Carter, the object of the Criminal Code provision in Rodriguez was that ‘section 241(b) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide’ (p. 593). [This purpose] is “grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken” (ibid.). His remarks about the ‘preservation of life’ in Rodriguez are best understood as a reference to an animating social value rather than as a description of the specific object of the prohibition’ (Carter, at para 76). This further illustrates that the outcomes is dictated closely by the characterization of the impugned law or provision.

Interestingly, at paragraph 79, McLachlin offers some guidance and insight into the Court’s Section 7 analysis. She writes ‘In determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s.7, courts are not concerned with competing social interests or public benefits conferred by the impugned law’. It is obvious that the decision in Carter raises profound questions regarding the process by which cases such as these will be dealt with in the future. What does Carter actually say about the importance of the decision to those affected?”

Facially, it seems to say that the Courts will adjudicate matters without much, if any, consideration of the people whose lives will be fundamentally affected by the outcome. This may not be problematic per se, however, when dealing with future issues, the exclusion of social and public interests will likely raise some controversy.

In conclusion, for patients awaiting their death at the hands of an irreversible disease, Carter represents their right to choose to die with dignity and with respect of their individual autonomy; values highly regarded in Canadian jurisprudence and the Canadian Constitution. Quite simply, Carter is a case which enshrines a human right, a right to choose to end one’s life, but more importantly, the human right to choose to do or not to do something. This clearly upholds both the concepts of ‘autonomy’ and ‘dignity’ by the impugned law.

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DNA Exonerations in the USA: A Lesson for Everyone

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ABSTRACT

Innocent people have been—and continue to be—convicted of crimes they did not commit. The tireless efforts of organisations like the Innocence Project in the United States of America (USA) have helped to free 325 wrongfully convicted individuals through post-conviction DNA testing. This number represents the tip of the ‘miscarriages of justice’ iceberg. Although the media spotlight is focused on the cases emerging from the USA, these issues are not theirs alone. Several other countries have overturned the convictions of innocent people (e.g., the Chamberlain case in Australia); however, none are on the same scale as the USA. In this paper, I highlight factors associated with these known wrongful convictions, and explain how criminal justice systems around the world are susceptible to these risk factors. Rather than viewing the US-based cases as an anomaly, I argue that governments should learn from their lesson and proactively introduce reforms.

1. INTRODUCTION

Although not the first DNA exonerations in the United States of America, the case of Ronald Cotton is arguably the most well-known. On July 28, 1984, a young college student, Jennifer Thompson, was brutally raped in North Carolina. A man broke into her apartment during the night while she was sleeping and raped her. Jennifer reported that during the attack she saw a face she had never seen before. Jennifer interviewed Jennifer and she worked with a forensic sketch artist to produce an image of the perpetrator. Someone in the community thought it looked like a man by the name of Ronald Cotton. Cotten went down to the police station to clear his name and provide an alibi for that night. Unfortunately, he confessed his weeklong, which led to his conviction. After 11 years behind bars he is arguably on the same scale as the USA. In this paper, I highlight factors associated with these known wrongful convictions, and explain how criminal justice systems around the world are susceptible to these risk factors. Rather than viewing the US-based cases as an anomaly, I argue that governments should learn from their lesson and proactively introduce reforms.

While Cotton was in prison, other prisoners began confusing him with a new inmate. Bobby Poole. Poole had been convicted of a rape that took place around the same time and place as Jennifer’s attack.

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2. WRONGFUL CONVICTIONS AROUND THE WORLD

2.1. The United States of America

Uncovering a wrongful conviction is a difficult task made possible by a confluence of factors. Although confirmed miscarriages of justice are not a new phenomenon (e.g., House of Commons 1967; Munsterberg 1908), DNA testing has largely removed lingering doubts about claims of innocence (Connors, Lundregan, Miller & McEwen 1996; Scheck, Neufeld & Niven 2003). In total, in the US alone, the Innocence Project − a not-for-profit organisation founded by Barry Scheck and Peter Neufeld at the Benjamin N. Cardozo School of Law − used DNA testing to establish 325 cases of wrongful convictions. These indisputably innocent individuals spent an average of 14 years behind bars − a total exceeding 4,000 years for crimes they did not commit. Each wrongful conviction represents two errors: (1) an innocent person is punished, and (2) the actual perpetrator remains free. Indeed, the perpetrator’s freedom may extend beyond the innocent person’s exoneration; unlike Bobby Poole, less than half of the actual perpetrators are brought to justice (Innocence Project 2015).

