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# PLEADING “INNOCENT”?: IMPLICATIONS FOR ADVERSARIAL CRIMINAL PROCEDURE

Pamela R. Ferguson\*

Wrongful convictions are difficult to overturn due to the pressure for finality in criminal trials. They appear to be more common in the United States than in Scotland. They have a variety of causes, but much of the dissatisfaction in the United States has focused on the adversarial nature of the criminal process. This has led to proposals for alternative procedures for those who do not simply rely upon the presumption of innocence and the standard of proof, and plead “not guilty”, but positively assert that they are in fact “innocent”. The reform proposals include enhanced pre-trial processes, more active judicial involvement in the trial, and removal of the right of silence, much of which reflects a more inquisitorial approach, similar to that employed in many continental European jurisdictions. This article briefly considers the nature of “innocence” in a criminal context. It then reviews a number of the “actual innocence” reform proposals, and compares key features of criminal procedure in the United States with those which operate in Scotland – a jurisdiction which has not, to date, experienced an “innocence crisis”. The article concludes that various features of Scottish criminal procedure render “actual innocence” devices unnecessary and tend to explain why wrongful convictions appear to be rarer in Scotland than in the United States.

## *Wrongful Convictions and Innocence*

### **Extent and Causes of Wrongful Convictions**

The “innocence movement” has become a global phenomenon, with Innocence Organizations now operating in several countries.<sup>1</sup> In the United States alone, more than 2,000 convicted people have had their convictions quashed based on new evidence of innocence, largely from the advent of DNA evidence.<sup>2</sup> When the number of exonerations in the United States reached 1,500, it was calculated that these defendants had between them spent more than 13,000 years in prison.<sup>3</sup> An analysis of the first 200 exoneration cases found that they often involved crimes of violence: 71% of them were rape convictions, 6% were murder convictions, and in 22% of the cases defendants had been convicted of both rape and murder.<sup>4</sup> Biological materials such as blood or semen had been left by the perpetrators of these crimes; DNA identification demonstrated, albeit belatedly, that those who had been convicted were not in fact the perpetrators. For many crimes there was no biological evidence or none was collected by the police, so the true rate of wrongful convictions is likely to be higher than the number of reported

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<sup>1</sup> See the *Innocence Network* list, available at: <http://innocencenetwork.org/members/#alpha> (all URLs last accessed on 30 June 2017).

<sup>2</sup> The *National Registry of Exonerations* is available at <http://www.law.umich.edu/special/exoneration/Pages/>. For a description of wrongful conviction cases in the United States, see S. R. Gross, et al., “Exonerations in the United States 1989 through 2003”, *Journal of Criminal Law & Criminology*, XCV (2005), p. 523; B. L. Garrett, “Judging Innocence”, *Columbia Law Review*, CVIII (2008), p. 55.

<sup>3</sup> L. Weathered, “Reflections on the Role of Innocence Organisations in Australia”, *Flinders Law Journal*, XVII (2015), pp. 515-516.

<sup>4</sup> Garrett, note 2 above, p. 73.

exonerations might suggest.<sup>5</sup> Other countries have similarly recognized that there have been more wrongful convictions than had been imagined hitherto,<sup>6</sup> leading to the claim that this has become “an international human rights issue”.<sup>7</sup> The problem seems particularly acute in the United States, however, where it has been suggested that innocent people are convicted of serious crimes “on a regular basis.”<sup>8</sup>

Innocence scholarship has identified several potential sources of wrongful convictions, focusing primarily on certain types of potentially problematic evidence. These include: mistaken eyewitness identifications,<sup>9</sup> flawed forensic science,<sup>10</sup> perjured testimony (particularly from informers/“jailhouse snitches”<sup>11</sup>), false or fabricated confessions,<sup>12</sup> and so-called “noble-cause corruption” by police – a willingness to fabricate evidence to ensure the conviction of a person whom they are convinced is the perpetrator.<sup>13</sup> Other sources identified in the literature are inadequate performance by defense lawyers,<sup>14</sup> and prosecutorial misconduct.<sup>15</sup> In some cases of wrongful conviction a defendant is claiming that the criminal process was flawed, thus justice was not done. Others make the more profound claim that they did not, in fact, commit the crime, and it is on these types of cases which innocence projects primarily focus. One author has coined the term “innocentrism” to describe the growing concern to make protection of those who are actually innocent the central focus of the American justice system,<sup>16</sup> and has suggested that “the effort to free the innocent has become the civil rights movement of the twenty-first century”.<sup>17</sup> Thus before embarking on discussion of reform proposals, some consideration must be given to what we mean by “innocence” and “guilt”.

## “Legal” and “Factual” Innocence

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<sup>5</sup> See *National Registry of Exonerations*, note 2 above, which estimates that 24 % of exonerations are based on DNA evidence.

<sup>6</sup> See, for example, Public Prosecution Service of Canada, *The Path to Justice: Preventing Wrongful Convictions* (2011), available at: <http://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/index.html>; R. Dioso-Villa, “A Repository of Wrongful Convictions in Australia: First Steps towards Estimating Prevalence and Causal Contributing Factors”, *Flinders Law Journal*, XVII (2015), p. 163; J. He, “Case Study on the Causes of Wrongful Conviction in Chinese Criminal Proceedings”, *Frontiers of Law in China*, X (2015), p. 670.

<sup>7</sup> L. Weathered, “The Growing Acknowledgement of Wrongful Conviction - the Australian Response within an International Context”, *Victoria University Law and Justice Journal*, III (2013), p. 79.

<sup>8</sup> S. R. Gross, “Convicting the Innocent”, *Annual Review of Law & Social Science*, IV (2008), p. 174.

<sup>9</sup> See G. L. Wells, “Eyewitness Identification Evidence: Systemic Reforms”, *Wisconsin Law Review* (2006), p. 615; K. A. Findley, “Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies”, *Missouri Law Review*, LXXXI (2016), p. 377.

<sup>10</sup> See K. Berger, “Science Convicting the Innocent”, *Medicine and Law*, XXIX (2010), p. 1.

<sup>11</sup> A. Natapoff, “Beyond Unreliable: How Jailhouse Snitches Contribute to Wrongful Convictions”, *Golden Gate University Law Review*, XXXVII (2006), p. 107; J. A. Roth, “Informant Witnesses and the Risk of Wrongful Conviction”, *American Criminal Law Review*, LIII (2016), p. 737.

<sup>12</sup> B. Cutler, K. A. Findley and D. Loney, “Expert Testimony on Interrogation and False Confession”, *University of Missouri at Kansas City Law Review*, LXXXII (2014), pp. 591-595.

<sup>13</sup> See T. Newburn, *Literature Review - Police Integrity and Corruption* (2015), p. 9.

<sup>14</sup> S. M. Berry, “Bad Lawyering - How Defense Attorneys Help Convict the Innocent”, *Northern Kentucky Law Review*, XXX (2003), p. 487; J. A. C. Parker, “What a Poor Defense! Exploring the Ineffectiveness of Counsel for the Poor and Searching for a Solution”, *Jones Law Review*, VII (2003), p. 63.

<sup>15</sup> Gross, note 8 above, p. 186. See also H. M. Caldwell, “The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal”, *Catholic University Law Review*, LXIII (2013), p. 51.

<sup>16</sup> D. S. Medwed, “Innocentrism”, *University of Illinois Law Review* (2008), p. 1549.

<sup>17</sup> *Ibid.*, p. 1550. For a similar crisis of confidence in South Africa, see J. R. Du Plessis, “The Accusatorial System: Too Much a Game?”, *South African Law Journal*, CVIII (1991), p. 577.

The difference between “legal innocence” and “factual innocence”, and between their counterparts “legal guilt” and “factual guilt”, is well-known to scholars of criminal procedure and evidence law.<sup>18</sup> “Factual guilt” is generally taken to mean that the defendant did actually perform the criminal act (the *actus reus*) with the requisite mental element (the *mens rea*), while “legal guilt” means that the prosecution is able to establish beyond a reasonable doubt and in conformity with due process that the defendant performed the criminal act, etc. Likewise, those who did not commit the crime may be described as being “factually innocent”, while those whose are factually guilty but whose guilt cannot be, or has not been, established at trial are “legally innocent”. Michael and Lesley Risinger employ the terms “factual innocence” and “normative innocence”, and define “factual innocence” as occurring

only when the defendant is innocent of the crime charged either because he was not the actual perpetrator (and bore no accomplice responsibility) or because no crime was committed. All other circumstances that might result in an acquittal or diminution in the charge to a lesser offense do not present circumstances of factual innocence, but of normative innocence connected with value judgements usually concerning attributed states of mind.<sup>19</sup>

The reference to cases in which “no crime was committed” presumably refers to lack of an *actus reus*.<sup>20</sup> By contrast, we can consider the position of a defendant, charged with murder for having caused the victim’s death in an unprovoked attack, but who claims that he did not intend to kill, merely to wound. He is not “factually innocent” since a non-intentional killing following assault is itself a crime (for example, “culpable homicide” in Scotland). It is not clear, however, whether the Risingers’ defendant who has killed in self-defense can claim “factual innocence”. It is not a crime to kill in self-defense, so perhaps “actual innocence” is an appropriate plea. However, it could equally be argued that the killer is merely “normatively innocent” since the *actus reus* of murder has been performed and a determination of self-defense is, at least in part, a normative decision for the jury.<sup>21</sup> The latter interpretation seems the more plausible, since in an earlier paper Michael Risinger refers to “‘who, what, when, and where’ actus reus/identity fact issues” as “specific brute fact details of the crime and the identity of the defendant as its perpetrator.”<sup>22</sup> He elsewhere explains that “brute fact innocence” means “the defendant was not the perpetrator of the crime, and someone else was”.<sup>23</sup>

In practice, distinguishing between “brute” facts and other facts is not always easy, nor is the distinction between law and fact always clear cut. Zuckerman uses the term “assumption of objectivity” to refer to the idea that “the facts of the individual case are not themselves created

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<sup>18</sup> “Factual innocence”/ “factual guilt” and “legal innocence”/ “legal guilt” are the terms favored in H. L. Packer, “Two Models of the Criminal Process”, *University of Pennsylvania Law Review*, CXIII (1964), p. 1, at p. 17. See also H. L. Packer, *The Limits of the Criminal Sanction* (1968), pp. 166-167.

