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The Charter and Protection against Wrongful Conviction: Good, Bad or Irrelevant?

Christopher Sherrin[*]

I. INTRODUCTION

Over the last 25 years, the *Canadian Charter of Rights and Freedoms*[1] has made an admirable contribution to the fairness of Canadian criminal law and procedure. It has ensured, for example, that persons under arrest have immediate access to free legal advice,[2] that the police justify in advance intrusions into our homes,[3] and that those awaiting trial are not left to languish endlessly.[4] Whether the Charter has made a similar contribution to the *accuracy* of our criminal adjudicatory process, however, is another matter. The Charter has certainly led to the acquittal of a greater number of guilty persons, a by-product of enhanced fairness that is unfortunate but often justifiable. But has the Charter also led to the acquittal of a greater number of innocent persons? The question is surely an important one in any evaluation of the Charter's impact, yet the answer is not entirely clear. The Charter has undeniably made some contribution to protection against wrongful conviction, but its overall impact is debatable. Much Charter litigation has been largely irrelevant. Worse, it is arguable that in some ways the Charter has had an adverse impact, diverting attention and resources away from defence investigations into factual innocence and provoking an embattled reaction by the police

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

[2] *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173 (S.C.C.) (applying Charter s. 10(b)).

[3] *Canada (Combines Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97 (S.C.C.); *R. v. Rao*, [1984] O.J. No. 3180, 12 C.C.C. (3d) 97 (Ont. C.A.), leave to appeal refused [1984] S.C.C.A. No. 107, [1984] 2 S.C.R. ix (S.C.C.) (applying Charter s. 8).

[4] *R. v. Morin*, [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771 (S.C.C.) (applying Charter s. 11(b)).

resulting in greater subversion of the rules and practices that *do* protect against wrongful conviction. The evidence is fairly sparse, but it is plausible that at least at the margin there has been a trade-off between fairness and accuracy for the innocent. If that is true, the Charter may have done more harm than good.

In this paper, I examine the record of Charter jurisprudence as it relates to protection against wrongful conviction. In a single paper, of course, it is impossible to examine the record exhaustively, so my analysis is necessarily limited and my conclusions somewhat tentative. However, I do attempt to address, at a broad level, most of the major areas of criminal Charter jurisprudence. I will undoubtedly fail to mention some relevant law, but hopefully the analysis will be sufficiently extensive as to justify my conclusion that the Charter's impact on the fight against wrongful conviction is not obviously positive.

In Part II, I start by defining what I mean by wrongful conviction and explain how that immediately eliminates from consideration several areas of Charter law. In Part III, I examine the areas of Charter jurisprudence that can probably be said to have made a substantial, if not unqualified, contribution to protection of the innocent.[5] In Part IV, I explain how a great deal of Charter law has been largely irrelevant to the issue of wrongful conviction. I further pursue this theme in Part V by discussing how the Charter has not had any significant impact on many of the main factors that lead to wrongful conviction. In Part VI, I consider the other side of the coin by discussing a couple of ways in which the Charter may have made it more difficult for the innocent to avoid conviction. I conclude with a plea for better use of the Charter to ensure that it helps more than it hurts.

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[5] I should note here that I will not be considering the so-called right of the innocent not to be convicted, referred to in a few cases, *e.g.*, *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 611 (S.C.C.); *R. v. Leipert*, [1997] S.C.J. No. 14, [1997] 1 S.C.R. 281, at 297 (S.C.C.); *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at 717-18 (S.C.C.). As far as I can see, that "right" has never been given any meaning independent of other rights in the Charter. One also cannot forget that the Supreme Court has also stated that the Charter "does not imply an entitlement to those rules and procedures most likely to result in a finding of innocence": *R. v. Rose*, [1998] S.C.J. No. 81, [1998] 3 S.C.R. 262, at 317 (S.C.C.).

II. WRONGFUL CONVICTION

There is more than one sense in which a conviction may be wrongful,[6] but in this paper I am only concerned with conviction of the factually innocent. By "wrongful conviction", therefore, I refer to conviction of an individual for a criminal offence when either no crime was actually committed or the individual was legally and physically uninvolved in it.[7] This definition excludes convictions brought about by illegal or improper means but of individuals who actually committed the crime.

A focus on factual innocence naturally limits the relevance of the Charter, which is primarily concerned with procedural fairness. It is possible that procedural fairness has resulted in or contributed to factual accuracy — that is a question I address here — but a focus on factual innocence clearly renders a whole range of Charter jurisprudence irrelevant. Substantive Charter review defines and delimits the offences of which a person can be convicted,[8] but does nothing to protect an innocent person from being convicted of them. Review under section 15 of the Charter ensures that we are all subject to the equal application of the same laws,[9] but does not distinguish between application to the innocent and to the guilty. Charter decisions regarding punishment and sentencing procedure[10] only come into play *after* a possibly erroneous conviction. For the most part, the Charter can only offer protection against wrongful conviction to the extent that it impacts on the accumulation, presentation and use of evidence. It is that which can and occasionally does lead to the conviction of the innocent.

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[6] See Clive Walker, "Miscarriages of Justice in Principle and Practice" in Clive Walker & Keir Starmer, eds., *Miscarriages of Justice: A Review of Justice in Error* (Oxford: Blackstone Press, 1999), c. 2.

[7] See Hugo Bedau & Michael Radelet, "Miscarriages of Justice in Potentially Capital Cases" (1987) 40 Stan. L. Rev. 21, at 45.

[8] For example, *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.); *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

[9] For example, *R. v. M. (C.)*, [1995] O.J. No. 1432, 98 C.C.C. (3d) 481 (Ont. C.A.).

[10] For example, *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.); *R. v. Casey*, [2000] O.J. No. 71, 141 C.C.C. (3d) 506 (Ont. C.A.), leave to appeal refused [2000] S.C.C.A. No. 382 (S.C.C.).

III. THE CHARTER'S CONTRIBUTION TO PROTECTION AGAINST WRONGFUL CONVICTION

There are two ways in which the Charter has made a notable contribution to protection against wrongful conviction. Both of those contributions have to be qualified in one way or another, but the qualifications do not completely undermine the contribution.

The Charter's most significant contribution has undoubtedly been in relation to the law of disclosure. An accused person in Canada now has a constitutional right to disclosure of all information in the Crown's possession, whether inculpatory or exculpatory, unless it is privileged or clearly irrelevant.[11] This is a very significant right for the innocent. Non-disclosure of relevant evidence has been a very frequent contributor to wrongful conviction.[12] Recognition of a constitutional right to disclosure of such evidence, therefore, has to be recognized as a positive and meaningful development.

Analysis of the Charter's contribution to protection against wrongful conviction, however, has to take into account the fact that the disclosure duty did not originate with the Charter. As the Supreme Court of Canada has stated, the duty "had already been recognized at common law as a component of the accused's right to a fair trial and to make full answer and defence".[13] Indeed, it is possible to read the Court's seminal judgment on the issue, *R. v. Stinchcombe*,[14] as resting largely on common law rather than constitutional principles.[15] The Charter has undoubtedly "reinvigorated" and "developed"[16] the disclosure duty and consequently made a significant contribution to protecting the innocent. But one might legitimately wonder whether a substantial portion of the current law would have developed at common law in the absence of the Charter (albeit absent some of the remedial powers).

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[11] *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.); *R. v. Dixon*, [1998] S.C.J. No. 17, [1998] 1 S.C.R. 244 (S.C.C.).

[12] See Melvyn Green, "Crown Culture and Wrongful Convictions: A Beginning" (2005) 29 C.R. (6th) 262, at 265: "Every Canadian historical wrongful conviction is attributable, at least in part, to the Crown's failure to provide full disclosure to the defence" [only a slight over-statement].

[13] *R. v. Taillefer*, [2003] S.C.J. No. 75, [2003] 3 S.C.R. 307, at 336 (S.C.C.).

[14] [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

[15] The Court never stated that the Charter dictated a change in the disclosure rules. In fact, the word "Charter" only appears twice in the judgment, and never in a critical part.

[16] *R. v. Taillefer*, [2003] S.C.J. No. 75, [2003] 3 S.C.R. 307, at 336 and 314 (S.C.C.), respectively.

The other facet of Charter law that has contributed to protection against wrongful conviction is the law relating to reverse onuses and presumptions. The Supreme Court has held that section 11(d) of the Charter constitutionally entrenches the beyond-a-reasonable-doubt burden of proof in criminal matters.[17] This burden of proof long pre-dated the Charter, of course, but the courts have used its constitutionalization to strike down statutory provisions "that [permit] or [require] a conviction in spite of a reasonable doubt as to the existence of one or more of the elements of the offence."[18] On the theory that a lower burden of proof is more likely to result in conviction of the innocent, elimination of statutory provisions that result in a lower burden must have increased protection against wrongful conviction. The increase has probably not been enormous. Many reverse onuses and presumptions have been upheld, sometimes even when they risk conviction in the face of reasonable doubt.[19] But, on the whole, the impact of the reverse onuses/presumptions Charter law has been positive.

IV. Charter Rights and the Innocent Accused

In my view, the Charter jurisprudence relating to disclosure and reverse onuses/presumptions has probably been the only jurisprudence that can be said to have made a *substantial* contribution to the fight against wrongful conviction. Some other Charter developments have had some impact, but it has only been minimal.

1. Right to Make Full Answer and Defence

The Charter, under sections 7 and 11(d), protects the right to make full answer and defence.[20] This is an important right for the innocent, as any restrictions on the ability to mount a defence can result in erroneous conviction. Thus, the right could have made a difference. But close analysis suggests that it has not made much of one.

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17 *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

18 *R. v. Whyte*, [1988] S.C.J. No. 63, [1988] 2 S.C.R. 3, at 16 (S.C.C.).

19 See, for example, *R. v. Whyte*, [1988] S.C.J. No. 63, [1988] 2 S.C.R. 3 (S.C.C.). For a comprehensive list of reverse onuses and presumptions upheld under the Charter (usually under s. 1), see Eugene Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2d ed., looseleaf (Aurora, ON: Canada Law Book, 1987), at 31-374.

20 *R. v. Rose*, [1998] S.C.J. No. 81, [1998] 3 S.C.R. 262 (S.C.C.).

The Charter has been interpreted to protect a right to engage in full cross-examination of Crown witnesses.[21] Since cross-examination is one of the primary tools given to an accused to expose the weaknesses in the prosecution's case, this should be an important right for the innocent. And the right has been validated in a number of instances.[22] But the accused was already endowed with generous rights of cross-examination prior to the Charter,[23] and it is not clear that such rights are really much greater now.[24] The Supreme Court has also upheld several limitations on the right to cross-examine[25] (not all of them inappropriate) and countenanced a significant expansion of the use of hearsay evidence.[26] Whether, on the

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[21] *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595, at 665 (S.C.C.); *R. v. Lyttle*, [2004] S.C.J. No. 8, [2004] 1 S.C.R. 193, at 206-207 (S.C.C.).

[22] For example, *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595 (S.C.C.); *R. v. Shearing*, [2002] S.C.J. No. 59, [2002] 3 S.C.R. 33 (S.C.C.); *R. v. Wyatt*, [1997] B.C.J. No. 781, 115 C.C.C. (3d) 288 (B.C.C.A.); *R. v. Duong*, [2007] O.J. No. 316, 217 C.C.C. (3d) 143 (Ont. C.A.).

[23] See, for example, *R. v. Anderson*, [1938] M.J. No. 2, [1938] 3 D.L.R. 317, at 319-20 (Man. C.A.):

> Cross-examination is a powerful weapon of defence, and often its sole weapon. The denial of full opportunity to sift and probe the witnesses of the opposing side has always been regarded with extreme disfavour by British Courts of justice … That full cross-examination of an opposite witness should be permitted by the trial Judge is well settled. The Judge may check cross-examination if it become irrelevant, or prolix, or insulting, but so long as it may fairly be applied to the issue, or touches the credibility of the witness it should not be excluded.

See also *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595, at 663 (S.C.C.): "The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well established principle that is closely linked to the presumption of innocence."

[24] The Supreme Court has indicated that the Charter right "should be interpreted in the 'broad and generous manner befitting its constitutional status'" — arguably a manner more generous than at common law — but it is hard to find many concrete realizations of this ideal. See *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595, at 665 (S.C.C.), citing *R. v. Potvin*, [1989] S.C.J. No. 24, [1989] 1 S.C.R. 525, at 544 (S.C.C.).

[25] *R. v. B. (K.G.)*, [1993] S.C.J. No. 22, [1993] 1 S.C.R. 740 (S.C.C.) (cross-examination need not be contemporaneous with the giving of incriminating evidence); *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, [1993] 4 S.C.R. 419 (S.C.C.) and *R. v. F. (C.C.)*, [1997] S.C.J. No. 89, [1997] 3 S.C.R. 1183 (S.C.C.) (young witness can sometimes testify by adopting the contents of an earlier videotaped statement even if the witness has no memory at the time of trial of the events described in it); *R. v. Levogiannis*, [1993] S.C.J. No. 70, [1993] 4 S.C.R. 475 (S.C.C.) (young witness can sometimes testify out of court or behind a screen).

