The Wrongful Conviction Law Review

Volume 3, Issue 2

Editorial Board

The Wrongful Conviction Law Review

Volume 3, Issue 2 **Cited as (2022) 3:2 Wrongful Conv L Rev**

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Conviction Integrity: The Canadian Miscarriages of Justice Commission

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Recently, the Canadian Government has committed to creating an independent Canadian Criminal Cases Review Commission. Minister Lametti initiated a consultation process with stakeholders, led by Justice Harry S. LaForme of the Ontario Court of Appeal and assisted by retired Judge Juanita Westmoreland-Traoré of the Court of Quebec, to precede the implementation of the Commission. The resulting report recommends a visionary innocence commission for Canada that is more independent, better funded, more systematic, proactive, and inclusive, has scope to review far more potential miscarriages of justice, and has broader referral grounds and more remedies than existing innocence commissions in other countries. Hopefully, the Canadian Government will seize this singular opportunity to implement a monument to justice and place Canada as the global leader in addressing wrongful convictions.

I Background

In 1989, the Commission of Inquiry into the wrongful murder conviction of seventeen-year-old Donald Marshall recommended the creation of an independent innocence commission.[1] The Commission noted that the ministerial referral of Marshall's case for a new appeal "left Marshall with the burden of preparing and presenting the case to prove his own innocence. This reinforced the adversarial nature of an appeal and . . . precluded a complete examination of why the wrongful conviction occurred."[2]

In 2001, an inquiry into Thomas Sophonow's wrongful conviction, led by Supreme Court Justice Peter Cory, repeated this recommendation to create an independent commission to replace the Ministerial review that is a vestige of the royal prerogative of mercy.[3]

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[1] Hon Harry LaForme & Hon Juanita Westmoreland-Traoré, "A Miscarriages of Justice Commission" (2022) at 16, online: *Department of Justice Canada* <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/index.html>.

[2] *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queen's Printer, 1989) at 158.

[3] LaForme & Westmoreland-Traoré, *supra* note 1 at 34; Colin Perkel, "Creation of Wrongful Conviction Review Board Edging Closer to Reality", (1 Mar 2020), online: *CBC*

In 2002, the government created a review mechanism for postconviction claims of wrongful conviction, which enlarged the scope of review power of the Minister of Justice on applications for mercy and clemency.[4] The legislation also created a Criminal Conviction Review Group (CCRG) within the Department of Justice to review and investigate applications and make recommendations to the Minister, but the federal Minister of Justice still held the power to make the final decision regarding whether to grant relief.[5]

These reforms disappointed advocates who had hoped that the government would follow the recommendations of the public inquiries for an innocence commission.[6] The long struggle to create an independent commission in Canada has generated distrust among those seeking remedies for miscarriages of justice.[7]

In 2008, a commission of inquiry into David Milgaard's wrongful conviction concluded that the current ministerial review process was "reactive" and placed too heavy an onus on the wrongfully convicted.[8] In total, all seven public inquiries into miscarriages of justice in Canada have urged the creation of an independent innocence commission without success until now.[9]

One driving force behind reform is the concern about the significant overrepresentation of Indigenous and Black Canadians in prison and underrepresentation among the exonerated.[10] Indigenous Canadians comprise approximately five percent of the Canadian population but 30 percent of the prison population.[11] Overrepresentation is even higher for Indigenous women and youth.[12] Of the 20 cases that the Minister of Justice has referred to the courts for review over the past 20 years, all were men and 18 were white.[13]

Recently, the Canadian federal government has committed to creating an independent Canadian Criminal Cases Review Commission (CCCRC). On December 13, 2019, David Lametti, the Minister of Justice and Attorney General of Canada, was mandated to establish an independent CCRC to improve the process for assessing applications from potentially wrongfully convicted

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<https://www.cbc.ca/news/canada/toronto/ont-wrongful-convictions-1.5481608>.

[4] Carrie Leonetti, "The Innocence Checklist" (2021) 58 Am Crim L Rev 97 at 117; Kent Roach, "Exceptional Procedures to Correct Miscarriages of Justice in Common Law Systems" in Darryl K Brown et al, eds, *The Oxford Handbook of Criminal Process* (Oxford: Oxford University Press, 2019) at 962-963 [Roach, "Exceptional Procedures"].

[5] "Criminal Conviction Review" (last visited 23 Aug 2022), online: *Government of Canada* <https://www.justice.gc.ca/eng/cj-jp/ccr-rc/index.html>; LaForme & Westmoreland-Traoré, *supra* note 1 at 51; Roach, "Exceptional Procedures", *supra* note 4 at 981.

[6] Roach, "Exceptional Procedures", *supra* note 4 at 981.

[7] LaForme & Westmoreland-Traoré, *supra* note 1 at 46.

[8] *Ibid* at 39.

[9] Leonetti, *supra* note 4 at 117.

[10] LaForme & Westmoreland-Traoré, *supra* note 1 at 17, 31-32, 190.

[11] *Ibid* at 26, 59-60.

[12] *Ibid* at 26, 66.

[13] *Ibid* at 6, 17, 31, 59, 190.

persons.[14] The CCCRC will consider claims of wrongful conviction that have not been remedied by the courts. The CCCRC is intended to change fundamentally the way that wrongful convictions are addressed in Canada by removing the power to review claims of wrongful conviction from the federal Minister of Justice and transferring it to an independent body.[15]

Minister Lametti initiated a consultation process with stakeholders, led by Justice Harry S. LaForme of the Ontario Court of Appeal and assisted by retired Judge Juanita Westmoreland-Traoré of the Court of Quebec, to precede the implementation of the CCCRC.[16] Stakeholders included prosecutors, police, judges, the defence bar, academics, legal-aid officials, victims' advocates, forensic scientists, and exonerees.[17] The process also included consultation with representatives from existing innocence commissions in the United Kingdom (UK), Scotland, Norway, North Carolina, and New Zealand. A detailed consultation document was issued on June 18, 2021.[18]

The resulting report recommends a visionary innocence commission for Canada that is more independent, better funded, more systematic, proactive, and inclusive, has scope to review far more potential miscarriages of justice, and has broader referral grounds and more remedies than existing innocence commissions in other countries. It is a detailed blueprint for a transformational CCCRC.

II The Status Quo: Ministerial Review

Canada still relies on a traditional, discretionary ministerial review process to remedy miscarriages of justice, through which applicants can apply to the federal Minister of Justice for a remedy. The Minister can refer possible miscarriages of justice back to the provincial courts of appeal for review or ask an appellate court to answer specific questions relating to an application for review.[19] The ministerial process dates back to 1892, although the grounds for relief were considerably narrowed in 2002.[20] The Minister of Justice has the authority to order a new trial or to refer the matter for a new appeal to the Court of Appeal in the appropriate province or territory.[21] The present CCRG is funded through a revolving fund budget process that does not constrain its work.[22]

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[14] Mandate Letter from Minister of Justice David Lametti to Hon. Harry S. LaForme, 16 Dec 2020 (on file with Author), online: https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-justice-and-attorney-general-canada-mandate-letter.

[15] *Ibid.*

[16] *Ibid*.

[17] LaForme & Westmoreland-Traoré, *supra* note 1 at 5.

[18] Consultation on a Criminal Cases Review Commission for Canada, online: https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/index.html.

[19] "Criminal Conviction Review", *supra* note 5.

[20] LaForme & Westmoreland-Traoré, *supra* note 1 at 48-49.

[21] "Criminal Conviction Review", *supra* note 5.

[22] LaForme & Westmoreland-Traoré, *supra* note 1 at 7.

The ministerial process involves exceptional requests for an extraordinary and highly discretionary remedy that derives from the royal prerogative of mercy.[23] The Minister *may* make a referral to a provincial Court of Appeal or order a new trial if there is a reasonable basis to conclude that a miscarriage of justice *likely* occurred, a discretionary determination that requires a finding that a miscarriage of justice probably happened.[24]

The ministerial process places a heavy burden on applicants.[25] It has limited investigative powers and is solely application driven.[26] The Minister of Justice does not conduct a proactive investigation on receipt of an application, but rather relies on the applicant, lacking in investigative expertise, to identify the grounds for an alleged miscarriage of justice.[27] The CCRG does not have access to the Minister's powers to compel the production of documents or the answering of questions until an application moves to a formal investigation.[28] At the early phases of review, it must rely on the voluntary cooperation of police, prosecutors, and potential witnesses.[29] Ministerial review can take years to resolve.[30]

The Minister will not exercise the discretion to order a new trial or appeal in the absence of new and significant evidence.[31] The Minister is unlikely to order an investigation unless the application identifies new matters of significance.[32] Most applications are denied after the preliminary assessment.[33]

The CCRG devotes most of its resources to processing the applications that it receives.[34] It currently receives fewer than twenty applications per year – sometimes, considerably fewer.[35] Over the past 40 years, the Minister of Justice has decided 91 applications and sent 29 cases back to the courts, including that of Milgaard, who spent 23 years in prison for a murder that he did not commit.[36] There have been 20 referrals since 2002. Eight were for new trials; 12 were for new appeals.[37] All 20 successful applicants were represented by counsel.[38]

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[23] *Ibid* at 50, 58; Roach, "Exceptional Procedures", *supra* note 4 at 982-983.

[24] *Criminal Code*, RSC 1985, c C-46, s 696.3.

[25] LaForme & Westmoreland-Traoré, *supra* note 1 at 52.

[26] *Ibid* at 34-35.

[27] *Roberts v British Columbia (Attorney General)*, 2021 BCCA 346 at para 58.

[28] LaForme & Westmoreland-Traoré, *supra* note 1 at 52.

[29] *Ibid*.

[30] Roach, "Exceptional Procedures", *supra* note 4 at 981.

[31] *Albon v Ontario*, 2019 ONSC 3372 at para 112.

[32] *Roberts*, *supra* note 27 at para 57.

[33] LaForme & Westmoreland-Traoré, *supra* note 1 at 53.

[34] *Ibid* at 39.

[35] *Ibid* at 35.

[36] Perkel, *supra* note 3; Roach, "Exceptional Procedures", *supra* note 4 at 982.

[37] LaForme & Westmoreland-Traoré, *supra* note 1 at 53.

[38] *Ibid* at 58-59.

Almost all referrals have resulted in the conviction being overturned or dismissed.[39] This suggests that the Minister has only referred relatively clear miscarriages of justice back to the courts.[40] Experts believe that the 29 referrals likely represent a small fraction of actual wrongful convictions in Canada.[41] As the LaForme and Westmoreland-Traoré report notes, "they are the tip of the iceberg."[42]

III International Comparison of Independent Review Bodies

A. The UKCCRC

From 1989 to 1992, the British Home Secretary referred twenty-eight cases involving forty-nine people to the Court of Appeal, including the Guildford Four, Birmingham Six, and Maguire Seven cases, which involved wrongful convictions and police misconduct by the notorious West Midlands Serious Crime Squad.[43] In 1993, the Royal Commission on Criminal Justice (the Runciman Commission) recommended the creation of an independent and proactive innocence commission to replace the previous discretionary system of ministerial referrals.[44] The Commission concluded that the Home Secretary's role as part of the political executive in the cabinet and the minister responsible for criminal justice and policing was "incompatible" with the constitutional separation of powers between the courts and the executive.[45]

The UKCCRC was created in 1995 and has been operating since 1997.[46] It examines putative miscarriages of justice in England, Wales, and Northern Island. It was the first independent public body in the world responsible for reviewing alleged miscarriages of justice and sending meritorious claims back to the Court of Appeal for further review.[47] It can obtain new expert reports and appoint investigating police officers to obtain new evidence.[48] It has 12 commissioners and makes referral decisions in three-member panels.[49] It does not have the power to reverse convictions. Instead, a referral functions as a grant of leave to appeal to the Court of Appeal.[50]

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[39] *Ibid* at 41, 58; Roach, "Exceptional Procedures", *supra* note 4 at 983.

[40] *Ibid*.

[41] Perkel, *supra* note 3.

[42] LaForme & Westmoreland-Traoré, *supra* note 1 at 41.

[43] Roach, "Exceptional Procedures", *supra* note 4 at 963.

[44] *Ibid*; LaForme & Westmoreland-Traoré, *supra* note 1 at 32.

[45] "Report of the Royal Commission on Criminal Justice" (1993) at 181, online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf> ["Runciman Commission Report"].

[46] LaForme & Westmoreland-Traoré, *supra* note 1 at 32; Roach, "Exceptional Procedures", *supra* note 4 at 961-963.

[47] Leonetti, *supra* note 4 at 116.

[48] Roach, "Exceptional Procedures", *supra* note 4 at 964.

[49] *Criminal Appeal Act*, 1995, c. 35 (UK).

[50] "Welcome to the Criminal Cases Review Commission" (last visited 26 Sept 2022), online: *CCRC* <https://ccrc.gov.uk>.

Since its creation, the UKCCRC has been the subject of criticisms that it has not done enough to remedy wrongful convictions in the UK. Some of these criticism stem from the fact that it cannot overturn convictions that it deems unsafe or admit fresh evidence.[51] Others have complained that it does not show enough concern for factual innocence.[52] Others have complained that it has not made proposals for systemic policy reforms to prevent future miscarriages of justice, as contemplated by the Runciman Commission.[53]

The UKCCRC refers relatively few applications to the courts, fewer than three per cent of the approximately 1400 applications that it reviews per year.[54] While referrals require the assent of three commissioners, a single commissioner can reject an application.[55] Approximately two thirds of the appeals resulting from UKCCRC referrals have been allowed by the Court of Appeal.[56] While this may seem like a high rate of "success" for the UKCCRC, it could also indicate that the Commission is not referring enough cases to the Court of Appeal for reconsideration.

Few of the cases that the UKCCRC has referred to the Court of Appeal have involved actual innocence.[57] Instead, the referrals have largely involved claims of procedural injustice, diminished responsibility, police misconduct, and witness reliability.[58]

B. The Scotland CCRC (SCCRC)

The SCCRC was established in 1999 and is structured similarly to the UKCCRC.[59] It has a chief executive, seven commissioners, and several legal officers.[60]

Unlike the UKCCRC, the SCCRC does not have the authority to grant leave to appeal. Instead, the Court of Appeal retains the power to reject a referral if it deems that the appeal is not in the interests of justice.[61]

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[51] Laforme & Westmoreland-Traoré, *supra* note 1 at 32.

[52] Michael Naughton, *The Innocent and the Criminal Justice System: A Sociological Analysis of Miscarriages of Justice* (London, UK: Palgrave Macmillan, 2013) [Naughton, *The Innocent*]; Michael Naughton, ed, *The Criminal Cases Review Commission: Hope for the Innocent?* (London, UK: Palgrave Macmillan, 2010).

[53] Roach, "Exceptional Procedures", *supra* note 4 at 969; Kent Roach, "The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?" (2010) 85 Chi-Kent L Rev 89.

[54] "Facts and figures" (last visited 10 Sep 2022), online: *CCRC* <https://ccrc.gov.uk/facts-figures>.

[55] *Criminal Appeal Act*, *supra* note 49.

[56] Laforme & Westmoreland-Traoré, *supra* note 1 at 58; Roach, "Exceptional Procedures", *supra* note 4 at 967.

[57] Roach, "Exceptional Procedures", *supra* note 4 at 968.

[58] *Ibid.*

[59] *Ibid* at 970; Laforme & Westmoreland-Traoré, *supra* note 1 at 34.

[60] "Annual Report 2017-2018" (2018) at 8, online: *SCCRC* <https://irp-cdn.multiscreensite.com/8f56052e/files/uploaded/SCCRC%20-%202017-18%20Annual%20Report%20-%20Final%20%28Online%20Version%29.pdf>.

[61] *Criminal Procedure (Scotland) Act*, 1995, c. 46 (UK), s 194DA (2).

The SCCRC receives approximately 300 applications per year.[62] Since 1999, it has received almost 3000 applications and referred 85 convictions back to the courts as probable wrongful convictions, of which 41 have been quashed.[63] Its referral rate is higher than that of the UKCCRC at 5.4%, but its success rate is lower at less than 50%.[64] These figures suggest that the SCCRC is more aggressive than the UKCCRC at referring cases to the Court of Appeal.

The SCCRC has been more active than the UKCCRC on systemic issues. It has commissioned and published research on a range of systemic justice topics, including the correlation between legal representation for applicants in the SCCRC and referrals back to the courts.[65]

Nonetheless, like the UKCCRC, the SCCRC has been criticized for being too conservative and dependent on the views of the Court of Appeal and the Commission's criminal-justice insiders rather than acting independently and pushing the courts to reform.[66]

C. The Norway CCRC (NorCCRC)

Norway established the NorCCRC in 2004.[67] It is supposed to operate completely independently of the political and legal systems and is not bound by High Court rulings in particular cases.[68] It has the power to investigate and reopen criminal cases in which there may have been a wrongful conviction.[69] As long as there is new evidence not presented previously, there is no limit to the number of times that an application may be filed with the NorCCRC in a given case.[70] When the NorCCRC reopens a case, it refers it for retrial to a court district other than the district that imposed the original conviction.[71]

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[62] Laforme & Westmoreland-Traoré, *supra* note 1 at 56.

[63] *Ibid* at 57.

[64] Roach, "Exceptional Procedure", *supra* note 4 at 973.

[65] *Ibid.*

[66] James Chalmers & Fiona Leverick, "The Scottish Criminal Cases Review Commission and Its Referrals to the Appeal Court: The First 10 Years" (2010) 8 Crim L R 608; Stephanie Roberts & Lynne Weathered, "Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission" (2009) 29 OJLS 43 at 58.

[67] Ulf Stridbeck & Philos Svein Magnussen, "Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission" (2012) 80 U Cin L Rev 1373 at 1381. The Norwegian justice system is quite different to the justice system in the other comparator jurisdictions reviewed here. Unlike much of Europe, Norway has a party-led adversarial system of criminal justice and a majority of judges are lay jurors. Like most European inquisitorial systems, however, plea bargaining is forbidden in Norway. All criminal cases are tried before a judge, and there is no way to circumvent trial through guilty plea; *ibid* at 1375.

[68] *Ibid* at 1381.

[69] *Ibid* at 1374.

[70] *Ibid* at 1389.

[71] *Ibid* at 1383.

The NorCCRC has five commissioners, with a mix of three who are legally trained and two who are not, appointed in three-year terms.[72] It receives between 150-300 applications per year and has reopened 351 cases since 2004.[73] It primarily focuses on fresh evidence: new medical or psychiatric evidence, a confession by an alternate suspect, or new witnesses.[74]

The administrative staff includes two investigators with police training and seven legally trained investigators, and it also has the power to recruit extra police investigators for individual cases.[75] The NorCCRC can appoint expert witnesses and defense lawyers at public expense during the post-conviction review process.[76]

D. Virginia and North Carolina

Virginia and North Carolina are the two American states that have had innocence commissions.[77] The North Carolina Innocence Inquiry Commission (NCIIC) was the first innocence commission in the United States.[78] It was created in 2006.[79] The eight-member Commission reviews claims of factual innocence and investigates those that meet certain criteria.[80] After investigation, it decides whether to transfer the claim to a special panel of three judges with no prior involvement in the case for an adversary proceeding.[81] The judicial panel can vacate convictions and charges.[82]

The NCIIC receives approximately 200 applications per year.[83] It has referred 19 cases involving 27 convicted people for judicial review, less than one percent of the applications that it has reviewed.[84]

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[72] Laforme & Westmoreland-Traoré, *supra* note 1 at 69; Stridbeck & Magnussen, *supra* note 67 at 1381.

[73] Laforme & Westmoreland-Traoré, *supra* note 1 at 56-57.

[74] Stridbeck & Magnussen, *supra* note 67 at 1374.

[75] *Ibid* at 1381.

[76] *Ibid* at 1382.

[77] Jon B Gould, *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System* (New York: NYU Press, 2008).

[78] Christine C Mumma, "The North Carolina Innocence Inquiry Commission: Catching Cases That Fall Through the Cracks" in Marvin Zalman & Julia Carrano, eds, *Wrongful Conviction and Criminal Justice Reform: Making Justice* (London, UK: Routledge, 2014) at 255.

[79] Roach, "Exceptional Procedures", *supra* note 4 at 962.

[80] Nancy J King, "Judicial Review: Appeals and Postconviction Proceedings" in Allison D Redlich et al, eds, *Examining Wrongful Convictions* (Durham, NC: Carolina Academic Press, 2014) at 229.

[81] Roach, "Exceptional Procedures", *supra* note 4 at 977.

[82] King, *supra* note 80 at 229.

[83] King, *supra* note 80 at 229; LaForme & Westmoreland-Traoré, *supra* note 1 at 56; Roach, "Exceptional Procedures", *supra* note 4 at 976.

[84] LaForme & Westmoreland-Traoré, *supra* note 1 at 57; Roach, "Exceptional Procedures", *supra* note 4 at 976.

