Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences, and Wrongful Convictions

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Abstract
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DISTORTING THE PROSECUTION PROCESS: INFORMERS, MANDATORY MINIMUM SENTENCES, AND WRONGFUL CONVICTIONS

BY DIANNE L. MARTIN

As the use of mandatory minimum sentences becomes more common in Canada, it is important to consider a range of potential consequences that are neither intended nor anticipated. This article considers the implications of mandatory minimum sentences in contributing to wrongful convictions. It considers the impact of these sentences on two significant processes in the criminal justice system, plea bargaining and the development of informers, and argues that both processes are vulnerable to distortions. These distortions, which include the wrongful conviction of innocent people, can be exacerbated by the threat of mandatory minimum prison sentences. In the case of plea bargaining, innocent people may plead guilty to lesser offences to avoid mandatory minimums. In regard to the development of informers, the article concentrates primarily on the role of mandatory minimum sentences in the matter of "jailhouse informer" witnesses who have been associated with a significant number of wrongful convictions. Experience in the United States, where these sentences are most widely used, informs the analysis which is nonetheless focused on the Canadian criminal justice system.

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3 2001, D. Martin.

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I. INTRODUCTION

Mandatory minimum sentences are attractive to many interests. They are politically attractive, as Anthony Doob and Carla Cesaroni amply demonstrate. As experience in the United States particularly illustrates, these sentences serve the operational interests of the prosecution process in a number of ways. Most well-known is the role that these sentences serve in plea bargaining, when accused persons are faced with a choice between a certain, often lengthy, prison sentence if they are convicted of an offence that carries a mandatory minimum sentence of imprisonment after a contested trial, and a guilty plea to a lesser offence that does not. The opportunity to avoid the mandatory minimum sentence is a clear inducement to plead guilty. The dark side of this choice is that some of those pleas of guilt are taken from the factually innocent.

A related function, the use of the threat of the mandatory minimum sentence as a tool in the development of informers, and the relationship between informer evidence and wrongful convictions, is the focus of this article. Informer evidence generally (and “jail house informer” evidence in particular), has been implicated in wrongful convictions throughout the

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2. In a wide-ranging review, Stephanos Bibas discusses the increasing use of mandatory minimum sentences and equally rigid sentencing guidelines and the costs of due process and justice in the United States that have been attributed to them. S. Bibas, “Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas” (2001) 110 Yale L.J. 1097.


4. Jailhouse informers are discussed at greater length, infra, but in general refer to the individuals who, while in custody themselves, claim to receive confessions from accused persons before or during their trials.
This article considers the links between those implications and mandatory minimum sentences. The data concerning mandatory minimum sentences is drawn primarily from the United States where these sentences are most widely used. However, concerns about the risks and harms associated with the use of informer evidence is widespread, and the causes of wrongful convictions are similar in Canada and the United Kingdom. The concern is that as Canada moves toward greater reliance on mandatory minimum sentences, one of the costs of that choice will be a heightened risk of wrongful convictions.

Much of the work of criminal investigation involves managing informers. Although strictly speaking, the informer may simply be the individual who reports a crime, the more usual sense of the term connotes a person who provides information or testimony for benefit. These informers may provide information to police as a routine practice, or the informer may be an associate or accomplice of the accused who gains a benefit by providing information or offering to testify against the key suspect. In the case of drug offences and other crimes which take place in secret, informer evidence is often central to investigations. Although the use of informers to resolve criminal cases is recognized in law and considered by many to be an essential part of law enforcement and

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7 In R. v. Scott, [1990] 3 S.C.R. 979 at 994, Mr. Justice Cory stressed the importance of informers generally, and in the context of drug investigations: "The value of informers to police investigations has long been recognized. As long as crimes have been committed, certainly as long as they have been prosecuted, informers have played an important role in their investigation. It may well be true that some informers act for compensation or for self-serving purposes. Whatever their motives, the position of informers is always precarious and their role is fraught with danger. ... The role of informers in drug-related cases is particularly important and dangerous. Informers often provide the only means for the police to gain some knowledge of the workings of drug trafficking operations and networks."
investigation,\textsuperscript{8} there are well-known risks associated with their use, including the danger that the informer will lie and thus contribute to a wrongful conviction.\textsuperscript{9}

Informer evidence is commonly seen in two different settings in the criminal justice system: in the routine cases where sentences of imprisonment are common such as drug offences, and in the more high-profile, difficult-to-solve cases of violence perpetrated by strangers. The role of informers in resolving the often more high-profile cases of violence perpetrated by strangers is developed more fully below, but in essence has most of the same features as in routine cases. That is, the informer comes forward or is developed to provide the evidence that secures a conviction and a resolution of the crime.

