THE DEATH PENALTY AND WRONGFUL CONVICTIONS

This issue contains reminders that in the not so distant past, we executed some of our murderers and that in the fresh past, we seriously considered the reinstatement of capital punishment. One of the best arguments against capital punishment is the risk of executing an innocent person. People may disagree about whether capital punishment is morally right or whether it deters crime, but the injustice of executing a person for a murder that he or she did not commit is undeniable. The debate can only be about what level of risk, if any, is acceptable.

If capital punishment can ever be justified, it should be reserved for the evil that resulted in the death of nine-year-old Christine Jessop. Yet Guy Paul Morin was wrongly convicted of her murder. Moreover, the recent public inquiry on the case concluded that his case was "not an aberration . . . the causes of Mr Morin's conviction are rooted in systemic problems, as well as the failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide . . .". The Commission on Proceedings Involving Guy Paul Morin, Report (1998) at p. 1243. Between 1972 and 1996, 70 inmates were released from the death rows of American prisons because of concerns about their innocence: M. Radelet et al. "Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt" (1996), 13 Thomas Cooley L. Rev. 907 at p. 916. The innocent and those who might have been innocent have been executed.

Heinous crimes create pressures on the police that are conducive to wrongful convictions. The Morin report documented the phenomena of tunnel vision in which police and prosecutors, honestly convinced of a suspect's guilt, interpret innocuous or ambiguous data as supporting their hypothesis. They do not fully explore the possibility that they have the wrong person and they fail to exercise their discretion not to put forth potentially unreliable evidence. Human judgment is fallible. It is difficult for all of us, and especially those that the community looks to for protection, to accept that the perpetrators of some of the worst crimes might never be apprehended and convicted.
Witnesses are susceptible to various influences and errors. The Morin inquiry documented the many dangers associated with jailhouse informers and miscommunication by forensic scientists. The inquiry into Donald Marshall's wrongful conviction also demonstrated how young witnesses may be susceptible to influence by investigators convinced that they have identified the right suspect.

Disclosure, like other safeguards of the adversarial system, depends on the diligence, competence and funding of defence counsel. It is not, as the Marshall Commission recommended, automatic and the trend is to hold the errors of defence counsel against the accused. Even open file disclosure will not include potentially exculpatory evidence that has been ignored or not documented.

Judges can make mistakes by admitting unreliable evidence, excluding potentially exculpatory evidence and influencing juries in their final summations. Juries can also make mistakes, but as the Morin Commission recognized, the present law in Canada precludes most inquiries into their deliberations. Even more than police, prosecutors and judges, juries are never called to account in any way for their decisions.

Appeal courts do not focus on claims of factual innocence and the admissibility of fresh evidence is restricted. New trials and appeals can be obtained through petitioning the Minister of Justice for the mercy of the Crown. The Marshall Commission recommended the creation of an independent review body with powers of investigation. The Morin Commission noted that the United Kingdom's Criminal Cases Review Commission, which has only been operating since 1997, already has 1,000 applications before it and that two of its six referrals to the Court of Appeal involve people who had been executed; see the Report at pp. 1237-41.

It could be argued that in the age of DNA, the dangers of executing the innocent are greatly diminished. DNA exonerated both Guy Paul Morin and David Milgaard. It is possible to imagine some future world in which people are only executed on the basis of positive DNA matches. The Morin Commission, however, documented the frailties of scientific evidence including problems of contamination, miscommunication and misunderstanding, all of which could apply to DNA evidence. It also wisely warned that "[o]ne can expect that there are other innocent persons, swept up in the criminal process, for whom DNA results are unavailable": ibid., at p. 1243.

Wrongful convictions remain a compelling argument against capital punishment. If we seriously consider its reinstatement, the cases of the three Ms (Marshall, Milgaard and Morin), as well as others wrongfully convicted or possibly wrongfully convicted, should figure prominently in the debate.

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