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I. Introduction

Although much has been written since the September 11 terrorist attacks about how far states should go in combating terrorism, much less has been written about the risks of harming the innocent in the war against terror. Indeed, the very metaphor of a war against terror suggests a willingness to accept some collateral damage.[1] Reduction of the freedom of citizens is typically cited as the most common form of collateral damage, and much of the debate about anti-terrorism measures has revolved around threats to civil liberties.[2] In this paper, we will begin to examine how various anti-terrorism measures taken in a number of countries may increase the risk of another type of collateral damage—miscarriages of justice. In addition, we will explore the significance of the war against terror for what is classified as a miscarriage of justice. In particular, recent American anti-terrorism efforts—such as the detention of enemy combatants at Guantanamo Bay, the use of detention under immigration laws, the detention of people under material witness

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1. For an epidemiological study estimating close to 100,000 additional deaths in post-invasion Iraq, *see* Les Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, LANCET, Oct. 29, 2004, at http://image.thelancet.com/extras/04art10342web.pdf.

2. *See, e.g.*, the creation of a Privacy and Civil Liberties Oversight Board in § 1061 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 §§ 7211-14 (2004).

warrants, and the designation of American citizens as enemy combatants—raise the issue of whether the conceptualization of miscarriages of justice as the wrongful criminal conviction of the factually innocent is too narrow. That is, should deprivations of liberty short of the criminal conviction of those who are innocent under the relevant law be classified and studied as miscarriages of justice? Can concerns about the punishment of the innocent be applied to immigration and military laws that employ detention as a preventive measure? How does the context of the war on terrorism inform the debate about what is a miscarriage of justice and the efforts that are necessary to minimize the risk of miscarriages of justice?

The British experience with wrongful convictions in the Birmingham Six, the Maguire Seven, the Guildford Four and the Judith Ward cases provides dramatic evidence about the danger of convicting the innocent as a response to terrible acts of terrorism. Wrongful convictions in all cases are corrosive to the integrity of the justice system, but they are particularly corrosive in terrorism cases. As in the so-called Irish cases in the United Kingdom, miscarriages of justice may be taken as a partial affirmation of some of the political or other grievances of the terrorists. This is particularly so if democracies that claim to abide by the rule of law and equal rights and justice for all do not live up to these ideals when they are threatened by terrorism. The temptation of departing from normal legal standards and engaging in pre-judgment, prejudice, and stereotyping may be particularly high in emotive and devastating cases involving allegations of terrorism and fears of continued acts of terrorism.

The need to maintain legal standards of fair treatment and to ensure the just and accurate determination of individual responsibility are particularly important if democracies are to maintain the high ground in their fight against terrorists. The punishment of the guilty, and only the guilty, is one of the important distinctions between the force that a democracy should use to defend itself against terrorists and the force that terrorists themselves use.[3] In addition, the risk of wrongful convictions in terrorism cases, both before and after 9/11, are likely to fall disproportionately on particular groups, such as racial and religious minorities, or those with radical political views. Thus, even if you accept

3. Section 102(a)(3) of the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272, 276 (2001), includes a finding of Congress that "the concept of individual responsibility for wrongdoing is sacrosanct in American society, and applies equally to all religious, racial and ethnic groups." On the sometimes fine distinctions between terrorism and counterterrorism, *see* Laura Donohue, *Terrorism and Counterterrorist Discourse*, *in* GLOBAL ANTI-TERRORISM LAW AND POLICY (V. Ramraj, M. Hor & K. Roach eds. (forthcoming)).

that the risk of wrongful convictions can never be reduced to zero, there may be a special case for taking additional precautions to reduce this risk in terrorism cases.[4]

In the first part of this paper, we review the experience of wrongful convictions in terrorism cases, with special attention to the so-called Irish cases of the Birmingham Six, the Maguire Seven, the Guildford Four, and Judith Ward, who were all wrongfully convicted of IRA bombings. These cases provide evidence of the many pressures that may be brought to bear on the criminal justice system in high profile and emotive terrorism cases. For example, they demonstrate how police misconduct can generate false confessions and false evidence that is used against others thought to be connected with a terrorist cell. They reveal the effect that tunnel vision can have on those who prosecute terrorism cases, including supposedly objective forensic scientists, judges, and juries. These cases also reveal how a common factor in wrongful convictions—the failure of the state to make full disclosures of information to the accused—can be a special risk in complex terrorism cases where the state is reluctant to disclose information that may affect national security. We also examine how broad criminal laws relating to terrorism, including new post 9/11 anti-terrorism criminal laws, executive designation of terrorists and terrorist groups, and reliance on circumstantial evidence may encourage a process of guilt by association that may run the risk of convicting the factually innocent. We conclude that the above factors, as well as the pressure to reassure the public after a terrible act of terrorism, generate real risks that factually innocent people, especially innocent associates of terrorists, may be charged and perhaps wrongfully convicted of terrorism. As in the Irish cases, such wrongful convictions, if eventually discovered, will shake the public's confidence in the criminal justice system and be seen as an affirmation of state discrimination against those who may share political beliefs, national or ethnic origins, and/or the same religion as the terrorists.

Despite the above risks of wrongful convictions in terrorism cases, we are not able to point to specific examples of confirmed or suspected wrongful convictions since the terrorist attacks of September 11, 2001. In Germany and the United States, prosecutions of those alleged to have participated in the September 11 plot have been thwarted or stalled because of an unwillingness to disclose intelligence sources to the accused. Lack of full disclosure was a significant cause of wrongful convictions in the Irish cases, and insistence on disclosure is an important safeguard against future wrongful convictions. At the same

4. RONALD DWORKIN, A MATTER OF PRINCIPLE 88 (1985); Ronald Dworkin, *The Threat to Patriotism*, NEW YORK REV. OF BOOKS, Feb. 28, 2002.

time, the due process requirements of the criminal trial have placed considerable pressure on many states to use less restrained alternatives to the criminal law. The less restrained alternatives include the use of military power, immigration laws, and other laws that are not designed to punish the guilty.[5] In the second part of this paper, we will examine some of these alternatives to criminal prosecutions to determine whether concerns about miscarriages of justice are transferable from the criminal context to these alternative proceedings.

Many western countries have used immigration laws as an important means to apprehend and detain terrorist suspects. This method has been used in the United States, most infamously in the round-up conducted immediately after September 11. About a thousand people were detained in this round-up, but no criminal charges relating to September 11 were subsequently brought.[6] After September 11, the United Kingdom's government derogated from fair trial rights to enact a new law that authorized the indefinite detention of non-citizen terrorist suspects who could not be deported because of concerns that they would be tortured upon their return.[7] This use of the immigration law to deal with terrorism has recently been declared by the House of Lords to be both disproportionate and discriminatory given the limits of deportation as an anti-terrorism device and the fact that the extraordinary and draconian powers of indefinite detention only apply to non-citizens.[8] In Canada, only one criminal charge under a new Anti-Terrorism Act[9] enacted after 9/11 has been brought against a suspected terrorist who happened to be a Canadian citizen. Instead, the government has used a number of security certificates under immigration law which allow for the indefinite detention of terrorist suspects until they can be deported

5. PHILIP HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 91-98 (2003).

6. DAVID COLE, ENEMY ALIENS: IMMIGRANTS RIGHTS AND AMERICAN FREEDOMS IN THE WAR ON TERRORISM 22-47 (2003); OFFICE OF INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE SEPTEMBER 11 ATTACKS (2003), *at* http://www.usdoj.gov/oig/special/0306/index.htm; *see also* THE MAZE OF FEAR: SECURITY AND MIGRATION AFTER 9/11, 11 (John Tirman ed., 2004).

7. Anti-terrorism, Crime and Security Act, 2001, c. 24 (Eng.).

8. *A (FC) and* others *(FC) v. Secretary of State for the Home Department* [2004] UKHL 56. This important decision under the *Human Rights Act, 1998* did not, however, result in the striking down of the relevant provisions of the *Anti-terrorism, Crime and Security Act, 2001*, but rather constitutes a declaration of their incompatibility with the rights and derogation provisions of the act and by implication of the fair trial rights and derogation provisions in Articles 5 and 15 of the European Convention on Human Rights. The British government has allowed the indefinite detention to lapse, but enacted new legislation providing for control orders that could apply to terrorist suspects who are both non-citizens and citizens/ Prevention of Terrorism Act of 2005 c.2 (Eng.).

9. Anti-Terrorism Act, ch. 41, S.C. 2001 (Can.).

and for the government to present evidence affecting national security to a judge without the evidence being disclosed or even summarized for the detainee.[10] Unlike the United Kingdom, Canada has not ruled out the possibility of deporting terrorist suspects even if there is a risk that they will be tortured upon their return.[11] Post 9/11, many countries have found immigration law to be preferable to the criminal law as a means to detain and incapacitate terrorist suspects.

Other procedural shortcuts have been used in the war against terrorism. An unknown number of terrorist suspects have been detained in the United States under material witness warrants.[12] Perhaps the bluntest alternative to the criminal law in the war against terrorism has been the use of military power and military law to detain terrorist suspects. There is a real concern that people who are factually innocent of terrorism and involvement with the former Taliban government in Afghanistan may have been detained at Guantanamo Bay. The government's claim that it could use its power to detain enemy combatants without judicial review was dealt a blow in the Supreme Court's decision in *Rasul v. Bush*, which asserted habeas corpus jurisdiction over the detainees at Guantanamo Bay.[13] In the companion case of *Hamdi v. Rumsfeld*, which dealt with an American citizen, Justice O'Connor, writing for a plurality of the Court, discussed the requirements of due process in the context of a citizen who is alleged to be an enemy combatant.[14] This judgment inspired new rules that were quickly issued in July, 2004, establishing combatant status review tribunals to determine whether detainees at Guantanamo Bay have been properly classified as enemy combatants.

We will critically examine the dangers presented by Justice O'Connor's judgment in *Hamdi* and the new rules in producing inaccurate determinations of fact about whether someone is an enemy combatant or a terrorist. We recognize that it has not been common in the past to apply concerns about miscarriages of justice and the punishment of the innocent outside of the criminal justice context. Nevertheless, we believe that it is necessary to do so given the prominence of alternatives to the criminal law as a means of dealing with

10. Immigration and Refugee Protection Act, ch. 27 §§ 77-88 (2001) (Can.). *See generally*, KENT ROACH, SEPTEMBER 11: CONSEQUENCES FOR CANADA (2003); Kent Roach, *Canada's Response to Terrorism*, *in* GLOBAL ANTI-TERRORISM LAW AND POLICY (V. Ramraj, M. Hor & K. Roach eds., forthcoming).

11. Suresh v. Canada, [2002] S.C.R. 3.

12. One study reported that 43 people were held under these warrants in the first 14 months after 9/11 and that almost half never testified in any proceeding. COLE, *supra* note 6, at 37.

13. Rasul v. Bush, 124 S. Ct. 2686, 2696 (2004).

14. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2649-50 (2004).

suspected terrorists since 9/11, as well as the length of detentions in what appears to be a war against terrorism without a foreseeable end. Detention of suspected terrorists under military and immigration law may not technically depend on formal findings of guilt, but they may have a similar effect on those who are detained. Indeterminate detention may in some respects be even harsher than most punishments that would follow criminal convictions for acts of terrorism.[15] In addition, we note that the risk of error in depriving someone of liberty is an important factor in the *Mathews v. Eldridge* test[16] that Justice O'Connor applied in *Hamdi v. Rumsfeld*,[17] and one that should also have been considered in the drafting of the rules to determine the status of the detainees at Guantanamo.

In the final part of this paper, we return to the issue of what should constitute a miscarriage of justice in a post-September 11 world where there is an increased use of less-restrained alternatives to criminal prosecutions. We argue that post-September 11 experiences point in the direction of broadening what has traditionally been conceived of as a miscarriage of justice beyond the field of wrongful convictions that result from criminal prosecutions. We take as a starting point a broad definition of miscarriages of justice provided by a leading British scholar, Professor Clive Walker, which includes many rights violations that would fall short of wrongful convictions of the factually innocent. At the same time, we are sensitive to the risk that too broad a definition of miscarriages of justice will diminish the legal, moral, and political salience of the powerful term. In the end, we will propose a definition that is narrower than Professor Walker's, but one that can apply to the prolonged detention of the innocent under military and immigration law.

In determining what constitutes innocence outside of the criminal law context, we will focus on the risk of error in applying relevant legal criteria for detention without assessing the justice of the criteria. In other

15. In the course of holding that the combatant status review tribunal rules violate the 5th Amendment guarantee of due process, Judge Green has observed that that government:

> [H]as been unable to inform the Court how long it believes that war on terrorism will last. . . . Indeed, the government cannot even articulate at this moment how it will determine when the war on terrorism has ended. At a minimum, the government has conceded that the war could last several generations, thereby making it possible, if not likely, that 'enemy combatants' will be subject to terms of life imprisonment at Guantanamo Bay. . . . Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror—and thus the period of incarceration—will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitely sentenced to a fixed term.

In re Guantanamo Detainee Cases, 2005 WL 195356, at *19 (D.D.C. Jan. 31, 2005).

16. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

17. *Hamdi*, 124 S. Ct. at 2646-47 (2004).

words, our definition of a miscarriage of justice will not engage the legality under either international or domestic law of the definition of who is an enemy combatant or who is an inadmissible alien because of involvement with a terrorist group. Rather, our focus will be on the injustice of detaining a person who is innocent under the existing statutory definition of an enemy combatant or an inadmissible alien. On the basis of this admittedly positivistic definition of miscarriages of justice, we conclude that security certificate immigration proceedings used in Canada to detain and deport terrorist suspects and the new rules used by the American military to determine whether the Guantanamo Bay detainees are enemy combatants run a serious risk of producing miscarriages of justice. In other words, they run the risk of detaining people who in fact do not satisfy the definition of inadmissible and removable aliens in immigration law, or of enemy combatants provided in the relevant military order.

As has been the case with wrongful convictions and the death penalty, we hope that the focus on factual innocence under our proposed definition of a miscarriage of justice will generate bi-partisan concern from those who may both agree and disagree on the substantive justice of the rules relating to the detention of inadmissible aliens and enemy combatants. In other words, even if you believe that the detention of an inadmissible alien or an enemy combatant is justified and legal, you should be concerned about the wrongful detention of a person who is in fact not an inadmissible alien or an enemy combatant. At the same time, we do not mean to suggest that the broad grounds for detention of inadmissible aliens or enemy combatants are necessarily just. A focus on miscarriages of justice and factual innocence either in criminal law or its less restrained alternatives only examines a partial, albeit important and compelling, facet of justice.[18]

II. Terrorism and the Risks of Wrongful Convictions

Terrorism is unfortunately a world-wide phenomena, and much can be learned from the comparative experiences of other countries' responses to terrorism. In many cases, the lessons learned will be lessons

18. Much of the advocacy against the Guantanamo detentions has not focused on the risk of detaining the innocent, but rather on the injustice of the rules of indefinite detention themselves. This may suggest that a focus on innocence under the rules laid down may have the indirect effect of legitimating the detention and punishment of those who are factually guilty under such rules. If true, this might suggest that advocacy against wrongful convictions in the United States and elsewhere might have the indirect and often unintended effect of helping to legitimate the use of the criminal sanction and the death penalty in cases where factual guilt is clear because of DNA evidence or perhaps other factors. This is an important possibility that should be examined, but it is beyond the scope of this paper.

to be avoided.[19] In Northern Ireland, it has been estimated that 3,636 lives have been lost to political violence between 1966 and 1999, with another 121 being killed during that time in Great Britain.[20] New criminal laws against terrorism were enacted in the United Kingdom as a response to a series of IRA bombings in 1974 and in Omaagh in 1998.[21] In the United States, new terrorism laws were created in reaction to the murder of Leon Klinghoffer upon the Achille Lauro when it was hijacked by the PLO in 1985, as well as in response to the bombing of the World Trade Center in 1993 and the Oklahoma City bombing in 1995.[22] By its very nature, terrorism creates fear and anxiety that fuels society to take decisive measures to catch and punish the terrorists.[23]

Societies dealing with terrorism and the fear of terrorism are liable to forget not only that past anti-terrorism laws have not made them safer, but also that they have contributed to miscarriages of justice. The United Kingdom suffered from much terrorist violence in the 1970s, most of it involving bombings by the Irish Republican Army (IRA). The acts qualified under most definitions of terrorism because they targeted and killed civilians and they were committed for the purposes of compelling the government to act. British anti-terrorist efforts also resulted in miscarriages of justice.

In the non-terrorism context, a miscarriage of justice imposes wrongs on those wrongfully convicted. Society also suffers because the wrongful conviction of an innocent person means, by definition, that a guilty person goes free. Miscarriages of justice can be even more harmful in terrorism cases if they are seen as legitimating the grievances of terrorists. In other words, a miscarriage of justice in a terrorism case can contribute to the destabilizing effects of the actual terrorist acts. The British experience with wrongful convictions in the so-called Irish cases shook British confidence in the administration of criminal justice and were seen by many as evidence of discrimination against the Irish, as well as a symbol of a heavy-handed approach that seemed to inspire deeper and more bitter grievances. After his release, Brandon Mayfield

19. Geoffrey Bennett *Legislative Responses to Terrorism—A View from Britain* 109 PENN ST. L. REV. 947 (2005).

20. CLIVE WALKER, BLACKSTONE'S GUIDE TO ANTI-TERRORISM LEGISLATION 1 (2002).

21. Philip Thomas, *September 11 and Good Governance*, 53 NORTHERN IRELAND L. Q. 366 (2002); Philip Thomas, *9/11: USA and UK*, 26 FORDHAM INT'L L.J. 1193 (2003).

22. Laurie McQuade, Note and Comment, *Tragedy as a Catalyst for Reform: The American Way?* 11 CONN. J. INT'L L. 325 (1996).

23. For a recent and controversial proposal to recognize the role of preventive detention as a "reassurance" strategy that may be necessary after devastating terrorist attacks, *see* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1037 (2004). On the flawed psychology of the risk perception of terrorism, *see*, Cass Sunstein, *Terrorism and Probability Neglect*, 26 J. OF RISK AND UNCERTAINTY 121 (2003).

argued that his false identification as a terrorist connected with the Madrid bombing was connected to the fact that he was a convert to Islam. Revelations of wrongful convictions in the war against terrorism may be seen by some as confirmation that the west is engaged in an indiscriminate war against Islam, just as the wrongful convictions in the Irish cases were seen by some as confirmation of prejudice against the Irish.[24] Even though he maintains that there is no right to the most accurate process possible for determining guilt, Ronald Dworkin has stressed that collective policy decisions about the level of accuracy in criminal or civil processes should not "discriminate against some independently distinct group."[25] Leaving aside the difficult issue of whether the risks of wrongful convictions generally fall disproportionately on less powerful groups, the risk of wrongful convictions in terrorism cases would seem to fall disproportionately on various distinct groups. Professor Dworkin, for one, has argued that the risks to civil liberties, including the detention of the innocent, from post-9/11 measures have not been evenly distributed and impose particular harms on Muslims and Arabs.[26]

A. The Irish Cases

In 1975, the Birmingham Six were convicted of murder arising from the 1974 pub bombings that killed twenty-one people, injured 160 people, and lead to the quick enactment of the Prevention of Terrorism Act. They were arrested by the police on the night of the bombings en route to the funeral of an IRA bomber in Belfast. They were convicted on the basis of confessions, circumstantial evidence linking them to other Republicans, including the bomber whose funeral they were to attend, and forensic evidence that seemed to demonstrate that they had handled explosive substances. They claimed that the confession evidence had been beaten out of them. It was clear that the men had been assaulted in custody, but the question was whether they had been assaulted before or after they made incriminating statements. The trial judge determined that their confessions had been voluntarily obtained and admitted their statements. The jury convicted the six men of twenty-one counts of murder.

The six men—Patrick Hill, Gerry Hunter, Richard McIlkenny, Billy Power, Johnny Walker and Hughie Callaghan—sought, but were denied,

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24. On the importance of perceptions in the war against terrorism, *see*, THE NATIONAL COMMISSION ON TERRORIST ATTACKS AGAINST THE UNITED STATES, 9/11 COMMISSION REPORT § 12.3 (2004).

25. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 4 at 88.