The NCIIC considers only claims of actual innocence and uses a "factual innocence" test for referring cases.[85] Most claims are rejected because the applicant has no fresh evidence, there is no evidence of innocence, or the claimant did not claim factual innocence.[86] Conversely, most exonerations have involved DNA analysis or other forms of fresh forensic evidence.[87]

Since the inception of the NCIIC, ten applicants have been exonerated as factually innocent.[88] Because of the high standard for referral and reliance on fresh evidence, in cases in which the NCIIC makes a referral to the judicial panel, the State often concedes that a conviction should be overturned.[89]

The creation of the NCIIC was followed by the creation of the Innocence Commission for Virginia (ICVA). The ICVA was not a CCRC. It was not a governmental entity, but rather it was a privately funded innocence reform commission. It was a time-limited organization primarily focused on the study of wrongful convictions, based on case investigations and legal research.[90] It lacked the powers to compel evidence and enact reform.[91] It was sponsored by the Innocence Project of the National Capital Region (IPNCR) (now the Mid-Atlantic Innocence Project), the Administration of Justice Program at George Mason University, and the Constitution Project.[92] It was supported by pro bono contributions from large law firms.[93] Its staff were volunteers and served without compensation.[94] It examined only official exonerations (i.e., cases in which the defendant's conviction was overturned by a governor's pardon or a court order or in which prosecutors conceded that the wrong person had been convicted).[95] It did not examine matters of legal error or procedural injustice, only cases involving factual innocence, in part because of a calculation that "'legal technicalities' were less likely to generate public concern than were factual exonerations."[96] It released its report in 2005 after 18 months of investigation.[97]

[85] LaForme & Westmoreland-Traoré, *supra* note 1 at 15; Roach, "Exceptional Procedures", *supra* note 4 at 962.

[86] King, *supra* note 80 at 229; Roach, "Exceptional Procedures", *supra* note 4 at 976.

[87] Roach, "Exceptional Procedures", *supra* note 4 at 977.

[88] *Ibid.*

[89] *Ibid.*

[90] Gould, *supra* note 77 at 56-66.

[91] *Ibid* at 70.

[92] *Ibid* at 58.

[93] *Ibid* at 58-59.

[94] *Ibid* at 70.

[95] *Ibid* at 61.

[96] *Ibid* at 61.

[97] *Ibid* at 66.

E. The New Zealand CCRC (NZCCRC)

In 2019, New Zealand formally established the NZCCRC, Te Kāhui Tātari Ture.[98] The Commission began operations in July 2020.[99] It was largely modeled on the UKCCRC. The primary function of the NZCCRC is to investigate and review convictions and sentences (whether arising before or after the creation of the Commission) raised by applicants and to decide whether to refer the conviction or sentence to the relevant appellate court for further consideration.[100] The Commission may also choose to investigate any "practice, policy, procedure or other matter of a general nature" that it considers may be related to cases involving a miscarriage of justice or have the potential to do so.[101]

There are seven commissioners who come from a range of backgrounds. The New Zealand Parliament delegated to the NZCCRC the power to regulate its procedures for performing its functions, including how applications will be made.[102]

The NZCCRC is vested with wide powers to gather information and evidence in relation to any application that it decides to investigate. These investigative powers include accessing documents held by the courts or other persons or agencies and compelling persons to give evidence.[103] The Commission is authorized to challenge objections to the production of documents or giving evidence based on claims of privilege and confidentiality in court.[104]

The NZCCRC considers applications in a three-stage process: screening, investigation, and evaluation. In the screening stage, it decides whether to investigate the application. In the investigation stage, it reviews in more detail the cases that survive the initial screening. In the evaluation stage, it determines whether the case should be referred to an appellate court. The primary test for referral is whether referral is in "the interests of justice". In making that assessment, the Commission must consider: whether the eligible person has exercised their rights of appeal against the conviction or sentence;[105] the extent to which the application relates to argument, evidence, information, or a question of law that was raised or dealt with in prior

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[98] *Criminal Cases Review Commission Act 2019* (NZ), s 7 [*CCRCA*].

[99] Natalie Akoorie, "New Commission for Miscarriages of Justice Poised to Refer Unjust Sentence Back to Court" (7 Sept 2022), online: *NZ Herald* <https://www.nzherald.co.nz/nz/new-commission-for-miscarriages-of-justice-poised-to-refer-unjust-sentence-back-to-court/QLEA5HF4XL3WXK5DRGN75A6M7I>.

[100] *CCRCA*, *supra* note 98 at s 11.

[101] *Ibid* at s 12.

[102] *Ibid* at ss 15, 16.

[103] *Ibid* at ss 31-33.

[104] *Ibid* at ss 38-42.

[105] The applicant is not required to have pursued an appeal against conviction or sentence, but it is likely that the failure to pursue an appeal through normal channels, without justification, will inure against a reference.

proceedings; the prospects of the court allowing the appeal;[106] and any other matter that it considers relevant.[107]

The NZCCRC has received 308 applications in its first two years of operation, significantly more than what was anticipated by the government when it was established in 2020.[108] It is currently poised to refer its first case back to the appellate court, a case involving a putatively unjust sentence, which could lead to a sentence reduction.[109]

IV Major Decision Points for the Creation of a Canadian Innocence Commission

The LaForme and Westmoreland-Traoré report is comprehensive. This article focuses only on some of the significant decisions that the Canadian government will have to make and particularly those that have bedeviled innocence commissions in other jurisdictions: staffing, funding, independence, defining miscarriages of justice, the standard for referral to appellate courts, and the standard for appellate review of putative wrongful convictions.

A. Staffing

The first important issue is the composition of the CCRC. There are three possible models for the Commissioners. The first is an expertise model. The second is a vulnerable-stakeholder model. The third is an adversarial-stakeholder model. In addition, the government must decide whether to authorize the CCRC to retain expert consultants or investigators in individual cases.

a. The Expertise Model

Under an expertise model, the Commissioners are predominantly legal and criminal-justice experts commissioned by the state. For example, in the UK, Scotland, and New Zealand, one third of the commissioners must be experienced lawyers and two thirds must have expertise in criminal justice.[110] One downside of a commission of experts is that it can "underestimate the understandable distrust that many applicants have towards the system that has convicted them."[111]

b. The Vulnerability Model

Under the vulnerability model, the Commissioners must have special expertise and understanding of groups that are overrepresented in the justice system and/or particularly vulnerable to miscarriages, such as indigenous and other racialized peoples or individuals with

[106] Success on appeal does not have to be certain, but, in the typical case, there will be new and cogent evidence that came to light after regular appeals are exhausted that raises a real possibility that the conviction or sentence was erroneous or unsafe.

[107] *CCRCA*, *supra* note 98 at s 17 (2).

[108] Akoorie, *supra* note 99.

[109] *Ibid.*

[110] Roach, "Exceptional Procedures", *supra* note 4 at 970.

[111] LaForme & Westmoreland-Traoré, *supra* note 1 at 67.

serious mental illness. For example, in New Zealand, at least one commissioner must have special expertise and understanding of Māori world views and customary practices. In Norway, Commissioners include academic psychiatry and psychology experts. The New Zealand CCRC can appoint, as required, qualified persons to give advice on cultural, scientific, technical, or other matters involving particular expertise. The benefits of drawing Commissioners from disadvantaged groups include expertise in diversity, enhancing creativity, and facilitating outreach to the disproportionately justice-involved populations that the CCRC seeks to serve.

c. The Adversarial Model

Under the adversarial model, the emphasis is on ensuring that a cross-section of criminal-justice stakeholders and personnel are represented. Commissioners are partisan criminal-justice advocates. For example, the NCIIC commissioners are judges, prosecutors, defense lawyers, police, and victims' advocates.[112]

B. Funding

Underfunding is a chronic problem with CCRCs internationally. They tend to be particularly vulnerable to underfunding because they receive more applications than ministerial processes and cannot draw on central governmental resources.[113] It is difficult for innocence commissions accurately to predict the budgets that they need because their expenditures depend on the number of applications that they receive and the complexity of the investigations that they perform.[114]

The UKCCRC and NCIIC have manifestly inadequate resources.[115] The budget of the UKCCRC was cut by 30 percent between the 2009-10 and 2014-15 fiscal years.[116] A 2015 Parliamentary committee found that the UKCCRC was under-funded and that its funding was 43% lower in real terms than in 2004.[117] The number of days worked by the commissioners in the UK has recently been reduced by 30%, and their full-time equivalents have been cut by more than two thirds.[118] Caseloads have more than doubled, and salaries are no longer competitive.[119] This has increased delays in processing applications and significantly hampered the UKCCRC's ability to fulfill its role effectively.[120]

The SCCRC has a minimal budget for investigation, and it has also experienced budgetary and staffing reductions over the past few years, while the number of applications submitted has

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[112] Roach, "Exceptional Procedures", *supra* note 4 at 974.

[113] LaForme & Westmoreland-Traoré, *supra* note 1 at 7.

[114] *Ibid* at 45.

[115] *Ibid* at 38-39, 90.

[116] Roach, "Exceptional Procedures", *supra* note 4 at 964.

[117] "Twelfth Report of Session 2014-15" (17 Mar 2015), online: *CCRC* <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/850.pdf> ["Twelfth Report"].

[118] LaForme & Westmoreland-Traoré, *supra* note 1 at 44.

[119] *Ibid* at 90.

[120] Roach, "Exceptional Procedures", *supra* note 4 at 964.

increased.[121] The NZCCRC is already facing budgetary shortfalls because it has received twice the number of applications that it anticipated before it started work in 2020.[122] These existing commissions devote most of their resources just to processing the applications that they receive.[123]

This history with other commissions demonstrates that the motivations and aspirations when CCRCs are created are often not matched by realities of providing them with sufficient resources and the complexity of the investigations and analyses that are involved. Ensuring adequate and sustainable funding for the CCRC will likely be a challenge in Canada.

C. Independence

The government must choose between having a CCRC that is treated like a small administrative agency in the federal government or having an adequately funded and independent commission at arm's length from the government and the courts.[124] For example, the UKCCRC commissioners are appointed by the government, while the NCIIC commissions are appointed by the North Carolina judiciary.[125]

D. Scope of Review: Actual Innocence or Procedural Injustice

One of the first steps in establishing a CCRC is determining the scope of cases for review and the standard of proof necessary to demonstrate an unsafe verdict.[126] The government must choose between having a commission that is limited to cases in which factual innocence can be established or one that is concerned with all miscarriages of justice.[127]

The academic literature on miscarriages of justice proposes three primary models for defining them: (1) actual innocence;[128] (2) legal innocence;[129] (3) or procedural injustice.[130]

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[121] "Case Statistics" (last visited 28 Sep 2022), online: *SCCRC* <http://www.sccrc.co.uk/case-statistics>; LaForme & Westmoreland-Traoré, *supra* note 1 at 90; Roach, "Exceptional Procedures", *supra* note 4 at 970.

[122] LaForme & Westmoreland-Traoré, *supra* note 1 at 18, 45, 90.

[123] *Ibid* at 39.

[124] *Ibid* at 38.

[125] Roach, "Exceptional Procedures", *supra* note 4 at 974.

[126] Leonetti, *supra* note 4 at 105.

[127] LaForme & Westmoreland-Traoré, *supra* note 1 at 38.

[128] David Hamer, "Wrongful Convictions, Appeals, and the Finality Principle: the Need for a Criminal Cases Review Commission" (2014) 37 UNSWLJ 270 at 306; Richard Leo, "Has the Innocence Movement Become an Exoneration Movement?" in Daniel S Medwed, ed, *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (Cambridge: Cambridge University Press, 2017) at 61, 72.

[129] Naughton, *The Innocent*, *supra* note 52 at 20-23; Keith Findley, "Defining Innocence" (2010) 74 Alb L Rev 1157 at 1162-63.

[130] Bibi Sangha et al, *Forensic Investigations and Miscarriages of Justice* (Toronto: Irwin Law, 2010) at 67; Sarah A Crowley & Peter J Neufeld, "Increasing the Accuracy of Criminal Justice Decision Making"

The government must decide whether the CCCRC will be an innocence commission, focused only on claims of actual, factual innocence, or whether it should be given a larger scope to review all forms of miscarriages of justice, including failures of procedural justice. This is one of the most fraught policy determinations.

The benefit of a narrow focus on cases involving actual innocence is that it would allow the CCCRC to focus on the core of cases that gave rise to its creation, which have historically been the cases that traditional appeals processes have been the least able to address.[131] The disadvantage of focusing only on actual innocence is that factual innocence is often unknowable and unprovable, particularly in cases where there have been failures of procedural justice. For example, if the police extracted an unreliable confession through coercion or an eyewitness made an unreliable identification due to suggestion, the falsity of the confession or the error in identification might be unprovable, but the use of coercive and suggestive tactics to generate them creates an intolerable risk of error. If a procedural injustice resulted in a guilty verdict that would otherwise have been an acquittal, then the defendant is legally innocent.[132] In this way, procedural injustice and wrongful conviction are interwoven.[133] Actual innocence claims have also historically been DNA-based, but DNA can only exonerate defendants in a narrow subset of cases.[134]

The existing CCRCs are concerned with miscarriages of justice, largely following the original model of the UKCCRC, except for the NCIIC, which is exclusively concerned with claims of factual innocence for serious crimes.[135] The NCIIC statute defines factual innocence as "complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief."[136] A successful application must be supported by fresh evidence and cannot involve a claim only of procedural injustice.[137]

in Thomas R Zentall & Philip H Crowley, eds, *Comparative Decision Making* (Oxford: Oxford University Press, 2013) at 357; Marvin Zalman, "Wrongful Convictions: Comparative Perspectives" in A Javier Trevino, ed, *The Cambridge Handbook of Social Problems* (Cambridge: Cambridge University Press, 2018) at 449.

[131] Hamer, *supra* note 128 at 270-71; Leonetti, *supra* note 4 at 103.

[132] Leonetti, *supra* note 4 at 108.

[133] *Ibid* at 102, 140-142.

[134] Stephanie Roberts Hartung, "Post-Conviction Procedure: The Next Frontier in Innocence Reform" in Daniel S Medwed, ed, *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (Cambridge: Cambridge University Press, 2017) at 247, 252; Leonetti, *supra* note 4 at 102-105.

[135] LaForme & Westmoreland-Traoré, *supra* note 1 at 47.

[136] *NC Gen Stat*, s 15A-1460 (2015).

[137] Roach, "Exceptional Procedures", *supra* note 4 at 976.

E. Intake Process

The government must choose between a CCCRC that only responds to individual applications or one that takes a more proactive and systemic approach.[138] All the existing CCRCs have focused on error correction and processing individual applications in a quasi-judicial manner, as opposed to engaging in research or advocacy for systemic reform to decrease miscarriages of justice in the future, although this is often a result of budgetary shortfalls rather than intentional design.[139]

a. Private Complaints

The current ministerial process is reactive and depends on applications. As a result, it reviews few applications and has made only twenty referrals to the courts since 2003.[140] All the applicants granted new appeals or trials through the existing ministerial process were men; one was Indigenous, and one was Black.[141] As a percentage of defendants, these statistics suggest that women, Indigenous people, and Black people have been under-represented in the ministerial process.[142] By contrast, the Scottish CCRC has referred 85 convictions back to the courts since 1999, even though Scotland has a population of less than one seventh of Canada's.[143]

b. Pipeline

The government must decide whether the CCCRC will be application-based or empowered to self-initiate investigations. For example, the SCCRC has referred cases to the courts without an application.[144] The government also must decide what, if any, outreach to potential applicants the Commission will be permitted or required to make.

c. Independent Investigations

Investigating potential miscarriages of justice is one of the most important roles of a CCRC. The English Court of Appeal can direct the UKCCRC to investigate matters that would help it decide appeals.[145] Between 1997 and 2017, the Court of Appeal made 95 investigation requests to the UKCCRC.[146] The UKCCRC has investigated a range of matters, including jury irregularities, police misconduct, witness retractions, and alternative suspects.[147] To be effective, it critical that

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[138] LaForme & Westmoreland-Traoré, *supra* note 1, at 38.
[139] Roach, "Exceptional Procedures", *supra* note 4 at 989.
[140] LaForme & Westmoreland-Traoré, *supra* note 1 at 6.
[141] *Ibid* at 6.
[142] *Ibid* at 6.
[143] *Ibid* at 6.
[144] *Johnston v HM Advocate*, [2006] HCJAC 30 (Scot).
[145] *Criminal Appeal Act*, *supra* note 49.
[146] LaForme & Westmoreland-Traoré, *supra* note 1 at 180.
[147] *Ibid* at 180.

a CCRC be able to obtain new evidence, but, in practice, many existing CCRCs actively reinvestigate only a tiny percentage of the applications that they receive.[148]

d. Access to Materials

CCRCs typically have broad inquisitorial powers allowing them to access files and other materials held by public and private bodies as part of their investigation, including materials in the databases of police, prosecutors, and crime laboratories. For example, the UKCCRC can obtain relevant material from any party regardless of any claim of legal privilege, confidentiality, or privacy.[149] The SCCRC has broad powers to summon relevant information from public and private bodies, undertake inquiries, obtain statements, opinions, or reports, and require reluctant witnesses to provide information through a judicial process.[150] The NorCCRC can compel individuals who are suspected or convicted of any serious criminal offense to provide fingerprints and DNA samples, access national DNA and fingerprint databases, and obtain documents and files from all official bodies.[151] The NCIIC is entitled to all relevant official documents and files, can order forensic testing, can compel the attendance of witnesses and sworn testimony, and can grant immunity to witnesses who assert their privilege against self-incrimination to compel their testimony.[152] The UKCCRC, SCCRC, and NCIIC can obtain relevant documents from private bodies with court assistance.[153] This is consistent with the investigative powers that the Minister of Justice currently has in Canada for ministerial reviews.[154]

F. Legal Test for Referral to Courts

There are at least four possible legal thresholds for referral to the courts after investigation: probable miscarriage of justice, possible miscarriage of justice, substantial evidence of actual innocence, and the interests of justice.

a. Probability

The first option is the probability or likelihood that the conviction will be quashed by the courts. For example, the NCIIC largely bases its referral decisions on a prediction of whether an appellate court will overturn the conviction.[155] The current ministerial review mechanism employs "a reasonable basis to conclude that a miscarriage of justice likely occurred".[156]

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[148] Roach, "Exceptional Procedures", *supra* note 4 at 965.

[149] *Ibid* at 13, 18.

[150] *Criminal Procedure (Scotland) Act*, *supra* note 61, s 1941.

[151] Stridbeck & Magnussen, *supra* note 67 at 1384.

[152] *NC Gen Stat* ss 15A-1467 (d), 1468 (a1), 1471 (2015); Robert P Mosteller, "NC Innocence Inquiry Commission's First Decade: Impressive Success and Lessons Learned" (2016) 94 NC L Rev 1725.

[153] Roach, "Exceptional Procedures", *supra* note 4 at 965.

[154] *Ibid.*

[155] LaForme & Westmoreland-Traoré, *supra* note 1 at 41.

[156] *Criminal Code*, RSC 1985, c C-46, s 696.3 (3)(a).

b. Possibility

The second option is a possibility that the conviction will be quashed by the courts. For example, the UKCCRC has the power to refer a conviction to the courts if it finds that there is "a real possibility" that a conviction is unsafe.[157] "The 'real possibility' test . . . denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty."[158] This is a predictive test, requiring the UKCCRC to determine whether the Court of Appeal would overturn the conviction,[159] although the UKCCRC insists that it does not simply make predictions about whether the Court of Appeal will overturn a conviction as unsafe. The "real possibility" test is also discretionary.[160] The UKCCRC has the authority but not the obligation to refer qualifying cases back to the courts.

c. New Evidence of Factual Innocence

The third option is an actual-innocence test. For example, the NCIIC refers cases to the courts is there is credible, verifiable new evidence of "factual innocence". Factual innocence is defined as "complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief."[161]

d. Interests of Justice

The fourth is an "interests of justice" test. For example, the NZCCRC uses the "interests of justice" as its sole criterion for referral.[162] The SCCRC will refer a case to the Scottish Appeals Court if a miscarriage of justice *may* have occurred[163] and it is in the "interests of justice" that a referral be made.[164] The first prong of the referral test requires the SCCRC, like the UKCCRC, to have regard to the practices of the Court of Appeal.[165]

G. Legal Test for Courts Allowing Appeals: Substantive Grounds for Granting Relief

While the grounds for allowing an appeal used by the appellate courts is not necessarily within the scope of legislation creating a CCRC, in practice, the effectiveness of CCRC referrals

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[157] *Criminal Appeal Act*, *supra* note 49 s 13 (1)(a).

[158] *R v Criminal Cases Review Commission (ex parte Pearson)*, [1999] EWHC 452 (UK) at para 17.

[159] LaForme & Westmoreland-Traoré, *supra* note 1 at 15.

[160] Roach, "Exceptional Procedures", *supra* note 4 at 967-68.

[161] *NC Gen Stat*, ch 92, s 15A-1460 (2015).

[162] LaForme & Westmoreland-Traoré, *supra* note 1 at 160. This is a different test from the one that appeals courts use once the case has been referred.

[163] This is the same ground of appeal that the Scottish courts use.

[164] *Criminal Procedure (Scotland) Act*, *supra* note 61, s 194C.

[165] Roach, "Exceptional Procedures", *supra* note 4 at 971.

and the test used for referral are significantly affected by the test that courts employ for deciding whether to allow appeals on the ground of miscarriage of justice. After all, there is not much point to a CCRC referring cases to an appellate court under a standard more lenient than the standard used by the courts to review convictions because doing so would only result in the referred convictions being upheld by the courts.

