Wrongful Convictions: Adversarial and Inquisitorial Themes

Kent Roach

Follow this and additional works at: https://scholarship.law.unc.edu/ncilj

Recommended Citation

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Wrongful Convictions: Adversarial and Inquisitorial Themes

Cover Page Footnote
International Law; Commercial Law; Law
Wrongful Convictions: Adversarial and Inquisitorial Themes

Kent Roach†

I. Introduction ........................................................................... 388

II. The Common Causes of Wrongful Convictions: Adversarial and Inquisitorial Themes ................................................... 393
   A. Mistaken Eyewitness Identification .................................. 393
   B. Lying Witnesses ............................................................. 394
   C. False Confessions and False Guilty Pleas ....................... 396
   D. Faulty Forensic Evidence .............................................. 398
   E. Tunnel Vision or Confirmation Bias ............................... 401
   F. Inadequate Defense Representation ............................... 402

III. Remedies for Wrongful Convictions: Adversarial and Inquisitorial Themes ............................................................... 403
   A. Mistaken Eyewitness Identification ................................ 403
   B. Lying Witnesses ............................................................. 406
   C. False Confessions and False Guilty Pleas: Continuous Limits on Guilty Pleas ..................................................... 409
   D. Faulty Forensic Evidence .............................................. 412
   E. Tunnel Vision or Confirmation Bias ............................... 418
   F. Inadequate Defense Representation ............................... 423

IV. Some Inquisitorially-Inspired Remedies for Wrongful Convictions ........................................................................... 424
   A. An Increased Role of Judges in Preventing Wrongful Convictions ................................................................. 426
   B. Innocence Procedures .................................................... 432

†Professor of Law and Prichard-Wilson Chair in Law and Public Policy, University of Toronto B.A., LL.B. (Tor); LL.M (Yale), Fellow Royal Society of Canada. I thank Professor Michael Corrado and the Hon. Patrick Healy for the opportunity to present a preliminary version of this paper at an excellent conference on the Future of the Adversary System in April 2009. The conference was sponsored by the University of North Carolina European Union Center of Excellence and by the University of North Carolina School of Law. I also thank Richard Frase for his comments on earlier draft. The ongoing financial assistance of Canada's Social Sciences Humanities and Social Sciences Research Council of my work on a comparative study of wrongful convictions is also gratefully acknowledged.
C. Continental Appeal and Revision Proceedings on the Facts ................................................................. 435
D. Investigative Innocence Commissions ......................... 437

IV. Conclusion ................................................................................................................................. 444

I. Introduction

The discovery of wrongful convictions in Anglo-American systems over the last twenty years has shaken confidence in the adversarial system of criminal justice. In the United States, commentators have identified 340 exonerations between 1989 and 2003, including 245 DNA exonerations since the first such exoneration in 1989. In the United Kingdom, the Criminal Cases Review Commission (CCRC) has, from the start of its work in 1997, ordered 444 cases referred back to the Court of Appeal because of suspected miscarriages of justice. Convictions have been quashed in 290 of those cases. In Canada, growing awareness of wrongful convictions, including a number of high-profile wrongful convictions, led the Supreme Court in 2001 to overrule 1991 precedents and to hold that the risk of wrongful convictions made it unconstitutional to extradite fugitives without assurances that the death penalty would not be applied. No fewer than six commissions of inquiry in Canada have recommended that the government create a permanent criminal case review commission to investigate claims of wrongful convictions with a

1 Note that throughout the article "adversarial" and "adversary" will be used as interchangeable equivalents. So too will "continental" be used interchangeably with "inquisitorial."


5 Id.

6 Compare United States v. Burns, [2001] 1 S.C.R. 283, 289-90 (Can.), with Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779, 783-84 (Can.) (finding "the sole fact" that "the appellant could face the death penalty was insufficient" to render extradition unconstitutional), and Reference Re Ng Extradition (Can.), [1991] 2 S.C.R. 858, 859-60 (Can.) (finding surrender of a fugitive without assurances was not in error).
number of the inquiries defending such commissions as inquisitorial and non-adversarial.\(^7\)

All around the common-law world, criminal justice systems have produced wrongful convictions in which innocent people have been convicted or in which serious doubts have been placed on the reliability of results produced by adversarial criminal trials. Although most of the attention has been devoted to the immediate causes of wrongful convictions such as faulty eyewitness identification, police tunnel vision, false confessions, and faulty scientific evidence, commentators have begun to ask whether the significant numbers of wrongful convictions may not be a symptom of flaws in the adversarial system and, in particular, its qualified commitment to the discovery of truth.\(^8\)

There is nothing new in the argument that the adversarial system contributes to wrongful convictions. In 1932, Edwin Borchard wrote a pioneering book detailing sixty-five


miscarriages of justice. He identified almost all of the immediate causes that are associated with wrongful convictions today. Moreover, he hinted that the adversarial system was frequently to blame in the sense that convictions were often regarded "as a personal victory calculated to enhance the prestige of the prosecutor" while "the inability to engage competent attorneys makes it often impossible for the accused to establish his innocence." Professor Borchard looked to Europe for answers, particularly with regard to the ability in many continental systems to obtain indemnity for errors committed by prosecutors and even judges. He appealed to inquisitorial ideals when he recommended the creation of "an independent public investigating committee," believing that "the haphazard investigations now often instigated are hardly adequate or efficient."

In 1957, Jerome and Barbara Frank related wrongful convictions to the idea that the criminal trial was "a sort of game or sporting event." They noted that the defense was often mismatched in such a game and looked to Scandinavia as an example where there was not only public legal aid, but where defense counsel "can call on government officials, at government expense, to make all necessary investigations (including searches for witnesses and documents) and to supply analyses of handwriting as well as expert testimony on behalf of the defendant." They also criticized plea-bargaining as a potential source of wrongful convictions and compared restrictions on the introduction of new evidence on appeal to the idea "that a criminal trial is a sort of prize fight." They criticized the jury as an amateur trier of fact compared to "well-trained, experienced trial

9 See EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (Yale University Press 1932).
10 Id. at xv.
11 Id. at xx.
12 See id. at xxi-xxiv; see also Edwin M. Borchard, European Systems of State Indemnity for Errors of Criminal Justice, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684 (1913).
13 BORCHARD, supra note 9, at xxi.
14 JEROME FRANK & BARBARA FRANK, NOT GUILTY 34 (Doubleday & Company, Inc. 1957).
15 Id. at 87.
16 Id. at 115.
Wrongful convictions judges. Prosecutors, in their view, should be trained professionals on the European model with disclosure and discovery obligations. Finally, they argued that the criminal trial "should not be a game; it should be a diligent search for the truth." There is nothing particularly new to the idea that inquisitorial systems might be better suited than adversarial systems in preventing wrongful convictions, and such conclusions have been reached by some of the best minds that have examined the phenomena of wrongful convictions.21

It should not be assumed that wrongful convictions do not occur in inquisitorial systems. One of the main findings about wrongful convictions in Anglo-American systems, namely that they are often the product of a phenomenon affecting police, prosecutors, and courts known as tunnel vision or confirmation bias, seems intuitively to be even more prevalent in inquisitorial rather than adversarial systems. In other words, tunnel vision—a process in which evidence is wrongly interpreted or discarded so as to confirm a suspect's guilt and the investigator's cognitive biases—seems even more likely to occur in official investigations conducted by prosecutors or judges in inquisitorial trials than in an adversary system. Wrongful convictions provide an excellent and timely context to reflect on the comparative strengths and weaknesses of adversarial and inquisitorial systems, including what each system can learn from the other and the potential for creative hybrids between the two systems.22

The first part of this article will assess the main identified causes of wrongful convictions in Anglo-American systems

17 Id. at 225.
18 See id. at 241 (noting that European lawyers must serve as apprentices to prosecutors before becoming prosecutors themselves).
19 See id. at 244-48 (explaining that European court procedures require prosecutors to give defendants greater notice of evidence to be used against them at trial).
20 Id. at 248.
21 See, e.g., Borchard, supra note 9 (looking to inquisitorial systems as the answer to miscarriages of justice in the adversarial system).
through the lens of what they reveal about the limits of the adversary system. A distinction here will be made between inherent limits in the adversary system and limits that are associated with a lack of resources and a lack of proper conduct within that system. For example, the adversarial system's willingness to accept a guilty plea from a person who may be innocent is an inherent limitation of an adversary system that is based on the parties' autonomy in resolving disputes in a manner in accordance with their interests. In contrast, the contribution that ineffective assistance of counsel and disparity of resources may make to wrongful convictions can be seen as a lack of perfection, as opposed to an inherent limitation, of the adversarial system. Distinctions between inherent and contingent limits in the adversarial system, however, can only be taken so far because some contingent limits of the system, such as the occasional incompetent representation, seem inevitable in at least some cases in any adversarial system.

The second part of this article will assess possible remedies for wrongful convictions in Anglo-American systems through the lens of the extent to which they attempt to improve the adversary system and the extent to which they adopt practices that use inquisitorial methods of investigation. This part of the article will also consider the related question of the degree to which adversarial and inquisitorial systems may resist reforms inspired by the other system and the degree to which attention to the problems of wrongful convictions may contribute to convergence or divergence between the two systems.

The third part of the article will discuss reform proposals for preventing and remedying wrongful convictions that explicitly or implicitly draw on inquisitorial ideals, in which the judge or the state, as opposed to the parties, assume responsibility for discovering the factual accuracy of criminal allegations. It will be suggested that many adversarial systems can quite easily accommodate inquisitorially inspired reforms, provided resistance to them is not mobilized and the reforms can be modified to reflect the values and procedures of the particular system.23

Finally, this article will draw some conclusions about what wrongful convictions can tell us about adversarial and inquisitorial systems. The weaknesses and blind spots of each system will be examined as a prelude to suggesting that combining aspects of adversarial and inquisitorial systems can best prevent and remedy wrongful convictions. Such a creative hybrid could combine the power of adversarial challenge of the state's case with an inquisitorial commitment by the state to impartial and complete investigation in order to ensure truth in imposing the criminal sanction.

II. The Common Causes of Wrongful Convictions: Adversarial and Inquisitorial Themes

There is a remarkable consensus about the common causes of wrongful convictions. Indeed, some have argued that wrongful convictions scholarship has gotten into a rut by continually focusing on these causes and neglecting broader systemic issues. In what follows, the common causes will be briefly reviewed with a focus on their relation to the workings of the adversary system. The purpose here is not to provide a definitive account of the causes, but to reflect on what they reveal about the adversary system and its alternatives.

A. Mistaken Eyewitness Identification

The American experience, especially with DNA exonerations, has led to widespread conclusions that mistaken eyewitness identification is the leading cause of wrongful convictions. In many of these cases, the eyewitness may be the victim of the crime. The cross-examination of adverse witnesses is a central feature of the adversary system. Wigmore argued that cross-examination is "the greatest legal engine ever invented for the discovery of truth." You can do anything," said Wendell Phillips 'with a bayonet—except sit on it.' A lawyer can do
anything with cross-examination, if he is skillful enough not to impale his own cause upon it."

Although cross-examination may often be a powerful instrument to discredit a lying witness, it is much less effective when a witness is honestly mistaken. Indeed, in such cases, defense lawyers run a risk of impaling themselves on their bayonets. A lawyer who aggressively cross-examines a crime victim or an innocent bystander can hurt his or her own cause especially in a jury trial. Mistaken eyewitnesses are often not liars who can be caught by aggressive cross-examination. Although a skillful cross-examination of an eyewitness may reveal factors that limit the accuracy of the identification, there is no guarantee that these will be appreciated by the trier of fact, especially an amateur trier of fact such as the jury who may be unfamiliar with the fallibility of eyewitness identification. The adversary system thus has significant inherent limits in countering one of the leading causes of wrongful convictions.

B. Lying Witnesses

Another common cause of wrongful convictions is lying witnesses, including jailhouse informers and accomplices. Here, the adversary system is in a better position to take remedial action because it allows such witnesses to be subject to full adversarial cross-examination and confrontation by the accused. In many jurisdictions, the prior criminal records of such witnesses and any statements, including inconsistent statements, that they made to the police will be disclosed to the accused in order to assist in cross-examination. Failure to make full disclosure, especially of prior inconsistent statements, can be a major contributing factor to allowing the testimony of lying witnesses to be accepted.

For example, a major Canadian wrongful conviction of a seventeen year old Aboriginal man, Donald Marshall Jr., was related to the prosecutor’s failure to disclose to the accused prior inconsistent statements made by witnesses who reluctantly and

26 Id. See generally Sklansky, supra note 23, at 1636-37 (noting the role of anti-inquisitorialism in the United States Supreme Court’s recent interpretation of the confrontation clause).

27 See, e.g., R. v. Brown [1995] 1 Crim. App. 191, 198 (U.K.) (holding that, in an adversarial system in which the police and prosecution control the investigatory process, an accused’s right to fair disclosure is inseparable from his right to a fair trial).
falsely testified at trial that they observed Marshall stab the victim.\textsuperscript{28} The commission of inquiry, composed of three experienced trial judges, concluded that the wrongful conviction would have been prevented had the trial judge allowed full cross-examination of one of the lying witnesses.\textsuperscript{29} This conclusion demonstrates significant faith in the adversarial system and cross-examination as a vehicle for achieving accuracy in the justice system.\textsuperscript{30}

The prosecutor's obligation to disclose relevant\textsuperscript{31} or exculpatory\textsuperscript{32} information to the accused can itself be seen as an inquisitorial modification of a pure adversary system.\textsuperscript{33} In other words, special obligations of the prosecutor to provide disclosure to the accused are the adversarial equivalent of disclosure of the continental dossier to the accused. In addition, proper disclosure and discovery presupposes a degree of professionalism among investigators and prosecutors that is often described as a key feature of continental inquisitorial systems. As Abraham Goldstein reminded us over thirty years ago, there are many aspects of Anglo-American criminal justice systems that could rightly be described as having inquisitorial features and indeed these features may be increasing.\textsuperscript{34}

\textsuperscript{28} \textit{See} HICKMAN, MARSHALL REPORT, \textit{supra} note 7, at 71-72.