26. Dworkin, *The Threat to Patriotism*, *supra* note 4.

leave to appeal to the Court of Appeal after they were convicted. Prison officials were also charged with the assaults occurring while the men were in custody, but were acquitted. The six men subsequently commenced a civil action against the police, claiming damages for the assault. The courts dismissed this civil suit as an abuse of process and a collateral attack on the criminal verdict. In his judgment for the Court of Appeal, Lord Denning made the following infamous statement:

> Just consider the course of events if this action were to proceed to trial. It will not be tried for 18 months or two years. It will take weeks and weeks. The evidence about violence and threats will be given all over again, but this time six or seven years after the event, instead of one year. If the six men fail, it will mean that much time and money and worry will have been expended by many people for no good purpose. If the six men win, it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted in evidence: and that the convictions were erroneous. That would mean that the Home Secretary would have either to recommend they be pardoned or he would have to remit the case to the Court of Appeal under section 17 of the Criminal Appeal Act 1968. This is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further. . . . This case shows what a civilized country we are. Here are six men who have been proved guilty of the most wicked murder of twenty-one innocent people. They have no money. Yet the state lavished sums on their defence. They were convicted of murder and sentenced to imprisonment for life. In their evidence they were guilty of gross perjury. Yet the state continued to lavish sums on them—in their actions against the police. It is high time that it stopped. It is really an attempt to set aside the convictions by a side-wind. It is a scandal that it should be allowed to continue.[27]

The use of the civil process, even though unsuccessful in this case, demonstrates some of the potential of "jurisdictional redundancy"[28] in providing alternative routes to challenge criminal convictions that may turn out to be wrongful. In this respect, it is interesting to note that British nationals who have been released from Guantanamo Bay, including the Tipton Three—Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed—are suing Donald Rumsfeld and the United States government for mistreatment while in custody at Guantanamo Bay.[29]

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27. McIlkenny v. Chief Constables of the West Midlands, 1980 Q.B. 283, 323 (Eng. C.A.).

28. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*, 22 WM. & MARY L. REV. 639, 648-49 (1981).

29. Vikram Dodd, *Guantanamo Britons sue Rumsfeld*, THE GUARDIAN, Oct. 28,

Although the civil action in the Birmingham Six case was stopped as an abuse of process, controversy over the convictions continued, and the Home Secretary referred the case back to the Court of Appeal in 1987 to consider fresh evidence relating to two issues: whether the men had been mistreated in police custody at the time they made incriminating statements, and whether the scientific evidence linking the men with explosives was credible. The Court of Appeal, however, dismissed the new appeal, dismissively characterizing the men's allegations of mistreatment as "a wide-ranging conspiracy involving all the many policemen concerned to create a false case against them by means of torture and perjury" and concluding that "we have no doubt that these convictions were both safe and satisfactory."[30]

However, the controversy over the convictions continued, and in 1990 a different Home Secretary referred the case back to the Court of Appeal for a second time because of new evidence that suggested that police notes had not been taken contemporaneously and new scientific evidence that indicated that the test for explosives was not reliable. The Director of Public Prosecutions concluded that neither the scientific evidence nor the confession evidence was reliable, thus he would not seek to sustain the conviction. The Court of Appeal then decided that the convictions were unsafe and unsatisfactory, and the men were eventually released in 1991 after serving sixteen years in prison.[31]

The Guildford Four were convicted of murder in 1975 for pub bombings by the IRA in 1974 that killed seven people. An appeal taken in 1977 failed on the basis that alibi evidence, including claims by others that they had committed the bombings, was not convincing given the confessions. In 1989, the Home Secretary referred the case back to the Court of Appeal after new scientific evidence was discovered indicating that police reports were not taken contemporaneously with the alleged confessions. New evidence also emerged about an alibi witness and other exculpatory evidence that was not disclosed. In 1989, the convictions were quashed after the Director of Public Prosecutions

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2004, at 4. Note that in another similarity with the Irish cases, a movie about the three is also being contemplated. Vanessa Thorpe, *Tipton Three Set for Big Screen*, THE OBSERVER, Jan. 23, 2005, at 6.

30. R. v. Callaghan, 88 Cr. App. R. 40, 47 (1989).

31. R. v. McIlkenny, 93 Crim. App. R. 287 (1991). The Court of Appeal concluded:

> [T]hat in light of the fresh scientific evidence, which at least throws grave doubt on Dr. Skuse's evidence, if it does not destroy it altogether, these convictions are both unsafe and unsatisfactory. If we put the scientific evidence on one side, the fresh investigation carried out by the Devon and Cornwall Constabulary renders the police evidence at the trial so unreliable, that again we would say that the convictions are both unsafe and unsatisfactory. Adding the two together, our conclusion was inevitable.

Id. at 318.

decided not to contest the convictions of the four: Paul Hill, Carole Richardson, Gerald Conlon and Patrick Armstrong. A public inquiry also was made into the case,[32] and the case was subsequently dramatized into a movie, *In the Name of the Father*.[33]

The Guildford Four case was also related to that of the Maguire Seven, who were convicted in 1976 of possessing explosives. The convictions rested on the basis of forensic tests that showed traces of nitroglycerine, even though no explosives were found. The Maguire Seven included Gerald Conlon's aunt, Anne Maguire, and his father, Giuseppe Conlon, who died in prison in 1980. Gerald Conlon, part of the Guildford Four, allegedly confessed to the police that his aunt had taught him how to make bombs. Most of the Maguire Seven were sentenced to terms of imprisonment of fourteen years. In 1987, the Home Secretary refused to refer the Maguires' case to the Court of Appeal on the basis that he had no doubts about the scientific evidence linking them with explosives.[34] Subsequent tests carried out at the behest of the public inquiry, however, revealed the possibility of innocent contamination, as well as the fact that not all of the scientists' notes had been disclosed to the defense at the original trial. In 1991, the Home Secretary referred the case back to the Court of Appeal with the Director of Public Prosecutions conceding that the convictions were unsafe. The Court of Appeal quashed the convictions on the basis "that the possibility of innocent contamination cannot be excluded and on this ground alone, we think that the convictions of all of the appellants are unsafe and unsatisfactory. . . ."[35] The Maguires insisted that no explosives had been in the house and complained that the Court of Appeal's innocent contamination theory did not constitute a full exoneration.[36]

The May public inquiry sided with the Maguires over the Court of Appeal by endorsing statements by the Maguires' counsel that the "Crown's case, as presented at trial was so improbable as to be frankly incredible." Lord May explained the wrongful conviction as following from frequent references in the Guildford Four trial to the Maguires' residence as a "bomb factory." He concluded:

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32. SIR JOHN MAY, REPORT OF THE INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE CONVICTIONS ARISING OUT OF THE BOMB ATTACKS IN GUILDFORD AND WOOLWICH IN 1974, FINAL REPORT (1993-94 H.C. 449).

33. A. Logan, *In the Name of the Father*, 144 NEW L.J. 244 (1994).

34. Joshua Rozenberg, *Miscarriages of Justice*, *in* CRIMINAL JUSTICE UNDER STRESS, 91, 99-100 (Eric Stockdale et al. eds., 1992).

35. R. v. Maguire 94 Cr. App. R. 133, 152-153 (1992). The Court of Appeal also indicated that forensic scientists advising the prosecution had a duty to disclose "material of which he knows and which may have 'some bearing on the offence charged and the surrounding circumstances of the case.'" *Id.* at 147.

36. Rozenberg, *supra* note 34, at 102-03.

> [T]he "bomb factory" assumption pervaded the entire case and was allowed to obscure the improbability of what was alleged against the Maguire Seven. I do not criticize the jury: the context of the prevailing bombing campaign and the atmosphere of the trial are likely to have made it impossible for them to make a wholly objective and dispassionate appraisal of the admissible evidence alone.[37]

In less diplomatic terms, the jury was influenced by tunnel vision, fear, and stereotypes. The connection between the Guildford and Maguire cases illustrates how the cell nature of modern terrorism, when combined with unreliable interrogations and forensic evidence, can lead to multiple and related miscarriages of justice.

The final case involved Judith Ward, who was convicted in 1974 of murder and causing an explosion causing twelve deaths, including those of two children, on an Army coach. She was also convicted at the same time of two other IRA bombings. Like the previous cases, the bombings were part of a series of bombings by the IRA during 1973 and 1974, and the conviction was obtained on the basis of incriminating admissions by the accused and forensic evidence linking the accused with explosives. Judith Ward was open about her Republican sympathies, though she did not admit to being an active member of the IRA. In 1991, the Home Secretary referred her case to the Court of Appeal, in part because the forensic evidence linking her to the explosives had been given by the same scientist that had been involved in the Birmingham Six case. Ward was released in 1992 with the Court of Appeal ruling that "the disclosure of scientific evidence was woefully deficient" and deliberate non-disclosure by governmental forensic scientists had resulted in an unfair trial.[38] The Court of Appeal also concluded that the forensic evidence relied upon by the Crown at trial was unreliable. Finally, the Court of Appeal indicated that Ward's confession was unreliable. Unlike the other IRA cases, there was no allegation of police abuse or mistreatment; Ward's confession was problematic because of her own mental instability.[39]

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37. SIR JOHN MAY, SECOND REPORT ON THE MAGUIRE CASE, at 9.2, 9.13 (Dec. 3, 1992).

38. R. v. Ward, 96 Crim. App. R. 1, 51 (1993). Noting that such standards applied at the time of the 1974 trial, the Court of Appeal defined the duty of disclosure broadly:

> An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, the duty is continuous: it applies not only in the pre-trial period but also throughout the trial.

Id. at 50.

39. *Id.*; *see also* Clive Walker, *Miscarriages of Justice in Principle and Practice, in*

B. Police Misconduct, False Confessions, and False Statements

These cases demonstrate many of the classic features of miscarriages of justice, as well as some that are more prominent in the terrorism context. A theme that runs through most of the cases is police misconduct. Police misconduct can manifest itself at many stages of a criminal investigation or prosecution. The Irish cases reveal that the interrogation process is particularly vulnerable to this type of abuse, especially when there is no electronic recordings of interrogations.[40] The horrors of terrorism make the police vulnerable to the idea that abusive means in interrogating suspected terrorists are justified by the noble end of punishing and preventing the killing of innocent civilians. The horrors of terrorism in the Irish cases should not be underestimated. Between October, 1974 and December, 1975, there were thirty-five terrorist bombings in the England. Lord May concluded that "having regard to the public outrage and concern over these bombings . . . I would not have been surprised if any police force had adopted a hostile approach to each of the Guildford Four." [41] In the Irish cases, police misconduct resulted in both false confessions and false statements that incriminated associates of the detainees.

False confessions have long been recognized as a contributor to wrongful convictions. There is a growing body of literature on why false confessions occur and the frequency of false confessions.[42] False confessions are generally associated with police misconduct and the mistreatment of suspects. This was explicitly recognized in the Canadian context in the case of *R. v. Oickle*,[43] in which Justice Iacobucci for the majority of the Supreme Court of Canada said, "Fortunately, false confessions are rarely the product of proper police techniques. As Leo & Ofshe (1998) point out, false confession cases almost always involve 'shoddy police practice and/or police criminality.'"[44] At the same time,

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MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR 31, 48 (Clive Walker & Keir Starmer eds., 1999).

40. *See* Walker, *supra* note 39, at 46-49; *see also* C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT—WRONGFUL CONVICTION AND PUBLIC POLICY 70-73 (1996.).

41. Sir John May Report of the Inquiry into the Circumstances Surrounding the Convictions Arising out of the Bomb Attacks in Guildford and Woolwich in 1974 Final Report (1993-94 H.C. 449) at 14.1, 21.13.

42. For example, *see* Richard Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 302 (1986); Richard Leo, *Police Interrogation and Social Control*, 3 SOC. & LEGAL STUD. 93 (1994); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 151-53 (1997); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 449-54 (1998).

43. R. v. Oickle, [2000] S.C.R. 3.

44. *Id.* at 30.

proper interrogation practices can still result in false confessions, especially from those who are suffering from a mental disorder.

The application of extreme interrogation techniques makes it more likely that terrorist suspects will make false confessions and false incriminating statements about their associates. As discussed above, this process occurred as interrogation of members of the Guildford Four produced information that led to charges against the Maguire Seven. Lord May in his public inquiry report recommended that the jury be warned about the dangers of false confessions with a specific and stronger warning that "against the background of a terrorist bombing campaign such as there was in 1974/75, and the consequent public demand for the arrest and conviction of those responsible, there may be pressure on the police to induce persons accused to confess by conduct which is not acceptable. Further, when the police feel certain that they have indeed arrested the right people, perhaps on the basis of what is regarded as reliable intelligence, but have little or no admissible evidence to prove their guilt, there may be a strong temptation to persuade those persons to confess."[45] Lord May correctly identified the dangers of convicting accused terrorists solely on the basis of confessions, but his suggestion that warnings to the jury about the dangers of false confessions may prevent miscarriages of justice discounts the fact that the jury in the Guildford Four trial was already warned of the danger of false confessions[46] but convicted in any event on the basis of the false confessions. Stronger remedies such as the exclusion of unreliable evidence obtained through extreme interrogation are necessary.

It is disturbing that while debate is raging in the legal academy about whether torture is a proper approach in some terrorism cases,[47] relatively little attention has been given to the obvious risk that a person who is being tortured or being subject to extreme interrogation

45. Sir John May Report of the Inquiry into the Circumstances Surrounding the Convictions Arising out of the Bomb Attacks in Guildford and Woolwich in 1974 Final Report (1993-94 H.C. 449) *at 21.17.*

46. *Id.* at 12.21.

47. Alan Dershowitz recognizes that some might criticize his proposal for torture warrants on the grounds that it "is 'well known' that torture does not work—it produces many false confessions and useless information, because a person will say anything to stop being tortured." He then recounts a case where torture did apparently produce life-saving information and dismisses the concern by concluding "that torture *sometimes* works, even if it does not always work. No technique of crime prevention always works." ALAN DERSHOWITZ, WHY TERRORISM WORKS 136-37 (2002). Professor Dershowitz does not mention the Irish cases discussed in this paper. For an argument about the risk of torturing the wrong person, *see* Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* J. NAT'L SECURITY L. & POL'Y. (forthcoming). *See also In re* Guantanamo Detainee Cases, 2005 WL 195356, at *26 (D.D.C. Jan. 31, 2005) (holding that "due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture.").

techniques may falsely incriminate himself and others in an attempt to satisfy the interrogator and stop the abuse or otherwise provide unreliable and false information. One report has, however, surfaced from Guantanamo indicating that after three months of solitary confinement at Camp Delta, initial denials, and continued interrogation, three men falsely confessed to have been at a meeting between Mohamed Atta, the leader of the 9/11 hijackers, and Bin Laden in Afghanistan. These confessions were only discovered as false after British intelligence discovered documentary evidence that the men could not have been in Afghanistan at the relevant time.[48]

Proper interrogation techniques cannot eliminate the danger of false confessions. Judith Ward's incriminating statements were accepted as made voluntarily and without police coercion, but they were subsequently revealed to have been unreliable. The Court of Appeal observed that "in our experience, cases in which it is accepted that a confession was made and was made voluntarily but nevertheless it is asserted that the confession was wholly untrue are rare in the extreme. This of course is such a case."[49] The problem of false confessions in that case was aggravated by non-disclosure of "wild and untrue" statements made by Ward, as well as by non-disclosure of evidence about her mental condition and the failure of the defense to call its own psychiatric evidence.[50]

C. Tunnel Vision

An element that binds many of the causes of wrongful convictions together is the concept of "tunnel vision,"[51] defined as the "single-minded and overly narrow focus on a particular investigative technique or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information."[52] This phenomenon is recognized elsewhere as a cause of miscarriages of justice.[53] It is particularly problematic in the terrorism

48. Neil Katyal, *Executive and Judicial Overraction in the Guantanamo Cases,* 2004 SUP. CT. REV. 49 at 65. Professor Katyal suggests that cautionary instructions should be given to panels reviewing detention when the only evidence supporting continued detention is from the detainee himself, and that panels should be assisted by non-voting security intelligence and mental health experts. *Id.* at 65-66.

49. R. v. Ward, 96 Cr. App. R. 1, 58 (1993).

50. *Id.* at 59-60, 67.

51. *See* HON. F. KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998). On this inquiry, *see* Kent Roach, *Inquiring Into Wrongful Convictions*, 35 CRIM. L. BULL. 152 (1999).

52. KAUFMAN, *supra* note 48, at 1137.

53. *See* Dianne L. Martin, *The Police Role in Wrongful Convictions—An International Comparative Study*, *in* WRONGLY CONVICTED—PERPECTIVES ON FAILED JUSTICE 77 (Saundra D. Westervelt & John A. Humphrey eds., 2003).

context when it is fused with prejudice and stereotyping of groups who are associated with terrorism. Professor Dianne Martin identifies certain pre-disposing factors, including the commission of an odious crime, that places great pressure on the police and prosecutorial authorities to convict.[54] Combined with a marginalized or odious accused person, the recipe for tunnel vision is complete. The late Professor Martin cited the Irish cases (horrible crimes and ethnic marginalization) as a perfect example of when tunnel vision is likely to occur.[55] In the post-9/11 terrorist context, where crimes of unspeakable magnitude are committed in a context in which ethnicity, race, and religion are ascendant considerations, the danger of tunnel vision is exacerbated.

Tunnel vision is particularly likely to occur in cases where false confessions have been obtained from detainees. The Guildford Four contended that they made false confessions in response to assaults, threats of assaults and threats of violence against their families. They were also deprived of sleep, food and drink while being subject to extensive questioning. They told the police what they wanted to hear in the hope that the questioning would stop. Lord May adverted to the close connection between false confessions and tunnel vision when he concluded in his public inquiry report that "one should not underestimate the impact which apparently full confessions may have upon the conduct of an investigation. Because a confession may be false it is essential for the police, lawyers and courts to consider other evidence on its merits independently of that confession and be cautious before relying upon it at face value. I am quite satisfied that in a number of respects this need for caution was neither understood nor followed in the case of the Guildford Four."[56] Harsh interrogation techniques combined with stereotypes that associate detainees with terrorism because of their ethnicity or religion are a virtual recipe for investigative and prosecutorial tunnel vision that ignores exculpatory evidence.

D. *The Role of Experts: Problems of Tunnel Vision and Lack of Disclosure*

Tunnel vision is not limited to police and prosecutors who may focus on a suspect and refuse to accept evidence pointing away from guilt. It may also corrupt evidence-based scientific methods The British experience with the Irish cases demonstrate that state scientists who

54. *Id.* at 85.
55. *Id.* at 83-87.
56. Sir John May Report of the Inquiry into the Circumstances Surrounding the Convictions Arising out of the Bomb Attacks in Guildford and Woolwich in 1974 Final Report (1993-94 H.C. 449) at 21.21, 21.10-21.11.

provided expert evidence on the presence of nitroglycerine were both incompetent in carrying out the tests and dishonest in failing to disclose false-positive test results.[57] The archetypal, impartial expert witness may be a dying breed. The English Court of Appeal observed in the *Ward* case:

> For lawyers, jurors and judges a forensic scientist conjures up the image of a man in a white coat working in a laboratory, approaching his task with cold neutrality, and dedicated only to the pursuit of the scientific truth. It is a sombre thought that the reality is sometimes different. Forensic scientists may become partisan. The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial character of the proceedings tend to promote this process. Forensic scientists employed by the government may come to see their function as helping then police. They may lose their objectivity. That is what must have happened in this case. It is illustrated by the catalogue which we have set out.[58]

The terrorism context can move experts further away from the ideal of impartiality. In other words, experts may understandably (though wrongly) come to see themselves as part of the official response to the war on terror, rather than the dispassionate and wise sources of technical knowledge we need.

In the Birmingham Six case, the prosecution's expert, Dr. Skuse, relied on positive results from a preliminary field-screening test, the Griess test, for nitroglycerine. Two more sophisticated tests were conducted in the laboratory, one that indicated no contact with nitroglycerine, and one that indicated contact for only one of the accused—a contact that was subsequently found to be possible from contact with other sources, including cigarettes. The Court of Appeal found that "Dr. Skuse said he regarded the positive result on Hill's left hand as confirming his Griess result. Instead of being 99 percent certain, he was now 100 percent. He did not regard the negative GCMS results on Power's and Hill's right hands as undermining the previous positive Griess results, even though, as we have seen, the GCMS is a thousand

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57. *See* Walker, *supra* note 39, at 46-48.