[26] *R. v. Khan*, [1990] S.C.J. No. 81, [1990] 2 S.C.R. 531 (S.C.C.); *R. v. Smith*, [1992] S.C.J. No. 74, [1992] 2 S.C.R. 915 (S.C.C.); *R. v. Khelawon*, [2006] S.C.J. No. 57, [2006] 2 S.C.R. 787 (S.C.C.). The Court commented in *Khelawon* (at 814-15) that

> the constitutional right guaranteed under s. 7 of the *Charter* is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved. Trial fairness embraces more than the rights of the accused. While it undoubtedly includes the right to make full answer and defence, the fairness of the trial must also be assessed in the light of broader societal concerns ... In the context of

whole, the innocent accused is now in a better or worse position is hard to say.

The Supreme Court ruled in *R. v. Crawford*[27] that an accused in a joint trial has the right to rely upon his co-accused's pre-trial silence in order to discredit any incriminating testimony offered by the co-accused. This right can help the innocent, but it can also hurt them. In a given case, the accused who spoke to the police may be guilty and the accused who stayed silent may not be. In that situation, the right to rely upon pre-trial silence might contribute to *conviction* of the innocent. It is true, of course, that no inference of guilt is to be drawn against the silent accused, but it is probably fanciful to believe that it will not be.[28] Any beneficial impact of *Crawford* relies upon the assumption that the silent accused is more likely to be guilty. I suspect that is true, but absent any clear understanding of the relevant statistical probabilities[29] it is impossible to state that the benefits from *Crawford* have been substantial.

The Charter has been interpreted to protect the right of the accused to know the case he[30] has to meet before he has to respond.[31] This right can protect the innocent by ensuring that he has an opportunity to respond to every aspect of the Crown's case. But the right is nothing new. The Crown has long been prohibited from splitting its case.[32] At most, the rules are only a little stricter in the Charter era.[33] Furthermore, in the main Charter

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an admissibility inquiry, society's interest in having the trial process arrive at the truth is one such concern.

To the extent that hearsay evidence is truly reliable, of course, its admission will not be of concern to the innocent. I will refrain, however, from discussing the thorny issue of whether the current hearsay rules are adequate to ensure the admission of only truly reliable evidence.

27 [1995] S.C.J. No. 30, [1995] 1 S.C.R. 858 (S.C.C.).

28 Even the Supreme Court acknowledged that "[t]he distinction between the use of evidence limited to credibility and evidence that can be used to infer guilt is well understood by lawyers but may not be easily understood by a jury. It has been criticized as being artificial": *R. v. Crawford*, [1995] S.C.J. No. 30, [1995] 1 S.C.R. 858, at 883 (S.C.C.).

29 As discussed below, there is good reason to believe that innocent suspects usually waive the right to silence, but there is also strong evidence that a large percentage of guilty suspects do the same. See, text accompanying and included in notes 45-52. The difference, if any, between the percentages for innocent and guilty suspects is unknown.

30 I employ the masculine pronoun throughout when referring to innocent accused simply because the vast majority of the known wrongly convicted are male. I employ the feminine pronoun whenever referring to someone other than an accused or a suspect.

31 *R. v. Rose*, [1998] S.C.J. No. 81, [1998] 3 S.C.R. 262, at 318-19 (S.C.C.).

32 See *R. v. P. (M.B.)*, [1994] S.C.J. No. 27, [1994] 1 S.C.R. 555 (S.C.C.) (citing many pre-Charter cases).

33 See, for example, *R. v. P. (M.B.)*, [1994] S.C.J. No. 27, [1994] 1 S.C.R. 555, at 575-76 and 580-81 (S.C.C.) (narrowing the authority of its earlier decision in *R. v. Robillard*, [1978] S.C.J.

case in which the right was sought to be actualized, *R. v. Rose*,[34] the Supreme Court ruled against the accused, holding that he has no right to always address the jury last. I am not certain that addressing a jury first necessarily prejudices an accused, but *Rose* certainly does not suggest that the Charter has made things better for the accused.

The Supreme Court in *R. v. Seaboyer* held that it violated section 7 to exclude from trial defence evidence, not otherwise subject to an exclusionary rule, unless its probative value is substantially outweighed by its prejudicial effect.[35] A generous admissibility rule regarding defence evidence certainly has the potential to protect the innocent, but in *Seaboyer* the Supreme Court actually *restricted* the rule of admissibility, by recognizing a discretion to exclude defence evidence that did not exist at common law.[36] Of course, the Charter was responsible for the power exercised in *Seaboyer* to strike down legislation that ran afoul of the new admissibility rule, and to that extent the Charter may have contributed to protection of the innocent. But as far as I know *Seaboyer* has never been used to strike down legislation again, so the Charter's contribution has been minimal.[37]

It is difficult to come to a final assessment of the value to the innocent of the constitutional right to make full answer and defence. The right is a broad one of diverse application. There have certainly been isolated instances where it has proven to be valuable.[38] But looking at the record as a whole it is not obvious that it has been of great benefit. It has undoubtedly helped a little, but probably only a little.

No. 31, [1978] 2 S.C.R. 728 (S.C.C.), on the *assumption* that it *could* (but really should not) be interpreted in a way that offends the Charter).

[34] [1998] S.C.J. No. 81, [1998] 3 S.C.R. 262 (S.C.C.).

[35] *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 611 (S.C.C.).

[36] David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 4th ed. (Concord, ON: Irwin Law, 2005), at 35-36.

[37] Perhaps of greater promise is the suggestion of the Ontario Court of Appeal that a trial judge can, in some circumstances, allow an accused "to tender certain evidence that might be technically inadmissible, as a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for an abuse of process or to ensure a fair trial": *R. v. Felderhof*, [2003] O.J. No. 4819, 180 C.C.C. (3d) 498, at 532 (Ont. C.A.). It is too early to tell whether this suggestion will be actualized in a way that is truly beneficial to the innocent, or whether it extends much beyond the common law power, cited in *Felderhof*, to "relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard does not exist": *R. v. Williams*, [1985] O.J. No. 2489, 18 C.C.C. (3d) 356, at 378 (Ont. C.A.).

[38] See, for example, *R. v. Roy*, [1994] N.S.J. No. 82, 31 C.R. (4th) 388 (N.S. Prov. Ct.) (proceedings stayed against deaf mute who could not understand the proceedings or properly instruct counsel). The result in *Roy* is rather exceptional, however: see, for example, *R. v. Morrissey*, [2003] O.J. No. 3961, 177 C.C.C. (3d) 428 (Ont. S.C.J.), affd [2007] O.J. No. 4340, 87 O.R. (3d) 481 (Ont. C.A.); *R. v. H. (L.J.)*, [1997] M.J. No. 450, 120 C.C.C. (3d) 88 (Man. C.A.).

2. Excluding Prejudicial Evidence

Another rule coming out of the *Seaboyer* case was the rule that a trial judge has the power to exclude Crown evidence in circumstances where its probative value is outweighed by its prejudicial effect.[39] This principle does not protect the right to make full answer and defence, but it probably protects against wrongful conviction by protecting against the risk that an accused will be convicted based on something other than evidence actually proving his guilt. The holding in *Seaboyer* was important because it put to rest the more restrictive rule in *R. v. Wray*[40] that a judge could only exclude Crown evidence if its probative value was trifling and its prejudicial effect grave. But it would be dangerous to attribute this change to the Charter. In her decision in *Seaboyer*, McLachlin J. (as she then was) did not say the Charter required her to overrule *Wray*. On the contrary, she relied on the fact that the *common law* had been developing a different approach since *Wray*.[41] The decision is admittedly ambiguous, but the better view is that *Seaboyer* reflects an evolution of the common law, which may now be constitutionalized. The *Seaboyer* rule had been recognized in the Supreme Court before the Charter,[42] and some members of the Court had acknowledged after the Charter came into effect that the common law endowed a judge with the *Seaboyer* discretion.[43] As the Court itself noted in *R. v. Buhay*, "even in the absence of a *Charter* breach, judges have a discretion at common law to exclude evidence … if the prejudicial effect of admitting the evidence outweighs its probative value."[44]

3. Right to Silence

Section 7 of the Charter has been interpreted to include a right to silence. False confessions are a surprisingly frequent contributor to

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39 *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 610-11 (S.C.C.).

40 [1970] S.C.J. No. 80, [1971] S.C.R. 272 (S.C.C.).

41 *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 609-11 (S.C.C.).

42 *R. v. Sweitzer*, [1982] S.C.J. No. 48, [1982] 1 S.C.R. 949 (S.C.C.).

43 See *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670, at 739-40 and 697 (S.C.C.), *per* La Forest J. and Dickson C.J.C., respectively; *R. v. Potvin*, [1989] S.C.J. No. 24, [1989] 1 S.C.R. 525, at 531-32 (S.C.C.), *per* La Forest J.; *Thomson Newspapers Corp. v. Canada (Director of Investigation and Research)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425, at 559-60 (S.C.C.), *per* La Forest J.

44 [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631, at 650 (S.C.C.).

wrongful convictions,[45] so a constitutional right not to speak to the authorities could help the innocent by allowing them to hide behind a protected veil of silence. But the reality is that the right is probably of little assistance. In the large majority of cases the innocent will waive the right, eager to convey their exculpatory story to investigators.[46] There has yet to be an empirical study analyzing the practices of the factually innocent in interrogations, but the suggestion that they will speak has obvious intuitive appeal and has proven true in numerous Canadian[47] and American[48] wrongful convictions. The suggestion has also been confirmed in a laboratory experiment showing that the innocent are most likely to waive their right to remain silent.[49] If the innocent almost always speak, the right to stay silent is of little significance to them.

A recent re-analysis of the right to silence argued that the right indirectly protects the innocent, not because it will encourage them not to speak, but because it will encourage the *guilty* not to speak. Triers of fact will then accord the statements of those who do speak more credence, on the assumption that silence is indicative of guilt (*i.e.*, of having

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[45] Samuel Gross *et al*., "Exonerations in the United States, 1989 Through 2003" (2005) 95 J. Crim. L. & Criminology 523, at 544-46; Steven Drizin & Richard Leo, "The Problem of False Confessions in the Post-DNA World" (2004) N.C. L. Rev. 891.

[46] See Jeremy Bentham, *A Treatise on Judicial Evidence* (Littleton, Co.: Fred B. Rothman & Co., 1981), at 241:

> Let us now consider the case of persons who are innocently accused. Can it be supposed that the rule in question [the right to silence] has been established with the intention of protecting them? They are the only persons to whom it can never be useful. Take an individual of this class … What is his highest interest, and his most ardent wish? To dissipate the cloud which surrounds his conduct, and give every explanation which may set it in its true light; to provoke questions, to answer them, and to defy his accusers. This is his object; this is the desire which animates him … If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence.

[47] See, *e.g.*, *The Inquiry regarding Thomas Sophonow: the investigation, prosecution and consideration of entitlement to compensation* (Winnipeg: Manitoba Justice, 2001), at c. 2; *Commission on Proceedings Involving Guy Paul Morin: Report*, vol. 2 (Toronto: Ontario Ministry of the Attorney General, 1998), at 786-96, 847-52, and 997-99; *The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons, Randy Druken: Report and Annexes* (St. John's, Newfoundland: Ministry of Justice, 2006), at 77 and 183-84 (regarding Parsons and Druken, respectively).

[48] Richard Leo *et al*., "Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century" [2006] Wis. L. Rev. 479, at 497-98; Paul Cassell, "Protecting the Innocent from False Confessions and Lost Confessions — And from *Miranda*" (1998) 88 J. Crim. L. & Criminology 497, at 539-40.

[49] Saul Kassin & Rebecca Norwick, "Why People Waive Their *Miranda* Rights: The Power of Innocence" (2004) 28 Law & Hum. Behav. 211 (finding that 81 per cent of innocent suspects compared to 36 per cent of guilty suspects waived their right to silence).

something to hide).[50] Interesting as this argument is, it incorrectly assumes that the people who waive the right to silence will distinguish themselves from the bulk of suspects as a group deserving of especially favourable consideration. The large majority of suspects (80 to 90 per cent) waive the right.[51] Triers of fact are unlikely to believe that 80 to 90 per cent of suspects are innocent and consequently accord the suspects who talk more charitable consideration. Instead, they will simply assume that many guilty people waive their right to silence and that waiver says nothing about innocence.[52]

The right to silence also fails to protect against wrongful conviction because it fails to offer any meaningful protection against interrogation tactics that might prompt false confessions. The right to silence does not really regulate police questioning. That role is left to the common law voluntariness rule.[53] The role of the right to silence is limited to protecting a person's right to choose whether to respond to questions.[54] Even then it does not do a very good job. A person can repeatedly invoke his right to silence and still be questioned for hours, with the police doing everything they can to change his choice.[55] Capitulation in the face of such

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[50] Daniel Seidmann & Alex Stein, "The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege" (2000) 114 Harv. L. Rev. 430.