\textsuperscript{29} \textit{See id.} at 79 (concluding that a full cross-examination of a witness “almost certainly would have resulted in his recanting the evidence given during his examination-in-chief that he had seen Marshall stab Seale. In those circumstances, no jury would have convicted Donald Marshall, Jr.”).

\textsuperscript{30} The Commission also faulted Marshall's lawyers for not requesting disclosure, for not conducting their own independent investigations, and for not working as hard for Marshall as their non-Aboriginal clients. \textit{Id.} at 73-77. Subsequent Canadian commissions of inquiry, however, have generally not found inadequate defense representation to be a cause of the wrongful convictions that they examined. Indeed, some of the most prominent Canadian wrongful convictions such as Morin, Sophonow, and Milgaard, have occurred in cases where the accused was represented by some of the most experienced defense lawyers in the jurisdiction. \textit{See} Lee Stuesser, \textit{Experts on Eyewitness Identification: I Just Don't See It}, 31 MAN. L.J. 543, 550 (2005-2006).


\textsuperscript{32} \textit{See} Brady v. Maryland, 373 U.S. 83, 86-87 (1963) (holding that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment”).

\textsuperscript{33} \textit{See} Goldstein, \textit{supra} note 22, at 1022.

\textsuperscript{34} \textit{See id.}
C. False Confessions and False Guilty Pleas

The adversary system with its emphasis on party control of the proceedings is particularly vulnerable to false confessions and false guilty pleas. The accused is in a difficult position to argue that a confession that he or she previously made should now be rejected as false. Many Anglo-American systems have moved away from corroboration requirements considering them to be unduly technical and formalistic. In contrast, many continental systems still have corroboration requirements that would not allow a conviction to be based on the accused's confession alone. That said, corroboration requirements may not be that effective in preventing wrongful convictions if the police have informed the suspect about the details of the crime.

The adversary system is particularly vulnerable to false guilty pleas. In the United States, it is constitutionally permissible for a person who maintains his or her innocence to plead guilty. At least in those circumstances, some effort is made to ensure that there is a factual basis for the plea. In cases where the accused does not maintain his or her innocence, there may be less scrutiny of the plea. In Canada, acceptance of guilty pleas is generally left to the discretion of trial judges and there is no statutory requirement that a factual basis for a guilty plea be established.

Three recent cases from Ontario demonstrate the dangers in the Canadian system that innocent people will be encouraged and allowed to plead guilty to crimes that they did not commit. In one case, the accused pled guilty after the mother of the victim made a positive, but mistaken, eyewitness identification and the accused faced the prospect of a much stiffer sentence if he was convicted.

37 See id. at 38 n.10 ("Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice . . . pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea" (citation omitted)).
39 See id. at 429.
after the trial. In the second case, the accused pled guilty because of the seemingly overwhelming evidence of non-accidental death provided by a pediatric pathologist. The pathologist, Dr. Charles Smith, was widely regarded as an icon at the time, but serious doubt has subsequently been cast on his work and competence. The third case involved an accused who was charged with first degree murder but pled guilty to infanticide and received a one year sentence. The conviction in this case was also based on evidence from Dr. Smith. It has recently been reversed on the basis of new evidence discrediting Smith’s testimony that the accused had killed her four-month-old son.

The guilty plea sentencing reduction that characterizes Anglo-American systems presents a particular risk that innocent people who fear receiving a higher sentence if convicted at trial will plead guilty in order to receive a more lenient sentence. As Professor Mirjan Damaska has argued, the acceptance of settlements is the "final refuge" of an adversary system in which full adversarial trials have become so expensive and lengthy that they are only employed sparingly.

Although there are de facto forms of plea-bargaining in many continental systems, they generally prohibit the formal entry of a guilty plea in serious cases. The reason for this policy is that

40 See R. v. Hanemaayer, 239 O.A.C. 241, File 48928, 2008 O.N.C.A. 580 ¶¶ 21-29 (Aug. 11, 2008), available at http://www.canlii.org/en/on/onca/doc/2008/2008onca580/2008onca580.html. The Court of Appeal held that while the guilty plea was voluntary, the appellant, after waiting eight months for trial and facing up to six years upon conviction, was faced with a “terrible dilemma” and the “justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence.” Id. ¶ 18.


42 GOUDGE, PEDIATRIC INQUIRY, supra note 7, at 514 (“[D]r. Charles Smith’s work was flawed in a number of cases in which criminal convictions were registered.”).


44 MIRJAN DAMASKA, EVIDENCE LAW ADRIFT 142 (Yale University Press 1997).

45 Since 2004, a type of guilty plea has been allowed in France, but only in less serious cases, and even then the judge can refer the case for further investigation if not satisfied that there is “an adequate factual and legal basis for the charge(s).” Richard S. Frase, France, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 201, 227 (Craig Bradley ed., 2d ed. 2007). In Germany, the judge is required to find facts necessary for conviction if the accused admits guilt, but often this will be satisfied by the accused
these systems prioritize accurate determination of the truth over the accused’s autonomy to decide the best way to settle his or her dispute with the state. As Professor Damaska has shown, these differences reflect very different visions of state authority. The adversary system reflects a more laissez-faire and reactive state, while the continental system reflects a more proactive and hierarchical vision of the state that, in theory at least, demands accuracy in employing the criminal sanction. Acceptance of false guilty pleas may be an inherent limitation of the adversary system that can result in the wrongful conviction of those who make both rational and irrational decisions to falsely concede their guilt.

D. Faulty Forensic Evidence

Another common cause of wrongful convictions is faulty expert forensic science that purports to link the accused with a crime. Much of this evidence may be generated by analysts and scientists employed by the state and can be based on a range of forensic sciences. Under the adversary system, the accused has a right to challenge both the admissibility of such evidence under rules relating to expert evidence and the content of the evidence. In addition, the accused can present competing expert evidence. In some cases, principles of due process and equality of arms may giving a "credible and detailed" account of the offence. See Thomas Weigend, Germany, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 243, 264-65. One commentator has argued that "continental law lacks incentives to lure an innocent defendant into entering an Alford guilty plea to avoid a worse outcome in case of a full trial." Martin Killias, Wrongful Convictions in Switzerland: The Experience of a Continental Law Country, in WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE, supra note 8, at 139, 143.

46 See Mirjan Damaska, The Faces of Justice and State Authority 3-6 (Yale University Press 1986). Professor Damaska has also observed that there has been a movement towards dispute resolution in civil lawsuits in continental systems, but this has occurred less in criminal law where "the policy-implementing objective increases the relative weight of truth-finding considerations." Damaska, supra note 44, at 122.


48 See id.

49 See, e.g., FED. R. EVID. 702 (establishing the criteria for expert testimony in the United States federal court system).

50 See id.
require that the accused have access to state funding to call competing expertise. Nevertheless, faulty forensic evidence has often gone unchallenged by the accused in many wrongful convictions.

In Canada, two public inquiries into notorious wrongful convictions examined cases in which hair and fiber analysis led to the conviction of the wrong person. Problems included contamination of the evidence and a failure to accurately communicate the limits of the science. More recently, another commission of inquiry in Ontario examined cases in which faulty forensic pathology led to a determination of non-accidental death of children, although subsequent analysis by other forensic pathologists determined that the cause of death was either accidental or undetermined. The commission of inquiry found that the pathologist in question believed that his task was to play an adversarial role as an advocate for the prosecution and to "make a case look good."

The pathologist was also prepared to testify in areas beyond his expertise, often in categorical terms unsupported by the evidence or the underlying science. In addition, the expert attacked at least one expert called by the accused to testify by describing the expert as a "paid mouth."

51 See, e.g., Ake v. Oklahoma, 470 U.S. 68 (1985) (holding that due process requires an indigent defendant be provided access to a psychiatrist on the issue of his sanity at the time of the offense upon a preliminary showing that it is likely to be an important consideration in the case). Unfortunately, there is a not a similar case in Canada about the need for state-funded expert evidence.

52 See Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 8-11, 89 (2009), for an examination of the role of forensic science in cases involving DNA exonerees in the United States and a finding that the defense only offered its own competing expert evidence in 19 of 137 trials of subsequent DNA exonerations.

53 See Lesage, Driskell Inquiry, supra note 7, at 1 (finding that "[i]t is not in serious dispute that Driskell was incarcerated for 13 years, one month, and seven days for a crime for which he was wrongfully convicted"); see also Kaufman, Morin Proceedings, supra note 7.

54 See Kaufman, Morin Proceedings, supra note 7, at 12 (revealing that the hair and fiber evidence was contaminated and was "worthless in demonstrating guilt"); Lesage, Driskell Inquiry, supra note 7, at 155-58.

55 See Goudge, Pediatric Inquiry, supra note 7, at 6-10.

56 Id. at 179.

57 See id. at 186-87.

58 Id. at 185.
one of the most well-known cases, the defense called two competing forensic pathologists, "but the evidence of the defense experts was not compelling and in some respects bolstered the Crown['s] case."\(^{59}\) These findings demonstrate how the legal system remains vulnerable to reliance on expert evidence that may subsequently be found to be flawed.\(^{60}\)

One factor in many of these cases may be the limited resources of the accused, particularly in cases where the state may have a near monopoly on the relevant expertise.\(^{61}\) Jerome Frank related the dangers of wrongful convictions to the adversary system and expressed concerns that "if the government does not supply the funds" required for expert evidence then "justice is denied the poor."\(^{62}\) The United States Supreme Court has recognized that in some cases due process will require funding of defense experts,\(^{63}\) but questions have been raised about whether such rights have been effectively implemented.\(^{64}\)

As will be discussed in greater depth below, it is not clear that inquisitorial systems would be better at avoiding reliance on faulty expertise, given that many continental systems will only use one court-appointed expert.\(^{65}\) At the same time, continental procedures allow the judge to study scientific opinions over a period of time and afford the judge free rein to ask questions of the experts. This process may be better than the adversarial trial before a jury in producing a full understanding of both the strengths and weaknesses of complex scientific evidence.\(^{66}\)


\(^{60}\) See id.

\(^{61}\) See Givelber, supra note 8, at 258-59.


\(^{65}\) See infra Part III.D.

\(^{66}\) "A better way of conveying scientific data would be to prepare briefs that . . . the trial judge [could study] in advance of the trial . . . The more complex the scientific issue subject to proof, the more difficult it becomes to elucidate it through conventional
E. Tunnel Vision or Confirmation Bias

Another commonly cited cause of wrongful convictions is the concept that the police engage in a form of tunnel vision in which they focus on one suspect and ignore other plausible suspects.\(^6\)

Tunnel vision typically occurs when police and prosecutors interpret innocuous or neutral evidence in a manner that confirms guilt and when they dismiss or discount the relevance of exculpatory evidence.\(^7\)

A former Chief Justice of Canada, Antonio Lamer, has recognized that although tunnel vision is rarely the result of malice, "[o]nce 'locked in' to the theory of their case, it is not difficult to understand how some police officers, with 'noble' motivation, may move from mere interpretation of the evidence to more malignant practices."\(^69\)

These malignant practices "could include 'assisting' witnesses in their recollection, ignoring relevant evidence that does not support their mission and using coercion to attempt to obtain admissions from the single suspect, whose guilt is assumed."\(^70\)

One striking feature of tunnel vision or confirmation bias is that it is a form of inquiry that is the epistemological opposite of the adversary system in which opposing parties are allowed to challenge evidence and provide their own interpretations of the evidence. As such, it could be argued that inquisitorial systems, which rely on the building of dossiers, may be particularly vulnerable to tunnel vision or confirmation bias because evidence that does not correspond with the investigator's judgments can be discounted and excluded in the process of constructing the partisan advocacy designed to win the day in court."\(^67\)

\(^67\) See Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291, 396 ("Cognitive distortions such as confirmation bias, outcome bias, and a host of other psychological phenomena make some degree of tunnel vision inevitable. Institutional pressures on police, prosecutors, defense lawyers and courts amplify those natural tendencies.").

\(^68\) Id.


\(^70\) Id. at 72.
One Dutch commentator has written about how some prosecutors leave exculpatory evidence and evidence relating to other suspects out of the dossier and how judges may also ignore evidence that may conflict with the accused's guilt. Both adversarial and inquisitorial systems seem subject to the dangers of tunnel vision or confirmation bias. As is demonstrated in the next part of this article, common remedies for tunnel vision draw on both adversarial and inquisitorial ideals.

F. Inadequate Defense Representation

Another commonly identified cause of wrongful convictions is inadequate defense counsel. Inadequate defense counsel can distort the adversary process at all stages, for example by inadequately investigating the case and preparing for cross-examination. This may be a particular danger in cases where the prosecution relies on various forms of forensic evidence that may be within the special expertise of analysts, scientists and pathologists employed by the state.

