldo, 1975; Hagan, 1974; Kleck, 1985; Langan, 1985). However, the findings of this study—and of many other methodologically rigorous studies conducted during the last 20 years (e.g. Bridges & Crutchfield, 1988; Crawford, Chiricos, & Kleck, 1998; Demuth, 2003; Nobling et al., 1998; Petersilia, 1985; Schlesinger, 2005; Spohn & Cederblom, 1991; Steffesmeier et al., 1998)—challenge that perspective. In fact, the study's findings suggest that racially disparate decision making at several stages of criminal processing contribute substantially to racial disparities in punishment outcomes—in pretrial incarceration, level of adjudication (and thus prior record), and post-sentencing incarceration (and therefore in post-release supervision, such as parole). It is time that researchers of race and punishment realize that, while findings on racial bias influences in criminal processing are mixed, the findings on whether racial bias is present in criminal processing are consistent: during some criminal processing stages, among some groups of

offenders, Black and Latino offenders are disadvantaged compared to White offenders with similar legal characteristics.

Criminal justice systems operate most smoothly and efficiently when the citizens have faith in their legitimacy. However, this legitimacy is threatened when offenders are processed and released in ways that disproportionately impact members of marginalized communities. As such, it is imperative that our criminal justice system not only assures that offenders with similar legal characteristics receive comparable punishment outcomes, but also that these outcomes are the least punitive ones necessary for obtaining the system's goals. Criminal processing policies, and especially pretrial processing policies, need to be rethought. For example, since residential stability and employment correlate with race and ethnicity, procedures for pretrial release decisions that stress these variables may contribute to racial disparities in pretrial decision making. As such, pretrial decisions based, even in part, on these variables may be doing more damage than good.

Finally, this study suggests many roads for future research. First, this study's finding of particularly harsh treatment of Latino defendants is not the first. Although this finding should be interpreted cautiously—Blacks still face the most disparity, and this disparity may be generated by criminal justice practices such as policing that lay outside the scope of this study—there is a consensus emerging from studies conducted since the most recent large-scale immigration of Latinos into the U.S. that disparity in the criminal processing of Latino defendants is both real and pervasive. This finding calls for more research that breaks down the Black/White binary paradigm of race and begins to explore disparity based on myriad and complex racial categorizations. Second, research in other fields finds that Latinos from different national origins face extremely different experiences once in the U.S. (Johnson, 1998; Portes, 1996). Thus, it is imperative that data be collected that will allow criminologists to analyze Latinos from different national origins separately. Finally, current methodologies mask the ubiquity of racially disparate criminal processing. Researchers need to use methodologies that are more adept at detecting both direct and indirect effects of racially disparate processing and to include more stages of processing within our analyses. The findings of this study suggest that the field would benefit from future research employing alternative methodologies, such as multi-stage and structural equation modeling. These methodologies could help the U.S. criminal justice system understand not just when differential processing happens, but also how it is produced.

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DNA AND HOMICIDE CLEARANCE: WHAT'S REALLY GOING ON?

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Abstract

Homicide clearance rates in the United States have been dropping steadily since the late 1960s. The literature on homicide clearance has yet to explore exactly what effect DNA evidence is having on the homicide investigation. As such, the increased use of DNA as an investigative tool to raise homicide clearance is hardly axiomatic. The current study examined homicides committed in Manhattan, New York, within the years 1996 to 2003 for the use of DNA evidence in making an arrest. An analysis was also conducted with an eye toward how useful DNA evidence could be—indicating that, via its current usage, the creation of large DNA databases of known criminal offenders will, at best, only marginally increase the homicide clearance rate. Further, the implications of the use of DNA may point to a larger phenomenon which may have contributed to the drop in clearance experienced nationwide.

DNA and Homicide Clearance: What's really going on?

Homicide clearance rates have dropped considerably in the United States since the late 1960s (Bureau of Justice Statistics (BJS), 2002c; Federal Bureau of Investigation (FBI), 2006; Regini, 1997; Wellford & Cronin, 1999). As the homicide clearance rate has been called "the litmus test" for the efficacy of homicide investigations (Simon, 1991) it would seem logical to deduce that police across the country are not doing as good a job solving murders as they did in the past. Despite its potential, little is actually known about how DNA evidence is used by investigators at the pre-arrest stage of a homicide case. Indeed, we do not even know how often DNA-testable samples are gathered or examined, and therefore become available to investigators. As such, it is unclear what, if any, impact this scientific evidence is having on homicide investigations, much less how this potential might be enhanced.

There exists a dearth of research specifically on homicide clearance—and what does exist seems to focus on circumstances surrounding the murder or homicide event (Addington, 2006; Litwin, 2004; Regoeczi, Kennedy, & Silverman, 2000; Reidel & Rinehart, 1996; Wolfgang, 1958). Only one study has specifically examined investigative procedure in relation to clearance (Wellford & Cronin, 1999).

Conventional wisdom proffers the idea that forensic evidence helps in solving homicide cases (Fisher, 2000; Gaines & Kappeler, 2005; Geberth, 1983, 1996; Gilbert, 1993; Inman & Rudin, 2001; Lyman, 1999). However, this conventional wisdom assumes that the forms of evidence that were used before DNA became available were not as good at producing clearances as DNA is today. The notion that DNA could be having anything other than a positive effect on clearance rates runs counter-intuitive to conventional investigative thinking. However, the relationship between DNA and clearance has not been examined previously; therefore, the possibility exists that conventional wisdom may be in error.

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The Rise of DNA

The first homicide cases to use DNA evidence in the course of the investigation or trial were in the mid-1980s (Morton, 2001). By 1996, evidence from 15,000 cases was referred to publicly operated DNA labs; in 1997 the number jumped to 21,000 (BJS, 2000). By the year 2000 that number was up to 25,000 (BJS, 2002a). Two-thirds of prosecutors' offices used DNA evidence during plea negotiations or felony trials in 2001, up from about one-half in 1996 (BJS, 2002b). In 1998, 98% of public labs were analyzing DNA for law enforcement agencies (BJS, 1998). The rise of DNA evidence in the prosecution of crime, homicide or otherwise, is beyond dispute. However, what is conspicuously absent from the data above is any indication of how DNA is being utilized at the pre-arrest stage of a homicide investigation—it is unclear if DNA is being used before or after an arrest has been made. As such, it is difficult to determine whether DNA is helping to clear cases or just helping to convict (or force a plea once an arrest has been made).

DNA and the Corrective Effect

Confessions, eye-witness identifications, and witness statements are all forms of evidence which are subjective in nature and can be in error, or they can change (or be changed) over time (Cutler & Penrod, 1995; Fabian, Stadler, & Wetzels, 1995). Certain forms of forensic evidence cannot be changed over time—at least not at the investigative level. Arguments in courtrooms on the veracity of the forensic analysis of any given piece of physical evidence are frequent; experts with differing forensic interpretations of physical evidence are frequently found on opposite sides of a case during trials. However, at the investigative level, once a determination has been made by a forensic expert (i.e. fingerprint examiner, coroner, ballistics examiner), investigators generally are not at liberty to question the veracity of that forensic determination (Fisher, 2000; Gaines & Kappeler, 2005; Geberth, 1983, 1996). Therefore, an analysis of how this shift from subjective forms of evidence 40 years ago to the use of an objective form of evidence, like DNA, has impacted homicide clearance seems like the logical next step.

Research into another violent crime has already found that objective DNA evidence does prove to exclude from suspicion the tested suspect in a significant number of cases. When studying sexual assault, the National Institute of Justice (1996) noted that in one-quarter of sexual assault cases referred to the FBI, the primary suspect had been excluded by forensic DNA testing. Further, the report concluded that:

> The fact that these percentages have remained constant for 7 years, and that the National Institute of Justice's informal survey of private laboratories reveals a strikingly similar 26 percent rate, strongly suggests that postarrest and postconviction DNA exonerations are tied to some strong, underlying systematic problems that generate erroneous accusations and convictions (NIJ, 1996, p. *xxvii*).

As such, it seems likely that a "corrective effect"—the excluding of suspects from suspicion by the use of objective physical evidence—has already been documented within cases of sexual assault and there is reason to believe that the same or similar systematic problems may be found in homicide investigations as well (in fact, given

the absence of a victim statement in a homicide case, this effect could be much greater).

Prior Research on Circumstances of the Homicide Event

Marvin Wolfgang (1958), in his seminal work conducted within the city of Philadelphia, examined homicides committed between January 1, 1948 and December 31, 1952. This was the first time in the literature that an assertion had been made that certain elements found at, in, around, or in relation to a homicide could predict whether the case would remain "unsolved." Wolfgang (1958) found that unsolved homicides have higher proportions of:

1) white male and white female victims;
2) victims 65 years of age or over;
3) robbery motives;
4) victims who were strangers to their assailants;
5) beatings;
6) week-end slayings;
7) deaths occurring outside the home, and in the street (pg. 294).

When examining the above list of variables with a subjective/objective lens it seems evident that only number 3 (robbery motives) and number 4 (victims who were strangers to their assailants) are not objectively determinable before a suspect has been found. All of the other variables seem to be objectively observable from the moment (or very shortly thereafter) the homicide is discovered, and all are things that homicide investigators would have almost no ability to affect.

As the dataset utilized by Wolfgang predated any nationwide use of forensic evidence (or the current scientific standards found therein), it seems reasonable to deduce that subjective forms of evidence (i.e. eyewitness statements, eyewitness identifications, and confessions) would have been the norm in "solving" homicide cases found in Philadelphia, and indeed the entire country at that time.

Wolfgang (1958) also addressed many of the same concepts found in later research on homicide clearance:

> A high portion of unsolved homicides *may* indicate ineptitude of the police. On the other hand, a police force may be well organized, free of corruption, unusually efficient, and well trained; yet because of its being understaffed, fail to have sufficient time to investigate adequately all cases. To these factors that affect the proportion of unsolved homicides should be added: size and density of a community; prevailing mores regarding respect for law and authority; the extent to which the culture pattern ennobles the dignity and worth of individual human life; the degree to which members of the community have internalized prevailing culture values; the amount of internal and external pressure to confess (italics in original, pg. 285).

From this it can be argued that the issues and problems experienced by homicide investigators in working with the public then were as varied and problematic as they are today—and yet the homicide clearance rate remained above 90%.

Reidel and Rinehart (1996) examined 3,066 Chicago murders, committed between 1987 and 1991. They found that:

> The single most important variable to predict whether a murder will be cleared was whether it involved a concomitant felony. Where the murder occurred in the context of a suspected felony, robbery, or rape, it was substantially less likely to be cleared than murders involving arguments or brawls (pg. 97).

In other words, the weapon used, the age, race, and gender of the victim all had little or no predictive value. Further, Reidel and Rinehart (1996) point out:

> The most important variables affecting clearances are community involvement with the police investigation and eyewitness testimony…With respect to clearances, murder is unlike other forms of violence because the victim generally cannot provide information. This means that information relevant to clearances must come from one or more of three sources: (1) the homicide setting; (2) the behavior of third parties; (3) investigative activities (pg. 85).

Homicide setting and the behavior of third parties are things that homicide investigators have little ability to affect—they are by-and-large out of the investigator's control. Investigative activities or investigative tack, on the other hand, is something the homicide investigator has total control over (Fisher, 2000; Geberth, 1996).

Regoeczi, Kennedy, and Silverman (2000), noting that the drop in homicide clearance in the U.S over the last 40 years is similar to the drop in homicide clearance experienced in Canada over the same time period,[1] analyzed homicide clearance rates in both countries. By examining victim and offense characteristics they found a correlation between some of those characteristics and homicide clearance in both countries as a whole—namely that homicides are likelier to be solved if the victim is a child (under 10) or the murder was not connected to another felony—a similar finding to Reidel and Rinehart (1996). They also found that some of these correlations disappeared when the analysis was brought to the state level (comparisons between New York and Ontario).

Further, Regoeczi et al. (2000) undertook a comparison between the U.S. and Canada because they felt that the drop in clearance experienced by both nations may have a similar cause. This is germane to the present analysis in that, if the use of forensic evidence (i.e. DNA) is related to clearance in the U.S., then one would expect this relationship to also exist in other countries where homicides are investigated in a similar fashion and the use of forensic evidence has been comparable (like Canada).

The five hypotheses tested by Regoeczi et al. (2000) all contain variables which cannot be affected by those investigating the homicide (gender, race, and age of victims, use of a firearm, and occurring during the commission of another offense). As such, this study avoided any discussion of how the homicides were investigated and whether or not aspects of the investigation were a factor related to clearance.

Puckett and Lundman (2003) analyzed factors affecting homicide clearance via data collected from homicides in Columbus, Ohio from 1984 through 1992. The analysis they conducted supported four conclusions regarding homicide clearance: homicides in African American neighborhoods have lower clearance rates; extralegal

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[1] Regoeczi et al., (2000), citing data from Cardarelli & Cavanagh (1992) and Silverman & Kennedy (1997) point out that cleared homicides in the U.S. dropped from 93% to 66%, and Canada's clearance rate dropped from 95% to 80% from the years 1961 to 1991 (pg. 135).

factors such as the victim's race do not affect clearances; detective workload does not affect clearances; and detectives work hard to clear all homicide cases.

What is of direct relevance to the current study is an observation made by Puckett and Lundman in evaluating the research presented above (and below). They state that this previous research taken in concert "suggests that homicide clearances rise or fall on the amount of physical evidence created while committing the murder" (Puckett & Lundman, 2003, pg. 175). Puckett and Lundman (2003), relying on the Locard Exchange Principle,[2] claim that the use of weapons that promote close physical contact leave behind more traces of physical evidence for the police to find, and therefore produce higher clearance rates. The authors avoid a discussion of the most likely criticism of this theory—that increased physical contact also increases time and therefore the likelihood of witness involvement.

Litwin (2004) analyzed data from the Chicago Homicide Dataset for the years 1965 through 1995 by examining factors affecting homicide clearance which are primarily "nondiscretionary"—factors those investigating the homicide could not affect. Borrowing from Black's (1976) theory on valued and non-valued members of society, Litwin examined these homicide cases to determine if cases involving "non-valued" members of society had a lower clearance rate. Although his examination does not support Black's theory, Litwin did find that certain factors which the police had no control over—no ability to interpret on their own—were predictive of a case remaining un-cleared.

What is of importance in deference to the current study is Litwin's definition of "non-discretionary" and "discretionary" in relation to homicide investigations. Litwin (2004) lists certain variables as having a non-discretionary status: concomitant felony, victim age (both under 10 and over 65), body location, area-wide adult educational attainment and educational expenditure, racial make-up of educational attainment, income, employment, and residence. He then concludes, "The homicide clearance literature appears to indicate that only nondiscretionary factors affect homicide clearances" (Litwin, 2004, pg. 334). The discretionary variables that he sought to test were 1) the gender of the victim, 2) the race of the victim, and 3) the prior arrest record of the victim (Litwin, 2004). Clearly those investigating homicides can make decisions regarding myriad variables other than the age, race, and prior record of the victim during the course of an investigation (i.e. truthfulness of a witness statement or confessions seem far more salient).[3] In other words, even though Litwin's analysis was originally reliant on the idea that "only factors beyond police control should shape homicide clearances" (pg. 331), his research seems to support the idea that the more subjective the evidence used in a homicide case, the greater the chance the case will be cleared (whether Litwin classifies it as "discretionary" or not).

Addington (2006) examined homicide clearance data provided by the National Incident Based Reporting System (NIBRS). In this research note, Addington tests the utility of NIBRS data against the previous standards in homicide clearance data, the Uniform Crime Report (UCR) and the Supplemental Homicide Report (SHR) of the Federal Bureau of Investigation (FBI). As Addington's focus is on testing a new

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[2] In short, it is not possible to come in contact with an environment without changing it in some small way, either by adding to it or by taking something away from it. This concept of transfer is the so-called Locard Exchange principle and is the basis for a study of trace evidence (Fisher, 2000, pg. 161).

[3] This is of little import to Litwin as his study is designed to test Black's theory of "valued" vs. "non-valued" bias on behalf of law enforcement.

dataset,[4] her focus remains set on comparisons between NIBRS and the UCR/SHR. This is relevant to the current research in that clearance via the UCR can be determined only as a rate—the UCR does not allow for extending the analysis of any one cleared case to specific elements within that case. The SHR does allow for specific analysis of factors related to any given homicide case, however it does not record the clearance status of that case. In other words, to effectively use UCR and SHR data to discover elements related to homicide clearance, one must rely on proxy-measures to determine whether the case has been cleared—most notably the existence of any suspect or assailant information. This, of course, is problematic as there are several ways in which a case may warrant the recording of suspect or assailant information but the case could still remain uncleared. However, by analyzing NIBRS data, Addington's (2006) findings are consistent with other clearance research:

> Analysis of NIBRS data suggest that factors related to evidence play an important role in predicting clearance, considering that knives and contact weapons as well as home location are associated with clearance. These findings are consistent with prior studies by Puckett and Lundman (2003) and Wellford and Cronin (1999), both of which used actual clearance measures collected from police records (pg. 148).

Thus Addington (2006), while showing a great value to the use of the very limited NIBRS data, supports the notion that clearance research is most educational when conducted on data collected from original police records.

