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Wrongful Convictions/Miscarriages of Justice, Law as a System, and the story of the Little Girl

by

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ABSTRACT

As one of humanity's most vital social systems, Law plays a pivotal role in being the glue which keeps society functioning. Law's function in society is to prescribe the rules by which we can all live safe, decent, fulfilling and just lives. The way Law relates and applies to us therefore, becomes extremely important.

Wrongful Convictions/Miscarriages of Justice are very opposite to what we expect to see after Law's processes have run their course, and they are very opposite to the achievements that we envisage for Law. Yet, they do occur - and their problematic occurrence poses certain questions for Law; chief among them, the question of how we address wrongful convictions/miscarriages of justice.

Wrongful convictions/Miscarriages of Justice occur when decision making gets locked up within extremes. Addressing wrongful convictions/miscarriages thus requires that we avoid extremes in Legal decision making. The manner in which Judges conduct Legal decision-making therefore becomes quite central in the effort to address wrongful convictions/miscarriages of justice. Middle decision-making, through the striking of a *mean,* is argued as most yielding in avoiding extremes, as well as most yielding in addressing the issue of wrongful convictions/miscarriages of justice.

Judges must re-train themselves to think and act in a manner which allows for Middle Legal Decision making. Judges must be flexible, abandon their default and traditional modes of Legal decision-making when necessary, take note of circumstance, pay attention to the stories of the individuals that are placed before them, and be willing to act as every set of facts exclusively demand.

INTRODUCTION

The Problem Presents Itself

Very much like most Post Graduate Researchers, the path to my research presented itself quite early in my legal studies in the form of a problem – one which I felt raised certain issues about Law – a problem which struck me as being at the very heart of what Law is, how it operates and what it does – a problem which raises significant questions about the functionality of Law.

My story begins with my very first Criminal Law tutorial at the University of Southampton. I had just began what would turn out to be a roller coaster of legal study and was eager to learn about a Law made for people by people. The tutorial was focused on the scenario of a little girl who was of diminished responsibility – for the purpose of this *thesis*, I will from now on refer to her as *Ginger*.

Due to her state of mental incapacity, *Ginger* woke up in the middle of the night and wondered onto her neighbour's land. She entered a barn belonging to that neighbour – in there she found a box full of matchsticks. Not appreciating the fact that there were stacks of hay in the barn she begins the dangerous thing of playing with the matchstick by lighting them. She unfortunately ended up setting the entire barn on fire causing damage worth thousands of pounds.

At trial, the Judge found *Ginger* guilty of recklessness. Applying the test of the reasonable man, the Judge reasoned that a reasonable person in such a situation as *Ginger's* would have appreciated the risk that playing with matchsticks could well set the entire barn on fire. *Ginger* did not do as a reasonable person would in the given circumstance (appreciate the risk) - therefore, she would be guilty of recklessness.

Anyone who has studied Criminal Law, even at the most basic level, will recognise these facts to be that of the case of *Elliot v C*[1]. Whiles this *thesis* will not at all be focused on a discussion of *Elliot v C,* or the merits/demerits of the legal test for recklessness laid out in *R v Caldwell*[2], it must be understood that the facts surrounding *Ginger* served as a catalyst for me. It motivated me to consider questions of Law (for instance, why had Law treated her in that way?) – and it is the consideration of such questions which has led to the writing of this *thesis.*

The conclusion of *Ginger's* case bothered me a lot and left me puzzled as I headed out of the tutorial and to the library. I disagreed with the Judge's decision - but most importantly, I disagreed with how the Judge had made the decision. It seemed to me that the Judge had neglected *Ginger's* condition completely, was holding her to a standard which she naturally could not satisfy, and punished her once she did not meet the standard. This raised for me the spectre of a whole new range of considerations; not least, the question of why had Law treated her this way. Law's treatment of *Ginger*, in my view, was not in the least equitable – it looked to me at the time to be a wrongful conviction/miscarriage of justice and I felt Law had been complicit in this. As I was to become only too aware, there are problems with Law which result in wrongful convictions/miscarriages of justice – problems which result in the painting of an image of injustice.

One of such problems, I found, is what I see as the black-and-white nature/approach which Law had taken to *Ginger's* case i.e the Law was there to be applied, and the technical standards for applying the Law having been met, the Law was applied regardless of any other factors which ought to have been taken into consideration (her diminished responsibility). But life is not straight forward as that – life doesn't happen in black-and-white, life happens in colour.

[1] [1983] 1 WLR 939
[2] [1981] 1 All ER 961

The black-and-white nature of Law presents us with a problem. We can gain some idea of the nature or type of problem presented here by reference to a much-reported description provided by the Snooker commentating icon *Ted Lowe*. In the 1960's and early 1970's, when black-and-white television sets were common, *Lowe* frequently sought to help the viewing of his television audience watching on black-and-white television sets by explaining which coloured ball was where on the snooker table. In this regard, he is famously quoted to having once commented;

"For those of you watching in black-and-white, the pink ball is right next to green."[3]

Such a statement undoubtedly left all his black-and-white television viewers in a state of bewilderment; without a more detailed knowledge of the rules of the game of snooker, and how they worked together within the game, and further *ceteris paribus* assumptions about the current positions of other balls in the game, how were they to know which ball was green and by such reference locate the pink ball? I felt such similar bewilderment when I thought of the Judge's decision in *Ginger's* case; how could the Judge reach the conclusion of guilty without considering further questions concerning the form and context of *Ginger's* condition?

This raised for me a serious question; what was a wrongful conviction/miscarriage of justice? How do they arise and why? How do we address them? In *Chapter 2* of this *thesis,* I discuss differing definitions of wrongful convictions/miscarriages of justice – different perspectives that seek to explain how wrongful convictions/miscarriages of justice might be understood and how they occur. For me, *Ginger* had experienced an injustice tantamount to a miscarriage of justice and I find support for this conclusion in the Systems Theoretical/Marxist definitions of a miscarriage of justice; Law's black-and-white approach to scenarios – its reduction process

[3] The Daily Mail Website, http://www.dailymail.co.uk/sport/othersports/article-1382405/Snooker-commentator-Whispering-Ted-Lowe-dies-90.html, 25th February 2016

and binary code applications have blinded it from noticing and addressing the colour surrounding *Ginger* (her diminished responsibility) – *Ginger's* condition made her very vulnerable to marginalisation, and as such, the Legal System was used to place responsibility upon her without any consideration as to her condition. For me, this represented a form of injustice which resulted from the black-and-white and grey thinking which supports Law as a system.

These were very serious thoughts and questions about Law and the way Law works which then sprung up in my mind – they are the thoughts and questions which I now intend to address as I look to interrogate and respond to Law:

To my mind, it is clear that wrongful convictions/miscarriages of justice occur because legal decision making gets locked up in extremes (what I refer to as the *Universal/Particular*). Avoiding these extremes in legal decision making therefore is the surest path to avoiding wrongful convictions/miscarriages of justice - and the best way to avoid extremes is to simply do that - avoid them – by concentrating legal decision making in a space where both extremes find representation, without either extreme dominating outright.

There is existing, as there always will be, tensions between the Law's *Universality* and the *Particularity* of any given case. They are two extremes that run in opposite directions to one another. Both these extremes vie for, and seek to influence every legal decision that is to be made. This gives rise to a difficulty: the question of how we manage this tension and use it, creatively and affirmatively, in Law.

In *Chapter 1,* I return to the little girl (*Ginger*), and to similar forms and different aspects of the injustice done to her. I find her represented in the stories of the parties in the series of high-profile Canadian cases: *the marginalised outsider; the wrongfully convicted; the defendant that Law just can't see because of its black-and white approach to situations; the defendant who is an easy target for the System; the defendant who is vulnerable to circumstantial evidence e.t.c.* Simultaneously, this *thesis* will demonstrate what it posits to be the primary cause of wrongful convictions/miscarriages of justice; the concentration of the legal decision making process within extremes, either solely within Law's *Universality* (*Universal* extreme) or solely within the *Particularity* of any given case.

Chapter 2 of the thesis will discuss differing perspectives on wrongful convictions/miscarriages of justice with the purposes of outlining and assessing some the major different ways that the causes of wrongful convictions have been understood. Additionally, the *Chapter* considers the Legal Reforms that have been put in place to address the wrongful convictions/miscarriage of justice discussed in the Canadian cases, and how effective they have been.

Chapter 3 of this thesis locates the problem in Law and articulates it as being one to do with the tensions/differences produced between Law's Universal nature and the *Particularities* of a case. This *thesis* puts forward a solution to address wrongful convictions/miscarriages of justice - (*avoiding extremes by deciding in the middle)* – in *Chapter 4.*

Chapter 5 discusses the notion of the *mean* as the best way to decide in the *middle* and thus avoid extremes. The *mean* is applied to the Canadian cases in *Chapter 6* to demonstrate the difference it makes to decision making. Also in *Chapter 6,* is a discussion of how a positioning of the *mean* is done, the theoretical underpinning of the *mean,* the implications on Law's system of applying the *mean,* and how Judges can learn to strike the *mean.*

CHAPTER 1

1.1 **CASE REVIEW**

The purpose behind this case review is to assess alleged and confirmed high-profile cases of wrongful convictions/miscarriages of justice within the Canadian Criminal Justice System. By looking at the facts, the judgements and how they were arrived at, this *thesis* will seek to demonstrate what it posits to be the primary cause of wrongful convictions/miscarriages of justice; the concentration of the legal decision making process either solely within Law's *Universal* nature (*Universal* extreme) or solely within the *Particularity* of any given case.

This thesis focuses on cases from Canadian Criminal Justice System for two main reasons; Firstly, Canada is within the Common Law jurisdiction – it thus operates under same Common Law tradition as the Criminal Justice System of the United Kingdom. Secondly and most importantly, the Canadian Criminal Justice System has been bedevilled in recent decades by a seemingly endless stream of very high profile wrongful convictions/miscarriages of justice. As a result, a heated debate has ensued in Canada over the most suitable way to address the issue of wrongful convictions/miscarriages of justice. It has been argued by many in Canada that their System would benefit from a UK styled Criminal Cases Review Commission (CCRC) – a systemised approach established to address wrongful convictions/miscarriages of justice in the UK.

The handlers of the Canadian Criminal Justice System are therefore looking to the UK and asking themselves whether they should employ a systemised solution to address the issue of wrongful convictions/miscarriages of justice in their country. This *thesis* will argue in parts subsequent, against the use of a systemised solution as a sole measure in addressing wrongful convictions/miscarriages of justice. A focus on cases from the Canadian Criminal Justice System is therefore justified because that system provides us the best possible case studies with which to illustrate/discuss the causes of wrongful convictions/miscarriages of justice as identified by this thesis, and with which to demonstrate the unsuitability of systemised solutions in addressing the issue of wrongful convictions/miscarriages of justice.

1.2 *Truscott*[4] as the Little Girl

The Individual

There would be very little reason for any person to think that *Steven Truscott* was a murderer or in any way an unusual child. In every respect, Steven was a very normal teenager – he had a happy home life, he excelled in school and as a result was popular with his teachers, and had many friends. He achieved many accolades for extracurricular activities – he had been awarded his school's all round best athlete, for instance. His father was a warrant officer in the Canadian military and had been voted the community's man of the year for his work with young people. Indeed, what made Steven's life different from that of other teenagers at the time was the lifestyle of his parents.[5]

Being a military man through and through – Dan Truscott always took his family wherever he was posted; they never really settled in one community. Though Steven was not marginalised from society in the same as others in this *thesis*, he was nonetheless, young, without experience and vulnerable – a teenager who was just at the wrong place at the wrong time.[6]

In 1959, *Steven Trustcott*, was convicted in an adult court for the murder of his 12 year old classmate Lynn Harper. Few cases in Canadian legal history have caused and created so much controversy as this one did. Steven continued to maintain his innocence until 2007 when his conviction was declared a miscarriage of justice and he was formally acquitted of the crime.

[4] R v Truscott 125 C.C.C 100
[5] Swan, B. 2012, *Real Justice: Fourteen and Sentenced to Death: The Story of Steven Truscott,* Toronto, Lorimer Publishing, pp.7-18
[6] *Ibid*

The Facts – Order of Events

On the 9th of June 1959, Lynn Harper was reported missing. She was last seen near RCAF Station Clinton, a Canadian Air force base located in the South of Clinton in Ontario. Two days later, during the afternoon of June 11th, Lynn's body was found in a farm woodlot. Upon a close examination of the body, it became apparent that Lynn had been raped and strangled to death with her blouse.

Two days after Lynn's body was discovered, *Truscott* was taken into custody and was charged with first degree murder under the provisions of the Juvenile Delinquents Act 1908. On June 30th, Steven was ordered to be tried as an adult after the Crown Prosecutor H. Glenn Hays, Q.C., succeeded in obtaining an order under section 9(1) of the Act which states that;

"Where the act complained of is, under the provisions of the Criminal Code or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the Court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of the Criminal Code in that behalf …"

The evidence presented in court against the accused was mostly circumstantial, and centred on pacing Lynn Harper's murder within a narrow timeframe which implicated Steven. On the 30th of September that year, the jury returned a verdict of guilty with a recommendation of mercy. Mr. Justice Ferguson, sitting in judgement of the case at the time, sentenced *Truscott* to be hanged.

Truscott was scheduled to be hanged on December 8th 1959 – a temporary reprieve was granted on November 20th 1959, postponing his execution to February 16th, 1960 to allow for an appeal. On the 22nd of January 1960, his death sentence was commuted to a life in prison sentence.

In April of 1966, the public's attention was returned to Steven's trial by the publication of a book titled; *The trial of Seven Truscott*[7], by *Isabel LeBourdais*. *LeBourdais.* The book raised a number of questions about the conviction and how it had been arrived at – questions which, for instance, challenged the authenticity of the method that the coroner had used in determining Lynn Harper's time of death.

In *LeBourdais'* view, the time of death was the most key aspect to solving the murder – it was the defining factor – the only one factor which would either implicate or exonerate *Truscott.* The coroner had determined the time of death by examining the contents of Lynne Harper's stomach. Based on the state of the stomach contents, the original coroner placed her time of death to be about an hour after she ate supper – sometime between 7:15 and 7:45pm, during the half hour or so that Steven voluntarily admitted to being with Lynne.[8]

According to *LeBourdais,* the coroner's work was deeply flawed and not at all properly done – the body was never examined with a lens. Additionally, the autopsy was done shabbily, in much haste and was thus riddled with error. In recent years, pathologists have come to unanimously agree that stomach contents cannot be relied on in accurately determining the exact time of death.[9]

[7] Lebourdais, I. 1996, *The Trial of Steven Truscott,* Philadelphia:J.B, Lippincott Company Publishing.
[8] *Ibid*
[9] *Ibid*

Furthermore, a second doctor, David Brooks, examined *Truscott* and testified that he found lesions on his genitals that were likely to have been caused by his rape of Lynn Harper. Years later, it became clear that the lesions were the result of a skin disease. In 2002, Brook himself told investigators reviewing the case that some parts of his testimony were 'absolute garbage'.[10]

LeBourdais' book also bemoaned the attitude and conduct of the police during the investigation. *LeBourdais* states that from the beginning of the ordeal, the police placed their focus on *Truscott* as their chief suspect; Lynn Harper died on the 9th of June, and *Truscott* was arrested only two days after that. No other suspects were seriously investigated by the police before *Truscott* was arrested; it seemed the police were simply not interested in conducting a thorough investigation to find out exactly what happened – it is perhaps no wonder that they hastily arrested the teenager shortly after Lynn's body was discovered.[11]

In response to the claims made by *LeBourdais*, the Federal Cabinet took the step of directing a reference of the case to the Supreme Court of Canada, pursuant to Section 55 of the Supreme Court Act 1952. The Order in Council laid out the justification behind the reference;

"*There exists widespread concern as to whether there was a miscarriage of justice in the conviction of Steven Truscott, and it is in the public interest that the matter be inquired into".*[12]

[10] CBC News In Review, http://newsinreview.cbclearning.ca/wp-content/uploads/2007/10/truscott.pdf, 16th January 2014.

[11] *Ibid*

[12] Order in Council, 26th April 1996, P.C, 1966-760

The Reference gave the Supreme Court a broad mandate – it was tasked to consider the matter of *Truscott's* innocence as if it were an appeal brought forward pursuant to what was then section 597(a) of the Criminal Code which permitted the Court to review not only findings of Law, but also findings of fact and mixed fact and law.[13]

At the hearing of the Reference, the Court considered both the record of the trial and a significant body of fresh evidence. Included in the body of fresh evidence was a testimony from *Truscott,* who provided *viva voice* evidence for the first time before the full panel of the Supreme Court.[14] Based on the evidence, eight of the nine judges concluded that the verdict should stand. First, the majority held that based on the original evidentiary record, the verdict was not unreasonable.

They (the majority), then went on to say that there was nothing in the new evidence which gave them reason to doubt the correctness of the original conviction. The majority ruled therefore that had an appeal of the conviction been heard by the Supreme Court, it would have been dismissed. The only dissenting judge in the Reference hearing was Mr. Justice Hall who said that he would have quashed the conviction and ordered new trial.

Justice Hall's dissent was based on a number of factors, including his view that the trial Judge had wrongly permitted the Crown to present highly prejudicial similar fact evidence – that other prejudicial, non-probative evidence had been improperly admitted, and that the trial Judge's charge to the jury contained a number of misdirections.[15]

[13] *Re Truscott,* [1967] S.C.R 309 at 312
[14] *Ibid*
[15] *Ibid.,* at 392

In November of 2001, *Truscott* applied to the Federal Minister of Justice, asking the Minister to review the case on the grounds that his conviction was a miscarriage of justice. The Federal Government granted his request and appointed the Honourable Justice Fred Kaufman to review his case. Justice Kaufman engaged in a thorough review of all the evidence – he delivered a report which concluded that there was a clear and reasonable basis upon which to say that a miscarriage of justice had most likely occurred. He therefore recommended at the Minister of Justice refer the matter to the Court of Appeal for Ontario.[16]

In line with Justice Kaufman's recommendations, the Federal Minister of Justice directed a Reference to the Ontario Court of Appeal – to consider whether new evidence would have changed the 1959 verdict. Most notably, the court was instructed to hear and determine the matter as if it were an appeal by *Truscott* from conviction.

The Ontario Court of Appeal trawled through the evidence and, amongst other things, reviewed the four pillars of the Crown's case; the time of death, the country road evidence, *Truscott's* post-offence conduct and the penis lesions evidence.[17]

[16] Honourable Fred Kaufman, Report to the Minister of Justice on an application by Steven Murray Truscott, April 2002, at 699.
[17] *Re Truscott* [2007] ONCA 575

The Court of Appeal's Conclusions

Upon reviewing the three pillars of the Crown's case, considering new evidence and assessing how that new evidence would influence a jury in a hypothetical new trial, the Ontario Court of Appeal concluded that the conviction against Steven Truscott must be quashed – saying that the fresh evidence satisfied it that Steven's conviction was wrongful and as such a miscarriage of justice had taken place. Ultimately, Steven received compensation from the Ontario Government – they paid him $6.5 million for suffering a miscarriage and living 48 years with the stigma of having being wrongfully convicted of a rape and murder he did not commit.[18]

The *Truscott* case was a very high-profile wrongful conviction/miscarriage of justice which shook the very foundations of the Canadian Criminal Justice System. The case caused everyday Canadians to reflect on their system and its integrity. The public thought it unacceptable, that the Criminal Justice System would allow a minor (14years of age) to be convicted for a crime that he did not commit.

It was clear from the outset of the *Truscott* trial that the main stakeholders off the Canadian Criminal Justice System (Police, Courts etc.) were not at all interested in seeking the truth of what happened the night of Lynn Harper's death - and by that truth, to bring to Justice, the individual responsible. There was an obvious rush towards 'convenient conviction' by the Court.

The rush to conviction was clearly demonstrated by the Court's decision to trial *Truscott* as an adult, even though he was a minor. The order to do this was granted by the judge under Section 9(1) of the Juvenile Delinquents Act 1908, which gave the judge the discretion to proceed against a child as though he were an adult, if the accused child was apparently or actually over

[18] CBC News website, http://www.cbc.ca/news/canada/steven-truscott-to-get-6-5m-for-wrongful-conviction-1.742381,

the age of 14. *Truscott,* at the time, was just 14 – he was not over the age of 14 in fact – and it is not at all far-fetched to argue that there was nothing in his appearance to suggest that he was over 14 either.

The Court order to proceed against *Truscott* as an adult therefore represents little more than a Court's rush to convict. There was no substantial basis upon which to proceed against *Truscott,* as an adult. By the very standards set within the Section[19] itself, *Truscott* was a minor and he should have been trialled as a minor.

This thesis argues that the order granted by the Judge, to proceed against *Truscott* as an adult – and *Truscott's* ultimate wrongful conviction/miscarriage of justice was a result of the Judge concentrating the legal decision making process solely within Law's *Universal* nature. The letter of the Law allowed the Judge, through the discretion it gave him, to proceed against *Truscott* as an adult, even though *Truscott* was a minor by any and every standard, and should have been treated as a minor by the Judge.

The Judge nevertheless concentrated the legal decision making process within Law's *Universal* nature by choosing to use the discretion given him under the Law to give an Order for *Truscott* to be trialled as an adult, although it was quite objectively clear by every other measure he was a minor and the Judge did not have to give any such order. The concentration, by the judge, of the legal decision making process solely within Law's *Universal* nature, like has just been described, was the primary cause of *Truscott's* wrongful conviction and his suffering a miscarriage of justice.

[19] S 9(1) Juvenile Delinquents Act 1908. It is worthy to note that the 1908 Act was superseded by the Young Offenders Act 1984, which was later repealed by the Youth Criminal Justice Act 2003. The 2003 Act allows youth aged between 14 and 17 to be sentenced as adults under certain conditions.

1.3 *Marshall* [20] as the Little Girl

The case of Donald Marshall, like that of Steven Truscott, was a landmark case and one of the most controversial in the history of the Canadian Criminal Justice system. The case inspired a number of very disturbing questions about the Canadian Criminal Justice system – questions which still remain today even after *Marshall's* passing to glory in 2009.

The Individual

Like many teenagers, Donald Marshall drank, smoked and hung around the local park with rowdy friends. He might have grown up to become a stalwart citizen, a native leader or even an entrepreneur – we will never know. He lost his chance to realize his ambitions when he was convicted of murder, at 17, and was imprisoned for 11 years for a crime he did not commit. By the time he was finally released on parole in 1982, he was forever damaged by a clear miscarriage of justice and years of detention.[21]

Donald Marshall was a Micmac (Mi'kmaq) Indian – the Micmacs are the aboriginal natives and settlors of present day Canada. Long before Europeans arrived in Canada, the Indian Micmacs solely occupied what is now Nova Scotia, Prince Edward Island, a part of the Gaspe Peninsula and Eastern New Brunswick.[22] *Marshall* was thus an ethnic minority – an aboriginal.

[20] 146 DLR (4th) 257
[21] The Globe and Mail Website, http://www.theglobeandmail.com/news/national/the-life-and-death-of-donald-marshall-jr/article4283981/?page=all, 6th February 2014
[22] The Newfoundland and Labour Heritage Website, http://www.heritage.nf.ca/aboriginal/mikmaq_history.html, 6th February 2014.

Order of Events – Trial - Imprisonment

On the 28th of May 1971, Donald Marshall, was walking through Sydney's Wenthworth park, met up with Sandy Seale, a Black youth from Whitney Pier. Donald and Sandy were casually acquainted – proceeding through the Park together they encountered two men who struck conversation. One of these men, Roy Ebsary, described as an eccentric and volatile old man with a fetish for knives, fatally stabbed Sandy Seale fatally in the stomach without provocation.

When the police began investigating the incident, Ebsary admitted that he had stabbed Seale but then lied about his role in the scuffle to the police. As a result, the police immediately focused their investigation on *Marshall,* who apparently, had been known to them before. From the beginning, the system seemed determined to prove that *Marhsall* was guilty.

Marshall was convicted for the death of Sandy Seale and given a life prison sentence. He spent 11 years in jail before being acquitted by the Nova Scotia Court of Appeal in 1983 after a witness came forward to say that he had seen another man stab Seale, and several prior witness statements pinpointing *Marshall* were recanted. It is very interesting to note however, that in acquitting *Marshall,* the Nova Scotia Court of Appeal stopped short of calling his ordeal a miscarriage of justice. The Court refused to call it that because in their view, Marshall had been the author of his own misfortune seeing as he had lied at the trial about what he and Sandy Seale were doing that night.

Post Imprisonment/Royal Commission Report and Findings

After he came out of prison, Marshall was introduced to a reporter by the name of Michael Harris – Harris was a Toronto native and worked for *The Globe and Mail*, a national newspaper. Over the next four years, Harris interviewed Marshall many times and spent hours with the young Micmac (Mi'kmaq). The hours of interviews with Marshall, along with the extensive transcripts of court hearings and trials, resulted in another book[23] which shook the foundations of the Canadian Criminal Justice System in 1986.[24]

The book told the story of *Marshall* in blunt detail. What is more, it was a huge indictment of the police, the courts and the lawyers involved in the case. It drew lots of attention and cast a light on *Marshall* as a hard-skinned teen who survived prison through physical strength and will-power. But it also clearly depicted his unjust and unfair mistreatment by the Criminal Justice System.[25]

Harris chronicles in his book that in one of the first interviews, Marshall said to him: 'My name is Donald … and I was a 17 year-old Mi'kmaq teen who spent 11 years in prison for a crime I did not commit.'[26] The book drew national attention and gained immense recognition - it got the whole country wanting and needing answers as to why the system failed a teen and ethnic minority so badly. Having been embarrassed by the negative publicity and media pressure, the Government of Nova Scotia setup a Royal Commission to examine the investigation of the death of Sandy Seale as well as the subsequent prosecution of Donald Marshall.

[23] Harris, M. 1990, *Justice Denied: The Law Versus Donald Marshall,* Toronto, Harper Collins Canada Ltd.
[24] Swan, B. 2103, *Real Justice: Convicted For Being A Mi'kmaq,* Toronto, James Lorimer & Company Ltd.
[25] *Ibid.,* p.149
[26] *Ibid 50*

The Royal Commission's mandate was to;

"*… make recommendations to the Governor in Council respecting the investigation of the death of Sandford Seale … the charging and prosecution of Donald Marshall … the subsequent conviction of Donald Marshall for the non-capital murder of Sandford Seale …"*[27]

In other words, the Royal Commission was tasked with finding out what went wrong with the investigation of the murder and the subsequent prosecution of Donald Marshall. The Royal Commission's report minced no words in apportioning blame.

It held that the police acted with gross incompetence and unprofessionalism. The first police officer (Detective Michael Bernard MacDonald) who arrived at the scene of murder did not take any statements from *Marshall*, and a witness called Maynard Chant who as at the scene that night. Secondly, the police failed to secure the crime scene which they should have done, and which would have aided their collection of evidence.[28]

The Commission focused especially on the conduct of the Detective who run the investigation – John MacIntyre was referred to by the Commission as a liar who bullied and intimidated teenage witnesses to change their stories/testimonies to fit his version of events – MacIntyre seemed hell-bent on proving that Marshall had killed Sandy Seale. The Commission was convinced that MacIntyre's stubborn and persistent surety of Marshall's guilt was not informed by clear evidence, but by a prejudiced and racist view shared by many amongst Sydney's 'white' community at the time, that the ethnic minority and aboriginal MicMac (Mi'kmaq) Indians – like Donald Marshal - were inferior to 'whites'. The Commission found MacIntyre's motives and motivations in the investigation to be highly racist and stereotypical.[29]

[27] Royal Commission on the Donald Marshall Jr Prosecution, Novia Scotia Government, December 1989.
[28] *Ibid.,* p.2
[29] *Ibid.,* p.3

MacIntyre's assistant, Detective William Urquhart, did not escape the Commission's blitz. It is expected of a competent and professional Detective in his position to have realized that MacIntyre was pursuing his own theory of the stabbing. In failing to speak up or do something about it, Urquhart failed in his responsibilities as a police officer. Additionally, three years after Marshall's conviction, Donna Esbary told of seeing her father washing blood from a knife on the night of the crime. Urquhart had a duty to see that this new information was passed to his superior, but he failed to do so.[30]

The Crown Prosecutor (Donald C. MacNeil) was not spared blame or criticism from the Royal Commission – they said of him that he had no interest to see that justice was done. By not providing full disclosure of the evidence to the defence as he ought to have done, he failed in his duty and was also as grossly incompetent and unprofessional as the police had been in the investigation. Donald Marshall's two Lawyers, surprisingly, were found to have acted unprofessionally and incompetently by the Commission – the Commission said that even though the defence lawyers (Rosenblum and Khattar) had long, distinguished, careers and both were paid substantial fees, and had access to the funds needed to provide Donald Marshall a good defence, they let him down badly.[31] [32]

[30] *Ibid.,* p. 8
[31] *Ibid.,* p.4
[32] Marshall's defence counsel, for their part, failed to provide an adequate standard of professional representation to their client – they conducted no independent investigation, interviewed no Crown witnesses and failed to ask for disclosure of the Crown's case against their client. Even though, prior to the trial, they were very much aware that some witnesses had provided earlier statements, they made no efforts to obtain them.

The trial judge (Mr. Justice Louis Dubinsky) was also fingered by the Commission for having made a number of incorrect rulings. The worst of these was his misinterpretation of the Canada Evidence Act 1983 – reason for which he did not allow the defence to explore one of the eye witness' change in testimony. It was the Commission's belief that a full cross-examination of the eye witness (John Pratico) would have resulted in his recanting evidence, and in that circumstance, no jury on earth would have convicted *Marshall*.[33]

The Court of Appeal's assertion that *Marshall* was to blame for his ordeal was most unfortunate. The Commission could not understand how and why the Court of Appeal could conclude that there was no miscarriage of justice when, on the evidence before it, *Marshall's* conviction was secured by perjured testimony, obtained through police pressure, and his counsel were precluded from carrying out a full cross-examination because of lack disclosure by the Crown.[34]

In concluding its findings the Commission asserts that for any citizen to spend eleven years in jail in a federal penitentiary for a crime he did not commit constitutes, even in the narrowest sense, a miscarriage of justice in the extreme. It was very clear to the Commission that racism, racist attitudes and discrimination had been at the heart of the activities of the police, courts, Crown Prosecutor and Defence Counsel in this case – and had therefore played a major role in *Marshall's* wrongful conviction and imprisonment.[35]

This *thesis* points to the locking up of the legal decision making process within the *Universal/Particular* extreme (in *Marshall's* case, Law's *Universal* nature*)* as being directly responsible for the wrongful conviction and miscarriage of justice suffered by *Marshall.* The Royal Commissions findings very much supports this claim.

[33] *Ibid 58*
[34] *Ibid.,* p.22
[35] *Ibid.,* p.9

The lead detective, as the Commission found, was not at all interested in finding out the truth of who had really murdered *Sandy Seale.* His bullying, lying and intimidation of teenage witnesses to change their stories to favour his version of events was indicative of a rush to convict an innocent man, not by clear evidence, but because he was deemed to be inferior by a large proportion of society because of his race.

This racist and stereotypical motive for the investigation and conviction, as the Royal Commission found, was also carried by the Trial Judge – who concentrated the legal decision making process within Law's *Universal* nature by his deliberate making of a number of 'incorrect rulings' as the Royal Commission termed it; rulings which include his misrepresentation of the Canadian Evidence Act 1983.

This made it possible for the Judge to preclude the defence from pressing a witness about a change in his testimony. The letter of the Law allowed the Judge to rule this way, and he did - by concentrating the legal decision making process within the letter of the Law; within Law's *Universal* nature. In so doing, the Judge neglected the *Particularities* of the case, and as such rid himself of the ability to be practical in his judgement and prevent a wrongful conviction/miscarriage of justice. A further and much deeper discussion of the neglecting of the *Particularities* of the case on the part of the Judge and what those *Particularities* are is carried out in Chapter 7 of this thesis.

1.4 *Driskell* as the Little Girl

The Individual

James Patrick Driskell is a Canadian and father of eight (8) who was wrongfully convicted for the murder of Perry Harder in 1991. He maintained his innocence and fought to get another trial to have his case reviewed. With the help of the Association in Defence of the Wrongly Convicted (AIDWYC), and many other media outlets and campaigners, James finally managed to get his case reviewed, and his conviction ultimately quashed in 2005.

James made his living as an auto mechanic and a long-haul truck driver. Whiles he himself did not have a criminal record, he associated with others who did. He admits that he led a hard life. He grew up in one of the meanest areas in Winnipeg, was surrounded by violence. Such violence characterised his life and upbringing that even at the tender age of eleven years old he witnessed, he witnessed, for the very first time, his father, a bouncer in a hotel bar and a violent alcoholic, beat up another man. Eventually that violent lifestyle caught up with him.[36]

A few years later from that incident, in 1978 to be exact, at the age of Forty-Four (44), Driskell's father was beaten to death at a party. The sad occurrence ought to have scared Driskell away from violence. Rather, however, it somehow made more curious about it. Driskell and his wife got married when they were teenagers – and soon after their marriage they moved to Winnipeg, where Driskell was corrupted by bad company – his friends included drug dealers, prostitutes and thieves. It is in this context that he met Perry Harder, who was at the time a bouncer who stole things for money – they became really close friends.[37]

[36] Anderson, D., Anderson, B. 2009, *Manufacturing Guilt,* 2nd edition, Black Point, Fernwood Publishing, p.114
[37] *Ibid.,* p.115

Order of Events

Harder was murdered in 1990 – he was 29 years old and was last seen outside his house in a pick-up truck – his remains were later found in a shallow grave just outside Winnipeg in Manitoba, Canada, three months after his disappearance. He had been shot three times in the chest. *Driskell* and Perry had been friends – and a year before his death, the police had caught and accused them both of being in possession of stolen goods. The Crown Prosecutor concluded that because Perry Harder had decided to plead guilty and give evidence to the effect that James Driskell had been involved in the crime, *Driskell* murdered him to prevent him testifying.[38]

Trial and Conviction

James *Driskell's* trial began on the 3rd of June 1999. The primary evidence presented against *Driskell* was mostly circumstantial. Four main witnesses were used by the Crown Prosecutor during the trial to convict James of first degree murder. Two of these witnesses (Reath Zaindean and John Gumieny) were criminals with extensive criminal records, and they testified to having heard *Driskell* plot to kill Perry Harder.[39]

[38] Prezi Webisite, The Wrongfully Convicted: James Driskell, http://prezi.com/dh_crkz8azbg/the-wrongfully-convicted-james-driskell/, 11th February 2014
[39] *Ibid*

A Police Officer was also used by the Crown to testify that that strands of hair found in the back of Driskell's van belonged to Perry Harder – this was the most crucial piece of evidence tying him to the crime. Harder's girlfriend also aided the Crown's case by testifying that he (Harder) had been feeling the pressure from *Driskell* to plead guilty to having handled the stolen goods and to take ultimate blame for the fact that both of them were being charged for it. Additionally, Shakiv Kara, a Crown witness, presented a recorded conversation between him and Driskell containing many statements which could be interpreted as admissions to *Driskell's* guilt.[40]

A stern review of the police report, released in 2003, later revealed that Winnipeg police had made a deal with one of these witnesses (Zanidean), coercing him into giving false testimony against Driskell. Zanidean had been charged with arson in an unrelated matter and the deal was that those charges would be dropped if he gave a false testimony. Also Zanidean is said to have conveniently received around $70,000 for the duration of his witness protection programme in line with this deal.[41]

[40] *Ibid*
[41] *Ibid*

The most incriminating piece of evidence used by the Crown against Driskell was the strands of human hair discovered in his van. A hair and fibre expert (Todd Christianson) corroborated Zaniden and Gumieny's story by testifying that microscopic hair analysis confirmed that three of the hairs found in Driskell's van were of a type matching Harder's hair. This made it reasonable to say that Driskell in fact used his vehicle to transport Harder's body, as suggested in Zaniden's testimony. At trial, Christianson asserted; 'if the hair is consistent, that means it either came from the same person as that known sample, or from somebody else who has hair exactly like that.'[42] As previously stated, all the evidence presented by the Crown Prosecutor against Driskell was circumstantial.