[51] In a survey of American interrogations, Richard Leo found that only about 20 per cent of suspects remained silent: "Inside the Interrogation Room" (1996) 86 J. Crim. L. & Criminology 266. Other studies have reported even lower numbers: Paul Cassell & Bret Hayman, "Police Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda*" (1996) 43 U.C.L.A. L. Rev. 839 (reporting that only 12.1 per cent of suspects invoked their *Miranda* rights); Paul Softley, *Police Interrogation: An Observational Study in Four Police Stations* (London: H.M.S.O., 1980) (reporting that only 9 per cent of suspects refused to answer some or all questions during interrogation); Roger Leng, "The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate", Royal Commission of Criminal Justice Research Study 10 (London: HMSO, 1993) (reporting that only 4.5 per cent of suspects exercised their right to silence).

[52] See Stephanos Bibas, "The Right to Remain Silent Helps Only the Guilty" (2002-2003) 88 Iowa L. Rev. 421. As Bibas says (at 430), "in a world where 80% to 90% of suspects talk, talk is cheap. Some guilty suspects choose to remain silent, but many more talk, mimicking innocent defendants and so leading juries and police to distrust all alibis."

[53] See *R. v. Singh*, [2007] S.C.J. No. 48 (S.C.C.). Certain aspects of the voluntariness rule may now be constitutionalized under Charter s. 7, but the Supreme Court has made it clear that the latter does not subsume the former: *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at 25 (S.C.C.).

[54] *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151, at 176 (S.C.C.): "Section 7 confers on the detained person the right to choose whether to speak to the authorities or to remain silent."

[55] "Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence": *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151, at 184 (S.C.C.). For illustrations of how this has permitted the police to engage in prolonged and sometimes intense questioning, see *R. v. Singh*, [2007] S.C.J. No. 48 (S.C.C.); *R. v. Edmondson*, [2005] S.J. No. 256, 196 C.C.C. (3d) 164 (Sask. C.A.); *R. v. Timm*, [1998] J.Q. no 3168, 131 C.C.C. (3d) 306 (Que. C.A.), affd [1999] S.C.J. No. 65, [1999] 3 S.C.R. 666 (S.C.C.); *R. v. Wood*, [1994] N.S.J. No. 542, 94 C.C.C. (3d) 193 (N.S.C.A.). In fairness, the law is not entirely

onslaught is far from rare. Until the right to silence is used to regulate pernicious police questioning[56] it will never really protect against false confessions and the wrongful convictions that almost inevitably ensue.[57]

4. Right against Self-Incrimination

A right against self-incrimination has developed under the Charter. It has been used to render inadmissible at a criminal trial statutorily compelled statements from the accused[58] as well as evidence derived from statutorily compelled testimony given by the accused in a prior proceeding.[59] This may have added some protection against wrongful conviction, but not much.

It is far from obvious that statutory compulsion to speak to the authorities incites or contributes to false statements of guilt. False confessions seem to come about as a result of a critical combination of interrogative pressure and suspect vulnerability,[60] not legal compulsion to speak.[61] It is possible that the police will take advantage of a statutory compulsion to pressure a suspect into confessing, but the exclusion of

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clear as to what constitutes legitimate persuasion, and there are some, mostly lower court, decisions that seem to impose some greater limits on acceptable police conduct. See Benissa Yau, "Making the Right to Choose to Remain Silent a Meaningful One" (2006) 38 C.R. (6th) 226 and, more recently, *R. v. Smith*, [2007] O.J. No. 963 (Ont. S.C.J.). The Supreme Court in *Singh* also noted that "[i]n some circumstances, the evidence will support a finding that continued questioning by the police in the face of the accused's repeated assertions of the right to silence denied the accused a meaningful choice whether to speak or to remain silent": *R. v. Singh*, [2007] S.C.J. No. 48, at para. 53 (S.C.C.). However, it is fair to say that the police have significant leeway.

[56] See Welsh White, "*Miranda*'s Failure to Restrain Pernicious Interrogation Practices" (2001) 99 Mich. L. Rev. 1211.

[57] Richard Leo, "False Confessions: Causes, Consequences, and Solutions" in Saundra Westervelt & John Humphrey, eds., *Wrongly Convicted: Perspectives on Failed Justice* (Piscataway, NJ: Rutgers University Press, 2001) 36, at 44-46.

[58] *R. v. White*, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417 (S.C.C.). *White* did not actually hold that statutorily compelled statements are always inadmissible in criminal trials, but that has almost always been the result. See, for example, *R. v. DaCosta*, [2001] O.J. No. 2392, 156 C.C.C. (3d) 520 (Ont. S.C.J.); *R. v. Jones*, [2002] O.J. No. 2136 (Ont. S.C.J.); *R. v. Aziga*, [2006] O.J. No. 5232 (Ont. S.C.J.). For a rare exception, see *R. v. Barnes*, [2007] O.J. No. 1224 (Ont. S.C.J.).

[59] *R. v. S. (R.J.)*, [1995] S.C.J. No. 10, [1995] 1 S.C.R. 451 (S.C.C.); *British Columbia (Securities Commission) v. Branch*, [1995] S.C.J. No. 32, [1995] 2 S.C.R. 3 (S.C.C.).

[60] In some cases one or the other may suffice. See Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005) 30 Queen's L.J. 601; Richard Leo & Richard Ofshe, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 Denv. U.L. Rev. 979.

[61] The Supreme Court in *White* suggested that legal compulsion could lead to false confessions, but the case law has actually focused on false statements of innocence: see *R. v. White*, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417, at 445-46 (S.C.C.); *R. v. Zwicker*, [2003] N.S.J. No. 496, 186 C.C.C. (3d) 395, at 405-406 (N.S.C.A.), leave to appeal refused [2004] S.C.C.A. No. 54, 187 C.C.C. (3d) vi (S.C.C.).

compelled statements will only protect against wrongful conviction to the extent that, absent the statutory compulsion, the police would not have applied equivalent pressure in a traditional interrogation (and thereby received the same sort of statement) — an unlikely scenario. The police are more likely to *get* statements in the face of statutory compulsion, and even a truthful statement *might* harm an innocent accused if the prosecution uses it to plug holes in its case and/or cross-examine the accused, which *might* lead to conviction. But statutorily compelled statements are only occasionally relevant to criminal proceedings so the added protection given by the Charter is probably small.[62]

Exclusion of evidence derived from compelled testimony offers about as much protection against wrongful conviction. The innocent will only be protected if the derivative evidence is falsely incriminating. In most cases, however, the fact that evidence is derivative will say nothing about the likelihood that it will point to the wrong suspect. Probably the only scenario where there might be a connection is where an innocent suspect compelled to testify identifies the real, but previously unknown, perpetrator and that person responds by falsely *and convincingly* implicating the innocent suspect. That may happen from time to time, but surely not frequently.

5. Search and Seizure

Section 8 merits only brief mention, and only because it has received so much attention over the past 25 years.[63] Section 8 regulates access to events transpiring in, and items and information stored in, private locations. It is hard to fathom how the regulation of *access* protects the innocent from conviction. The evidence sought by the police exists independently of them and is neither created nor changed *by being accessed*.[64] The

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[62] The Charter does, of course, prevent the government from creating new statutory compulsions specifically for use in the criminal context, but common law traditions have long done the same thing.

[63] See Daniel Givelber, "Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?" (1996-1997) 49 Rutgers L. Rev. 1317, at 1378: "The rules regarding search and seizure … do little for the actually innocent defendant."

[64] The only exception to this that I can contemplate is when s. 8 is applied to police questioning, as in *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615 (S.C.C.). In theory, answers to such questions could be affected by the form and manner of questioning. But the vast majority of police questioning is not regulated by s. 8. It only seems to apply when the police have formed the intention to conduct a physical search and questions are asked in relation to that upcoming physical search. See *R. v. Grant*, [2006] O.J. No. 2174, 209 C.C.C. (3d) 250, at 264-65 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 99 (S.C.C.). Such questions are highly

evidence can certainly be misinterpreted, altered, concealed, destroyed, *etc*. — all of which can contribute to wrongful conviction. But all those misuses occur *after* the evidence has been accessed and thus after the applicability of section 8 has largely been exhausted.[65] One could argue that the Charter protects against misuse prophylactically by restricting access to the evidence in the first place, but the connection between the Charter and the wrongful conviction that otherwise may ensue from the misuse seems rather remote. Regulating search and seizure could really only protect reliability to the extent that it prevented a corrupt investigator from planting evidence, by restricting the investigator's ability to get inside the location where the evidence would be planted. But if the investigator is so corrupt the reality is that a warrant or other similar requirement will probably do little to thwart her plot. She will simply fabricate the necessary evidence to justify access.

6. Arbitrary Detention

Section 9 seems similarly unimportant. It protects the innocent from harassment and unreasonable interference with liberty, but not from conviction. Section 9 would only be significant if the arbitrariness of an arrest or detention somehow generated evidence that could result in wrongful conviction. Evidence can be discovered during the course of an arbitrary arrest or detention, of course, but it would not normally be created by it. Detained individuals may make false confessions or admissions, but there is no evidence that such statements come about as a result of the arbitrariness of a detention.[66] The only way in which section 9 might protect against wrongful conviction is by ensuring a person was given a prompt opportunity for release. Release would minimize contact with the authorities (who might be pressuring the person to confess) and allow

unlikely to contribute to a wrongful conviction. If, for example, a person falsely states that he has narcotics in his gym bag, the subsequent physical search will quickly uncover the truth.

[65] To the extent that s. 8 regulates private information after it has been accessed, it often (although not always) only regulates further access to it. See, for example, *R. v. Arp*, [1998] S.C.J. No. 82, [1998] 3 S.C.R. 339 (S.C.C.); *R. v. Dore*, [2002] O.J. No. 2845, 166 C.C.C. (3d) 225 (Ont. C.A.).

[66] There is no evidence that a randomly chosen suspect is more likely to falsely confess than a suspect chosen for good reason. In fact, if anything, a randomly chosen suspect is probably less likely to falsely confess. It is only when the choice of suspect is *not* random that there will be some evidence that seems to implicate the suspect and that gives the police reason to believe in his guilt and pressure him to confess.

the person to quickly begin to gather evidence in his defence.[67] But the common law and the *Criminal Code*[68] already limited the time period in which the police could keep a suspect within their exclusive control.[69] The Charter has not added much to the limitations. In fact, the Supreme Court once interpreted section 9 to permit a delay of over 18 hours before the accused was given an opportunity for release (specifically so that the police could continue their investigation).[70]

7. Section 10(a)

Section 10(a) of the Charter guarantees a person under arrest or detention the right to be informed promptly of the reasons therefor. One of the purposes of the right is to "enable the person under arrest or detention to immediately undertake his or her defence".[71] Since, as a general rule, a valid defence prepared sooner is more likely to succeed, this right undoubtedly provides some protection against wrongful conviction. But one must ask whether it really provides anything new. Both the common law and the *Criminal Code*[72] had already dictated that persons under arrest be advised of the reason for it.[73] The Charter case law has not really added anything. Indeed, one could argue that section 10(a) has proven to be a rather weak right. In several cases the courts have ruled that persons

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[67] A person under detention will often have some opportunity to gather evidence, but the task is usually more difficult from behind bars.

[68] R.S.C. 1985, c. C-46.

[69] Very generally, the *Criminal Code*, R.S.C. 1985, c. C-46 provides (and similarly provided in 1982) that a police officer should not arrest someone unless it is necessary, should release someone from custody as soon as possible after an arrest, and otherwise must bring an accused before a justice "without unreasonable delay" (a phrase that has been interpreted strictly) and at least within 24 hours, unless a justice is not available within that time: *Criminal Code*, ss. 495-499, 503; *R. v. W. (E.)*, [2002] N.J. No. 226, 168 C.C.C. (3d) 38 (Nfld. C.A.); *R. v. Koszulap*, [1974] O.J. No. 726, 20 C.C.C. (2d) 193 (Ont. C.A.). At common law, if a police officer detained someone for too long it could be held to constitute an arrest: see Roger Salhany, *Canadian Criminal Procedure*, 3d ed. (Toronto: Canada Law Book, 1978), at 29.

[70] *R. v. Storrey*, [1990] S.C.J. No. 12, [1990] 1 S.C.R. 241 (S.C.C.).

[71] *R. v. Evans*, [1991] S.C.J. No. 31, [1991] 1 S.C.R. 869, at 875 (S.C.C.).

[72] R.S.C. 1985, c. C-46.