Several inquiries have suggested that the conflicts between standards for referral and standards for appellate review should be resolved by lowering the judicial standards of review. The Runciman Commission recommended that the Court of Appeal be more willing to consider new evidence suggestive of factual innocence and to apply a more rigorous "lurking doubt" standard when reviewing convictions.[166] The 2015 Parliamentary committee recommended that the Law Commission examine reforming the grounds that the Court of Appeal uses in determining whether to overturn convictions by changing the safety standard to one focused on serious doubt.[167] One significant decision for the government in creating a CCCRC, therefore, will be whether to maintain the existing legal test that Canadian appellate courts use in reviewing putatively wrongful convictions or to adopt a lower threshold like a serious doubt.

a. Existing Legal Test in Canada

Canada still follows the traditional common-law test for quashing a conviction – whether the evidence was sufficient to permit a reasonable jury to reach a guilty verdict. Appellate courts in Canada can overturn convictions if there were errors of law, the conviction was unreasonable or unsupported by the evidence, or there was a miscarriage of justice. This test is more deferential to jury verdicts than the ones used in many comparable jurisdictions.[168] The Canadian courts have been resistant to the idea of a more lenient standard of review for putative wrongful convictions.[169]

The leading case on the test for appeals is *R v Corbett*,[170] in which a majority of the Supreme Court clarified that the proper test was whether the verdict was one that no reasonable jury could have reached. The Court explained that the function of a reviewing court was not to substitute itself for the jury and decide guilt or innocence, but rather the task was to decide whether the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered.[171] The Court adopted a presumption that the result achieved at trial was proper and explained that it fell to the appellant in a given case to demonstrate that the conviction was a miscarriage of justice. The dissenting justices would have held that the existence of some evidence upon which the jury could convict did not permit an appellate court to abdicate its function of assessing whether, on the evidence taken as a whole, the verdict was unreasonable.[172]

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[166] Runciman Commission Report, *supra* note 45 at 173.

[167] "Twelfth Report", *supra* note 117 at paras 27-28.

[168] Andrew Furgiuele, "The Self-Limiting Appeal Courts and Section 686" (2007) 52 CLQ 237; Michael Cory Plaxton, "The Biased Juror and Appellate Review: A Reply to Professor Coughlan" (2002) 44:5 CR 294.

[169] Roach, "Exceptional Procedures", *supra* note 4 at 968, n 30.

[170] *R v Corbett*, [1975] 2 SCR 275, 14 CCC (2d) 385.

[171] *Ibid* at 389.

[172] *Ibid* at 391 (Laskin & Spence JJ).

In *Yebes v R*,[173] the Supreme Court upheld Yebes's conviction for killing his sons. *Yebes* is leading precedent on the standard of review for legal innocence.[174] The Court reiterated the test in *Corbett*: that an appellate court must determine whether, on the whole of the evidence, the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered.[175] It concluded that, given the evidence heard at trial, Yebes's conviction should be sustained. More than thirty years later, Yebes, who had always maintained his innocence, was exonerated through the existing ministerial review process.[176]

In *R v Biniaris*,[177] the Supreme Court unanimously held that juries had considerable leeway in their appreciation of the evidence, the proper inferences to be drawn from it, their assessment of the credibility of witnesses, and their ultimate assessment of whether the Crown's case was made out beyond a reasonable doubt.[178] The Court held that any judicial system had to tolerate reasonable differences of opinion on factual issues and that all factual findings were open to the jury except unreasonable ones. The Court confirmed that a "lurking doubt" was not a proper basis upon which to interfere with the findings of a jury without further articulation of the basis for such a doubt.[179]

In *A-G v R*,[180] the Supreme Court reaffirmed its holding in *Biniaris* and clarified that the fact that appellate judges would have had a doubt if they were jurors was insufficient to justify the conclusion that the trial judgment was unreasonable.[181]

b. Comparable Jurisdictions

(i) The UK

The threshold for overturning a conviction is relatively low in the UK compared to in Canada, although its stringency has fluctuated over time.[182] The English Court of Appeals applies the same standard of appellate review to cases referred to it by the UKCCRC as it does to other appeals against conviction. The criminal appeal provisions were recast in 1968 and further refined in 1995.[183] The concept of unreasonable verdicts has been replaced with that of unsafe convictions.[184] After the 1968 amendments, the principle of "lurking doubt" emerged as the means of assessing whether a verdict is unsafe.[185] The Runciman Commission recommended that the

[173] *R v Yebes*, [1987] 2 SCR 168, 36 CCC (3d) 417 [*Yebes*].
[174] LaForme & Westmoreland-Traoré, *supra* note 1 at 171.
[175] *Yebes*, *supra* note 173 at 430.
[176] LaForme & Westmoreland-Traoré, *supra* note 1 at 171.
[177] *R v Biniaris*, [2000] 1 SCR 381.
[178] *Ibid* at para 24.
[179] *Ibid* at para 38.
[180] *R v AG*, [2000] 1 SCR 439, 143 CCC (3d) 46 (SCC).
[181] *Ibid* at para 29.
[182] Roach, "Exceptional Procedures", *supra* note 4 at 968, n 30.
[183] *Criminal Appeal Act*, 1968, c. 19 (UK), s 2.
[184] *R v Munro*, [2007] NZCA 510 at para 22.
[185] *Criminal Appeal Act*, *supra* note 183 s 2.

Court of Appeal be more willing to receive fresh evidence and overturn convictions based on "lurking doubt".[186] The 2015 Parliamentary committee recommended an expansion of the Court of Appeal's grounds for allowing appeals and receiving new evidence.[187]

In 1969, in *R v Cooper (Sean)*,[188] the English Court of Criminal Appeal held that, because an appellate court had to allow an appeal against conviction if, under all of the circumstances of the case, it was unsafe, the court had to determine "whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done."[189]

Since *Cooper*, however, the Court of Appeal has often employed a more deferential standard of review.[190] Critics have argued that the safety standard is too restrictive, the Court of Appeal has been reluctant to follow the lurking-doubt standard of *Cooper*, and the effectiveness of the UKCCRC has been impaired by the Court of Appeal taking too restrictive an approach to appeals after referral.[191] The UK Parliament recently recommended that the Law Commission examine the adequacy of the grounds of appeal.[192]

(ii) Australia

Australia does not have a CCRC, but, over the past few decades, it has reformed its approaches to appeals in response to several high-profile exonerations. The reforms include easing bans on successive appeals and scrutinizing the threshold for allowing appeals in putative miscarriages of justice in several Australian states.

(a) Fresh Evidence and Successive Appeals

South Australia and Tasmania have recognized a right to a second appeal based on "fresh and compelling" evidence that a miscarriage of justice has occurred.[193] The purpose of establishing these new rights of appeal was to replace petition to the government for executive review with a process of judicial review.[194]

"Fresh" evidence is evidence that was not and could not with due diligence have been produced at trial, and "compelling" evidence is evidence that is reliable, substantial, and "highly

[186] LaForme & Westmoreland-Traoré, above, at 32.

[187] Roach, "Exceptional Procedures", *supra* note 4 at 988.

[188] *R v Cooper (Sean)*, [1969] 1 QB 267 (CA).

[189] *Ibid* at 271.

[190] Sangha et al, *supra* note 130 at chs 3-5. See, e.g., *R v Pope* [2012] EWCA (Crim) 2241.

[191] LaForme & Westmoreland-Traoré, *supra* note 1 at 173-174.

[192] *Ibid* at 172.

[193] *Statutes Amendment (Appeals) Act 2013* (SA); *Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Act 2015* (Tasmania); Bibi Sangha, "The Statutory Right to Second or Subsequent Criminal Trial Appeals in South Australia and Tasmania" (2015) 17 Flinders LJ 471 at 486.

[194] Roach, "Exceptional Procedures", *supra* note 4 at 986.

probative in the context of the issues in dispute at the trial".[195] The courts have held that, even if there is fresh and compelling evidence, they still have the discretion to decline leave to appeal if denying leave is in the interests of justice – for example, if the evidence of guilt is overwhelming despite the new and compelling evidence.[196]

In South Australia, two defendants have had their convictions overturned using these new second-appeal procedures. In both cases, the appellate court accepted that the new evidence was fresh and compelling and that it suggested that there had been a substantial miscarriage of justice and ordered new trials. In both cases, the defendant was not retried, and the prosecution acknowledged the wrongful convictions.[197]

The appellate standard of review is more onerous for a successive appeal based on the exceptional mechanism for fresh and compelling evidence in comparison to an ordinary appeal. If the court grants leave for the second or subsequent appeal, it can allow the appeal if it concludes that there has been a "substantial miscarriage of justice."[198] The "substantial miscarriage of justice" test requires a "significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at trial" considering all the evidence.[199]

(b) Judicial Inquiry

New South Wales has adopted new exceptional procedures that allow an appellate court to convene a judicial inquiry if it appears that there is a doubt or question as to the convicted person's guilt.[200]

(c) Appellate Standard of Review

The Australian caselaw regarding the ordinary appellate standard of review for putative miscarriages of justice has wavered between following the traditional reasonableness test or adopting a lower threshold for allowing appeals like in England and Wales, but, for the most part, Australian courts have resisted a lower "lurking doubt" standard.

Beginning in 1974, in *Ratten v R*,[201] the Australian High Court began to move away from the traditional common-law reasonableness test. Barwick CJ held that it was the reasonable doubt in the mind of the appellate court that was the operative factor on review.[202]

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[195] *Criminal Law Consolidation Act 1935* (SA), s 353A.

[196] *Van Beelen v The Queen*, [2017] HCA 48 at para 30 (SA) [*Van Beelen*]; *R v Keogh (No 2)*, [2014] SASCFC 136 at para 115 [*Keogh*]; *R v Bromley*, [2018] SASC 41 at para 386.

[197] *R v Drummond (No 2)*, [2015] SASCFC 82; *Keogh, supra* note 196.

[198] Roach, "Exceptional Procedures", *supra* note 4 at 985.

[199] *Van Beelen, supra* note 196 at paras 22-23.

[200] *Crimes (Appeal and Review) Act 2001* (NSW), s 2 79.

[201] *Ratten v R*, (1974) 131 CLR 510.

[202] *Ibid* at 516.

Chamberlain v R[203] complicated the law in Australia because there were two panels of the Australian High Court – the first granted Chamberlain leave to appeal with one judge in dissent, and the second dismissed the appeal and upheld Chamberlain's conviction by a different majority with two judges in dissent. The plurality of the merits Court held that an appellate court had the power and duty to set aside a verdict which it considered to be unsafe, even if there was sufficient evidence to support it as a matter of law and there was no misdirection, erroneous reception or rejection of evidence, and no other complaint as to the course of the trial.[204] The *Chamberlain* court, therefore, equated reasonableness with safety. A concurring judge agreed that the law did not permit an appellate court to overturn a jury verdict on the grounds that it was unsafe merely because the court entertained a reasonable doubt.[205]

One dissenting judge would have held that courts of criminal appeal had the power to set aside convictions not only if the trial judge wrongly admitted or rejected evidence or misdirected the jury but also if the appellate court considered it unsafe, even if there was evidence that could justify the verdict.[206] In his view, the appellate courts had to operate as a further safeguard against mistaken conviction of the innocent.[207] The other dissenting judge endorsed Barwick CJ's approach in *Ratten* because, in his view, the safeguard provided by trial by jury did not depend upon any assumption of the infallibility of the jury's verdict.[208]

In *M v R*,[209] a majority of the Australian High Court observed that a verdict could be set aside if it was unsafe or unsatisfactory.[210] The Court held that the assessment required the appellate court to make its own independent assessment of the evidence to determine whether, notwithstanding that there was evidence upon which a jury could convict, it would nonetheless be dangerous in all of the circumstances to allow the guilty verdict to stand.[211] The majority also noted that, in most cases, a doubt experienced by an appellate court would be a doubt that the jury ought to have experienced and that it was only in cases in which the jury's advantage in seeing and hearing the evidence was capable of resolving the doubt experienced by an appellate court that the court could conclude that no miscarriage of justice occurred.[212] Under *M v R*, therefore, deference to jury verdicts is only required if any discrepancy between the views of the appellate court and the views of the jury can be explained by the manner in which the evidence was given.

In *Weiss v R*,[213] the Australian High Court moved closer to a return to the traditional reasonableness test, holding that the assessment of whether a substantial miscarriage of justice had occurred was to be undertaken in the same way that an appellate court decided whether a jury

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[203] *Chamberlain v R*, (1984) 153 CLR 521.
[204] *Ibid* at 530-531.
[205] *Ibid* at 603 (Brennan J, concurring in result).
[206] *Ibid* at 569 (Murphy J, dissenting).
[207] *Ibid*
[208] *Ibid* at 617 (Deane J, dissenting).
[209] *M v R*, (1994) 181 CLR 487.
[210] *Ibid* at 492.
[211] *Ibid* at 493.
[212] *Ibid* at 494.
[213] *Weiss v R*, (2005) 224 CLR 300.

verdict should be set aside on the ground that it was unreasonable or could not be supported having regard to the evidence.

In Australia, therefore, the test remains whether a reasonable jury ought to have had a reasonable doubt, but, in application, often leads to a detailed examination of the evidence, even in cases resting primarily on credibility findings.

(iii) New Zealand

New Zealand largely still follows the traditional reasonableness test, although in application the test allows an appellate court to exercise some independent judgment regarding the existence of reasonable doubt. The leading case on the test for appellate review in New Zealand is *R v Ramage*,[214] which dictated: "A verdict will be of such a character if the Court is of the opinion that a jury acting reasonably must have entertained a reasonable doubt as to the guilt of the applicant. It is not enough that this Court might simply disagree with the verdict of the jury."[215]

In *R v Munro*,[216] the New Zealand Court of Appeal revisited *Ramage* to determine whether to adopt a lower standard more akin to the "lurking doubt" standard used in the UK. The Court reaffirmed the *Ramage* test, explaining:

> [A]n appellate court may find a verdict to be unreasonable or unsupported by the evidence even where there is some evidence to support it and there has been no misdirection. This will be the case if, taking into account all of the evidence, a reasonable jury could not be satisfied of guilt to the requisite standard. The concentration is on a reasonable jury and not on whether the appellate court might have differed in its conclusion from that reached by the jury.[217]

The Court explicitly rejected an actual-innocence inquiry, which it characterized as "the wrong inquiry", insisting instead that appellate courts should focus on "whether a jury ought to have had a reasonable doubt as to guilt".[218] The Court also rejected the proposition that a reasonable doubt entertained by the court would "necessarily be a reasonable doubt that ought to have been entertained by a jury".[219] The Court explained: "A verdict will be deemed unreasonable where it is a verdict that, having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt."[220] The Court concluded that "by itself a 'lurking doubt' is not sufficient grounds on which an appeal court should deem a conviction to be unsafe."[221] The Court explained that appellate courts needed "to recognise that reasonable minds

[214] *R v Ramage*, [1985] 1 NZLR 392 (CA).
[215] *Ibid* at 8.
[216] *R v Munro*, [2007] NZCA 510.
[217] *Ibid* at 21.
[218] *Ibid* at 41.
[219] *Ibid* at 44.
[220] *Ibid* at 87.
[221] *Ibid* at 88.

might disagree on findings of fact and that the jury, not the appellate court, is the ultimate arbiter of fact. It is only where a jury's verdict is unreasonable on all the evidence . . . that an appeal court may properly differ from it."[222]

(iv) United States

Compared to other common-law jurisdictions, the United States has a severe and unforgiving finality doctrine that makes post-conviction review, including in cases of actual innocence, exceptionally difficult.[223] In 1996, the United States Congress severely restricted the availability of postconviction review of state convictions by the federal courts when it enacted the Antiterrorism and Effective Death Penalty Act, which requires an applicant to "establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense".[224] In *Herrera v Collins*,[225] the United States Supreme Court has held that the burden on defendants seeking post-conviction relief from capital convictions on the ground of actual innocence should be "extraordinarily high" because of "the very disruptive effect that entertaining claims of factual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases on stale evidence would place on the States."

(v) North Carolina

In comparison to this baseline finality principle in American jurisprudence, the strict standard of review for referrals from the NCIIC is an improvement for defendants making claims of actual innocence. Because the NCIIC is limited to claims of likely factual innocence, the three-judge panel that reviews its referred cases applies a dedicated standard of review that is different from the standards used in the ordinary appellate review of convictions. To overturn a conviction for actual innocence, the judges must be unanimously satisfied that the applicant has proven by clear and convincing evidence that they are innocent of the charge.[226] The panel found that all but one of the cases referred by the NCIIC met this stringent actual-innocence standard.[227]

V The Report: The Canadian Miscarriages of Justice Commission

On 4 February 2022, at the conclusion of the consultation process, Justice LaForme and Judge Westmoreland-Traoré issued their report, *A Miscarriages of Justice Commission*, outlining the options for the structure and mandate of the new Canadian innocence commission.[228] As an initial matter, the report recommends that the new commission be called the Canadian

[222] *Ibid.*

[223] Paige Kaneb, "Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim" (2014) 50 Cal W L Rev 220 at 220–224.

[224] 28 USC s 2254 (1996).

[225] *Herrera v Collins*, 506 US 390 (1993).

[226] *NC Gen Stat*, s 15A-1469 (h) (2015).

[227] Roach, "Exceptional Procedures", *supra* note 4 at 977.

[228] LaForme & Westmoreland-Traoré, *supra* note 1.

Miscarriages of Justice Commission (CMJC) rather than the Canadian CCRC in recognition of the fact that individuals who are wrongfully convicted are not "criminals".[229] The report makes the following major recommendations.

A. Staffing

The report recommends the creation of a CMJC with a minimum of nine commissioners in a combination of full-time and part-time appointments.[230] It recommends a hybrid of the expertise and vulnerability models, proposing that one third of commissioners be legally trained, one third have expertise in the causes and consequences of miscarriages of justice, and one third represent groups that are overrepresented in prison but disadvantaged in seeking relief, including at least one Indigenous and one Black commissioner.[231] It also recommends equitable representation of women on the CMCJ.[232]

The report recommends that the nine commissioners be appointed by an independent statutory advisory committee to maximize independence.[233] This is somewhat similar to how the NCIIC was established, based on the recommendation of the North Carolina Actual Innocence Commission, a voluntary thirty-person commission.[234] Unlike with the NCIIC, however, the LaForme and Westmoreland-Traoré report recommends that the advisory committee play a permanent role offering strategic advice and engaging in advocacy but that it not involve itself in individual applications that will be investigated and decided by the CCCRC.[235]

B. Intake

a. Proactivity

The report recommends that the CMCJ be proactive and systematic and not simply react to the applications that it receives.[236] It recommends that the CMCJ have a vice chair who is responsible for culturally and linguistically competent outreach to and support of applicants and crime victims.[237] It explains:

> The commission must be proactive and reach out and accommodate those who have good reason to distrust the justice system that overrepresents them in prison and underrepresents them in positions of power. The success of the commission should be evaluated, in part, by whether it

[229] *Ibid* at 9.
[230] *Ibid* at 9, 20, 70, 151.
[231] *Ibid* at 9, 20, 65, 191.
[232] *Ibid* at 65, 191.
[233] *Ibid* at 10, 74.
[234] Roach, "Exceptional Procedures", *supra* note 4 at 974.
[235] LaForme & Westmoreland-Traoré, *supra* note 1 at 5, 20, 78, 193.
[236] *Ibid* at 5, 20, 38, 122, 191.
[237] *Ibid* at 9, 11, 22.

> receives applications from vulnerable and disadvantaged groups to the extent that they are overrepresented in prison.[238]

None of the existing CCRCs in other jurisdictions have focused on systemic reform or made concrete proposals to prevent wrongful convictions.[239] Instead, they stress error correction over systemic reform.[240] The LaForme and Westmoreland-Traoré report rejects this application-based, error-correction model, concluding that "the reactive model is not ambitious enough. The reactive approach has already been tried. It has been repeatedly criticized as inadequate by Innocence Projects, commissions of inquiry and courts."[241]

b. Collaboration

Existing innocence commissions tend not to be collaborative.[242] In the UK, the 2015 Parliamentary committee recommended that the UKCCRC become more engaged with other justice-system to achieve systemic reform.[243] Similarly, the LaForme and Westmoreland-Traoré report recommends that the CMCJ take a collaborative approach to working with counsel and Innocence Projects that represent applicants.[244] It notes:

> We have deep respect and appreciation for those who do grass roots work on behalf of the wrongfully convicted. They struggle with poor funding and sometimes lack of cooperation. It would be a mistake if a new commission ended the positive role that Innocence Projects and others have had in the lives of the wrongfully convicted. These groups deserve credit for teaching a too often reluctant justice system that wrongful convictions occur and are inevitable. They provide in depth education for students and justice participants about the reality and consequences of wrongful convictions.
>
> We believe that the commission should work collaboratively with Innocence Projects and other community groups. A new commission must be independent, but that does not mean that it should operate in isolation. Moreover, it should respect the lived experience and expertise of community groups and victims of miscarriages of justice.[245]

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[238] *Ibid* at 32.

[239] Roach, "Exceptional Procedures", *supra* note 4 at 969.

[240] *Ibid.*

[241] LaForme & Westmoreland-Traoré, *supra* note 1 at 41.

[242] Stephanie Roberts & Lynne Weathered, "Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission" (2009) 29 OJLS 43.