In either case, it is significant that relatively few of the matters processed by police are solved by the “sleuth” of fiction detecting and locating an unknown assailant. Instead, most incidents that are defined as crimes involve individuals well-known to police engaging in repeated antisocial acts.\textsuperscript{10} In the context of these routine investigations, police must gather evidence from the participants. In order to obtain that evidence, it is not uncommon for the threat to be made, directly or indirectly, that if potential witnesses wish to avoid prosecution and imprisonment, they will

\textsuperscript{8} The use and protection of those who inform police about the identity of criminals and the commission of crimes is well-known to the law. For example, the rule of “informer privilege” was developed to protect the identity of citizens who assist in law enforcement and to encourage others to do the same. In response to a challenge to the privilege brought under the \textit{Canadian Charter of Rights and Freedoms}, Part I of the \textit{Constitution Act, 1982}, being Schedule B to the \textit{Canada Act 1982} (U.K.), 1982, c. 11 [hereinafter \textit{Charter}], Mr. Justice Cory stated in \textit{R. v. Hunter} (1987), 57 CR (3d) 1 at 5 (Ont. C.A.): “The rule against the non-disclosure of information which might identify an informer is one of long standing. It developed from an acceptance of the importance of the role of informers in the solution of crimes and the apprehension of criminals.” It has also been the subject of considerable study by criminologists. Clifford Zimmerman sets out the long history of its use, and the conventional view that informers are a “vital and necessary element of the criminal justice system,” in Zimmerman, supra note 5 at 57.

\textsuperscript{9} The risks associated with informer testimony are well known. See \textit{e.g.} G.L. Wool, “Police Informants in Canada: The Law and Reality” (1985-86) 50 Sask. L. Rev. 249; J. Farris, “The Confidential Informant: Management and Control” in M. Palmiotto, ed., \textit{Critical Issues in Criminal Investigation} (Cincinnati: Anderson, 1988); and Zimmerman, supra note 5.

provide police with names and information. In this setting, reliably harsh punishments that may be imposed on the non-cooperative or non-informative witness/suspect are a crucial tool for police in their efforts to generate and manage informers.11

Prosecutors also need tools to encourage guilty pleas, as the prosecution process cannot afford unlimited contested trials.12 Indeed, the risk of certain imprisonment, whether because a mandatory minimum sentence is involved or because of the nature of the offence, is almost as helpful in inducing guilty pleas13 as the denial of bail.14 For the criminal justice system as a whole, the fast, efficient resolution of cases and of charges is essential to its legitimacy, and history suggests that anything that promises to deliver this result is welcomed.

Mandatory minimum sentences serve all of these interests, and, at the same time, heighten the risk that injustices will be done. No sentence is as certainly harsh as the mandatory minimum penalty, and as the U.S. literature demonstrates, no sentence is as demonstrably implicated in

11 Zimmerman, supra note 5.

12 The significance of the negotiated plea to the efficient management of the criminal process was recognized thirty years ago in J. Hogarth, Sentencing as a Human Process (Toronto: University of Toronto Press, 1971) and examined in detail in R.V. Ercelon & P.M. Bharanek, The Ordinance of Justice: A Study of Accused Persons as Defendants in the Criminal Process (Toronto: University of Toronto Press, 1982). In 1987, the Canadian Sentencing Commission recognized that plea bargains were essential to the operation of the criminal justice system, and broke the process down into the types of negotiations that take place. They identified “charge bargaining,” “sentence bargaining,” and “fact bargaining.” They also recommended abolition of mandatory minimum sentences, except for the sentence for murder. Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach (Ottawa: Supply and Services, 1987) at 404. That recognition was affirmed again by The Honourable G.A. Martin in Canada, Report of the Attorney General's Advisory Committee on Charge Setting, Disclosure, and Resolution Discussion (Toronto: Queen's Printer, 1993) (Chair: G.A. Martin) [hereinafter Martin Report].