[73] *Christie v. Leachinsky*, [1947] A.C. 573 (H.L.); *R. v. Evans*, [1991] S.C.J. No. 31, [1991] 1 S.C.R. 869, at 875 (S.C.C.), *per* Sopinka J.; *Criminal Code*, R.S.C. 1985, c. C-46, s. 29(2). It is less clear that a person under detention had the right at common law to be advised of the reason for it, but if a detention turned into or amounted to an arrest the accused would be no worse off in terms of his ability to undertake his defence. A person detained, released, and then later arrested may be in a better position now, although the legal obligation to inform a person of the reason for his detention did exist under s. 2(c) of the *Canadian Bill of Rights*, R.S.C. 1985, App. III (albeit with less teeth than under the Charter).

under arrest did not have to be informed of the specifics of the offence for which they were arrested.[74] Although in each of those cases it is probably fair to say that the accused already knew the specifics, decisions condoning the use of generalized information in order to comply with section 10(a) carry the risk that an innocent person, truly ignorant of the specifics of the allegation, will not be able to immediately undertake his defence.

8. Right to Counsel

A great deal of Charter litigation has considered the content of the right to counsel under section 10(b). A person under arrest now clearly has the right to consult with counsel of choice, in private and without cost, immediately upon arrest or detention.[75] The authorities are prohibited from trying to elicit incriminating information until the person has had a reasonable opportunity to consult counsel,[76] and are also prohibited from unfairly undermining or denigrating any advice given by counsel.[77]

Access to a lawyer right after being confronted with a false accusation of criminal conduct will undoubtedly be of comfort to the innocent but it will probably only protect them from later conviction to the extent that it enables immediate preparation of a defence. One of the main functions of counsel at this stage is to inform the suspect of his right to remain silent,[78] yet we have already seen that such information is of little significance to the innocent. Counsel can also advise the suspect concerning participation in any other investigative activities, such as provision of biological samples, but it is not those sorts of activities that have led to wrongful conviction.[79]

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[74] *R. v. Jackson*, [2005] A.J. No. 1726, 204 C.C.C. (3d) 127, at 135 (Alta. C.A.) ("The appellant was advised that he was under arrest for murder as required under s. 10(a). He has not shown that he must be provided with the circumstances of the offence, including the identity of the deceased, in order to satisfy s. 10(a)"); *R. v. Wong*, [1998] B.C.J. No. 858, 52 C.R.R. (2d) 89 (B.C.C.A.) (police did not have to inform arrestee of the specific illegal narcotic he was alleged to have possessed); *R. v. B. (C.)*, [1995] O.J. No. 2303 (Ont. Prov. Div.) (police did not have to inform arrestee of the nature of the stolen property which he was alleged to have possessed).

[75] *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173 (S.C.C.); *R. v. Pavel*, [1989] O.J. No. 2307, 53 C.C.C. (3d) 296 (Ont. C.A.); *R. v. Jackson*, [1993] O.J. No. 2511, 86 C.C.C. (3d) 233 (Ont. C.A.).

[76] *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233 (S.C.C.).

[77] *R. v. Burlingham*, [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206 (S.C.C.).

[78] *R. v. Brydges*, [1990] S.C.J. No. 8, [1990] 1 S.C.R. 190, at 206 (S.C.C.).

[79] Participation in biased lineups has contributed to wrongful conviction, but it is the lineup bias and not the accused's participation that is the problem and defence counsel have no control over how a lineup is conducted. Furthermore, an accused's refusal to participate in a lineup can have adverse consequences: *R. v. Ross*, [1989] S.C.J. No. 2, [1989] 1 S.C.R. 3, at 14 (S.C.C.).

Indeed, they have often led to exoneration.[80] Miscarriages of justice are often the result of improper or biased police investigations, but defence counsel has no formal power to direct or influence the course of an investigation or to prevent it from going off course.[81] Defence counsel can really only offer meaningful protection against wrongful conviction to the extent that she can effectively respond to the Crown's case and discover and develop the opposing case for the accused. This requires that the accused be given (a) access to trial counsel, and (b) access to competent trial counsel. The Charter has not really guaranteed the accused either.

The major impediment to obtaining counsel is normally financial. In most regions of the country an accused person can usually find a lawyer willing to take on his case, but the cost can be daunting. The Charter does not really solve that problem. There is no general constitutional right to state-funded counsel.[82] An accused person is expected to bear the costs of his own defence if he can. If he cannot, the applicable legal aid plan will provide assistance in the vast majority of cases, at least where the accused faces any prospect of imprisonment.[83] Legal aid plans largely pre-date the Charter and do not owe their existence to it. For the most part, therefore, access to trial counsel is not granted or even addressed by the Charter.[84] The only exception is where legal aid has been refused, the

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"The most obvious consequence … is that the accused at trial might find that he cannot effectively complain about a less satisfactory method of witness identification such as by showing witnesses photographs of the accused taken from a police book of 'mug-shots'": *R. v. Parsons*, [1993] O.J. No. 1937, 84 C.C.C. (3d) 226, at 232 (Ont. C.A.). The trier of fact cannot normally draw an inference of guilt from refusal to participate in a lineup, unless a person takes extraordinary steps to avoid participating: *R. v. Shortreed*, [1990] O.J. No. 145, 54 C.C.C. (3d) 292 (Ont. C.A.); *Parsons*, *ibid*.

[80] Barry Scheck, "Barry Scheck Lectures on Wrongful Convictions" (2006) 54 Drake L. Rev. 597, at 601: "Since 1989, when the FBI began doing DNA testing … [in] twenty-six percent of the cases where the FBI got results, the primary suspect was excluded."

[81] Indeed, it is unclear that the police even have to speak to defence counsel during the initial stages of an investigation: see *R. v. Fitzsimmon*, [2006] O.J. No. 5079, 216 C.C.C. (3d) 141 (Ont. C.A.). It would be hard for defence counsel to influence an investigation if she could not obtain information about it.

[82] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at 96 (S.C.C.).

[83] I do not mean to minimize the problems faced by unfunded accused not at risk of imprisonment, but they are not always left to their own devices. State-funded legal clinics will sometimes provide assistance. In any event, Charter relief is unlikely to be provided in such minor cases. See, for example, *R. v. Sechon*, [1995] J.Q. no 918, 104 C.C.C. (3d) 554, at 560-61 (Que. C.A.).

[84] Legal aid also provides counsel at bail hearings, helping to secure an accused person's release, which as stated above can be important for the innocent. The Charter right to counsel has not had much impact on access to counsel at bail hearings, except insofar as an accused may benefit from any early preparation for a bail hearing undertaken by private counsel contacted after arrest.

accused is truly impecunious, and representation by counsel is essential to a fair trial. In that situation, the trial judge has the power under the Charter to stay the proceedings until the necessary funding for counsel is provided.[85] Thus, the Charter only steps in to fill the gap in access to counsel in "exceptional" cases.[86] Arguably, the Charter grants the accused no greater right than he had at common law.[87] The Charter right is also quite limited. The accused does not necessarily have access to counsel of choice and the courts have little if any power to supervise the level of funding afforded to counsel.[88] The accused basically has to accept the terms set by the funding agency, except in the exceedingly rare situation where he cannot find competent counsel to represent him on those terms.[89]

In any event, a right of access to trial counsel, no matter how broad, is of little use to the innocent (or the guilty) if it does not include a right of access to competent counsel. A bad lawyer is unlikely to prevent a wrongful conviction. Indeed, bad defence lawyering can contribute to wrongful conviction.[90] The Charter cannot really be said to have protected against wrongful conviction, therefore, unless it has ensured competence. It is doubtful that it has. Nominally, an accused person has a constitutional right to effective assistance from counsel.[91] In reality, however, the courts have probably set the bar too low to ensure quality representation. Claims on appeal of ineffective representation at trial do not usually succeed.[92] Counsel benefits from a strong presumption that her conduct was

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[85] *R. v. Rowbotham*, [1988] O.J. No. 271, 41 C.C.C. (3d) 1 (Ont. C.A.).

[86] *R. v. Rowbotham*, [1988] O.J. No. 271, 41 C.C.C. (3d) 1, at 69 (Ont. C.A.).

[87] See *R. v. Rowbotham*, [1988] O.J. No. 271, 41 C.C.C. (3d) 1, at 69 (Ont. C.A.):

> … there may be rare circumstances in which legal aid is denied but the trial judge, after an examination of the means of the accused, is satisfied that the accused, because of the length and complexity of the proceedings or for other reasons, cannot afford to retain counsel to the extent necessary to ensure a fair trial. In those circumstances, even before the advent of the Charter, the trial judge had the power to stay proceedings until counsel for the accused was provided.

[88] *R. v. Cai*, [2002] A.J. No. 1521, 170 C.C.C. (3d) 1 (Alta. C.A.), leave to appeal refused, [2003] S.C.C.A. No. 360, 181 C.C.C. (3d) vi (S.C.C.); *R. v. Ho*, [2003] B.C.J. No. 2713, 17 C.R. (6th) 223 (B.C.C.A.), leave to appeal refused [2004] S.C.C.A. No. 57 (S.C.C.); *Québec (Procureur général) c. C. (R.)*, [2003] J.Q. no 7541, 13 C.R. (6th) 1 (Que. C.A.); *R. v. Peterman*, [2004] O.J. No. 1758, 185 C.C.C. (3d) 352 (Ont. C.A.); *R. v. Koumoutsidis*, [2006] N.B.J. No. 132, 207 C.C.C. (3d) 286, at 295 (N.B.C.A.).

[89] *R. v. Peterman*, [2004] O.J. No. 1758, 185 C.C.C. (3d) 352, at 362-63 (Ont. C.A.).

[90] See Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence* (New York: Signet, 2001), at c. 9. See also *Royal Commission on the Donald Marshall, Jr., Prosecution: Commissioners' Report* (Halifax: The Commission, 1989), at 72-77.

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

[92] Dale Ives, "The 'Canadian' Approach to Ineffective Assistance of Counsel Claims" (2003-2004) 42 Brandeis L.J. 239, at 247.

reasonable[93] and appeal courts have been reluctant to criticize counsel's strategic and tactical decisions.[94] The American standard for reviewing counsel's conduct set out in *Strickland v. Washington*,[95] and largely adopted by the Supreme Court of Canada, has been criticized for providing little to no protection against wrongful conviction.[96] After reviewing the relevant Canadian case law, Dale Ives concluded that "the right to effective assistance of counsel does not itself ensure in any significant way that accused persons will receive competent representation."[97] This is not to say that the Charter is a toothless tiger in this area. Appellate review of defence counsel's performance will presumably catch some of the problems, and the mere possibility of review will motivate some otherwise poor counsel to do a competent job (although the impact will be mitigated by the low standard of review and the unpredictability of outcome). But the Charter has probably not done much to ensure that innocent accused are not prejudiced by their own counsel. By not guaranteeing adequate funding for counsel's time and disbursements, the Charter has also failed to ensure that counsel are always even *capable* of mounting an effective defence.

9. Trial within a Reasonable Time

The right to a trial within a reasonable time has as one of its purposes the protection of the innocent. As the Supreme Court noted in *R. v. Askov*,[98] time can work against the wrongly accused: he can lose important evidence

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93 *R. v. B. (G.D.)*, [2000] S.C.J. No. 22, [2000] 1 S.C.R. 520, at 532 (S.C.C.).

94 Dale Ives, "The 'Canadian' Approach to Ineffective Assistance of Counsel Claims" (2003-2004) 42 Brandeis L.J. 239, at 252. The courts have sometimes seemed more willing to second-guess counsel's pre-trial investigation (or lack thereof): see, for example, *R. v. McKellar*, [1994] O.J. No. 2046, 34 C.R. (4th) 28 (Ont. C.A.); *R. v. Jim*, [2003] B.C.J. No. 1663 (B.C.C.A.); *R. v. Giroux*, [2004] O.J. No. 2054 (Ont. C.A.). But a remedy is only granted if the accused convinces the appeal court there was a reasonable possibility that better pre-trial investigation would have resulted in an acquittal, a fairly high threshold to surmount. Furthermore, the Charter only *adds* protection against wrongful conviction to the extent that evidence establishing inadequate investigation (*i.e.*, documenting the exculpatory evidence that was available at trial) would not be sufficient to obtain a new trial based on fresh evidence. It is hard to say how often that has been or will be the case.

95 466 U.S. 668 (1984).

96 See, for example, Monroe Freedman, "An Ethical Manifesto for Public Defenders" (2005) 39 Val. U. L. Rev. 911, at 918: "There is, of course, wide scholarly agreement that *Strickland* has neither discouraged incompetent representation nor prevented wrongful convictions."

97 Dale Ives, "The 'Canadian' Approach to Ineffective Assistance of Counsel Claims" (2003-2004) 42 Brandeis L.J. 239, at 265.