These DNA exonerations do not represent all of the innocent lives destroyed by miscarriages of justice. Of all possible crimes (e.g., hit and run, larceny, property crime), a limited few involve the perpetrator’s DNA (i.e., rape, homicide). In some cases, even if DNA was left at the crime scene, it may not have been properly preserved to allow for subsequent testing. Furthermore, even if DNA is available for testing, the law in that country or state may not allow for post-conviction DNA testing (e.g., Steinback 2007). Taken together, researchers are confident that the DNA exonerations represent only the tip of the iceberg of wrongful conviction cases. Indeed, a comprehensive database of wrongful convictions through the Innocence Network and Northwestern Law, the National Registry of Wrongful Convictions (National Registry 2015) cites 1,560 cases of confirmed innocence to date. Whereas the Innocence Project relies upon DNA evidence to prove actual innocence, the National Registry includes any case that meets the following criterion: ‘A person has been exonerated if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant, the defense attorney and the court at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person.’

Despite increasing the number of exonerations reported by the Innocence Project (2015) fivefold, the National Registry claims that, ‘the exonerations we know about are just a fraction of those [wrongful convictions] that have taken place’ (National Registry 2015).

2.2. Around the World

With only a few exceptions (e.g., the Lindy Chamberlin case in Australia), very few wrongful convictions outside of the USA have received significant coverage by the mainstream Western media. Nonetheless, the lack of media attention does not mean that other countries have not experienced their own miscarriages of justice. The Innocence Network connects independent Innocence Projects around the world, including those in the USA, Canada, France, Ireland, Israel, Italy, the Netherlands, New Zealand, South Africa and Taiwan. For brevity, I highlight only a few countries’ miscarriages of justice. Canada’s Association in Defence of the Wrongly Convicted [AIDWYC] reports 19 wrongful convictions, with the first exoneree spending more than 50 years in prison (AIDWYC 2015). The Project Innocence France has not yet contributed to an overturned conviction (although the Court of Revision has independently overturned convictions during appeals); nonetheless, the Project’s reporting of suspicion rather than a bill that will facilitate additional criminal conviction reviews. Although not part of the Innocence Network, Japan has uncovered 167 wrongful convictions, some on death row (Johnson 2015). Like in the USA, the numbers presented above are unlikely to represent the totality of the innocent persons convicted by those countries’ criminal justice systems.

In contrast, my research team was unable to obtain any information about wrongful convictions in general in 92 countries: Argentina, Brazil, India, Indonesia, Mexico, Republic of Korea, and Russia. The lack of readily-available information on confirmed wrongful convictions in those countries should not be taken as evidence that none exist. Rather, many countries may not have suitable processes and procedures in place to uncover and/or officially overturn a wrongful conviction. Therefore, many of the world’s justice systems are arguing for reform on a number of fronts to prevent, correct, and compensate for the convictions of innocent persons. The justice system will be better served if organisations like the Innocence Project are in place to provide pro bono services to individuals claiming innocence. The legal system needs to ensure the proper long-term preservation of DNA evidence, provide individuals with access to post-conviction DNA testing, and appropriately compensate exonerees. Without proper infrastructure and responsive criminal justice systems that address known risks and issues, innocent individuals will continue to be convicted of crimes they did not commit.