13 This effect of mandatory minima has commanded considerable academic attention in the United States, where this sanction has become endemic, particularly in regard to drug cases; see e.g. Bibas, supra note 2 at Part III, “The Real World of Guilty Pleas”; and D. Guelker, “Punishing Protestations of Innocence: Denying Responsibility and Its Consequences” (2000) 37 Am. Crim. L.R. 1363. However, the effect has been acknowledged in Canada as well, most poignantly by Madame Justice L. Ratushny as part of her review of the convictions of women for spousal homicide in light of the “battered woman” defence. The pressure to plead guilty to manslaughter to avoid a mandatory life sentence despite an available defence troubled her, and she made a number of recommendations to reduce this pressure; see L. Ratushny, Self-Defence Review: Final Report (Ottawa: Supply and Services, 1997).

14 The significance of the bail decision has been understood at least since Martin Friedland's 1955 study which first highlighted it; see M.L. Friedland, Detention Before Trial (Toronto: University of Toronto Press, 1965). Studies which followed bail reform reached the same conclusions. See e.g. J. Hagan & C.P. Morden, “The Police Decision to Detain: A Study of Legal Labeling and Police Deviance” in C. Sharpen, ed., Organizational Police Deviance (Toronto: Butterworths, 1981) 9.
developing informers of various stripes or in encouraging guilty pleas.\textsuperscript{15} Apart from the very serious questions about the propriety and efficacy of informer use and plea bargaining, the concern is that these particular devices of the criminal prosecution process are used and developed in ways that have seriously harmful, albeit usually unintended, consequences.

As Elizabeth Sheehy establishes in regard to their impact on defences,\textsuperscript{16} mandatory minimum sentences induce significant distortions in the criminal justice system. In the operation of these sentences in the development of informers, and as a device for encouraging guilty pleas generally, that distortion is also implicated in one of the most serious of criminal justice failures—the conviction of an innocent person for a crime that she or he did not commit. That distortion is examined in this short article, first by examining the phenomenon of wrongful convictions generally, and then by demonstrating the role that informer testimony has played in contributing to them. The U.S. literature concerning the relationship among informers, mandatory minimum sentences, and wrongful convictions provides a backdrop against which examples of informer testimony that have led to wrongful convictions in Canada and the United Kingdom can be examined. The concern is that if informer testimony is implicated in wrongful convictions in regimes with relatively few mandatory minimum sentences, the U.S. evidence suggests that the risk of wrongful convictions will increase if the trend toward greater use of mandatory minimum sentences continues in Canada. That is, even more informers willing to provide false evidence can be expected if there are more opportunities for authorities to rely on the threat of a mandatory minimum sentence in negotiating with them, and more persons serving or facing mandatory minimum sentences can be expected to come forward with false jailhouse confessions. The related concern is that more people will plead guilty to crimes they did not commit, or for which they have a defence, in order to avoid the risk of a mandatory minimum sentence.

The arguments sketched here are suggestive, not conclusive. Although much has been learned in recent years about wrongful convictions and about some of the ways that a sentencing regime that relies heavily on mandatory minimum sentences may be harmful to a just criminal justice system, eliminating mandatory minimum sentences will not eliminate wrongful convictions. However, in a jurisdiction like Canada,
where choices are still to be made about when and whether to increase the
use of mandatory minimum sentences, the prospect of increasing the risk
of miscarriages of justice merits serious consideration. The arguments set
out in this brief article are meant to contribute to that debate.

II. CAUSES OF WRONGFUL CONVICTION

When a crime is resolved through the conviction of an innocent
person, a double failure of justice has occurred—not only is an innocent
person wronged by the conviction, but the guilty person is thereby allowed
to go free. However, a wrongful conviction also provides the opportunity
to critically examine criminal justice processes and practices. When we
know that the outcome was wrong, we are able to retrace the steps that led
to it, even if that process requires rethinking practices that have been widely
followed and accepted. Cases of wrongful conviction from all over the
common law world have been identified, remedied, and studied in recent
years, in part fueled by advances in DNA identification techniques.17 These
cases provide a virtual laboratory for examining the criminal justice process.
In the United States, the death penalty has driven most writing and
research although recent work has considered the problem more widely,18
while in Britain, shock at the revelation that a series of IRA bombing cases
were in fact wrongful convictions generated first a Royal Commission and
then an independent agency for the review of cases.19 In Canada and

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17 The analysis by the National Institute of Justice of twenty-eight DNA exonerations was
evertheless valuable in this regard. See E. Connors et al., Convicted by James, Exonerated by Science;
Case Studies in the Use of DNA Evidence to Establish Innocence after Trial (Washington: National
Institute of Justice, 1996). See also Scheck, supra note 5.