[243] "Twelfth Report", *supra* note 117.

[244] LaForme & Westmoreland-Traoré, *supra* note 1 at 12, 22.

[245] *Ibid* at 33-34.

c. Discretion

The report recommends that the CMCJ have the flexibility to define its own acceptance and screening policies without rigid statutory requirements.[246] It also recommends against a rigid requirement that applicants exhaust appeals.[247] It explains: "What must be avoided is an overly bureaucratic, harsh and unkind 'tick box' mentality that mechanically denies applications because there has been no appeal and then offers no assistance to rejected applicants."[248]

d. Investigation

The report recommends that the CMCJ assist appellate courts by investigating matters raised by appeals but not fully explored at trial.[249] It recommends that the CMCJ have the power to compel material witnesses to answer questions under oath.[250] It also recommends that the CMCJ be able to obtain relevant material regardless of any claim of legal privilege or confidentiality.[251] The report recommends that appellate courts be empowered to ask the CMCJ to investigate matters related to any appeal, to assist in its resolution, which would create a new investigatory mechanism for appeals.[252]

C. Funding and Independence

The report recommends that the CMCJ be truly independent from the government and the judiciary, including in the method of appointing commissioners, and adequately funded through the federal Courts Administration Service.[253] It recommends that Commissioners be subject to appointment, have security of tenure, and that their salaries be tied to the independent process that determines the salaries of superior court judges.[254] It notes: "An institution, arm's-length from government, is necessary to replace the current system of Ministerial reviews of miscarriages of justice in order to increase access to justice."[255]

The report emphasizes the necessity of adequate funding.[256] It recommends that the CMCJ have access to an adequate revolving fund budget that will allow it to hire and appoint contractors when necessary to deal with increased numbers and complexity of applications.[257] It notes that there must be adequate funding to hire staff in an independent and competitive manner.[258] The

[246] *Ibid* at 12, 22, 134, 193.
[247] *Ibid* at 12, 22, 134.
[248] *Ibid* at 134.
[249] *Ibid* at 173.
[250] *Ibid* at 13, 23.
[251] *Ibid.*
[252] *Ibid* at 25, 33, 192.
[253] *Ibid* at 7-8, 20-21, 30, 44, 90-92, 193.
[254] *Ibid* at 7, 18-19, 21, 46, 193.
[255] *Ibid* at 32.
[256] *Ibid* at 18, 21, 30, 193.
[257] *Ibid* at 18, 21.
[258] *Ibid* at 10.

report explains that it is essential that the CCCRC's budget is adequate to ensure outreach to potential applicants and investigations that are national in reach.[259] It notes that there is "a danger that an under-funded and weak commission could be even worse than the present Ministerial system of review."[260]

D. Defining Miscarriages of Justice

The report recommends that the CMCJ be concerned with all miscarriages of justice, not only cases where factual innocence can be established.[261] It explains:

> Our understanding of miscarriages of justice is that it includes proven factual innocence. But it also includes cases where a conviction is no longer reliable, accurate, or fair. It also includes grave procedural errors such as the destruction of relevant material that make it impossible for the accused to demonstrate that the conviction is unreliable.[262]

The report rejects a "factual innocence" test as "too restrictive".[263] It also recognizes that factual innocence can be difficult to establish in cases that do not involve DNA-based exoneration.[264] It explains:

> If miscarriages of justice are equated with proof of factual innocence, remedied miscarriages of justice may eventually shrink to nothing, leaving people with the false impression that our criminal justice system does not make errors. But no criminal justice system run by humans can be perfect. There are many miscarriages of justice that have not been discovered, recognized, or even yet understood as miscarriages of justice.[265]

At the same time, however, the report recommends that the CMCJ prioritize cases of factual innocence, particularly when applicants are still imprisoned.[266] It notes that "factual innocence matters."[267] It endorses a broad and flexible understanding of miscarriage of justice that is capable of growth as knowledge about the frequency and causes of miscarriages of justice grows.[268]

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[259] *Ibid* at 11.
[260] *Ibid* at 30.
[261] *Ibid* at 8, 20, 191.
[262] *Ibid* at 165.
[263] *Ibid* at 15.
[264] *Ibid* at 24, 164.
[265] *Ibid* at 165.
[266] *Ibid* at 18.
[267] *Ibid* at 165.
[268] *Ibid* at 14, 192.

E. Grounds for Referral

The report rejects a predictive tests like a probability or real possibility that a conviction will be overturned by the courts and recommends instead that the CMCJ refer cases back to the courts if it concludes that a miscarriage of justice "may have occurred", a lower threshold than the present ministerial standard of probability.[269] The lower threshold is meant to encourage the CMCJ not to limit referrals only to cases that are nearly certain to be overturned.[270] The test is not meant to be predictive of the outcome in the appellate courts.[271] Instead, the CMCJ should form an independent opinion of whether a miscarriage of justice has occurred.[272] The report also rejects an "interests of justice" test, in part out of concern that it could potentially disadvantage marginalized and racialized applicants.[273]

F. Grounds for Appeal

The report recommends a new ground for appellate courts to quash convictions: that the conviction is "unsafe".[274] It also recommends an innovative reform that has not been instituted in other jurisdictions: a requirement that courts must consider new evidence that the CMCJ considers reliable and probative to the question of whether a miscarriage of justice occurred.[275] The purpose of this recommendation is to prevent appellate rules regarding admitting fresh evidence on appeal from keeping courts of appeal from considering all evidence that played a role in the CMCJ's referral.[276]

VI Reflections

The LaForme and Westmoreland-Traoré report is a bold and masterful vision for the future. In practice, there are two lurking issues that could stymie its vision. The first, to which the report's authors were clearly alert, is the risk that the government will not fully fund the proposed Commission. The second relates to the staffing of the new Commission. While it may seem technical and pedantic, the report's recommendation of separating both the staff and the responsibilities of the proposed advisory committee and the commissioners is crucially important. In implementation, other countries have wrestled with the balance between personnel with high-level expertise (academics, judges, King's Counsel) and personnel with technical expertise (criminal barristers, retired police and other investigators, psychologists and psychiatrists, social workers). While the high-level experts are often able to identify systemic issues (see the forest), they can lack the technical expertise necessary for the day-to-day work of innocence commissions (miss the trees), which is heavily investigative in nature. While the technical personnel understand

[269] *Ibid* at 14, 24, 162, 192.
[270] *Ibid* at 14, 192.
[271] *Ibid* at 163, 192.
[272] *Ibid* at 15, 163, 166, 192.
[273] *Ibid* at 163.
[274] *Ibid* at 15, 24, 173.
[275] *Ibid* at 15, 24.
[276] *Ibid* at 15-16.

the day-to-day operation of the criminal-justice system (see the trees), they can lack the multidisciplinary expertise to identify systemic issues and barriers to reform (miss the forest). Getting this balance right is crucial to the dual role of the proposed CMCJ: identifying and exonerating those who have suffered miscarriages of justice and identifying areas for systemic reform.

VII Conclusion

Miscarriages of justice are a predictable byproduct of imperfect criminal investigations, prosecutions, and trials in politicized and racialized criminal-justice systems. They are not random mistakes but rather "organic outcomes of a misshaped larger system that is rife with faulty eyewitness identifications, false confessions, biased juries, and racial discrimination."[277]

Despite the increased consciousness around the prevalence of wrongful convictions, there remains a profound lack of consensus among common-law countries regarding the proper scope and procedure for correcting miscarriages of justice. The LaForme and Westmoreland-Traoré report has given Canada the opportunity to learn from the trials and errors of other jurisdictions. Like with many other proposals, however, the question will be how it survives the political process that gave rise to it. The experience internationally with the creation of innocence commissions has been that their success depends on sometimes seemingly minor design choices. The temptation will be to strip down and underfund the proposed CMJC, a trend that has already been seen in other places. One of the experiences of other innocence commissions has been a sizeable gap between aspiration and implementation. The enormity of the mandate is rarely backed up with resources proportionate to the task. Hopefully, the government will seize this singular opportunity to implement a monument to justice and place Canada as the global leader in addressing wrongful convictions. As the LaForme and Westmoreland-Traoré report notes: "The devil is in the details."[278]

[277] Charles J Ogletree & Austin Sarat, eds, *When Law Fails: Making Sense of Miscarriages of Justice* (New York: NYU Press, 2009).

[278] LaForme & Westmoreland-Traoré, *supra* note 1 at 38.

Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty in Canada[1]

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The only way that I'm going to get out of here…. is to do what they want me to do.
- Stefon Morant (US Exoneree)

Historically, the literature on wrongful convictions has focused on a relatively small number of high-profile exonerations of convictions for serious crimes. However, these cases represent only a small percentage of the total number of wrongful convictions. An emerging area of scholarship is expanding our understanding of their prevalence, by examining the role that systemic and structural pressures have had on the choice of factually innocent defendants to enter false guilty pleas (FGPs). Plea bargaining – particularly presenting defendants in low-level criminal cases with "offers that they cannot refuse" – needs to be understood as having the potential to increase the number of wrongful convictions. Within this context, this article argues that the increased use of pre-trial detention (PTD) represents a powerful source of FGPs. Part I discusses the potentially large number of cases affected by FGPs in Canada. Part II explores how the mechanisms of PTD likely influence defendants' decisions to give an FGP. Part III discusses how the prevalence of FGPs represents a trade-off of the value of a defendant's innocence in favour of other institutional or societal objectives rooted in the generalized culture of risk aversion and risk management in the Canadian criminal justice system. This emerging scholarship represents a particularly important area of inquiry because, by their very nature, FGPs represent one of the least correctable and answerable parts of the criminal justice system.

[1] I wish to thank Christopher Sherrin, Kathryn Campbell and two anonymous reviewers for their valuable comments and suggestions as well as Natalie Chaar for her excellent editorial assistance. The writing of this paper was supported by a Social Sciences and Humanities Research Council of Canada grant.

I Introduction

DNA testing has been revolutionary in many fields. One need only think of its application to medicine (e.g., screening, diagnosis, treatment, or prevention of disease), genealogy (e.g., ancestry or paternity), agriculture (e.g., genetic modification of crops or livestock), or even archeology and history (e.g., genome evolution or population genetics). Within the criminal justice system, its impact has arguably been of equal magnitude. In particular, the forensic sciences have greatly benefited from increased certainty in the identification – and, by extension, conviction – of offenders. In fact, society may breathe a figurative sigh of relief, knowing that we are safer than ever before as an increasing number of unsolved criminal cases are finally cracked.

The irony – of course – is that DNA testing has also led to the consequent recognition of hundreds of wrongful convictions. In fact, this realization has shaken the criminal justice world in a number of different ways.[2] Most obviously, it has challenged the longstanding belief that the criminal justice system rarely fails in its assigned responsibility to accurately and consistently determine guilt. Contrary to past confidence that wrongful convictions are 'extremely rare'[3], criminal justice actors (as well as society more generally) have been forced to reassess their potential role in miscarriages of justice. On a more positive note, this recognition has led to a new scholarly line of research that has focused on the identification (and, ultimately, reform) of the principal causes of wrongful convictions.

In fact, we did not hesitate to usher in what has been called the second generation of wrongful convictions scholarship.[4] Following the first generation – a study of exonerations by modern science such as DNA evidence[5] – this new wave developed the 'classic' or canonical list of contributing factors to wrongful convictions – eyewitness errors, false confessions, the use of incentivized witnesses (including jailhouse informants), and police and prosecutorial misconduct.[6] Importantly, the focus of this literature was on the ways in which these factors (alone or in conjunction) could result in a finding of guilt when actually innocent. The scholarly work has been extensive and well developed, albeit largely concentrated on very serious offences which pay higher dividends when wrongful convictions are proven. While resulting exonerations that

[2] Keith A Findley & Michael S Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases" (2006) 2 Wis L Rev 291.

[3] Justice Antonin Scalia (of the US Supreme Court) stated the error rate (in felony convictions) in 2006 to be 0.027 percent. See his concurring judgment, citing Joshua Marquis, in *Kansas v Marsh*, 548 US 163 (2006).

[4] Andrew M Siegel, "Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy" (2005) 42 Am Crim L Rev 1219.

[5] In particular, see Barry Schreck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted* (New York: Doubleday, 2000). Notably, many of the factors considered by these scholars to be 'causes' of wrongful convictions were also observed by Edwin Borchard & E Russell Lutz, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (Garden City: Garden City Publishing Company, 1932).

[6] For a more detailed account, see Kathryn M Campbell, "Part One: Factors Contributing to Miscarriages of Justice," in *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018) at 544.

'rectify' these most egregious errors are clearly cause for celebration, the remarkable consistency in the findings has led some legal academics to suggest that the wrongful convictions scholarship "has gotten into a rut by continually focusing on these causes and neglecting broader systemic issues".[7]

Perhaps taking its cue from this recognition, a third generation of wrongful convictions scholarship has more recently begun to emerge.[8] Importantly, there has been a fundamental shift in focus on multiple levels. First, we no longer look solely to the trial as a source of wrongful convictions. Rather, there is a growing awareness that decisions made earlier in the criminal court process may also encourage miscarriages of justice. In particular, one cannot forget that most guilt is not 'discovered'. Rather, it is 'negotiated'.[9] Within this context, accused persons may be induced to plead guilty, irrespective of guilt or innocence. And, in fact, false guilty pleas (FGPs) have become an issue of growing concern amongst the Canadian[10] and international communities,[11] in part because they dramatically increase the potential pool of wrongful convictions. Low level offences would not only be included but likely constitute the group most susceptible to wrongly pleading guilty.[12] Specifically, the often-enormous process costs of maintaining one's innocence may quickly overwhelm any cost-benefit analysis, in that the predicted sanction – albeit unjust – would, in most cases, likely involve no more than a non-custodial sentence or a short prison stay. Described as one of the 'dark secrets of the criminal justice system',[13] we have increasingly come

[7] Kent Roach, "Wrongful Convictions: Adversarial and Inquisitorial Themes" (2010) 35:2 NCJ Intl L & Com Reg 387 at 393; see also Richard A Leo, "Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction" (2005) 21:3 J Contemp Crim Just 201.

[8] Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent" (2010) 56:1–2 Crim LQ 116.

[9] Alexandra Natapoff, "Negotiating Accuracy: DNA in the Age of Plea Bargaining," in Daniel S Medwed, ed, *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (Cambridge: Cambridge University Press, 2017).

[10] Outside of scholarly attention, see, for instance, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, Report of the Provincial and Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, (Ottawa: Public Prosecution Service of Canada, 2018) c 8, online (pdf): <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/is-ip-eng.pdf> [*Innocence at Stake*]. However, concern had already been raised by the Law Reform Commission of Canada as early as 1975.

[11] See, for instance, Natapoff, *supra* note 9; Caitlin Nash, Rachel Dioso-Villa & Louise Porter, "Factors Contributing to Guilty Plea Wrongful Convictions: A Quantitative Analysis of Australian Appellate Court Judgments" (2021) 0:00 Crim & Delinquency 1.

[12] See, especially, Alexandra Natapoff, "Innocence," in *Punishment Without Crime* (New York: Basic Books, 2018). Although focused on US criminal justice, the excellence of the analysis as well as the parallels between Canada and the US merit particular attention. For a similar assertion, see also Marvin Zalman & Robert J Norris, "Measuring Innocence: How to Think about the Rate of Wrongful Conviction" (2021) 24:4 New Crim L Rev 601.

[13] John H Blume & Rebecca K Helm, "The Unexonerated: Factually Innocent Defendants Who Plead Guilty" (2014) 100:1 Cornell L Rev 157. See also Makin's reference to them as our "dirty little secret… the hidden underbelly of the justice system… [and] a plea of convenience in disguise", taking place with "a whole bunch of nods and winks". This 'adaptation' was taken from Brockman, *supra* note 8 at 117.

to recognize that innocent people plead guilty at much higher rates than what prior estimates (based almost exclusively on serious offences) would suggest.

Just as importantly though, this recent attention to FGPs also underlines a second – and arguably more profound – shift in the current scholarship on wrongful convictions. Guilty pleas are no longer taken at face value as simply rooted in human agency or isolated investigative or evidentiary failings.[14] Rather, the sources of FGPs are now increasingly being located in the mechanics or systemic features of our criminal justice system. That is, the search for contributing factors now extends to structural pressures on innocent defendants to plead guilty.[15] Within this context, the explanatory focus is on these 'frictional costs'[16] or forceful institutional levers that make FGPs not only predictable but also a rational product of the way in which the wider system is designed.[17]

The combination of these two shifts in scholarly attention has produced an entirely new literature. The classic notion of wrongful convictions as being limited to the most high-profile trial cases of serious offences, believed to be the almost exclusive result of individual error, has not only been dispelled. Rather, it has been replaced by an image of a sea of FGPs to mundane common offences largely encouraged by systemic factors that likely happen every day in Canadian criminal courts.[18] If not revolutionary, this new third generation perspective certainly constitutes one of the historical ironies of miscarriages of justice and our initial understanding of them as rare events. And it was not long before a new list of contributing factors began to emerge for these 'micro-miscarriages of justice'.[19] Notably though, this catalogue of criminal justice practices or processes shares little with its predecessor as it attempts to locate the 'causes' of FGPs within the system itself and how it induces – if not coerces – innocent defendants to plead guilty.

Arguably the most developed of these more systemic factors is the practice of plea bargaining or what Sherrin refers to as the category of 'minimizing penalty'.[20] In fact, an entire

[14] Natapoff, *supra* note 9 at 86.

[15] For a notable case in point within the Canadian context, see Kent Roach, "You Say You Want a Revolution? Understanding Guilty Plea Wrongful Convictions" in Kathryn M Campbell et al, eds, *Wrongful Convictions and the Criminalization of Innocence: International Perspectives on Contributing Factors, Models of Exoneration and Case Studies* (UK: Routledge, forthcoming).

[16] Expression taken from David Feige, *Indefensible: One Lawyer's Journey into the Inferno of American Justice*, 1st ed (New York: Little, Brown and Company, 2006), cited in Russell D Covey, "Reconsidering the Relationship between Cognitive Psychology and Plea Bargaining" (2007) 91:1 Marq L Rev 213 at 240-241.

[17] Covey, *supra* note 16 at 223.

[18] On this shift as applied to Ontario, see, for example, Sean Robichaud, "Disincentives Towards Innocence: Wrongful Convictions at a Micro-Level", (2004), online: *Rochibaud's Criminal Defence Litigation* <https://robichaudlaw.ca/disincentives-towards-innocence-wrongful-convictions/>.

[19] Expression of Robichaud to underline the everyday occurrence of defendants pleading guilty to lower-level crimes that they did not commit at a frequency and measure that far surpass anything previously identified as a cause of wrongful convictions.

[20] Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal Soc Issues 1 at 7–8.

wrongful convictions literature has emerged on the various ways in which innocent defendants are presented with 'offers that they cannot refuse'.[21] Obviously any (significant) reduction in the type or quantum of sanction is itself a powerful inducement to plead guilty. However, this umbrella term often hides more than it reveals. Specifically, it ignores (or at least fails to highlight) other structural mechanisms within the criminal justice system that are working 'behind the scenes' to render plea bargains even more attractive, precisely by further increasing the costs to the defendant of maintaining their innocence.

Nowhere is this more true than with pretrial detention (PTD). Indeed, it is not difficult to imagine how the mere deprivation of liberty before trial constitutes a powerful incentive to plead guilty for reasons wholly ancillary to a defendant's guilt or innocence. To borrow an apt analogy from Robichaud, factual guilt or innocence are small pebbles on the scales of influence or justice when in remand custody.[22] Not surprisingly, this systemic factor has not gone largely unnoticed by the academic[23] – or, for that matter, legal[24] - community. Having said this, PTD – as well as its wider procedural/institutional context rooted in the bail process – have historically not been explored as a major player in the wrongful convictions process. Rather, it has generally sufficed to merely affirm – either theoretically or empirically – that PTD is related to a higher likelihood to plead guilty.[25] While several scholars[26] have connected this association to an increased probability of wrongful convictions through FGPs, there has been little analysis or broader investigation into the various ways in which the criminal justice system itself may be producing them.

Yet this lack of scholarly consideration (and development) of the contribution of PTD within the context of FGPs (and wrongful convictions more broadly) is perhaps understandable.

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[21] In Canada, see, in particular, *ibid*; Christopher Sherrin, "Excessive Pre-Trial Incarceration" (2012) 75 Sask L Rev 55; Roach, *supra* note 15.

[22] Robichaud, *supra* note 18.

[23] See, for instance, Roach, *supra* note 15; Sherrin, *supra* note 20; Sherrin, "Excessive Pre-Trial Incarceration" *supra* note 21; Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64:3–4 Crim LQ 415; Martin L Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates Courts* (Toronto: University of Toronto Press, 1965).

[24] See, for instance, Robichaud, *supra* note 18; Marc Rosenberg, "The Attorney General and the Administration of Justice" (2009) 34:2 Queen's LJ 813.

[25] See, for instance, *Guilty pleas among Indigenous people in Canada*, by Angela Bressan & Kyle Coady (Ottawa: Department of Justice Canada, Research and Statistics Division, 2017), online (pdf): <https://www.justice.gc.ca/eng/rp-pr/jr/gp-pc/gp-pc.pdf>.

