



National Institute of Justice

International Perspectives on Wrongful Convictions: Workshop Report

September 2010

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International Perspectives on Wrongful Convictions: Workshop Report, September 2010

By Miranda Jolicoeur

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Author's Note

The group of experts that assembled in mid-September 2010 came well prepared to discuss international practice on wrongful convictions and actionable research items to prevent and correct wrongful convictions. As the co-organizer and rapporteur for the group, I would like to thank the attendees for taking time out of their busy schedules and arriving ready to engage the issues, open-minded, and ready to learn about alternative practices from around the globe from a diverse group of practitioners and researchers. Without their willingness to engage in open and frank discussions, this meeting would have never been as successful. I hope the meeting has also provided a larger than expected network of international colleagues working on the issue of wrongful convictions.

I would like to thank Edwin Zedlewski, the recently retired Director of the International Center at the National Institute of Justice (NIJ). He co-organized this meeting with me, and without his initiative and interest in examining international practices on wrongful convictions, this meeting would not have occurred. Additionally, I would like to thank Maureen McGough, Outreach Coordinator and Presidential Management Fellow at NIJ, for her tireless research and writing assistance that made it possible to complete this report.

Please note that the expert working group report does not attribute any comments made during the working group to the participants.

For more on the National Institute of Justice and its work in the field of wrongful convictions, please consult nij.gov.

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INTRODUCTION

Wrongful convictions in the criminal justice system are not only a U.S. problem, but an issue present around the world. The National Institute of Justice (NIJ) conducted a workshop on September 13 and 14, 2010, to examine alternative international practices to prevent and correct wrongful convictions. The purpose of the workshop was to hear about how other countries, as well as states and counties in the U.S., are handling wrongful convictions and to determine possible best practices that could be adapted for the U.S. system to prevent and correct wrongful convictions.

The multidisciplinary expert working group (EWG) brought together U.S. and international researchers, academics, advocates, law enforcement, and legal practitioners. The goal of the EWG was to learn about alternative practices for preventing and correcting wrongful convictions from around the globe, address the transferability of best practices to the United States, and devise a research agenda based on these practices. The workshop addressed the needs for research, research gaps, and new potential research areas in the field of wrongful convictions in light of international best practices.

This report provides an overview of the participants' discussions at the *International Perspectives on Wrongful Convictions Workshop*. The report mainly covers the dialogue at the workshop, but it also provides descriptions of practices to prevent and correct wrongful convictions. Citations are available in the report so that readers may follow up on these alternative practices in detail. The workshop agenda began with discussions of the legal system and proceeded in a reverse manner through the criminal justice process because of scheduling conflicts. This report reverses the order of the discussion and goes through the criminal justice process from beginning to end to improve the flow of the report. The report includes Professor C. Ronald Huff's lunchtime discussion of his book "Wrongful Convictions: International Perspectives on Miscarriages of Justice."¹ Lastly, the report includes discussions on ideas for a research agenda on wrongful convictions that incorporate international perspectives and practices.

The workshop agenda and participant list is located in Appendix A and B at the end of the report. Appendix C contains case studies written by workshop participants. These case studies are provided to give context to the discussions. These case studies are in no way a reflection of views at the Department of Justice.

LEGAL SYSTEMS

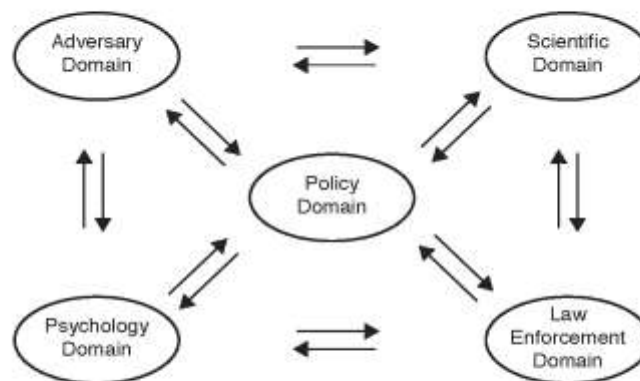
The expert working group (EWG or Group) discussed different legal systems. The EWG considered questions of whether particular legal systems invite wrongful convictions and whether there are inherent aspects of certain legal systems (i.e., adversarial vs. inquisitorial) that allow for wrongful convictions.

¹ Huff, Ronald C., and Martin Killias, *Wrongful Conviction: International Perspectives on Miscarriages of Justice*, Philadelphia: Temple University Press, 2008.

The legal systems discussion began with a dialogue about an integrated justice model.² The integrated justice model builds on the innocence paradigm, which focuses on the various causes of wrongful convictions. The theory is that if each cause of wrongful convictions is identified and addressed, the problem of wrongful convictions will disappear. The integrated justice model approach provides a way to look at wrongful convictions from a policy perspective, and is applicable to both adversarial and inquisitorial systems. The model portrays wrongful convictions in five interconnected domains:

(1) policy, (2) adversary, (3) law enforcement, (4) psychology, and (5) scientific. The policy domain is positioned at the center and is surrounded by the other domains. The psychology and scientific domains are separated to show that the entire justice system should be aware of cognitive and other biases. Both, the adversary and the law enforcement domains put emphasis on improved balanced fact-finding and evidence gathering.³

Integrated Justice Model



One participant noted that there are probably 5,000 to 10,000 wrongful convictions per year. Of these, probably an estimated 2,000 to 4,000 individuals are sent to prison. This statistic is not reliable. In the book *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (New York: Palgrave Macmillan, 2007, Chapter 2-3) by Michael Naughton,⁴ the starting point for measuring the scale of miscarriages of justice is to include all successful appeals against criminal

² For more information, see Appendix C for a case study by Marvin Zalman and C. Ronald Huff titled: "Legal Systems: An Integrated Justice Model."

³ *ibid.*

⁴ Naughton, Michael, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg*, New York: Palgrave Macmillan, 2007, chapters 2–3).

conviction. Of course, a successful appeal is not synonymous with innocence, but it is an official acknowledgement that a previous conviction is legally unsafe.

The article “Learning from Error in American Criminal Justice” by James Doyle⁵ suggests that researchers look at wrongful convictions from the accident model, as in hospitals. The problem is, however, that wrongful convictions are rarely recognized when they occur and typically are discovered years after the conviction (if at all). The research dilemma is this: even if governments could implement every reform on the agenda of the innocence paradigm, it would be exceedingly difficult to identify and track wrongful convictions. See “Measuring Reforms and the Number of Wrongful Convictions,” below.

Participants mentioned an effort in Massachusetts to implement lineup reform. Participants noted that it is extremely difficult to actually track the reform’s effect on wrongful convictions. The criminal justice field has no way to measure how its reforms are working, unlike in the hospital setting where there are measurable policies (e.g., hand washing). One participant recommended that NIJ do innovation policy research because this is a rare opportunity to initiate real reforms in the criminal justice process. The Group also considered questions about whether political elections in the judiciary cause wrongful convictions. The EWG discussed issues associated with elections for district attorneys, mayors, and other public officials. Participants noted that there is often intense public pressure to solve a crime, and this can distort an investigation. Participants suggested that research in this area could be beneficial to see how the political aspect impacts wrongful convictions.

One participant raised the issue that researchers should consider the types of criminal justice systems, specifically the due process model versus the crime-control model when looking at reforms of the system. These two models represent competing interests in the criminal justice system. A due-process model ensures that a citizen has absolute rights which the state cannot deprive him of, such as fundamental fairness under the law and the freedom from police oppression. On the other hand, a crime-control model suggests that the state should do whatever it can in its power to prevent and punish crime because order is fundamental to have a free society.

Inquisitorial Versus Adversarial Systems

Participants discussed differences between the inquisitorial system and the adversarial system. Several countries operate under an inquisitorial justice system. In the inquisitorial system, a judge asks direct questions to determine the facts in the case, while also representing the state’s interest in the trial. In an adversarial system, the judge plays a more passive role in the final decision and listens to the evidence presented by the state’s attorney and defense attorney. The state’s attorney and defense attorney are directly opposed, whereas in an inquisitorial system, the prosecutor also seeks the truth of the case rather than just a conviction.

Some participants noted that in the inquisitorial system there seems to be more truth seeking. The Group noted that when attorneys make mistakes in an inquisitorial system, judges are still

⁵ Doyle, James, “Learning From Error in American Criminal Justice,” *The Journal of Criminal Law & Criminology* 100 (January 2010): 109.

expected to sift through the evidence and information in a case to find the truth. Some participants raised questions about whether an adversarial process has less tolerance for procedural/ process error than for wrong outcomes. Participants found that problems with the adversarial system revolve around inadequate resources for defense counsel. Without adequate funding for the defense, there is not an equal fight in court, especially when a prosecutor has more resources than the defense.

Participants raised the issue that the inquisitorial system's search for the truth may be beneficial when defense resources are limited. This may be especially true when an indigent defendant cannot afford a defense attorney or if a public defender's office is extremely overburdened by their caseload.

EWG members discussed the Canadian example of a hybrid adversarial/inquisitorial system. Discussions arose about Canada seemingly developing a two-stage system with adversarial trials and an inquisitorial approach to reviewing cases for wrongful convictions. Wrongful convictions are investigated in an inquisitorial fashion on the premise that it is a better truth-seeking mechanism even though it sacrifices due process. The Canadian Criminal Conviction Review is inquisitorial because the Criminal Code allows the Minister of Justice, assisted by the Criminal Conviction Review Group, to review cases in which a possible miscarriage of justice may have occurred in the justice process.⁶

The EWG also mentioned that it is important to remember that many cases, particularly in metropolitan areas, do not use the adversarial system, but rather try to move cases through quickly and efficiently. Judges play an active role in these cases and also many individuals plead guilty without having a trial.

The EWG also discussed North Carolina's system for determining wrongful convictions under the newly established Innocence Inquiry Commission, an inquisitorial system model. The Innocence Inquiry Commission is an independent state agency that is commissioned with investigating claims of innocence. The Commission reviews cases referred to them by various parties, including the convicted individual, friends and family of the convicted, victims, police, attorneys and witnesses.⁷

Participants discussed that the inquisitorial model thus far seems to be a good model for post-conviction innocence, but participants mentioned that the U.S. seems to be having difficulty with transitioning into this model. Some of the EWG expressed that the problem is that while the inquisitorial system is attractive in some ways, it does not stop miscarriage of justice. One particular issue raised was that of expert witnesses. In an inquisitorial system, a judge may determine which expert should testify, the standards upon which the expert is chosen, and which experts get on the list. This process may still result in faults, some arising from the criteria used to define expertise but some also from an over reliance on experts, like in the adversarial system.

⁶ The legislation also requires the Minister to issue an annual report on the findings of the Criminal Conviction Review Group. It contains statistics and other information about the Criminal Conviction Review process. For more information, see <http://www.justice.gc.ca/eng/pi/ccr-rc/index.html>.

⁷ North Carolina Innocence Inquiry Commission, <http://www.innocencecommission-nc.gov/>.

The EWG also discussed the negatives associated with an inquisitorial system, including too much reliance on police work, scientific evidence and the prosecutor. Another problem raised concerning the inquisitorial system is that once a petition of revision⁸ is over, the scientific evidence is discarded. There is more reliance on scientific evidence and less on eyewitness evidence and confessions. Some participants thought this reliance was positive, but because a final ruling is more final in Europe, scientific evidence is not often preserved, which can cause difficulties in proving a miscarriage of justice occurred.

Participants discussed the UK's police operations as inquisitorial. In England and Wales, police in theory operate in an inquisitorial fashion. However, after a high-profile case where the state discovered police corruption (Yorkshire Ripper), the state instituted reforms where police have to test alternative hypotheses of the case to see if their hypotheses are well-founded. They also do this in cases involving confessions because of research that shows high rates of false confessions.⁹

One participant's concern is that the adversarial system only allows jurors a black or white choice, with the case narrative dependent on what evidence the prosecution or defense adduce in court. Often juries may not have a full insight into a case due to the large amount of materials that are unused. This could lead to the conviction of the innocent or bring about an acquittal of a guilty offender. Another concern is defense lawyers tend not to investigate cases for themselves, but rather work within the agenda set by the prosecution. Those on the side of the presumed innocent can also have tunnel vision because they are pitted against the prosecutor in an adversarial contest rather than a pursuit of truth. It should be possible to have both crime control and due process; i.e., crime control through due process.

The EWG acknowledged that the U.S. justice system is overwhelmed and that this must be considered when understanding the problems in the system.

Experts discussed the possibility of moving towards an inquisitorial system in the U.S., but that the problem is that the culture in the U.S. is surrounded by the adversarial system. One suggestion is to interject wrongful conviction cases into law school textbooks to start the dialogue within law schools.

MEASURING REFORMS AND THE NUMBER OF WRONGFUL CONVICTIONS

The group acknowledged problems with research concerning wrongful convictions because it is difficult to recognize a wrongful conviction as soon as it occurs. As mentioned above, it often takes years to discover that there was a wrongful conviction. The EWG discussed the difficulty

⁸ All European countries allow defendants to file a petition of revision in situations where evidence turns out to be false or when new evidence becomes available that was not available at trial. The petition for revision allows the defendant to file a request to the court for a new trial. See Huff, Ronald C., and Martin Killias, *Wrongful Conviction: International Perspectives on Miscarriages of Justice*, 2008.

⁹ Smith, Georgina, "The Psychology of False Confessions," *Criminal Bar Quarterly* 1 (2009): 8, http://www.criminalbar.com/83/records/29/CBQ%201-09%20v6.pdf?form_83.userid=1&form_83.replyids=29 (accessed May 2, 2011)

in measuring the success of reforms because even if governments implement reforms to prevent or correct wrongful convictions, the criminal justice process does not have a way to know whether its reforms are working. EWG participants recognized that it is important not just to initiate real reform into the criminal justice process, but to actually be able to measure its effectiveness. One suggestion was that cases could be measured through a criminal case review process. One suggested that if we developed more models like The Criminal Case Review Commission (CCRC) model in England, Wales and Northern Ireland, it could help review criminal convictions and possibly catch miscarriages of justice. Others argued that the CCRC is not the proper model to catch miscarriages of justice because the CCRC's remit is not to seek to find problems that cause wrongful convictions and communicate lessons back to the criminal justice system so that they are rectified. It works on a case-by-case basis of alleged miscarriages of justice (not innocence), sentence discounts, and even parking ticket cases that are alleged to be wrongful. The CCRC model and its criticisms will be discussed in further detail later in the report.

The EWG discussed possible solutions to measuring the effects of reforms, including thinking of the issue as a social science problem, rather than just a justice problem. The EWG acknowledged that the U.S. could invest huge resources in investigating a set of cases and reviewers still may not be able to determine how many individuals were falsely convicted. However, the Group said it could be possible to learn about how many cases are of concern or should be red flagged, which could at least reveal the uncertainty of the system.

The EWG also discussed the lack of information and research regarding the actual number of wrongful convictions that occur in any given time. In the United States, even a small error rate affects thousands of lives because of the high number of trials and incarcerations in the U.S. The EWG discussed that one way to track progress is for police departments to track lessons learned in the investigative stage. Another suggestion was to track the cases where DNA clears a wrongfully convicted person and keep those statistics institutionally. However, participants raised concerns that often suspects can be held for as much as a year based on eyewitness reports while waiting for a DNA result to eventually clear them.

Participants also highlighted an important factor in favor of obtaining pre-conviction data—exonerations are sometimes hotly contested and their circumstances are not all the same. The EWG discussed that the definition of exoneration is still not clear. They expressed that research on the topic may yield greater consensus on the definition, especially if the research includes law enforcement.

Hot Spots

Participants discussed the likelihood of wrongful conviction “hot spots”¹⁰ and determining the known causes of wrongful convictions. EWG participants thought that an area to explore is whether the locations of “hot spots” are likely to lead to errors and wrongful convictions or whether the “hot spot” is identified simply because there is more effort in that particular area to discover wrongful convictions. Another point raised by participants is that not only should a hot

¹⁰ “Hot Spots” refers to the locations where wrongful convictions are more likely to happen more often.

spot be examined, but also whether the evidence still exists to prove the wrongful conviction. In many cases evidence is destroyed.

The EWG discussed the elimination of suspects through DNA. One participant highlighted that it may be more effective to track state laboratories to determine “hot spots” rather than to track police departments because DNA can clearly exonerate a suspect, whereas other reasons for exoneration may be more difficult to track. Participants found that it is important to transfer knowledge about mistakes in cases where DNA exonerates an individual to cases where DNA is not present, such as with faulty eyewitness testimony and other causes. Participants stressed the need for more education regarding exonerations and the errors which occur in the justice system. However, participants also mentioned that 65 percent of exonerations are actually accomplished without the use of DNA.¹¹

EWG participants mentioned that while we may know hot spots are located where scandals have occurred, it is very difficult to know where hotspots may be located otherwise. One difficulty with hot spots is that while one is aware that hotspots exists in certain jurisdictions, these jurisdictions can often be the most resistant and obstructionist to any efforts to address the problems. Some participants noted that often the state or county will not provide basic information to attorneys or researchers; therefore certain areas do not actually show up as hotspots because of the lack of information. Some EWG participants noted that Innocence Projects are making headway into gathering information, but the real impact needs to come from practitioners working in the criminal justice field and educating their colleagues or at least pushing for further education about wrongful convictions. The EWG noted that it is important to have leaders involved to help lead the way, specifically lead prosecutors and head judges.

The Group also expressed concerns with studying hotspots. One such concern is that they shift overtime. The EWG found that this presents a problem for research because the hot spots that occurred 10-15 years ago may not be the same hot spots in today’s environment.

The EWG suggested that a useful research area is looking at the motivations of persons going into certain jobs in the criminal justice system. In Bristol, England, British researchers are looking at the psychological reasons why one would want to become a police officer and how they view suspects. One part of the research involves determining whether the police officer, before he or she has done any investigation, automatically sees a victim when an individual makes an allegation. This can sometimes cause tunnel vision.

One participant noted that the UK has very few successful eyewitness identification-based appeals because they have the Turnbull rule. Under this rule, at the time of trial, if one side is using eyewitness identification as evidence, the judge gives the jury the Turnbull warning. This is where the judge warns the jury that eyewitness evidence should be treated with caution because it is known to be unreliable.¹² In addition, the Police and Criminal Evidence Act 1984, (PACE) (discussed further below) contains detailed codes on how identification parades should be conducted, breaches of which could render eye witness identifications inadmissible depending

¹¹ Gross, Samuel, Kristen Jacoby, Daniel Matheson, Nicholas Montgomery, and Sujata Patel, *Exonerations in the United States, 1989 Through 2003*, 2004.

¹² See http://www.cps.gov.uk/legal/h_to_k/identification_of_suspects/.

on the severity of the breach. EWG participants then asked the question that if eyewitness identification is inherently unreliable, why is it still allowed into evidence?

The Group discussed education on wrongful convictions and its importance. Participants mentioned that a fruitful area of focus is on education throughout the system on the causes of wrongful convictions and how to prevent errors.¹³ For example, a seminar on forensic science for law enforcement and prosecutors can be an important tool in preventing errors. One participant felt that it is important that the causes of wrongful conviction are still a focus of attention.

Another participant felt that one area of research to address is whether the adversary system is a cause of wrongful conviction. There seems to be fruitful research about the accuracy of juries. Some of this research has included areas such as allowing jurors to take notes during trial and jury instructions before and after trial. Participants repeatedly found that the area of plea bargaining is an area that needs a lot of work.

Some experts also expressed a concern that research focuses too much on the causes of wrongful convictions. They expressed that this is problematic because sometimes what is identified as a cause is not always the cause. A lot of the research on wrongful conviction identifies the cause of the wrongful conviction as whatever the judgment states is the cause. This can be problematic because the judgment may give a different interpretation of what was the actual cause for wrongful conviction. For instance, a case may be overturned on the basis of procedural irregularities and non-disclosure by the prosecution when in reality the non-disclosure could be that all of the witnesses to the crime identified white offenders when the convicted persons were all black, bringing the issue of racism into view. Participants expressed that research should look at individual causes, structural causes, sociological causes, and procedural causes.

The Group thought that the use of the organizational accident model may help researchers look into the causes for wrongful convictions and help prevent them. The reasoning is that other fields such as medicine, aviation, and various industries have all experienced disasters and mistakes. These mistakes warn those looking at the causes not to look at one cause, but a combination of several causes to determine what went wrong. Therefore a defect in the system may not be one police officer for example, but a variety of things. Participants felt that the answer cannot only be committing to an end-of process inspection; there must be a continuous quality improvement culture throughout the system. The Group felt that there are many causes of wrongful convictions throughout the justice system which often explains the multitude of problems seen with Brady.¹⁴ Wrongful convictions are organizational accidents. However, unlike the mistakes seen in industry and medicine, accidents in the justice system are not as easy to spot at the time they occur.

Participants acknowledged that research on methods of checks and balances is also needed in the field. Humans will inevitably make mistakes and intentionally cause wrongful convictions for a variety of reasons, but checks and balances in the system need to be set in place so those mistakes and intentional acts are identified and prevented.

¹³ For more information, see Appendix C for a case study by Judge Barbara Hervey and Megan M. Molleur titled: "Preventing Wrongful Convictions through Education."

¹⁴ *Brady v. Maryland* 373 U.S. 83 (1963).

POLICE AND INVESTIGATIONS

The EWG began with an overview of police investigations in the Netherlands and the U.S.

Investigations in the Netherlands

In the Netherlands, measures have been implemented to reduce wrongful convictions. One measure comes from the Anglo-Saxon system. The Dutch Government tried to build adversariality into its inquisitorial system within both its police force and its public prosecutor's office. Having seen that tunnel vision was one of the main problems, it changed its day-to-day practice. One new measure used was the testing of different hypotheses and theories. All levels of police and prosecutors, managers included, got used to having their ideas contested with these alternative hypotheses and theories. This had never been done before in the Netherlands, and they feel that it makes their cases stronger.