<sup>19</sup> D. M. Risinger and L. C. Risinger, “Innocence is Different: Taking Innocence into Account in Reforming Criminal Procedure”, *New York Law School Law Review*, LVI (2011-12), p. 869, at p. 875.

<sup>20</sup> See also M. Raymond, “The Problem with Innocence”, *Cleveland State Law Review*, XLIX (2001), p. 449, at p. 456.

<sup>21</sup> Arguably a finding of self-defense has both a factual and a normative element. In terms of Scottish law: was reasonable force used by the defendant? Did the defendant believe on reasonable grounds that he was being threatened with deadly violence? The first is a question of fact, the second a normative question.

<sup>22</sup> D. M. Risinger, “Preliminary Thoughts on a Functional Taxonomy of Expertise for the Post-Khumho World” , *Seton Hall Law Review*, XXXI (2000), p. 508, at p. 528.

<sup>23</sup> D. M. Risinger, “Unsafe Verdicts: the Need for Reformed Standards for the Trial and Review of Factual Innocence Claims”, *Houston Law Review*, XLI (2004-5), p. 1281, at p. 1298.

by the law, but exist in the world that lies beyond the law.”<sup>24</sup> This assumes that the trial will be able to ascertain some sort of objective truth,<sup>25</sup> but what we treat as “the truth” is determined in part by certain values and principles which relate to our understanding of rights and duties, and this shapes the nature of the truth that emerges from the criminal process.<sup>26</sup> Determining “the truth” in a criminal trial may well be an impossible task, and it is arguable that this is not the aim of an adversarial trial. Rather, its aim is the more attainable one of deciding whether we are sure enough of guilt to justify condemnation and punishment. An acquittal may follow because the jury (i) believes the defendant did in fact commit the crime, but that the case has not been proven beyond a reasonable doubt; (ii) is not able to determine one way or another whether the defendant committed the crime; or (iii) believes the defendant had nothing whatsoever to do with the crime. It is only in the last of these scenarios that we can say that the jury believes that the defendant is in fact innocent, but in all three cases the verdict will be one of “not guilty” and the jury’s beliefs are immaterial. In short, an acquittal is not synonymous with a finding of “innocence”, rather it means that the prosecution has failed to establish guilt beyond a reasonable doubt. It must be acknowledged, therefore, that not only is the separation of the “factually innocent” from the merely “legally innocent” theoretically difficult, it is also not something which the criminal process attempts to determine. This must be borne in mind when assessing claims that one or other system of criminal procedure is better at finding “the truth”.

Subject to these caveats, this article uses the terms “factual innocence”/“actual innocence” in Risinger’s “brute fact innocence” sense, and uses “wrongful convictions” to refer to cases in which factually innocent defendants have been found legally guilty. This is a narrower definition of wrongful convictions than that used by some authors.<sup>27</sup> It should not, however, be taken to suggest a lack of sympathy for the factually guilty person who has been convicted following a flawed criminal process. Such people are also victims of miscarriages of justice: their conviction threatens the moral integrity of the criminal justice system since even the factually guilty deserve a fair trial. However, the focus here is on wrongful convictions involving brute fact innocence – the “unjust treatment of the blameless”<sup>28</sup> – since these are the cases which worry us the most.

### *Reform Proposals*

There is a tendency to caricature both the adversarial and inquisitorial systems, obscuring the fact that there has been a great deal of borrowing between them over the years.<sup>29</sup> There is also a long history of American scholars, as well as some members of the US judiciary, denigrating European continental criminal procedures.<sup>30</sup> It has even been suggested that for the US Supreme Court, “avoiding inquisitorial justice is what our own system is all about”,<sup>31</sup> and that it treats continental criminal procedure as a “kind of negative polestar for American criminal

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<sup>24</sup> A. A. S. Zuckerman, “Law, Fact or Justice?”, *Boston University Law Review*, LXVI (1986), p. 487, at p. 487.

<sup>25</sup> *Ibid.*, p. 488.

<sup>26</sup> *Ibid.*, p. 489.

<sup>27</sup> For example, A. D. Leipold, “How the Pre-Trial Process Contributes to Wrongful Convictions”, *American Criminal Law Review*, XLII, (2005), p. 1123, at p. 1124.

<sup>28</sup> S. A. Bandes, “Framing Wrongful Convictions”, *Utah Law Review*, I (2008), p. 5, at p. 9.

<sup>29</sup> For the general argument see J. Jackson and S. Summers, *The Internationalisation of Criminal Evidence* (2012), pp. 8-9.

<sup>30</sup> D. A. Sklansky, “Anti-Inquisitorialism”, *Harvard Law Review*, CXXII (2009), p. 1634.

<sup>31</sup> *Ibid.*, p. 1638.

procedure.”<sup>32</sup> Those who favor adversarial systems have tended to subscribe to the view that they are likely to produce more accurate verdicts than their continental counterparts,<sup>33</sup> but misgivings about the adversarial process surface periodically<sup>34</sup> and, as noted previously, more recent debate has been sparked by DNA exonerations. Some scholars now suggest that the American justice system is incapable of reaching correct verdicts in cases involving “actual innocence”, leading to claims that “in its Americanized form, the process of allowing the parties to control examination of witnesses is a highly flawed mechanism for promoting accuracy”;<sup>35</sup> “a search for truth is the most effective means through which to discover innocence. Unfortunately, however, this premise does not currently underlie the adversarial system...”;<sup>36</sup> and “the adversarial system in [the US] is too dysfunctional to reliably produce the truth”.<sup>37</sup> Systems of criminal procedure can be judged on the extent to which they achieve correct verdicts and instill public confidence: these quotations illustrate a perception that the US criminal process is achieving neither goal, and is facing an “innocence crisis”.<sup>38</sup> This has generated quite radical proposals, and we turn now to those offered by six of the leading scholars in this debate: Michael and Lesley Risinger, Christopher Slobogin, Tim Bakken, Samuel Gross, and Keith Findley.

The Risingers suggest some practical ways to improve the collection of evidence by the police, such as that police vehicles should be fitted with cameras that activate to record whenever someone is in the back seat.<sup>39</sup> Cameras could also capture any activity at police stations, not just in the interview rooms, but in the corridors and public areas.<sup>40</sup> A recent empirical study in California found that incidents involving use of force by the police when wearing body-worn cameras (BWCs) was half the number recorded when cameras were not worn.<sup>41</sup> Not only do cameras offer greater protection to suspects, they can also decrease accusations of police fabrication of confessions, and allegations that confessions were not voluntary.<sup>42</sup> The Risingers also advocate improvement of pre-trial eyewitness identification procedures,<sup>43</sup> and for police officers to be trained to conduct their investigations in a way which considers both the possibility that the suspect is guilty, and that he may be innocent.<sup>44</sup> The pre-trial stage should be overseen

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<sup>32</sup> Ibid.

<sup>33</sup> As the US Supreme Court has put it: “Truth is best discovered by powerful statements on both sides of a question.” (*United States v Cronin* 466 US 648, 655 (1984)).

<sup>34</sup> See J. Frank, *Courts on Trial: Myth and Reality in American Justice* (1949), p. 20; M. E. Frankel, “Search for Truth: An Umpireal View”, *University of Pennsylvania Law Review*, CXXIII (1974-75), p. 1031.

<sup>35</sup> C. Slobogin, “Lessons from Inquisitorialism”, *Southern California Law Review*, LXXXVII (2014), p. 699, at p. 704.

<sup>36</sup> T. Bakken, “Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System”, *University of Michigan Journal of Law Reform*, XLI (2008), p. 547, at pp. 547-548 (footnote omitted).

<sup>37</sup> G. Kowaluk, “Legal Thinking, the Adversarial Process and Exonerating Innocent Defendants: A Socio-Legal View of the Wrongful Conviction Process”, *Southwestern Law Review*, LXV (2015), p. 27, at p. 44.

<sup>38</sup> M. Zalman and J. Carrano, “Sustainability of Innocence Reform”, *Albany Law Review*, LXXVII (2013-14), p. 955, at p. 958.

<sup>39</sup> Risinger and Risinger, note 19 above, p. 897.

<sup>40</sup> Ibid.

<sup>41</sup> B. Ariel, W. A. Farrar and A. Sutherland, “The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints against the Police: A Randomized Controlled Trial”, *Journal of Quantitative Criminology*, XXXI (2015), p. 509, pp. 523-524. See also D. Evans, “Police Body Cameras: Mending Fences and How Pittsburgh is a Leading Example”, *Pittsburgh Journal of Technology Law and Policy*, XVI (2015), p. 76.

<sup>42</sup> Risinger and Risinger, note 19 above, p. 897.

<sup>43</sup> Ibid., pp. 898-906.