3. RISK FACTORS FOR WRONGFUL CONVICTIONS

Regardless of whether one examines DNA or non-DNA exonerations emerging from the USA, the same factors emerge as increasing the risk of wrongful convictions. Some factors are more or less prevalent than others depending on the type of crime; thus, I resist ranking them according to risk or prevalence in wrongful conviction cases. For example, the Innocence Project (focused exclusively on DNA-based cases with crimes such as rape and homicide) cite mistaken eyewitness identification evidence as the largest risk factor present in 72% of the 325 cases (Innocent Project, 2015). In contrast, the National Registry (2015) includes additional crimes such as child abuse and other non-homicide and non-sexual assault crimes. Although eyewitness evidence is present in nearly 80% of their stranger sexual assault cases, less than 20% of the sexual abuse wrongful conviction cases cite a mistaken eyewitness identification as the most convincing piece of eyewitness testimony. Instead, when we try to remember an event our memory does not function like a video camera; we cannot rewind and play back an important event as it actually occurred. Instead, when we try to remember an event our memory reconstructs the pieces, filling in missed or misunderstood bits with information from other sources. As a result, an eyewitness’s testimony should be treated like any other kind of trace evidence (e.g., fingerprints) that needs to be preserved and protected from contamination (Wells et al. 2000).

Unreliable eyewitness memory, in general, can substantially affect the course of a police investigation (e.g. Memon & Wright 1999). Nonetheless, perhaps the most convincing piece of eyewitness testimony is when an individual points to the defendant and says that s/he is the person the eyewitness saw commit the crime (e.g., Boyce, Beaudry & Lindsay 2007). Unfortunately, eyewitnesses make mistakes, and the real-world rates of selections of known innocent
lineup members (i.e., in real cases, approximately 35% of eyewitnesses who made an identification selected a filler; e.g., Wells, Steblay & Dysart 2015) raise questions about the reliability of an eyewitness’ identification of a stranger. Whereas the selection of a targeted lineup member limits forensic relevance (apart from discrediting the eyewitness as having a poor memory for the culprit), a mistaken selection of an innocent suspect (i.e., someone that the police believe may have committed the crime, but who is actually innocent of the crime in question) has the potential to lead to further investigation and potential prosecution of that innocent suspect (Derby & White 2000, Wells et al. 2000). This line of reasoning is at the core of the criminal justice system needs eyewitnesses; we cannot and should not abandon this evidence. Rather we must develop procedures and institute policy to increase its reliability.

3.1.1. reforms

Efforts to improve the reliability of eyewitness identification evidence are focused on factors that are under the control of the criminal justice system (e.g., Technical Working Group for Eyewitness Evidence [Technical Working Group], 1999; National Academy of Sciences [NAS], 2014; Wells et al. 1998, a White Paper by the American Psychological Association). These recommendations include (but are not limited to) separating eyewitnesses so each can give independent pieces of information, informing the eyewitness that the culprit may or may not be in the lineup; constructing the lineup such that all lineup members fit the general description provided by the eyewitness and none stand out in the lineup as unique or different; having an independent person who does not know the suspect’s identity show the lineup to the eyewitness; prohibiting the administrator from giving any information to the eyewitness about their selection; and asking the eyewitness for a statement about the certainty of their selection. Furthermore, the officers should retain a video record of the interaction between the eyewitness and the lineup administrator; however, emerging research suggests that this video record has the most utility if combined with uncontaminated and properly conducted identification procedures (e.g., Beaudry & Sauer 2015; Beaudry, Sauer & Blanksby 2015). Finally, eyewitness researchers argue that a case should not be prosecuted based on eyewitness identification evidence alone; instead, it should only be pursued if there is independent corroborating evidence of the suspect’s guilt (Wells et al. 2000). The main goal of these recommendations is to ensure that any lineup selection made by an eyewitness is guided by their memory for (and recognition of) the selected lineup member rather than the result of social influence (intentional or otherwise). Given the space constraints, I cannot discuss the extensive recommendations (and the empirical evidence supporting them) in great detail; however, I point interested readers to the readily-accessible reports mentioned previously.