Inadequate defense counsel can also lead to unwarranted concessions and guilty pleas as the adversary system places the accused at the mercy of his or her lawyer. A commission of inquiry conducted by a former Chief Justice of Canada described how a bank manager who had been wrongfully convicted of murdering his wife had his appeal delayed for eight years for a variety of reasons, including the health problems of one of the lawyers and difficulties in obtaining legal aid funding.

---


72 See id.

73 See infra Part III.E.


76 See Givelber, supra note 8, at 255.

77 See THE LAMER INQUIRY, supra note 69 (analyzing the case of Robert Dalton and the delayed appeal process).
Commission found that the Court of Appeal itself should have more actively intervened to expedite the delayed appeal, which ultimately reversed the accused’s conviction. Another Canadian inquiry recommended that an appeal court should have raised errors of law that contributed to a wrongful conviction on its own motion even though the accused’s lawyers never raised these points of law. The accused’s lawyers were found to have provided inadequate representation to their client in part because the accused was an Aboriginal and in part because they likely believed he was guilty.

The fact that inadequate defense work can contribute to wrongful convictions at so many junctures of the criminal process underlines how reliant the adversary system is on competent defense counsel. As the next part of this essay will reveal, the remedies for inadequate defense counsel are limited and somewhat problematic within the adversary system.

III. Remedies for Wrongful Convictions: Adversarial and Inquisitorial Themes

A. Mistaken Eyewitness Identification

One commonly proposed remedy for mistaken eyewitness identification is the use of better identification procedures by the police. Such reforms are designed to minimize the risk of incorrect identifications. They include the correct use of foils, sequential photo-arrays, and the use of double-blind procedures where the police officer conducting the procedure does not know the identity of the suspect and thus cannot advertently or inadvertently signal the “correct” result to the witness. These procedures are promising, but they represent an acceptance of a scientific and professional approach to police investigation that could be associated with the focus in inquisitorial systems on professional investigations to discover the truth. They do not rely

78 See id. at 16-68.
79 See HICKMAN, MARSHALL REPORT, supra note 7, at 88 (finding that “[t]he Appeal Courts must ensure that justice is done” and “[w]hen counsel fails, the courts must step in”).
80 See id.
81 See Thompson, supra note 74, at 1489.
82 See id. at 1489-90, 1493, 1505.
on the adversarial techniques of questioning the veracity of a witness who makes an identification.

Another remedy for mistaken eyewitness identification is judicial warnings to jurors about the frailties of eyewitness identification. In Canada, for example, jurors often receive a warning from the judge about the possibility of honest mistakes in eyewitness identifications. The judge then often instructs the jury to consider the circumstances under which the identification was made, drawing to the jury's attention factors such as the length of the witness's observation, the witness's visibility, and the detail and consistency of the witness's description. Judicial instructions to juries tend to be much more detailed in British-based systems than in the United States. Detailed judicial instructions reveal some distrust of the jury as an amateur trier of fact and some desire to draw on the judge's wealth of professional experience. As such, they may represent a move in an inquisitorial direction where the professional judge assumes more responsibility for the findings of fact. Despite this, there are limits to the ability of a judge to inject his or her own expertise and experience in the adversarial system. Judges who have received training from experts, such as psychologists, in the frailties of eyewitness identification can legitimately complain that they can do little with this knowledge as a result of their obligation to take limited judicial notice in order to protect the integrity of the adversary system based on party presentation of the evidence.

A further possible remedy for faulty eyewitness identification is the exclusion of such identifications from the criminal trial. Although the trial judge in some jurisdictions can order exclusion of identifications for reasons related to unduly suggestive procedures or a violation of the right to counsel, trial judges

83 See id. at 1516.

84 See Martin L. Friedland & Kent Roach, Borderline Justice: Choosing Juries in the Two Niagaras, 31 ISR. L. REV. 120, 150 (1997) (noting that Canada requires the judge to issue special instructions to the jury regarding certain types of evidence).

85 See id.

86 See id.

87 See Thompson, supra note 74, at 1514-15.

88 See, e.g., Stovall v. Denno, 388 U.S. 293, 301-02 (1967). But see Neil v. Biggers, 409 U.S. 188, 201 (1972) (holding that although there may have been suggestive elements to the showing and substantial time had passed between the crime
Wrongful convictions are reluctant to exclude evidence from the jury simply because it may not be reliable. For example, the Supreme Court of Canada, in an unanimous decision by Justice Louise Arbour, refused to exclude evidence of an in-dock identification of the accused by the victim despite evidence that the victim was initially unable to identify the accused and that her memory might be a product of post-event confirmations of her initial identification of her attacker.90

A final remedy for mistaken eyewitness identification is to allow the accused to call expert evidence about the frailties of such evidence.91 Unlike the above remedies, this remedy can be seen as an enhancement of the adversary system. It requires the defense to have adequate resources to retain and call an expert on the frailties of eyewitness identification.92 This adversarial approach could result in dueling experts testifying about the scientific evidence regarding witness identifications. Although such expert evidence is allowed in some jurisdictions, it is disallowed in Canada on the basis that it invades the domain of the trier of fact in assessing the credibility of the witness.93

Even in jurisdictions where expert testimony on the frailties of eyewitness identification is allowed, there are concerns about whether the accused will have equal access to such expertise and whether the expert witness is able to effectively communicate the frailties of identification evidence to the jury.94 One study

and the confrontation, there was "no substantial likelihood of misidentification"); accord Manson v. Braithwaite, 432 U.S. 98 (1977); see also R. v. Mezzo, [1986] 1 S.C.R. 802, 833-34 (Can.) (refusing to direct a verdict of acquittal in a case where the accused was identified through a very suggestive show up procedure). See generally Richard Rosen, Reflections on Innocence, 2006 Wis. L. REV. 237, 247-51 (limitation of due process reforms on preventing eyewitness error).

89 See generally R. v. Ross, [1989] 1 S.C.R 3, 4 (Can.) (finding that a detainee must be given a reasonable opportunity to retain counsel and given instructions before police may attempt to elicit evidence from the detainee); see also United States v. Wade, 388 U.S. 218 (1967).


91 See generally Thompson, supra note 74 (discussing the inaccuracy of eyewitness testimony and possible reforms).

92 See id. at 1515.

93 See R. v. McIntosh [1997] 35 O.R.3d 97, 101-03 (Can.) (holding that "[t]here was a very real danger that such evidence would distort the fact finding process").

94 See, e.g., Edmund Higgins & Bruce Skinner, Establishing the Relevance of
discovered that in forty American cases in which DNA analysis revealed eyewitness identifications to be mistaken, evidence by an expert with experience in eyewitness identification had not been admitted in a single case.95

Given the costs associated with calling expert evidence and the varying nature of defense representation, reforms to improve police identification procedures and judicial warnings to juries seem to be more promising responses to eyewitness error than reliance on expert testimony. As suggested above, these reforms can be seen as adding inquisitorial elements to the existing adversary system rather than attempts to improve the adversary system.

B. Lying Witnesses

One possible remedy for the contribution that lying witnesses can make to wrongful convictions is to prohibit certain witnesses such as jailhouse informers from testifying.96 Although some Canadian commissions of inquiry have made such recommendations,97 Canadian courts have been reluctant to accept such categorical bans.98 Such decisions are related to a belief that, in the adversary system, the prosecutor as a party should be free to decide what evidence should and should not be called.99 Daniel Givelber has identified this assumption of the adversary system but has argued that it should be tempered in order to prevent wrongful convictions. He asserts that:

[o]ne might improve the quality of justice accorded the innocent if the court had the power to refuse to permit a case to be tried on what is patently second-best evidence. For instance, the state should not be able to prosecute a

---

95 See id. at 478.


97 See CORY, SOPHONOW INQUIRY, supra note 7.

98 See, e.g., R. v. Brooks, [2000] 1 S.C.R. 237, 253 (Can.) (stating that “[a]lthough there may have been some reason to doubt the credibility of [the witnesses] . . . based on their criminal records [and] . . . motivation to lie, these factors were highlighted by the trial judge in instructing the jury.”).

99 See id.
case involving violence against a stranger by relying primarily on eyewitness testimony when biological material exists, which, if analyzed appropriately, could be highly relevant to the defendant’s guilt or innocence. An insistence that the state has the same equality to decide what evidence to call as the accused also discounts the special responsibilities and powers of the state.

A laissez-faire approach in Canada and elsewhere, in which judges allow suspect witnesses, such as jailhouse informers, to testify is also related to the idea that the jury and not the judge should make the ultimate decision about the reliability of evidence. This deference to the jury as the trier of fact is also often accompanied by a belief that full adversarial cross-examination will uncover any lies that a witness may tell. The experience of wrongful convictions based on false testimony, however, challenges the belief that adversarial cross-examination will reveal the truth.

A less extreme judicial remedy than the exclusion of the testimony of jailhouse informers or other unreliable witnesses is the use of judicial warnings about the dangers of accepting such evidence. These warnings, however, can also be problematic due to their discretionary nature, their uncertain effect on jurors, and the danger that the witness’s credibility may be bolstered when the judge reviews evidence that is capable of confirming or corroborating the witness’s testimony. In the leading Canadian case on jailhouse informers, the defense lawyers made a tactical decision not to request a warning to the jury about the unreliability of such witnesses. This decision was made because such a warning would be accompanied by the judge’s review of evidence that was capable of corroborating the testimony of the jailhouse informers. The value of such independent corroboration can be overestimated in cases where jailhouse informers have been able

100 Givelber, supra note 8, at 264.
101 See, e.g., Hickman, Marshall Report, supra note 7, at 79 (drawing conclusions demonstrating faith in the effectiveness of cross-examination in securing the truth).
102 See Informants/Snitches, supra note 96.
103 See Thompson, supra note 74, at 1514-18.
105 Id.
to gain access to "hold back" information about the case that is not generally known to the public. ¹⁰⁶

English-based systems tend to allow judges more latitude than American systems to instruct the jury about the evidence that they have heard and to issue warnings about relying on such evidence. Such judicial practices suggest that English-based systems are both more hierarchical and closer to judge-dominated inquisitorial systems than the American system, which tends to place more trust in the ability of a jury to make determinations of fact with minimal assistance from the judge. The greater freedom of the jury in the United States may also reflect a more populist political culture. It also manifests itself in more adversarial-driven jury selection systems, compared to English-based systems where the judge more strictly vets questions that the parties are allowed to ask prospective jurors. ¹⁰⁷

Another reform that has been proposed and adopted with respect to jailhouse informers is to require line prosecutors to seek special permission from committees within the prosecutor’s office for the use of such witnesses. This remedy reflects inquisitorial themes to the extent that it emphasizes the importance of the prosecutor not placing unreliable evidence before the court. ¹⁰⁸ It also reflects an ideal that the prosecutor’s office should be a professional, hierarchical, and bureaucratic body with a commitment to truth seeking. ¹⁰⁹ An extreme version of the adversary system might resist such central control on the basis that individual prosecutors, like individual defense attorneys, should have discretion to decide what evidence should be called. ¹¹⁰ In general, attention to the critical role that state institutions such as the police, prosecutors, or crime laboratories play in criminal justice processing will narrow the distance that is sometimes

¹⁰⁶ See Informants/Snitches, supra note 96.


¹⁰⁸ See Givelber, supra note 8, at 260-61.

¹⁰⁹ See id. at 261.

¹¹⁰ One Canadian commission of inquiry recommended both Ministerial guidelines to govern the use of jailhouse informers and approval of their use by a committee of senior prosecutors. Some individual prosecutors, however, argued against such reforms as fettering the discretion of prosecutors in individual cases. See KAUFMAN, MORIN PROCEEDINGS, supra note 7 at 580, 602-03.
perceived between party-based adversarial procedures and more state-dominated inquisitorial procedures.\textsuperscript{111}

A final possible remedy for witnesses who may lie is corroboration requirements. Such requirements would represent another form of judicial guidance or control of the ability of the jury to make decisions on its own.\textsuperscript{112} Corroboration would not be effective in those cases where lying witnesses have been able to obtain access to details about a case that are not publicly known.\textsuperscript{113} Corroboration requirements have become much less popular in recent years and are dismissed in many systems as an unduly formalistic and complex judicial intrusion on the fact-finding process.\textsuperscript{114} Although the discovery of significant numbers of wrongful convictions have not rehabilitated corroboration requirements, a recent decision by the Supreme Court of Canada included a dissent who believed that the Court was re-introducing rigid corroboration requirements.\textsuperscript{115} The dissent based this claim on the fact that the rest of the Court stressed the importance of warnings that ask the jury to consider whether there is independent confirmation of the testimony of unsavory witnesses.\textsuperscript{116} The dissent was wrong, however, because the Canadian warnings still eschew corroboration by deferring to the ability of the jury to accept an unsavory witness's testimony in the absence of any independent confirmation.\textsuperscript{117}

C. False Confessions and False Guilty Pleas: Continental Limits on Guilty Pleas

The most popular remedy proposed for false confessions is the videotaping of interrogations.\textsuperscript{118} There are a number of implicit

\textsuperscript{111} See id. at 253-59.

\textsuperscript{112} See R. v. Vetrovec, [1982] 1 S.C.R. 811, 817 (Can.) (reflecting on judicial instructions and considerations related to corroboration requirements).

\textsuperscript{113} See Informants/Snitches, supra note 96.


\textsuperscript{116} See id.

