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The Protection of Innocence Under Section 7 of the Charter

Kent Roach*

Unlike debates about the proper reach of section 7 of the Charter with respect to health care or welfare rights, the idea that principles of fundamental justice would be offended by the imprisonment of the innocent is utterly uncontroversial. Indeed, as early as *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*,¹ Lamer J. stated that “[i]t has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law”.² The anxiety about the appropriate role of the judiciary that has caused the Court to pull back when giving content to the principles of fundamental justice even in other areas of criminal justice such as the imposition of fault³ or harm⁴ standards do not seem to apply to the judicial duty to protect the innocent. If any subject is within the inherent domain of the judiciary, it is the protection of the innocent from punishment.

The principle that the innocent not be punished is as compelling as it is uncontroversial. In *United States of America v. Burns*,⁵ the Court

* Professor of Law, University of Toronto. The financial assistance of the Social Sciences and Humanities Research Council with respect to this paper and a larger project on the comparative study of miscarriages of justice is gratefully acknowledged. I am very grateful to Michael Code, Patrick Healy, Dale Ives, David Paciocco, Christopher Sherrin and James Stribopoulos for very helpful comments on an earlier draft of this paper. Yaara Lemberger-Kenar provided helpful research assistance.

¹ [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at para. 69.

² *Id.*, at para. 67. The Court has repeatedly relied on this principle in subsequent cases. See *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326; *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577; *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411; *R. v. Leipert*, [1997] S.C.J. No. 14, [1997] 1 S.C.R. 281, at para. 24; *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668.

³ *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3.

⁴ *R. v. Marmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571.

⁵ [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283.

not only took notice of the tragic reality of wrongful convictions, but changed its interpretation of section 7 of the Charter in recognition of the risk that they may occur in the future.

Although the principle that the innocent not be punished is a bedrock principle of fundamental justice, it is not self-executing or easy to administer. There is a danger that the principle will be used in an ad hoc manner and as a rhetorical flourish. Properly understood, however, the principle that the innocent not be punished can be one of the unifying principles of section 7 as it relates to the administration of justice.⁶ The principle that the innocent should not be punished reflects our basic expectation that the justice system be just. It stands for an abiding commitment that our justice system will take all reasonable precautions to prevent and remedy miscarriages of justice.

The principle that the innocent not be convicted operates at two levels: one in relation to an individual case in which there is reason to think that a person may have suffered a miscarriage of justice⁷ and second in relation to systemic measures that can be taken across cases to minimize the risk of miscarriages of justice and especially wrongful convictions⁸ in future cases. Both aspects of the principle must be respected because while it is important to minimize the risks of wrongful convictions at a systemic level, systemic reforms will not be full-proof. With respect to individual cases, the Court should be guided by the principle that guilt should be established beyond a reasonable doubt and it should be reluctant to balance a reasonable possibility or a reasonable doubt about innocence against social interests. At the same time, the idea of balancing competing interests, or its more disciplined cousin of allowing proportionate restrictions on rights, is perhaps

⁶ In this paper, I focus on the criminal trial process, but the concept of miscarriages of justice can apply to other areas such as long term detention under immigration law where people are deprived of life, liberty and security of the person without “sufficient safeguards for the determination of whether the criteria for detention accurately apply to that person”. Kent Roach & Gary Trotter, “Miscarriages of Justice in the War Against Terrorism” (2005) 109 Penn. State L. Rev. 967, at 1037.

⁷ A miscarriage of justice is a broader concept than the wrongful conviction of a person who is “actually innocent”. It would include the conviction of a person in the face of a reasonable doubt or a reasonable possibility of innocence, as well as denying a person a fair trial.

⁸ A wrongful conviction is a sub-category of the broader concept of a miscarriage of justice and refers to the conviction of those who are actually innocent. Courts do not usually recognize the concept of innocence as part of the regular trial process, but they have taken notice of the conviction of the innocence and have recognized the concept of innocence in the process of re-opening convictions. See *Reference re Milgaard*, [1992] S.C.J. No. 35, [1992] 1 S.C.R. 866.

unavoidable when discussing systemic measures to minimize the risk of wrongful convictions in future cases. The latter conclusion may strike many concerned about wrongful convictions as problematic and even morally suspect. Nevertheless, I will suggest in the first part of this paper that it is supported by the writings of two of the 20th century's leading theorists of law and rights: Lon Fuller⁹ and Ronald Dworkin.¹⁰ Moreover, I will suggest that a more forthright recognition of the competing interests at stake and application of principles of proportionality when crafting systemic measures may produce more, not less, protections against the risk of wrongful convictions.

The analytical distinction between the need under section 7 to respond to the risk of wrongful convictions in future cases and the need to respond to the possibility of a miscarriage of justice in an individual case will be used throughout this paper. I will explore the implications of the dual aspects of preventing miscarriages of justice by examining the Court's decision in *United States of America v. Burns*.¹¹ In that case, the Court was concerned not so much with the risk of a wrongful conviction or a miscarriage of justice in the individual case before it, but rather with the systemic risk of a wrongful conviction in future cases should fugitives be extradited without assurances that the death penalty would not be applied. *Burns* is revealing because it engaged in a form of proportionality analysis that the Court failed to perform a decade earlier in *Kindler v. Canada (Minister of Justice)*¹² when it ruled that a fugitive could be extradited to face the death penalty. The proportionality analysis in *Burns* reached the conclusion that the state's legitimate interest in extradition could be satisfied in a less rights invasive manner by obtaining assurances that the death penalty not be applied. The use of proportionality analysis in *Burns* supports the idea that systemic reforms designed to minimize the risks of wrongful convictions will require some form of interest balancing. Moreover, it suggests that a disciplined proportionality analysis will often produce more, not less, protections for the accused.

The Court's section 7 jurisprudence on disclosure will next be examined in light of the dual aspects of protecting innocence discussed

⁹ Lon Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969), at 179-80.

¹⁰ Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), c. 3.

¹¹ [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283.

¹² [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779.

above. The Court's decision in *R. v. Stinchcombe*¹³ required full disclosure to the accused of all relevant and non-privileged information in the Crown's possession in no small part to respond to the risk, identified by the Marshall Commission,¹⁴ that lack of full disclosure could contribute to wrongful convictions in future cases. The Court boldly created a broad right to disclosure in all cases in part because of its concern about Parliament's inertia in responding to the Marshall Commission's recommendations that disclosure requirements be included in the *Criminal Code*. At the same time, however, the Court engaged in a balancing of interests and concluded that a right to disclosure would not only make the trial process fairer, but more efficient. I will also examine the Court's subsequent jurisprudence enforcing *Stinchcombe* and suggest that the Court has made a useful distinction between a broad right to disclosure that can help prevent wrongful convictions in future cases and a narrower right to full answer and defence which responds to the danger of a miscarriage of justice in specific cases before the Court.¹⁵

In the next section, I will examine how the rights of the accused to disclosure and to full answer and defence have fared in the face of legislative replies to the Court's controversial decisions in *R. v. Seaboyer*¹⁶ and *R. v. O'Connor*.¹⁷ Parliament altered the balance of interests set by the Court in an effort to assert equality and privacy rights of child and female complainants and the social interest in encouraging the increased reporting of sexual offences. The legislative activism in the Parliamentary replies to these two cases stands in stark contrast to the legislative inertia that characterizes many measures that might help prevent wrongful convictions in the future, including the accused's right to disclosure. I will examine how the Court in *R. v. Mills*¹⁸ and *R. v. Darrach*¹⁹ upheld the Parliamentary replies to its previous cases in an attempt to reconcile the rights of the accused with those asserted on behalf of complainants. I will express some concerns

¹³ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326.

¹⁴ Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queens Printer, 1989), at 238-44.

¹⁵ *R. v. Dixon*, [1998] S.C.J. No. 17, [1998] 1 S.C.R. 244; *R. v. Taillefer*, [2003] S.C.J. No. 75, [2003] 3 S.C.R. 307.

¹⁶ [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577.

¹⁷ [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411.

¹⁸ [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668.

¹⁹ [2000] S.C.J. No. 46, [2000] 2 S.C.R. 443.

that the Court's approach to reconciling rights in these cases may underestimate how these Parliamentary replies may increase the systemic risk of wrongful convictions in future cases, especially in cases where the accused may be under-represented and not prepared to bring the necessary and onerous pre-trial motions. At the same time, however, the Court in *Mills* and *Darrach* may have also read down the legislation in a manner that may allow trial judges to side with the rights of the accused in individual cases where a refusal to introduce or disclose sexual or therapeutic history evidence could contribute to a miscarriage of justice in an individual case.

This article on the protection of innocence under section 7 of the Charter lies within Lamer J.'s idea that the focus of section 7 should be on the justice system.²⁰ It is thus not surprising that the remainder of the paper will examine how section 7 of the Charter may affect police, prosecutors, defence lawyers, judges, juries and appellate courts as they administer criminal justice. I will explore how section 7 of the Charter has informed civil liability for police and prosecutorial misconduct. Starting with *Nelles v. Ontario*,²¹ the Supreme Court has rejected claims that prosecutors are absolutely immune from civil actions and have allowed civil actions for malicious prosecution. Similarly, the Court rejected claims that prosecutors should be absolutely immune from law society disciplinary action in *Krieger v. Law Society of Alberta*²² and opened the possibility that a prosecutor could be subject to professional discipline for ethical breaches in relation to non-disclosure of evidence. The availability of both civil and disciplinary remedies can help to address individual cases in which improper conduct has contributed to a miscarriage of justice. At the same time, the high standard of malice or improper purpose required in *Nelles* and *Krieger* may not have established optimal conditions for systemic reforms to decrease the risk of misconduct that contributes to wrongful convictions. With respect to police conduct, the Court in *Odhavji Estate v. Woodhouse*²³ recognized the role of negligence liability and it will soon hear *Hill v. Hamilton-Wentworth Regional Police*²⁴ which raises the important issue of

²⁰ See Jamie Cameron in this volume.

²¹ [1989] S.C.J. No. 86, [1989] 2 S.C.R. 170, at 195-96.

²² [2002] S.C.J. No. 45, [2002] 3 S.C.R. 372.

²³ [2003] S.C.J. No. 74, [2003] 3 S.C.R. 263.

²⁴ *Hill v. Hamilton Wentworth Regional Police Services Board*, [2005] O.J. No. 4045 (C.A.), leave to appeal to S.C.C. granted [2005] S.C.C.A. No. 511.

whether the police should be held liable for negligent investigative practices, in this case relating to the identification of an Aboriginal person who was wrongfully convicted of a robbery. This case will raise important issues concerning the remedies that are available to victims of wrongful convictions and systemic measures to minimize the risk of wrongful convictions in future cases.

Police and prosecutors are not the only criminal justice participants who have contributed to wrongful convictions. The Royal Commission on the Donald Marshall Prosecution recognized the role of ineffective assistance of defence counsel in that wrongful conviction.²⁵ In the next section, I will focus on adequate assistance of defence counsel by examining the Supreme Court's jurisprudence under section 7 of the Charter as it relates to the provision of legal assistance at trial²⁶ and claims of inadequate assistance after trial.²⁷ In both cases, I will suggest that the Court has recognized that un-represented or under-represented accused may in some individual cases be victims of miscarriages of justice, but that it has not defined the rights to effective assistance of counsel so as to minimize the risk of wrongful convictions in future cases. Even with respect to the danger of a miscarriage of justice in an individual case, I will argue that the Court has placed too heavy a burden on the accused to overcome a strong presumption that counsel's conduct is constitutionally adequate and to demonstrate a reasonable probability of a miscarriage of justice. This latter requirement does not fit other doctrines such as the jurisprudence on the right to full answer and defence that are responsive to a reasonable possibility of a miscarriage of justice in an individual case.²⁸

Although police, prosecutors and defence counsel all play a key role in wrongful convictions, the ultimate decision to convict is made by judges and juries. I will examine the Court's evolving approach to the need for judicial reasons to justify a conviction. After some initial hesitation, the Supreme Court has appropriately affirmed that trial judges should give reasons to justify their verdicts. Nevertheless, it has

²⁵ Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queens Printer, 1989), at 72-77.

²⁶ *G. (J.) v. New Brunswick (Minister of Health and Community Services)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46.

²⁷ *R. v. G.D.B.*, [2000] S.C.J. No. 22, [2000] 1 S.C.R. 520.

²⁸ *R. v. Dixon*, [1998] S.C.J. No. 17, [1998] 1 S.C.R. 244; *R. v. Taillefer*, [2003] S.C.J. No. 75, [2003] 3 S.C.R. 307.

refused to articulate a right to reasons under section 7 of the Charter as a systemic reform that would improve decision making and lessen the risk of wrongful convictions, but has rather tied the sufficiency of reasons to the existing grounds of appeal.²⁹ Although this provides the possibility of remedies in individual cases where there is a miscarriage of justice or an unreasonable conviction, the Court's approach begs the question of whether the existing grounds of appeal are adequate. As such, it must be understood in the context of the Court's decision to reject proposals made by the Commission on Guy Paul Morin's wrongful conviction that appellate courts should allow appeals on the basis of a lurking doubt about guilt.³⁰

The Court's approach to the reasons why juries may convict is even less satisfactory from the perspective of the protection of innocence. In *R. v. Pan*,³¹ the Court turned its back on the reasons that may have motivated a jury's decision to convict. It has also left to Parliament the overdue task of reforming the overbroad offence against disclosing the deliberations of the jury even though such matters would seem to be within the inherent domain of the judiciary and implicate section 7 concerns about the protection of the innocent. Although the Court has recognized the dangers and experience of wrongful convictions in *Burns* and other cases and has generally been attentive to claims of miscarriages of justice in individual cases, more work needs to be done in crafting optimal systemic responses to decrease the risk of wrongful convictions in future cases.

I. THE INDIVIDUAL AND SYSTEMIC DIMENSIONS OF THE PRINCIPLE THAT THE INNOCENT NOT BE PUNISHED

There are at least two dimensions to the principle of fundamental justice that the innocent not be punished. In the first dimension, the principle that the innocent not be convicted or punished relates to individual cases. In this context, it is possible to speak of an absolute rule that the innocent not be punished regardless of the consequences for society. To take the extreme hypothetical of a knowing prosecution of an innocent

²⁹ *R. v. Sheppard*, [2002] S.C.J. No. 30, [2002] 1 S.C.R. 869; *R. v. Braich*, [2002] S.C.J. No. 29, [2002] 1 S.C.R. 903; *R. v. Gagnon*, [2006] S.C.J. No. 17, 2006 SCC 17.