98 [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199, at 1220 (S.C.C.).

in his favour as memories fade, documents are lost and witnesses disappear. Section 11(b) seeks "to ensure that proceedings take place while evidence is available and fresh"[99] and thus could, in theory, provide significant protection against wrongful conviction.[100] The problem is that matters have not really worked out that way. Ever since the Supreme Court's decision in *R. v. Morin*,[101] a section 11(b) application is highly unlikely to succeed.[102] It is still possible that the Charter right will protect an innocent accused, particularly if he can prove that the delay adversely impacted his ability to make full answer and defence,[103] but by sometimes countenancing delays of years[104] the courts have interpreted section 11(b) in a way that significantly reduces its prospects for protecting against the loss of evidence.

It is also well arguable that section 11(b) does not even address the most relevant delays for innocent accused.[105] The more relevant delays are probably those that occur prior to charge and prior to disclosure after a charge is laid. Once notified of a specific allegation, an accused has some ability to obtain and preserve evidence in his favour. Even if a relevant witness dies or otherwise becomes unavailable, the accused can still seek to introduce the witness's evidence as an exception to the hearsay rule.[106] I do not mean to minimize the problems that extensive delay can bring, but if promptly notified of an allegation of wrongdoing an accused at least has a fair chance of finding and holding on to proof of his innocence. An accused does not have that chance if he is not notified of the allegation and its details promptly after its alleged occurrence, such as when a charge is laid many years after the event or when a charge is

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99 *R. v. Morin*, [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771, at 786 (S.C.C.).

100 "When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated": *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199, at 1221 (S.C.C.).

101 [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771 (S.C.C.).

102 Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Carswell, 2005), at 377.

103 See, for example, *R. v. Padfield*, [1992] O.J. No. 2813, 79 C.C.C. (3d) 53 (Ont. C.A.).

104 See, for example, *R. v. Qureshi*, [2004] O.J. No. 4711, 190 C.C.C. (3d) 453 (Ont. C.A.); *R. v. G. (C.R.)*, [2005] O.J. No. 3764, 206 C.C.C. (3d) 262 (Ont. C.A.).

105 As the Supreme Court also noted in *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199, at 1222 (S.C.C.) (quoting Doherty J., writing extra-judicially), s. 11(b) may be of most interest to the guilty: "An accused is often not interested in exercising the right bestowed on him by s. 11(b). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits."

106 The prerequisites for admitting hearsay evidence can sometimes be relaxed when the defence seeks its admission: *R. v. Folland*, [1999] O.J. No. 143, 132 C.C.C. (3d) 14, at 31 (Ont. C.A.).

laid more promptly but disclosure of the purportedly incriminating evidence is not given with similar alacrity. Unfortunately, the Charter currently allows for this to occur. An accused charged with an historic offence can apply for a remedy under sections 7 and 11(d) but he must establish that he cannot have a fair trial as a result of the pre-charge delay.[107] Lengthy pre-charge delay alone does not establish a Charter violation.[108] And the remedy for prejudicial pre-charge delay is a stay of proceedings, which is only to be granted in the clearest of cases, a difficult burden for an accused to overcome.[109] The situation is more optimistic in relation to disclosure, but still of some concern. The Supreme Court has stated that disclosure must be made "early enough to leave the accused adequate time to take any steps he … is expected to take that affect or may affect" his right to make full answer and defence.[110] Yet, in complex cases it is not uncommon for delays of months to occur, and courts have countenanced delays that are much longer, sometimes extending beyond the preliminary inquiry.[111] If prejudiced, the accused can usually obtain an adjournment, but time is of little assistance when the exculpatory evidence is permanently lost. In those circumstances, an innocent accused must seek a more substantial remedy, such as exclusion of the Crown evidence to which the lost evidence relates or a stay of proceedings. I have already noted that the latter remedy is difficult to obtain.[112] A lesser remedy will be granted more readily but only if the accused establishes a reasonable possibility that his ability to defend himself was impaired.[113] Perhaps that is not an onerous burden, but it does prejudice the innocent accused who, through no fault of his own, cannot prove what he lost.

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[107] *R. v. Potvin*, [1993] S.C.J. No. 63, [1993] 2 S.C.R. 880, at 915-16 (S.C.C.).

[108] *R. v. L. (W.K.)*, [1991] S.C.J. No. 40, [1991] 1 S.C.R. 1091, at 1099-1100 (S.C.C.).

[109] It is not, admittedly, an impossible one. See, for example, *R. v. MacDonnell*, [1997] S.C.J. No. 16, [1997] 1 S.C.R. 305 (S.C.C.); *R. v. Flamand*, [1989] J.Q. no 4361, 141 C.C.C. (3d) 169 (Que. C.A.), leave to appeal refused, [1999] C.S.C.R. no 534, 254 N.R. 200n (S.C.C.).

[110] *R. v. Egger*, [1993] S.C.J. No. 66, [1993] 2 S.C.R. 451, at 466 (S.C.C.).

[111] See, for example, *R. v. Biscette*, [1995] A.J. No. 557, 99 C.C.C. (3d) 326 (Alta. C.A.), affd [1996] S.C.J. No. 103, [1996] 3 S.C.R. 599 (S.C.C.); *R. v. Nova Scotia Pharmaceutical Society*, [1992] N.S.J. No. 406, 116 N.S.R. (2d) 431 (N.S.T.D.). In both of those cases an adjournment was granted.

[112] It is only to be given as a "last resort": *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411, at 466 (S.C.C.).

[113] *R. v. Dixon*, [1998] S.C.J. No. 17, [1998] 1 S.C.R. 244 (S.C.C.); *R. v. Wicksted*, [1996] O.J. No. 1576, 106 C.C.C. (3d) 385 (Ont. C.A.), affd [1997] S.C.J. No. 17, [1997] 1 S.C.R. 307 (S.C.C.).

10. Jury Selection

A major issue in criminal procedure over the past couple of decades has been jury selection. An accused now has a greater ability to challenge prospective jurors for cause than he did before the Charter, particularly in relation to challenges based on the accused's race.[114] Although the beneficial impact of expanded challenges for cause is open to debate, at least in theory it could contribute to protection of the innocent by helping to ensure impartiality. But legal developments in this area have not really been attributable to the Charter. Chief Justice McLachlin spoke in *R. v. Williams*[115] of the need to interpret the pertinent *Criminal Code*[116] sections in light of the Charter, but the Charter seems to have had only a modest impact on the actual outcome of cases.[117] The seminal case of *R. v. Parks*[118] did not even mention the Charter. Expanded rights to challenge for cause are really attributable to the impact, on the interpretation of long-standing *Criminal Code* provisions regulating jury selection, of growing evidence and acknowledgment of the pervasiveness of racial prejudice.[119] The only way in which the Charter can be said to have made a real contribution to the fight against wrongful conviction is in striking down the right of the Crown to stand aside prospective jurors.[120]

11. Bail

Section 11(e) of the Charter has been used to strike down a couple of extremely broad grounds for denying bail pending trial.[121] In theory, this may have contributed to protection against wrongful conviction since it is generally harder to mount an effective defence while confined in a

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[114] See *R. v. Parks*, [1993] O.J. No. 2157, 84 C.C.C. (3d) 353 (Ont. C.A.), leave to appeal refused, [1993] S.C.C.A. No. 481, 87 C.C.C. (3d) vi (S.C.C.); *R. v. Koh*, [1998] O.J. No. 5425, 131 C.C.C. (3d) 257 (Ont. C.A.).

[115] [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128, at 1152-54 (S.C.C.).

[116] R.S.C. 1985, c. C-46.

[117] As L'Heureux-Dubé J. said in *R. v. Sherratt*, [1991] S.C.J. No. 21, [1991] 1 S.C.R. 509 at 526 (S.C.C.), "[t]he impartiality of the jury is controlled in the main through the *Criminal Code* procedure."

[118] [1993] O.J. No. 2157, 84 C.C.C. (3d) 353 (Ont. C.A.), leave to appeal refused [1993] S.C.C.A. No. 481, 87 C.C.C. (3d) vi (S.C.C.).

[119] See *R. v. Parks*, [1993] O.J. No. 2157, 84 C.C.C. (3d) 353, at 372-79 (Ont. C.A.), leave to appeal refused [1993] S.C.C.A. No. 481, 87 C.C.C. (3d) vi (S.C.C.).

[120] *R. v. Bain*, [1992] S.C.J. No. 3, [1992] 1 S.C.R. 91 (S.C.C.).

[121] *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.) (in the "public interest"); *R. v. Hall*, [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309 (S.C.C.) (for "any other just cause being shown").

detention facility. But the impact of section 11(e) has probably been minimal. Many of the same considerations used to deny bail under the impugned provisions are still employed by the courts.[122] The Charter would have only been beneficial to the extent that innocent accused would have been detained because of considerations no longer in use. The prospect is possible but hardly likely.

12. Exclusion of Evidence

Irrespective of whether the content of any Charter right protects against wrongful conviction, it might be argued that merely having rights protects the innocent by giving them added legal avenues for excluding seemingly incriminating prosecution evidence. There is some truth to that, but it seems strange to attribute the added protection to the Charter. The protection comes not strictly from having the constitutional right, but from having the police violate it. The Charter helps by being ignored. The protection is entirely fortuitous and can be eliminated simply by the police obeying the law. The jurisprudence under section 24(2) also does not focus on the "(un)reliability" of evidence in determining whether it ought to be excluded.[123] Reliability is a factor,[124] but hardly a prominent one. I suppose one must say that the possibility of excluding evidence has made some contribution to the fight against wrongful conviction, but it is a random one, not directed or always available to the innocent.

V. THE CHARTER'S IMPACT ON THE FACTORS THAT LEAD TO WRONGFUL CONVICTION

This brief review has undoubtedly failed to do justice to the vast array of Charter rulings made over the years. It is possible that more of them have contributed to protection of the innocent.[125] But apart from the law relating to disclosure and reverse onuses/presumptions, it is hard

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[122] Compare the (constitutionally valid) factors listed in s. 515(10) of the *Criminal Code*, R.S.C. 1985, c. C-46 with the factors considered under the old "public interest" criterion, reviewed in Gary Trotter, *The Law of Bail in Canada* (Scarborough, ON: Carswell, 1992), at c. 3.

[123] See *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

[124] For example, *R. v. Belnavis*, [1997] S.C.J. No. 81, [1997] 3 S.C.R. 341 (S.C.C.); *R. v. Grant*, [2006] O.J. No. 2179, 209 C.C.C. (3d) 250 (S.C.C.).

[125] The jurisprudence under Charter s. 13, for example, may have made some contribution, but only to the limited extent that it affords protection against self-incrimination more easily than the *Canada Evidence Act*, R.S.C. 1985, c. C-5. See *R. v. Henry*, [2005] S.C.J. No. 76, [2005] 3 S.C.R. 609 (S.C.C.).

to discern any major developments that have had a significant beneficial impact. The Charter seems to have been largely irrelevant. Further support for this conclusion comes from a review of the Charter's impact on the main documented causes of wrongful conviction.[126] The impact has been minimal indeed.

Eyewitness misidentification is generally regarded as the leading contributor to wrongful conviction.[127] The simple reality is that eyewitnesses can be mistaken in their identification of a perpetrator, especially when the latter is a stranger and the encounter is brief. Misidentifications are usually made because of problems with the eyewitness's perception or recollection of the perpetrator and/or problems with the post-offence identification process that lead the eyewitness to identify an innocent suspect.[128] In other words, eyewitnesses make mistakes because at the time of the event they fail (for whatever reason) to adequately or accurately perceive the perpetrator, because after the event they forget in whole or in part what they observed, and/or because the lineup or other identification procedure used is biased, suggestive or otherwise misleading.[129]

The Charter cannot solve the problem of eyewitness misidentification, of course; people will always make mistakes. But the Charter could have some role to play. It could be used to exclude eyewitness testimony that is insufficiently reliable, to exclude eyewitness evidence that is tainted by unreliable identification procedures employed by the police, and/or to grant an accused the right to call expert evidence on the frailties of eyewitness testimony.[130] Charter claims of this sort have been rare and almost always unsuccessful. The courts have generally held that

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[126] Three of them, non-disclosure, false confession and poor defence representation, have already been discussed and will not be further examined here. Police misconduct is also usually listed as a factor contributing to wrongful conviction, but it will not be addressed as a separate topic because it has been and will be discussed in connection with so many other topics.

[127] Samuel Gross *et al.*, "Exonerations in the United States, 1989 Through 2003" (2005) 95 J. Crim. L. & Criminology 523, at 542.

[128] See, generally, Gary Wells, "Applied eyewitness testimony research: System variables and estimator variables" (1978) 36 J. Personality and Social Psychology 1546; Brian Cutler, "A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy" (2006) 4 Cardozo Pub. L. Pol'y & Ethics J. 327; Gary Wells, "Eyewitness Identification: Systemic Reforms" [2006] Wis. L. Rev. 615.

[129] For example, the innocent suspect could stand out in a lineup or the lineup administrator could suggest, even subtly and unconsciously, that the suspect is the perpetrator.