Media/Public Attention

After his initial conviction, and when the Manitoba Court of Appeal denied his application for a new trial in 1992, the *Driskell* case began to get a lot of public attention which was indicative that he may have been wrongfully convicted – at least the general public were beginning to think so, and several newspaper articles on the case began to surface. For instance, the *Winnipeg Sun*, a Winnepeg based paper, published an article in which they included allegations of the secret immunity deal struck between the Police and Zanidean.[43]

[42] *Ibid 33.,* p.118
[43] *Ibid*

It was a month after the persistent media coverage/pressure of the case that the then Justice Minister Jim McCrae publicly announced that there would be an internal review of the case.[44] Also as a result of media pressure from news outlets like the *Winnipeg Sun*, the Winnepeg police announced that it had ordered an internal review into the way the police investigated the homicide.[45]

Once the reviews were undertaken, it was found out that the statements of key witnesses like Zanidean were incorrect and that the police had been corrupt and unprofessional. It is very important to note that it was the persistent media coverage and pressure which caused the stakeholders in the Criminal Justice System (Police and Judiciary) to hold an inquest into *Driskell's* case i.e. how it was trialled and investigated. Without the consistent media pressure, none of this would have happened.

AIDWYC Campaign

Even though inquests had been ordered into the investigation of the homicide and the trial, there were questions surrounding the forensics of the three stands of hair which the Crown Prosecutors used as evidence to prosecute Driskell. In 2001, the Association in Defence of the Wrongly Convicted (AIDWYC) took on the Driskell case. AIDWYC is a Canadian based, non-profit, dedicated to identifying, advocating for, and exonerating individuals convicted of a crime that they did not commit, and preventing such injustices in the future through legal education and reform of the Criminal Justice System.[46]

[44] This review did not place until nine (9) years after Driskell's conviction – the review was started in June of 2000 and completed in the winter of 2000/2001.
[45] LeSage, Patrick. 2007. *Report on the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell,* Government of Manitoba, Canada.
[46] The Association in Defence of the Wrongly Convicted Website, http://www.aidwyc.org/, 16th February 2014.

AIDWYC managed to persuade the Manitoba Justice Department to pay $30,000 to have the three strands of hair which were found in Driskell's re-analysed through DNA analysis – a procedure that was not available at the time of Driskell's trial. The British Lab that analysed the hairs concluded that not only that the hairs did not come from Harder, but that they had come from three separate individuals. This conclusion refuted of the only piece of physical evidence supporting the testimony of Zanidean.[47]

The AIDWYC's push on the case is pretty much the most significant of all the help Driskell received in fighting his conviction. AIDWYC took on the only piece of evidence which linked Driskell to Harder's murder and disproved it. Once it was clear that the three strands of hair had not belonged to Harder, it made no legal or logical sense to hold that Driskell had killed Harder and transported his body in the van – the only sensible thing left to say was that Driskell was not guilty of the crime for which he had been convicted and a miscarriage of justice had therefore taken place.[48]

Driskell's background and upbringing consisted of certain *Particularities* which very much shaped his life – he was no stranger to violence and violent associations – associations which saw him flocking with Criminals. Bad company would not corrupt his good character, but it would however place him within proximity of the murder of his Criminal friend. He was a marginalised and vulnerable person – marginalised and vulnerable to a wrongful conviction/miscarriage of Justice by a 'rush to convict – happy' Criminal Justice System which would ignore his *Particularities*, and as a result be swindled by twisted witness statements because it concentrated the legal decision making process within Law's *Universal* nature whiles completely neglecting the *Particularities* of the case.

[47] *Ibid 33.,* p.120
[48] *Ibid*

1.5 *Wilbert Coffin* as the Little Girl

The Defendant

Very much like the *Truscott, Marshall,* and *Driskell* cases, that of *Coffin* and the appalling circumstances surrounding his conviction and subsequent execution provokes certain questions about Law and demonstrates what this *thesis* proposes to be the primary cause of wrongful convictions/miscarriages of justice; the concentration of the legal decision making process within an extreme – in this instance, within the extremity of Law's *Universal* nature at the total and complete expense of the *Particularities* of a case.

Wilbert Coffin was a forty-two year old (42) old uneducated prospector and woodsman. He was an English-speaking Protestant in a predominantly French Speaking Roman Catholic society. Wilbert was liked by most people who came to know him, but his poverty, religion, poor education, and language made Wilbert visible and vulnerable to mainstream Quebec society.[49]

Order of Events

On the 5th of June 1953, three rugged American outdoor adventurers, Eugene Lindsay, his son Richard, and their friend Frederick Claar, set out from Hollidaysburg, Pennsylvania, for the Gaspe Peninsula near the mouth of the great St. Lawrence River with a truck loaded with equipment the three Americans had planned to spend two wonderful, wild, back-to-nature weeks hunting and fishing in one of the world's few virgin forests. A month later, on the 5th of July, when they failed to return and were already long overdue back home, they were officially reported missing.[50]

[49] *Ibid 33.,* p.57

[50] Fanthorpe, R. & Fanthorpe, P, 2003, *The World's Most Mysterious Murders,* Toronto, Dundurn Group, p.224

Canadian search and rescue teams went into efficient action. There were numerous abandoned prospectors' camps on the St. John River, and among these, the search parties soon found the missing truck – which by this time, had been abandoned. The search parties were assisted by *Coffin*. They found him to be a practical man who knew the area well.[51]

Coffin told the search parties that he had helped the three Americans on the 10th of June when their truck let them down. *Coffin* had been instrumental in getting it moving again for them. *Coffin* was thus the last person to see them alive. Next to the truck, the search parties found a crumpled up note – the note suggested that the men had split up at some point and that one of them had left a message for the others saying that he had returned to the truck and was leaving again. This note was never presented at trial and a subsequent government enquiry rejected the note's existence. The bodies of Eugene and the others was found about 5miles from their truck.[52]

The bodies were so severely mutilated, as though the men had been attacked by bears. At least, that's what the rescuers thought until they discovered bullet holes in Eugene Lindsay's tattered shirt. The police speculated that the murderer had used Lindsay's own weapon to strike him down, then used it again to fire at him, leaving bullet holes through his clothing and them left him to the bears. Lindsay was known to carry large sums of money with him; his empty wallet was found along the bank of the river near his body.[53]

[51] *Ibid*
[52] *Ibid*
[53] *Ibid 33.,* p.226

The discovery of the bodies made headlines throughout the United States, and the Quebec Premier, Maurice Duplessis was soon under pressure from the American State Department, to find and prosecute the killer. It is important to keep in mind that this was 1954 – the post war era where America was the absolute dominant force in the world. Every huff and puff from the State Department carried much weight and the Police in Quebec most certainly felt that pressure and it played a role in their rushed and misguided investigation of the case.[54]

Coffin was the last to see the three Americans alive – the police therefore focused their efforts on him and as a result, he was detained as a material witness in this case and later arrested for the murder of Eugene Lindsay. *Coffin's* brother secured the services of a defence lawyer (Alphonse Garneau) to handle the case. In a letter to *Coffin*, Garneau warned him not to say anything to the police without counsel present.

However, he had sent the letter through Captain Matte of the Quebec Police, who in turn gave it to the Province's Attorney General. *Coffin* never received the letter and talked openly when interrogated by Matte. Garneau did not remain Wilbert's lawyer for long – on the advice of his father, *Coffin* dismissed Garneau and hired Maher. In hindsight, this act may have cost him his life.[55]

[54] *Ibid 47.,* p.58
[55] *Ibid*

The Trial

The Prosecution's main argument through the trial was that *Coffin* killed the three American hunters and then robbed them. The evidence produce presented to support this claim was that *Coffin* had been seen spending substantial amounts of dollars. A witness by the name of Wilson McGregor testified that he had seen the tip of rifle sticking out of Wilbert's truck shortly after the crime had been committed.[56]

The Prosecution's case was based entirely on circumstantial evidence. *Coffin* had freely admitted that he had met the three Americans in the bush – and drove the younger, Lindsay, back to Gaspe to buy a new pump and then returned her to the camp. The Prosecution argued however, that when the American's truck was later examined, it was found to be in working order and the pump had not been changed. It was said therefore, that *Coffin* had fabricated the fuel pump story.[57]

While the evidence suggests that *Coffin* may have been a petty thief and may have been in possession of a gun – it however did not prove he was the killer. The Prosecutor however managed to convince the jury of *Coffin's* guilt. The Prosecutor painted *Coffin* as a dangerous and skilled predator – a hunter of men. *Coffin's* defence failed him badly – the man who had represented himself to *Coffin's* father as one of Quebec's best defence lawyers had done virtually nothing for his client. Furthermore, he had even refused to let *Coffin* testify in his own defence after failing to respond to the Prosecution's arguments. Hearing only the Prosecution's dramatic interpretation of events, the jury had little choice but to find *Coffin* guilty of murder.[58]

[56] A year later, McGregor changed his testimony in a sworn statement filed with the justice minister. In the statement he claimed he had seen equipment, including pots and pans, in the back of Wilbert's truck along with what he took to be the barrel of a rifle.
[57] *Ibid 47.,* p.60
[58] *Ibid*

Coffin was sentenced to be hanged in Quebec's Bordeaux Jail on August 5, 1954. Several appeals were launched, but did nothing other than delay and put off the inevitable. On the 10th of February 1956, forty-four (44) year old *Coffin* was hung by the neck until he died. He proclaimed his innocence until the end.[59]

Public Reaction

In the times following *Coffin's* conviction and execution, it was discovered that he had left behind a statement rebutting the Crown's case against him. This caused public interest in the case to peak and people began to wonder whether the Criminal Justice system had just been used to put an innocent man to death.

For instance, Lawyers who fought to clear his name continued to say – especially through media outlets – that the evidence against him was indeed circumstantial, his defence lawyer was clearly incompetent and that his trial – a case rife with political pressure was a sham. There were no eyewitnesses.[60]

It also came out that the Duplessis Government, by all accounts, needed a quick resolution of this case because of the political pressure from the American State Department. Also, hunting was a big business in the Gaspe part of Quebec and so it was deemed to be extremely damaging publicity if there had been such horrific murders and no one had been prosecuted for them.[61]

[59] *Ibid*
[60] Mysteries of Canada Website, http://www.mysteriesofcanada.com/Quebec/coffin_sits_up_in_his_coffin.htm, 20th of February 2014.
[61] *Ibid*

One of the revelations that upset the public was the tale about *Coffin's* Defence Lawyer; the Defence Lawyer had announced that he was going to interview up to 100 witnesses to defend his client – but when the Crown Prosecution conclude its arguments, he stood up and said 'the defence rests'. He did not present even a single shred of evidence to support his client.[62]

These facts, amongst others, fuelled the public's speculation all the more that something had wrong – and so the trial of the Criminal Justice System in the Court of Public Opinion began. Even though the media and public pressure worked to good effect in the sense that it caused the Government to setup a Royal Commission to review the case, nothing became of it because the Royal Commission upheld the verdict when it had so many grounds on which to reject it.[63]

From this point on it was clear that *Coffin* was the man that the Criminal Justice System had decided should take the blame for the killing – and so that is how it was going to stay. As Vancouver writer Lew Stoddard put it; *Coffin* had been railroaded – he was the fall guy.[64]

Coffin's only crime was having the fatal misfortune to have been in the wrong place at the wrong time; helping three Americans whose truck had broken. This was the only evidence against him i.e. he was the last person to be with them.

[62] *Ibid*
[63] *Ibid*
[64] *Ibid*

Two years after *Coffin* was hanged, and when the question surrounding his trial and conviction clearly showed that a wrongful conviction had occurred, the police arrested an Aboriginal Canadian called Gilbert Thompson for vagrancy. In the most surprising fashion, Thompson confessed that he was the man who had killed the three Americans in Gaspe in 1953. Thompson's confessions was examined carefully, but despite his apparent knowledge of the intimate details of the tragedy, the Quebec police refused to believe his story and declared him to be an imposter.[65]

This absolutely ludicrous decision by the police reinforces a point previously made; they (the Police) had decided who their 'fall-guy' was going to be, their 'fall-guy' had taken the fall, and nothing was going to be allowed to change that – not even the truth. Whenever the legal decision making process is concentrated within Law's *Universal* nature, the truth cannot influence its course and a wrongful conviction/miscarriage of justice becomes the consequential result.

[65] *Ibid*

1.6 *David Milgaard* as the Little Girl

The Individual

Milgaard was a sixteen-year old living the life that many teenagers dreamed of; he had his own place and a job, earning money which he spent quickly. There were no curfews or boundaries in David's life. Nothing was forbidden for him – not girls, drugs or petty theft – and at five foot ten with an athletic build, David was the kind of guy some girls noticed. The only people he had to watch out for were the police.[66]

Even before his teenage years, *Milgaard* had been in constant trouble. His parents withdrew him from kindergarten because he was a negative influence on the other children. The schools he attended labelled him as an impulsive, restless troublemaker who often fought with other students and resisted authority. By the time he was thirteen, he had spent three months in a regional psychiatric centre. When released, he was so difficult to handle that his parents did not want him home, and he was placed in a series of foster homes and a boys' school.[67]

[66] Faryon, C.J. 2012, *Sentenced to life at seventeen,* Toronto, James Lorimer Publishers, 16
[67] *Ibid 33.,* p.45

Order of Events – The Crime

On a still winter's morning in January, the body of twenty year old Gail Miller, a nursing assistant at Saskatoon's city Hospital, was found. The police quickly determined that the young lady had been the victim of a brutal rape and murder. Miller had left her rooming house in a working-class district of Saskatoon at about 6:45am and was on her way to a nearby bus stop when she was attacked and dragged into an alley. A police search of the area revealed what was believed to be the murder weapon; a blood stained blade that appeared to have come from a kitchen paring knife. The Coroner's report disclosed that Miller had been stabbed in the back, front, sides, and neck a total of twelve times and had also suffered numerous nonfatal slash wounds.[68]

Forensic evidence also suggested that the rape had occurred after she had died. Few clues to the murder came to light; Miller's purse was found in a nearby garbage can and there was no money in it. No incriminating fingerprints were found, and there was no evidence that Miller knew anyone who would do her harm. It appeared that Miller had been the victim of a person or persons unknown, and that person was still at large, possibly still in the city.[69]

Murder in Saskatoon during the 60's was quite uncommon – because of this, the media gave the Miller murder considerable attention and reportage. Rumours fast began to spread in the community that other attacks and rapes had taken place, and that a mad killer was on the loose. Indeed, two sexually motivated attacks on women had occurred in the same area of the city as the murder of Miller. [70]

[68] *Ibid.,* p.46
[69] *Ibid*
[70] *Ibid 63.*

The similarities of these attacks to the Miller case had not gone unrecognised by the police, but, in their desire to not stir up public hysteria, the authorities attempted to sit on this information. Nevertheless, the public's fear and panic continued to grow, and the Saskatoon police felt the pressure to solve the case. With no obvious suspects, the police offered a $2000 reward to anyone with information that would lead to the conviction of the killer – ultimately, it was this reward that would draw *Milgaard's* name into the case. [71]

In late January of 1969, *Milgaard* run into a friend by the name of Ron Wilson and the two decided to take a trip to Alberta but transiting through Saskatoon – they arrived in Saskatoon in the morning at about 6:30 am. The events immediately following their arrival in Saskatoon would determine *Milgaard's* life for the next twenty-three years.[72]

In Saskatoon, they encountered a local resident whose car had been stuck in the snow. They tried to help him by pushing his car free – instead, both cars became stuck in the snow, and in effort to free both cars, *Milgaard* ripped his trousers. An hour later, both cars were freed – this incident occurred a short distance from where Gail Miller's body had been found. *Milgaard* and his group of friends then left for Alberta –they stayed there only for a few days and returned to Regina on February the 5th.[73]

[71] Anderson, D., Anderson, B. (2009), *Manufacturing Guilt,* 2nd edition, Black Point, Fernwood Publishing, p.46

[72] *Ibid*

[73] *Ibid*

A few days after they returned the police arrested one of *Milgaard's* friends who had accompanied him to Alberta – Cadrain was arrested by the Regina Police for vagrancy and sentenced to a week in jail. Meanwhile, the Saskatoon Police had received a tip that a group of young people had been at Cadrain's house. The Regina Police questioned him about the murder, but they learned nothing. Cadrain returned to Saskatoon in early March when he heard of the $2000 reward in the Miller's case.[74]

Cadrain immediately went to the Saskatoon Police with the most extraordinary narration of events of January 31. He told the police that *Milgaard* had blood on his clothes when he arrived at his residence and that he (Milgaard) was very eager to leave town. He also told the police that on their way to Alberta, *Milgaard* had thrown a woman's cosmetic case from the car and told him that he would have to get rid of the other guys who were travelling with them (Wilson and John) because they knew too much. Cadrain would later be given the reward money.[75]

Acting on what Cadrain told them, the Police tracked down Wilson and John for questioning. Wilson told that *Milgaard* did not at all have blood on his clothes that morning and had not been away from the group long enough to have committed a murder without his knowledge.

When interviewed separately, John supported Wilson's narration of events. Nonetheless, the Police still pursued *Milgaard* – tracking him down to Prince George, British Columbia, where he had secured a job working as a seller of magazine subscriptions. He was questioned several times, giving the same story as John and Wilson.

[74] *Ibid 68.,* p.47
[75] CBC News Website, http://www.cbc.ca/archives/categories/society/crime-justice/the-wrongful-conviction-of-david-milgaard/police-apprehend-david-milgaard.html, 3rd March 2014

There Police were desperately looking for something when there really was nothing. It was obvious that Cadrain had told them a 'cock and bull' story just to get the reward and that they were simply chasing shadows – yet, they went on.[76]

The Police questioned Wilson again – a second time – and several more times after that. The seventeen year old was even given a polygraph test, shown Gail Miller's blood-stained clothes, taken to the scene of the crime and subjected to a particularly stressful interview in which he and John were interrogated together. This clearly was an attempt on the part of the Police to psychologically manipulate the emotions of the teenager in order to get them to say something which they (the Police) could use scapegoat *Milgaard* for reasons of expediency.[77]

In light of this, during the interrogation, Wilson began to suspect that the police were feeding him information which they wanted repeated back to them in a sworn statement. This information was of course in conformity with the police version of events of January 31st which implicated *Milgaard* as Gail Miller's killer. The police continued the intense pressure and relentless interrogations of the teens, even to the point that Wilson's resolve to tell the truth began to crumble – bit by bit, little by little, he began to implicate *Milgaard* with a story completely fabricated from the pieces of information the Police had fed him – they made him make up a story.[78]

For not only did Wilson repeat most of what the Police had suggested, he embellished the narration of events, he told them that whiles on the trip to Saskatoon, he noticed that *Milgaard* had a knife. He said that when they had stopped a woman while searching for the Cadrain house, *Milgaard* had referred to her as a 'bitch.' [79]

[76] *Ibid*
[77] *Ibid*
[78] *Ibid*
[79] *Ibid*

Furthermore, the Police got Wilson to say that Milgaard indeed had blood in his clothes, after he had returned from helping the car stuck in the snow. Additionally, Wilson was made to say that on the way to Alberta, Milgaard had thrown a woman's cosmetic case from the car and while in Calgary, Milgaard told him that he had 'got the girl' in Saskatoon. The Police were obviously delighted with their statement – they had found their 'fall guy' – someone they could make to look the guilty party and thus satisfy the pressure that was being placed on them by the public to solve the murder and find the killer. Armed with their ill-acquired statement, the Police arrested *Milgaard* – they would make a case against him which would lead to his trial.[80]

At the Trial

Miligaard's trial lasted for two short weeks only. The most damaging testimony against him was the one given by his friends Cadrain, Wilson, John. Wilson merely reiterated the story he had been pressured by the Police to believe to be true; that *Milgaard* had returned to the car out of breath with blood stained trousers. It was the Crown's contention that, in the fifteen to twenty minute time-frame that they had been separated, Milgaard raped and murdered Miller.[81]

Nichol John presented a problem for the Crown however. Having previously told the Police what they wanted to hear; that she actually saw *Milgaard* stab Miller, she told the court something rather different. She told the court that she could remember nothing of what happened that morning. Not wanting to lose the testimony of one of their star witnesses, the Crown Prosecutor was allowed to treat John as a hostile witness.[82]

[80] Karp C, Rosner C. 1991, *When Justice Fails: The David Milgaard Story,* Toronto, McClelland and Stewart Publishers, pp.63-64
[81] *Ibid*
[82] *Ibid*

This would give the Crown Prosecutor the right to cross-examine her and have the previous incriminating statements she gave the police read into the record as evidence against *Milgaard.* Cadrain testified, as Wilson did, that he had seen blood on *Milgaard's* pants the morning of the murder. Certain parts of Cadrain's testimony had a bizarre quality and about them; he said that *Milgaard* was a member of the Mafia and that he was going to 'wipe out' Wilson and John because they knew too much. What neither the jury nor defence Counsel Calvin Tallis knew was that Cadrain had claimed the $2000 reward. He was also experiencing psychotic delusions in which *Milgaard* appeared to him in the form of a snake. These episodes led to Cadrain being admitted to a psychiatric institute, where he was diagnosed as a paranoid schizophrenic.[83]

Though the Crown attempted to bolster its case with non-circumstantial evidence involving blood and antigen identification, the evidence was quite weak. The defence had done a good job of raising doubt in the minds of members of the jury about the reliability of the witnesses' testimony. But Tallis's optimism was shattered by surprising new Crown evidence that suggested that *Milgaard* had confessed to the murder.[84]

Seventeen year old Craig Melynk and eighteen year old George Lapchuk told the court that in May of 1969, they had been watching a television newscast in a Regina motel room with *Milgaard* and two girls, Deborah Hall and Ute Frank. After watching a story that said police were still looking for Miller's killer, *Milgaard* was reported to have grabbed a pillow and demonstrated to the group how he had killed the woman, stating several times; 'I killed her'.[85]

[83]Anderson, D., Anderson, B. 2009, *Manufacturing Guilt,* 2nd edition, Black Point, Fernwood Publishing,, p.49
[84] *Ibid*
[85] *Ibid 80.,* p.88

Ute Frank was not called by the Crown or the defence. This is not a surprise at all given that she admitted to having been very high on drugs and could remember little about the events of that night. Clearly, it would be very unwise to rely on her for evidence. For reasons unknown, Deborah Hall was also not called to testify.[86]

In his instructions to the jury, Justice Alfred Bence was very critical of the Crown's case against *Milgaard*. He warned the jury that the testimony of many Crown witnesses should be treated with much scepticism. A day after, the jury brought in a guilty verdict. In accordance with that verdict the judge (Bence) sentenced *Milgaard* to life in prison.[87]

After The Trial – Road to the Supreme Court

The Supreme Court of Canada refused to hear an appeal and in 1979, his application for parole was denied. However, he was later given escorted leave from the prison for a few hours a time. During one of these leaves he slipped away from his escort and made his way to Toronto. He found a job, a room and a girlfriend, and for 60 days eluded the Police, who considered him to be armed and dangerous. On the seventy-seventh day, his mother, Joyce, was called to Toronto. Her unarmed son, his arms in the air, had been shot in the back by a policeman.[88]

Joyce Milgaard campaigned for *Milgaard's* innocence and even got Dr. James Ferris, a senior forensic pathologist to review the semen and blood stains used against *Milgaard* at his trial. Dr. Ferris conclude that the semen and blood samples were either contaminated or capable of eliminating Milgaard as a witness. In pursuing this new lead, Joyce Milgaard attained the services of Paul Henderson, a Seattle private investigator who specialised in cases of wrongful

[86] *Ibid*
[87] *Ibid*
[88] *Ibid*

conviction. Henderson's efforts in trying to proving the innocence of Milgaard was funded by Centurion Ministries, a U.S-based group dedicated to helping the wrongfully convicted.[89]

Henderson was able to track down Linda Fisher, the ex-wife of Larry Fisher who was in prison for a series of sexual attacks which took place just around the time of the Miller murder. Linda Fisher said that she believed that her husband killed Miller with a paring knife he had taken from their kitchen. Larry had missed work the day of Gail Miller's murder and had appeared badly shaken when Linda, in a fit of anger, had accused him of killing Miller. Linda was surprised to see Henderson because she had indeed given all this information to the police in 1980 after reading about the $10,000 award being offered by *Milgaard*, but had not heard anything back from the Police since that time. [90]

Henderson also tracked down Ron Wilson. Wilson completely recanted the testimony that he had given at trial. He said he had been manipulated by the Police into lying and later giving false testimony against Milgaard. All of this new evidence was forwarded to the then Justice Minister Kim Campbell.[91] On the 29th of November 1991, Campbell announced that she would ask Supreme Court of Canada to reopen the case in light of the new evidence. [92]

[89] Centurion Ministries, http://www.centurionministries.org/, 15th March 2014.
[90] Karp C, Rosner C. 1991, *When Justice Fails: The David Milgaard Story,* Toronto, McClelland and Stewart Publishers, p.191-193
[91] *Ibid*
[92] CBC News Website, http://www.cbc.ca/archives/categories/society/crime-justice/the-wrongful-conviction-of-david-milgaard/supreme-court-orders-a-new-trial.html, 15th March 2014

At the Supreme Court

The Supreme Court emphasised that it was not satisfied beyond reasonable doubt that *Milgaard* was innocent of the murder, but the new evidence was sufficient to have the guilty verdict quashed and a new trial ordered. The Supreme Court set out therefore to answer three main questions: Can *Milgaard* establish his innocence beyond reasonable doubt? Is it more likely than not that *Milgaard* is innocent? If a new trial were held, would there be a similar result, or would the result be different. Ultimately, the Supreme Court concluded that *Milgaard's* innocence could not be established either beyond reasonable doubt or on a balance of probabilities.[93]

As regards the third question, the Court could not be sure that if a new trial were held, a conviction would be forthcoming. Accordingly, it decided that a new trial was in order. The Province of Saskatchewan decided not to proceed with a new trial, however, citing cost and compassion – David Milgaard was therefore set free in April of 1992. He was found neither innocent nor guilty, nor was he found to be deserving of any compensation.[94]

It wasn't until the summer of 1997 that the Province of Saskatchewan changed its approach to the Milgaard case and apologised to him for his wrongful conviction. He was offered monetary compensation to the tune of $10 million. DNA test result from London had confirmed what many who were following the case had believed for years; there was no DNA match between *Milgaard* and Gail Miller; there was, however, a DNA match with Larry Fisher, who at this time was serving a sentence in jail after having been convicted of first degree murder. [95]

[93] Boyd, N. 2014, *Canadian Law: An Introduction,* 5th edition, Toronto, Nelson Publishing, pp. 147-148
[94] *Ibid*
[95] *Ibid*

In September of 2003, a Commission of Inquiry into the Wrongful Conviction of *Milgaard* was announced by the Saskatchewan government. The terms of reference directed the Inquiry to review the investigation into the death of Gail Miller, the prosecution of *Milgaard*, and the question of whether or not the investigation into Miller's death should have been re-opened earlier, and to make recommendations to prevent future wrongful convictions/miscarriages of justice.[96]

In its final report, Commissioner MacCallum concluded that the Criminal Justice System had failed *Milgaard* because his wrongful conviction was not detected and remedied as early as it should have been. He found no simple answer as to why *Milgaard* was wrongfully convicted and why it took so long to correct this injustice. MacCallum found fault with the Police for not following up on the claim of Larry Fisher's wife in 1980. MacCallum felt that they should have reopened the investigation.[97]

When the legal decision making process is concentrated within *Law's Universal* nature at the complete expense of the *Particularities* of the case, it becomes possible for the handlers of the Criminal Justice System (the Police and the Court) to twist evidence and witness testimony to fit their desired version of the crime and who perpetrated it - to neglect a search for the truth and rather prefer to tick the box of conviction by conveniently charging the crime to the individual to whom it can circumstantially stick. The ultimate result is a wrongful conviction/miscarriage of justice, as *Milgaard's* case attests.

[96] MacCallum, E. 2008, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard,* Saskatchewan Government.
[97] *Ibid*

1.7 *Thomas Sophonow* as the Little Girl

The Individual

Sophonow was the youngest of three children. His parents were separated only after a few years of marriage and the difficult task raising three young children fell on his mother. There is no doubt that life was extremely difficult for the family as they were always very poor – even to the extent that he and his brother frequently stole fruit and vegetables from the market in order to feed the rest of the family.[98]

His childhood was frequently disrupted because he went from foster home to foster home and was placed also in a few juvenile detention facilities. He therefore had no sense of belonging or family – this is mainly the reason why he, for a time, joined the Neo-Nazi party. He was searching for a family, a place to belong – he was a lost young man looking for his place in society.[99]

As a result of his unfortunate family background, *Sophonow* found himself more and more in trouble with the Police which led to criminal record made up of mainly minor offences – none being violent however. For instance, he admitted to having been a courier of stolen goods in 1981.[100]

[98] Manitoba Justice Department Website, http://www.gov.mb.ca/justice/publications/sophonow/compensation/tsbackground.html, 16th March 2014
[99] *Ibid*
[100] *Ibid*

As an adult, he abandoned his criminal activities and wanted to help young boys who were 'heading for trouble'. He apprenticed as a machinist and demonstrated considerable skill at the job. Despite the fact that he had turned his life around, *Sophonow's* teenage police record may well have made him vulnerable to targeting by the Police for a murder he did not commit.[101]

Order of Events – The Crime

On the 2rd of December 1981, 16 year old Barbara Stoppel was murdered while she worked in the Idea Donut Shop in Winnipeg, Manitoba. She was found in the women's washroom with a nylon cord around her neck and died in the hospital five days later. Several witnesses told Police they had seen a tall man wearing a cowboy hat lock the door from the inside and proceed to walk towards the back of the store.[102]

Nearly a month passed without any primary suspects being identified. At the end of January 1982, investigators received a phone call from a police officer in British Columbia who remembered an incident where a man named *Sophanow* contacted them about giving a ride to a hitchhiker who went missing and was never found.[103]

The Police Office did a background check and discovered that *Sophonow* had a criminal record. Moreover, the police sketch of Stoppel's killer resembled a photo of Sophonow in the police files. Vancouver police interviewed Sophonow and found out that he had stopped for a coffee at Tim Hortons doughnut shop on the same street on which Stoppel was killed, and that he was indeed aware of the murder.[104]

[101] *Ibid*
[102] Rossmo, D. K. 2009, *Criminal Investigative Failures,* Boca Raton, CRC Press Publishers, pp. 299-306
[103] *Ibid*
[104] *Ibid*

Sophonow was very co-operative with the Police – telling them that he had arrived in Winnipeg about 1:00am on the 2rd of December. He had made several unsuccessful attempts by phone to locate his wife and daughter. He visited his wife's parents and left several gifts for his daughter, telling them that he intended to drive to Mexico the next day.[105]

The Vancouver Police claim that *Sophonow* told them that he had stopped for coffee at a doughnut in the Goulet street shopping centre. *Sophonow* claimed that he went to a Tim Horton's shop on Portage Avenue. Asked if he knew about the Stoppel murder, *Sophonow* reportedly said he thought the girl's name had been Michelle or Barbara. The Police had taken the precaution in telling him that anything he said could be taken down and used against him.[106]

Throughout the questioning, they made little notes in the notebooks – it would later emerge however, that what they were jotting down was not necessarily what he was saying. During the first interview, the Police took notes but did not allow *Sophonow* to check them for accuracy. Bizarrely enough, the Police later explained that they did not let *Sophonow* check the notes and sign them because they feared that he would eat them.[107]

Based on primarily on eyewitness accounts and inadequate physical evidence, *Sophonow* was arrested and charged with the murder of Barbara Stoppel and the first of what would be a series of three trials began.

[105] Katz, H. Carroll , M &Chaplin, N. *Justice Miscarried,* Toronto, Dundurn Publishing, pp.174-176
[106] *Ibid*
[107] *Ibid*

Trial! Trial! Trial!

At the first of what would be a tiring ordeal of three trials, the Crown Prosecutor called various Police Officers to describe the murder scene and the evidence discovered. They mentioned how a man named Doerkeson had seen a man he believed to be *Sophonow*, leave the murder scene and was also seen throwing something of the Norwood Bridge thereafter. Following this testimony two pairs of gloves and some twine had been recovered from the ice below. On cross-examination the police stated that they had found no evidence of *Sophonow's* fingerprints at the scene – nor did any of the hair and fluid samples submitted by *Sophonow* match those found on Stoppel's body.[108]

Doerkeson's eyewitness testimony against *Sophonow* appeared very positive and concrete. He had no hesitation identifying *Sophonow* as the man he had chased and attempted to drag back to the crime scene. The prosecution also called Mr. and Mrs. Janower and others, to identify *Sophonow* as the man they had seen leaving the Ideal Donut Shop on the evening of the murder. Although none of these witnesses had been able to pick *Sophonow* out in a police-line up, they were able to, for the convenience of the Prosecution, identify him at trial.[109]

The jury in the first trial deliberated for twenty-eight hours before informing the judge they had reached an impasse. Judge Louis Denist had no choice but to declare a mistrial and a date was set for the second trial.[110]

[108] *Ibid 33*
[109] *Ibid*
[110] *Ibid*

At the second trial, the prosecution called Constable Trevor Black to the stand. Before Sophonow was sent to Winnipeg to be charged, he had been held in a cell by the Vancouver Police. Black, acting as a fellow prisoner awaiting deportation to the United States, was placed in the hope that he would get Sophonow to confess. Black took no notes at the time, nor was he wired for the task with any recording equipment. In his testimony, he claimed that Sophonow admitted to being in the doughnut shop in Winnipeg and to locking the door while he talked to the waitress. This testimony fitted perfectly with what the Police indicated Sophonow had told them during their first interview. [111]

Sophonow contended that he was in a different doughnut shop and told the police he had not locked the door of any doughnut shop. The lack of notes or electronic verification of this suppose conversation with Black makes it very suspect, as does the fact that Black was not asked to testify at the first trial.[112]

[111] *Ibid 33.,* p.89
[112] *Ibid*

Thomas Cheng, an immigrant from Hong Kong facing numerous fraud and immigration offences was also put on the stand and testified against Sophonow. He said that he met Sophonow in the Winnipeg Public Safety Building and that Sophonow confessed to the murdering of Barbara Stoppel. Under cross-examination, Cheng admitted that a couple of days after he had handed in his statement to the Police, he was released from prison and that, when he eventually appeared from trial, all twenty-eight charges against him had been dropped. Within six months, Cheng was allowed to leave the country voluntarily without facing deportation.[113] It seemed so clear that a deal had been struck behind closed doors between Cheng and the Police – and to show him that they were grateful to him for sticking to the plan, they had gone ahead and wiped his slate clean.

On account of Cheng's testimony and that of others, Sophonow was convicted of Stoppel's murder in 1983. He appealed the ruling – the appeal was successful, and on account of that the Manitoba Court of Appeal ordered an unprecedented third trial.

The third trial included more witnesses being called to give eyewitness accounts – the prosecution had to do this seeing as their star witness, Thomas Cheng, had left the country by this time, having all charges against him for various previous criminal offences dropped. In summation, the prosecution relied heavily on the eye-witness accounts of those who identified Sophonow as the man they had seen leaving the Ideal Donut Shop on the night of the murder, and ignored evidence or testimony that contradicted the prosecution's case.[114]

[113] Manitoba Justice Department Website, https://www.gov.mb.ca/justice/publications/sophonow/jailhouse/cheng.html, 15th March 2014
[114] *Ibid 33.,* p.94

After four days of deliberation, it was clear that the jury was having difficulty reaching a decision. The possibility of another hung jury loomed. On the fifth day, Justice Hewak received a note from the jury, indicating that it was unable to reach a decision in the case, because one juror, who spoke of having 'psychic powers and gifts' seemed mentally incapable of dealing with the evidence at hand.[115]

When the judge questioned the juror, she denied having psychic powers, and said rather that she had a gift for thinking. The judge concluded that the jury member did harbour thoughts of having special powers and discharged her. The remaining eleven members were then sent back to continue their deliberations, returning a few minutes later with a verdict which read guilty.[116]

It had been a most unusual trial. Witnesses which were called forward by the Prosecution had previously been deemed unreliable or questionable by the Court of Appeal. A testimony which was given at the second trial by a person charged with several crimes, who had since left the country after having all charges dropped against him, was allowed to be read into the record. The Crown prosecutor was allowed to substitute his hand size for tat of the accused without ever proving that they were similar.[117]

The judge refused to allow the defence to call Dr. Elizabeth Loftus as an expert witness on the frailties of eyewitness testimony; failed to give the jury adequate warning about convicting an accused on potentially weak eyewitness testimony; and refused to allow the accused to call four witnesses to support his alibi. And, in a final blow to the defence, the judge dismissed the one juror who obviously believed *Sophonow* was not guilty.[118]

[115] *Ibid*
[116] *Ibid*
[117] *Ibid*
[118] *Ibid*

Very much like *Truscott*, *Driskell*, *Coffin* and *Milgaard*, the primary cause for *Sophonow's* wrongful conviction/miscarriage of justice is the concentration of the legal decision making process within either of the two extreme modes of Legal Judgement – in *Sophonow's* case, within Law's *Universal* nature.