The Netherlands also allows the defense attorney to have access to open-case files and interrogations, as well as access to the prosecutor's case before the trial to ensure transparency in prosecution and police methods of investigation and interrogations. In the Netherlands criminal justice system, the prosecutor is the one in charge, but the police carry out investigations, so a third important measure was to develop a service-level agreement between prosecution and police so that they will abide by certain criteria and standards. Finally, within the police force, the Netherlands have more specialized experts working with police in teams. These specialized crime analysts work with the police to develop theories of the case rather than just test police evidence from the police.

Investigations in the U.S.

Participants also talked about police investigations in the U.S. The conversation began with discussing how, in the U.S., the criminal justice system goes from a crime scene to a conviction, and then a wrongful conviction. In the U.S. there are two levels of proof: (1) probable cause and (2) beyond a reasonable doubt. One participant discussed that the second level of proof, beyond a reasonable doubt, is often difficult for law enforcement to understand. In the U.S. criminal justice system, there are a series of filters in place. A patrol officer picks up a case and follows all the procedures similar to what people see on TV. If charges are filed, the information goes to the prosecutor. Then a defense team comes in. Then there is the trial, jury and judge. These are all filters. Then the U.S. has courts of appeals, the Supreme Court, and post-conviction commissions. One participant asked how wrongful convictions cases in the U.S. make it through all these filters.

Other participants expressed that there are only initial filters. They said that once facts get into the court record, the filters are not effective because the facts are not questioned later on in the process. The EWG expressed that the lack of filters later on in the judicial process, such as questioning factual information, puts more pressure on law enforcement earlier on in the process. Some participants felt that some type of recording, especially video recordings, of the eyewitness procedures may help improve the system by providing a record of the procedure.

Police have many policies and procedures for dealing with a situation at a moment's notice (e.g., the Incident Command System (ICS)). This provides a framework for the police in crisis situations. The police are often very good at responding to crisis situations. One participant suggested that the U.S. should look at that same type of system when police are trying to manage an investigation. He also noted that 84 percent of exonerees were convicted of sexual assault.¹⁵

“Near Misses”

One participant noted that he had supervised many sexual assault cases in which there were a few “near misses.” Near misses are cases where the wrong individual is investigated or arrested, but is eventually set free when the police realize they have the wrong individual. He explained that reasons for near misses included bias, subjectivity, emotional involvement, tunnel vision, internal and external pressures, community, victims' families, social networks, media, politicians, group think, paralysis by analysis, ego, fatigue, inexperience, lack of expertise, turnover, lack of training, and so on.

EWG participants recognized that researching “near misses” could be beneficial. Near misses are a good area of research because much earlier in the investigative process practitioners know something went wrong and law enforcement investigated the wrong person. When someone is wrongfully convicted, the state probably does not know, and it may take a long time to discover it. The near misses would be a lot closer in time than the discovery of a wrongful conviction.

Participants recognized that in the medical world individuals already know what goes wrong, and it is reported, including the near misses, as a matter of routine, by organizations such as the Joint Commission on Accreditation of Healthcare Organizations (now known as “The Joint Commission or “TJC”), a non-profit organization that accredits health care organizations, including hospitals.¹⁶ The NTSB also runs a near-miss report program.¹⁷ The National Transportation Safety Board (NTSB) conducts independent investigations of civil aviation accidents (as well as other major transportation accidents). NTSB's investigations are conducted by “Go Teams.” These teams are composed of as little as three or as many as a dozen or more investigators assigned on a rotational basis. These investigators are each specialists responsible for a distinct portion of the investigation, and each directs a working group based on their expertise, which acts as a subcommittee of the investigation. These working groups are staffed by representatives of the parties to the investigation.¹⁸

Participants mentioned that many of the things that can go wrong for police officers are not under the detective's control. Some participants felt that detectives tend to get the blame for decisions and workload designs made by policymakers. Participants felt that we need a vehicle for ongoing analysis of near misses, similar to NTSB near-miss reports. An advantage of such ongoing reports is that we are not waiting 15 years to deal with the problems, and we can also show some successes. Developing this vehicle would not be simple, but if a systems approach

¹⁵ Innocence Project, “Latest Exoneree Statistics,” compiled from Innocence Project profiles of exonerees; see <http://www.innocenceproject.org/know/Browse-Profiles.php>.

¹⁶ For more information on the TJC, see www.jointcomission.org.

¹⁷ For more information on the NTSB, see http://www.nts.gov/abt_ntsb/invest.htm.

¹⁸ See http://www.nts.gov/abt_ntsb/invest.htm.

like this were taken, it would undermine the fragmentation over time that occurs when discovering wrongful convictions much later than when they occur. Additionally, if lessons learned were disseminated into the field, it would provide practitioners and students with available case studies for training and learning.

Eyewitness Identification

Participants also discussed eyewitness identification and its contribution to wrongful convictions. Participants noted that the error rate is extreme. Participants discussed the history of eyewitness identification. Until the 1980s, research results were not deemed useful in forensics. This started to shift with scientifically designed experiments on factors surrounding post-event information that would influence the accuracy of eyewitness information. The peer-reviewed psychological literature began to address how to pick out which eyewitness is right and which is wrong. NIJ published the piece “Convicted by Juries Exonerated by Science,¹⁹” and the U.S. Government became aware of the theories of Gary Wells, who developed a typology of factors that affect eyewitness evidence, grouped into two categories: (1) estimator variables that the system cannot control, and (2) system variables that the system can control.

One participant noted that if researchers could apply the psychological knowledge to system variables, researchers could move the science into police stations. NIJ issued an eyewitness evidence guide for law enforcement in 1999 addressing some of the psychology behind getting ideas out into the field.²⁰ One recommendation from Wells was the double-blind sequential lineup. The technique is catching on in the field. However, it looks like a top-down process handed down to the field even though most of the impetus came from law enforcement officials who were ready to accept that a fewer false positives would result. Spurred by the Innocence Projects, acceptance of a more conservative screening test for guilt has sprung up locally in many jurisdictions. The new technique is being field-tested, and a feedback loop is occurring.

An interesting eyewitness identification case in New Jersey, under the leadership of the Innocence Project, is assessing what it means for a legal system to adopt the modern concept of memory.²¹ Memory is like trace evidence—it is difficult to recover and easy to contaminate. Researchers are beginning to see judges forced to think about eyewitness memory evidence as trace evidence. Previously, courts looked for misconduct. This indicates a possible paradigm shift, with judges viewing bad eyewitness identification memory evidence more like a system problem involving contamination and less like the work of a “bad apple” police officer.

The EWG also discussed eyewitness identification procedures including double-blind sequential eyewitness identification practices. In a sequential lineup a witness must exercise “absolute judgment,” comparing each photograph or person only to their memory of what the offender

¹⁹ Connors, Edward, Thomas Lundregan, Neal Miller, and Tom McEwen, “Convicted by Juries Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial,” Research Report for the National Institute of Justice, Washington, DC: National Institute of Justice, 1996, NCJ 161258, <http://www.ncjrs.gov/pdffiles/dnaevid.pdf>.

²⁰ “Eyewitness Evidence: A Guide for Law Enforcement,” Research Report for the National Institute of Justice, Washington, DC: National Institute of Justice, 1999, NCJ 178240, <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

²¹ See http://www.innocenceproject.org/Content/New_Jersey_Judge_to_Hear_Case_on_Eyewitness_Guidelines.php.

looked like.²² In a double-blind lineup the person presenting the lineup does not know the identity of the suspect, thus in theory creating an unbiased lineup.²³

Participants discussed that North Carolina is the only U.S. state with a statutory law for double-blind sequential eyewitness identification.²⁴ The practice evolved in North Carolina because researchers and practitioners recommended it as a best practice. The North Carolina Justice Academy adopted it first and then it was tested in several jurisdictions. Participants noted that it was difficult to institute, but the overall research showed that advantages outweighed the difficulties, which helped push the bill.²⁵ This also shows the effects of research on pushing legislation. One participant noted that an important part of this collaboration in North Carolina and the passage of the law was the involvement of law enforcement. The EWG noted that an important part of getting law enforcement and others onboard is pulling together the data on new procedures and disseminating it to law enforcement. The EWG said that the data helps remove the fear factor from instituting new procedures.

Participants discussed the practical difficulties of sequential double-blind identification in major metropolitan departments including the logistical issues with some of the best practice procedures.²⁶ One participant noted that some of these practices have been tested in police departments and they did not work. Many times this happens because there are several small groups of detectives who handle hundreds of cases per year. Scheduling witnesses so they are not contaminated involves — at a minimum — audio-taping or, better yet, videotaping. Lineups are challenging for law enforcement. If evidence gets dismissed, where are the legs of the investigation? Police officers are not comfortable with lineups alone based on the current research.

The EWG also discussed a double-blind sequential line-up pilot project in Minnesota. Minnesota started a double-blind project in the fall of 2003 in several police departments in Hennepin County.²⁷ Practitioners had several conversations because there had been resistance to double-blind eyewitness identification due to insufficient staff. The district attorney's office offered a functional equivalent to the double-blind identification to enhance the blindness. A blinded functional equivalent is available when there is not an individual without knowledge of the suspect available to administer the identification. The administrator must "(1) instruct the witness that he does not know the order of the photos or whether the person who committed the crime is in any of the photos and (2) have the witness view the photos in such a manner that the

²² See <http://www.ojp.usdoj.gov/nij/topics/law-enforcement/investigations/eyewitness-identification/simultaneous-sequential.htm>.

²³ See <http://www.ojp.usdoj.gov/nij/topics/law-enforcement/investigations/eyewitness-identification/variables.htm>.

²⁴ North Carolina: Session Law 2007-421; HB 1625 (2007).

²⁵ See http://www.nacdl.org/sl_docs.nsf/Issues/eyewitnessid1.

²⁶ For a description of model policy on eyewitness identification, see http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Eyewitness%20ID%20policy%20brief.pdf.

²⁷ Klobuchar, Amy, Nancy K. Mehrkens Steblay, and Hilary Lindell Caligiuri, "Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project," *Cardoza Public Law, Policy & Ethics Journal* (April 2006), <http://www.innocenceproject.org/docs/SteblayIDStudy.pdf>.

administrator cannot see which photo the witness is viewing.”²⁸ Ultimately, the departments rarely used the functional equivalent and were able to implement double-blind. One participant noted that the key in Minnesota was to make it as simple as possible. During the pilot project, one major department asked to take part, and by the time the pilot was over all departments were participating.

Participants acknowledged that often police departments lack written procedures for eyewitness evidence. This is an area that may be easy to improve. Accuracy can be improved and evidence can be better documented cheaply. It was also noted that it is important not to focus on police misconduct, but rather focus more on the system and documentation approaches. Participants felt that often officers are well intentioned, but have little training. There are many problems in this area that can be avoided with simple procedures and checklists. It was noted that small police departments need help getting access to collections of photographs, including digital, so that they can construct better lineups and fillers.

Alternative Case Theories and Investigation Practice

Experts also acknowledged that some prosecution offices perform crime analysis by having a devil’s advocate on staff that looks at both sides of the case. The EWG thought such exercises could be beneficial in preventing wrongful convictions.

Participants also discussed the inclusion of crime analysts. Organizations have conducted research on crime analysis and have found that they are underutilized in police departments in the United States.²⁹ Part of this is cultural because analysts are often civilians with advanced degrees. However, another challenge to using alternative hypotheses in cases is that they are often expensive and it is hard to invest the time and money in them. The EWG felt that crime analysts could be a key factor in this kind of work if they develop the alternative hypotheses. Additionally, participants noted that police managers need case management training and need to critically think about alternative theories. The system cannot afford to repress opposing views.

Police Practice and Training

Experts acknowledged that feedback and communication between police officers needs to be examined. When a senior officer critiques a junior officer engaged in collecting information or conducting a lineup, there is a risk that anything said can go into the junior officer’s record, even if it is just corrective and not disciplinary. The methods used to make feedback to police officers more productive seem like an area to examine.

Other participants felt differently and stated that corrective action taken regarding a police officer is normally documented and is public record. It is important to document it because the police can later track that officer. It is important for police officers to step in before lineups and

²⁸ Schleh, Jeanne, “The How and Why of Sequential Lineup Reform,” Ramsey County Train the Trainer Bulletin (October 2009), <http://www.co.ramsey.mn.us/NR/rdonlyres/CFFF14C4-0F44-4BD9-9995-0186E9C17085/18041/TheHowandWhyofBlindSequentialLineupReform.pdf>.

²⁹ Amendola, K.L., and G. Jones, “Selecting the best analyst for the job: A model crime analyst assessment process for law enforcement agencies,” Washington, DC Police Foundation, 2010.

require officers to articulate why they are putting a particular person into a lineup. If an officer cannot articulate this, the lineup should not be allowed.

However, it was acknowledged that police officers do have different processes to deal with integrity issues and training issues. If it is a training issue, some police departments have implemented processes to deal with it. Sometimes the two issues get blurred. It may help to examine improving supervision and management of teams and officers. Documentation may help police identify patterns in investigations.

One participant noted that a possible avenue for exploration was term limits for officers, reasoning that this would prevent officers from becoming hardened. Experts discussed the value of moving towards more scientific policing where forensics has a larger role. This is often difficult for law enforcement because it requires learning new skills, and feedback is necessary during training. If this feedback is regarded as corrective, this dissuades patrol officers from doing anything other than what they already know is acceptable.

The discussion also covered issues of police biases. Participants noted that NIJ should take a look at understanding police issues better. Participants also noted that it is insinuated that police often consciously impose their bias, with others arguing that is not the case.

Another concern expressed by the Group was the pressure regarding high-profile cases. Police might be pressured to solve the case quickly rather than conduct a comprehensive investigation. One way to control certain pressure is to have good administrative staff that can handle media and politicians. This allows officers to concentrate on identifying the suspects and investigating the case without worrying about the public scrutiny.

The EWG also discussed that there are 18,000 police departments in America which makes fragmentation issues regarding standardization of practices difficult to address. One question arose about what the typical hunches are for officers regarding the “good original suspect.” What evidence comes into a case that ultimately impresses the state? One participant expressed that lawyers had potentially dropped the ball with police departments after the Miranda case. It was expressed that lawyers should have more discussions with police departments.

One participant reminded others that the police can only control certain things. For example, victims and their families often go through photos on registered sex offender Web sites or do other kinds of online searches and then say, “This is who attacked me.” The police do not run out and arrest this suspect, but they also cannot tell the family they are wrong. The police have to take time to investigate and eliminate a suspect. Often, everyone watches crime shows and expects police to produce immediate solutions. However in actuality, it can take a year or two to get a rape kit analyzed.

Participants also discussed policing in the U.K., including the U.K.’s Police and Criminal Evidence Act of 1984 (PACE), which became effective in January 1986. This Act does not apply to Scotland which operates under a different legal system. PACE and its Codes of Practice “provide the core framework of police powers and safeguards around stop and search, arrest,

detention, investigation, identification and interviewing detainees in the U.K.”³⁰ The British parliament passed PACE in response to the Confait Affair³¹ where the police were shown to be developing cases against suspects based on false information in order to round up suspects quickly.³² One thing it mandated is that all custodial sessions be taped in their entirety.³³

One participant discussed that while PACE was very good at the onset, it has been watered down. He said that when PACE was enacted, any breaches of PACE by police officers were considered criminal offenses.³⁴ Police complained they could not do their investigations properly with the new requirements. Many police officers also got pressured by politicians, who just wanted results. Eventually, the British Parliament passed several measures that watered down PACE, including the Criminal Justice Act of 2003 which significantly expanded police powers, such as stop and search and warrantless searches.³⁵ There are also limited repercussions, even if a police officer violates the expanded police powers in PACE. One participant responded that the only measure taken for compliance with PACE is that the police send officers to a training course on PACE compliance.

One participant suggested that NIJ should look critically at some of the legislation for procedures that govern policing in the UK and US to evaluate policies and practices. One example provided was the Proceeds of Crime Act in the UK under which the police department gets half of the proceeds of crimes. This sometimes causes difficulties with forcing convictions rather than truly investigating the case.

Participants stressed that policy makers must understand that when the wrong suspect is convicted, the perpetrator escapes without punishment for the crime. Not only is an innocent person convicted, but letting the guilty go free threatens public safety.

FORENSICS

The EWG began their discussions with an overview of the forensics systems in Scotland, Canada and Arizona.

Forensics in Scotland

In Scotland, developments in the United Kingdom have affected the forensics process. The Birmingham Six case happened in the 1970s.³⁶ In the 1980s, there was a lab contamination problem, and, more recently, the Damilola Taylor case involving failure to identify blood on a

³⁰ Police and Criminal Evidence Act 1984 (PACE) and accompanying Codes of Practice, U.K. Home Office, <http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/>.

³¹ The Confait Affair refers to the murder of Maxwell Confait in London in 1972. This case brought to light problems with British police procedures.

³² See http://news.bbc.co.uk/1/hi/english/static/in_depth/uk/2001/life_of_crime/miscarriages.stm.

³³ Police and Criminal Evidence Act 1984 (PACE) and accompanying Codes of Practice, U.K. Home Office, <http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/>.

³⁴ For more information on PACE in the UK, see <http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/>.

³⁵ For information on the extended police powers now available under PACE, see <http://www.homeoffice.gov.uk/about-us/home-office-circulars/circulars-2003/060-2003/>.

³⁶ For more information, see Appendix C for a case study by Brian Caddy titled: “A Miscarriage of Justice Based Upon Scientific Evidence: The Birmingham 6.”

shoe. These cases all pointed to problems related to quality-control systems, either not in place or not properly implemented. In accord with the decisions of the European Network of Forensic Science Institutes (ENFSI) and implemented through the United Kingdom Accreditation Service (UKAS) and with the support of the Forensic Science Regulator, laboratories in the UK now have to be accredited. In addition, standards are established to ensure that crime scenes are properly documented, including, for example, transportation of materials to the laboratory. Standards also cover documenting who receives samples into the laboratories, as well as requirements for proper storage and the amount of time samples are stored. Later on, the defendant might wish access to those samples again. Methods of testing must be recorded having been previously validated. Tests must be interpreted and presented to courts. Many questions arise: What is the mechanism of validation and who oversees compliance? There will be errors associated with any quantitative methods, and we want to know what these errors will be. These data are submitted to the United Kingdom Accreditation Service (UKAS), an independent accreditation agency, to ensure standards are met. Separate laboratories are required to analyze clothes from the suspect and those from the victim. Because UKAS cannot monitor laboratories on a daily basis, a Forensic Science Regulator can enter a lab at any time to check compliance. This person is under the control of an independent council.

A problem concerning forensic reports is that ideally the forensic scientist should not know anything about a case until after the examination is complete. But the forensics teams only have a short window to examine the evidence and return it to the police, consequently targeting of evidence types becomes inevitable. Another problem concerns interpretation using statistics, which can be difficult for scientists and lawyers to understand. One participant noted the need for mechanisms to interpret statistics for the layperson.

Forensics in Canada

The EWG also discussed Canadian forensic labs and procedures. There are three forensic science services across Canada — one in Ontario, a second in Quebec, and a third serving the rest of Canada. Private labs are used in limited circumstances as well. Two national databases are funded by the federal government and administered by the Royal Canadian Mounted Police Forensics Science Service: the National DNA databank and an Integrated Ballistics Identification System (IBIS). Police identification units are responsible for dealing with scenes of crime, fingerprinting, basic computer forensics, and other pattern matching services.

The Center of Forensic Sciences (CFS) in Toronto, Ontario, is accredited by the American Society of Crime Laboratory Directors–Laboratory Accreditation Board. In the 1990's, CFS was part of a miscarriage of justice (the Guy Paul Morin case) and was subject to a public inquiry. The commission of inquiry issued a large report that contained 26 recommendations related to forensics. The CFS made major changes following these recommendations, including to its management structure and operational procedures. It implemented all but one of the recommendations, which resulted in a stronger organization and restored and enhanced its credibility in the defense and prosecutor communities and in courts. Commitment and leadership from CFS management were crucial to implementing the changes. The Canadian public inquiry process is expensive and lengthy but leads to viable recommendations and systemic change. Canada has not done as well with extrapolating from one inquiry to another, so one will find that

over the years the inquiry recommendations with respect to miscarriages of justice have the same themes.

Some of the reforms implemented from the inquiry process included requiring that all forensics conclusions be in writing and included in the case files. The CFS also created a comprehensive report writing policies and guidelines for forensic reports. The report creates several guidelines some of which are: chain of continuity; identification of tests conducted; reasons for the examination of some evidence and not other pieces of evidence; the results of the examination and testing; and the conclusions that can reasonably be drawn and the relevant limitations on such conclusions.³⁷ Additionally, all forensic reports include an information sheet, which includes a “glossary of terms used, details of the examination employed and, where appropriate, examples of verbal qualifiers of likelihood ratios accompanies the report.”³⁸

Another reform instituted by Canada was a court-monitoring program. The policy “requires managers to make a genuine effort to observe evidence by one of several means, most preferably direct observation in court, has been established. Mock courts are employed for scientists who may not have been called to testify for significant periods of time.”³⁹

One participant noted that in Canada they are too often reinventing the wheel and need to spread the knowledge from each inquiry across jurisdictions. The CFS works to prevent miscarriages of justice through accreditation, quality assurance, qualified and trained staff, and rigorous use of the scientific method. Through a fairly liberal disclosure law, the defense has rights to all evidence. It provides free testing to the defense community, but they have to agree to disclose the information to prosecutors. Pretrial consultation is held to discuss and explain report findings. Staff training includes courses on miscarriages of justice and ethics, and address “cognitive bias.” The staff selection process goes beyond scientific/technical proficiency to behavioral competencies.