[26] Carling, *supra* note 23; *Government Misconduct and Convicting the Innocent, The Role of Prosecutors, Police and Other Law Enforcement*, by Samuel R Gross et al (National Registry of Exonerations, 2020); Gail Kellough & Scot Wortley, "Remand for Plea. Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42:1 Brit J Crim 186; Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" (2005) 50:1 Crim LQ 14; *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by Abby Deshman & Nicole M Myers (Toronto: Canadian Civil Liberties Association and Education Trust, 2014), online (pdf): <https://ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf>.

Despite occasional calls for reform over the last several decades,[27] the phenomenon of FGPs arising from PTD is virtually invisible. There are few high-profile cases.[28] Further, they largely go undetected. Indeed, defendants have no interest in declaring that they have pleaded guilty despite being innocent, particularly before the courts which are not legally permitted to accept a plea in the case that the accused continues to affirm their innocence.[29] They are also not easy to corroborate and it is very likely that they are predominantly found with low level offences that do not typically attract the same concerns as wrongful convictions.

But things may be changing such that FGPs related to PTD are gradually receiving more attention. On the one hand, we have witnessed mounting concern with the dramatic increase in the number of accused persons who are being processed through the Canadian bail system and, as such, at risk of PTD. Indeed, police are increasingly more likely to hold accused persons for a bail hearing, despite long-term, continuing declines in the overall as well as violent crime rates.[30] On the other hand, there has been a growing awareness that the actual use of PTD has also been rising over the last 3-4 decades. In fact, the recent numbers of accused persons in remand are shockingly high.[31] In combination, we have the perfect breeding ground for FGPs – a growing number of accused persons housed in overcrowded remand facilities with increasingly more onerous conditions that dramatically raise the 'cost' of maintaining one's innocence. As Paciocco reminds us, we are currently living in a culture of preventative detention, irrespective of innocence or guilt or the presumption of innocence.[32]

While these practical concerns are already disconcerting, other – more principled or legal – arguments have also been increasingly raised against the current state of affairs in the Canadian bail system *sensu latu*. Specifically, the increased use of PTD – and its direct as well as indirect impact on FGPs - risk undermining the integrity of the wider system as a whole. Such recourse to PTD, with all of its accompanying powerful incentives for innocent defendants to plead guilty to crimes that they did not commit, can easily deny any realistic right to trial. In fact, such systemic pressures can lead accused persons to bargain away all relevant (lofty) guarantees such that there is no opportunity to exercise their constitutional rights in practice.[33] Compounding the problem, the bail process – and its corresponding decision to detain an accused until trial – are left to the

[27] See, for instance, Friedland, *supra* note 23; Sherrin, *supra* note 20; Sherrin, "Excessive Pre-Trial Incarceration" *supra* note 21.

[28] Although exceptions to this rule exist. One case that immediately comes to mind is *R v Hanemaayer*, 2008 ONCA 580 [*Hanemaayer*].

[29] See the difficult issues surrounding defence counsel's ethical responsibilities as well as the obligations of judges to inquire into guilty pleas before accepting them in *Innocence at Stake*, *supra* note 10; Roach, *supra* note 15.

[30] See, for instance, Cheryl Marie Webster, Anthony N Doob & Nicole M Myers, "The Parable of Ms Baker: Understanding Pre-Trial Detention in Canada" (2009) 21:1 Current Issues Crim Just 79. The data for this assertion are discussed in Part II of this paper.

[31] Deshman & Myers, *supra* note 26.

[32] Cited in Robichaud, *supra* note 18.

[33] Rudolph J Gerber, "A Judicial View of Plea Bargaining" (1998) 34 Crim L Bull 16 at 23–25.

least experienced (and legally trained)[34] justice actors in Ontario (Canada's largest jurisdiction), in that bail courts are still largely presided over by Justices of the Peace.[35] Further, the discussions surrounding an innocent defendant's decision to plead guilty are almost completely hidden and, as such, not part of the official record. Thus, they are largely immune to detailed review[36] and retraction. Indeed, FGPs are one of the least correctable and answerable parts of the criminal justice system.[37]

The call to arms has been declared. This paper proposes to take it up, if only as a small contribution to the broader discussion of FGPs in the Canadian legal system. While PTD and its wider role within the bail process have already been extensively examined by a number of scholars over the last several decades,[38] it is its impact on FGPs that has escaped serious consideration to-date. This paper proposes to bring this wider literature to bear on an innocent defendant's decision to plead guilty. In essence, it is argued that PTD needs to be seen as a (very powerful) source of wrongful convictions in its own right (rather than a simple cog in the plea-bargaining process). To this end, Part I attempts to shed some light on the number of cases that may be affected by FGPs in Canada. Simply put, if there is little reason to believe that FGPs are anything more than a mere trivial occurrence, serious scholarly attention to the impact of PTD may be better directed to more frequent sources of wrongful convictions. Part II explores – from multiple vantage points - the various mechanisms of PTD that likely play an important role in a defendant's decision to give an FGP. The focus will be on understanding and assessing the strength/power of the disincentives to maintain one's innocence that are created by the system itself that have yet to receive serious dissection. Part III concludes by returning to the point of departure – that is, the contribution of FGPs from the perspective of an (intentional or unintentional) trade-off of innocence for other institutional or societal values/objectives as a new avenue of inquiry within the wider literature on wrongful convictions.

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[34] In Ontario, there is no requirement that justices of the peace have a law degree. While the trend is toward appointing more people with law degrees, the vast majority of sitting justices of the peace (at least in 2016) were not legally trained. See *Bail and Remand in Ontario*, by Raymond E Wyant (Toronto: Ministry of the Attorney General, 2016), online (pdf): <http://hsjcc.on.ca/wp-content/uploads/Bail-and-Remand-in-Ontario-Ministry-of-the-Attorney-General-2016-12.pdf>. In contrast, Provincial Court Judges preside over bail court during regular business hours in virtually all other Canadian jurisdictions, such that JPs would only have this responsibility in the evening and on weekends.

[35] See, in particular, the concerns with this practice in Robichaud, *supra* note 18.

[36] Obviously, judges play a role in determining whether to accept a guilty plea. However, this process is not without concerns. See, for example, Sherrin, *supra* note 20, for calls for greater scrutiny by the judiciary.

[37] For a parallel criticism of plea bargaining more generally with the innocent, see Gerber, *supra* note 33 at 23–25.

[38] See, for instance, Nicoles Marie Myers, "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017) 57:3 Brit J Crim 664; Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325; Deshman & Myers, *supra* note 26.

II The Numbers Dilemma: Counting What We Cannot See[39]

It seems like a simple enough question: how many FGPs occur in Canada? Indeed, there is virtually unanimous agreement across academics and criminal justice professionals that not only do FGPs happen, but they are not a rare occurrence. Many go even further, explicitly asserting that they almost certainly happen more frequently than we might think, especially because the majority of FGPs are presumed to occur at the lower end of the offence severity scale – precisely where the bulk of criminal activity occurs. The problem emerges when one moves from the realm of impressions, logic, or professional experience – however well informed – to actual, verifiable numbers or empirical research. This is particularly true in this area in which the phenomenon under study is essentially hidden and, as such, undetected by the courts and, even more problematically, largely undetectable. As Gross and O'Brien playfully remind us, "There are no answers in the back of the book".[40] Hence, any description of its frequency is, by necessity, only educated estimates.

A. Proven False Guilty Pleas

Having said this, the confidence that we may have in these estimates can be augmented by relying on a number of different sources. Convergence or agreement builds confidence in their validity. As such, our first stop is to consider those cases in which an FGP has, in fact, been discovered or 'proven'. Internationally, the US National Registry of Exonerations reported – as of July, 2021 – that 21% of their exonerees had been convicted by a guilty plea.[41] In the UK, the proportion is even higher at roughly 39%. Using a different methodology, Nash, Dioso-Villa and Porter identified 139 Australian appellate court judgments in which a guilty plea conviction was overturned.[42] Closer to home, Innocence Canada has reported 6[43] out of 23 exonerated cases or 26%.[44] Two observations are relevant for our current purposes. First, FGPs clearly occur and not

[39] For a parallel examination within the context of the US, see, in particular, Zalman & Norris, *supra* note 12. This article is described by its authors as the "first comprehensive review of wrongful conviction rate estimates" (at 616) in that it includes virtually all of the studies that have explored US wrongful convictions rates (at 618). Beyond finding support for the thesis advanced in this section of the current paper (albeit focusing on the American reality), Zalman and Norris cite additional supporting research as well as provide further explanation for the 'how' and 'why' FGPs arise within the plea-bargaining system, yet represent relatively few cases among known exonerations.

[40] Samuel R Gross & Barbara O'Brien, "Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases" (2008) 5:4 J Empirical Leg Stud 927.

[41] Two years earlier, the New York based Innocence Project had identified nearly 11% of the 349 exonerations as involving false guilty pleas. See, Glinda Cooper, Vanessa Meterko & Pradelika Gadtaula, "Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases" 31:4–5 Fed Sent'g Rep 234.

[42] Nash, Dioso-Villa & Porter, *supra* note 11.

[43] Interestingly, Roach, *supra* note 7, listed 7 cases of FGPs – *R v Marshall*, 2005 QCCA 852; *Hanemaayer*, *supra* note 28; *R v Sharatt Robinson*, 2009 ONCA 886; *R v CF*, 2010 ONCA 691; *R v CM*, 2010 ONCA 690; *R v Kumar*, 2011 ONCA 120; *R v Brant*, 2011 ONCA 362.

[44] All numbers/percentages are reported by Nash, Dioso-Villa & Porter, *supra* note 11. Importantly, preliminary work on a Canadian National Registry of Exonerations reported at least 18 recognized wrongful convictions involving guilty pleas, see Roach, supra note 15 at 9. Given an estimated 70 wrongful

in small numbers. Second, the cases at the base of these numbers almost certainly represent serious offences in which DNA (or other virtually irrefutable evidence)[45] subsequently demonstrated that the offender was factually innocent. As with estimates of wrongful convictions more broadly, these numbers may only describe the (confirmed) FGPs within a very small pool of potential guilty findings, telling us very little about the extent of its occurrence across a broader sweep of (less serious) cases.

With this limitation in mind, the question becomes one of how many FGPs we might find within a wider pool of lower end crimes. Most importantly, the denominator (or pool of potential FGPs) increases dramatically. Using the most recent available crime statistics (from 2019-2020), the most conservative estimate of the number of all convictions across Canada for non-serious offences is 149,464 cases.[46] Even if we were to assume a very low wrongful conviction rate of 0.5%[47], it still suggests 746 miscarriages of justice during this year. However, not all of these convictions would have been on the basis of a guilty plea. While one can find a number of different sources which unequivocally state that the vast majority of accused persons dealt with in the Canadian criminal justice system plead guilty,[48] Statistics Canada does not provide a breakdown

convictions recognized in Canada at the time, these more recent data support the 26% estimate proposed by Nash, Dioso-Villa & Porter.

[45] Note that the National Registry of Exonerations does not restrict itself to only exonerations in which DNA evidence eliminates the accused as the offender. See *Innocence at Stake*, *supra* note 10, c 8. Equally notable, most exonerations in Canada did not involve DNA. See, for instance, Kathryn Campbell, "DNA Evidence: Raising the Bar" in *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018), especially pages 151-152 for examples of cases in which DNA did, in fact, play a significant role.

[46] This number is derived from the total number of all convicted cases minus all of those identified as including serious offences. The latter figure included all cases in which the most serious offence falls within the offence category defined by Statistics Canada as 'Crimes Against the Person'. As such, it comprises those 'very serious' offences most often associated with exonerations (i.e. homicide, attempted murder, and sexual assaults) but also includes robbery, major assault, common assault, uttering threats and harassment. If one were to only consider the first 3, the denominator of the potential pool increases to 187,882 cases in which a conviction was entered.

[47]A rate proposed by Kent Roach, "Wrongful Convictions in Canada" (2012) 80 U Cin L Rev 1465 when estimating possible wrong convictions generally. In support, see also Marvin Zalman, Brad Smith & Angie Kiger, "Officials' Estimates of the Incidence of 'Actual Innocence' Convictions" (2008) 25:1 Jus Quarterly 72; Marvin Zalman, "Qualitatively Estimating the Incidence of Wrongful Convictions" (2012) 48:2 Crim L Bull 221. Importantly though, more recent reviews consider rates of <1% to be exceedingly low and almost certainly underestimates of wrongful convictions. Arguing that these low estimates are the product of studies containing "serious methodological flaws, ungrounded assumptions, and logical fallacies," Zalman & Norris, *supra* note 12 at 652, argue that at least relative to certain types of felonies, a rate between 3-6% is more reasonable.

[48] See, for instance, *Innocence at Stake*, *supra* note 10, c 8. Similarly, while Roach, *supra* note 47 at 1475 states that two-thirds of cases in adult criminal court result in convictions on the basis of guilty pleas, Sherrin, *supra* note 20 at 6 cites *R v Gardiner* (1982), 68 CCC (2d) 477 at para 514 in which the SCC makes clear that "the vast majority of offenders plead guilty". In addition, testimony referred to in the 2017 Senate

of its 'total guilty cases' in order to be able to separate those found guilty from those who pled guilty.

As a (very) rough estimate, the Ontario Court of Justice (Canada's largest trial court) provides data on the number of guilty pleas as well as the number of trials.[49] Using data from October 2020 to September 2021, the trial rate was 3.1% of all cases disposed, representing 6,067 cases of the 196,226 cases during this period. Consistent with other research, these data confirm, yet again, that trials are a very rare criminal procedure. Although we cannot, obviously, assume that all trials ended in a finding of guilt, we can compare the number of trials with the number of cases in which a guilty plea was entered as a window into their respective frequencies. Combining guilty pleas given either before trial or at trial (without a trial), there were 71,423 – completely dwarfing the number of trials. A rough estimate would suggest that the guilty plea rate is approximately 90%[50] (of those cases which either ended in a guilty plea or trial).[51]

It is difficult to know how to interpret these data. Given significant jurisdictional differences across Canada in criminal case processing and outcomes, one would be hesitant to use the Ontario data as synonymous with what we would find for the country as a whole. Nonetheless, Ontario represents roughly 40% of all criminal cases. Taking the 2020-2021 Ontario data at face-value and assuming, again, a 0.5% error rate, the most conservative estimate of FGPs would still be 357 cases. Having said this, there are certainly compelling reasons to believe that this figure constitutes a (gross) underestimate of FGPs relative to less serious offences. Given that the penalty is likely to be also minor in nature, innocent defendants may be less motivated to seek redress for this type of wrongful conviction.[52] Equally important, the mere fact that the sanction is likely to

Report on delays in Canada's criminal justice system indicated that 90% of criminal cases do not go to trial and are resolved mainly through plea bargains. See, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*, Final Report of the Standing Senate Committee on Legal and Constitutional Affairs (Ottawa: Senate of Canada, 2017) at 44, online (pdf): <https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf> [*Delaying Justice*].

[49] Importantly, the case definition used by the Ontario Court of Justice differs from that used by Statistics Canada. As such, the Ontario numbers are not directly comparable to the national data.

[50] This percentage is within the range given in the 1992 Martin Committee Report which placed the guilty plea rate anywhere between 70%-95%. See Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, by Arthur G Martin, (Toronto: Ministry of the Attorney General, 1993). More notably, it is identical to that reported by the Canadian Sentencing Commission (referring to a 1974 Law Reform Commissions of Canada report). See *Sentencing Reform: A Canadian Approach*, Report of the Canadian Sentencing Commission, (Ottawa: Government of Canada, 1987).

[51] Importantly, 57% of all disposed cases in Ontario for this period were through withdrawals or stays.

[52] For a similar appraisal, see, for instance, *Innocence at Stake*, *supra* note 10, c 8. Sherrin, *supra* note 20 at 6–7 also reminds us that particularly with minor offences, the chances of *actual* redress are remote. Not only is the defendant less credible as well as less sympathetic in their claim of innocence (precisely because of the plea), but they may also appear less deserving of assistance, given that the sanction is typically less

be relatively minor would presumably weigh heavily in any cost-benefit analysis, particularly when contrasted with the immediate benefits of a quick resolution of their criminal matter. Not surprisingly, many scholars have argued that the rate of FGPs for relatively minor offences is likely higher than that for more serious offences in which the costs of being found guilty are much greater.[53]

B. Alleged False Guilty Pleas

The second stop in our attempt to shed light on the extent of our 'dirty little secret' would be to consider those cases in which FGPs have been alleged (but not proven). This data source comes almost exclusively from interviews with accused persons who pled guilty but claim to be innocent. A 1982 study by Ericson and Baranek (1982) found that 23% of the 101 interviewees admitted to having given an FGP.[54] More recently, Euvrard and Leclerc interviewed 22 convicted individuals who had pled guilty to the charges against them. Despite their guilty plea, 11 of them maintained that they were innocent of the crime(s) of which they had been charged.[55] Similar findings can be found in the US.[56] Interestingly, this latter research demonstrates comparable FGPs for those facing felonies.

While one obviously needs to be cautious in interpreting the exact figures of the FGP rate from this type of self-declared finding, Sherrin underlines that they have a certain plausibility given the multiple aspects of the criminal justice system that may induce innocent defendants to plead guilty irrespective of their guilt. Further, he reminds us that our assessment of their accuracy should not be undermined by the lack of proven FGPs. Indeed, this latter category of FGPs is exceedingly rare, although not necessarily because there are, in fact, few of them. Rather, their tiny numbers are because they typically only come to light because of the "extraordinary efforts by individuals who expend enormous resources in an effort to uncover the truth".[57]

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severe. Further, given that the allegedly inculpatory evidence frequently will not have been detailed or tested in court, the likelihood of proving innocence is very low.

[53] See, for instance, Sherrin, *supra* note 20 in which he argues that especially for relatively minor matters, the costs of going to trial (particularly when in PTD) may quite simply be perceived as too high when weighed against the likely sanction for a guilty plea. A similar rationale is offered by Blume & Helm, *supra* note 13, as well as Brockman, *supra* note 8, and Josh Bowers, "Punishing the Innocent" (2008) 156 U PA L Rev 117. In the latter case though, this recognition is used for largely different argumentative purposes.

[54] Richard V Ericson & Patricia M Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process*, Heritage, (Toronto: University of Toronto Press, 1982). For similar studies from the UK and the USA conducted in the 1960-1970s in which interviewees protested their innocence in one form or another despite having entered guilty pleas, see Sherrin, *supra* note 20 at 5. The error rate extended from 18%-51%.

[55] Elsa Euvrard & Chloe Leclerc, "Pre-trial Detention and Guilty Pleas: Inducement or Coercion?" (2017) 19:5 Punishment & Society 525.

[56] See, for instance, Tina M Zottoli et al, "Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City" (2016) 22:3 Psychol Pub Pol'y & L 250.

[57] Sherrin, *supra* note 20 at 6. For a similar argument, see Samuel R Gross et al, "Exonerations in the United States 1989 through 2003" (2005) 95:2 J Crim L & Criminology 523.

C. Suspected False Guilty Pleas

Next on the data parade are those sources of suspected FGPs. This information generally comes directly from interviews with criminal defence lawyers. These criminal justice players will often talk about FGPs within the context of the cost-benefit analysis that innocent defendants conduct when deciding whether to plead guilty. As Andras Shreck (former Toronto defence lawyer and now a Superior Court judge) commented, the likelihood is especially strong when the accused is denied bail and detained until trial. When given the option – through an FGP – to end proceedings, Shreck asserted that it "probably happens hundreds of times a day".[58] An almost identical statement is made by Robichaud.[59]

More systematically, Erntzem, Schuller and Clow (2021) surveyed 158 Canadian criminal defence lawyers and found that almost ¾ of them reported having represented at least one client who was convicted despite credible claims of innocence. When asked to estimate the rate of FGPs, the most commonly selected response category was '25% or higher' of all guilty pleas – chosen by more than 20% of the sample. As the authors note, these findings suggest that defence counsel believe that FGPs occur on a regular and frequent basis.[60] In fact, one respondent concluded – albeit anecdotally – that the vast majority of wrongful convictions appear to occur at the guilty plea stage (before a trial date has even been set).[61] A similar study was conducted by Doob in 1997.[62] Although defence lawyers were asked about wrongful convictions more generally, nearly half of them believed that they had personally experienced at least one miscarriage of justice in their career.

D. Hypothetical False Guilty Pleas

And finally, one can also look to hypothetically derived data on FGPs. These studies are primarily conducted by psychologists under laboratory-like conditions. The advantage is that it is much easier to control for other extraneous factors that may impact one's decision to give an FGP, permitting a better sense of the conditions under which a (hypothetical) defendant may be more likely to plead guilty, despite being innocent. The disadvantage, of course, is the degree to which the findings can be generalized to real-life scenarios. The types of subjects used in these laboratory experiments (often students) and the actual pressures (or lack thereof) under which they are being asked to make decisions about pleading guilty render this source of data more suspect in terms of actual in vivo decision-making.

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[58] Reported by Kirk Makin, "Case puts focus on justice system's 'dirty little secret,'" *The Globe and Mail* (14 January 2009), online:<https://www.theglobeandmail.com/news/national/case-puts-focus-on-justice-systems-dirty-little-secret/article1205567/>.

[59] Robichaud, *supra* note 18.

[60] Caroline Erentzen, Regina Schuller & Kimberley Clow, "Advocacy and the Innocent Client: Defence Counsel Experiences with Wrongful Convictions and False Guilty Pleas" (2021) 2:1 WCLR 1 at 11.