Stan. L. Rev. 21; R.C. Huff, A. Rattner & E. Sagarin, Convicted But Innocent: Wrongful Conviction and
Public Policy (Thousand Oaks: Sage, 1996); M.L. Radelet, H.A. Bedau, & C.E. Putnam, In Spite of
Innocence (Boston: Northeastern University Press, 1992); M.L. Radelet, W.S. Lofquist & H.A. Bedau,
“Prisoners Released from Death Rows since 1970 Because of Doubts About Their Guilt” (1997) 13
Thomas Cooley L. Rev. 907; and M.L. Rosenbaum, “Inevitable Error: Wrongful New York State

19 Journalistic accounts of the IRA cases were instrumental in exposing the wrongful convictions.
Bomb: Irish Bombers, English Justice, and the Guilford Four (London: Bloomsbury, 1985); and C. Mullin,
Error of Judgment: The Truth About the Birmingham Bombings (Dublin: Poolbeg Press, 1993). The
scandal led to The Royal Commission on Criminal Justice, (London: The Home Office, 1991) and the
formation of the Criminal Cases Review Commission (CCRC); “Press Release: CCRC Receives 1,359
Applications in its First Year” (21 July 1998), online: <http://www.ccr.org.uk/latestnews.html> (Date
accessed: 3 February 2002). See also A.A.S. Zuckerman, “Miscarriages of Justice-A Root Treatment”
Australia, both journalistic accounts and Commissions of Inquiry have been influential in generating a new awareness of the fallibility of the prosecution process and informed critiques of current investigative and prosecution practices.\(^2\)

From this array of analyses, some well-founded propositions have emerged. Wrongful convictions are not, as some have argued,\(^2\) the inevitable errors of a human system and thus impossible to eliminate or reduce. Rather, we are learning which cases are at greatest risk for an incorrect outcome and why. They typically can be found in one of two institutional contexts (which frequently overlap): the pressure to convict in the highly charged and politicized environment generated by the high-profile case, and the willingness to prosecute and convict someone without real scrutiny of the evidence engendered by the operation of stereotype and bias in routine environments. High-profile cases where the innocent are convicted receive the most media attention. However, wrongful convictions have been identified in more routine cases, and common causes and factors are being identified.\(^2\)

Indeed, it is important to be aware that wrongful convictions are not just a product of the high-profile, pressure-to-convict paradigm, so familiar from the notorious cases of wrongful conviction. All miscarriages of justice have their roots in the more common problem of institutional cynicism and neglect—the cases of the same old suspects "obviously guilty" of the same old offences investigated primarily by means of interrogation and informer manipulation and resolved through negotiated guilty pleas. Many of the known cases turn out to be neither aberrations nor difficult to prevent. In the words of the commissioners reporting on the causes of the wrongful conviction of Donald Marshall, Jr., the errors "could have and should have

\[\text{[1992] Crim. L.R. 323.}\]


\(^2\) Scheck, *supra* note 5.
been prevented if persons involved in the criminal justice system had carried out their duties in a professional and/or competent manner," or understood the risks in some practices.23

III. INFORMERS, GUILTY PLEAS, AND WRONGFUL CONVICTIONS

Most cases of confirmed wrongful conviction are a product of the pressure to resolve a crime, whether that pressure is externally generated because of a high-profile crime, or is internally generated by resource constraints and other institutional forces. In turn, most demonstrate one or both of two common predisposing circumstances: the accused was a marginalized outsider, and/or the case rested on suspect or inherently unreliable evidence such as that provided by informers. In the context of the argument that increased use of mandatory minimum sentences increases the risk of wrongful convictions, this analysis first examines the role of informer evidence generally and then looks at the use of jailhouse informers through a discussion of some of the better known Canadian and British cases of wrongful convictions. The conclusion is then drawn, just as has been the case in the United States, that Canada can expect more instances of wrongful conviction if the trend toward mandatory minimum sentences continues. The related circumstance of the wrongful guilty plea completes the discussion.