\textsuperscript{117} See id. ¶ 69.

and perhaps questionable assumptions behind the videotaping remedy. One assumption is that the accused will be able to demonstrate to the judge or the jury that the confession was improperly obtained and false by making use of the evidence contained in the videotape.\textsuperscript{119} Another assumption is that most false confessions will be the product of improper interrogation techniques that will be easily detected through the use of videotaping.\textsuperscript{120} Although some false confessions will be obtained through such techniques,\textsuperscript{121} others may be related to the personal characteristics of the accused.\textsuperscript{122} The videotaping remedy can be seen as one that is geared towards perfecting the adversary system by creating conditions conducive to adversarial challenge to false confessions.\textsuperscript{123} At worst, it can be seen as a means to avoid struggling with the dangers of relying on the accused as a main source of evidence.

Another possible remedy for false confessions is to allow expert evidence to be introduced about the false confession phenomena to counter any unwillingness of the jury to accept that a person would falsely confess. The Ontario Court of Appeal has recently indicated that such expert evidence, like expert evidence about the frailty of identification evidence, will generally not be admissible.\textsuperscript{124} Canadian courts are reluctant to allow expert evidence about eyewitness error and false confessions because of their deference to the jury as the ultimate trier of fact.

A more radical remedy would be either to ban confession

\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} The leading Canadian case on the voluntariness rule has recognized the prevention of the admission of false confessions as one of the most important rationales for the rule that the prosecutor must establish the voluntariness of confessions beyond a reasonable doubt. The case also asserts that most false confessions will be the product of improper police interrogation techniques. \textit{See} R. v. Oickle, [2000] 2 S.C.R. 3, 44-45 (Can.).

\textsuperscript{122} For example, Canadian courts will accept confessions from mentally disturbed accused or those with severe mental disabilities so long as they have a limited cognitive capacity or operating mind. \textit{See} R. v. Whittle, [1994] 2 S.C.R. 914, 917 (Can.).

\textsuperscript{123} \textit{See} Mandatory Recording, \textit{supra} note 118.

evidence altogether or to require that it be corroborated, as is the case in the Netherlands.\footnote{Chrisje Brants, The Vulnerability of Dutch Criminal Procedure to Wrongful Conviction, in WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE, supra note 8, at 157, 166-67.}

The reluctance of Anglo-American systems to consider such remedies may be related to a sense that the parties, including the state, should be able to present their own evidence, subject to some judicial supervision ensuring that confessions be voluntary and constitutionally obtained.\footnote{See Brandon Garrett, Judging Innocence, 108 COLUM. L. REV. 55, 88-91 (2008). The article summarizes an empirical study examining how the United States Government approached cases in which the accused were subsequently found innocent through post-conviction DNA testing. The DNA results demonstrated that, in 16% of the cases analyzed, there were false confessions by defendants. The study indicates that despite efforts to prevent the violation of Fifth Amendment and Miranda rights, false confessions served as powerful evidence at trial.}

This raises a general issue about whether Anglo-American systems have placed too much emphasis on protecting the accused’s rights as opposed to ensuring that the system accurately determines the truth of allegations.\footnote{See Pizzi, supra note 22 (criticizing American use of exclusionary rule and contrasting it with more truth oriented continental systems).}

This line of argument, however, should be approached with caution because it is not clear that less rights protection should necessarily be the cost of increased commitment to the discovery of the truth. Indeed, continental justice systems seem to combine inquisitorial procedures that require quasi-judicial investigation of serious crimes with a high level of rights protection under the European Convention on Human Rights.\footnote{See Brants, supra note 125, at 164-65 (explaining that the right to know and challenge evidence brought against a defendant are at the forefront of the guarantees of a fair trial under the European Convention of Human Rights).}

It is a testament to the hold of the adversary system that little, if any, thought has been given to attempting to abolish plea bargains as one means of preventing innocent people from being pressured into pleading guilty. Indeed, most recent attention has

\footnote{Id.}

\footnote{Id.}

\footnote{Id.}

\footnote{Id.}
been paid to the introduction of plea bargaining as a means of Americanizing continental criminal justice systems.\textsuperscript{129}

\textbf{D. Faulty Forensic Evidence}

One common remedy for the role that bad forensic evidence can play in wrongful convictions is increased professionalism among experts who are employed by the state and provide expert evidence. In the Canadian province of Ontario, two commissions of inquiry have examined wrongful convictions caused in part by faulty scientific evidence: The Commission of Inquiry into the Proceedings against Guy Paul Morin\textsuperscript{130} and the Commission of Inquiry into Pediatrics Forensic Pathology in Ontario.\textsuperscript{131} Both commissions have recommended extensive reforms of the state institutions that have produced the faulty evidence.

The Commission of Inquiry into the Proceedings against Guy Paul Morin found that evidence about hair and fiber had been misused in the investigation and trials of Morin. It stressed that the state-funded Centre for Forensic Science that conducted the test and provided the expert witnesses "plays a vital role in the administration of criminal justice . . . [i]t cannot perform its duties unless its scientists are objective, independent and accurate. Further, they must be perceived to be independent by the participants in the criminal justice system."\textsuperscript{132} It recommended that the police and prosecutors should only act upon forensic


\textsuperscript{130} See KAUFMAN, MORIN PROCEEDINGS, supra note 7. On reforms in Ontario following this Commission see Jeffrey R. Manishen, *Wrongful Convictions, Lessons Learned: The Canadian Experience*, 13 J. CLINICAL FORENSIC MED. 296, 297–98 (2006) (detailing post-inquiry reforms including DNA testing of hair, recording of preliminary reports, increased training, new protocols for reports and complaints, documentation of contamination, monitoring of courtroom testimony, and creation of advisory board and quality assurance unit).

\textsuperscript{131} See GOUDGE, PEDIATRIC INQUIRY, supra note 7. On reforms in Ontario following this Commission, see Kent Roach, *Forensic Science and Miscarriages of Justice: Some Lessons from Comparative Experience* 50 JURIMETRICS 67, 78 (2009) (detailing post-inquiry reforms such as creation of a registry of qualified forensic pathologists, recognition of supervisory role of the Chief Forensic Pathologist, and creation of a Death Investigation Oversight Council).

\textsuperscript{132} KAUFMAN, MORIN PROCEEDINGS, supra note 7, at 8.
opinions when those opinions had been reduced to writing. It also recommended that these reports should be more carefully written and monitored with attention to matters such as the accuracy of the language and the importance of an objective scientific approach. These recommendations sound an inquisitorial theme by stressing the importance of state investigators being objective and committed to the discovery of the truth. In addition, the importance of written expert reports is an important feature of inquisitorial systems. The Commission did not specifically appeal to the truth-seeking values of continental systems, but its recommendations reveal how many Anglo-American systems have inquisitorial elements to the extent that they rely on expert forensic science produced by investigators employed by the state. Greater recognition of these inquisitorial features of existing adversary systems could result in more effort being devoted to improving the professionalism of state scientists in producing accurate results with perhaps less emphasis on the often theoretical ability of the defense to offer competing expertise.

The second inquiry, the Commission of Inquiry into Pediatric Forensic Pathology in Ontario, focused on forensic pediatric pathology after concerns were raised about evidence given by a particular pathologist in a number of cases. As with the first inquiry, this inquiry stressed the need for better training, professionalism, and quality assurance among the pathologists who performed autopsies on behalf of the state. The Commission recommended that the oversight role of the Chief Forensic Pathologist be codified and that there be increased review and oversight of the work of pathologists in criminally suspicious deaths. Even preliminary reports by pathologists should be reduced to writing and the reports should be written in a clear

133 See id.
134 Id.
135 The Commission did, however, recommend that there be reciprocal disclosure of expert evidence in cases where the defense obtained its own expert. See id. at 358.
136 See GOUDGE, PEDIATRIC INQUIRY, supra note 7, at 6-8.
137 See id.
138 See id.
The results of the Commission of Inquiry into Pediatric Forensic Pathology in Ontario suggest that pathology remained resistant to the reforms recommended by the Morin inquiry a decade earlier. South Australia has had a similar experience because problems concerning the competency of a forensic pathologist have persisted even after reforms were instituted as a follow-up to royal commissions in Australia that revealed problems in expert forensic evidence, including in the famous “dingo eat my baby” case. The resistance of state institutions to reforms designed to increase their commitment to impartial truth-seeking may be related to a lack of full acceptance of their independent and objective role within adversary criminal justice systems.

The recent Commission of Inquiry into Pediatric Forensic Pathology in Ontario also found that the pathologist in question did not understand that his role as an expert witness was to provide the court with impartial evidence. Rather, he thought, in accordance with some popular ideas of the adversarial system, that his role was to make the prosecution’s case “look good.” The pathologist also operated in an adversarial context as represented by a memo that encouraged pathologists to “think dirty” when they reviewed the deaths of children. The pathologist’s flawed testimony is an example of the damage that can be done when expert witnesses assume the role of advocates or become too caught up with the adversarial interests of the parties that called their evidence. The Commission recommended that all experts should agree to a code of conduct emphasizing their duty to assist

139 See id.  
140 See id. at 80.  
142 See GOUDGE, PEDIATRIC INQUIRY, supra note 7, at 16.  
143 See id. at 17-18.  
144 See generally id. at 16-18, 189. The inquiry acknowledged the reality that pathologists work more closely with police and prosecutors, but concluded that “the role is neutral, at all stages of involvement, not just when testifying” and that experts should provide all actors in the system “with a reasonable and balanced opinion, and to remain independent in doing so. The expert cannot become a partisan.” Id.
the court with impartial advice. Such an approach rejects extreme adversarialism that sees all witnesses as advocates and simply relies on cross-examination to reveal exaggerations in their testimony. The commission’s approach is consistent with inquisitorial values that conceive of expert witnesses as witnesses who should advance the court’s search for truth.

Another recommendation made by the Commission of Inquiry into Pediatric Forensic Pathology in Ontario was that a systemic audit be conducted of past shaken baby deaths in order to determine whether there were miscarriages of justice. This audit would include cases where the accused was found guilty or pled guilty. A similar audit of criminal cases that depended on hair analysis was conducted in Manitoba and revealed evidence of two possible miscarriages of justice.

Audits of cases involving suspect forms of evidence or suspect witnesses are an interesting and positive development. They represent an official recognition that the state’s interests in accurate verdicts may outweigh the interests in the final resolution of criminal cases either by adjudication or by plea. In Damsaka’s typology, audits are a manifestation of the role of the proactive state in pursuing policies relating to the determination of truth and the restoration of public confidence in the justice systems as opposed to the adversary system’s acceptance of the ability of the parties to resolve disputes in a way that is generally acceptable to the state. Systemic audits of the accuracy of scientific evidence used by the criminal justice system confirm the ability of adversary systems to accept state-based truth seeking modifications, at least in times of perceived crisis.

The Commission of Inquiry into Pediatric Forensic Pathology in Ontario also recommended that trial judges play an increased gate-keeping role with respect to expert evidence. Although accepting that the jury would continue to make the ultimate determinations about whether expert evidence was reliable, Commissioner Goudge stressed that trial judges had an obligation

145 See id. at 504; see also R. v. Harris, [2005] E.W.C.A. Crim. 1980, ¶ 271 (Eng.).
146 See Goudge, PEDIATRIC INQUIRY, supra note 7, at 533.
147 Id.
148 See LeSAGE, DRISKELL INQUIRY, supra note 7, at 181.
149 See DAMASKA, supra note 45 and accompanying text.
to determine the threshold reliability of scientific evidence essentially by applying factors similar to the Daubert criteria articulated by the United States Supreme Court.\textsuperscript{150} These recommendations contemplate a more active judicial role in policing the admissibility, content and scope of expert evidence.

At the same time, there are limits to how much adversarial systems will adopt practices from inquisitorial systems, especially in criminal as opposed to civil justice. The Ontario commission, like the Royal (Runciman) Commission on Criminal Justice in Britain,\textsuperscript{151} was not willing to recommend an inquisitorial system in which the court, as opposed to the parties, would call expert evidence.\textsuperscript{152} It is not clear that inquisitorial systems would be more reliable with respect to forensic expert evidence. In many such systems, rules generally allow only one expert to be selected by the court and a special showing has to be made to allow supplementary or competing expertise. For example, in Switzerland, a second expert opinion will only be allowed if the accused establishes that the expertise of the first expert is "(1) obviously incomplete, unreliable, or does not meet professional standards; and (2) that the expert is unable to respond adequately to the eventual critiques of this sort."\textsuperscript{153} It is similarly difficult to have a second expert appointed in the Netherlands. One Dutch commentator has argued that the main danger with court appointed experts "is not that they are inherently partisan, but that, precisely

\textsuperscript{150} See Gouge, Pediatric Inquiry, supra note 7, at 480; see also Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

\textsuperscript{151} Royal Commission on Criminal Justice, 1993, Cm. 2263. The Commission warned of the danger that evidence from a court appointed expert might be given more weight when "it cannot be said that, simply because it has been given by an expert, the evidence is correct or, indeed, credible. Serious miscarriages of justice may occur if juries are too ready to believe expert evidence or because it is insufficiently tested in court." Id at 159. The Commission stressed that there would be no guarantee that a court appointed expert would "be any nearer to the truth of the matter than the expert witnesses for the parties." Id at 160. This Commission recommended increased mutual disclosure of expert evidence and that experts be asked by the judge after adversarial examination and cross-examination whether there was anything else they wished to say. See id. at 160. It also recognized that "in some instances, such as our approach to forensic science evidence, our recommendations can fairly be interpreted as seeking to move the system in an inquisitorial direction, or at least as seeking to minimise the danger of adversarial practices being taken too far." Id. at 3.