[130] The Charter could also be used to mandate strong cautionary warnings to the jury of the specific dangers of relying upon eyewitness testimony, but I will not address that issue here because the accused already has a common law right to such warnings: see, *e.g.*, *R. v. Baltovich*, [2004] O.J. No. 4880, 191 C.C.C. (3d) 289, at 314-15 (Ont. C.A.). In any event, I see little evidence that the Charter has altered the required content of such warnings.

the reliability of eyewitness testimony goes only to weight, not to admissibility;[131] the exceptions have been few.[132] A few courts have allowed for the possibility of excluding eyewitness evidence tainted by problematic identification procedures,[133] but I know of no case where the evidence was actually excluded.[134] The courts have yet to consider the admissibility of expert evidence in this area on Charter grounds, but the current state of the common law is that such evidence is not admissible.[135] The Charter cannot be said to have made any significant contribution to solving the problem of mistaken identifications.

Jailhouse informant testimony is another notorious contributor to wrongful conviction. Such informants tend to prevaricate both frequently and convincingly[136] and they have contributed to numerous wrongful convictions in the past.[137] Attempts to use the Charter to exclude jailhouse informant testimony as a category of evidence, however, have failed.[138] A court is neither obliged nor empowered to review the quality of an

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[131] See, for example, *R. v. Wang*, [2001] O.J. No. 1491, 153 C.C.C. (3d) 321, at 331-33 (Ont. C.A.). The same position is taken at common law: see *R. v. Hibbert*, [2002] S.C.J. No. 40, 163 C.C.C. (3d) 129, at 146-47 (S.C.C.).

[132] *R. v. Johnson*, [2003] O.J. No. 3580 (Ont. S.C.J.); *R. v. Sandhu*, [2005] O.J. No. 5855 (Ont. S.C.J.). Both of those cases considered in-dock identification evidence, traditionally regarded as the weakest form of identification evidence. Both cases could also be interpreted as applications of common law rather than Charter principles.

[133] *R. v. Gagnon*, [2000] O.J. No. 3410, 147 C.C.C. (3d) 193, at 237-40 (Ont. C.A.); *R. v. Tam*, [1995] B.C.J. No. 1428, 100 C.C.C. (3d) 196, at 211-13 (B.C.C.A.). But see *R. v. Wang*, [2001] O.J. No. 1491, 153 C.C.C. (3d) 321 (Ont. C.A.); *R. v. Mezzo*, [1986] S.C.J. No. 40, [1986] 1 S.C.R. 802, at 844-45 (S.C.C.); *R. v. Aulakh*, [2006] B.C.J. No. 2013 (B.C.S.C.); *R. v. Ferro*, [2007] B.C.J. No. 746 (B.C. Prov. Ct.).

[134] On occasion, a court will exclude eyewitness evidence through the exercise of its common law powers: *e.g*., *R. v. S. (H.M.L.)*, [2005] B.C.J. No. 2175 (B.C. Youth Ct.); *R. v. Vivar*, [2003] O.J. No. 5100 (Ont. S.C.J.). See also *R. v. Holmes*, [2002] O.J. No. 4178, 169 C.C.C. (3d) 344, at 358-59 (Ont. C.A.); *R. v. Tebo*, [2003] O.J. No. 1853, 175 C.C.C. (3d) 116, at 124-25 (Ont. C.A.). But see *R. v. Grant*, [2005] A.J. No. 745, 198 C.C.C. (3d) 376 (Alta. C.A.); *R. v. Goulart-Nelson*, [2004] O.J. No. 4010 (Ont. C.A.).

[135] *R. v. McIntosh*, [1997] O.J. No. 3172, 117 C.C.C. (3d) 385 (Ont. C.A.); *R. v. Sheppard*, [2002] M.J. No. 135, 164 C.C.C. (3d) 141 (Man. Q.B.); *R. v. Myrie*, [2003] O.J. No. 1030 (Ont. S.C.J.).

[136] "Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts ... They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable": *The Inquiry regarding Thomas Sophonow: the investigation, prosecution and consideration of entitlement to compensation* (Winnipeg: Manitoba Justice, 2001), at 63.

[137] The Guy Paul Morin, Thomas Sophonow and Randy Druken cases are three prime Canadian examples.

[138] See, for example, *R. v. Johnston*, [1991] O.J. No. 485, 64 C.C.C. (3d) 233, at 244 (Ont. C.A.), leave to appeal refused 67 C.C.C. (3d) vi (S.C.C.); *R. v. Majiza*, [2006] O.J. No. 2838 (Ont. S.C.J.); *R. v. Chenier*, [2001] O.J. No. 4708 (Ont. S.C.J.).

informant's testimony before admitting it.[139] Crown Attorney's offices often vet informants for reliability before calling them as witnesses,[140] but there is no legal obligation on the Crown to do so. The only real assistance given to an innocent accused by the Charter in this context is the right to disclosure of information relating to the informant's credibility.[141] That is not an insignificant right, but it is just a particularization of the point previously made that the Charter has (along with the common law) contributed to protection against wrongful conviction through the law of disclosure.

Erroneous or improperly used scientific evidence has also contributed to wrongful convictions in the past.[142] In recent years the courts have increasingly begun to grapple with the difficult problem of regulating scientific evidence and they have now assumed a moderately robust gatekeeping role.[143] This at least has the potential to keep out unreliable evidence and thereby protect against wrongful conviction. However, this development is not attributable to the Charter. The courts have applied their common law, not their constitutional, jurisdiction to screen out unreliable evidence.

Witness perjury is another common contributor to wrongful conviction.[144] The Charter obviously cannot prevent people from lying, but it could prevent them from testifying when their evidence is highly suspect and/or regulate the ways in which their evidence is gathered in the first place. Neither has occurred. The Supreme Court has ruled that the Charter does not endow a trial judge with the power to exclude evidence on the basis that it is unreliable (except evidence traditionally

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139 *R. v. Campbell*, [2005] O.J. No. 4669, 203 O.A.C. 360, at 363 (Ont. C.A.); *R. v. Assoun*, [2006] N.S.J. No. 154, 207 C.C.C. (3d) 372 (N.S.C.A.); *R. v. Mallory*, [2007] O.J. No. 236, 217 C.C.C. (3d) 266, at 332 (Ont. C.A.). It is not clear that a Charter, as opposed to a common law, argument was being made in each of these cases but it safe to assume that the courts' comments at least strongly suggest that a Charter argument would fail. Jailhouse informant testimony seems reviewable under the Charter only when the informant is a state agent: see, for example, *R. v. McInnis*, [1999] O.J. No. 1353, 134 C.C.C. (3d) 515 (Ont. C.A.).

140 Christopher Sherrin, "Comment on the Report on the Prevention of Miscarriages of Justice" (2007) 52 Crim. L.Q. 140, at 165.

141 See, *e.g.*, *R. v. Antinello*, [1995] A.J. No. 214, 97 C.C.C. (3d) 126 (Alta. C.A.); *R. v. Babinski*, [1998] O.J. No. 1407, 135 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Chenier*, [2000] O.J. No. 5421 (Ont. S.C.J.); *R. v. Coombs*, [2003] A.J. No. 598 (Alta. Q.B.); *R. v. Rojas*, [2003] B.C.J. No. 1636 (B.C.S.C.).

142 See, for example, *R. v. Truscott*, [2007] O.J. No. 3221, 50 C.R. (6th) 1 (Ont. C.A.).

143 See *R. v. Mohan*, [1994] O.J. No. 36, [1994] 2 S.C.R. 9 (S.C.C.); *R. v. J. (J.-L.)*, [2000] S.C.J. No. 52, [2000] 2 S.C.R. 600 (S.C.C.); *R. v. Trochym*, [2007] S.C.J. No. 6, 216 C.C.C. (3d) 225 (S.C.C.); *R. v. Ranger*, [2003] O.J. No. 3479, 178 C.C.C. (3d) 375 (Ont. C.A.).

144 Samuel Gross *et al.*, "Exonerations in the United States, 1989 Through 2003" (2005) 95 J. Crim. L. & Criminology 523, at 543-44.

subjected to judicial review, such as confession or hearsay evidence).[145] Accused persons have occasionally sought Charter relief for police investigatory misconduct that might have tainted a witness's testimony,[146] but few rulings have been made in their favour.[147] Certainly, no body of law has developed that has attempted to regulate police-witness interactions that might result in perjured or unreliable testimony.[148] The courts have really only responded to extreme cases.[149]

Prosecutorial misconduct also contributes to wrongful conviction.[150] Misconduct can come in many forms, including suppression of exculpatory evidence, unreasonable exercises of discretion (brought about by tunnel vision),[151] improper cross-examination, inflammatory jury addresses, interference with the neutral administration of justice, and so forth. The

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[145] *R. v. Buric*, [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.), affg [1996] O.J. No. 1657, 106 C.C.C. (3d) 97 (Ont. C.A.).

[146] For example, *R. v. Buric*, [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.), affg [1996] O.J. No. 1657, 106 C.C.C. (3d) 97 (Ont. C.A.); *R. v. Post*, [2007] B.C.J. No. 352, 217 C.C.C. (3d) 225 (B.C.C.A.), leave to appeal refused [2007] S.C.C.A. No. 207 (S.C.C.); *R. v. M. (B.N.)*, [1997] B.C.J. No. 3129 (B.C. Prov. Ct); *R. v. Bartkowski*, [2005] B.C.J. No. 1438 (B.C.S.C.).

[147] One of the rare examples of success is *R. v. Xenos*, [1991] J.Q. no 2200, 70 C.C.C. (3d) 362 (Que. C.A.), where the court granted a Charter remedy in an arson case after the police became involved in an improper agreement whereby a witness would receive money from an insurance company if the accused was convicted. See also *R. v. McMillan*, [2003] O.J. No. 3489, 176 O.A.C. 215 (Ont. C.A.) (although the remedy in that case was not granted explicitly because of concerns over witness tainting). Police misconduct is a factor considered in the application of the principled exception to the hearsay rule: *R. v. U. (F.J.)*, [1995] S.C.J. No. 82, [1995] 3 S.C.R. 764 (S.C.C.).

[148] It would, of course, be extremely difficult for the courts to fashion Charter rules regulating police-witness interaction in any meaningful way, but they could draw upon the substantial body of existing literature pertaining to reliable interview practices.

[149] See, for example, *R. v. Dikah*, [1994] O.J. No. 858, 89 C.C.C. (3d) 321 (Ont. C.A.), affd [1994] S.C.J. No. 108, [1994] 3 S.C.R. 1020 (S.C.C.), in which *R. v. Xenos*, [1991] J.Q. no 2200, 70 C.C.C. (3d) 362 (Que. C.A.) was distinguished from the situation where payment to a witness was conditional, not on conviction, but on the laying of charges. See also *R. v. Antinello*, [1995] A.J. No. 214, 97 C.C.C. (3d) 126, at 138 (Alta. C.A.):

> It is not unusual that unsavoury people are witnesses to crimes, and the Crown cannot be criticized simply for treating with them … To reward the fact of testimony by lenient dispositions on unrelated matters or other special treatment, such as immunity from prosecution, is, it seems, a necessary if unpleasant activity in order effectively to prosecute crime. It may be different, however, if the Crown rewards a witness for what is, or appears to be, an "approved version" of that testimony.

[150] Heather Schoenfeld, "Violated Trust: Conceptualizing Prosecutorial Misconduct" (2005) J. Contemp. Crim. J. 250.

[151] Tunnel vision refers to "the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information": *Commission on Proceedings Involving Guy Paul Morin: Report* (Toronto: Ontario Ministry of the Attorney General, 1998), at 1136. In this context, it essentially refers to a prosecutor being blinded as to the possibility of the accused's innocence.

Charter has helped combat suppression of evidence, as discussed above in connection with disclosure, but otherwise has not had much impact. The courts have been very reluctant to use the Charter to regulate the exercise of Crown discretion[152] and have resorted to common law and statutory means to address other forms of prosecutorial misconduct.[153] It is obviously dangerous to generalize, and resort has certainly sometimes been made to the Charter,[154] but in most cases a remedy has been unavailable.[155] The Charter also does not appear to have deterred prosecutorial misconduct, given how often it has grounded successful appeals over the last 25 years.[156]

VI. HAS THE CHARTER CONTRIBUTED TO CONVICTION OF THE INNOCENT?

The discussion to this point may have been neither surprising nor disconcerting. The Charter was not really designed to be an instrument for the effective protection of the innocent, and maybe we should not be concerned if has not turned out to be. But we must be concerned if the

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[152] *R. v. Power*, [1994] S.C.J. No. 29, [1994] 1 S.C.R. 601 (S.C.C.). See also Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Carswell, 2005), at 155: "Courts have resisted frontal s.7 attacks on discretionary powers of police or prosecutors but have accepted that the exercise of power in an exceptional case may require judicial intervention."