[61] *Ibid*.

[62] Anthony N Doob, *An Examination of the Views of Defence Counsel of Wrongful Convictions* (Toronto: University of Toronto, Centre of Criminology, 1997).

Nonetheless, their strength – at least for our current purposes – is the degree to which the findings support (or contradict) other sources of information about the frequency with which defendants may wrongly plead guilty. Overall, it would seem that even under hypothetical conditions, those assigned to the 'guilty' category were more likely than those asked to assume that they were innocent, to plead guilty. In fact, actual guilt has repeatedly been shown to be related to the decision to plead guilty.[63] Equally pertinent though, participants asked to assume they are innocent were clearly not immune to pleading guilty. In a 2018 study by Edkins and Dervan, FGPs were given by 24.4% and 48.7% of study participants, depending on the particular scenario presented. These findings are very similar to those found in 2016 by Redlich and Shteynberg, although there were some differences noted between juveniles and young adults (with juveniles being more than twice as likely to plead guilty while innocent).[64]

So where do these various data sources leave us in terms of the confidence that we might have in the existence – and, by extension, prevalence – of FGPs? First, all types of data demonstrate, with varying degrees of confidence, that innocent people do, in fact, plead guilty. Further, the prevalence certainly seems to exclude the notion that they only occur in rare or trivial numbers. This assessment is also consistent with the bulk of research both within and outside of Canada. For better or for worse, it would appear that FGPs are a phenomenon that is real and, as many have already affirmed,[65] likely occurring at a higher incidence than previously appreciated. Said differently, despite the fact that the wrongful convictions scholarship has, at least until recently, mostly ignored this phenomenon, its significance should not be under-estimated (even while its true estimation is difficult, if not largely impossible).

III Systemic Pressures to Plead Guilty: The Role of PTD

The numbers would seem to justify FGPs as a legitimate – if not urgent – topic of inquiry. And the thesis statement is clear. PTD should be examined as a potentially powerful structural factor in encouraging – if not coercing – FGPs. What is less clear is the most appropriate methodology to evaluate this proposition. Intuitively, one is tempted to adopt a systems approach in which all of the moving parts are integrated into one narrative. The trick – as they say – is figuring out how to present (or even construct) the story. Like all good tales, it should be told in three parts. But rather than adopt the traditional structure of a beginning, middle and end, it may be more instructive – in this particular case - to look at the same issue through three different levels of analysis: micro, meso and macro. That is, the role of PTD in an innocent defendant's decision to plead guilty can be understood or explained from three unique perspectives. While only the third – macro – level will focus on structural issues, the other two are included for historical context as

[63] See, for instance, Vanessa A Edkins & Lucian E Dervan, "Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty" (2018) 24:2 Psychol Pub Pol'y & L 204; Allison D Redlich & Reveka V Shteynberg, "To plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions" (2016) 40:6 L & Human Behavior 611.

[64] Redlich & Shteynberg, *supra* note 63.

[65] See, for instance, Roach, *supra* note 15; Sherrin, *supra* note 20; Roach, *supra* note 7 or *Innocence at Stake*, *supra* note 10, c 8.

well as for contrast. Indeed, it is precisely through the 'evolution' in our thinking about PTD (and its impact on FGPs) that the systemic foundation becomes both more clear and arguably more persuasive.

A. Micro Level Analysis: I am My Own Keeper

Drawing largely from the fields of psychology and economics, this conceptualization of FGPs – and the impact of PTD on them - is firmly rooted in an individualistic approach. That is, innocent defendants conduct a type of cost-benefit analysis of their decision to plead guilty. This decision-making process has traditionally been conceptualized as a purely economic strategy – a model in which the benefits and harms/losses are strictly weighed in an attempt to secure the optimal outcome within the given circumstances. However, this assumption has not generally held up well under empirical examination within the context of FGPs.[66] As such, this cost-benefit analysis has moved toward a conceptualization of the accused person as a non-rational actor who is more psychologically oriented. In this model, a decision to plead guilty despite being innocent places greater emphasis on 'losses' versus 'gains' relative to one's current standing, as well as shows a distinct preference for certain or guaranteed outcomes rather than those that 'may or may not' occur.[67]

Within either of these conceptual models, what is important is the decision-maker's unique situation and the evaluation of their own particular perceived costs and benefits of an FGP. Clearly, PTD can be a very powerful factor in this individual decision, as the deprivation of one's freedom can have multiple and devastating effects on the defendant, even over short periods. And the (long) list is already well known and well rehearsed (e.g., separation from loved ones; loss of job or children; eviction and subsequent loss of housing; emotional and economic hardships experienced by family members, etc.). Further, these painful consequences are only intensified by the length of time in which the individual accused is in pretrial detention. Unfortunately though, this factor is often unknown such that the stress and anxiety of this uncertainty can be crushing for anyone who is not already a seasoned or 'frequent flyer'.[68]

From a cost-benefit analysis, the scales seem particularly tipped when PTD is involved. Specifically, the costs of maintaining one's innocence (and remaining in PTD) would seem to be quickly – and overwhelmingly – outweighed by the benefits of falsely pleading guilty. Indeed, the price of innocence can be exceptionally high when one is in PTD. As Edkins and Dervin empirically demonstrate, FGPs are generally seen as a 'loss' or cost by study participants. That is, until they are asked to imagine themselves in PTD. At that point, FGPs are perceived as a 'gain'.

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[66] See, for instance, Shawn D Bushway & Allison D Redlich, "Is Plea Bargaining in the 'Shadow of the Trial' a Mirage?" (2012) 28:3 J Quant Criminol 437; Lucien Dervan, "The Surprising Lessons from Plea Bargaining in the Shadow of Terror" (2011) 27:2 Ga St U L Rev 239.

[67] On these 2 models, see, for example, Edkins & Dervan, *supra* note 63. See also Sherrin, *supra* note 20 at 4–5.

[68] See, for instance, Holly Pelvin, "Remand as a Cross-Institutional System: Examining the Process of Punishment before Conviction" (2019) 61:2 Can J Corr 66.

As expected, these researchers found that PTD increased the likelihood to falsely plead guilty.[69] Similarly, Bowers proposes that FGPs should not be perceived as a source of wrongful punishment but rather as a normative good that cuts (enormous) punishment short.[70]

This would be especially true for low level offenders who may be released with a sentence of 'time served' or, at most, a non-custodial sanction. This argument is only exacerbated for those who were never in jeopardy of a custodial sanction or who would spend more time in remand awaiting trial than the length of any custodial sentence that might ultimately be handed down for the alleged offence(s).[71] In these latter cases, time spent in PTD can never be directly compensated. Indeed, punishment does not necessarily begin with the sentence. For those in remand custody, the actual punishment is often served before there has even been a conviction.[72] A similar argument can be made for those accused who already have a criminal record as most of the collateral consequences associated with prior convictions are minimized. And the combination is particularly powerful. As Erntzem et al. quote from one of their defence counsel study participants, it is "patently irrational to expect an innocent person to wait for trial when they have a relatively minor offence, criminal record and [are] likely to spend more time in custody than the sentence the Crown is seeking".[73]

Of course, an FGP has its own costs. Most obviously, a defendant pleads to a crime that they did not commit. Further, they will now have a criminal record (or a longer one), with all of the collateral consequences that this criminal history may impose. In addition, they are also more apt to accept a 'bad deal'. Many remand detainees describe a loss of faith in the system, a sense of hopelessness or a sentiment of having simply given up following a stay in remand custody. As such, they are less willing to wait for a better offer in exchange for a guilty plea. Recent research has shown that while collateral consequences of a guilty plea matter, freedom matters more. That is, the 'immediate' generally outweighs the 'longer term' for those in PTD, particularly when the 'benefits' are certain and proximate.[74]

In the end, it all comes down to the particular defendant's own calculus of the costs and benefits of a decision to plead guilty despite being innocent. From the perspective of this micro-level analysis, FGPs are conceived strictly as an individual decision that represents the most favourable (economical or psychological) outcome. For those who believe that such a decision

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[69] Edkins & Dervan, *supra* note 63 at 213. For similar findings, see Paul Heaton, Sandra Mayson & Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention" (2017) 69 Stan L Rev 711.

[70] Bowers, *supra* note 53. It is difficult not to see the irony in this position. While traditional plea bargaining is based on the notion that a guilty plea is exchanged for a reduction in the pains of a *future* punishment (typically a shorter or less harsh sentence), an FGP while in PTD is largely a decision to reduce or avoid the pains of the *present* (punishment).

[71] On this latter phenomenon, see, in particular, Sherrin, *supra* note 21.

[72] See, in particular, Malcolm Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979).

[73] *Ibid* at 15.

[74] Megan Stevenson, "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes" (2018) 34:4 JL Econ & Organization 511.

should be considered an 'accident' or 'error' – and, as such, regrettable – its 'cause' or responsibility is laid solely at the feet of the accused. But the same conclusion would be drawn by those who argue that FGPs should be promoted and encouraged when they are perceived – by the defendant – to be in their best interests.[75] While both sides would undoubtedly agree that PTD has a direct and powerful impact on this calculus, neither would feel a need, nor a desire to 'look behind' this explanation in search of any underlying or systemic factors. PTD gives innocent defendants personal or individual reasons to perceive FGPs as the best outcome. Nothing more is needed in order to understand the outcome or, more pointedly, who is responsible for it.

B. Meso Level Analysis: I am Being Kept

Drawing largely from the fields of political science and law, this second conceptualization of FGPs – and the impact of PTD on it – moves away from a purely individualistic approach to adopt a more institutional and/or procedural focus. While the innocent defendant is still conceived as having free will, this ability to 'choose' whether to plead guilty or not is conditioned or restrained by other external factors. That is, FGPs are the result of an interaction between the individual and their wider circumstances. In the current case, the 'external context' of PTD can hold considerable power to limit or restrict the accused person's options such that a decision to plead guilty irrespective of innocence is not so much a rational choice as the 'only' choice. Within this conceptual framework, the focus of analysis shifts from the individual calculus to concentrate on the wider institutional and procedural mechanisms governing PTD. Specifically, the inquiry is rooted in identifying or teasing out the various ways in which these more structural components – that are largely beyond the control of the individual defendant – often induce FGPs through the enormous pressure that they can exert.

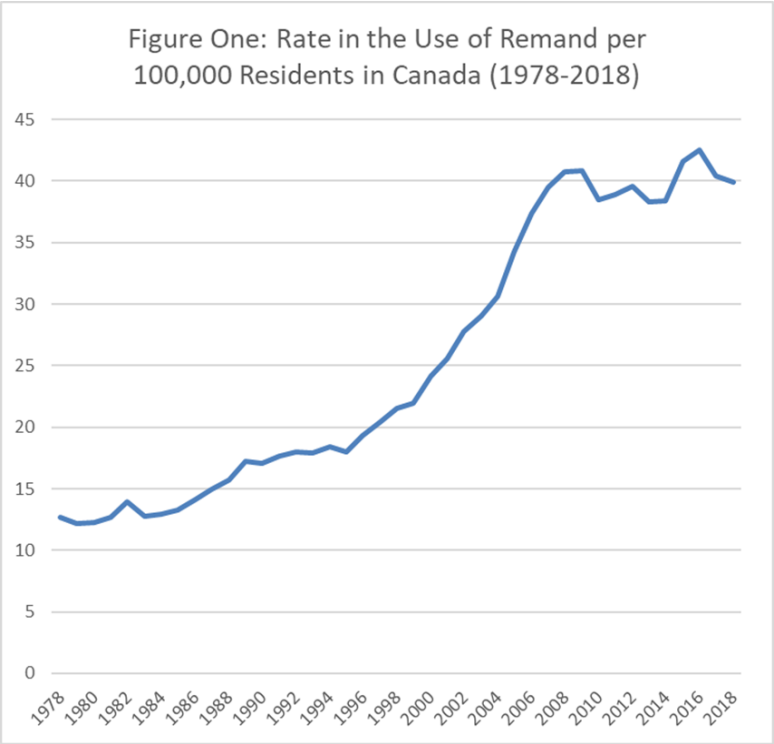
When thinking about PTD as a set of institutional and procedural mechanisms, those concerned with its (forceful) impact on FGPs have tended to highlight two broad areas: remand conditions and isolation from the outside world. Both are clearly worthy topics of inquiry. However, the analysis surrounding them has predominantly been cursory and merely descriptive in nature. To more fully capture their power in bringing about FGPs, a more detailed analytic examination would seem to be in order. Further, the framework might be broadened to include not only the institutional components (incorporating a much broader conceptualization of conditions in PTD to include key institutional pressures surrounding overcrowding and lockdowns) but also procedural issues (such as the number and type of accused persons being funneled into PTD, as well as the length of time in which they stay).

Procedurally, the composition and rate of the remand population are determined by the policies and practices of the police, as well as the decisions made in bail court. The difficulty involved in any attempt to describe and analyse these 'procedural' elements is that there are very few available data sources. Statistics Canada does not (yet) collect/publish data on case processing in bail court, nor report those accused persons who are detained by the police for a bail hearing.

[75] For a particularly radical position, see Bowers, *supra* note 53. This scholar defends the notion that accused persons are punished through the process of PTD and released by an FGP.

As such, most available data come from case studies or, at best, provincial-level analyses.[76] In contrast, Statistics Canada provides relatively complete data on certain aspects of the provincial/territorial remand populations.

Let's start with the big picture (no pun intended – see Figure 1).[77]



Note: Data for some provinces/territories are estimated for some years.
Source: Canadian Socio-Economic Information Management System (Statistics Canada)

To say that this increase in the use of remand in Canada over the past 4 decades has been dramatic might be considered an under-statement. While we have largely been able to contain further growth over the last decade, remand rates have increased by more than 200% since 1978. Perhaps even more striking, there were 14,788 accused persons in remand custody on any given day in provincial/territorial correctional facilities in 2018 while 'only' 8,708 in sentenced custody. Said differently, a greater number of legally innocent (or at least unsentenced) people are being held in remand than there are offenders actually serving custodial sentences post-conviction in Canada since 2004/5. The most recent figure (from 2018) indicates that 62% of all adults in provincial/territorial institutions on an average night were in pretrial detention. Notably, Canada's remand rate is higher than almost all comparable Western European nations (with the exception of

[76] See, for instance, Michael Weinrath, "Inmate Perspectives on the Remand Crisis in Canada" (2009) 51:3 Can J Corr 355; Wyant, *supra* note 34; Carolyn Yule & Rachel Schumann, "Negotiating Release? Analysing Decision Making in Bail Court" (2019) 61:3 Can J Corr 45.

[77] All national remand data were downloaded from the Canadian Socio-Economic Information Management System (CANSIM), online: <https://www150.statcan.gc.ca/n1/en/type/data>.

Luxembourg) as well as several English-speaking countries (England/Wales, Scotland, Ireland, Northern Ireland).[78] It would seem trite to say that Canada has a remand problem.

By extension, a large and growing remand population significantly increases the pool of defendants in PTD who might be pressured into pleading guilty despite being innocent. Recognizing that those with non-serious offences (and, as such, presumably eligible for more lenient sanctions) may be more tempted to enter an FGP, it would be equally relevant to identify their numbers. While there are no national data that speak to this issue, detailed Ontario data from 2015-2016 make the point.[79] While just over half of all cases that spent at least 1 day in a remand facility had what would be considered serious offences (i.e. all violence and weapons charges; criminal harassment, threats, etc.; obstruction of justice; trafficking/importing drugs and child pornography, indecent exposure, child luring, etc.), there were still almost half (48%) whose charges were of a more minor nature (i.e. fraud and related; property offences, including break and enter as well as arson; moral offences, administration of justice offences and those of public order; drug possession; Criminal Code traffic offences).

A similar argument might be made regarding the time in which an accused person spends in remand custody. Particularly for those with relatively minor charges, it would not seem incorrect to assume that innocent defendants may be more likely to plead guilty as the length of time in remand increases (thereby risking greater PTD than would be presumably handed down as part of a sentence). While those with serious offences were clearly more likely than those with less serious offences to spend more than 3 months in PTD, it is significant that just over ¼ of those with more minor charges also spent 91 days or more in remand. This relatively long stay would certainly appear to constitute a significant inducement to FGPs. Just as importantly, this phenomenon does not show any signs of abating. On the contrary, the length of time spent in remand has been increasing over time (at least in Ontario).

Looking in more detail at time spent in remand, it is useful to think about two different types of remand prisoners (with arguably different pressures to give FGPs). On the one hand, there are the short stays (up to 1 week) that almost certainly reflect those accused persons who are still in the bail process, awaiting a determination.[80] In Ontario in 2016, this group constituted just under 50% of all remand prisoners. One might assume that these detainees – given their relatively short period in PTD – may be less likely to be compelled to give an FGP. However, it is less clear how to categorize the 25% who spend 8-30 days in PTD. Given that 35% of all bail cases completed in 2013/14 took at least 3 bail appearances to complete the bail process, it is possible that those

[78] *World Prison Population List*, by Roy Walmsley, 12th ed (London: Institute for Criminal Policy Research, 2018), online (pdf): <https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf>.

[79] *Looking Behind (Prison) Walls: Understanding Ontario's Remand Population*, by Anthony N Doob, Jane B Sprott & Cheryl Marie Webster (Toronto: Ministry of the Attorney General, 2017). Within this report, a number of different (national and provincial) data sources were used. All subsequent data presented relative to the remand population are drawn form this source.

[80] Indeed, we know that most accused persons require 7 days to receive a determination of bail. See Webster, Doob & Myers, *supra* note 30. However, there is significant variability in this measure across accused persons. For a more detailed breakdown, see Doob, Sprott & Webster, *supra* note 79.

spending up to a month in remand may still be awaiting a determination of bail. Given the continued uncertainty surrounding the outcome, the significant stress involving in being transported to and from the courthouse for multiple bail appearances and the almost complete lack of programs or activities to pass the time, innocent defendants in this group may, in fact, feel greater pressure to plead guilty.

On the other hand, there are the long-stay prisoners who are in remand custody for more than a month. Although they represent 'only' 25% of the remand population, their actual numbers are non-trivial (12,034 prisoners of the 47,404 people who spent at least one day in remand in 2016). It is likely that this group constitutes those who have been formally – or informally[81] – detained until trial. For this group, the uncertainty of knowing when their criminal case will be completed could also represent a significant source of stress and anxiety, potentially making them more prone to FGPs. This would seem especially true for the 2,035 of them who are in remand for greater than 6 months, particularly given that many of them may be in jeopardy of excessive pretrial incarceration.

Of course, the other significant implication of this dramatic increase in the number of people being held in PTD is institutional in nature. That is, remand facilities are being forced to contend with a constantly expanding number of detainees over time. With limited resources – particularly when it involves the allocation of public tax dollars for potential criminals – it is unsurprising that the conditions experienced by inmates in detention centres are particularly harsh. However, the difficulty in any analysis of remand living conditions is twofold. First, it is very difficult for the average citizen to fully appreciate them – largely because they have never seen them nor know anyone who has witnessed them. For the vast majority of us, PTD is something theoretical and even then, distant from our minds and imagination. By extension, the strength of this factor in encouraging FGPs remains far too abstract to promote any real concern. Second, descriptions of remand conditions by actual inmates are always considered suspect to exaggeration.

As one possible remedy, case law can be used as an additional – and arguably more compelling (if not also more credible) - voice. Indeed, judges' descriptions come from evidence and testimony presented and tested in court. Within Ontario alone, detailed descriptions of remand conditions are not difficult to locate (perhaps suggesting, in itself, the extent of the problem). Schreck J. quotes his colleagues when describing the conditions in Toronto South Detention Centre as "unacceptable, shocking, deplorable, harsh, oppressive, degrading, disheartening, appalling, Dickensian, regressive and inexcusable".[82] Similar judicial scorn is used to describe numerous

[81] There is a sizable number of detainees who remain in PTD without having had a formal determination of bail. They are presumably accused persons who have either waved their right to a bail hearing or are simply maintaining the possibility at a later date (for some strategic reason). On this group of detainees, see, for instance, Ontario, *Remanding the Problem: An Evaluation of the Ottawa Bail Court*, by Cheryl Marie Webster (Ottawa: Ministry of the Attorney General, 2007). More recently, see Doob, Sprott & Webster, *supra* note 79.