One participant stressed the importance that CFS is not part of a police organization. Independence and objectivity are difficult (but possible) in a lab associated with a police department, especially in today’s environment. For example, one participant discussed how it is hard to control cognitive bias and tunnel vision without independence. Many things can be done to improve the forensic science system, including removing labs from police services and putting oversight in place, but underlying these must be a deep, sustained culture of quality assurance and ethics that is messaged by management and lived on a daily basis by staff.

Forensics Services Advisory Committee

Participants also discussed developments in Arizona. Several years ago the Arizona attorney general established a Cold Case Task Force that issued recommendations, one of which was to establish the Arizona Forensic Services Advisory Committee. The Committee has no statutory

³⁷ Manishen, Jeffrey R., “Wrongful Convictions, Lessons Learned—The Canadian Experience,” Ross & McBride, LLP, May 5, 2005, <http://www.rossmcbride.com/articles/Wrongful-Convictions-Lessons-Learned-The-Canadian-Experience/>.

³⁸ *ibid.*

³⁹ *ibid.*

authority or funding and is a work in progress. Its goal is to prevent problems in Arizona labs that have occurred in other jurisdictions around the country. Committee members include lab directors, prosecutors, defense attorneys, a judge, professors, and a member of the Arizona Justice Project. The Committee plans to set up a website so that the public can file complaints on laboratories. It has gotten an improved preservation and collection statute through the legislature, and plans to introduce legislation on eyewitness identification and videotaped statements. The prosecutors have agreed to back this.

The Committee has a special focus on education. It has presented forensic science programs at the state judicial conference for judges, prosecutors, and defense attorneys, and in other settings. Recently, it has broadened its educational effort through its education subcommittee and is starting a forensic sciences academy for prosecutors, defense attorneys, and judges that will offer weekly courses in a 6-month program on every part of forensic science, moot court exercises for experts, and other practical exercises.

The Forensic Services Advisory Committee evolved because individuals attended a DNA conference in California, and realized that Arizona needed to coordinate efforts in its patchwork system of city and state labs and do a better job with its existing resources. Then the Committee decided to do a project on post-conviction DNA testing—the result was the Arizona Justice Project directed by Carrie Sperling, which is their version of the conviction integrity unit in Texas. Funded through the Bloodsworth grant, its job is to facilitate testing and help find evidence. The mantra is test early and often, and then argue about the results later. The statewide project works with individual counties. A disadvantage compared with the Texas unit is the project's lack of autonomy, in that ultimate decision-making lies with counties. In their original pitch of the Project to the state prosecutors' association, the Project's founders noted that Arizona has a good post-conviction system and the Project's experience would be expected to be similar to that of San Diego and Minnesota. The Project was expected to show that Arizona's system is relatively good. There have been two exonerations in Arizona. The Project has had buy-in from most of the prosecutors. It has done some presentations at the National Association of Attorneys General, which is a way to distribute information to other states.

The Arizona Justice Project is trusted by inmates because it does not involve just the attorney general and law enforcement. The Project takes the first look and then hands over the material to the attorney general. Despite the passage of the preservation and collection statute, the Project recognized that there were so many law enforcement agencies handling evidence that it could not determine where evidence was after trials or why it was where it was. No policies were in place in most jurisdictions on what happens to evidence, even though this is mandated by law. So the Project assigned a criminal justice graduate student to compile information on policies in every agency in the state. The Project then analyzed the policies and came up with best practices. The best practice policies can be used statewide. Participants also noted that it would be helpful if there were resources to place bar codes on every piece of evidence.

Participants noted that cooperation for achieving good policy is essential. Cooperation was the key that led the Project to success. It is important that the Project gets its hands dirty looking for the evidence with the Innocence Projects because this enables it to understand the problems after

a trial, see where the policies drop off, and learn what is needed. In addition, it was crucial to have the attorney general behind the project, as well as an advisory committee.

Forensics Challenges in the U.S.

Participants also discussed challenges in the U.S. Participants recognized that if it were not for forensic science, we would not have the number of exonerations we do today. However, participants also noted that forensic science has contributed to some wrongful convictions as well. It was noted that no single factor contributes to a wrongful conviction. Wrongful convictions result from many individual errors, as might be visualized in the Swiss cheese model (by James Reasons), in which holes in pieces of Swiss cheese line up to create a “perfect storm” for a bad situation.

A big challenge in the United States is that it does not have enforcement mechanisms for mandatory certification. An accreditation process brings tangible measurement and quality assurance/control. In some wrongful convictions cases back in the early 80s and 90s, there were charlatans. Accreditation was rare back then and is more common now, but how do you enforce it? Accreditation is optional, not mandatory. There is no way to force people to be certified or laboratories to be accredited. The U.S. has 50 states, each like a separate country with its own laws. It is up to each individual state to enact a law to enforce accreditation. For example, after 9/11 there was talk of a national ID card, but there was so much opposition from different states that nothing could be accomplished. In today’s environment it is hard to do.

Independence, Accreditation, and Bias

Experts acknowledged that research is needed in two areas: (1) independence of labs, especially concerning cognitive bias — it may be useful for the U.S. to look to other countries in this area, and (2) prioritizing workloads in the forensic community when there is limited funding.

The EWG furthered the discussion concerning accrediting forensics labs. Participants expressed that lab accreditation is not a magic bullet. It only validates a lab. The EWG expressed that maintenance and checks at each stage of the process is what is important in forensic labs because maintenance is needed to minimize human mistakes and eliminate near misses. Quality control and attention to detail is needed more than basic accreditation.

One participant noted that one positive development is that the forensic community now accepts the idea of cognitive bias. Participants noted that one area in which this recognition is taking hold is in the examination of fingerprints.⁴⁰

EWG discussed problems identified with faulty forensics labs. Such problems include: (1) lack of training, lack of quality assurance; (2) lack of supervision; (3) lack of funding leading to an under resourced lab; and (4) problems with preservation and storage of evidence.

⁴⁰ For more information on fingerprint analysis and possible cognitive bias, see http://www.cognitiveconsultantsinternational.com/Dror_FSI_cognitive_issues_fingerprint_analysis.pdf.

Partnerships

The Group also discussed partnerships between the forensics community, police, prosecutors, and defense attorneys. A concern of experts was that testing of drugs is often not used in cases, but takes up a lot of time of forensic examiners. The EWG found that a possible focus area is determining how prosecutors and labs can work together to find out which evidence is necessary and which evidence will be used in court in order to prioritize the information that comes from labs.

The EWG discussed forensics in the Netherlands. The Netherlands employs an extra 500 forensic assistants at 26 police agencies to investigate crime scenes. In addition, the Netherlands Forensics Institute (NFI), a national and independent forensics laboratory, and police have agreed on norms for describing, photographing and transporting corpses and treating crime scenes. The Netherlands Forensics Institute advises the police on securing crime scenes and works with police from the onset to create the hypothesis for a case.⁴¹

The EWG also discussed alternative practices in Canada, including the training of police officers. The Center for Forensic Sciences (CFS) in Toronto has a close association with the Ontario Police College. The Center sends scientists to participate in scenes-of-crime officer training courses. The Center also produces a booklet that addresses how to collect and preserve evidence at crime scenes to bring into the lab.⁴²

The Group also discussed CFS's relationship with the police. It convenes meetings with police officers in large cases to discuss what is more probative in a case. This allows both police and forensics staff to work together to determine what the most important pieces to be tested, for example 5 to 10 out of 100.

Another area of importance pointed out by discussants was cooperation between the justice and forensics communities to deliver clear reports. Participants identified ambiguous language in forensics reports as one problem area. The EWG expressed concern that a lot of forensic science is thought to be based on fact, but may actually be opinion. Participants discussed the need to determine how a lawyer relies on the information. They also expressed that judges rely on this information too, and sometimes judges have a difficult time understanding the language in the reports.

Participants also agreed that training lawyers and judges is critical. One participant asked why there is not a mandatory class in law school on basic scientific concepts (e.g., representativeness, reliability and validity). Other participants agreed that it is important to focus on more scientific evidence education and training in law school. Law students need to become more aware of how scientific evidence can lead to wrongful convictions and how to sort through reliable and unreliable evidence and make determinations. It would help to evaluate the tools used at this gatekeeper stage.

⁴¹ General Information on the Netherlands Forensics Institute, 2008, see <http://www.forensicinstitute.nl/>.

⁴² For more information on the CFS, see http://www.mcscs.jus.gov.on.ca/english/centre_forensic/intro.html.

Another participant noted that the forensic scientist's role at a trial is not just to report results, but also to educate and explain plainly to lawyers, judges, and jurors. Experts also acknowledged that while it may be important to train lawyers about forensics, it is also important to have a pool of scientists that are available to examine files as the cases come up because technology in forensics is constantly changing.

The EWG suggested that researchers should explore clear communication. Experts acknowledged that it is forensic scientists' responsibility to communicate clearly and to use terminology (such as consistent with and match) that is clear. It was also acknowledged that there is research currently occurring in these areas. NIJ put out a number of grants recently for fundamental research in this area. However, experts acknowledged that while forensics is an important piece of the puzzle of wrongful convictions that it is still just a piece.

ARRESTS AND CONVICTIONS

Plea Bargaining

The group acknowledged that in the U.S. about 95% of people convicted of felonies plead guilty as a result of plea bargaining.⁴³ For misdemeanors this number is most likely higher. Research shows that 16 of the 250 DNA exonerees, or 6%, opted for pleading guilty and did not ever stand trial.⁴⁴ The EWG discussed several reasons an innocent person may plead guilty to a crime.⁴⁵ They acknowledged that individuals plead guilty because they expect to suffer less in the criminal justice system if they plead guilty. Many individuals that are convicted of lower level crimes confess to a crime they did not commit in order to go home rather than spend time in pre-trial detention while waiting for a trial. These individuals also want to avoid the hassle and suffering of repeated visits to court. Individuals may also think they will lose at trial even if they have not committed the crime. Some individuals plead guilty because they are mentally ill, want attention, or want to protect others.

Experts acknowledged that the U.S. does not have figures on how often this occurs. Participants noted that it seems that everyone is reluctant to reconsider and investigate cases in which the individual pleads guilty for a plea bargain. The EWG stated that more research needs to occur to find out if and how plea bargaining promotes wrongful convictions and if it entices people to judicially confess to crimes they did not commit.

The EWG also noted that plea bargaining is also a way in which our system can operate semi-efficiently. With a large case loads it may become very difficult to get cases through the system effectively and not violate the rights of those accused. However, the EWG found that it must be acknowledged that plea bargaining can force individuals into choices they may not otherwise have made.

⁴³ Durose, Matthew R., and Patrick A. Langan, "National Judicial Reporting Program: Felony Sentences in State Courts, 2004," Washington, DC: Bureau of Justice Statistics, 2007. NCJRS, NCJ 215646.

⁴⁴ Garrett, Brandon, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, Harvard University Press, 2011.

⁴⁵ For more information, see Appendix C for a case study by Lindsay Herf titled: "The Pious Plea."

The EWG also discussed the absence of plea bargaining in some countries. In Germany, plea bargaining only occurs after a thorough police investigation and all findings are available to the defendant for review. Judges are also active in the plea bargaining negotiations.⁴⁶ In France, plea bargaining is not permitted.⁴⁷ In Spain, defendants cannot plead guilty when the prosecuting attorney asks for a sentence of six years or more.⁴⁸

The participants also discussed penal orders, which differ from the American plea bargain. A Penal Order is used in several European countries and is commonly referred to as the “continental plea bargain.”⁴⁹ It is similar to plea bargaining, but differs from the U.S. system in a few ways. One of the most important differences is that if a defendant does not agree with the Penal Order, he/she does not run the risk of having a larger sentence because of choosing to go to trial rather than take the deal.⁵⁰

A Penal Order takes the form of a summary proceeding. The prosecutor writes out a form on which the offense is summarily described and a sentence is imposed. Such warrants are possible only if (1) the facts are obvious and not contested and (2) the prosecutor sees no reason to impose a sentence beyond a certain limit (Switzerland: 6 months; Germany: suspended custodial sentence of up to 1 year). If the defendant does not agree with the verdict, the legal interpretation, or the sentence, he/she can insist on a full trial (Switzerland: within 10 days; Germany: within 2 weeks).

In Switzerland the prosecutor issues the decision.⁵¹ In Germany penal orders are only available upon written request by the public prosecutor to the judge. The judge then determines if the request is justified and then pronounces the proposed sentence. In practice, the judge in Germany rarely refuses approval. Because court rejection is rare, the public prosecutor’s influence is significant. Although legally a penal order is a court decision (in Germany), it can be said that in practice it is a sanction imposed by the prosecutor.

In Switzerland as well as in Germany, this written procedure results in a judgment without the parties being heard. Because the defendant can ask for a full trial, this is not seen as incompatible with the constitutional “right to be heard.” In the absence of an objection, the judgment becomes final and has the same effect as a judgment following a main hearing. In Switzerland in 2000, penal order was applied in nearly 80 percent of cases, and in Germany for the same year it was applied in about 40 percent of cases.⁵² The procedure is often used in cases of traffic offenses, minor thefts, and possession of drugs.

⁴⁶ Turner, Iontcheva J., “Can We Manage Plea Bargaining Better? Insights from Germany,” paper presented at the annual meeting of the The Law and Society, J.W. Marriott Resort, Las Vegas, NV, 2009, 05-25, http://www.allacademic.com/meta/p17852_index.html.

⁴⁷ Huff, Ronald C., “What can we learn from other nations about the problem of wrongful conviction?,” *Judicature* 86 (2) (2002): 95.

⁴⁸ *ibid.*, 96.

⁴⁹ Killias, Martin, and Stefan Trechsel, “Laws of Criminal Procedure,” *Introduction to Swiss Law* (3rd ed), ed. François Dessemontet and Tuğrul Ansay, Hague: Kluwer Law International, 283.

⁵⁰ *ibid.*

⁵¹ For more information, see Appendix C for a case study by Gwladys Gillieron titled: “Prosecutions and Penal Orders in the Swiss System.”

⁵² *European Sourcebook of Crime and Criminal Justice Statistics, 2003*, tables 2.2.2.1 – 2.2.2.3.

Switzerland conducted research on the influence of penal orders on wrongful convictions. They analyzed all admitted petitions of revision over a period of 10 years. It turned out that this kind of simplified procedure was at the origin of several wrongful convictions (70% concerned penal orders: 30% concerned judgments).⁵³ The main problem is that the decision is issued without a previous hearing of the defendant, but only on the basis of police accounts. The state determined that police accounts are sometimes incomplete or inaccurate. As a consequence, individuals are wrongfully convicted. Many cases of wrongful conviction happened because the defendant was wrongfully identified (e.g., confusion of names). The state found that such problems could have been easily avoided through further investigation. Swiss authorities also found out that in many cases the defendant could have easily proved his/her innocence, but did not oppose the decision. Reasons for not contesting the penal order included: indifference; fear of unfavorable outcomes, such as costs of a procedure; ignorance of the law; and functional illiteracy. Other defendants just did not understand the meaning of a penal order and that by missing the deadline to object to it meant that they agreed to the sentence imposed by the prosecutor.

Brady Requirements and Open-Case Files

Experts discussed the view that the U.S. justice system is a nontransparent adversarial system and that prosecutors hold a lot of the power. An important part of this non-transparency is to consider open-case files. An open-case file is when the prosecutor's case file is available in its entirety to the defense. In other countries like Switzerland, open-case files are considered a basic part of due process.⁵⁴ Currently in the United States, prosecutors must disclose exculpatory evidence to the defense as a result of the Supreme Court's 1963 *Brady v. Maryland* case.⁵⁵ However, participants expressed that Brady had no teeth, making it difficult to enforce to protect a defendant's rights.

The EWG found that one area to examine for wrongful conviction hot spots is an office that has numerous Brady violations.⁵⁶ They found that this is a way for researchers to be proactive without waiting for someone to move forward with a claim for wrongful conviction.

One participant compared the adversarial trial to an end-of-process inspection after a very long non-adversarial fact-finding process. They noted that human beings often hate being inspected. The Group also expressed concern over end-of-the-process inspection because it is often poor quality control. The EWG discussed that if Brady violations happen because of concern for witness security or evidence tampering, then an empirical study should compare open-file jurisdictions to tight jurisdictions to determine the protection and validity of tight jurisdictions. These studies should determine what purpose withholding evidence from the defendant serves.

⁵³ Killias, Martin, Gwladys Gilliéron, and Nathalie Dongois, "A survey of exonerations in Switzerland over ten years," Report to the Swiss National Science Foundation, Lausanne and Zurich, Switzerland: University of Lausanne and University of Zurich, 2007, 22.

⁵⁴ Dessemontet, François, and Tunçrul Ansay, eds., *Introduction to Swiss Law*, 3rd ed., The Hague: Kluwer Law International, 2004, 275.

⁵⁵ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁵⁶ For more information, see Appendix C for a case study by Carolyn Hoyle titled: "The AEDPA: A Barrier to Justice? A Case Study of Carlton Gary."

Another participant also suggested that we should consider inspections during the process of gathering evidence so that a trial is not the only inspection of the case.

Other members of the Group noted that research already shows the benefit of open-files. They highlighted that the real issue is bringing this research to light and explaining it to practitioners in the field.

One participant raised a recent positive Brady development which is a recent push to adopt checklists of Brady material that prosecutors would expect police to provide to them for trial. It was expressed that better training on Brady would lead to better information during investigations. Participants mentioned that there are many prosecutors doing automated management, so the checklists can be automated. The EWG found that this may be a good area to explore further.

ROLE OF ATTORNEYS, TRIALS, AND EVIDENCE

The EWG acknowledged the difficulties in determining the role of lawyers, the trial process and other causes in wrongful convictions because of the large amount of plea bargaining in the U.S. The EWG also discussed several reasons why it is difficult for a defendant to prove their innocence when they put on their case in court. Some of the reasons involved the consequences of limited resources for indigent defendants, including: many defendants may have an alibi witness, but have little ability to locate evidence of their innocence; defendants may have little finances to produce expert witnesses; and many defendants cannot even afford an attorney. An area of concern that arose in discussion was that courts do not closely regulate lawyers, both defense and prosecution. A concern of some in the group is that researchers might be missing volumes of information because there is a lack of transparency when trying to determine what a defense lawyer filed on behalf of his or her client. Other areas which lack transparency are suppressed evidence because this information is not revealed even after the individual is convicted.

The EWG found that it remains difficult to research the role of prosecutors and ineffective counsel in wrongful convictions because in order to uncover these errors, one must rely on court appeals made by defendants post-conviction. Concerns arose that prosecutor errors are involved in more cases than is actually determined. One EWG recommendation is to determine what the remedies are when one discovers prosecutor error. Another question asked was whether we should consider disciplinary action for prosecutors, although there were conflicting views on this issue because if there was disciplinary action, prosecutors may not have an incentive to correct wrongful convictions.

Lawyers in Denmark

The EWG discussed alternative practice models regarding both prosecutors and defense attorneys. The EWG discussed the Danish model. In Denmark, there is a small prison population. All prosecutors are public servants and are not elected.⁵⁷ Police are in charge of the investigation under the control and instruction of the prosecutors. Police are amalgamated with the prosecution

⁵⁷ World Prison Population List, 8th ed., King's College, London, 2009.

at the lowest levels and work together on the investigation. The police and prosecutors are bound by a principle of objectivity.

The adversarial process is modified where the principle of material truth is most important. The judge is responsible for finding the truth, even if the prosecutor and/or the defense attorney do a poor job of presenting their case. Defense attorneys are private attorneys appointed by the court, not public servants. There is no waiver of counsel; the court appoints an attorney whether the defendant wants an attorney or not. The quality of the defense attorney is usually decent because the Ministry of Justice takes care in choosing the attorney and the fees paid to the attorney by the court are reasonable.

Additionally in Denmark, judges are not elected or appointed by politicians, rather they are appointed by the Judicial Appointments Council. It is an independent council and it is comprised of a supreme court judge (chairman), a high court judge (vice-chairman), a district court judge, a lawyer and two representatives of the public. This council submits one recommendation for each position to the Minister of Justice for judicial appointments in Denmark.⁵⁸

Conviction Integrity Units and Prosecutors

The experts also talked about the Dallas Conviction Integrity Unit and the New York Conviction Integrity Program. Dallas' Conviction Integrity Unit administers the post-conviction review of over 400 DNA cases in cooperation with the Innocence Project of Texas. Additionally, the Unit investigates old cases (both DNA and non-DNA cases) where the evidence identifies different or multiple perpetrators. The Unit staff consists of one assistant district attorney, one investigator and one legal assistant.⁵⁹

Experts also discussed the New York County Conviction Integrity Program. The New York County Conviction Integrity Program was created in March of 2010. Its mission is to not only correct cases of wrongful convictions, but to try to prevent them too. It is housed in the New York County District Attorney's Office and has three components. The first component, the Conviction Integrity Committee is comprised of ten senior members of the District Attorney's staff. These individuals "review practices and policies related to training, case assessment, investigation, and disclosure obligations, with a focus on potential errors such as eyewitness misidentifications and false confessions."⁶⁰ The second component is the Conviction Integrity Chief who "coordinates the activities of the Committee and leads all re-investigation of any cases that present a meaningful claim of actual innocence."⁶¹ The third component, The Conviction Integrity Policy Advisory Panel is comprised of leading criminal justice experts, including legal

⁵⁸ For more information, see

<http://www.domstol.dk/om/otherlanguages/english/thedanishjudicialsystem/Pages/TheDanishjudicialsystem.aspx>.