3.1.2. risk factors beyond the USA

The fallibility of eyewitness memory is a consequence of the human condition. As a result, no country is immune from the risk of mistaken identification (e.g., one that is innocent of the crime). The USA has undertaken reforms of eyewitness identification procedures (e.g., International Association of Chiefs of Police 2010; Police and Criminal Evidence Act 1984, Home Office 2010; Cory 2001). Other countries, however, appear to have overlooked or are unaware of the empirical evidence supporting eyewitness reform. Given the prevalence of eyewitness identification evidence, its potential to be easily and effortlessly contaminated, and its persuasiveness in court, it is crucial that criminal justice systems around the world incorporate the empirically-supported best practice recommendations into their police practices. The majority of the recommendations require minimal resources and can be effortlessly implemented with nominal training (Technical Working Group 2003).

3.2. False Confessions

People seem to inherently understand that an eyewitness can make an error perhaps because they have experienced their own memory slips on occasion. In contrast, it is more difficult to comprehend why an innocent person would falsely confess to a crime they did not commit. People struggle to place themselves in the position of the accused – as the subject of intense suspicion – and tend to underestimate the influence of external factors (e.g., pressure from the officer) on the person’s decision to confess (Kassin 2008). General theories of eyewitness memory and interrogations suggest that interrogations can induce confessions by maximising and minimising techniques (e.g., discomfort; a harsher charge) while minimising the costs associated with confessing (e.g., getting to leave the interrogation room; a more lenient sentence). These maximisation and minimisation techniques increase the likelihood of an innocent person making a false admission (Kassin et al. 2010).

Suspects may be under interrogative duress for hours (some of the wrongful convictions cited interrogations of more than 12 hours; Innocence Project 2015), placing the suspect in a food- and sleep-deprived state, which increases their vulnerability. Furthermore, some dispositional characteristics can increase individuals’ vulnerability in an interrogation setting. Some of the DNA exonerated cases had adults or adolescents, some had limited mental capacity (i.e., low IQ scores), and some suffered from substance abuse or mental health issues. Teina Pora’s ongoing case in New Zealand is a perfect example of a vulnerable person making a false admission in response to interrogative pressure. Pora was 17 years old at the time of the 1993 interrogation, but had limited mental capacity due to substance abuse or mental health issues. Teina Pora’s case is illustrative of the human condition. As a result, beyond the USA, several countries have internalised the recommendation that innocence actually puts innocent people in the most vulnerable position. For example, Innocence Project (2015) suggests that defendants often do not know the suspect’s identity show the lineup to the suspect, and asking the eyewitness for a statement about the suspect, and deceiving the suspect (Kassin et al. 2010). The interrogation’s focus on obtaining an admission of guilt, rather than on obtaining information, creates a situation in which the suspect is the innocent person isolated from others, and made to feel anxious. While the suspect is in this state of duress the interrogator—if following the Reid Technique, the most popular interrogation technique in the USA (Inbau, Reid & Buckley & Jayne 2001) – proceeds through a nine-step process tailored to maximise the costs associated with not confessing (e.g., discomfort; a harsher charge) while minimising the costs associated with confessing (e.g., getting to leave the interrogation room; a more lenient sentence). These maximisation and minimisation techniques increase the likelihood of an innocent person making a false admission (Kassin et al. 2010).

Beyond being persuasive to courts, false confessions are particularly damaging because they taint other aspects of the case. That is, compared to non-confession cases, the wrongful conviction confession cases included more errors in other aspects of the case, such as improper forensic evidence and a mistaken eyewitness evidence, falsely creating an appearance of corroborating evidence (e.g., Kassin, Bogart & Kerner 2012). Findings from laboratory studies and analyses of wrongful conviction cases call into question the fundamental presumption that various pieces of evidence obtained during an investigation support the guilty verdict as impartial forensic evidence, and that information from a false confession are particularly high: individuals who provide a ‘voluntary’ confession lose the right to post-conversion DNA testing.