\textsuperscript{152} See Gouge, Pediatric Inquiry, supra note 7, at 472.

\textsuperscript{153} Killias, supra note 45, at 151.
because they are regarded (and regard themselves) as nonpartisan, a court may place too great a reliance on their findings without there being an automatic response from an expert from the other side to contradict them.\textsuperscript{154} Just as those familiar with the failings of the adversarial system with respect to expert witness look to inquisitorial ideals as an inspiration for reforms, those familiar with the failings of the inquisitorial system look to adversarial ideals.

Although the Commission of Inquiry into Pediatric Forensic Pathology in Ontario emphasized the need for increased professionalism and scientific rigor by state-employed pathologists and an increased gate-keeping role for the judge, it also stressed the potential value of the adversary system in guarding against the acceptance of faulty science. Indeed, one of the cases examined by the Commission involved a family who sold their home and cashed in their retirement savings to pay the expenses of ten leading foreign forensic pathologists and neuropathologists to defend their twelve year old daughter who had been charged with manslaughter after a sixteen month infant she was babysitting died from a fall.\textsuperscript{155} In this case, the adversary system worked in the sense that the twelve year old was acquitted by the trial judge in a bench trial. The judge found that the evidence offered by the state's forensic pathologist lacked objectivity, failed to investigate thoroughly all relevant facts, and neglected to keep adequate records of his work and findings.\textsuperscript{156} The Commission recommended that legal aid funding for experienced counsel and expert forensic pathologists who could testify for the defense should be increased, though these recommendations would not necessarily have assisted the middle class family that invested so heavily in their daughter's defense.\textsuperscript{157}

The approach taken in the above case relied on the ability of the judge to reject faulty forensic evidence. This raises the issue of the degree to which bench trials in Anglo-American system

\textsuperscript{154} Brants, supra note 125, at 172.

\textsuperscript{155} See Goudge, Pediatric Inquiry, supra note 7, at 6.

\textsuperscript{156} See id. at 11, 13-31 (demonstrating that this pathologist continued to be a key witness in child death cases for almost a decade after his testimony had been rejected in this case). The adversary system worked in this single case, but unfortunately those in charge of overseeing the pathologist's work did not act on this decision.

\textsuperscript{157} See id. at 457.
reflect some of the same values of reasoned decision-making that are found in judge-dominated inquisitorial systems. Decreased use of juries might increase the ability of the justice system to reach accurate results, especially in cases involving complex scientific evidence.

The area of forensic science demonstrates how adversarial and inquisitorial themes can be blended in existing justice systems. Many of the remedies designed to increase the accuracy and objectivity of forensic evidence would be equally suitable for continental systems which typically rely on only one court-appointed expert. The dominance of state experts in some fields of expertise effectively means that the system often functions as a single-expert system. In both systems, it is very important that the expert be as objective and accurate as possible if the innocent are not to be convicted. Evidentiary rules that allow trial judges to decide whether expert evidence is admissible and to place limits on the scope of the expert's expertise are a move in the direction of inquisitorial systems where judges assume more responsibility for understanding and policing expert testimony. Nevertheless, the adversary system may have an important role to play in revealing areas of scientific controversy and uncertainty. For these reasons, the Ontario Commission backed away from the idea of relying on court-appointed or joint experts. Consistent with adversarial ideals, it recommended that increased funding be available to ensure that the accused could be represented by experienced counsel and present competing expert evidence.

E. Tunnel Vision or Confirmation Bias

One of the most common recommended remedies for "tunnel vision," i.e., when police focus on one suspect to the exclusion of others, is the improvement of police education in order to increase police professionalism and expand investigative skills. One Canadian inquiry even suggested that the police should follow one version of the scientific method in which investigators devote resources to attempting to disprove their hypothesis. Such recommendations draw on inquisitorial ideals which see the police

---

158 See id. at 621-22.
159 See id. at 631.
160 See THE LAMER INQUIRY, supra note 69, at 132.
and prosecutors as professionals committed to an even-handed investigation to discover the truth. In some continental systems, the accused can even require police and prosecutors to follow suggested lines of investigation.

Recommendations that rely on the training and professionalism of the police may neglect institutional and public pressures placed on the police to identify and charge suspects particularly in the high profile cases that are often associated with miscarriages of justice. There may be limits to how much increased education and professionalism among the police will assist in preventing tunnel vision, especially because the police often are placed in an adversarial position with respect to the accused. That said, recommendations for increased police training and professionalism, like the recommendations examined above with respect to the role of forensic experts, suggest that adversarial systems incorporate some of the truth-seeking and impartiality ideals usually associated with the role of investigating state officials in inquisitorial systems.

Other recommended remedies for tunnel vision take a more structural approach and borrow from adversarial ideals. One of the recommendations for combating tunnel vision has been to dedicate people within policing or prosecutorial agencies to perform a challenge or contrarian function to the case that is being assembled. Prosecutors are also urged to exercise a challenge function that can counteract police tunnel vision. Reliance on the challenge role of a contrarian or a prosecutor to combat police tunnel vision is consistent with adversarial ideals which maintain that truth is likely to be revealed when those with opposing interests engage in conflict about what happened. An extreme version of the adversary system would counteract tunnel vision by giving both prosecutors and the accused adequate resources to conduct their own investigations. The unrealism of such a proposal, however, underlines how the police, like forensic scientists, have a near monopoly on the collection and production of evidence and as such should be committed to an evenhanded pursuit of the truth.

161 See id.; see also Bruce MacFarlane, Convicting the Innocent: A Triple Failure of Justice, 31 MAN. L.J. 403, 443 (2006).

162 See THE LAMER INQUIRY, supra note 69, at 132.
Rules that require defense disclosure of alibi are in part based on a faith that the police will fairly investigate the accused’s alibi. One Canadian commission of inquiry, however, found that the accused’s late disclosure of his alibi was related to the distrust that existed between defense lawyers and the police. The commission recommended early disclosure by the accused of an alibi, but also suggested that the alibi be investigated in an evenhanded manner by different officers than those who had investigated the accused. These officers would also conduct any re-examination of the prosecutor’s original witnesses under carefully recorded conditions.

In many continental systems, the accused has the ability to request the investigating officials to pursue further lines of investigation. As Zalman argues, such requests can be seen as an intervention that “strikes at the heart of adversarialness” by allowing the defense to direct part of the police investigation. A request for further investigation by the defense could allow the police to use their superior resources and skills to discover exculpatory evidence that might have not been obtained in the initial investigation. Nevertheless, the very nature of the adversary system and the deep distrust that the defense may have of the police may make the accused reluctant to make such requests of the police. Ambivalence about whether the best remedies to counter tunnel vision can be found in the adversary or the inquisitorial systems reflects an even deeper ambivalence about the ability of either adversary or inquisitorial systems to reach accurate results in criminal cases.

Although tunnel vision has been generally thought to influence police and prosecutors, it could also affect judges. Professors Doran, Jackson, and Seigel have argued that bench trials suffer from a deficit of adversarialism because the judge who decides the verdict is exposed to inadmissible evidence and plays an active role in the pre-trial and trial stage of the proceedings. There is indeed a danger that a judge who has excluded a confession or

\[\text{\textsuperscript{163} See Cory, Sophonow Inquiry, supra note 7.}\]
\[\text{\textsuperscript{164} See id.}\]
\[\text{\textsuperscript{165} Zalman, supra note 8, at 85.}\]
\[\text{\textsuperscript{166} See Sean Doran et. al., Rethinking Adversarialism in Nonjury Criminal Trials, 23 Am. J. Crim. L. 1, 27-28 (1995).}\]
evidence of prior bad conduct by the accused may be unconsciously influenced by such evidence when hearing other admissible evidence. As such, there is merit to their recommendations that judges should expose a provisional guilty verdict to an adversarial challenge by the accused. Indeed, such a procedure could inject a valuable adversarial check not only on bench trials in adversarial systems, but also on continental investigative procedures.\textsuperscript{167}

Concerns about judicial tunnel vision are, if anything, more acute in inquisitorial systems. In their study of German and French systems prepared for the Runciman Commission, Professors Leigh and Zedner acknowledged that while a “vigorous examining magistrate determined to get at the truth” could prevent some miscarriages of justice, “a biased examining magistrate can do untold harm to the defense” by not pursuing exculpatory avenues of investigation and because of the presumption of correctness that will be applied to the investigative dossier.\textsuperscript{168}

Although one potential antidote to judicial tunnel vision might be more adversarialism in the form of exposing provisional verdicts to adversarial argument, there are also some signs in Canada that courts are not well-equipped to expose police tunnel vision. Canadian courts have restricted the accused’s ability to introduce evidence of alternative suspects at a criminal trial. The Supreme Court of Canada has held that evidence of a suspect’s motive and opportunity to commit a crime were not sufficient to allow evidence about that suspect to be admitted in the accused’s trial even though the victim was killed three days after the suspect, who had previously threatened the victim, was released from prison.\textsuperscript{169} Without adverting to the literature on police tunnel vision, the Court unanimously dismissed the accused’s attempts to introduce the evidence about the alternative suspect as “a chain of speculation joined by gossamer links.”\textsuperscript{170} This neglects the

\footnotesize
\textsuperscript{167} See id. at 30-43 (discussing suggested checks to maintain adversarialness in bench trials).


\textsuperscript{170} Id. ¶ 58. For criticisms of American cases that require a direct connection between the crime and evidence about alternative suspects as a re-enforcement of tunnel
possibility that the accused would have to rely on speculation in part because the police investigation of the alternative suspect had been truncated by tunnel vision.

Other Canadian cases where the accused has alleged that the police investigation was tainted by tunnel vision have not produced satisfactory results. Although the courts have at times allowed such defense challenges, they have also stressed that the state should be allowed to defend the police investigation through the use of "investigative hearsay" that might not otherwise be admissible.\textsuperscript{171} Such hearsay often relates to the bad character of the accused, a factor that itself may help produce both tunnel vision and noble cause corruption. In some cases, appeal courts have ordered new trials because of concerns that too much bad character and propensity evidence about the accused had been introduced into the trial as the prosecutor made its adversarial challenge to the accused's claims of tunnel vision.\textsuperscript{172} The Supreme Court of Canada, however, recently held in a 5-4 decision that the improper and prejudicial use of investigative hearsay did not require a conviction to be quashed given the other evidence that was available to implicate the accused.\textsuperscript{173}

The adversarial criminal trial is not well-equipped to discover whether the preceding police investigation has been adversely affected by tunnel vision. An accused who seeks to point a finger at alternative suspects faces a high hurdle within the adversarial trial. Moreover, an accused who alleges that the police investigation was affected by tunnel vision faces a risk that such an argument will backfire because the state will be allowed to introduce otherwise inadmissible bad character and other evidence to justify its focus on the accused. It is far from clear that the present adversary system is well-equipped to respond effectively


\textsuperscript{172} See, e.g., Dhillon, 161 O.A.C. 231.

\textsuperscript{173} See R. v. Van, [2009] 1 S.C.R. 716 (Can.).
to the widely observed phenomenon of tunnel vision or confirmation bias in the investigation of crime.

F. Inadequate Defense Representation

Another common remedy for wrongful convictions is to delegate increased funds to defense representation. As discussed above, a recent Ontario commission recommended increased legal aid funding for lawyers and experts in cases involving pediatric forensic pathology.174 American legislative reforms have proposed including increased funding for counsel defending capital cases.175 These examples demonstrate that proposals to improve the adversary system remain attractive. It is difficult to deny that some wrongful convictions likely could be avoided by more skilful and diligent defense work.

Although better defense representation may be a good marginal reform, such a remedy has two important limitations. The Canadian experience affirms that wrongful convictions can occur even in cases where the accused had excellent representation. An example is the wrongful conviction of David Milgaard who served twenty-three years in jail for a murder that he did not commit.176 In 1992, the Supreme Court of Canada held that he was entitled to a new trial because of new evidence but also concluded that Milgaard had received a fair trial.177 Milgaard was defended by a highly regarded lawyer who later served as a judge on Saskatchewan’s highest court.178 A recent commission of inquiry which examined the case concluded that the defense lawyer had “offered a skilled, thorough, nuanced and ethical defense,” that he was well prepared, and that his conduct did not contribute to the wrongful conviction.179

The second limit to improvements of defense representation in

174 See Goudge, Pediatric Inquiry, supra note 7, at 460-66.
176 See MacCallum, Milgaard Inquiry, supra note 7, at 296.
177 See Re Milgaard, [1992] 1 S.C.R. 866 (Can.).
178 See MacCallum, Milgaard Inquiry, supra note 7, at 301-03.
179 Id. at 301, 404. The commission did find that the defense lawyer was deprived of an opportunity to cross-examine a key witness who testified that she did not remember making a statement incriminating Milgaard even though the trial judge then allowed her previous statement to be read to her. Id. at 406. These conclusions can be seen as an affirmation of faith in the ability of adversarial cross-examination to reveal the truth.
preventing wrongful convictions is that while defense performance can be improved in the average case, problems will still remain in the most egregious cases. Constitutional standards of ineffective assistance of counsel in both Canada and under federal law in the United States are very deferential towards lawyers and will not likely prohibit much defense work that contributes to wrongful convictions. Bar societies have not done a particularly good job in disbarring lawyers on competence grounds. Even if it functions well in most cases, the adversary system is particularly vulnerable in those cases where one party is not effectively represented or resourced. This inherent weakness of the adversary system helps explain why there is interest in adversary systems for reforms that have implicit or explicit inquisitorial elements as a means to prevent and remedy wrongful convictions of innocent persons.