³⁰ Hon. Fred Kaufman, *Report on the Guy Paul Morin Prosecution* (Toronto: Queens Printer, 1998); *R. v. Biniaris*, [2000] S.C.J. No. 16, [2000] 1 S.C.R. 381.

³¹ *R. v. Pan*, [2001] S.C.J. No. 44, [2001] 2 S.C.R. 344.

person, police, prosecutors, witnesses and even judges³² who willfully and knowingly participated in the conviction of an innocent person could be guilty of the crime of obstructing justice or related crimes.³³ Prosecutors who knowingly prosecuted an innocent person would be subject to civil actions³⁴ and professional discipline³⁵ and police officers would also be subject to civil suits for the intentional tort of misfeasance in the use of a public office.³⁶ The principle that the innocent not be punished in individual cases applies not only to deliberate misconduct of the type posited above, but also to other individual cases such as applications to adduce fresh evidence³⁷ or appeals relating to undisclosed evidence or the reasonableness of the verdict.³⁸ Here the courts would be obliged to respect both the principle that the innocent not be punished, as well as the related principle of proof of guilt beyond a reasonable doubt.³⁹

Matters become more complicated and controversial when a second dimension of the principle that the innocent not be punished is considered. In this second dimension, the principle applies not to

³² Judges, however, could not be compelled by a public inquiry to explain why they convicted an innocent person or even why they sat on a case when they had a prior involvement with the accused. *MacKeigan v. Hickman*, [1989] S.C.J. No. 99, [1989] 2 S.C.R. 796. The judges, including Pace J. who had been Attorney General of Nova Scotia at the time of Donald Marshall's wrongful conviction, were, subject to an inquiry by the Canadian Judicial Council that did not require them to testify and did not recommend that they be removed from office. Inquiry Report (1991) 40 U.N.B.L.J. 292.

³³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 139. See also s. 140 of the *Code* defining the crime of public mischief to include making false statements to a peace officer accusing people of committing crimes and ss. 131, 134, 136 and 137 relating to perjury and other forms of giving false evidence.

³⁴ *Nelles v. Ontario*, [1989] S.C.J. No. 86, [1989] 2 S.C.R. 170; *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9 discussed *infra*.

³⁵ *Krieger v. Law Society of Alberta*, [2002] S.C.J. No. 45, [2002] 3 S.C.R. 372 discussed *infra*.

³⁶ *Odhavji Estate v. Woodhouse*, [2003] S.C.J. No. 74, [2003] 3 S.C.R. 263.

³⁷ *R. v. Palmer*, [1980] 1 S.C.R. 759.

³⁸ *R. v. Taillefer*, [2003] S.C.J. No. 75, [2003] 3 S.C.R. 307.

³⁹ In *R. v. Lifchus*, [1997] S.C.J. No. 77, [1997] 3 S.C.R. 320, at para. 13, Cory J. stated that the principle of proof of guilt beyond a reasonable doubt

is of fundamental importance to our criminal justice system. It is one of the principal safeguards which seeks to ensure that no innocent person is convicted. The *Marshall*, *Morin* and *Milgaard* cases serve as a constant reminder that our system, with all its protections for the accused, can still make tragic errors. A fair trial must be the goal of criminal justice. There cannot be a fair trial if jurors do not clearly understand the basic and fundamentally important concept of the standard of proof that the Crown must meet in order to obtain a conviction.

individual cases in which innocence is a real possibility, but to all future cases. In other words, this second dimension applies to the crafting of rules to guide future cases so as to minimize the risk that the innocent will be convicted. At this point, some may object to the notion that any risk of convicting the innocent is acceptable. A discussion of acceptable risks of miscarriages of justice is as uncomfortable as the discussion of acceptable risks of cancer or plane crashes. There is an understandable desire to argue that everything that is humanly possible must be done to avoid these risks and that there is no acceptable level of risk. Set against this is the fact that in other contexts, including those such as the prevention of disease and accidents, society and the law regularly relies on risk management. The due diligence defence that is required as a principle of fundamental justice,⁴⁰ at least when prison is used as a penalty,⁴¹ is based on the idea that not every step to prevent a wrong will be reasonable and it increasingly embraces risk management techniques.⁴²

Even with respect to wrongful convictions, some eminent philosophers of law have taken the position that there is no absolute right to a system of justice that takes every possible precaution against the punishment of the innocent. Lon Fuller, who is famous for his natural law position defending the internal morality of law, addressed this very problem in his famous 1963 Storrs Lectures. Professor Fuller explained:

... if the question be asked, "How much effort should be expended to make certain that no innocent man is ever convicted of crime?," the answer is apt to run toward the absolute, and the suggestion may even be made that where fundamental human rights are at stake a question so indecently calculative should not even be raised. Yet when we reflect that in order to make sure that a decision is right we must consume the scarce commodity of time, and that a right decision too long delayed may do more damage to the accused himself than a mistaken decision promptly rendered, the matter assumes a different aspect. We then perceive that even in this case we are compelled to

⁴⁰ *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299; *Reference re Motor Vehicle Act (British Columbia)* S 94(2), [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486.

⁴¹ *R. v. Pontes*, [1995] S.C.J. No. 70, [1995] 3 S.C.R. 44.

⁴² See generally Todd Archibald, Ken Jull & Kent Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Aurora: Canada Law Book, 2005).

make a calculation that is in the broad sense “economic” even though money costs are completely left out of account.⁴³

Ronald Dworkin, famous for his understanding of rights as trumps and his distinction between principle and policy, also draws a similar distinction between a “profound right” of a particular person not to suffer the “moral harm” of being convicted of a crime that he or she did not commit and what he dismisses as an “impractical” and false claim that each citizen “has a right to the most accurate procedures possible to test his guilt or innocence, no matter how expensive these procedures might be to the community as a whole”.⁴⁴

Professor Dworkin adds an important qualification to his conclusion that there is no right to the most accurate procedures possible: the risk of a miscarriage of justice should not be imposed disproportionately in violation of the right to equal concern and respect.⁴⁵ Given the racial, class and mental health demographics of the exonerated, Professor Dworkin’s exception threatens to swallow his main argument that there is no right to the most accurate criminal justice system possible.⁴⁶ Nevertheless, it is significant that two of the 20th century’s leading theorists of rights both drew a distinction between the right of the innocent in an individual case never to be punished and the more difficult question of how far society should go to prevent the risks of a wrongful conviction being imposed on some unknown person in the future. Although the notion of balancing interests when dealing with wrongful convictions remains unsettling, the next part of this article will suggest that when the Supreme Court squarely tackled this issue in its

⁴³ Lon Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969), at 179-80.

⁴⁴ Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), at 72, 77. For an argument that Dworkin reduces criminal procedure to matters of policy to be left to the legislature and that the principle that the innocent not be convicted recognized by Dworkin in individual cases requires prophylactic rules requiring corroboration and expanded appellate powers see Michael Plaxton, “A Dworkian Theory of Criminal Procedure”, unpublished SJD Thesis, University of Toronto, 2004.

⁴⁵ Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), at 88. He also argues that there is a right to have criminal procedure recognize wrongful convictions as a moral harm and to a “consistent weighting” of that moral harm and that “the content of these rights provides a middle ground between the denial of all procedural rights and the acceptance of a grand right to supreme accuracy”. *Id.*, at 89-90.

⁴⁶ For an argument that the risk of imprisoning the innocent is now being disproportionately imposed on non-citizens under Canada’s security certificate regime see Kent Roach & Gary Trotter, “Miscarriages of Justice in the War Against Terror” (2005) 109 Penn. State L. Rev. 967, at 1002ff.

decision in *United States of America v. Burns*, the result was to increase protection for all accused including those who may be wrongfully convicted in some future case.

II. FROM *KINDLER* TO *BURNS*: SEARCHING FOR A PROPORTIONATE RESPONSE TO THE RISK OF WRONGFUL CONVICTIONS

In 1991, the Supreme Court decided that extradition to the United States without assurances that the death penalty would not be applied did not violate section 7 of the Charter. The majority judgments written by both La Forest and McLachlin JJ. decided the issue under section 7 of the Charter. Justice La Forest stressed the importance of balancing competing interests and gave considerable weight to the danger that Canada, given its shared border with the United States, could become a safe haven for fugitive American murderers. Justice La Forest also drew an analogy between extradition and deportation and suggested that both were united in their concerns about ensuring “that a specific kind of undesirable alien should not be able to stay in Canada”⁴⁷ and by the need for judicial deference to the executive.⁴⁸ This theme of deference to the executive was also stressed by McLachlin J. in her majority judgment where she emphasized that the executive was in a better position than the Court to balance competing interests including those “of comity and security”.⁴⁹ Perhaps because they decided the issue under section 7 of the Charter and found no violation of the Charter, neither La Forest nor McLachlin JJ. considered whether there were more proportionate means to honour Canada’s extradition obligations. Indeed, at one point, McLachlin J. framed the issue as whether it would be “better that a fugitive not face justice at all rather than face the death penalty”⁵⁰ despite the fact that the Minister of Justice had not attempted to seek assurances from American authorities that the death penalty would not be applied.

The neglect of proportionality analysis in *Kindler* was unfortunate because it would have required the state to demonstrate why its legitimate interests in extradition could not be pursued without placing

⁴⁷ *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779, at para. 134.

⁴⁸ *Id.*, at para. 138.

⁴⁹ *Id.*, at para. 176.

⁵⁰ *Id.*, at para. 182.

the fugitive's life at risk. One of the reasons why the majority of the Court in *Kindler* avoided this issue was that it engaged in an internal balancing of interests within section 7 and never reached section 1. Although the Court has not always been consistent on this point, it often does not reach section 1 in its section 7 cases because of its early decision to hold that violations of section 7 cannot be justified under section 1 of the Charter except perhaps in emergencies.⁵¹ Somewhat paradoxically, the marginalization of section 1 under section 7 may have contributed a process where, as in *Kindler*, section 7 rights are defined more narrowly than they might have been should the balancing of interests have been conducted under section 1.⁵² Under section 1, the state would have the burden of justifying limits whereas the balancing of conflicting interests within section 7 places the burden on the accused. Moreover, the balancing of interests under section 7 tends to be much less structured and disciplined and more open-ended than if the analysis was conducted under the familiar proportionality test of section 1 of the Charter.⁵³

In his dissent in *Kindler*, Cory J. found that extradition to face the death penalty violated section 12 of the Charter by imposing cruel and unusual punishment. He described the indignity of various modes of execution, but did not address the possibility of executing an innocent person. Although wrongful convictions were not as prominent in 1991 as they were in 2001, they were hardly a secret. Hugo Bedau and Michael Radelet had a few years earlier published a landmark study outlining 350 miscarriages of justice in American capital cases from 1900 to 1985.⁵⁴ In Canada, the report of the Commission into Donald

⁵¹ *Reference re Motor Vehicle Act (British Columbia)* S. 94(2), [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 518; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at para. 9; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, [2002] S.C.J. No. 3, at para. 78; *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687, at para. 92.

⁵² For a further explanation of this argument and an application of it in the context of the Court's record under s. 7 of the Charter in not constitutionalizing common law presumptions of *mens rea* under s. 7 of the Charter see Kent Roach, "Common Law Bills of Rights as Dialogue Between Courts and Legislatures" (2005) 55 U.T.L.J. 733.

⁵³ For a discussion of the limits of the balancing metaphor see Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet and Maxwell, 2002); Jeremy Waldron, "Security and Liberty: The Image of Balance" (2003) 11 J. Pol. Phil. 191; Kent Roach, "Must We Trade Rights for Security: The Choice Between Smart, Harsh or Proportionate Security Strategies in Canada and Britain" (2006) 27 Cardozo L. Rev. 2151.

⁵⁴ Hugo Bedau & Michael Radelet, "Miscarriages of Justice in Potentially Capital Cases" (1987) 40 Stanford L. Rev. 21. For criticisms of this study see Stephen Markman & Paul Cassell,

Marshall Jr.'s Wrongful Conviction was published in 1989 and had raised awareness of wrongful convictions throughout the Canadian criminal justice system. Indeed, the Supreme Court itself had relied on this report when it decided the landmark *R. v. Stinchcombe*⁵⁵ decision on the accused's right to disclosure. Nevertheless, neglect of the risk of wrongful convictions in *Kindler* may also be related to the fact that only one group, Amnesty International, intervened in the 1991 case while in *Burns* a number of associations representing criminal lawyers concerned with wrongful convictions intervened in the case.⁵⁶ One significant feature of Cory J.'s dissent on section 12, however, is that it featured the section 1 proportionality analysis that was lacking in the majority's decision. Under section 1, Cory J. stressed that there was no evidence to support the majority's concerns about Canada becoming a safe haven for American murderers and that Canada's extradition obligations could be fulfilled by extraditing with assurances that the death penalty would not be applied.⁵⁷

In 2001, the Supreme Court re-visited the issue of extradition to face the death penalty in *United States of America v. Burns*.⁵⁸ Although the Court cited other developments such as the abolition of Canada's last vestiges of the death penalty, a growing international movement towards abolition and the dangers of extended stays on death row, the main and strongest justification given by the Court for requiring assurances that the death penalty not be applied was the dangers of executing the innocent. The Court stated:

Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been

"Protecting the Innocent: A Response to the Bedau-Radelet Study" (1988) 41 Stanford L. Rev. 121. But see also Hugo Bedau & Michael Radelet, "The Myth of Infallibility: A Reply to Markman and Cassell" (1988) 41 Stanford L. Rev. 161.

⁵⁵ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326.

⁵⁶ On the importance of support groups in litigation see Charles Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998).

⁵⁷ *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779, at 824-28.

⁵⁸ [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283.

carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution.⁵⁹

The structure of this statement is interesting because at one level it limits the Court's concerns to the death penalty even though a fugitive extradited from Canada could still be wrongfully convicted and, consistent with the Court's ruling, die in prison. In this passage the Court may be performing, albeit somewhat silently, the balancing of competing interests that is said in *Kindler* and *Burns* alike to underlie section 7 of the Charter. In other words, the Court may be balancing the interest in not punishing the innocent against the state's interest in extraditing fugitives and finding that the former prevails only when the punishment imposed is the irreversible one of execution.

Although *Burns* generally prohibits extradition without assurances that the death penalty will not be applied, it also stands for the converse proposition that extradition is constitutional so long as the death penalty is off the table. As the late Dianne Martin insightfully indicated, one shortcoming in the Court's otherwise praiseworthy recognition of the risk of wrongful convictions is that its decision does nothing to address the risk of wrongful convictions in non-death penalty cases. Indeed, as Professor Martin pointed out shortly after *Burns* was decided, the extradition process itself remains one that lacks some of the safeguards normally found in criminal trials.⁶⁰

The only full-proof way to prevent the risk that Canada will participate in a miscarriage of justice in a foreign land would be for Canada to follow the lead of some rogue states and simply refuse to extradite all fugitives. This stance, however, would unduly sacrifice Canada's interests in fulfilling its obligations under its extradition treaties. It would also beg the question of miscarriages of justice at home. The logical conclusion of the absolutist idea that any risk of a

⁵⁹ *Id.*, at para. 1.