<sup>44</sup> Ibid., p. 891.

by a “judicial officer” with a responsibility to ascertain the truth.<sup>45</sup> Once this judicial officer has made the decision about which criminal charges to bring, all information collected by the police should be made available to both the prosecution and the defense.<sup>46</sup>

More radically, the Risingers propose that defendants ought to be able to choose an alternative prosecution procedure: “the factual innocence track”.<sup>47</sup> Anyone opting for this process would be required to specify in advance of the trial one or two facts which support their claim of innocence.<sup>48</sup> Presumably this means that defendants would have to state at the outset that, for example, they have an alibi and have been incorrectly identified as the perpetrator, or that they acted in self-defense, or were coerced into committing the crime. Under this special procedure, defendants would have to testify at trial, thus waiving the Constitutional right to silence/privilege against self-incrimination.<sup>49</sup> In return, the defense would be entitled to full pre-trial disclosure of the prosecution evidence – something which currently does not happen as a matter of routine in the US.<sup>50</sup> The Risingers argue that lack of pre-trial disclosure is a potent source of wrongful convictions of the factually innocent: while the factually guilty generally will have a fairly good idea of what they are being accused, and what the evidence against them is likely to show, the factually innocent may have little or no information about the circumstances of the charge.<sup>51</sup> This disclosure by the prosecution would be dependent on the defense waiving a further Constitutional right: the right not to disclose its case, pre-trial.<sup>52</sup>

Slobogin’s approach is similar to that of the Risingers in recommending an enhanced pre-trial role for the judiciary. He wants trial judges to take on the job of selecting witnesses to testify at trial, and leading the questioning of witnesses.<sup>53</sup> It should also be for the court rather than the parties to appoint expert witnesses.<sup>54</sup> Again, defendants suffer a diminution of rights in return: they must give unsworn testimony at trial.<sup>55</sup> The Risingers’ option of pleading “innocent”, rather than “not guilty”, is also favored by Bakken.<sup>56</sup> Lest factually guilty people be tempted to opt for this plea, they need to be able to persuade their lawyer of their innocence for the lawyer must file an affidavit, asserting belief in the claim of innocence.<sup>57</sup> It is not clear what this would achieve, given that many factually guilty people presumably protest their innocence even to their lawyers.<sup>58</sup> Under Bakken’s system, counsel who filed an affidavit without a proper factual or legal basis could be sanctioned by the court.<sup>59</sup> It has been suggested that many lawyers employ a “selective ignorance” model of client interviewing, during which they refrain from

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<sup>45</sup> Ibid., pp. 882-883: “We ... will be calling for the institution of the supervising magistrate”. See also p. 894.

<sup>46</sup> Ibid., pp. 892-893.

<sup>47</sup> Ibid., p. 893.

<sup>48</sup> Ibid., p. 894.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid., p. 875. This is discussed further, below.

<sup>51</sup> Ibid., p. 886.

<sup>52</sup> Ibid., p. 887.

<sup>53</sup> Slobogin, note 35 above, pp. 715-716.

<sup>54</sup> Ibid., p. 724.

<sup>55</sup> Ibid., p. 728.

<sup>56</sup> Bakken, note 36 above, pp. 549 and 566. See also T. Bakken and L. M. Steel, “Exonerating the Innocent: Pretrial Innocence Procedures”, *New York Law School Law Review*, LVI (2011-12), p. 825.

<sup>57</sup> Ibid., p. 568.

<sup>58</sup> See Raymond, note 20 above, p. 460.

<sup>59</sup> Bakken, note 36 above, pp. 568-569.

asking their clients whether or not they committed the crime.<sup>60</sup> For Bakken’s model to work, this would have to change.

Bakken’s “innocence” plea would trigger a pre-trial investigation by the prosecution, akin to those used in non-adversarial systems.<sup>61</sup> Juries would be invited to draw favorable inferences of innocence if they found that the state had failed to conduct full investigations in these types of cases.<sup>62</sup> He also advocates a higher standard of proof: rather than the jury being satisfied of guilt “beyond a reasonable doubt”, it would require to reach the standard of “moral certainty” or “beyond *all* reasonable doubt”.<sup>63</sup> It is difficult to know what certainty beyond all reasonable doubt means – perhaps an *unreasonable* doubt, such that something highly improbable or bizarre may in fact have occurred – would be enough to bar conviction? In return, the defendant must co-operate with the investigation, submit to questioning, and waive the right to confidentiality regarding communications with counsel.<sup>64</sup> These are radical proposals, particularly since they affect the confidentiality of lawyer/client communications, as well as the right to silence during police questioning and at trial.

That those who claim innocence must waive their right to silence is also required under the scheme devised by Gross;<sup>65</sup> such defendants must answer questions from state officials at the investigation stage (with counsel present, and “possibly under oath”), and must also testify at trial.<sup>66</sup> Gross acknowledges that requiring defendants to testify on oath would breach the Fifth Amendment to the US Constitution,<sup>67</sup> but argues that the *quid pro quo* for benefitting from enhanced “actual innocence” procedures is that defendants have to waive certain constitutional rights, including the right to object to illegally seized evidence,<sup>68</sup> and the right to a jury trial.<sup>69</sup> In turn, there would be greater pre-trial disclosure by the prosecution – but also by the defense.<sup>70</sup> Those who opt for these “innocence procedures” would be given increased opportunities to claim innocence post-trial, including the right to a review of conviction if there is significant new evidence, and to a re-trial if that new evidence leads to a substantial doubt about guilt.<sup>71</sup>

Similar to the Risingers and Gross, Findley favors full disclosure of the prosecution’s file to the defense in advance of the trial.<sup>72</sup> His most radical suggestion is that states establish an “Office of Public Advocacy” in which lawyers alternate between prosecution and defense, so that they become committed to the search for the truth.<sup>73</sup> Unlike Bakken and Risinger, however,

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<sup>60</sup> P. G. Cassell, “Freeing the Guilty Without Protecting the Innocent: Some Skeptical Observations on Proposed New Innocence Procedures”, *New York Law School Law Review*, LVI (2011-12), p. 1063, at p. 1069.

<sup>61</sup> Bakken, note 36 above, p. 549 and pp. 561-562.

<sup>62</sup> *Ibid.*, pp. 562 and 575.

<sup>63</sup> *Ibid.*, p. 574 (emphasis added).

<sup>64</sup> *Ibid.*, pp. 563 and 569.

<sup>65</sup> S. R. Gross, “Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence”, *New York Law School Law Review*, LVI (2011/12), p. 1009, at p. 1023.

<sup>66</sup> *Ibid.*, p. 1024.

<sup>67</sup> The Fifth Amendment provides, *inter alia*, that: “No person ... shall be compelled in any criminal case to be a witness against himself.”

<sup>68</sup> Gross, note 65 above, p. 1023.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, pp. 1025-1026.

<sup>71</sup> *Ibid.*, p. 1023. See also p. 1027.

<sup>72</sup> K. A. Findley, “Adversarial Inquisitions: Rethinking the Search for the Truth”, *New York Law School Law Review*, LVI (2011/12), p. 911, at pp. 937-938.

<sup>73</sup> *Ibid.*, p. 913. See also p. 935: “This structure would be designed to create a culture that mutes the polarizing forces of career adversaries.”

Findley's proposals would not require the "actually innocent" defendant to give up the right to lawyer/client confidentiality, nor forfeit the right to remain silent.<sup>74</sup>

While the details of these "actual innocence" processes vary from one author to another, a key similarity is that each is attracted to aspects of continental European systems of criminal procedure. Thus Slobogin accepts that his proposals are "a hybrid between pure adversarialism and pure inquisitorialism, one that moves closer to the procedural regime that exists in a number of civil law countries",<sup>75</sup> while Bakken notes that under his scheme, those who opt for an "innocence" plea "are in essence pleading for an inquisitorial process".<sup>76</sup> Slobogin's suggestion that the defendant give *unsworn* testimony at trial is somewhat similar to the position in some continental European systems, such as Germany and Switzerland, where a defendant can lie without penalty or other adverse consequences.<sup>77</sup> Where it differs, however, is that Slobogin would make such testimony mandatory. As previously noted, Findley's proposals would not require the "actually innocent" to give up the right to lawyer/client confidentiality, nor would complete pretrial disclosure of the defense case be compulsory, but this is because he believes that continental European systems "function quite well" without requiring waiver of such rights.<sup>78</sup>

We can also see the inquisitorial influence in the Risingers' proposals, particularly the suggestion that pre-trial procedures be overseen by a judicial officer,<sup>79</sup> and in Gross's similar suggestion that the judge become a more active investigator.<sup>80</sup> This seems very like the role played by a French investigating judge/*juge d'instruction*. These scholars may, however, have an overly optimistic view of continental European systems of justice. Empirical studies suggest that judicial oversight in France, for example, is not necessarily a guarantee of greater truth-finding accuracy,<sup>81</sup> and similar criticisms are made of the Dutch system.<sup>82</sup> Furthermore, giving the trial judge primary responsibility for cross-examining the witnesses can only work effectively if the judge has had sight, prior to the trial, of the evidence the witnesses are likely to give.<sup>83</sup> Thus a

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<sup>74</sup> *Ibid.*, p. 937.

<sup>75</sup> Slobogin, note 35 above, p. 702.

<sup>76</sup> Bakken, note 36 above, p. 563.

<sup>77</sup> See R. S. Frase and T. Weigend, "German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?", *Boston College International and Comparative Law Review*, XVIII (1995), p. 317, at p. 343; M. Killias, "Wrongful Convictions in Switzerland: The Experience of a Continental Law Country" in C.R. Huff and M. Killias (eds.) *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (2008), pp. 142-143.

<sup>78</sup> Findley, note 72 above, p. 937.

<sup>79</sup> Risinger and Risinger, note 19 above, pp. 882-883.

<sup>80</sup> Gross, note 65 above, pp. 1027-1028.

<sup>81</sup> It has been suggested that the French system "structurally and ideologically excludes the defence whilst providing no real guarantee that the accused will be adequately protected" (J. Hodgson, "The Police, the Prosecutor and the *Juge D'instruction*: Judicial Supervision in France, Theory and Practice", *British Journal of Criminology*, XLI (2001), p. 342, at p. 359). See also J. Hodgson, "The Role of the Criminal Defence Lawyer in an Inquisitorial Procedure: Legal and Ethical Constraints", *Legal Ethics*, IX (2006), p. 125.

<sup>82</sup> C. Brants and S. Field, "Truth-finding, Procedural Traditions and Cultural Trust in the Netherlands and England and Wales: When Strengths become Weaknesses", *International Journal of Evidence and Proof*, XX (2016), p. 266.