[153] Crown misconduct can be remedied on appeal by an order for a new trial under s. 683(1)(a)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46 on the ground that there was a miscarriage of justice. Crown misconduct can be remedied at trial by the trial judge's common law powers to correct misstatements, control cross-examination, declare a mistrial, *etc.* The accused need not invoke the Charter to obtain a remedy. See, for example, *R. v. Fanjoy*, [1985] S.C.J. No. 55, [1985] 2 S.C.R. 233 (S.C.C.); *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217 (S.C.C.); *R. v. Romeo*, [1991] S.C.J. No. 6, [1991] 1 S.C.R. 86 (S.C.C.); *R. v. Henderson*, [1999] O.J. No. 1216, 134 C.C.C. (3d) 131, at 146-47 (Ont. C.A.).

[154] See, for example, *R. v. Hooites-Meursing*, [2006] B.C.J. No. 2867, 148 C.R.R. (2d) 285 (B.C.S.C.) (stay granted where Crown conduct risked tainting the evidence of the accused and his witness by making them fear for their safety if they testified).

[155] The doctrine of abuse of process affords the major legal avenue for regulating Crown conduct under the Charter, but the doctrine has not expanded much beyond its common law roots and has only succeeded "in the most egregious of circumstances": *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.); *R. v. Regan*, [2002] S.C.J. No. 14, [2002] 1 S.C.R. 297 (S.C.C.); Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed. (Scarborough, ON: Thomson Carswell, 2005), at 16-18.

[156] Robert Frater, "The Seven Deadly Prosecutorial Sins" (2002) 7 Can. Crim. L. Rev. 209, at 210: "The last decade has seen an explosion in case law in which the conduct of Crown counsel was, if not a decisive legal issue, an important one." See also *R. v. R. (A.J.)*, [1994] O.J. No. 2309, 94 C.C.C. (3d) 168, at 176 (Ont. C.A.): "Counsel for the appellant submits that Crown counsel's cross-examination of the appellant resulted in a miscarriage of justice … This argument is becoming a familiar one in this court"; *R. v. White*, [1999] O.J. No. 258, 132 C.C.C. (3d) 373, at 378 (Ont. C.A.).

Charter has somehow contributed to *conviction* of the innocent. It is possible that it has.

I have two concerns, neither of which I can conclusively substantiate but both of which I believe are realistic. My first concern is that the possibility of Charter relief may have diverted scarce defence time and resources away from the investigation and preparation of factual defences.[157] My second concern is that the increased and often confusing regulation of police activities that has come with the Charter has provoked a hostile reaction from the authorities leading to greater disrespect for and subversion of rules and practices generally, including those rules and practices that do protect against wrongful conviction.

1. Legal versus Factual Defences

Counsel do not usually have unlimited time and resources to spend defending a case. On the contrary, time and money are usually in short supply, especially if the client is funded by legal aid. This obviously makes the job of defence counsel much harder. She must attempt to provide an adequate defence without the means or opportunity to do it. Some counsel will go the extra mile to provide that defence, even to the point of working for free and covering some of the costs, but financial and logistical realities will frequently limit the ability to do so. Not only do counsel have to earn a living, they also have to devote time and resources to other clients. The result of this practical reality is that in almost any given case choices will have to be made, and in some cases a choice will have to be made between defences to pursue (with any real vigour). There simply will not be enough time and money to pursue them all. Presumably, the choice will be based heavily on the perceived merits of the various defences. But merit will not always be the only consideration. A busy defence lawyer will also have to (or at least often will) take into consideration the time and expense required to investigate and litigate a defence.

The problem with the Charter is that it often provides counsel with the option of pursuing a constitutional defence that, in general, is likely to be easier and cheaper than a factual defence. This may work out well for the guilty, but not so well for the innocent whose best shot at an acquittal

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[157] In my discussion of this issue I draw heavily on the excellent article by William Stuntz entitled "The Uneasy Relationship Between Criminal Procedure and Criminal Justice" (1997) 107 Yale L.J. 1.

(not to mention exoneration) often lies in a factual defence. William Stuntz has explained the problem well:

> Consider the relative cost of raising a search and seizure claim and a self-defense argument. The search and seizure claim has many advantages. Such claims are easy to raise … The facts on which they rest usually do not involve much independent digging by defense counsel. The typical suppression hearing is nothing more than an adjudication of the plausibility and legality of the police officer's version of events. This adjudicative process requires neither detailed papers nor a complicated jury proceeding ... And the benefits of a successful claim are sometimes enormous — it can mean dismissal of all charges. ...
>
> The self-defense claim, meanwhile, will likely involve substantial digging. Among other things, counsel will have to investigate in detail any prior relationship between the victim and the defendant, since that relationship will tend to determine the plausibility of any claim that the victim was the true aggressor. It is also costlier to pursue than the Fourth Amendment claim. If the government fights the suppression motion, the upshot is a brief suppression hearing; if the government fights a self-defense argument, the upshot is a jury trial, and jury trials are more involved and require more preparation than suppression hearings. And the self-defense claim is generically no more likely to succeed ...[158]

Stuntz properly acknowledges that defence counsel have other motivations besides minimizing cost, but he also correctly points out that counsel are only rarely in a position to choose between consitutional and factual defences.

> The far more common choice is whether to file the motion or *investigate* the factual claim. Factual arguments are not merely harder to prepare and pursue than legal claims; they are harder to evaluate. ... [F]actual arguments — claims that the defendant did not do the crime, or acted in self-defense, or lacked the requisite mens rea — tend to require nontrivial investigation simply to establish whether there is any argument to make. Most possible challenges to the legality of a police search, meanwhile, appear on the face of the police report ...
>
> The relevant choice, therefore, is not whether to file a suppression motion or make a self-defense argument, but whether to file the motion or find out if the argument even exists, in a world where it probably doesn't. Given how cheap is the process that decides the suppression motion, and given the expense of *both* determining whether the self-defense

[158] William Stuntz, "The Uneasy Relationship Between Criminal Procedure and Criminal Justice" (1997) 107 Yale L.J. 1 (footnotes omitted).

> argument is worth making *and* actually taking that argument to trial, the system places substantial pressure on counsel to opt for the procedural claim rather than the (potential) substantive one. …[159]

As Stuntz also notes,[160] the pressures operating to prioritize constitutional claims in an individual case operate with added force in the context of a busy defence practice. Time spent on one case cannot be spent on another, and since it is generally more profitable to defend a bunch of short cases than a smaller number of longer cases, counsel are pressured to minimize the amount of time they spend on each individual case.

Stuntz's example of a search and seizure versus a self-defence argument may not be the best one; not too many cases will present that choice. But many cases will present a choice of the sort that Stuntz describes. Over 80 charges can often be defended by right to counsel or evidence to the contrary arguments. Drug possession charges can raise section 8 issues as well as *mens rea* issues concerning knowledge (of the presence of the substance or of its illicit character). Personal violence offences can sometimes be litigated based on unreasonable search and seizure or on the fallibility of the forensic analysis of the items seized. In each case, the Charter argument is likely to be the easier and cheaper one.

Stuntz was writing in an American context but there is little reason to believe that the same pressures to prioritize constitutional claims do not operate here. Indeed, it is possible that the legal aid systems in at least some Canadian provinces exacerbate the problem. In Ontario, for example, legal aid funding is weighted in favour of in-court time and against preparation time. Counsel defending an importing cocaine case, for example, is paid for all her court time but for only a limited amount of preparation time.[161] That would not be problematic if the number of hours paid for preparation was extensive, but sadly it is not. If the importing trial lasts one week, counsel is entitled to bill for a maximum of 31 hours of preparation time[162] (subject to any discretionary increase granted by

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[159] William Stuntz, "The Uneasy Relationship Between Criminal Procedure and Criminal Justice" (1997) 107 Yale L.J. 1, at 38-41 (emphases in original; footnotes omitted).

[160] William Stuntz, "The Uneasy Relationship Between Criminal Procedure and Criminal Justice" (1997) 107 Yale L.J. 1, at 44-46.

[161] See Legal Aid Ontario, *Tariff and Billing Handbook* (Legal Aid Ontario, 2002) at c. 3, available online at <http://www.legalaid.on.ca/en/info/Resources.asp> (accessed March 6, 2008).

[162] Legal Aid Ontario, *Tariff and Billing Handbook* (Legal Aid Ontario, 2002), available online at <http://www.legalaid.on.ca/en/info/Resources.asp> (accessed March 6, 2008). Counsel can bill extra for time spent on bail hearings (two hours), a judicial pre-trial (two hours) and Charter motions (two hours).

legal aid).[163] That 31 hours has to cover all time spent on seemingly unavoidable matters like client meetings,[164] adjournments, obtaining and reviewing disclosure, travel to and from court, preparation for cross-examinations and legal arguments, drafting jury addresses, and so forth. How much time will be left for the often frustrating and unpleasant task of properly investigating and preparing a positive factual defence?[165] The situation is even worse for what are categorized as less serious charges. Defence counsel in a one-day sexual assault trial is paid for about eight hours of preparation time.[166] Counsel in a two-day summary conviction criminal harassment trial is covered for about two hours of preparation time.[167] In such situations it would hardly be surprising if counsel even unconsciously give preference to defences that do not require a lot of preparation time, or that require less than alternative defences. Because the Charter often presents counsel with a plausible less time-consuming defence, it may lead counsel to neglect factual defences in a number of instances.

Most counsel, of course, would not consciously abandon or de-emphasize a factual defence simply because it is less profitable, but the choice to prefer a constitutional defence will not necessarily appear to be unethical. Counsel are obliged to consider Charter defences; indeed,

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163 Given that these increases are discretionary, it is impossible to calculate the impact they have on payment for preparation time. Suffice it to say that in my experience discretionary increases are given with some frequency but they rarely cover all the additional time spent on a case. Completing an application for a discretionary increase also consumes additional time.

164 I say that client meetings are unavoidable, but a study of New York defence counsel in the 1980s revealed that they met with their clients a shockingly low percentage of the time: 25.5 per cent in murder cases and 17.6 per cent in other felony cases. See Michael McConville & Chester Mirsky, "Criminal Defense of the Poor in New York City" (1986-1987) N.Y.U. Rev. L. & Soc. Change 581, at 758-59.

165 Further exacerbating the problem is the fact that extra time (albeit only two hours) is specifically allocated for Charter arguments but not for complex or unusual (or even mundane) factual defences.

166 Legal Aid Ontario, *Tariff and Billing Handbook* (Legal Aid Ontario, 2002), available online at <http://www.legalaid.on.ca/en/info/Resources.asp> (accessed March 6, 2008). Counsel are entitled to bill for up to 15 hours of time, including time for attendance in court. On the assumption that a one-day trial will consume about seven hours of time, eight hours remain for preparation. Counsel can bill extra for time spent on bail hearings (two hours), a judicial pre-trial (two hours) and Charter motions (two hours). A discretionary increase can also be requested.

167 Legal Aid Ontario, *Tariff and Billing Handbook* (Legal Aid Ontario, 2002), available online at <http://www.legalaid.on.ca/en/info/Resources.asp> (accessed March 6, 2008). Counsel defending summary conviction trials are paid for a maximum of 10.5 hours of work up to the first day of a trial and for five hours per day for each day that the trial continues. On the assumption that each day at trial will consume about seven hours of time, less than two hours remain for preparation. Counsel can bill extra for time spent on bail hearings (two hours) and Charter motions (two hours). A discretionary increase can also be requested.

they would be professionally irresponsible if they did not. And Charter defences can be quite attractive: they can lead to acquittal. The problem is that Charter defences can also fail. This is not a problem for the guilty client. He has not lost anything. The Charter defence was simply an opportunity for acquittal that he otherwise did not have. But an unsuccessful Charter defence is a problem for an innocent client if it consumed time and resources that could have been spent developing a factual defence. Accused persons and their lawyers often have to make tough tactical choices, but the point is that the Charter offers and sometimes forces a choice between a legal and a factual defence rather than between factual defences. The option to choose or prefer a legal defence can often appear to be the best choice to counsel who is mired in the routine practice of criminal law where most of her clients are guilty. Counsel is apt to develop a strong presumption of guilt in relation to all clients[168] and consequently a strong presumption that investigation of factual defences will be fruitless. Pursuing a Charter defence allows counsel to believe (often quite legitimately) that she is doing a better job for her client than she would be if she pursued an "obviously pointless" factual defence. If we did not have the Charter, ethical counsel would not have that option and would be forced to pursue a factual defence no matter how unrealistic it might appear to her to be.

All of the above is somewhat speculative. I cannot prove that defence counsel have consciously or unconsciously given preference to constitutional defences over factual ones. Even if they have, there would not have been a one-to-one displacement of factual for legal defences; the effects would presumably have only been felt at the margin. But the possibility of displacement of any level is cause for concern.

2. Increased Police Corruption

The other cause for concern is the possibility that the Charter has had an adverse impact on police behaviour. Police officers are confronted with a challenging, unpleasant but nonetheless critically important task.