Prior Research on Investigative Procedure

Wellford and Cronin (1999) examined 798 homicides that occurred in four large U.S. cities during 1994 and 1995. The study was conducted in four parts, only the last two are relevant here: a logistic regression analysis, and statistical regression models created from correlations between variables and the solving of a case. The instrument used was the Homicide Attribute Coding Instrument (HAC) which consisted of over 220 variables covering over a dozen general topics relevant to the solving of a homicide case. They found that approximately 55 of the variables they tested were positively correlated to a cleared homicide and more than a dozen of those 55 were procedural in nature. Several of these procedural variables have to do with first responder activity. They found that:

> The probability of clearance increases significantly when the first officer on the scene quickly notifies the homicide unit, the medical examiners, and the crime lab and attempts to locate witnesses, secure the area, and identify potential witnesses in the neighborhood (Wellford & Cronin, 2000, pg. 6).

The data they collected also indicate that the number of detectives assigned to the case, the time in which they arrive at the homicide scene, and the use of computer

[4] Addington notes that the NIBRS data she examined represent homicides reported by law enforcement agencies which cover only 17% of the U.S. population.

databases of various types were also strongly correlated with clearance (Wellford & Cronin, 1999).

Puckett and Lundman (2003) draw two conclusions which are directly relevant to police investigative procedures in their analysis of homicide data from Columbus, Ohio. First, detective experience and workload do not affect homicide clearance. Second, the

> …visibility and seriousness of homicide and the singular importance of homicide clearances combine to cause homicide detectives to work aggressively to clear all homicides irrespective of the places where they occur and the characteristics of homicide victims (Puckett & Lundman, 2003, pg. 189).

Puckett and Lundman (2003) felt this was an area to examine as they noted other police duties provide many avenues for evaluation (e.g. writing tickets, misdemeanor, or other felony arrests), but homicide investigators are left with only one course of evaluation—the homicide clearance rate. As such, Puckett and Lundman (2003) wanted to test how such a motivator to complete an investigation would be affected by other "extralegal" factors (such as victim race or place of residence).

This is of particular importance to the present analysis in that it supports the idea that the conscious legitimate effort on behalf of law enforcement could be the fuel behind the effect of unseen changes in investigative decision making. In other words homicide investigators are probably doing exactly what we want them to do—vehemently following a trail of physical evidence. This trail of objective physical evidence may simply be better at keeping "incorrect" arrests from happening than it is at providing new avenues of investigation—suspects are no longer subject to arrest outside of an objective standard of evidence presented by the use of physical evidence.

Homicide Clearance, DNA, and the Corrective Effect

The conventional wisdom mentioned above would require changes to how murders are being conducted or in the relationships or conditions which exist between victim and offender to explain the drop in homicide clearance experience in the last 40 years (which undoubtedly has happened to some degree).[5]

However, when looking for influences that have been both ubiquitous throughout the entire country and increasing incrementally since the 1960s, it would also seem prudent to examine the rise of certain objective forms of forensic evidence; DNA being the most prominently discussed today. As such, the research questions this study seeks to examine, in relation to homicide investigations, are:

1) How often is DNA evidence available in homicide cases and how many investigations actually have an analysis of some DNA evidence available at the pre-arrest stage?
2) How is the use of DNA related to homicide clearance?
3) Could a "corrective effect"—the effect of the increased use of DNA—be related to the drop in homicide clearance?

[5] For a detailed discussion of these changes please see Zahn and Jaimeson (1997).

Method

To research the connection between the use of DNA and a successfully cleared homicide, an analysis was conducted on homicide case files within the Borough of Manhattan, New York City, between the years 1996 and 2003. Case files were selected after an extensive examination revealed how many cases had a forensic analysis of viable DNA evidence available before making an arrest. Then an analysis of exactly what the DNA analysis accomplished within each investigation was conducted with respect to 4 categories: "victim only DNA," "direct link between a tested suspect and evidence from the crime scene," "database could provide further lead," and "insufficient DNA for analysis."

The Borough of Manhattan is uniquely suited to this study as Manhattan is one of the most densely populated areas in America. Therefore, it would be logical to expect issues in crime exacerbated by population density to be very apparent. Further, the transient nature of those residing in parts of Manhattan would suggest a greater number of stranger-to-stranger crimes: crimes for which previous research has indicated DNA evidence would figure more prominently. Also, one would expect the experience of Manhattan homicide detectives[6] to be among the most erudite in the profession, owing to the number of homicides which occur in New York City as well as the NYPD's resources and reputation in law enforcement. As such, an analysis of homicide cases from this Borough can arguably be applied to almost any large metropolitan area in America.

Data Collection

The cohort of homicide case files within the Borough of Manhattan from the years 1996—2003 was sought. Out of the total 1,037 case files, 10 were determined to be incorrectly recorded (they in fact were not homicides) and 80 files were cleared as "exceptional" or "justifiable"—both designations irrelevant to the present analysis. Out of the remaining 947 case files, 354 (or 37.4%) were unavailable leaving a total of 593 files examined. However, the clearance status of each unavailable file was still determinable via information provided by the Homicide Analysis Unit of the NYPD. Cases were unavailable for myriad reasons: the case file was with the prosecutor's office as the case was in or near trial, the file was in transit between various departments, or the file was needed in conjunction with other on-going investigations.

Each located file was then examined for information regarding the collection and examination of DNA evidence. This was determined by examining any "found property invoice" (sometimes called a "voucher"), which is necessary in commencing any action by the two agencies responsible for all serological analysis requested by the NYPD (The Forensic Investigation Division of the NYPD and the Office of the Chief Medical Examiner). Nothing about this study required the identification of anyone involved, and to that end, no victim, suspect, witness, officer, or detective information was recorded in any way.

By examining this request for serological analysis, in conjunction with the date of arrest (found on follow-up reports) and the presence of any report regarding DNA analysis, it was possible to determine whether or not the detectives investigating the

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[6] Point of fact: At this time NYPD does not employ "homicide detectives" per se. The current organizational structure simply assigns detectives to precincts. If a homicide occurs in that precinct it is assigned to one of the presently assigned detectives.

murder had 1) found or considered DNA evidence relevant to the investigation, 2) requested any DNA analysis, 3) had that analysis available to assist them (i.e. implicate a known suspect) or 4) used that analysis to exclude someone (i.e. failed to implicate a tested suspect) from their investigation, whether an arrest was made or not. It should be noted, in deference to the use of DNA (3 and 4 above) that the implication or failure thereof provided by a DNA analysis does not necessarily constitute inclusion, or exclusion, of a suspect in any given investigation. However, clearly a failure to implicate a suspect via DNA analysis would not serve to assist in the arrest of that suspect. Therefore, a failure to implicate would at least provide no helpful information and at most clear a suspect of all suspicion. In other words, a corrective effect would have at least fostered the failure to gather further helpful information, and at most freed someone who was incorrectly suspected.

Therefore, each case was assigned one of four DNA Case Model Designations (DNA-CMD): DNA-CMD-1, DNA is not a factor in the investigation; DNA-CMD-2, DNA analysis was requested, but not used; DNA-CMD-3, a DNA analysis was available in the investigation prior to an arrest; or DNA-CMD-4, a DNA analysis failed to implicate at least one tested subject. The homicide case's clearance status serves as the dependent variable—the case is either open or cleared by arrest. The DNA Case Models themselves will serve as independent variables in examining how clearance is related to each case model. Solved and unsolved cases (the clearance rate) for each category is then calculated and used in exploring the efficacy of DNA evidence in clearing homicide cases.

Hypotheses

The size and clearance rates of DNA CMD-3 and 4 will be used to examine hypothesis 1: DNA evidence has played a substantial role in clearing homicide cases in Manhattan from 1996 to 2003.

The clearance rates for each of the four DNA-CMDs will be used to examine hypothesis 2: Cases with DNA analyses (DNA-CMD-3 and -4) will have higher clearance rates than cases without DNA analyses (DNA-CMD-1 and -2).

The number of cases in which evidence was collected and not examined (DNA-CMD-2) and the clearance rate of this group will be examined in testing hypothesis 3: The building of large DNA databases will significantly assist in raising the homicide clearance rate.

An examination of what the DNA in each case actually accomplished will be conducted in testing hypothesis 4: Has a "corrective effect" caused by the use of DNA evidence been related to the drop in homicide clearance?

Results

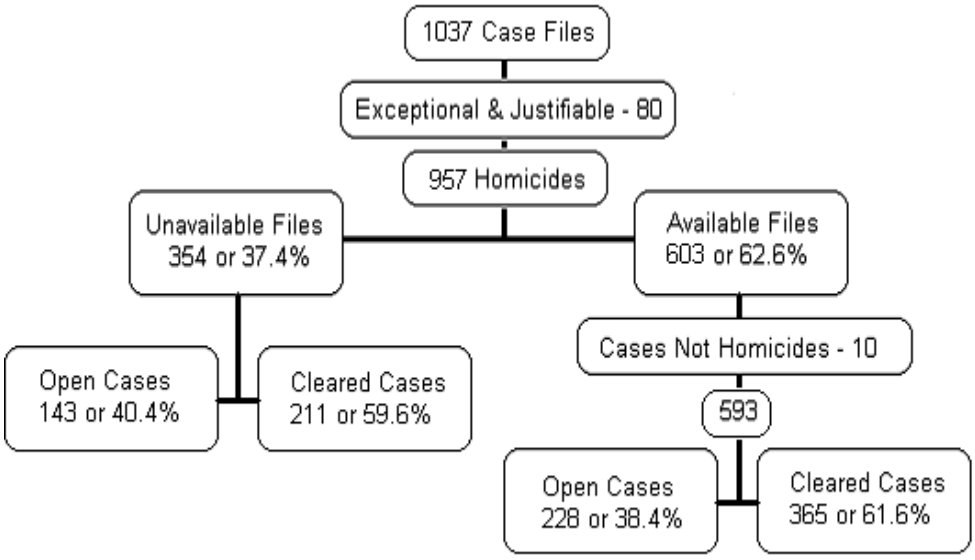
Clearance Rates by Year

From Figure 1 it can be seen that the overall clearance rate for the unavailable cases (59.6%) is very similar to the overall clearance rate for the available cases (61.6%). This finding prima face suggests that there is nothing significantly different between the unavailable and the available cases regarding clearance.

Figure 2 displays the clearance rates for the available and the unavailable files, as well as Manhattan overall, and the U.S. overall, per year. The clearance trend experienced by Manhattan over the time period examined is more sporadic than the

nation as a whole. Manhattan's clearance rate reaches a high of 73% in 1998 and a low of 48% in 2003. The nation as a whole has a much smaller fluctuation—from a high of 69% in 1998 and a low of 62% in 2003. The fluctuations in the clearance rates of the available and unavailable files are greater than the fluctuations in clearance for Manhattan or the nation as a whole. Unavailable files have a high of 73.9% in 2001 and a low of 42.6% in 1996, a span of more than 30%. The available files have a near identical span with a high of 74.1% in 1998 and a low of 44.4% in 2003. From this it seems clear that Manhattan's overall clearance rate seems to more closely resemble the clearance rates of the available files than it does the U.S. overall. This is to be expected as the overall clearance rate for Manhattan is an average of the clearance rates of the available and unavailable files. However, these differences could also speak to possible problems with the generalizability of this study's findings to other cities in the U.S.—although the clearance rate of the files analyzed here (the available files) is representative of Manhattan as a whole, Manhattan may not be representative in clearance of the nation or any specific city within it.

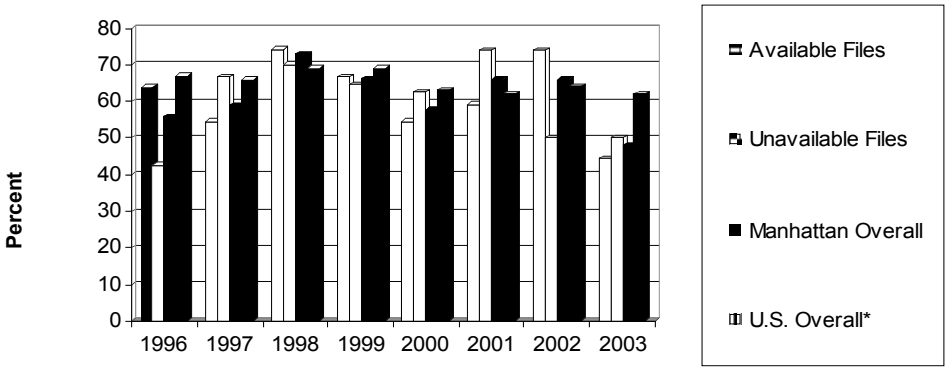
Figure 1.
Overall homicide clearance rates for the Borough of Manhattan, New York City, by file availability, 1996 through 2003



Although the overall clearance rates for the available and unavailable files are not dissimilar (Figure 1), the differences in year to year clearance rates do fluctuate somewhat—the largest gap between the two groups being in 2002. In that year the available files had a clearance rate of 74% and the unavailable files had a clearance rate of 50%; a 24% difference. The smallest gap in clearance occurs in the year 1999—in that year the available case files had a clearance rate of 66.7% and the unavailable cases had a clearance rate of 64.6%. In four years (1996, 1998, 1999, and 2002) the clearance rate for the available files was greater and in four years (1997, 2000, 2001, and 2003) the clearance rate for the unavailable files was greater.

The average difference in clearance rates between available and unavailable files overall was 11.5%.

Figure 2.
Clearance rates per year



Source – Bureau of Justice Statistics Homicide Trends in the United States, http://www.ojp.usdoj.gov/bjs/homicide/tables/clearedtab.htm

The Available Files

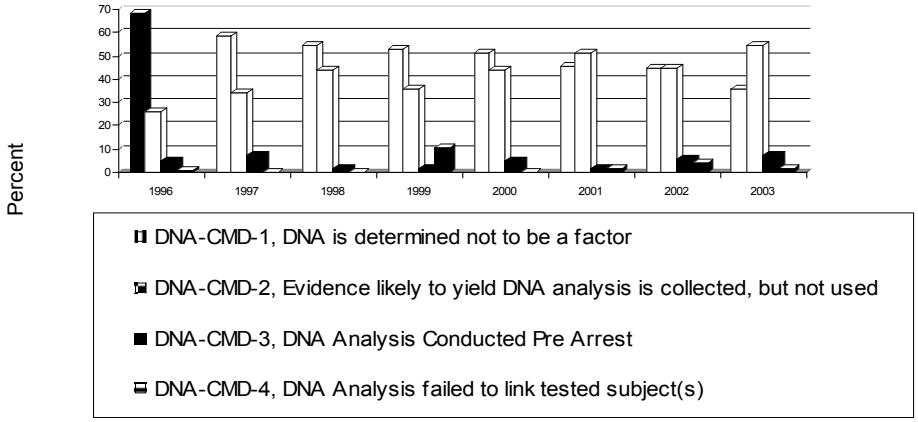
Figure 3 indicates that in 1996, evidence likely to produce a DNA analysis was not collected (and therefore presumably not perceived to be a factor in the investigation) in over 65% of the homicide cases. This percentage drops consistently each year and by 2003 has dropped to around 35%. As expected, this decrease in DNA CMD-1 is matched by an increase in DNA CMD-2: by 2003 more than half the cases involved the collecting of evidence likely to yield a DNA analysis.

This indicates that there has been, within this police department, an increased interest in the use of DNA evidence in solving homicide cases. However, as DNA-CMD-3 and -4 indicate, this interest is not met with a corresponding increase in use. Quite surprisingly, DNA analyses available pre-arrest were found in only 40 cases (DNA CM-3 and 4 combined). As such, of the original 593 cases, only 6.7% were affected by a DNA analysis pre-arrest.

The next logical question—how often is DNA being used in relation to how often evidence likely to yield a DNA analysis is taken from crime scenes?—is assessed by determining the number of cases which could realistically need the help of a DNA analysis in relation to the number of cases which have used a DNA analysis (N = 40). From Figure 3 it is apparent that 270 cases (DNA-CMD-2, -3, and -4 combined) out of a total 593 (or 45.5%) have the potential for the creation and use of a DNA analysis as part of the investigation. Out of the 270 cases that have the potential to use a DNA analysis, only 40 did. This means that analyses of DNA evidence taken from homicide crime scenes are only being conducted in 14.8% of the cases in which a DNA analysis could possibly be conducted. It would therefore seem that homicide investigators are seeking the objective/scientific certainty provided by a DNA analysis

in a very modest number of cases in which such an analysis is possible before making an arrest.

Figure 3.
Percentage of DNA Case Models per year



However, to properly analyze this 14.8% in context we must first ascertain: For how many cases is the certainty provided by DNA really necessary in affecting an arrest? Simon (1991) proposes that there are two types of homicide investigations: "whodunits," in which a suspect is not readily available at the scene and "dunkers" in which "the detective steps over the body to meet the unrepentant…[killer], who has not bothered to change his bloodied clothes …" (pg. 39-40). Simon's colorful example notwithstanding, it would be disingenuous to expect DNA to play a role in cases which Simon (1991) would describe as dunkers. Therefore it would seem logical to examine the use of DNA in only those cases that could be described as whodunits.