Whenever the legal decision making process is concentrated within *Law's Universal* nature at the complete expense of the *Particularities* of the case, it becomes possible for the handlers of the Criminal Justice System (the Police and the Court) to twist evidence and witness testimony to fit their desired version of the crime and who perpetrated it, to neglect a search for the truth and rather prefer to tick the boxes on the road to conviction by conveniently charging the crime to the individual to whom it can circumstantially stick. The ultimate result is a wrongful conviction/miscarriage of justice.

This was quite well demonstrated in *Sophonow's* case by the Judge's refusal to allow the defence to call Dr. Elizabeth Loftus as an expert witness on the frailties of eyewitness testimony; the Judge's failure to give the jury adequate warning about convicting an accused on potentially weak eyewitness testimony; the refusal to allow the accused to call four witnesses to support his alibi. And, in a final blow to the defence, the judge dismissing the one juror who obviously believed *Sophonow* was not guilty.[119]

The three judges of the Manitoba Court of Appeal all strongly agreed that a number of serious errors had occurred during the trial. The Court of Appeal made the decision that the dismissing of the juror constituted the grounds for them to set aside the verdict. The justices were emphatic in their opinion that *Sophonow* was not to face a fourth trial. The Supreme Court of Canada agreed and refused the Crown's request for leave to appeal.

[119] *Ibid*

Added to the fact that *Sophonow* played himself into the hands of the police when he assisted them in the search for a hitchhiker that he had given a ride to a few days before she went missing, the circumstances surrounding him made it easy for the Police to build a case around him.

1.8 *Guy Paul Morin* as the Little Girl

The Individual

In the 1980's, boys dreamed of fast muscle cars with wide tires, spoilers and metallic paint. Even a geeky, shy boy with a face splotched with acne got the hottest girl as long as he had the hot car. After school on Fridays, teenagers parked them in their driveways and washed the cars until the shone.[120]

Twenty-four year old *Morin* was one of six kids, but the only one still living at home. He absolutely loved cars and enjoyed seeing the muscle cars roaring down the hillside. He drove his parents' Honda with gold-coloured seat covers. He seldom washed it and most certainly never vacuumed it. He was considered by his peers to be boring and somewhat a nerd.[121]

Like many twenty four-year olds, he was heavily into music. He loved it so much – he played instruments and was a member of three separate bands. *Morin* liked girls his age and had casually dated a few over the years, but he was a geek without a hot car, so he never got to date the hot girls. He kept busy helping his father renovate the family home, looking after his bees, and tinkering on the beat-up cars littering the yard.[122]

Morin was not a smoker and neither did he drink or go out for wild parties. Though his hair was short and well kept, his work as a labourer meant that he was sloppily dressed most the time. After graduating from high school, he took courses in air conditioning and refrigeration, auto upholstery, spray painting, and gas fitting.[123]

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[120] Faryon, C.J, 2012, *Guilty of being Weird: The Story of Guy Paul Morin,* Toronto, Lorimer &Co Publishers, pp.15-18
[121] *Ibid*
[122] *Ibid*
[123] *Ibid*

In July of 1984, he started work with Interiors International Limited, a furniture manufacturing company as a finishing sander. He loved working nights, but his boss had recently scheduled him for the day shift so he had decided he would quit when November came.[124]

Guy Paul was marginalised from the community in which he lived. Indeed, in terms of small-town standards behaviour, the entire *Morin* family was unusual. They displayed unbridled affection for one another in ways that some people found embarrassing, and on one crucial occasion, they set up floodlights in their backyard so they could tinker with old cars well into the wee hours of the morning, even as others in the community were out searching for a little girl who had gone missing.[125]

The family seemed to exclude the community from their lives and was almost fanatical about their privacy. The fact that Guy Paul was still living with his parents made him quite strange. Additionally, he dated very few girls, rather preferring the company of honey bees – these made him even all the more strange. He had a strange cadence to his speech pattern and often chose inappropriate words to express himself. It was this combination of characteristics that would cause the police investigators to regard him as 'weird'.

[124] *Ibid*

[125] Anderson, D., Anderson, B. 2009, *Manufacturing Guilt,* 2nd edition, Black Point, Fernwood Publishing p.65

Order of Events – The Crime

On the 3rd of October, 1984, nine year old Christine Jessop disappeared sometime after being dropped off at home by the school bus. When her parents came home, they found her school bag on the counter, but there was no sign of Christine. By early evening, her parents realized that something was terribly wrong and her mother called the Police. Although the search for Christine lasted several days, there was no sign of her at all.[126]

Christine's body was not found until the 1st of December 1984, over 50 kilometres from her home. Christine had been stabbed to death. Investigators discovered semen stains or her underwear. Christine's mom described her as described her as a happy, sensitive, lively and caring fourth grader who loved school and sports.[127]

At the time of Christine's disappearance, *Morin* was working as a finishing sander with a furniture manufacturing firm. *Morin* and his parents would later testify that on the day Christine vanished, *Morin* had brought the groceries in, taken a nap and then worked on the renovations until after the dinner.[128]

The police first became interested in *Morin* when Christine's mother mentioned that their neighbour was a 'weird-type guy' who played the clarinet. The police setup surveillance of the Morin family home. *Morin* was interviewed by two Police officers. During this interview, Guy did not say anything that objectively could have been construed as a confession, nor did he give any indication that he was responsible for Christine's death.[129]

[126] AIDWYC Website, http://www.aidwyc.org/cases/historical/guy-paul-morin/#_ftn1, 19th March 2014
[127] *Ibid*
[128] *Ibid*
[129] *Ibid*

Nonetheless, the Police suspected that he was responsible for her murder. The Police found it strange that *Morin* didn't know that Christine's remains had been found across the Ravenshore Road despite the fact that it was public knowledge at the time. They also did not like the sound of a comment he made to the effect that all little girls are sweet and beautiful, but grow up to be corrupt. Additionally, *Morin* made a snarky remark about his innocence, perhaps because he was irritated at being treated as a suspect.[130]

After this interview, the Police investigators obtained *Morin's* time card from work, which suggested that it would have been difficult or impossible for *Morin* to return from his job and abduct Christine before her parents' return. However, the Police remained convinced that this 'weird type of guy' had sexually assaulted and murdered Christine.

On the basis of circumstance therefore, *Morin* was arrested on the 22nd of April 1985. Later that evening the police searched his house and took samples of his hair, blood and saliva. During his six-hour interrogation, *Morin* repeatedly stated that he was innocent, but a full decade would elapse until he would be exonerated.[131]

[130] *Ibid*
[131] *Ibid*

At the First Trial

Morin's first trial began on the 7th of January 1986. During this four-week ordeal, the jury heard expert evidence from the Prosecution, suggesting that a hair stuck in Chrisitine's necklace matched *Morin's* hair sample – and similarly, that three hairs found in *Morin's* car matched Christine's. Furthermore, the experts testified that a number of fibres located on Christine's clothing and recorder case could have come from *Morin's* home and car.

The jury also heard from two of *Morin's* cellmates – Mr. May and someone identified only as Mr. X, that he confessed to killing Christine while incarcerated prior to his trial. *Morin*, in fact, never confessed anything in prison. The defence team maintained that it was impossible for Morin to have left work at the hour indicated on his time card and have arrived at Christine's house with enough time to commit the crime.[132]

Morin's lawyers also argued that the hair and fibre evidence did not really prove anything and they called their own experts who disagreed with the Crown experts' analysis. On the 7th of February 1986, the jury reached a verdict of not guilty. Morin was acquitted and set free. However, his struggle had only just begun.[133]

[132] *Ibid*
[133] *Ibid*

The Crown's Appeal – Morin's Second Trial

On the 4th of March 1986, the Attorney General of Ontario launched an appeal of *Morin's* acquittal. The Crown claimed that the trial judge had made a mistake in directing the jury about the meaning of 'reasonable doubt', and that the acquittal should therefore be thrown out and *Morin* retried.[134]

The Court of Appeal agreed, and ordered a new trial. *Morin* appealed this decision to the Supreme Court of Canada, but that Court dismissed his appeal on November 17th 1988. *Morin* was out of options; he would have to stand trial again. The new jury at the second trial heard similar evidence about the supposedly incriminating hairs and fibres, and about Morin's alleged confession to Mr. May overheard by Mr.X. Moreover, the jury also heard a great deal of new evidence from witnesses who had not testified at the first trial, but who had now recalled a wide range of damaging information.[135]

Much of this new, damaging information focused on certain aspects of *Morin's* behaviour shortly after Christine's death, which, in the witnesses' opinion, reflected his guilty conscience. For example, the Crown called a police Constable to the stand – he claimed to have visited the Morin residence on the night of Christine's disappearance. The Constable testified that he Morin appeared unconcerned that the young girl from next door had gone missing.[136]

[134] *Ibid*
[135] *Ibid*
[136] *Ibid*

A member of *Morin's* band testified that she had been shocked by the very 'uncaring way' that *Morin* had remarked on Christine's death. The Crown also called Christine's best friend to the stand – she testified that the two girls had had several conversations with Morin in the past, during which he had kept a tight grip on his hedge clippers that his knuckles turned white.[137]

Another neighbour, Paddy Hester, testified that *Morin* had chased her away from his car (where the incriminating hair and fibre evidence had been found). Finally, Christine's mother testified at the second trial that after Christine's funeral, she and several guests had heard a man's voice screaming saying; "Help me, help me oh God." She believed that this frightened, desperate and guilt ridden voice was *Morin*. On the basis of these statements, *Morin* was found guilty of first degree murder and sentenced.[138]

[137] *Ibid*
[138] *Ibid*

Morin's Appeal and Acquittal

Immediately after Morin's second trial and wrongful conviction, a grass-roots organization sprang up to aid him in his quest for exoneration – this group was called the Justice for Guy Paul Morin Committee. The group's first objective was to help *Morin* to appeal his conviction and in the meantime, to apply for his release on bail while he waited for the appeal to be decided. *Morin* and the Committee were successful – despite his murder conviction, *Morin* was granted bail in 1993.[139]

Morin and the committee had intended to win his appeal by demonstrating that neither the Crown's hair and fibre evidence, nor the 'jailhouse informant' evidence about his supposed confession, was reliable. But just days before they were to present their arguments to the Ontario Court of Appeal, DNA test results came in that made these issues moot. Several previous attempts had been made to perform DNA tests on the semen found on Christine's underpants, but had been unsuccessful because the technology was not there.[140]

The technology had now become available and the very sophisticated test could be performed. Once performed, the test proved much; 'the evidence proved an indisputable fact that *Morin* was not guilty of the first degree murder of Christine, and should therefore be acquitted. The Ontario Court of Appeal set aside *Morin's* conviction and entered an acquittal instead. Ten years after his arrest, *Morin* had finally proven his innocence and cleared his name. A Public Inquiry was ordered into the causes of his wrongful conviction.[141]

[139] *Ibid*
[140] *Ibid*
[141] *Ibid*

Morin's case is obviously one of a Criminal Justice System gone horribly wrong. The Inquiry setup to investigate *Morin's* wrongful conviction/miscarriage pointed to Tunnel Vision as the root cause of his ordeal. The Inquiry described Tunnel Vision as the single minded and narrow focus on an investigation or prosecutorial hypothesis – in this case, the hypothesis that *Morin* committed the rape and murder of Catherine – so as to unreasonably colour the evaluation of information received and one's conduct in response to the information.[142]

This 'unreasonable colouring' of the evaluation of information received, and the unreasonable colouring of one's conduct in response to that information can also be similarly described using the very words of this *thesis*, in so far as the primary cause of wrongful conviction/miscarriage of justice is concerned; it is the concentration of the legal decision making process within either extreme modes of Legal Judgement (*Law's Universal* nature/ the *Particularities* of a case).

As clearly demonstrated in *Morin's* case, and the cases of *Driskell*, *Milgaard*, *Coffin* and *Sophonow* - whenever the legal decision making process is concentrated within *Law's Universal* nature at the complete expense of the *Particularities* of the case, Tunnel Vision is what results.

The presence of Tunnel Vision in these cases, very much confirms that there is a concentration of the legal decision making process within either extreme of the modes of Legal Judgement (*Law's Universal* nature/the *Particularities* of the case). Similarly, wherever we have witnessed, in these cases, a concentration of the legal decision making process within either extreme, we simultaneously witness the occurrence of Tunnel Vision – with the ultimate result of both such phenomena being wrongful conviction/miscarriages of justice.

[142] The Honourable Fred Kaufman, C.M., Q.C, Report of The Kaufman Commission on Proceedings Involving Guy Paul Morin, 1998.

It is of substance to argue therefore that the position of this *thesis;* that wrongful convictions/miscarriages of justice occur primarily because legal decision making is concentrated within extremes of the modes of Legal Judgement, is very much self-evident - as demonstrated by the cases of *Truscott, Driskell, Milgaard, Coffin, Sophonow* and *Morin.* All these defendants suffered wrongful convictions/miscarriages of justice because of a concentration of the Legal decision making process within extremes.

CHAPTER 2

2.1 SYSTEMS THEORY, NAUGHTON'S RETHINK, AND A MARXIST PERSPECTIVE ON WRONGFUL CONVICTIONS/MISCARRIAGES OF JUSTICE

The proposition of this *thesis*; that the concentration of the legal decision making process within extremes of the modes of Legal Judgement (*Law's Universality/* the *Particularities* of the case), is very much evidenced by the Canadian cases discussed in *Chapter 1*. We find this to be true all the more when we pay attention to the differing perspectives that there are on wrongful convictions/miscarriages of justice. The perspectives provide and represent the different ways in which the causes of wrongful convictions/miscarriages have been understood.

Frequent references will be made to the Canadian cases as the Perspectives are discussed, with the purpose of further demonstrating, through the light that the Perspectives provide, that wrongful convictions/miscarriages of justice occur when the legal decision making process takes refuge in one extreme or the other (Law's *Universality/* the *Particularity* of a given case).

2.2 Systems Theory

It is commonly known that Law is a system with a theoretical underpinning which helps our understanding of the legal system, why it behaves the way it does, and why it approaches issues the way it does. *Sally Falk Moore*[143] writes that;

"The Law in the broad sense of our whole legal system with its institutions, rules, procedures, remedies, etc., is society's attempt … to control human behaviour and prevent anarchy, violence, oppression and injustice by providing and enforcing … rational, fair and workable alternatives to the indiscriminate use of force by individuals or groups in advancing or protecting their interests ... Law seeks to achieve both … freedom and justice."

Moore's statement lends much weight to the concept that Law represents a means of social order – hence its inextricable link to sociology. *Banakar and Travers* write that Law and Sociology have always had a close relationship as academic disciplines. They both have common origins in the eighteenth century – origins which came about as a result of mankind's attempt to understand and regulate the social world according to rational principles at the time.[144]

[143] Moore, S. 1978. *Law as process.* London, Routledge, p.2
[144] Banakar, R. Travers, M. 2002. *An Introduction to Law and Social Thoery,* Portland, Oxford Printing Press. p.2

The legal system, at its core, is made up of many different legal theories – these theories have been 'systemized', thus forming the legal system. According to *Luhmann*[145], 'legal theories are produced in a direct response to legal practice. They classify the subject matter, they organise the opaque material with which legal practice is faced and turn it into problem related and case related constellations, which from then on can restrict and guide the process of decision making.'[146]

Luhmann cites two advantageous reasons for the systemization of theories; the first is that it makes sense to develop and sustain rules for balancing interests which do not in principle classify one party's interest as unlawful in terms of a conflicts of interest scenario – and when unjust enrichment occurs, systemized rules have to be applied which help the plight of the disadvantaged party.

Secondly, a systemization of theories is important for legal education. *Luhmann* says 'the relevance of legal theory in legal education can be evaluated rather differently from its relevance to legal practice – as illustrated above in the 'conflict of interest' instance. This is so even though it is the education system's training that prepares people to work as legal professionals. Legal education can afford to provide more abstraction, more generalisations of decisions, and even more philosophy than will ever be applied in practical work.[147] Systems theory is therefore a means of thinking deeply, and systematically, about the relationship between the individual and society,[148] and how different institutions in society fit together.[149]

[145] Luhmann, N., Ziegert, K. and Kastner, F. 2004. *Law as a social system.* Oxford: Oxford University Press
[146] *Ibid 141.,* p. 53
[147] *Ibid.,* p.54
[148] *Ibid*
[149] Holmond, J. 1996. *Founding Sociology?,* London, Longman Publishing, p.13

There are quite a number of system theorists who offer various opinions on societal systems in general (the legal system included). One of such theorists is *Parsons*[150] who presents society as a smoothly-functioning system, very capable of meeting the four functional needs every society has to satisfy;

a) adaption to the physical environment, (b) goal attainment i.e finding the best ways to organise the system's resources to achieve its goals and obtain gratification, (c) integration, which concerns how the system manages internal tensions and conflicts, and co-ordinates its different parts, and (d) pattern maintenance or latency which is how the system maintains and reproduces itself over time.

Parsons indicates that there are four sub-systems which enable society to survive – the economy adapts the system to its environment by extracting resources from the natural world. The political system sets goals for the system through the legislative process, whether in the executive or through parliament. The educational system and media ensures that the population is socialised into shared values, such as respect for the law and desire to consume economic goods. Most importantly, the legal system, which is of particular interest to this *thesis*, binds everything together, and acts as a safety net by punishing deviants who have not been properly integrated into society.[151]

[150] Banakar, R. Travers, M. 2002. *An Introduction to Law and Social Thoery,* Portland, Oregon: Oxford.p52
[151] Pound, R. 1942. *Social Control through Law,* New Haven, Yale University Press, p.23

For this reason, *Parsons* is considered a great admirer of the legal profession, and has praised lawyers for fulfilling the important functions of social order in society such as persuading clients to settle disputes without going to court.[152] Though comprehensive and logical, Parsons' has not been without criticism. He is criticised by conflict theorists for offering a conservative and uncritical view of American society after the Second World War.[153]

The systems theorists who came after *Parsons* all maintained the basic structure of society as *Parsons* let out, albeit with a greater emphasis on the conflicts between sub systems. *Jeffery Alexander*'s neo-functionalism is probably the closest to *Parsons*. It regards society as something that can be steered and managed by enlightened government.[154]

There are also those theorists who believe that there are no systems at all. *Hermans* is one of such theorists and he offers the opinion that there are indeed no systems – systems exist only in systems theory: because human beings are the ones who invent these systems by writing about them and explaining them – they write the systems into being. [155]

[152] Parsons, T. 1954, *Essays in Sociological Theory,* Glencoe, Free Press, p.372
[153] Mills, C.W. 2000, *The Sociological Imagination,* Oxford, Oxford University Press, p.53
[154] Banakar, R. Travers, M. 2002. *An Introduction to Law and Social Thoery,* Portland, Oregon: Oxford.p52

[155] Hermans, B. Oostendrop, M, 1999, *The derivational residue in phonological optimality theory,* Amsterdam, John Benjamins Publication Company, 103

2.3 Luhmann's System Theory

Luhmann is thought to offer the most comprehensive and sober theory on societal systems, especially the legal system. *Luhmann* has explicit answers to the question of how law can be observed and described as a phenomenon. Generally, *Luhmann* offers a loaded description of society, because society is very complex and is filled with detail. *Luhmann* sees the legal system as the immune system of society – a system within the social system – which protects against the unpredictability of an open future.[156]

The social system – *Luhmann*[157] says – is the unity of all human communication. In coping with its complex environment, the social system selectively increases its own complexity by differentiating communication operations. Law is society's law and society has always had law – the legal system is a sub-system of the social system.[158] The operations of legal decision making must consistently reproduce the selectivity of legal communication, and, therefore, add normative communication i.e. rules, principles, laws, statutes and codes to that process. These would not exist at all in society without the operations of the legal system.

[156] Luhmann, N. 1993, *Risk,* New York, Gruyter Printing Press, 566
[157] Banakar, R. Travers, M. 2002. *An Introduction to Law and Social Thoery,* Portland, Oregon: Oxford, 64-65
[158] Podgorecki A, Whelan C, Khosla D, 1985, *Legal Systems and Social Systems,* London, Croom Helm Publications, p.47

The Law acts as the immune system of the social system. In this case of a deficiency, of normative expectations – disappointments, blame, claims, contradictions, conflicts, impasses, accidents, cases and controversies – society provides a proxy solution in the operations of the legal system, observing the legal system as to the disturbance for the legal system. In each case the consequences are a further legal operation i.e decision, new legislation and legal change. The function of an immune system is to keep the body (the social system) from contracting disease (social disorder), and this is achieved by the operatively closed self-steering of the legal system.[159]

More directly, *Luhmann* asserts that the legal system performs in society by differentiating itself within the society. In other words, the legal system creates its own territory by its own operations - only when doing so does it develop a social environment of law within society. This then allows the question to be asked as to how the influences of this environment can be brought to bear on Law, without the consequence being that Law and society cannot be distinguished from one another.[160]

The legal system uses a mode of operation of communication i.e. it cannot do anything else but frame sentences in the medium of meaning with the help of communication. It is an achievement of the social system that this has become possible, and that a long socio-cultural evolution has made this self-evident. This achievement for instance, provides the legal system with the guarantee that neither paper nor ink, neither people nor organisms, neither courthouses and their rooms nor computers are part of the system. The social system has already constituted this frontier.[161]

[159] Ziegert, K. 1992, Courts and the Self-Concept of Law: The Mapping of the Environment by Courts of First Instance, *Sydney Law Review,* pp 196-229
[160] Luhmann, N. Ziegert, K. Kastner, F. 2004, *Law as a Social System,* Oxford , Oxford University Press, 73
[161] Nelken, D. 1996, *Law as Communication,* Aldershot, Dartmouth Publications, 112

Communication with regards to the legal system is operated under the protection of boundaries that are drawn by society. This means that the legal system must be distinguished in a special way, all that it does has to be treated as legal communication in the social system.[162]

Luhmann answers the question of what the function of law is in relation to the social system. In other words, our concern is which of the problems of the social system are solved by differentiating specialized legal norms and arriving eventually at the differentiation of a specialized legal system.[163]

The question can be shunted onto two different tracks depending on how the problem to which the question refers is defined. Abstractly, law deals with the social costs of the time binding of expectations. Concretely law deals with the function of the stabilization of normative expectations by regulating how they are generalised in relation to their temporal, factual and social dimensions.[164]

Law makes it possible to know which expectations will meet with social approval and which will not. Given this certainty of expectations, one can take on the disappointments of everyday life with a higher degree of composure; at least one knows that one will not be discredited for one's expectations. One can afford a high degree of uncertain confidence or even of mistrust as long as one has confidence in law.[165]

[162] Jackson, B. 1985, *Semiotics and legal theory,* London, Routledge and Kegan Paul, 25
[163] Luhmann, N. Ziegert, K. Kastner, F. 2004, *Law as a Social System,* Oxford , Oxford University Press, 146
[164] Luhmann, N. 1987, *Rechtssoziologie,* 2nd edition, Opladen, Westdeutscher Verlag, 40
[165] Barber, B. 1983, *The Logic and Limits of trust,* New Jersey, Rutgers University Press, 22

In addition to this, *Luhmann* talks about the Law's coding and programming. He asserts that the function of law alone cannot clarify what the legal system uses for its orientation when it reproduces itself and draws boundaries between itself and its environment. This is why sociological systems theory uses the concepts 'function' and 'structure' throughout. Structural fixtures are seen as indispensable because the description of function leaves too much open-ended.[166]

This problem is also apparent in legal theory. Thus, *Jeremy Bentham*, for example, ultimately saw the function of law as achieving security of expectations, but with law's orientation being provided by commands from a politically authorised, powerful legislator. A command produces the differences between obedience and disobedience. The term 'coding' characterises a distinction which is specific to law. This term coding, when contrasted with the term command, leaves open the question of the source of validity of law – a source which is seen to rest in the legal system itself by autopoietic systems theory.[167]

[166] Parsons, T. 1964, *The Social System,* New York, Free Press of Glencoe, 19
[167] Luhmann, N. Ziegert, K. Kastner, F. 2004, *Law as a Social System,* Oxford , Oxford University Press, 173

The function of law[168] produces a binary scheme in which normative expectations, whatever their origin, are fulfilled or disappointed as the case may be. *Luhmannn* says both of these things happen and the reaction of law is correspondingly different. *Luhmann* says it still remains open for consideration, however, how to treat those case in which disappointing conduct, in its turn, envisages norms and insists that they are legal; not to mention those cases in which a violation of the law is only hypothesized, or in which the attribution of norm-violation to certain actors is contested. The fulfilment of the function of law always depends on social structures which are not at the actual disposition of law. [169]

The strict scheme of binary coding cannot be explained by the mere fact that normative conflicts arise or the fact that the harm created by their consequences prompts us to find a solution. One has to distinguish the values of the legal code, the positive and the negative even though both are involved all the time and the distinction has to function as a mode for linking operations. One has to apply this distinction even though one can neither ask nor answer the question – because it would lead to a paradox – as to whether the distinction between legal and illegal, is itself legal or illegal. The paradox itself turns unwittingly into a creative principle because one has to try so hard to avoid and conceal it.[170]

[168] *Ibid*
[169] *Ibid.,* p. 174
[170] Fletcher, P. 1985, Paradoxes in Legal Thought, *Columbia Law Review,* 85 pp. 1263-1292

One is forced to implement the distinction between legal and illegal through further distinctions. There may for example be situations in which one is held liable for damage to goods belonging to someone else. This has to be explained by the fact that the person who has caused the damage acted unlawfully – as an exception, as it were, to the normal rules. Law in other words, cannot prohibit or sanction its own use or impose liability in relation to the consequences of such use. One can only be made liable for causing an injury by wrongdoing.[171]

Doctrinal Law, which implements the legal/illegal scheme directly, is not compatible with the phenomenon of risk. This problem was addressed by the development of the legal instrument of strict liability. It allows the development of conditions, rules, and reasons for the distribution of harm from lawful conduct, which is making someone liable for conduct that was otherwise permitted by law. The reasoning is that the permission for conduct with possibly harmful consequences must be paid for by the acceptance of liability for any damage.[172]

The legal system must take time if it wants to cross the boundary of its code i.e legal and illegal, and sabotage the mutual exclusion of the value of its code. Through its own programmes law must be able to distinguish between earlier and late positions in law. In practice binary codes are easily dealt with - without this advantage they could not be institutionalized. It is easier to keep an eye on two values at the same time when the one excludes the other. All that is needed for the system to be closed is to simplify the rule further that all that is not legal is illegal, or vice versa. This advantage of the scheme, however, conceals complicated logical structures. We define them, using the logical-mathematical term of re-entry, as a double re-entry of the form into the form.[173]

[171] Luhmann, N. Ziegert, K. Kastner, F. 2004, *Law as a Social System,* Oxford , Oxford University Press. p 178
[172] *Ibid*
[173] Barber, B. 1983, *The Logic and Limits of trust,* New Jersey, Rutgers University Press, p.180

The legal code - which takes the form of if x then y, z and a - has properties which prevent the legal system from being oriented exclusively by the code itself. There are however – *Luhmann* says – deficiencies with the notion of pure coding which can be discussed from two vantage points – the temporal and the functional. From a temporal perspective, the code is and remains unchanged even when specified transformation is applied to it. If it is replaced by other values – for example, the value of utility or the maintenance of political power – one is dealing with a different system.[174]

Law does not speculate about the future, it binds time and thus the present's future. It is above all this development of the distinction between binary code and programmes and the combination of operative closure and openness for future contingencies in the form of conditional programmes, which has propelled the evolution of law to a much higher level of external complexity. This, in turn, has significantly raised the attraction of legal communication for the social system and its sub systems.[175]

[174] Luhmann, N. Ziegert, K. Kastner, F. 2004, *Law as a Social System,* Oxford , Oxford University Press, p.190
[175] *Ibid 164.*, p.68-69

2.4 Christodoulidis' Inertia of Institutional Imagination[176]

Christodoulidis writes in reply to *Unger's* views on politics and its links to institutions of society such as law. For *Unger*, law is not at all rigid and confining. *Unger* vests in Law, the possibility to pursue radical politics and counter the false necessity of the confinement of our political vision within rigid institutional assumptions.[177]

Unger is against the school of 'rationalising legal analysis,' which is the alleged improvement which occurs through developing the underlying conceptions of principle and policy - rejecting bit by bit, the pieces of received understanding and principle that fail to fit the preferred conceptions of policy and principle.[178]

It is to these views that *Christodoulidis* replies – and in so doing offers his own views on social theory, law as a subsystem. To begin with, *Christodoulidis* points to what *Luhmann* refers to as 'constitutive reductions' - which are always at play in law's picture of the world.[179]

As this *thesis* has already stated, Law creates boundaries for itself and rightfully so seeing as it is a subsystem within the overall social system. Creating these boundaries means that the Law as a system must filter the very complex bits of information that comes in from the external societal environment – it must filter the information to fit its own code and its own language. The constitutive reduction method is the tool that the law employs to achieve this – with this mechanism, it undertakes a reduction of the information it admits on the basis of importance and priority, and not much else.

Unger's arguments in his article to which *Christodoulidis* responds is very much based on the case for solidarity rights within Law. *Unger* believes that the connection between solidarity

[176] Christodoulidis, E. 1996, The Inertia of Institutional Imagination, *Modern Law Review,* 59 pp. 377-396
[177] *Ibid*
[178] Unger, R. 1996, Legal Analysis as Institutional Imagination, *Modern Law Review,* 59 pp1-23
[179] *Ibid 176.*, p. 378

and law is a crucial one. Solidarity is the foundation of community, the ideal behind human association which motivates much Critical Legal Theory. Solidarity rights, *Unger* says, form a part of a set of social relations enabling people to enact a more defensible version of communal ideals than any other version currently available to them.[180]

In other words, an individual's right to communal sympathy is an integral part of the Social system as a whole and should be recognised as such. This recognition then ought to allow individuals the convenience of adopting a much more justifiable position in terms of their actions – this would ultimately mean an enshrining of solidarity (sympathy) into law, its systems and institutions.

In response, *Christodoulidis* asks the question of how Law can fulfil the quest for solidarity. How can it admit solidarity into its system which is very much its own world, very much secluded from the social system in general? *Christodoulidis* argues that this proposed admittance of solidarity into law brings some problems. He makes it clear that there is a certain incompatibility between law and solidarity which brings results in a paradox.

Sacrifices made in solidarity towards fellow members of the community must be voluntary if it is to be a true expression of solidarity. The enforcement, whether in court or even in the shadow of the law, makes it involuntary *Christodoulidis* argues. Solidarity is a right which ought to be enforced freely and without coercion by a court of law.[181]

Unger writes of Solidarity that it is nothing short of the social face of love – and love is neither an act nor emotion, but a gift of self which may fail to eventuate in acts. There is a single reason, he says, why no set of rules and principles can do justice to the sentiment of solidarity.

[180] *Ibid 176.,* p.379
[181] *Ibid 176.,* p.380

A legal order confers entitlements and obligations whereas an individual's rights and duties resemble the forces of nature.[182]

In making the immediate above assertion, *Unger* is criticising a type of legal system that exhibits formality and rigidness – and in this regard *Christodoulidis* asks that we note the tension, which he puts in this form; solidarity involves a reaching out to the other person, an element of suppression of the self and sacrifice towards the other, and law by its very structure as a means of litigating competing claims, its operating of dispositive concepts and the win-or-lose principle, violates the self-effacing moment underlying the encounter of solidarity.[183]

What *Christodoulidis* means here is that the very make-up of the legal system, its core composition, prevents it from fulfilling the notion of solidarity. As previously mentioned, the language of law can be summed by the binary code; legal/illegal – Law takes this binary code and applies it to any and every set of facts it admits from the other subsystems and the external societal environment in order to reach a conclusion – this is the only language it understands (legal/illegal) – this is how the legal system is programmed to think on facts – it therefore cannot reach out to people or the circumstances of their fluid lives – Law indeed isn't even aware that it cannot do these things. For outside of its binary code (legal/illegal), Law knows nothing, considers nothing and can do nothing – this is the nature of the law as a system – it is a nature of *Universality.*

[182] Unger, R. 1976, *Law in Modern Society,* New York, Free Press, pp206-207
[183] *Ibid 176.,* p.381

We see this 'binary code-inspired' *Universality* of Law on clear display in the *Driskell* case, where both the Justice Ministry and Police announced that there would be an inquiry into the Criminal Justice System's handling of the trial, only after the *Winnipeg Sun* newspaper published articles exposing the corruption and misconduct of the Police. The newspaper articles caused many to question the integrity of the Criminal Justice System, giving way to a trial of the Criminal Justice System in the court of public opinion – then, and only then, did the System act.

Law needs such a nudging to do what is obviously right. It is frozen in inaction by the tunnel vision brought upon it by its binary code (legal/illegal). The effect of this 'binary-code induced' Tunnel Vision is that Law is fixed within its own world where it views and perceives things in one way only; its *Universal* nature – a condition which makes Law unable to accommodate *Particularity* as a part of the process of Legal Judgement.

This accounts for the wrongful conviction/miscarriage of justice in *Driskell's* case; a legal decision making process locked within the extremity of Law's *Universality* nature as inspired by its binary code (legal/illegal), which brought upon a Tunnel Vision which would lead to one single outcome; a wrongful conviction/miscarriage of justice.

Christodoulidis confirms this by asserting that Law as a system cannot take social interdependence on board as such, since in Law, such interdependence, whether as co-operation or conflict, is staged through categories that pre-ordain its form and content, demarcate the problems and pre-empt what can be said about them. In the legal system, solidarity is necessarily aligned to legal co-ordinates where concepts of rights, liberties, legal notions of harm and legal analogies, legal tests and legal presumptions first make sense of it.[184]

Furthermore, *Christodoulidis* asks the question of why it is that legal analysis gives us a limited and limiting repertoire for a sustained conversation about our social and political arrangements. The answer, he says, is that law is a reduction from other possible political discourse. Legal institutionalisation is the entrenchment of certain reductions. Social interdependence acquires a specific form in law to the exclusion of other possibilities – one such excluded possibility is fully-fledged solidarity. [185]

Christodoulidis takes a much closer look at Law's reduction process. As already mentioned every system restricts on its own terms the ambit of what is meaningful by filtering communication through system-relevance established by its code. Competing categorisations and interpretations of events will not all find expression in the system's terms; out of the infinite possibilities of describing a person's action, for example, the legal system addresses what is relevant by deeming it legal or illegal. Only on that basis can a person's action further be thematised as intention or motive on the basis that it is conductive to a legal characterisation of his/her action.[186]

Each system will restrict the modes in which the world can be talked about by perceiving it in a categorically preformed way. The complexity of the world is thus met from within the system

[184] *Ibid 176.,* p. 382
[185] *Ibid*
[186] *Ibid 176.,* p.383

through specific capacities of resonance. The system creates order from noise by drawing selectively on the surplus of possibilities. Noise is what is not yet reduced. In the process of this selective depiction, the system construes/shrouds the external world that it cannot conceive in its complexity. A system knows by simplifying, and then by choosing through manipulating and combining these self-produced simplifications that stand in for that which is too complex for the system to conceive. Systems are agents of reduction, in terms of which the unbearable complexity of the world becomes meaningful.[187]

A system comes about when a specific, reductive, selective way of observing a complex world, with a surplus of possibilities, is established. In other words, the world is a horizon; it is not yet meaningful except as a background against which certain possibilities are actualised – by the system – over against those that are not – the environment. [188]

Systems thus become constraints that facilitate meaning- and this, says *Christodoulidis*, is no paradox at all. Only constraints appearing as reduction have the capacity to allow intelligibility and interaction by setting up a context and carving out only a certain part of the totality as expected. Expectations underlie all social interaction, but acquires specific forms that are particular to systems that, as templates, impose specific reductions to the open contingency of communication and make it structured and meaningful.[189]

[187] *Ibid 176*
[188] *Ibid 176*
[189] *Ibid 176.*, p.385

What reduction structures impose has to do with how their selectivity mechanisms set up the system domain and how themes of communication develop, around which communicative offers may be organised. This explains the legal system's seeming inability to accomodate the *Particularties* of a given case. In most instances it is clearly a 'no-brainer' that the legal system should take into account a *particular* or a set of *particulars*, but it simply seems unable to – and the reason for this is its reduction process working hand in hand with its binary code (legal/illegal). Put simply, the *Particular* is reduced - it is filtered out when the reduction process occurs. It is therefore left out there, outside the four walls of the legal system and remains in the external environment.