⁶⁰ Dianne L. Martin, "Extradition, the Charter and Due Process: Is Procedural Fairness Enough?" (2002) 16 S.C.L.R. (2d) 161, at 169. Professor Martin was well aware of these risks because of her long work on behalf of Aboriginal activist Leonard Peltier, who was extradited from Canada and sentenced to life imprisonment in the United States. See Fred Kaufman, *Searching for Justice: An Autobiography* (Toronto: University of Toronto Press, 2005), at 300-306.

miscarriage of justice is unacceptable might be that all sentences of imprisonment or perhaps all convictions violate the principles of fundamental justice. No one who wants to be taken seriously would go that far. Once the abolitionist response to wrongful convictions is rejected, however, we are left with the vexing question of how should the courts balance or reconcile the state's legitimate interest in controlling crime with the right of the innocent not to be punished.

One problem with the balancing process as it was conducted in *Burns*, however, was that it was tacit and opaque. This may be related to the rather unstructured character of all balancing of interests exercises in general, but it may also be related to an understandable reluctance of judges to admit openly that they are willing to accept any level of risk of wrongful convictions as an acceptable level of risk. As discussed in Part I of this paper, both Lon Fuller and Ronald Dworkin made provocative arguments that while wrongful convictions in individual cases always constitute grave moral harms, there is no right to the most accurate criminal justice system possible. The analogue in the Charter jurisprudence are the Court's frequent statements that section 7 does not guarantee procedures that are the most favourable to the accused, but only the basics of a fair trial.⁶¹

Statements that the Charter does not guarantee the most favourable procedure or the most accurate system possible are conclusions not reasons. They fail to address the critical questions of the extent to which additional procedural protections will on the one hand minimize the risk of wrongful convictions and on the other hand harm social interests. Professor Fuller argued that this is an "economic" question while quickly adding that money costs are not relevant. Fuller's position updated to take into account modern rights protection and the Charter would revolve around issues of proportionality. In other words, the modern version of the "economic" approach to balancing competing interests would be to focus on the proportionality question of whether there is a less rights invasive means of securing the state's security interest. The main difference between *Kindler* and *Burns* is that the Court in the latter case addressed this issue of proportionality and rejected the idea that "the United States would prefer no extradition at

⁶¹ *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 362; *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 72.

all to extradition with assurances”.⁶² In other words, the Court in *Burns* concluded that extradition with assurances that the death penalty not be applied was a more proportionate means to advance Canada’s legitimate interests in extradition while better respecting the rights of the accused in relation to the unavoidable risk of wrongful convictions. Not surprisingly, the Court’s assessment of proportionality was most explicit when it concluded as part of its section 1 analysis that extradition with assurances that the death penalty would not apply would be a less restrictive means for Canada to co-operate with foreign states and deter fugitives from coming to Canada.⁶³ The section 1 analysis in *Burns* produced more, not less, protection of rights than the internal balancing of interests conducted in *Kindler*.

Although the right of the innocent not to be punished may exist as an absolute right in individual cases, a focus on individual cases obscures the fact that many rights and rules, including the one proclaimed in *Burns*, will be proclaimed as general rules that apply across cases and will apply, as in *Burns*, even in cases where there is no reasonable possibility to suspect that a wrongful conviction will occur. Once rights are seen as applying across cases and influencing the criminal justice system as a whole, proportionality analysis may well be appropriate to discipline the balance that is struck between competing values. Seen in this light, it was appropriate for the Court in *Burns* to have considered whether state interests in extradition could be satisfied in a more proportionate manner and *Kindler* was wrongly decided precisely because it did not address the question of whether Canada’s interests in extradition could be secured in a less rights invasive manner. If social interests are to limit the rights of the accused, this should be done in a transparent manner and the government should have to justify any limits on those rights as reasonable and proportionate under section 1 of the Charter.⁶⁴

It would be a mistake to read *Burns* as simply a case about extradition and the death penalty even though the Court’s holding was limited to those issues. The recognition of the reality and risk of wrongful convictions in *Burns* should affect how the Court approaches

⁶² *United States of America v. Burns*, *supra*, note 58, at para. 125.

⁶³ *Id.*, at paras. 136-43.

⁶⁴ This is consistent with the approach long taken by my colleague David Beatty. See David Beatty, *Talking Heads and the Supremes* (Toronto: Carswell, 1990); David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

the administration of section 7 of the Charter in the criminal justice system and beyond. Having accepted that the problem of wrongful convictions exists both at home and abroad, it would be hypocritical for the Court to limit its response to extradition. In *Burns*, the Court could not very well tell the United States how to reform its criminal justice system to minimize the risk of wrongful convictions, but the Court does not have the same problem on the homefront. Indeed, the Court should be bold and confident in this area precisely because it concluded that “occasional miscarriages of the criminal law are located in an area of human experience that falls squarely within ‘the inherent domain of the judiciary as guardian of the justice system’”.⁶⁵ The Court elaborated on this theme by stating that:

The avoidance of conviction and punishment of the innocent has long been in the forefront of the basic tenets of our legal system. It is reflected in the presumption of innocence under s. 11(d) of the *Charter* and in the elaborate rules governing the collection and presentation of evidence, fair trial procedures, and the availability of appeals.⁶⁶

The principle that the innocent not be convicted articulated in this passage has implications that go far beyond the limited context of extradition and the death penalty. In the remaining parts of the paper, I will examine whether the Court has lived up to the promise of *Burns* both in terms of ensuring that reasonable and proportionate efforts are made in all cases to minimize the risk of wrongful convictions and whether the Court has been sufficiently responsive to claims that a miscarriage of justice may have occurred in the individual case before it.

III. DISCLOSURE AND WRONGFUL CONVICTIONS

The Supreme Court’s section 7 jurisprudence giving the accused a broad right to disclosure of relevant evidence in the possession of the Crown is arguably the most important development in our criminal justice system in the last quarter century. It has transformed the way the justice system operates and this new right has been crafted in no small part as a systemic measure that would apply across cases to lower the risk of wrongful convictions. The failure to disclose inconsistent statements and exculpatory material has played an important role in many wrongful

⁶⁵ *United States of America v. Burns*, *supra*, note 58, at para. 38.

⁶⁶ *Id.*, at para. 95.

convictions. The Marshall Commission for example revealed how Mr. Marshall was deprived of inconsistent statements made by the witnesses who perjured themselves in his murder trial and exonerating evidence that was given to the police shortly after his conviction.⁶⁷

In *R. v. Stinchcombe*, the Court dealt with the accused's request for the written and recorded statements that the police had taken from his former secretary after she had given evidence favourable to the accused at the preliminary hearing. The Court built on a decision earlier that year that affirmed a common law right to disclosure from the Crown⁶⁸ but took the step of constitutionalizing the right to disclosure as a principle of fundamental justice under section 7 of the Charter. Justice Sopinka explained:

The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the Royal Commission on the Donald Marshall Jr. Prosecution ... the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play".⁶⁹

In some respects, the Court went beyond the Marshall Commission's recommendations⁷⁰ that the *Criminal Code* be amended to require disclosure by concluding that all relevant and non-privileged information held by the Crown should be disclosed without regard to whether the information was inculpatory or exculpatory and without regard to whether statements related to a person who might be called as a witness. Such a broad right to disclosure can be defended as providing the accused with all the available raw materials in the state's possession to combat the risk of error and to protect the accused's right to full answer and defence. The broad scope of the duty to disclose articulated

⁶⁷ Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queens Printer, 1989), at 238-42.

⁶⁸ *R. v. C. (M.H.)*, [1991] S.C.J. No. 27, [1991] 1 S.C.R. 763.

⁶⁹ *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326, at para. 17.

⁷⁰ As well as those of the Law Reform Commission of Canada in *Report 22 Disclosure by the Prosecution* (Ottawa: Supply and Services, 1984), at 27-28.

by the Court in *Stinchcombe* may in some cases provide the accused with some material to fight the phenomena of tunnel vision by arguing that the police ignored evidence in its possession that was consistent with the suspect's innocence.

The Court's constitutionalization of disclosure requirements was a bold move. In taking the leap that it did, it is perhaps not surprising that the Court first examined whether social interests would be harmed by the new right to disclosure. Justice Sopinka predicted that disclosure disputes could be avoided by the adoption of "uniform, comprehensive rules for disclosure" and that disclosure could increase efficiency by producing an "increase in guilty pleas, withdrawal of charges and shortening or waiving of preliminary hearings".⁷¹ Justice Sopinka may have been overly optimistic in these predictions, but the fact that he made them is significant because it suggests that the Court was not prepared to impose broad disclosure obligations without regard to their costs or their effect on competing social interests. As in *Burns*, the Court's consideration of whether increased rights were a proportionate measure to protect innocence was not fatal to the case of reform.

Although the Court in *Stinchcombe* expressed some optimism that uniform and comprehensive rules to govern disclosure would increase efficiency in the criminal justice system, the new rights recognized in the case have turned out to be quite costly to administer. For example, the *Stinchcombe* case itself came back to the Court four years later when the accused argued that the trial judge was correct to stay proceedings when the Crown only disclosed copies as opposed to originals of the secretary's statements to the police. Justice Sopinka explained that the Crown could only be expected to disclose what was in its possession and that in the absence of misconduct in destroying the originals, a stay of proceedings was not appropriate.⁷² In a number of decisions in the 1990s, the Court returned to questions such as the extent of the Crown's disclosure obligations,⁷³ the limits of the Crown's discretion to delay disclosure and to protect the identity of informers,⁷⁴ the concept of

⁷¹ *Stinchcombe*, *supra*, note 69, at para. 13. On this issue see Michael Code, *Trial in a Reasonable Time* (Toronto: Carswell, 1992) and Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999), at 89-99.

⁷² *R. v. Stinchcombe*, [1995] S.C.J. No. 21, [1995] 1 S.C.R. 754.

⁷³ *R. v. Chaplin*, [1994] S.C.J. No. 89, [1995] 1 S.C.R. 727.

⁷⁴ *R. v. Khela*, [1995] S.C.J. No. 95, [1995] 4 S.C.R. 201.

relevant evidence,⁷⁵ the Crown's duty to retain evidence and the proper approach to lost material that could not be disclosed.⁷⁶

In several cases, the Court distinguished between the accused's right to disclosure and the accused's right to full answer and defence. In *R. v. Dixon*,⁷⁷ the Court stressed that not every violation of the accused's right to disclosure will violate the accused's right to full answer and defence. It indicated that a new trial will be a minimum remedy if the accused's right to full answer and defence has been violated and related that issue to whether there is a reasonable possibility that the undisclosed evidence would affect the reliability of the verdict.⁷⁸ On the other hand, violations of the right to disclosure require no such minimum remedies and can in some cases be considered harmless. The Court's dualistic approach to the rights and remedies at stake in disclosure fits into the distinction drawn in the first part of this paper between rights that attempt to reduce the risk of miscarriages of justice in future cases and rights that respond to the possibility of a wrongful conviction in the particular case before the Court. In other words, the Court has maintained a broad and generous approach to defining the right to disclosure in a manner that requires the broadest form of pre-trial disclosure in all cases while defining the right to full answer and defence more narrowly so that it is only violated when there is a possibility that a trial has resulted in a miscarriage of justice or an unfair trial.

In *R. v. Taillefer*; *R. v. Duguay*,⁷⁹ the Court demonstrated that it was prepared to enforce the rights to disclosure and full answer and defence with some rigour. The Court affirmed that the right to disclosure existed at common law independent of the Court's decision in *Stinchcombe* and it again pointed out that a failure to make disclosure was one of the causes of "catastrophic judicial errors" that had caused Donald Marshall Jr.'s wrongful conviction.⁸⁰ The case involved convictions, including a guilty plea, by two accused to first degree murder. The undisclosed evidence was discovered by the Poitras Commission into police

⁷⁵ *R. v. Egger*, [1993] S.C.J. No. 66, [1993] 2 S.C.R. 451.

⁷⁶ *R. v. La (appeal by Vu)*, [1997] S.C.J. No. 30, [1997] 2 S.C.R. 680.

⁷⁷ [1998] S.C.J. No. 17, [1998] 1 S.C.R. 244.

⁷⁸ The accused's right to full answer and defence can also be violated if non-disclosure affected the fairness of the trial in terms of a reasonable possibility that the material if disclosed would have opened up new lines of inquiry and opportunities for the accused to obtain new evidence.

⁷⁹ [2003] S.C.J. No. 75, [2003] 3 S.C.R. 307.

⁸⁰ *Id.*, at para. 1.

misconduct and concerned inconsistent statements by some Crown witnesses that were not disclosed to the accused, as well as other statements by undisclosed witnesses that were inconsistent with the Crown's case, including one relating to the location of the 14-year-old murder victim on the night she was killed. The Court found that there was a reasonable possibility that the undisclosed evidence affected the decision of one accused to plea, the reliability of the verdicts and the fairness of the trial process. It also indicated that the test for dealing with undisclosed evidence would be somewhat more generous to the accused than the test for admitting fresh evidence on appeal.⁸¹ The Court affirmed that a new trial would be the minimum remedy for a violation of the accused's right to full answer and defence. This minimal remedy would apply without regard to competing social interests. At the same time, the Court held that a stay of proceedings was appropriate for one of the accused given the time he had already served and the fact that another trial would "be the perpetuation of an injustice".⁸²

In justifying his decision to constitutionalize the accused's right to disclosure, Sopinka J. noted that the "legislators have been content to leave the development of the law in this area to the courts".⁸³ This fits into the pattern of Parliament being relatively unconcerned about the dangers of wrongful convictions.⁸⁴ As will be seen in the next section, however, Parliament has been more active in restricting the accused's access to information and evidence in sexual assault cases.

IV. LIMITS ON THE ACCUSED'S RIGHTS TO DISCLOSURE AND FULL ANSWER AND DEFENCE IN SEXUAL ASSAULT CASES

Although the Court filled a legislative vacuum when implementing *Stinchcombe*, it encountered legislative resistance when implementing the accused's right to full answer and defence in sexual assault cases.

⁸¹ *Id.*, at para. 78.

⁸² *Id.*, at para. 133.

⁸³ *R. v. Stinchcombe*, *supra*, note 69, at para. 9.