[82] *R v Persad*, 2020 ONSC 188 at para 31 [*Persad*].

other Ontario remand facilities.[83] It would seem that Goudin's expression of US jails as the 'shadowlands of justice' find their own relevance in Canada.[84]

More analytically, Ontario judges have seemingly singled out two predominant sources of the particularly harsh conditions experienced by detainees: overcrowding and lockdowns. Overcrowding is a repeated theme in the case law, frequently rebuked as violations of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the so-called Mandela Rules) to which Canada is a signatory. But words are one thing; images are another. In a particularly elucidating example, Kenkel J. describes the situation of a defendant sharing a 6x9 ft. cell with 2 other men, in which one of them is forced to sleep on a mattress on the floor, requiring a decision about whether to sleep with his head "beside the toilet to be closer to the open grill … or… with [his] head under the desk".[85] Either speaks volumes. Moreover, the poor sanitation of older jails was highlighted in *R v Lowe* in which the cell floors are "often wet from backed-up plumbing".[86] Improvements are apparently not found outside of the cell either. As *R v Poirier* noted, the jail "is full of tuberculosis and hepatitis B… it's like the middle ages."[87] Further, overcrowding has meant that space is at a premium such that many correctional programs/services for the accused have either been eliminated or severely overstretched.[88] Left with little, if any, meaningful activity over extended periods of time, inmates often suffer deleterious psychological effects.[89] But physical health is also comprised as medical personnel can no longer keep pace with overcrowding. In *R v Fermah*,[90] staff frequently failed to provide the accused with his daily anxiety and seizure medications, while in *R v Fuentes*, the Ontario Court of Appeal reduced the offender's sentence to time served because he was denied surgery to treat a very serious eyesight condition.[91]

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[83] See, for instance, expressions such as "an embarrassment" (*R v Smith*, [2003] OJ No 1782 (QL) at para 8) or "brutal and medieval", "inhumane" and "horrific" (*R v Lowe*, [2003] OJ No 2980 (QL) at para 4 [*Lowe*].) For other equally biting descriptions, see *R v Edwards-Lafleur*, 2016 ONCJ 97; *R v Robinson*, [2001] OJ No 5235 (QL); *R v Fermah*, 2019 ONSC 3597 [*Fermah*]; *R v Searay*, 2018 ONCJ 645.

[84] Lauryn P Gouldin, "Reforming Pretrial Decision-Making" (2020) 55 Wake Forest L Rev 857 at 871.

[85] *R v Kravchov*, [2002] OJ No 2172 (QL) at para 5 [*Kravchov*]. Described in the same case, overcrowding also translated into insufficient tables in the refectory such that some had to eat their meals either standing or sitting on the floor. In extreme cases, 'surplus' accused were housed in segregation cells or holding 'bullpens' and unjustifiably subjected to their onerous regimes.

[86] *Lowe*, *supra* note 83. In extreme cases, remand prisoners have had to sleep amongst feces. See e.g., *R v Dorian*, [2003] OJ No 1415 (QL) at para 8.

[87] *R v Poirier*, [2001] OJ No 2320 (QL) at para 6.

[88] *Ibid.* Similarly, see Sylvia Jones, "Letter to Solicitor General Jones - Elgin Middlesex Detention Centre", (17 May 2019), online: *Ontario Human Rights Commission* <https://www.ohrc.on.ca/en/news_centre/letter-solicitor-general-jones-elgin-middlesex-detention-centre>.

[89] See e.g., *R v Capay*, 2019 ONSC 535.

[90] *Fermah*, *supra* note 83.

[91] *R v Fuentes*, [2003] OJ No 2545 (QL) at para 1. More alarming yet, the accused in *R v Ugbaja* did not receive appropriate medical attention, leaving him with a serious foot deformity that would likely necessitate major reconstructive surgery - a consequence found in breach of s.7 of the *Charter of Rights and Freedoms* that ultimately resulted in a stay of proceedings. See *R v Ugbaja*, 2019 ONSC 96.

But these remand conditions are only exacerbated by routine lockdowns that increasingly occur due to staff shortages – described by Hill, J. as "unnecessarily oppressive and challeng[ing] adherence to humane and civilized treatment of the presumptively innocent".[92] And one does not need to look far for examples of the onerous deprivations that result from them. As Green, J. describes in *R v Nguyen*, it is not simply that the accused is "physically caged – in a small, windowless cell 24-hour-a-day", frequently with 2 other cellmates. Rather, "his access to mobility, exercise, human communication, fresh air, showers, family visits and educational/recreational facilities [are] severely restricted if not entirely denied."[93] But it is not only that contact with the outside world is lost. Rather, essential services within the prison are disrupted. As recounted in *R v Persad*, laundry provisions, clothing, bedding, and towels provided during the lockdown were frequently stained with urine, feces or blood that led to rashes.[94] As meals are now eaten in the cell, one person inevitably eats on the floor[95] and bodily functions must be done in front of the others.[96] As they say, a picture is worth a thousand words (or, in this case, a thousand FGPs).

More broadly, lockdowns almost inevitably create widespread tension with the guards and a constant risk of conflict amongst cellmates. For some, the heightened stress/anxiety causes frequent breakdowns[97] while for others, the "state of hyper-vigilance" leads to a deterioration of their mental health.[98] For yet others, they are victimized. In *R v Selinevich*,[99] the accused was not only assaulted in remand, but subsequently forced to enter Protective Custody for her continued safety (severely restricting her movement through no fault of her own). In the extreme, violence can take over an institution.[100] And all of these factors are only multiplied by the length of the lockdowns. It is difficult to comprehend lockdowns of 488 days reported in *R v Ward-Jackson*[101], 410 days described in *R v Nguyen*[102] or 285 days in *R v Barnes*.[103]

As they say, the proof is in the pudding (or, in this case, the prison slop).[104] These real-life cases paint a very compelling picture of the powerful impact that PTD can have on innocent

[92] *R v Tulloch*, 2014 ONSC 6120 at para 8.

[93] *R v Nguyen*, 2017 ONCJ 442 at para 38 [*Nguyen*].

[94] *Persad*, *supra* note 82 at para 12. Equally notable, with no products to clean the cells, bedbug infestations were rampant, and the nail clippers shared across inmates were not cleaned, causing an untreatable fungal infection.

[95] *Kravchov*, *supra* note 85 at para 7.

[96] See e.g., *R v Ward-Jackson*, 2018 ONSC 178 at para 47 [*Ward-Jackson*].

[97] See e.g., *R v Oksem*, 2019 ONSC 6283 at para 29.

[98] See e.g., *Persad*, *supra* note 82 at paras 11–13.

[99] *R v Selinevich*, 2017 ONCJ 42 at para 47.

[100] See, for instance, *Henebry v Her Majesty the Queen*, 2018 ONSC 6584 in which an accused won a large civil lawsuit for serious physical and psychological violence experienced in the Elgin Middlesex Detention Centre.

[101] *Ward-Jackson*, *supra* note 96 at paras 42–46.

[102] *Nguyen*, *supra* note 93 at para 23.

[103] *R v Barnes* (9 December 2019), [unreported] (Ont SCJ) at 9, cited in *Persad* at para 29.

[104] See, for instance, the repulsive description of the food prepared in the kitchen of one of Ontario's remand facilities by a Toronto Star reporter and reproduced, in part, in Robichaud, *supra* note 18.

defendants to plead guilty.[105] While one might hope that the remand conditions described are anomalous and, as such, exceptional in frequency and severity, the repeated variations on the same theme, across multiple remand facilities and across time would seemingly undermine any conclusion other than their normalcy. By extension, the decision to either endure these conditions for an indefinite period of time or plead guilty to a crime that the accused didn't commit and be sentenced to 'time served' or transferred to sentenced custody in a more humane setting, certainly emerges as a straightforward choice. And it goes without saying that this ability to induce FGPs likely increases exponentially when combined with a lengthy stay in PTD (which is becoming increasingly more common as case processing times continue to worsen[106]) and especially with detainees with only minor charges – as more low-level cases are apparently being sucked into the bail vortex.

C. Macro Level Analysis: I am My Brother's Keeper

Drawing largely from the fields of sociology and criminology, this final conceptualization of FGPs – and the impact of PTD on them – extends the meso level analysis. While all of the institutional and procedural mechanisms remain, a macro level perspective attempts to look behind them in search of their root cause(s). In contrast with a meso-level analysis that attempts to answer the question of 'how' – that is, the mechanics of PTD that lay behind a defendant's inducement to give an FGP – a macro-level analysis is interested in the question of 'why'. There is no question that these institutional and procedural components place (often tremendous) pressure on innocent defendants to plead guilty. What this latter level of analysis attempts to identify is the motor that operates these lower-level mechanisms. In other words, this is the proverbial 'big picture' perspective as our attention shifts to the much deeper systemic contributing factors of PTD that encourage - or coerce – FGPs.

As the prior analysis has attempted to demonstrate, PTD can impose potentially tremendous suffering on a defendant. As Rosenberg aptly criticizes, PTD translates into a state-sanctioned mechanism by which people – who still enjoy the presumption of innocence and the right to fundamental justice – are frequently housed in "overcrowded medieval conditions… subjected to treatment that some would argue is inhumane and degrading".[107] It would be easy (if not logical) to deduce from this recognition that PTD generally – and particularly for those defendants who are factually innocent – reflects a systemic 'culture of punishment' rooted in the so-called 'punitiveness theory'.[108] Alternatively, the powerful ability of PTD to encourage guilty pleas might also be understood as a necessary – if not fundamental - part of a wider system driven fundamentally by concerns of efficiency or functionality. As the argument goes, the criminal

[105] For similar conclusions and deductive strategy, see Laura Appleman, "Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment" (2012) 69:3 Wash & Lee L Rev 1297.

[106] See, most recently, *R v Jordan*, 2016 SCC 27; *Delaying Justice*, *supra* note 48.

[107] Cited in Robichaud, *supra* note 18.

[108] See, for instance, David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2002); James Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (New York: Oxford University Press, 2003).

justice system would likely grind to a halt under its own weight without a significant reliance on guilty pleas.[109]

Either of these more structural theories goes some distance in explaining the ways in which our current criminal justice system operates on both procedural and institutional levels. The problem is that both of them ultimately leave us unsatisfied. In the first case, while 'increased punitiveness' is certainly consistent with many of the deleterious effects of the current institutional and procedural mechanisms, this systemic explanation ignores contrary evidence. Most notably, Canada has been internationally recognized for its unique ability within much of the Western world to have been able to largely resist wider pressures toward increased punitiveness vis-à-vis crime and criminals over the past half century (if not longer).[110] In the second case, this structural explanation appears suspect - almost too simplistic or utilitarian in nature. Indeed, its elevation of efficiency as the primary goal directly challenges other fundamental legal and moral principles at the core of our criminal justice system.

While there are almost certainly elements of both reflected in PTD as it currently operates in Canada, this paper proposed to focus on an alternative macro-level model found in the notion of risk aversion.[111] The current use of PTD generally – as well as its use in inducing guilty pleas – may be seen as part of the rise of a much wider cultural climate of risk avoidance and risk management. In fact, the entire criminal justice system in Canada has witnessed a significant change in mentality in the past 3-4 decades. The gradual substitution of the welfare state ideology with a neo-liberal mentality has introduced heightened concern with potential dangers in society that cause unease/fear in citizens. Within the criminal justice sphere, the state's role has become one of limiting – to the greatest extent possible – the risks to public safety that offenders represent.[112] Importantly for our current purposes, this risk-averse mentality has permeated the

[109] See, for example, Meghan Sacks & Alissa Ackerman, "Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?" (2014) 25:1 Crim Jus Policy Rev 59.

[110] See, for instance, Cheryl Marie Webster & Anthony N Doob, "Punitive Trends and Stable Imprisonment Rates in Canada" in Michael Tonry, ed, *Crime and Justice* (Chicago: University of Chicago Press, 2007) at 297.

[111] See, for instance, Ulrich Beck, *Risk Society: Towards a New Modernity*, 1st ed, (London: Sage Publications, 1992) or Jonathan Simon, "The Emergence of a Risk Society: Insurance Law and the State" (1987) 95 Socialist Rev 61. This latter scholar argues that the concept of risk has emerged as part of the 'new penology' – that is, we have abandoned the 19th century disciplinary society (à la Foucault) and adopted a risk society of the postmodern world. Specifically addressing risk aversion as a systemic factor within the bail process, see, for instance, Diana Catherine Grech, *Culture Before Law: Comparing Bail Decision-Making in England and Canada* (Ph.D. Dissertation, University of Leeds (United Kingdom), 2017) [unpublished].

[112] One can easily see the links between this theory of risk aversion and other systemic explanations rooted in increased punitiveness (as a response to crime). For instance, the rise in a risk-averse mentality (and the corresponding increase in PTD) dovetails nicely with Jonathan Simon's *Governing through Crime* thesis (New York: Oxford University Press, 2007) or that of Michael Tonry's changing sensibilities to penal culture, see *Thinking About Crime: Sense and Sensibility in American Penal Culture* (New York: Oxford University Press, 2004). However, while Canada has clearly not been immune to wider pressures toward greater punitiveness in its response to crime and criminals, we have largely lacked the corresponding

entire bail process (including PTD) and translates into a generalized incentive among justice players to avoid – as long as possible – releasing anyone with more than a non-trivial likelihood of committing a criminal offence.[113]

The implications for our broader understanding of the driving forces behind PTD are twofold. On the one hand, the substantial rise in the remand population takes on wider meaning. As we have yet to perfect a method of distinguishing – with complete reliability – those who will, in fact, offend while on bail, the (increasing) use of PTD virtually guarantees that a significant proportion of those held for a bail hearing will be unable to commit any crimes (at least in the community) before their case is resolved. Its additional power to induce guilty pleas – whether false or otherwise – further ensures the safety of the community and, for better or worse, incidences of FGPs may be seen as a small price to pay. Indeed, there is an unfortunate tendency – as Goudin reminds us – to conceptualize the "balancing of the interests of the community and the defendant's liberty interests as a zero-sum binary choice" – that is, individual freedom (at any point in the criminal court process) or community safety. Not surprisingly, one accused person's "intangible liberty injuries frequently pale in comparison to the potential harms that whole communities might suffer" on this simple judicial scale.[114]

On the other hand, a risk-averse mentality goes a long way in explaining why we are increasingly finding defendants in PTD who instinctually should not be there, as well as why they might be there for extended periods of time. As a frontline decision-maker, police are increasingly less likely to release any accused person, even for more minor offences. This is particularly true

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appetite as well as the necessary structural and cultural factors that would permit – as well as perpetuate – a systemic commitment to mass incarceration (of which PTD would be included). Although Canadians have been periodically encouraged by our political masters to fear crime and support harsher responses, the growth in PTD in Canada has not – at least directly and sustainedly – constituted a systemic response to a wider 'punitive turn'. If that were the case, we would have seen an increase in our total imprisonment rate (which we have not). But to be clear, this is not to say that macro-level explanations rooted in increased punitiveness have no relevance to Canada; only that their impact has been considerably muted or less direct. See, for instance, Anthony N Doob & Cheryl Marie Webster, "Back to the Future? Policy Development in Pre-trial Detention in Canada", in Karim Ismaili, Jane B Sprott & Kim Varma, eds, *Canadian Criminal Justice Policy: Contemporary Perspectiv*es (Toronto: Oxford University Press, 2012) at 30-57 or Cheryl Marie Webster & Anthony N Doob, "Maintaining Our Balance: Trends in Imprisonment Policies in Canada", in the same text.

[113] See, for instance, Nicole M Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 Current Issues Crim Just 127; Myers, "Eroding the Presumption of Innocence", *supra* note 38. For a similar interpretation, see Nathan Jon Shubael Gorham, *Wrongful Pre-Trial Detention in the Toronto Bail System* (Thesis, University of Toronto, 2015) [unpublished] at 139, in which he also affirms that to 'qualify' for release on bail, all but the most speculative risk must be eliminated.

[114] Gouldin, *supra* note 84 at 869. See also Garland, *supra* note 108 in which this scholar argues that defendants fair poorly in this calculation precisely because judges typically exclude them from their conception of the 'community' whose safety (and interests) must be protected. Specifically in relation to FGPs, the harms caused to the accused through PTD have traditionally been ignored.

for administration of justice charges that have increased significantly over the past 2-3 decades.[115] Further, they are laying a greater number of charges generally per case (often argued to reflect over-charging practices as a more effective incentive for guilty pleas)[116] that ultimately renders release on bail less likely.[117] Not surprisingly, a greater number of cases begin their criminal court lives in bail court (and, by extension, a greater number of accused persons are finding themselves in remand).[118]

Once in bail court, a risk-averse model continues to find its translation. Cases are taking longer to be processed such that a generalized expectation now exists that a substantial number of cases will be adjourned on any given day in bail court.[119] Further, one cannot exclude legislative amendments that have also acted as additional impediments to obtaining bail (e.g., reverse onus provisions[120]; legislative expansion of the criteria for release, rendering bail more difficult to obtain[121]). And to this growing list, one must also add an increased use of more stringent release orders (e.g., the use of sureties becoming the norm rather than the exception in some jurisdictions; the imposition of multiple, often unrealistic or unnecessary, conditions) and the accompanying rise in breaches.[122] This process virtually ensures an even longer subsequent bail process with even greater numbers of release restrictions and, ultimately, a vicious cycle of recontact, re-arrest, (lengthier) criminal record and eventually denial of bail.

Simply put, the entire bail system (*sensu latu*) is currently hard-wired to promote risk-averse behaviour at every turn. By extension, more defendants find themselves in PTD for often extended periods of time. Given the conditions within PTD, guilty pleas generally – and FGPs specifically - are a likely result.[123] Two conclusions can be drawn. First, PTD is not just a cog in a risk averse system. Rather, it is the culmination of a series of decisions and practices occurring in prior stages of the bail process. While scholars have often identified PTD as the most proximate cause of FGPs,[124] such statements need to be understood within a much wider or systemic process

[115] Doob, Sprott & Webster, *supra* note 79.

[116] Kellough & Wortley, *supra* note 26 at 205. These scholars refer to this process as 'structural coercion' whereby circumstances are arranged such that accused persons will 'choose' officially predetermined options.

[117] See, for example, Doob, Sprott & Webster, *supra* note 79.

[118] See Webster, Doob & Myers, *supra* note 30. For a more recent confirmation, see *Trends in Bail Court Across Canada*, (Ottawa: Department of Justice Canada, Research and Statistics Division, 2018), online (pdf): <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2018/docs/dec01-eng.pdf> [*Trends in Bail Court*].

[119] This practice has now come to be commonly known as a 'culture of adjournments.' On this phenomenon, see, for instance, Webster, *supra* note 81. More recently, see *Trends in Bail Court*, *supra* note 118.

[120] See, for instance, the multiple examples provided that directly link reverse onus provisions with the accused's detention in PTD and a subsequent finding of not guilty at trial in Gorham, *supra* note 113 at 65.

[121] See, for example, Doob & Webster, "Back to the Future? Policy Development in Pre-trial Detention in Canada," *supra* note 112 at 30.

[122] See, in particular, Myers, "Shifting Risk: Bail and the Use of Sureties", *supra* note 113; Myers, *supra* note 38. See also *Trends in Bail Court*, *supra* note 118.

[123] See, for instance, Heaton, Mayson & Stevenson, *supra* note 69.

[124] See, for example, James R Acker, "Taking Stock of Innocence: Movements, Mountains, and Wrongful Convictions" (2017) 33:1 J Contemp Crim Jus 8.

that is set in motion by an underlying culture of risk aversion and risk management. Second, the bail system (including PTD) does not target innocent accused. That is, the process is not intentionally discriminatory. Rather, it is structural in nature. Having said this, the effect is the same whereby the entire bail system is set up to encourage guilty pleas. The fact that some of these accused will be factually innocent is an unfortunate – but foreseeable – by-product. But importantly, this end result of FGPs is not rooted in individual failures (e.g., corrupt police investigatory practices). Nor is it a design flaw. On the contrary, it is all part of a system purposefully designed to minimize risk at potentially great cost to those who pass through it. And we are its creators.

IV Moving Forward

This paper is a story about shifts. Just as the wrongful convictions scholarship has begun to move away from a sole focus on individual error whereby criminal justice players deliberately or unintentionally provide false evidence at trial, this current contribution extends the traditional explanation for FGPs. Specifically, it moves away from the notion of FGPs as rooted in an individual cost-benefit analysis to a consideration of wider institutional/procedural factors – and their underlying drivers - that encourage innocent defendants to plead guilty, precisely because it is perceived to be in their best interest. While perhaps not revolutionary, this notion of FGPs as a predictable cost of a highly risk-averse justice system in which PTD can exert tremendous pressure on all accused – including the innocent – to plead guilty opens up the proverbial door to a new scholarly line of research.

First, it dramatically expands the potential pool of wrongfully convicted defendants, largely targeting those on the lower end of the offence severity spectrum who have traditionally not been on the radar of the wrongful convictions scholarship. With it, an arguably more accurate or fulsome picture of miscarriages of justice will emerge as a new piece of a much wider puzzle is discovered. Second, it extends our critical gaze from trials to earlier stages of the criminal justice process, forcing us to recognize that miscarriages of justice are not an isolated problem. Similarly, it challenges traditional beliefs surrounding guilt, obligating us to confront the reality that innocent people do - knowingly, voluntarily and intelligently - accede to their own wrongful conviction.[125] Indeed, this recognition might be aptly referred to as the 'dark side' of wrongful convictions, as we move away from the notion of the resilient victim of a wrongful conviction fighting to clear their name and attempt to integrate the (likely much greater number of) others who have simply lost hope or faith in the justice system, been beaten down and have given up. Third, it has compelled us to develop different analytic tools to begin to understand a whole new set of pressures or contributing factors to wrongful convictions that call out for further analysis. PTD is only one of them.

And finally, it has introduced a new target for innocence reform. Notably, the possibilities have exploded as multiple remedial levels have emerged. From a micro perspective, new research has begun to determine the most significant factors that go into an individual defendant's costs-benefit analysis when determining whether to give an FGP while in remand custody. By identifying them, as well as their respective weight in the final decision, we have the opportunity

[125] Natapoff, *supra* note 9 at 89.

to alter the individual assessment and, by extension, produce a different outcome. While the decision to give an FGP while in PTD continues to be conceived as a discrete and unique choice, this level of research also allows us to search for patterns across accused persons as well as test individual-level theories about human behaviour that may shed additional light on the internal decision-making processes (e.g., risk-taking preferences).