⁵⁹ See <http://www.dallasda.com/conviction-integrity.html>.

⁶⁰ "Conviction Integrity Program," New York County District Attorney's Office, <http://manhattanda.org/organization/integrity/>.

⁶¹ *ibid.*

scholars and former prosecutors, who advise “the Office on national best practices and evolving issues in the area of wrongful convictions.”⁶²

The experts also acknowledged that it is particularly important to have evidence-based research that these different types of wrongful conviction models, like the conviction integrity units, are working. While education, best practices, and training are important, it is also important to make sure the programs in place work to solve the problems of wrongful convictions.

Experts acknowledged that change is occurring and, while legislative change is needed, district attorneys are taking initiative. This type of cultural change is important throughout the criminal justice system. It was also acknowledged that law enforcement is open to change, and researchers just need to find a way of disseminating information into the field. Cultural change is occurring with younger generations, including prosecutors. There is a push to further this and educate young prosecutors on Brady requirements and wrongful convictions.

One of the concerns the Group acknowledged is the lack of supervision young prosecutors receive once they are on the job. One possible solution suggested is to introduce more wrongful conviction education into the education of young prosecutors.⁶³ Young prosecutors could observe exoneration cases.

The group acknowledged that Minnesota is an example to look to when viewing positive examples because it has the lowest incarceration rates in the U.S.⁶⁴ It also has completely open-discovery and liberal post-conviction statutes.

The EWG also discussed positive reform in Minnesota. The examples discussed were reforming eyewitness identification policy⁶⁵ and reforming evidence retention policies⁶⁶ so that they are uniform in all police departments. Participants felt that examining these types of reforms may be useful to researchers and also those studying alternative best practices.⁶⁷ In Ramsey County, Minnesota, Susan Gaertner, the Ramsey County Attorney, initiated and completed a DNA

⁶² “Conviction Integrity Program,” New York County District Attorney’s Office, <http://manhattanda.org/organization/integrity/>.

⁶³ For more information, see Appendix C for a case study by Judge Barbara Hervey and Megan M. Molleur titled: “Preventing Wrongful Convictions Through Education.”

⁶⁴ Glaze, Lauren E., and Seri Palla, *Probation and Parole in the United States*, Bureau of Justice Statistics Bulletin (2004).

⁶⁵ Gaertner, Susan, and John Harrington, “Successful Eyewitness Identification Reform: Ramsey County’s Blind Sequential Lineup Protocol,” *The Police Chief* 76 (4) (April 2009), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1776&issue_id=42009.

⁶⁶ Ramsey County Uniform Evidence Retention Policy, Effective April 5, 2004, Revised November 5, 2007, <http://www.co.ramsey.mn.us/NR/rdonlyres/CFFF14C4-0F44-4BD9-9995-0186E9C17085/15111/RamseyCountyEvidenceRetentionPolicy1.pdf>.

⁶⁷ Glaze, Lauren E., and Seri Palla, *Probation and Parole in the United States*, Bureau of Justice Statistics Bulletin (2004).

project which reviewed 116 post-conviction cases to look for possible DNA testing.⁶⁸ One participant mentioned that this can be initiated and completed by those prosecutors that have been politically elected, as well as those that are not.

The EWG also discussed how the culture of punishment influences the justice systems in countries like the U.S. and the U.K. Participants were interested in learning about other countries that did not have such an appetite for punishment in their justice systems. They found that it might be beneficial to explore these different models and the type of culture which reduces the public appetite for vengeance.

EWG participants also acknowledged that the U.S. needs to determine a way for prosecutors to focus on seeking justice rather than seeking convictions.

In the U.S. elected officials and officers of the courts are immune⁶⁹ from civil suits for actions undertaken while conducting their official duties. Some participants noted that prosecutors in the U.S. should not have this immunity when knowingly allowing wrongful convictions, such as misrepresenting or falsifying evidence. In other countries prosecutors are not immune from prosecution.⁷⁰ Other Group participants expressed concerns about losing immunity and being forced to pay compensation to the wrongfully convicted. Participants noted that prosecutors will be reluctant to change the system if they lose immunity and are forced to pay compensation out of the state budget for courts.

The EWG discussed checklists for prosecutors as an option to provide a watch list for prosecutors to help prevent wrongful convictions. Some participants found that this type of checklist would be beneficial to circulate among prosecutors.

Experts also acknowledged that it seemed difficult for prosecutors to use the word “innocence” to describe those that have been wrongfully convicted because of the connotation that it condemns the U.S. criminal justice system.

Experts thought that NIJ could try to work on research that would motivate prosecutors and others in the system to do the right thing regarding wrongful convictions. EWG were curious about the state of national surveys for prosecutors, and there was a debate among the Group about whether systems-change analysis would be appropriate for determining the change occurring among prosecutors. A systems-change approach acknowledges that systems are complex, that there is no single remedy for societal problems, and that there must be change at several different levels to remedy and reform practices. For example, policy may not be enough to sustain societal change; other elements must also be at work.

⁶⁸ Gaetner, Susan, “Driving Home Prosecutors’ Commitment to Justice,” *American Bar Association’s Criminal Justice Section Newsletter* 16 (3), spring 2008, http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_practicetips_gaertnertips.authcheckdam.pdf.

⁶⁹ Immunity is an exemption granted by statute or government authorities from a legal duty, penalty or prosecution.

⁷⁰ For a full discussion, see C. Ronald Huff’s lunch time presentation titled “Conclusions from an International Overview” below.

One thing mentioned by the experts is possible research looking at how to tone down the political nature of wrongful convictions, especially in light of political campaigns for judges and prosecutors.

Partnerships

The EWG expressed the need for research projects to focus on holistic changes in the system. One such example was that new projects and programs should include more actors than just prosecutors. It was expressed that while prosecutors hold an important part in the cultural change of the system, they alone will not solve the problem. EWG participants expressed that the cultures of police and public defenders are also willing to look at change.

The Group discussed The Timothy Cole Advisory Panel on Wrongful Convictions. In 2009, the Texas Legislature passed H.B. 498, which established the Timothy Cole Advisory Panel on Wrongful Convictions, named for the first Texan to be exonerated posthumously through DNA testing. Panel members included judges, representatives of both defense attorneys and district attorneys, and representatives of the governor's office. The Panel was tasked with advising the Task Force on Indigent Defense about causes of wrongful convictions and recommending measures to prevent wrongful convictions in the future. They specifically addressed eyewitness identification, custodial interrogations, open discovery policies, post-conviction procedures, and the practicability of establishing an innocence commission.⁷¹

Participants expressed that researchers should explore how various components of the system (i.e., different criminal justice actors, can find common ground. Experts felt that this could help determine what actors defend their political agendas short-term and long-term. There is evidence of prosecutors' offices and police departments collaborating on solving problems. However, what about other parts of the criminal justice system?

APPEALS AND INNOCENCE COMMISSIONS

Criminal Case Review Models

The experts discussed at length the Criminal Cases Review Commission (CCRC)⁷² and similar models. The CCRC, established by the Criminal Appeal Act 1995, is an independent public body funded by Great Britain's parliament to review possible alleged miscarriages of justice and unfair sentencing.⁷³ The CCRC is governed by statute to only review a case after there has been a trial and a conviction and, except in exceptional circumstances, where the applicant has already failed in appeal. The CCRC seeks to determine whether there is a real possibility that if the conviction was referred back to the appeal courts it would not be upheld; i.e., that it would be quashed. As such, it requires individuals to have fresh evidence that may render their conviction unsafe in the eyes of the appeal court. However, innocent applicants face difficulties in that if the evidence of innocence was available at the time of the original trial it may not constitute grounds

⁷¹ For the full text of the Panel's recommendations, see <http://www.courts.state.tx.us/tfid/pdf/FINALTCAPreport.pdf>.

⁷² See <http://www.ccrc.gov.uk/>.

⁷³ Criminal Cases Review Commission, United Kingdom, <http://www.ccrc.gov.uk/>.

enough for the CCRC to refer the case. The CCRC operates on a triage system to ascertain which cases may be suitable for a review to determine if they meet the real possibility test.

The CCRC reviews, but does not undertake full reinvestigations of cases to determine whether claims of innocence are valid or not. It acts as a gatekeeper for the appeal courts. It has a staff of 70 people, including a mixture of lawyers and police officers, and has the resources for new forensic testing and further scientific evidence. It also has the legal power to obtain public information, including material held by security services. A criticism of the organization is that the real possibility test undermines the CCRC's claimed independence by anchoring it to the criteria of the appeal courts. It has also become unduly cautious and too deferential to the Court of Appeal.

In England and Wales, in the most recent year for which the UK has figures, there were 1.3 million convictions in magistrates' courts (lower level offenses).⁷⁴ In crime courts, there were 71,000 convictions, of which 7,000 were appealed. Of these appeals, the Court agreed to hear 2,500. Of the appeals heard, roughly 2,000 resulted in the Court saying, yes, we got it wrong. For roughly 500 of these, the conviction was wrong and for 1,500 the sentence was wrong. Despite all this, the CCRC still gets about 1,000 cases a year.⁷⁵ Of these, in any one year it will refer approximately 30 cases.⁷⁶ Of these, 70percent result in a conviction being quashed or a sentence being changed.⁷⁷ Also mentioned were the jurisdictions (states) where prosecutors, police, and the legal system never think they make a mistake.

The EWG noted that a concern with simply deciding which cases have the best chance of meeting the real possibility test is that a general process is often used to decide which cases are the strongest. Sometimes when the review occurs, there are things that were previously unknown to even the attorney and defendant in the case. The commission simply does not know what they do not know.

Further criticism of the CCRC model is that it is not to be confused as a state-sponsored innocence project. Instead, it concerns itself with the safety of conviction rather than the actual innocence of applicants.⁷⁸ Participants also expressed the importance in looking at scholarship coming out of the UK on the CCRC and the criticisms of it. Some expressed the need for other innocence efforts even with a CCRC in place because there is a significant chance that cases will still slip through the cracks and not be reviewed.

The EWG also discussed the Scottish CCRC. The Scottish CCRC, established in 1999, is an independent body funded by the Scottish Government that reviews alleged miscarriages of justice in convictions and/or sentences. It is much smaller than the CCRC and gets only

⁷⁴ CCRC Annual Report 2009-2010, see

http://www.ccr.gov.uk/CCRC_Uploads/CCRC%20Annual%20Report%20and%20Accounts%202009-10.pdf.

⁷⁵ For statistics on the CCRC, see http://www.ccr.gov.uk/cases/case_44.htm.

⁷⁶ CCRC Annual Report 2009-2010. See *also*

http://www.ccr.gov.uk/CCRC_Uploads/CCRC%20Annual%20Report%20and%20Accounts%202009-10.pdf.

⁷⁷ The CCRC deals increasingly with minor offenses and sentencing matters. See CCRC Annual Report 2009-2010, http://www.ccr.gov.uk/CCRC_Uploads/CCRC%20Annual%20Report%20and%20Accounts%202009-10.pdf.

⁷⁸ For more information, see Appendix C for a case study by Michael Naughton titled: "The Key Limitations of the CCRC."

approximately 100 cases a year. Convicted persons and/or their representatives may apply for review by the SCCRC. While the SCCRC has no power to quash convictions or sentences, the Commission may refer cases to the appeals court if: a miscarriage of justice may have occurred and the interests of justice demand that the case should be referenced.

The SCCRC is made up of a board of 8 part-time members. The board is divided into three committees of legally qualified and lay persons that steer the direction of the investigation and decide when the case should be passed on to the board for decision. Since the SCCRC's founding in 1999, the SCCRC has referred 74 cases to the appeals court, 44 of which were successfully appealed (as of March 2010).⁷⁹

The EWG discussed the evaluation process for handling miscarriages of justice in the Netherlands. The Netherlands has an evaluation process within the public prosecutor's office, headed by an independent person to review cases for possible miscarriages of justice. Individuals do not apply to this evaluation committee on their own. It must be done by members of the original investigation or even legal scholars.

Innocence Commissions

The experts also discussed the newly established North Carolina Innocence Inquiry Commission. The North Carolina Innocence Inquiry Commission is a state agency created in August 2006 to investigate post-conviction claims of factual innocence. The Chief Justice of the North Carolina Supreme Court and Chief Judge of the North Carolina Court of Appeals choose the Commission's eight members, which include a prosecuting attorney, a defense attorney, a Superior Court judge, a victim advocate, a sheriff, a member of the public, and two discretionary members.⁸⁰ The Commission is separate from the traditional appeals process, and if the Commission exonerates someone, that person is declared innocent and cannot be retried for the same crime. Anyone may initiate a claim, and the Commission has reviewed hundreds of claims since it began operating 2007.⁸¹

One issue raised by the EWG is that the difficulty with these types of commissions is determining if the investment is worth the return. An important part of making commissions work effectively is having a complete post-conviction open-file discovery. Often information is held in deeply hidden files. This makes investigation timely and expensive.

Participants found that it is important for the commissions to also publish an annual report which documents those issues which turn up in determining whether a wrongful conviction occurred. Some found that this could affect policy change.

The Group noted that one thing to consider in reinvestigating cases is that DNA is much cheaper than having to go in and reinvestigate a whole case, for example re-interviewing witnesses. Factual non-biological cases tend to have high fees, which will restrict the number of cases one can take on.

⁷⁹ See <http://www.sccrc.org.uk>.

⁸⁰ The North Carolina Innocence Inquiry Commission, <http://www.innocencecommission-nc.gov/>.

⁸¹ *ibid.*

The EWG also raised the difficulty in determining how to define new evidence in innocence cases. Often cases are brought to innocence commissions or criminal review commissions when they can show new evidence. Participants were concerned that there is not always a clear definition of what new evidence is and how it can be shown.

The Group also pointed out that another thing to consider is when the prosecutor's case is based on a scientific principle that does not exist anymore and it results in a conviction. For example a lot of the science surrounding arsons, shaken babies, and bite-mark evidence has since been discredited. If an original conviction is based upon one of these discredited scientific principles, it could be difficult to go back and reinvestigate the case in the absence of the faulty scientific evidence. The EWG found this an area that should be looked at closely.

Participants also noted that if post-conviction rules are more generous, there is less need for a commission. A state-by-state review of post-conviction rules would be useful to those in the field and in research. For example rules in North Carolina are much more generous than those in Texas. One participant stated that politically, addressing this issue by changing post-conviction rules may be easier than asking the legislature to fund a commission. It may be important for states to understand the post-conviction rules before establishing or trying to establish a commission.

An issue that participants noted that seems to occur in several counties is that once a case needs to be re-investigated the evidence has been destroyed. In North Carolina, the Innocence Inquiry Commission has the authority to search evidence rooms.⁸² Therefore, if someone says the evidence does not exist, they have the ability to go in and actually search for the missing evidence.

POST-EXONERATION PRACTICES

Post-Exoneration Compensation

The EWG discussed several issues surrounding post-exoneration compensation. The EWG began with a discussion of alternative practice in New Zealand.

The New Zealand compensation process is very similar to that of Canada. There is no legal right to compensation for wrongful convictions. Recently the government decided it should adopt a process for paying out compensation for deserving applicants. In 1998, it developed guidelines. The Minister of Justice is responsible for assessing claims with the assistance of a Queen's Counsel, and the Cabinet makes final decisions. People are eligible to apply if they were in prison and subsequently pardoned or their convictions quashed. It is not appropriate to

⁸² N.C.G.S. 15A-1467(d). The enabling statute allows the Commission to search and locate missing evidence. Once they determine they want to search, they file a formal request to enter upon lands under Rule 34 of the N.C. Rules of Civil Procedure.

compensate every person who is exonerated, because not all exonerees are innocent. Innocence on the balance of probabilities must be established before compensation is provided.⁸³

The Queen's Counsel determines innocence and then has to determine pecuniary losses (livelihood, future earnings, etc.) and non-pecuniary losses (loss of liberty, reputation, family or personal relationships, etc.). An amount of compensation is set for each. Also, the guidelines require a public statement about the person's innocence, an apology, and more. These guidelines are working reasonably well. Five out of six wrongful convictions came from misidentification. About 20 claims have been unsuccessful.⁸⁴

There is some concern about the actual practice under the guidelines. There is a risk in applying. For example, one person who applied turned out in the Queen's Counsel investigation to be most likely guilty. Just because a person on appeal is proved not guilty beyond reasonable doubt does not mean he or she is innocent on the balance of probabilities. Some applicants do not deserve compensation. One participant noted that the guidelines are still ambiguous in this regard and could benefit from clarification.

The EWG acknowledged that immunity for practitioners is still an ongoing discussion in many countries when it comes to compensation for the wrongfully convicted. For example, in New Zealand, an agency whose conduct led to the wrongful conviction (e.g., police-planted evidence) might be required by Cabinet to pay all or some of the compensation to the wrongly convicted person. In Canada, the federal government shares a percentage of the payments with the provincial government and sometimes even the local police pay. Participants also discussed that Canada is still resolving issues pertaining to whether all expert witnesses should receive immunity when they testify or if the standard is that which applies to him/her as a doctor.

Experts maintained that it remains important to recognize that not all exonerated individuals deserve compensation. It is possible that someone is exonerated, but is still guilty. The exonerated may still have to prove innocence in order to get compensation. The experts discussed different categories of innocence which apply to post-exoneration compensation, including: (1) clearly factually innocent, (2) probably guilty but released because of legal reasons, and (3) presumed innocent when a conviction is overturned.

EWG noted that in the U.S. about half of states provide compensation for those wrongfully convicted.⁸⁵ In discussions the EWG expressed that prosecutors and law enforcement are concerned about money leaving the system for something they are held responsible for, either rightly or wrongly. The Group acknowledged it was difficult to prove actual innocence; this is why the Innocence Project model statute⁸⁶ includes thresholds of innocence. This is also important because without these levels of innocence the statute would not have a chance of passing.

⁸³ See Jeff Orr, *Compensation for Wrongful Conviction and Imprisonment* (Nov. 11, 2006) (unpublished manuscript, on file with author); discusses the process of wrongful conviction compensation, specific cases, and how very few applications for payments have been made, and even fewer successful).

⁸⁴ *ibid.*

⁸⁵ See <http://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/chart.html>.

⁸⁶ See http://www.innocenceproject.org/docs/2010/Compensation_Model_Bill_2010.pdf.

The EWG discussed that states in the past have offered to sponsor research to determine the approximate numbers of wrongful convictions because policy makers want to budget an available amount of money for compensating the wrongfully convicted. States do not like unpredictable runs on the treasury.

The EWG also recognized that research should be conducted to determine whether compensation was a deterrent on future wrongful convictions because there is a need to do it right the first time rather than pay out these costs at a later time, especially, when the perpetrator of the crime is still unknown. One part of this is to also look at the expenses of wrongfully imprisoning a person and how much it costs. There are continuums of harm, including how much it costs to keep this person in jail, and the costs to society if this person is not working because they are wrongfully imprisoned and their family is forced to rely on the state.⁸⁷

Experts found that thought should also be extended to looking at the idea that retribution may drive information underground. For example, if you make prosecutors or states pay for problems which cause a wrongful conviction, it may not make those parties willing to share information to correct wrongful convictions because of the concern that it will be a drain on state finances. Public safety should be enough of a deterrent for states, and it does not cost the state money, such as the costs of financial compensation for extended parties. If there is a wrongful conviction, the person that committed the crime is still out on the street.

The EWG also discussed the types of compensation, such as alternative models in England and Wales.⁸⁸ In this system when an individual is exonerated because of a miscarriage of justice, support services, and after care services are notified.⁸⁹ They meet with the individual in prison and work with his family so that he can have services once he leaves prison. This includes linking them with psychiatric treatment. These individuals are supported as long as they need it. Often individuals do not use the services because they feel that they have gotten freedom and that is all they need now. It is possible that the effects will be felt farther down the road. One concern expressed by the EWG is that the compensation statutes should be similar to others like in the torts field. It should seek to put the person whole again. Some participants expressed that post-conviction compensation should include medical support, job support, and benefits like therapy.

One area that the experts discussed is compensation and services for the family of those that have been wrongfully imprisoned. The EWG recognized hardships by these family members as well as the individual that has been exonerated.

One participant suggested that researchers look at modifying views of the wrongfully convicted. Often families of the crime victim do not want to recognize the wrongfully “convicted” or their

⁸⁷ For a discussion of the social, psychological, physical and financial harms of wrongful convictions to victims, their families and society as a whole from a zemiological perspective, see Naughton, Michael, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg*, New York: Palgrave Macmillan, 2007, chapter 8.

⁸⁸ For more information, see Appendix C for a case study by Michael Naughton titled: “Statutory Compensation for Victims of Miscarriages of Justice in England and Wales.”

⁸⁹ *ibid.*

families as victims. It is important to those wrongfully convicted and released that they are treated differently from those that are released, but were rightfully imprisoned.

Commissions of Inquiry

The group also discussed Canadian Inquiries, seven of which have been commissions of inquiry into wrongful convictions in Canada.⁹⁰ These inquiries occur post-exoneration. They do not determine innocence, but rather seek to determine the cause of the miscarriage of justice and what can be done to prevent such mistakes from occurring again.⁹¹ The inquiries are fact-specific and system wide. Usually the issue of compensation for the wrongfully convicted is not addressed in the Commission of Inquiry.

In Canada all of the wrongful convictions inquiries have been provincial since most of the prosecutions are carried out provincially. The individual jurisdictions take the inquiries results very seriously. The recommendations of these commission inquiries make a huge contribution to wrongful convictions in the jurisdictions in which they are held and in the country as a whole. The one concern is that it may not be the most efficient and cost effective model to conduct these types of inquiries and they occur post-conviction.