IV. Some Inquisitorially-Inspired Remedies for Wrongful Convictions

This section will outline some inquisitorially inspired reforms that might help prevent or remedy wrongful convictions. There are some common analytical features to inquisitorially inspired reforms. They rely on a more proactive stance by the judge and the state in ensuring that criminal cases are resolved in a manner that discovers the truth of the allegation. Inquisitorial features generally place less reliance on party presentation of the evidence and the strategic decision-making of the parties in resolving the case.

The idea in this section is not to suggest that features of inquisitorial systems could simply be transplanted or even borrowed by adversarial systems. The end result of any reform

---


181 See generally Bernhard, supra note 180 (noting the relatively low standard of competence for a counsel's performance).
will inevitably be shaped by the particular legal and political cultures of each jurisdiction. Moreover, there would be differences in how different adversarial systems would adapt to inquisitorially inspired reforms. For example, the United States, with its deep commitments to the adversary and jury systems, might be more resistant to some inquisitorially inspired reforms than the United Kingdom or Canada, where judges already play a greater role in instructing juries about the facts. The danger that adversary systems may resist reforms if they are presented in explicitly inquisitorial terms, however, can be overstated. In 2002, Barry Scheck and Peter Neufeld stopped short of recommending the creation of American criminal cases review commission patterned after the British Criminal Cases Review Commission. This was in part because they feared that such proposals “could be too easily, albeit unfairly, attacked as requiring large government bureaucracies based on un-American notions of an inquisitorial justice system that would squander precious law enforcement funds on prisoners making frivolous claims.” Even at the time, however, other American commentators advocated the adoption of such an institution. In 2006, North Carolina became the first North American jurisdiction to create such a body when it created

182 See, e.g., Langer, supra note 23, at 3 (explaining that the importation of American style plea bargaining, a characteristic of the American adversarial system, takes on new characteristics when used in other judicial systems such as Germany, Italy, Argentina, and France).

183 See, e.g., Sklansky, supra note 23, at 1682 (arguing that the U.K. and continental European nations have more exposure to each other’s systems through international tribunals and that these systems have differing roles for judges and litigants). Despite its geographical location, Canada might also be more receptive to inquisitorial-based reforms given the role of judges in instructing juries about the facts and the prevalence of bench trials in Canada. See, e.g., Friedland, supra note 84, at 120 (arguing that criminal defendants in Canada choose judge-alone trials more often than defendants in the United States).


185 Id.

the North Carolina Innocence Inquiry Commission.\textsuperscript{187} This Commission has robust powers to investigate claims of factual innocence and to refer suspected wrongful convictions back to the courts.\textsuperscript{188} Both adversarial and inquisitorial systems have proven able to accept reforms inspired by the other systems in part because the differences between the two systems can be overstated and in part because each system will place its own stamp on reforms drawn from the other system. Contemporary concerns about wrongful convictions have the potential to allow both adversary and inquisitorial systems to adopt reforms inspired by the other system.

\textit{A. An Increased Role of Judges in Preventing Wrongful Convictions}

One remedy that could assist in preventing wrongful convictions is to have the judge take a more active role at various junctures of the trial process. George Thomas III has recently recommended radical changes to American criminal procedure that are inspired from continental procedures.\textsuperscript{189} He recommends that judicial officials or “magistrates” be involved in ensuring the reliability of identifications, confessions, and any jailhouse informers who may testify.\textsuperscript{190} He also recommends that such judicial officials supervise disclosure and plea bargaining and that they conduct a more robust pre-screening of cases before the cases go to trial.\textsuperscript{191}

As described above, a recent Ontario inquiry has suggested that judges should be more active in determining the threshold reliability of expert forensic evidence.\textsuperscript{192} Although concerns have been raised that stricter \textit{Daubert} standards may frequently result in the exclusion of expert evidence called by the accused than the prosecutor,\textsuperscript{193} they have the potential to prevent the prosecutor


\textsuperscript{188} See N.C. GEN. STAT. §15A-1460, 1461-1475 (2008).


\textsuperscript{190} See \textit{id}.

\textsuperscript{191} \textit{Id}.

\textsuperscript{192} See supra note 37 and accompanying text.

\textsuperscript{193} Peter Neufeld, \textit{The (Near) Irrelevance of Daubert to Criminal Justice}, 95 AM. J.
from relying on forensic evidence of dubious reliability.\textsuperscript{194} It is also important for judges to go beyond binary decisions about the admissibility or inadmissibility of expert evidence and to evaluate whether the language used by the expert is appropriate given the evidence and the scientific theory. Such enhanced judicial controls could address the dangers of overstating the science, but they will require trial judges to abandon a passive role and to become more knowledgeable about the scientific evidence in question.\textsuperscript{195}

One limit on the ability of the judge to assume a more active role in the adversary system is the idea that the jury should have a monopoly on making factual and credibility determinations. In his report on three wrongful convictions in Newfoundland, the late Antonio Lamer, the former Chief Justice of Canada, recommended that trial judges have an increased role in taking weak cases away from juries.\textsuperscript{196} He made these comments in a case where a man had been wrongfully convicted of murdering his mother in part on the basis of post-offense conduct and footprint evidence.\textsuperscript{197} He reasoned that, "the recent spate of demonstrated convictions of innocent persons is proof that juries are not always reliable. It is no longer acceptable for the criminal justice system to place blind faith in the perceived innate good sense of juries." He recommended that the trial judge be allowed, on his or her own motion, to take a case away from the jury in instances where the evidence was manifestly unreliable on any essential element of the offense, including cases where the only evidence of identification was circumstantial evidence of motive or opportunity.\textsuperscript{198} Although

\begin{small}
\textsuperscript{194} For a recent Canadian case, see R. v. Trochym, [2007] 1 S.C.R. 239, 240 (Can.) (excluding post-hypnosis eyewitness identifications as unreliable).


\textsuperscript{196} See THE LAMER INQUIRY, supra note 69, at 167-68.

\textsuperscript{197} See id.

\textsuperscript{198} Id.

\textsuperscript{199} See id. at 164. (stressing the importance of assigning judges with criminal law experience to serious criminal cases). Again, this recommendation can be seen as a movement in the direction of an expert judiciary that is a feature of continental systems.
\end{small}
such an approach has not yet been implemented in Canada, it demonstrates a willingness to inject reforms that require judges to be more active in assessing the reliability of evidence and of a conviction. Such reforms are a way of introducing inquisitorial elements into the adversary jury trial that has traditionally reserved all findings about the credibility and sufficiency of the evidence to the jury.

Another example of increased judicial participation is the use of judicial warnings to juries about suspect forms of evidence. As discussed above, British-based systems generally allow trial judges more latitude than found in the United States to review factual evidence and to issue warnings about suspect forms of evidence. Judicial warnings on issues such as the frailties of identification evidence and the dangers that accomplices may give false testimony are seen in Canada as a means by which amateur juries can benefit from the accumulated experience of the professional judge. Given the reluctance of trial judges to exclude evidence on reliability grounds, judicial warnings to juries may be seen as a second best strategy that draws on the knowledge and expertise of a professional judiciary in a jury system.

The idea that wrongful convictions could be decreased through a more active judicial role is not limited to the work of trial judges. The Royal Commission on Donald Marshall’s Prosecution criticized the judges who heard Marshall’s first appeal from his wrongful conviction for murder for ignoring critical legal errors at trial that were apparent from a reading of the transcript but were not raised by Marshall’s lawyers on appeal. The adoption of such a practice would temper reliance on party definition of the issues in an adversarial system, but would help vindicate the public interest in properly conducted trials.

200 See supra note 186 and accompanying text.


202 See HICKMAN, MARSHALL REPORT, supra note 7, at 87.

203 But see Hon. Michael Kirby, Miscarriages of Justice—Our Lamentable Failure?, 17 COMMONW. L. BULLETIN 1037, 1048 (1991) (warning that appellate judges do not generally have the time to read all the evidence and that rather they “visit the evidence, on the invitation of competing counsel, skipping from one passage to another. Rarely do they capture the subtle atmosphere of the trial.”).
Appeal courts in Canada often hear extensive fresh evidence in cases of suspected wrongful convictions. In the Stephen Truscott case, for example, extensive new forensic evidence about the victim's time of death was heard on appeal.\(^{204}\) The hearing of fresh evidence in that case was done in an adversarial context, but the Court of Appeal discounted the evidence given by two expert witnesses called by the prosecution on the basis that the experts had taken a dogmatic and adversarial approach and did not engage with the evidence that went against their opinion.\(^{205}\) In other cases, however, Crown prosecutors have agreed that the conviction was a miscarriage of justice in light of newly discovered evidence. An appeal in the William Mullins-Johnson case heard from only two witnesses, the wrongfully convicted man and Ontario's chief forensic pathologist, who testified that the medical evidence did not support Mullins-Johnson's conviction of sexually assaulting and murdering his young niece.\(^{206}\) To the extent that the reversal of the conviction in this case relied on only one expert, it took a more inquisitorial form. The prosecutor's concession in this case was consistent with the idea that prosecutors are not pure adversaries and have an overriding obligation to see that justice is done.\(^{207}\)

Appeal courts in Canada not only have the power to hear new evidence when the interests of justice desire, but they also have powers to appoint special commissioners to conduct investigations.


\(^{205}\) See id. ¶ 241.


\(^{207}\) See, e.g., Boucher v. The Queen, [1955] S.C.R. 16, 23-24 (Can.) ("It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. . . . The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.").
and report back to the Court of Appeal.208 Although not frequently used, such provisions demonstrate how adversarial systems can incorporate inquisitorial features. This power has been used in at least one Canadian wrongful conviction case in which a trial court judge was appointed as a special commissioner to investigate the recanting witnesses.209 Over a month, the special commissioner interviewed twenty-two witnesses, examined ninety-seven exhibits and prepared a two-volume report that detailed lack of full disclosure to the accused, problems with recanting witnesses and a failure of the police to investigate other viable suspects.210 As a result of the commissioner’s investigation, the accused was acquitted on appeal.211 In another case, a retired judge was appointed by the Court of Appeal to investigate a claim of ineffective assistance of counsel.212 The commissioner found that counsel had made a tactical decision not to use a tape where the complainant is recorded denying being sexually abused by the accused. The commissioner and subsequently the Court concluded that counsel’s decision not to use this tape did not result in a miscarriage of justice or affect the reliability of the conviction.213 Although the conclusion in the latter case can be questioned, the use of this procedure demonstrates how inquisitorial inquiries can be of assistance in cases where miscarriages of justice are suspected.

In England and Wales, the Court of Appeal had a similar power to that of the Canadian Courts of Appeal to appoint an investigating commission.214 This power has, however, rarely been used, and the 1993 Royal Commission on Criminal Justice215

210 Id.
211 See id. at 33.
213 Id.
214 See Criminal Appeal Act, 1968, 16 & 17 Eliz. 2, c.19 § 23(4) (Eng.).
215 The Royal Commission resisted the idea that the Court of Appeal should “supervise or direct police or other investigations” in part because of the separation of judicial and executive functions. It recommended that the proposed new independent commission, in addition to deciding whether claims of miscarriage of justice merited referrals back to the court, should also have a duty when requested by the Court to investigate matters and report back to the Court of Appeal. See ROYAL COMMISSION ON
recommended that the Court of Appeal be given a new power to
direct the Criminal Cases Review Commission (CCRC) to
investigate matters that would be helpful in determining an appeal
including whether to grant leave to appeal.\textsuperscript{216}

In its 2008 annual report, the CCRC reports that eleven such
referrals were ordered and many related to allegations of jury
contamination.\textsuperscript{217} The Court of Appeal in turn has observed:

The Court has needed to call upon the CCRC this year to
investigate a number of sensitive and complex issues. Of
particular note was the Commission’s willingness and
expediency in investigating allegations of juror bias in a
number of conjoined appeals (none of which had been
referred to the Court by the Commission) listed to consider
the impact of the composition of juries and the appearance
of bias. . . . In respect of two of the cases, the Commission
were able to undertake their investigations into two jurors
(said to be prison officers) and report their findings to the
Court within 6 days. Their findings were conclusive and
resulted in a great saving in terms of argument before the
Court and delay to the hearing of the matters.\textsuperscript{218}

These observations affirm that appeal courts can be assisted by
inquisitorial inquiries.

Judges can in some cases also conduct their own inquiries. Judicial
inquiries into suspected wrongful convictions are available in the Australian state of New South Wales. The judges
heading such inquiries can be appointed either by the government
or by the Supreme Court itself. The inquiries are conducted under
general legislation providing for royal commissions that provide
judges with investigative powers.\textsuperscript{219} Judicial use of such

\begin{footnotes}
\item[216] See Criminal Appeal Act, 1995, 43 & 44 Eliz. 2, c. 35 §15 (amending Criminal
\item[217] See CCRC, ANNUAL REPORT 2007-2008 at 18 (2008), available at
http://www.ccrc.gov.uk/CCRC_Uphloads/Annual%20Report%202007%20-
%202008.PDF.
\item[218] COURT OF APPEAL CRIMINAL DIV., REVIEW OF THE LEGAL YEAR 2007-2008 at 20
(2009).
(procedures for appointment and conduct of judicial inquiries into convictions and
sentences).
\end{footnotes}
inquisitorial powers has led to convictions being quashed in New South Wales.\textsuperscript{220}

The fact that Courts of Appeal in Canada, England, and Australia can order other bodies to conduct investigations for them indicates that appellate courts in adversarial systems can draw on some of the investigative powers and resources that are typically associated with inquisitorial systems. In the United States, a judge was appointed to inquire into misconduct relating to forensic evidence given by Fred Zain. The judge was assisted by a court-ordered investigation of Zain's work by other forensic experts. After finding gross and systemic misconduct by Zain, the judge ordered that Zain's testimony should be deemed invalid and unreliable in any subsequent habeas corpus proceeding.\textsuperscript{221} This represents a proactive judicial investigation and audit of a category of cases that would not normally be expected in a party-initiated adversary system where judges are thought to play a passive role. All of these examples suggest that when necessary judges, in adversary systems can take on a proactive role to discover and prevent wrongful convictions.