<sup>83</sup> A point made many years ago by Damaska: without sight of the evidence in advance, the judge's questioning "would seldom elicit more than a thin narrative account from a witness. Counsel, who are aware of information available from the witness, would soon take over, and assume their dominant role in the interrogation process." (M. Damaska, "The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments", *American Journal of Comparative Law*, XLV (1997), p. 839, at p. 850).

more pro-active judge requires a continental-type *dossier*, which in turn involves greater pre-trial disclosure of evidence from both prosecution and defense.

Each of the scholars whose reforms are described above is convinced that the inquisitorial approach is better than the adversarial system at determining “the truth”, By contrast, some European scholars argue that while both types of system are “vulnerable to delivering wrong verdicts”,<sup>84</sup> it is in fact the adversarial approach which is better at truth-finding.<sup>85</sup> It is of course impossible to determine whether one system is more adept at this than the other since we cannot know how many factually innocent people are convicted under either type of process, nor how many of the factually guilty are acquitted. Rather than continuing this old and somewhat sterile debate we would do well to recognize, as Jackson suggests, that truth-finding procedures “are rooted in particular epistemological conceptions of law”.<sup>86</sup>

### *Pleading “Actual Innocence” in Practice*

The various reform proposals described above could easily be dismissed as of purely academic interest, divorced from the “real world” of the criminal process. However, it was reported in April 2016 that a prosecutor in St Clair County, Illinois is “trying a radical new experiment”, namely “admitting his office has charged innocent people with crimes and clearing their names before they spend a day in prison.”<sup>87</sup> Lashonda Moreland is one of those who have benefitted from a new form of criminal process. She was arrested for shoplifting, evading police and trying to run down a police officer with a car. The officer purported to identify Moreland as the driver who had attempted to run him down. Moreland claimed that she had not visited the shop in question and that the car was not hers – it had been registered to her address by her cousin. She was remanded in custody and the case would ordinarily have gone to trial some months later, but her lawyer contacted the prosecutor and told him that Moreland was, in fact, innocent. This caused the prosecutor to offer Moreland a lie detector test. When she passed it, the prosecution conducted a review of all the evidence and the case against her was dropped.

This novel process was part of the County’s “Actual Innocence Claim Policy and Protocol”, described as a “unique, pre-conviction intervention which attempts to prevent the ‘actually innocent’ from going through a trial, taking a plea deal, or ending up in prison.”<sup>88</sup> Just as several of our American scholars advocate, rather than pleading “not guilty” a defendant in Clair County may now plead “innocent.” Moreland’s case can be contrasted to that of Henry Earl Clark, who was charged with a drug offense in Texas. He spent six weeks in jail before being assigned a lawyer, then another seven weeks before his case was dismissed when it was realized that he had been the victim of mistaken identity.<sup>89</sup> His case is far from exceptional.<sup>90</sup>

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<sup>84</sup> C. Brants, “The Vulnerability of Dutch Criminal Procedure to Wrongful Conviction” in Huff and Killias, note 77 above, pp. 157 and 159.

<sup>85</sup> *Ibid.*, p. 170.

<sup>86</sup> J. D. Jackson, “Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach”, *Cardozo Law Review*, X (1988-89), p. 475, at p. 476.

<sup>87</sup> J. Lussenhop, “Could ‘Actual Innocence’ Save the Broken US Justice System?”, *BBC News Magazine*, 21 April 2016, available at: <http://www.bbc.co.uk/news/world-us-canada-35971935>

<sup>88</sup> *Ibid.*

<sup>89</sup> M. S. Backus and P. Marcus, “The Right to Counsel in Criminal Cases, a National Crisis”, *Hastings Law Journal*, LVII (2006), p. 1031, at pp. 1031-1032.

<sup>90</sup> See *Ibid.*, pp. 1031-1034. The authors blame the lack of effective legal assistance. This is discussed further, below.

While we can begin to see the attractions of having special procedures and pleas for the “actually innocent”, such an approach is likely to be highly detrimental to those who maintain the traditional plea of “not guilty”. Returning to our discussion of the differences between “factual” and “legal” guilt, official recognition of the concept of “factual innocence” is likely to cause courts, lawyers and the media to pay far less attention to wrongful convictions involving people who may well be factually guilty, but whose conviction was obtained through violation of their rights.<sup>91</sup> Defense lawyers should not offer, nor should they be expected to offer, a better standard of service to those who protest their innocence since their ethical duty is to represent all their clients to the best of their abilities. Further, special processes for the “actually innocent” may well cause jurors to form the view that those who instead opt to plead “not guilty” are in effect saying that they are “factually guilty”: that they did commit the crime, but should be acquitted due to some flawed aspect of the process such as the way in which the evidence was acquired. In all but the most egregious of flawed procedures, such as where a confession has been obtained by torture, it is likely that jurors would regard such an acquittal as being based on “a technicality”. Thus if jurors do currently take the presumption of innocence seriously, moving to a system which recognizes a plea of “actual innocence” would be likely to erode that presumption for those who plead “not guilty”.<sup>92</sup> In short, special procedures for the “actually innocent” endanger the due process rights which should be afforded to all defendants – even those who are factually guilty. Rather than embrace the concept of “actual innocence”, reformers would be better advised to focus their efforts on changing other aspects of the criminal process.

### *Comparing the Scottish and United States Systems of Criminal Procedure*

The Scottish and United States systems of criminal procedure share many fundamental features, such as the presumption of innocence, the standard of proof, the centrality of the trial, the role of the judge as a neutral referee, and party control of the evidence. Each has state systems of prosecution and employs jury trials in serious cases. Yet Scotland has not witnessed similar calls for the adoption of special “innocence” pleas or procedures. This part of the article compares aspects of the two systems in an attempt to determine whether Scotland has particular features which guard against wrongful conviction.

### **Police, Prosecution, and Judiciary**

In the United States there are thousands of local law-enforcement bodies.<sup>93</sup> This is different from Scotland; although there are more than 100 reporting agencies which conduct criminal investigations of a specialized nature, such as the Health and Safety Executive and the Scottish Environment Protection Agency,<sup>94</sup> the great majority of cases are dealt with by the police, and all resultant prosecutions are the responsibility of the Crown Office and Procurator Fiscal Service (COPFS), a national body. Scotland now has one police force, giving a high level of standardized

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<sup>91</sup> E. Hughes, “Innocence Unmodified”, *North Carolina Law Review*, LXXXIX (2010-11), p.1083, at p. 1087.

<sup>92</sup> See also H. Quirk, “Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer”, *Modern Law Review*, LXX (2007), p. 759, at p. 771.

<sup>93</sup> M. Zalman and R. Grunewald, “Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial”, *Texas A&M Law Review*, III (2015), p. 189, at p. 247.

<sup>94</sup> See <http://www.copfs.gov.uk/about-us/what-we-do>

practice. There has been a plethora of cases of prosecutorial misconduct in the US,<sup>95</sup> but no such cases in Scotland. This may in part be due to the approach taken by Scottish prosecutors, who do not generally feel that they must defend a conviction at all cost, and occasionally will offer no opposition to an appeal.<sup>96</sup> The Crown has accepted that a defendant may appeal against conviction on the basis of a miscarriage of justice even where the conviction had resulted from a plea of guilty.<sup>97</sup> By contrast, some US prosecutors have been accused of defending convictions even in cases where there has demonstrably been an error.<sup>98</sup>

It is difficult to know what accounts for this difference in approach, but one factor may be that the office of US prosecutor is often an elected one, and those facing re-election may feel the need to have a high conviction rate as a way of demonstrating to voters that they are “tough on crime”.<sup>99</sup> No Scottish prosecutor is elected. Indeed, it is noteworthy that, historically, the position of the most senior prosecutor, the Lord Advocate, was often filled by someone with expertise in an area other than criminal law. Although the previous two Lord Advocates came from within the ranks of the COPFS, the appointment of the current incumbent, in June 2016, reverts to the previous practice: James Wolffe QC was formerly Dean of the Faculty of Advocates and is more of a commercial or public law expert than a criminal lawyer.<sup>100</sup> Prosecutions in the High Court of Justiciary, Scotland’s highest criminal trials court, are conducted by advocates depute (ADs). Experienced members of the COPFS may be appointed to these posts but it is more common for ADs to come from the Faculty of Advocates, and to be people who do not specialize in criminal law. This system helps to ensure that senior prosecutors maintain a level of independence from the COPFS, and since they will generally not be “career prosecutors” they may be less likely to become case-hardened. ADs who aspire to judicial appointment may wish to avoid acquiring a reputation for being more interested in “counting scalps” than in justice. This too may moderate any tendency to overzealousness.

As previously noted, Findley proposes that US states establish an Office of Public Advocacy to supervise police investigations. In Germany, the prosecutor is referred to as “*Herrin des Ermittlungsverfahrens*” or “Master of the Investigation”, and can give instructions to the police.<sup>101</sup> Dutch police are likewise “subordinate to the public prosecutor”.<sup>102</sup> Brants claims that while prosecutors in adversarial systems can refuse to prosecute a case where the evidence is weak or tainted with illegality, they have no control of the pre-trial investigation, and “cannot tell the police what to do.”<sup>103</sup> This may be so in some adversarial systems, but it is not correct so far as Scotland is concerned; legislation provides that in all cases the police must follow the

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<sup>95</sup> For examples of prosecutorial misconduct see S. A. Reiss, “Prosecutorial Intent in Constitutional Criminal Procedure”, *University of Pennsylvania Law Review*, CXXXV (1987), p. 1365, at pp. 1421-1422.

<sup>96</sup> See, for example, *P v Williams* 2005 SLT 508; *Murray v HM Advocate* 2008 SCL 1147.

<sup>97</sup> *Carrington v HM Advocate* 1994 JC 229.

<sup>98</sup> Leipold, note 27 above, pp. 1123-1124. Why it is that prosecutors have been resistant to claims of innocence, after conviction, is explored in D. S. Medwed, “The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence”, *Boston University Law Review*, LXXXIV (2004), p. 125.