Some conclusions drawn from a recent Canadian inquiry where two defendants were wrongfully convicted on faulty forensic evidence include: (1) systemic approaches are essential because there were multiple areas where things went wrong and; (2) there is a moral obligation to compensate for discrete harm. The government provided “recognition payments” to compensate those who had been wrongly charged and investigated “near misses.”

Participants expressed that, with expensive commissions such as the one in Canada, it is important to determine the precise benefit of the inquiry. What will it provide in terms of monitoring and reporting miscarriages of justice in the system on a more routine basis? The Group recognized that it would be beneficial to see how we could systemize a sentinel event review, like the ones used in the health field, because another set of eyes or several set of eyes is always better than one.

The EWG mentioned that it could be beneficial to look at exoneration cases between a non-profit justice organization, the attorney general’s office, and the defense counsel. It is a collaborative effort and helps multiple sides view the case together. This examination does not cost much, but it does help build collaborative relationships and an ability to see multiple sides of a case and where things went wrong.

⁹⁰ Canada conducts inquiries on many subjects, not just wrongful convictions. These commissions are independent, freestanding inquiries; cost millions of dollars; attract media interest; and produce voluminous reports. For more information, see *Inquiry into Pediatric Forensic Pathology in Ontario*, 2008. Volumes 1 and 2 available at http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v1_en_pdf/Vol_1_Eng_vi.pdf and http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v2_en_pdf/Vol_2_Eng_v.pdf.

⁹¹ For more information about the Commissions of Inquiry, as well as the resulting reports, see <http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/p3.html>.

PRESENTATION: CONCLUSIONS FROM AN INTERNATIONAL OVERVIEW

Conclusions from an International Overview

By: **C. Ronald Huff**, University of California, Irvine Author of *Wrongful Conviction: International Perspectives on Miscarriages of Justice*⁹²

Dr. Huff presented this at our working lunch on Day One of the workshop. He has given NIJ permission to include his remarks in the report.

First, by way of background, Martin Killias (University of Zurich) and I, with funding from the Swiss National Science Foundation, held an international workshop in 2003 that brought together a group of scholars from North America, Europe, and Israel who were interested in wrongful conviction. We wanted to create a network of scholars to do some comparative analysis of this problem across nations, somewhat like the Eurogang network to which I belong that focuses on gangs in North America and Europe. The book that we published really began with that workshop.

Given the limited time I have, I'm not going to discuss some of the topics in our book that have been and will be dealt with by others at this workshop. I'm going to focus, instead, on some general observations and some of the major conclusions that we drew from our cross-national research.

Is the focus on finding the "truth" or on obtaining convictions?

The risk of convicting innocent people is probably not equally distributed across nations, nor is it necessarily the same at all levels of national systems. And no criminal justice system is perfect; each has its advantages and disadvantages when it comes to avoiding both Type I and Type II errors - - convicting the innocent or acquitting the guilty. My own research on wrongful convictions in the U.S. led me to conclude that most of those errors were like the errors made in the *Challenger* disaster that killed some of our astronauts. In the best study of that disaster, my fellow Ohio State grad school colleague, Diane Vaughan concluded that it resulted from "... an incremental descent into poor judgment".⁹³ An important issue is, of course, the extent to which the criminal justice system is devoted to finding the truth. Of course, almost everywhere prosecutors and police officers are obliged to search for the "truth," to "get" the guilty, and to save the innocent. However, as long as such declarations of intent are not embedded in a setting of institutional safeguards shaping the legal culture, they will probably be no more efficient than codes of ethics of bar associations.

The continental procedure in *civil* lawsuits shares many features of the American criminal justice model. One could say that the specifically inquisitorial tradition of the continental system is

⁹² Huff, Ronald C., and Martin Killias. *Wrongful Conviction: International Perspectives on Miscarriages of Justice*, Philadelphia: Temple University Press, 2008.

⁹³ Vaughan, Diane, *The Challenger Launch Decision: Risky Technology, Culture, and Deviance at NASA*, Chicago: University of Chicago Press, 1996, xiii.

limited to the field of criminal law. Here, indeed, it has always been the understanding that establishing the truth is the court's business, and that parties and their lawyers are expected to assist the court in this task. One consequence of this *officiality maxim* (*Offizialmaxime*) is that the court never may rely on what the parties present, but has to verify the facts by its own means. This system of "balanced" fact finding efforts on the side of the judiciary is entrenched in the continental "inquisitorial" tradition. It first appears, expressively, in the code adopted by the German *Reichstag* in 1532 under Emperor Charles V. In section 47 of this *Constitutio Criminalis Carolina* (CCC), judges are warned (1) to consider all relevant facts, including those favorable to the defendant; (2) never to rely only on what the parties declare; and (3) to be critical about confessions. This rule still applies in countries maintaining a continental system, and may be the most fundamental difference from American criminal procedure. Although both the inquisitorial and the adversarial systems replace private vengeance with state authority, the adversarial criminal justice system is focused much more on respect for formal rules, or process, than on outcomes.

The bad reputation of the inquisitorial system is certainly due to the abuses in connection with witchcraft trials, where the guarantees against torture did not apply due to the "enormous seriousness of the offence"⁹⁴—a justification not unfamiliar in modern times where often due process guarantees may be set aside in "very serious" (e.g., "terrorist") cases, or where there is a "sympathetic victim" (e.g., a baby or small child), or whenever moral panics tend to compromise formal guarantees of due process. In such cases, "coordinated" testimony by several victim-witnesses can also lead to devastating consequences.⁹⁵

The "*officiality maxim*" has far-reaching consequences. It means that police officers and prosecutors who fail to collect or disclose evidence that might be favorable to the defendant are liable to criminal prosecution. Although such cases are rare, the mere existence of such rules may work as an efficient deterrent for individuals concerned about their careers and any "scandal" of this sort. Two chapters in our book (one on Germany and one on Switzerland) provide illustrations about the potential of such rules in helping discover wrongful convictions and initiating exonerations.

In the debate on the role of forensic scientists, the question of whether they should be independent of the police cannot be adequately debated without reference to the role of the police in general and the *officiality maxim*. If the police are required to search for evidence that may turn out to be favorable to the defense, not just the prosecution, any police officer and any specialist employed in the forensic science unit of the police is *per se* entitled to come forward with whatever evidence he/she finds. The answer may obviously be different if police laboratories are embedded in a "partisan" police organizational culture where the hierarchy has the power to suppress "undesirable" findings, or if they are organized as private companies concerned with their clients' interests. Therefore, one may question whether even private laboratories will really be the answer if they end up "selling" whatever evidence might best serve the cause of those who are going to pay them. In sum, we believe that an impartial search for the

⁹⁴ Schmidt, Eberhard, *Einführung in die Geschichte der deutschen Strafrechtspflege* [History of German criminal procedure], 3rd ed., Göttingen: Vandenhoeck and Ruprecht, 1965, 209-211.

⁹⁵ Crombach, H., Collaborative story-telling: A hypothesis in need of experimental testing," *Psychology, Crime and Law* (1999): 279-289.

truth may, if it is underscored by ethical guidelines on police, prosecutorial and experts' conduct and backed by appropriate sanctions, go a long way to help reduce these errors.

What is the Role of Plea Bargaining?

Plea-bargaining, or "justice without trial"⁹⁶, can also help contribute to wrongful convictions. Several chapters in our book offered new and compelling illustrations. When the defendant risks being punished more severely by the court if he does not accept an offer by the prosecutor, the probability is that actually innocent people will be "lured" into entering an "Alford"⁹⁷ guilty plea simply to avoid an even worse outcome at trial. Several conclusions can be drawn concerning how to reduce the risk of such outcomes. As my colleagues and I noted in a 1996 book,⁹⁸ the threat of a death sentence may be a powerful incentive for a defendant to enter a guilty plea in order to avoid the worst of all possible outcomes and hope that the truth will emerge before he is executed. In addition, verdicts leading to capital sentences, despite the high level of legal scrutiny that is expected in such cases, have often resulted in wrongful convictions, as the exonerations of death row inmates in American prisons have illustrated. Even in Europe, the last defendant (Ranucci) beheaded in France — the last country on the "old" continent to abolish the death penalty (in 1981) — may have been innocent, as noted in our book.⁹⁹

One of our most controversial recommendations, I'm sure, is that plea bargaining should be restricted to minor offenses (traffic violations, minor thefts, possession of drugs, etc.) where the sentence at stake does not exceed a few months or one year at most; where the facts are obvious; and where the legal qualification does not raise any difficulty. Under such circumstances, it certainly is legitimate to divert the system's scarce resources to more important cases. This form of "justice without trial" (including "convictions by the prosecutor" or "penal orders") exists under many different names¹⁰⁰ in virtually all countries. The Netherlands has an equivalent system of "transactions with the prosecutor," implying that a certain amount is being paid to the treasury or any other agreed upon body; other countries (e.g., France, Belgium, Germany, and Italy) combine the two systems.

The experience with wrongful convictions suggests, however, that there should be a number of additional procedural safeguards. First, there should be a rule that the sentence the defendant receives if he insists on a court hearing does not exceed the one the prosecutor had offered. Second, since many defendants accept a "penal order" (or a "transaction") merely because this procedure is not public and, therefore, does not attract public attention, the rule should be that the court hearing is not public whenever the defendant requires his case to be heard behind closed doors. Further, a "penal order" (or "transaction") should never be issued as an option to downgrade serious crimes. Finally, such a decision should never be possible without a hearing of

⁹⁶ Newman, Donald, *Conviction: The determination of guilt or innocence without trial*, Boston: Little Brown, 1966.

⁹⁷ *North Carolina v. Alford*. 400 U.S. 25 (1970).

⁹⁸ Huff, Ronald C., Ayre Rattner, and Edward Sagarin, *Convicted but Innocent: Wrongful Convictions and Public Policy*, Newbury Park, CA: Sage Publications, 1996.

⁹⁹ Dongois, Nathalie, "Wrongful Convictions in France: The Limits of "Pourvoi en Revision," ed. R.C. Huff and M. Killias, *Wrongful Conviction: International Perspectives on Miscarriages of Justice*, 2008, chapter 12.

¹⁰⁰ In Italy, it is called "patteggiamento" (transaction); "ordonnance pénale" in France, "Strafbefehl" in Germany, etc.

the defendant by the prosecutor¹⁰¹ to ensure that the relevant facts (including the suspect's identity) have been sufficiently verified. Even if such errors concern mostly minor offenses and often trivial sanctions, their combined effect on the legitimacy of the criminal justice system should not be underestimated, since they concern many more people than the few exonerations in homicide or other serious cases.

Finally, while some will argue that such a reduction in the use of plea bargaining would "swamp" the criminal justice system in the U.S., some earlier limited experiments suggest that instead, the weaker cases might simply be dropped - - not necessarily a bad outcome in a nation where the overreach of the criminal justice system has resulted in prison populations whose cost has overwhelmed the budgets of many states at the expense of public education and other critical public services.

How Much Weight is Given to Confessions?

False confessions have, since 1532, been recognized as an important source of wrongful convictions. The most important lesson to be learned is that confessions should not have the same far-reaching consequences in criminal procedures as they do in civil cases. If a defendant admits (in a police interrogation) to having committed an offense, the police should try to obtain from him/her as many details as possible in order to search for evidence corroborating that the crime happened in exactly the way the defendant described. In no way should any confession "close" a case (as, for example, in a damage suit). In particular, a confession should never make a court hearing unnecessary except in minor cases, as I mentioned earlier. If the facts are uncontested, the focus may turn, of course, to legal issues (or the sentence in those countries where the court decides both the verdict and the sentence during the same hearing). The confession itself should, at best, be a mitigating circumstance of limited impact on the sentence.

The devastating role of false confessions can also take unexpected forms that might become of even greater interest in the context of the "war on terrorism." As our colleague, Marcelo Aebi (2003), described at our initial workshop in Switzerland, terrorist defendants with ETA connections in Spain, when facing a life sentence due to other uncontested or presumably well-established offenses, tend to admit to a number of other terrorist attacks actually committed by other members of their organization (unknown to the police), in order to make prosecutors and the police believe that they have solved more attacks than they actually did. In such cases, false confessions (and what Aebi calls a sort of "voluntary wrongful conviction") will protect other terrorists, and may make the police drop investigations that are necessary to prevent further terrorist actions. We've seen this in the U.S., as well, when lower level criminals "take the rap" for those higher up in organized crime families, for example.

What Are the Rules on Disclosure and Is There a "Right to be Heard?"

The role of "disclosure" of evidence before trial is critical. Under the continental system, full disclosure of the entire file of the prosecution is the rule, and is based on the constitutional

¹⁰¹ In several European countries (Germany, parts of Switzerland), this practice is widely used despite its apparent contradiction with the constitutional right of "being heard," but generally not seen as unconstitutional as long as the defendant remains entitled to ask for a full-fledged (court) hearing.

principle of any citizen's "right to be heard" before any decision is made about his/her case. As a result, the defendant (and his lawyer) has the right to comment on all relevant aspects of the file.

In order to reduce the risk of wrongful convictions, the full file of the police and/or the prosecutor should be made available to the defense before the case goes to trial. Having an opportunity to see whatever charges are in the file allows one to come forward with contrary evidence before the trial begins. In continental countries where these rules are routinely applied, defense attorneys are discouraged from abusing their privileged information because they are expected to announce, before trial, all exonerating evidence that they can reasonably provide. Although the defense is not bound by the "right to be heard" (that applies only to the Government and, thus, the prosecutor and the police), defense lawyers typically come forward with potentially exonerating — even speculative — hypotheses during the police investigation. In case they do so only at trial, the court will likely interrupt the hearing and order a complementary investigation. Such rules may quite efficiently assist courts in avoiding the conviction of innocent people, but also in avoiding the acquittal of guilty defendants. Both Type I and Type II errors compromise public safety.

How Critical Is the Role of the Defense?

Wherever the full disclosure of the prosecution's file is the rule, the role of the defense is more limited in the establishment of the relevant facts. In the U.S., few defense attorneys have the resources to conduct adequate independent investigations. In continental law countries, defense lawyers typically do not conduct their own investigations. Whenever they believe that the police have neglected evidence that might be favorable to the defendant, they will ask for an extension of the police investigation, usually when the case is being heard at a pre-trial hearing by the examining magistrate or the prosecutor (*Staatsanwalt*, *procureur*). In practice, police investigations often involve long and energy-consuming searches for evidence for or against alternative (including speculative) hypotheses advanced by the defendant or his/her counsel¹⁰². For example, police and prosecutors always have to consider the possibility that a crime has been committed by a third party. This rule even applies if the defense does not establish any evidence in that respect, and the police often invest considerable resources in order to rule out the existence of any "third party." Such rules help reduce the risks of convicting innocent defendants resulting from incompetent or inadequately resourced counsel¹⁰³ and, in the most egregious cases, those whom my colleagues and I labelled "guilty plea wholesalers" in an earlier book.

Given the risks involved in poorly resourced or incompetent counsel, judicial errors may, ironically, more easily be reduced by limiting the role of the defense. If the defense does not need to do much more than to raise — even speculative — alternative explanations, and if the prosecutor and the police share the burden of investigating and ruling out any such possibilities raised by the defendant, it may be more difficult to convict an innocent person than if the

¹⁰² As a rule, the burden of proof lies with the prosecution in showing that "alternative" explanations, or potentially exonerating circumstances (for example, any *alibi*), *cannot* be true.

¹⁰³ Schmid, N., *Strafverfahren und Strafrecht in den Vereinigten Staaten: Eine Einführung* [Criminal procedure and criminal law in the United States], 2nd ed., Heidelberg, Germany: Müller, 1993; Killias, Martin and Stefan Trechsel, "Laws of Criminal Procedure," *Introduction to Swiss Law*, ed. François Dessemontet and Tuğrul Ansay, The Hague: Kluwer Law International, 2004.

prosecutor wins his case whenever the defense fails in its efforts to come forward with a successful alternative investigation. In terms of error management, it may indeed be preferable not to rely excessively on the ability of the defense.

How Adequate is the System of Appeals?

The frequency with which innocent people are convicted may depend also on the checks that exist in the system and the possibilities of getting such a decision overturned through appeals and other legal remedies. The scope and frequency of appeals seem to vary greatly between countries. However, the frequency of appeals may also depend on whether or not they may be brought against the sentence imposed. In European countries, most appeals are focused on or even limited to the sentence — a situation easily understandable since European judges have very wide discretion at that stage, and because most defendants do not contest the facts, but rather hope for a relatively lenient sentence. Another variable is whether or not appeals are available to the prosecution and not only to the defense. To the extent that prosecutors are also entitled to file an appeal, their success rate seems to be not much different (or even higher) than those of defense counsels, at least in France, Germany¹⁰⁴ and in Switzerland. A higher success rate of appeals by prosecutors may not necessarily mean that courts are more sympathetic to prosecutors' views, but may reflect the fact that prosecutors may file an appeal less often. Overall, it appears that roughly one in three decisions brought before a higher court is amended, although appeals are rarely successful on issues related to fact finding by the lower courts. Of course, one must bear in mind the number of lower court decisions that are routinely appealed; again, the variety across Western countries is great, ranging from far less than ten percent to fully one third. From these figures, it would seem that higher courts in France, Germany, and Switzerland review decisions brought before them rather critically. Obviously, the risk of wrongful conviction can be reduced if many errors are discovered and, eventually, corrected through appeals to higher courts. A high risk of having a decision overturned by a higher court may also be a strong incentive for lower courts to avoid errors of all kinds.

A low rate of decisions that are overturned by courts of appeal can be interpreted in several ways. It could mean that lower court rulings are relatively uncontested, or hard to contest because they obviously fit the facts rather well. It could, however, also reflect what my colleagues and I¹⁰⁵ earlier called “the ratification of error,” a tendency among all decision-makers to routinely confirm whatever has been decided at the preceding step — obviously the easiest way to manage a high caseload with limited resources.

It may not be easy to overcome such confirmation bias. However, a few other conclusions seem quite straightforward. First, every verdict should be subject to appeal. If fact-finding by lower courts cannot be contested before a higher court, judges and juries may be far less concerned about careful fact-finding. Appeals on facts are also necessary in order to correct the effects of any “surprise tactics” by both parties, witnesses, or experts. If statements can be contested (and have, eventually, to be repeated in a higher court), bluff and surprise will be far less promising as

¹⁰⁴ Jehle, J.M., “An overview of the German appeal system,” paper presented at the International Workshop on Wrongful Convictions, Breil/Brigels, Switzerland, August 2003.

¹⁰⁵ Huff, Ronald C., Ayre Rattner, and Edward Sagarin, *Convicted but Innocent: Wrongful Convictions and Public Policy*, Newbury Park, CA: Sage Publications, 1996.

a strategy at trial. Barring the prosecution from filing an appeal seems less warranted if any wrongful decisions — including acquittals of guilty defendants — are to be prevented. Indeed, acquittal of guilty defendants may often do great injustice to victims. Since errors are unavoidable to some extent, error management becomes the central issue. In this sense, appeals may be considered as a built-in system of error control and elimination.

What Are the Rules Re: Exoneration and New Trials?

National systems vary greatly in the extent to which "final" judicial decisions ever become really final and, thus, executable. According to a fundamental principle in continental law, any ruling in any legal field, once all appeals are exhausted, is called *res judicata*, meaning that it cannot be challenged again, except under a few exceptional circumstances. In other words, *habeas corpus* or other remedies are not available once the verdict and the sentence have become final. Therefore, a "final" ruling is more final in Europe than in the United States¹⁰⁶ — a difference which explains why scientific (technical) evidence is far less often preserved over extended periods of time in Europe than in America. This may, in part, explain why cases of exoneration are less common in Europe than in the United States.

Under continental law, one of the exceptional circumstances that allows the appeal of a verdict after it has become legally effective is when evidence presented at trial turns out to be untrue, or when any relevant new evidence can be found that was not available at trial. For example, a witness may have lied, or an expert may have drawn wrong or excessive conclusions from the material he/she had at hand, or a DNA test conclusively proves that the defendant *cannot* be guilty. In all these situations, all European countries allow for a procedure by which the defendant can file a "petition of revision" (usually to a higher court) by which he can ask for a new trial. The terminology varies greatly,¹⁰⁷ but the basic conditions are fairly similar across Europe. Further, *double jeopardy* is possible in most continental countries (except in France) if, on the prosecution's "petition of revision," the court cancels a former (final) decision by which the defendant was found not guilty.

In order to prevent wrongful decisions from remaining uncontested, every civilized country should allow for such a procedure and should not, as for example in France, make the process excessively difficult. If we accept that some innocent people are being convicted every year, the rate of successful petitions of revision should not, as in the French case, be depressed by a multitude of formalistic obstacles. The merits of the case and the facts should guide the outcome of such procedures, rather than concerns for the "majesty of the law" or the "prestige" of the criminal justice system. Exonerations represent the last safety valve, once all other built-in mechanisms of error control and management have failed, and we should not simply bow to the "principle of finality of the law."

Some countries have developed extremely detailed rules as to how wrongful convictions can be corrected, and how the damage suffered by the defendant has to be compensated. Given the

¹⁰⁶ Gerberding, P., *Das Rechtsmittelsystem im US-amerikanischen Strafverfahren* [The system of appeals in American criminal procedure], Frankfurt, Germany: Peter Lang, 2005, 142–158.