A. Developing Informers

In high-profile cases, or in any case where a substantial pressure to produce a resolution exists, that pressure generates a "convict at any cost" climate. If it is a case involving unknown assailants, informer evidence assumes great significance and poses considerable risks. This was clearly the context of the investigation of the IRA pub bombing cases in England in the 1970s. Popular books,24 a very popular film (In the Name of the Father), and a Royal Commission,25 amongst others, have examined these cases, and the facts are today relatively well known. Scores of people died when the IRA planted bombs in pubs frequented by off-duty British soldiers—a terror tactic that provoked extraordinary public fear and anger. Three cities were

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24 McKee, supra note 19 and Mullin, supra note 19.
25 The Royal Commission on Criminal Justice, supra note 19.
involved in what became three separate cases of wrongful conviction: Guildford and Birmingham where bombs were detonated, and Manchester where an entire family, the Maguires, were wrongly convicted of having supplied the explosives.

These were also cases where informers facing the threat of harsh punishment themselves offered names to satisfy their interrogators. Police rounded up hundreds of young Irish men and women who had any connection to the IRA, particularly those who were leaving England in the days following the bombings. They subjected them to intense interrogation, including threats that they would face imprisonment themselves, either for the bombings, or under Britain's antiterrorism law, questioning them for names and information. The threat of charges and jail would disappear if a name was given. Not surprisingly, names were given by the pressured informers and suspects were identified. These in turn were brought in for further investigation. The "Guildford Four," the "Birmingham Six," and the "Maguire Seven," as they became known, were then themselves subjected to lengthy, abusive interrogations until false confessions composed in advance by the police were signed. Finally, police forensics experts were convinced to offer misleading opinions about matters such as gunshot residue tests. Not surprisingly, given this combination of evidence and the climate of the times, all seventeen were convicted and spent almost twenty years in prison before they were finally freed and exonerated. But for the search for suspects through the abuse of informers, these innocent people would not have been victims of a miscarriage of justice.

Part of the responsibility for these wrongful convictions has been attributed to a justification for police misconduct dubbed "noble cause corruption," a variant on the rationale that the "ends justify the means." That is, that the noble end—the conviction of a person who police know is guilty—justifies the use of corrupt means—in this instance, improper pressure on informers. However, it is misleading to dub these practices corruption, whether nobly caused or not, because to do so masks the reality that seeking out, pressuring, and developing informers is standard police practice. It is a practice that appears to be rooted in a misplaced faith in the reliability of the confessional evidence that determined interrogation

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26 Supra note 19.
27 McKee, supra note 19.
28 Mullin, supra note 19.
almost always produces, whether from informers or from those accused. That misplaced faith, in turn, appears to be rooted in ignorance about the role that the threat of harsh and certain punishment has on the individuals who provide the evidence thus obtained. It is a practice used in Canada where two of the three most famous Canadian cases of wrongful conviction (the cases of Donald Marshall, Jr. and David Milgaard) rest on false informer/accomplice testimony, while the third (Guy Paul Morin) is an example of the most egregious form of informer evidence—the so-called jailhouse informer.

Donald Marshall, Jr. was an Aboriginal teenager known to police when he was wrongly convicted of murdering his friend, an African-Canadian youth named Sandy Seale. Police, with little to go on other than bias, jumped to the conclusion that Donald Marshall, Jr. was the killer, even though Marshall, wounded by the real killer, flagged down police to get help for himself and his friend after they were attacked. Police wanted to believe that Marshall was the killer and did not want to believe that a middle-aged white man had in fact killed Seale and attacked Marshall. The police did not bother to investigate the crime scene or to search for independent witnesses. Instead, they pressured Marshall’s teenaged acquaintances, with threats of criminal charges and imprisonment, into becoming informers against him. In a racially charged community, that was all that was needed.

David Milgaard was a drug-using teenaged hippie heading out to Saskatoon with two of his friends when Gail Miller, a young nursing assistant, was raped and murdered on a bitterly cold winter night. The high-profile case was investigated in the usual way through interrogations of all the usual suspects, which in the 1970s in Saskatoon definitely included drug-using teens. Milgaard was offered up to the police by one such youth during his interrogation for another matter. With Milgaard named, police fairly quickly built a case based on evidence extorted in a similar fashion from his friends. It took twenty-three years of constant pressure and reinvestigation from his mother Joyce, the New Jersey-based Centurion Ministries, and others to finally unravel the conviction. Approximately six years after his release from prison, DNA testing confirmed his innocence.