⁸⁴ The relative lack of concern by legislatures with innocence can be related to their tendency to identify more with victims of crime than those accused or convicted of crimes. At the same time, some legislatures have enacted laws designed to better protect innocence in response to strings of highly publicized miscarriages of justice. See for example *Criminal Appeal Act 1995*, c. 35 (U.K.) establishing the Criminal Case Review Commissions for England, Wales and Northern Ireland and *The Innocence Protection Act* (Public Law 108-405) providing for DNA testing in American federal criminal cases and encouraging states to provide for DNA testing.

This raises the delicate question of the incidence of wrongful convictions in such cases. DNA analysis has increased the likelihood of wrongful convictions being discovered in rape cases and 90 per cent of exonerations in the United States in non-homicide cases are rape cases. Barry Scheck and Peter Neufeld have argued that it is important to learn about wrongful convictions from the current experience of DNA exonerations because they predict that DNA exonerations will eventually dry up given contemporary standards of obtaining DNA warrants and using DNA analysis to exclude suspects.⁸⁵ The availability of DNA material is greater in rape cases than other crimes and this means that rape convictions are held to higher standards of review than in cases where DNA is not available.⁸⁶ It is thus not surprising that in Canada several wrongful convictions have been revealed in sexual assault and rape cases and this does not necessarily suggest that there is a higher rate of error in such cases as opposed to other cases. Nevertheless, it is disturbing that the names of those wrongfully convicted of sexual assault in Canada remain relatively unknown.⁸⁷ In any event, it is clear that the accused's right both to access and adduce evidence has played out somewhat differently in the context of sexual assault prosecutions, despite the fact that wrongful convictions have occurred in such cases.

In *R. v. Seaboyer*⁸⁸ the Court in a 7:2 decision held that the so-called rape shield law that prohibited the introduction of evidence of the complainant's prior sexual conduct except with respect to rebuttal evidence, evidence going to identity and evidence relating to the incident in question, violated the accused's right to make full answer and defence. Justice McLachlin for the majority related the right to full

⁸⁵ Barry Scheck & Peter Neufeld, "DNA and Innocence Scholarship" in Sandra Westervelt & John Humphrey, eds., *Wrongly Convicted: Perspectives on Failed Justice* (Rutgers: Rutgers University Press, 2001).

⁸⁶ Samuel R. Gross *et al.*, "Exonerations in the United States 1989 through 2003" (2005) 95 J. Crim. Law and Criminology 523, at 530. Professor Gross concludes that "If we had a technique for detecting false convictions in robberies that was comparable to DNA identification for rapes, robbery exonerations would greatly outnumber rape exonerations, and the total number of falsely convicted defendants who were exonerated would be several times [the 340 exonerations] that we report." *Id.*, at 531.

⁸⁷ The website of the Association in Defence of the Wrongfully Convicted ("AIDWYC") lists the cases of Wilfred Beaulieu, Michael Dunn, Norm Fox, Herman Kaglik, Steven Kominiski, Jamie Nelson and Richard Norris as those wrongfully convicted in Canada of sexual assault. See online: <http://www.aidwyc.org/index.cfm/ci_id/1115/la_id/1.htm>.

⁸⁸ [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577.

answer and defence to the principle of fundamental justice that the innocent should not be convicted:

Given the primacy in our system of justice of the principle that the innocent should not be convicted, the right to present one's case should not be curtailed in the absence of an assurance that the curtailment is clearly justified by even stronger contrary considerations. What is required is a law which protects the fundamental right to a fair trial while avoiding the illegitimate inferences from other sexual conduct that the complainant is more likely to have consented to the act or less likely to be telling the truth.⁸⁹

The Court found that the law restricting the admissibility of defence evidence of the complainant's prior sexual conduct was overbroad because of its restrictive pigeonhole approach and because it did not distinguish between illegitimate uses of the evidence — those that used the myths that a woman was more likely to have consented or less likely to be believed because of her prior sexual activity — and legitimate uses of the evidence directed at other relevant and probative issues in the trial.

Although the Court found that section 276 of the Code violated section 7 of the Charter, it was prepared to consider the state's case for justifying the violation under section 1 of the Charter on a deferential standard that conceived the case as involving the competing rights of the accused and the complainant. It indicated that there was a rational connection between the legislation and its objectives in preventing the sexist use of sexual conduct evidence, but concluded that a law that excludes "probative defence evidence which is not clearly outweighed by the prejudice it may cause to the trial strikes the wrong balance between the rights of complainants and the rights of the accused. The line must be drawn short of the point where it results in an unfair trial and the possible conviction of an innocent person. Section 276 fails this test."⁹⁰ The Court reformulated a less categorical rule to determine the relevance of prior sexual conduct evidence but one that, unlike the old section 276, applied to the complainant's prior sexual conduct with the accused.

Parliament was under great pressure to act even though the Court had already refashioned the common law rules to advance the objective of preventing sexist use of sexual conduct legislation as far as was

⁸⁹ *Id.*, at para. 62.

⁹⁰ *Id.*, at para. 80.

consistent with the accused's right to full answer and defence. The new section 276(1) embraced the Court's understanding of impermissible uses of sexual conduct evidence by providing that sexual conduct evidence, whether with the accused or another person, was not admissible "to support an inference that, by reason of the sexual nature of the activity" the complainant was more likely to have consented or less worthy of belief. In *R. v. Darrach*,⁹¹ the Court held that this rule excluded evidence offered for illegitimate sexist reasons that was not related to a fair trial. In other words the accused had no right to adduce misleading or irrelevant evidence. At the same time, the Court also read down section 276(1) so that it would not apply to prior sexual conduct that was offered for a legitimate purpose not related to the sexual nature of the activity. Justice Gonthier explained:

evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted. The phrase "by reason of the sexual nature of that activity" has the same effect as the qualification "solely to support the inference" in *Seaboyer* in that it limits the exclusion of evidence to that used to invoke the "twin myths".⁹²

The Court also held that the requirement in section 276(2) that the sexual conduct evidence should have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" should be read down to refer to evidence that "the evidence is not to be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt".⁹³ In justifying this reading down of the requirement that the evidence have significant probative value, Gonthier J. employed both the French language version of the law that did not include the word significant and the principle that laws should be interpreted where possible to avoid violating the accused's constitutional right to a fair trial. Although such an interpretative remedy would apply in all cases, it will be most relevant in providing a remedy in a particular case in which denial of the ability to call prior sexual conduct evidence might contribute to a miscarriage of justice.

⁹¹ [2000] S.C.J. No. 46, [2000] 2 S.C.R. 443.

⁹² *Id.*, at para. 35.

⁹³ *Id.*, at para. 39.

Although it left some room for exceptions when required to respect the accused's right to full answer and defence, the Court in *Darrach* upheld a law that will in general restrict the accused's ability to call prior sexual conduct evidence. To this end, it upheld various procedural and substantive restrictions on the admissibility of prior sexual conduct evidence. In particular, the Court upheld the requirement that the accused submit an affidavit and be cross-examined on it when seeking to justify the introduction of evidence of the complainant's prior sexual conduct. Furthermore, the Court upheld the rule that the complainant could not be compelled to testify at the *voir dire* or subject to cross-examination by the accused as necessary to protect the complainant's privacy and to encourage the reporting of sexual offences. Such procedural requirements and evidential restrictions may in some cases deter accused persons from attempting to adduce such evidence. This may particularly be true in cases in which the accused is un-represented or under-represented by counsel. The un-represented or under-represented accused may also not fully appreciate how, as discussed above, section 276 has been read down in some crucial respects to accommodate the accused's right to full answer and defence. In these ways, the new law may at the margins increase the risk that in some cases the accused will not even attempt to adduce evidence that might raise a reasonable doubt about guilt. Beyond this systemic concern, however, section 276 as interpreted by the Court in *Darrach* appears to have left room to allow sexual conduct evidence to be introduced when required to respect the accused's right to full answer and defence.

Professor David Paciocco, however, has expressed concerns that *Darrach* is ambiguous on the issue of whether probative evidence could be excluded because of its prejudice. He argues that such evidence should never be excluded on the basis that it would be "an affront to the most basic principles of our criminal justice system" to prefer the privacy interests of the complainant or the social interest in encouraging complaints to the accused's right to introduce significant evidence that could raise a reasonable doubt.⁹⁴ At the same time, however, the Court seems to have resolved at least two borderline issues in favour of the accused: namely reading the twin myth exclusion down to prohibit the introduction of sexual conduct evidence only by reason of the sexual

⁹⁴ David Paciocco, "Balancing the Rights of the Individual and Society in Matters of Truth and Evidence: Part II — Evidence About Innocence" (2002) 81 Can. Bar Rev. 39, at 62.

nature of the activity and reading the requirement of significant probative value down to a requirement that the evidence only be of more than trifling probative value. In both cases, the Court related its decisions to read section 276 down to the accused's right to full answer and defence and the related principle of proof of guilt beyond a reasonable doubt. In my view, the greater concern that the courts are running the risk of ignoring evidence that might raise a reasonable doubt about the accused's guilt lies not so much with restrictions on the admissibility of the complainant's prior sexual conduct under section 276, but with respect to restrictions under sections 278.1-278.9 on the production, disclosure and admissibility of the complainant's private records.⁹⁵

In *R. v. O'Connor*,⁹⁶ the Supreme Court dealt with an application for defence access to complainants' school, medical and counselling records in an historical sexual assault prosecution. The majority of the Court outlined a two-step procedure that would govern the production of private records to the court and to the accused. It stressed that this new procedure would not apply to private records already possessed by the Crown which would be subject to the *Stinchcombe* duty of disclosure and would be presumed to be relevant to the accused's defence.⁹⁷ At the first stage, in order to justify production to the trial judge, the majority ruled that the accused would have to establish the likely relevance of the material to an issue at trial including the credibility of the complainant. The majority stressed the difficulties faced by the accused who had not seen the documents. The minority would only require production to the judge at the first stage if the accused established that the material was useful to the accused's right to make full answer and defence. At the second stage, the majority of the Court required a balancing of the

⁹⁵ I thus must also disagree with Professor Paciocco's suggestion that production issues are less central to the accused's right to a fair trial than admissibility decisions. *Id.*, at n. 30. Note, however, that Professor Paciocco has acknowledged that any reluctance by judges to even inspect third party records could contribute to wrongful convictions: "By closing its eyes to the inspection of records that are likely to contain relevant information, stones are left unturned, stones under the weight of which wrongful convictions can occur. The approach to the 'likely relevance' standard should be reconsidered." David Paciocco, "A Primer on the Law of Third Party Records" (2005) 9 Can. Crim. L.R. 157, at 189. His observation that access to third party records is most likely to be denied in cases that are "litigated badly", *id.*, at 173 also supports the idea that even though the law may make allowance for access in cases where a miscarriage of justice is likely to occur, it may also not address the systemic risks of wrongful convictions in future cases especially when the accused is unrepresented or under-represented.

⁹⁶ [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411.

⁹⁷ *Id.*, at para. 12.

accused's rights against the privacy rights of the complainant while the minority would also require consideration of the equality rights of women and children and the societal interest in encouraging complainants to seek treatment and bring complaints of sexual assault. The same split in the Court occurred in a subsequent case in which the majority of the Court held that a stay of proceedings was the appropriate remedy when a rape crisis centre had, consistent with its standard policy, destroyed notes of an interview with the complainant. The minority expressed doubts about the relevance of the interview notes and concluded that a stay of proceedings was an excessive remedy.⁹⁸

Parliament responded to all this controversy with new legislation that codified a two-step procedure to govern production to the trial judge and the accused. The new legislation departed from the majority's procedure in *O'Connor* by applying to records held by the Crown and otherwise subject to *Stinchcombe* and by requiring consideration of equality rights and social interests in reporting and counselling at both the production and disclosure stages of the two-step process. Moreover, the new legislation also provided an extensive list of 11 possible assertions that an accused could make in an attempt to justify the production of private records to the judge. The legislation then categorically deemed that all 11 arguments, either alone or combined, were insufficient to justify production to the court. Section 278.3(4) of the *Criminal Code* is such an extraordinary piece of legislation that it deserves to be quoted in its entirety:

278.3(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

- (a) that the record exists;
- (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
- (c) that the record relates to the incident that is the subject-matter of the proceedings;
- (d) that the record may disclose a prior inconsistent statement of the complainant or witness;

⁹⁸ *R. v. Carosella*, [1997] S.C.J. No. 12, [1997] 1 S.C.R. 80.

- (e) that the record may relate to the credibility of the complainant or witness;
- (f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
- (g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
- (h) that the record relates to the sexual activity of the complainant with any person, including the accused;
- (i) that the record relates to the presence or absence of a recent complaint;
- (j) that the record relates to the complainant's sexual reputation; or
- (k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

As my colleague Hamish Stewart has observed, "taken literally, this subsection seems to doom any application from the outset".⁹⁹

The new legislation also placed another barrier in the way of production to the trial judge by providing that in determining whether the record is likely relevant to an issue at trial, the judge should consider not only the accused's right to full answer and defence, but also the complainant's rights to privacy and equality¹⁰⁰ and society's interests in encouraging the reporting of sexual offences and the obtaining of treatment by victims of sexual offences.¹⁰¹ As Jamie Cameron has observed, Parliament's restrictive approach to production to the trial judge is a direct reversal of the Court's approach in *O'Connor* which only balanced competing rights after the judge had seen the documents and before they were disclosed to the accused and even then only balanced the accused's right to full answer and defence against the

⁹⁹ Hamish Stewart, *Sexual Offences in Canadian Law* (Aurora: Canada Law Book, 2004), at 8:300.20.20.

¹⁰⁰ For criticism of the relevance of equality rights in this regard see David Paciocco, "Competing Constitutional Rights in an Age of Deference: A Bad Time to Be Accused" (2001) 14 S.C.L.R. (2d) 111, at 120 who argues that it is based on "an attenuated theory of state action, one that disregards the substance of what is happening, to characterize the process by which the accused seeks to defend himself or herself against the state as involving state action".

¹⁰¹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 278.5.

privacy rights of the complainant.¹⁰² In this respect, the legislation on its face made more incursions on adjudicative fairness than even the security certificate procedures under immigration law which allow the judge (but not the detainee) to examine all possibly relevant evidence.¹⁰³ Moreover, the private records legislation is also more restrictive than the security certificate regime because it subjects material held by the state to the same restrictive regime of deemed insufficient grounds and balancing of competing rights and social interests whereas courts have stressed the state's duty to disclose all relevant evidence to the judge in security certificate cases.¹⁰⁴ The severe restrictions on production of records to the judge in sections 278.3 and 278.5 of the *Criminal Code* raise real questions about Parliament's apparent lack of concern about the dangers of convicting the innocent.