Law's reduction achievement therefore involves Law developing a partial blindness and deafness to what it considers to be noise. Noise in this sense is most often the *Particularities* of a given case i.e circumstances surrounding the individual's life, and pertinent facts situated around the occurrence of the crime. All those are 'Noise' to Law's *Universatility* – its *Universal.*

Law's reduction process can be seen at work in the *Marshall*[190] case. The legal decision making process there was concentrated within the *Universal* mode of Legal Judgement at the complete expense of the *Particularities* of the case, and by that Law's *Universality,* Law's reduction process did its work of filtering out the 'noise' and leaving those *particularities* (*Marshall's* age, ethnic background, the fact that he was a minority and the fact that he was living in a white dominated racist society) out of the legal decision making process.

As such, those *Particularities* did not form part of the process of adjudication – they did not count and were not counted – and the ultimate result, as we saw, was that *Marshall* suffered a wrongful conviction/miscarriage of Justice.

[190] R v Marshall 146 DLR (4th) 257

The ‘absolute’ nature of Law’s reduction process raises questions about the cost of it - whether that cost is too high and whether it is one we can afford. For *Marshall*, it cost him pretty much all of his teenage and adult life as he unnecessarily spent the fruitful years of his life behind bars. Law’s reduction process similarly cost *Truscott*, *Milgaard*, *Driskell*, *Sophonow* and *Morin* the fruitful years of their lives. For *Coffin*, Law’s reduction process cost him not only his fruitful years, but his very life as he was sentenced to death by hanging.

A system’s openness to the world lies in the fulfilment of the expectations it sets and projects for itself. Of course, the system is neither static nor insensitive to change – in order for the system to remain responsive to a changing world and stay relevant by moving with the times, the system must also vary the expectations it projects. The legal system thus varies its structures, reconstructs and alters them, and in the process learns and evolves. It does this by providing legal answers to the controversial and conflicting expectations that it faces.[191]

From a systems-theoretical perspective, it is the case that given law’s function in society of stabilizing expectations and the values that consequently accompany its development, it is only congruent that the surprising or anomalous event is grasped as concretely as possible, so that the required structural changes can be kept limited in scope and made to proceed along predictable lines.[192] In other words, given law’s function in society it is important that its normalisation functions and tendencies remain firmly in place so that the systems structures do not change in any drastic fashion and the systems products therefore are churned along predictable lines.

[191] *Ibid 176.*, p.387-388
[192] Luhmann, N. 1990, *Essays on Self Reference,* New York, Columbia University Press, p.33

Does this then mean that no one can ever take to Law to challenge existing structures? *Luhmann* says no, it only means that a special effort and special measures within the system are required if this normalisation tendency is to be changed into a tendency for existing structures to be questioned or problematized and information evaluated as a symptom of impeding crisis, as a cost, as dysfunction in the prevailing order, or somehow or other looked at as a possible source of alternatives. A special effort is required because the system will always give a disciplining, non-random response to a random event – in other words, the system will toe the line.[193]

Luhmann uses the term 'redundancy' to denote the system's tendency to reduce the element of surprise within it – and *particularities* present surprises thus they will be reduced. Information is produced when the system is surprised in some way. On the other hand, a system is redundant in so far as it supports itself in processing information on what is already known. Every repetition makes information superfluous which in turn makes the superfluous information redundant. The problem of law's inertia, says *Christodoulidis*, is that the legal system is paramountly a redundant order. In processing information on the basis of what is already known[194], it supports itself and self-reliantly assimilates what is new to what already exists.[195]

[193] *Ibid*

[194] Processing information on the basis of what is already known is in direct reference to the doctrine of precedent. When faced with a set of facts, the law tends to look backwards in order to address the set of facts before it – thus processing the facts before it on the basis of what is already known

[195] *Ibid 176.*, p.389

However, the practice of distinguishing and overruling does, on occasion, invent new grounds to achieve a position where the system can, on the basis of a little new information, fairly and quickly work out what state it is in and what state it is moving towards. The imagination of the legal system needs to be stretched so as to make it less rigid enough to adopt new concepts – and a special effort is required because the system tends to reduce its own surprise to a tolerable amount and allow information only as differences added in small numbers to the stream of reassurances.[196]

[196] *Ibid 176.,* p.389

2.5 A Systems Theory Approach to Miscarriages of Justice[197]

It is fair to say that what counts as a miscarriage of justice will depend critically upon what criminal justice is meant to mean. There is however no universally accepted understanding of the nature or purpose of criminal justice systems. Besides theories of punishment, various models have been discussed in the literature – models such as 'due process' and 'crime control'.[198]

Miscarriages of Justice do not necessarily relate to the wrongful acquittal of the guilty in any practical or strict legal sense, as this undermines fundamental principles that underpin the legitimacy of the entire criminal justice process: the presumption that defendants are innocent in criminal trials until a case has been proven beyond a reasonable doubt by the prosecution against them.[199]

As *Kennedy* affirms, in the adversarial criminal justice system we do not start off from a position of neutrality. We start off with a preferred truth – that the accused is innocent - and we ask the jury to err on the side of that preferred truth, even if they think that the accused is guilty. Should jury members find themselves in the jury room saying they think the defendant might have done it or the defendant probably did it, then they have to stop themselves short, because probabilities are not good enough. The criminal justice system is based on the fundamental value that it is far worse to convict an innocent person than to let a guilty walk free.[200]

[197] Nobles, R. and Schiff, D. 1995, Miscarriages of Justice: A Systems Approach, *Modern Law Review,* 58, pp.299-320
[198] Greer, S. 1994, Miscarriages of Justice Reconsidered, *Modern Law Review,* 57, pp.58-74
[199] Naughton, M. 2007, *Rethinking miscarriages of Justice,* Basingstoke Hampshire, Palgrave Macmillan, 16
[200] Kennedy, H. 2004, *Just Law,* London, Chatto & Windus Publishing, 11

A key characteristic of miscarriages of justice is that whatever allegations there may be, a miscarriage of justice cannot be said to have occurred unless an applicant has been successful in appeal against a criminal conviction, and until that time she/he remains an alleged miscarriage of justice. [201]

From a legal perspective, miscarriages of justice are neither about ensuring that the factually guilty are convicted, nor that the factually innocent are acquitted – it is not necessarily about the truth – for convictions to be quashed they have to be adjudged to question the integrity of the trial in which they were given and, thus, be rendered 'unsafe' by appeal court judges.[202]

Schiff and *Nobles* affirm that when the Court of Appeal quashes a criminal conviction, it does not pronounce on the innocence or guilt of those whose convictions no longer stand – nor does it offer an alternative narrative of events to that which, following the original conviction, had been constructed by the media and others to account for a finding of guilt by the jury. [203]

In the event of the media disclosing a miscarriage of justice, they claim that the person(s) previously convicted are innocent and they try to offer alternative narratives of the events that took place, and most often suggest who they believe to be guilty and(or) innocent. *Schiff* and *Nobles'* study of the phenomena of discourse(s) on miscarriages of justice has been informed by systems theory. They find this approach to be useful because it explains structural patterns which allows for a location of the problematic miscarriages of justice for the legal system, and in particular the difficulties faced by the legal system if criminal justice is expected to function as something separate from, and different to, other systems such as politics and the media.[204]

[201] *Ibid., 194,* p.17
[202] *Ibid.,* p.22
[203] *Ibid 194*
[204] *Ibid*

There is a meaning of miscarriages of justice which is almost entirely internal to the legal system; the conviction ought to be quashed because of a blatant mistake of law.[205] The greatest pressure on law, at the level of appeals, comes from appeals based on questions of fact. Appeals based on the assertion that the jury's verdict was factually incorrect, provide the greatest problem for the finality of criminal trials and the ability of the criminal justice system to operate as a viable and workable process.[206]

Schiff and *Nobles* assert that to understand the particular strains placed on the criminal justice process by appeals based on fact, one needs to appreciate how law, as a system, maintains itself. The ability of law to continue to function, in common with any other system, is through its closure – having its own boundaries and environment which is apart from the general social environment. Law cannot be totally open to the general social environment, for to do this would be to have no boundaries at all - and without boundaries there can be no system.[207]

[205] Criminal Appeal Act 1968, s 2(1)(b) and (c)
[206] Nobles, R. and Schiff, D. 1995, Miscarriages of Justice: A Systems Approach, *Modern Law Review,* 58, pp.299-320
[207] *Ibid*

Normative closure is what makes cognitive openness possible – this means that in order for the prospect of law being open to society to be realised, law as a system must be closed to society – it is the 'closing' which makes 'openness' possible – and this is so because normative closure gives form to Law's boundary. Law determines what events will count as conditioning programmes for its own operations.

Thus, the cognitive openness produced by normative closure is not total openness to all events and the meanings given to those events within other systems; for that would overwhelm Law, making it unable to function – this is perhaps why it is said that the legal system is incapable of considering the particular. As already mentioned, *Luhmann* has described this as obtaining order from noise. To continue the metaphor, Law can only hear if it constructs own partial deafness – if it doesn't do so it will end up not hearing at all.[208]

Schiff and *Nobels* affirm that we see a particular example of this paradoxical problem in the Criminal Justice System. Criminal Justice cannot operate on the basis of total openness to events. The legal punishment which follows from a conviction is not justified by reference to earlier events, but by the legal fact of conviction which is a conclusion from the legal interpretation of those events. Appeals based on fact i.e the particular, can threaten the normative closure that the legal system requires – the partial deafness to events which makes it possible to achieve convictions: authoritative conclusions that an accused has, or has not, carried out an unlawful act.[209]

[208] *Ibid*
[209] *Ibid*

The impact of Systems Theory on our understanding of wrongful convictions/miscarriage of justice rests in the realisation it offers; that is, the very nature of the legal system, its language, binary code, partial deafness, reduction process and boundaries together create a recipe for miscarriages of justice. This is because of Law's innate desire to offer finality, to create relatively stable operations which it can utilise, and relatively stable events which can be utilised by other systems – these create conditions for high profile miscarriage of justice cases.[210]

The recent cases of miscarriages of justice are a consequence of an increasingly dominant concept of justice which threatens the very ability of law to maintain its autonomy; the concept of Justice based on truth. The history of the reform of criminal procedure since the last century is one in which practices which had been justified by reference to ideas of fairness and rights have been progressively eroded in favour of practices justified by reference to ideas associated with the claims of truth. [211]

This increasing dominance of ideas associated with truth, as the basis for justifying practices within the legal systems, puts pressure on that system, for what can objectively count as truth lies not in law, but in science. Sciences' conditioning programmes when applied with its binary code (truth/untruth or probable/improbable) bear very little resemblance to the conditioning programmes of Law (juries, cross examination, rules of evidence and jurisdiction) through which Law attains its aims: conviction/acquittal or conviction quashed/upheld.[212]

[210] *Ibid*
[211] *Ibid 194.,* p.304
[212] *Ibid*

Science lacks the temporal commitment represented by a criminal trial. Law's authority is threatened when the scientific paradigm is applied to the legal system itself. Miscarriages of justice generate perceptions that the law's authority is in crisis when they result in the application of the scientific model to the legal system itself. If the procedures commonly used to produce convictions cannot be relied upon to produce an authoritative statement of guilt, criminal justice cannot easily continue to operate as an authoritative process.[213]

Openness of the legal system to other sub systems and the societal system in general would undermine the normative closure which is necessary and vital to the very existence of the legal system and the authority of the criminal justice process. It is pressures from other systems which threatens law's autonomy and which need to be managed by the legal system in its own way.[214]

[213] *Ibid*
[214] *Ibid*., p.307

Schiff and *Nobles* analyse the Court of Appeal's response to miscarriage of justice. In doing so, they turn to the views of two academics – *Zuckerman* and *Thornton*. *Zuckerman* is known to argue that courts, including the Court of Appeal, are duly responsible for facilitating miscarriages of justice by their relaxed attitude to those standards which he finds latent in past and present rules of evidence.[215]

Thornton, a practicing barrister, argues that courts are more willing to cure a technical defect of the procedure than to root out a real miscarriage of justice. He feels that there is enough suspicion to support the sentiment that the Court of Appeal still harbours a deeply-felt reluctance to overturn convictions.[216]

What explains the failings identified by *Zuckerman* and *Thornton*, *Schiff* and *Nobles* ask. Is it inexperience, tribal loyalty or the result of the senior judiciary's political values? *Schiff* and *Nobles* say if we find the answer to this reluctance in political values and seek a sociological analysis which will uncover them, how do we approach the Court of Appeal's recent willingness to accept that miscarriages of justice have occurred – are judges simply actors with particular dispositions, who bend in response to outside pressures and then return to their former practices when the pressure is removed?[217]

The politics of the Court of Appeal is, they argue, not too different to what is espoused by its critics. In order to deal with powers and tasks that threaten the ability of law to be different from politics, the law resorts to constitutionalism. The general statutory authority to overturn convictions is reconstructed by the Court of Appeal as a constitutional relationship between itself and the executive.[218]

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[215] Zuckerman, A. 1991, Miscarriage of Justice and Judicial Responsibility, *Criminal Law Review*, p. 492
[216] Thornton, P. 1993, Miscarriages of Justice : A Lost Opportunity, *Criminal Law Review,* p.926
[217] *Ibid*., *194*, p.307
[218] *Ibid*., *194*, p.308

The success and problems of the Court of Appeal's differentiation of its own legal politics from the political system are illustrated by the Court's relationship with the Home Office. Before the creation of the Court of Criminal Appeal in 1907, the power to pardon, vested in the Home office - and the Home Secretary was primarily responsible for dealing with 'unsafe' and 'unsatisfactory' jury verdicts. This power has a historical attachment to the prerogative power of mercy and the executive's control post-conviction punishment. With the introduction of the Court of Appeal's power to quash jury verdicts in the absence of any error of law, the Home Secretary's powers have largely fallen into disuse, and *Schiff* and *Nobles* argue that the Home Office has failed to maintain the pardon as an alternative basis on which to decide that a jury's verdict was wrong.[219]

As the pardon has fallen into disuse, the role of the Home Office's Criminal Division has become that of an investigatory body prior to reference onto the Court of Appeal. This has produced further complications in the relationship between the two institutions.[220]

The history of high profile miscarriages of justice is also a history of the relationship between the press and the legal system. The establishment of the Court of Criminal Appeal in 1907 had its origins in the media publication of individual miscarriages of justice, most notably, that of *Adolf Beck*. The significance of the press was acknowledged in debates on the 1907 Act by the Lord Chancellor who intimated that cases like Beck's raised the question of whether there should be an appeal to the Press or to the Judges sitting in Her Majesty's court – the trialling of the cases in the court of public opinion (the press) is what necessitated this question.[221]

The manner in which miscarriages of justice present themselves outside of the legal system has not really changed since the Beck case. To the legal system, conviction is a jury's acceptance,

[219] *Ibid*
[220] *Ibid*
[221] *Ibid*

after having being warned of the need for certainty beyond reasonable doubt, that the accused has committed the offence charged. This acceptance is however constructed legally through legal procedures; rules of evidence, cross-examination e.t.c.[222]

When the media reports what it accepts has been a miscarriage of justice, its claims reverses the label that it had previously attached to the conviction; the person did not do what he was accused of and is therefore innocent – and the media expects the legal system to quickly see that a miscarriage of justice has occurred, an innocent man/woman has been wrongly convicted of a crime they did not commit and thus the legal system ought to provide a legal operation which similarly reverses the meaning which it attributed to the conviction.[223]

The media's search for a legal process which reverses the meaning of a conviction has elements, say *Schiff* and *Nobles*, which can build into a perception of a crisis. The basis on which a miscarriage of justice becomes high profile may contain elements of proof which the legal system refuses to recognise. The media rely on such authoritative sources for the construction of news. In the case of *George Edalji*, the support of a renowned crime fiction writer Sir Arthur Conan Doyle played a large part in building belief in his innocence. The Court of Appeal however, recognises no opinion as authoritative except that which it constructs for the jury.[224]

[222] *Ibid*
[223] *Ibid*., 194, p.312
[224] *Ibid*

The deference of the Court of Appeal to the jury's constitutional importance is not generally appreciated or respected by the media. The narrative which the media draws from the fact of conviction is based largely on the prosecution's case – the prosecution's case is that which is presented to the public by the media. Thus, if persons whom the media regards as authorities come forward to question the fundamental elements of the prosecution's case, then the media may come to expect the conviction to be quashed.[225]

By resisting a reversal of convictions based on the media construction of a convicted person's innocence – a resistance which is necessary for the continued authority of the legal system – the Court of Appeal can precipitate a trial by the media of the legal system itself.[226]

Whilst the media generates for itself a perception of the legal system being in some form of 'trouble' or 'crisis', *Schiff* and *Nobles* say, there are good reasons to expect such 'crisis' to be both episodic and unlikely to lead to radical reforms. Once media recognised cases of miscarriages of justice have been 'legally recognised' as wrongful, the pressure for reform of the legal system, based on the continued assertion is likely to evaporate and disappear. The media's more usual relationship with the legal system – that of an outsider which misreads legal communications for its own purposes – a system which relies on law to produce facts of guilt and innocence will then return.[227]What this also means is that the legal system will sometimes overturn a conviction to prevent its integrity from being questioned and to do away with the pressure from the media and other systems.

[225] *Ibid*
[226] *Ibid*
[227] *Ibid*

This was clearly demonstrated in *Truscott's* case. *Isabel Lebourdais'* book raised many questions about the trial and how the legal decision making process had been conducted and revived much public interest in the case. As was confirmed by the Royal Commission, the legal decision making process had been concentrated within the extremity of Law's *Universal* nature at the complete and total expense of the *Particularities* of the case.

The media, following *Lebourdais'* book, began extensive re-coverage of the case and it got ordinary people in Canada talking – questioning the evidence and ultimately the integrity of the Criminal Justice System. People were disappointed with the handlers of the system (Court's, Police etc.), for allowing such grave unfairness and injustice to occur. This questioning of the integrity of the Criminal Justice System is what pushed its handlers to act.

The obvious question that follows therefore is one of why the Criminal Justice System tends to wait till its integrity is questioned before it acts on a purported miscarriage of justice. It is almost as though every other social system recognises that a wrongful conviction/miscarriage of justice has taken place well before the Criminal Justice System itself does.

In using *Teubner's* terminology, a conviction provides a crucial moment in structural coupling between the legal system and its environment. Conviction allows a stable misreading of legal processes by other systems. It facilitates the legal system's ability to interrelate in a stable manner with other systems. With the focus on structural coupling i.e between the media and the legal system, the crisis generated by miscarriages of justice is the threat to the stability of this coupling. *Schiff* and *Nobles* argue that it is a crisis of confidence within the media in terms of its ability to rely on convictions to make communications about crime.[228]

[228] *Ibid*

Nonetheless, just as there are elements within the media that can lead it to talk of crisis, so there are even more systematically structured elements which lead it away from such communications. If all convictions were to be questioned, then actors within the media and other systems would have to go behind the legal code to unravel the events which led to its application and to reach their own judgement on whether the legal communication of conviction was appropriate. This would however, add to the complexity of the media's ability to report on crime.[229]

[229] *Ibid*

2.6 Naughton's Perspective - Michael Naughton's Rethink of Miscarriages of Justice[230]

Naughton opines that there are misconceptions within the discourse pertaining to miscarriages of justice. He therefore makes the case that there ought to be a rethink of miscarriages of justice and the discourse pertaining, to make 'all crooked paths straight'.

With regards to popular discourses on the criminal justice system and miscarriages of justice as they relate to the criminal justice system, *Naughton* points out that the very notion which demands the criminal justice process to convict the guilty and acquit the innocent, exposes a crucial incompatibility between lay discourses which embody lay public and (or) political aspirations of what the criminal justice system should deliver and what it actually delivers.[231]

In *Naughton's* view, miscarriages of justice are problematic, not just in terms of the harm to victims and the loss of faith in the criminal justice system that the can engender but, equally, in terms of the need to distinguish clearly just what is meant when articulations about miscarriages of justice are made. [232]

For instance, even if the term miscarriages of justice is restricted to quashed criminal convictions, and not just used as a general metaphor for any kind of apparent unfairness or subjective expression of injustice, it is variously used as synonymous with at least four scenarios; **a)** the wrongful conviction of the factually innocent, **b)** the wrongful acquittal of the factually guilty, **c)** convictions quashed by the appeals system because they are deemed to be unsafe, and **d)** convictions obtained in breach of due process or human rights, regardless of whether the convicted are innocent or guilty. [233]

[230] Naughton. M, 2007, *Rethinking Miscarriages of Justice,* Basingstoke, Palgrave Macmillan.
[231] *Ibid,* p. 15
[232] Naughton, M. 2013. *The Innocent and the Criminal Justice System*, Basingstoke: Palgrave Macmillan, 15
[233] *Ibid,* p.16

The using of the term 'miscarriages of justice' to explain happenings in the abovementioned four scenarios, has significant implications for the sociological study of miscarriages of justice – the way in which a miscarriage of justice is defined determines how it is understood.[234]

The very first key characteristic to note of miscarriages of justice is that whatsoever allegations there may be, a miscarriage of justice cannot be said to have occurred unless and until an applicant has been successful in an appeal against a criminal conviction, and until such time, he/she remains an alleged miscarriage of justice.[235]

The popular perception of a miscarriage of justice is that it is linked to factual innocence – there is the notion that when someone is acquitted then it most definitely means that he was factually innocent all along. This is not always the case - *Naugthon* says. Miscarriages of Justice, as they are understood and acted upon by the criminal justice system, differ from popular perceptions in an important way. They are distinct from the specific problem of the wrongful conviction of the innocent, as a successful appeal against a criminal conviction is not necessarily evidence of the conviction of the innocent. On the contrary, a successful appeal against criminal conviction denotes an official and systematic acknowledgement of a breach in the 'carriage of justice' i.e the rules and procedures that together make-up the criminal justice process. [236]

[234] *Ibid*
[235] *Ibid 227.,* p.17
[236] *Ibid*

The criminal system in England and Wales is not about the pursuit of the objective truth of a suspect's or defendant's guilt or innocence. Adversarial justice is an evidential contest, regulated by the rules and principles of due process; compliance with the rules and procedures of the legal system. In particular, the two key tenets of the criminal law in England and Wales are stated as the presumption of innocence, and the standard of proof. The presumption of innocence is claimed to mean that an individual is deemed to be innocent, until proven guilty – evidence against the defendant must be beyond reasonable doubt.[237] Criminal trials are therefore not a consideration of factual innocence in any straightforward sense.[238]

This position is further supported by the House of Lords in the case of *Director of Public Prosecutions v Shannon*[239]where the Law Lords maintained that the Law is not concerned with absolute truth, but with proof before a fallible human tribunal to a requisite standard of probability in accordance with the formal rules of evidence.

Turning now to the public and political discourse on miscarriages of justice, a majority of the public is of the belief that the criminal justice system should attempt to convict those who are guilty, and acquit those who are innocent – the public sees this as the primary duty and obligation of the criminal justice system. From this line of thought, the media routinely conceives/misconceives successful appeals against criminal convictions as evidence supporting the notion that an innocent person has been wrongfully convicted by a flawed system.[240]

[237] Chapman, B. & Niven, S. 2000, *A guide to the Criminal Justice system in England and Wales,* Great Britain, Home Office, Research, Development and Statistics Doctorate, p.4-5
[238] *Ibid 227*., p.18
[239] [1974] 59 Cr.App.R.250
[240] Woffinden. B. 1987, *Miscarriages of Justice,* London, Hodder &Stoughton, p.32

Even more so, *Naughton* reminds us that public discourse works from the equally mistaken premise that the appeals system exists – or should exist – mainly because the criminal justice system, being a human institution, is fallible and thus with error. From this perspective then, the function of the appeals system is to correct the fruits of human infallibility by overturning the convictions of the innocent. The reality however, is that the Criminal Appeals system exists and functions to ensure that appellants received a fair trial, as defined by the rules and procedures of the system, and that their convictions are therefore 'safe' on these terms – this is the reality in so far the purpose of the Criminal Appeal system is concerned. [241]

Under such an objective, one's proof of innocence does not guarantee that a criminal conviction will be quashed, unless - of course – it undermines the safety of the conviction too.[242] In other words, the Criminal Appeal system is partly in place to safeguard the integrity of the wider Criminal Justice system – and it is mainly in response to questions of integrity that this wider Criminal justice system uses the appeals process to quash convictions and to somewhat quell any public dissatisfaction that there may be about the system.[243] Our best hope of dealing with wrongful convictions/miscarriages of justice therefore, isn't in the expectation of a process of appeal, but rather in the surety of avoiding a wrongful conviction/miscarriages of justice in the first place.

[241] *Ibid 227.,* p. 20
[242] *Ibid*
[243] *Ibid*

From the perspective of the criminal justice system, a miscarriage of justice is entirely internal to its workings. For the system therefore, a miscarriage of justice derives from technical decisions made from the existing rules and procedures of the appeal courts. Concerns about the wrongful conviction of the innocent are wholly external to the criminal justice system – this of course is wholly incompatible with public discourse and the way the public thinks miscarriages of justice relate to the criminal justice system.[244]

Naughton says the idea that miscarriages of justice – from a legal perspective - are neither about ensuring that the factually guilty are convicted, nor that the factually innocent are acquitted, is not at all merely theoretical or abstract academic argument. This is supported by the leading legal authorities on successful appeals against criminal conviction, which further demonstrate that the appeal courts do not consider the question of an appellant's innocence or guilt. Instead, for convictions to be quashed and set aside, they have to be considered to threaten and question the integrity of the criminal justice system, and thus be rendered 'unsafe' by appeal court judges.[245]

[244] Naughton. M. 2006, Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education, *Web Journal of Current Legal Issues,* 3

[245] *Ibid 227.,* p.22

This is demonstrated by Appeal Court judges in the *Bridgewater*[246] case – the judges in this case affirmed*;*

the court is not concerned with the guilt or innocence of the appellants, but only with the safety of their convictions … the integrity of the criminal process is the most important consideration for courts …[247]

The problem with such judgements, *Naughton* says, from the public's perspective on what the criminal justice system should deliver, is that they can fuel campaigns which lump together, victims of miscarriage of justice who are guilty, with those who are innocent. Such judgements conceive both as getting off on the basis of technicalities. This in turn can act to allow the issue of accountability for miscarriages of justice and the wrongful conviction of the innocent to be sidestepped – suppressing the problem of the wrongful conviction of the innocent from the public's eyes until such a time when the real perpetrators of the crimes for which they were convicted are convicted – it suggests that until such an unlikely scenario occurs, their innocence should remain in doubt.[248]

In other words, there is a real risk that the wrongful conviction of the innocent is mixed up with the general problem of technical miscarriages of justice so that until the real perpetrator of a crime is caught, the innocence of the defendant who has had his/her conviction quashed is in doubt – their innocence is in doubt because judgements like the one in the *Bridgewater* present first to the public, the idea that the defendant got off on the basis of a technicality.

[246] [1997] EWCA Crim 2028
[247] *Ibid*
[248] *Ibid 227.,* p.23

However, a case which begins to unearth the wrongful conviction of the innocent and separates it from the general problem of technical miscarriages of justice is the *Cardiff Three*. This trial turned out to be the longest in British history and on it conclusion in 1990, three men were found guilty and sentenced to life imprisonment. In early 1991, a number of journalists began to question the safety of the convictions and as a result of their investigations two of the convicted men were grated leave to appeal their convictions.

The third, Stephen Miller, was refused. An investigative journalist by the name of Satish Sekar managed to track down two witnesses not called at the trial who could provide an alibi for Milller's whereabouts at the time of the murder. Miller asked him if he would organise a new legal team to prepare his appeal. Sekar agreed and persuaded a renowned barrister and solicitor to join the cause.

A public campaign to overturn the convictions, started by families and friends of the three men, began to receive high-profile support from all over the world. In part, as a result of this, the convictions were ruled unsafe in 1992 and quashed by the Court of Appeal after it was decided that the police investigating the murder acted improperly. The police claimed that they had done nothing wrong, that the third man of the Cardiff three had been released on a technicality of law, and resisted calls for the case to be reopened.

Sekar continued to investigate the case following the successful appeal, and in 1995, while researching for a book he was writing on the happenings of the trial, discovered errors in the original evaluation of the forensic evidence from the crime scene. Sekar, with the assistance of a member of parliament, lobbied the Home Office to reopen the investigation and carry out new DNA tests.

As a result of Sekar's persistence, South Wales Police reopened the case and agreed to carry out DNA testing on the surviving forensic evidence, but not using the most sensitive method of testing that was then only becoming available in the field. When the preliminary tests failed to produce usable profiles, Sekar, recognising that the technology to extract profiles from such poor samples would eventually become available, urged the police to cease testing before they used up the remaining samples. In 2001, the Second Generation Multiplex Plus (SGM+) test was developed, and forensic scientists were finally able to obtain a reliable crime scene DNA profile. In 2003, the extracted profile allowed the police to identify the real killer as Jeffrey Gafoor, who confessed to Lynette White's murder and was sentenced to life imprisonment.

Naughton points out that the convictions of the Cardiff three were overturned in 1992 not because they were innocent, but because they, through their frantic efforts, got the CACD[249] to agree that the processes which were used to secure the convictions lacked integrity and thus rendered the convictions unsafe.

This was well illustrated when Lord Taylor quashed the convictions asserting that whether Steven Miller's admission to the murder of Lynette White were true or not, was irrelevant, as the oppressive nature of his questioning (he was asked the same question three times) required the interview to be rejected as evidence. It was a breach of due process, more specifically, the rules of evidence under the Police and Criminal Evidence Act 1984.[250]

[249] Court of Appeal Criminal Division
[250] *Ibid 227.,* p.23

In keeping with the general uncertainty that results from successful appeals, doubts prevailed for the next decade or so about whether the Cardiff three were indeed innocent until, Jeffrey Gafoor confessed to the murder after an enhanced DNA analysis had pointed him out to be the killer.[251] [252]

The case of the Cardiff three therefore confirms the wrongful conviction of the innocent, distinguishing it from the general problem of technical miscarriages of justice. It also tells us that the Criminal Justice System is more likely to quash a conviction if the due processes applied to acquire that conviction are perceived to lack integrity, rather than if there is a huge chance that the defendant is innocent and has thus been wrongfully convicted. Given the limits of the appeal system, not all innocent victims of wrongful convictions will be able to overturn their convictions and attain a miscarriage of justice – nor will all victims of miscarriages of justice be fortunate enough to have real perpetrators of the crimes for which they were convicted brought to justice and their innocence proven.[253]

Seeing as the criminal justice system is more likely to quash a conviction on the basis that there has been a breach of due process and that the conviction therefore lacks integrity and is unsafe, it is worth taking a look at the historical background of due process and how it has come to dovetail with the criminal justice system.

[251] *Ibid*
[252] BBC News Website, http://www.bbc.co.uk/news/uk-wales-15409841, 26th October 2013
[253] *Ibid 227*

Naughton points out that the Criminal Justice system, in its early years, was not subject to an elaborate system of procedures that govern acts deemed criminal today. Ideas such as the 'presumption of innocence' and the 'burden of proof' on the prosecution to prove their case 'beyond all reasonable doubt' simply did not exist. In those days, justice was an eminently subjective and arbitrary affair. This was a time when the pronouncements of the sovereign went unchallenged, whether they were correct or otherwise. There were no formal opportunities for appeal and, hence, no official miscarriage of justice had occurred.[254]

This arbitrary exercise of power presented a considerable constraint to social change. Changes in the structures of society effects changes in how people think about what is and is not possible and, accordingly, how they act in social reality. As this relates specifically to this discussion of the birth of due process and fair trials as a governing principle in criminal justice matters, for modern capitalist societies to flourish they required populations that were not hindered by a perpetual anxiety about the arbitrary exercise of power. However, modern capitalist societies are supposed to provide structural conditions that allow people to go about their daily lives and commercial activities freely and openly without undue fear or impediment of arbitrary discrimination or persecution. Hence, the need for and introduction of due processes.[255]

Naughton tell us that the way governments rationalise things in the modern world is intrinsically linked to developments in statistical forms of knowledge[256] and to powers of governmental expertise which attempt to improve the overall welfare of the society and its members. In this regard, the existing modes of power are therefore not so much a matter of imposing constraints or limitations upon citizens, as was the case in the era of the Sovereign,

[254] *Ibid 247,* p.26
[255] Elias, N. 1978, *The Civilising Process: Volume One,* Oxford, Blackwell Publishing, p.42
[256] This is understood more deeply when we think of and focus on things such as opinion polls and how useful they have become to governments and political parties when they are setting their agendas and formulating policy.

but become rather a matter of making citizens capable of bearing a kind of regulated freedom.[257]

Viewing things through the models of power within the sphere of corporate governance, government can be seen as the 'board' i.e board of directors, whilst the population can be seen as analogous to the shareholders in whose beneficial interests the board exists to exercise its decision making responsibilities with fairness and accountability. Unlike under the sovereign, where exercises of power were not open to challenge by the population, the governentality project is premised on the need for members from sections of the population (shareholders) to question policies which they believe detract from their wellbeing. Under governmentality, it is a duty of the governed (the people) to inform the government of changes needed to address social problems and to enhance their interests.[258]

Naughton asserts therefore, that alleged victims of miscarriages of justice are obliged to challenge the aspect of the criminal justice system that is said to be the cause of the miscarriages of justice, in the keeping of the governmentality process. Only if such claims achieve support in the form of a successful appeal against criminal conviction, can government even consider making an intervention to change the offending aspect of the criminal justice system.[259]
Put simply, government cannot make changes to the criminal justice system unless it is in response to a complaint that a member of the population has suffered a miscarriage of justice – a complaint which is backed and evidenced by a successful appeal against a criminal conviction.