<sup>99</sup> More than 95% of district attorneys in the USA are elected: N. Sekhon, “The Pedagogical Prosecutor”, *Seaton Hall Law Review*, XLIV (2014), p. 1, at p. 29, footnote 169.

<sup>100</sup> See D. Leask, “James Wolffe Named as New Lord Advocate” *The Herald*, 31 May 2016, available at [http://www.heraldscotland.com/news/14525783.James\\_Wolffe\\_named\\_as\\_new\\_Lord\\_Advocate/](http://www.heraldscotland.com/news/14525783.James_Wolffe_named_as_new_Lord_Advocate/)

<sup>101</sup> Zalman and Grunewald, note 93 above, p. 248.

<sup>102</sup> C. Brants, “Wrongful Convictions Inquisitorial process: The Case of the Netherlands”, *University of Cincinnati Law Review*, (2012), p. 1069, at p. 1076. See also p. 1082.

<sup>103</sup> *Ibid.*, p. 1077.

prosecutor's instructions.<sup>104</sup> This dominant position of the Crown was well described in the case of *Boyle v HM Advocate*:<sup>105</sup> it is for the Lord Advocate

to decide when and against whom to launch prosecution and upon what charges. It is for him to decide in which Court they shall be prosecuted. It is for him to decide what pleas of guilt he will accept and it is for him to decide when to withdraw or abandon proceedings. Not only so, even when a verdict of guilt has been returned and recorded it still lies with the Lord Advocate whether to move the Court to pronounce sentence, and without that motion no sentence can be pronounced or imposed. In the exercise of these formidable responsibilities the Lord Advocate has at his disposal the fullest available machinery of inquiry and investigation.<sup>106</sup>

There is also less judicial independence in the US, where the position of state court judge is an elected one. One commentator suggests that

enforcing the law may cost [judges] their jobs. An elected judge who upholds a constitutional right of a person accused of child molestation, murder, or some other crime may be signing his or her own political death warrant.<sup>107</sup>

By contrast, no Scottish judges are elected; they have tenure until they retire. Members of the High Court of Justiciary can be removed from office only by the Queen, acting on the recommendation of the First Minister of the Scottish Parliament, following a resolution to that effect from the Parliament.<sup>108</sup> This must be preceded by a finding by an independent tribunal that the judge is unfit to hold office by reason of "inability, neglect of duty or misbehaviour."<sup>109</sup>

## Defense Lawyers

In 1963 the United States Supreme Court ruled in *Gideon v Wainwright*<sup>110</sup> that the Sixth and Fourteenth Amendments to the Constitution requires states to provide a lawyer for any defendant who faces prosecution for a serious crime and cannot afford to pay for legal advice. Some states interpreted the reference to serious cases to mean felonies, as opposed to misdemeanors,<sup>111</sup> but the Supreme Court subsequently ruled that no one could be sentenced to a period of imprisonment unless they have received the benefit of legal assistance at trial, or have waived the right.<sup>112</sup> *Gideon* did not give any guidance as to how states should determine whether or not a defendant was too poor to afford a lawyer, and in practice the threshold is often set at a very low

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<sup>104</sup> Police and Fire Reform (Scotland) Act 2012, s 17(3). See also the COPFS *Book of Regulations*, para 2.1.3, available at: [http://www.crownoffice.gov.uk/images/Documents/Prosecution Policy\\_Guidance/Book\\_of\\_Regulations/Book%20of%20Regulations%20-%20Chapter%20-%20Investigation%20of%20Serious%20Crime.PDF](http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Book_of_Regulations/Book%20of%20Regulations%20-%20Chapter%20-%20Investigation%20of%20Serious%20Crime.PDF)

<sup>105</sup> 1976 JC 32.

<sup>106</sup> *Ibid.*, 37, *per* Lord Cameron. See also *Jude, Hodgson and Birnie v HM Advocate* [2011] UKSC 55, para. [17].

<sup>107</sup> S. B. Bright, "Is Fairness Irrelevant: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights", *Washington & Lee Law Review*, LIV (1997), p. 1, at p. 10.

<sup>108</sup> Scotland Act 1989, s 95(10).

<sup>109</sup> For the composition of these tribunals see the Judiciary and Courts (Scotland) Act 2008, s 35(1) (for High Court judges) and the Courts Reform (Scotland) Act 2014, s 21(1) (for sheriffs). Justices of the Peace (the judges in the lowest criminal courts in Scotland) are subject to similar processes for dismissal by the Criminal Proceedings etc. Reform (Scotland) Act 2007, s 71.

<sup>110</sup> 372 US 335 (1963).

<sup>111</sup> A misdemeanour is a crime with a maximum penalty of one year's imprisonment; a felony generally attracts a greater maximum penalty.

<sup>112</sup> *Argersinger v Hamlin* 407 US 25 (1972).

level indeed, so that only the very poorest are eligible for a state-funded lawyer.<sup>113</sup> The Innocence Movement has reignited the debate on adequate legal representation,<sup>114</sup> with the lack of financial assistance to pay for counsel being described as “the most serious challenge to justice” facing the US.<sup>115</sup> It seems that more than 50 years after *Gideon*, the right to a lawyer remains the preserve of those who can afford it.<sup>116</sup>

In contrast, the Scottish Legal Aid Board is empowered by legislation to provide assistance to any person “if the Board is satisfied after consideration of the person's financial circumstances that the expenses of the case cannot be met without undue hardship to the person or the person’s dependants.”<sup>117</sup> Those of low income or who are in receipt of state benefits, and with low levels of disposable capital, are given free legal assistance, while others contribute to their defense cost proportionately to their financial situation. There is also a state-funded Public Defence Solicitors’ Office, based in seven of the Scottish cities.

In *Strickland v Washington*<sup>118</sup> the US Supreme Court held that the right to legal assistance requires a lawyer who is competent and effective. In practice, however, the courts have held that there has been no breach of this right even where defense counsel fell asleep or was drunk during the trial; was openly racist while representing a black defendant; or represented a defendant in a capital murder trial despite having no experience of criminal practice.<sup>119</sup> Again, this is in contrast to the Scottish approach; as Lord Hope stated in the leading case on defective legal representation,

an essential principle for any system of criminal justice is the [defendant’s] right to a fair trial. That right involves the right ... to have his defence presented to the court. ... If the system breaks down to such an extent that the defence is not presented, it would be a denial of justice for the court not to intervene in order to set aside the conviction and allow a new trial.<sup>120</sup>

There have been few cases in which legal representation has fallen below this threshold.

## **Pre-trial Procedural Safeguards**

As we have seen, some scholars advocate a greater pre-trial role for the American trial judge, with a view to improving the lot of the “actually innocent” defendant. Others draw attention to the French system in which the defendant has a right to request that the investigating magistrate carry out further investigations into the crime, and suggest that in the US the defense ought to be

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<sup>113</sup> J. P. Gross, “Too Poor to Hire a Lawyer but not Indigent: How States use the Federal Poverty Guidelines to Deprive Defendants of their Right to Counsel”, *Washington & Lee Law Review*, LXX (2013), p. 1173.

<sup>114</sup> Backus and Marcus, note 89 above, p. 1036.

<sup>115</sup> R. P. Mosteller, “Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness”, *North Carolina Journal of International Law and Commercial Regulation*, XXXVI (2011), p. 319, at p. 327.

<sup>116</sup> C. H. Drinan, “Getting Real about *Gideon*: The Next Fifty Years of Enforcing the Right to Counsel”, *Washington & Lee Law Review*, LXX (2013), p. 1309, at p. 1315.

<sup>117</sup> Legal Aid (Scotland) Act 1986, s 23A(1) (solemn procedure) and s 24(1) (summary procedure). This is also the test for the granting of legal aid for appeals against conviction or sentence: s 25(2)(a).

<sup>118</sup> 467 U.S. 668 (1984).

<sup>119</sup> T. Young, “The Right to Counsel: An Unfulfilled Constitutional Right”, *Human Rights*, XXXIX (2013) p. 6, at p. 6.

<sup>120</sup> *Anderson v HM Advocate* 1996 JC 29, 38.

permitted to request the prosecutor to conduct further investigations.<sup>121</sup> In Scotland, potential pre-trial safeguards include the defense right to request an identification parade,<sup>122</sup> and to interview potential witnesses on oath.<sup>123</sup> A defense lawyer who believes her client to be “actually innocent” could approach the prosecutor in advance of the trial. Any potentially exculpatory evidence would be checked and this may lead to charges being dropped. This is surely what ought to have happened in the American case of Lashonda Moreland, described above. It seems that at least some of wrongful convictions in the US may be attributed to police and prosecutors failing to do their jobs properly.

## Interviewing Witnesses

There is no extensive pre-trial preparation of witness testimony in Scotland, unlike in the US, where “witness prepping” is considered an ethically acceptable practice.<sup>124</sup> Thus an American lawyer in preparing a witness

typically does at least some of the following things:

- discusses the witness’s perception, recollection, and possible testimony about the events in question;
- reviews documents and other tangible items to refresh the witness’s memory or to point out conflicts and inconsistencies with the witness’s story;
- reveals other tangible or testimonial evidence to the witness to find out how it affects the witness’s story;
- explains how the law applies to the events in question;
- reviews the factual context into which the witness’s testimony will fit;
- discusses the role of the witness and effective courtroom demeanor;
- discusses probable lines of cross examination that the witness should be prepared to meet;
- rehearses the witness’s testimony, by role playing or other means.<sup>125</sup>

In relation to the first of these, a Scottish prosecutor may *note* the witness’s perceptions and recollections, but may not “discuss” these with the witness. None of the other actions is permitted. There is a subtle but nonetheless important distinction between acceptable witness preparation and improper coaching. Coaching – whether deliberate or inadvertent – can cause witnesses to alter their testimony. It too has become a source of wrongful convictions.<sup>126</sup>

## Bail

Under the US bail system, courts generally require defendants to provide a sum of money as a surety that they will attend their trial as a condition of being released from custody in the interim.