B. Innocence Procedures

There are concerns that the adversary system and, in particular, its reliance on jury verdicts may be vulnerable to faulty decision-making on questions of pure fact as opposed to questions of mixed fact and law. Examples of the former would be the question of whether a crime was committed or whether the accused actually committed the crime while examples of the latter would include questions such as whether the accused acted reasonably or had the required degree of fault to be held criminally responsible. In response to these perceived weaknesses, commentators have proposed various ways for the accused to signal and isolate pure factual questions that could lead to wrongful convictions so that triers of fact and appellate courts may pay special attention to these factual issues. One commentator has proposed that the defense be allowed more freedom to call expert evidence that may


be relevant to such factual questions and that appellate courts should undertake a more searching scrutiny of the safety of the jury's verdict on such questions.222

Another commentator has proposed that accused should be able to plead innocence in addition to the traditional plea of not guilty.223 In innocence cases, it is proposed that the accused would have to waive both the right to silence and the right to solicitor-client privilege.224 The police would not be obliged to investigate the accused's claim of innocence, but adverse inferences could be drawn from their failure to do so.225 Although this proposal is presented as inquisitorial, it does not examine any continental procedure. Even a cursory examination of such systems would indicate that it is possible to require the police and prosecutors to follow lines of investigation proposed by the accused and that such procedures do not necessarily have to result in waivers of the right to silence or right to counsel. It is important to avoid stereotyped and archaic notions that see inquisitorial systems as incompatible with rights protection.

Another type of innocence procedure would be innocence hearings to provide a person with the opportunity to go beyond a not guilty verdict and to obtain some official declaration of innocence. Writing in 1932, Edwin Borchard praised European countries for providing indemnity for innocent people who had been wrongfully convicted, sometimes even in cases where the conviction was overturned on the first appeal. He wrote:

In Europe, the opportunity to assert and prove innocence is practically always available before the courts, on a petition for revision of the sentence. It is therefore appropriate that the court which finds the innocence of the accused and which has all the evidence before it, shall at the same time determine whether he merits an indemnity from the state.226

224 See id.
225 See id.
226 BORCHARD, supra note 9, at 405.
Borchard clearly saw European systems as more concerned about truth and innocence than Anglo-American adversary systems.

Concerns have been raised in Canada about the practice of prosecutors entering stays of proceedings in cases of suspected miscarriages of justice which hold the prosecution in abeyance and deprive the wrongfully convicted of a not guilty verdict. A Manitoba Commission of Inquiry in 2007 disapproved of the use of prosecutorial stays in miscarriage of justice cases on the basis that they deprive the previously convicted person of a verdict. In most cases, the appropriate procedure would be for the prosecutor to call no evidence so that the accused received the benefit of a not guilty verdict. If a stay is used, it should be approved by the Attorney General and generally replaced by a not guilty verdict if new evidence justifying a new trial is not discovered with a year. This recommendation appeals to the notion that the prosecutor is not a pure adversary but rather is concerned that justice be done.

The Commission also recommended that the desirability of innocence hearings be further studied in conjunction with issues of compensation for the convicted person. Compensation in Canada generally requires a finding of innocence beyond a not guilty verdict. Subsequently, criminal appeal courts in Canada have found that they do not have jurisdiction to make official declarations of innocence. Although there are serious concerns that innocence procedures might devalue the meaning of the not guilty verdict, the lack of such procedures is a testament to a lack of official concern about innocence.

---

227 See LeSAGE, DRISKELL INQUIRY, supra note 7, at 130-33; see also THE LAMER INQUIRY, supra note 69, at 317.

228 See LeSAGE, DRISKELL INQUIRY, supra note 7, at 138-44.

229 See LeSAGE, DRISKELL INQUIRY, supra note 7.

230 See id.


232 The accused’s case for compensation as well as the accused’s exoneration and rehabilitation within society often depend on a finding that the accused is innocent. It may be artificial to assume that the presumption of innocence will effectively protect a person who has been wrongfully convicted. See Kent Roach, Exonerating the Wrongfully Convicted: Do We Need Innocence Hearings?, in HONOURING SOCIAL JUSTICE 57 (Beare ed. 2008).
C. Continental Appeal and Revision Proceedings on the Facts

Although common law systems differ in their receptiveness of fact-based appeals, appeals are generally oriented towards revealing mistakes of law. In contrast, many continental systems allow generous fact-based appeals or retrials. The apparent willingness of continental systems to reconsider factual findings may indicate the primacy that they accord to the discovery of the truth, over the final settlement of disputes and ensuring respect for legal rights which seem to be the major concerns of adversarial systems. In the wrongful conviction context, fact-based appeals and reviews seem promising in light of studies which suggest that appeals on questions of law, including questions of constitutional violations, have generally been ineffective in correcting cases that have later turned out to be wrongful convictions.

In both Germany and the Netherlands, the first level of appeal is heard by trial de novo with subsequent appeals being centered on alleged legal errors that are the focus of most appeals in Anglo-American systems. In Germany, either the prosecutor or the defense can call for a re-opening of a case in favor of a convicted defendant. Although viewed as extraordinary, a study in the 1960s determined that this power was used to re-open 1600 cases over a thirty year period. In France, decisions of assize courts can also be appealed de novo, and in 2002 this was done in about

---

233 See Griffin, supra note 186 at 1243-44.
234 See id. at 1269-71; Garrett, supra note 126, at 125-26.
235 See, e.g., van Koppen, supra note 71, at 51; THOMAS, supra note 189, at 179 (discussing French appeals by way of new trials).
236 See Garrett, supra note 126, at 69, 126-27.
237 See Brants, supra note 125, at 167 (discussing the Dutch system); Weigend, supra note 45, at 268-69 (discussing the German system); van Koppen, supra note 71, at 54 (discussing the Dutch system and the occurrence of appeals in about thirty percent of cases).
238 Isabel Kessler, A Comparative Analysis of Prosecution in Germany and the United Kingdom Searching for Truth or Getting a Conviction?, in WRONGFUL CONVICTION INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE, supra note 8, at 213, 220.
239 Id.
sixteen percent of cases.\textsuperscript{240} Such appeals are heard by three professional judges and twelve jurors, and they allow fresh determinations on all issues of fact, law, and sentencing under much of the same procedures used at the initial trial.\textsuperscript{241} Similar de novo appeals are available from lower court judgments.

In many adversarial systems, a likely objection to the introduction of broad appeals on facts or trial de novo would be that they have the potential to swamp the courts in appeals. Indeed, many adversarial systems already struggle with their limited capacity for trials given their high volume caseloads. Many continental systems make more sparing use of the criminal sanction than the United States and even the United Kingdom and Canada.\textsuperscript{242} These differences are related to cultural and political factors,\textsuperscript{243} but they may also be related to the more limited capacity of inquisitorial trial and appeal systems to accommodate high volumes of cases.

In France, there is a formal procedure that allows for revisions of serious criminal convictions in cases where these robust appeal rights have been exhausted. The Minister of Justice or the accused can apply to a five judge commission of revision which has the ability to refer the case to a revision court on limited grounds, with the most important being that a new fact has occurred or has been discovered after conviction which is liable to raise doubts about the conviction.\textsuperscript{244} Both the revision commission and the revision

\textsuperscript{240} See Frase, supra note 45, at 235, 237.

\textsuperscript{241} Id. at 236; see also Bron McKillop, Review of Convictions After Jury Trials: The New French Jury Court of Appeal, 28 SYDNEY L. REV. 343, 348-49 (2006) (addressing the difference in the composition of the assize courts and the courts that hear appeals).

\textsuperscript{242} See, e.g., Richard S. Frase, Sentencing Laws & Practices in France, 7 FED. SENT’G REP. 275, 275 (1995); see also Roy Walmsley, World Prison Population List (fourth edition), HOME OFFICE, 2003, at 3, 5, http://www.homeoffice.gov.uk/rds/pdfs2/r188.pdf (specifying the worldwide prison populations, with the United States having a prison population of 686 per 100,000 of the national population, Canada 102 per 100,000, England and Wales 139 per 100,000, while France has one of 85 per 100,000 and Germany 96 per 100,000). But see id. at 5 (revealing that Russia has a prison population of 638 per 100,000 of the national population).

\textsuperscript{243} See, for example, Frase, supra note 242, at 279, for a discussion of the different political factors.

\textsuperscript{244} See C. PR. PÉN. arts. 622-23 (Fr.), available at http://195.83.177.9/upl/pdf/code_34.pdf (English translation) (listing the additional grounds for revision, which include: evidence suggesting a homicide victim is still alive; another person being found guilty of the offense in a verdict that is inconsistent with the convicted person’s guilt;
court have powers to conduct appropriate inquiries and investigations in addition to hearing representations from the accused and the prosecutor before deciding whether to quash the conviction, and if necessary, to require a new trial.  

Although the French power of revisions looks strong on paper, it is rarely exercised. One commentator has observed that over 2,000 demands have been filed with the commission of revision since the enactment of the law in 1989, but only fifty-four have been transferred to the commission with thirty-two verdicts being repealed and six reviewed trials resulting in an acquittal. The conclusion is drawn that "many judicial errors go undetected or, at least, uncorrected [because of] the extremely narrow scope of the power of revision as outlined here..." These facts provide a timely reminder not to romanticize or overestimate the ability of inquisitorial systems to prevent or remedy wrongful convictions. Nevertheless, the French revision procedure at least provides the judiciary an ability to engage in self-correction on factual matters after appeals have been exhausted.

D. Investigative Innocence Commissions

Another reform that is in part inspired by inquisitorial procedures is the appointment of commissions with powers to investigate allegations of wrongful convictions. One of the most established commission in this regard is the Criminal Cases Review Commission for England, Wales and Northern Ireland. In 2006, North Carolina created a commission with powers to investigate claims that people have been wrongfully convicted. Both of these commissions are examined elsewhere.

and a witness in the initial trial having been convicted of perjury in relation to his or her testimony).

245 See id. arts. 623, 625.


247 Id. at 258.


249 See Maiatico, supra note 187.

here will be on the Canadian experience and how demands for investigative commissions reveal dissatisfaction about the ability of adversarial procedures based on party investigation and presentation of the evidence to reveal the new evidence that is often necessary to reverse wrongful convictions. The limitations of investigative commissions also will be briefly examined because they demonstrate some reservations about reliance on state-based investigation as the exclusive means to uncover wrongful convictions.

In Canada, six different commissions of inquiry have addressed the benefits of the British CCRC, with some specifically recommending the creation of an independent commission patterned after the CCRC to investigate claims of wrongful convictions.\(^{251}\) The Canadian government has not followed these recommendations, so the federal Minister of Justice still makes the decision to order new trials or new appeals if there is a reasonable basis to believe that a miscarriage of justice occurred.\(^{252}\) In part because of this high standard for re-opening convictions, both the numbers of applications for review and the number of actual referrals are far less than in the United Kingdom, even when Canada’s smaller population is considered.\(^{253}\)

The Canadian procedure was changed in 2002 to give both the Minister and a person delegated by the Minister the same investigative powers as a Canadian commission of inquiry.\(^{254}\) The

---

251 See Cory, Sophonow Inquiry, supra note 7, at 291; Gouge, Pediatric Inquiry, supra note 7, at 538-41; Hickman, Marshall Report, supra note 7, at 145; Kaufman, Morin Proceedings, supra note 7, at 1237-39; Lesage, Driskell Inquiry, supra note 7, at 121; MacCallum, Milgaard Inquiry, supra note 7, at 389-90, 411. See generally Roach, supra note 250.


253 From November 2002 to March 2009, 83 applications for reviews were decided by the Minister of Justice. 73% of the applications were closed because there was no ground for investigation, and 14% of the applications were referred back to the courts. See Criminal Conviction Review Group Annual Report 2009, http://www.justice.gc.ca/eng/pi/ccr-rc/rep09-rap09/p5.html#s3. In contrast, the British Criminal Case Review Commission considered 919 applications and referred 39 cases to the appeal courts in just one year. See Criminal Case Review Commission, Annual Report and Accounts 2008-2009 at 6 (2009), available at http://www.crcr.gov.uk/CCRC_Uploads/ANNUAL_REPORT_AND_ACCOUNTS_2008_9.pdf.