[257] *Ibid 252.,* p.28
[258] *Ibid 252.,* p.29
[259] *Ibid*

Naughton cites the sealing of *Magna Carta* as a defining moment in the appearance of due process as the guiding principle in the governmentality of the criminal justice system. *Forst* writes that despite the fact that the words 'due process' do not appear in any of the documents that have come to be known as *Magna Carta*, King John attaching his seal to those documents in 1215 was nonetheless an explicit commitment to the principle that no one, not even the king, was above the law, and that the governed shall not be subjected to capricious rule.[260]

Naughton reasons therefore, that *Magna Carta* can be conceived as indicative of a shift in the power of relations within society and the emergence of a new relationship between government and the governed. It represents a very early acknowledgement of a shift to a rule of law system and due process in criminal justice matters.[261]

Holt writes that *Magna Carta* lays down that no free man is to be imprisoned, dispossessed, out-lawed, exiled or damaged without lawful judgement by his peers or by the law of the land. It established the foundations for our ideas about what justice ought to be – judgement by our peers, the presumption of innocence until proven guilty and the burden of proof on the prosecution to prove guilt beyond a reasonable doubt – these principles form the core components of 'due process.'[262]

The government (especially one in a society which adheres to the rule of law) therefore does not need to be seen as a negative, coercive force of control, but rather an entity which is obligated to care for and improve the living standards of the citizenry – this is the task of all legitimate governments.[263]

[260] Forst, B. 2004, *Errors of Justice,* Cambridge, Cambridge University Press, 11
[261] *Ibid 252.,* p.30
[262] Holt, J.C 1992, *Magna Carta,* 2nd edition, Cambridge, Cambridge University Press, 2-3
[263] *Ibid 252.,* p.30

In regards to this then, *Naughton* reminds us that the government draws statistics on all aspects of the population that is being governed in order to inform itself about the needs of the population to be managed. The emergence therefore of governmental rationality and statistical forms of reason, ushered in a new regime of power which Foucault calls 'bio-power.'[264]

At its root then, governmentality can be seen as a process by which a society which adheres to the rule of law is managed and operated with the professed interests or rationale of enhancing the wellbeing of the population. As already mentioned in this writing, unlike exercises of power by a Sovereign (King/Queen), governmental exercises of power are not arbitrary. Governmental modes of power cannot simply impose changes to societal systems. On the contrary, they must themselves follow a certain form of governmental 'due process' - governmentality – within which any proposed have to come from the population itself.[265]

Naughton says in societies where exercises of power are relational between government and the governed, it is incumbent upon the governed to play their part in informing government of aspects of social life which are detrimental to public wellbeing. Through such engagement, the government becomes very much aware of societal problems which need intervention.

Only through such engagement is government legitimately allowed to intervene. For example, governmental changes to the way in which post-appeal allegations of miscarriages of justice were referred back to the CACD could not be introduced without the efforts of victim support groups and campaign organisations that kept faith with the Guilford four and the Birmingham six despite them exhausting the existing legal remedies.[266]

Naughton's rethinking of Miscarriages of Justice therefore has at its core the reality of the system; the system relies on prevailing standards of due process to determine the guilt or

[264] Foucault, M. 1978, *The history of Sexuality,* New York, Pantheon Books, 143-144
[265] *Ibid 252.,* p.33
[266] *Ibid*

otherwise of defendants. Quashed convictions are achieved by proving that trials were unfair, and thus unsafe. This flows from the very complex relationship between government and governed in post-sovereign rule of law societies. The onus is on the governed to seek out instances to show failures and compel their government to intervene by introducing changes into the system.

2.7 A Marxist Approach to Law and Miscarriages of Justice

Marxism is a socio-economic and political worldview based on a materialist interpretation of historical development, a dialectical view of social transformation, and an analysis of class-relations and conflict within society. Marxism is the result of the work of two German philosophers by the names of *Karl Marx* and *Friedrich Engels*.[267]

Marx and *Engels*' thoughts begin with history – the history of class struggles. They assert that freeman and slave, patrician and plebeian, lord and serf, guild-master and journeyman stood in constant opposition to one another, carried on an uninterrupted fight against each other which at each time ended in either a revolutionary reconstitution of society at large, or the common ruin of the contending class.[268]

In the earlier parts of history, we find almost everywhere, a complicated arrangement of society into various orders, a manifold gradation of social rank. In ancient Rome we had the patricians, knights and slaves. In the Middle Ages we had feudal lords, vassals, guild-masters, journeymen, apprentices, serfs; in almost all of these classes, again, subordinate gradations. The modern bourgeois[269] society that has sprouted from the ruins of feudal society has not done away with class antagonisms. It has but established new classes, new conditions of oppression, and new forms of struggle in place of the old ones.[270]

[267] Marx, K. Engels, F. 1969, *Marx/Engels Selected works Vol.1*, Moscow, Progress Publishers, pp 98-137
[268] Engels, F. Kelley, F. 1888, *The Condition of the Working Class in England,* London, William Reeves Publsihers, p.13
[269] Bourgeoisie simply refers to a class of modern capitalists – owners of the means of social production and employers of wage labour – the upper/ruling class in society.
[270] *Ibid 264*

Though the modern bourgeois have established new classes of antagonisms, they have distinctly simplified them. Society as a whole is splitting up into two great classes facing one another – the Bourgeoisie and the Proletariat[271]. *Marx* and *Engels* say that the proletariat came into being as a result of the introduction of machines at the inception of industrial age – machines such as the steam engine, the spinning machine and the power loom. These machines were very expensive and could therefore only be purchased by the rich.[272]

This supplanted workers at the time because the use of such machinery made it possible to produce commodities more quickly and more cheaply than it would be if you had workers using their imperfect spinning wheels and hand looms. The machines therefore delivered industry and the wealth that came with industry into the hands of big capitalists, rendering the workers' scanty property which consisted mainly of tools, looms, e.t.c, quite worthless – and so the capitalist was left with everything and the worker with nothing.[273]

In this way the factory system was introduced – and once the capitalists saw how advantageous it was for them, they sought to extend it to more and more branches of labour. They divided work more and more between the workers so that workers, who formerly made a whole product, now produced only a part of it. Labour simplified in this way produced goods more quickly and therefore more cheaply. With time it became clear that machines could be used in almost every aspect of work. As soon as any branch of labour went over to factory production, it ended up in the hands of big capitalists, and the workers were deprived of the last remnants of their independence.[274]

[271] Proletariat simply refers to the class of modern wage labourers who have no means of production of their own, but are reduced to selling their labour power in order to survive in the economy. A class of society which lives exclusively by its labour and not on the profit from any kind of capital – the class whose very life depends on the alternation of times of good and bad business.
[272] *Ibid 268*
[273] *Ibid*
[274] Marx, K. Engels, F. 1987, *The Communist Manifesto,* Arlington, Heights, H. Davidson Publishers.

We have gradually arrived at the position where almost all branches of labour are run on a factory basis. This has increasingly brought about the ruin of the previously existing middle class, especially of the small master craftsmen. The aim therefore of *Marx* and *Engels* is to organise society in a way where every member of it can develop and use all his/her capabilities and powers in complete freedom, thereby liberating emancipating the proletarian from economic slavery.[275]

The main aim of Marxism therefore is emancipation, the emancipation of the 'little guy' in society – the less fortunate – the poor – the underprivileged – the vulnerable – the goal is the emancipation of people in society within these classes, emancipate them from the domination of the 'big guys' in society – the rich – the more privileged and favoured - the more fortunate. Emancipation, in Marx's view, leads to a fairer society overall and the bridging of the equality gap to the extent that there is not gap at all. Emancipation through the employing of a communal mind-set is the way.[276]

Law was clearly a subject of interest for *Marx* and *Engels*. Yet while they devoted considerable attention to particular laws that were the focus of intense political debates and mentioned law in discussions of the structure superstructure dichotomy, they provide no comprehensive discussion of law within the context of historical materialism. The legal system is only addressed by them as part of more general analyses of the movement of history and the economy's interface with society. [277]

[275] *Ibid*
[276] Lenin, V. 1974, *Lenin on the question,* New York, International Publishers, pp.55-57
[277] Stone, A. 1985, The Place of Law In The Marxian Structure – Superstructure Archetype, *Law and Society Review,* 19(1), pp. 39-67

A Marxist theory of law cannot be expected to yield specific predictions about such mundane things as the content of specific legal rules or whether, where, or when specific laws will be enacted. The propositions underlying Marxism are too general to yield unequivocal predictions at an operational level.[278]

Marxism, however, has a good deal to offer those who seek to understand the legal system. Marxism is methodological in that it provides a way of ordering concepts that relate diverse facts. Marxism is also heuristic in that its central formulations – such as the connection between structure and superstructure – provide a coherent picture of the connections among apparently discrete realms, such as technology, the economy, law, and class structure.[279]

Law, politics, economics, sociology are, under Marxism, ways of approaching a larger whole rather than disciplines focusing on natural divisions in social life that are capable of being understood as self-contained systems. In this, Marxism is consistent with the very general approach of law and social science. Marxism can be a powerful tool in understanding the social world and the law's place in it.[280]

A Marxist theory of law, however, remains relatively undeveloped in comparison with Marxist critiques of a political economy. One reason is that *Marx* himself never returned to the project he set himself in his youth: to complement his critique of political economy with a critique of jurisprudence. The principle aim of Marxist jurisprudence is to criticize the centrepiece of liberal political philosophy; the idea called the rule of law. Marxists seek to pave the way towards a revolutionary social transformation – and within this programme, the theory of law assumes an important place.

[278] *ibid*
[279] *Ibid*
[280] *Ibid*

Marxists examine the real nature of law in order to reveal its functions in the organizations of power and to undermine the pervasive legitimating ideology in modern industrial societies known as the 'rule of law'.[281]

In many different passages, Marx lends credence to the value and durability of legal forms whose contradictions he analyses without a normative preconception of what ought to replace them. In one of his many writings, Marx writes of the 'positive suppression' of bourgeois law, as opposed to its abstract negation, but he does not give this much content.[282]

In early texts as *On the Jewish Question*[283] , Marx appears most critical of civil rights as icons of egoism and separation, the thrust of his work is to defend the rights of Jews against a form of radicalism which pretty much said that Jews ought not be granted equal rights unless and until they abandon their Judaism. Perhaps the one thing we can say about Marx's conception of modern legality is that he never abandoned the desire to look more closely into the matter.[284]

[281] Collins. H, 1982, *Marxism and Law,* Oxford, Clarendon Press, 1-2
[282] Marx K, Tucker R. Engels F, 1972, *The Marx-Engels Reader,* New York, Norton Publishers, pp23-24
[283] Marxists website, www.marxists.org/archive/marx/works/1844/jewish-question, 15th November 2013
[284] Banaker, R. and Travers, M., 2013, *Law and Social Theory,* 2nd edition, Oxford, Hart Publishing, p95

Marx's most significant insight into law are to be found in his marginal comments on the idea of 'right' in works focusing on the critique of economic forms. In these, Marx argued that the kind of society which gives rise to the commodity form, money relations and capital also gives rise to modern forms of right, Law and state. Marx's argument is that in a society based on production by independent producers, whose contact with one another is mediated through the exchange of products, producers are free to produce what and how much they wish, equal in that no producer can force others to produce or expropriate their products against their will, and self-interested in that they are entitled to pursue their own private interests.[285]

Relations with other producers take the form of free and equal exchanges in which individuals alienate their own property in return for the property of another for the mutual benefit of each party. Exchange relations make no reference to the circumstances in which individuals seek to exchange, or to the characteristics of the commodities offered for exchange. They appear as self-sufficient relations, divorced from any particular mode of production and enjoyed by free and equal property owners who enter a voluntary contract in pursuit of their own mutual self-interests.[286]

The parties to the exchange must place themselves in relation to one another as persons whose will resides in in those objects and must behave in such a way that each does not appropriate the commodity of the other and alienate his own, except through an act to which both parties consent.[287]

[285] *Ibid*
[286] Marx K, 1973, *Grundrisse,* Harmondsworth, Penguin Publishers, pp242-250
[287] Marx, K, Walton J, 1930, *Capital,* London, Dent Publishing, 175

Marx's claim is that the form of law is rooted in commodity exchange. The presupposition of exchange, however, is an organisation of production which forces producers to exchange their products. Their interdependence means that they cannot survive except by exchanging the products of their labour. Both the form of their relations, that of a contract between two private parties based on the exchange of property, and the content, the terms on which such contracts are made, are beyond the will of the individuals and thus became power over them.[288]

Marx is thus trying to build this connection between economics and law here by saying that the unequal relational exchange in a capitalist society between capital and labour translates itself into a social theory of law. Two theorists, *Renner* and *Pashukanis*, talk about this link and the Marxist interpretation of law in Society.

Renner finds there to be a weak connection between economic development and Law. In *Renner*'s view, Law cannot cause economic development or change, but can be gradually modified to meet changed and changing economic conditions. For example, contracts are used by people in doing business and as the way people do business changes, the law on contract will have to be modified to accommodate and meet that change. Renner thus concludes that Laws change steadily, continuously, like the growth of grass, according to the law of all organic development.[289]

[288] *Ibid*

[289] Renner, K. 1949, *The institutions of private law and their social functions,* London , Routledge, 252-253

One criticism levelled against *Renner* is that he fails to grasp an important part of what he had shown – on the one hand, laws change, but on the other hand, essential legal relations such as contract or property, are at once durable and adaptable. *Renner*'s failure to grasp the distinction between Law in general and the fundamentals of the legal order is what compelled him to the view that there is only a weak relationship between the economic system on the one hand, and the legal system and its changes, on the other.[290]

Pashukanis' views are however different – writing at a point in history well before Stalin's consolidation and its following horrors, *Pashukanis* sought to determine the place of law in a future communist society. His conclusion was that law, like the state, was associated with a class society and would accordingly wither away with the development of a classless society. What was ingenious was the general Marxist theory of law that *Pashukanis* devised as a route to this conclusion. In developing his argument, *Pashukanis* talks about the difference between technical rules, such as train timetables which regulate rail traffic, and legal rules. In the case of technical rules, he sees a unity of purpose since technical rules can benefit everyone in similar ways – with regards to legal rules however, he writes that there is an episode of 'differentiation and opposition of interests' and that this is as a result of the fact that legal rules are an advantage for particular parties in particular transactions.[291]

[290] *Ibid 285.,* p.43
[291] Pashukanis. E. Arthur. C, 1978, *Law and Marxism,* London, Links Publishing, pp.81-90

Pashukanis asserts that a capitalist system involves the production and distribution of commodities. This characteristic, in turn, implies an economy where private economic units compete and bargain with one another in the areas of product superiority and service. The dynamics involved in bargaining and competition, which drives the economy in a capitalist society, is rooted in the conflicting interests of parties involved in social relationships. With the desire to win being the key motivating force, individual and corporate person being very key actors in the system, are inevitably drawn into dispute with one another – this dispute which stems from the desire to win in a competitive capitalist system, gives rise to legal action. The legal system is the arena where this conflict is resolved and winner/loser in that regard declared – the legal system is an arena in this sense, but not the same as the economic system. Its central actor is not the economic man/woman of the market place but of the judicial place.[292]

A capitalist society and the law that is found therein adheres to the ideology of individualism, private property, autonomy, and at the same time reinforces mutual obligations between persons and obedience to external authority. Just as a commodity which is produced in a capitalist society acquires an exchange value independently of the will of the producer, so also man acquires the capacity to be a legal subject and a bearer of rights. He is simply the personification of the abstract, impersonal, legal subject, the pure product of social relations.[293]

[292] *Ibid*
[293] *Ibid*

Social relations between persons assume a double and mysterious form. They appear as relations between things i.e. commodities and as relations between the wills of autonomous entities equal to one another. The legal system appears to be the impartial guarantor of obligations and arbiter of disputes between rival claimants and force, but behind this is the organised power of one class over the other. Thus the rules of law, imposed by the state to clarify and stabilise social relations, mirror the relations of production.[294]

Pushakanis' analysis in this regard deals most primarily with contract and property. Mainly, he is arguing that capitalist social relationships and the legal relationships that run parallel to them in the paradigm case of contract are translated into other areas of law. For example, in a Criminal prosecution, the state appears both as the plaintiff (public prosecutor) and judge. The prosecutor asserts a claim, demanding satisfaction from the defendant in the form of a quite high price i.e a sever sentence. The offender pleads for leniency. The court determines the guilt and intention of the individual. The question of whether the act was caused intentionally, negligently or accidentally reinforces the concept of the autonomous subject. The whole of the criminal proceeding is affected by the principle of equivalent recompense – making the value of the punishment, be it time or money, equal to the value of the costs imposed by the criminal.[295]

Within the Marxist understanding therefore, there is a connection between Law and the class society – between law and economic development. For *Marx* it seems that law serves as an instrument of class oppression. The theory of historical materialism has to explain how these consciously created laws are ultimately determined by material circumstances. Considering the already established connections of law with the production and the material world, *Marx* suggests that all social institutions of a community, including law, arise from and adapt

[294] *Ibid*
[295] *Ibid*

themselves to the nature of the relations of production. Therefore, laws are determined in their form and content by the relations of production.[296]

An instrumentalist analysis of law and the connections between the legal system and other social and political institutions are all related to the problem, in Marxist theory, of social order in modern societies. As previously mentioned, *Marx* argues in the *Communist Manifesto*[297] that all societies have, as a matter of history, been divided into antagonistic social classes. Thus, class is determined according to the position a person holds in the relations of production. Those persons who controlled access to the means of production, whether it be land, natural resources, or a factory, were in a dominant position because they could use their power to secure political control over other social classes.[298]

The legal system was an obvious candidate as a mechanism of control, and *Marx* argues that it was used as such. The criminal courts, prisons and the scaffold or guillotine were hardly distinguishable from the use of brute force. The legal system thus shared the task of class repression along with the other institutions of government including the armed forces, the police, and the bureaucracy.[299]

For many, the legal system is very important for the maintenance of social order. It can be related to being similar to rules of a game which prevent any one player from securing an unfair advantage.[300] Marxists think differently - insisting that law does not ensure a fair system, but rather, guaranteed the preservation of a particular mode of production and its corresponding

[296] *Ibid 282.,* p.18
[297] *Ibid 275*
[298] *Ibid 282.,* p.27
[299] *Ibid 282.,* p.28
[300] Harrison, R. 2003, *Hobbes, Locke and Confusion's Masterpiece,* Cambridge, Cambridge University Press, p.91

class structure, thereby placing nearly all the available wealth and power in the hands of a fraction of the population.[301]

In other words, the legal system is a tool of oppression used by the 'well-off' (rich and powerful) in society to keep the status quo in place – to keep those who are down the social ladder there, and to preserve those at the top of the ladder from being set down in any way.

In this way, a class instrumentalist approach shows how economic relations and positions determine the class structure and the sorts of persons who fall within a particular class. Put simply, seen through a Marxist lens, the economic base determines the legal superstructure, not instantaneously or mechanically, but through a process of class rule in which the participants further their interest through the Legal System. The State and the Legal System are within the exclusive control of the dominant class, and that they deliberately use the Law to pursue their own interests at the expense of the subordinate classes.[302]

A Marxist view therefore, of miscarriages of justice is that it is a consequence stemming from the legal system being used by the wealthy and powerful to bully and oppress other classes in society. The wealthy and powerful control the legal system because of their place on the economic ladder and they use their influence in that way to ensure that the system serves their interests first and not that of the general population.

In Marxist terms, this system of oppression is set up to satisfy a specific group of people in society, and that is why it seems to always be the case that the rich and powerful always seem to somehow escape the grips of the Law, or get a simple slap on the wrist, in situations and circumstances where ordinary people would face the full brunt of the Law.

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[301] *Ibid 282.,* p.28
[302] *Ibid 282.,* p.29

A Marxist understanding of Law calls its reduction achievement into question; this partial deafness and blindness which Law engages in so as to be able to filter out information and function in its own way as an independent system. From a Marxist stand point, this process filtration – law's ability to pay no attention the 'noise' and only focus on what it can only contemplate and consider (legal/illegal – black/white) – which on one level, appears as an achievement isn't so much an achievement as a deception.

In reality, it is the by-product of a tool of oppression which, clothed with legitimacy, is nonetheless exercised by the 'powerful' in society against the vulnerable. By concentrating the Legal decision making process within the seeming respectability of Law's *Universal* nature at the expense of a fuller understanding of the *Particularities* of the case before it, Law itself creates the conditions out of which wrongful convictions/miscarriages of justice arise,

This is the understanding a Marxist Perspective gives us of wrongful convictions/miscarriages of justice, of a system that enables injustice to appear as justice - the unnatural and unacceptable to appear as natural and acceptable – wrongful convictions/miscarriages of justice appearing as an occasional, unfortunate and regrettable, though natural, by-product of the system rather than in their own true colours. Wrongful convictions/miscarriages of justice arise through Law's black-and-white approach to scenarios, which is not at all helped whenever Judges concentrate the legal-decision making process within an extreme.

A Marxist Perspective of Law therefore offers us a unique understanding of the Canadian cases previously discussed – a unique understanding of why a concentration of the Legal decision making process within extremes (*Universal/Particular)* is the root cause of the wrongful convictions/miscarriages of justice in those cases. A Marxist understanding of Law calls its reduction achievement into question; this partial deafness and blindness that Law engages in so as to filter information and be able to function as the System it is.

We can see how this is demonstrated in the *Truscott* case by the order obtained for the Crown's case by Crown Prosecutor H. Glenn hays, Q.C. This was an order which made it possible for *Truscott* to be trialled as an adult though he was a teenager (14 years old). To the legal system, *Truscott's* age was nothing but 'noise' – noise to be sieved out by its binary code (legal/illegal). Such sieving of such pertinent facts could not be balanced, tempered or made practical in anyway because the legal decision making process was concentrated within Law's *Universal* nature – where its binary code takes extreme function. An injustice appeared, clothed in the legitimacy of the apparently proper application of legal procedure. A wrongful conviction/miscarriage of justice was the result therefore.

Similarly, in the *Marshall* case, we see an ordinary teenager, an ethnic minority from an ethnic group that is considered by a large portion of the society to be inferior, and is thus dominated by the 'big guys' in the society; people in positions of power in the Criminal Justice System (police, prosecutors, judges, defence counsels). The 'big guys', were able to use the legal system as their tool of oppression, by concentrating the legal decision making process within the Law's *Universality* at the total and complete expense of the *Particularities* of the case, to dominate *Marshall* mainly because he was an ethnic minority (Mi'kmaq Indian).

The Royal Commission's report on the *Marshall* case supports this. It confirmed that there existed racist feelings amongst whites living in Sydney towards the Mi'kmaq's whom they thought of as an inferior race and class. The Commission found that the Chief Detective (MacIntyre) who run the investigation into Sandy Seal's death subscribed to this notion and therefore did everything possible – including bullying and coercing witnesses to change their statements – to ensure that *Marshall* was convicted.

MacIntyre and the white-dominated Criminal Justice System wanted to maintain the status quo - white domination over the Mi'kmaq's – and they achieved this by concentrating the legal decision making process within the Law's *Universal* nature at the complete and total expense of the *Particularities* of the case – and as such, a wrongful conviction/miscarriage of justice was the result.

A Marxist Perspective on Law and wrongful convictions/miscarriages of justice similarly offers a unique understanding of the *Wilbert Coffin* trial. To begin with it exposes that *Coffin* was clearly the victim of oppression through a Criminal Justice system controlled by corrupt people with power and influence (politicians, police and the Courts). When the bodies of the American hunters were found, the Duplessis Government and Quebec police were pressured greatly by a powerful American State Department to find the killer. The Duplessis government was therefore desperate for an arrest with which to present the Americans – and to prove to the world that Quebec was once again a safe and secure haven for tourism because they had caught the murderer. In *Coffin*, they found their fall guy.

Coffin was unfortunate to have been in and around the area where the bodies were discovered. He was poor, non-Catholic English speaking man who lived in a majority French speaking and Catholic society. Put simply, he was a minority. *Coffin* was thus vulnerable and marginalised, he was an easy target – and once he was targeted, all evidence pointing to other suspects would either be ignored or suppressed by a Criminal Justice System that would concentrate the legal decision making process within Law's *Universality* at the complete expense of the *Particularities* of the case at hand and by that ultimately engineer a wrongful conviction/miscarriage of justice.

The *Coffin* case is particularity disturbing because it shows that if economic and political pressures demand, the State is be prepared to use the legal system to mistreat its own citizens by concentrating the legal decision making process within Law's *Universal* nature at the complete and total expense of the *Particularities* of the case in hand. This was a clear case of those with power (the Duplessis government, Quebecan Police and the Courts) using the legal system to oppress a less privileged, less fortunate, and less educated member of society, in satisfying their own objectives. And they did it by concentrating the legal decision making process within Law's *Universal* nature at the complete neglect of the *Particularities* of the case in hand.

A Marxist Perspective unearths the concentration of the legal decision making process within Law's *Universal* nature at the complete neglect of the *Particularities* of the case as the root cause of the wrongful conviction/miscarriage of justice *Sophonow's* trial as well. We saw there that the Police were under intense pressure to solve a murder that had completely shaken up the community and immersed it in fear. The system found for itself, a person who it could make to take the fall for the murder, and whose prosecution would relieve the political pressure;

Sophonow. He had a Criminal record and had been in and out of trouble with the Law – he was the perfect 'fall guy' for the Police, and he would surely be convicted wrongfully and suffer a miscarriage of justice as a result of the legal decision making process being concentrated with Law's *Universal* nature at the complete neglect of those *Particularities* associated with *Sophonow*.

The Police solicited and even sometimes coerced eyewitnesses to give false testimonies which supported the narrative they wanted to put forward i.e that *Sophonow* killed Stoppel. The Police even went so far as getting testimonies from jailed inmates to support their version of events. Law required eyewitness accounts and testimonies to determine legal/illegal so the Police found that information from anywhere that they could get it and by whichever means– for them it didn't matter that the testimony was unreliable as it was given by a prisoner.

Having been fed that inaccurate testimony, Law then went on to make its determination of legal/illegal – the legal decision making process would not consider any other factors that would sway it away from a wrongful conviction/miscarriages of justice because it would be concentrated within Law's *Universal* nature at the complete neglect of the *Particularities* of the case. When concentrated within Law's *Universal* nature, the legal decision making process is deprived of the *Particularities* of the case as it is filtered out by Law's reduction process. The *Particularities* therefore do not become available for the purposes of the adjudication process, and a wrongful conviction/miscarriage of justice is the result.

Had the *Particularities* of the case been available for the legal decision making process to take into account, it would not have capitulated to tunnel vision. It would not have capitulated because of there would have been a realisation on the part of the Judge/Jury that even though *Sophonow* had a troublesome childhood and a Criminal record from his past – these things did not make him a killer. Rather, these things made him vulnerable to those who would want to label him as a killer wrongfully by concentrating the legal decision making process within Law's *Universal* nature at the complete expense of those *Particularities.*

2.9. Legal Reforms

As can be expected, the high profile wrongful conviction/miscarriages of justice previously discussed have been met with numerous calls for reform of the Criminal Justice System in Canada. The cases caused the handlers of the System deep embarrassment, called the integrity of the entire system into question. There has come with the implementation of these reforms, a question of their effectiveness in addressing the issue of wrongful convictions/miscarriages of justice.

The most ubiquitous of these reforms is Legal Aid. Legal aid services have become common place in Canada over the years. This concept has its genesis in 17th Century England and is based on the democratic concept of equal justice for all – defendants unable to retain legal counsel would have one provided to them by the state. Despite the fact that there have been several models employed in delivering legal services to defendants, none of those models have succeeded in achieving legal equality for the marginalised in society – such as a *Truscott, Driskell, Sophonow* or *Coffin*. [303]

[303] Snider, L. 1985, Legal Aid Reform and the Welfare State, *Crime and Social Justice Journal,* pp.24-85

2.9.1 Learning from Other Jurisdictions – The CCRC Example?

The handlers of the Canadian Criminal Justice System could look to other jurisdictions within the Common Law System to see what they can learn from them as regards to how they deal with wrongful convictions/miscarriages of justice. The UK Legal System is one such System, and it has responded to the issue of wrongful convictions/miscarriages by setting up the Criminal Cases Review Commission, hereinafter referred to as the CCRC.

The CCRC was established by the Criminal Appeal Act 1995 following a recommendation made by the Royal Commission on Criminal Justice. It replaced the Criminal Case Unit of the Home Office where the Home Secretary had the power to order re-investigations of alleged wrongful convictions/miscarriages of justice and send them back to the Court of Appeal (Criminal Division) under section 17 of the Criminal Appeal Act 1968.[304]

As with all reforms against wrongful convictions/miscarriages of justice, the CCRC was hard fought for and stands unique as the world's first statutory publicly-funded body charged with the task of reviewing alleged wrongful convictions/miscarriages of justice. It is, perhaps, not surprising that it has been the subject of much pride in certain quarters in its native jurisdiction and viewed with a great deal of interest from other jurisdictions that see it as a possible extension to their own Criminal Justice system to solve their wrongful convictions/miscarriages of justice.[305] The CCRC is therefore the UK Legal Systems' solution to the problems of wrongful convictions/miscarriages of justice.

[304] May, J. *Report of the Inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guilford and Woolwich in 1974,* HC 556, London, 1974, pp.189-90.
[305] Naughton, M. 2012, The Criminal Cases Review Commission: Innocence Versus Safety and Integrity of Criminal Justice System, *Criminal Law Quarterly,* 58, pp.207-224

In order for the CCRC to refer back a case to the Court of Appeal, it must present an argument or evidence not raised at trial or on appeal other than in 'exceptional circumstances.' It must also consider that there is a 'real possibility' that the conviction would not be upheld by the Court if the reference were made. Thus, the approach of the CCRC is closely tied to that of the Court of Appeal. If the Court is unwilling to quash convictions in certain types of cases, the CCRC is unable to refer those cases back, however strongly it considers the case for an appeal to be.[306]

At the end of the process, a decision is made whether or not to refer a case to the Court of Appeal. If a preliminary decision is made not to make a referral, the applicant or his lawyer will be informed of the proposed reasons for non-referral and invited to comment. The Criminal Appeal Act 1995 sets out the criteria for making a referral – a referral should not be made unless 'the Commission considers that there is a real possibility that the conviction would not be upheld.'[307]

[306] Malleson, K. *The Legal System,* 3rd edition, New York, Oxford University Press, pp.173-176
[307] *Ibid*

2.9.2 A Solution for the System, Provided by the System

It is obvious that at the centre of the Commission's task is a predictive exercise – it should not make a referral just because it thinks there is a wrongful conviction/miscarriages of justice, but only if it believes that the Court of Appeal may quash the conviction. Thus, as earlier mentioned, its decision must be informed by the Court of Appeal's working practices. The Criminal Appeal Act 1995 underlines this by requiring a new argument or evidence, but even without this provision something would generally be needed, because that is what the Court of Appeal itself demands.[308]

The referral criteria was discussed by the Divisional Court in the case of *R v Criminal Cases Review Commission, ex p Pearson*[309] which involved the a judicial review of a CCRC decision. In this case, the applicant was convicted of murder and sentenced to life imprisonment in 1987. Her defence at trial was that it had been another who had committed the murder. In 1988, she applied for leave to appeal against her conviction out of time; she admitted that she had committed murder, but that as a result of her mental physical state at the time of the murder, she had not been responsible for her actions.[310]

[308] *Ibid*
[309] [2000] 1 Cr App R 141
[310] *Ibid*

In 1997 her case was transferred to the CCRC, which refused her application, having decided that the Court of Appeal would be unlikely to receive the applicant's fresh evidence under S.2 of the Criminal Appeal Act 1968 or to quash her conviction. The applicant applied for judicial review, contending, amongst other things, that the CCRC had usurped the function of the Court of Appeal by itself purporting to decide whether the evidence should have been admitted and whether the verdict should have been regarded as unsafe.[311]

The Court led by Lord Bingham C.J dismissed the application – saying that although the 'real possibility' test prescribed in section 13(1)(a) of the Criminal Appeal Act 1995 as the threshold which the Commission had to judge to be crossed before a conviction might be referred to the Court of Appeal was imprecise, it plainly denoted a contingency which, in the Commission's judgement, was more than an outside chance or bare possibility, but which might be less than a probability, or a likelihood, or a racing certainty.[312]

In a case which was likely to turn on the willingness of the Court of Appeal to receive fresh evidence, the Commission had to predict whether, if the reference was made, there was a real possibility that the Court of Appeal would receive the fresh evidence under section 23 of the Criminal Appeal Act 1968 and, if so, whether there was a real possibility that the Court of Appeal would not uphold the conviction.

[311] *Ibid* at [141]
[312] *Ibid*

Further, in trying to predict the response of the Court of Appeal if the case were referred and an application to adduce evidence made, the Commission had to pay attention to what the Court of Appeal had said and done in similar cases on earlier occasions and then make its own assessment, with specific reference to the materials in the case. In the present case, the Court said, the Commission stated and then applied the right test, fully conscious of the respective roles of the Commission and the Court of Appeal.[313]

The *ex p Pearson*[314]case is a typical example of how the CCRC solution is one provided by the system to solve a problem generated by the system and as such serves the system's interests more than it does help the actual and potential sufferers of wrongful convictions/miscarriages of justice.

This is exactly so because the 'real possibility test' contained in s.13 of the Criminal Appeal Act 1995 shackles the CCRC to the criteria of the Court of Appeal for quashing convictions. It means that the CCRC is at all material times, engaged in the business and art of second-guessing how the Court of Appeal might decide any conviction that is referred to it. Thus, the CCRC does not attempt to determine the truth of alleged wrongful convictions/miscarriages of justice – but rather, whether convictions might be considered 'unsafe' by the Court of Appeal.[315]

[313] *Ibid*
[314] *Ibid 310*
[315] *Ibid 306*

The CCRC is therefore wholly disconnected from the concern with whether a wrongful conviction/miscarriage of justice has occurred. This is, perhaps most problematic at the extremes of the CCRC's operations when it means assisting the factually guilty to overturn convictions on abuses of process and turning a blind eye to potentially factually innocent victims of wrongful convictions/miscarriages of justice who are unable to fulfil the real possibility test to the satisfaction of the CCRC[316] – this is how our 'little girl', a *James Driskell, Thomas Sophonow, Guy Paul Morin or Steven Truscott,* get lost in the system - the solution (CCRC) devised by the System does not serve their interest primarily. This state of affairs can be explained further by Systems Theory.

[316] *Ibid*

2.9.3 A Solution for the System, Provided by the System - The System's Theory Angle

When other social systems, like the media, reports what it accepts has been wrongful convictions/miscarriage of justice, it claims to reverse the meaning which the media formerly attached to the conviction: the person convicted did not do what he was accused of and is therefore innocent. The media expects the legal system to provide a legal operation which similarly reverses the meaning which it attributed to conviction.[317]

The narrative which the media draw from the fact of conviction is based largely on the prosecution's case. Thus, if persons whom the media regard as authorities come to question important aspects of this case, the media may come to expect the conviction to be quashed.[318]

Where, however, the reversal of convictions based on the media's construction of a convicted person' innocence is rejected by the Court – a resistance which is necessary for the continued authority of the legal system itself – the Court of Appeal can precipitate a 'trial in the media' of the legal system itself - a 'trial in the media' which questions the integrity of the legal system.

To maintain its integrity and to ease the pressure placed on it by a media which believes that a wrongful conviction/miscarriage of justice has occurred, the legal system offers a self-made solution which – this *thesis* submits – does not solve the problem, but only eases the pressure and helps the legal system maintain its integrity. This is exactly how the CCRC came into being – given the state of affairs that abide, the argument can easily be made that the CCRC does not solve the problem of wrongful convictions/miscarriages of justice – all it does is to serve the legal system's interests, its integrity and thereby maintain the status quo.[319]

[317] Nobles, R. Schiff, D. 1995, Miscarriages of Justice: A Systems Approach, *Modern Law Review,* Vol 58, pp.299-320
[318] *Ibid*
[319] Beirne, P, Quinney, R. 1982, *Marxism and Law,* New York, Wiley Publishing, pp.54-60

A CCRC-type solution to check wrongful convictions/miscarriages of justice is therefore nothing more than a mirage. Its main aim isn't to prevent or act on wrongful convictions/miscarriages of justice, but rather to preserve the integrity of the Legal System by acting on wrongful convictions/miscarriages of justice. This means that where the integrity of the Legal System isn't at stake, there is no need to act on/prevent wrongful convictions/miscarriages of justice, seeing as it is the dependant variable in all of this. Law has offered not a solution, it has rather offered a distraction.