Although accepted definitions of "whodunits" or "dunkers" have not been vetted by the existing literature, it would seem cogent to use as a proxy-measure the time lapsed between the reporting of the crime and clearing of the case as a rough indication. As such, the original data provided by the NYPD Homicide Analysis Unit was examined regarding the date of offense and the date of any recorded clearance for the cohort of homicide cases (Figure 1—947 cases total). If these two dates were found to be within 2 days of each other the case was classified as a "dunker." Any case not cleared within 2 days was classified as a "whodunit." Of the original 947 cases[7] 226, or 23.8%, are dunkers. By removing the dunkers from the above analysis we come up with a slightly different percentage of cases which have a DNA analysis

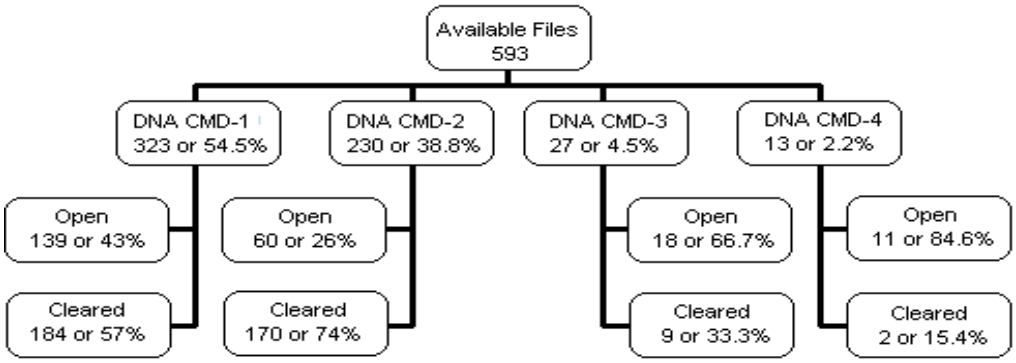
[7] It should be noted that 5 of the 947 cases did not have clear dates stated for the commission of the offence or the date of clearance.

available pre-arrest—the numerator remains the same, 40, but the denominator changes from 593 to 430.

Forty DNA cases out of a total of 430 available whodunits (716 whodunits total, 286 of which were unavailable files) works out to 9.3%. In other words, once we remove all the influence caused by cases that are immediately cleared (the dunkers), the percentage of cases which have a DNA analysis available to them pre-arrest only changes from 6.7% to 9.3%.

Moreover, when the total number of whodunit cases from DNA-CMD-2 (N = 136) is combined with the original 40 DNA cases, a total of 176 cases that could feasibly be affected by a DNA analysis are noted. Therefore, when the dunkers are removed from the analysis, the above stated 14.8% of DNA-CMDs -2, -3, and -4 increases to 22.7%. In other words, in only about one quarter of the cases in which DNA could feasibly be used, it is actually being used (feasibility being determined by both the collection of evidence likely to yield a DNA sample at the crime scene and the lack of an immediate solution [whodunit]). It would seem that even when testing the utility of DNA evidence within the context of Simon's (1991) dichotomy (dunkers and whodunits), DNA analysis is not conducted very often, even when evidence likely to yield a DNA analysis is available. Therefore, in deference to hypothesis 1, DNA alone could not have had a substantial effect on homicide clearance within the Borough of Manhattan. Possible reasons for the infrequent use of DNA analyses in homicide cases are discussed below.

Figure 4.
Overall homicide clearance rates for the Borough of Manhattan, New York City, by DNA-Case Model Designation - 1996 through 2003



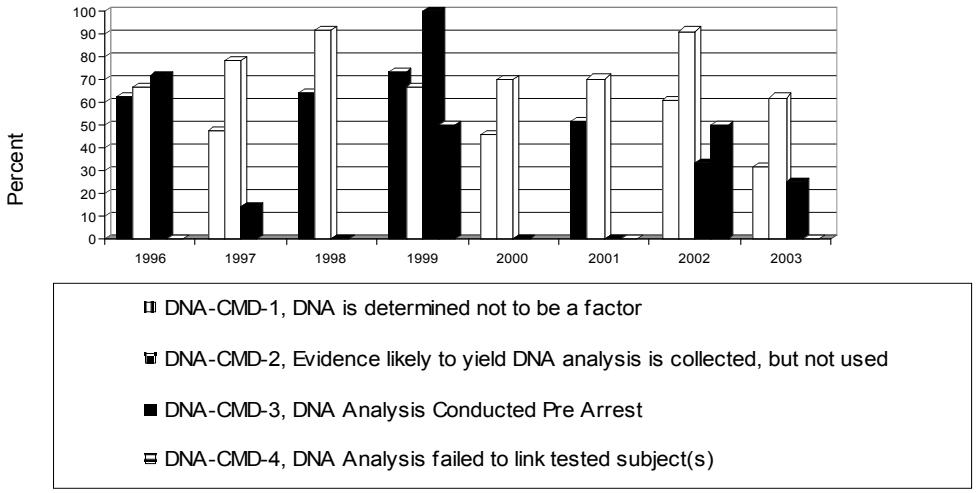
Note: DNA CM-1: DNA not relevant to the investigation;
DNA CM-2: DNA was requested, but not used;
DNA CM-3: DNA analysis available pre-arrest;
DNA CM-4: DNA analysis failed to implicate a tested subject

Clearance rates of the DNA-CMDs

The overall clearance rates of each DNA-CMD can be seen in Figure 4; a year by year breakdown is visible in Figure 5. Overall, the highest clearance rates are found in DNA-CMD-2; the lowest clearance rate found within DNA-CMD-2 is in 2003 and is above 60%. DNA-CMD-1 possesses a lower overall clearance rate but does exceed DNA-CMD-2 in the year 1999. The DNA cases (DNA-CMD-3, and -4) have, per year, wildly fluctuating clearance rates; DNA cases have an overall clearance rate of 27.5%.

At first glance, Figure 5 seems to indicate that DNA has been somewhat useful in certain years; most visibly in 1996, 1999, and 2002. However, in 1996 there were only 8 DNA cases (7 from DNA-CMD-3, and 1 from DNA-CMD-4), in 1999 there were 9 cases (1 from DNA-CMD-3, and 8 from DNA-CMD-4), and in 2002 there were only 5 cases (3 from DNA-CMD-3, and 2 from DNA-CMD-4). As such, the clearance rates from DNA-CMD-3 and -4 do not provide any real information regarding the effectiveness of DNA evidence in producing clearances in comparison to the much larger number of cases found in DNA-CM-1 and -2. However, what is clear is that in deference to hypothesis 2, homicide cases which have used a DNA analysis do not have higher clearance rates than non-DNA cases.

Figure 5.
Clearance rates of DNA Case Models per year



Implications for DNA Databases

Today, the building of large databases in which the DNA of past offenders can be easily and inexpensively compared to DNA found at crime scenes is at the forefront of many criminal justice policy initiatives (FirstGov, 2006). These initiatives are largely reliant upon the assumption that matching someone's DNA to a crime scene will be the defining measure of the matched suspect's guilt. The efficacy of building large DNA databases as a means of clearing more homicide cases is directly tied to this principle (Fisher, 2000; Geberth, 1996), and can be examined by looking at the number of open cases in which evidence likely to yield DNA was collected but not analyzed or used in relation to clearance, and those cases in which a DNA analysis exists that are still open. From Figure 4 we can see that 60 out of the 230 cases which asked for a DNA analysis and did not obtain it are open and therefore the possibility exists that the use of a large DNA database could possibly assist in clearing those 60 cases in the future. This 60, plus the 29 cases in which DNA evidence is available/used but no arrest has been made (DNA-CMD-3 and 4), gives a total of 89 cases, out of an original 593 (or 15%); in all other cases an arrest was made through other means, DNA was already being used successfully, or DNA was determined not to be a factor. However, out of the 40 DNA cases analyzed, 16 (or 40%) discovered only the victim's DNA (Table 1). Therefore, if we are to expect that 40% of the time DNA taken from homicide crime scenes will only come back to the victim, the resulting number of cases which would most likely be afforded a DNA match between a suspect and evidence from a crime scene by the use of a large DNA database drops to 54. In other words, if DNA from every human being in America was available for comparison to the DNA found at homicide crime scenes, this data indicates the *maximum* possible increase in overall homicide clearance to be approximately 9.1% (54 out of 593).

However, given the clearance rates of DNA-CMD-3, and -4, it would seem highly unlikely that all of the cases that have DNA evidence available for analysis would be cleared if such a database did exist. In other words, it could very well be that a match between a known individual and a DNA sample taken from a crime scene may be less incriminating that previously believed. Given the nature of the crime of homicide—the prerequisite emotion and proximity between victim and offender—the ability to place certain suspects in proximity to the crime scene may have little or no investigative value. Imagine the case of a homicide believed to have been committed by an intimate partner of the victim. If that victim were killed in the home they both shared (bedroom, bathroom, or kitchen), the presence of the other's DNA at the scene may be of little or no investigative value as the suspected individual may have deposited that DNA at anytime in the past, not necessarily in conjunction with the homicide.

From Table 1 it is evident that in 6 of the 40 cases (or 15% of the time) the DNA analyzed found a match between a tested subject and evidence collected from the crime scene. However, out of these six cases, only three resulted in an arrest. From this it can be clearly seen that a DNA match between a known individual and evidence from a crime scene does not necessarily equate to clearing that homicide. There may be many reasons for a DNA match not translating into an arrest in homicide cases. The above example notwithstanding, another possibility found in one of the cases analyzed, was that the DNA analysis did not single out any one person. In that case, a woman had been killed and the investigation focused on those whom she had recently been sexually involved with—an excellent investigative tack, given the other

available information at the scene. However, when the resulting DNA analysis came back indicating five separate male donors, all of which were already under suspicion, the DNA analysis did not serve to assist an arrest, as the DNA analysis did not provide the police any new information. In fact, there existed myriad convoluted issues regarding the uses of the DNA analyses within the 40 cases examined. As such, it would be erroneous to believe, even if DNA databases could provide all of the cases in DNA-CMD-2 with matches between known individuals and evidence from crime scenes, that they would end up being cleared because of it.[8] Therefore, in deference to hypothesis 3, it would seem likely that the creation of large DNA databases will not assist in significantly raising the homicide clearance rate. Hypothesis 4 will be addressed in the discussion section below.

Table 1.
How DNA evidence was used in each of the 40 DNA cases (CMD-3 and -4)

	CMD-3		CMD-4		Total
How DNA Was Used	Open	Cleared	Open	Cleared	
Victim Only DNA	8	7	1	0	16
Direct Link	2	2	1	1	6
Database Could Provide Further Lead	6	0	9	1	16
Insufficient DNA for Analysis	2	0	0	0	2
Total	18	9	11	2	40

Note: Victim only DNA: All DNA analyzed came back to the victim;
Direct Link: DNA analysis provided a link between a known suspect and evidence from a crime scene or victim.
Data Base Could Provide Further Lead: Representative of a database of the entire U.S. Population.
Insufficient DNA For Analysis: A determination made by the OCME in the attempt to analyze submitted evidence.

Discussion

In using a DNA analysis, the most salient variable in deference to a homicide investigation is the time involved in processing the evidence in question. The shortest turn-around time for the scientific analysis of DNA evidence in any of the 40 DNA cases examined was several weeks—the longest was several years. Clearly the

[8] Accepting the limitations of the tiny numbers analyzed here (6 direct links with only 3 arrests), it could be argued that only half of those cases which receive a match will end in arrest. Therefore, it could be that the most realistic expectation for an increase in homicide clearance via the use of DNA, even if DNA from every person in America were available, to be around 4.6%.

establishment of an investigative tack (if not the resolution of most homicide cases which are cleared) would have taken place within the first several weeks of an investigation (for example, 69.44% of the cleared cases examined in the present study were cleared within one month). Further, because of the delay and expense[9] in analyzing DNA evidence, detectives may only be turning to DNA evidence after all other forms of evidence and investigative techniques have been exhausted. Therefore, the very few cases which have been afforded a DNA analysis pre-arrest (N = 40) may simply be the result of perceived necessity on behalf of those investigating the homicide (i.e. investigators only turn to DNA after everything else has failed). However, it should be noted that this necessity is based on the ability to produce an arrest, not the scientific or objective accuracy of that arrest. This can be seen in the present analysis: twice as many cases in 2003 had evidence likely to yield DNA (DNA-CMD-2) taken from crime scenes than in 1996, and this Case Model Designation has the highest overall clearance rate. From this it could be concluded that within the Borough of Manhattan investigators are doing a better job today of covering all the forensic bases at the scene, but by the time the evidence has been analyzed, an arrest has already taken place. As such, it would behoove those who have already secured an arrest through more traditional means (i.e. confessions or eye-witness testimony), not to mention fiscally expedient, to stop the analytic process for that case, allowing those resources (both manpower and scientific analysis) to be used for other cases which have not been cleared.

Expedience vs. Accuracy

The true cost of a trade-off of accuracy for expediency, in both money and miscarriages of justice is unknown. However, the literature on homicide investigation makes clear the desire for homicide detectives to rely on the efficacy of forensic evidence in general, and DNA in particular, in solving homicide cases.

> Today, forensic DNA typing is having a significant impact on violent criminal investigations and has revolutionized the ability to identify criminals through national DNA offender data bases (Fisher, 2000, pg. 217).
>
> The astute homicide investigator will use these new advances in scientific law enforcement [DNA] to eliminate or include suspects during the investigation and add to the body of evidence for a subsequent trial (Geberth, 1996, pg. 539).

However, Pratt, Gaffney, Lovrich, and Johnson (2006) found that there are currently approximately 96,000 open homicide cases in the U.S. awaiting the results of a DNA analysis. These two opposing forces, the desire to clear homicides accurately and the backlog created by the time and expense of DNA testing, create a rather unique challenge for those investigating homicides today. This challenge is best summed up by the question: How certain do we need to be before we can make an arrest in a homicide case? This challenge is, of course, not only experienced in homicide investigations. Many different types of crimes can utilize DNA evidence

[9] Conversations with the Forensic Investigations Division and the Central Investigation & Resource Division of the NYPD have indicated that in 1996 a single DNA analysis cost in excess of $1,000. By 2007 that cost has been projected to drop to approximately $300 or less.

(Pratt et al., 2006, state that there are 446,723 other cases awaiting results of a DNA analysis). However, given the nature of some of these other crimes, the evidence created by the DNA analysis may be much more incriminating. Take for instance the case of a burglary, or a stranger-to-stranger rape. The presence of the suspect's DNA in almost any capacity would be incriminating and suggest guilt. However, in most homicide investigations the relational distance between victim and any potential offender may negate the power this form of evidence has with other crimes, like burglary or any stranger-to-stranger offense.

Clearly society wants detectives to use physical evidence in generating probable cause as much as possible—it makes for more accurate arrests. Further, homicide detectives are only given one avenue of evaluation by their superiors, their clearance rate (Simon, 1991). In other words, homicide detectives are highly motivated to make arrests. The number of "whodunit" cases in DNA-CMD-2 and its overall clearance rate may be indicative of the fact that in a significant number of cases the evidentiary certainty provided by physical evidence has succumbed to the expediency of using other forms of evidence which meet the evidentiary value of probable cause to make an arrest. As such it seems clear that a great deal could be learned about the true success rate (or the "correct" rate) of homicide arrests and the use of DNA analysis, if the evidence likely to yield DNA in all the cases in DNA-CMD-2 could also be analyzed. Whatever the outcome of analyzing all possible DNA evidence found at homicide crime scenes, Table 1 indicates that a significant number (11 out of 40, or 27.5%) of DNA analyses have excluded a tested subject and remained open. However, that means that only 1.8% of the total number of cases (11 out of 593) could have been corrected by a DNA analysis. Therefore, in deference to hypothesis 4, a corrective effect fostered by DNA evidence alone is impossible for this sample. However, how all forms of objective physical evidence working together over the last 40 years may have produced a corrective effect has yet to be examined, and therefore is an excellent area of future research.

Summary

There is no doubt that the analysis of DNA evidence from crime scenes *can* be a powerful tool in determining the identity of the subjects responsible for that crime. However, the current analysis throws some doubt on exactly how useful DNA can be in clearing homicide cases. The overall percentage of cases that have a DNA analysis available to them pre-arrest is 6.7%. When we account for the number of cases which have no investigative need for forensic evidence (the dunkers) this percentage rises to 9.3%. Only 22.7% of those whodunit cases which collected evidence "likely to yield a DNA analysis" (DNA-CMD-2) had a DNA analysis available to them pre-arrest. Further, the creation of larger DNA databases will most likely only modestly raise homicide clearance (at most 9.1%), given the number of cases which can be assisted by a DNA analysis and the number of direct DNA links between crime scenes and known suspects which did not end in arrest.

Many possibilities still exist regarding the use of DNA evidence at the investigative stage of a homicide. As the time needed to process DNA evidence may be at a minimum several weeks, detectives may be seeking its use in only those cases where they have no other evidence to go on. Therefore, the present analysis could be pointing out a refinement to the efficacy of using DNA evidence. The use of DNA analyses may not help a great deal in increasing clearance rates, but it may stop the

police from making a certain number of arrests in cases where DNA evidence is analyzed and provides information favorable to the accused (i.e. the corrective effect).

Clearly within a significant percentage of DNA cases the DNA analysis failed to implicate a tested subject and the case remains open (Table1; 11 out of 40 or 27.5%). Therefore, it could be said that when a DNA analysis is available pre-arrest, over one-quarter of the time the analysis serves in some capacity to prevent what *could* have been a wrongful arrest had that DNA analysis not existed. However, given the tiny overall number of DNA cases (6.7%), drawing such a conclusion based solely on DNA evidence would be erroneous.