The final stage of the reply legislation governs whether private records that are produced and examined by the judge in a private hearing should then be disclosed to the accused. Here the judge is asked again to balance the accused's right to full answer and defence with the complainant's privacy and equality rights and the social interest in reporting sexual assaults and receiving counselling. Consistent with principles of proportionality, the legislation quite sensibly contemplates disclosure to the accused subject to conditions designed to restrict the invasion of privacy such as editing the document or restricting its further distribution. The legislation also allows the trial judge to take a variety of steps including editing and prohibiting further distribution of the material.¹⁰⁵

In *R. v. Mills*,¹⁰⁶ the Supreme Court considered the constitutionality of Parliament's new regime for the production of records. Despite the significant differences between the new regime and the *O'Connor* regime, the Court declined to strike the law down. It stressed that Parliament was entitled to diverge from the *O'Connor* scheme and to act on its own interpretation of the Charter even when Parliament's interpretation of the Charter differed from that already provided by the

¹⁰² Jamie Cameron, "Dialogue and Hierarchy in Charter Interpretation: A Comment on *R. v. Mills*" (2001) 38 Alta. L. Rev. 1051.

¹⁰³ *Re Charkaoui*, [2004] F.C.J. No. 2060, 247 D.L.R. (4th) 405 (C.A.), leave to appeal S.C.C. granted [2005] C.S.C.R. no 66.

¹⁰⁴ *Id.*

¹⁰⁵ *Criminal Code*, R.S.C. 1985, c. C-46, s. 278.7.

¹⁰⁶ [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668.

Court on the same issue. The Court sought to legitimate this holding by reference to the concepts of both reconciling competing rights and fostering dialogue between courts and legislatures.¹⁰⁷ I have expressed my reservations about the Court's approach to both rights and dialogue elsewhere and will not repeat them here.¹⁰⁸ I will only raise the additional issue of how vulnerable the innocent are under a reconciliation of rights approach that is loathe to admit that the accused's right to full answer and defence is being limited. As Ronald Dworkin has observed with respect to the attenuated procedural protections that are now being deployed with respect to terrorist suspects, there is an important difference between admitting that a risk of miscarriages of justice exists and simply ignoring and denying any risk altogether.¹⁰⁹ A jurisprudential approach that insists that the accused's rights are not being limited but simply reconciled with those of victims and potential victims, especially when combined with one in which the judiciary defers to the legislature's interpretation of the rights of the accused even when the legislature departs from the judiciary's prior interpretation of those rights, is one that is likely to increase the risk of convicting the innocent.

The only dissenting voice in *Mills* came from Lamer C.J. and only applied to Parliament's decision to extend the restrictive production regime to private records that were in the Crown's possession. Chief Justice Lamer reasoned:

As this Court maintained in *Stinchcombe*, *supra*, at p. 336, the right of an accused to make full answer and defence is a pillar of criminal justice on which we rely heavily to prevent the conviction of the innocent. It is a principle of fundamental justice protected by ss. 7 and 11(d) of the *Charter*. Flowing from the right to make full answer and defence is the Crown's constitutional and ethical duty to disclose all information in its possession reasonably capable of affecting the accused's ability to raise a reasonable doubt concerning his innocence.¹¹⁰

¹⁰⁷ *Id.* See also Hon. Frank Iacobucci, "Reconciling Rights' The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137, at 165 arguing that the reconciliation of rights approach "invites and facilitates dialogue".

¹⁰⁸ See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), at 277-82.

¹⁰⁹ Ronald Dworkin, "The Threat to Patriotism", *New York Review of Books*, February 28, 2002.

¹¹⁰ *R. v. Mills*, *supra*, note 106, at para. 5.

Chief Justice Lamer was not blind to the state's interest in protecting the complainant's privacy and equality rights. He proposed as a more proportionate means to advance these interests that all records held by the Crown be disclosed not directly to the accused but to the trial judge where they would be subject to the second stage of balancing the accused's rights against those of the complainant before being disclosed to the accused.¹¹¹ Chief Justice Lamer considered the section 1 case for limiting the accused's right to full answer and defence, but concluded that it could not be made out given less restrictive alternatives and because "the risk of suppressing relevant evidence and of convicting an innocent person outweighs the salutary effects of the impugned provisions on privacy and equality rights".¹¹² His decision reaffirms that a full and disciplined section 1 proportionality analysis can often produce more, not less, protections for the innocent than the more open-ended internal balancing and reconciliation of rights approach taken by the majority in *Mills*.

Although the Court's refusal to strike down the restrictive legislative regime that governs production of records remains in my view regrettable, it is important to recognize that the Court in *Mills*, as in *Darrach*, has read down some of the features of the legislative regime that may produce the greatest danger of denying the judge or the accused access to evidence that may raise a reasonable doubt about guilt. The majority in *Mills* recognized that the right to full answer and defence "is crucial to ensuring that the innocent are not convicted" and expressed some sensitivity to placing the accused in an impossible catch-22 position to establish the relevance of documents he had not seen.¹¹³ It also indicated that "where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent".¹¹⁴ The Court read down the broad insufficient grounds discussed above so that they only applied to bare assertions and would not apply if the accused could "point to case specific evidence or information to show that the record in issue is likely relevant to an issue at trial or the competence of a witness to testify".¹¹⁵ The Court also

¹¹¹ *Id.*, at para. 14.

¹¹² *Id.*, at para. 11.

¹¹³ *Id.*, at para. 76.

¹¹⁴ *Id.*, at para. 94.

¹¹⁵ *Id.*, at para. 120.

stressed that in borderline or uncertain cases, judges should at least look at the record¹¹⁶ and that “[i]t can never be in the interests of justice for an accused to be denied the right to make full answer and defence”.¹¹⁷ As in *Darrach*, the Court may have preserved some space for judges to act in cases where the restricted evidence could raise a reasonable doubt about the accused’s guilt. At the same time upholding the restrictive production and disclosure regime may have a systemic effect of deterring unrepresented and under-represented accused from even attempting to gain access to the complainant’s private records.

Some of the issues discussed in *Mills* were revisited by the Court a few years later in *R. v. Shearing*.¹¹⁸ The Court held that the restrictions on production of private documents discussed above did not apply in a case in which the accused had come into lawful possession of the complainant’s diary. This ruling, however, raises the question of whether the accused could have obtained production of the diary through sections 278.1 to 278.9 had he not otherwise gained access to the diary. Much depends on how trial judges exercise their discretion with respect to the very broad insufficient grounds provision, as well as with respect to the balancing of competing rights. The majority of the Court in *Shearing* also concluded that the accused could cross-examine the complainant on her diary including the lack of an entry about the alleged sexual assault. Don Stuart has suggested that *Shearing* may indicate a shift of tone back to *Seaboyer*¹¹⁹ and towards the primacy of the accused’s right to full answer and defence.¹²⁰ For example, Binnie J. took the opportunity to disagree with a judge below who had concluded that “*Mills* has shifted the balance away from the primary emphasis on the rights of the accused” on the basis that *Mills* “itself affirms the primacy — in the last resort — of the requirement of a fair trial to avoid

¹¹⁶ *Id.*, at para. 132. The Court added: “Where there is a danger that the accused’s right to make full answer and defence will be violated, the trial judge should err on the side of production to the court.” *Id.*, at para. 137.

¹¹⁷ *Id.*, at para. 138. On the reading down aspects of the case see Stephen Coughlan, “Complainant’s Records After *Mills*: Same as it Ever Was” (2000) 33 C.R. (5th) 300; David Paciocco & Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005).

¹¹⁸ [2002] S.C.J. No. 59, [2002] 3 S.C.R. 33.

¹¹⁹ This is underlined by the dissent of L’Heureux-Dubé J. with Gonthier J. in both cases. In *Shearing*, L’Heureux Dubé J. would not have allowed cross-examination on the diary because of concerns about the complainant’s privacy and equality rights and because of the social interest in encouraging reporting of sexual assaults.

¹²⁰ Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto: Carswell, 2005), at 224-25.

the wrongful conviction of the innocent”.¹²¹ Professor Stuart is correct to point out this shift in tone, one that may be related to heightened awareness of wrongful convictions in sexual assault cases, but the fact remains that the restrictions on production and disclosure in sections 278.1-278.9 remain in place even if they were not applicable on the particular facts of *Shearing*.

The material discussed in this section suggests that Parliament may be relatively unconcerned with the risk of convicting the innocent when it legislates. Although the Court has interpreted such legislation to leave some room for judges to protect the innocent in individual cases, the Court in both *Mills* and *Darrach* was reluctant to strike down legislation that by imposing high hurdles on the accused to gain access to evidence may increase the systemic risk of wrongful convictions in future cases.

V. ACCOUNTABILITY FOR PROSECUTORIAL AND POLICE MISCONDUCT THAT CONTRIBUTES TO WRONGFUL CONVICTIONS

Even the most generous protections for disclosure will not protect innocence if they are flouted by the police or prosecutors. Although it would be a mistake to reduce wrongful convictions to questions of individual misconduct as opposed to systemic failures, misconduct by police and prosecutors has been found to contribute to wrongful convictions. This raises the issue of the standards for holding prosecutors and police accountable for such conduct.

The Court related the Crown’s duty to disclose relevant evidence to the distinct role of the prosecutor as a Minister of Justice who is supposed to be more concerned that justice is done than in winning the case. This vision of the prosecutor suggested not only that the prosecutor should never knowingly suppress information that would support the accused’s claim to innocence, but also that the prosecutor should comply readily with broad rights of disclosure that are designed to serve the interests of justice.¹²² In *Nelles v. Ontario*,¹²³ the Supreme Court appealed to the same vision of the prosecutor as a minister of justice to justify the rejection of the idea that prosecutors should be

¹²¹ *R. v. Shearing*, *supra*, note 118, at para. 132 (citing *Mills*, *supra*, note 106, at para. 94) (emphasis in original).

¹²² *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326.

¹²³ [1989] S.C.J. No. 86, [1989] 2 S.C.R. 170, at 192.

absolutely immune from civil actions with respect to the performance of their duties. Justice Lamer quoted Rand J.'s famous statement in *Boucher v. The Queen* that "[t]he 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." He also reasoned that absolute immunity from civil liability could have the effect of denying access to a Charter remedy because a prosecutor who engaged in a malicious prosecution "would be depriving an individual of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice."¹²⁴ This aspect of the case has at times been neglected, but it constitutionalizes malicious prosecutions lawsuits¹²⁵ and gives content to the section 7 principle that the innocent should not be punished. Only L'Heureux-Dubé J. in dissent was prepared to take the view that "[t]he freedom of action of Attorneys General and Crown Attorneys is vital to the effective functioning of our criminal justice system. In my view, the greater public interest is best served by giving absolute immunity to these agents."¹²⁶

In *Proulx v. Quebec (Attorney General)*,¹²⁷ the Supreme Court in a narrow 4:3 decision upheld a successful malicious prosecution suit on the basis that the prosecutors had charged the plaintiff with first degree murder without reasonable and probable grounds and on the basis of an improper purpose related to the defence of a defamation suit. The majority found many flaws in the identification evidence and surreptitious electric recordings relied upon by the Crown and stressed that the Crown "must have sufficient evidence to believe that guilt *could* properly be proved beyond a reasonable doubt before reasonable and probable cause exists, and criminal proceedings can be initiated. A lower threshold for initiating prosecutions would be incompatible with

¹²⁴ *Id.*, at para. 50.

¹²⁵ In some jurisdictions this could allow lawsuits to be brought even though barred by statutes of limitations. See *Prete v. Ontario (Attorney General)*, [1993] O.J. No. 2794, 110 D.L.R. (4th) 94 (C.A.), leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 46.

¹²⁶ *Nelles v. Ontario*, *supra*, note 123, at para. 95.

¹²⁷ [2001] S.C.J. No. 65, [2001] 3 S.C.R. 9.

the prosecutor's role as a public officer charged with ensuring justice is respected and pursued."¹²⁸

The Court also held that the prosecutor acted with malice which was broadly interpreted to include improper purpose either by allowing the prosecution to be used in aid of a defence of a defamation action or through a "tainted tunnel vision" in which the prosecutor decided "to secure a conviction at all costs" with the "tainted assistance" of a former police officer who was defending a defamation action brought by the accused. The majority stressed that *Nelles* must not be taken to have established a "remedy . . . only in theory and not in practice".¹²⁹

Justice L'Heureux-Dubé in her dissent argued that the fact the plaintiff was committed at a preliminary hearing and convicted of murder at trial was telling evidence that the Crown had reasonable and probable grounds to charge the accused.¹³⁰ This conclusion, however, ignores the fact recognized in *United States v. Burns* that the criminal process has produced wrongful convictions. Justice L'Heureux-Dubé argued that there was no evidence that the Crown attorney "acted for personal purposes, out of vengeance or ill-will toward the appellant, in bad faith or beyond his mandate for improper purposes, or that he committed a fraud on the law".¹³¹ Although the dissent's malice standard included improper purposes, its restrictive approach was highlighted by the idea of ill-will, vengeance and fraud.

The majority's judgment in *Proulx* is an important recognition that the *Nelles* standard for malicious prosecution includes a broader range of improper purpose and is not limited to proof of malice as a narrow form of individual subjective fault. The majority's recognition of "tainted tunnel vision" as a form of malice is also intriguing given how recent public inquiries have found tunnel vision to be a prime cause of wrongful convictions.¹³² The Court's affirmation of a damage claim of over \$1 million in *Proulx* also suggests that some victims of malicious prosecutions will be successful in obtaining significant compensation. At the same time, however, the Court in *Proulx* made clear that a

¹²⁸ *Id.*, at para. 31.

¹²⁹ *Id.*, at para. 44.

¹³⁰ *Id.*, at paras. 205ff.

¹³¹ *Id.*, at para. 242.

¹³² Hon. Fred Kaufman, *Report on the Guy Paul Morin Prosecution* (Toronto: Queens Printer, 1998), recommendation 74; Hon. Peter Cory, *The Inquiry Regarding Thomas Sophonow Prosecution* (Winnipeg: Queens Printer, 2001); Right Hon. Antonio Lamer, *The Inquiry Regarding Ronald Dalton, Gregory Parsons and Randy Druken* (St. John's: Queen's Printer, 2006).

successful malicious prosecution action “must be based on more than recklessness or gross negligence”.¹³³ This dicta, however, should not be read as precluding liability based on negligence for prosecutorial misconduct which was not at issue in *Proulx*. Indeed, a number of Courts of Appeals have left the door open to actions for negligent prosecutions¹³⁴ and the Supreme Court has not fully shut it.