This is well affirmed by the Court of Appeal in the *R v Mullen* case.[320] This case concerned a claimant (Mullen) who was convicted of conspiracy to cause explosions and was sentenced to 20 years' imprisonment. After he had been in prison for ten years, the Court of Appeal quashed his conviction on an appeal, on the ground that his deportation from Zimbabwe to the United Kingdom to stand trial had involved an abuse of process - thus rendering his conviction 'unsafe'[321] - having said that it involved a 'blatant and extremely serious failure to adhere to the rule of law'.[322]

[320] [1999] EWCA Crim 278
[321] *Ibid*
[322] Rose L.J in *R v Mullen,* [1999] EWCA Crim 278, at [40]

In quashing Mullen's conviction, Rose L.J made it absolutely clear that the need for convictions such as Mullen's to be quashed rests in the public interest to preserve the integrity of the Criminal Justice System – not to prevent or remedy wrongful convictions/miscarriages of justice, but to preserve the integrity of the criminal justice system[323]

"It is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience … not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place."[324]

A CCRC type solution to address wrongful convictions/miscarriages of justice is therefore inadequate; it does not solve the problem of preventing wrongful convictions/miscarriages of justice - and when it addresses already existing miscarriages of justice, it does so with the aim of attending to the aid of the integrity of the Criminal Justice System, rather than bring out the factual/legal truth about the innocence of the accused.

[323] *Ibid*
[324] *Ibid*

2.9.4 A Middle-Man Inspired by the CCRC – The Story of INUK

The inception of the CCRC eventually gave rise to the Innocence Network UK, hereafter referred to as INUK. The network was setup in 2004 with the help of actual victims of miscarriages of justice[325] – with the aim of enabling academics and lawyers to research cases of prisoners who maintain their innocence saying they have been falsely convicted.[326]

The way INUK would work is that criminals who have exhausted their appeals process will be able to ask it to review their cases (through different innocence projects) in order for it to ascertain whether there are any new grounds which could be put before the CCRC.[327]

INUK is therefore a non-statutory body serving as a middle man between those claiming that they have been wrongfully convicted and the CCRC with the goal of investigating those claims and presenting them to the CCRC if new grounds for review are found. More importantly, INUK's overall aim is to improve the criminal justice system by helping to overturn convictions given to factually innocent people, to learn lessons from such wrongful convictions and to effect reforms to prevent such wrongful convictions from occurring in the future.[328]

The CCRC very much welcomed the creation of INUK and the innocence projects initiative, conceding and confessing that they (CCRC) were often helpless in assisting innocent victims of wrongful convictions – especially, if they had not satisfied the 'real possibility' test laid down in the Criminal Appeal Act 1995.[329]

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[325] Paddy Hill, one of the Birmingham 6, was one of the instrumental voices behind the setting up of INUK.
[326] The Guardian Website, http://www.theguardian.com/uk/2004/sep/03/ukcrime.prisonsandprobation/print, 31st March 2014.
[327] *Ibid*
[328] INUK Website, http://www.innocencenetwork.org.uk/about-us, 31st March 2014
[329] *Ibid*

2.9.5 INUK's CCRC Distraction

For much of its life, INUK has maintained a steady barrage of criticism of the CCRC. In March of 2012, INUK convened a conference which was held on the 30th of March to discuss possible review of the CCRC. A report put together by INUK prior to the conference stated that a review of the CCRC's effectiveness was the only way gateway back to the Court of Appeal for convicted persons who have failed in their first appeal.[330]

Findings from the INUK report revealed how innocent victims of wrongful convictions can be failed and called for urgent reforms to ensure that innocent victims of wrongful convictions are better assisted. In INUK's view, the main problem was that the CCRC was too dependent on the courts. It proposed that the 'real possibility test' be replaced by a test that allows the CCRC to refer a conviction back to the Court of Appeal if it thinks that the applicant is or might be innocent, which would require the CCRC to consider all the evidence – and where the Court of Appeal dismisses an appeal against conviction following a CCRC referral, the CCRC should have the power to refer the case to the Secretary of State to consider exercising the Royal Prerogative of Mercy. [331]

Michael Zander QC, states that he does not share INUK's views. *Zander'*s arguments against INUK's views were two-fold: firstly, *Zander* says the Royal Commission which recommended setting up the CCRC would have taken the view that it makes no sense to suggest that the CCRC should refer conviction cases where it did not think there was a real possibility that the conviction would be reconsidered.[332]

[330] INUK Website, http://www.innocencenetwork.org.uk/news-2, 1st April 2014
[331] See report on INUK Website, http://www.innocencenetwork.org.uk/wp-content/uploads/2013/01/CCRC-Symposium-Report.pdf, 1st April 2014
[332] The Justice Gap Website, http://thejusticegap.com/2012/04/zander-on-the-ccrc/, 1st April 2014

Secondly and even more interestingly, *Zander* points out that the Royal Commission based its recommendation for the establishment of the CCRC on the proposition that the role assigned to the Home Secretary and his department under the then existing legislation was incompatible with the constitutional separation of powers between the courts and the executive. The scrupulous observance of constitutional principles has meant a reluctance on the part of the Home Office to enquire deeply enough into the cases put to it. Enquiring into a case relates to investigation, the purpose of which is to see whether there is something important that is new that was not there before the trial or the appeal courts.[333]

Ultimately, *Zander* says his views do not at all mean that he is against INUK and the work it does. The relationship between INUK and the CCRC should be one of informal partnership and mutual support. After all, if INUK can establish that a convicted person is factually innocent that may be the basis of a successful referral. If the CCRC does not refer a case, or the Court of Appeal does not quash a conviction, INUK must just go on to continue to argue the case. It can even attempt to mobilise media or other support. *Zander* therefore believes that the CCRC as established by the Criminal Appeal Act 1995 does broadly live up to what the Royal Commission envisaged.[334]

[333] *Ibid*
[334] *Ibid*

David Jessel, a well-known broadcaster, campaigner and author adds to the debate on possible reform of the CCRC by pointing out that the key problem with the CCRC and the Court of Appeal Criminal Division is the statutory terms of the relationship between them. *Jessel*'s prescription for the CCRC therefore is that it should be free to do what it does best – investigate. The CCRC, he said, has huge powers to inspect materials that journalists can only dream of accessing – medical records, police disciplinary records, surveillance logs etc. Sometimes it finds gold in those files which leads to a successful referral.[335]

Before going into all of this however, *Jessel* made a quite astonishing statement about INUK. He stated most emphatically that he had accepted the invitation to speak at the conference with much reluctance due to the fact that INUK's agenda seems to be less concerned with finding evidence to free the wrongfully convicted than with bashing the CCRC – a dreadful diversion of zeal, which can only delight the enemies of justice.[336]

What *Jessel* and *Zander* have clearly tried to do is to point out that INUK has somewhat lost focus and taken its eyes of the 'ball'. This thesis suggests that this loss of focus is not entirely INUK's fault – and this is why;

[335] David Jessel Website, http://www.davidjessel.co.uk/index.php?/JusticeIssues/article/speech_to_inuk_seminar_on_the_ccrc_march_30_2012/, 2nd April 2014

[336] *Ibid*

In the CCRC we have a solution provided by the system to fix a problem that exists in the system. This self-suggested solution then inspires the emergence of a helper and middleman (INUK) which aims to help make the solution work by providing vital bridge-linkage between the solution itself and the individuals for whose benefit, supposedly, that the solution was initially put in place for. As we now see, this middle man has however, become so distracted to the extent that it is more concerned with fixing the fixer (CCRC) than helping the wrongfully convicted prove their innocence to the fixer (CCRC). A sad diversion of zeal, as *David Jessel* puts it.[337]

Explained differently, Law has created a distraction which saves its face and ensures that its integrity is not questioned – the focus has shifted from questions on Law, about Law and on reforming Law, to questions on the CCRC, about the CCRC and reforming the CCRC. Such a distraction can prove to be very disastrous for the simple reason that real reform of the legal system, which might be badly needed, is overlooked because the focus is shifted from Law to a solution that Law has given to fix it. Should the handlers of the Canadian Criminal Justice System possibly decide to adopt a CCRC type solution, they should be very much aware of this danger.

More importantly, one of the lessons they should draw for the setting up of the CCRC in the United Kingdom is that a solution provided by the System to fix a problem in the system, does not work as intended, it rather preserves the status quo. All it does is to create a distraction where the integrity of the legal system is no longer the focus, giving birth to groups which emerge with the aim of helping the wrongfully convicted to benefit from the solution by questioning and calling for reform of the solution itself.

[337] *Ibid*

2.9.6 Australia's Rejection of a CCRC-type Solution

On the 10th of November 2010, Ann Bressington, an independent member of South Australia's Legislative Council, introduced a Bill to establish a Criminal Cases Review Commission (CCRC) modelled on the CCRC established in the UK in 1997. According to the Bill, the South Australian CCRC would be an independent body with powers to actively investigate claims of wrongful convictions and refer substantiated cases to the Full Court for Appeal.[338]

The South Australian CCRC would replace a petition process by which a person claiming to have been wrongfully convicted lodges a petition with the Attorney-General for consideration. The Attorney-General under this process should only consider the petition in accordance with established legal principles, particularly those relating to fair trial.[339]

The establishment of a CCRC in South Australia had very broad support in the legal profession and elements of the judiciary, including the former Justice of the High Court, *Michael Kirby* AC CMG, and by victims of wrongful conviction, such as *Lindy Chamberlain* – who wrote in support of a CCRC in South Australia saying;

'It is wonderful to see that South Australia is taking the lead … to begin bringing the justice systems of our great country into the 21st century at last … A commission where all the facts can be reviewed is desperately needed in this country … [340]

[338] Ann Bressington Website, http://www.bressington.net/sub/Policies/Criminal_Cases_Review_Commission.htm, 5th April 2014
[339] *Ibid*
[340] *Ibid*

The calls for a CCRC in South Australia, was ignited by cases such as the infamous *Dingo Baby Case*[341]. Azaria Chamberlain, a nine week old baby, disappeared on the night of the 17th of August 1980 from her parents' tent in a camping ground near Uluru. Her mother, Lindy Chamberlain, claimed that a dingo 'got her baby – Azaria's body was never found. Lindy Chamberlain spent three years in jail for Azaria's murder as a jury decided that the evidence showed that she was responsible for her daughter's death.

Following the conviction, an appeal was made to the High Court in November of 1983 – asking that the convictions be quashed on the basis of the verdicts being unsafe and unsatisfactory. In February of the same year however, the court refused the appeal by a majority.[342]

In 1986, an English tourist by the name of David Brett fell to his death during an evening mountain climb in Uluru. Because of the very vast nature of the rocky mountain and the scrubby nature of its surrounding terrain, it was eight whole days before David's remains were discovered – lying below the bluff where he had lost his footing and in an area full of dingo lairs.[343]

As the police searched the area, looking for missing bones that might have been carried off by the dingoes, they discovered a very small item of clothing. It was quickly identified as the crucial missing piece of evidence from the Chamberlain case – it was Azaria's missing matinee jacket.[344]

[341] Chamberlain v R (1983) 153 CLR 514
[342] Re Chamberlain v R [1983] FCA 78
[343] The Australian News, http://www.theaustralian.com.au/news/features/discovery-of-jacket-vindicated-lindy/story-e6frg6z6-1225905092032, 5th April 2014
[344] *Ibid*

The Chief Minister of the Northern Territory therefore ordered Lindy Chamberlain's immediate release and the case was reopened. In 1988, the Northern Territory Court of Criminal Appeals unanimously overturned all convictions against the Chamberlains and a Coroner's report released in 1995 reflected this, stating that the evidence points to the fact that a dingo did take baby Azaria from the campsite.[345]

The very questionable nature of the forensic evidence in the Chamberlain case, and the significance which was given to it, raised concerns and questions about the Legal System, its processes and procedures. The prosecution had been so successfully and easily able to argue that the pivotal/central haemoglobin tests indicated the presence of foetal haemoglobin in the Chamberlains' car and it was a vitally significant part of their argument – indeed, it was the glues that kept the prosecution's case together – a glue which couldn't have been further from the truth.

Had it not been for the death and subsequent search for the remains of another, the Chamberlain's would probably never been acquitted and the truth would have never been learnt because the circumstantial and inaccurate forensic evidence would have been given place to stand against them. It is for reasons such as these that the calls for a CCRC in Australia became ever louder – reasons for which Ann Bressington's Bill[346] was propelled to the legislature in South Australia.

Though the Bill was backed by many in the legal profession – supported and advocated for by a few victims of wrongful convictions and members of the judiciary itself – and though the reasons put forward for its proposed inception made sense to the Australian public, the Bill did not pass.

[345] BBC News Website, http://www.bbc.co.uk/news/world-asia-18404330, 5th April 2014
[346] Ann Bresington Website, http://www.bressington.net/Files/Bills/Criminal_Cases_Review_Commission_Bill_2010.pdf, 5th April 2014

On the 18th of July 2012, the South Australian Legislative Review Committee on the CCRC Bill reported that it would not be recommending that a CCRC-style body be established in South Australia. The recommendation was made instead for a new statutory right for certain qualifying offences to provide that a person may be allowed at any time to appeal against a conviction for serious offences if the court is satisfied that a) the conviction is tainted, and, b) where there is fresh and compelling evidence in relation to the offence which may cast reasonable doubt on the guilt of the person convicted.[347]

An additional Recommendation was made for the Attorney-General to consider establishing a Forensic Science Review Panel which would enable testing or re-testing of forensic evidence which may cast reasonable doubt on the guilt of a convicted person, and for these results to be referred to the Court of Criminal Appeal.[348]

The Bill modelled on a UK CCRC approach was rejected by the Legislative Review Committee for a couple of reasons. Firstly, the Committee expressed concern about the fact that the UK-CCRC model is not one that is designed to take interest in the truth and (or) innocence – it is one that is there only to handle new evidence or argument that may cast doubt on the safety of an original decision; it does not rectify the errors of the Criminal Justice System.[349]
Secondly, the Committee expressed concerns about the UK's CCRC's narrow interpretation of what constitutes fresh evidence for the purpose of a review. In this regard, *Michael Naughton* submitted before the committee that he was concerned that the UK CCRC is a body which only conducts a 'desktop review', appraising the arguments of applicants first by the fresh evidence test and then by the real possibility test, rather than an investigatory body.[350]

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[347] INUK Website, http://www.innocencenetwork.org.uk/no-ccrc-for-south-australia-but-new-statutory-right-of-appeal-for-certain-qualifying-offences, 5th April 2014
[348] *Ibid*
[349] Kandelaars, G. 2012, *Legislative Review Committee Report on its Inquiry on the CCRC Bill 2010,* Parliament of South Australia, p.52
[350] *Ibid* p.53

A CCRC-type solution is therefore clearly and wholly inadequate in addressing the issue of wrongful convictions/miscarriages of justice and as such, this *thesis* does not present or propose it as a solution, or as a way forward in addressing the wrongful convictions/miscarriages of justice suffered by people such as *Truscott, Milgaard, Sophonow, Driskell, Marshall, Guy Paul-Morin* and our 'little girl' suffering unnecessary wrongful convictions/miscarriages of justice.

This *thesis* suggests, and will argue in parts subsequent, that a proper solution to the issue of wrongful convictions/miscarriages of justice is one predicated on avoiding extremes (*Law's Universality/the Particular)* in legal decision making.

CHAPTER 3

3.1 LOCATING THE PROBLEM IN LAW – LAW'S UNIVERSAL NATURE AND THE PARTICULAR

The Debate

For our purposes, let us reset the tone by recapping the story of our little girl (Ginger). Ginger is a young teenager living down the street who is of diminished responsibility. She wanders outside her house in the middle of the night at a time when both her parents are asleep and enters the barn of a neighbour. Once there, she begins to play with a box of matches she finds. Her playing with fire causes a huge blaze in the barn and before long, the blaze has spread into the neighbour's house. Before the Fire Department can get a hand on things, both the house and barn are burnt to the ground. There is no loss of life but loss in property to the tune of hundreds of thousands of pounds.

A key question which results from this fictional scenario is one of whether *Ginger* should be made to feel the full weight of the Law i.e. a conviction, or should her condition (diminished responsibility) be taken into account by the legal decision making process, to the extent that she is not convicted because she did not have the capacity to appreciate the risk that a fire might result from her actions? The debate that this question sparks is one which lies at the very heart of law and is of two limbs - it is firstly a debate regarding Law's *Universal* nature versus the *Particularities* of the case in hand, and secondly a debate on the paradox at the heart of the relationship between mercy and justice.

Law is pretty much a set of *Universal* and abstract rules –for Ginger to not face conviction, the condition from which she suffers (*the Particular* – diminished responsibility) must be considered and taken into account by the legal decision making process. There are theorists who are of the opinion that the law does and should accommodate the *Particular* (Ginger and her condition) within the legal decision making process. There are also, other theorists who believe that Law can accommodate particular people and their particular conditions in the legal decision making process because Law works on the basis of Generality and *Universality*. Then there are the theorists who are of the opinion that yes Law can see *Particular* people and their *Particular* circumstances or conditions, but it cannot apply itself to those *Particulars.*

The second limb of the debate has to do with the paradox at the heart of the debate between mercy and justice. It will be in the pages that follow that some theorists argue that to pardon Ginger because of her particular condition, would be to show mercy – which in itself is at odds with Justice because it requires a suspension of the very Justice that Law is there to provide. The Chapter engages in a review of all the arguments and differing approaches of the contributors who have fuelled both limbs of the debate thus far – outlining their differences in opinion and assessing their strengths and weaknesses.

3.2 Jeffrie Murphy's Mercy and Legal Justice[351]

Murphy's argument has mainly to do with the second limb of the debate i.e. mercy, justice and the paradox sitting at the heart of the relationship between these two. He asserts that all 'human beings are ordinarily inclined to believe that justice and mercy are both moral virtues – virtues characteristic of 'lofty' objects as God and of human objects such as the legal systems.'[352] Taking a few points from Shakespeare's[353] *Merchant of Venice I, II, III, and IV,* Murphy goes on to express some widely held views about mercy;

- Mercy is an autonomous moral virtue. This means that is not dependant on, nor is it derived from any other virtue (especially justice).

- It is a virtue that tempers or seasons justice. This means that mercy makes justice better serving as its conscience.

- Mercy is not owed to anyone as a right therefore one can only plead for mercy and never demand it – it therefore goes beyond the realm of obligation and is more of an act of grace, love or compassion. Justice on the other hand is quite different. It is a right enshrined in the constitutions of nations all over the world. It can be demanded and deserved by all peoples of any given land.

[351] Murphy, J. (1986), Mercy and Legal Justice, *Social Philosphy and Policy,* 4(1), pp1-14
[352] *Ibid 352.,* p.2
[353] Shakespeare, W. Lamb, S. Nicol, D. (2000), *CliffsComplete Shakespeare's The Merchant of Venice,* 1st edition, Foster City, IDG Books Worldwide Publishing.

- As a moral virtue, mercy derives its value from a kind of character – a figure who performs acts of mercy but does not lose of the importance of justice in doing so.

- Mercy requires a retributive outlook on punishment and responsibility as it is often regarded as the instance where a judge meats out punishment that is a bit less than the offender deserves.

Murphy goes on to argue that the abovementioned characteristics of mercy suggests that 'there are other moral virtues which are often – though they should not be – confused with mercy. The other virtues include justification, excuse and forgiveness. It is very easy to mistake anyone of these for mercy because they lead to the same outcome as mercy; the watering down of justice. *Murphy* illustrates further using 'justification' and 'excuse', by asserting that 'if a person has actually done the right thing, i.e. his conduct was justified, or if he was not responsible for what he did, i.e. he had a valid excuse, then it would be simply unjust to punish him, and no question of mercy arise – for there is no responsible wrongdoing.'[354]

After having ironed out the characteristics of mercy, *Murphy* turns his attention to 'forgiveness', which he admits is 'trickier'. *Murphy* describes forgiveness as a matter primarily concerned with changing how one feels with respect to a person who has done oneself an injury – it is a matter of overcoming the resentment that emanates from the offensive act or injury. Though related to forgiveness mercy is quite different – *Murphy* explains that to be merciful it is required not merely that one change how one feels about someone, but also requires a specific kind of action (or omission) – namely treating the person less harshly than they deserve.

[354] *Ibid 352.,* p.3

In other words, forgiveness is a step lower than mercy and in practical terms, mercy is one virtue which goes further than a change in feeling towards an individual that has caused harm. Thus to forgive someone does not necessarily equal a show of mercy - and vice versa. So a judge may decide to soften a defendant's punishment due to one reason or the other – this should not at all be taken to be an act of forgiveness, it is mercy –a tampering of justice – this is the very context within which the paradox at the heart of the relationship between mercy and justice arises.

Murphy explains the paradox perfectly in the following way;

'*If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice. Thus to be merciful is perhaps to be unjust … Society hires the judge to enforce the rule of law … the doing of this is surely his sworn obligation. What business does he have then … pursuing some private, idiosyncratic, and not publicly accountable virtue of love or compassion.* '[355]

So in other words, the nature of the paradox suggests that there is no place for mercy in society, so far as the exercise and application of justice is concerned, because of the 'vice' that mercy is – or becomes. Thus in our earlier fictional scenario concerning Ginger, a show of mercy because of her condition would mean a suspension of the criminal charge that she would face – a clear tampering of justice which in itself creates injustice.

[355] *Ibid 352.,* p.4

Murphy considers two articles which he dubs 'the two most interesting articles on mercy' – they are those by *Alwynne Smart*[356] and *Claudia Card*[357]. They both – *Smart* especially – seek to argue that there is indeed a place for mercy in the process of delivering justice by developing a discussion of the issue focusing on specific cases – cases which will test and measure our institutions so we can be at par about the issues of justice and mercy.

To begin with, *Smart* asks that we consider a pair of fictional cases – cases that may well come before a judge having some discretion and not bound by any mandatory sentencing rules. Our first fictional case is the case of *A* – there are two main facts to know about this case;

(1) the defendant, convicted of vehicular homicide, had his own child - whom he loved deeply – as his victim.

(2) the defendant is a young and inexperienced criminal.

Our second fictional case is the case of *B* – its two main facts are as follow;

(1) The defendant has been convicted of killing another person in cold blood.

(2) The defendant is a hardened career criminal.

Smart opines that we would all agree to a judge imposing a lighter sentence on the defendant in case *A* than the defendant in case *B*, and that it would be proper to express our conviction about what he should do by using the word mercy – i.e. the judge should show mercy in the case of *A*.[358]

[356] Smart, A. (1969), *The Philosophy of Punishment,* 1st edition, New York, St. Martin's Press, pp.212-227
[357] Card, C. (1972), Mercy, *Philosophical Review,* 43, pp.182-207
[358] *Ibid 352.,* p.6

Murphy asks us to suppose – for the sake of argument – that *Smart* is right here and that it is proper for the judge to go easy on the defendant in case *A* and such easing up would be referred by many as an act of mercy – but it is 'philosophically confused, says *Murphy,* and an obstacle to philosophical clarity on the concept of mercy.'[359]

He opines that 'if we feel the judge should go easy in the case of *A,* then this is so because we believe that there is some morally relevant feature that distinguishes the case of *A* from the case of *B* – this morally relevant feature is justice. For as *Murphy* puts it;

"to avoid inflicting upon persons more than they deserve, or to avoid punishing the less responsible as much as the fully responsible, is a simple ... demand of justice ... morally relevant differences between persons should be noticed and our treatment of those persons be affected by those differences. This demand for individualisation ... is ... what we mean by taking persons seriously as persons and is thus a basic requirement of justice."[360]

[359] *Ibid*
[360] *Ibid*

So in other words, according to *Murphy* what we most at times consider to be a show of mercy is not a show of mercy at all, but rather the operation of justice. Thus if a judge were to apply Murphy's reasoning here to our earlier scenario involving Ginger, a pardon in that case would not amount to a show of mercy – rather, Justice – and it is so because it is a basic demand for justice is that the relevant thing which differentiates Ginger from everybody else – i.e her disability and therefore inability to appreciate risk – should be noticed and the Judge's treatment of her ought to be affected by the differential. To reinforce this point, *Murphy* goes on to assert that *"Judges … who are unmindful of the importance of individuated response are not lacking in mercy; they lack a sense of justice."*[361]

Smart introduces some further fictional cases in an attempt to capture a different and more important kind of mercy – seeing as not everyone will find her aforementioned fictional cases to be representative of mercy in any deep sense. The case of *Jones* is one of these and with regards to this *Murphy* asks us to suppose we agree that some punishment *P* is – all relevant things about Jones considered – the just punishment for what Jones has done but on moral grounds however, there is a counter argument that a punishment less than *P* should be inflicted. The facts of *Jones* to be most considered are three fold;

(1) Jones' family, who need his support, would be harmed to an unacceptable degree if P is inflicted on Jones. Thus, we ought to show mercy to Jones and inflict a punishment less severe than P.

(2) Adverse social consequences will result if P is inflicted on Jones – perhaps he is a popular leader of the political opposition … his followers will riot or commit acts of terrorism if P is inflicted on Jones. Thus, we should show mercy to Jones.[362]

[361] *Ibid 352.,* p.8
[362] *Ibid*

(3) *Jones has been in jail for a long time and has … reformed … he is, in a very real sense, a "new person". Thus, we should show him mercy ….*

Murphy asserts that these facts are unpersuasive. Here, mercy is based on some form of concern for the defendant and being sensitive to his plight. For example, in fact numbered one (1) above, the mercy that will be shown will be towards Jones' family. Jones himself will be but a simple indirect beneficiary of the mercy.

On this basis therefore, *Murphy* insists that there is a new paradigm for mercy (Private Law Paradigm) – which presents mercy as an autonomous moral virtue. He points out that this new paradigm is represented in a common play titled the *Merchant of Venice.*[363] In this play, a character by the name of Antonio makes a bad bargain with Shylock and, having defaulted, is contractually obligated to pay Shylock compensation. Portia, acting as judge, asks that Shylock show mercy to Antonio by not demanding the harsh payment. Being a case of contract law, this scenario differs from a criminal case where a judge has an obligation to do justice i.e at a minimum, an obligation to uphold the rule of law.

Thus, if a judge in a Criminal law scenario is moved even by love or compassion to act contrary to the rule of law then he acts wrongly – because he violates an obligation - and manifests a vice rather than a virtue – a Criminal Law judge must simply impose the just punishment, *Murphy* insists.[364]

[363] Shakespeare, W. Lamb, S. Nicol, D. (2000), *CliffsComplete Shakespeare's The Merchant of Venice,* 1st edition, Foster City, IDG Books Worldwide Publishing.
[364] Murphy, J. (1986), Mercy and Legal Justice, *Social Philosphy and Policy,* 4(1), pp1-14, p.10

A litigant - such as Shylock above – in a civil proceeding however, occupies a private role and does not have the sort of obligation to do justice that a Criminal Law judge would have. Thus if he chooses to show mercy, he is simply waiving his right to justice and *Murphy* argues that there is no paradox or contradiction here. Thus, within the Private Law Paradigm, mercy is revealed as an autonomous virtue which is the result of a person (the offended), who out of the compassion of his own heart, waives his right to justice in order to free the offending individual from the burden of the obligation to pay back. The offended can waive his right to justice by showing mercy because unlike a judge within the Criminal Law Paradigm, he has no obligation to do justice – therefore, he can show mercy. To *Murphy* therefore, mercy and other factors like it can function within Law – and *Murphy* suggests to us that Law can accommodate mercy within the Private Law Paradigm at least.[365]

Murphy's take on our little girl's (Ginger) case therefore would be to say that though Mercy is an autonomous virtue and can be accommodated within the paradigm of Private Law, in Criminal Law a judge sitting on such a case such as Ginger's has a certain obligation to do Justice – and doing Justice means considering those *particulars* which differentiates Ginger from everybody else i.e. her diminished responsibility.

[365] *Ibid.,* p.13-14

3.3 Detmold's Practical Reasoning Thesis[366]

Detmold on the other hand focuses on the practicality of law and the reasoning associated with it. He asserts that Law is practical and Legal Reasoning is practical reasoning. To illustrate this, an analogy involving a judge is presented; we could make nothing of a judge - Detmold says - who having listened to counsel's arguments and reflected about the law governing his case thought that the state of knowledge he had achieved was the natural termination of his enterprise and submitted his conclusions to the editors of Halsbury's Laws of England rather than performed the action of giving judgement.

The parties would be outraged and rightfully so. Legal reasoning is practical 'in the sense that its original conclusion is an action i.e the action of giving judgement in the judge's case, rather than a state of knowledge.' [367] Thus, *Detmold* aims to strike a contrast between practical and theoretical thought. Practical thought – he writes - has 'action' as its natural conclusion, whereas the natural conclusion of theoretical thought is knowledge.[368]

If action is indeed the natural conclusion of practical thought as *Detmold* suggests, then a judge must at all material times engage in practical thought so as to be able to perform the action of giving a judgement. According to *Detmold*, a judge's practical reasoning towards the action of giving judgement has 'priority for our understanding of law over the vast range of practically idle things that lawyers do. It is a priority of practicality, not a priority of judges or lawyers.'[369]

[366] Detmold, M. (1989), Law as Practical Reason, *Cambridge Law Journal,* 48(3), pp.436-471
[367] *Ibid*
[368] *Ibid*
[369] *Ibid*

Detmold seems particularly keen to emphasis practicality as the priority of Law because he sees court-centred legal theory as an undesirable thing and frowns upon it with the opinion that it ought not to be the operating theory in the legal process. *Detmold* seemingly identifies court-centred theory to be one which places the application of legal doctrines and dogma above the practical and sometimes common sense arguments of a citizen on trial in court. He sets out this opinion in the following way:

'Law is for citizens before judges – judges are for citizens, not citizens for judges – and there is something very wrong in a theory which overlooks this.'[370]

This point is somewhat opposite to what *Murphy* sees as a Criminal Judge's 'obligation to do justice by not being moved by mercy, love or compassion for the citizen.' *Detmold* shows how the practicality of judging – by judges - is inextricably linked to the practical judgement of the particular citizens concerned, by examining the place of reason in Law and assessing the particularity of practical reasoning - then drawing both of these together to present a theory of the practicality in Law.

Examining the place of reason in law means accepting that law itself is a type of practical reason. Detmold illustrates this by making reference to the case of *Thomas Conham v College of Physicians*[371]. In that case, Coke CJ proposes that there is a deep relation between Law and reason by asserting that:

'The Common Law will control acts of parliament … when an act of parliament is against right and reason, or repugnant … the common law will control it and adjudge it.'

[370] *Ibid 367.,* p.437
[371] 8 Co. Rep. 107

This statement suggests that at no point should the law be applied senselessly or just for the sake of it. Judges ought to refuse to apply a certain legal standard or a set of laws if its application makes no material or logical sense – such is the relationship between reason and Law - and though it may seem simple enough, *Detmold* warns that it is not. He maintains that the relationship is very complex and in order to even begin to understand it, it is necessary to identify and differentiate the four types of Law determining processes. According to Detmold, these are the adjudicatory process, the advisory process, the interpretive process and the legislative process.[372]

The result of the process of adjudication is that decisions are reached – as *Detmold* puts it – according to Law or right. A decision is never an automated consequence stemming from the application of a pre-existing norm to the particular case. The process of adjudication ought to be the stage upon which differing elements of the case interact to churn out an outcome that is right and reasonable.

The advisory process is seen by *Detmold* to involve the rendering of guidance on general propositions of law or right for the purposes of confirmation, exhortation, or warning. We usually see the advisory process serving the additional purpose of forestalling the some of the inconveniences of retrospective adjudication.

[372] *Ibid 367.,* p.437

The interpretative process seems to be the most complex of the four law determining processes Detmold cites – it is a process of 'explanation, exposition, particularisation, interpretation, or amplification of some pre-existing law or right.'[373] This interpretative process differs from the advisory process as espoused above – and Detmold points this out by branding the interpretative process as creative, one which goes further than just giving advice.

Everybody within the legal world, and even those without, believes that the courts play an interpretative role i.e. they interpret Acts of Parliament. *Detmold* however, is of a different persuasion. According to him, what the courts actually do is adjudication – the decision of particular cases – a task different from sub-legislative interpretation of the law. To dramatize this point, *Detmold* uses an analogy involving a fictional law on motor vehicles. Imagine, he says;

"that there is a law referring to motor vehicles which covers the class of motor vehicles … What we can now say is that the Law covers … a class of motor cycles. There is at yet no adjudication; just sub-legislative interpretation … Adjudication is the application of the class of the law (a, b, c … n) to a particular case."[374]

Therefore a particular moving projectile without the characteristics a, b, c … n would not be guilty of a traffic offence as it possesses not the characteristics of a vehicle under the fictional law in question and will not be covered by any sub-legislative interpretation of our fictional vehicle law.

[373] *Ibid 367.,* p.438
[374] *Ibid 367.,* p.439

An analysis of *Detmold's* statement as set out above will bring one to the conclusion that he perceives the terms of law – in the case of his example the characteristics a, b, c … n – to be *Universal* and thus part of the universality of the law. The *Particular* on the other hand, he considers to be the characteristics of the subject which the law is to be applied to. Thus in *Detmold's* view, the *Universal* and the *Particular* engage during the process of adjudication.

The legislative process, which is the last of the law-determining processes Detmold cites, is one that is different from the other three[375]. The difference – Detmold says – lies in the fact that the first three processes, though creative, 'determine the law from some sort of pre-existing base in law or right. Where there is no such base, or where the base is irrelevant to the processes, then the legislative process comes to the fore. My interpretation of this is that Detmold seems to be referring here to what H.L.A Hart calls 'hard cases'. Hart posits that on occasion, a case appears before judges with the facts such that there is no clear law which the judge can apply in order to reach a decision[376].

Thus, *Hart* says such a case is a 'hard case'. In such a case, the judge will have to give a judgement which will become the law governing later facts of that nature – unless Parliament legislates on the matter of course. It is clear therefore that in deciding hard cases, the court engages in a legislative process by handing down a decision which becomes the law and precedent for all cases of factual similarity down the line.[377]

[375] Shakespeare, W. Lamb, S. Nicol, D. (2000), *CliffsComplete Shakespeare's The Merchant of Venice,* 1st edition, Foster City, IDG Books Worldwide Publishing.

[376] Hart, H.(1961), *The concept of Law,* 1st edition, Oxford, Clarendon Press, 124

[377] *Ibid*

Another difference that sets the first three processes apart from the legislative process is reason - *Detmold* argues that reason is intrinsic to the first three processes. The fourth type - which is the legislative process - however, is one of 'will', having no reason intrinsic to it. This does not at all mean that the legislative process has no relationship with reason. After all, legislators do enact laws for a reason and their act of will in that regard is to be accepted or recognised only in as far as it is reasonable. But it is still a pure act of will says *Detmold* – there is no reason intrinsic to it.

By contrast, he says, when we look at the modern precedent of courts, we see what at first glance looks like a similar set of absolute norms – and according to the doctrine of precedent, the norm of a precedent is tied rationally to the facts. Thus if a new set of facts arises which is rationally distinguishable from the precedent facts, the norm of the precedent is not applied (hard case).

Raz[378] holds the firm view that legislation is there to address a problem, set a standard etc. If legislation does not in some way address the issue for which it was enacted, society would in truth have no legislation and it will result to deliberating the legislative question in its institutions. In such circumstances, *Raz* claims that we would be 'precluded from saying any legislation existed'[379].

[378] Raz, J. (1994), Ethics in the Public Domain, 1st edition, Oxford, Clarendon Press, pp.219
[379] *Ibid*

The relationship between Law and reason is indispensable and must therefore be recognised and fully considered by judges. Judges ought to apply only that which is reasonable to apply given the unique facts of a particular case. 'Reason' acts as the laws filter – without reason, Law as it is applied would be an unwanted burden on society, dehumanizing it and ultimately robbing it of its soul. Reason keeps this from happening – applying only what is reasonable to apply at any given time is the most enlightened form of adjudication and serves the best interests of Law as it relates to society. With regards to our 'little girl'(Ginger) therefore, one of the things that *Detmold* would say is that the judge ought to pay attention to the particular citizen, the particular facts surrounding that particular citizen and apply the Law as reasonably and practically as possible.

The '*Universal*', as *Detmold* refers to it, is the Law in general i.e statutory provisions or case law, whereas the particular is the person or personalities to which the law is being applied. As per Detmold's illustration above, considering the *particular* within a given process of adjudication is what makes law practical. Without the *particular*, the application of the law would be purely theoretical and its effect would be of the same and it would no longer be a practical process. When *Particularity* becomes absent from Law, Law works against the very individuals of society it is meant to protect.