Either way, it seems clear that before we can understand the significance of DNA evidence to homicide investigation, it must be used much more often. To accomplish this, two things are made apparent by the present analysis. First, the analysis of DNA evidence must be made available to the homicide investigator more quickly than it has in the past. Second, as the cost of DNA analyses continues to drop, those cases in which DNA evidence is available for analysis must be provided the benefit of that analysis. Only then can we get some adequate understanding of how DNA evidence has, and can, assist in increasing the efficacy of homicide investigations.

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NON-PRECEDENTIAL OPINIONS CAUSE AND PERPETUATE MISCARRIAGES OF JUSTICE

Hans Sherrer

Abstract

After gaining proponents in the 1960s, the practice of appellate courts issuing non-precedential opinions, which in the United States are synonymous with non-published opinions, has reached the point that they are used to resolve the overwhelming majority of federal and state appeals. This paper examines negative effects non-precedential opinions have on the administration of justice in the United States; in particular, how they allow judges to expeditiously resolve the many cases they consider of lesser importance by sidestepping the litigant's expectation of being fairly and equally treated. The conclusion is reached that the negatives associated with non-precedential opinions warrants abandoning the practice, and publishing all federal and state appellate court opinions as precedential.

Non-Precedential Opinions Cause and Perpetuate Miscarriages of Justice

A cornerstone of the legal system in the United States is the principle of "equal justice for all." Notions related to that principle are the "equal protection of the law" and "due process" that are intended to ensure that litigants will be treated fairly during their day in court.[1] An aspect of that fair treatment is the recognition that a criminal defendant must be protected from the arbitrary, prejudicial, or capricious actions of the police or prosecutors, by the firewall provided by a trial court judge, and if necessary, appellate court judges.

That protection is dependent, however, on the involvement of judges able to be neutral arbiters. That ideal behavior is subject to the real-world recognition that the decision making process of every federal and state judge in the United States is subject to being colored by varying shades of deference to executive authority. This is to be expected because of the politically laden processes that are used to select federal judges, and to select or elect their state counterparts.[2] It is a reflection of the type of person able to successfully pass through the filters necessary to become a

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[1] Although this article primarily deals with criminal cases, its principles also apply to civil cases involving a government agency or actor(s) as either a defendant or plaintiff, when the opposing party is not another government agency or actor(s).

[2] See e.g., Hasnas, John, The Myth of the Rule of Law, 1995 *WIS. L. REV.* 199 (1995). "Consider, for example, people's beliefs about the legal system. They are obviously aware that the law is inherently political. The common complaint that members of Congress are corrupt, or are legislating for their own political benefit or for that of special interest groups demonstrates that citizens understand that the laws under which they live are a product of political forces rather than the embodiment of the ideal of justice. Further, as evidenced by the political battles fought over the recent nominations of Robert Bork and Clarence Thomas to the Supreme Court, the public obviously believes that the ideology of the people who serve as judges influences the way the law is interpreted" *Id.* at 200. See also Hasnas' discussion of the educational, behavioral, and ideological mold the lawyers fit who become state and federal judges *Id.* at 215.

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judge, that a significant percentage of state and federal judges were formerly employed in some capacity as a government attorney.[3]

In this country there are two checks on overt displays of judicial bias.[4] One check is conducting court proceedings in public, and the consequent availability of a case's documents and transcripts.[5] The rare instance of when a judge is admonished for ethical misconduct occurs because proceedings are public.[6]

The second check is *stare decisis*,[7] which is expressed in the common law as the "doctrine of fairness."[8] Stated simply, that means fairness and consistency in application of the law requires that similarly situated litigants should be treated equally regardless of the judge(s) involved. Thus, if defendant Jones' case was dismissed because of a particular police or prosecutor impropriety, then *stare decisis* dictates that defendant Smith's similar case under a different judge needs to likewise be dismissed.

Stare decisis is embodied in the principle of precedent, that within a court's jurisdiction a legal opinion about a factual situation is to be respected as having a binding effect on future courts considering a substantially similar situation. That all decisions of a court have precedential value was a given for the first 175 years of the United States' history, and it is integral to the common law upon which this country's legal heritage rests.

I. Two Tier System of Opinions Created

A revolutionary assault on precedent was launched in 1964. In that year the Judicial Conference of the United States (Conference) issued a report recommending, "That the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct."[9] The impetus behind the Conference's recommendation was to limit the growth in the number of legal volumes necessary to store opinions, by creating a heretofore unknown class of non-precedential opinions that were not published as an opinion of the court. The idea was based on the assumption that most cases involve factual situations resolvable by established legal rules, and consequently it would be duplicative to publish the opinion in any factually

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[3] An example of this is that eight of the current members of the U.S. Supreme Court worked as a government attorney in some capacity prior to becoming a member of the federal judiciary. The only exception being Justice Ruth Bader Ginsburg.

[4] In a criminal case, the deference of judges to executive authority can manifest itself subtly and not-so-subtly in rulings, body language, verbal queues, and courtroom treatment of prosecutors and their witnesses, as well as in numerous other ways from the time of a defendant's arraignment through resolution of his or her direct appeal, and any subsequent habeas proceeding.

[5] For criminal defendants the right to a "public trial" is embedded in the Sixth Amendment to the United States Constitution, and applied to the states by the Fourteenth Amendment.

[6] All the states have judicial ethics rules that are enforced by a judicial conduct commission, and there is a Code of Conduct for United States Judges that can be enforced against a federal judge violating one or more of its provisions.

[7] *Stare decisis*. Lat. To abide by, or adhere to, decided cases. Policy of courts to stand by precedent and not to disturb settled point (citation omitted). Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, when facts are substantially the same; regardless of whether the parties and property are the same (citation omitted). *Black's Law Dictionary*, Sixth Edition (p. 1406). Minneapolis: Thomson West (1990).

[8] Dworkin, Ronald (1977). *Taking Rights Seriously* (p. 113). Cambridge: Harvard University Press (1977).

[9] Judicial Conference of the United States, *Reports of the Proceedings of the Judicial Conference of the United States* 11 (1964).

similar case that followed the precedent setting case.[10] The time and energy judges spent thinking about and writing opinions could thus be focused on "important" cases involving the development of new legal rules that would be published and considered precedential. All other cases that could be quickly resolved by application of existing legal rules would be relegated to non-published status and not citable as precedent. The Conference's recommendation was much more than a procedural revision: it was a substantive alteration to a critical component of this country's legal system.

In 1971, the First Circuit Court of Appeals became the first federal circuit court to adopt a rule authorizing the judges deciding a case to issue an unpublished opinion that would only apply to that case and thus be barred from citation as precedent.[11] Within the next few years all the federal circuit courts adopted rules that to varying degrees restricted publishing and citation of selected opinions. A majority of state appellate courts did likewise.[12] Those rules triggered the creation in this country of what U.S. Supreme Court Justice John Paul Stevens described in 1985 as "a body of secret law," that only applies to the litigants of the particular case under review.[13] In recognition of the special status accorded published cases, they have been referred to as first-tier cases, while consistent with non-published cases being considered less important, they have been referred to as second-tier cases.

For three decades the revolutionary new system of appellate courts routinely issuing decisions that were neither published nor allowed to be considered precedential, was implemented with little fanfare.[14] Members of the general public, and even some lawyers, only became aware of it if they happened to be involved in a civil or criminal case secretly disposed of with an order or memorandum stamped "do not publish" or "not for publication." The practice expanded to the point that in 2006, 84% of federal circuit court decisions were non-published,[15] and 93% of California Court of Appeals decisions were non-published (97% of criminal case opinions were non-published).[16]

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[10] Opinions selected for precedential (published) status would include those that established a new rule of law, applied an existing rule to a set of facts significantly different from prior published opinions, modified an existing precedent, resolved an apparent conflict in the law, or involved a legal issue concerning a matter of public interest.

[11] The State of California acted in 1964, the year of the Conference's recommendations, to adopt Court Rule 976 that established a non-publication rule for the state Court of Appeals. See, *Cal. Rules of Court*, rule 976.

[12] Serfass, Melissa M. and Jessie Wallace Cranford (Fall 2004). Federal and State Court Rules Governing Publication and Citation of Opinions: An Update, *The Journal of Appellate Practice and Process*. As of the fall of 2004, 45 states (plus the District of Columbia) limit non-published decisions to non-precedential status.

[13] C*ounty of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985) (Stevens. J., dissenting). Justice Stevens observation is consistent with the fact that an opinion is published so that the legal community specifically, and society in general, can be aware of the legal standard(s) that governed the factual issues involved in the case—which are precedential to other cases. While in contrast, a non-precedential opinion becomes part of an underground body of secret law that at best, officially may only have persuasive value in deciding the outcome of future cases.

[14] Although non-publishing an opinion and its lack of precedentiality are not the same thing, in the United States the two concepts invariably go hand in hand. In the past there have been unwritten opinions that carried the weight of precedentiality, but since written reports became the norm in the United States, the publishing of an opinion has conferred upon it the status of being precedential.

[15] U.S. Courts of Appeals (Excludes Federal Circuit). *Type of Opinion or Order Filed in Cases Terminated on the Merits After Oral Hearing or Submission on Briefs*. (Year ending June 30, 2006.) Table 2.5. Retrieved August 29, 2007, from U.S. Courts website: http://www.uscourts.gov/judicialfactsfigures/2006/Table205.pdf. Table 2.5 lists that 68% of federal circuit court opinions were non-published in 1990, 76% in 1995, and 80% in 2000. So there has been a steadily increased reliance on resolving a case with a non-published opinion.

[16] Percentage of Majority Opinions Published Courts of Appeal, Fiscal Year 2005–06, Table 9.

II. Non-Precedential Opinions Hit the Radar Screen

Reliance on non-precedential opinions grew without scrutiny from within the legal community until August 2000. That is when a furor was created in legal circles by the ruling of a panel of federal Eighth Circuit Court judges that the Circuit's non-precedential (non-citation/non-publishing) rule violated Article III of the U.S. Constitution.[17] Based on the historical common law tradition predating the U.S. Constitution of judges relying on the precedential value of any prior opinion to decide a case, Judge Richard Arnold wrote for the panel in *Anastasoff v. United States* (2000), that the rule "insofar as it would allow us to avoid the precedential effect of our prior decisions purports to expand the judicial power beyond the bounds of Article III."[18]

The Eighth Circuit subsequently vacated that decision as moot when the civil dispute between Faye Anastasoff and the Internal Revenue Service that gave rise to the case was settled. However, the controversy triggered by the *Anastasoff* decision resulted in numerous articles in law reviews and legal publications discussing the pros and cons of non-published and/or non-precedential decisions, and the creation of at least one website devoted to the subject.[19]

III. Ways That Non-precedential Opinions Differ From Precedential Opinions

The research inspired by the panel's ruling in *Anastasoff* supports a number of conclusions. The following are brief explanations of 14 of those conclusions.

Non-precedential Opinions Depart From Historical Norms

Classification of selected court opinions as non-precedential is a radical departure from the centuries-old practice of considering every opinion as precedential. As Richard Cappalli observed in *The Common-Law's Case Against Non-Precedential Opinions*, "The non-precedent regimen starkly reverses centuries of common law tradition." [20]

Future Courts Have Historically Determined an Opinion's Precedentiality

It is integral to the common law that whatever aspect of a particular opinion is precedential can only be determined by a court in the future confronted with similar circumstances—not by the court issuing the opinion.[21] A non-published opinion

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2007 Court Statistics Report (p. 29). Retrieved August 29, 2007, from California Courts website: http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf. California's percentage of non-published opinions is similar to other states. In 2000, 85% of the Minnesota Court of Appeals opinions in criminal cases were non-published. Borger, John and Chad Oldfather (December 2000). The Uncertain Status of Unpublished Opinions. *Bench & Bar of Minnesota*. Retrieved August 29, 2007, from Bench & Bar website: http://www2.mnbar.org/benchandbar/2000/dec00/unpublished.htm

[17] *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 8/22/2000).

[18] *Anastasoff*, 223 F.3d at 900.

[19] The Committee for the Rule of Law's website is, http://www.nonpublication.com (Last visited August 29, 2007.)

[20] Cappalli, Richard B. (2003). The Common Law's Case Against Non-precedential Opinions, *Southern California Law Review*, 76:755, 772.

[21] *Id*. at 774-775.

reverses that principle by having the judges who decide a case determine the precedentiality of their own ruling.

An Opinion's Precedentiality Can Be Concealed by Designation for Non-publication

The key issue of a case decided by an opinion designated as non-precedential can be resolved by establishing what is in fact a recognizable new rule of law or the refining of an existing one. The non-published opinion is thus precedential—but not citable as such by other courts. These hidden precedential opinions have been described as a "shadow body of law"[22] created by judges inappropriately exercising their discretion to designate an opinion for non-publication. One commentator described as "frightening" the common practice of sweeping "under the rug" precedential opinions involving controversial, difficult, or complex issues, by their designation as non-precedential.[23] One consequence of this practice is that judges are routinely violating court rules by designating what they know are precedential decisions for non-publication status.[24] This practice is possible in part because the judges involved in a case can summarily, and in secret without any public explanation, designate an opinion for non-publication.[25]

Less Attention is Devoted to Deciding and Producing Non-precedential Opinions

Less attention is devoted to producing opinions that are not published for citation as precedent. An effect of that is documented by a June 2005 Federal Judicial Center report that analyzed 650 randomly selected cases from all 13 federal circuit courts.[26] The 15% of the opinions that were published averaged 5,137 words. That is 648% more words than the non-published opinions that averaged 793 words.[27] The intuitive insight that non-published opinions are given less attention than published opinions is borne out by their significantly lesser length. A published opinion can be expected to have a statement of the relevant facts, a recitation of the legal issues under review, the current state of the law as it applies to the facts and legal issues, and what if any new legal rules are needed to resolve the legal issues related to the case's facts. Consequently, the one or few sentences of the court's order are understandable in the

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[22] *Id*. at 764, note 52; and also note 53.

[23] Mandell, Joshua R. (April 2001). Trees That Fall in the Forest: The Precedential Effect of Unpublished Opinions, *Loyola of Los Angeles Law Review*, 34:1255, 1264.

[24] The flip side of this situation is that unbeknownst to the parties involved, judges are known to rely on non-precedential opinions when determining the outcome of a case. In California, 58% of the appellate court judges acknowledged relying on non-precedential opinions. See, Schmier, Kenneth J. and Michael K. Schmier (November 4, 2005). Justices Carve Exception to No-Cite Rule, *The Recorder* (San Francisco, CA)., Retrieved August 29, 2007, from The Committee for the Rule of Law's website, http://www.nonpublication.com/doaswesay.htm

[25] This is the practice in federal court, and the author has not found any state procedure that deviates from the secrecy enshrouding designation of an opinion for non-publication.

[26] Reagan, Tim, *et al* (June 1, 2005). *Citations to Unpublished Opinions in the Federal Courts of Appeals*, Retrieved August 29, 2007, from Federal Judicial Center website: http://www.fjc.gov/public/pdf.nsf/lookup/Citatio1.pdf/$File/Citatio1.pdf

[27] *Id*. This situation is particularly pronounced in four circuits: in the Fourth Circuit 98% of the opinions were non-published and they averaged 273 words; in the Fifth Circuit 94% of the opinions were non-published and they averaged 390 words; in the Ninth Circuit 92% of the opinions were non-published and they averaged 557 words; and, in the Eleventh Circuit 98% of the opinions were non-published and they averaged 557 words. The report's findings were consistent with the belief that the Fourth, Fifth, and Eleventh Circuits are particularly defendant-unfriendly federal appeals courts, while it also indicates that in spite of its reputation to the contrary; the Ninth Circuit may be no better for defendants.

context of the entirety of the opinion. In contrast, the shortened length of a non-published opinion is accomplished by a combination of truncating or omitting the statement of facts, limiting or omitting a recitation of the legal issues, and restricting or omitting the current state of the law. Consequently, the focus of an unpublished opinion is on the court's order. Depending on the degree that a discussion of the factual and legal issues is omitted, the order must literally be taken on blind faith that the judges had a legitimate basis upon which to base their judgment.

A Judge Typically Does Not Reason and Write a Non-precedential Opinion

Non-precedential opinions are typically reasoned and written by a clerk or staff attorney who may lack experience or training in "legal methods" of understanding and interpreting case law and statutes.[28] Thus, those opinions can be so lacking in consistency with legal norms that they have been described as "cheesy." [29]

Precedential Opinions Are Weighted to Favor the Prosecution

Publishing only selected opinions as precedential allows the weighting of those opinions to favor prosecution-friendly arguments consistent with the executive deferential world-view of the judges involved.[30] In contrast, defendant-favorable decisions are more likely to be designated for non-publication status.