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<sup>121</sup> For example, M. Zalman, “The Adversary System and Wrongful Conviction” in Huff and Killias, note 77 above, p. 71 and pp. 85-86.

<sup>122</sup> Criminal Procedure (Scotland) Act 1995, s 290(1).

<sup>123</sup> *Ibid.*, s 291. This does not permit precognition of the complainer (alleged victim) by the defendant, in person.

<sup>124</sup> B. R. Cohen, “Whose Line is it Anyway?: Reducing Witness Coaching by Prosecutors”, *New York University Journal of Legislation & Public Policy*, XVIII (2015), p. 985, at p. 989.

<sup>125</sup> R. C. Wydick, “The Ethics of Coaching”, *Cardozo Law Review*, XVII (1995), p. 1, at pp. 4-5 (footnote omitted).

<sup>126</sup> Cohen, note 124 above, p. 1003.

The Eighth Amendment provides that: “Excessive bail shall not be required”,<sup>127</sup> but this has not prevented courts from setting bail at levels which are unaffordable by many, and it has been estimated that 450,000 people are incarcerated in the US each day due to inability to raise bail,<sup>128</sup> with half of jail inmates awaiting trial.<sup>129</sup> In some states, courts issue a bail payment schedule on an annual basis, and even for minor offenses a fixed sum of money must be paid before liberty is granted.<sup>130</sup> Bail is a competent disposal for all crimes in Scotland, but may be subject to conditions designed to ensure that defendants attend trial and will not interfere with witnesses.<sup>131</sup> The court or the Lord Advocate can impose as one of the conditions that the defendant deposits a sum of money with the court, but only if such a condition “is appropriate to the special circumstances of the case”.<sup>132</sup> In practice, this is very rarely required.

Incarceration pre-trial makes it much harder for a defendant to challenge the prosecution case or establish a defense.<sup>133</sup> Psychologically, it is more likely that defendants who are on remand prior to trial will succumb to the pressures to plead guilty.<sup>134</sup> This is particularly so where the remand conditions are much less favorable than those following conviction. In Scotland, untried prisoners are kept separate from convicted ones, have greater access to their lawyers, have increased visiting rights for family members, and are able to wear their own clothes. It is arguable that this is in keeping with the presumption of innocence, if we interpret that presumption to mean that an untried person should be treated the same as any other citizen to the extent that this is possible.

## Pre-Trial Disclosure

We have seen that some of those who champion special procedures for those who claim “actual innocence” would compel defendants who wish to take advantage of these procedures to play a more active role in the process, including a requirement to be forthcoming about potential defenses. Pre-trial disclosure in US federal courts is governed by Rule 16 of the Federal Rules of Criminal Procedure, and by the Jencks Act (2012).<sup>135</sup> Rule 16 requires the prosecution to produce “books, papers, documents, data, photographs [and] tangible objects ... within the government’s possession, custody and control” which are “material to preparing the defense”, or which the prosecution intends to use as evidence at trial.<sup>136</sup> Crucially, however, the Jencks Act

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<sup>127</sup> See also *Stack v Boyle* 342 US 1, 5 (1951).

<sup>128</sup> Data from the Southern Center for Human Rights in Atlanta and Equal Justice Under Law, cited in D. Savage, “Obama Administration Challenges the Money Bail System: Can People be Kept in Jail just because they are Poor?”, *Los Angeles Times*, 25 August 2016 (available at: <http://www.latimes.com/nation/la-na-bail-poverty-court-20160825-snap-story.html>)

<sup>129</sup> M. S. Woodruff, “The Excessive Bail Clause: Achieving Pretrial Justice Reform through Incorporation”, *Rutgers University Law Review*, LXVI (2013), p.241, at p. 242.

<sup>130</sup> S. W. Howe, “The Implications of Incorporating the Eighth Amendment Prohibition on Excessive Bail”, *Hofstra Law Review*, XLIII (2015), p. 1039, at p. 1041.

<sup>131</sup> Criminal Procedure (Scotland) Act 1995, s 24(4) and (5).

<sup>132</sup> *Ibid.*, s 24(6).

<sup>133</sup> See Leipold, note 27 above, p. 1131, who notes the “strong correlation between pretrial detention and a negative trial outcome.”

<sup>134</sup> R. Uphoff, “Convicting the Innocent: Aberration or Systemic Problem?”, *Wisconsin Law Review*, II (2005), p. 739, at pp. 797-798.

<sup>135</sup> 18 U.S. C. s. 3500 (2012).

<sup>136</sup> Quoted in V. N. Gimbel, “Body Cameras and Criminal Discovery”, *Georgetown Law Journal*, VI (2016), p. 1581, at p. 1587.

exempts statements from prosecution witnesses from this disclosure regime until they have actually been called to testify.<sup>137</sup> This is not pre-trial disclosure; rather it is “at trial” disclosure, and is therefore of limited value in assisting defense preparation. Pre-trial prosecution disclosure for state crimes varies greatly from one state to another.<sup>138</sup> In *Brady v Maryland*<sup>139</sup> the Supreme Court determined that it is a breach of Constitutional rights for the prosecution to fail to inform the defense about any exculpatory evidence of which the state is aware. However, the *Brady* process has been criticized for allowing the prosecution to determine whether something is “exculpatory” and “material”.<sup>140</sup> In many states there is no formal requirement for the prosecution to disclose even its list of witnesses to the defense,<sup>141</sup> far less is the defense entitled to interview these witnesses pre-trial.<sup>142</sup> When such interviews are permitted, witnesses are generally interviewed by defense counsel in the presence of their client. If this were changed, perhaps more states might be willing to permit greater access to prosecution witnesses, pre-trial.

Scotland’s pre-trial disclosure processes requires the prosecution to inform the defense of the evidence it intends to lead at trial, as well as any information which would materially weaken or undermine that evidence or materially strengthen the defense case.<sup>143</sup> This duty is “a continuing one – it persists in perpetuity.”<sup>144</sup> It is now routine for the defense to be given the police statements taken from all witnesses on the Crown witness lists, as well as information concerning any previous convictions and pending prosecutions which these witnesses may have.<sup>145</sup> The Crown Office *Disclosure Manual* advises:

When assessing the materiality of a piece of information, a generous approach should be adopted and where there is a doubt about the materiality of a piece of information, then the Crown must err on the side of disclosure.<sup>146</sup>

The defense also has a separate and long-standing statutory right to have access pre-trial to the Crown “productions”, that is, the documents and physical evidence which the prosecution intends to introduce during the trial.<sup>147</sup>

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<sup>137</sup> *Ibid.*, p. 1588.

<sup>138</sup> Uphoff, note 134 above, p. 835. Contrast G. S. Reamey, “Innovation or Renovation in Criminal Procedure: Is the World Moving Toward a New Model of Adjudication?”, *Arizona Journal of International & Comparative Law*, XXVII (2010), p. 693, at p. 708, which suggests that in practice, little of the prosecution case is disclosed to the defense, with the views of Sklansky and Yeazell, who contend that “...many prosecutors – probably most – regularly go well beyond their constitutional and statutory obligations of discovery providing defendants with virtually all information uncovered by law enforcement” (D. A. Sklansky and S. C. Yeazell, “Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure and Vice Versa”, *Georgetown Law Journal*, XCIV (2006), p. 683, at p. 715).

<sup>139</sup> 373 US 83 (1963). See also *United States v Bagley* 473 U.S. 667, at 675 (1985).

<sup>140</sup> Risinger and Risinger, note 19 above, p. 886; Leipold, note 27 above, pp. 1150-1151; A. Smith, “*Brady* Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny”, *Vanderbilt Law Review*, LXI (2008), p. 1935, at pp. 1940-1943.

<sup>141</sup> G. C. Thomas, “Two Windows into Innocence”, *Ohio State Journal of Criminal Law*, VII (2010), p. 575, at p. 591. See also Leipold, note 27 above, p. 1151.

<sup>142</sup> Thomas, *ibid.*, p. 592.

<sup>143</sup> Criminal Justice and Licensing (Scotland) Act 2010, s 121(3). “Information” includes material of any kind which has been given to or obtained by the prosecution in connection with the proceedings (s 116).

<sup>144</sup> COPFS *Disclosure Manual*, para. 2.1.5, available at: <http://www.crownoffice.gov.uk/publications/prosecution-policy-and-guidance?showall=&start=2>

<sup>145</sup> *Holland and HMA v Murtagh* [2009] UKPC 32.

<sup>146</sup> *Disclosure Manual*, note 144 above, para. 2.1.16.

<sup>147</sup> Criminal Procedure (Scotland) Act 1995, s 68(2).

## Plea-Bargaining and Sentence-Bargaining

In some states of the United States, DNA evidence which proves innocence may not be presented on appeal if the defendant pled guilty, even though the plea bargaining process offers such high sentence discounts for a guilty plea that it is likely that many innocent persons plead guilty to avoid lengthy period of imprisonment.<sup>148</sup> While plea bargaining, or “charge bargaining” is a common occurrence in Scottish courts, and there is a sentence discount for those who plead guilty at an early stage,<sup>149</sup> there are not the extreme disparities which can be found in the US. For example, in one American case the prosecution advised the defendant that if he agreed to plead guilty to the crime of uttering, he would receive a sentence of 5 years’ imprisonment. If, however, he maintained his plea of not guilty he would be prosecuted instead under a different statute, with a maximum sentence of life imprisonment. The defendant refused to plead guilty to the lesser charge, was convicted of the more serious one, and was indeed given a life sentence. The Supreme Court was unperturbed by this, holding that it was a legitimate exercise of prosecutorial discretion.<sup>150</sup>

In Scotland and many US states, increased penalties may be imposed if the prosecution establishes that the defendant was motivated by certain forms of hatred towards the victim.<sup>151</sup> However, the option of prosecuting a more serious crime, with a higher maximum penalty – or even a higher mandatory penalty – has been strengthened for US prosecutors by “sentence enhancement” legislation. Defined as “a fact or set of circumstances that, once proved, serves to increase a defendant’s punishment”,<sup>152</sup> sentence enhancements are designed to induce a guilty plea to the non-enhanced charge which is offered as an alternative. For example, an assault which could be depicted as being motivated “for the benefit of a gang” has a higher maximum sentence than an assault committed without such a motive, and the disparity in the two sentences could very well induce an innocent defendant to plead guilty to the latter to avoid a conviction for the former.<sup>153</sup> US defendants may plead *nolo contendere*, which means that they accept the sentence being imposed by the court but refuse to admit guilt. Judges also have discretion to accept a so-called *Alford* plea<sup>154</sup> which allows a defendant to maintain innocence but nonetheless plead guilty, to avoid the greater penalty which would be imposed on conviction after trial.<sup>155</sup> *Alford* pleas are made by 3 per cent of federal defendants and more than 6 per cent of state

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<sup>148</sup> A. W. Alschuler, “A Nearly Perfect System for Convicting the Innocent”, *Albany Law Review*, LXXIX (2015-16), p. 919.