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30 Leo, supra note 3.
31 The officer in charge of the investigation, Sgt. McIntyre, had experienced previous “run-ins” with Marshall. See Hickman, supra note 20.
32 Ibid.
33 Karp, supra note 20.
and implicated another man. A serial rapist named Larry Fisher who had been living just blocks away from the murder scene was convicted of Gail Miller's murder in November 1999. While police had known about Fisher and the seven similar rapes and knife attacks he had committed, they relied instead on the dubious evidence they had generated from frightened teenagers. A Commission of Inquiry into David Milgaard's wrongful conviction is expected.

These are common situations for the generation of informer evidence. That is, vulnerable individuals, faced with the threat that they will themselves be charged and imprisoned, offer testimony against someone else. The risks are inevitably as great, and arguably much higher, when the threat is backed by the certainty of imprisonment guaranteed by a conviction for an offence that carries a mandatory minimum sentence.

B. Jailhouse Informers

The dubious foundation for faith in informer and accomplice evidence pales in comparison with the cases where the authorities rest their cases on the evidence of jailhouse or in-custody informers. This evidence, from a prisoner who claims to have received a confession to the crime from the accused, while sharing a cell for example, and who agrees to testify in exchange for some benefit, is inherently and intuitively unreliable. Although this evidence may be offered in exchange for almost any benefit, when the informer is serving a mandatory minimum term, such as a life sentence, which in the United States may be without parole, it is literally the only way out of jail. Despite the frailties caused by the motive to fabricate these confessions, they are presented to prosecutors by police and accepted by juries all over the world, where they have repeatedly caused wrongful convictions. This evidence has become notorious in the United States, but its use is not limited to jurisdictions distorted by a host of mandatory minimum sentences. It is happening in Canada.

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35 Ibid.
37 Zimmerman, Ibid.
38 An entire chapter is devoted to jailhouse "snitches" in B. Scheck, P. Neufeld & J. Dwyer, Actual Innocence: Five Days To Execution And Other Dispatches From The Wrongly Convicted (New York: Doubleday, 2000).
The Ontario case of the wrongful conviction of Guy Paul Morin for the rape and murder of his eight-year-old neighbour, Christine Jessop, is the most well-known example, and is the case that has been instrumental in generating reforms in Canada to limit this evidence. Morin's arrest was not a product of informer evidence, but his conviction was. In investigating the causes of Morin's wrongful conviction, Mr. Justice Fred Kaufman, former Justice of the Quebec Court of Appeal, conducted an exhaustive inquiry into the facts of the case and the systemic and other failings that led to the wrongful conviction of an innocent man and the concomitant failure to apprehend a child killer. The arrest was based on a frail foundation of suspicion of a weird neighbour and his ambiguous comments to police, and suspect hair and fibre evidence found many months after the crime on the deceased child's body. A conviction was highly unlikely on that evidence. In fact, the conviction was only ultimately secured at a second trial because of the skillful presentation by the Crown of Morin's alleged confession to two jailhouse informers.

Mister Justice Kaufman conducted the most extensive investigation of this type of informer evidence since the Los Angeles Grand Jury Report (LAGJR) in 1990 exposed the extraordinary scope of the problem and made a series of highly significant findings of fact and recommendations for the stringent control of this type of evidence. The LAGJR, together with the testimony of well-known U.S. Attorney Martin Weinberg, highlighted the aggravating role of mandatory life sentences in the production of jailhouse informers. As a result, Mr. Justice Kaufman included a caution about mandatory minimum sentences in his report. He said:

I am mindful of the distinction to be drawn between the Canadian experience and that of Mr. Weinberg, given the system described above [one driven by mandatory minimum sentences and life sentences without parole]. I agree with Mr. Weinberg that it is a system not worthy of emulation in Canada. It provides an almost irresistible incentive to implicate a fellow inmate.