¹⁰⁷ In Germany, the petition for a new trial is called *Wiederaufnahme-Gesuch*. In France, the term used is *pourvoi en révision*.

extremely low frequency of exonerations in France, Canada, and Israel (to name just a few countries), the multitude and the high complexity of rules as to the kind, mechanisms, and extent of damage compensation appears to be highly disproportionate given their almost complete irrelevance, statistically at least, in practice. Perhaps such prolific rules serve an ideological purpose, in the sense that they may make people believe that the criminal justice system cares considerably about correcting errors, although the opposite may be true. Some countries, however, face the problem of thousands of applicants for compensation, particularly after the collapse of dictatorships, as in Poland after 1989, when hundreds of rulings became invalidated because the laws under which the applicants had been convicted were declared contrary to fundamental principles of human rights. If a country follows this line, the issue of how far back and how extensively compensation should be paid — in terms of time, degrees of proximity of the applicant to the victim of a wrongful conviction, etc. — becomes dramatic. Similarly, many defendants may have been wrongfully convicted of ordinary crimes under dictatorships, but their convictions may have been based on political reasons and doubtful or manipulated evidence. Other countries that made the transition from dictatorships to democratic societies, such as Germany, Greece, Turkey, Spain, Portugal, and many others, have not known comparable challenges, probably because the idea of compensation was far less popular at the time of their transition to democracy.

What is the Role of Forensic Science and Scientific Expertise vs. Eyewitness Testimony?

In connection with our book project, we confronted the issue of wrongful convictions in many common law and continental law countries. Despite the fact that wrongful convictions are a commonly debated subject in all countries, the impression we got is that exonerations — particularly those based on DNA evidence not available at the time of the trial — are far more common in the United States than in Europe. An easy conclusion would be that wrongful convictions are less frequent under the continental system, because several mechanisms that I have described may more efficiently protect against such errors, including less reliance on the competence of defense counsel; the more unbiased police and pre-trial investigations; the strong focus on technical-scientific evidence; the limited role of confessions; the more active role of neutral judges during trial; the wider availability of appeals on issues of facts; etc. Although these characteristics of the continental procedural system may indeed limit the risk of wrongful convictions, one should not ignore a number of fundamental differences in the way forensic evidence is stored after the trial. Indeed, critical items of physical evidence are often destroyed in Europe once a case has become definitively decided by the courts.¹⁰⁸) If critical items are no longer available, no DNA analysis or any other recent technology will ever allow the discovery of errors. Thus, it is equally possible that no physical evidence is available in Europe to retest the items presented during the first trial. Given the thousands of annual convictions for serious offenses throughout Europe, it is simply impossible to believe that no innocent people are among those convicted. Thus, forensic science units and coroners should be required to preserve physical evidence over extended periods, at least as long as the convicted person remains in prison or until a test can be completed.

¹⁰⁸ In France, evidence used by forensic medical experts is routinely destroyed one year after delivery of the expert's opinion (personal communication from Professor Malicier, University of Lyon). In other European countries, rules seem to be less standardized, but evidence is usually destroyed once a case has reached the stage of *res iudicata*.

U.S. observers usually call for independent forensic science experts. There are obviously many advantages in institutionalized independence of laboratories and institutes, although private firms may not necessarily guarantee high quality. Intentional deception and manipulation occur but appear to be the exception,¹⁰⁹ whereas classical (and often trivial) errors are far more common. Against these type of errors, institutionalized independence is of little help, however. In order to overcome risks of that kind, it may be more important that the defendant has access to a second opinion. In contested cases, and even if no substantiated suspicion may challenge the first expert's conclusion, second opinions should, therefore, become part of a standard procedure of quality control. Beyond high standards of fairness, medical and forensic examiners should develop a culture of *quality control*. This implies that second opinions should no longer be regarded as a form of distrust, but as part of routine and good practice. Recent developments in the medical field concerning error management and appropriate ways of dealing with cases of malpractice may offer useful models to adopt in forensic science. So far, not much has been done in this respect.

With all these problems with forensic evidence and its role in criminal procedures being kept in mind, one should not forget that identification through forensic evidence is far less vulnerable to errors than is eyewitness testimony. Whenever witnesses are mistaken, it is rarely because they lie or misrepresent facts, but mostly because they misidentify people. Since misidentification of persons is, according to U.S. as well as European research,¹¹⁰ the most prominent single factor in wrongful convictions, forensic evidence should be preferred over personal testimony as much as possible. Moving away from heavy reliance on eyewitness accounts and increasing the accuracy and use of forensic evidence when it is available should, on average, make a great contribution to avoiding miscarriages of justice.

What is the Role of Jailhouse Informants or “Snitches”?

Another important contributing factor is the widespread and often unprincipled use of informants, or “snitches,” by police, prosecutors, and jail officers. Such informants, many of whom have been used repeatedly, are often willing to shape their stories to fit whatever is needed, in return, of course, for favorable considerations of various kinds (or, sometimes, simply because they do not like the defendant or the nature of the crime with which he/she has been charged. These unreliable informants have often played key roles in helping convict defendants, including those in capital cases. It is ironic that these same informants would never be believed by prosecutors when they deny their own crimes, but suddenly their veracity is accepted when they can help win a conviction of someone else. Major investigations concerning the use of jailhouse informants have been conducted in both the U.S. and Canada in recent years, culminating in recommendations for reform.

¹⁰⁹ The American experience may differ in this respect; see Gross et al, 2004.

¹¹⁰ Huff, Ronald C., Ayre Rattner and Edward Sagarin, *Convicted but Innocent: Wrongful Convictions and Public Policy*, Newbury Park, CA: Sage Publications, 1996; Huff, Ronald C., "What Can We Learn From Other Nations About the Problem of Wrongful Conviction?," *Judicature*, 86 (2) (2002): 91–97; Peters, K., *Fehlerquellen im Strafprozess. Eine Untersuchung der Wiederaufnahmeverfahren in der Bundesrepublik Deutschland* [Sources of errors in criminal proceedings: A study of cases of successful petitions of revision in the Federal Republic of Germany] (3 vols.), Karlsruhe, Germany: C. F. Müller, 1970–1974.

Conclusions

Our conclusions go far beyond the simplistic alternative of favoring either an "adversarial" or an "inquisitorial" system. Although some elements of the continental/inquisitorial system may help reduce the errors that we find in U.S. wrongful conviction cases, Italy's experience in shifting to an "accusatorial" procedural system has not eliminated judicial errors.¹¹¹

Beyond forensic experts, coroners and police officers, prosecutors should conform their behavior to ethical guidelines whose violations should become an offense. In fact, we argue that criminal justice officials of all fields and levels who, *knowingly*, fail to collect or disclose evidence that might be favorable to the defendant, or who fail to initiate procedures to exonerate a person whom they discover has been wrongfully convicted, should be liable to criminal prosecution, or at least some sort of sanctions.¹¹² If *mens rea* is important in convicting criminals, how can it be overlooked when officials intentionally contribute to the conviction of innocent persons? In this connection, "winning" a case should not be the prosecutor's top priority; doing everything possible to ensure fair and just verdicts should be that priority instead, as required by the ABA's canons of ethics for prosecutors.

RESEARCH AGENDA

Transferability of International Practices

At the end of the last day of the workshop the EWG discussed their top priorities for research and actionable measures to correct and prevent wrongful convictions. The Group began with a discussion of determining which international programs are worth evaluating in order to determine transferability to the U.S. justice system.

Accountability of Officials

During the workshop, the EWG discussed accountability of officials in other countries. Participants discussed concerns related to the U.S. system of elected judges because these judges are essentially politicians. Participants thought that the U.S. could benefit from looking at international models where judges are not elected, but appointed by independent commissions, such as the model in Denmark.

One topic that arose involved the need for more accountability and sanctions for public officials who *knowingly* allow wrongful convictions to take place by withholding exculpatory evidence, committing perjury, or fabricating evidence. It was expressed that if the U.S. is serious about *mens rea* in crime, it has to be more serious about this. Participants suggested a possible program on prosecutorial ethics in conjunction with the prosecutors association. Some experts noted that these types of ethics are already included in the ABA canons of legal ethics. Some members of

¹¹¹ Gualco, B., "An example of a wrongful conviction in Italy," paper presented at the International Workshop on Wrongful Convictions, Breil/Brigels, Switzerland, August 2003.

¹¹² Huff, Ronald C., "What Can We Learn From Other Nations About the Problem of Wrongful Conviction?," *Judicature* 86 (2) 2002: 91-97

the Group also expressed concern that compared with European countries, very little happens to prosecutors in the United States for knowingly allowing a wrongful conviction to occur.

Some participants noted that the United States lacks working quality assurance systems when it comes to lawyers, both defense and prosecution. EWG discussions highlighted that the system should not just rely on court determinations of misconduct or ineffective assistance. Some participants found it important that the U.S. build up its quality assurance systems and increased oversight for lawyers. It was mentioned that bar associations, like the American Bar Association (ABA), should take more of a leadership role in policing lawyers.

It was also expressed by participants that sanctions against officials and attorneys could create a lack of participation from these individuals to uncover wrongful convictions because of concerns about sanctions and public censures. Other participants felt that courts and prosecutors *are* taking this very seriously, and there is already enough public pressure so that offices do not want to be perceived as committing this kind of misconduct. This alone is enough to prevent officials from allowing wrongful convictions. Participants with these views felt that there were more important things to focus on in the area of wrongful convictions than the policing of lawyers and public officials.

Another point of discussions concerning prosecutors and international practices concerned the case study of Denmark. Participants were interested in its system where the prosecutors conduct the trial, but the trial is not a game where the end result is that the better player wins. There was interest in creating a legal culture which supports trials where the end game is the truth. Some participants found that this is an area where the U.S. could learn from other cultures because the U.S. culture is based firmly in the adversarial system. The EWG found that the whole attitude of win and lose should be considered when looking at research and alternative models.

Quality Assurance

Participants discussed quality assurance in the UK, specifically, that all the main elements — police, prosecution, and prison service — are subject to independent inspections.¹¹³ Inspectors look both at performance of the individual and at cross-cutting teamwork. Parts of the U.S. system, e.g., prisons, could serve as a model. Prisons inspectors look at how good a job prisons are doing, and evaluate the end-to-end process.

Participants acknowledged that in talking about accreditation and quality assurance, they might mean different things. Participants suggested that while everything may look fine in an accreditation, one must consider the composition of an oversight council. If it is only comprised of police officers and prosecutors this is problematic; there has to be balance on the council. For example, one participant mentioned that the U.K.'s CCRC was established as a form of quality control; however there was a lot of disagreement about whether the CCRC could maintain this quality control because of its composition.

¹¹³ See http://www.cps.gov.uk/publications/docs/cjs_inspection_reform.pdf. For more information on police independent inspections, see <http://www.ipcc.gov.uk/en/Pages/default.aspx>, and for prison inspections, see <http://www.justice.gov.uk/inspectorates/hmi-prisons/>.

Participants also discussed the case study of New Zealand with regards to concern about the quality of criminal defense lawyers. New Zealand is currently instituting a new quality assurance framework where in order to provide legal aid services to indigent defendants, attorneys have to be accredited through a process.¹¹⁴ Accreditation is for a fixed period, and attorneys need to apply for re-approval once their period of approval expires. If the attorney does not meet the accreditation standards, then the attorney will be removed as a provider of legal aid services and cannot work on legal aid cases.¹¹⁵ New Zealand decided to institute an accreditation process for legal aid attorneys after experiencing several issues with attorneys, including not showing up prepared to defend their indigent clients.¹¹⁶ The EWG suggested a model like this may free up funds to allow the state to hire better qualified defense attorneys to represent indigent defendants that may be more at risk for wrongful convictions because of a lack of appropriate legal counsel.

Participants discussed that some defense attorneys lack quality. Discussants mentioned that there are programs aiming at resolving these problems such as state progressive programs where the state will pay the tuition for law school in return for a few years of legal aid. However, even in this area the resources are limited. Participants found that programs like this were important to get more defense attorneys in the field and that resources should be improved in this area.

Participants also raised ineffective assistance of counsel in the sentencing stage. The EWG briefly discussed issues in Texas in the sentencing stage. The system channels juries into the death sentence through questions they must answer. There used to be two questions, but this was ruled unconstitutional. Now there are three questions: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.¹¹⁷ Many participants said that the legislature has to address the jury information problem. They found that it may be useful to look to other countries and their use of juries and jury instructions to determine new methods.

U.S. participants were curious about whether there was a better balance in other parts of the world regarding the resources available to the prosecution and defense. International respondents stated that in terms of adversarial and inquisitorial systems, within each system many countries have variations. It was acknowledged that research should study the benefits and weaknesses of each model, which would allow the U.S. to think about selectively borrowing some ideas and bringing them into the U.S. system.

It was also discussed that progress is being made. U.S. defense lawyers are tracking the mitigation issues. Death cases are being addressed. However, one issue that is still a problem is death penalty cases. Many attorneys representing death penalty clients do not have the file from

¹¹⁴ “Legal Aid Lawyers May Face Competency Tests,” *The National Business Review*, February 11, 2010, <http://www.nbr.co.nz/article/legal-aid-lawyers-may-face-competency-tests-118399>.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ Tex. Cr. Code. § 37.0711.3(b).

the trial and get involved in the case at the end, rather than in the beginning stages of the initial trial.

Transparency

Participants highlighted that ineffective assistance of counsel is a downstream problem in the system because if police and prosecutors conduct reviews of the case properly, the person would not have needed counsel later. Experts highlighted the case of Anthony Porter as an example of this scenario. Anthony Porter was convicted of two murders in Illinois and sentenced to death. In 1988, just 50 hours before his scheduled execution, he received a reprieve from the Illinois Supreme Court. However, his reprieve was not granted because the Court feared Porter might be innocent, but because the Court was concerned that Porter could not comprehend what was about to happen and why (he had tested extremely low on an IQ test). Porter had been convicted in the wake of poor representation, an insufficient investigation by the police department, and a complete lack of physical evidence connecting him with the murders. Over ten years later, a witness in the Porter case admitted that he committed the murder to students from Northwestern University who were investigating the case. Porter was released from prison on bond and the murder charges against him were dropped.¹¹⁸

Experts also highlighted the case of Alejandro Dominguez that portrays the issue with eyewitness identification and forensics. In 1990, Alejandro Dominguez was convicted of raping a woman in Illinois when he was 16 years old. Dominguez was tried as an adult in a bench trial. The only evidence “linking” Dominguez to the crime was an uncertain identification by the victim and forensic evidence that did not exclude him as a match. Six years after his release in 1994, INS threatened to deport Dominguez for failing to register as a sex offender. Dominguez sought DNA testing of the semen recovered from the victim, and in 2002 DNA testing proved that Dominguez was innocent. Dominguez was officially exonerated that same year.

The EWG stated that no matter what reforms governments institute for eyewitness identification, they will still have a high error rate. Participants suggested instituting policies like those in the Netherlands, where you cannot use eyewitness evidence unless it is corroborated. In the Netherlands, the Dutch rules of evidence also require that any weak aspects of a case, like uncorroborated testimony, be fully tested against other possible versions. There must always be corroborating evidence; however, it is still possible to convict on two independent corroborating pieces of false evidence and the procedure is not completely free from confirmation bias.¹¹⁹

Participants also found it important that governments institute open-file policies. Participants stated that there were a lot of good examples of this in the U.S. and overseas. The EWG found that it does not seem to matter whether evidence is Brady or not, it should all be turned over to the defense. The Group suggested that researchers could be very powerful in recommending reforms in these areas.

¹¹⁸ See <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilPorterSummary.html>.

¹¹⁹ Brants, Chrisje, “The Vulnerability of Dutch Criminal Procedure,” *Wrongful Conviction: International Perspectives on Miscarriages of Justice*, ed. Ronald C. Huff and Martin Killias (2008): 173.

Participants discussed concern over restrictions on public records requests, especially during the appellate process. The EWG discussed that a problem associated with the public records requests is that if the attorney needs the public records to make the case at the appellate level, he/she cannot get them until after the appellate level is over. Participants suggested that the U.S. should look to models with more transparent record keeping, especially during the trial process.

One participant raised issues that have evolved with the U.K. Freedom of Information Act. The Freedom of Information Act 2000 creates a general right of access to information held by public authorities in the U.K. The Act provides for 24 exemptions from disclosure, including both absolute and qualified exemptions. For qualified exemptions, the public official must decide whether the public interest in disclosure outweighs the public interest in invoking the exemption.¹²⁰ Participants raised the concern that while it seemingly allows one to access information, there is a clause which allows authorities to withhold sensitive information. This is often subjective, so attorneys cannot access the records when necessary. It is important to consider these types of clauses when looking at public records requests.

Participants also mentioned the benefits of exploring the inquisitorial system and that NIJ could at least reduce to empirical questions the claimed detriments of those practices. The EWG found that there are many objections to inquisitorial processes that are not empirically supported. There may be justifiable workarounds to these detriments. Participants mentioned that the double blind is an example of an area where there are justifiable workarounds to the detriments. Participants stated that if we are not using inquisitorial models in parts of our justice system that we should have empirical evidence to base the choice not to use inquisitorial practices.

U.S. participants discussed the critical need for checks and balances, regardless of the type of criminal system. Participants asked the following questions with regards to these checks and balances: (1) What are the rules for getting post-conviction relief under the different systems?; and (2) What impediments are there for getting review?

Evidence

Participants discussed other countries where certain evidence must be corroborated. For example in Scotland, you cannot have a confession stand alone as evidence, it must be corroborated.¹²¹ The EWG found that one area of useful research would be to look at how often individuals are convicted on eyewitness evidence or what percentage of the case is made up by an eyewitness identification.

Participants also raised the point that even if an eyewitness identification or confession is “improved” or corroborated by another piece of evidence, that corroborating evidence may also be unreliable. For example, the investigators may have five pieces of evidence which corroborate each other, but all are unreliable.

¹²⁰ For more information about the UK’s Freedom of Information Act, see <http://www.legislation.gov.uk/ukpga/2000/36/contents>.

¹²¹ Per Lord Justice-Clerk Thomson, *Sinclair v. Clark*, 1962 J.C. 57 at 62.

Participants discussed that the U.S. is not necessarily safer than other countries, yet its criminal justice system touches exponentially more people and acts than other countries. The Group wondered what the U.S. could learn from other countries about their approaches to criminality which could enable the U.S. to maintain public safety yet minimize wrongful convictions. The EWG found that investment should focus on quality rather than quantity.

Death Penalty

Participants discussed the effects of the death penalty on wrongful convictions. Participants raised issues regarding capital punishment in Illinois. In 2000, 13 people were released from death row, out of a total of 289 people on death row, an error rate of 4.4%.¹²² Illinois' governor at the time, George H. Ryan, then declared a moratorium on executions, and the legislature set up a capital punishment litigation trust fund that provides money for defense.¹²³ That fund has since expended \$70 million on 20 death sentences.¹²⁴ Participants expressed that this is a lot of money that could be spent in other areas, such as DNA testing. Participants claimed that while the error rate improved and mitigation at trial improved, there are still issues that cannot be controlled. One of these issues is that the system cannot control the disparity in death sentencing from judges and juries. The EWG expressed concern over the issue of proportionality with death sentencing. Some participants expressed that the only remedy is to abolish the death penalty. Other participants suggested that the U.S. could look to countries without the death penalty to explore the differences.

Racial Issues

The EWG discussed the difficulties with race because of the disproportionality of minorities moving through the justice system. Race is an issue in wrongful convictions because of these statistics; minorities may be more impacted by wrongful convictions, but the figures are not clear. Participants wondered if there was something the U.S. could learn from other countries' procedures to minimize the impact of racism on decisions.

Participants also discussed this issue as an inherent underlying issue in the U.S. justice system. The potential for racial biases begins in each stage of the criminal justice process, including: arrest, access to counsel, higher proportion of indigent suspects, arbitrary sentences, and other biases in the system. These inherent biases, whether intentional or not, throughout the criminal justice system result in a greater proportion of incarcerated minorities.

Research Ideas

The Group expressed that the rate of wrongful convictions must be publicized. The EWG discussed fundamental questions for the research community. They discussed the following questions in terms of exploring further research on wrongful convictions.

¹²² Warden, Rob, "Illinois Death Penalty Reform: How it Happened, What it Promises. Northwestern University School of Law," *The Journal of Criminal Law & Criminology* 95 (2), <http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/deathPenaltyReform.pdf>.

¹²³ *ibid.*

¹²⁴ *ibid.*

1. **Rate and Proportion of Wrongful Convictions.** What is the rate of wrongful convictions? The EWG found this critical. What is the proportion of wrongful convictions that are malfeasance vs. error? Is it possible that there are going to be random mistakes? Is it an issue that happens only once in a while when people fall through the cracks, or does it have to be an organizational accident? Does the rate of wrongful convictions vary by crime? At what rate does wrongful conviction have a social cost that warrants a larger intervention than we have today? How many wrongful convictions need to occur to trigger a widespread public response?
2. **Hot Spots.** Are there hot spots of wrongful conviction? If this is true, are there observable indicators showing a higher risk of wrongful convictions in some locations?
3. **Plea Bargaining.** Do pleas cause wrongful convictions?
4. **Risk Factors.** Are particular individuals more at risk for unnoticed wrongful convictions? What does the past tell us about current problems?
5. **Case Studies.** What can we learn from individual cases? How can we generalize from the enormous body of literature about individual cases?
6. **Forensic Consulting.** What would be the detriment to a public lab providing consultative services to defense lawyers?
7. **Open-File Discovery.** Is it true that witnesses are in more jeopardy if you have open-file discovery than if you do not?
8. **Value of Evidence.** The EWG expressed that two statements made at the workshop led to an important research question. The statements were: (1) “Better that 10 guilty men go free than one innocent man is convicted.” (2) “Getting a convicted criminal is more important than avoiding a wrongful conviction.” The related research question is: What is the value of getting inculpatory evidence that convicts someone who is guilty compared with the value of exculpatory evidence that keeps someone who is innocent from being incarcerated?