In my view, there is much to be said for a broader liability rule that could apply not only to “tainted tunnel vision” but to grossly negligent tunnel vision and negligent prosecutions.¹³⁵ In such an approach, liability might be better directed at the Crown as an entity¹³⁶ as opposed to individual prosecutors in recognition that many prosecutorial abuses are caused more by “organizational factors such as excessive workload, poor standard operating procedures and ... tunnel vision” than “ill-willed individuals”.¹³⁷ To the extent that reliance in *Nelles* and *Proulx* is placed on the high standards of prosecutorial conduct contemplated in *Boucher*, one would have thought that this might justify requiring higher standards of conduct on Crown prosecutors than simply that they refrain from acting out of malice, ill will or vengeance. In *Stinchcombe*, the *Boucher* vision of the prosecutor as a minister of justice was used to justify very high standards for the disclosure of all relevant evidence and not more minimal standards that would only prohibit bad faith and fraudulent failures to make full disclosure.

Although one might have thought that the Court’s decision in *Nelles* laid to rest any idea that prosecutors are immune, they resurfaced in *Krieger v. Law Society of Alberta*¹³⁸ where the Attorney General of Alberta argued that prosecutors should be immune from disciplinary decisions before the law society in relation to delayed disclosure of a DNA test that was favourable to the accused. The Supreme Court held that prosecutors could be subject to professional discipline so long as they were not engaged in a good faith and proper exercise of

¹³³ *Proulx v. Quebec*, *supra*, note 127, at para. 35.

¹³⁴ *Milgaard v. Kujawa*, [1994] S.C.J. No. 439, 118 D.L.R. (4th) 653, at para. 27 (C.A.), leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 458; *Folland v. Ontario*, [2003] O.J. No. 1048, 64 O.R. (3d) 89, at para. 18 (C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 249.

¹³⁵ John Sopinka, “Case Comment” (1995) 74 Can. Bar Rev. 366.

¹³⁶ For an argument in favour of suits against the government see Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983).

¹³⁷ Kent Roach, “The Attorney General and the Charter Re-Visited” (2000) 50 U.T.L.J. 1, at 13.

¹³⁸ [2002] S.C.J. No. 45, [2002] 3 S.C.R. 372.

prosecutorial discretion. It held that “[r]eview by the Law Society for bad faith or improper purpose by a prosecutor does not constitute a review of the exercise of prosecutorial discretion *per se*, since an official action which is undertaken in bad faith or for improper motives is not within the scope of the powers of the Attorney General”.¹³⁹ The Court appeared to have applied the high standard that a prosecutor must act in bad faith or for improper purposes not only to exercises of prosecutorial discretion, but to disclosure violations even though it rightly characterized disclosure as a matter of “prosecutorial duty” and not a matter of “prosecutorial discretion”.¹⁴⁰ Although the bad faith or dishonesty standard has been defended as consistent with *Nelles*,¹⁴¹ my own view is that it may place a higher premium on proof of subjective fault than the majority’s decision in *Proulx*.

The high *Krieger* threshold of bad faith or improper purpose may make it extremely difficult to subject prosecutors to professional discipline in a manner that might help prevent wrongful convictions. This is unfortunate because law society discipline should serve a preventive and licensing function¹⁴² that is not necessarily limited to the type of conduct that attracts civil liability for intentional torts. Fortunately, prosecutors across Canada are starting to demonstrate an admirable desire to learn from the experience of wrongful convictions and are probably in front of most law societies on these matters.¹⁴³ Nevertheless, requiring higher standards for prosecutors with respect to both civil liability and professional discipline might help minimize the risk of wrongful convictions. A negligence standard is not an invitation to judicial second-guessing of prosecutorial conduct and it should not deter legitimate exercises of prosecutorial discretion.

A reluctance to impose negligence standards on prosecutors would create an anomaly with respect to the police who are subject to liability

¹³⁹ *Id.*, at para. 51.

¹⁴⁰ *Id.*, at para. 54.

¹⁴¹ Lori Sterling & Heather Mackay, “Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*” (2003) 20 S.C.L.R. (2d) 169, at 196.

¹⁴² In the different context of the duty of civility, my colleague Michael Code has argued that the law societies do have a role in responding to uncivil conduct, but he finds little evidence of a robust response from them. Michael Code, “Counsel’s Duty of Civility: an Essential Component of Fair Trials and an Effective Justice System”, unpublished manuscript.

¹⁴³ Federal Provincial and Territorial Task Force, *Report on the Prevention of Miscarriages of Justice* (2004).

in negligence.¹⁴⁴ In *Odhavji Estate v. Woodhouse*,¹⁴⁵ the Supreme Court refused to strike out negligence claims against a Police Chief in relation to the failure of officers to co-operate with a Special Investigation Unit investigation into a fatal shooting.¹⁴⁶ Justice Iacobucci observed for the Court that:

Although the vast majority of police officers in our country exercise their powers responsibly, members of the force have a significant capacity to affect members of the public adversely through improper conduct in the exercise of police functions. It is only reasonable that members of the public vulnerable to the consequences of police misconduct would expect that a chief of police would take reasonable care to prevent, or at least to discourage, members of the force from injuring members of the public through improper conduct in the exercise of police functions.¹⁴⁷

Applying the above-quoted standard, the police should have a duty of care towards subjects of investigations for negligent conduct that might contribute to a wrongful conviction and there should be no policy reasons, especially as related to indeterminate liability, to defeat such a duty of care. The Court has frequently held that the common law should reflect Charter values, and it has already recognized the relevance of section 7 of the Charter in *Nelles*. The imposition of a duty of care on the police with respect to subjects of investigations would respect the section 7 principle that the innocent should not be punished. It would provide potential remedies for individual victims of negligent police investigations, including those that have resulted in wrongful convictions or other miscarriages of justice, and it would also act as a systemic incentive to encourage the police to take reasonable steps to prevent wrongful convictions in future cases.

¹⁴⁴ Defence lawyers are also subject to liability for negligence. *Folland v. Reardon*, [2005] O.J. No. 216, at para. 41 (C.A.), in which the Court of Appeal ruled that there was “no justification for departing from the reasonableness standard. That standard has proven to be sufficiently flexible and fact-sensitive to be effectively applied to a myriad of situations in which allegations of negligence arise out of the delicate exercise of judgment by professionals. Without diminishing the difficulty of many judgments that counsel must make in the course of litigation, the judgment calls made by lawyers are no more difficult than those made by other professionals.”

¹⁴⁵ [2003] S.C.J. No. 74, [2003] 3 S.C.R. 263.

¹⁴⁶ The Court did, however, strike out negligence claims against both the police board and the province on the basis of a lack of proximity and duty of care towards the plaintiff.

¹⁴⁷ *Id.*, at para. 57.

The duty of care on the police when they conduct investigations will likely be clarified by the Supreme Court in the upcoming case of *Hill v. Hamilton-Wentworth Regional Police Services Board*.¹⁴⁸ A five judge panel of the Ontario Court of Appeal unanimously accepted that police officers owed a duty of care to a suspect and that harm to the suspect from a negligent investigation was reasonably foreseeable. Justice MacPherson for the entire panel on this issue rejected the idea that liability for negligence would interfere with valid police work. He stated:

The assertion that the imposition of a legal duty of care on the police with respect to their criminal investigations will cause the police to change the way they perform their professional duties is, in my view, both unproven and unlikely. Surgeons do not turn off the light over the operating room table because they owe a duty of care to their patients. They perform the operation, with care. The owners of summer resorts do not lock the gates because they owe a duty of care to their customers. They open their resorts and take care to make them safe. In short, the “chilling effect” scenario ... is, in my view, both speculative and counterintuitive.¹⁴⁹

The Court of Appeal stated while its conclusions were at odds with those of the House of Lords,¹⁵⁰ it was consistent with the Supreme Court’s refusal to strike out negligence claims against a police chief in *Odhavji Estate v. Woodhouse*.¹⁵¹ Although the Court of Appeal distinguished prosecutors from police on the basis that the former perform quasi-judicial duties, all of the other functional considerations that supported negligence liability in *Hill* would seem to apply to prosecutorial negligence. For example, in both cases there would be “no alternative remedy for the loss suffered by a person by reason of wrongful prosecution and conviction”, the right to liberty and the principles of fundamental justice under section 7 would be implicated and there would be no concerns about indeterminate liability or liability for legitimate policy choices.¹⁵²

Hill will also be an important case on the merits because the Ontario Court of Appeal split 3:2 on whether the police officers were negligent

¹⁴⁸ [2005] O.J. No. 4045 (C.A.), leave to appeal to S.C.C. granted [2005] S.C.C.A. No. 511.

¹⁴⁹ *Id.*, at para. 63 (C.A.).

¹⁵⁰ *Hill v. Chief Constable of Yorkshire*, [1988] 2 All E.R. 238; *Brooks v. Commissioner of Police for the Metropolis*, [2005] U.K.H.L. 24.

¹⁵¹ [2003] S.C.J. No. 74, [2003] 3 S.C.R. 263.

¹⁵² *Hill v. Hamilton-Wentworth Police*, *supra*, note 148, at paras. 68-69 (C.A.).

in their investigation. The majority held that the police had not acted negligently despite the fact that the plaintiff, an Aboriginal person, was the only non-white person in a 12-person photo line-up used in an attempt to identify a serial bank robber that had been described by many witnesses as non-white. Faulty identifications are the leading cause of wrongful convictions and the case may provide the Supreme Court with an opportunity to clarify proper identification procedures. The case also involves the equally important issue of tunnel vision as the police and the prosecutor persisted in the prosecution despite the fact that the serial robberies continued after Mr. Hill was imprisoned and another suspect was identified and eventually charged with other robberies. Finally, the case will again raise the issue of the over-representation of Aboriginal persons in the criminal justice system.¹⁵³ Justices Feldman and Laforme noted in their strong dissent that this was a “very significant case involving another wrongful conviction of an Aboriginal person in Canada, who served more than 20 months in prison for a crime he did not commit...”¹⁵⁴ An affirmation that the police owe suspects a duty of care and an articulation of appropriate standards for cross-racial identifications could help individuals receive effective remedies for wrongful convictions and encourage the police to take reasonable precautions in all cases against the real risk of wrongful convictions.

VI. THE PROTECTION OF INNOCENCE AND THE ROLE OF DEFENCE COUNSEL

Prosecutors and police are not the only criminal process actors that can contribute to miscarriages of justice. Another area crucial to the protection of innocence is the adverse consequences of the accused not being represented or being inadequately represented by defence counsel. The Supreme Court’s section 7 jurisprudence seems surprisingly underdeveloped given the importance of these topics and the voluminous comparative jurisprudence under the American *Bill of Rights*. In general, the Court has opened the door to interventions in individual cases where a lack of counsel or inadequate representation of counsel may contribute to a miscarriage of justice in the case before the court, but it has yet to take a strong stand that will encourage adequate

¹⁵³ *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688.

¹⁵⁴ *Hill v. Hamilton-Wentworth Police*, *supra*, note 148, at para. 131.

defence lawyering as a systemic safeguard that can lessen the risks of wrongful convictions in future cases.

In *R. v. Prosper*,¹⁵⁵ the Supreme Court refused to require toll free access to duty counsel in part because the framers of the Charter had considered but rejected a right to counsel for those without sufficient means to pay for counsel when required in the interests of justice. Chief Justice Lamer also expressed concerns about requiring governments to spend funds or devising remedies to enforce positive obligations.¹⁵⁶ Although it stressed that the framers' decision to reject a right to legal aid was entitled to more weight than the more general intent of the framers on other issues,¹⁵⁷ the Court's approach in *Prosper* was in tension to its interpretative approach in many other Charter cases. For example, the Court was not deterred by relatively clear intent that the framers intended section 7 of the Charter to only provide procedural protections and that it would not affect abortion.¹⁵⁸ The concern in *Prosper* about not requiring governments to spend money on positive obligations was also in tension to other Charter cases that implicitly required the expenditure of funds.¹⁵⁹

In the 1999 case of *New Brunswick (Minister of Health and Community Services) v. G. (J.)*,¹⁶⁰ the Court took a somewhat bolder approach than in *Prosper* and ordered that section 7 of the Charter required the provision of counsel in a hearing in which the state sought custody of a parent's child. The Court stressed the complexity of the scheduled three-day hearing in which 15 affidavits and two expert reports would be presented, as well as the limited capacities of the parent and the stakes of extending the state's custody of the children for another six months. The Court considered the state's interests in controlling legal aid expenditures, but found that these were outweighed by the need to provide counsel when essential to ensure a fair hearing. Chief Justice Lamer reconciled his approach with that taken in *Prosper* simply by indicating that the section 7 right to counsel would not apply

¹⁵⁵ [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236.

¹⁵⁶ *Id.*, at 268 S.C.R.

¹⁵⁷ *Id.*, at 267 S.C.R.

¹⁵⁸ *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486; *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30.

¹⁵⁹ *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326; *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199.

¹⁶⁰ [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46.

in all cases where a person's life, liberty or security of the person was at stake, but only in those cases where a fair hearing would not be possible without counsel.¹⁶¹ This suggests that section 7 will generally only produce case by case remedies with respect to the provision of counsel.

It is odd that after 20 years of section 7 jurisprudence, the Supreme Court has not yet outlined the test for when defence counsel is required to ensure the fairness of a criminal trial. In *G. (J.)*, the Court took note of a variety of Court of Appeal cases dealing with section 7 claims for counsel in criminal trials, but did not comment on the validity of those cases or the appropriate remedy that would apply in the criminal context. The remedial problems should not be insurmountable as the Court would have the options of either staying proceedings or ordering counsel to be provided.¹⁶²

One justification for a broader approach to the right to have counsel provided is the increased dangers of wrongful convictions or other miscarriages of justice when an accused is not assisted by a lawyer in our increasingly complex criminal process.¹⁶³ One shortcoming to such a broad systemic approach, however, may be that the prevalence of wrongful convictions in less serious cases is not well known and the causes of such wrongful convictions are not well understood. The reasons for this are speculative but groups such as AIDWYC understandably focus their limited resources on the most serious cases. There are also considerable costs, including in terms of time and exposure, in invoking the process under sections 696.1-696.6 of the *Criminal Code*.¹⁶⁴

In *G.D.B.*, the Court considered the issue of inadequate assistance of counsel in a criminal trial.¹⁶⁵ The claim of ineffective assistance of counsel revolved around a defence counsel's tactical decision not to use a tape recording of the complainant denying shortly after she left home that her stepfather had sexually molested her. In this case the Court

¹⁶¹ *Id.*, at para. 107.