3.2.1. reforms

Interrogation practices in the USA have received significant attention in the past decade, particularly in response to the report by the International Committee of the Red Cross (Danner 2009) and the so-called CIA torture report (Senate Select Committee on Intelligence 2014). Both reports highlight the continued use of third-degree techniques and they open the door to conversations about the most effective way to obtain reliable forensic evidence and information from persons of interest, regardless of whether they are suspected of petty larceny or large-scale terrorist activity. Recommended reforms propose moving from an accusatorial approach – where the goal is to get a confession— to an information-gathering approach that relies on building rapport and establishing empathy (Kassin et al. 2010, a White Paper by the American Psychological Association). Besides condemning third-degree techniques, various psychological techniques (e.g., lying about incriminating evidence and minimising the consequences of crimes in exchange for a confession) are prohibited. In addition, the recommendations include limiting the interview length and video-recording the interview between the suspect and interrogator. Approaching an interrogation as an interview is already commonplace in the UK (Kassin et al. 2010) and Australia where investigative interviewers agree that these reforms have merit (Sivasubramaniam, Goodman-Delahunty, Fraser & Martin, in press).

3.2.2. risk factors beyond the USA

Minimal information is available about interrogation practices around the world; however, the existence of the European Court of Human Rights and the United Nations Convention against Torture
and had a long career as a forensic scientist, proffering testimony for the prosecution in 12 states, including West Virginia and Texas. One of the first wrongful conviction cases overturned through DNA evidence (Gerald Davis) revealed that Zain had lied about the match between the sample taken at the crime scene (Innocence Project 2015). According to one estimate, Zain’s testimony contributed to the conviction of over one hundred defendants charged with violent offences; many of these convictions were eventually overturned because the reliability of his evidence and credibility of his testimony was brought into question by the Innocence Project (2015). Although Zain’s behaviour is unusual and most certainly the exception to the rule, it serves to highlight the imperfect science underpinning some convictions.

3.3.1. reforms

The unreliability of forensic scientific evidence is the focus of a 350-page report released by the National Research Council of the National Academies in the USA (NAS 2009). In addition to identifying the challenges and issues with the field, the NAS discussed, in great detail, the agencies’ findings and put forward thirteen clear recommendations to improve the way the forensic sciences operate in court. The report points to the fragmentation of the forensic science disciplines as a major issue facing the field and many of their recommendations focus on increasing national oversight of the laboratories and agencies as well as standardizing the testing and reporting of forensic tests. Again, for brevity’s sake, I will not rehearse their report, but rather I direct interested readers to the National Academy Press website where the report can be easily obtained. In addition to increasing the standards for forensic scientific evidence, researchers are trying to develop new ways of conducting forensic tests that remove the influence of confirmation bias, reduce the risk of false positives for suspects, and provide an estimate of error rates (e.g., Wells, Wilford & Smalzar 2013).

3.3.2. risk factors beyond the USA

The problems facing the American system are not unique, but rather have been brought to light through the DNA-exoneration cases and their current attention attracts scholarly interest by developing the National Institute of Forensic Science (NAS 2009). Several countries, including Australia (e.g., Edmond, Thompson & Tangen 2013; Heyer & Semmler 2013) and China (e.g., Na 2014), are also calling into question the reliability of forensic science evidence in investigations and the courtroom. Given the subjectivity – and apparent implied credibility – of many forensic tests, it is unlikely that any country whose legal system relies on forensic evidence is immune from the issues facing the USA. This is critical that all countries, regardless of whether they rely on the adversarial or inquisitorial justice system, revisit their approaches to forensic science.

4. CONCLUSION

Criminal justice systems will never be perfect. Nonetheless, the considerable efforts of organisations like the Innocence Projects around the world are making great strides in the pursuit of justice. Academics have an important role to play in this regard and should collaborate with organisations and governments as much as possible. Psychological researchers arm these organisations with the empirical evidence outlining the risks associated with current criminal investigation procedures and the potential solutions. If governments around the world adopt the proposed reforms citizens will be able to place greater confidence in the police and courts. Ideally, raising awareness of the large numbers of wrongful convictions emerging from the USA and elsewhere will prompt other nations to proactively introduce reforms to curb the known risk factors associated with wrongful convictions.

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