<sup>149</sup> Criminal Procedure (Scotland) Act 1995, s 196(1). See also *Du Plooy v HM Advocate* (2005) 1 JC 1. For commentary see F. Leverick, “Tensions and Balances, Costs and Rewards: The Sentence Discount in Scotland”, *Edinburgh Law Review*, VIII (2004), p. 360.

<sup>150</sup> *Bordenkircher v Hayes* 434 US 357 (1978).

<sup>151</sup> In Scotland these require proof that the crime was motivated by prejudice based on the victim’s race: Crime and Disorder Act 1998, s 96; religion: Criminal Justice (Scotland) Act 2003, s 74; disability, sexual orientation or transgender identity: Offences (Aggravation by Prejudice) (Scotland) Act 2009, ss 1 and 2.

<sup>152</sup> W. R. Porter, “Threaten Sentence Enhancement, Coerce Plea, (Wash, Rinse,) Repeat: A Cause of Wrongful Conviction by Guilty Plea”, *Texas A & M Law Review*, III (2015), p. 261, at p. 266.

<sup>153</sup> *Ibid.*, p. 264.

<sup>154</sup> *North Carolina v Alford* 400 US 25 (1970). For a critique see S. Bibas, “Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of *Alford* and *Nolo Contendere* Pleas”, *Cornell Law Review*, LXXXVIII (2003), p. 1361.

<sup>155</sup> For cases in which innocent defendants have entered *Alford* pleas to avoid the death penalty being imposed following conviction after trial, see J. H. Blume and R. K. Helm, “The Unexonerated: Factually Innocent Defendants who Plead Guilty”, *Cornell Law Review*, C (2014), p. 157.

defendants.<sup>156</sup> Neither of these pleas is permitted in Scotland; if a defendant offered to plead guilty while protesting innocence, the prosecution would proceed to trial.

## **Juries, Verdicts, Opening Speeches and Closing Arguments**

The *voir-dire* process in the United States allows lawyers on both sides to attempt to shape the jury in a way which is more likely to favor their case. In Scotland, no such questioning of jurors is permitted,<sup>157</sup> the appeal court going so far as to say:

It is not a sufficient cause for a juror to be excused that he is of a particular race, religion, or political belief or occupation, or indeed that the juror might or might not *feel prejudice one way or the other* towards the crime itself or to the background against which the crime has been committed.<sup>158</sup>

One cannot imagine a similar sentiment being expressed by an American court: any hint that a juror might harbor such prejudice would surely be subject to challenge by the parties.

In relation to jury size and verdicts, Scotland is unusual in having a jury of 15, in permitting conviction on a bare majority, and in having a “not proven” verdict as well as the more usual options of “guilty” and “not guilty”.<sup>159</sup> There are no opening speeches in a Scottish trial, unlike the position in the US. At the close of the evidence, and before the judge’s summation, the Scottish prosecutor makes a closing address to the jury, then the defense lawyer does likewise. This is in contrast to the position in the majority of US states, in which the prosecution makes its final arguments after the defense has done so. Described as a “fundamental tenet of American jurisprudence”,<sup>160</sup> it is claimed that this ordering of closing arguments “favors traditional notions of fairness”.<sup>161</sup> By contrast, to a Scottish-trained lawyer, fairness requires that the defense gets to speak last. It is difficult to know what impact jury size, majority verdicts, and order of speeches have on the defendant’s chances of acquittal, far less whether they offer any sort of a safeguard against wrongful conviction.<sup>162</sup> Scottish lawyers do, however, cherish their right to have the “last word” – a right which is enshrined in statute.<sup>163</sup>

## **Corroboration**

Scotland retains a corroboration requirement: the essential elements of a crime, namely the fact that a crime has been committed and that the defendant is the person who committed it, must be established by the prosecution by means of two independent sources of evidence. According to

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<sup>156</sup> J. W. Diehm, “Pleading Guilty while Claiming Innocence: Reconsidering the Mysterious Alford Plea”, *University of Florida Journal of Law & Public Policy*, XXVI (2015), p. 27, at p. 34. According to Leipold, *Alford* pleas are permitted in the federal system and in 47 states (note 27 above, p. 1156, footnote 176).

<sup>157</sup> *McCadden v HM Advocate* 1985 JC 98. See P. Duff, “The Scottish Criminal Jury: A Very Peculiar Institution”, *Law and Contemporary Problems*, VXII (1999), p. 173, at pp. 180-182.

<sup>158</sup> *M v HM Advocate* 1974 SLT (Notes) 25 (HCJ) (emphasis added).

<sup>159</sup> It has been suggested that the number of jurors should be reduced: see Scottish Government, *The Modern Scottish Jury in Criminal Trials* (2008) Chapter 7 and, more recently, *Post-Corroboration Safeguards Review* (2015), Chapter 12, available at: <http://www.gov.scot/Resource/0047/00475400.pdf>

<sup>160</sup> N. Velasco, “Taking the Sandwich Off of the Menu: Should Florida Depart from Over 150 Years of its Criminal Procedure and Let Prosecutors Have the Last Word?”, *Nova Law Review*, XXIX (2004), p. 99, at p. 121.

<sup>161</sup> *Ibid.*, p. 129.

<sup>162</sup> For a sceptical view of the research on jury size, see P. Lermack, “No Right Number? Social Science Research and the Jury-Size Cases”, *New York University Law Review*, LIV (1979), p. 951.

<sup>163</sup> Criminal Procedure (Scotland) Act 1995, s 98.

the Risingers, “multiple identifying witnesses are no good guarantee of accuracy, so counting multiple identifications as mutually corroborating in any strong sense is a tragically flawed perception.”<sup>164</sup> Nevertheless, the chances of two witnesses misidentifying the defendant as the perpetrator are less than one witness doing so, and it may be argued that in general corroboration provides a safeguard against wrongful conviction. It is, however, a safeguard which is under attack in Scotland, with a judge-led review recommending that the corroboration requirement be abolished.<sup>165</sup> This suggestion provoked such hostility among the legal profession that the provision in the draft legislation which would have effected this change was subsequently dropped, and the then Justice Secretary announced that the matter required further consideration. In the US, the uncovering of wrongful convictions has led to calls for a corroboration requirement for some particularly problematic forms of evidence,<sup>166</sup> or even that no conviction should be based on only one piece of evidence.<sup>167</sup> At a time when some American prosecutors are considering dropping cases which are dependent on the testimony of a single eyewitness,<sup>168</sup> it would be unfortunate if Scotland were to abolish this important safeguard.

## Expert Witnesses

There have been cases involving perjured expert testimony and falsified laboratory reports in the United States, and it has been suggested that there is clear bias on the part of some experts in favor of the prosecution.<sup>169</sup> Legal Aid in Scotland generally covers the expense involved in obtaining an expert opinion. Forensic experts testify for whichever side approaches them first, but their primary obligation “is to assist the court and remain independent of the parties”.<sup>170</sup> Less happily, the Scottish courts are reluctant to allow the defense to call its own experts for certain types of evidence. In *Gage v HM Advocate*<sup>171</sup> the defense sought to introduce evidence from a psychologist to explain to the jury that witnessing a serious and violent crime would tend to decrease the accuracy of any identification of the perpetrator. It also wanted the expert to describe the distorting effect which information acquired by a witness after an incident can have on the memory of that incident. The appeal court refused to admit such evidence, listing several objections, including that the credibility and reliability of identification evidence is a jury issue,<sup>172</sup> and that trial judges provide jurors with detailed warnings about the potential

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<sup>164</sup> Risinger and Risinger, note 19 above, p. 899.

<sup>165</sup> The *Carloway Review: Report and Recommendations* (2011), para 4.0.14 (available at <http://www.gov.scot/Resource/Doc/925/0122808.pdf>)

<sup>166</sup> S. G. Thompson, “Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony”, *UC Davis Law Review*, XXI (2008), p. 1487; D. Crump, “Eyewitness Corroboration Requirements as Protections against Wrongful Conviction: The Hidden Questions”, *Ohio State Journal of Criminal Law*, VII (2009), p. 361.

<sup>167</sup> B. Sangero and M. Halpert, “Why a Conviction Should Not be Based on a Single Piece of Evidence: A Proposal for Reform”, *Jurimetrics*, XLVIII (2007), p. 43, at p. 94.

<sup>168</sup> Medwed, note 98 above, at p. 127.

<sup>169</sup> P. C. Giannelli, “The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories”, *Virginia Journal of Social Policy & Law*, IV (1997), p. 439, at p. 441.

<sup>170</sup> The Law Society of Scotland's *Directory of Expert Witnesses, Code of Practice*, para. 11, available at: <http://www.lawscot.org.uk/members/expert-witness-directory>. Further: “A solicitor must not make or offer to make payment to a witness contingent upon the nature of the evidence given” (ibid).

<sup>171</sup> [2011] HCJAC 40.