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[168] The presumption of guilt held by many members of the defence bar has been noted by numerous observers: *e.g.*, Michael McConville & Chester Mirsky, "Criminal Defense of the Poor in New York City" (1986-1987) N.Y.U. Rev. L. & Soc. Change 581, at 771; Daniel Givelber, "Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?" (1996-1997) 49 Rutgers L. Rev. 1317, at 1329-30; Adele Bernhard, "Effective Assistance of Counsel" in Saundra Westervelt & John Humphrey, eds., *Wrongly Convicted: Perspectives on Failed Justice* (Piscataway, NJ: Rutgers University Press, 2001), at 231-32.

They must tackle large numbers of crimes and do battle with the often unethical and sometimes cunning individuals who perpetrate them. It is fair to say that many officers consider their task too difficult but their cause noble; they are the ones who defend and protect the innocent victims.[169] It is also fair to say that many police officers consider some of the limitations on their powers to be unjustified. This attitude has been noted by many observers over the years.[170]

The Charter, of course, has increased the number and complexity of limitations on police powers. One can argue about how dramatic the change has been, but it is beyond question that a police officer in 2007 faces greater constraints than a police officer did in 1982. That may not seem like a bad thing to an outside observer, but to at least some police officers it has probably appeared to be an inappropriate and unacceptable state of affairs. Some officers may have felt hounded by the courts and unreasonably handcuffed in their task. They are especially likely to have felt that way if the new Charter rules have been unclear, inconsistent, and not obviously justifiable — a description that might reasonably be applied to some criminal Charter jurisprudence.

My concern is that officers have reacted to the new constitutional constraints by increasingly operating outside of the law — by bending legal and institutional rules in order to catch the bad guy (and then concealing and denying their behaviour to the outside world).[171] Some

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[169] See, generally, Michael Caldero & John Crank, *Police Ethics: The Corruption of Noble Cause*, 2d ed. (Cincinnati: Anderson Publishing, 2004).

[170] Jerome Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society*, 2d ed. (New York: John Wiley, 1975), at 183: police "interpret procedural requirements as frustrating the efficient administration of criminal justice"; Phil Crawford & Thomas Crawford, "Police Attitudes Towards the Judicial System" (1983) 11 J. Police Sci. & Admin. 290 (finding that police are more favourable than either firemen or college students towards eliminating procedural restrictions that hamper crime control, even if it reduces constitutional rights); Brian Payne, Victoria Time & Randy Gainey, "Police chiefs' and students' attitudes about the Miranda warnings" (2006) 34 J. Crim. J. 653 (finding that police chiefs were more likely than college students to believe that the courts are too cautious regarding the warnings to suspects mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966), that the courts should overturn the warnings, and that the warnings make it difficult for police to do their job); J. Moynahan, "Perceptions of Police Legal Powers" (1973) 2 Police L.Q. 5 (survey of police officers in which 80 per cent agreed that they cannot do enough to curb crime because of legal restrictions and 86 per cent agreed that they should have more power to make arrests and searches).

[171] Numerous authors have documented the willingness of some police officers to lie in order to cover their misconduct. See, for example, Dallin Oaks, "Studying the Exclusionary Rule in Search and Seizure" (1969-1970) 37 U. Chicago L. Rev. 665, at 739-40: "High-ranking police officers have admitted to the author that some experienced officers will 'twist' the facts in order to prevent suppression of evidence and release of persons whom they know to be guilty"; Note, "Effect of *Mapp v. Ohio* on Police Search-and-Seizure Practices in Narcotics Cases" (1968) 4 Colum. J.L. & Soc. Probs. 87, at 87: "There is some indication … that police officers often … fabricate testimony to avoid the effects of … motions to suppress illegally seized evidence"; Thomas Barker,

police officers have always bent the rules to some extent, but the danger is that the number of police officers willing to engage in that behaviour, and the frequency with which they do so, may have increased along with an increase in what they have considered to be inappropriate rules limiting their ability to do their job.

Observers of police behaviour have noted that officers will sometimes react to new rules that complicate their task by avoiding or ignoring them.[172] To the extent that the Charter has added rules that protect the innocent, such a reaction, if it has taken place,[173] would obviously have detracted from the usefulness of those rules. That concerns me, but what concerns me more is the prospect that the Charter has affected some officers' views of, and commitment to, the justice system as a whole. Reluctance to comply with new beneficial rules would have diminished their impact, but wrongful conviction would be no more likely than it was before. The risk of wrongful conviction could have increased, however, if the Charter has had a ripple effect. Police feeling hemmed in by constitutional constraints may have lost respect for legal and institutional constraints generally. They may have come to believe, even more than before, that they have to take matters into their own hands if they are to win the battle against crime. This may not simply have translated into a broad (but hidden) reluctance to comply with the Charter; some Charter rules cannot easily be avoided, and an officer can never be sure if a new rule, or an existing rule that he cannot control, will torpedo his investigation. Antagonism towards the Charter may have translated into an increased willingness, and even desire, to circumvent legal and institutional constraints of all sorts, including those that protect against wrongful conviction.

"An Empirical Study of Police Deviance Other Than Corruption" in Thomas Barker and David Carter, eds., *Police Deviance*, 2d ed. (Cincinnati: Anderson Publishing, 1991) 123 (reporting on a survey in which almost 23 per cent of police respondents said that they have lied, or that police sometimes lie, in court).

[172] Note, "Effect of *Mapp v. Ohio* on Police Search-and-Seizure Practices in Narcotics Cases" (1968) 4 Colum. J.L. & Soc. Probs. 87; Richard Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworth & Co., 1981), at 12:

> [D]etectives will not respond to a new rule aimed at making their task more difficult by a willing commitment to implement it in letter and spirit. Instead, they will assess the rule in the context of the rule frameworks they have already established. They will then develop strategies to avoid the new rule, to implement it with a minimum level of compliance possible, and/or turn it to their advantage in easing their task.

[173] Susan Kuo & C.W. Taylor have recently described how disclosure rules are frequently ignored by American and British police: "In Prosecutors We Trust: UK Lessons for Illinois Disclosure" (2007) 38 Loy. U. Chicago L.J. 695.

There are many ways in which this could have played out. Police officers feeling caged in by the Charter may, for example, have increasingly violated the common law confessions rule, thereby overcoming constitutional limitations by securing powerfully incriminating but false confessions and admissions.[174] Police officers uncertain of the admissibility of evidence they have collected may have felt a greater need to influence the evidence of witnesses, urging them to remember who the perpetrator "really" was or what he "really" did. Police officers dispirited by legal developments may have increasingly turned to unsavoury individuals like informants for new "evidence".

Many police officers are people of high integrity, of course, but it would be naïve to believe that they all are. It would also be wrong to assume that a given police officer will necessarily consider a breach of the rules to be improper, or at least unjustified. Police officers often set a higher value on the apprehension of criminals than on adherence to legal "technicalities".[175] Clearly not every police officer would have reacted to the Charter in the way I have described. But it seems plausible that some of them have.

Unfortunately, the hypothesis is very difficult to substantiate. There is very little information available regarding police officers' views of or reactions to the Charter. One study uncovered some positive attitudes towards the Charter, but the finding was not uniform and was based on questioning of a very small number of officers.[176] Another study showed that while the official police response to the Charter was positive, officers interviewed felt that it had made investigations more difficult and created long-term frustration for some officers; they were also unhappy that some old investigative procedures have been disapproved and that some Charter rulings had seemed to favour the rights of the accused over the protection

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[174] In an interesting article, Mike McConville documented two instances where police reacted to new rules mandating the videotaping of interrogations by going off camera in order to offer inducements to the suspect to confess: "Videotaping Interrogations: police behaviour on and off camera" [1992] Crim. L. Rev. 532.

[175] Dallin Oaks, "Studying the Exclusionary Rule in Search and Seizure" (1969-1970) 37 U. Chicago L. Rev. 665, at 708; Jerome Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society*, 2d ed. (New York: John Wiley, 1975), at c. 10.

[176] Kathryn Moore, "Police Implementation of Supreme Court of Canada Charter Decisions: An Empirical Study" (1992) 30 Osgoode Hall L.J. 547. The precise number of officers interviewed is not indicated in the article, but positive comments were specifically attributed to only two people: a senior officer of the Halton Regional Police Service and a senior administrator at the Ontario Police College. A negative comment was attributed to a member of the RCMP (possibly reflecting the view of a front-line officer).

of society.[177] There is also a body of literature in the United States demonstrating that the police there have sometimes reacted negatively to increased constitutional constraints, have been willing to violate those and other legal constraints, and have believed it was justifiable to do so.[178] It would not be surprising if similar attitudes were found here. None of this proves that police in Canada have rebelled against the Charter by increased subversion of rules generally, but it does suggest that the police may have been motivated to do so.

Sadly, if police in Canada have reacted in the way I have described it may have had (and may continue to have) especially adverse consequences for the innocent. All things being equal, a police officer is probably most likely to bend the rules in a case where she feels the greatest need to do so because strong incriminating evidence against the suspect is lacking. Such evidence will usually be lacking against an innocent suspect. Thus, an increased willingness to bend the rules may have been operationalized with particular frequency in cases where a risk of wrongful conviction was present. Of course, one would assume that a police officer would be less likely to bend the rules if she was worried that a suspect might be innocent, but we cannot assume that police officers have often had doubts about guilt when it came to actually innocent suspects. Indeed, in many documented wrongful convictions the police felt (and sometimes continue to feel) absolutely certain of the suspect's guilt.[179] Furthermore, there is

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[177] Reginald Devonshire, "The Effects of Supreme Court *Charter*-Based Decisions on Policing: More Beneficial than Detrimental?" (1994) 31 C.R. (4th) 82. See also *R. v. Schedel*, [2003] B.C.J. No. 1430, 175 C.C.C. (3d) 193 (B.C.C.A.) (documenting an official police policy of not complying with a particular Charter right). But see Simon Verdun-Jones, *A Review of Brydges Duty Counsel Services in Canada* (Department of Justice, 2003), at 72-73 (implying that some police do not object to complying with the informational component of the Charter right to counsel).

[178] Jerome Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society*, 2d ed. (New York: John Wiley, 1975), at c. 10; Michael Brown, *Working the Street: Police Discretion and the Dilemmas of Reform* (New York: Russell Sage Foundation, 1988), at 164-65 (finding that well over half of police officers surveyed agreed that the police are sometimes required to violate search and seizure laws and other procedural safeguards in order to prevent crimes and apprehend felons); Wesley Skogan & Tracey Meares, "To Better Serve and Protect: Improving Police Practices" (2004) 593 Annals 66, at 71: studies show that "police mostly follow the rules, but sometimes, they do not. Officers know the rules, but they sometimes skirt constitutional standards because they want to deter crime by incarcerating the truly guilty." See, also, the sources cited above in note 170.

[179] Commissioner Kaufman refers several times to the fact that the officers investigating Guy Paul Morin firmly believed in his guilt: *Commission on Proceedings Involving Guy Paul Morin: Report* (Toronto: Ontario Ministry of the Attorney General, 1998), at c. 5.

evidence that protestations of innocence by a suspect can actually serve to reinforce an officer's belief in guilt.[180]

It is unpleasant to think that police officers are willing to violate legal and institutional rules, but the evidence is fairly convincing that they sometimes do. Unfortunately, the Charter may have given them added reason to do so, a possibility that may have had and continue to have unfortunate consequences for the innocent.

VII. CONCLUSION

In this paper I have argued that the Charter has made a contribution, but probably not a major contribution, to protection against wrongful conviction in the Canadian criminal justice system. At the same time, I have expressed a concern that the Charter may have also hurt the innocent by diverting defence resources away from investigations into factual innocence and by provoking an adverse reaction from the police leading to a greater willingness to engage in behaviour that increases the risk of wrongful conviction. Whether on balance the Charter has helped more than it has hurt is hard to say, but it is at least possible that the overall impact has been negative. At the very least, this shows that we cannot be complacent about the gains we have achieved through the Charter. It could also suggest that the Charter should be abolished or its interpretation substantially narrowed. I, however, would not go that far. The Charter has contributed to the fairness of our criminal justice system and, more importantly, it has the potential to be a useful tool in protecting against wrongful conviction. Charter-based rules mandating reliable identification procedures and videotaped reliable interrogation procedures, for example, could go a long way towards protecting the innocent. The important task is to use the Charter well. Indeed, increased Charter rules designed to safeguard against wrongful conviction could even prophylactically solve the problem of defence diversion by turning some Charter litigation into accuracy litigation. By ensuring that the authorities comply with the Charter, in other words, defence counsel may indirectly ensure that some of the conditions leading to wrongful conviction do not arise. Even if its impact will not be uniformly positive, the Charter has considerable promise. We only have to strive to fulfil it.

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[180] Saul Kassin, Christian Meissner & Rebecca Norwick, "'I'd Know a False Confession if I Saw One': A Comparative Study of College Students and Police Investigators" (2005) 29 Law & Hum. Behav. 211.