The Wrongful Convictions Rate

EWG acknowledged that there needs to be some type of way to determine how many wrongful convictions exist, but the problem is that this is very difficult to determine. The EWG noted that there is a lot of information that exists about the 250 death penalty and DNA cases. They also stated that most researchers are comfortable with a 1-percent to 3.3-percent or even a 5-percent error in murder and death penalty cases. However, they expressed that there is no direct way to measure the number of wrongful convictions in robberies and burglaries. The EWG felt that estimates could be done. Participants mentioned the study of prison conditions conducted by Rand. Researchers surveyed inmates on many topics including whether they were wrongfully

convicted. An average of 15 percent said they were wrongfully convicted.¹²⁵ The EWG discussed that most prisoners do not claim they are innocent. Therefore they found that with a well-done prison survey asking both inmates and people who work in prisons which individuals are innocent, it would be possible to derive information on which estimates could be generated. The Group also expressed that researchers could also address looking at the issue of wrongful convictions by studying issues with parole boards.

The Group mentioned the perennial discussion in criminal justice about the Blackstone principle (“Better that 10 guilty men go free than one innocent man is convicted.”) and a lot of misunderstanding about the statement. The EWG expressed that it is important to get a sense of the real scale of the wrongful convictions problem. Participants expressed concern that if there is only a small rate of error, people will try to minimize the importance of the problem. Experts felt that in order to provide the true statistics of wrongful convictions, researchers need to know how often errors are being made at the mundane level, not just at the high-profile level. For example, looking at cases overturned by CCRC, the number is .0001%. Participants found that this figure may not be persuasive in urging policy makers to initiate and follow through on reforms; therefore studies must go further in looking at wrongful conviction rates.

Judicial Processes

The EWG discussed checks at the judicial stage of the criminal justice process because jurors are known to give tremendous credence to what has been put on the record. The EWG noted that very little research had been conducted on the role of the court process on wrongful convictions. Participants expressed the difficulty in receiving money or a sponsor for research on the judicial process. The EWG posed five questions in this area:

1. **Level of Certainty.** What level of certainty of the evidence does a prosecutor need to bring a case to grand jury? This is one of the first checks in the process. Where are prosecutors making that decision?
2. **Voir Dire.** Are innovations in *voir dire* effective in practice?
3. **Jury Instructions.** How do researchers effectively evaluate the impact of reforming jury instructions? There’s been innovation in the last 20 years, however researchers and practitioners know that jurors often have no idea what the instructions mean.
4. **Expert Witnesses.** What are the effects when judges allow experts at trial to talk about the frailties of particular kinds of evidence (e.g., eyewitness, police interrogation techniques)?
5. **Caseloads.** What is an acceptable caseload for defense attorneys? Participants expressed horrific underfunding for indigent defense as a concern in the area of wrongful convictions.

¹²⁵ Peterson, Mark, Jan Chaiken, Patricia Ebener, and Paul Honig, “Survey of Prison and Jail Inmates: Background and Method,” Final Report for National Institute of Justice, grant number N-1635-NIJ, Washington, DC: National Institute of Justice, 1982, <http://www.rand.org/content/dam/rand/pubs/notes/2005/N1635.pdf>.

False Confessions

The Group discussed the gap in research in the area of the effect of false confession expert testimony. Some found that studies in this area would be helpful to fill the gap. The EWG discussed appellate bias, because the only cases reported are those in which the judge would not let the expert in, the defense appealed, and then the appellate judge held that this was in the judge's discretion. Participants felt that it would be fairly easy to do a project on false confession expert testimony. The feeling was that researchers could find a significant effect of false confession expert testimony, and no significant effect of eyewitness expert testimony.

Prosecution

The EWG also found that research would be useful to determine how prosecution units get high rates of conviction and if the cases are approved by felony review. The following question arose in this discussion: How many cases are plea bargains, how many go to trial, and how many cases are lost? The EWG felt that researchers need to study what led to the initial error during felony review in approving these charges. Researchers should explore why prosecutors did not pursue these specific cases.

Participants raised the issue that if researchers want prosecutors to participate in research endeavors, language is important (e.g., “mandates” vs. “guidelines”). Us-versus-them language is not helpful. Specifically, unhelpful or contentious issues include stories about bravado prosecutors or misconceptions that acquittal means the person is innocent.

Law Enforcement

The EWG expressed the need for descriptive data from police agencies because many of the research questions researchers ought to address would have an impact on policies and practices in police departments. Participants raised questions in this area:

1. **Ideas into Practice.** How do new ideas spread in the field (diffusion of innovation)? Where have police departments that have adopted new practices gotten their scientific information? How did the science get out there?

Participants also discussed wrongful police stops and front-door errors. The EWG expressed the need to look at why the stops happened on a clinical level. Participants asked the following questions in this discussion:

1. **Training.** Could there be more effective training?
2. **Cost.** What about the cost of police stops?
3. **Racial Bias.** Do we tolerate a higher rate of error for our minority citizens? Participants raised concerns about the causes underlying the disparities. It is concerning when there is a potential for bias at each level of the criminal justice system, whether intentional or not.

Partnerships

Lastly, the EWG expressed that the criminal justice system has blind faith in each of its actors, which is problematic if each operates independently without supervision. Participants found that the discussions at the workshop revealed significant distrust between different actors in the criminal justice system.

The Group expressed the importance of different actors in the criminal justice system working together and talking to each other. This is especially important because practitioners are put on opposite sides of the adversarial process. Participants discussed that these conversations may not occur naturally without prodding and encouragement. Participants found that finding common ground between these different elements of the criminal justice system is an important focus area.

Appendix A: Agenda

INTERNATIONAL PERSPECTIVES ON WRONGFUL CONVICTIONS WORKSHOP: PRACTICES AND RESEARCH

Monday, September 13, 2010

8:00–9:00 a.m. **Registration and Networking**

9:00–9:05 a.m. **Greetings and Welcome**
John Laub, Director, National Institute of Justice

9:05–9:15 a.m. **Opening Remarks**
Edwin Zedlewski, Division Director, International Center, National Institute of Justice

9:15–9:30 a.m. **Goals and Outcomes for the Group**
Edward Connor, Workshop Facilitator, President, Institute for Law and Justice

The goal of the workshop is to learn about preventing and correcting wrongful convictions by listening to colleagues from around the globe. If we can determine alternative practices, we can devise a research agenda around these best practices to determine their transferability and effectiveness in the United States. The participants shall address needs for research, research gaps, and new potential research areas in the field of wrongful convictions in light of international and domestic practices. The group should also address what action is a priority and what the federal government can do to make these changes happen.

9:30–10:30 a.m. **LEGAL SYSTEMS**

An Integrated Justice Model
Marvin Zalman, Professor, Wayne State University

Discussion

- Do particular legal systems invite wrongful convictions? Are there inherent issues with certain legal systems; i.e., adversarial vs. inquisitorial, which allow for wrongful convictions?
- Do political elections in the judiciary cause wrongful convictions? What can we learn from other countries

10:45–11:50 a.m. **POST-EXONERATION**

New Zealand Compensation
Jeff Orr, Chief Legal Counsel, Ministry of Justice, New Zealand

Canadian Inquiries

Stephen Bindman, Special Advisor on Wrongful Convictions, Department of Justice, Canada

Discussion

- What do other countries do post-exoneration? What methods of compensation do they incorporate and what types of services are offered? In this session we will discuss practices, including New Zealand's system of compensation for wrongful conviction and imprisonment.
- Should a formal inquiry be conducted in each case? How do these inquiries help our understanding of wrongful convictions? In this part of the session we will discuss the inquiries Canada has conducted after exonerating those wrongfully convicted.

11:50 a.m.–1:10 p.m. **WORKING LUNCH AND PRESENTATION**

Laurie Robinson, Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice

C. Ronald Huff, Co-editor: *Wrongful Conviction: International Perspectives on Miscarriages of Justice*, Professor of Criminology, Law, and Society and Sociology University of California, Irvine

1:10–2:20 p.m. **APPEALS AND INNOCENCE COMMISSIONS**

The Criminal Cases Review Commission

Richard Foster, Chair, Criminal Cases Review Commission, England, Wales and Northern Ireland

North Carolina Innocence Inquiry

Kendra Montgomery-Blinn, Executive Director, North Carolina Innocence Inquiry Commission

Discussion

- How can a separate appeals process for wrongful convictions help in discovering wrongful convictions? In this panel we will discuss alternative appeals practices, including Great Britain's Criminal Cases Review Commission (CCRC) and the Scottish Criminal Conviction Review Commission (SCCRC), Canada's Criminal Conviction Review Group, and New Zealand's post appeals process.
- We will also discuss the North Carolina Innocence Inquiry Commission.

2:20–4:00 p.m. **ROLE OF ATTORNEYS, TRIALS, AND EVIDENCE**

The Role of Lawyers in the U.S.

Brandon Garrett, Professor of Law, University of Virginia School of Law

The Role of Lawyers in Denmark

Hans Fogtdal, Assistant Deputy Director, Office of the Danish Director of Public Prosecutions

Dallas Conviction Integrity Unit

Michael Ware, Special Fields Bureau Chief, Dallas County District Attorney's Office

Terri Moore, First Assistant, Dallas County District Attorney's Office

Discussion

- What is the role of the prosecutor? What about truth vs. conviction? How do legal ethics and culture change the dynamic of the case? What are prosecutors doing in the U.S. and abroad to prevent and correct wrongful convictions?
- What is the state of criminal defense attorneys abroad and in the U.S.? Is there a different legal culture when it comes to taking indigent cases abroad?
- What is the role of expert witnesses in trials in the U.S. and abroad? Are there alternative models? What is the harm in opinion evidence vs. fact evidence?
- How can the use of juries contribute to wrongful convictions? Are juries too inexperienced with the rules of evidence? Can and do non-jury trials protect a defendant?
- Examples on this topic will be presented and discussed, such as the Dallas Conviction Integrity Unit, and the New York Conviction Integrity Group.

4:15–5:30 p.m. **ARRESTS AND CONVICTIONS**

False Convictions and Guilty Pleas in the U.S.

Sam Gross, Professor of Law, University of Michigan Law School

Plea Bargaining in Europe

Gwladys Gillieron, Visiting Research Scholar, Institute on Crime and Public Policy
University of Minneapolis Law School

International Perspectives on the Death Penalty

Carolyn Hoyle, Reader in Criminology and Fellow of Green Templeton College,
Centre for Criminology, University of Oxford

Discussion

- How do plea bargains lead to wrongful convictions and what about alternative models of plea bargains, or sometimes the absence of plea bargains, such as in France? Does the death penalty lead to faulty plea bargains? What are ways to minimize it?
- How can we prevent wrongful convictions in highly charged and politicized environments brought on by high-profile cases?

5:30 p.m. **WRAP-UP AND ADJOURN**

Tuesday, September 14, 2010

8:30–10:00 a.m. **FORENSICS**

Forensics and Wrongful Convictions in Scotland

Brian Caddy, Lay Member Scottish Criminal Cases Review Commission

Forensics and Wrongful Convictions in Canada

Stephanie Reilander, Deputy Director, Center of Forensic Sciences

Preventing and Correcting Wrongful Convictions Using Forensic Science in Arizona

Ron Reinstein, Judge (retired), Judicial Consultant Arizona Supreme Court

Carrie Sperling, Executive Director Arizona Justice Project, Sandra Day O'Connor College of Law

Kent Cattani, Chief Counsel, Capital Litigation and Criminal Appeals Arizona Attorney General's Office

Forensic Challenges in the U.S.

Gerald LaPorte, Forensic Policy Program Manager Office of Investigative and Forensic Sciences, National Institute of Justice

Discussion

- How can forensics lead to wrongful convictions and what ways can this be prevented? What are alternative methods of involving forensics to prevent wrongful convictions? What can we learn from European investigations methods which teams forensics investigators and detectives to determine the hypothesis of a case?
- How does the interpretation of forensic evidence lead to wrongful convictions and how can this be prevented? Do judges, attorneys, and jurors understand forensic evidence and how can this be rectified to prevent wrongful convictions?
- How do psychological factors impact forensic examiners?

10:15–11:40 a.m. **POLICE AND INVESTIGATIONS**

Investigations in the Netherlands

H.P. Schreinemachers, Counselor for Justice and Police Affairs, Embassy of the Netherlands

Investigations in the U.S.

James Markey, Sergeant, Phoenix Police Department

Eyewitness Identifications

James Doyle, Director of the Center for Modern Forensic Practice, John Jay College of Criminal Justice

Discussion

- What is the role of police in investigations? What are different roles of the police in investigations around the world? What are the European investigative methods? What are alternative models of investigations?
- How does constabulary independence (little involvement from the prosecutor) differ from the American tradition where the prosecutor is more involved in investigation
- What is the role of context bias and “tunnel vision”? How do psychological factors impact investigators?
- How can eyewitness identifications be improved to prevent wrongful convictions? Are there practices in line-ups which have proved effective in protecting against

wrongful convictions? Should eyewitness identifications be corroborated like in other countries, like the Netherlands?

- What about false confessions and snitches? What are alternative practices to prevent mistakes in these areas?

12:00–1:30 p.m. **LESSONS LEARNED AND FUTURE RESEARCH AGENDA**
Edward Connor, Workshop Facilitator

In this session we will discuss the possibility and feasibility of transferring international programs and models into the U.S. We will then discuss a future research agenda to look at the real feasibility of such knowledge and practice transfers.

1:30 p.m. **WRAP-UP AND ADJOURN**

Appendix B: Participant List

Karen Amendola

Chief Operating Officer
Police Foundation

Bethany Backes

Social Science Analyst
Office of Research and Evaluation
National Institute of Justice
U.S. Department of Justice

Jim Bethke

Director
Texas Task Force on Indigent Defense

Stephen Bindman

Special Advisor on Wrongful Convictions
Department of Justice
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Alison Brooks

Research Assistant
National Institute of Justice
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Katharine Browning

Senior Social Science Analyst
Office of Research and Evaluation
National Institute of Justice
U.S. Department of Justice

Brian Caddy

Lay Member
Scottish Criminal Cases Review Commission
United Kingdom

Kent Cattani

Chief Counsel
Capital Litigation and Criminal Appeals
Arizona Attorney General's Office

Edward Connors (*Workshop Facilitator*)

President
Institute for Law and Justice

James Doyle

Director of the Center for Modern
Forensic Practice
John Jay College of Criminal Justice

Hans Fogtdal

Assistant Deputy Director
Office of the Danish Director of
Public Prosecutions
Denmark

Richard Foster

Chair
Criminal Cases Review Commission
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Susan Gaertner

Ramsey County Attorney
Ramsey County Government Center West

Brandon L. Garrett

Professor of Law
University of Virginia School of Law

Gwladys Gillieron

Visiting Research Scholar
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Stephen Goudge

Judge
Court of Appeals for Ontario
Canada

Jon Gould

Director
Center for Justice, Law and Society
George Mason University

Samuel Gross

Thomas and Mabel Long Professor of Law
University of Michigan Law School

Barbara Hervey

Judge
Texas Court of Criminal Appeals

Carolyn Hoyle

Reader in Criminology and Fellow of
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Miranda Jolicoeur

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MetaMetrics, Inc. Contractor
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Maha Jweied

Senior Counsel
Access to Justice Initiative
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Gerald LaPorte

Forensic Policy Program Manager
Office of Investigative and Forensic Sciences
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Appendix C: Participant Provided Case Studies

This appendix contains case studies written by workshop participants to illustrate some of the points made in workshop discussions. These case studies are provided to give context to the discussions. They are in no way a reflection of views at the Department of Justice.

Legal Systems: An Integrated Justice Model

By: **C. Ronald Huff**, University of California, Irvine and **Marvin Zalman**, Wayne State University

In recent decades, studies about miscarriages of justice have raised concerns about the accuracy of police investigation, prosecution, and criminal convictions, both in common law and Roman law countries. These issues appear to be more prevalent in common law countries where a large number of innocence projects have been established.

If so, common law systems might look to continental/inquisitorial systems for guidance. Any conclusion about prevalence, however, is premature since (1) no nation keeps systematic records of exonerations and (2) policies vary regarding the retention of forensic evidence for post-conviction testing. Further, the often fortuitous discovery of wrongful convictions and the controversy or doubt that surrounds miscarriage claims makes such recording unlikely. It is nevertheless useful to speculate about the structures of various criminal justice systems to consider whether certain characteristics might logically suppress error. This task is aided by analyzing justice systems through an integrated justice model that divides the whole into relevant domains, and within each domain examines the institutions, functions, personnel, regulating concepts, ideologies, and ideals that contribute to case outcomes.

In conceptualizing an integrated justice model that would seek to minimize wrongful convictions, four domains are critical: (1) the adjudication (or adversary) domain of lawyers, courts, and jurors; (2) the law enforcement domain of police investigations; (3) the psychology domain, which has been critical to uncovering errors in eyewitness identification, false confessions, juror error, and tunnel vision; and (4) the forensic science domain, where DNA profiling has been the most important element in discovering justice errors. We comment briefly on these domains below to illustrate some key features that might characterize such a model.

The Adjudication Domain: An integrated justice model would seek to place greater emphasis on “balanced fact finding” rather than a traditional adversarial approach to adjudication, which rests on the assumption that both the prosecution and the defense have the resources and the ability to perform their roles. This model would require expanded disclosure of the prosecution’s evidence prior to adjudication.

The Law Enforcement Domain: An integrated justice model would envision investigations that are more even-handed (again, “balanced fact-finding”), pursuing inculpatory and exculpatory evidence that is designed solely to discover truth, rather than to pursue convictions. Defense counsel would have direct input into investigations, as do prosecutors in the adversarial model.

The Psychology and Forensic Science Domains: Both of these domains would be envisioned as the scientific (“evidence-based”) foundation of fact-finding in the pursuit of evidence to be considered by jurors and judges. Greater emphasis would be placed on such scientific expertise than on eyewitness testimony, for example, which has been the single leading correlate of wrongful convictions. Toward that end, forensic laboratories would be independent entities, rather than part of law enforcement or prosecutorial agencies; forensic evidence, including DNA, would be retained until post-conviction testing could be performed or, in case of acquittal, until it could be utilized in attempting to determine the identity of the actual offender; and the testimony of qualified psychologists and forensic scientists would routinely be permitted to assist the court in fact-finding.

Ideally, all justice personnel would adopt the ideals of each domain—justice, public safety, human insight, and truth—to seek to assure accuracy in the investigation, prosecution and adjudication processes.

Preventing Wrongful Convictions Through Education

By: **Judge Barbara Hervey and Megan M. Molleur**, Texas Court of Criminal Appeals

Most criminal practitioners still have no clue what the term “actual innocence” really means. Does it indicate that bad lawyering (ineffective assistance of counsel) deprived the defendant of his rights? Does it indicate that “bad science” was used to convict the wrong person? And what do we really mean by “bad science”? Does it indicate the State concealed, lost, or otherwise was responsible for keeping evidence material to the defense from discovery? Does it mean the defendant committed some other offense but not the one actually charged? Or does it mean the accused just isn’t the actual perpetrator? And if the defendant is actually innocent, what do we do about it? What lessons can we learn from the tragic injustice that occurs with every wrongful conviction and unjust incarceration?

Endless debates and conversation on the topic of actual innocence/wrongful conviction must give way to meaningful reform and education, through instructions and training—these things are key to reform.

All the participants in the criminal system have a stake in the correct administration of justice. Likewise, all the participants share the responsibility of understanding the basics: law, science, procedure, and the respective roles of the other participants and the overall structure of the criminal justice system. Everyone must learn to accept responsibility when flaws in the system are found, without pointing fingers. And everyone must be able to accept that mistakes are made and admit that he or she has something to learn, whether it is as a result of a mistake or a basic concept they never fully grasped in the first place. It is always acceptable to admit you don’t know something, and it is wise to seek instruction when this occurs.

So, it should be that we go back to basics, that we hammer the basics, and that we also keep full and open minds to disciplines we don’t understand.

Judges should understand their roles as gatekeepers. They should have more instruction on forensic science and standards for the admissibility of scientific evidence. Attorneys must

understand their ethical obligations and their responsibilities to their clients and community, and they must be held accountable for mistakes without shifting blame or refusing to learn from those errors. Law enforcement should encourage the use of best practices in the performance of their duties. Crime labs must be reliable. Standards for collection, preservation, and storage of evidence must be addressed by our legislatures. And all of us must strive to educate each other as to how all these pieces of the puzzle can fit together in a never ending effort to bring about meaningful reform to rectify the causes of wrongful convictions.

A Miscarriage of Justice Based Upon False Scientific Evidence: “The Birmingham 6”

By: **Brian Caddy**, Lay Member Scottish Criminal Cases Review Commission

In 1974 a series of explosions killed and maimed a large number of people spending an evening in two different public houses in the centre of Birmingham, England. These explosions were associated with Irish dissidents. At this time a number of Irish residents were journeying to Northern Ireland to attend the funeral of an Irish dissident who had blown himself up in a previous incident. They were stopped boarding a ferry and transferred to the local police station where they were tested by a scientist from the local forensic science laboratory for the presence of trace explosive on their hands. The test he employed was the so-called Griess test which is basically a colour (pink) test for nitrite ion which can be liberated from such material as the explosive nitroglycerine using caustic soda. Such a test is usually referred to as a presumptive or screening test. This means that while nitroglycerine will respond to the test, it does not exclude other materials also producing the pink colour to the test, especially something as common as nitrocellulose used as a covering to many shiny surfaces. This means that any positive test should be confirmed by a more independent specific and sensitive test.