¹⁶² See Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, as updated), at 9.230ff; Guy Cournoyer, "Canada's *Gideon* Trumpets and the Limits of Financial Constitutional Remedies: Courts as Funambulists" (2005) 19 C.R. (6th) 273.

¹⁶³ Kent Roach, "Is there a Constitutional Right to Legal Aid" in *Making the Case* (Ottawa: Canadian Bar Association, 2002).

¹⁶⁴ For an argument that the financial costs of using the process are often over-estimated see Kerry Scullion, "Wrongful Convictions and the Criminal Review Process" (2004) 46 C.J.C.C.J. 189, at 193.

¹⁶⁵ *R. v. G.D.B.*, [2000] S.C.J. No. 22, [2000] 1 S.C.R. 520.

recognized the right to effective assistance of counsel as a principle of fundamental justice under section 7,¹⁶⁶ but adopted the deferential and oft-criticized American test for determining ineffective assistance of counsel. Under the *Strickland v. Washington*¹⁶⁷ test an accused must first establish that the alleged incompetence of counsel caused a miscarriage of justice and then that counsel's actions were unreasonable. With respect to the first step, the Court in *G.D.B.* did not specifically address the issue of the probability of a miscarriage of justice occurring and simply concluded "[t]here was no miscarriage of justice".¹⁶⁸ The United States Supreme Court in *Strickland v. Washington*¹⁶⁹ has, however, required that there be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." This standard imposes a high standard on the accused to establish a reasonable *probability* of a miscarriage of justice whereas in other areas of Canadian constitutional law, including with respect to the right to full answer and defence, the focus is on whether there is a reasonable *possibility* of a miscarriage of justice.¹⁷⁰ If *G.D.B.* has indeed incorporated the *Strickland* requirement of a reasonable probability of a miscarriage of justice then the Court has adopted a higher standard for intervening when the cause of the alleged miscarriage of justice is ineffective assistance of counsel as opposed to denial of the right to full answer and defence. Such differing approaches to miscarriages of justice seem wrong in principle. A miscarriage of justice is a miscarriage of justice however it has been caused. Moreover, a miscarriage should be defined in a manner consistent with the fundamental requirement that guilt be proven beyond a reasonable doubt. The reasonable possibility standard is more consistent with the reasonable doubt standard than the American reasonable probability standard.

With respect to the second step in the test for ineffective assistance of counsel, the Court in *G.D.B.* indicated that there is "a strong presumption that counsel's conduct fell within the wide range of

¹⁶⁶ *Id.*, at para. 24.

¹⁶⁷ 466 U.S. 668 (1984).

¹⁶⁸ *R. v. G.D.B.*, *supra*, note 165, at para. 35.

¹⁶⁹ 466 U.S. 668 (1984), at 694.

¹⁷⁰ *R. v. Dixon*, [1998] S.C.J. No. 17, [1998] 1 S.C.R. 244; *R. v. Taillefer*, [2003] S.C.J. No. 75, [2003] 3 S.C.R. 307.

reasonable professional assistance”.¹⁷¹ The second step raises the question of whether a court could in good conscience ignore a reasonable probability or preferably a reasonable possibility of a miscarriage of justice on the basis that the lawyer’s conduct would still fall within the presumption of reasonableness.

From the perspective of avoiding miscarriages of justice, it is unfortunate that the Court has followed the restrictive and oft-criticized¹⁷² American approach and not followed the approach taken by the Quebec Court of Appeal and most Commonwealth countries which focuses simply on whether counsel’s conduct rendered “the conviction unsafe and unsatisfactory”.¹⁷³ The Commonwealth approach does not attempt to judge the flagrancy of counsel’s error.¹⁷⁴ Moreover, the Commonwealth approach also seems to be more consistent with the focus on a reasonable possibility of a miscarriage of justice in other section 7 jurisprudence. The Court’s approach in *G.D.B.* seems less than optimal both in terms of responding to a risk of a miscarriage of justice in an individual case and encouraging systemic measures that will reduce the risk of wrongful convictions in future cases.¹⁷⁵

VII. JUDGES, THE REASONS FOR CONVICTIONS AND THE GROUNDS FOR APPEAL

Before the Charter, the Supreme Court was reluctant to require judges to give reasons for their decisions on the basis that “the volume of criminal work makes an indiscriminate requirement of reasons impractical, especially in provincial criminal courts, and the risk of ending up with a

¹⁷¹ *R. v. G.D.B.*, *supra*, note 165, at para. 27.

¹⁷² See for example Stephen Bright, “Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer” (1994) 103 Yale L.J. 1835; Jeffrey Levinson, “Don’t Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel” (2001) 38 Am. Crim. L. Rev. 147.

¹⁷³ *Mills v. The Queen*, [1995] J.C.J. No. 8, [1995] 1 W.L.R. 511, at para. 34 (J.C.P.C.) For a masterful survey of the Commonwealth jurisprudence see the judgment of Proulx J.A. in *R. v. Delisle*, [1999] A.Q no 18, 133 C.C.C. (3d) 541 (C.A.).

¹⁷⁴ One drawback of the Commonwealth approach may be that a jurisprudence may not develop about when defence lawyering falls below constitutional standards. At the same time, professional discipline here, as with respect to prosecutorial conduct, may play a more preventive and remedial role. Indeed, the Court in *R. v. G.D.B.*, [2000] S.C.J. No. 22, [2000] 1 S.C.R. 520, at para. 29 contemplates that the law societies will be active with respect to bad lawyering.

¹⁷⁵ A valuable survey of the reported case law following *G.D.B.* found a 10 per cent success rate in reported cases claiming inadequate assistance of counsel. Dale Ives, “The ‘Canadian Approach’ to Ineffective Assistance of Counsel Claims” (2004) 42 Brandeis L.J. 239.

ritual formula makes it undesirable to fetter the discretion of trial judges”.¹⁷⁶ This approach, including a presumption that trial judges know the law and concerns about slowing the system of justice, influenced the Court’s 1994 decision in *R. v. Burns* not to require trial judges to give reasons for their verdicts or decisions. In that case, the Court upheld a conviction of sexual and indecent assault despite the Court of Appeal’s concerns about the young age of the complainant and the fact that the complainant had initially complained of sexual abuse by her stepbrother and not the accused.¹⁷⁷ In 1995, the Court upheld the briefest and most conclusory of reasons provided by a trial judge about the admissibility of statements to the police after a complex *voir dire*.¹⁷⁸ In neither of these cases did the Court make reference to section 7 of the Charter or related concepts of fairness and reasons in administrative law. These cases represented a total failure to recognize that a lack of reasons could contribute to a miscarriage of justice in an individual case and that the systemic message that judges need not deliver reasons could encourage practices that could increase the risk of wrongful convictions.

In two cases decided in 1996, the Court re-visited the issue and made clear that *Burns* should not be read as authority for the broad proposition that trial judges never have to provide reasons, especially in cases where the law was unclear¹⁷⁹ or where the evidence was confused and contradictory.¹⁸⁰ In 2002, the Court addressed the trial judge’s duty to give reasons in a series of cases. The lead case, *R. v. Sheppard*, held that a trial judge had given insufficient reasons when he convicted an accused of possession of stolen property in a case with no physical evidence and by asserting that he found the testimony of the accused’s ex-girlfriend more credible than that of the accused. Although the Court justified the requirement for reasons in terms of explaining the verdict to the parties and the public, much of the decision related the need for reasons to the right to have meaningful appellate review. Justice Binnie stressed that “[t]he simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful

¹⁷⁶ *R. v. MacDonald*, [1977] 2 S.C.R. 665, at 672.

¹⁷⁷ *R. v. Burns*, [1994] S.C.J. No. 30, [1994] 1 S.C.R. 656. See Kent Roach, “Developments in Criminal Procedure: The 1993-94 Term” (1995) 6 S.C.L.R. (2d) 281, at 335-37 for my previous criticisms of this case.

¹⁷⁸ *R. v. Barrett*, [1995] S.C.J. No. 19, [1995] 1 S.C.R. 752.

¹⁷⁹ *R. v. McMaster*, [1996] S.C.J. No. 31, [1996] 1 S.C.R. 740, at para. 27.

¹⁸⁰ *R. v. D.R.*, [1996] S.C.J. No. 8, [1996] 2 S.C.R. 291, at para. 55.

appellate review of the correctness of the decision, then an error of law has been committed”.¹⁸¹ He also added that this functional approach to reasons and appeals would in appropriate cases allow appellate courts to conclude that the absence of reasons was either an error of law, a miscarriage of justice or contributed to an unreasonable verdict under section 686 of the *Criminal Code*.¹⁸² The reasons were insufficient in *Sheppard* in large part because it was not clear that the trial judge had properly applied the reasonable doubt standard even if he did find the ex-girlfriend’s testimony to be more credible than that of the accused.¹⁸³ A more robust approach to the need for reasons, however, would have created a free-standing right under section 7 of the Charter to reasons, both in order to ensure procedural justice for the accused and, as Professor Quigley has suggested, “as a mechanism for avoiding wrongful convictions”.¹⁸⁴

The utility of the *Sheppard* approach in providing relief from possible miscarriages of justice is inextricably tied to whether the grounds for appeals from convictions under section 686 are adequate. In the companion case of *R. v. Braich*,¹⁸⁵ the Court held that the trial judge’s reasons were sufficient despite the fact the British Columbia Court of Appeal had concluded that a conviction was unsafe because of mistakes and inconsistencies in the identification evidence given by victims of a drive-by shooting. The Court stressed that the absence of reasons was not a free-standing ground of appeal and that the Court of Appeal had not found the trial judge’s guilty verdict to be unreasonable. Justice Binnie concluded that the Court of Appeal “simply took the view that if the trial judge had thought harder about the problems and written a more extensive analysis he might have reached a different conclusion ... [the Court of Appeal] considered the conviction ‘unsafe’ but, with respect, his conclusion was driven more by the peculiarities of the facts

¹⁸¹ *R. v. Sheppard*, [2002] S.C.J. No. 30, [2002] 1 S.C.R. 869, at para. 28.

¹⁸² “Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the *Criminal Code*, depending on the circumstances of the case and the nature and importance of the trial decision being rendered”, *id.*, at para. 55.

¹⁸³ *Id.*, at para. 65. But for a more recent decision in which the majority of the Court affirmed a conviction despite a possible error by the trial judge in this regard see *R. v. Boucher*, [2005] S.C.J. No. 73, 2005 SCC 72.

¹⁸⁴ Tim Quigley, “*Sheppard*: Functional Standards for Reasons in Criminal Cases” (2002) 50 C.R. (5th) 104.

¹⁸⁵ [2002] S.C.J. No. 29, [2002] 1 S.C.R. 903.

than the alleged inadequacies of the trial reasons. A lurking doubt about an ‘unsafe’ verdict is not sufficient to justify appellate intervention.”¹⁸⁶ *Braich* underlines how closely the Court’s functional approach to the giving of reasons is tied to the existing grounds of appeal. Indeed, the functional approach to reasons in *Sheppard* and *Braich* begs the question of whether the existing grounds of appeals from convictions under section 686 are adequate.

In his report on Guy Paul Morin’s wrongful conviction, Kaufman J. recommended that Courts of Appeal should be able to set aside a conviction on the basis of a lurking doubt as to guilt.¹⁸⁷ Justice Kaufman did not address whether such a standard should be introduced through statutory expansion of the existing grounds of appeals or through judicial interpretation of the existing grounds of appeal. He did, however, cite some Courts of Appeal that had already introduced the concept of the safety of the verdict into the existing grounds of appeals. Indeed, in 1996, the Supreme Court had come close to reading the lurking doubt standard into section 686 when it ruled that “the conviction rests on shaky ground and that it would be unsafe to maintain it” adding that the power to overturn unreasonable guilty verdicts under section 686(1)(a) “was intended as an additional and salutary safeguard against the conviction of the innocent”.¹⁸⁸

In *R. v. Biniaris*,¹⁸⁹ however, the Supreme Court refused to read the lurking doubt concept into section 686 when it stated that “It is insufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence. This ‘lurking doubt’ may be a powerful trigger for thorough appellate scrutiny of the evidence, but it is not, without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of a jury.”¹⁹⁰ Although the Court has made clear that a lack of reasons or a lurking doubt may be a trigger to find that a conviction is unreasonable or a miscarriage of justice under section 686, it has refused to make a lurking doubt in itself a ground for appeal. It is to be hoped that appellate courts will use the existing law to intervene in cases where

¹⁸⁶ *Id.*, at para. 39.

¹⁸⁷ Hon. Fred Kaufman, *Report on the Guy Paul Morin Prosecution* (Toronto: Queens Printer, 1998), at 1178.

¹⁸⁸ *R. v. Burke*, [1996] S.C.J. No. 27, [1996] 1 S.C.R. 474, at para. 6.

¹⁸⁹ [2000] S.C.J. No. 16, [2000] 1 S.C.R. 381.

¹⁹⁰ *Id.*, at para. 38.

there is a reasonable possibility that the verdict may be unsafe, but the Supreme Court's approach to reasons and to the existing grounds of appeal may not be optimal in promoting systemic practices to minimize the risk of wrongful convictions.

The close and sometimes confusing connection between the reasons given by trial judges and the grounds for appeal courts to overturn convictions under section 686 was at issue in the recent case of *R. v. Gagnon*.¹⁹¹ In that case, the Court split 3:2 over the adequacy of the reasons given to convict the accused of sexual assault of a young child that he had cared for in a day-care centre. Justices Bastarache and Abella for the majority distinguished *Sheppard* and applied *Braich* on the basis that the trial judge had given extensive reasons for accepting the testimony of the child complainant and for not finding the accused's testimony that denied the sexual assault to be credible.¹⁹² They indicated that after having "admonished trial judges to explain their reasons on credibility and reasonable doubt in a way that permits adequate review by an appellate court ... it would be counterproductive to dissect them minutely in a way that undermines the trial judge's responsibility for weighing all of the evidence."¹⁹³ As in *Braich*, the majority in *Gagnon* stressed that although the Court of Appeal had overturned the conviction, it had not found the verdict to be unreasonable and that there was a reasonable basis for the trial judge's conclusions on credibility.

In dissent, Deschamps and Fish JJ. consistently blended their analysis of the sufficiency of the reasons under *Sheppard* and the reasonableness of the verdict under *Biniaris*. For example, they concluded that "regardless of whether ... [the trial judge's] decision is characterized as being unreasonable, the judgment is found to be wrong in law, or ... the reasons are considered inadequate ... we must reach the same conclusion: the guilty verdict entered by the trial judge should be set aside and a new trial ordered..."¹⁹⁴ Their dissent also raises the possibility that the standard for concluding that a guilty verdict is unreasonable may be lower in judge-alone trials because of the ability of appellate courts to scrutinize the judge's reasons. They stressed that

¹⁹¹ [2006] S.C.J. No. 17, 2006 SCC 17.