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39 Kaufman, supra note 6, vol. 1.
41 Kaufman, supra note 6, vol. 1 at 403.
42 Ibid. at 585 [emphasis added].
C. Wrongful Guilty Pleas

The relationship between wrongful guilty pleas and mandatory minimum sentences is easier to map out, although more difficult to detect. After conducting her review of the cases of women imprisoned for life for partner homicide in circumstances that raised the possibility of self-defence, Madame Justice Lynn Ratushny had this to say about mandatory minimum sentences for murder:

I have seen, over the course of my Review, cases where the accused person faced irresistible forces to plead guilty even though there was evidence that she acted in self defence. In some cases, this evidence was very strong. These irresistible forces are the product of the Criminal Code's mandatory minimum sentences for murder. A woman facing a murder charge risks imposition of a mandatory sentence of life imprisonment with parole eligibility after between 10 and 25 years. By contrast, a woman who pleads guilty to manslaughter will generally receive a sentence of between three and eight years with eligibility for full parole after serving one-third of her sentence. This would obviously be a difficult choice for any person accused of second-degree murder to make.43

The pressure is just as great for any accused faced with any mandatory minimum sentence. The recent scandal of police corruption and misconduct in the Los Angeles Police Ramparts Division uncovered, along with the extreme corruption, a disturbing record of innocent men who pleaded guilty to crimes they did not commit to avoid draconian mandatory minimum sentences. As Samuel Pillsbury, a professor at Loyola Law School, said in the Los Angeles Times:

It's something you never see on TV: the victims of a police conspiracy pleading guilty to false charges. On TV, the wrongfully accused always proclaim their innocence to a jury. That's the American way. Yet consistent with the general pattern of criminal cases in Los Angeles today, most of the defendants whose convictions have recently been overturned because of corruption in the police department's Rampart Division pleaded guilty.

The Rampart cases reveal a sorry truth about L.A. law: Using entirely lawful threats, the state can make even the innocent plead guilty. At a recent press conference, Dist. Atty. Gil Garcetti expressed his concern about this aspect of the Rampart scandal: "It raises the specter, obviously, that they pleaded guilty to something [even though] they were telling their lawyer, "I'm not guilty, I'm innocent." That raises a question for everyone in the criminal justice system."44

43 Ratushny, supra note 13 at 14.
44 Pillsbury, supra note 3.
IV. CONCLUSION

The ideological functions of criminal prosecutions are enhanced by preserving the myth that guilt or innocence is resolved through fair and public trials where the facts are contested and the law is challenged. That myth in turn rests on others: that the presumption of innocence actually guides criminal justice determinations; that the accused “criminal” has more rights than do crime victims; and that the criminal justice system is soft on crime. The combination of the latter two myths in turn fuels government response to demands for more harsh and determinate sentences.45

The reality that lays bare the myth about the protections of due process safeguarding convictions is something darker and more troubling. Most cases in the criminal justice system involve targeted, racialized, marginalized people who are known to each other and known to the system, and most of these cases are resolved through plea negotiations. It is fewer than 10–20 per cent of all charges that actually proceed to a contested trial,46 and of that percentage, a much smaller number involve cases where factual guilt is at issue. Most of the litigated disputes concern matters of justification, such as self-defence or consent, or of intention or state of mind, rather than a question concerning the identity of the perpetrator, or whether a crime has been perpetrated at all. True “who done it” or “what happened” crimes are relatively rare. However, these rare cases command headlines and dominate politically motivated “law and order” rhetoric. These are the cases that are used and reused to justify draconian, short-sighted measures such as mandatory minimum sentences. But these are also the cases that we get wrong. Even more errors will be made as Canada blindly goes down the path toward more mandatory minimum sentences, a path “not worthy of emulation in Canada.”47


46 According to P.H. Solomon, Jr., Criminal Justice Policy, From Research to Reform (Toronto: Butterworths, 1983) at 37, in 1983 in Canada, the guilty plea rate was 80 per cent. In 2001, Bibas cites U.S. Department of Justice, Bureau of Justice Statistics in his study of the pressures to plead criminal cases to the effect that fewer than 4 per cent of adjudicated felony defendants have jury trials, and another 5 per cent have bench (judge alone) trials. Ninety-one per cent plead guilty. These figures exclude cases in which the prosecution was dropped, dismissed, or otherwise terminated before verdict. See Bibas, supra note 2 at n. 9.

47 Kaufman, supra note 6 at 585.