Non-precedential Opinions Are "Dreadful in Quality"

The quality of non-published decisions is so inferior that they have been described as "dreadful in quality."[31] This can be partially attributable to a judge's lack of oversight after a case is designated for "second class" processing by the bureaucratic decision of the judge's clerk or staff attorney who filtered the case based on various factors. Those factors can include the opinion's anticipated lack of precedential value, or if it doesn't concern an issue of interest to the judge or possibly the staff member(s) reviewing it. Federal Ninth Circuit Court Judge Alex Kozinski has written, "Human nature being what it is, there is a strong tendency to devote a disproportionate amount of judicial time to the big cases and to give short shrift to the small ones."[32]

An Opinion's Arbitrariness Is Concealed By Non-precedentiality

The arbitrariness and inconsistency that underlies an opinion can go undetected by everyone except the parties involved, if it is designated as non-precedential. Non-publishing such opinions enables the deliberate discretionary application of precedents due to a bias or preference for a particular litigant or issue by the judge, or possibly the clerk or staff attorney who screened the case.[33] A litigant with case law favorable to the facts of his or her case can be ruled against by a court that either

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[28] Cappalli, *supra* at 790.
[29] A non-precedential opinion that was particularly poorly reasoned in the course of failing to apply the controlling precedents to the case's facts was described to the author by a federal public defender as "cheesy."
[30] See, Note 2.
[31] Cappalli, *supra* at 789.
[32] Kozinski, Alex. (2004). The *Real* Issues of Judicial Ethics, *Hofstra Law Review*, 32(4): 1095, 1097.
[33] Cappalli, *supra* at 787.

ignores or misstates that case law, or ignores or misstates the key fact(s) so it doesn't appear the case law applies[34]—with the subterfuge tucked away in a non-precedential opinion. Thus, non-published opinions allow a precedent to "rule" publicly in name, while being ignored in practice.

Non-precedential Opinions Reduce the Workload of a Judge

The designation of a case for non-precedential status and the lesser attention to details devoted to it can be due to judicial laziness, since many appellate judges view their position as a form of semi-retirement.[35] It is thus an effective method of reducing a judge's workload, by clearing his or her caseload of cases deemed less important without personally spending appreciable time considering their merits. That may be one reason "that judges support the non-precedent policy *en masse* against the near unanimous opposition of lawyers and academics."[36]

Ignoring, Misrepresenting, or Ignorance of a Case's Facts Can Be Concealed in a Non-precedential Opinion

No discernable justification for a decision is set forth in many non-precedential opinions. Those opinions are issued without substantive legal support based on the case's facts.[37] That can be due to a lack of understanding about a case's facts, ignoring them, deliberately misrepresenting them, or by shrinking or stretching them.[38] As law Professor Richard Cappalli phrased it, "Today's appellant wins and tomorrow's appellant loses on the same basic facts."[39] An opinion's designation for non-publication status, however, virtually eliminates the likelihood that the judges involved will experience any negative public or professional fall-out from issuing an opinion based on substantive factual inaccuracies.

Non-precedential Opinions May Be Extrajudicial

Designating selected opinions as non-precedential may be an illegitimate extrajudicial practice. It is legitimate to ask several questions. Is a litigant deprived of due process by being accorded the significantly less attention to his or her case that is indicated by the issuing of a non-precedential opinion? Is that same person also deprived of equal protection of the law by their second class treatment compared to a litigant whose opinion is published? Indeed, less and different justice is reserved for a litigant

[34] See e.g., D'Amato, Anthony (1990). The Ultimate Injustice: When a Court Misstates the Facts, *Cardozo L. Rev.* 11: 1313. See also, Cappalli, *supra* at 769. "After studying non-precedent opinions issued by the Seventh Circuit, a student author surmised that the appellate bench was stretching case facts to fit within precedents or stretching precedents to fit the facts before them" *Id.* at 769. For a detailed examination of the federal Fourth Circuit Court of Appeals' alteration of facts in its opinions related to capital cases, in order to avoid applying a precedent that would require granting a new trial or resentencing, see, Johnson, Sheri Lynn (2006), Wishing Petitioners to Death: Factual Misrepresentations in Fourth Circuit Cases, *Cornell Law Review*, 91:1105.

[35] Barnett, Stephen R. (Fall 2003). No-citation Rules Under Siege, *The Journal of Appellate Practice and Process*, 5(2).

[36] Cappalli, *supra* at 760. (citation omitted)

[37] See, Note 34.

[38] Cappalli, *supra* at 769.

[39] *Id.* at 787.

without political power or influence.[40] It is thus with good reason that resolution of a case by a non-precedential opinion conveys the impression that the losing party was short-shrifted. Professors William Reynolds and William Richman observed in *The Non-Precedential Precedent*, "Justice must not only be done, it must also appear to be done."[41] Under even the lowest level of scrutiny non-precedential opinions can appear to not do justice, and thus may be considered an extrajudicial procedure.[42]

Judges Secretly Rely On Non-precedential Opinions

Contrary to court rules, judges are known to secretly rely on non-precedential opinions as if they had precedential effect.[43] This is being done unbeknownst to the parties involved, in jurisdictions that either bar citing a non-published/non-precedential opinion, or only permit doing so for its persuasive value in supporting an argument.

Non-precedential Opinions Are Not Procedurally Transparent

There is an aura of secrecy enveloping a non-precedential and non-published opinion that is contrary to the procedural transparency guaranteed by the Constitutional requirement for a public trial.[44] Non-publishing an opinion is inconsistent with the convention that trial proceedings about which the opinion is concerned must be conducted publicly. This secrecy is particularly odious because it allows affirmation of a conviction or rejection of a state or federal habeas petition challenging the conviction, without the prospect that significant irregularities in the opinion will be subject to public or professional scrutiny.

Bureaucrats Are Surreptitiously Performing As Judges

Practical observations about the negative aspects of non-precedential opinions are compounded by the ethical and legal considerations related to non-judicial bureaucrats who routinely perform tasks that the public, the media, and the litigants believe are performed by the judge(s) involved.[45] Yet the only association a judge

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[40] See e.g., Richman, William M. and William L. Reynolds (1996). Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, *Cornell L. Rev.* 81: 273, 277. "[T]hose without power receive less (and different) justice" *Id.* at 277.

[41] Reynolds, William and William Richman (1978). The Non-precedential Precedent—Limited Publication and No-citation Rules in the Untied States, *Columbia L. Rev.* 78:1167, 1175.

[42] Although it isn't the purpose of this paper, it can certainly be surmised that there may be a substantive basis upon which to challenge the constitutionality of resolving a case with a non-precedential/non-published opinion.

[43] Schmier, *supra*.

[44] The Sixth Amendment to the United States Constitution includes the requirement of a "public trial," that is applied to the states by the Fourteenth Amendment. In overturning a rape conviction, during the trial of which the judge cleared the courtroom of all spectators when three prosecution witnesses testified, the Eighth Circuit recently stated in *United States v. Thunder*, 438 F.3d 866 (8th Cir. 02/22/2006); 2006.C08.0000279 <http://www.versuslaw.com>, "While the Supreme Court has held that the right of access to a criminal trial is "not absolute," the Court has never actually upheld the closure of a courtroom during a criminal trial or any part of it, or approved a decision to allow witnesses in such a trial to testify outside the public eye" *Id.* at ¶12.

[45] Judge Alex Kozinsky of the Federal Ninth Circuit Court of Appeals discussed this in The Re*al* Issues of Judicial Ethics. See, Kozinski, *supra*. Some excerpts from that article follow: "A closely related issue is the tendency to delegate essential aspects of the judicial function to staff" *Id.* at 1098. "The increase in caseload coupled with the proliferation of staff creates a constant temptation for judges to give away essential pieces of their job" *Id.* at 1099. "It is a reality of current judicial life that few judges draft their

may have with an opinion is reviewing his or her staff person's summary of the case and signing off on its assignment to non-precedential status, and then signing the opinion/memorandum/order written by a clerk or staff attorney.[46] It is possible that the judge has not read a single word of the petition or briefs, so the judge does not even have the knowledge necessary to challenge the staff member's opinion of the case.[47] For all practical purposes, the actual judge in the case is the bureaucrat whose judgment determined its outcome. Thus, behind the scenes the role of the judge and his or her staff member is reversed: the judge is the bureaucratic paper shuffler and the staff member is the judge.

IV. Guilt Determination Contributes to the Prejudicial Effects of Non-Precedential Opinions

The most important post-conviction determination a judge and/or his or her support staff makes is deciding (irrespective of a conviction) if the defendant is actually guilty, likely guilty, or probably not guilty. Consequently, the government's ability in its briefing (and if granted, oral arguments) to create the appearance of a defendant's culpability in the crime, and the effectiveness of the defendant's countering of culpability, can be the most important factor in the outcome of the case. Thus, regardless of the factual or legal issues involved, a defendant considered to be guilty or likely guilty will probably be denied relief based on the absence of error or harmless error,[48] and the case will likely be disposed of in a non-published and non-precedential opinion. The "guilt determination" flowchart (Figure 1) outlines the process whereby state and federal appellate court judges decide if a case is to be resolved by a non-published, or a published and precedential opinion.

V. How Many Innocent People Are Affected By Non-precedential Opinions?

There is no hard data on how many innocent people have been adversely affected by the negative consequences explained in the preceding Sections III and IV, related to resolution of their case by a non-precedential opinion. However, a hint of the magnitude of the problem can be gleaned from the number of non-precedential opinions that are issued. Federal circuit courts and 45 states (plus the District of Columbia) limit non-published decisions to non-precedential status.[49] It can be conservatively estimated that from 1971 to 2006 some 630,000 non-published federal appeals court opinions were issued,[50] and state courts handle many times more

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own opinions from scratch…And we do occasionally get opinions circulated that look like they were written by someone a year out of law school with no adult supervision. The only guarantee one can have that judges are not rubber-stamping their law clerks' work product is each judge's sense of personal responsibility" *Id.* at 1100.

[46] Cappalli, *supra* at 785.

[47] Judge Kozinsky has written, "It often takes a frantic act of will to continue questioning successive staff attorneys about each case, or to insist on reading key parts of the record or controlling precedent to ensure that the case is decided by the three judges whose names appear in the caption, not by a single staff attorney" Kozinsky, *supra* at 1099.

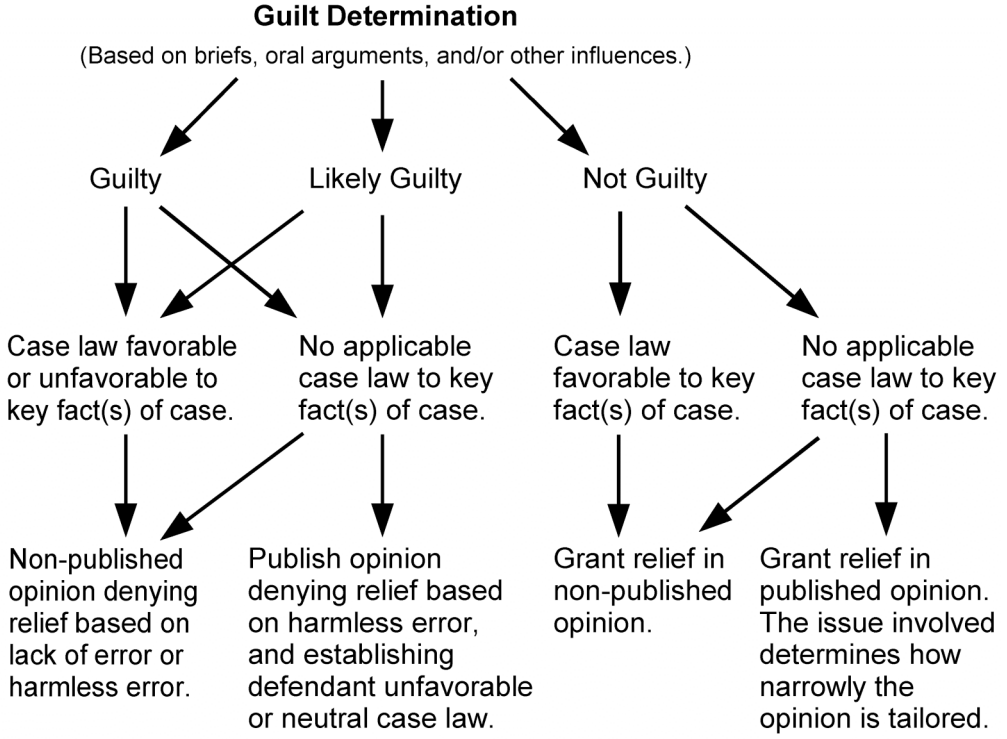
[48] Harmless error. "An error that does not affect a party's substantive rights or the case's outcome. A harmless error is not grounds for reversal" *Black's law dictionary*, Eighth Edition (p. 582). Minneapolis: Thomson West (2004).

[49] The federal circuit court information is accurate as of August 27, 2007, and the author is unaware of any change in the state court information compiled in the fall of 2004. See, Serfass, *supra*.

[50] See, Cappalli, *supra* at 769-770, note 71. (For the 1981–2000 period, one researcher counted 340,866 unpublished opinions. *See* Michael Hannon, *A Closer Look at Unpublished Opinions in the United States*

appeals than federal courts. So it can conservatively be surmised that from 1971 to 2006 federal and state courts issued something more than 1.25 million non-published opinions. About 48% of federal appeals involve a criminal case,[51] and in the state of California, for example, 50% of appeals involve a criminal case.[52]

Figure 1.
Guilt Determination Flowchart



If only 1% of the estimated 1.25 million state and federal non-published opinions from 1971 to 2006 involved a criminal case in which an innocent defendant's conviction was inappropriately affirmed on direct appeal, or habeas relief was unjustifiably denied, that would total 12,500 innocent defendants, or about 350 yearly. This would be a direct impact of the scheme of designating select opinions for non-precedential status.

Courts of Appeals, 3 J. APP. PRAC. & PROCESS 199, 205 (2001). Twenty thousand per year is the average for the latest years.) So if based on the research of Michael Hannon an average of 17,000 per year is figured for 1971 to 2000, and 20,000 per year is assumed from 2001 to 2006, the total is 630,000.

[51] U.S. Court of Appeals, *supra*. This includes direct federal criminal appeals and state and federal prisoner habeas corpus petitions considered by federal courts. (Including 28 USC §2241, §2254 and §2255 petitions.)

[52] Summary of Filings Courts of Appeal, Fiscal Years 1994–95 Through 2003–04, Table 4. *2005 Court Statistics Report* (p. 24). Retrieved August 29, 2007, from California Courts website: http://www.courtinfo.ca.gov/reference/documents/csr2005.pdf

Another consideration is that if there were 12,500 wrongly decided cases during the past four decades involving an innocent defendant, it would still be a significant understatement of the impact non-precedential opinions have on innocent defendants. Consider, for example, their effect on the plea bargaining process. About 95% of state and 96% of federal convictions are obtained by a guilty plea.[53] A defendant claiming innocence may agree to a plea bargain at the goading of a defense lawyer who may be convinced that the prosecution-slanted case law relied on by the trial judge, and if necessary the appellate judges, is adverse to the facts of the defendant's case.

VI. Conclusion

An enormous body of non-precedential opinions has been created by the selective publishing rules instituted to reduce the number of legal volumes necessary to be published, purchased, and stored for reference purposes. That justification is no longer legitimate due to the ability of unlimited numbers of opinions to be electronically stored and readily accessed for a reasonable cost. Consequently, the original justification for publishing only selected opinions has been replaced by a different and unrelated argument. Namely, that the present number of appellate judges is insufficient to devote the time and energy necessary to carefully analyze each case's facts and legal issues, and then write a complete opinion outlining the facts, the applicable case law, and the judge's reasoning for deciding wholly or partially, for or against the relief sought by a litigant.

That argument ignores that if a person allegedly committed an offense serious enough to warrant the expenditure of the considerable resources necessary to investigate, prosecute, convict, and punish him or her, then it is reasonable to require a full, public, and precedential explanation of the reasons used to justify upholding that person's conviction and sentencing to a deprivation of their liberty and/or property. It is a mockery of the principles of "due process," the "equal protection of the law," and the transparency expected of a public proceeding, for a case to be resolved by a quasi-secret non-precedential opinion.

If more appellate judges are needed to carefully process each case and issue a well-reasoned precedential opinion, so be it. The cost of additional judges would be a minor expenditure to ensure confidence in not just the judiciary's fairness and unbiased treatment of all defendants, but the legitimacy of the law enforcement process itself. Yet while there have been stopgap measures to diffuse the broad based opposition to disallowing the citation of non-published opinions for their

[53] The most current state figure is for 2002. See, Durose, Matthew R. and Patrick A. Langan (December 2004). *Felony Sentences in State Court, 2002* (NCJ 206916). Retrieved August 29, 2007, from Bureau of Justice Statistics: http://www.ojp.usdoj.gov/bjs/dcf/ptrpa.htm
The most current federal figure is for 2004. See, *Compendium of Federal Justice Statistics, 2004* (p. 2) (December 2006, NCJ 213476). Retrieved August 29, 2007, from Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs04.pdf

persuasive value,[54] to date no organization has favored publishing and restoring precedential status to all opinions.[55]

Considering the plethora of negatives outlined in the preceding Section III and IV that are associated with selectively designating opinions as non-precedential, the near universal adoption of the practice in the United States can at best be described as shortsighted and ill-advised. At worst it has been a disaster undermining the most basic notions of fairness, impartiality, and consistency upon which the legal system's credibility rests. Miscarriages of justice are being perpetrated every day that non-precedential decisions are allowed to be issued.[56] Consequently, the significant changes to the legal process encouraged by the Judicial Conference of the United States in 1964 should be abandoned, and all state and federal appellate court opinions should be deemed precedential and published.

[54] Federal courts have half-heartedly responded to the controversy by modifying Federal Rules of Appellate Procedure, Rule 32.1. Citing Judicial Dispositions. FRAP 32.1 was revised effective on December 1 2006, so that all "unpublished" opinions issued by federal courts on or after January 1, 2007, can be cited, but it does not mandate that those opinions have precedential, or even persuasive value. The effect of the rule change is unknown at the time this is written in August 2007, but at most it can be expected to be minimal, and it possibly may have no appreciable effect.