¹⁹² *Id.*, at paras. 16-18.

¹⁹³ *Id.*, at para. 19.

¹⁹⁴ *Id.*, at para. 41. They elaborated that "the same reasons that led us to conclude above that the verdict was unreasonable can also lead to the conclusion that there has been an error of law in the case at bar". *Id.*, at para. 54. See also at para. 62.

“[j]uries do not give reasons for their verdict, but judges do. A judge’s verdict must be reviewed with this in mind.”¹⁹⁵ In the result, they were prepared to review the trial judge’s reasons for rejecting the accused’s testimony on the basis that those conclusions conflicted “with the bulk of judicial experience in the assessment of credibility”.¹⁹⁶ At the same time, however, Deschamps and Fish JJ. focused solely on assessing the trial judge’s reasons for rejecting the accused’s testimony while not addressing the trial judge’s acceptance of the complainant’s testimony.

The split in *Gagnon* suggests that the close connection under *Sheppard* between the adequacy of reasons and the grounds for appeal may sow confusion. As a matter of first principle, it might be advisable to separate the adequacy of reasons from the reasonableness of the verdict: each issue is important in its own right. On this basis, the majority’s approach in *Gagnon* seems persuasive on the adequacy of the reasons, but is lacking in its refusal to address the reasonableness of the verdict. In contrast, the minority’s approach does not fully address the reasonableness of the verdict given its narrow focus on the reasons for rejecting the accused’s testimony and its refusal to deal with the child’s testimony which the trial judge found to be reliable because the child’s reports of having been abused were spontaneous, consistent and detailed.

The minority’s demanding approach to the reasonableness of the trial judge’s verdict also begs the questions of the adequacy of the test for determining the reasonableness of a jury’s verdict which by definition will not include reasons. Indeed, the minority seems to suggest that in jury trials the focus has only been on whether the verdict can be supported on the evidence whereas section 686 contemplates that verdicts can be set aside when they are “unreasonable *or* cannot be supported by the evidence”.¹⁹⁷ As will be seen, the role of juries in wrongful convictions is particularly problematic.

¹⁹⁵ *Id.*, at para. 46.

¹⁹⁶ *Id.*, at para. 52.

¹⁹⁷ Justices Deschamps and Fish commented that “[t]he unreasonable verdict test has evolved based on its context” which they note has focused on jury trials. “The reasonableness of a conviction must be analysed in light of the evidence in the record, since this is the only way to reach a conclusion that a jury has not ‘act[ed] judicially’ ... However, the tendency has been to say that verdicts that ‘cannot be supported by the evidence’ are also ‘unreasonable’, seemingly merging the two elements of s. 686(1)(a)(I): ‘the verdict should be set aside on the ground that it is unreasonable *or* cannot be supported by the evidence’ (emphasis added). Juries do not give reasons for their verdicts, but judges do. A judge’s verdict must be reviewed with this in mind. It is possible for a judge’s decision to be unreasonable even though it is supported by the evidence to a certain extent.” *Id.*, at paras. 45-47.

VIII. JURORS, SECRECY AND MISCARRIAGES OF JUSTICE

Although the Court has indicated that a failure by trial judges to give reasons to support a guilty verdict may be a grounds for a successful appeal, it has taken a position on jury secrecy that, with the exception of evidence of external interference, suggests that courts will not consider any reasons that may emerge about why a jury has convicted an accused.

In *R. v. Pan*; *R. v. Sawyer*¹⁹⁸ the Court rejected a section 7 challenge to the traditional doctrine of jury secrecy including a more flexible case by case approach articulated by the Ontario Court of Appeal and the Law Reform Commission of Canada. The Court reasoned that “We would be doing jurors a disservice, in my view, to tell them, on the one hand, that everything they say in the course of their deliberations is private and confidential, and, on the other hand, to decide after the deliberations are over whether in fact we will give effect to our guarantee of confidentiality.... More certainty and predictability is required for jury secrecy to be meaningful.”¹⁹⁹ This approach, however, ignores that even information covered by solicitor and client privilege or police informer privileges is subject to innocence at stake exceptions.²⁰⁰ It raises the unedifying prospect of confirming convictions that were decided by a majority as opposed to a unanimous decision of the jury or decisions that were influenced by racist stereotypes that cannot be totally controlled through the use of challenges for cause. With respect to the latter, the evidence sought to be admitted in *Sawyer* related to claims that racial comments were made by the jury in a trial of co-accused, one who was white, the other black.²⁰¹ In addition, there is some evidence that one of the jurors who wrongly convicted Donald Marshall Jr. may have been influenced by racist stereotypes about both

¹⁹⁸ [2001] S.C.J. No. 44, [2001] 2 S.C.R. 344.

¹⁹⁹ *Id.*, at para. 68.

²⁰⁰ *R. v. McClure*, [2001] S.C.J. No. 13, [2001] 1 S.C.R. 445; *R. v. Brown*, [2002] S.C.J. No. 35, [2002] 2 S.C.R. 185; *R. v. Leipert*, [1997] S.C.J. No. 14, [1997] 1 S.C.R. 281, at para. 24. This is not to say that the innocence at stake exception is itself necessarily adequate in terms of protecting the innocence. See *R. v. Brown*, *supra*, at paras. 57-58 where the Court appears to contemplate that some wrongful convictions may occur because of the strictness of the innocence at stake exception and that such cases can be addressed “through the traditional procedure of appealing to the royal prerogative” under what was then s. 690 of the *Criminal Code*.

²⁰¹ *R. v. Pan*; *R. v. Sawyer*, *supra*, note 198, at para. 17.

the Aboriginal accused and the African-Canadian victim.²⁰² The Court's approach to even possibly racist reasons used by a jury to convict appears to be: "don't ask, don't admit". The costs of such injustices are a very high price to pay for maintaining the confidences of jurors or the finality of their verdicts.

The *Pan* case could have been decided differently if it was viewed through the prism of concerns about wrongful convictions and innocence at stake exceptions to even the most revered privileges. The Court raised the spectre of acquittals being overturned or tainted by evidence about the jury's deliberations,²⁰³ but this would not be a problem under a limited exception that admitted evidence of jury deliberations only when it revealed a reasonable possibility of a miscarriage of justice. The Court's discussion of whether the common law rule and section 649 of the Code violated section 7 of the Charter never really engaged the principle that the innocent should not be punished.²⁰⁴ Indeed, the innocence at stake principle is a foundational principle that should inform both the common law and section 7 of the Charter.

In addition to the vital question of remedies in individual cases of possible miscarriages of justice, a bolder approach in *Pan* would have invalidated the crime of revealing the deliberations of the jury as an unjustified violation of freedom of expression. Such a decision could have encouraged systemic reforms by legalizing research about how actual jurors make their crucial decisions. The Court recognized the need for such research, but relied upon an invitation to Parliament to consider the case for legislative reform, even though the Law Reform Commission had already made the case for reform in 1982.²⁰⁵ The past record on issues affecting the protection of innocence suggests that the continued wait for Parliamentary reform could be long indeed.

²⁰² Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999), at 254.

²⁰³ *R. v. Pan; R. v. Sawyer*, *supra*, note 198, at para. 81.

²⁰⁴ The Court did, however, indicate that the accused did have a number of other safeguards such as the ability to challenge jurors for partiality, the requirement for a unanimous verdict, the judge's charge to the juror and the ability of the judge to dismiss a juror. It did not, however, mention that while the accused typically can elect trial by judge alone that an accused charged with murder has no right to a judge alone trial. *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296.

²⁰⁵ *R. v. Pan; R. v. Sawyer*, *supra*, note 198, at para. 107. See also *R. v. Find*, [2001] S.C.J. No. 34, [2001] 1 S.C.R. 863, at para. 87.

IX. CONCLUSION

The principle that the innocent should not be punished is the most fundamental of all the fundamental principles of justice. The punishment of the innocent is a travesty of justice that benefits no one. Nevertheless the implementation of this bedrock principle is complex and controversial. A primary issue is what constitutes innocence. Although DNA exonerations and other forms of exonerating the wrongfully convicted and the actually innocent are valuable reminders of the fallibility of the system, it is unrealistic to expect such certainty in all cases. Innocence in this paper has been defined in relation to the broader concept of miscarriages of justice which is based on the foundational principles that guilt must be proven beyond a reasonable doubt and that trials must be fair. Cases such as *United States of America v. Burns*²⁰⁶ recognize the tragic reality of wrongful convictions and require courts to take systemic steps to minimize the risk of wrongful convictions in future cases, but courts must remain attentive to any miscarriage of justice in any particular case. Both individual and systemic strategies to protect innocence are necessary and complementary: no systemic measure will reduce the risk of error in the criminal process to zero and hence the system must always be attentive to claims of miscarriages of justice in individual cases.

Another disagreement is whether the principle that the innocent not be punished should be balanced with other interests. Drawing on the work of Lon Fuller and Ronald Dworkin,²⁰⁷ I have suggested that a useful distinction can be made between the need for courts to respond to a reasonable possibility of a miscarriage of justice in an individual case before them without regard to competing social interests and the need to take systemic but proportionate measures in all future cases to minimize the risk of wrongful convictions. The former strategy is well represented in the primacy that the Court has given in its section 7 jurisprudence to protecting the accused's right to full answer and defence but is compromised by suggestions in cases such as *G.D.B.*²⁰⁸ that courts should wait until a miscarriage of justice is probable. The latter systemic strategy is well represented by decisions such as *United States of*

²⁰⁶ [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283.

²⁰⁷ Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) c. 3; Lon Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969), at 179-80.

²⁰⁸ [2000] S.C.J. No. 22, [2000] 1 S.C.R. 520.

*America v. Burns*²⁰⁹ and *R. v. Stinchcombe*²¹⁰ which adopt systemic safeguards in recognition of the risk of wrongful convictions in some future cases, but only after carefully considering whether the new rights articulated by the Court would have a proportionate effect on competing social interests.

Many but not all of the cases examined in this paper have involved the interpretation of section 7 of the Charter. Some of the cases were decided simply on the basis of evolving common law principles. The process of constitutionalization, however, may help underline questions of principle. The Court should aspire to using the idea that the innocent not be punished as a coherent and demanding principle that can inform much of section 7 and the related common law. Greater use of the constitutional principle that the innocent not be punished may also provide some, albeit not complete, protection from legislative resistance. Parliament's record on the protection of innocence has not been inspiring. It has placed restrictions on the ability of the accused to access evidence in sexual assault cases and it has ignored judicial invitations to take steps to minimize the risk of wrongful convictions in other cases. One of the main messages of this paper is that the protection of innocence, in both its individual and systemic dimensions, should be seen as a matter within the inherent domain of the judiciary. The task of protecting the innocent should not be left to Parliament as a majoritarian institution with little apparent concern for remote risks of punishing the innocent. In this regard, we are fortunate that the Supreme Court in cases such as *Stinchcombe* and *Burns* was prepared to take matters of justice into their own hands.

The topics examined in this paper have been eclectic,²¹¹ but this underlines how the principle of protecting the innocent can help direct the wide swath that section 7 cuts across the justice system. The task of protecting innocence is too important and too pervasive to be cabined to the discrete categories of substantive, procedural or evidential law or to be limited to criminal as opposed to civil or administrative law. The

²⁰⁹ [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283.

²¹⁰ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326.

²¹¹ The topics could have been more eclectic as an earlier version of the paper included a discussion of the Court's failure to recognize a right under s. 7 of the Charter to the exclusion of unreliable evidence. See now Kent Roach, "Unreliable Evidence and Wrongful Convictions: The Case for Exclusion of Tainted Identifications and Jailhouse and Coerced Confessions" (2007) 52 *Crim. L.Q.* (forthcoming).

protection of innocence cannot be limited to the operation of the criminal justice system and for this reason the liability of criminal justice actors to civil actions and professional discipline were discussed in this paper. In the post 9/11 environment, it is dangerous to limit concerns about imprisoning the innocent to criminal law and the Supreme Court should be concerned with protecting innocence at both individual and systemic levels in the forthcoming cases that will consider whether the use of immigration security certificate to detain terrorist suspects indefinitely without full disclosure or adversarial challenge of the government's case violates section 7 of the Charter. Wrongful convictions have disproportionately occurred in terrorism cases and care should be taken before sanctioning procedures that provide far less protections for innocence than the criminal trial.²¹²

In the end, we must ask whether section 7 of the Charter has improved the protection of the innocence in our justice system? It is too soon to make a final judgment in part because we are only starting to understand the prevalence and causes of wrongful convictions. Nevertheless, there have been some important victories for the protection of innocence under section 7 of the Charter. In a number of cases, most notably *Burns*, the Court has recognized that the conviction of the innocent is a problem that requires remedies. Admitting that there is a problem is a necessary first step to addressing it. The Court's decision in *Stinchcombe* was an important step in creating broad disclosure rights and relating a failure to make full disclosure with wrongful convictions. At the same time, however, the Court has failed to apply the principle that the innocent should not be convicted in the context of the confidentiality of jury deliberations. In other areas such as the right to reasons, the right to adequate legal assistance, civil and professional discipline for prosecutorial misconduct and the production, disclosure and admissibility of some crucial defence evidence in sexual assault prosecutions, the Court deserves credit for opening a door for remedies for miscarriages of justice in individual cases. Nevertheless, the section 7 jurisprudence in all of these areas does not live up to the

²¹² *Re Charkaoui*, [2004] F.C.J. No. 2060, 247 D.L.R. (4th) 405 (C.A.), leave to appeal to S.C.C. granted [2005] C.S.C.R. no 66. For further discussion of the problems of innocence and miscarriages of justice in relation to security certificates see Kent Roach & Gary Trotter "Miscarriages of Justice in the War Against Terrorism" (2005) 109 Penn. State L. Rev. 967, at 1002-1006.

promise of *Burns* by taking broader systemic measures to reduce the risk of wrongful convictions in future cases.

Systemic reforms to minimize the risk of miscarriages of justice in future cases should not be undertaken recklessly, but with attention to principles of proportionality drawn from section 1 of the Charter. Application of proportionality principles in cases such as *Stinchcombe* and *Burns*, however, suggests that the result of disciplined proportionality analysis may be more, not less, systemic protections against wrongful convictions. The most fundamental of our fundamental principles of justice, the right of the innocent not to be punished, has rightly received significant attention under section 7 of the Charter. More, however, needs to be done.