58. R. v. Ward, 96 Cr. App. R. 1, 51 (1993). Similarly, in a case involving the admissibility of opinion evidence proffering "novel science," the Supreme Court of Canada offered the following cautionary tone:

> This notion has long disappeared and now the "professional expert witness" has emerged. Although not biased in a dishonest sense, these witnesses frequently move from the partiality generally associated with professionals to advocates in the case. In some notable instances, it has been recognized that this lack of independence and impartiality can contribute to miscarriages of justice.

R. v. D.D., [2000] S.C.R. 275, 299-300.

times more sensitive than the Griess test."[59] Such dismissals of contradictory evidence are a sign of tunnel vision in which authorities simply refuse to consider evidence that a suspect may be innocent.

A further complicating factor may be an inequality in the availability of experts. The state may have essentially unlimited access to salaried or even hired experts, while the defense may have limited funds to hire experts and may distrust salaried experts who work in state laboratories. At their trial, the Birmingham Six called a young expert, Dr. Black, who testified about the frailties of the Griess test relied upon by Dr. Skuse, the Crown's senior expert. The trial judge suggested to the jury that Dr. Black's concerns about the Griess test were a result of his "own theorising" and that if they preferred Black's evidence:

> [T]hen you will obviously conclude that the forensic evidence of Dr. Skuse is of no value. Indeed Dr. Black's theory logically seems to imply not only that Dr. Skuse's theories were of no value, but that Dr. Skuse has been spending and must have spent much of his professional life wasting his time. . . . Do you think that Dr. Skuse has been wasting most of his professional time? It is a matter entirely for you.[60]

The Court of Appeal, which finally overturned the 1975 convictions in 1991, observed:

> A disadvantage of the adversarial system may be that the parties are not evenly matched in resources. As we have seen, one reason why the trial judge expressed his preference for Dr. Skuse was that Dr. Black had carried out no experiments to prove his theory. Experiments presumably cost money. Whether Dr. Black could have carried out experiments within the limitation of legal aid, or the time available, we do not know.[61]

In major terrorism cases, the state will have access to unlimited resources, while the accused may only have minimal legal aid funding. Even if the accused could gain access to increased funding, many may be reluctant to help fund a defense because of concerns about broad laws against financing terrorism and laws that allow the freezing of property believed to belong to terrorists or their supporters.

The Court of Appeal in the Birmingham Six case stated that one response to the unequal access to experts problem is to require the prosecution to disclose all information in its possession. As discussed below, this was originally not done in the Birmingham case and

59. R. v. McIlkenny, 93 Cr. App. R. 287, 296 (1991).
60. *Id.* at 297.
61. *Id.* at 312.

contributed to the wrongful conviction. Another response is for the state or the judge to commission supposedly neutral scientific evidence. This was also done in the Birmingham case, but the Court of Appeal was reluctant to rely on such new evidence because it had not been subject to cross-examination.[62] Inquisitorial elements have some promise as a response to failures of the adversarial system that may result in miscarriages of justice.[63] At the same time, however, adversarial systems may resist such transplants and see them as improper intrusions on the adversarial system.

A more inquisitorial approach may, however, also lend itself to the problems of tunnel vision. In the Brandon Mayfield case, a number of experts, including a court-appointed expert, initially confirmed a false match of his fingerprints with those found in Madrid despite Mayfield's claims that he had not been out of the United States. Fortunately, this mistake was corrected, but the fact that it persisted for a number of weeks confirms that experts, including those appointed by the court, may be subject to error.

The failure of experts in miscarriages of justice, particularly in the Irish cases, raises questions about whether our faith and reliance is properly placed on experts in the criminal justice system. Mounting experience suggests that it is not.[64] However, writers and advocates are inconsistent in their regard for science in the criminal process, being quite willing to unquestionably accept the conclusions yielded by DNA analysis.[65] In the Irish cases, science played a role both in the wrongful convictions and their discovery, as it was scientific tests that revealed that police notes were not taken contemporaneously with alleged confessions and that the tests for explosives were vulnerable to false positive tests.[66] Indeed, some argue that the judges who overturned the convictions made over-confident conclusions about the scientific validity of the exonerating scientific evidence, just as the judges and juries who convicted the accused over-confidently relied on the scientific validity of the incriminating evidence.[67] Wrongful convictions raise the thorny issue of the often intractable difficulties of discovering the truth and the

62. *Id.* at 313.

63. D. Givelber, *The Adversary System and Historical Accuracy: Can we do Better? in* WRONGLY CONVICTED—PERPECTIVES ON FAILED JUSTICE 47 (Saundra D. Westervelt & John A. Humphrey eds., 2003).

64. *See* Gary Edmond, *Constructing Miscarriages of Justice: Misunderstanding Scientific Evidence in High Profile Criminal Appeals*, 22 O.J.L.S. 53 (2002).

65. *See* EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES OF THE WRONGFULLY CONVICTED (2000).

66. Rozenberg, *supra* note 34, at 105-06.

67. *See* Edmond, *supra* note 64.

proper institutional and moral assignment of doubts about the truth.

E. Judges and Juries

It is not just the investigative and prosecutorial authorities who must shoulder the entire burden of miscarriages of justice. Judges and juries may also be at fault, including an appellate process that can make allegedly wrongful convictions difficult to review and that defers excessively to the verdicts of juries. In the Birmingham Six case, the trial judge reviewed the evidence for the jury in a way that favored the prosecution. For example, he suggested that marks on the accused, especially scratches on the chest, were likely self-inflicted,[68] and that a prison doctor who testified that the police had inflicted the injuries was likely guilty of perjury.[69] He also suggested to the jury that if the accused's testimony was to be believed "there is no escape from the fact that the police are involved in a conspiracy to commit a variety of crimes which must be unprecedented in the annals of British criminal history."[70] The appellate courts did not at first correct the miscarriages of justice, and in many of the cases were faced with prosecutorial concessions that the convictions were unsafe. The appellate courts place excessive weight on fresh evidence and are reluctant to reevaluate problematic findings of fact by the jury.[71]

Juries may also play a role in wrongful convictions. Juries, by design, represent a majority of citizens, and the majority may feel particularly threatened by terrorism and hostile to those accused of terrorism or other emotive crimes. In Britain, at the time of the Irish cases, jurors were selected without extensive *voir dires* into the attitudes or prejudices that they might bring to a case.[72] Even in jurisdictions that

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68. The trial judge, Justice Bridge, posed the following leading question to the jury: "If a man wants to inflict injuries on himself, what more obvious place in which to do it than by scratching his chest?" Clive Walker, *The Judiciary*, *in* MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR 203, 227 (Clive Walker & Keir Starmer eds., 1999).

69. The trial judge told the jury:

> Can you believe one single word of what Dr. Harwood says? There are inescapably many perjurers who have given evidence. If Dr. Harwood is one of them, is he not the worst? . . . If this man has come to this court to give you false evidence, he is certainly not fit to be a member of the honourable profession upon which, by perjuring himself, he has brought terrible shame.

Id. at 227. On the differences between the British and Canadian practices of elaborate, and at times, leading judicial instructions to the jury, and more bare-boned American instructions, *see* M.L. Friedland and Kent Roach, *Borderline Justice: Choosing Juries in the Two Niagaras*, 31 ISRAELI L. REV. 120 (1997).

70. Walker, *supra* note 68, at 227.

71. RICHARD NOBLES & DAVID SCHIFF, UNDERSTANDING MISCARRIAGES OF JUSTICE ch. 3 (2000).

72. For an argument that the racist viewpoints of a juror may have contributed to a

do allow such inquiries, jury panels may often not include groups such as non-citizens. In addition, minorities may also be underrepresented. In this vein, it is significant that Lord May, in his review of the Maguire Seven case, concluded that the jury convicted the accused despite an improbable case being offered by the prosecution. Although he was quick to say that he did not criticize the jury, he implicitly did so by suggesting that "the context of the prevailing bombing campaign and the atmosphere of the trial are likely to have made it impossible for them to make a wholly objective and dispassionate appraisal of the admissible evidence alone."[73] The fact that juries do not give reasons for their verdict may also increase the likelihood that stereotypes will influence their deliberations and verdicts.

F. Disclosure and Public Interest Immunity

The Irish cases demonstrated that a failure to disclose relevant evidence is often a significant factor in miscarriages of justice. Lack of disclosure can occur at the level of police officers and prosecutors, and even those working behind the scenes in crime laboratories. The sheer complexity and multi-jurisdictional nature of many terrorism investigations may also create situations where, deliberately or inadvertently, evidence that ought to be disclosed to the defense is not disclosed. In the Judith Ward case, which involved allegations of three bombings, four different police forces were involved, even though Britain has a far more centralized police structure than either the United States or Canada.[74] In addition, there were disclosure problems with prosecutors and forensic scientists. The trend in many current terrorism investigations is towards the involvement of multiple police forces and, the mixing of police and intelligence agencies. Each agency may have its own standard operating procedure with respect to disclosure, and material that should be disclosed may fall through the cracks.

A failure to make full disclosure has led the United States Attorney to agree to a motion for a new trial in which two men, Karim Koubriti and El Maroudi, were convicted by a Detroit jury of material support of terrorism in June of 2003. [75] The government conceded in August of 2004 that it had failed to disclose evidence that there was no initial

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wrongful conviction in Canada, *see* KENT ROACH, DUE PROCESS AND VICTIMS' RIGHTS: THE NEW LAW AND POLITICS OF CRIMINAL JUSTICE 251-56 (1999).

73. MAY, *supra* note 37, at 9.2, 9.13.

74. Kent Roach and M.L.Friedland, *Borderline Justice: Policing in the Two Niagaras* 23 Am. J. Crim. L. 241 (1996).

75. Government's Consolidated Response Concurring in Defendant's Motion for a New Trial August 31, 2004 at http://news.findlaw.com/hdocs/docs/terrorism/uskoubriti 83104g.pdf

consensus about alleged targets and that it had failed to disclose photos of the alleged targets, resulting in misleading evidence being led at trial. The government also conceded that it had failed to disclose alternative theories held within the Armed Forces, the Central Intelligence Agency and the Federal Bureau of Investigation to explain tapes that the government had alleged were designed to case various targets for terrorism. It also conceded that it failed to disclose impeachment evidence concerning a jailhouse informer who testified that the accused were involved in terrorist plots. Finally, it conceded that the prosecutor's closing arguments that stressed the harm that terrorism could cause to innocent people was unduly prejudicial to the accused. This case demonstrates a combination of failure by multiple police and intelligence agencies to make full disclosure with both tunnel vision which suppresses exculpatory interpretations of the evidence, reliance on jailhouse informers and the danger of prejudice against accused who were presented to the jury as Islamic extremists. The Koubriti case fortunately also demonstrates an eventual recognition by prosecutors of their responsibilities to make full disclosure.

A related factor that may make terrorism cases more risky for wrongful convictions is that they are more likely to result in claims of public interest immunity over evidence that might normally be disclosed to the accused. In the Judith Ward case, the Court of Appeal observed that the prosecution had taken it upon themselves to make decisions about non-disclosure of sensitive information in the public interest. In the face of this finding, the Court of Appeal stressed "the rule that the court and not the litigant must be the ultimate judge of where the balance of public interest lies must always be applied by the prosecution in criminal cases."[76] The Court of Appeal added that "if, in a wholly exceptional case, the prosecution are not prepared to have the issue of public interest immunity determined by the court, the result must inevitably be that the prosecution will have to be abandoned."[77] As will be seen in subsequent parts of this paper, states have abandoned or sacrificed criminal prosecutions since 9/11 in order to ensure that national security intelligence is not made public or disclosed to the accused. Nevertheless, the concern about maintaining the secrecy of such information has not, as suggested by the Court of Appeal in the *Ward* case, led to the abandonment of attempts to detain terrorist suspects. Rather, it has encouraged the state to use immigration and military laws, which are more protective of state secrets and place less demanding disclosure obligations on the state.

76. R. v. Ward, 96 Cr. App. R. 1, 27 (1993).
77. *Id.* at 57.

Writing in 1999, Professor Clive Walker observed that public interest immunity claims were increasing because of the greater role of security intelligence in the policing of terrorism, as well as the increased role of the collection of intelligence in policing.[78] This trend has only increased since 9/11, with greater emphasis on information sharing between police and intelligence agencies within jurisdictions, as well as sharing between states. In many cases, foreign and domestic intelligence agencies may share evidence with the police, but strenuously object to the disclosure of such information to the accused. These objections may make alternative military or immigration proceedings attractive because of reduced disclosure obligations.

In Canada, public interest immunity was expanded in the Anti-Terrorism Act,[79] which was enacted a few months after the September 11 terrorist attacks. The grounds of public interest immunity apply to "sensitive information" relating to international relations, national defense, or national security of the type that the government is taking measures to safeguard. The law also provides new duties on all justice participants, including the accused, to bring potential disclosures to the attention of the Attorney General.[80] Even if a specially designated reviewing judge has determined that the public interest in disclosure outweighs the possible injury to international relations, national defense, or national security,[81] the federal Attorney General can still issue a certificate prohibiting disclosure of the information.[82] There is a limited right to review this certificate before another specially designated judge; however, this judge may only overturn the certificate if he or she concludes that it does not relate to matters affecting international relations, national defense, or national security.[83] This limited right of review was only introduced after objections were raised about unreviewable executive powers when the bill was first introduced.[84]

Once an Attorney General's certificate has been sustained as relating to national security or defense information, or information obtained in confidence from a foreign body, no judge can go behind the certificate or order that the information be disclosed. A trial judge in a criminal trial, however, retains the explicit right to order whatever

78. Clive Walker & Geoffrey Robertson, *Public Interest Immunity and Criminal Justice, in* MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR 170, 171-72 (Clive Walker & Keir Starmer eds., 1999).

79. Anti-Terrorism Act, ch. 41, S.C. 2001 (Can.).

80. Canada Evidence Act, R.S.C., ch. C-5, § 38.01 (1985) (Can.).

81. *Id.* § 38.06.

82. *Id.* § 38.13.

83. *Id.* § 38.131.

84. Hamish Stewart, *Public Interest Immunity after Bill C-36*, 47 CRIM. L.Q. 249 (2003).

remedy is necessary to ensure the fairness of the trial without the disclosed evidence. This remedy can include a stay of proceedings.[85] The new powers have been applied in a few cases with judges ordering some evidence disclosed and some evidence not disclosed and the Federal Court of Canada suggesting that evidence affecting national security may only be disclosed when the accused's innocence is at stake.[86] Even if the Federal Court decides that the evidence must be disclosed to the accused because his innocence is at stake, the Attorney General can override a judicial disclosure order with a national security certificate. To be sure, even this certificate is subject to some judicial review and the criminal trial judge retains the right to stay proceedings if he or she determines that a fair trial is impossible. Nevertheless, concerns have been raised that the reviewing Federal court judge, who is not the criminal trial judge, is not in a good position to judge the relevance of the evidence or its usefulness to the defense.[87] In turn, the trial judge may be left in the difficult, if not impossible, position of determining the effect on the fairness of a criminal trial of evidence that he or she cannot examine. It is not inconceivable that judges could be influenced by the public outrage that would result should they terminate the prosecution of a suspected terrorist in a notorious case.

The ability of the state to assert broad public interest immunity claims in terrorism cases raises concerns about miscarriages of justice because it restricts the flow of information to the accused. Given that inadequate disclosure was an important factor in the Irish cases, the risk of wrongful convictions in terrorism cases will increase with legislative enactments that restrict disclosure in the name of national security and exchange of information with foreign agencies.

G. Circumstantial Evidence and Intelligence

Another factor that may make terrorism cases particularly susceptible to wrongful convictions is the reliance placed on circumstantial evidence and intelligence that links suspects to other known or suspected terrorists. As discussed above, abusive interrogation in the Guildford Four case led to false claims implicating the Maguire

85. Canada Evidence Act, R.S.C., ch. C-5, § 38.14 (1985) (Can.). Note, however, that this power applies only in criminal trials and not in immigration proceedings, which, as will be discussed below, can result in a person's detention and deportation.

86. In one case involving criminal charges of hostage taking in Bosnia, four reported decisions have already been made with respect to the accused's access to evidence. *See* Ribic v. Canada, [2002] F.C. 290; Ribic v. Canada, [2002] F.C. 839; Ribic v. Canada, [2003] F.C. 10, *aff'd* [2003] F.C. 246; Ribic v. Canada, [2003] F.C. 43.

87. Peter Rosenthal, *Disclosure to the Defence After September 11: Sections 37 and 38 of the Canada Evidence Act*, 48 CRIM. L.Q. 186, 199-204 (2004).

Seven. A person faced with abuse may falsely implicate a known associate. The cell nature of modern terrorism also encourages prosecutors to offer evidence about a person's associates as evidence of that person's participation in terrorist activities. Canada's Anti-Terrorism Act specifically provides that evidence of the accused's political or religious motive to engage in terrorism is relevant, as is evidence that an accused "frequently associates with any of the persons who constitute the terrorist group"[88] is relevant evidence in determining that the accused is guilty of the new offence of participating in the activities of a terrorist group. Such provisions, as well as the emphasis placed on the accused's associates in many terrorism cases, blurs the line between security intelligence data collected by agencies unconcerned with guilt and evidence that is traditionally used to prove guilt in a criminal trial. Lord May noted that the police relied on intelligence data linking some of the Guildford Four to anti-army activities in Northern Ireland but warned that "it is in the nature of intelligence obtained from informants that it often cannot be verified. There is also a risk that information may be invented or embellished to gain greater rewards or to inculpate an innocent person for ulterior motives."[89]

Terrorism prosecutions places pressures on the distinction between intelligence data and probative evidence. Even within the setting of a criminal trial, circumstantial evidence is often important in terrorism cases. The respected English barrister Louis Blom-Cooper Q.C. has closely examined the circumstantial evidence linking the Birmingham Six with the bombings. The six were all acquainted with James McDade, an IRA bomber who was killed a week before the Birmingham bombings when a similar bomb he was working on prematurely exploded. Indeed, five of the men were departing for McDade's funeral in Belfast when the bombs exploded. Blom-Cooper defends the value of circumstantial evidence in criminal trials and concludes that even when the unreliable confession and forensic tests are excluded, "I am not in a position to

88. Criminal Code of Canada, R.S.C., ch. C-35, § 83.01(1)(b), 83.18(4) (1985) (Can.). Evidence of association and political and religious motive was also considered in the trial of two men in Canada charged with but recently acquitted of murdering 329 people killed in the 1985 bombing of an Air India airliner. This trial was conducted under the ordinary criminal law and not under the new anti-terrorism provisions of Canada's *Criminal Code* that require proof of religious and political motive and allow association evidence. One factor in the acquittals in this terrorism case may have been that the case was tried by a judge alone and not by a jury who probably would have been more influenced by the motive and association evidence. *R. v.Malik and Bagri* 2005 BCSC 350

89. Sir John May Report of the Inquiry into the Circumstances Surrounding the Convictions Arising out of the Bomb Attacks in Guildford and Woolwich in 1974 Final Report (1993-94 H.C. 449) at 3.7.

answer the question whether the six men are or are not innocent of the crimes committed on November 21, 1974."[90] Blom-Cooper has a valid point about the difficulty of concluding whether someone is innocent, but in our view he underestimates the dangers of relying on circumstantial evidence in terrorism cases, where political and cultural associations, perhaps combined with stereotypes or lack of knowledge about the community, may facilitate a process of guilt by association. There may be a case for reviving warnings about the use of circumstantial evidence in terrorism cases by pointing out to the jury the possibility of innocent associations.[91]

H. Substantive Criminal Law

In terrorism cases, the nature of the substantive criminal law may also produce increased risks of wrongful convictions. Accomplice liability allows juries to find the accused guilty, even in the absence of evidence that the accused actually perpetuated the crime. Although the accused have to commit some act of assistance with the required fault level, there is a danger in the hands of the police, and even a jury, that accomplice liability can be distorted into something akin to guilt by association. Conspiracy laws may also present a risk that all who are present or have any knowledge of a terrorist plot may be charged with acts of terrorism. The natural human tendency to engage in guilt by association is one of the causes of miscarriages of justice, and this tendency may be particularly compelling in a context where terrorists act in cells and share certain political or religious beliefs. At a symbolic level, the USA Patriot Act recognized that "the concept of individual responsibility for wrongdoing is sacrosanct in American society, and applies equally to all religious, racial, and ethnic groups."[92] This is an important and admirable statement about a bedrock principle of criminal liability.[93] Nevertheless, the mere fact that this concept had to be reaffirmed in the law in the wake of 9/11 is an implicit recognition of the challenges that religious or ethnic differences and cell-based terrorism present for traditional understandings of individual responsibility.