[55] This would also apply to trial court opinions on points of law. As is the case now with published opinions, an opinion's precedentiality would be limited by the level of the court issuing the opinion.

[56] For other aspects of how judges contribute to a wrongful conviction, including selective application of the harmless error rule, see, Sherrer, Hans (2003). The Complicity of Judges in Generating Wrongful Convictions, *N. Ky. L. Rev*. 30(4): 539.

EXPECTANCY EFFECTS IN FORENSIC EVIDENCE HANDLING: SOCIAL PSYCHOLOGICAL PERSPECTIVES

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Abstract

Expectancy effects in forensic evidence handling pose a serious threat to the validity of analyses conducted by forensic examiners. This questionable validity creates an impasse regarding key assumptions of law involving the admissibility of scientific and expert testimony. The history of specific rules of law governing the use of scientific evidence in the courtroom is detailed, followed by a review of social psychological concepts that provide a foundation for understanding how expectancy effects occur. The following review of theories of self and identity, and group theory will address the phenomena of expectancy effects from a social psychological perspective. This discussion emphasizes the need for review of forensic practices due to the human influence that examiners impart on the evidence, and the impact outside social forces exert on the examiners themselves.

Expectancy Effects in Forensic Evidence Handling: Social Psychological Perspectives and Implications

There exists a substantial body of literature detailing the collection, use, and judicial review of evidence chronicling the types of evidence routinely gathered, trends in evidence utilization, and the impact it has in courts of law. From the crime scene to the courtroom, forensic evidence plays an integral role in civil cases and, perhaps more importantly, in criminal investigation and prosecution. Researchers have found that the use of forensic evidence increases rates of arrest, the filing of criminal charges, and conviction (Peterson, Ryan, Houlden, & Mihajlovic, 1986). The importance of forensic science and crime laboratories and their intrinsic value to police and legal experts "has never been questioned" (Peterson, Mihajlovic, & Gilliland, 1984, p. 2).

What has come under investigation, however, is the human handling of evidence and the impact social and psychological factors have on that evidence. Scientific investigation is conducted collectively by examiners who, by virtue of being human, come equipped with values, needs, interests, and prejudices (Boghossian, 2001). These values, needs, and interests have the potential to create what Merton (1948) termed the self-fulfilling prophecy (as cited in Darley & Fazio, 1980). Once a prediction or prophecy is made, people may alter their behaviors and actions so that a statement that would have been false becomes true as a consequence of the prediction or prophecy being made. The prophecy itself can affect the outcome or result because of the power it has to shape behavior. According to Merton, "The self-fulfilling prophecy is, in the beginning, a *false* definition of the situation [which evokes] a new behavior which makes the originally false conceptions come *true*" (Merton,

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1948, 1957 as cited in Darley & Fazio, 1980, p. 868, italics added). The inherent danger of a self-fulfilling prophecy is evident in its ability to make an objectively false situation appear subjectively true.

The underlying premises of the self-fulfilling prophecy (i.e., expectations and their power to alter behavior and perception) have been expanded upon in the social psychological literature, giving rise to a more general discussion of expectancy effects. One expectancy effect is the experimenter effect, in which the experimenter manipulates the behavior of a participant either consciously or unconsciously in a way that confirms the experimenter's hypothesis, which introduces bias into the research findings. A similar kind of expectancy effect is the observer effect, in which the experimenter mistakenly sees behavior which has not actually occurred and misjudges stimuli in a way that confirms the experimenter's own hypothesis (i.e., reporting that worms wiggled more in response to a light being turned on than they wiggled when the light was not on; see Langlois & Prestholdt, 1977). This false perception is not the same as a purposeful misrepresentation or manipulation of behavior, but rather the observer effect is much more subtle and embedded within the experimenter's own experience. In both cases, expectancies follow the same trajectory as the self-fulfilling prophecy: a prediction about an objective event triggers subjective interpretation or manipulation that results in false support of the original prediction. Though not entirely free of controversy, expectancy theory has nevertheless had widespread adoption in the field of social psychology (Rappaport & Rappaport, 1975).

The debated significance, or even existence, of the influence of social phenomena, such as peer pressure, expectancy effects, and bias, is contested in the scientific world. From the perspective of social psychology, science is a social enterprise (Boghossian, 2001). In light of scandals at the FBI forensic laboratory and the highly publicized overturning of convictions based on the reevaluation of DNA evidence, it appears that something else must account for the rift between what forensic scientists have evidence for and what becomes understood as truth (Boghossian, 2001). That controversial something may be directly related to the forensic scientists' background, values, and interests, as well as the impact of their social environment.

According to Risinger, Saks, Thompson, and Rosenthal (2002) the most obvious danger in forensic science is that an examiner's observations and conclusions will be influenced by potentially biasing information. The forensic examiner seeks to establish a link between evidence collected from a crime scene and an individual (Kelly & Wearne, 1998). Kelly and Wearne (1998) argue that this intent to establish a confirmatory link between evidence and suspects makes forensic science different from all other sciences in that analyses cannot be conducted objectively with such a directive in place. Kelly and Wearne (1998) also contend that the advancements in scientific technology have not resolved this troubling lack of objectivity on the premise that "these new technologies have in many cases been grafted onto a profession that in many of its traditional sub-fields, like fingerprints, questioned documents, ballistics, hair and fibers, explosives, was not actually based on science at all but on subjective comparisons by individual examiners" (p. 12). Risinger et al. (2002) support this assertion, commenting that subjective judgment and interpretation is still the principal method of reaching conclusions in most forensic disciplines, also emphasizing that the working environment of the forensic scientist is not impervious to the influence of expectations or outcome preferences.

This paper will provide a brief overview of specific rules of law governing the use of scientific evidence in the courtroom, followed by a discussion of social psychological concepts related to expectancy effects. The following review of the social value of science, accompanied by a discussion of theories of self and identity, and group theory will address the phenomena of expectancy effects from a broad social psychological perspective. This work concludes with an emphasis on the need for review of forensic practices due to the human influence that examiners impart on the evidence, and the impact outside social forces exert on the examiners themselves.

History

Evidence and Expert Testimony

Scientific evidence is thought to be intrinsically more reliable than other kinds of evidence, such as eyewitness accounts and statements from defendants, because of its physical basis (Peterson et al., 1986). It is this real, tangible quality, in conjunction with the meticulousness and accuracy of the scientific method, which gives it the influence it has come to exercise in legal settings. Evidence standards have changed throughout the 20th century, revolving around the merit of the scientific methods used to examine the evidence itself. In the groundbreaking decision of *Daubert v. Merrill-Dow Pharmaceutical* (1993), the Supreme Court opinion returned by Justice Blackmun suggested a benchmark for the judicial review of scientific expert testimony that included four fundamental criteria (falsifiability, peer review and publication, known error rate, and general acceptance) as standards of evidentiary reliability and validity. This ruling built upon the *Frye* rule for the admission of evidence, which relies upon general acceptance of scientific practices in the relevant scientific community as the sole determinant of evidentiary validity. The *Daubert* decision introduces a more fine-tuned examination of scientific method into the judicial review process by explicating specific elements of the scientific process (i.e., falsifiability and known error rate). In conjunction with *General Electric Company v. Joiner* (1997) and *Kumho Tire Company v. Carmichael* (1999), the collectively named *Daubert* Trilogy changed the role of the judge by creating a "gatekeeper" role, aimed at allowing proffered scientific evidence if, and only if, it rested on scientifically valid reasoning and methodology (Neufeld, 2005).

Forensic Evidence and Social Factors

The assumption that evidence or expert testimony rendered by the scientific method is a valid source of evidentiary proof is intractably embedded in the *Daubert* Trilogy. Modern technological advances, and the shortcoming of those advances, have incited critical introspection and reevaluation regarding the fact-finding and evidence-evaluating accuracy of the American criminal justice system. Failures such as post-conviction DNA exonerations challenge the long-held assumptions regarding the surety of science (Model Prevention and Remedy, 2001). The inadequacy lies not solely, or even predominantly, within the scientific techniques used to examine evidence, but with the subjectivity and error that is subsumed within the analyses conducted by human hands.

A dangerous potential shortcoming of the *Daubert* Trilogy revolves around the ability of expectancy effects to occur even within methodologically sound forensic examination, which highlights the need for greater social science investigation into the field of forensic evidence handling. For example, Dror, Charlton, and Péron (2005) found that forensic fingerprint examiners were vulnerable to the influence of misleading contextual information. Three out of four examiners in Dror and associates' study reversed a previous correct fingerprint identification based solely on the context in which the evidence was presented on a second occasion. The methods the examiners used in both instances were scientifically correct, but it was the biasing influence of the context that led to the erroneous reversals. Forensic scientific evidence is given unique and weighted importance by the judiciary because of the presupposed impartiality and objectivity of the experts who examine and interpret the evidence (Peterson et al., 1986). If this objective handling presumption is brought into question, and in fact shown to be false, the *Daubert* criteria may not be enough to keep "junk science" out of the courtroom.

Call for Review of Forensic Procedure: The Madrid Train Bombing

Unfortunately, forensic science research has been conducted only after questions have been raised about the accuracy and reliability of analytic procedures, and those questions usually first appear in the courtroom (Kelly & Wearne, 1998). One example occurred in 2004, surrounding the search for suspects responsible for the Madrid train bombing that made international headlines. The Madrid train bombing consisted of a series of coordinated bombings, allegedly perpetrated by Islamic extremists, against the *Cercanías* (commuter train) system of Madrid, Spain on the morning of March 11, 2004, killing 191 people and wounding 1,755 (BBC News, 2004).

In collaboration with Spanish authorities, the Federal Bureau of Investigation's forensic crime laboratory identified latent fingerprints found on a plastic bag that was linked to the bombing. The FBI identified a suspect by means of fingerprint analysis. A lawyer from Oregon named Brandon Mayfield who had ties with the Muslim community was identified, yet the FBI was ultimately proven wrong in this identification (Associated Press, 2004). The findings of the panel that investigated the false link to Mayfield highlighted a critical complaint about the field of forensic science. The evidence that is assumed to be both scientific and unbiased in order to be admitted into American courts often fails to meet either of those standards (McRoberts & Possley, 2004).

This highly publicized error led to the publication of the *Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case*, also known as the *Stacey Report*. The report, written by Robert B. Stacey, the unit chief of the FBI's Quality Assurance and Training Unit, admitted full responsibility for the mistake on the part of the FBI and specifically named confirmation bias, a kind of expectancy effect, as a contributing factor to the misidentification. The report stated that,

> The power of the IAFIS match, coupled with the inherent pressure of working an extremely high-profile case, was thought to have influenced the initial examiner's judgment and subsequent examination. This influence is recognized as *confirmation bias* (or *context effect*) and describes the mind-set in which the *expectations* with which people approach a task of observation will affect their perceptions and interpretations of what they observe (Stacey, 2005, p. 6-7, italics added).

The focus on expectancy effects in forensic evidence handling is not a new concept or concern. The increasing attention to the potential danger this form of bias poses, as evidenced by the growing number of publications and public acknowledgments of errors, is an indication of escalating apprehension in the scientific and legal communities. This trepidation is, in part, a result of those communities coming to terms with the challenges that have been posed to evidence that previously had its inherent objectivity taken for granted.

Social Psychological Perspectives

To understand the existence of errors in the interpretive practices involved in forensic science, one must not look to the science, but rather to the sociology of the field (Thompson, 1997). Current examinations of forensic practice focus on interpersonal expectancy effects, and an assessment of those effects in an ever-widening circle of contexts (Rosenthal, 1998). By taking a social psychological approach in the evaluation of forensic evidence handling a variety of inter- and intra-personal factors can be addressed. These factors may contribute not only to the overall cause of expectancy effects, but may also provide an explanation for why the scientific community is reluctant to admit that they exist.

Self and Identity

Understanding an individual's definition of self and identity within society provides critical insight into an individual's beliefs, desires, and other internal states that influence behavior. According to Baumeister (1998), "Selves are handles and tools for relating to other people" (p. 680). A forensic examiner's sense of self and identity, in relation to other members of the scientific community and law enforcement agencies, can play a fundamental role in expectancy effects. If one is to understand how internal motivation can affect the execution of forensic analyses, one must examine the origins of those motivations: self and identity.

Definition of self as "scientist." Essential information about the self is garnered through interactions with other people (Baumeister, 1998). Calling oneself a scientist carries with it the specific designation of self as a scientific being—based on what it means to be scientific and what it means to be a member of the scientific community. As a consequence of being a part of an intimate group, forensic examiners receive feedback from a community comprised of members who also deeply value science and the trait of being scientific. The impact that an individual's contemporaries can have on that individual's sense of self makes this meaningful social environment crucial.

One important mechanism by which people receive information from those around them is through a process known as reflected appraisal. In the performance and observation of reflected appraisals, others' assessment of an individual shapes that individual's self-understanding (Baumeister, 1998). That is, a person reads the reactions, judgments, and behavior of others, as it regards him or her, and internalizes that appraisal. This internalization, in turn, informs, or even completely alters, the intrapersonal concept of self. The designation of self as scientist, reflected by the appraisals of one's valued peers, reinforces the significance of science and scientific thought for the forensic examiner. This repeated emphasis influences examiners'

understanding of themselves on a number of important levels, including their perception of their professional obligations (i.e., their job) as forensic scientists.

Identity as members of the law enforcement community. Generally defined, identity is composed of "categories people use to specify who they are and to locate themselves relative to other people" (Owens, 2003, p. 207). Because of this "relative" positioning of the individual in relation to others, Owens' (2003) definition of identity suggests both distinctiveness, in that the individual is a separate social entity from others, and sameness, in that the interaction between the two is mutual. Applying this concept to forensic examiners, there exists a unique self, previously discussed as heavily influenced by the meaning of being "scientific," and a shared component established through their collaboration with others. It is this reciprocal relationship that emphasizes the importance of the larger forensic and law enforcement communities. An examiner's identity is based on this internal-external interplay of influences, all of which can add up to a heightened and reinforced potential for expectancy effects. Externally speaking, crime laboratories themselves are customarily housed within police agencies and typically limit their performance of forensic analyses to law enforcement clients. These labs rarely prepare evidence or do other casework for private individuals, and only about one-third will analyze non-criminal samples (Peterson et al., 1986). This location in a police-dominated environment creates the opportunity for a strong law enforcement-directed bias in the execution of forensic examinations.

Because of their ambiguous place somewhere between science, law enforcement, and the courtroom, crime labs, and the examiners who operate within them, are typically orphans left in the ward of multiple agencies (Model Prevention and Remedy, 2001). In terms of internal influence, forensic examiners typically think of themselves as working for the police or prosecution within the criminal justice system (Koppl, in press). This is a possible source of professional pressure, which in turn can lead to biased evaluations of evidence. This pressure is amplified by the manner in which a governing agency interacts with the examiners at crime labs that serve them. Due to budgetary concerns, police departments often do not treat their crime labs as a priority, and lab directors are placed in a subordinate position to police officials (Model Prevention and Remedy, 2001). These officials typically do not think like scientists and, instead, view science as just another part of making a case (Model Prevention and Remedy, 2001). If forensic examiners define themselves (i.e., form an identity) as part of a crime-fighting team and knowingly produce evidence for that purpose, their ability to perform an unbiased forensic examination may be compromised. In conjunction with the external influence from investigating officers—or police agencies as a whole—who view those same examiners as integral to the making of a case, and a situation arises such that the role of expectations and the likelihood of expectancy effects cannot be ignored.

United States of America v. Darryl Green. In 2005, *United States of America v. Darryl Green* involved *Daubert* defense challenges, including one specific to the prosecution's firearms expert, citing "observer bias and lack of blind testing." The challenge was based on the lack of an objective evidence line-up, calling it instead an evidence "show-up" when the examiner, Sergeant Detective James O'Shea, was only presented with one weapon with which to compare spent bullet shell casings. The implication is that with only one weapon presented and the inherent expectation that

he is to match evidence to standards, O'Shea was unduly influenced—and thus, biased. Judge Gertner found in favor of the defense on this point, but only imposed limitations on the testimony rather than full exclusion. Gertner stated that she would not allow O'Shea to conclude that the testing of the weapon was decisive enough to permit the exclusion of *all other guns* as the source of the casings because of flaws in the specific methodology.

In the case of *United States of America v. Darryl Green*, the evidence "show up" and the prescribed task of matching evidence collected at the crime scene to standards on file for suspects created a potential for bias that was recognized and remedied by the judge. It can be argued that the examiner's identity as both a scientist and member of the law enforcement community may be an underlying factor in this kind of biased evaluation. If the examiner was influenced by the expectations that the law enforcement community held regarding the "job" of the examiner in "making the case" for the police or prosecution, then it would be correct to say that an experimenter effect had occurred. Recall that an experimenter effect takes place when an individual intentionally or unintentionally manipulates the behavior of another in a way that falsely confirms the individual's hypothesis, which introduces bias into the research findings. If an error had been made on the part of the examiner that was due to his or her own expectations regarding the evidence, this biased judgment would be classified as an observer effect. As aforementioned, observer effects occur when an individual observes a result (i.e., a behavior or trait) that erroneously confirms a previous prediction regarding the outcome of an analysis or an experiment. In either case, the examiner's definition of self and their concurrent identity lay a foundation for expectancy effects in forensic evidence handling when the methods used to examine evidence do not provide safeguards to counteract it.

Groups

Groups, previewed in the discussion of how communities shape identity, feature a compilation of significant societal, important individual, and influential interpersonal ideals, models, and expectations.