Extending this exercise at the meso-level, remedial attention shifts to more institutional and/or procedural changes that may alter a defendant's decision to plead guilty in PTD despite being innocent. The most intuitive types of modifications may be in the form of better conditions in remand custody (e.g., expanding institutional capacity and amenities). However, remedial intervention may be better focused on reducing the number of accused people in PTD – a solution that will simultaneously improve remand conditions by reducing the strain on institutional resources. In particular, greater selectivity by police of who they detain for a bail hearing or how they respond to administration of justice offences (particularly when the violations do not, in themselves, constitute criminal behaviour) would be well advised such that fewer low-level offenses are being brought into the bail system. In bail court, Crown prosecutors could insist less on onerous release plans or the use of sureties except when absolutely necessary as ways to reduce the vicious cycle that such practices encourage. Parallel remedial efforts in reducing the length of time in remand would also be of considerable value.[126]

However, long-term and widespread remedial change will only come at the macro level. While meso-level changes in individual courthouses or remand facilities certainly have value and can bring about significant localized – if not necessarily permanent - change, structural modifications dramatically increase the scope and expanse of remedial action. Indeed, the difference is one between merely tinkering with the current criminal justice system and actually bringing about long-term systemic change. Many Canadian jurisdictions have experimented with all sorts of institutional/procedural changes. One need only think of Ontario's Upfront Justice program in the early 2000s[127] or the more recent Justice on Target project.[128] Both have seen some success in curbing the rise in the number of accused persons spending time in remand custody. However, neither has been successful in turning the tide. Until the underlying risk averse mentality is addressed and curbed, the likelihood of reducing the number of FGPs in PTD is unlikely to change in any significant way.

But all is not bleak. There is clearly a greater recognition of the underlying or systemic causes and the battle against our current risk-averse mentality is already well underway. First, the Supreme Court of Canada has joined the fight through decisions surrounding greater use of bail.[129] Second, recent federal legislation has been passed with similar intent.[130] Third, multiple NGOs

[126] As one strategy, see Terry L Baumer, "Reducing Lockup Crowding with Expedited Initial Processing of Minor Offenders" (2007) 35 J Crim Jus 273.

[127] See, for example, Webster, *supra* note 81.

[128] See, for instance, Doob, Sprott & Webster, *supra* note 79.

[129] See, in particular, *R v Antic*, 2017 SCC 27; *R v Myers*, 2019 SCC 18; *R v Zora*, 2020 SCC 14.

[130] Most obviously, see Bill C-75 and its modifications to the sections of the Criminal Code relative to the bail process: Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, (SC 2019, c 25). In particular, this legislation was

have been very active in promoting change that might lead to fewer people in PTD.[131] And there is also the wrongful convictions scholarship that has shown indications of taking up the torch. While the conversation surrounding PTD as an important source of FGPs is still more of a whisper than a battle cry, it is beginning. Equally significant are broader calls for a 'Criminology of Wrongful Convictions'.[132] Sadly, criminologists have largely been missing from the table. While the wrongful convictions scholarship has timidly recognized the significant pressure that PTD can have in encouraging FGPs,[133] this area of study requires greater breadth and depth. Indeed, the stakes are too high for anything less. As Robichaud eloquently reminds us, "[t]hings like the Charter, rules of evidence, factual determination by a competent court of law, the adversary system, hundreds of years of legal tradition to what we attribute the term 'Law' and 'Justice' are all ivory towers far off in the distance when sitting in a medieval dungeon".[134] As we are all our brother's keeper, systemic change in PTD should be an urgent reform on the criminal justice agenda, if only to ensure that justice is not usurped by the limits of human suffering.[135]

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intended to modernize bail practices and procedures such that all bail decisions must give primary consideration to release at the earliest reasonable opportunity and with the least onerous conditions possible. For even more recent legislative activity, see Bill C-5 which is currently before the Senate. This bill proposes to repeal mandatory minimum sanctions for 14 offences in the *Criminal Code* as well as all offences in the *Controlled Drugs and Substances Act*. This sentencing option has been identified as an effective mechanism to pressure accused persons into falsely pleading guilty to lesser charges. On this phenomenon, see, for instance, *Injustices and Miscarriages of Justice Experienced by 12 Indigenous Women: A Case for Group Conviction Review and Exoneration by the Department of Justice via the Law Commission of Canada and/or the Miscarriages of Justice Commissio*n (Ottawa: Office of The Honourable Kim Pate, CM, 2022) at 14-15, online (pdf): *Senate of Canada* <https://sencanada.ca/media/joph5la2/en_report_injustices-and-miscarriages-of-justice-experienced-by-12-indigenous-women_may-16-2022.pdf> or Roach, *supra* note 15. Importantly though, the latter scholar reminds us that the pressure for this legislative reform has come largely from the courts. As of December 2021, 217 constitutional challenges of mandatory minimum sanctions were before our courts, accounting for 34% of all challenges under the *Charter*. Over the last decade, 69% of challenges to drug offences and 48% of those to firearms offences were successful at various court levels. See "Legislative Summary of Bill C-5: An Act to amend the Criminal Code and the Controlled Drugs and Substances Act", online: *Library of Parliament* <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/441C5E#:~:text=Bill%20C%2D5%20removes%20several,%2D%20and%20firearm%2Drelated%20offences>.

[131] See, for instance, *Reasonable Bail*, by John Howard Society of Ontario (Toronto: The Centre of Research, Policy & Program Development, 2013); Deshman & Myers, *supra* note 26.

[132] See, in particular, Leo, *supra* note 7. For a similar call within the Canadian context, see Roach, *supra* note 15.

[133] Sacks & Ackerman, *supra* note 109.

[134] Robichaud, *supra* note 18.

[135] *Ibid*.

Manifesting Justice: Wrongly Convicted Women Reclaim Their Rights

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New York: Kensington Publishing, 2022

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We live in a true "Age of Innocence."[1] The emergence of deoxyribonucleic acid (DNA) testing in the 1980s offered a way to prove something to a degree of scientific certainty that commentators had long suspected—that a significant number of prisoners are actually innocent. Since 1989, DNA testing has exonerated 375 people,[2] and almost 3,000 others have proven their innocence without the benefit of that technology.[3]

Scholars who conduct research in the field often explore "what went wrong" in these cases to identify the weakest links in the criminal justice chain and craft reforms to strengthen them. Eyewitness misidentifications, false confessions, police and prosecutorial misconduct, and poor defense lawyering are among the major factors that lead to wrongful convictions.[4] Those of us who work in this area have also studied the demographic characteristics of the wrongfully convicted, emphasizing how Black and Latino men are overrepresented in the dataset.[5] What we have not done is pay sufficient attention to other marginalized populations affected by the scourge of wrongful convictions, that is, until the publication of Professor Valena Beety's terrific book, *Manifesting Justice: Wrongly Convicted Women Reclaim Their Rights*.

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[1] This is not my first reference to this term. See Daniel S Medwed, "Up the River without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts" (2005) 47 Ariz L Rev 655 at 656.

[2] *Exonerate the Innocent*, Innocence Project, online: https://innocenceproject.org/exonerate/ (last visited 20 Jul 2022).

[3] National Registry of Exonerations: Homepage, online: https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6332 (last visited 20 Jul 2022).

[4] See Brandon L Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge, MA: Harvard U Press, 2012).

[5] See Daniele Selby, *How Racial Bias Contributes to Wrongful Conviction*, Innocence Project, 17 Jun 2021, online: https://innocenceproject.org/how-racial-bias-contributes-to-wrongful-conviction/.

Beety trains her keen scholarly eye on the conviction of not only innocent women and members of the LGBTQ+ community, but also factually guilty defendants injured by a system dominated by overcharging and excessive sentencing. As she notes,

> It is not just the factually innocent who are wrongly in prison. Forensic fraud, "testilying" police officers, prosecutors withholding exculpatory evidence, mistaken eyewitness identification, and false confessions lock away factually innocent people. But these systemic breakdowns also unjustly lock away far more people who are wrongfully convicted and sentenced, even if their factual innocence cannot be conclusively proven or their guilt is not in dispute (4).

By offering a broad vision of what constitutes a miscarriage of justice and the characteristics of those involved in them, Beety challenges many long-held assumptions in the Innocence Movement and reimagines wrongful convictions in a more inclusive way. And she does all of this with flair, interspersing the haunting saga of one of her former clients in Mississippi, Leigh Stubbs, throughout her narrative to illustrate the complexities of the criminal justice system. The result is a compelling and important addition to the literature in our field.

I Injustice Refashioned

For years, progressives have disparaged innocence advocates for creating a hierarchy of injustice that elevates "factual" or "actual" innocence above other concerns. Waxing poetic about the innocent, some argue, takes the oxygen out of the room—and makes it virtually impossible to raise winning arguments about the more pervasive problems of racial bias and constitutional deprivations that affect people who committed the crimes for which they were convicted.[6] Although I have defended the strategic emphasis on actual innocence, which I label "innocentrism,"[7] the criticisms persist and rightfully so. Beety navigates this debate with skill. She achieves this not by portraying innocence advocates and due process warriors as rivals grasping for scarce resources and limited attention spans in the public sphere. Instead, she highlights the commonalities in the injustices experienced by so many people ensnared in the criminal justice system, guilty and innocent alike, and underscores how we have reached a moment in the history of the Innocence Movement where it is high time, perhaps past time, to think more expansively. In Beety's words, "[i]nnocence work challenges our current system and ultimately encourages reforming our system for everyone—not only innocent people. Manifesting justice, advocating against unjust convictions even without concrete proof of factual innocence, is in my opinion the next step" (215).

[6] See Abbe Smith, "In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects" (2010) 13 U Pa JL & Soc Change 315.

[7] Daniel S Medwed, "Innocentrism" (2008) U Ill L Rev 1549.

II Innocence and Intersectionality

The insidious effects of racial bias in the criminal justice system cannot be overstated. The topic of race currently dominates the criminal justice discourse—and for good reason. Racism taints every corner of the system, including the field of wrongful convictions. Data about homicide cases, for example, suggest that innocent Black defendants are seven times more likely to be convicted than their white counterparts.[8] The demographic features of the exonerated population reflect this disturbing reality. As of June 2021, two-thirds of the people cleared by the largest innocence organization in the country, the Innocence Project in New York City, were people of color and 58% were Black.[9]

Yet the picture is more nuanced than it might seem at first glance. With some notable exceptions,[10] scholars of wrongful convictions have largely ignored recent conversations about "intersectionality" that stem from the work of Kimberlé Crenshaw.[11] At the risk of oversimplification, intersectionality refers to the complicated, multilayered identities that we all have, identities that cannot be reduced to a single label based on, say, one's race or gender. Rather, this concept posits that it is essential to recognize and value intragroup differences as well as the unique attributes of each person.

Beety makes intersectionality a key theme in her book, tackling issues like homophobia, drug addiction, and ableism head-on and calling them out as causes of wrongful convictions. At one point, she observes that "[o]ur multiple identities can be used against us in the criminal legal system. Our autism flags us as erratic and dangerous to police who respond with violence; our deafness is interpreted as noncompliance and justification to make us comply; our disabilities heighten our own danger from law enforcement particularly when we are already stereotyped as dangerous because of our race (53)." Beety showcases her formidable analytical firepower in covering these topics, especially in her discussion of sexual orientation and gender.

Chapter 10 homes in on the history of what Beety labels "Criminalizing Queerness." She mentions a range of disturbing laws, among them, "sumptuary laws" that date back to the 1840s and banned cross-dressing or "disguising" in an effort to promote gender-specific attire. She also gives moving examples of wrongful convictions involving LGBTQ+ people, such as the notorious "San Antonio Four" case in which "Latina lesbians" were "wrongfully convicted of fantasized sexual crimes against children" (96).

Chapters 12, 16 and 17 grapple with issues principally related to women. Statistics compiled by the National Registry of Exonerations indicate that women represent 9% of those

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[8] See Daniel S Medwed, *Barred: Why the Innocent Can't Get Out of Prison* (New York: Basic Books, 2022).

[9] See Selby s*upra* note 5 and accompanying text.

[10]See Elizabeth Webster & Jody Miller, "Gendering and Racing Wrongful Conviction: Intersectionality, 'Normal Crimes,' and Women's Experiences of Miscarriage of Justice" (2105) 78 Albany L Rev 973.

[11] See Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43 Stanford L Rev 1241.

exonerated either through DNA or non-DNA evidence,[12] and these cases tend to differ from those involving male defendants in several respects. In particular, about 40% of exonerated women were wrongfully convicted of crimes related to children or other loved ones in their care, suggesting that dated, sexist visions of women as "caretakers" factor into these outcomes.[13] Importantly, 63% of women exonerees were convicted in "no crime" wrongful convictions, where no criminal act ever occurred. This is three times the rate of "no crime" cases found in the pool of exonerated men.[14]

As is her wont, Beety draws on intersectionality in analyzing the experiences of women embroiled in the criminal justice system. She explains how "[p]olice, prosecutors, and judges misperceive Black girls as less 'innocent' and more adult than white girls, even of the same age. Their adultification means that Black girls are labeled in the courtroom as willing participants in sex trades, rather than as victims" (177). I was also thrilled to see Beety pay tribute to many women who played pioneering roles in the Innocence Movement's early days: Shawn Armbrust, Aliza Kaplan, Jackie McMurtrie, Nina Morrison, Theresa Newman, Vanessa Potkin, Cookie Ridolfi, and Linda Starr (212-213). These largely unsung super(litigator)heroes of the battle to correct wrongful convictions were my contemporaries during this era but did not always get the same level of recognition that their male comrades received. Beety has sought to rectify the historical record.

Beety's magnificent decision to focus on the unjust conviction of women could not come at a better moment. The Supreme Court's recent opinion in *Dobbs* dismantled a half century of federal constitutional protections for the right to choose whether to terminate a pregnancy[15] In the wake of *Dobbs*, many states have criminalized aspects of abortion, ranging from enacting laws that propose to go after women who cross state lines to procure one to the medical professionals who administer them.[16] The risk of unjust prosecutions and convictions of women in the abortion space is acute—and Beety's work should provide a theoretical roadmap for attacking those cases.

In sum, *Manifesting Justice* is a fascinating, meaningful contribution that features Beety's unique combination of intellectual breadth and depth when thinking about wrongful convictions.

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[12] See Daniele Selby, *Eight Facts about Incarcerated and Wrongfully Convicted Women You Should Know*, Innocence Project, 22 Mar 2022, online: https://innocenceproject.org/women-wrongful-conviction-incarceration-facts-iwd2020/ (citing data compiled by the National Registry of Exonerations).

[13] Medwed, *supra* note 8, at 120.

[14] See National Registry of Exonerations, Female Exonerees: Trends and Patterns, online: https://www.law.umich.edu/special/exoneration/Pages/Features.Female.Exonerees.aspx (last visited 25 Jul 2022).

[15] *Dobbs v Jackson Women's Health Organization*, (2022) 597 US___ No 19-1392.

[16] See Caroline Kichener & Devlin Barrett, *Anti-Abortion Lawmakers Seek to Block Patients from Crossing State Lines*, Washington Post, 29 Jun 2022.

Shattered Justice: Crime Victims' Experiences With Wrongful Convictions and Exonerations

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New Jersey: Rutgers University Press, 2022

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In *Shattered Justice*, Kimberly J Cook gives voice to victims of wrongful conviction, focusing on the original crime victims and their family members. Most wrongful conviction research focuses on faulty legal procedures and what is often considered the direct victims of these injustices: the wrongfully convicted individual. While these examinations are crucial and provide invaluable information necessary to prevent and treat these injustices, a piece has been historically missing. The examination of wrongful convictions and exonerations through the lens of original crime victims and their family members offers a meaningful perspective that is often overlooked. This book fills a key gap in the literature, and it does so in a transformational and sympathetic manner.

These unseen victims experience trauma in distinctive ways that often span decades, and in many cases, lifetimes. These traumas are aptly described as primary trauma, which relates to the impact of the original crime, and secondary trauma, which refers to the harms caused by the criminal legal system. The author develops an additional theory of trauma, coined tertiary trauma. This type of trauma focuses on re-traumatization stemming from a wrongful conviction/exoneration and is a substantial contribution to the literature. Cook provides ample evidence of structural barriers to justice experienced throughout these distinctive traumas. These, along with several other theories of victimization, are explored and extended to provide new frameworks of injustice.

The research presented in this book draws on 21 in-depth interviews with original crime victims, which include both homicide victims' family members and rape survivors. Acknowledging the complex, and often compounded trauma, the author's methodology utilized a trauma-informed approach and strong ethical research practices. Part 1 of the book (chapters 1-4) focused on the research methodology and participants' experiences surrounding the original crime(s), referred to as primary trauma. These accounts also included exploration of secondary traumas which were the result of the initial investigation and legal proceedings. This part of the book concludes with the impact specifically on family members, a group almost never considered in these types of cases.

Part 2 began with what I would consider the most powerful chapter in the book, aptly titled *Shattered Justice*. This section explored victims' experiences of the post-conviction process and the moment the exoneration(s) "erupted" in their lives often decades after the original crime had occurred. This chapter underscores the suffering associated with re-living the original event, renewed media interest and feelings of misplaced guilt and confusion. Of utmost importance, the analyses focused on the intersectionality of sexism and racism, particularly as it applied re-traumatization for victims and family members.

As a leading expert in the study of wrongful convictions, victimology and restorative justice, Cook brings a unique perspective that few could provide and is extremely well suited to deal with the complex issues introduced in this book. Her ground-breaking work on death row survivors, along with co-author Sandra Westervelt (2008, 2010, 2012, 2013, 2018) seemingly set the foundation for *Shattered Justice* in that it recognized a number of death row exonerees as surviving family members.

Other than her numerous scholarly publications in these areas, Cook is a founding member of the board of directors for the non-profit Healing Justice, an organization dedicated to helping those who are affected by wrongful conviction. In this capacity she has helped build, and implement, trauma-recovery practices that are aimed at collective healing and aptly acknowledge the many layers of harm and the networks of people affected by a wrongful conviction. In fact, Cook's essential work in this organization was one of the catalytic agents for this project. This is best illustrated in part three of the book which discusses the role of Healing Justice in the recovery process for many crime victims and survivors.

The final section of Shattered Justice offers recommendations for reform in three distinct areas: prevention, mitigation and reparations. This holistic approach is unique as most scholarship focuses on policy implications surrounding the prevention and mitigation aspects, while ignoring the importance of repairing and rebuilding. These victim-centered suggestions were not only drawn from the authors expertise, but more importantly taken directly from her interviews with original crime victims. Among the most significant and novel recommendations concerns expired statute of limitations. When the wrong person is incarcerated for a crime, often the actual perpetrator inflicts additional harms on society (referred to as *wrongful liberty*). If, and when, the actual perpetrator is discovered they may not be brought to justice if the time for legal recourse has expired. Cook recommends a viable avenue for reform: "reinstate the authority to charge the actual perpetrator on the basis of new evidence that helped exonerate the wrongly convicted." This improvement would increase confidence in the legal system while increasing public safety and should be prioritized.

Cook clearly values the precision of language as evidenced by the terminology applied throughout the book. Throughout this text, rather than referring to the *criminal justice system* she uses the phrase *criminal legal system* in acknowledgement of the persistent inequities in both the application and the enforcement of the law in our country. Furthermore, thoughtful language was utilized when discussing victims and harm. For example, Cook employed the terms *parallel tracks (*also referred to as *parallel harms* and *parallel hell)* and *combined harms* to illustrate the connection between the original crime victims' and the exonerated individual, specifically, as ways to explain how both parties have been impacted by similar events. Likewise, the use of the term

flawed-eyewitness identification procedures accurately shifts the blame from the identifier (who is often the crime victim) to faulty systemic policies and practices.

My critiques of this work are few and inconsequential. As with all research in the area of wrongful convictions, the population is unknown and therefore the findings are not generalizable. This limitation is merely just a by-product of the nature of the research and a limitation recognized by the author. In terms of the sampling methodology, the author had an existing relationship with many of the participants and a detailed knowledge of each case prior to each interview. While these factors may have allowed for quicker rapport building and less of a focus on nuances of the original event, it could have altered participant responses and researcher analyses. Lastly, this book begs the questions: How might these crime victims differ from other crime victims? Are these victims and survivors unique in that they accepted, and in some cases advocated for, the exoneration? Understanding those who aren't involved in Healing Justice, and more broadly, victims in cases where there is no exoneration, or a lingering question of innocence could provide useful insight for practitioners and policy makers. Given her expertise and competence I believe Cook would be best suited to explore these areas in future investigations and I hope that she will.

This book is a significant contribution to the field and will clearly appeal to criminal justice students and scholars, especially those interested in wrongful convictions. However, the benefits of this book are further reaching. *Shattered Justice* will appeal to feminist scholars, restorative justice practitioners, victim advocates, legal system actors and policy makers. In fact, anyone who values and works towards fairness in the criminal legal system will find this book compelling. This book conveys a vital message: As a society we owe these distinctive victims, and their family members, more respect and care as they process their trauma.