New criminal anti-terrorism laws in many parts of the world have

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90. LOUIS BLOM-COOPER, THE BIRMINGHAM SIX AND OTHER CASES: VICTIMS OF CIRCUMSTANCE 9 (1997).

91. Note that most jurisdictions no longer require special warnings that before accepting circumstantial evidence, juries must conclude that the evidence is inconsistent with any other rational inference. *See* Holland v. United States, 348 U.S. 121 (1954); McGreevy v. D.P.P., 1 All E.R. 503 (H.L. 1973); R. v. Cooper, [1978] S.C.R. 860.

92. USA Patriot Act, § 102(a)(3), Pub. L. No. 107-56, 115 Stat. 272, 276 (2001).

93. For a discussion of how collective fault is anathema to principles of criminal responsibility, *see* GEORGE P. FLETCHER, ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM (2002).

broadened the grounds for conviction of crimes of terrorism beyond those grounds normally provided by laws relating to accomplice and inchoate liability. The United Kingdom's Terrorism Act, 2000[94] includes broadly defined offences, such as membership in a terrorist organization (section 11), use and possession of property and funds for terrorism (section 16), or possession of anything for terrorist purposes (section 57). These offences are even broader than the forms of accomplice and conspiracy liability used in the Irish cases. They increase the likelihood that those who associate with terrorist suspects will also be charged with a terrorist offence or threatened with such a charge. In Canada, the Anti-Terrorism Act provides a variety of new, broadly defined crimes directed at various forms of financing terrorism and terrorist groups, participating in the activities of a terrorist group, facilitating a terrorist activity, providing instructions about terrorist activity or activities that benefit terrorist groups, and harboring or concealing terrorists.[95] In the United States, concerns have been raised about the breadth and the vagueness of the frequently-employed charge of providing material support for terrorists.[96] New anti-terrorism laws may encourage the police to classify innocent associates of terrorists as terrorists.

The United Kingdom's Terrorism Act, 2000, also requires lower fault levels and lower burdens of proof than are normally required under the criminal law. For example, section 16(2)(b) of the act makes it an offence for a person to possess money or property if "he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism."[97] The American crime of harboring or concealing terrorists, as amended by the USA Patriot Act, similarly has an objective level of fault, as it applies to "whoever harbors or conceals any person who he knows, or has reasonable grounds to believe, has committed or is about to commit"[98] various offences involving terrorism. In Canada, a new offence of knowingly facilitating a terrorist activity has a reduced fault level because it is not necessary to know "that a particular terrorist activity is facilitated" or that "any particular terrorist activity was foreseen or planned at the time it was facilitated."[99]

At a formal level, it could be argued that the expansion of terrorism offences may actually reduce the possibility of convicting the factually

94. Terrorism Act, 2000, c. 11 (Eng.).

95. Criminal Code of Canada, R.S.C., c. C-34, pt. 11.1 (1985) (Can.). *See generally* Kent Roach, *Canada's New Anti-Terrorism Law*, 2002 SINGAPORE J. OF LEGAL STUD. 122 (2002).

96. USA Patriot Act, § 805 (amending 18 U.S.C. § 2339A); Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185 (C.D. Cal. 2004).

97. Terrorism Act, 2000, § 16(2)(b).

98. USA Patriot Act, § 803 (amending 18 U.S.C. § 2339).

99. Criminal Code of Canada, § 83.19.

innocent. In other words, these offences authorize punishing those who did not intend to assist terrorists, but who should have known they were assisting terrorists. In the last part of this paper, we will suggest that miscarriages of justice can profitably be understood apart from concerns about the substantive justice of the laws being applied. Nevertheless, broadly defined terrorism offences may make it more likely that unwitting associates of terrorists who may not even be guilty under the expanded crimes of terrorism will be wrongly detained, charged, and convicted of crimes of terrorism.

The United Kingdom's Terrorism Act, 2000, also increases the risk of convicting the innocent by altering the normal burden of proof that is placed on the prosecution. For example, section 77(2) provides that for a number of offences involving possession of explosives and firearms, "the court may assume that the accused possessed (and, if relevant, knowingly possessed) the article unless he proves that he did not know of its presence on the premises or that he had no control over it."[100] Requiring the accused to disprove guilt obviously increases the risk of convicting the guilty as it allows a conviction despite a reasonable doubt. The dangers of the reverse burdens found throughout the Terrorism Act, 2000, are, however, lessened by another provision that reduces most of the reverse burdens from persuasive burdens that require the accused to establish an exonerating fact on a balance of probabilities to an evidential burden that only requires "the person adduces evidence which is sufficient to raise an issue with respect to the matter[,]" in which case the prosecution is required to assume its normal burden of proving guilt beyond a reasonable doubt.[101] This provision was only added in light of concerns that courts might find that a persuasive burden on the accused would violate the right to a fair trial, which is protected under the European Convention on Human Rights and the Human Rights Act, 1998. Although evidential burdens do mitigate some of the dangers of persuasive burdens, they still require an active defense that adduces evidence to displace a mandatory presumption that will otherwise apply. To the extent that anti-terrorism laws depart from the standards of the regular criminal law that are designed to protect the innocent, "it must be recognised that in terrorist cases greater risks of injustice are accepted than in the ordinary course of criminal cases."[102]

100. Terrorism Act, 2000, § 77(2).

101. *Id.* § 118(2).

102. Sir John May Report of the Inquiry into the Circumstances Surrounding the Convictions Arising out of the Bomb Attacks in Guildford and Woolwich in 1974 Final Report (1993-94 H.C. 449) at 21.8.

I. Executive Listing of Terrorists and Terrorist Groups

Another feature of modern anti-terrorism law that increases the risk of wrongful convictions is the reliance that is placed in international and domestic law on lists of terrorists and terrorist groups. Under Canada's Anti-Terrorism Act, for example, executive designation of a group as a terrorist group is purported to constitute definitive proof for the purpose of a criminal trial that the listed entity is a terrorist group. This could effectively substitute an executive decision that there are reasonable grounds to believe that a group or even an individual has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity, or is knowingly acting on behalf of, at the direction or in association with such a group, for proof beyond a reasonable doubt at criminal trials.[103] In addition, many jurisdictions incorporate lists of individual terrorists compiled by the United Nations into regulations relating to the financing of terrorism. Canadian law, to its credit, recognizes the possibility of error by providing for a procedure by which a person who has been mistakenly identified as part of a listed terrorist group to obtain a prompt ruling from the executive.[104] At the same time, this procedure involves only executive review and is designed only to correct cases of mistaken identity, and not to examine the merits of the decision to list a person or a group as a terrorist. In Canada, at least one person has found himself wrongly listed as a terrorist, a mistake that took months to correct.[105] Although the listing itself does not constitute a wrongful criminal conviction, it does result in a harmful stigma because the lists are public and distributed to financial institutions. Informed persons will not have financial dealings with a listed terrorist for fear of being subject to criminal prosecutions for financing or assisting a terrorist. Even if the listed person is never charged criminally, they may still be treated and punished as if they were a terrorist.

J. Guilty Pleas

It cannot be assumed that all wrongful convictions in terrorism cases will result from trials. In the Irish cases, the accused insisted on their innocence and faced trials in which they were wrongfully

103. Criminal Code of Canada §§ 83.01(1), 83.05 (defining a "terrorist group" as a "listed entity" and providing grounds for the executive to list terrorist groups, respectively). For criticism of these laws, *see* David Paciocco, *Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act*, 16 S.C.L.R. (2d) 185 (2002).

104. Criminal Code of Canada, § 83.07.

105. E. Alexandra Dosman, *For the Record: Designating "Listed Entities" for the Purposes of Terrorist Financing Offences at Canadian Law*, 62 U. T. FAC. L. REV. 1, 15-19 (2004).

convicted. In the current terrorism context, however, even those who insist on their innocence may find it in their best interests to plea guilty to a terrorism offence. One factor in the United States may be a concern that a person who insists on a trial might be taken outside of the criminal justice system by executive designation as an enemy combatant. Thus it is not clear that those who plead guilty to terrorism criminal charges in Portland, Oregon or Buffalo, New York may not have been concerned about possible executive designation as an enemy combatant.[106] It is also possible that non-citizens might plea guilty to criminal charges in order to escape potentially harsher treatment under immigration law. Indeed, this is a real prospect in Canada given that the Supreme Court has refused to rule out the possibility that it may in some circumstances be constitutional to deport a terrorist suspect even in cases where there is a real risk that the person will be tortured upon his return to his country of origin.[107] Prosecutors may also have incentives to offer favorable sentences in return for guilty pleas so as to avoid having to disclose sensitive intelligence either to the accused or the public. People who are scared or have trouble communicating in the language used by courts may also plea guilty to crimes that they did not commit.

K. Conclusion

There are many factors that contribute to miscarriages of justice. Case studies and commissions of inquiry have generally established that wrongful convictions are over-determined—that is, they are the result of multiple and interrelated causes. We return to concern about the role of tunnel vision in this context. In a sense, tunnel vision is the glue that brings together a number of failings in the system—police negligence and misconduct, prosecutorial overzealousness, skewed expert testimony and the failure to discover or disclose exculpatory evidence. The incidence of tunnel vision is arguably higher in the terrorism context. As Clive Walker has said in the context of the Irish cases:

> Amongst the reasons behind this tendency to lapse from acceptable standards are, first, that terrorist action creates, and is designed to create, extraordinary tension, fear and panic. These reactions are to be induced in the forces of authority, such as the police, just as much as in sectors of the public. . . . Secondly, official reaction to terrorism

106. Michael J. Kelly, *Executive Excess v. Judicial Process: American Judicial Responses to the Government's War On Terror*, 13 IND. INT'L & COMP. L. REV. 787, 799-803 (2003).

107. Suresh v. Canada [2002] 2 S.C.R. 3, para 78. For criticism of this deportation to torture exception and arguments that it constitutes a derogation from rights under domestic and international law *see* K. Roach, *Domestic, International and Remedial Dialogues About Rights: The Canadian Experience*, 40 T.I.L.J. (forthcoming) (2005).

> often involves a conscious departure from the normal due process ideology of the criminal justice system and tendency towards the holding of grand "State trials". . . . There is also the "presentational" aspect—the desire to be seen to be taking effective action against terrorists. Even if the official action is in reality worthless, it can still relieve public frustrations and fears. . . . These wider society considerations may also explain why miscarriages seem so hard to remedy. The problem is not simply stubbornness, but an acquittal becomes costly to the State in terms of its legitimacy and prestige.[108]

When the criminal justice system is conscripted in the service of the war on terrorism, one can easily see how departures from proper and accepted professional duties and responsibilities can occur. Police, prosecutors, scientists, civilian witness, and even judges and juries are at risk of becoming involved in this goal—to catch the terrorist and restore public order and confidence. The ominous note to Professor Walker's caution is that a miscarriage of justice may be seen to have utility in quelling public fears and frustrations through the conviction of someone for the acts of violence against the state. A conviction of anyone—even an innocent person—might for a time at least serve what Professor Ackerman has called the reassurance function that is often thought necessary after a horrible act of terrorism.[109] Because wrongful convictions are so impervious to authentic review, the revelation that the prosecution was misguided may not be revealed for years, if ever. If it is revealed, however, the conviction of the innocent will be seen by some as legitimating some of the grievances of terrorists and it will be a stain on any democracy's fight against terrorism.

III. New Dimensions in the War Against Terror and New Dimensions of Miscarriages of Justice

In the last section, we examined the risks of wrongful convictions in terrorism cases arising from prosecutions of suspected IRA terrorists in the 1970s and under new anti-terrorism laws enacted in many countries after the September 11 terrorist attacks. To be sure, the risk of wrongful convictions under these new anti-terrorism laws remains significant. Nevertheless, it should be acknowledged that attempts to prosecute suspected terrorists after September 11 have been hampered in part because of due process norms associated with the regular criminal process. Zacarias Moussaoui, the so-called twentieth hijacker, has been charged with a variety of existing criminal conspiracy offences. The government has repeatedly refused Moussaoui access to Ramzi bin al-

108. *See* Walker, *supra* note 39, at pp.48-49.
109. *See* Ackerman, *supra* note 23.

Shibh who is in American custody and is believed to have played a key role in the attacks. The trial judge eventually ruled that the death penalty should not be applied and the matter is now the subject of appellate litigation. An appeal court has affirmed Moussaoui's right to have access to witnesses who can provide material evidence essential to his defense, but has also held that the government has acted in good faith and overturned the sanction of taking the death penalty off the table.[110]

The experience in Germany with prosecutions under the criminal law illustrates in even more dramatic form some of the difficulties of criminal prosecutions in the terrorism context. One criminal conviction arising from September 11 was the conviction of Mounir Motassedeq in a Hamburg court of over 3,000 counts of accessory to murder. This conviction, including the accused's fifteen year sentence, was reversed on appeal. Although noting that the accused "is certainly far removed from being clear of suspicion," the appeal court stressed that the accused should have had access to evidence of a key witness, Ramzi bin al-Shibh. The German Court reasoned that "a conflict between the security interests of the executive and the rights to defense of the accused cannot be resolved to the disadvantage of the accused." The Court defended the legality model of the criminal law over the war metaphor by stating that "we cannot abandon the rule of law. That would be the beginning of a fatal development and ultimately a victory for the terrorists. . . . The fight against terrorism cannot be a wild, unjust war."[111] This appeal court ruling followed on the heels of an acquittal of another alleged member of the Hamburg al Qaeda cell a few weeks earlier, with both courts emphasizing the importance of providing the accused access to relevant evidence.[112] A retrial is pending in the *Motassedeq* case, but again the United States has refused to make witnesses held in American custody available and attempts are being made to deport the accused should the prosecution again falter.[113] In these cases, the courts to their credit seem to have learned some lessons from the wrongful convictions in the Irish cases, particularly with respect to the need for full disclosure to the accused.

Although there have been criminal prosecutions in the wake of September 11 in many countries, there has also been increased interest in

110. United States v. Moussaoui, 365 F.3d 292, 312-15 (4th Cir. 2004).

111. Jeff Sallot, *Guilty verdict overturned in al-Qaeda suspect's case* GLOBE AND MAIL (Toronto), March 5, 2004, at A14; Desmond Butler *German Judges order a Retrial for 9/11 Figure* N.Y. TIMES, March 5, 2004, at A1.

112. Luke Harding, German Court Clears Student of Plotting with 9/11 Terrorists: Verdict Casts Doubt on Conviction of Second Suspect and is Seen as Blow to U.S. and German Investigators, THE GUARDIAN Feb. 6, 2004, at 21.

113. Craig Whitlock, *9/11 Cases Proving Difficult for Germany: Suspects May be Sent Elsewhere for Trial*, WASHINGTON POST, Dec. 13, 2004, at A1.

alternatives to the criminal law, and especially alternatives that place less of a burden of proof on the state and that are more amenable to secrecy.[114] The most frequently used alternatives have been immigration and military proceedings as a means to detain those suspected of terrorist acts.

It can be argued that it is inappropriate to examine preventive detention under immigration and military laws through the lens of criminal law concerns about wrongful convictions and miscarriages of justice. After all, detention under either immigration and military law is not formally thought of as punishment and it should be temporary pending deportation or the end of hostilities. Although it is important to take note of these differences of form between criminal law and its less restrained alternatives, issues of form should not eclipse those of substance.

The substantive issues at stake implicate both the individual and the government. From the individual's perspective, prison is prison. The emphasis from the individual's perspective is on the effects of state actions and not their purposes. Detention of terrorist suspects under immigration or military law is not nearly as temporary as it may be in non-terrorism cases. In the United Kingdom, indefinite detention has been authorized with respect to terrorist suspects who cannot be deported because of concerns that they will be tortured. The House of Lords has recently rejected the government's defense of these measures as only a "three wall prison" that can be avoided by voluntary acceptance of deportation. It took a substantive approach that focused on the liberty interests of the detainee with Lord Nicholls stating that "indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified."[115]

The argument that detention under military law is a temporary measure designed to ensure that combatants do not return to the battlefield is strained given the continued detention of combatants long after the Taliban government in Afghanistan has been defeated and a

114. K. Roach, *Terrorism and the Criminal Law in* V. RAMRAJ, M. HOR AND K. ROACH, GLOBAL ANTI-TERRORISM LAW AND POLICY (forthcoming). In the United Kingdom, for example, while 664 people have been arrested under the *Terrorism Act, 2000* between September 11, 2001 and September 30, 2004, only seventeen individuals have been convicted under the act. 118 people have been charged under the act and 135 were charged under other legislation. 315 people have been released without charge and 55 have been transferred to immigration officials. *See* Home Office Terrorism Act Arrest and Charge Statistics *available at* http://www.homeoffice.gov.uk/docs3/tatcarreststats.html.

115. A. v. Secretary of State [2004] UKHL 56 at para 74.

new government elected. Moreover, the logic of preventive detention is strained to the breaking point when it is suggested that suspected terrorists can be detained for as long as a seemingly never-ending war against terrorism lasts. The indefinite detention of people at Guantanamo Bay is much more draconian than even temporary measures enacted by countries such as Israel and the United Kingdom which, like the United States, have faced severe terrorism.[116]

It is also important to focus on substance rather than form when evaluating the government's response to terrorism. In the present war against international terrorism, many governments can choose between criminal prosecutions or immigration or military proceedings as a means to deal with terrorist suspects. Selecting less restrained, less demanding and less public alternatives to criminal prosecutions will often be in their tactical advantage. David Cole has argued that the United States has chosen immigration law over criminal prosecutions for a variety of reasons including the expansive nature of immigration law which can authorize detention for a wide range of conduct including that of not informing the government of a change of address and because the procedures of immigration law are not as public or as protective of the detainee as those of the criminal law. "Had it used criminal charges as a basis for arrest and detention, the government would have had to provide suspects with prompt access to independent federal courts and the assistance of counsel. . . . Eighty percent of immigration detainees are unrepresented. Under criminal law, the government must provide a public trial; yet every special interest immigration detainee was tried in secret."[117] To this list, we would add that by choosing to avoid criminal law, the government has so far avoided the danger of being seen to have participated in the punishment of the innocent. Given the political and moral weight of claims about factual innocence and wrongful convictions, this is a non-trivial tactical advantage for the government. Moreover, as we will suggest below, the diminished procedural hurdles that the government faces outside of the criminal context may significantly increase the danger that terrorist suspects who are in fact innocent of terrorism will be subject to long-term detention under immigration or military law.

A. Immigration Proceedings

Immigration law has been used frequently since September 11 as anti-terrorism law. In the United States, the immediate law enforcement

116. Stephen Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1955 (August 2004).

117. COLE, *supra* note 6, at 34-35.

reaction to 9/11 was not the laying of criminal charges but a round-up of terrorist suspects under immigration law. As Philip Heymann has commented much of this use of immigration law has a pretextual quality: "There are about 20 million aliens in the United States at any given time, a high percentage of whom are at least technically in violation of one or another visa regulation. But that fact is now being used as a device for holding suspects—most only weakly linked to terrorism—for purposes of interrogation or incapacitation."[118] The pre-textual use of immigration law provides a real challenge to those concerned about miscarriages of justice because it means that it may not be possible for a detainee who is not a terrorist suspect to claim factual innocence under all immigration law.

1. Ministerial Security Certificates under Canada's *Immigration and Refugee Protection Act*

Immigration law routinely employs what in criminal law would be seen as problematic status-based offences and standards of proof well below the criminal law standard of proof beyond a reasonable doubt. For example, section 34 of Canada's *Immigration and Refugee Protection Act* allows a non-citizen to be declared inadmissible on security grounds for being a member of an organization that there are reasonable grounds to believe either engages, has engaged or will engage in terrorism.[119] In addition, section 33 of the Act provides that grounds of inadmissibility such as membership in a terrorist organization, engaging in terrorism or being a danger to the security of Canada exist if "there a reasonable grounds to believe they have occurred, are occurring or may occur." Membership in a terrorist organization can be proven on the basis of a bona fide belief in a serious possibility based on credible evidence.[120] This standard is less onerous for the government than even the civil standard of proof on a balance of probabilities, let alone the criminal law standard of proof beyond a reasonable doubt.