We cannot discuss '*Particularity*' and '*Universality*' as they relate to the Law without mentioning the particularity void. The Particularity void as described by *Detmold* is the gap between a rule (the universal) and its application – it is respect for the *Particular*. What this means is that 'there is a difference between asking whether a rule is reasonable and whether it is reasonable to apply a rule. In other words, it is in *Particulars* and not in *Universals* that actions must be grounded. An assessment has to be made each time a decision is made as to whether the conditions of application have been met.'[380]

It also means that a judge taking into consideration certain characteristics of a defendant in reaching a conclusion does not at all mean that the *Particular* is being respected, thus making the ensuing judgment impractical because it does not 'cross the void' – the negotiation of the particularity void 'depends upon the particular in respect of which action is contemplated, speaking for itself, seeing as humans are just particular arrangements of the matter of the universe,'[381] *Detmold* says.

[380] Maclean, J. (2012), *Rethinking law as process,* 1st edition, Milton Park, Abingdon, Routledge, p.25
[381] *Ibid 367.,* p.459

Further to all this is the issue of 'action.' *Detmold* argues that action is purposeful and law is a philosophy of action. Law must therefore be purposeful and have purposeful ends – a practical enterprise concerned with guiding, influencing or controlling the actions of citizens. If this is true – if Law is an enterprise aimed at guiding and controlling the actions of citizens, then *Particularity* ought to lie at the very heart of the application of Law – for it is directed towards citizens who are particular and its main aim is to shape their conduct, which is also particular. Thus, *Detmold* confirms that action is necessarily particular in two forms;

"First an action must be in relation to a particular or set of particulars ... For there to be an action there must be a particular purpose or end of a particular agent."[382]

Therefore, in the case of our 'little girl'(Ginger), *Detmold* say that the *Particular* must be respected in her case, otherwise the process of adjudication will be merely theoretical and not practical – that would not be Law.

[382] *Ibid 367.,* p.461

3.4 Doing Justice To Particulars[383]

Scott Veitch's contribution to the debate is based on the difference epistemology and justice. Whether through the form of a particularity void or an aporia, the question of doing justice to the particular is the focus of modern critical theory.' Unlike *Detmold*, *Veitch's* main argument here is 'that such theorizing (particularity void etc.) loses sight of the locations of decisions, shifting its gaze mistakenly to the very detriment of an analysis of justice.'[384]

To state things more clearly, the problem with the debate as identified by *Veitch* is that theorists treat the link between the *Universal* and the *Particular* as something that is from within as the central concern of analysis - in the matter of doing justice to particulars, Veitch argues that it is the process and context which counts and aims to use mercy to illustrate this. He draws on the work of *Detmold* and *Simmonds* as they have both considered mercy in terms of the issue of *Particularity*.

Simmonds argues that treating the exercise of mercy as taking place in the gap between the *Universal* and the particular is wrong and misguided. Mercy conveys the importance of *Particularity* over and against the abstract *Universality* of *Justice* and *Law*. *Simmonds* however, strongly rejects the postulation of the particular as existing in itself. He asserts: *'since a total description of any concrete situation is impossible and inconceivable, all descriptions must be more or less abstract.'*

[383] Veitch, S (1998), Doing Justice to Particulars, In *Communitarianism and Citizenship,* Ed. Emilios Christodoulidis, Aldershot: Ashgate
[384] *Ibid.,* p. 220

In refusing to accept the independence of the particular, *Simmonds* conveys the message that he views the construction of it as a matter of relations between abstracts. To him particulars are created within contexts and what changes as regards the description of particulars is the context. It is in this sense that one cannot be faithful to the particular in itself because the particular as such does not exist.[385]

Veitch tries to explain what *Simmonds* means when he says a 'total description of any concrete situation is impossible and inconceivable':

there is a difference between the inevitable ignorance of all possible descriptions, and the inadequacy of doing justice to a particular according to the values rules or standard involved.

For *Veitch,* 'the postulated relation between the *Universal* and the *Particular* cannot fully grasp the degrees of norms and normative contestation which exist across the spectrum of activities, i.e. friendship, marriage etc., within which it is possible to be just or otherwise. The relation when put in terms of *Universal-Particular,* is the same, and so cannot develop our analysis of justice in the matter.'[386]

Veitch considers *Detmold's* point of view on the matter in a bid to draw contrast. He recollects *Detmold*'s views on the particularity void especially.[387] *Detmold* suggests to us that there exists particular situations, practical problems which universal reasoning does not solve – and that the whole problem is that no reasoning can solve it. It is particular about which nothing can be said.

[385] *Ibid*
[386] *Ibid 384.,* p.228
[387] *Ibid*

To illustrate his point, *Detmold* draws our attention to a point in *War and Peace* where *Pierre* is brought before Davout – suspected of being a spy – and is saved by a look he gives Davout – a look which made them both realise that they were both children of humanity and were brothers. Of this *Detmold* assesses that Davout the judge, at the moment of practicality entered the un-answering void of particularity, the realm of love, about which only mystical things can be said or nothing at all.

Veitch begs to differ however, saying that *Detmold*'s perception in this regard couldn't be further from the truth:

In this case (Davout and Pierre) the two know only minimally of each other. The silence … in which the particularity void is thought to consist has its roots not in any particularity or event or singularity, but on the contrary exists in the perceived possibility of one of the most abstract.[388]

In other words, *Veitch's* view is that the Particularity void does not exist at all – he argues it away by using the illustration of Davout and Pierre to demonstrate that the gap between the rule and its application has no founding or basis in particularity or singularity but rather has foundation in some abstract principle. Simply put, particularity has nothing whatsoever to do with the gap.

In *Vietch's* view therefore, our little girl (Ginger) and the *Particularities* surrounding her cannot be seen or considered by Law – and her voice is not heard because to Law the *Particular* does not exist – she does not exist.

[388] *Ibid 367.,* p.229

3.5 The Irrationality of Merciful Legal Judgement[389]

Christodoulidis posits that the notion of merciful legal judgement is wholly irrational, and he asks whether the integrity of our legal system is not being belittled by the arbitrariness of mercy and whether mercy compromises the rationality of legal judgement. Mercy is undoubtedly an important factor in this debate and it is important to define mercy and its relationship with justice because considering the particular in a process of adjudication could mean two things; it could firstly mean that justice is prevailing or it could mean that mercy is being shown.

If justice is prevailing then that is okay seeing as that is the one primary objective of the law. However, if considering the *Particular* in a given process of adjudication equals mercy then we have a problem which is in the form of a paradox seeing as the objective of mercy is to suspend the prevalence of justice. *Christodoulidis* realises this and uses the National Reconciliation Process which went on in post-apartheid South Africa to illustrate. A Truth and Reconciliation Commission was established in 1995 in South Africa to act as a 'public confessional' – a platform on which people who had tortured, committed various crimes during the apartheid era and the victims of these crimes could come forward and tell their stories.

According to the Interim Constitution at the time, the individual's accounts would be addressed on the basis that there is a need for understanding and national healing, not vengeance or recrimination. This ultimately meant that at the end of the process there was going to be the granting of amnesty and pardon for people who had committed very hideous crimes. This recipe of Law mixed with mercy is one that is conceptually problematic. Of it, *Christodoulidis* writes that:

[389] Christodoulidis, E. (1999), The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular, *Law and Philosophy Journal,* 18, pp.215-241

Even before we explore … the notion of particularity or the particularity void, we encounter a prima facie paradox: forgiveness is of necessity personal response that belongs to the realm of ethics and thus in tension with formal justice.[390]

In other words, *Christodoulidis* is of the view that the particular and the particularity void are strongly linked to mercy/ forgiveness and thus belong to the world of ethics – they belong to this domain because mercy/forgiveness is in tension with justice.

The crux of his argument is that in order to consider the *Particular*, Law would have to cross the particularity void and from its general abstract categories, reach down to address the particular – this reaching down, he says, is impossible. *Christodoulidis'* views can be attributed to his perception of the particular, mercy, forgiveness and their relations with justice. *Christodoulidis* argues that there is a clear departure from justice here i.e mercy, made possible by the law's consideration of the *Particular.*[391]

Very much like *Veithch*[392], *Christodoulidis* cites the work of *Nigel Simonds.* As previously stated, *Simmonds* rejects the idea that the *Particular* exists. He agrees with *Simmonds* but disagrees with *Veitch* when he suggests that we seek particularity not in the most abstract and thus meaningless singularity but in the flowering of commonality.

In disagreeing with this *Christodoulidis* asserts that '*neither the spontaneous emergence of the pattern of commonality nor the containment criteria for assessing appropriate action can occur in law …'*[393]

[390] *Ibid*
[391] *Ibid*
[392] *Ibid 384*
[393] *Ibid 390.,*p. 223

Christodoulidis also has a difference in opinion to *Detmold* with regards to the particularity void. He argues that the void must be seen and understood as a complexity deficit- a deficit between the 'infinite possible understandings of a *Particular* and its legal determination.

Christodoulidis has his own interpretation and opinion of the scenario from *War and Peace* as presented by *Detmold* and spoken of by *Veitch*[394]. He asserts that *Davout, 'faced with his borther Pierre, finds his reasons for his decision in compassion and not in Law. Law is already there dictating reasons to act … the law tells Davout he must kill Pierre. And it is only compassion that allows Davout to defy law's justice and encounter Pierre as a brother. To claim this can be accommodated within law is to stretch the plasticity of law to a point beyond recognition.'*[395]

The 'point beyond recognition' which *Christodoulidis* talks of is a point where we find that we are not actually functioning within Law because we begin to make certain considerations (the *Particular*) which takes us outside of Law. Our movement outside of Law is propelled by the fact that the considerations (the *Particular*) is invisible to Law, *excluded* by Law and cannot therefore be addressed by it. Law cannot see it – Law therefore excludes it, Law throws it out - Law throws us out. *Christodoulidis* refers to the exclusionary reasons of Law to prove this.

[394] *Ibid 418*
[395] *Ibid 384*

The idea of exclusionary reasons was brought about *by Joseph Raz* in his much acclaimed work *Practical Reasons and Norms.*[396] Law's exclusion of the *Particular* is an action by Law – and as is the case with all actions, there must be reason(s) provided for exclusion. Having set the concept of a reason for action at the centre of practical philosophy, *Raz* draws an important distinction between first and second order reasons for actions.

First-order reasons are reasons to perform an act; they go into a balance where their relative weights are decided. Second order reasons are to act for a reason. They may be positive (such as a reason to act on the basis of the weightiest first-order reason) or negative (a reason not to act for a reason), the latter is what Raz terms *exclusionary*.[397]

In *Raz's* view, in so far as Law gives you a reason to do what it tells you to do, it also gives you an exclusionary reason, which is a reason not to act on particular contrary reasons, such as self-benefit. Although the contrary reasons are genuine reasons, *Raz* argues that they do not weigh against Law's reason.[398]

So in a case where one ought to keep the law, the explanation of why one ought to keep it is not simply that the reason to keep the law outweighs opposing reasons. It is more complicated than that; it involves the exclusion of other reasons.[399] We can thus say that exclusionary reasons are not reasons not to act on other reasons, but rather reasons why other facts (like the *Particular*) do not become reasons.[400]

[396] Raz, J. (1975), *Practical Reason and Norms,* 1st edition, London, Hutchinson Publishing
[397] Christodoulidis, E. (1998), *Law and Reflexive Politics,* 1st edition, Dordrecht, Kluwer Academic Publishers, pp227-228
[398] Wallace, J. Pettit, P. Smith, M. 2006, *Reason and Value,* 1st edition, Oxford, Oxford University Press, pp47-48
[399] *Ibid*
[400] Hage, J. (1997), *Reasoning with Rules,* 1st edition, Dordrecht, Kuwer Academic Publisers, pp 19-20

Raz claims that the whole idea of exclusionary reasons is deeply important in distinguishing rules from other non-rules and that the exclusionary function is distinctive of, among others, roles, legal rules and legal systems. With all these, balancing of first-order reasons is blocked: an exclusionary reason stands in for the background arguments that justify it, preventing recourse to those arguments.[401]

The reason for having rules as reasons to act is that they are time and labour saving as well as reduce the possibility of errors in practical reasoning. More importantly, they underline normative expectations, and equip people with the prima facie certainty that others will act in a certain way no matter how they might resolve balancing reasons or themselves.[402]

This, of course, is particularly opposite to the Legal System whose function is to use the litigation of conflicts to stabilise normative expectations across society – that is, to allow certain expectations we have of others in social interaction to remain unquestioned even when they are sometimes disappointed because people break the rules. For rules to function properly in eliminating other reasons for action exclusionary reasons must be resistant and immune from the need for re-examination with a view to revision on the occasions in which they apply.[403]

But must this be the case on every occasion, *Christidoulidis* asks. Or do disregarded reasons occasionally become significant enough to waive or cancel their exclusion? So that, for example, one might waive a rule in the name of mercy for a particular instance, *Christodoulidis* asks. Revisability he says, is the important question here which, surprisingly, the theory is ill-equipped to answer – and he uses one of *Raz*'s example to prove this.[404]

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[401] *Ibid 397.,* p.139-140

[402] Veitch, S (1998), Doing Justice to Particulars, In *Communitarianism and Citizenship,* Ed. Emilios Christodoulidis, Aldershot: Ashgate

[403] *ibid*

[404] Raz, J. (1994), Ethics in the Public Domain, 1st edition, Oxford, Clarendon Press, p.226

The example is one which involves a woman named Ann, who decides not to make important financial decisions when she is fatigued, her regarding that as a reason for disregarding other reasons for action is what makes it exclusionary and therefore her exclusionary reason. A *Particular* financial case is not weighed up on its merits against the fatigue (that would be a conflict of first and second order reasons); the balancing is simply cancelled.[405]

Christodoulidis writes that this example is very unhelpful because it presents itself as a balance of thresholds. This balancing of thresholds resurrects precisely the thresholds that *Raz* wants ignored: to ask whether x is an important enough decision to be deferred presents precisely the kind of problem that exclusionary reasons were meant to have immunised us from. This however, does not mean that the exclusionary logic isn't at play. It is thus *Christodoulidis'* argument that Law's exclusionary logic is entrenched to the extent that first-order reasons cannot touch it.[406]

The exclusionary effect is of great value and it greatly facilitative for practical reasoning. It insulates our decision-making from always needing to take on board all the considerations that inform all reasons. There are obvious advantages to putting such an obstacle in place; most importantly, we are able to entrench and prioritise the reasons that we value most.[407]

[405] *Ibid*
[406] *Ibid 390*
[407] *Ibid 390*

Fortunately or unfortunately however, where there are gains, there are losses as well. *Christodoulidis* realises this and asks the question of how easy it is for us to dis-entrench and revise the reason for action having already entrenched it. The entrenchment occurs because the exclusionary reason elevates certain reasons over and above competition and also significantly stands in for those reasons. This means that unlike first-order reasons, second-order reasons because they either exclude or entrench the first-order reasons.[408]

The reversibility of exclusionary reasons, therefore, most certainly cannot be done by resurrecting the first-order reasons – seeing as they are invincible at the exclusionary level having either been excluded by kind or substituted (entrenched), argues Christodoulidis. This is because to allow competition between first and second-order reasons would be to turn the second-order reason into a first-order one, and in the process render it meaningless.[409]

Christodoulidis argues that the operation of exclusionary reasons therefore has a reductionary effect in the legal system. This argument begins with the generalisation of Law. *Christodoulidis* describes generalisation as an abstraction that is specific to a system, in our case the legal system. Each system does the job of actualising, from its own point of view, what it holds significant – and builds into its generalisations, at the same time suppressing features significant to other observes, features of the particularity of the thing as other-wise observed. This is the reductionary effect – and it is the particular that is reduced.[410]

[408] *Ibid390*
[409] *Ibid 390*
[410] Raz, J. (1994), Ethics in the Public Domain, 1st edition, Oxford, Clarendon Press,, p.236

Christodoulidis cites Law's aim of providing unequivocal stability of expectation and eliminating complexity from its processes as the main reason for this reduction. Without this reduction Law has no distinctive feature. However, conceding these reductions, *Christodoulidis* says, is also making a concession away from and against the reflexive of thinking things through in terms of appropriateness (whether it is appropriate in a given scenario – like that of the 'little girl' to apply a law), compassion, love and mercy.[411]

As such, *Christodoulidis* concludes that paradox of mercy is centred on the problem of the *Particular* and the particularity void. Law appears to miss it because of its exclusionary reasons and subsequent reduction – mercy tries to address it but does so by defying Law itself. In *Christodoulidis'* view, *Veitch* and *Simmonds*' arguments were attempts to argue away the paradox and reconcile mercy with legal judgement.[412] *Simmonds* did this by arguing away the particular as meaningless – as the most abstract of abstractions – then argued that judicial thinking is uniquely appropriate for doing justice to 'relative *Particulars*'.[413]

Veitch argued that the exercise of mercy is not an appeal to the mystical particular but relies on justifying criteria. He then advanced an argument regarding the appropriateness of criteria for judgement that relied on an inductive move – justice and mercy can link in a judgement about the appropriateness of the application of law in the case at hand; and he argued for the possibility of tapping a commonality in an inductive way, that might possibly allow a re-conceptualisation of a case as appropriate to mercy[414]

[411] *Ibid*
[412] Veitch, S (1998), Doing Justice to Particulars, In *Communitarianism and Citizenship,* Ed. Emilios Christodoulidis, Aldershot: Ashgate
[413] *Ibid 390*
[414] *Ibid 390*

Christodoulidis' arguments are different to *Veitch* and *Simmonds*. His recourse to the theory of exclusionary reasons was aimed at re-instating the paradox of mercy. Unlike *Detmold*, he argued that the particular can be meaning-fully invoked but not within Legal Judgement. This, according to *Christodoulidis*, is because the very logic of legal judgement is exclusionary in having substituted and entrenched the *Particular* at a level where its operation can no longer address it.[415]

Particularity can only be addressed, says *Christodoulidis*, by reverting back to the domain of high complexity which would in fact undo Law as an institutional achievement. Given the exclusionary and reductive nature of Law, considerations of formal justice cannot yield to considerations of appropriateness as would be minimally required by mercy in cases like that of our 'little girl.' Law does not contain the possibility of such a challenge. In being exclusionary, Law is not being reflexive. Reflexivity is an invitation to think something through, a reduction is an (exclusionary) reason not to. The problem for mercy and other factors like it is that it invites a reflexivity that Law cannot accommodate. [416]

Christodoulidis states that 'we know that the real lesson to be taught is that the human person is precious and unique yet we seem unable to set it forth except in terms of ideology and abstraction'. Legal judgement cannot address this or complement it. Rather than attempting to recover this loss in a field that has no room for it, *Christodoulidis* urges us to turn to ethics in regards of the *Particular* - that is where it can and will be addressed, not in Law, *Chrsistodoulidis* argues.[417]

[415] *Ibid 390.,* p.237
[416] *Ibid 390*
[417] Murdoch, I (1953), *Sartre Romantic Rationalist,* 1st edition, New Haven, Yale University Press

CHAPTER 4

4.1 INTRODUCTION – REALISING THE ALTERNATIVE: AVOIDING EXTREMES

The purpose of this Chapter is to articulate, discuss and defend the solution which this *thesis* puts forward to address the issue of wrongful convictions/miscarriages of justice. It has been demonstrated in previous Chapters that wrongful convictions/miscarriages occur when Legal-decision making is locked within extremes. It will be shown in this Chapter and the Chapter following, that an approach to Legal-decision making which involves avoiding extremes (*middle decision-making)* is best suited to address the issue of wrongful convictions/miscarriages of justice. The solution that this *thesis* puts forward is also best suited to demonstrate how a Judge might mitigate the negative effects which stem from Law's Systematic processes and which often give rise to wrongful convictions/miscarriages of justice.

4.2 Systems Theory – Bankowski's Take

Bankowski's views on System's theory are mostly accumulated in his work *'How does it feel to be on your own'*[418]. *Bankowski* looks at the standing of the individual person in the frame of autopoietic Law on writing about what he calls '*Gunther Teubner's* 115th Dream.' In this dream, *Bankowski* finds himself in a city full of disorder and 'awash with noise'. He describes himself as being a detective of some sort, working on 'the Paradox case', one of the biggest robberies of all – a case that many investigators in legal science had been unable to crack. Everyone knew the 'Teubner mob' to be responsible but they couldn't pin anything to them – and the police had tried everything but nothing would stick. *Bankowski* describes that he had been hired as a detective/investigator to 'deconstruct the case' i.e. break it down and make its 'ugly antinomies' clear.[419]

This was more than a job for *Bankowski* – it was quite personal – he had lived in this city as a child – he wanted to recreate the world that he had known then, before a group he calls 'the paradox boys' moved in and took over. You couldn't put your finger on truth or reality in the city anymore – everything solid melted into air – *Bankowski* was determined to crack the case even if it meant using a thousand references.[420]

Bankowski sought help from 'Blind Legal Evolution' – perhaps he could help, *Bankowski* thought – help make sense of the fog of self-constructed meaning which was the city. *Bankowski* catches up with 'Blind Legal Evolution' in the 'Enlightenment club' – He was however of no help, *Bankowski* narrates – a sad case who was lost in in the hot atmosphere of his own reality was he.[421]

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[418] Bankowski, Z. (1994), How Does It Feel to Be On Your Own? The Person in the Sight of Autopoiesis, *Ratio Juris,* Vol 7(2), pp.254-266
[419] *Ibid*
[420] *Ibid*
[421] *Ibid*

The noise in the club was getting louder – more and more communicative events were being spawned and *Bankowski* could not communicate with anyone/anything outside the city. He knew he had to leave or get lost in some strange hyper cycle. Seeing Blind Legal Evolution had terrified *Bankowski* – he was clueless, had no idea where he was going – lost in his own world. Nothing outside his own world could make contact with him.[422]

There was no point in asking and looking for help – you had to forget about the outside and be sensitive to the city's noise. *Bankowski* had to construct his own meanings – he let the seductive pull of the regulatory trilemma take a hold of him. Things were beginning to make sense – things were getting clearer – he could see the answer. Suddenly a loud noise filled the continuum – he realised it was God laughing – everything was clear.[423]

Bankowski is illustrating his version of Law's autopoetic environment by narrating this dream. It is an environment that is clouded – an environment where communication with elements outside of it is impossible – an environment which cannot be bothered by anything outside of it – an environment that is very much steeped in its own traditions, its own way of doing things – an environment that cannot be easily deciphered, one who's operations can be predicted – such is Law's autopoeitic environment – its *Universal* nature.

[422] *Ibid*
[423] *Ibid*

4.3 Law's Autopoeisis

An autopoietic system produces and reproduces its own elements by the interaction of the elements within it. According to *Luhmann*[424], the man representative of social autopoiesis, the decisive innovation in comparison to older theories of self-organisation is that certain systems are capable not only of creating an autonomous order, but of creating their own elements as well – and Law is such a system.[425]

The cornerstones of legal autopoeisis are a conception of Law in particular and society in general as networks of communication; the existence of a degree of social complexity that calls for a high level of functional differentiation; the generation of conflict as a means to the creation and application of legal norms; self-referentiality and circularity; the legal (sub) system's normative closure combined with its cognitive openness toward other spheres of social interaction construed as the legal system's environment.[426]

Autopoiesis is very much based on biological research – where organic cells replicate themselves into organic subsystems. *Humberto Maturana* generalised systems theory to explain homeostasis – a natural biological state kept stable by complex systems of information and control such as the chemical messages that exists within cells. *Maturana* also posed the question of whether it can be said that the dynamics of human society can also be determined by autopoiesis.[427]

[424] Luhmann, N., Albrow, M. & King-Utz, E, *A Sociological Theory of Law,* New York, Routledge Publishing
[425] Teubner, G. (1987), *Autopietic Law: A New Approach to Law and Society,* Berlin, W. de Gruyter Publishing, pp.3-8
[426] Rosenfeld, M. (1998), *Just Interpretations: Law between Ethics and Politics,* Los Angeles, University of California Press, pp.100-108
[427] Varela, F. &Maturana, H. (1980), *Autopoiesis and Cognition,* Reidel, Dordrecht Publishing, pp.78-82

Luhmann took up the task of attending to this question – and in doing so used autopoiesis to explain why people within institutions such as companies, political parties, or universities create their own kind of reality and meanings. In his eyes, communication takes the place of metabolic pathways in creating autopoiesis within human social systems. Roughly the whole of society is fragmented into institutions that use language to communicate in their own way and this perceive reality form their own perspective – their own reality. Society is divided into different social systems, with each undergoing some form of autopoietic development. The legal sub-system is no exception to this – it too is constructed by particular sets of self-referential and self-reproducing discourses.[428]

Teubner has taken from autopoiesis theory, the idea that law is found in binary legal/illegal discourse. He believes 'the binary code legal/illegal is not peculiar to the law of the nation state – this is in no way a view of 'legal centralism'. It refutes categorically any claim that the official law of nation states enjoys any hierarchically superior position. By locating law in all discourses conducted in the legal/illegal mode, Teubner sensitizes the analysis of legal transfers to transplantation effects occurring beyond the realm of state-based laws and legal mentalities.[429]

Bankowski interprets *Teubner's* take on autopoiesis to mean that a social sub system such as Law can be conceptualised as something that 'thinks' for itself – independent of the minds of individual actors or, indeed, of other systems. The Law is a system of meaning which creates its own objects and criteria of truth. It is these objects and criteria that determine its cognition – the way its thinks and perceives. All inputs coming from other systems such as the economy, politics, education and even individual actors are routed through and filtered by these criteria.

[428] *Ibid 425*
[429] Gillespie, J. (2006) *Transplanting Commercial Law Reform,* Aldershot, Ashgate Publishing Company, pp.24-26

The inputs from these other subsystems will only be recognised by Law if they are transformed into legal knowledge – then and only then will Law make sense of it and call it 'proper knowledge'.[430]

So the system, though it inhabits an environment which is composed of other systems, is radically solipsistic says *Bankowski*. It works by reproducing itself in terms of its own elements – nothing outside of that exists to it. Law is always producing Law, *Bankowski* says, and we cannot from a legal point of view ask 'what produced that'. Law justifies itself – and once in the system there is nothing outside of it except that which the system creates.[431]

This is so because Law has a code. The differentiating-out of a system occurs when one difference acquires primacy, marginalises and re-aligns other differences to it, and in a sense then first enables the new system's observations to 'crystallise' around it and the complexity of the world to be reduced to this difference.[432] The code underpins the reduction on which totalisation depends. Other distinctions, operative in other systems, are re-aligned to this central difference that renders all the variances and contrasts understandable because relevant to the difference the system to view the world.[433]

[430] *Ibid 419.,* p.256
[431] *Ibid*
[432] Luhmann, N. (1990), *Essays on Self-Reference,* New York, Columbia University Press.
[433] Christodoulidis, E. (1998), *Law and Reflexive Politics,* Dordrecht, Kluwer Academic Publishers, pp. 88-100

Law as a system is so radically indeterminate, *Bankowski* says. This means that it is something much more than a 'trivial machine'. A 'trivial machine' for *Teubner*, is one that is synthetically determined, it is one to which and to whose operations causal explanations are appropriate. If one fully understands its mechanisms, one will be able to predict what will happen in the future. Law on the other hand, argues *Bankowski*, has to be understood as a self-producing system of meaning. The operation of Law is very much dependant on its inner states, it would have to be defined as a 'non trivial' machine.[434]

Bankowski uses another analogy; the difference between a lecture and a free-wheeling interactive seminar. The lecture can be explained casually and one can explain why what was said was said. A thorough knowledge of the subject matter should in principle give one an understanding of what is said and the possibility of predicting it. The lecture will take place and each point made will not change the fundamental basis of the lecture or the possibility of predicting what will happen next – it is therefore independent of time.[435]

The seminar however will be quite different – though one will be able to casually explain what comes out of it, a knowledge of the participants and the initial subject matter will not enable one to understand the outcomes or predict what will be discussed next in the seminar. What is talked about in the seminar thus becomes unpredictable seeing as each intervention by a student will alter the basis of the seminar, re-evaluate its trajectory and lead somewhere totally new. *Bankowski* says this analogy demonstrates that autopoiesis is very useful in explaining the regulatory failures in society.[436]

[434] *Ibid 419.,* p.256
[435] *Ibid*
[436] *Ibid 419.,* p.257

In taking the 'University analogy' a bit further, *Bankowski* asks us to suppose that the 'free-wheeling seminar' as discussed above, engages in a session where the topic of discussion is centred on the draft translation of a book in order to help the translator with difficulties in the meaning. The translation can be thought of as the input into the system – gradually, the seminar behaving in the 'non-trivial' way that *Bankowski* describes. The seminar still has the translations before it, but its significance has become transformed. They are no longer draft translations to be discussed with a view of helping the translator – they form pegs upon which a discussion can hang.[437]

Slowly, the translation begins to disappear altogether, argues *Bankowski*, the seminar keeps referring back not to the translation, or even its subject matter, but to previous points that it has discussed. The translation is still there in the background – and when it does come up, it is only seen in context of what the seminar is now talking about. It will be seen as an aid in understanding the particular problem that the seminar is now dealing with. The seminar would have taken on a life of its own and our translator's plans would be upset.[438]

This illustrates an understanding of the legal process, its limits and the problem of how the individual human being – like a *Truscott, Driskell, Milgaard, Marshall, Sophonow* or our little girl fits into Law's equation – or doesn't even fit at all. *Teubner* expresses this vision of autopoiesis as Law's capacity to 'think' separately from the actors in the process – it is the legal system which 'thinks' and 'communicates', not the individual actors such as judges and lawyers.[439] Law has a way of taking a mind of its own – just as our 'seminar' takes a mind of its own – leaving the individual/translator lost in a heap of upset and frustration.

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[437] *ibid*
[438] *Ibid*
[439] Teubner, G.(1989), How the Law Thinks: Toward a Constructive Epistemology of Law, *Law and Society Review,* Vol 23(5), pp.727-757

According to *Teubner*, this outcome is one that Law is unable to prevent form occurring – not because it takes a mind of its own and precludes itself from being influenced by outside elements. The problem that *Bankowski* seeks to take on therefore is that autpoiesis assumes a loss of the 'human voice'

4.4 The Individual the System Doesn't See – Responsibility Evaded

Teubner is of the opinion that "psychic systems" i.e. individuals, do not take part in the construction of social systems. Thus, if human beings did not exist - a social system would still have meaning – the world would still have significance. One would of course argue against this, favouring the argument that human beings are essential to the existence of social systems – that human beings are necessary bearers of the social systems.[440]

For *Teubner* and the autopoiesis theory, 'human bearers' are only elements in the system and not human (psychic systems). So in fact, argues *Bankowski*, the theory assumes the functional equivalence of the non-existence of human beings.[441]

For *Bankowski*, this means that individual responsibility disappears into system responsibility. Therefore the system is to blame for any misfortunes that occur, not individuals. This, *Bankowski* argues, leads to peculiar paradox common among middle class radicals. They absolve themselves for their life styles because the system is to blame; but they do not absolve the 'real' capitalists on account of the system. The attribution of responsibility therefore becomes random and capricious.[442]

This leaves *Bankowski* asking questions; how do individual constructs map unto psychic systems? How and by what principle, do we attribute bits of communication to human beings? Whatever the things that humans are made of, we are autopoietic psychic systems. What does this mean? Well, put quite simply, it means a continual self-observation and self –production of self. A paradox ensues however when self-observation has to apply, within the system, the distinctions it works with to itself.[443]

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[440] *Ibid*
[441] *Ibid 419.,* p.259
[442] *Ibid*
[443] *Ibid 419.,* p.260

For *Teubner*, as soon the distinction (lawful/unlawful) is applied in law, it poses a threat. If there's any pretension to universality then that distinction will be applied to itself.[444] *Bankowski* says therefore that the self (psychic system) then continually observes itself and finally has to apply the distinctions it works with to itself. These end in paradox and the system stabilises by accepting this ultimate paradox as the condition of its existence. We thus have a picture of fragile humanity – each individual only saving itself from self-destruction by a precarious stability. But at any time, says *Bankowski*, it can break down into identity crisis and a mental breakdown. At times, systems theory applied to psychic systems seems most appropriate to describing the process of mental illness.[445]

In *Bankowski's* view, the paradox leaves us with what he calls a 'metaphysical illusion' – and the consequence of such illusion is that the self is lost simply because it becomes the product of that false way of thinking. The individual acts are therefore not actually his/her act – one does not act – it is that illusionary theoretically constructed self that does so – not the unique embodies self that acts. The 'self' which is produced by the theory is that which acts – not the real individual.[446]

[444] *Ibid 440*
[445] *Ibid 419.,* p.261
[446] *Ibid*

Bankowski points out that this is the crux of *Detmold's* argument[447] that a judge contradicts himself when he says that he is applying the Law but thinks it ought not to be applied i.e 'I sentence you to death but I think the death penalty is wrong'.[448] *Bankowski* notes *Susskind*'s criticism of Detmold's argument. Susskind says that; 'in the normative sphere of law the defendant is guilty and deserves to hang. For me, he says, in the moral sphere, it is wrong. But I am acting as a judge and as such must sentence you to death. There is no contradiction therefore, *Susskind* says - it all very much depends on which normative sphere the judge is acting from. If the judge is operating from within the normative sphere of law then it is right that the judge sentences the defendant to death. [449]

Bankowski's response to *Susskind* is that we are not talking of the self-constructed as judge condemning an individual constructed as offender. We are talking about an individual causing another to be killed. He is not deciding what to do as judge, he is deciding what he should make happen. All the normative spheres that he takes part in become instantiated in him. It is he as a judge, father, moralist etc. that takes the decision and not a bit of him. To accept this is to allow 'metaphysical illusion' to take hold and lose oneself in a particular normative sphere.[450]

[447] Detmold, M. (1984), *The Unity of Law and Morality,* London, Routledge & Kegan Paul.
[448] As occurred in *R v G* [2003] UKHL 50. The judge at the court of first instance applied the Law but made it absolutely clear that he personally disagreed with its application
[449] Susskind, R. (1986), Detmold's Refutation of Positivism and the Computer Judge, *Modern Law Review,* Vol 23, pp.125-137
[450] *Ibid 419.,* p.261

Responsibility on the part of the judge is evaded therefore because *he* is not the one who decides – it is the 'self' constructed by the theory of the normative sphere that he has chosen which does. At the same time, the judge forgets that he is dealing with some particular individual. *Bankowski's* argument is that the judge deals with the particular individual as constructed by the theory – as an offender, not as a person. This is what *Bankowski* means when he says that the *Particular* is left out – and this is how the *Particularities* surrounding individuals like *Truscott, Driskell, Marshall, Coffin, Sophonow* and our 'little girl' gets left out of the legal decision making process. Decisions are made by Judges with reference to *Universal* values which do not reach down to the *Particular*.[451]

This of course does not mean that a person who has committed a crime should not be made to pay and atone for his errors against society. However, *Bankowski* says, if such a decision is made to, it is the decision of the judge – he cannot evade responsibility by saying that it was not *him* but him as a judge who made the decision.

Bankowski's take on System's theory therefore, is that it's an extremely anti-individualistic theory in which the individual's *self* is alienated and replaced with a 'self' which is created by the theory. Additionally, the theory's creation of this 'self' allows judges to evade responsibility for their decisions by saying that it was not *they* who made the decision[452], but they that the theory has constructed – they the judge, they the positivist, they the formalist. A judge may not believe that it is morally right that a Law be applied, but he can still do with applying it because responsibility can be evaded.