Group Norms and Expectations

Being a member of a group carries with it certain communal benefits, including shared resources and social support. In exchange for these advantages, to which an individual is entitled via group membership, there exists a personal price of admission. According to Festinger, Schachter, and Back (1950), "The power of a group may be measured by the attractiveness of the group for its members. If a person wants to stay in a group, he will be susceptible to influence coming from the group, and he will be willing to conform to the rules which the group sets up" (as cited in Crandall, 1988, p. 590). These rules are known as norms and are based on the shared standards and expectations of the group. Because of the expectations associated with them, norms are important factors in determining the behavior of individuals within the group.

When a member of a group deviates from the norm, other members of the group will place social pressures—through direct communication, emotional support, disapproval, or other socially salient mechanisms—on the wayward individual in order to bring him or her back into the fold (Crandall, 1988). In terms of specific behaviors, the more central a behavior is to the group, and the more value a group has for an

individual, the more compelling the pressure will be to perform that central behavior. When individuals conform to group norms and model acceptable social conduct to other group members; central behaviors become even more desirable because they garner social approval. This desire for approval coupled with the other social pressures leads to a heightened demand for uniformity and a greater tendency for group members to imitate each other's behavior (Crandall, 1988). In terms of evidence handling, the issue of influence, imitation, and other pressures for conformity can dramatically impact the validity of any individual's forensic findings.

The Importance of Self-Categorization

The pressures influencing evidence handlers are rooted in each individual's membership in a group that is directly based on their self-categorization as members of the forensic community. Indeed, self-categorization may theoretically demonstrate the limits of the aforementioned normative influence. The existence of normative pressure to comply depends on whether or not one perceives the source of influence as belonging to one's own category (Abrams, Wetherell, Cochrane, Hogg, & Turner, 1990). Because of this dependence, self-categorization can be a crucial determining factor in social influence. That is, an individual's desire to receive awards, approval, and acceptance only exists if these forms of social support originate from others who are assumed to be categorically similar to that individual (Abrams et al., 1990).

Again related to the previous discussion of self and identity, the importance of forensic examiners' self-categorization as members of both scientific and law enforcement communities creates a set of dual expectations and a doubled desire to receive approval from both groups. In order to avoid disapproval, people will conform, obey, comply, change their behaviors and attitudes, work harder, and generally do everything they can to present themselves in a favorable manner (Williams & Sommer, 1997). The danger arises when the longing for approval and the malleability of behavior occurs in the field of forensic analysis, which leaves no room for social influence when determining what is to be believed as scientific fact.

The Impact of Individual Uncertainty

When one group member disagrees with another, who is categorically similar to him- or herself, it results in uncertainty, which group members will also try to resolve using cues provided by the group. According to Turner (1985), uncertainty arises only from disagreement with those with whom one expects to agree (as cited in Abrams et al., 1990). One of the fundamental factors that contribute to the existence of expectancy effects is an a priori sense of expected agreement. In one of the most highly publicized instances of forensic examiner error, the expectation for agreement was of central concern. As previously mentioned, in 2004 a Portland-area lawyer named Brandon Mayfield was incorrectly linked to a train bombing in Madrid by fingerprint evidence that was analyzed by the FBI's forensic laboratory. In what has been described as the highest-profile mistake in the history of modern fingerprint comparison (McRoberts & Possley, 2004), Robert Stacey, chief of the FBI laboratory's quality assurance training unit, openly acknowledged expectancy effects as a cause of the misidentification. Stacey wrote that, "Once the mind-set occurred with the initial examiner, the subsequent examinations were tainted," and that "to *disagree* was not an *expected* response" (Stacey, 2005, p. 7, italics added). Regardless of what the

examiners' private conclusions were about the evidence, the pressure from others led to what was ultimately an incorrect consensus. In this instance, it appears that the pressure from others for public compliance (Kiesler & Kiesler, 1969 as cited in Abrams et al., 1990) overshadowed their professional judgment.

United States of America v. Rudy Frabizio.

In 2006, the issues of expectancy effects surfaced again in *United States of America (US) v. Rudy Frabizio*. In this case involving possession of child pornography, the defense argued under the *Daubert* Trilogy that failure to conduct blind testing lead to experimenter bias. The findings and consequent expert testimony of Thomas Musheno, a forensic examiner of photographic evidence in the FBI's Forensic, Audio, Video, and Imaging Analysis Unit, was called into question because of the manner in which it was verified. The "peer review" process critical to the *Daubert* guidelines, was violated by a lack of independent review. In fact, Musheno's coworker evaluated the images in question "contemporaneously with Musheno's checklist and report, fully aware of Musheno's conclusions" (*US v. Frabizio, 2006,* p. 152). According to the defense, and in agreement with previously discussed psychological tenets, "The review process Musheno described runs a substantial risk of 'examiner bias,' a phenomenon by which an examiner who expects a particular result tends to find it" (*US v. Frabizio, 2006,* p. 152). Judge Gertner again presided over the case and ultimately granted the defendant's motion to exclude Musheno's testimony in its entirety, though it should be noted that the discussion of her conclusion pertained largely to the merits of the photographic evidence and the expert's qualifications given the state of modern technology.

The key issue with Musheno's testimony revolved around the lack of independent peer review, which violates the standards suggested by the *Daubert* Trilogy. Musheno's coworker, who verified the results of the forensic analysis, was potentially biased by his or her full knowledge of Musheno's findings. Underlying this potential for bias is the relationship between Musheno, the other forensic examiners, and the crime lab community as a whole. As previously discussed, members of the same group who are categorically similar (i.e., forensic examiners) will look to each other for cues in the face of uncertainty. Evaluating forensic evidence with full awareness of another group member's findings provides such a cue, and in the case of *United States of America v. Rudy Frabizio* may have lead to a biased review.

The Pressure for Agreement

The nature of forensic analysis itself may preempt a state of agreement. According to Risinger, Saks, Thompson, and Rosenthal (2002), the situation forensic scientists face is unusual because the job often comes with an almost built-in expectation, and implied certainty, that tested evidence will demonstrate guilt. This high rate of inculpatory results may be due to the fact that each piece of evidence submitted for examination is typically connected with a suspect. "Investigators do not select suspects or evidence at random, but only those they have some reason to think were connected to the crime" (Risinger et al., 2002, p. 47). When an examiner forms expectations of any kind—of guilt, innocence, group, or public expectations—there exists a high risk of those expectancies affecting their results. This is the very definition of expectancy effects (Risinger et al., 2002).

Another demonstration of possible sources of expectancy effects involves the outside police agency exerting influence on the examiner. The crime laboratory setting may also be interpreted as an "experiment," in which the law enforcement officials in the lab are the "examiners" that are "analyzing" the performance of the forensic technicians (Risinger et al., 2002).

> From this perspective, the beliefs and expectancies of superiors, coworkers, and external personnel are manifest in their behavior toward the forensic scientist “subject,” in turn affecting the behavior of those “subjects”—their observations, recordings, computations, and interpretations—not to mention the additional impact role and conformity might have (Risinger et al, 2002, p. 21).

This important example emphasizes the fact that the forensic examiner does not always generate expectancy effects, but rather those expectations can originate from a multitude of sources. Without evaluating the power of expectations in the handling of forensic evidence, taking forensic analyses at face value ignores highly influential phenomena that comprise the social fact of evidence, which has the potential to be science fiction.

Conclusion

The need for forensic science in the criminal justice system and the requisite demand for the science to be reliable and accurate are paramount. Through a review of the weight forensic evidence carries in a court of law and the way in which rules regulating the admissibility of that evidence have evolved over time, it is clear that with changing times come changing concerns. Ever-improving technologies provide forensic examiners with the means to conduct modern scientific analysis with unprecedented precision. Coupled with this great advantage is a great responsibility, an obligation to both the scientific field, and the people that they serve. Like the police agencies they are so often a part of, forensic examiners are also charged with a responsibility to protect—the innocent from incrimination, and the community as a whole from those who have been rightfully incriminated. The social psychological factors that bear on the validity of forensic science, though hotly debated, cannot be ignored.

Suggestions and Future Research

Though the existence of expectancy effects and the threat that they pose to forensic analysis is intractably imbedded in the human handling of evidence, policies and procedures can be instituted that address and counteract their influence. Dror, Charlton, and Péron (2005) found that extraneous information created a context effect that impacted the accuracy of forensic evaluations. As previously mentioned, three out of four examiners in Dror and associates’ study reversed a previous correct fingerprint identification based solely on the context in which the evidence was presented on a second occasion, though the methods used in the analyses were correct on both occasions. What is evident here is a need to limit extraneous information and safeguard examiners by providing them with only that information which is critical to the performance of the analysis. Case details such as the number of suspects in custody, information about a suspect’s prior record, or any other

analysis-irrelevant information should be withheld from the examiners. In addition, the results of forensic analyses themselves should be independently reviewed without knowledge of previous conclusions. Though altered procedures are not a panacea for the problem of expectancy effects in forensic evidence handling, removing these potentially biasing elements from the forensic evaluation process would be a worthwhile first step.

Langlois and Prestholdt (1977) demonstrated that simply educating people about the existence of expectancy effects virtually eliminated their existence in laboratory settings. Simply raising awareness of the danger that expectancy effects pose and subsequently providing forensic examiners with social science training on this and other biasing phenomena (i.e., context effects, conformity, persuasion, etc.) would potentially counteract the impact of expectancy effects in forensic settings. Future research into the effectiveness of such a training program would benefit both the social sciences, in terms of better understanding the nature and functioning of expectancy effects, and the forensic sciences in an applied sense by providing a tool by which expectancy effects may be countered.

The imperfection of human endeavors is not overruled by the precision of scientific technique. It is, in fact, an affront to the strength of the scientific method to place the blame of faulty forensics on the science itself. Human beings have human needs and are subject to human influence, even when striving for the noblest of causes—the pursuit of justice being one of them. As it stands now, the current system has faults that allow, or even endorse, biased work, even among those who enter the system as sincere and conscientious forensic workers (Koppl, in press). The purpose of a review of social psychological issues in forensic evidence handling is not to condemn, but rather to provide a means by which the psychological, sociological, and forensic communities may reach a place of understanding and, ultimately, a place of resolution.

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ISSUES IN JUVENILE JUSTICE: RIGHTS WAIVERS AND TRIAL COMPETENCY

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Abstract

The juvenile court in the United States has struggled through time with how to define juvenile legal issues and how to conduct business. Two significant developments have been the extension of *Miranda* protections and the waiver of juveniles to adult court. The purpose of this paper is to highlight these two areas regarding juveniles and possible miscarriages of justice in the United States. Significant court rulings will be presented and compared to rulings for adults, as well as prior research regarding each topic. Findings suggest that much future research needs to be conducted regarding juvenile cognition, and the juvenile justice system must be more mindful of limitations of juvenile cognition to ensure fairness.

Issues in Juvenile Justice: Rights Waivers and Trial Competency

The juvenile court in the United States was founded upon the premise that juveniles are fundamentally different from adults. Early juvenile court proponents cited a lack of ability to form intent, lower cognitive functioning, and poor environment (Bernard, 1992; Mack, 1909). The recent trend in juvenile justice and juvenile sentencing has been the introduction of the "get tough" philosophy, whereby juveniles are now more likely to receive harsher penalties in juvenile court, and the criterion to refer juveniles to criminal courts have been expanded. Legally, juveniles are now seen as not fundamentally different from adults in certain circumstances, yet historically, Constitutional protections for juveniles have not been comparable to protections for adults (Feld, 1999).

Adults enjoy many due process protections, formally put forth under the Constitution and confirmed by U.S. Supreme court rulings. A pattern emerges, however, where the extension of such protections to juveniles lags, sometimes by a period of many years, behind that of adults. One specific example of this involves the issue of interrogation. The Supreme Court ruled in *Brown v. Mississippi* (1936) that police could not use force to obtain a confession from an adult. Twelve years later the court extended the same protection to juveniles in *Haley v. Ohio* (1948), a significant time lag. The reasoning behind *Haley* was that juveniles are easily overwhelmed and need the support of counsel or parents in stressful situations, such as during a police interrogation (Melton, 1981). The U.S. Supreme Court has ruled on several occasions regarding the issue of juvenile vulnerability. Interacting with the police provides a unique and potentially coercive environment for juveniles, given the authoritative position officers hold, and social expectations of the behavior of children. However, this same Court has also ruled multiple times in favor of placing juveniles under the same legal categories as adults. This creates a confusing and potentially unjust

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situation for certain juvenile offenders. Are juveniles vulnerable and immature, in need of separate proceedings, or are they in fact the legal equivalent of adults, and competent to understand all of the legal aspects of the adult system?

In order for justice to be served, juveniles must be cognizant and fully aware of the consequences of their actions, their legal rights, and the legal proceedings that occur on their behalf. If juveniles are legally equivalent to adults, they must be cognitively equivalent, as well. The Constitution of the United States provides for a fair and impartial trial, yet if juveniles do not comprehend the meaning and intent of the proceedings, they are not protected under this clause.

The purpose of this paper is to highlight two concerns regarding juveniles and possible miscarriages of justice in the United States: rights waivers and competency to stand trial. Significant court rulings will be presented and compared to rulings for adults, as well as prior research regarding each topic. Suggestions for future research and policy implications are also included.

Juvenile Rights and *Miranda*

The legal history of a juvenile's competency to waive *Miranda* rights is similar to the legal history of the juvenile court itself, with often conflicting court rulings. As noted in *Haley*, juveniles were seen as easily coerced and in need of protection from police abuses. The Supreme Court of Colorado supported this notion in 1962. The Court reasoned that a juvenile who had been in detention for five days without benefit of speaking to counsel or parents was not capable of competently waiving his *Miranda* rights (Melton, 1981). The U.S. Supreme Court reiterated this notion and extended even further due process rights to juveniles in the landmark case, *In re Gault* (1967). Not only were juveniles granted the right against self incrimination and the right to counsel, equivalent to the *Miranda* ruling, but juveniles now had a right to notice of the charges, and confrontation and cross examination of witnesses (Grisso, 1980; Melton, 1981). The majority opinion in *Gault* made it clear, however, that juveniles were a special case, and that special protections may be needed due to the immaturity and vulnerability that place juveniles at a decided disadvantage against the police (Grisso, 1980). Thus, the judicial consensus was that 15 year-olds were incapable of fully understanding their rights under the law without benefit of counsel, and that juveniles were particularly susceptible to coercion by authorities. The courts were unwilling to disallow a juvenile waiver of rights totally, however (Melton, 1981).

As with many issues, the legal standard for juveniles began to mirror the legal standard for adults. The California Supreme Court decided in *People v. Lara* (1967), just a few months after *Gault*, that juveniles are competent to waive their *Miranda* rights (for any offense, including capital offenses) based on a "totality of the circumstances" (Melton, 1981). No single factor or characteristic can invalidate a juvenile waiver of rights, so long as the juvenile "knowingly, intelligently and voluntarily" makes such waiver. Thus, contradictory to *Haley* and *Gault*, juveniles did not require the advice of parent or counsel to determine whether or not they should "remain silent."

Granted, there are jurisdictions that are uncomfortable with the wide discretion present in the totality approach, and prefer the stricter "per se" approach. Relying on the decision in *Gallegos v. Colorado* (1962) mentioned above, some states have insisted that juveniles be provided the opportunity to speak with an "interested adult" before any waiver of rights can be accepted (Grisso, 1980). This approach has its

criticisms, including interference with police activities, the definition of an interested adult, and allowing sophisticated juveniles too much latitude in court proceedings (Grisso, 1980). Such criticism, along with skepticism that juveniles do not comprehend their *Miranda* rights, contributed to the Supreme Court's decision in *Fare v. Michael C.* (1979).

Even though a jurisdiction utilizes the totality approach in accepting juvenile waivers of rights, if the juvenile requests to speak with an interested adult, it is accepted as a "per se" invocation of their *Miranda* rights (Melton, 1981). The Court's ruling in *Fare* restricted the definition of interested adult to parents and attorneys only. The juvenile in the case was described as immature and poorly educated, and declined an attorney when presented with the opportunity (Melton, 1981). Rather than an attorney, the juvenile requested to speak with his probation officer. In the juvenile's perception, the attorney was another police officer, while his probation officer was an interested adult whom he could trust. His request was denied and he ultimately confessed. The Supreme Court ruled Michael's confession admissible, because a probation officer could not be considered an equivalent to an attorney in the eyes of the court (Melton, 1981).

Thus, a significant number of court rulings regarding the issue of juvenile waiver of *Miranda* rights support the idea that juveniles are vulnerable to coercion and need advice before taking such a step; however, the courts have also ruled that it cannot be assumed that a minor is incompetent to waive his rights on his own accord. Juveniles are malleable; however, they are sophisticated enough to understand the legal ramifications of their actions and the role of each court actor. Therefore, many jurisdictions have adopted the "totality of the circumstances" approach in handling juvenile waiver of rights. The important question still remains, however, whether or not juveniles comprehend the *Miranda* warning, and its intent.