The Canadian immigration act has been criticized both in the United

118. HEYMANN, *supra* note 5, at 92.

119. Canada's *Immigration and Refugee Protection Act* S.C. 2001 c. 27 *(IRPA)* § 34(1)(f) provides that: "A permanent resident or a foreign national is inadmissible on security grounds for . . . being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts . . . [of] terrorism." The Supreme Court of Canada has read down this provision to allow a refugee applicant "to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent." Suresh v. Canada, [2002] 1 S.C.R. 3 at para 110.

120. Chiau v. Canada, [2001] 2 F.C. 207, 209 (C.A.).

States[121] and Canada,[122] for being too lenient with respect to terrorist suspects, but it has some very draconian provisions. For example, it provides for investigative detention on the basis that "the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights."[123] There is no limit on this period of detention, but the reasons for the detention must be reviewed every thirty days.[124] In contrast, preventive arrests under the criminal law amendments of Canada's *Anti-Terrorism Act* require a reasonable and probable grounds that a terrorist activity will be carried, reasonable suspicion in relation to the individual and are limited to no more than seventy-two hours of detention.[125]

Another procedure available under Canadian immigration law but not Canadian criminal law is the use of security certificates to detain and remove non-citizens. Security certificates were introduced in Canadian immigration law in the early 1990s and about twenty-seven security certificates have been signed by the Ministers of Immigration and the Solicitor General since that time. Those subject to a security certificate may be subject to indefinite detention until the certificate has been reviewed by the judge and if upheld, they have been removed from Canada on the basis that they are a danger to national security.[126]

The security certificate is subject to judicial review in the Federal Court to determine its reasonableness, but this judicial review pre-empts other proceedings, including applications for refugee status and appeals. The procedure for reviewing security certificates is extraordinary because it involves the judge being required to hear the evidence in the absence of the person named in the certificate and their counsel if, in the judge's opinion, the disclosure of information would be injurious to national security or the safety of any person. Such information can be used by the judge in determining the reasonableness of the certificate, but it cannot even be included in a summary of other evidence that can be

121. Library of Congress Research Division, *Nations Hospitable to Organized Crime and Terrorism* 147, 152-53 (October 2003) *available at* http://www.ndu.edu/library/docs/Nats%5FHospitable.pdf. Note that the methodology and orientation of the report has been criticized by many in Canada. *See, US terror study 'crude' 'inexpert,'* TORONTO STAR, Feb. 17, 2004, at A04. On the false claims that some of the 9/11 hijackers entered the United States from Canada, *see* KENT ROACH, SEPTEMBER 11: CONSEQUENCES FOR CANADA 5-6 (2003).

122. Stewart Bell, Cold Terror: How Canada Nurtures and Exports Terrorism Around the World 55 (2004).

123. IRPA § 58(1)(c).

124. IRPA § 57(2).

125. Criminal Code of Canada § 83.3.

126. *See* IRPA §§ 82-84. These sections contain the complex detention provisions, which also make it easier to detain a foreign national as opposed to a permanent resident.

provided to the person named.[127] The Supreme Court of Canada upheld a somewhat similar procedure in an earlier act, but stressed the importance of providing at least a summary of the evidence to the person named in the certificate.[128]

Somewhat similar procedures are available under Canadian criminal law with respect to preserving the confidentiality of information obtained in confidence from a foreign entity or for protecting national defense or national security. An important exception under the criminal law, however, is that the criminal trial judge has the right, with regards to non-disclosure of national security information to the accused, to make any order, including a stay of the entire criminal proceedings, that he or she "considers appropriate in the circumstances to protect the right of the accused to a fair trial."[129] Such orders are not contemplated under Canadian immigration law. Indeed if the judge upholds the security certificate as reasonable, the person named is subject to removal without appeal and without being eligible to make a claim for refugee protection.[130]

The incursions that are made on standards of due process or adjudicative fairness in the name of keeping information affecting national security confidential but usable in security certificate proceedings is well demonstrated by a 2002 speech given by an experienced judge of the Federal Court of Canada, a specialized court in Canada that has jurisdiction over many security matters. He commented that:

> We do not like this process of having to sit alone hearing only one party and looking at the materials produced by only one party and having to try to figure out for ourselves what is wrong with the case that is being presented before us and having to try for ourselves to see how that witnesses that appear before us ought to be cross-examined.[131]

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127. *See* IRPA § 78(e). Section 78(e) of IRPA provides that at the government's request "the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of ant person." *See* IRPA § 78(h). Section 78(h) provides that "the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed."

128. Chiarelli v. Canada, [1992] 1 S.C.R. 711, 727-28.

129. Canada Evidence Act, *supra* note 80 at § 38.14(1).

130. IRPA § 81(c).

131. James Hugessen, *Watching the Watchers: Democratic Oversight in* David Daubney et al., *Terrorism, Law & Democracy: How is Canada Changing following September 11?: Papers Presented at a Conference Organized by the Canadian Institute*

The judge ended his speech with an extraordinary confession—"I sometimes feel a little bit like a fig leaf."[132] He also suggested a more proportionate alternative to the present system, one based on the British system of allowing lawyers with security clearances to have access to confidential information and play the role of the adversary in the national security context.[133] Unfortunately, this suggestion has yet to be taken up.

In a recent and strikingly executive-minded decision, the Federal Court of Appeal upheld the security certificate process as consistent with the guarantee of fundamental justice under the Canadian Charter and indicated that the question of whether to reform the system to allow adversarial challenge by way of a special advocate was a matter for the legislature.[134] The dangers of miscarriages of justice were, however, present even in the case in which the security certificate was held to be consistent with constitutional standards. The most damning evidence against the detainee that was made publicly available was that photographs of him had been identified by two terrorists in American custody, including Ahmed Ressam, who was apprehended with plans to cause explosions at the Los Angeles airport at the Millenium.[135] No information was, however, provided about the means of photo-identification. False eyewitness identification is a frequent cause of miscarriages of justice.[136] Some steps like a sequential photo line-up with at least 10 possible persons can help minimize the risk of false

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for the Administration of Justice, Held in Montreal, Quebec, Mar. 25-26, 2002 (Montreal: Canadian Institute for the Administration of Justice, 2002) at 384.

132. *Id* at. 386.

133. Under a previous Canadian law, a review of security certificates issued against permanent residents was conducted by the independent review body for Canada's security intelligence agency and security cleared counsel for that agency played an adversarial role in challenging the security certificate. *See* Murray Rankin, *The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness*, 3 CANADIAN J. OF ADMINISTRATIVE LAW AND PRACTICE 173 (1990). The British system will be discussed below.

134. Charkaoui (Re), [2004] F.C.J. No. 2060. Decary and Letourneau JJ.A. stated "if we were to accept the appellant's position that national security cannot justify any derogations from the rules governing adversarial proceedings we would be reading into the Constitution of Canada an abandonment by the community as a whole of its right to survival in the name of a blind absolutism of the individual rights enshrined in the Constitution." *Id.* at para 100. They also argued that normal standards of adjudicative fairness did not apply because "the threat of terrorism or a threat to national security does not represent or reflect a situation of normality, at least not in our country." *Id.* at para 84.

135. *Id.* at paras 17-18.

136. STANLEY COHEN, THE WRONG MEN: AMERICA'S EPIDEMIC OF WRONGFUL DEATH ROW CONVICTIONS Part II (2003); BARRY SCHECK, PETER NEUFELD AND JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 41-77 (2001); MICHAEL RADELET, HUGO BEDAU AND CONSTANCE PUTNAM, IN SPITE OF INNOCENCE 7-9, 239-40, 248-49 (1992).

identification,[137] but it is not known whether such steps were taken when a detainee under a Canadian security certificate was identified by detained terrorists as a person who attended terrorist training camps in Afghanistan.

One of the striking features of reliance on the immigration law to detain and deport suspected terrorists is how little attention is given to the risk of harming the innocent. As suggested above, immigration proceedings often fail to result in a full adversarial challenge to the government's case and the government does not have to prove guilt beyond a reasonable doubt. Security concerns about the information may preclude disclosure to detainees or even attendance by the detainees and their lawyers at the hearings. The information that is used in immigration proceedings may come from foreign sources of unknown reliability. Translation issues and lack of knowledge of the political situation of the country in which the detainee is alleged to have participated in terrorism or have been a member of a terrorist organization may also increase the risk of error.

The reasons why the risk of error in immigration proceedings has not generated the same type of concern generated by wrongful convictions under the criminal law are speculative. One factor may be a lack of knowledge about immigration law in general. Another factor may unfortunately be prejudice or a lack of concern about non-citizens. Yet another factor may be a perception that the consequences of removal under immigration law are not as great as the risk of imprisonment and perhaps execution under the criminal law. At the same time, immigration proceedings, even under Canada's allegedly lenient immigration law, can involve prolonged periods of detention before deportation and regrettably in Canada could possibly include deportation of a terrorist suspect to face torture.[138] As will be seen below, the use of immigration law to detain terrorists suspects in the United Kingdom has been intensely controversial because of the government's attempt to provide for indefinite detention through an explicit derogation from fair trial rights. In contrast, long periods of detention under immigration regimes in Canada and the United States seem to have attracted less public attention and criticism.[139]

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137. Province of Manitoba Justice, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001) *available at* http://www.gov.mb.ca/justice/sophonow/recommendations/english.html.

138. *Suresh*, [2002] 1 S.C.R. 3 at para 78.

139. *But see*, COLE, *supra* note 6, and Audrey Macklin, *Borderline Security* in PATRICK MACKLEM, RONALD J. DANIELS, AND KENT ROACH, THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL (2001).

2. Indefinite Detention under the United Kingdom's Anti-terrorism, Crime and Security Act, 2001

The use of immigration law to detain and deport suspected terrorists is striking given the alternative that is available under most new anti-terrorism criminal laws of charging these people with a broad range of criminal offences relating to terrorism. Most new criminal anti-terrorism offences define support for terrorism in a broad fashion and apply extra-territorially. In the United Kingdom the reliance on immigration law in the 2001 Anti-Terrorism, Crime and Security Act was especially striking given the broad crimes, including crimes of membership in a terrorist group, that are available under the Terrorism Act, 2000.

Section 21 of the Anti-terrorism, Crime and Security Act allows the Secretary of State to issue a certificate with respect to a non-citizen if he or she "reasonably believes that the person's presence in the United Kingdom is a risk to national security, and suspects that the person is a terrorist." A terrorist is defined broadly as a person who "is or has been concerned in the commission, preparation or instigation of acts of international terrorism" or "is a member of or belongs to an international terrorist group" or "has links with an international terrorist group" with links being further defined as supporting or assisting the group.[140] Section 23 of the Act provides for continued detention of the person so certified even though "his departure from the United Kingdom is prevented (whether temporarily or indefinitely)" by legal or practical concerns. In order to effect this form of indefinite detention, the British government derogated from fair trial rights under the European Convention on Human Rights.[141]

Appeals and reviews relating to the ministerial certification of terrorists and their detention are heard by a special tribunal, the Special Immigration Appeals Commission (SIAC), composed of a judge and two other persons with expertise in immigration and security respectively.[142] Unlike under the Canadian security certificate process examined above, the British SIAC procedure allows for the appointment of a security cleared special advocate who can challenge those parts of the government's case that cannot for reasons of national security be disclosed to the detainee.[143] The system is not perfect because the special advocate cannot take instructions from the detainee or discuss such matters with the detainee, but it is superior to the Canadian system because it allows for adversarial challenge of the government's case and

140. Anti-terrorism, Crime and Security Act, 2001, c. 24 (Eng.).
141. Human Rights Act (Designated Derogation Order), 1998, SI 2001/3644 (Eng.).
142. Special Immigration Appeals Act, 1997, c. 68 (Eng.).
143. *Id.* at § 5.

does not rely on a combination of the judicial body vetting the case and the government's lawyers presenting the case fairly.

The indeterminate detention provisions under Part IV of the *Anti-Terrorism, Crime and Security Act* have been intensely controversial in large part because the British government decided to make an explicit derogation from fair trial rights. The American equivalent to an explicit derogation would be a law suspending *habeas corpus*. A respected review committee, the Newton Committee, recommended that as "a matter of urgency" the immigration law powers of indefinite detention contained in Part IV of the Anti-terrorism, Crime and Security Act, 2001 be replaced and steps taken to rely more on criminal prosecutions against non-citizens and citizens alike.[144] The United Kingdom government rejected this suggestion concluding that the Newton Committee did "not offer a solution to the need to protect sensitive information whilst enabling the defendant to know the full case that has been put against him."[145] The government also defended the use of indeterminate detention against only non-citizens by arguing that "it is defensible to distinguish between foreign nationals and our own citizens" because of "their different rights and responsibility" and because "such draconian powers would be difficult to justify" with respect to British citizens and because "experience has demonstrated the dangers of such an approach and the damage it can cause to community cohesion and thus to support from all parts of the public that is so essential to countering the terrorist threat."[146] In other words, the government argued that it did not want to disclose sensitive information in criminal proceedings and that it was reluctant to extend draconian powers of internment to its own citizens.

Both of these arguments were dealt a crushing blow by the House of Lords in its landmark decision in *A (FC) v. Secretary of State for the Home Department*. In an 8:1 ruling the House of Lords held that indeterminate detention of non-citizen terrorist suspects was both disproportionate to the government's legitimate objective in fighting terrorism and discriminatory against non-citizens. Most of the judgments focused on these important issues. A few of the Law Lords, however, adverted to the risks that the innocent could be caught within the broad grounds provided in immigration law for detention of suspected

144. Lord Newton chair, *Anti-terrorism, Crime and Security Act 2001 Review Report*, Dec. 18, 2003, at para 203-205. The Newton Committee suggested that some reforms to the criminal law such as the use of a security cleared judge to assemble the case, greater incentives for plea bargains and "a more structured disclosure process that is better designed to allow the reconciliation of the needs of national security with the rights of the accused to a fair trial." *Id.* at para 241.

145. Home Secretary, *Counter-terrorism Powers: Reconciling Security and Liberty in an Open Society*, Feb. 2004, Part II, at para 37.

146. *Id.* at para 36.

terrorists. Lord Hoffmann for example stated that:

> [T]he suspect is not entitled to be told the grounds upon which he has been suspected. So he may not find it easy to explain that the suspicion is groundless. In any case, suspicion of being a supporter is one thing and proof of wrongdoing is another. Someone who has never committed any offence and has no intention of doing anything wrong may be reasonably suspected of being a supporter on the basis of some heated remarks heard in a pub.[147]

Baroness Hale added that the administrative tribunal, SIAC, "does not decide whether the detainee actually is an international terrorist as defined in the Act, merely whether the Home Secretary reasonably suspects that he is."[148] Immigration law uses much lower standards of proof and broader standards of liability than even enhanced criminal laws against terrorism.

Eight of the nine judges of Britain's highest courts found that the immigration indeterminate detention scheme violated the equality rights of non-citizens by exposing them to harsher powers than used against terrorist suspects who are British citizens. They emphatically rejected the government's argument that non-citizens were in unique positions because they as opposed to citizens were subject to deportation. Lord Bingham concluded that "what cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another."[149] This finding of

147. A v. Secretary of State for the Home Department, [2004] UKHL 56, 2 W.L.R. 87.

148. *Id.* at para 223.

149. *Id.* at para 68. He noted the United States Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), against indefinite detention of aliens while noting that "the court did not have to consider the position of aliens judge to present a terrorist risk but might well have sanctioned indefinite detention in such circumstances given the heightened deference shown by US courts to the judgments of the political branches with respect to national security." He then, however, concluded that "US authority does not provide evidence of general international practice" and would constitute discrimination on the basis of national origin. *Id.* at para 69. Lord Hope also stressed equality concerns in concluding that "the distinction which the government seeks to draw between these two groups—British nationals and foreign nationals—raises an issue of discrimination. . . . It proceeds on the misconception that it is a sufficient answer to the question whether the derogation is strictly required that the two groups have different rights in the immigration context. So they do. But the derogation is from the right to liberty. The right to liberty is the same for each group." *Id.* at para 132. Lord Scott explained his finding of discrimination in the following terms: "If those who are suspected terrorists include some non-Muslims as well as Muslims, it would, in my opinion, be irrational and discriminatory to restrict the application of the measures to Muslims even though the bulk of those suspects are likely to profess as Muslims. Some might well not be professed Muslims. Similarly it would be irrational and discriminatory to restrict the application of the measures to men although the bulk of those suspected are likely to be male. Some might well be women. Similarly, in my opinion, it is irrational

discrimination is important in light of Ronald Dworkin's argument that even if there is no right to the most accurate procedure possible, that there is no right to impose the risk of inaccuracies disproportionately on discrete groups.[150]

The United Kingdom government has accepted this decision and allowed the law authorizing indeterminate detention of non-citizen terrorist suspects who cannot be deported to lapse even though the House of Lords does not have the power to strike the law down. In its place, Parliament enacted the controversial *Prevention of Terrorism Act, 2005* that allows control orders, including the power of house arrest, to be imposed on terrorist suspects.[151] Although such powers could be subject to abuse especially if imposed only on the basis of suspicions and without judicial involvement, they are more proportionate in not imposing indefinite detention and in having both citizens and non-citizens equally exposed to the risk of error. The new law will also expire in one year unless it is renewed. Experience may prove that those previously detained under immigration laws can live safely in the community.

Since September 11, many Western states have proceeded against suspected international terrorists under immigration laws which allow preventive and indefinite detention and closed hearings based on evidence not disclosed to the non-citizen rather than attempt to prove guilt beyond a reasonable doubt in a criminal trial. The use of immigration law raises questions to be addressed in the last part of this paper about the adequacy of restricting concerns about miscarriages of justice to the criminal context. In other words, it may be wrong to assume that the innocent are not being detained and punished in a post-September 11 world simply because there have been relatively few criminal prosecutions and no documented cases of wrongful convictions that repeat the experience in the Irish cases. Times change, and the innocent today may be more likely to be detained under immigration laws that provide far fewer restraints on the state and far fewer protections against the detention of the innocent than the criminal law. This does not, however, mean that there should not be concerns about injustice in immigration detention. Prison is prison and innocence is innocence even if the mechanism of imprisonment is immigration law.

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and discriminatory to restrict the application of the measures who have no right of residence in this country. Some suspected terrorists might well be home-grown." *Id.* at para 158.

150. DWORKIN, *supra* note 4.

151. *Prevention of Terrorism Act, 2005* c.2 (U.K.).

B. Material Witness Warrants

Less restrained alternatives to criminal prosecutions are not limited to immigration proceedings. In the United States, material witness warrants have been used as part of investigations into terrorism.[152] The Second Circuit has upheld the use of material witness warrants in a case where a person who was suspected of having knowledge of the September 11 plot was detained for months in relation to a grand jury investigation. The Court emphasized the state interest in the investigation and held that the lack of any time limit on detention under federal rules for detention of material witnesses did not render the procedure unconstitutional.[153] It stressed that those detained under material witness warrants would have access to bail hearings and indicated that a magistrate in the particular case had made a harmless error when he denied bail on grounds of concerns about future danger, as well as the ground of ensuring that the detainee would testify before the grand jury.[154]

From the government's perspective, one of the advantages of material witness warrants is the secrecy of grand jury proceedings. Another advantage is the ability to interrogate and obtain information from the detainee without laying a criminal charge but with the real possibility of charging the detainee with a perjury offence if they are not truthful with the grand jury. Michael Chertoff, then assistant attorney general in charge of the Justice Department's criminal division, defended material witness warrants as "an important investigative tool in the war on terrorism. . . . Bear in mind that you get not only testimony—you get fingerprints, you get hair samples—so there's all kinds of evidence you can get from a witness." He also defended the procedure on the basis of the role of the judge in the proceeding. "This is always supervised by a federal judge. . . . It doesn't happen in the back room of a stationhouse somewhere. . . . That's the bedrock point: The judge always supervises. If the judge has a problem, then he can order the removal of the witness."[155] At the same time, however, the use of material witness warrants can amount to a form of indefinite investigative detention. As Philip Heymann has concluded, material witness warrants allow for the detention of an "open-ended category of prospective witnesses before an investigating grand jury . . . an institution largely controlled by

152. *See* United States v. McVeigh, 940 F. Supp. 1541, 1562 (D. Colo. 1996) (providing pre-9/11 example).

153. United States v. Awadallah, 349 F.3d 42 at 59, 62 (2d Cir. 2003).

154. *Id.* at n.15.