<sup>172</sup> Ibid., para. [28] per the Lord Justice Clerk, Lord Gill.

unreliability of such evidence.<sup>173</sup> The court also noted that the defense was permitted to highlight this potential unreliability during cross-examination, and could lead evidence of specific factors which might affect reliability.<sup>174</sup>

In 2009 the US Supreme Court held that expert witnesses should be permitted to educate jurors about the very matters the defense wanted its expert to address in *Gage*, namely the psychological literature on the impact of stress on identifications, and the distorting effects of post-event information.<sup>175</sup> The Court also noted that expert evidence could educate jurors about cross-racial identifications, and the weak correlation between witness confidence at trial and accuracy of identification.<sup>176</sup> Risinger recommends that expert evidence which the defense wish to lead on factors such as the weaknesses of eyewitness identifications, false confessions, etc. should no longer be ruled inadmissible by US courts on the basis that this invades the province of the jury.<sup>177</sup> Scottish law would benefit from taking a similar approach.

### Previous Convictions

Scottish defendants who attack the honesty of prosecution witnesses, give evidence of their own “good character”, or testify against co-defendants, may find that their own previous convictions are revealed to the judge or jury. This is generally at the discretion of the prosecutor,<sup>178</sup> and becomes mandatory only if the witness whose reputation the defendant is attacking is the complainer (i.e. the alleged victim) in a sexual offense case.<sup>179</sup> Apart from these quite narrow exceptions, legislation prevents previous convictions from being revealed until there is either a guilty plea or guilty verdict.<sup>180</sup> By contrast, in many US states, defendants who testify automatically expose themselves to their criminal records being revealed.<sup>181</sup> There is evidence that in “close” cases – defined as those in which there is some, but insufficient, evidence of guilt – such knowledge promotes juries to convict.<sup>182</sup> This may well lead to conviction of the “actually innocent”. It also seems that many of those subsequently exonerated by DNA analysis chose not to testify at trial due to a fear of having their previous convictions exposed.<sup>183</sup> Innocent defendants ought not to have to choose between explaining the truth, while hoping that the revealing of past convictions does not deflect jurors from deciding the cases before them on the facts, rather than on defendants’ past misdeeds, or opting not to testify, while hoping that silence is not misconstrued as guilt.

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<sup>173</sup> Ibid., para. [29].

<sup>174</sup> Ibid., para. [30].

<sup>175</sup> *United States v Smith* 621 F Supp 2d 1207, 1218 (2009). See also *Commonwealth of Pennsylvania v Walker* 92 A 3d 766 (2014).

<sup>176</sup> See M. Stoneman, “*United States v Smith*: An Example to Other Courts for How They Should Approach Eyewitness Experts”, *Catholic University Law Review*, LX (2011), p. 533.

<sup>177</sup> D. M. Risinger, “Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims”, *Houston Law Review*, LXI (2004-5), p. 1281, at pp. 1311-1312.

<sup>178</sup> Criminal Procedure (Scotland) Act 1995, s 266(4).

<sup>179</sup> Ibid., s 275A(1).

<sup>180</sup> Ibid., s 101(1) (solemn proceedings), s 166(3) (summary proceedings).

<sup>181</sup> T. Eisenberg and V. P. Hans, “Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes”, *Cornell Law Review*, XCIV (2009), p. 1353, at p. 1355.

<sup>182</sup> Ibid., p. 1388. For an English study which reached similar conclusions see S. Lloyd-Bostock, “The Effects on Juries of Hearing about the Defendant’s Previous Criminal Record: A Simulation Study”, *Criminal Law Review*, (2000), p. 734, at pp. 753-755. See, however, M. Redmayne, *Character in the Criminal Trial* (2015), which offers a robust defense of the use of character evidence, including previous convictions.

<sup>183</sup> Eisenberg and Hans, note 181 above, p. 1389.

## Criminal Case Review Commissions

There seem to be few mechanisms in the US by which those who have exhausted all avenues of appeal at state level may claim that they have been wrongly convicted and are factually innocent. Defendants must employ the habeas corpus provisions in federal courts, contending that their continued imprisonment violates the Constitution.<sup>184</sup> In *Herrera v Collins*<sup>185</sup> the Supreme Court stated, albeit obiter, that if a convicted person were able to make a really persuasive case of factual innocent, it would be unconstitutional for that person to then be executed. However, the Court held that a claim of actual innocence must be coupled with an independent Constitutional violation.<sup>186</sup>

The Scottish Criminal Cases Review Commission (SCCRC) was established in 1999.<sup>187</sup> The enabling legislation provides that the Commission may refer a case to the Scottish appeal court if it believes that a miscarriage of justice may have occurred and that it is in the interests of justice that a reference should be made.<sup>188</sup> It seems that the SCCRC debated whether it should refer a (hypothetical) case to the court if it believed that there had been a miscarriage of justice, but also believed that the applicant was “factually guilty”.<sup>189</sup> It concluded that it would not be “in the interests of justice” to refer a case where, despite evidence that there may have been a miscarriage of justice, “there is compelling evidence of the guilt of the applicant.”<sup>190</sup> This approach is based on the view that the SCCRC’s primary function is to prevent factually innocent people from being punished for offenses they had not committed.<sup>191</sup> According to a former Commissioner, however:

In practice, I cannot remember the Commission referring a case where I was absolutely certain that the applicant was factually innocent; quite simply, it was never possible to be sure about precisely what had happened. As regards some referrals, I thought it possible that the applicant was innocent but, as regards others, I had severe doubts as to their innocence but was not sure enough of their guilt to argue against a referral. In all such cases, however, I was convinced there had been a “miscarriage of justice” in legal terms.<sup>192</sup>

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<sup>184</sup> Habeas corpus is “the mechanism by which a person convicted in a state or federal court may petition the federal courts for review of a conviction or sentence on the grounds that it was obtained in violation of the Constitution”: Bright, note 107 above, p. 10.

<sup>185</sup> 506 U S 390, 399 (1993).

<sup>186</sup> For the argument that actual innocence should be a free-standing Constitutional claim see: P. Kaneb, “Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim”, *California Western Law Review*, L (2014), p. 171; M. Agliandolo, “A Case for Actual Innocence”, *Cornell Journal of Law and Public Policy*, XXIII (2014), p. 635.

<sup>187</sup> Criminal Procedure (Scotland) Act 1995, s 194A, as inserted by the Crime and Punishment (Scotland) Act 1997, s 25(1).

<sup>188</sup> Criminal Procedure (Scotland) Act 1995, s 194C.

<sup>189</sup> P. Duff, “Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner”, *Modern Law Review*, LXXII (2009), p. 705. See also P. Duff, “Criminal Cases Review Commissions and “Deference” to the Courts: The Evaluation of Evidence and Evidentiary Rules”, *Criminal Law Review* (2001), p. 341.

<sup>190</sup> Scottish Criminal Case Review Commission, *Sixth Annual Report and Accounts* (2005), cited *ibid*.

<sup>191</sup> Duff (2009), note 189 above, p. 707.

<sup>192</sup> *Ibid.*, p. 721.

A study of the Commission's first 10 years found that it had received 939 applications<sup>193</sup> and referred 75 of these to the appeal court.<sup>194</sup> This gives a referral rate of eight per cent,<sup>195</sup> which compares favorably with the Criminal Cases Review Commission (CCRC) for England, Wales and Northern Ireland, whose referral rate is less than four per cent.<sup>196</sup> Of the 75 Scottish cases, 42 related to conviction, rather than sentencing,<sup>197</sup> 30 of which had been determined by the date of the study. 18 cases had resulted in a quashing of the convictions (a 60 per cent success rate.<sup>198</sup>) It may be argued that state funded organizations such as the SCCRC or CCRC offer a better solution to investigating miscarriages of justice than *ad hoc* innocent projects.<sup>199</sup>

### Conclusions

It should not be thought that Scotland has all the solutions to the “innocence problem” in the United States, far less that its criminal procedure is entirely satisfactory. As previously noted, the proposal to abolish the corroboration requirement is a particular cause for concern. Nevertheless, this article has highlighted aspects of Scottish criminal procedure which may protect the “actually innocent” from wrongful conviction, or at least make such convictions less likely. As we have seen, some of the suggested reforms in the United States, such as pre-trial disclosure of prosecution evidence to the defense, already feature in the Scottish process. Admittedly, there has been a degree of *quid pro quo* here, with the defense now required to disclose its case pre-trial, but Scottish defendants retain the right to silence, both during police questioning and at trial, and lawyer/client confidentiality is maintained, thus we have not witnessed the diminution of defense rights being proposed by some American legal scholars. Scotland does not have an “Office of Public Advocacy” with lawyers alternating between prosecution and defense, as proposed by Findley, but the practice of drawing senior prosecutors mainly from the defense Bar and the “non-criminal” Bar is an important safeguard against prosecutorial tunnel-vision. The Legal Aid system in Scotland provides free legal advice at the police station, during bail proceedings, and at trial for the great majority of defendants. Coupled with the fact that money bail is extremely rare, this makes it less likely that factually innocent people will plead guilty to avoid languishing in jail for long periods, pre-trial.

Scotland is not facing an “innocence crisis” akin to that being experienced in the United States. It is therefore unlikely that any of the novel innocence procedures being proposed – and indeed utilized – in America will be adopted in Scotland. Those looking to reform criminal procedures in the United States may be better advised to consider borrowing features found in other adversarial systems such as Scotland, rather than opting for a more inquisitorial approach or devising new processes to accommodate pleas of “actual innocence”.

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<sup>193</sup> J. Chalmers and F. Leverick, “The Scottish Criminal Cases Review Commission and its Referrals to the Appeal Court: The First Ten Years”, *Criminal Law Review* (2010), p. 613.

<sup>194</sup> *Ibid.*, p. 612.

<sup>195</sup> *Ibid.*, p. 613.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*, p. 612.

<sup>198</sup> *Ibid.*, p. 616.

<sup>199</sup> A point made by Quirk, note 92 above, p. 772.