Minister’s delegate is required to be a good standing member of the bar of a province, a retired judge, or a person with similar background and experience.255 These investigative powers mean that the Minister’s delegate has full powers to subpoena documents and compel the attendance of witnesses.256 These powers are in law stronger than those available to the CCRC because they extend to the compulsion of private persons. They represent a willingness to use inquisitorial powers of investigations within an adversary system to investigate claims of wrongful convictions. That said, complaints are frequently made in Canada that the wrongfully convicted have to assemble new evidence before the Minister of Justice decides to use the investigative powers.257 Such complaints echo those of the “reactive” approach taken by officials in the Home Secretary’s department in Britain prior to the creation of the CCRC, when that department had responsibility for referring possible miscarriages of justice to the Court of Appeal.258

The expectation that the applicant be able, independent of subsequent investigation by the Minister or his delegates, to present new evidence is found in section 696.4 of the Canadian Criminal Code, which directs the Minister of Justice to consider “whether the application is supported by new matters of significance that were not considered by the courts [and] the relevance and reliability of information that is presented in connection with the application.”259 This sends a clear signal that the initial application needs to contain decisive new evidence even before it is amplified by the Minister’s investigations. In contrast, the British Criminal Case Review Commission does not expect that applicant to have done independent investigative work before

---

255 See id.
256 See id.
applying to the Commission.\textsuperscript{260}

In some high profile cases, the Minister of Justice has delegated his investigative powers to respected independent people. For example, a retired judge, Fred Kaufman, who was also commissioner in the Guy Paul Morin inquiry, was appointed in 2002 and conducted an extensive investigation into the 1959 murder conviction of Stephen Truscott.\textsuperscript{261} His investigation included interviews with twenty-four different witnesses, obtaining production of documents from some of them, and preparing a preliminary investigative summary upon which both prosecutors and those representing Mr. Truscott made submissions.\textsuperscript{262} After this investigation was completed in 2004, the Minister of Justice ordered a new appeal and Truscott’s conviction was overturned in 2007.\textsuperscript{263}

Taken by itself, the Truscott procedure would suggest that the Canadian system is capable of engaging in extensive independent investigation. Although the investigation can add value, however, the expectation is that the applicant will be able to present evidence to the Minister of Justice that, in itself, provides grounds for concluding that a miscarriage of justice likely occurred. Truscott was represented by expert lawyers who volunteered their time to work with the Association in Defense of the Wrongfully Convicted.\textsuperscript{264} From 1997 to 2002, these lawyers conducted extensive investigations on Mr. Truscott’s behalf. These investigations produced evidence from numerous archives that revealed that full disclosure had not been made in the 1959 trial, as well as affidavits sworn by many expert and lay witnesses that were considered as decisive, fresh evidence both by Mr. Kaufman in his investigative role and eventually by the Court of Appeal that overturned Truscott’s conviction.\textsuperscript{265} In practice, the Canadian

\textsuperscript{260} MACCALLUM, MILGAARD INQUIRY, supra note 7, at 380-82.


\textsuperscript{262} See id. ¶¶ 13-14.

\textsuperscript{263} Id. ¶¶ 6, 23, 787.


system requires significant adversarial investigation and discovery of new evidence before the investigative powers of the Minister of Justice or his or her delegate will be used.

Those who advocate for a permanent and independent commission patterned after the British CCRC argue that removing the investigative powers from the Minister of Justice would place less of a burden on applicants to investigate their own cases. There is likely some truth to this claim, but it also likely that applicants with strong cases and legal representation would continue to do their own investigation and not place all their reliance on the state’s investigations, even if conducted by an independent commission. Indeed, there are some signs that there is increased independent legal representation of applicants in the British CCRC system and that successful applicants who have their cases referred to the Court of Appeal for re-consideration (only about four percent of all applicants) are significantly more likely to have legal representation than the vast majority of applicants whose applications are rejected by the CCRC.266 In addition, Norway’s Criminal Case Review Commission appoints defense counsel to assist an applicant in complicated cases and in cases where there are concerns that the applicant should have been held not guilty by reason of insanity.267 In 2008, the Norwegian Commission appointed defense counsel in 26 of 143 petitions decided on the merits and in 2007, it appointed defense counsel in

266 See Jacqueline Hodgson & Juliet Horne, The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC) 4, 16 (May 2008) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483721 (explaining that “[o]f the 219 cases referred back to the Court of Appeal during 01-07, 63.5% were legally represented. Of the 2,248 cases rejected as ineligible or having no reviewable grounds, 29% were legally represented.” These findings only describe correlation between legal representation and referral as opposed to causation in the sense that legal representation resulted in referral. Nevertheless, the researchers also conducted qualitative analysis that identified cases where legal representation plays a critical role for applicants, for example, with respect to applications that the CCRC initially rejects, but then reconsiders. Such cases constituted 11 of 74 cases that were referred by the CCRC to the courts between 2005 and 2007).

51 of 196 petitions on their merits. Even within a state-based system that has a mandate to investigate whether there has been a miscarriage of justice, there will be an understandable reluctance to give up the possible advantages of adversarial representation and to rely solely on state-based inquisitorial investigations.

All of the commissions of inquiry that have examined the Canadian process for re-opening convictions have expressed dissatisfaction with it. For our purpose, the most noteworthy aspect of these proposals is their overt appeals to inquisitorial themes. One Manitoba commission of inquiry expressed concerns "about the adversarial nature of the present process." It indicated that the police were reluctant to disclose information to the convicted offender until an official application for Ministerial review had been made, but that such an application would generally require new evidence that only the police might possess. It noted that "an independent inquisitorial body" such as the British CCRC would have the ability to commence an investigation "of its own initiative" and to obtain information that would not normally be available to the offender. The Ontario Inquiry into Pediatric Forensic Pathology also made similar observations that a convicted person could be placed in a "Catch-22" situation by being unable to obtain legal funding for a Ministerial application unless new evidence was obtained by the convicted person. It observed that in cases involving forensic pathology, “[f]inding and retaining experts may well be difficult and expensive” and that either a CCRC body or an enhanced “investigative role” for the lawyers who presently advise the Minister of Justice would be appropriate in cases where the conviction may have been based on faulty forensic evidence.

The Milgaard Commission raised similar concerns that an offender had “the onus of investigating his own wrongfu

---


269 LÉSAGE, DRISKELL INQUIRY, supra note 7, at 121.

270 See id.

271 Id. at 121-22.

272 See GOUDGE, PEDIATRIC INQUIRY, supra note 7, at 540.

273 Id. at 541-42.
conviction, identifying credible grounds and providing those grounds to the federal Minister together with supporting evidence.\textsuperscript{274} It identified seven problems with placing such an onus on an offender: 1) The typically incarcerated offender lacks the resources and experience to investigate; 2) the offender often lacks legal assistance; 3) the convicted offender is not in a good position to learn about new evidence; 4) the convicted person does not have coercive powers to obtain evidence or compel witnesses; 5) it can be counterproductive if the convicted person succeeds in contacting witnesses; 6) the convicted person will inevitably take longer to investigate the case than state officials; and 7) "[t]he process would be better served by a proactive and inquisitional approach on the part of legal counsel for the Minister.\textsuperscript{275} The commission discussed the role of the CCRC in investigating cases once it has received an application, concluding that "[t]he CCRC brings a non-adversarial and inquisitorial approach to the process of conviction review. . . .\textsuperscript{276} Leaving aside the accuracy of these perceptions of the CCRC, given the increasing role that legal representation of applicants play, the Milgaard Commission's comments demonstrate a widespread appetite among reformers in Canada for the creation of an independent body that will bring state resources and powers to bear upon the investigation of suspected wrongful convictions.\textsuperscript{277} Indeed, it is significant that two of these three recent commissions chose to stress that what was needed was an inquisitorial rather than an adversarial body.

\textsuperscript{274} MacCallum, Milgaard Inquiry, supra note 7, at 356.
\textsuperscript{275} Id. at 373.
\textsuperscript{276} Id. at 390.
\textsuperscript{277} But see Clive Walker & Carole McCartney, Criminal Justice and Miscarriages of Justice in England and Wales, in Wrongful Conviction: International Perspectives on Miscarriages of Justice, supra note 8, at 183, 195-200 (suggesting that some applicants are not satisfied with the investigations conducted by the CCRC and criticizing the CCRC for using police in some cases to re-investigate; its backlog of cases; the paucity of reasons in rejecting the vast majority of applications; and its practice of rejecting cases on the decision of one commissioner while requiring three commissioners to agree to a referral to the Court of Appeal. Walker and McCartney additionally note that the number of applications prepared with legal assistance increased from ten to thirty percent between 1997 and 2000 and that a number of judicial reviews have been taken against the CCRC, which has been criticized by dissatisfied applicants as too deferential to the standards that will be used by the Court of Appeal to determine whether a conviction should be quashed).
IV. Conclusion

Recent widespread revelations of wrongful convictions provide an excellent opportunity to re-evaluate the strengths and weaknesses of the adversary system. Some of the causes of wrongful convictions, particularly those relating to inadequate defense counsel and the entry of guilty pleas, are directly related to the weaknesses of adversary systems. Compared to continental systems, the adversary system places less of a premium on the discovery of truth about allegations of criminality and more on resolving disputes in a manner where parties have a formal opportunity to present their case and make decisions in their own self-interest. Many of the reforms advocated to respond to wrongful convictions, particularly the creation of commissions to investigate claims of wrongful convictions, would add inquisitorial features to adversarial systems. The acceptance of such commissions in England and North Carolina suggest that adversary systems have the ability to accommodate inquisitorially inspired reforms. That said, adversary systems are likely to be more resistant to more fundamental reforms such as limiting guilty pleas or keeping evidence of contested reliability away from the jury.

Before the inquisitorial system is accepted as the answer to the wrongful conviction problem, however, attention should be paid to the limits of the continental system. Indeed those concerned about wrongful convictions in countries such as the Netherlands have bemoaned "the lack of adversary debate at trial, which would force judges to listen to the other side of the story and to consider possible alternatives to the defendant’s guilt." Countries such as France have had to broaden their procedures to reconsider cases that may be miscarriages of justice. In continental systems, the same premium is placed on finding new evidence as in adversary systems. Few legal systems will abandon the concern about finality that makes it so difficult to obtain post-conviction remedies for the wrongfully convicted. The operation of Norway’s Criminal Cases Review Commission has revealed a significant number of cases where people have been wrongly convicted in that country which employs an inquisitorial system.

278 Brants, supra note 125, at 178.
279 See supra note 268 and accompanying text.
In addition, that Norwegian Commission stresses its independence from the courts and it frequently appoints defense counsel to assist in the investigation of applications to re-open convictions. Wrongful convictions occur in inquisitorial systems and many in those systems look to adversarial-inspired reforms as a mean of both preventing and remedying wrongful convictions.

Some of the lessons of wrongful convictions in Anglo-American systems can in fact signal caution about relying on official investigations, whether they are conducted in adversarial or continental systems. The process of tunnel vision or confirmation bias, in which police and prosecutors single-mindedly focus on one suspect, would seem to be an equal or greater risk in inquisitorial systems given the centrality of official investigations. Similarly, the danger of reliance on faulty expert evidence would seem to be greater in a system that relies on court appointed experts. Both systems in this respect could benefit by facilitating adversarial challenges to official inquiries.

At the same time, however, police, prosecutors, and governmental scientists in adversary systems could benefit from a greater internalization of the idea that they are impartial seekers of the truth, a principle found in at least the official ideology of many continental systems. Accused people should be able to request re-investigation by the police, prosecutors, and government scientists without the fear that their theory will be investigated in an adversarial manner designed to shore up the prosecution’s case. Inquisitorial ideals can play a role in inspiring greater professionalism and commitment to the discovery of the truth. Nevertheless, attention should also be paid to the hypothesis that the high volume of cases that are processed through many Anglo-American justice systems encourages shortcuts and adversarial habits that diminish respect for truth-seeking.

Some have argued that adversary systems devote too much attention to ensuring respect for legal rights and not enough attention to the factual accuracy of the verdicts. Nevertheless,


281 See Pizzi, supra note 21.
the inquisitorial systems of continental Europe abide by a fairly robust set of due process rights under the European Convention on Human Rights.\textsuperscript{282} The choice between rights and reliability may be a false one. That said, Anglo-American systems would be improved by recognition of clearer rights better supporting the principles that the innocent should not be convicted and that unreliable evidence should not be admissible.

There is a fundamental ambivalence about adversary and inquisitorial systems when it comes to wrongful convictions. The grass looks greener from both sides of any fence that divides the two systems, and for good reasons. There are obvious weaknesses in the adversary system that help produce wrongful convictions, and a growing number of cases in those systems have recognized wrongful convictions. On the other hand, complete reliance on state investigations also seems dangerous, given the flaws in police, prosecutorial, and forensic expert conduct that have produced many wrongful convictions in the first place.

In the end, the optimal criminal justice system to prevent and remedy wrongful convictions is likely to combine elements of adversarial and inquisitorial procedures. Such a system should be built in recognition that each system has its own vulnerabilities when its underlying assumptions and strengths break down.\textsuperscript{283} In recognition of these weak spots, each system should incorporate fail-safe mechanisms, drawn from the other system, to counteract its particular weaknesses. Thus, adversary systems should recognize that they remain vulnerable to inadequate defense representation. They hence should allow trial judges, appellate courts, and ultimately investigative commissions to play a more active role in challenging suspect forms of evidence and determining the reliability of criminal allegations and convictions. In turn, inquisitorial systems should recognize that they are vulnerable to pre-judgment and erroneous expert opinions. They hence should allow for adversarial challenges of provisional verdicts and consider means to allow adversarial challenge to expert opinions and to the adequacy of police or judicial investigations. Each system can and should learn from the other in order to better prevent and remedy wrongful convictions.

\textsuperscript{282} See supra 128 and accompanying text.

\textsuperscript{283} Brants, supra note 125, at 177-79.