155. Steve Fainaru and Margot Williams, *Material Witness Law Has Many In Limbo: Nearly Half Held in War On Terror Haven't Testified*, WASH. POST, Nov 24, 2002, at A1.

prosecutors that has wide scope to investigate without serious judicial review." He sees the new use of material witness warrants as part of a significant change in the relations of individual and the state—a change that "has been tolerable to Americans only because it is implicitly and seemingly reliably limited to discrete groups to which most do not belong."[156]

Perhaps the most well known case of detention of a terrorist suspect under a material witness warrant is that of Brandon Mayfield, an Oregon lawyer and convert to Islam, who was detained under a material witness warrant from May 6, 2004 to May 20, 2004 before the FBI admitted that its computer and its experts were mistaken when they concluded that Mayfield's fingerprints matched those found on explosives used in terrorist bombings in Madrid.[157] It is not surprising that the best known case involves a white lawyer and American citizen and not the many non-citizens and others of Arab descent that have been detained under material witness warrants.[158] The Mayfield case also underlines the risk of error in terrorism case and the extensive publicity and stigma that may accompany the use of even a material witness warrant.

C. Military Detention and Determination of Enemy Combatant Status

Another less restrained alternative to the criminal law has been the use of military force to apprehend and detain suspected terrorists as prisoners of war or enemy combatants. Earlier on in the war against Afghanistan, President Bush made a decision that detainees were not entitled to the benefits of the Geneva Convention. Unlike in the first Gulf War, people were detained as enemy combatants without the benefit of hearings to determine the accuracy of the government's claims that they were not prisoners of war. The initial lack of hearings into the status of those captured on the battlefield in Afghanistan raised serious risks that people who were not even combatants would be detained. It should be recalled that people are captured and interrogated under stressful circumstances of war and perhaps without the aid of accurate translation. In the first Gulf War, over 1200 hearings were held to determine the status of captives and in about two thirds of these cases, the detainees were found to be misplaced civilians or refugees.[159]

The release of a significant number of detainees captured in Afghanistan and elsewhere from Guantanamo underlines the risk of error

156. HEYMANN, *supra* note 5, at 92-93.
157. Parts of the case file are posted *at* www.orduscourts.gov/Mayfield/6May04.pdf.
158. Only seven of the forty-four identified in one study as subject to a material witness warrant were American citizens. COLE, *supra* note 6, at 39.
159. *Id.* at 42, 245 n.69.

in detaining a person as an enemy combatant. One of the persons released from Guantanamo in October 2002 said he was 105 years old and was described in a report as "babbling at times like a child." Another released detainee described as a "wizened old man with a cane" said he was ninety-years-old and had been detained in a raid on his village in Afghanistan. On the basis of these and other cases, Michael Ratner has argued:

> Some might claim that these releases show that the Administration is willing to release people from Guantanamo. However, the example cuts the other way. Here were men who obviously should never have been taken to Guantanamo and yet they were imprisoned. Here were men who, had there been a hearing before some form of a tribunal, would have been free long ago. . . . These stories of the innocent, of some detainees not involved in any fighting, of detainees that were no more than lowly foot soldiers, demonstrate the importance of a legal process for determining the status of those imprisoned at Guantanamo.[160]

Ratner goes on to note that proposals for harsh treatment of detainees such as the use of torture should be viewed in part through the lens of the fallibility of the legal process. Invoking the extensive American experience of death row exonerations,[161] he argues that "even with full court processes necessary to prosecute an alleged murderer and the fact that proof beyond a reasonable doubt is necessary for convictions, convictions of the innocent are all too common."[162]

The lack of process concerning military detentions can produce false positives that result in the detention of the innocent, but also false negatives that can result in the release of the guilty. The Department of Defence for example claims that twelve people released from Guantanamo Bay have returned to terrorist or battlefield activities. Although this is cited by Pentagon officials as evidence of the need for caution with respect to further releases, it could also be interpreted as affirming the value of full adversarial procedure in identifying both the innocent and the guilty. One of the reasons why wrongful convictions have commanded bi-partisan concern in the criminal justice field is because each wrongful conviction allows the guilty to go free as well as

160. Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and the Rule of Law*, 24 CARDOZO L. REV. 1513, 1520 (2003).

161. *See, e.g.*, Illinois *Report of the Governor's Commission on Capital Punishment* (2002); James Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000); Michael Radelet et al., *Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996).

162. Ratner, *supra* note 160, at 1521.

the innocent to be punished.[163]

1. Rasul v. Bush and Hamdi v. Rumsfeld

The legal landscape affecting the Guantanamo detentions changed significantly in the summer of 2004. In *Rasul v. Bush*,[164] the United States Supreme Court decided 6:3 that the *habeas corpus* jurisdiction of the Federal Courts extended to those detained at Guantanamo Bay, Cuba. In *Hamdi v. Rumsfeld*,[165] the United States Supreme Court considered a habeas corpus application from Yaser Hamdi who was captured in Afghanistan. He was originally detained at Guantanamo Bay, Cuba, but transferred to a naval brig in Norfolk, Virginia when officials learned of his American citizenship. He was alleged by the government to have been fighting with the Taliban since his arrival in Afghanistan in July or August, 2001 while his father claimed he was in Afghanistan to do relief work. The Court's decision was a divided one, but for our purposes, the focus will be on Justice O'Connor's plurality judgment that was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. She held that the detention of the enemy combatants was authorized by Congress's authorization of the use of military force in the war against terrorism.[166] Justice O'Connor also held that due process required that Hamdi "be given a meaningful opportunity to contest the factual basis" of his detention "before a neutral decision-maker." In determining the precise requirements of due process, Justice O'Connor rejected the District Court's conclusion that reliance on hearsay contained in an affidavit called the Mobbs declaration was not sufficient and that Hamdi should have access to copies of his statements in custody and the names of his interrogators. Indeed, Justice O'Connor appeared to criticize the District Court for "agreeing with Hamdi" and concluding "that the appropriate process would approach the process that accompanies a criminal trial."[167] In this way, the O'Connor opinion makes it crystal clear that enemy combatants, including those who are American citizens, are not entitled to the same level of procedural protections as the criminal accused.

On the issue of what process was due, Justice O'Connor articulated the following key propositions:

> We . . . hold that a citizen-detainee seeking to challenge his

163. There are however some important differences as the subsequent return of detainees released from Guantanamo to hostilities involves an error in predicting future activity more than an error in determining historical guilt.

164. Rasul v. Bush, 124 S. Ct. 2686 (2004).

165. 124 S. Ct. 2633 (2004).

166. Authorization For Use Of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

167. *Hamdi*,124 S. Ct. at 2649.

> classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker. . . . Hearsay . . . may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. . . . There remains the possibility that the standards we have articulated could be met by an appropriately authorized and constituted military tribunal.[168]

This conception of due process and the application of the balancing test contemplated in *Mathews v. Eldridge*[169] was only agreed to by four of the nine justices. Justice Souter, with the concurrence of Justice Ginsberg, would not have reached this point because he found that Congress had not authorized the detention and the detention was therefore forbidden by existing law providing that American citizens can only be detained by an Act of Congress.[170] In order to give practical effect to the decision, Justice Souter joined with the plurality to affirm that Hamdi should have an opportunity to offer evidence that he was not an enemy combatant. However, Justice Souter specifically cautioned that "I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas."[171]

Justice Scalia, with the concurrence of Justice Stevens, was more dismissive of the plurality's approach, calling it "an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a "neutral" military officer rather than judge and jury."[172] Justice Thomas dissented on the basis that the plurality had not paid adequate attention to the Government's compelling interests in times of war.

2. Combatant Status Review Tribunals

A little over a week after the decisions in *Rasul* and *Hamdi*, an Order Establishing Combatant Status Review Tribunals was issued by

168. *Id.* at 2648-9, 2651.
169. 424 U.S. 319 (1976).
170. 18 USC § 4001(a) (1971) (Non-Detention Act).
171. *Hamdi*, 124 S. Ct. at 2660 (Souter, J., concurring in part, dissenting in part, and concurring in judgment).
172. *Id.* at 2673-84.

Deputy Secretary of Defense Paul Wolfowitz.[173] As will be seen, this

173. The full text of the July 7, 2004 order at www.defenselink.mil/news/Jul2004/d20040707/review/pdf provides:

This Order applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba ("detainees").

a. Enemy Combatant. For purposes of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

b. Notice. Within ten days after the date of this Order, all detainees shall be notified of the opportunity to contest designation as an enemy combatant in the proceeding described herein, of the opportunity to consult with and be assisted by a personal representative as described in paragraph (c), and of the right to seek a writ of habeas corpus in the courts of the United States.

c. Personal Representative. Each detainee shall be assigned a military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described herein. The personal representative shall be afforded the opportunity to review any reasonably available information in the possession of the Department of Defense that may be relevant to a determination of the detainee's designation as an enemy combatant, including any records, determinations, or reports generated in connection with earlier determinations or reviews, and to consult with the detainee concerning that designation and any challenge thereto. The personal representative may share any information with the detainee, except for classified information, and may participate in the Tribunal proceedings as provided in paragraph (g)(4).

d. Tribunals. Within 30 days after the detainee's personal representative has been afforded the opportunity to review the reasonably available information in the possession of the Department of Defense and had an opportunity to consult with the detainee, a Tribunal shall be convened to review the detainee's status as an enemy combatant.

e. Composition of Tribunal. A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee. One of the members shall be a judge advocate. The senior member (in the grade of 0-5 and above) shall serve as President of the Tribunal. Another non-voting officer, preferably a judge advocate, shall serve as the Recorder and shall not be a member of the Tribunal.

f. Convening Authority. The Convening Authority shall be designated by the Secretary of the Navy. The Convening Authority shall appoint each Tribunal and its members, and a personal representative for each detainee. The Secretary of the Navy, with the concurrence of the General Counsel of the Department of Defense, may issue instructions to implement this Order.

g. Procedures.

(1) The Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainee's designation as an enemy combatant.

(2) Members of the Tribunal and the Recorder shall be sworn. The Recorder shall be sworn first by the President of the Tribunal. The

Recorder will then administer an oath, to faithfully and impartially perform their duties, to all members of the Tribunal to include the President.

(3) The record in each case shall consist of all the documentary evidence presented to the Tribunal, the Recorder's summary of all witness testimony, a written report of the Tribunal's decision, and a recording of the proceedings (except proceedings involving deliberation and voting by the members), which shall be preserved.

(4) The detainee shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members or testimony and other matters that would compromise national security if held in the presence of the detainee. The detainee's personal representative shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members of the Tribunal.

(5) The detainee shall be provided with an interpreter, if necessary.

(6) The detainee shall be advised at the beginning of the hearing of the nature of the proceedings and of the procedures accorded him in connection with the hearing.

(7) The Tribunal, through its Recorder, shall have access to and consider any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any reasonably available records, determinations, or reports generated in connection therewith.

(8) The detainee shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. The Tribunal shall determine the reasonable availability of witnesses. If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In the case of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence.

(9) The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify or change the classification of any national security information it reviews.

(10) The detainee shall have a right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence.

(11) The detainee may not be compelled to testify before the Tribunal.

(12) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government's evidence.

(13) The President of the Tribunal shall, without regard to any other provision of this Order, have authority and the duty to ensure that all proceedings of or in relation to the Tribunal under this Order shall comply with Executive Order 12958 regarding national security information.

h. The Record. The Recorder shall, to the maximum extent practicable,

Order was inspired by Justice O'Connor's plurality decision.[174] As a technical legal matter, this approach also seems to rely on Justice Thomas' more extreme position on the limits of due process because, as discussed above, both Justices Souter and Scalia, speaking in total for four judges, expressed grave reservations about key aspects of Justice O'Connor's vision of diluted due process. The July 7, 2004 Order does not apply to Hamdi, who has subsequently been released in Saudi Arabia, because it only applies to foreign nationals being held as enemy combatants at Guantanamo Bay. Nevertheless, it is clearly inspired by Justice O'Connor's plurality in *Hamdi*.[175]

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prepare the record of the Tribunal within three working days of the announcement of the Tribunal's decision. The record shall include those items described in paragraph (g)(3) above. The record will then be forwarded to the Staff Judge Advocate for the Convening Authority, who shall review the record for legal sufficiency and make a recommendation to the Convening Authority. The Convening Authority shall review the Tribunal's decision and, in accordance with this Order and any implementing instructions issued by the Secretary of the Navy, may return the record to the Tribunal for further proceedings or approve the decision and take appropriate action.

i. Non-Enemy Combatant Determination. If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States.

j. This Order is intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

k. Nothing in this Order shall be construed to limit, impair, or otherwise affect the constitutional authority of the President as Commander in Chief or any authority granted by statute to the President or the Secretary of Defense.

This Order is effective immediately.

174. A senior defense official at a July 7, 2004 background briefing explained: "In response to last week's decisions by the Supreme Court, the Deputy Secretary of Defense today issued an order creating procedures establishing a Combatant Status Review Tribunal with notice of the basis for their detention and an opportunity for them to contest their detention as enemy combatants. . . . The tribunal will decide whether there is—will decide whether a preponderance of the evidence supports the detention of the individual as an enemy combatant. And as provided for—as suggested by Justice O'Connor's opinion in the *Hamdi* case, there will be a rebuttable presumption in favor of the government's evidence, but the detainee will be able to have an opportunity to rebut that presumption." News Transcript at www.defencelink.mil/transcripts/2004/tr20040797-0981.html.

175. The influence of the O'Connor opinion about what process was due may suggest that the decision was not a minimalist decision that decided only what was necessary to decide the case. For a defense of constitutional minimalism in the national security context *see* Case Sunstein, Minimalism at War, SUPREME CT. L. REV. (forthcoming).

The July 7, 2004 Order[176] provides that detainees shall be provided with a "personal representative" to assist them in the combatant status review proceedings and that the representative, a military officer with an appropriate security clearance, shall be afforded access to "any reasonably available information" in the possession of the Department of Defense. The personal representative is not a lawyer and is instructed to inform the detainee that "none of the information you provide me shall be held in confidence and I may be obliged to divulge it at the hearing."[177]

The tribunals are to be composed of "three neutral commissioned officers of the U.S. Armed Forces" who have no previous involvement with the detainee and who decide the case on the basis of majority vote. The detainee is to be provided "in advance of the proceedings with notice of the unclassified factual basis for the detainee's designation as an enemy combatant." With the assistance of an interpreter if necessary, the detainee can attend the hearings, except for the hearing of "other matters that would compromise national security if held in the presence of the detainee" and the tribunal's deliberations and voting. The detainee can testify but cannot be compelled to do so. He may call witnesses "if

176. The Combatant Status Review Order is distinct from the military order that authorizes the detention and trial of certain non-citizens in the war against terrorism. *See* Military Order of Nov 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918; 66 Fed Reg. 57, 833 (Nov. 13, 2001). For an analysis of how this order deviates from standard court martials because of the absence of pretrial hearings, by allowing trial panels as opposed to judges decide questions of law, by allowing sentencing on a two-third votes, by denying access to any judicial review, and by departing from criminal rules of evidence to a greater extent than court martials, *see* Note, David Glazier, *"Kangaroo Court or Competent Tribunal: Judging the 21st Century Military Commission,"* 89 VA. L. REV. 1954, at 2016-17. For a decision holding that the Military Commission Order is also inconsistent with the standards of justice required by court martials, *see Hamdan v. Rumsfeld* 8 Nov. 2004 (D.C. Dist Ct.). Judge Robertson found in that case that the unavailability of judicial review of the military commissions by five civilian judges of the Court of Appeals for the Armed Forces with possible further review by the Supreme Court of the United States was not fatal. He did, however, suggest that the possible exclusion of the detainee from the hearing for reasons of national security violated the Confrontation Clause and the right to be present at trial. The judge stated that counsel for the detainee "made the unrefuted assertion at oral argument that Hamdan has already been excluded from the *voir dire* process that 'the government's already indicated that for two days of his trial, he won't be there. And they'll put on the evidence at that point. . . .' Counsel's appropriate concern is not only for the established right of his client to be present at his trial, but also for the adequacy of the defense he can provide to his client. The relationship between the right to be present and the adequacy of defence is recognized by military courts, which have interpreted Article 39 of the UCMK in light of the Confrontation Clause jurisprudence." At p.39 slip judgment. As will be seen, the military commission process is in many respects more respectful of the rights of the detainee than the combatant status review process that is discussed in this paper.

177. Secretary of the Navy, July 29, 2004 Memorandum Enclosure 3 "Personal Representative Qualifications, Roles and Responsibilities."

reasonably available" and "in the case of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence. The Tribunal is not bound by the rules of evidence such as would apply in a court of law. . . . At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances."

Finally and perhaps most importantly: "Preponderance of evidence shall be the standard used in reaching [the determination of whether the detainee is properly detained as an enemy combatant], but there shall be a rebuttable presumption in favor of the Government's evidence." An enemy combatant is defined in the July 7 Order to be "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[178]

3. Combatant Status Review Hearings and the Risk of Error and Miscarriages of Justice

Many of the rules established by the July 7 Order run significant risks of erroneous determinations of whether the detainee in fact satisfies the above definition of an enemy combatant. The risk of error produced by these rules is relevant in determining whether they satisfy standards of due process under *Mathews v. Eldridge*.[179] In what follows, the main organizational and evidential shortcomings of the combatant status review tribunal rules will be examined in relation to the risk of wrongfully classifying people as enemy combatants.

a. Standard and Burden of Proof

One of the most important structural features of any legal proceeding is the standard and burden of proof. Such matters are a concrete manifestation of society's willingness to run a risk of error and whether the risk of error will be born by society at large or by the affected individual. Under the combatant status review tribunal rules, a civil standard of proof is required as opposed to proof beyond a reasonable doubt. This creates a danger that, in cases of uncertainty about whether the detainee is an enemy combatant, the doubts will be settled in the government's favor. This is particularly true when the civil standard of proof is coupled with a presumption in favor of the

178. Order Establishing Combatant Status Review Tribunal, 7 July 2004 in Memorandum for the Secretary of the Navy from Deputy Secretary of Defense.

179. 424 U.S. 319, 335 (1976).

Government's evidence. This effectively places the accused in a position of having to establish that he is not an enemy combatant. The presumption may be said to reflect the fact that the detentions of enemy combatants have already been subject to internal reviews by the Department of Defense. Nevertheless, the concept of tunnel vision is very helpful in pointing out the potential weaknesses in such a review process. In the absence of adversarial challenge, even the criminal justice system may disregard evidence of innocence and focus on affirming a case that has already been made. A legal presumption in favor of the government's evidence can be seen as a legal affirmation of tunnel vision, whereas the reasonable doubt standard used in criminal trials invites decision-makers to consider alternatives to the government's theory of the case.

b. Disclosure and Tunnel Vision

As examined in the first part of this paper, lack of disclosure is a major cause of miscarriages of justice. Under the July 7 Order, personal representatives of the detainees are only entitled to disclosure of "any reasonably available information in the possession of the Department of Defense that may be relevant to a determination of the detainee's designation as an enemy combatant." The requirement in the order that only reasonable available evidence be disclosed runs a risk that exculpatory evidence might not be disclosed.

The reference in the order to disclosure of "records, determinations or reports generated in connection with earlier determinations or reviews" runs another related and perhaps even greater risk that has been highlighted in recent examinations of wrongful convictions; namely the risk that Department of Defense, like police forces in many criminal cases of wrongful convictions, could develop "tunnel vision" in which only inculpatory evidence is gathered and ambiguous or exculpatory evidence is either ignored or interpreted in a manner that supports a preconception that the detainee is an enemy combatant. In a recent case in which two terrorism charges were dismissed against Arab immigrants in Detroit, the judge commented that prosecutors who had earlier worked on the case had developed a theory that the men were an al Qaeda sleeper cell "and then simply ignored or avoided any evidence or information which contradicted or undermined the view."[180] If such tunnel vision can occur in a criminal prosecution, it can certainly occur with respect to a less adversarial and less public process of military detention. The danger of tunnel vision is aggravated by prior statements and determinations in

180. Danny Hakim, *Judge Reverses Convictions in Detroit Terrorism Case* N.Y. TIMES, 3 Sept. 2004.

the chain of command from the President down that concluded that the Guantanamo detainees were enemy combatants and dangerous people.

c. Adversarial Challenge and Personal Representatives

One possible check on tunnel vision is a vigorous, well prepared defense. In the case of the Combatant Status Review Tribunals, however, the detainee is not represented by a lawyer, but rather by a "personal representative" who is a military officer with a security clearance. The fact that the representative has a security clearance may produce some benefits for the detainee because the military order contemplates that the personal representative may have access to classified information that is disclosed by the Department of Defense or discussed by the Tribunal when the detainee is not present.[181] In this way, the order contemplates an arrangement that is somewhat similar to that used in a Special Immigration Appeals Commission (SIAC) in the United Kingdom in which a security cleared Special Advocate has access to classified information that cannot be disclosed to the detainee and his lawyers. Neither the Special Advocate in the United Kingdom or the personal representative in Guantanamo can share classified information with the detainee.