Prior Research on *Miranda* Competence

Several research studies have been conducted since the adoption of the "totality" approach to assess whether juveniles do indeed comprehend the meaning of the *Miranda* warning, as well as its intent. Ferguson and Douglas (1970) conducted one of the first studies on the subject, which severely lacked methodological rigor, but it paved the way for subsequent research. The study attempted to address whether simplifying *Miranda* language would have a significant impact on juvenile comprehension of the meaning or application of the words. Respondents included both delinquent (detained) and non-delinquent (public school) juveniles, who were read their *Miranda* rights in a formal or simplified format. For the most part the participants understood their right to counsel and to remain silent, but certain nuances (such as a right to see an attorney *now*) were not as clearly understood (Ferguson & Douglas, 1970). A significant number of juveniles did not clearly understand the intent of the *Miranda* protection, however. Even after claiming a comprehension of the right to remain silent, 29% of the delinquents and 43% of the non-delinquents stated you would still have to talk to the police after invoking your *Miranda* rights (Ferguson & Douglas, 1970).

These results, while methodologically weak and unable to draw definitive conclusions because of a lack of statistical analysis (Melton, 1981), triggered a serious examination of the issue. Subsequent, well-designed studies confirmed the results found by Ferguson and Douglas. In several studies, about half of the juveniles

questioned had a basic understanding of their right to remain silent (Abramovitch, Higgins-Biss, & Biss, 1993; Abramovitch, Peterson-Badali, & Rohan, 1995; Grisso, 1980; Grisso & Manoogian, 1980). This means that a significant portion of the sample in each case still did *not* fully comprehend the meaning of the words "to remain silent." Grisso (1980) presents several examples of inadequate responses, such as "you don't have to talk if you don't want to, because the police might not want you to," and "you must speak quietly" (p. 1145).

In addition, several studies show that juveniles do not fully understand what the right to silence entails. In several instances, about half of the juveniles questioned believed that the police may continue to question you after you have invoked your *Miranda* rights (Abramovitch, et al., 1993; Grisso & Lovinguth, 1979). One study found that about 60% of juveniles believed you would be penalized for invoking your right to silence, and 55% believed you must speak to the judge in the courtroom (Grisso, 1980). While these results seem troublesome, a few studies compared the juveniles to adult samples, with older juveniles and adults sharing many misconceptions (Abramovitch et al., 1995; Grisso, 1980).

Juveniles do not fare nearly as well when considering the right to counsel. Several studies indicate juvenile comprehension of the right itself is lower than comprehension of the right to silence, and that juveniles have serious misconceptions about the role of the defense attorney. In general, juveniles are more likely to comprehend the right to silence than the right to counsel (Abramovitch et al., 1993; Abramovitch et al., 1995). Grisso (1980) found that about 89% of juveniles understood the vocabulary in the right to silence, but only about 44% understood the right to counsel. In addition, juveniles appear to have a fundamental misunderstanding about the attorney-client relationship and the role of a juvenile defense attorney. The consensus appears to be that juveniles believe attorneys only help the innocent. Juveniles in one study professed that those who are guilty do not have the right to an attorney (Ferguson & Douglas, 1970), and in another that once a juvenile admits any guilt, the attorney becomes an advocate for the court rather than the juvenile (Grisso, 1980).

Comprehension does not necessarily correlate with performance, however. Interestingly, though juveniles appear to comprehend their right to silence more readily than their right to counsel, one study revealed juveniles invoked their right to silence 45% of the time, but their right to counsel 77% of the time (Abramovitch et al., 1995). This example is apparently the exception, however, as other studies showed only about 10% of juveniles invoked their right to silence (Ferguson & Douglas, 1970; Grisso, 1980).

Juvenile Rights and Trial Competency

To combat the recent trend of juvenile violent crime, many state legislatures across the nation have responded by lowering the age in which juveniles can be tried in criminal court (Grisso, Steinberg, Woolard, Cauffman, Scott, Graham, Lexcen, Reppucci, & Schwartz, 2003). Criminal courts have responded by sentencing juvenile offenders to harsher penalties and longer prison terms. All 50 states allow for some option to transfer a juvenile to criminal court. The three most popular methods are through judicial review, direct file, and statutory exclusions. Judicial review is best described as a judicial hearing where a judge makes the decision whether a juvenile is fit to be tried criminally based on juvenile worker and prosecutorial

recommendations. The courts historically have favored judicial review in determining if a juvenile was fit to be criminally tried, although the standards were never concrete. The most recent move in *Kent v. United States* (1966) shifted the focus of judicial review from seriousness of the crime to a standard considering sophistication and maturity (Poythress, Lexcen, Grisso, & Steinberg, 2006). The change recognized juvenile cognition as a possible hindrance in decision making abilities, and thus unfair for juveniles to be held criminally responsible.

Many states have chosen to remove waiver powers from the judiciary in favor of prosecutorial discretion. Through direct file, prosecutors have the ability to file delinquency charges in adult court. To check the prosecutorial power, some jurisdictions have established reverse waivers to send any child deemed to be incapable to stand trial back to juvenile court (Poythress et al., 2006). Here a judge decides whether a juvenile is incapable to stand trial and will be sent back to the juvenile justice system. Statutory exclusion, a third waiver option, attempts to abandon discretion altogether. Statutory exclusions remove specific offenses from the juvenile court jurisdiction and maintain mandatory filing within criminal court (Poythress et al., 2006).

The U.S. Supreme Court has developed standards to test whether an individual is capable of standing trial. *Dusky v. United States* (1960) set forth the standard to be used in federal court and was adopted by most state jurisdictions (Reisner, Slobogin, & Rai, 1999). Within the *Dusky* decision is the criteria of the defendant's reasonable degree of understanding. The reasonableness standard is differentiated as a much lesser degree of "perfect" or "complete" understanding while emphasizing a need for factual and rational understanding (Reisner et al., 1999). The recognition of cognitive abilities in the *Dusky* decision emphasizes the need for criminal defendants to be mentally able to understand trial procedure. Along with the reasonableness standard is the need to effectively assist counsel in the case (Reisner et al., 1999).

There have been provisions attempting to ensure that juveniles are in fact able to participate in criminal proceedings. Based on the decision in *Pate v. Robinson* (1966), the criminal court was forced to examine the defendant for competency any time it is seriously in doubt (Reisner et al., 1999). This examination typically comes from a court appointed doctor of mental health who examines the defendant for mental illness or disabilities that would deter the ability to proceed with a trial. These evaluations fail to test for mental immaturity, an impediment commonly found in juveniles.

Prior Research on Trial Competency

With the rise of mental health issues in the justice system, an influx of studies has been developed to test the trial-related mental competencies of different age groups. The increasing number of studies has been greatly aided by the development of the MacArthur Adjudicative Competence Assessment Tool- Criminal Adjudication (MacCAT-CA). The evaluation tool uses vignettes or scenarios of characters and asks the evaluation subject questions based on the facts of the vignettes, and scores the subject based on the ability to answer the questions correctly (Poythress et al., 2006). The goal of the MacCAT-CA is to evaluate an individual's ability to make decisions based on legal circumstances (Poythress et al., 2006).

The MacCAT-CA is divided into three areas: understanding, reasoning, and appreciation. Understanding establishes the defendant's ability to understand the

proceedings factually and the role of adjudicative personnel. Reasoning assesses the ability of the defendant to assist and help counsel. Appreciation tests focus on the individual's own case and whether they are able to understand rationally the intricacies of their own case and whether he or she perceives fairness (Poythress et al., 2006). The MacCAT-CA is the most popular template for trial competency testing.

A 2003 study using the MacCAT-CA examined the ability of adolescents to serve as trial defendants in comparison to adults. The three major issues addressed in the study were whether adolescents differ from younger adults in trial abilities, what types of youths have significant differences, and what kinds of ability deficits can be used for law policy (Grisso et al., 2003). Participants included detained youths and adults as well as youths and adults from the community (Grisso et al., 2003).

The study found that juveniles aged 15 and younger were very likely to be impaired in abilities that would compromise their capability to serve as a defendant in a criminal trial, but that 16 and 17 year olds did not differ from adults studied (Grisso et al., 2003). The experiment also recognized intelligence as an important risk factor. Juveniles that were measured to have low intelligence were also likely to be deficient in trial competency abilities (Grisso et al., 2003). The adolescents were more likely than adults to comply with authority, choosing confessions rather than plea bargaining, and were less likely to recognize long term effects of their decisions (Grisso et al., 2003).

The relationship of preadolescent and adolescent defendants' legal decisions to age, cognitive development, psychopathology, and legal abilities was examined in an experiment conducted in 2005 by Viljoen, Klaver, and Roesch. The researchers found that defendants age 15 and younger were more likely to confess and waive rights to counsel, consistent with previous research (Grisso et al., 2003; Viljoen et al., 2005). The same age group was determined to be less likely to talk to their attorney about any disagreements in the handling of their case (Viljoen et al., 2005). One interesting finding revealed that defendants from low socioeconomic groups were less likely to invoke rights of any kind. The researchers attributed this to an over-exposure to negative situations involving justice system actors, where little or no rights were perceived by the defendant (Viljoen et al., 2005; Viljoen & Roesch, 2005).

Viljoen and Roesch furthered their studies in 2005 by examining the relationship of legal capacities to cognition, psychological symptoms, and legal learning opportunities. It was found that verbal ability, attention, and executive functioning all increase with age (Viljoen & Roesch, 2005). Cognitive aptitude was greatly related to capacity to communicate effectively and understand adjudicative proceedings in juvenile defendants (Viljoen & Roesch, 2005). Cognitive aptitude in juveniles is more likely obstructed by undeveloped mental capacities rather than mental disease or defect, a common exception in adult criminal adjudications (Viljoen & Roesch, 2005). Predictably, previous arrests and time spent with attorney led to increases in scores of appreciation and understanding (Viljoen & Roesch, 2005).

Predictors of *Miranda* Waiver and Trial Competency

Several key factors have emerged that consistently predict both comprehension of *Miranda* warnings and competency to stand trial. The first is age of the defendant. The consensus is that young juveniles, under the age of 15, are incapable of comprehending the meaning of *Miranda* warnings, and less likely to defend themselves effectively and efficiently in the context of the *Dusky* decision. In general,

only about one third of juveniles under age 15 were able to paraphrase *Miranda* vocabulary (Abramovitch, et al., 1995; Grisso, 1980), and age is a solid risk factor for trial incompetence (Viljoen et al., 2005).

Other significant factors that may be associated with age are suggestibility and intelligence measures. Juveniles who showed high levels of suggestibility were less likely to invoke their *Miranda* rights, or to be competent to stand trial (Redlich, Silverman, & Steiner, 2003). Intelligence measures such as IQ and verbal skills have been used as predictors of legal understanding, and generally produce the same results as age. IQ and verbal skills have been shown to be negatively correlated with understanding *Miranda* wording (Grisso, 1980) and waiving *Miranda* rights (Grisso & Pomicter, 1977). In addition, verbal skills were strong predictors of trial competency, connecting attentiveness and the power to communicate statements to others as well as understand the statements of others (Viljoen & Roesch, 2005). "Street knowledge" may be just as important for juveniles during legal proceedings, as well. Juveniles who had prior adjudication experience were less likely to waive their *Miranda* rights, although this was not a universal finding (Grisso & Pomicter, 1977). For trial competency, the necessity of adjudicative experience is consistent among all age groups, but may be least prevalent among juveniles having a lesser likelihood of involvement in criminal court (Viljoen & Roesch, 2005). Thus, several variables are jointly predictive of both a juvenile's likelihood to waive their *Miranda* rights, and their competence to stand trial. In fact, comprehending the *Miranda* waiver is shown to be strongly related to a juvenile's competence to stand trial (Redlich et al., 2003).

Conclusion

Levels of juvenile crime intensely concern American society, particularly given past and recent trends that show significant juvenile involvement in many types of crime (Jenson & Howard, 1998). While current policy does not affect all juveniles who come into contact with the authorities, there is concern that a percentage of juveniles who break the law are victims of unjust proceedings. This unfairness comes from the comprehension of the justice system.

It appears that juveniles have a rudimentary knowledge of their legal rights, such as to remain silent; however, it also appears they do not fully comprehend all of the legal ramifications of that right. There is some indication that juveniles weigh legal factors, such as the amount of evidence against them, when making decisions (Peterson-Badali & Abramovitch, in press). Juveniles that believe the right to remain silent means you must speak quietly obviously do not understand the meaning of the words presented, and it must be assumed they do not comprehend the legal intent of those words, either.

There may be no group with a lesser understanding of criminal trial procedures and a lower likelihood of trusting the system than juveniles. The ability to understand reasonably and effectively participate in a criminal trial is often unavailable due to cognitive immaturity frequently experienced by juvenile defendants. Granted, not all juveniles fall under this category of gross misunderstanding or severe immaturity, and in fact many adults share this general lack of comprehension. However, given the legitimate concern that, as a class, juveniles are more vulnerable and more susceptible to involuntary waiver of their rights, calls for increased (rather than decreased) procedural safeguards are well founded, especially for younger juveniles.

American society and the juvenile justice system must decide upon a more uniform standing considering juvenile offenders. Examination of Supreme Court rulings and current legal policies does not provide a clear picture of how juveniles are viewed through the legal lens. The fact that the Supreme Court made two conflicting rulings on the same day that affect the legal standing of juveniles concerns those with an eye for due process. The first ruling was *Fare*, stating that juveniles are competent to understand the legal role of a probation officer and to understand the legal ramifications of a *Miranda* waiver; yet on the same day the Court ruled that a parent can admit a juvenile to a psychiatric hospital with no hearing because juveniles are incapable of making sound decisions on their own (Melton, 1981).

Furthermore, in *Roper v. Simmons* (2005), the U.S. Supreme Court found that juvenile offenders under the age of 18 could not receive the death penalty. The Court reasoned that it was unfair to execute juveniles because they fail to understand fully their morally reprehensible actions due to a lack of maturity and responsibility (del Carmen, Ritter, & Witt, 2005). The decision was a furtherance of a previous case, *Thompson v. Oklahoma* (1988), where capital punishment of those 16 and younger was prohibited (del Carmen et al. 2005). The Supreme Court has honored juvenile immaturity in death penalty sentencing, but has failed to consider immaturity in standing trial as an adult.

There are definitely circumstances when juvenile offenders have committed serious crimes, and need the more stringent consequences of the adult justice system. However, juveniles must be treated fairly and given certain considerations for their age. Current sentencing practices have removed some juveniles unnecessarily from the protective and rehabilitative principles on which the juvenile court was founded, and used inappropriate measures on the defendant. The scientific testing courts use to determine trial competency is directed towards adult defendants, not to 14 year olds. A 14 year old with no trial experience and low verbal abilities can be found fit to stand trial, although the trial could easily be construed as fundamentally unfair. Juveniles have been found to score lower on criminal adjudication tests with the lowest scores earned by those with low intelligence (Grisso et al., 2003). Juveniles score at the same levels as adults with mental disease, but are much less likely to be protected by the courts (Viljoen & Roesch, 2005). The get tough on juvenile crime attitude has undoubtedly led to the conviction and sentencing of juveniles who were unfit to stand trial due to mental capacities inconsistent with the *Dusky* requirements. Supreme Court decisions such as *Kent* allow for immaturity and other circumstances to be taken into consideration when transferring a juvenile to adult court, yet the introduction and spread of statutorial exclusion nullifies this ruling.

Policy Implications

While it is often easy to point out shortcomings, it is more difficult to offer concrete solutions. The juvenile justice system has been plagued with controversy since its inception, and the increased attention on serious juvenile crime and transfer of juveniles to adult court has only added fuel to the fire. The system should evolve the standard of trial competency to include juvenile exceptions. With the courts' willingness to consider new defenses for adults based on psychological research, the same allowances should be evaluated when considering juvenile cognitive deficits. The trend of removing youths from the juvenile system has most likely led to unjust trials and most definitely will continue in this manner until a change occurs.

Psychological testing needs to be more considerate of juveniles, as well as allow reverse waivers in every jurisdiction based on the court's testing. The cognitive tests need to be reassessed especially in consideration of the increasing number of children being transferred to criminal proceedings. Evaluating juveniles by adult standards is simply unjust. The system must make exceptions to the testing standards to allow for the increasing number of juveniles. The historical *parens patriae* ideals have been crippled by the modern practices of the criminal court. It is a necessity to keep juveniles in the custody of the juvenile court until they are mentally able to stand criminally liable to ensure the fundamental fairness of the trial. Naturally, a second solution to this dilemma would be a united effort to increase the age at which juveniles may be eligible for adult proceedings. If juveniles under the age of 15 are the most at-risk for unjust proceedings, states should alter their waiver mechanisms to include a minimum age for transfer to the adult court.

Society must develop a consistent set of legal rules for juveniles. It is unrealistic to assume a young juvenile would ask for an attorney on his own, or remain silent when taught her whole life wrongdoing must be confessed, or worse consequences would apply (Melton, 1981). The expectations of juveniles in the juvenile court are not in congruence with the expectations of criminal defendants. Likewise, the traditional values taught to children are not the same values used in the criminal court. A consistent set of legal rules for juveniles would ensure reliability and trust, rather than offering conflicting expectations of juveniles. These rules necessarily would need to point out the manner in which the two courts must deal with juvenile offenders consistently.

Prior recommendations such as requiring the presence of a parent or attorney before a juvenile can waive the right to silence (Abramovitch et al., 1995; Melton, 1981), and introduction of increased procedural safeguards for juveniles (Grisso, 1980) have apparently gone, for the most part, unheeded. The increasing recognition and consideration of medical findings, as well as juveniles exhibiting several characteristics related to legal incompetency, have called for the courts to reevaluate the treatment of juveniles to ensure the fundamental ideals promised by the Constitution.

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