Subsequent evaluation of the processes used demonstrated that the laboratory had at least three different “recipes” for the Griess reagents. These showed variations in the strengths of the caustic soda, the use or not of a solubilising agent such as alcohol or ether, the temperature of the system, and the time required for the appearance of the colour. Details of the method supposedly used by the scientist were not written down at the time of use, but it would appear that he had tried to refine the test to increase its specificity but at the same time this would have reduced its sensitivity thereby vitiating the whole purpose of the test. (Many years later in a collapsed civil action, the recipe claimed to have been used by the scientist was demonstrated not to be viable because of the very low concentration of caustic soda employed). Subsequent testing demonstrated that the positive responses could have arisen from contamination of the testing basins with nitrite ion present in the soap used to clean the basins. Additionally, it was known that the detainees had played cards on the train to the ferry; the surfaces of these cards were likely to have been covered with nitrocellulose. These cards were heavily abraded and would have transferred surface particles to the hands of the players, which could have produced a positive reaction to the Griess test. Further testing with new cards showed that the retention time of surface particles was limited, but abraded cards would have transferred more material and persistence may well have been longer. This means that the cards could not be entirely excluded as the possible source of the positive Griess test. All attempts at trying to confirm the results of the Griess tests using thin layer chromatography failed. A single test of one swab using mass

spectrometry linked to gas chromatography (GC-MS) suggested the presence of nitroglycerine, but this test could not be repeated. Later testing of swabs taken from the hands of smokers demonstrated that there was an unknown compound that demonstrated all the same properties of nitroglycerine on this analytical system. In spite of the results from the defective state of the tests employed, the 6 accused were all convicted and spent 18 years in prison.

What are the lessons to be learned? First, scientists must be properly trained and regularly evaluated for their manipulative and interpretive skills. Second, all tests employed must be properly evaluated with details of their sensitivity, specificity and repeatability recorded. Scientists should be able to demonstrate what should be considered presumptive/screening and what specific tests should be ordered; a single test cannot be considered adequate for an identification. Details of all tests need to be recorded at the time of their use and any variations in the standard process recorded with reasons for the deviation.¹²⁶

This case brought an enormous impetus to the UK forensic science laboratories for the implementation of quality assurance and quality control systems that were externally verified and ultimately lead to the establishment of the Criminal Cases Review Commission (CCRC) for England, Wales and Northern Ireland in 1997. Scotland has its own Commission.

The Key Limitations of the CCRC

By: **Dr. Michael Naughton**, University of Bristol, UK

The Criminal Cases Review Commission (CCRC) is the statutory independent public body that reviews alleged miscarriages of justice in England, Wales and Northern Ireland. It is an outgrowth of the main recommendation of the Royal Commission on Criminal Justice that was established in response to the public crisis of confidence in the entire criminal justice system from start to end caused by notorious cases such as the Guildford Four and the Birmingham Six.¹²⁷ However, after a decade in operation it is increasingly clear that the help that the CCRC can provide for innocent victims of wrongful conviction is severely limited.

Not independent

The CCRC is supposed to be an independent public body. However, its operations are governed by s.13(1)(a) of the Criminal Appeal Act 1995 which requires that it cannot refer applications to the appeals courts unless:

‘...there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.’

The ‘real possibility’ test means that the CCRC is not independent, despite such claims. On the contrary, it is always in the realm of trying to second-guess how the appeal courts may view

¹²⁶ See Mullin, Chris, *Error of Judgement: The Truth about the Birmingham Bombings*, Dublin: Poolbeg Press, 1997.

¹²⁷ See Royal Commission on Criminal Justice, *Report* (Cm. 2263), London HMSO, 1993.

referred cases. This is because the CCRC has to bear in mind the decisions of the appeals courts in first appeals and cannot send cases back on the same grounds. As such, the CCRC is best described as a filter for the appeals courts, with CCRC reviews mere safety checks on the lawfulness or otherwise of criminal convictions, as opposed to in-depth inquisitorial investigations that seek the truth of claims of innocence by alleged victims of wrongful convictions.

Most crucially, cases may not be referred by the CCRC, even if it turns up compelling evidence that indicates an applicant's claim of innocence is valid, if it does not satisfy the 'real possibility' test in the eyes of the CCRC (for example, if the evidence was available or could have been made available at the original trial).

Not interested in innocence

In fact, the CCRC is not concerned with whether applicants are innocent or guilty, as it clearly states on its website:

*'We do not consider innocence or guilt, but whether there is new evidence or argument that may cast doubt on the safety of an original decision'.*¹²⁸

In this light, it is crucial to note that the CCRC is NOT a state-sponsored innocence project. It was not designed to investigate cases with the view of assisting those who might be innocent to overturn their convictions. It operates entirely within the parameters of the criminal appeals process in the role of a 'legal watchdog' to ensure that its decisions meet with its rules and procedures; it seeks to determine whether convictions are lawful.

In the U.S., the efforts of innocence projects have forced the issue of a possible federal-level solution to the apparent problem of the wrongful conviction of the innocent onto the agenda, with a CCRC-style body seen as a potential model.

However, in response to the CCRC's apparent failures in dealing with applicants who may be innocent, it is facing increasing attacks from practitioners, legal scholars, the media politicians and third sector groups.¹²⁹

The emergence of the innocence projects movement in the U.K. in a post-CCRC era is equally telling. Although innocence projects did not exist in the U.K. prior to the CCRC, the Innocence Network U.K. (INUK) has actively supported the creation of over 30 innocence projects in U.K. universities since 2004 in direct response to the limits of the CCRC in handling claims of innocence.¹³⁰

¹²⁸ Criminal Case Review Commission. UK. www.ccrc.gov.uk.

¹²⁹ See Naughton, Michael, *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave Macmillan, 2009.

¹³⁰ See www.innocencenetwork.org.uk.

Prosecutors and Penal Orders in the Swiss System

A Penal Order is the most common form of summary criminal procedure in the Swiss system. It is also popular in other European countries; it is commonly referred to as the “continental plea bargain.”¹³¹ It is similar to plea bargaining, but differs from the American system because if a defendant does not agree with the Penal Order they do not run the risk of having a larger sentence because they chose to go to trial rather than take the deal.¹³² In the Swiss system a Penal Order is only available in cases where the punishment is either a fine or a term of imprisonment that is less than 6 months.¹³³ Either a judge or a prosecutor provides both the charges and the sentence to the defendant in the form of a document.¹³⁴ If the defendant does not agree with any part of the terms, charges, or the facts surrounding the charge, then the defendant has the right to a full trial.¹³⁵ The defendant simply declines on the form to proceed to a trial.¹³⁶

The examples below show how a Penal Order operates in the Swiss justice system.

Case studies (Swiss penal order procedure)

By: **Dr. Gwladys Gillieron**, University of Zurich

Traffic violation

B is caught on radar driving 45 km p/h in excess of the speed limit on main roads. The public prosecutor issues a decision (“penal order”) in which B is sentenced to a fine of 750 Swiss francs (which is approx. 750 \$). If B doesn’t agree with the decision, he has ten days to make opposition.

Example of wrongful conviction

X is caught driving above the speed limit on motorways and sentenced by penal order to a fine of 120 Swiss francs. X doesn’t make opposition, so the decision becomes final. The penal order has been issued by the public prosecutor, although the vehicle registration plate wasn’t clearly readable. It was assumed that the car was from the canton of Bern (BE), but it could also be from the canton of Geneva (GE).¹³⁷ In addition, the person that could be identified on the photo taken

¹³¹ Killias, Martin, and Stefan Trechsel, “Law of Criminal Procedure,” *Introduction to Swiss Law* (3rd ed.), ed. Dessemontet, François and Tuğrul Ansay, The Hague: Kluwer Law International, 283.

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ *ibid.* According to the unified Swiss Code of Criminal Procedure that came into force on January 1 2011 and replaced the 26 cantonal criminal procedure codes, it is the public prosecutor that is responsible for issuing penal orders.

¹³⁶ Killias, Martin and Stefan Trechsel, “Law of Criminal Procedure.”

¹³⁷ The Swiss car number plates consist of a two-letter code for the canton followed by up to 6 numerical digits.

by the speed camera was a woman and not X (who is male). Therefore, the petition of revision¹³⁸ filed by X is admitted.

Petty theft

X steals a pair of trousers worth 100 Swiss francs (which is approx. 100 \$). The shop owner calls the police. A police officer writes a report about the incident. Based on this report, the public prosecutor issues a penal order in which X is sentenced to a fine of about 250 Swiss francs.

The prosecutor can decide to pronounce either a fine or a short prison sentence (until 6 months) if the stolen goods are worth more than 300 Swiss francs.

Drugs

A is caught selling drugs on the street. After the interrogation of the suspect at the police station, the police report is transferred to the public prosecutor. On the base of the police report, the public prosecutor convicts A by penal order to a fine of 1000 Swiss francs.

Depending on the amount sold, the public prosecutor can decide to pronounce either a fine or a short prison sentence (until 6 months) or both.

The Pious Plea

By: **Lindsay Herf**, Arizona Justice Project

Close to 95 percent of criminal cases end with convictions obtained through plea bargaining.¹³⁹ Most would believe that the plea bargaining system would never produce a wrongful conviction. After all, who would plead guilty to a crime she/he did not commit? John Watkins did.

In 2004, at age 20, John Watkins was charged with two unrelated crimes: (1) possessing child pornography¹⁴⁰ and (2) sexual assault.¹⁴¹ He was threatened with 120 years in prison on the pornography charges.¹⁴² Then, Watkins was offered a plea: if he pled guilty to both cases, he would receive no prison time for the pornography charges and be sentenced to 7-14 years in prison for rape.

With no DNA evidence to prove his innocence for the rape, he pled guilty to the two crimes. Seven and one half years later, advanced DNA testing techniques proved Watkins was not the

¹³⁸ The petition of revision is the only legal remedy once a judgment has become final. New evidence not available before must be shown.

¹³⁹ See Bureau of Justice Statistics: Criminal Cases in State Trial Courts (Report based on felony offenses charged in 2006 throughout the United States) at <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=221>.

¹⁴⁰ Under Arizona law, child pornography, or images of people under 15 years engaged in sexual activity, is punishable by 10 to 24 years in prison *per* image.

¹⁴¹ Under Arizona law, sexual assault, a violent crime against a person, is punishable by 7 to 14 years in prison.

¹⁴² Arizona's sentence for this crime is "by far the longest in the nation and is more severe than sentences imposed in Arizona for arguably more serious and violent crimes." See *State v. Berger*, 212 Ariz. 473, 134 P.3d 378 (2006).

person who committed the rape. This means the true assailant has never been caught and has possibly gone on to commit other violent attacks.

Watkins is not alone. At least 19 other individuals have pled guilty to violent crimes they did not commit and were later proven innocent through DNA testing.¹⁴³

Why this is happening in our innocent until proven guilty system of criminal justice? Part of the answer is that innocent people are being produced for prosecution based on flawed evidence: poor investigation, eye witness misidentification, and tunnel vision by some law enforcement agents. In the case against Watkins, each of these aspects came into play. The rape victim was a 48-year-old woman who was intoxicated at the time of the assault. Two hours after the assault, she told the detective she could not help in making a composite sketch of her attacker, but could only give a general description: young, white male, white t-shirt and basketball shorts, medium build, blondish-brownish hair. Police continued to press her for an identification and showed her a video where she identified a young man as the possible attacker. The man she identified was not John Watkins. However, police became fixated on Watkins. The victim was called in again and this time presented with a photo line-up which showed 6 similar looking young white males, 5 in black t-shirts and 1 in a white t-shirt. She chose the one in the white t-shirt — that was John Watkins. The suggestive photo line-up and pressure to identify the attacker created a false eyewitness identification.

The interrogation of Watkins also proved to be a problem. Police are trained that in a reliable confession, the suspect will produce information about the crime that is not known to the public and only the true assailant would know. In this case, Watkins denied involvement in the rape at least 68 different times during the interrogation. But after 4 ½ hours of interrogation in which Watkins was told he failed a voice stress test and that meant he was lying and the interrogators lied to Watkins by telling him his fingerprints were found at the crime scene *and* multiple witnesses had already identified him, Watkins finally broke down and admitted to the rape. However, his “confession” contained incorrect details about the crime, and the accurate details he gave had all been fed to Watkins by the interrogator during the first 4 hours and 20 minutes of the interrogation.

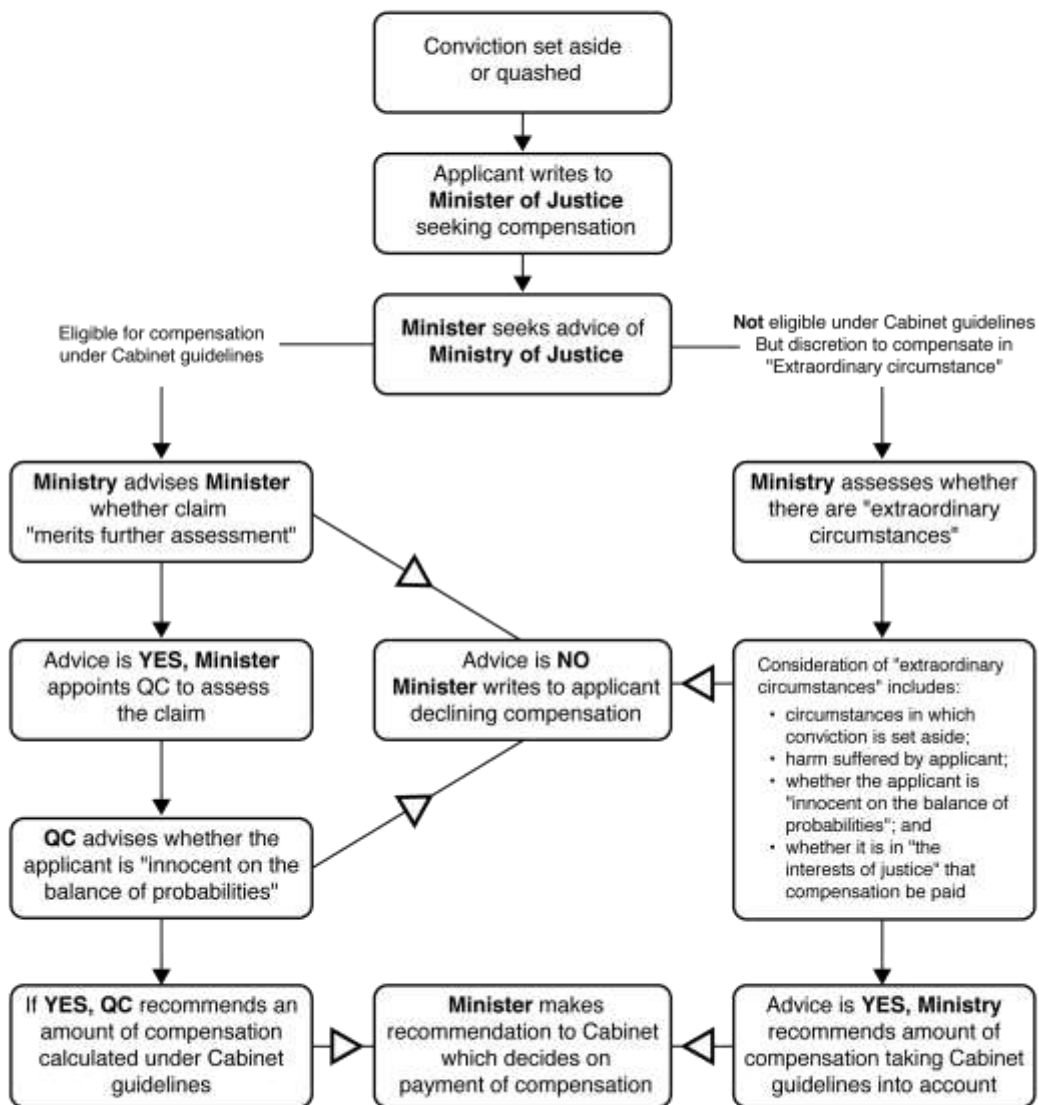
No matter what Watkins said about his innocence for the rape, the detectives thought they had their man.

Without DNA evidence, Watkins’s exoneration for the rape would have been impossible. The DNA and non-DNA exonerations remind us that there are cracks in the system and sometimes the unimaginable occurs: an innocent person pleads guilty to a crime she/he did not commit

¹⁴³ See “When the Innocent Plead Guilty,” www.innocenceproject.org.

New Zealand's Compensation for Wrongful Conviction and Imprisonment

Process for determining eligibility and quantum of compensation in New Zealand



New Zealand Ministry of Justice (July 2008)
Ministry of Justice Backgrounder: Compensation for Wrongful Conviction and Imprisonment

Statutory Compensation for Victims of Miscarriages of Justice in England and Wales

By: **Dr. Michael Naughton**, University of Bristol, U.K.

England and Wales has a statutory compensation scheme for victims of miscarriages of justice under the terms of s.133 of the Criminal Justice Act 1988 as follows:

‘(1) When a person has been convicted of a criminal offence and when subsequently his conviction has been reversed [quashed] or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted?’⁽⁵⁾ In this section “reversed” shall be construed as referring to a conviction having been quashed — (a) on an appeal out of time. (b) on a reference — under the Criminal Appeal Act 1995...’

This immediately denies statutory compensation to all successful appellants who overturn a criminal conviction within the normal criminal appeals system. It effectively limits eligibility to less than 1 percent of successful appeals that are overturned on fresh evidence in an out of time appeal or upon a referral back to the appeals courts by the Criminal Cases Review Commission, established by the Criminal Appeals Act 1995.

In the leading authority on the eligibility for compensation for a miscarriage of justice, Lord Justice Dyson distinguished four categories of successful appeal in the Court of Appeals (Criminal Division) at the post-appeal stage, with only the first category, relating to factual innocence, eligible for compensation:

‘...A category 1 case is where the court is sure that the defendant is innocent of the crime of which he has been convicted. An obvious example is where DNA evidence, not obtainable at the time of trial, shows beyond doubt that the defendant was not guilty of the offence. A category 2 case is where the fresh evidence shows that he [sic] was wrongly convicted in the sense that, had the fresh evidence been available at the trial, no reasonable jury could properly have convicted...It does not follow in a category 2 case that the defendant was innocent. A category 3 case is where the fresh evidence is such that the conviction cannot be regarded as safe, but the court cannot say that no fair-minded jury could properly convict if there were to be a trial which included the fresh evidence...There is a fourth category of case to which Lord Bingham referred in Mullen. This is where a conviction is quashed because something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted [but is likely to be guilty]’.¹⁴⁴

As such, statutory compensation in England and Wales is only awardable to those highly rare occasions when fresh evidence emerges at the post appeal stage that completely exonerates a

¹⁴⁴ *R (Adams) v. Secretary of State for Justice* [2009] EWCA Civ 129, para. 30.

person who was convicted of a criminal offence, for instance by new DNA evidence that was not available at the time of the original trial or previous appeal.

However, there has only ever been one case that has been overturned post-appeal following a referral by the Criminal Cases Review Commission that entirely exonerated the appellant in the England and Wales — the case of Sean Hodgson who overturned his conviction for rape and murder after 27 years in prison when DNA evidence proved that he was innocent.¹⁴⁵

The AEDPA: A Barrier to Justice?: A Case Study of Carlton Gary

By: **Dr. Carolyn Hoyle**, co-author of Hood, R. and Hoyle, C. *The Death Penalty: A Worldwide Perspective* (Oxford University Press, 2008)

In a due process model, evidence should be gathered honestly and cases handled with integrity. If prosecutors encounter evidence that weakens their case, they are obliged to disclose it, while if they find flaws in the work done by investigators they must demand further safe evidence or drop the charges. They must, in other words, be prepared to abandon their conviction that they've got their man when evidence arises to the contrary — an obligation which is especially strong in capital cases.

Non-disclosure of exculpatory evidence (as defined by the 1963 case of *Brady vs Maryland*) features in many wrongful convictions, but since the introduction of the *Antiterrorism and Effective Death Penalty Act* of 1996 (AEDPA) U.S. appellate courts have failed to uphold due process values.

The AEDPA aimed to curb federal death penalty appeals and to increase the speed and number of executions. It has succeeded, but at considerable cost. Evidence of misconduct, including exculpatory evidence hidden from the trial, is no longer enough to reverse a conviction. To get a new trial, a defendant has to prove that if the jury had known about it, it would have acquitted him. The only way to get a federal court to consider new evidence is if it amounts to overwhelming proof of innocence. The burden of proof in appeals has effectively been reversed.

The case of Carlton Gary illustrates these difficulties.¹⁴⁶ Convicted in 1986 of killing and raping three women in Columbus, Georgia, he remains on death row despite compelling evidence that critical elements of the state's case at his trial were fabricated or unreliable. Brady violations include the non-disclosure of a bite cast from a victim's wound which does not match Gary's teeth. Denied relief by the District and 11th Circuit courts because he did not meet the required AEDPA standard, he was refused cert by the U.S. Supreme Court in June 2009. That fall, the

¹⁴⁵ See *R v. Hodgson* [2009] EWCA Crim 490.

¹⁴⁶ For more information about the case of Carlton Gary, see Rose, David, *The Big Eddy Club: The Stocking Stranglings and Southern Justice*, New York: The New Press, 2007.

defense revealed that the forensic samples that the state had said had been destroyed had come to light in the police evidence store, but their motion for a stay pending DNA testing was denied. Gary came within 4 hours of execution when the Georgia Supreme Court finally granted a stay to permit the tests. The final rounds in this legal battle are expected in 2011.

Politicians, prosecutors and appellate courts, sometimes argue that Brady violations are ‘technicalities’ that, if used to reverse convictions, will lead to the exoneration of factually guilty people. There is no evidence of this. In fact, since the AEDPA, it isn’t hard to have someone executed on a technicality, despite compelling fresh evidence pointing to innocence.