In some respects, allowing a security-cleared advocate or personal representative to challenge the government's case can favorably be contrasted with the security certificate process under Canadian immigration law that was examined above. Under the Canadian procedure, confidential and classified information is considered in a closed court where the detainee and his lawyer are not present and no one acts as an adversary to the government's position. The Canadian courts have, however, expressed great confidence in the fairness of the state in presenting its evidence and the ability of the judge to probe and test the state's case.[182] Nevertheless, judges in the Anglo-American system are not trained to be inquisitorial investigators and there is a

181. The order provides that: "The detainee shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members or testimony and other matters that would compromise national security if held in the presence of the detainee. The detainee's personal representative shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members of the Tribunal."

182. Decary and Letourneau J.A. stress that "the designated judge plays a pro-active role in the interest of ensuring fairness . . . while there is no denying that it is harder for the appellant to test the validity and credibility of information that is not disclosed to him, the fact is that he is assisted in this task by the designated judge who has the heavy responsibility of maintaining a balance between the parties and accordingly respect for the principles of fundamental justice." *Charkaoui v. Canada, supra* note 134, paras. 80, 82.

benefit to exposing the government's case to adversarial challenge. In this respect, the quality of the adversary is important. Under the British system, Special Advocates are senior and well respected barristers who are independent from the government and can and have resigned when they conclude that they cannot do their jobs properly. In contrast, under the July 7 Order, personal representatives are military officers subject to the chain of command and, in many cases, without legal training.

The personal representative under the Guantanamo Combatant Status Review Tribunal rules is not a lawyer and his or her communications with the detainee are not covered by attorney-client privilege. This is not spelled out in the order, but rather in a subsequent explanatory memo. It advises the personal representative to tell the detainee the following: "I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obliged to divulge it at the hearing."[183] One of the main rationales for attorney-client privilege is to allow the client to make full disclosure to his or her lawyer in order to assist with the defense. A detainee given the above warning may well be reticent to tell his full story to the personal representative. This is a crucial shortcoming in terrorism cases in which a detainee will often be asked to explain why they associated with certain persons or why informants who may or may not be prior acquaintances have told the government that the detainee is a terrorist.

A shortcoming of the personal representative procedure, as well as the British Special Advocate procedure, is that the detainee is not in a position to fully instruct his or her representative who is in a position to challenge the government's case against the detainee. This is a significant in the terrorism context because the detainee may have information about his associates and his home country that a Special Advocate may not have.

In a recent decision holding that the Combatant Status Review Tribunals did not provide due process, Judge Green concluded that a personal representative under the rules:

> [I]s neither a lawyer nor an advocate and thus cannot be considered an effective surrogate to compensate for a detainee's inability to personally review and contest classified evidence against him. . . . Additionally, there is no confidential relationship between the detainee and the Personal Representative, and the Personal Representative is obligated to disclose to the tribunal any relevant

183. Secretary of the Navy Memo Implementation of Combatant Status Review Tribunal, July 29, 2004.

> inculpatory information he obtains from the detainee.... Consequently, there is inherent risk and little corresponding benefit should the detainee decide to use the services of the Personal Representative.[184]

Judge Green contrasts the use of personal representatives under the combatant status review tribunal rules with the ability of lawyers in both *habeas* cases and under military commission rules to obtain security clearances and access to classified information, even while they are prohibited from disclosing such evidence to their clients. She cited one combatant status review case in which a personal representative made no request for further inquiry regarding classified but presumably questionable evidence and concluded that in this case "clearly, the presence of counsel for the detainee, even one who could not disclose classified evidence to his client, would have ensured a fairer process in this matter by highlighting weaknesses in evidence considered by the tribunal and helping to ensure that erroneous decisions were not made regarding the detainee's 'enemy combatant' status."[185] Defence lawyers with access to classified information would undoubtedly be in a better position to challenge the government's case that a detainee is an enemy combatant than personal representatives who are military officers. Nevertheless, the quality of adversarial challenge of the government's case will be degraded to the extent that either defence lawyers or special advocates are not allowed to disclose classified information to the detainee in order to hear the detainee's side of the story.

d. Trial by Military Officers

The tribunals determine whether the detainee is an enemy combatant on the basis of the majority of three US military officers who have not previously been involved in the detention, interrogation or previous determination of the detainee's status. Although the no previous involvement with the detainee rule is an attempt to ensure some degree of impartiality, military officers appointed by the Secretary of the Navy on an *ad hoc* basis do not enjoy judicial independence. One of the lessons of the Irish cases and other cases of wrongful convictions is that even independent judges may succumb to defending a justice system of which they are a part of when confronted with a miscarriage of justice that may have seen the innocent imprisoned for years. If judges sometimes behave in this manner, it is possible that military officers may even more strongly believe that they are part of a system that is placed on

184. *In re Guantanamo Detainee Cases*, *supra* note 15 Jan. 31, 2005 at 54 of unclassified slip judgment (U.S.D.C. for the District of Columbia).

185. *Id.* at 54.

trial by claims of innocence.

Military officers presiding at the tribunals may be risk adverse and err on the side of continued detention in doubtful cases. The Convening Authority of the tribunals, Secretary of the Navy England, has argued that twelve of 200 people released from Guantanamo "have indeed returned to terrorism" and explained that this makes the Combatant Status Review Tribunals "a very difficult process . . . we don't want to let people out who will come back, fight and kill Americans or anyone else in the world; at the same time, we are trying to strike the right balance in terms of their rights and their freedoms. So it is not without risk."[186] The record of low "acquittal" rates at the enemy combatant hearings suggests that it may be the detainees who are bearing the risk of continued detention in cases of ambiguity. Moreover, it is an error to blame the twelve alleged false negatives on the combatant status review process. Indeed, it might be possible that an absence of full process in those cases may have played a role in the determination to release. In other words, inadequate process can contribute to false negatives as well as false positives. Similar concerns in the criminal justice field have led some to stress that miscarriages of justice not only punish the innocent, but allow the guilty to go free.

There are structural features of the combatant status review tribunal that may also produce a risk of risk aversion in deciding whether a person is an enemy combatant. The majority rule decision allows a person to be confirmed as an enemy combatant even though one of the three officers determines otherwise. Although the jury system is not free from majoritarian bias, it at least has the potential to empower dissenters.

Unlike a court, the combatant status review tribunals do not appear to have the ability to simply release their own decision. Rather their decisions are reviewed by the Secretary of the Navy who is the convening authority who then "may return the record to the Tribunal for further proceedings or approve the decision and take appropriate action." At the same time, it could be argued that in the case of the Tribunal finding that the detainee is not in fact an enemy combatant that the order provides for direct transmittal of the decision to the Secretary of Defense who is then obliged to advise the Secretary of State "in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States."[187]

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186. Special Defense Department Briefing on Status of Military Tribunals, Dec, 20, 2004 *available at* www.defenselink.mil/srch/docView?c=A3B245203F9EBEC5FC8C8C306E4AAF152F.

187. July 7 Order, *supra* note 173, at i.

e. The Use of Interpreters

The July 7 Order provides that the detainee "shall be provided with an interpreter, if necessary." An interpreter is obviously necessary to ensure that the detainee who cannot understand English can participate in hearings and the Guantanamo hearings provide a challenge given the wide range of languages spoken by the detainees. What is not known is how many hearings were conducted without a translator because the detainee was judged to have sufficient facility in English. The Canadian experience of miscarriages of justice suggests that those who understand English as a second, third or fourth language may still be at a disadvantage when they testify in that language. In one Canadian wrongful conviction, an Aboriginal accused who could understand English testified in English. The inquiry examining his wrongful conviction found that the person's hesitant manner of speech may have contributed to a jury decision to reject the credibility of his evidence. At a subsequent public inquiry, the now exonerated person was allowed to testify in his native language and the judges commented that this favorably affected their perception of his testimony.[188]

f. Trial in Absentia

Another issue for the tribunals is trial *in absentia*. The Convening Authority indicated that 292 detainees have participated in 507 combatant status reviews hearings conducted as of December 20, 2004.[189] This suggests that a large number of the hearings have been held without the detainee being willing or able to participate even though initial reports by the Convening Authority suggested that 90-95% of the detainees originally expressed interest in the hearings.[190] This raises the possibility that hundreds of detainees may have voted with their feet and refused to participate in hearings that they believed could not assist them. One factor in such a decision could have been information conveyed to the detainees that what they told their personal representative was not confidential. Another factor could be knowledge that the detainee will be excluded from the hearing when classified information is considered and that the personal representatives will be unable to inform the detainee about the classified information. It may be that many detainees in

188. Nova Scotia *Royal Commission on the Donald Marshall Jr. Prosecution* (1989) at 171-173.

189. Special Defence Department Briefing on Status of Military Tribunals, Dec. 20, 2004 *available at* www.defenselink.mil/srch/docView?c=A3B245203F9EBEC5FC8C8C306E4AAF152F.

190. Sec. Nav. Briefs on Review Tribunals 16 July 2004 www.defenscelink.mil/transcripts/2004/tr20040716-1006.html.

Guantanamo are making rational decisions not to participate in the hearings. In any event, the fact that over 40% of the combatant status review tribunal hearings at Guantanamo have been trials in absentia with only the detainee's personal representative being present to challenge the government's case may have increased the risk of erroneous determinations.

g. The Pace of the Hearings

Although the need for speed in conducting the combatant status review hearings is understandable given that detainees have already in many cases been detained for years, the speed in which the combatant status review hearings were conducted is also problematic. One factor that may contribute to wrongful convictions is if the defense does not have adequate time to prepare. Even more disturbing is the schedule for the hearings which were that each panel of three officers would conduct four hearings a day, six days a week.[191] The speed and summary nature of the hearings is revealed by the fact that 550 tribunals were conducted at Guantanamo between July 30, 2004 and January 19, 2005.[192] Routinized assembly-line justice also increases the risk of erroneous determinations.

h. Reduced Rights for Detainees to Call Evidence

The detainee is only allowed to call and question witnesses that are "reasonably available." Witnesses in the U.S. Armed Forces are deemed not to be reasonably available if their commanders determine that "their presence at a hearing would affect combat or support operations." In one report by the American Forces Press Service, a detainee accused of serving with the Taliban requested that three witnesses be called to testify that he had forcibly been taken from his family and forced to join the Taliban. This request was denied by the President of the Board on the basis that the issue of consent and intent was not relevant given the definition of an enemy combatant and the limited scope of the hearings.[193] The premature removal of the alleged combatants from the battlefield and the isolated location of Guantanamo Bay suggest that the right of the detainees in the July 7 order to call witnesses in their defense

191. Secretary of the Navy England Briefing on Combatant Status Review Tribunal 9 July 2004 at www.defenscelink.mil/transcripts/2004/tr200040709-0986.html.

192. "Combatant Status Review Tribunal Update" 19 Jan 2005 at www.defenselink.mil/srch/docView?c=A3B245203F9EREC5FC8C306E4AAF152F.

193. Kathleen Rhem, "Reporters offered Look Inside Combatant Status Review Tribunals," Aug. 29, 2004, American Forces Information Service News Articles.

is illusory.[194]

i. No Disclosure of National Security Information to Detainees

Another restriction on the combatant status review tribunal is that it does not have the authority to declassify national security information or allow the detainee to have access to such information. Because both the officers and the personal representatives have security clearances, they can see the information, but this information must be introduced and reviewed without the detainee being present or being able to make submissions about its accuracy. The danger of nondisclosure to the detainee is particularly acute in terrorism as opposed to other cases because much evidence about terrorism will come from intelligence sources of unknown reliability. Indeed as discussed in the first part of this paper, terrorism cases often blur the distinction between circumstantial evidence and intelligence.

In her decision holding that the combatant status review tribunal rules violated due process, Judge Green stressed the "inherent lack of fairness of the CSRT's consideration of classified information not disclosed to the detainees." She cited a tribunal transcript from thee case of Mustafa Ait Idr who, after being informed that the government alleged he had associated with a known Al Qaeda operative while living in Bosnia, tried to ask the following pertinent questions.

> Detainee: Give me his name.
>
> Tribunal President: I do not know.
>
> Detainee: How can I respond to this?
>
> Tribunal President: Did you know of anybody that was a member of Al Qaeda?
>
> Detainee: No, no. . . . This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person

194. When asked about the ability of a detainee to call a witness in another country such as Pakistan, Secretary of the Navy England replied that in some cases "maybe you don't" allow witnesses to be called. "It may not be reasonably possible to do it. So you have to look at the preponderance of the evidence and decide, gee, if—let's just say he came and gave that testimony. How would that stack up against all the other data. You're not going to be able to find all the people that people may call out. . . .you're not going to be able to just bring in anybody from every—from anywhere. You're not going to be able to find everybody. But you do what's reasonably possible in each case." Secretary of the Navy England Briefing on Combatant Status Review Tribunal 9 July 2004 at www.defencelink.mil/transcripts/2004/tr200040709-0986.html.

> was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.
>
> Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.[195]

This exchange demonstrates how evidence of perhaps innocent associations are important components of many terrorism cases. As discussed in the first part of this paper, the Maguire Seven were wrongfully convicted of involvement with the IRA in large part because of their associations with members of the Guildford Four, also wrongfully convicted. The Maguire Seven knew who was falsely implicating them, but under the combatant status review tribunal rules, Mustafa Ait Idr does not even know the name of the terrorist he is alleged to have associated with in Bosnia. Decisions to classify evidence linking detainees to terrorism deprive them of the opportunity to challenge the credibility and significance of the evidence, to place it into the political context of their home country and to challenge the government's case against them.

j. The Use of Hearsay Evidence

Another evidential limitation in the combatant status review tribunal is that the admissibility of hearsay evidence may prevent the detainee or his personal representative from cross-examining those who provide evidence to the tribunal. The order provides that the tribunal "shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it" and that this may include hearsay evidence. The tribunal is directed to take "into account the reliability of such evidence in the circumstances." Hearsay evidence may in particular be used in the case of witnesses who are determined not to be reasonably available. Indeed, the order contemplates that in such cases "written statements, preferably sworn, may be submitted and considered as evidence." Such evidence, however, would not be subject to cross-examination. The detainee or personal representative would be denied an opportunity to ask questions that could raise doubts or discredit the reliability of the evidence or inquire into other matters of the witnesses.

Written evidence from military personal not subject to cross-

195. *In re Guantanamo Detainee Cases, supra* note 15 Jan. 31, 2005 at 54 of unclassified slip judgment (U.S.D.C. for the District of Columbia).at 47-48.

examination may appear more reliable than it should and could perpetuate tunnel vision which ignores or discounts contradictions and ambiguities in the evidence. Another possible factor might be perjury that may be more easily disguised and accepted as truth when not subject to cross-examination. As discussed in the first part of this paper, police perjury was a factor in some of the Irish terrorism cases. The danger of "noble cause" corruption may be greater in both the terrorism and war contexts where discriminatory stereotypes about the enemy and notions of collective guilt may be strong. In addition, the war context may also produce a belief that the ends of the cause justify deceptive or less than truthful means.

k. Evidence Obtained Through Torture or Extreme Interrogation

The admissibility of hearsay evidence also raises the prospect that the Combatant Status Review Tribunals may have considered confessions or other incriminating statements from other detainees that may have been obtained under extreme circumstances. As discussed in the first part of this paper, extreme interrogation cases in the Irish terrorism cases in the United Kingdom in the 1970s produced both false confessions and false incriminating statements. Nothing on the face of the July 7 Order requires the tribunal to determine whether confessions from the detainee were obtained voluntarily or under duress. The controversy over interrogation tactics used and authorized at various times at Guantanamo is well known, but the focus for our purposes is on the risk that they produced unreliable evidence. One case has emerged in which three men falsely confessed to having been at a meeting between Mohamed Atta, the leader of the 9/11 hijackers, and bin Laden in Afghanistan after detention and interrogation at Guantanamo.[196] The Combatant Status Review Tribunals composed of American military officials who have been instructed by the July 7 Order to presume in favor of their government's information seem to be a most unlikely forum to challenge the reliability of confessions and incriminating statements that may have been obtained under situations of extreme duress and even torture.

In her decision holding that the combatant status review tribunal rules violated due process, Judge Green stressed that the connection between the requirement that incriminating statements be voluntary with the requirement that evidence be reliable. Without deciding the truth of the allegations on the preliminary motion to dismiss the detainees' habeas application, she cited allegations that some of the detainees had

196. Neil Katyal, *Executive and Judicial Overreaction in the Guantanamo Case,* 2003-05 CATO SUP. CT. REV. 49, 65.

been tortured abroad and at Guantanamo. She then concluded that "at a minimum . . . due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture."[197] Unlike many of the academic discussions of the use of torture in terrorism case, Judge Green's approach to the torture reflects an appropriate judicial concern about reliability and the possible detention and punishment of the innocent.

l. The "Acquittal" Rate

The above analysis is not meant to suggest that the Combatant Status Review Tribunals have been of no value at all. In early September 2004, the Pentagon announced that it would return one of the detainees at Guantanamo Bay to his home country after he was determined by a Combatant Status Tribunal not to be an enemy combatant as defined in the Order. Few details were provided about the proceeding, but it was announced that the detainee found not to be an enemy combatant did not call any witnesses.[198] It thus appears as if the proceeding simply had the effect of forcing the government to reevaluate its previous decision that the man who was captured in Afghanistan in May 2002 was an enemy combatant. As of January, 2005 there were only three findings that a detainee was not a enemy combatant out of then 330 finalized hearings. Since that time, the acquittal rate has increased and as of March, 2005 there were thirty-five more findings that a detainee was not an enemy combatant for a total of thirty-eight such findings of 558 finalized tribunals.[199] In the vast majority of cases, the tribunals have quickly confirmed the Department of Defense's previous findings that the detainee is an enemy combatant. In the cases that have led to adverse findings, the result and subsequent releases can perhaps be attributed more to a proper internal review by the military, as opposed to a full adversarial challenge to the military's case.[200]

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197. *In re Guantanamo Detainee Cases, supra* note 15 Jan. 31, 2005 at 54 of unclassified slip judgment (U.S.D.C. for the District of Columbia at 56, citing *Jackson v. Denno,* 378 U.S. 368, 386 (1964).

198. *Pentagon says Guantanamo Prisoner Improperly Held*, REUTERS, 8 Sept. 2004.

199. "Combatant Status Review Tribunal Summary" at www.defenselink.mil/news/Mar2005/d20050329csrt.pdf The reasons for the increase in findings that detainees were not enemy combatants after January of 2005 are speculative. One hypothesis would be that the more difficult cases were held till the end. Another hypothesis would be that the tribunals were more likely to hold that the detainees were not enemy combatant after the government began more actively to assert its rights to repatriate detainees back to their home countries. See Judge Limits the Transfer of 13 from Guantanamo New York Times March 30, 2005 A14. .

200. On the importance of adversarial challenges of the government's case in the terrorism context, *see* Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (2004).

4. Summary

The above analysis has suggested that important organizational choices have been made in the construction of the combatant status review tribunals at Guantanamo that assign a significant risk of erroneous determinations on to the detainee. The most dramatic examples are the assignment of a rebuttable presumption in favour of the government's evidence, the use of a civil standard of proof, the use of personal representatives as opposed to lawyers to help the detainee make his case, the failure to disclose classified information to detainees, the practical inability of detainees to call evidence in their own defence and reliance on information of questionable reliability in the government's case against the detainees.

Even on the limited information that is available to the public, it appears that some innocent people have been detained as suspected terrorists in recent years. The most well known example is probably the Oregon lawyer Brandon Mayfield who was detained for about two weeks under a material witness warrant before the FBI admitted that they had made a mistake in connecting him with the Madrid bombings. It is ironic that the most well-known case concerns a white American lawyer detained for a short period of time and not the largely nameless and faceless persons who are detained at Guantanamo Bay or detained under immigration laws for much longer periods. Nevertheless, there is good reason to believe that some innocent people have been and are likely still detained in the current war against terrorism. Because these people have not been subject to criminal trial, however, they may not be recognized as the wrongfully convicted. This is a triumph of form over substance and it diminishes the pride that democratic governments should take in only punishing the guilty and not harming the innocent. Democracies should only punish the guilty; it is terrorists who punish the innocent.

Judge Hand once complained that the criminal law was "haunted by the ghost of the innocent man convicted. It is an unreal dream."[201] It is now widely accepted that the innocent man convicted is a disturbingly real presence in the criminal justice system. There are good reasons to believe that some innocent people have also been caught in the war against terrorism. The remaining question is whether we are paying adequate attention to the innocent who may not be convicted because they may never even have an opportunity to have a criminal trial.

IV. What is a Miscarriage of Justice in a Post-September 11 World?

The above sections have advanced the argument that we should be

201. *United States v. Garsson*, 291 F. 646, 649 (1923).

concerned about the possibility of miscarriages of justice stemming from false allegations of terrorism. We have suggested that miscarriages of justice may be both more likely in terrorism cases and more corrosive to the integrity of justice, in part because the risks of wrongful accusations of terrorism are not distributed equally in society but fall disproportionately on various religious, racial and political minorities. The last section has also suggested that the dangers of imprisoning the factually innocent since the terrorist attacks of September 11 are by no means limited to the context of the criminal trial. Many suspected terrorists have been imprisoned under immigration laws, material witness warrants and military orders since September 11. Indeed, the numbers of those detained under non-criminal laws is probably considerably greater than the number of suspected terrorists who have been or are in the process of being prosecuted under criminal laws. We must not forget the lessons of the Irish cases about the risks of wrongful conviction in terrorism cases, but we must also be sensitive to how the problem of imprisoning the innocent may change as the nature of terrorism and of the war against terrorism changes.

This takes us back to the classificatory problem of what should be recognized as a miscarriage of justice. The language of miscarriage of justice is emotive and is generally considered to belong solely to the realm of criminal justice, involving the most serious of errors or a wrongful conviction. Claims of wrongful convictions are a potent political force; miscarriages of justices are public problems that can go to the top of the political agenda and command attention across the political spectrum.[202] The example of Illinois' experience with wrongful convictions and Governor Ryan's moratorium on capital punishment are but one example of the political power of claims of wrongful convictions. The wrongful convictions in the Irish cases in the United Kingdom led to public inquiries examining the criminal justice system and the eventual creation of a new body, the Criminal Cases Review Commission, to examine claims of miscarriages of justice.[203] In Canada, there have already been three major public inquiries into cases of wrongful convictions and two others are ongoing. Moreover, the Supreme Court of Canada has cited wrongful convictions in Canada, the United States and the United Kingdom as a major justification for a new constitutional rule that prohibits the extradition of fugitives without assurances that the death penalty will not be applied.[204] Concerns about

202. JOSEPH R. GUSFIELD, THE CULTURE OF PUBLIC PROBLEMS: DRINKING, DRIVING AND THE SYMBOLIC ORDER (1981).

203. A. James, *The Criminal Cases Review Commission: Economy, Effectiveness and Justice*, 2000 CRIM. L. REV. 140.

204. *United States of America v. Burns and Rafay*, 1 S.C.R. 283 (2001).

wrongful convictions and the punishment of the innocent have played a unique and powerful role that has led to some reconsideration of some of the excesses of the criminal justice system.

A crucial issue in the future of anti-terrorism efforts is whether they are conducted on a war model, a crime model or something in between. As the last section of this paper has suggested, governments have frequently abandoned the restraints of the criminal law model and have detained terrorist suspects under immigration and military law. Does this shift of focus mean that innocence and the widely held and powerful concern about the imprisonment of the innocent falls off the table? Can governments avoid justice concerns about innocence and the political problems that accompany the detention of the innocent simply by selecting procedures that do not result in formal determinations of guilt and innocence? As suggested above, we take a more substantive approach to this issue that focuses on the dangers of imprisoning the innocent regardless of whether detention is authorized by military or immigration law as opposed to criminal law. Governments should not be able to escape the type of public criticism and revulsion that accompanies wrongful convictions simply by opting out of the criminal law and using short cuts that avoid the difficulties of a criminal trial. The discussion in the preceding section suggests that there is an urgent need to reconsider the ambit of the public problem of miscarriages of justice in light of the way that the war against terrorism is being conducted.

The proper definition of miscarriages of justice is a thorny and difficult one. A definition that is too restrictive runs the risk of missing important facets of injustice. At the same time, too broad a definition of miscarriages devalues the currency of the term and the instinctive revulsion and sense of unquestionable injustice that accompanies the imprisonment of the innocent. Claims of miscarriage of justice have a bi-partisan political salience that should appeal to both those disposed to crime control and due process models of the criminal process, as well as to those who want justice for crime victims because all of these models of justice are set back when the innocent are punished.[205]

One end of the spectrum of miscarriages of justice is clearly occupied by cases of inconvertible factual innocence of the type provided by DNA exonerations after criminal convictions.[206] A slightly less restrictive definition is one that includes only cases "in which innocence

205. HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION, Part II, (Stanford U.P. 1968); K. Roach, *Four Models of the Criminal Process*, 89 J. CRIM L. & CRIMINOLOGY 671 (1999).

206. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001).

is established beyond a reasonable doubt."[207] Such approaches are, however, much too restrictive in the terrorism context. DNA will rarely be a factor in terrorism cases.[208] In addition, the role of overconfident predictions of scientific tracing of explosive residue in the Irish cases examined in the first part of this paper counsels against overconfident reliance on science either to convict or to exonerate the accused in terrorism cases.[209] Terrorism cases will often involve complex forms of accomplice and conspiracy liability as well as circumstantial evidence linking people with others and causes. Uncertainty about the facts may be a persistent feature in many terrorism cases.

At the other end of the spectrum is a definition of miscarriages of justice that encompasses all rights violations and injustices whether suffered by those accused of crimes or victims of crimes. Clive Walker has provided a broad taxonomy of different types of miscarriages of justice, summarized in the following passage:

> A miscarriage occurs as follows: whenever suspects or defendants or convicts are treated by the State in breach of their rights, whether because of, first, deficient processes or, second, the laws which are applied to them or, third, because there is no factual justification for the applied treatment or punishment; fourth, whenever suspects or defendants or convicts are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others; fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers, or sixth, by State law itself.[210]

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207. C. Ronald Huff, *Wrongful Conviction and Public Policy,* 40 CRIMINOLOGY 1, 1 (2002).

208. In a case holding that it will generally violate the Canadian Charter of Rights and Freedom to extradite a person without assurances that the death penalty will not be applied, the Supreme Court of Canada stressed that not all miscarriages of justice can be discovered through DNA evidence. It stated, "there is always the potential that eyewitnesses will get it wrong, either innocently or, . . . purposefully in order to shift the blame onto another. And there is always the chance that the judicial system will fail an accused . . . the concern about wrongful convictions is unlikely to be resolved by advances in the forensic sciences, welcome as those advantages are, from the perspective of protecting the innocent and punishing the guilty." *United States of America v. Burns and Rafay* at para 116.

209. Gary Edmond, *Constructing Miscarriages of Justice: Misunderstanding Scientific Evidence in High Profile Criminal Appeals,* 22 O.J.L.S. 53 (2002).

210. Clive Walker, *Miscarriages of Justice in Principle and Practice, in* C. WALKER AND K. STARMER, MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR (1999) at 33. For other broad definitions of miscarriages of justice that are, however, restricted to errors of criminal justice see Steven Greer Miscarriages of Justice Reconsidered 57 Mod .L.R. 58 (1994); Michael Naughton "Redefining Miscarriages of Justice: A Revived Human-Rights Approach to Unearth Subjugated Discourses of Wrongful Criminal Conviction" 45 British J. of Criminology 165 (2005).

Although Professor Walker's rights-based definition of miscarriages of justice has been contested by some writers,[211] and we eventually conclude that it is too broad, it has some definite virtues in a post 9/11 world. Walker's definition is written in a generic manner that is not necessarily tied to criminal convictions. Although he does not address this application directly when presenting the above definition, his expansive test for miscarriages of justice might be related to his expertise in British anti-terrorism laws, including the use of preventive internment in Northern Ireland that was not tied to criminal convictions.[212] Walker's definition quite properly, in our view, does not limit miscarriages of justice to wrongful convictions and includes procedural shortcuts that allow for detention without a criminal trial.

Another virtue of Walker's definition is that it locates miscarriages of justice, not only in practices that result in the conviction of the innocent, but also in substantive laws that produce those risks. As suggested in part one of this paper, broad new anti-terrorism laws run a risk of encouraging the apprehension, prosecution and punishment of innocent associates of terrorists. As discussed in part two of this paper, the order establishing combatant status review tribunals at Guantanamo , inspired by Justice O'Connor's plurality judgment in *Hamdi,* runs the risk of inaccurate determinations of guilt by providing for reverse burdens, hearsay evidence and presumptions in favor of the government's evidence.

Despite its virtue in focusing on the substantive issue of detention and paying attention to the content of the law authorizing detentions, Walker's definition of a miscarriage of justice seems overbroad and indeterminate in other respects. For example, Walker's definition seems to include even brief periods of unfair detention in the streets as a miscarriage of justice,[213] and in doing so risks expanding what should be a powerful label and conclusion to encompass all due process violations.

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211. In commenting on an earlier but similar definition of miscarriages of justice provided by Professor Walker, David Schiff and Richard Nobles argued that "this definition raises more questions than it answers. What rights? What is disproportionate adverse treatment? When are the rights of others not properly protected?" They go on to argue that the "actual link" between factors such as "unjust laws" and "failure to protect individuals against actions by criminals and vigilantes" and "miscarriages of justice remain tenuous." Nobles & Schiff, *Book Review* 34 BRIT. J. OF CRIM. 383, 383-384 (1994).

212. GERARD W. HOGAN & CLIVE WALKER, POLITICAL VIOLENCE AND THE LAW IN IRELAND (Manchester U.P. 1989).

213. Professor Walker suggests that "disproportionate treatment in terms of rights might include the granting of arrest or extensive search power" could qualify as a miscarriage of justice, but then excludes detention without proper cause "to keep the list manageable and to focus on the cases involving the greatest damage to rights and illustrating best the failure of process inherent in the term 'miscarriage.'" Walker Miscarriages of Justice in Principle and Practice, *supra* note 39 at 35, 45 n.110.

Walker's definition is also overbroad in the sense that it seems to apply to all state practices and laws that violate rights or have a disproportionate disadvantaging effect on rights. Not all rights violations, however, generate the same response as the conviction of the innocent. In addition, Professor Walker expands the definition even more by including crime victims as potential victims of miscarriages of justice when he includes state actions and laws that do not effectively or proportionately protect or vindicate wrongdoers. Although justice for victims is an important topic in its own right,[214] in our view, it is not helpful to include it under the rubric of miscarriages of justice. In a liberal society, the imprisonment of the innocent has a special significance that is different from a failure to respect victims or vindicate their interests or rights.

In the end we would adopt a narrower definition of miscarriages of justice than Professor Walker but one that, like his definition, is not limited to wrongful convictions in criminal trials. In our view, concerns about miscarriages of justice should be triggered whenever a person is detained in a manner that does not provide sufficient safeguards for the determination of whether the criteria for detention accurately apply to that person. In other words, our focus is on factual innocence as defined by the relevant law whether that be the law of war, immigration law or criminal trials.[215] Our focus is then on whether laws and practices with respect to detention and trial provide adequate procedures and evidential safeguards in order to ensure that only those who satisfy the substantive criteria of the law are detained.

For present purposes and with some reluctance, we would not go as far as Walker in including laws that may be substantively unjust in our definition of a miscarriage of justice.[216] Rather our focus is on laws that

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214. KENT ROACH, DUE PROCESS AND VICTIMS' RIGHTS: THE NEW LAW AND POLITICS OF CRIMINAL JUSTICE (1999); MARKUS DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS (2002).

215. This definition could also apply to commitments of the mentally ill to the extent that procedures used in that context may run a high risk of detaining those who do not meet the relevant criteria for detention. In this context, the United States Supreme Court has held that due process requires minimal procedural fairness. *See* Addington v. Texas, 441 U.S. 413 (1979); Parham v. J.R., 442 U.S. 584 (1979); Vitek v. Jones, 445 U.S. 480 (1980). We are indebted to Professor Chris Slobogin for this point.

216. Professor Walker includes "inherently unjust laws" within his definition of a miscarriage of justice, as well as laws that are "inherently unfair to victims." *Id.* at 34, 37. Stephen Greer has identified "anti-terrorist criminal justices processes" that have "reduced standards of proof" and "weakened rights for suspects and defendants" as a source of miscarriages of justice. Greer "Miscarriages of Justice Reconsidered," *supra* note 210 at 68-69. Professor Greer's definition focuses less than Professor Walker's on the substantive justice of the anti-terrorism laws. Professor Greer, like ourselves, focuses more on procedures, including procedural rights, that are used in determining whether an anti-terrorism law applies to a particular person rather than the injustice of perhaps

because of minimal procedural and evidential standards produce a serious risk of detaining those who are innocent under the terms of the relevant law that authorizes detention or punishment.[217] We recognize that in the terrorism context, there is a strong case for following Walker in including detention under unjust laws that violate rights as a miscarriage of justice. For example, the definition of enemy combatants in the July 7 order as those who supported the Taliban or al Qaeda can be criticized for not following international standards of the law of war and Judge Green has recently suggested that the definition may be overbroad.[218] Similarly, some would argue that the detention of people who are only suspected of terrorism or are only members of terrorist groups is also substantively unjust.[219] Nevertheless, we believe that a focus on factual innocence under the law as written should be a matter of concern to both those who share substantive concerns about the definition of terrorism and those who do not.

Another problem that may not be adequately addressed under either our definition or Walker's definition is the pretextual use of the law and especially immigration law. Thus one governmental tactic is to detain terrorist suspects not on the basis of their involvement with terrorism, but because they may be factually liable under some other law, such as the violation of a visa requirement.

Our relatively thin definition of a miscarriage of justice runs the risk of not engaging with the substantive justice of laws that authorize detention and perhaps even obliquely legitimating the detention of those who are factually guilty under expansive laws that authorize the detention of those who are enemy combatants, terrorist suspects or

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overbroad definitions of terrorism.

217. It should be noted that Professor Walker opposes a focus on matters of proof and evidence as "one of the shallowest definitions [of miscarriages of justice] imaginable" because it ignores questions of the substantive justice of laws and because "matters of evidence and proof" are not "self-evident and self-contained . . . evidence and proof should reflect rights rather than the reverse." *Ibid* at 42. Although questions such as whether silence can be used as evidence of guilt does, as Walker suggests, reflect rights, it is also possible that some laws such as the orders for combatant status review tribunals are so deficient with respect to procedure and evidence that one can confidently conclude that they will result in inaccurate application of the relevant legal standards for detention, standards which may or may not be substantively unjust.

218. Judge Green noted that the definition of enemy combatant in the order was broader than the definition considered in *Hamdi* and suggested that due process would be violated should the definition allow the indefinite detention of a person "solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainees aided, abetted, or undertook himself. *In re Guantanamo Detainee Cases,* Jan. 31, 2005, at 64, *supra* note 15 (U.S.D.C. for the District of Columbia).

219. Kent Roach, *The Anti-Terrorism Act and the Three Year Review*, U.N.B.L.J. (forthcoming); Roach SEPTEMBER 11: CONSEQUENCES FOR CANADA ch.4 (2003).

members of terrorist groups. It also may not address the problem of pretextual detentions. Nevertheless, our definition harnesses the widely held revulsion at the imprisonment of those who are innocent and speaks directly to those who may not share doubts about the substantive justice of the underlying law. Our definition of a miscarriage of justice would also encompass laws such as the status combatant review tribunal orders that provide inadequate procedural and evidential protections for the determination of whether a detainee satisfies the relevant definition of an enemy combatant or the Canadian security certificate process which affords inadequate adversarial protection in determining whether a non-citizen is a member of a terrorist group. Like Walker's definition, our definition would apply to both practices and laws that provide inadequate safeguards for the accurate determination of guilt and violate the rights of the accused not to be imprisoned for something that he did not do. The focus would not, however, be on unjust laws per se, but rather on laws that provide inadequate protections against the risk of detention that is not authorized by law. Such an approach is not meant in any way to displace criticisms of the substantive justice of the underlying laws or to suggest that the detention of people who satisfy the criteria of the relevant law is legitimate. Rather our goal is to suggest that more attention should be paid to the danger of detaining those who may be innocent under the broad range of laws that are being used in the war against terrorism.

We recognize that our definition of miscarriages of justice is unorthodox because it transcends the traditional criminal justice paradigm. It transplants the socially and politically emotive label of miscarriage of justice into new territory. However, as the state prosecutes alleged terrorists through military and immigration law, the protections and accountability that are delivered by criminal justice and miscarriage of justice discourse should not be lost. The United States Supreme Court has sometimes recognized the dangers of deprivation of liberty even when a person is not being found guilty of a criminal offence.[220] In addition, the risk of error is an important factor in the *Mathews v. Eldridge*[221] calculus of due process that applies to even administrative decision-making. Deprivations of liberty occasioned by immigration and military laws have many of the same features of traditional criminal deprivations of liberty, especially in terms of privation, hardship, stigma and dislocation. In other words, even though these measures might not be imposed *as* punishment, they are certainly experienced in this way. Although it has been argued that censure is tied

220. In the bail context, *see* Bell v. Wolfish, 441 U.S. 520 (1979), Schall v. Martin, 467 U.S. 253 (1984), U.S. v. Salerno, 481 U.S. 739 (1987).

221. 424 U.S. 319, 335 (1976).

to findings of criminal guilt,[222] we should be sensitive to how even censure may occur when people are designated as terrorists under military and immigration law. Our understandings of what constitutes a miscarriage of justice in terrorism cases should evolve to take into account both the deprivations caused by military and immigration detention of alleged terrorists and the self-interest of governments in using military and immigration law as a shortcut for incapacitating and punishing suspected terrorists.

V. Conclusion

Prior to 9/11, the desire to apprehend, try and punish those responsible for acts of terrorism presented special challenges for the criminal justice system, well illustrated by the experience in England with the Irish cases that resulted in the wrongful conviction of the Birmingham Six, the Guildford Four, the Maguire Seven and Judith Ward. These cases demonstrated the frailties of the Western world's most vaunted fact-finding mechanism—the criminal trial. The Irish cases shook the confidence of a system that had been shockingly complacent about the risk of punishing the innocent and confirmed the suspicions of many about discrimination against the Irish in British society. Once revealed, the wrongful convictions constituted a serious stain on British efforts against terrorism, imposed very serious harms on the innocent and allowed the guilty to escape conviction.

In a post 9/11 world, the war on terrorism continues to rely on the criminal prosecution as an important weapon. The criminal cases in Germany suggest that some lessons, such as the need for full disclosure of the prosecution's case to the accused, may have been learned from the Irish cases. At the same time, these lessons make it more difficult to obtain criminal convictions in terrorism cases. The costs and obstacles involved in addressing terrorism through the criminal process have sent governments in search of new, more efficient and less public and demanding methods to detain suspected terrorists.

The shift of cases typically claimed by the criminal justice system into areas of the law that deliver fewer substantive and procedural rights to the detained citizen, expose more individuals to great risks of detention without a full adversarial process to determine whether they actually are terrorists. Transferring terrorism cases from the criminal law to immigration law or the laws of war should not obscure the intimate links between detention as a terrorist and a fair and accurate determination of individual responsibility for real and apprehended acts

222. *See generally* ANDREW VON HIRSCH, CENSURE AND SANCTION (Oxford U. P., 1993).

of violence against civilians.

We should recognize the importance of not only determining individual responsibility, but also the increased danger of error in determining this responsibility at times of great public alarm and hostility towards those who share racial, ethnic or political ties with those who commit horrendous acts of terrorism. History tells us that the war on terrorism makes our criminal process more fallible. Common sense suggests that, by fighting what are in reality criminal cases outside of the rights-protective criminal process, we exponentially increase the risk of serious miscarriages of justice while at the same time not producing criminal convictions that might be subsequently revealed as wrongful convictions. Miscarriages of justice in all terrorism cases should be a much greater cause of concern because the risks of such miscarriages are not evenly distributed in society and because miscarriages once revealed can erode the high ground that democracies that only punish the guilty should have in the war against terror.

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