[451] *Ibid*

[452] As occurred in *R v G & R [2003] 3 WLR*

This view isn't one that is shared by every academic commentator. There are those who disagree with *Bankowski* – seeing individuals as having an important dual role within systems theory; individuals exist as psychic autopoietic systems in their own right as well as being point of attributions for the elements of the system.[453]

The deliberate decentring of the individual within systems theory of which *Bankowski* speaks can be explained by reference to what *Luhmann* was aiming to accomplish, namely to construct a complete theory of society. Taking as his starting premise, the idea that society was never human, that the idea of the human being has always been theoretically problematic and a sociology based on human terms has been misguided.[454]

Under a systems theoretical construction therefore, world society can be described as a multitude of self-constituted and functionally differentiated social subsystems such as politics, the economy, education, law, health and art, in relation to which individuals participate on a daily basis but within which they are never included and into which they are not subsumed.[455]

[453] Patterson, J. (1995), Who is Zenon Bankowski Talking to? The Person in the Sight of Autopoiesis, *Ratio Juris,* Vol 8(2), pp.212-229
[454] Moeller, H. (2012), *The Radical Luhmann,* New York, Columbia University Press, pp.21-25
[455] Avbelj, M. Fontanelli, F. Martinico, G, *Kadi On Trial: A Multifaceted Analysis of the Kadi Trial*, New York, Routledge Publishing, pp.66-68

4.5 Avoiding Extremes - Theorizing the Middle Ground

This *thesis* puts forward that avoiding extremes is the most suited solution in addressing the issue of wrongful convictions/miscarriages of justice. Avoiding extremes means exploring the *middle ground.* In her work *The Broken Middle*[456], *Rose* gives us a specific searching critique of Milbank's project[457] in a section entitled "New Jerusalem Old Athens: The Holy Middle."[458]

Rose argues that *Milbank*'s project gives a tale of three cities; Athens, Jerusalem and Salvation. Athens is presented as the Greek *polis*, cast as the sinful city – Jerusalem is the Judaic model of polity, presented as the heavenly solution; and then there is an interposed Salvation city mediating the immanent frame. So in other words, we've got Athens on the left, Jerusalem on the right, and the city of Salvation inserted in the *middle*.[459]

This basic three city structuring is clearly evident in *Milbank*'s discussion and reworking of the two cities *civitas terrena* and *civitas dei. Milbank* presented Rome as the sinful city – a city submerged in a sea of cancerous violence, only avoiding utter chaos by the staying hand of the *stator,* who is the ultimate limiter of violence.[460]

As *Rose* points out, the Salvation city (the third city), for *Milbank*, has two primary characteristics; a) pilgrimage and b) inclusivity – these are two things that Rose notes as destroying the idea of a city seeing as its task of salvation deprives it of site, whiles its inclusive appeal deprives it of limit or boundaries that would mark it off from any other city and their different laws.[461]

[456] Rose, G. (1992), *The Broken Middle,* Oxford, Blackwell Publishing.
[457] Milbank, J. (1993), *Theology and Social Theory: Beyond Secular Reason,* Oxford, Blackwell Publishing.
[458] *Ibid.,* pp.277-307
[459] *Ibid 457.,* p.281
[460] Thomson, A. (2014), *Culture in a post-secular context,* Oregon, Pickwick Publications, pp. 142-143
[461] *Ibid 457.,* p.281

By focusing on the quasi-theologising of *Milbank*, *Heidegger*, *Taylor* and others, Rose is pointing to the Salvation city – what she calls the 'middle ground'. In his study of *Rose'* work, *Andrew Shanks*[462] says that our true meeting place with God's grace is in 'the broken middle.' He suggests that to be situated in the *middle* is to be stranded between opposing pulls. There is a tension in this middle ground – it can be a space where transformation happens but it is not an easy place to occupy. Rather it is a fractured space, a broken middle, which requires a continuing sense of God's grace to negotiate and choreograph.[463]

Every human encounter is, to some extent, played out in the *broken middle*, broken by such things as difference in gender, ethnicity, religion or culture. Some, though, through the nature of their work or vocation, occupy a middle space which, because there are more differences, is more fragmented, and which requires more skilful mediating, than others.[464]

Beverly Campbell tells us that when we look at the very often used Christian term 'set apart', we notice that there is quite a lot of spatiality implied in that term which prompts us to question where and how the positioning of the middle is to be taken up. An interpretation which *Campbell* favours suggests that to be 'set apart' means to be placed beside in the 'middle'. The 'Salvation city' is 'set apart' from the city of Athens and Rome – and thereby set in the middle of Athens and Rome where it can best fulfil its purpose as a true city of Salvation.[465]

[462] Shanks, A. (2008), *Against Innocence: Gillian Rose's Reception and Gift of Faith,* London, SCM Publishing.
[463] *Ibid.,* p.167
[464] Campbell, B. (2013), *The Call to the Broken Middle Ground,* Ed. In, Winter, S. *Immense, Unfathomed, Unconfined: The Grace of God in Creation, Church and Community,* Oregon, Mosaic Press, pp.294-300
[465] *Ibid*

Implicit also in the idea of being 'set apart' i.e. being in the 'middle' is the notion that it is a space that is metaphorical, intersubjective and interlocutionary space which is messy and full of tension. According to renowned Russian philosopher *Mikhail Baktin*, this middle space is dialogical and relational.[466] The world *'middle'* derives from the Latin term '*medius*'. Etymologically, it is connected to the words 'mediator' and 'intermediary' – this means the occupying entity of the *'middle'* occupies a mediating middle ground – it is a ground that serves the purposes of mediation because it is a ground of tension that is messy and far from perfect.[467]

It is a place where difference expresses itself in a fury of conflict – setting the climate and agenda for confrontation and hostilities. It is in realisation of this that *Rose* argues that this world of the *'middle'* is broken and damaged with many differences. What are we to do with these differences however? *Rose* argues that we cannot approach these differences as fixers – for we would be betraying the differences of we tried to 'mend the world'.[468]

Instead of trying to mend the differences and seeking a resolution, as though the difference were a hindrance to overcome – we ought to accept the flawed tension-filled *middle*, *Rose* argues, and work towards sustaining this broken middle. This is of course what *Rose* calls the 'agon' of difference, where we endure the anxiety of difference without seeking the relief of synthesis. Here we neither grudgingly evade opposition nor blindly accede to it, but willingly act in the face of an opposition which can never be overcome.[469]

[466] Coates, R. (1998), *Christianity in Bakhtin,* Cambridge, Cambridge University Press, p.38
[467] *Ibid*
[468] Myers, b. (2012), *Christ The Stranger,* London, T&T Clark Publishing, p.53
[469] *Ibid*

In *Hegel's*[470] words, we need to bear with the negative. Our position (avoiding extremes and exploring/holding the *middle* ground) might be vulnerable and may ultimately fail – yet, by staking a position, it becomes possible to negotiate the difference and thereby bring about change. We well know that we may fail – success is not certain – this change is not guaranteed, but nevertheless we must stake our position, navigate the tension/difference and see change brought about.[471]

A veteran commentator on *Rose's* work, *Vincent Lloyd*[472], remarks that the *'middle'* is the realm of Law where the social practices and institutions that comprise our world meet. In similar fashion, *Christopher Brittain* explains the *'middle'* as the space between concepts – the area of tension between opposing extremes – the space between left/right, between Law's *Universal* nature/ the *Particularities* of a case, Law/Love. The tensions and differences are manifested at this *'middle'* because it is where the opposing extremes meet – where the interplay between the Law's *Universal* nature and the *Particularities* of a case is at its most heightened. Against the tendency to collapse these extremes into simple dualisms, *Rose* advocates the need to reside within the in-between spaces in which most of life occurs. [473]

Nicholas Poussin was the leading painter of the classical French Baroque style. He spent most of his working life in Rome and most of his works are characterised by clarity, logic, and order. One of *Poussin*'s greatest ever works is a painting known as 'the Landscape'. Like all of *Poussin*'s other works, the Landscape is a painting characterised by clarity, logic and order – it progressively tells a story and conveys a message.[474]

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[470] Minogue, K. & Rose, G. (1985), Hegel Contra Sociology, *The British Journal of Sociology,* Vol 36, pp.477-495
[471] *Ibid*
[472] Lloyd, V. (2009), *Law and Transcendence,* New York, Palgrave Macmillan
[473] Thomson, A. (2014), *Culture in a post-secular context,* Oregon, Pickwick Publications, p.144
[474] The National Gallery Website, http://www.nationalgallery.org.uk/artists/nicolas-poussin, 6th December 2014

Lettie Viljoen suggests that the Landscape should be seen as consisting several levels that portray a progression in time. The paradise-like background of the painting with the sublime landscapes shown thereon could possibly be regarded as a pre-colonial landscape. For *Rose*, the *'middle ground'* within that painting represents the landscape in all its dimensions – political, social and historical. *Poussin*'s painting therefore presents the *'middle ground'* as a space where the colonial cannot be contemplated from the post-colonial – the space where the colonial meets the post-colonial – where East meets West – where Law's *Universal* nature meets the *Particularities* of the case.[475]

The difference and tension that exists at the point of meeting of the extremes – the *middle ground* – is not at all 'painted away' by *Poussin*, and it ought not to. The difference ought to be construed in a constructive manner.

Rowan Williams has written extensively on the work of the late *Gillian Rose* and was indeed a friend of hers. *Williams* asserts that the answer to how we are to construe the difference is in the long run a metaphysical one i.e. it is not a question that can be settled by appealing to tangible state of affairs or set of facts – yet, at the same time not a question that can be relegated to a matter of taste or private judgement.[476]

[475] Van Marle, K, (2013), *Liminal landscape: law, literature and critique in post-apartheid South Africa*, Ed In Genres of Critique: Law, Aesthetics and Liminality, Cape Town, Sun Press, pp.120-122

[476] Williams R. (1995), Between Politics and Metaphysics: Reflections in the Wake of Gillian Rose, *Modern Theology,* Vol 11(1), pp.3-22

4.6 Theorizing the Middle Ground– Third Way Politics; Middle Way Leaders

There has been over the years, a lot of political theorizing of the *'middle ground'* in the form of 'third way politics'. There is much that can be learned by taking an in-depth look at how the *'middle'* is theorised in Politics. Third Way politics is not at all a new phenomenon in Western Europe and the United States – it is gradually gaining momentum elsewhere in the world, and arguably new in policy forums in most of Africa.[477] It has contributed immensely to the political system by being the solution to the problems and questions that the old Left and Right ideological extremes could not solve or answer. The *middle ground* can be of the same use for the Legal System also – it can be the solution to the problems and issues surrounding wrongful convictions/miscarriages of justice which the *Universal/Particular* extremes cannot solve or answer.

Third way politics technically refers to a framework of thinking and policy-making that seeks to adapt social democracy to a globalised world. It is a Third Way in the sense that it is an attempt to transcend both the old-styled social democracy and neo-liberalism. The aim of third way politics is to help people negotiate the revolutions of our time – globalisation, transformations in personal life, institutions, and our relationship to nature.[478]

[477] Wundah, M. (2011), *Landscaping Sierra Leone: Third Way Politics In the Mould of Attitudinal and Behavioural Change,* Pittsburgh, Red Lead Press, pp.1-9
[478] Segell, G. (2000), *Is There a Third Way?,* London, Glen Segell Publishing, pp.8-15

Middle/Third Way politics recognises that the range of questions which escape the opposing extremes of left/right in politics is great. It operates in a world where the views of the old left/right divide in politics is greater than ever before. It operates in a world where the views of the old left have become obsolete, and those of the new right are inadequate and contradictory. It also stems from a radicalisation of the political centre. If left and right are considered less encompassing than they once were, the centre ground becomes the space for a new political force – this has been labelled as the middle, the radical centre.[479]

The *'middle way'* in political circles therefore suggests a 'space' that exists between two opposing ideas. It is about engaging in a deluxe form of politics that escapes the standard constraints of the opposing left/right extremes. Today's *middle* claims to be new and future oriented – smart and inventive, rather than traditional or institutional.[480]

Intellectually speaking, the *'middle'* rests on paradox, on synergy, creativity and reasoning. All these are present in the *middle* because it is the place where the extremes meet – and their meeting brings about a flurry of difference and tension. There is paradox and synergy because there is the meeting of two opposing extremes – and there is creativity, reasoning and wisdom because that is what is required to utilise the difference in a constructive and productive way – that is what is needed in imagining new transformational solutions to the problems brought about by the tensions.[481] As *Rose* states, we must refuse to see the difference as something to be done away with – it will not go away – rather, we must concentrate on utilising and construing in a constructive way.

[479] *Ibid*
[480] Little, G. (2009), Middle Way Leaders, *International Journal of Applied Psychoanalytic Studies,* Vol 6, pp.111-128
[481] *ibid*

It is not surprising therefore that the notion of the *'middle'* has some great 'swag' about it – perhaps reason for which many young tertiary educated people find it so attractive. There definitely is something very attractive about the paradoxical, in crossing boundaries in liminal states and in-between worlds – creativity is understood as a 'space' where distinctions lose their edge and categories blend.[482]

Graham Little writes quite extensively on the *middle* and he asserts that his attempts to understand the psychology of the *'middle'* has taken him to most parts of the Western world where he has met a score of individuals he describes occupying 'boundary positions'. One of such individuals mentioned by him is *Lord Alderdice* who is the former leader of the Alliance Party in Northern Ireland who combined politics with a practice in psychoanalytic psychotherapy, and *Miss Pearl King,* a celebrated British Middle Group psychoanalyst, combining psychoanalytic practice with her religious background. Both of these individuals occupy boundary positions says *Little,* because they effectively harbour two opposing worlds at the same time by occupying the middle space between them.[483]

Little recollects the conversation he had with Pearl King in which she told him that she was a 'Gemini' i.e someone who cannot do just one thing. *Little* suggests that we add this to our ideas of the *middle*: it is attractive to people who are highly talented or have unusual freedom in the use of their talents, people who feel irked and unfulfilled if they are not juggling a combination of ideas. Occupiers of the *middle* have this 'Gemini' effect.[484]

[482] *Ibid*
[483] *Ibid*
[484] *Ibid*

As pointed out by *Duncan Watts*[485], some of the well-known '*Middle Way'* leaders of our time include Bill Clinton, Tony Blair and Gerhart Schroder of Germany. These three were known to be men of the *middle* during their political careers and during their tenures as President, Prime Minister and Chancellor respectively.

As *'middle way'* Leaders, Blair, Clinton and Schroder embraced what was described by many as a form of benevolent pragmatism – a philosophy that asked each policy; is it good? - is it necessary in this case? – does it work? There was a lot of wisdom and creativity accompanying this approach – it wasn't at all a matter of just putting ideologically motivated policies in place.[486]

It was not a case of a Liberal being Liberal and doing what Liberal ideology dictated or a Conservative being a Conservative and doing what Conservative ideology dictates. *Middle way* thinking is about a path of action that is wiser and much more creative; enacting the policies (irrespective of which ideological extreme they emanate from) that the country needs at any given time. It is not wise to put in place a policy that the country doesn't need – it is therefore the times and the facts of the day that determine the policy they chose. This is a most pragmatic approach.

[485] Watts, D. (2003), *Understanding US/UK Government and Politics,* Manchester, Manchester University Press.
[486] BBC News Website, http://news.bbc.co.uk/1/hi/458626.stm, 9th December 2014

The *'middle'* way approach that these leaders adopted was very much hated by the opposing political left/right extremes –the right because they never did anything that was good and the old left because they never did anything that worked. For many supporters of the political *'middle'* in the Western world, there is a certain tendency to define it by parodying what has come before it – to suggest that Thatcherism was only concerned with the market solutions for all ills is surely an oversimplification – likewise, to depict Old Labour as if it were some form of Stalinist mantra which favoured snuffing out all forms of private enterprise is equally silly.[487]

A criticism of the *'middle'* way in politics is that it is a crude attempt to construct a bogus coalition between the 'haves and have nots'– bogus because it entices the 'haves' by assuring them that the economy will be sound and their interests are not threatened, while promising the 'have nots' a world free from poverty, inequality and injustice. This criticism has been judged by many to be unfair as its paints a picture of opportunism.[488] *Niall Dickson,* a former BBC Social Affairs editor, remarks that it cannot be about opportunism if the main focus is on a willingness to contemplate private and not for profit alternatives, and not an ideological commitment to public sector provision and policy.[489]

[487] *Ibid*
[488] *Ibid*
[489] *Ibid*

So if the '*middle*' way isn't one of opportunism, then what is it? *Anthony Giddens*[490] points to a changing world in his analysis of the *middle way* – and he puts forward that the '*middle*' way is a response to the changes that are taking place in the world – not merely electoral opportunism then but a rational response to a new political, social and economic environment.

At the heart of these developments is globalisation – such is the nature of world trade and the rapid movement of capital that modern governments are no longer in control of their national destinies – so the *'middle'* represents a creative attempt to confront challenges that the old/left opposing extremes are inadequate to solve.[491]

Giddens goes a few steps further in saying that 'middle' way politics sees the nation state as too big for small problems and too small for some big ones – hence the enthusiasm for devolution in the UK, seen at its peak during the Scottish referendum of 2014, and on the other hand, the passing of certain powers to the European Union.[492]

Such a state of affairs means that the opposing left/right isn't enough anymore – there are problems and questions which cannot be solved or answered by collapsing into the extremes of left/right – of Law's *Universal* nature/ the *Particularities* of the case . The *'middle'* is where we must meet these questions and problems. Yes, it is a place of tension and difference – we shouldn't mock that tension and difference or wish it away; it will not go away. Rather, we can construe the tension and difference in a constructive way.

[490] Giddens, A. (1971), *Capitalism and Modern Social Theory,* Cambridge, Cambridge University Press, pp.9-25
[491] *Ibid*
[492] *Ibid*

The *'middle'* is where it is possible to confront the problems of wrongful convictions/miscarriages of justice and coming up with creative solutions – it is the 'space' of creativity. In a modern world where we are presented with new challenges, our best and obvious choice would be to occupy this space of creativity where we can construe differences constructively and device creative solutions.

CHAPTER 5

AVOIDING EXTREMES TROUGH THE MIDDLE – THE NOTION OF THE MEAN

5.1 The Middle As a Place of Process

In his work *Whitehead's Metaphysics and the Law*[493], *Jay Tidmarsh* explores the relationship between *Alfred Whithead*'s[494] process philosophy and the nature of Law, and to develop from that exploration a theory of process jurisprudence. *Tidmarsh* structures his work within a dialogue setting where *Whitehead* is having a dialogue with a young lawyer by the name of 'Chris'. It is argued that this dialogue exposes the *middle* as a place of process.

The dialogue begins with *Whitehead's* description of speculative philosophy and its inadequacies. Speculative philosophy, consists of 'the attempt to state the self-evident facts which for the basis of all existence.[495] The goal of the system of metaphysics is a 'coherent, logical and necessary system of general ideas in light of which every facet of our life experiences can be interpreted.[496]

Additionally, *Whitehead* says, a metaphysical scheme must also be applicable and adequate i.e the system must in fact so much apply to our experience to the extent that not a single facet of our experiences can escape its explanatory power. We cannot catch the actual world taking a holiday from the sway of our metaphysical first principles. They must be capable of explaining our experiences, the observations of the physical sciences, and the institutions of art, literature and religion. 'And Law?' asked Chris – 'Yes', even Law, replied *Whitehead.*[497]

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[493] Tidmarsh, J. (1998), Whiteheads Metaphysics and the Law: A Dialogue, *Albany Law Review,* 62, pp.1-90
[494] Whitehead, A. Griffin, D. & Sherburne, D. (1978), *Process and Reality,* New York, New York Free Press
[495] Whitehead, A. (1993), *Adventures of Ideas,* New York, Macmillan Publishing Company, p.258
[496] *Ibid*
[497] *Ibid*

Whitehead asks Chris; 'if I were to ask you what is the most basic entity – the most basic 'stuff' which ought to form the beginning of any metaphysical reflection, what would you reply?' Chris replies; 'I suppose I would say it is matter i.e. trees, cats, dogs, rocks, atoms, electrons. We would have to find some commonality among those sort of things.'[498]

Great, *Whitehead* says - he proceeds to ask Chris another question; 'What do you think of the epistemological dualism of *Descartes*, *Hune* and *Kant*,' he asked. Looking flabbergasted and confused Chris replies with laughter; 'excuse me, you forget that I am a Lawyer, not a philosopher. If you want an intelligent response, ask me what my opinion is concerning offensive collateral estoppel.'[499]

'Forgive me', *Whitehead* said apologetically – Epistemology is the branch of philosophy which studies the nature of human knowledge and how we can know what we know. Beginning with *Descartes*[500], modern epistemology has focused on the problem of how a subject (the person/the particular seeking to acquire the knowledge of the world) can truly know an object (something actual in the world like Law). *Hume's*[501] argument is the most known – he asserts that the only data we can know is our sense impression of a thing; we cannot know what the thing actually is, or even if it exists independently of our impression of it.[502]

[498] *Ibid 494*
[499] *Ibid 494.,* p.10
[500] Gombay, A. (2007), *Descartes,* Malden, Blackwell Publishing
[501] Dicker, G. (1998), *Hume's Epistemology and Metaphysics,* London, Routledge Publishing.
[502] *Ibid 494.,* p.10

Kant[503] was very much influenced by *Hume* on this point but still believed in the existence of a world external to us – he suggested that we must distinguish between *phenomena*, which is how we perceive something and which is all we can truly know about that thing, and *noumena*, which is how that thing really is. Thus, epistemological dualism sharply distinguishes between subject and object, and makes it impossible to state that two events are in fact interrelated.[504]

Very much like Law would, Chris said 'Perhaps it is the scepticism instilled by my education, but I find a great deal of truth in *Hune's* point. I can never know the truth about an object or an event.' Law would say, we can never know the truth about the events surrounding the 'little girl', or *Truscott*, *Driskell*, *Sophonow* or *Coffin.*

In dissuading both Chris and Law, *Whitehead* explains that all things change – nothing is everlasting – in *Locke*'s[505] words, 'everything is perpetually perishing.' This is simple, self-evident and very much common sense. It comes from our own experience in life. We age and die, languages and institutions evolve. Time is asymmetrical – we can go forward but never back. Yet with the perishing of each past moment comes the possibility of the present and the advance into the future.[506]

[503] Parrini, P. (1994), *Kant and Contemporary Epistemology,* Dordrecht, Kluwer Academic Publishers.
[504] *Ibid 494.,* p.11
[505] Locke, J. Nidditch, P. (1975), *An Essay Concerning Human Understanding,* Oxford Clarendon Press, p.238
[506] *Ibid 494.,* p.12

Therefore, every real thing of which we can experience is in the process of becoming – of moving from the past through the present and into the future – all things flow and are therefore in state of constant becoming. We must thus conceive of occasions of experience as comprising razor-thin slices of time.[507]

Our experiences flow – they take on a definite form and flow till they perish. Once an experience perishes, it is replaced by the succeeding occasion and seeks to maintain the same aim as the preceding occasion. In all of this, we must posit the existence of physical prehensions i.e the physical pole in which the occasion of experience seeks merely to perpetuate the aim of immediately preceding occasion. Once we posit physical prehensions, we are logically compelled to admit that each occasion of experience prehends all occasions of experience preceding itself.[508]

The reason is, that by means of a physical prehension, each occasion of experience prehends the immediately prior occasion of experience – and by means of a physical prehension, that immediately prior occasion prehended the occasion before it; and so forth backward to the beginning of time. Therefore, in each physical prehension the entire history of the universe is encoded. In the present occasion of experience, these past occasions are synthesized with conceptual prehensions into a subject aim.[509] So when the case concerning our little girl or *Truscott, Driskell, or Sophonow* is considered by a Judge, *Whitehead* suggests that such consideration be done with the fullness of the defendant's life story – a Judge must 'feel' the defendant's life story.

[507] *Ibid 494.,* p.14
[508] *Ibid 494.,* p.16
[509] *Ibid*

But how is this possible? asked Chris, and Law also would ask the same – 'I cannot remember what I ate for lunch yesterday much less know the entire history of universe which has existed for a billion years. You surely cannot mean that rocks and electrons are capable of prehending this history.' *Whitehead* replies to Chris and Law in the affirmative by saying it is possible to consider the full history of anyone individual. Prehension is not a conscious or rational activity, nor is it one associated with sense perception. Our ability to consciously feel and to remember should not be confused with the sort of 'feeling' *Whitehead* is suggesting. Mentality, consciousness, rationality and sense perception are all associated with the process of conceptual prehension –they are a second stage filter that selects some portions of physical prehension for emphasis.[510]

Fundamentally, *Whitehead's* metaphysics does require an acceptance of the point that the massive weight of all past occasions of experience is felt in each present occasion of experience whether that occasion is occurring in a rock or a human being – this means that a present occasion is not independent in itself – it is linked to past occasions and those past occasions have a bearing on it and its occurrence.[511] So the present occasion of a criminal charge against our 'little girl', or a *Driskell*, *Sophonow or Truscott* is not at all independent in itself but has within in it, certain past occasions which have bearing on the present occurrence.

By way of example therefore, we can say that the charge of recklessness, and the facts surrounding that charge, brought against our little girl is not independent in itself. Rather, it is linked to past occasions, such past occasion being her diminished responsibility for instance, which has a bearing upon her recklessness. A Judge deciding in the *middle* would prefer an

[510] *Ibid*
[511] *Ibid 494.,* p.18

approach of process, where he/she truly 'feels' the story of our little girl by taking in interest in the past occasions which have had impact and bearing on the present facts.

Each occasion of experience is its own subject, but when it perishes, it becomes an object – one single piece of data among the many – for other occasions of experience. In passing from subject to object, each occasion achieves a certain objective immortality – all future occasions must now grapple with the stubborn fact of its existence. This means that objects are in fact internally related to the present subject – a *Humean* and *Kantian* move to divide subject from object can therefore be rejected. Thus very much unlike the work of *Hume* or *Kant, Whitehead's* philosophy affirms our daily lived impression that in fact we are in a buzzing world, amid a democracy of fellow creatures. We do act in, and are acted upon by the world around us.[512]

Nevertheless, while it is true that all prior occasions of experience internally determine that present occasion in the initial phase of concrescence – it is equally true that each occasion of experience is ultimately free to come to its own individual satisfaction – because each occasion of experience contains a lure to novel adventure in addition to a desire to conform to patterns of the past, each occasion is in a real sense its own final cause. The concrescence of each individual actual entity is internally determined and is externally free.[513]

[512] *Ibid*
[513] *Ibid*

One might say that in many ways, *Whitehead's* philosophy resonates with Law - but there remains a question however, of whether Law will accept it. Will Law accept that eternal objects, which are forever definite in form, can never change their form? Or is that argument set aside by a counter argument which suggests that if eternal objects are incapable of change, they cannot be real and thus, *Whitehead's* metaphysical scheme collapses.'[514]

Whitehead points out that it is right to consider eternal objects as non-actual and that actual entities are the final real things which the world is made up. There is no going behind actual entities to find anything more real. However, to think that it is impossible for something to exist unless it is actual is inaccurate - our experience suggests that we can imagine things which are not, and will never be real.'[515]

It is agreed that no occasion of experience, can prehend an eternal object unless that eternal object is itself located in some other occasion. The fact that each new occasion of experience prehends all prior occasions may seem to solve the problem, for as long as an eternal object was prehended in a prior occasion, it is also prehended in the present occasion. What is it then that lures an occasion of experience to a novel adventure rather than blind confrontation to the past?[516]

Whitehead's answer is to posit an actual entity: God. In the first instance, God must possess a 'primordial nature, in which He is the repository of all eternal objects, of all potentialities. Thus, through prehending God, an occasion of experience also prehends the full range of eternal objects, the full potentialities for a particular occasion. But we must also realise that that God must also possess a 'consequent nature'.[517]

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[514] *Ibid*
[515] *Ibid*
[516] *Ibid*
[517] *Ibid 494.,* p.22

As an actual entity, God too is in the process of becoming, *Whitehead* says. God too is capable of prehending all prior occasions, but unlike us, God is aware of all of all prior occasions and is capable of supplying every other occasion of experience with an initial 'subjective aim' that seeks to maximise the aesthetic[518] potential of each occasion. But each occasion is free in the subsequent stages of determining its subjective aim to reject God's initial persuasive lure and chose a different subjective aim. And God of course must accept whatever evil or tragedy has already occurred, and can only persuade the world to achieve whatever aesthetic potential is now possible.[519]

Whitehead's dialogue with Law in the form of Chris, give us a much deeper understanding of his metaphysics. On a process wave, what is present derives its existence from the historicity of past events – from what is embedded inescapably within them; therefore, we are concerned primarily with questions of emergence (becoming), and only secondarily with questions of substance (being). This is very much captured in *Whitehead's* assertion that 'the creative advance of the world is the becoming – the perishing and the objective immoralities of those things which jointly constitute stubborn fact. Reality is simply the process of creative advance whereby many past events are integrated in the events of the present and in turn, are taken up by future events.[520]

[518] A branch of philosophy which deals with the nature of art, beauty and taste.
[519] *Ibid 494*
[520] Maclean J, (2011), *Rethinking Law as a Process: Creativity, Novelty, Change.* Abingdon, Routledge, pp.49-63

This is the basis upon which *Maclean* opines that the central concept of *Whitehead's* philosophy is that all things change. The only things that are real are momentary units of becoming – actual occasion of experience – wafer thin slice of time, not bits of material substance. Each actual occasions consists of three phases; the first phase, which takes place at an actual occasions physical pole, consists in the passive reception of data from its antecedent past, from its immediately prior moment of experience; the second phase, which takes place at the mental pole, consists in the entertainment of novel possibilities; and the third phase involves the reconciliation of the other two phases, where the desire to conform to and thus perpetuate the past is reconciled with the desire to achieve new possibilities.[521]

The tension between the mental and physical poles in the phases of concrescence of an actual occasion of experience is really a tension between conformity to the past and openness to or creativity in the future, a tension between order and chaos. Thus the reconciliation of these is one between the conformation of past occasions of experience and opportunity to take a leap forward towards an unknown possibility different from outcomes in the order of prior occasions of experience.[522] The latter is what the *middle ground* is all about – it is a place of process, a place which allows us to view things as 'becoming' rather than being.

Maclean supports this view by pointing out that process thought can be seen to emphasize the developmental nature of reality, becoming rather than being. Everything is fluid – everything is still moving – nothing is stagnant – and being is the outcome of each process of becoming. It is the result of the perishing of each occasion of experience as it passes from subjectivity into objectivity and the next stage of becoming begins.[523]

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[521] Maclean J, *Holding the Middle or Dancing on the Edge,* Ed In Michelon C, (2013), *The Anxiety of the Jurist,* Ashpath Publishing, pp.258-275.
[522] *Ibid*
[523] *Ibid*

A Judge deciding in the *middle ground* would see the life-story of a defendant as a developing reality, one that is in the process of becoming rather than being – one that is very fluid where things are and have been moving – a life story which's present, has been greatly influenced by the events of its near, immediate and distant past.

Like *Whitehead, Bergson* takes the view that reality is not made up of distinct things or substances, but of thoughts, feelings and impressions arrested from primary process. *Bergson* argues that the act of arresting actual occasions – as Law does to our little girl, to *Truscott*, to *Milgaard*, to *Coffin*, to *Sophonow*, to *Driskell* and *Morin* - in that it captures only the point in and around the actual happening of the criminal incident – from the ceaseless flow and flux of reality, whereby we try to make sense of a real life is a counterfeit motion, and one that can only at best approximate life's real experiences.[524]

Bergson outlines two ways of thinking according to which we should perceive reality and the real life of an individual – he refers to the two types of knowledge; epistemological and ontological. He describes the first as 'intellect' methods – knowledge through which we capture the world in substantial terms but do not fully engage with its reality as a continuous flow. The second, he describes as 'intuition' – a method of knowing where we actually place ourselves directly within the present flow of something real, and live within that flow and identify with it.[525]

[524] Bergson H, (1983), *Creative Evolution,* London, Macmillan Publishing, pp.302-310
[525] *Ibid*

The *Middle* therefore represents a place of process – a place where we are not concerned with thin-wafer slices of time, but rather are able to see the whole picture – we are able to comprehend the reality and fluidity of life and its occasions of experience. And because process can be seen as emphasising the developmental nature of reality as becoming rather than being, the *Middle* as process frees us from a demand to conform – it offers us the opportunity of taking a leap towards an unknown possibility different from and not given in previous occasions of our decision-making experience.

This is the same conclusion that *Zenon Bankowski* and *Claire Davis* come to when they consider the parable of the Good Samaritan. In that parable, the Good Samaritan suspends the application of Law, thereby offering help to a Jew. In interpreting the parable, *Bankowski* says that Jesus was asking the Lawyer to which he was telling the parable, to put himself in the shoes of the Jew who needed help – to insert himself into the flow of the Jew's story[526]

Jesus was asking the Lawyer to engage in process, to decide in the *middle ground* – to insert himself directly into something real, live within its fluid flow and identify with it – identify with the developmental nature of the reality in which things are becoming. This is of course the basis upon which *Deluze*[527] and *Guattari*[528] argue that becoming is always in the *'Middle'* – the *middle* is process.

[526] Bankowski Z, Davies C. *Living In and Out of Law,* In Oliver P. Victor T. (2000), *Faith in Law: Essays in Legal Theory,* London, Hart Publishing, pp 34-51
[527] Deluze, G. (1994), *Difference and Repetition,* London, Athlone Press, p.264
[528] Deluze, G. Guattari, F. (1987), *A Thousand Plateaus: Capitalism and Schizophrenia,* London, Athlone Press, p.323

As such, *Bankowski* and *Davies* offer their interpretation of the parable of the Good Samaritan as an example of Law being continually made and remade in the encounter – and this is possible because the Good Samaritan decided in the *middle* and engaged in process – inserting himself into the fluidity and reality of the case and living within its flow where things are becoming not merely being.

The Good Samaritan engaged in process by concentrating his decision-making in the *Middle* ground rather than within one extreme or the other – and in doing so, he was able to reject the conformity to prior experiences of decision-making where he wold follow the Law by not helping non-Jews, in favour of taking a leap towards an unknown possibility different from those seen with those previous experiences where decision making was concentrated within the extremity of the Law's *Universal* nature.

5.2 Deciding In the Middle Is Ethical Legal Decision Making

Human life is full of activity which is meant to achieve some good. Mankind is programmed to desire good achievement. It is for this reason that we go to school, learn a trade, engage in business or study a vocation. We always want to better ourselves by achieving something good – good can therefore be rightly declared as the aim of every purposeful activity in human life. As there are many actions in the form of arts and science, so are there many ends – the end of the medical art is health, that' of shipbuilding is a vessel, that of strategy victory and that of economics wealth.[529]

If, there are ends to the actions that we undertake – ends which are desirable and good, that we do indeed desire purposefully, not desiring them just for the sake of it, but desiring them because they are good and will have a greatly positively influence on life, shall we then like good archers have a mark upon that which is right so we are always likely to hit it?

The end of Law is Justice and fairness– it is expected that Law's application will be devoid of wrongful convictions/miscarriages of justice. Ethics employed within the decision-making process constitutes the art which assists us in achieving Law's end of avoiding wrongful convictions/miscarriages of justice.

Aristotle is considered in many circles to be the father of ethics. He was born three hundred and eighty-four (384) before Christ, to a well-off family living in a small town in northern Greece. His Father, Nicomachus, who died while Aristotle was very young, was allegedly a doctor to the King Amyntas of Macedon. When Aristotle turned seventeen, his guardian, Proxenus, sent him to study at Plato's academy in Athens and remained there for 20 years.[530]

[529] Ross, W. Urmson, J. (1998), *The Nicomachean Ethics,* Oxford, Oxford University Press, pp.3-20
[530] Reeve, C. (2014), *Aristotle Nicomachean Ethics,* Indianapolis, Hackett Publishing, pp.19-30

Aristotle's *Nicomachean Ethics* is an investigation. It poses a question at the start, looks at various possible answers along the way, and concludes with definite judgment. This is quite similar if not same to the way Law works – Law also poses a question; a legal question, looks for answers along the way and concludes with a definite at the end. The treatise therefore has something of the shape of a detective story.[531]

Aristotle is looking for what he calls 'the ultimate goal' of human life. In informal thought, we may think of this as what counts for 'doing well' in life, or what it is for someone to chalk success or achievement in life. Practically speaking, the ultimate goal in life is toward something which we would do well to direct everything else that we do. Our ultimate goal, we might think, is something we can rest satisfied in – we attain it, we require nothing more. Is there such a goal which is the same for all, and, if so, what is it? This is the basic question of Ethics.[532]

It is useful to think of any such search as involving four basic elements. Suppose, for instance, that a detective wished to establish the identity of a suspect – first, he would come up with a description of the suspect, or a criteria that the suspect will satisfy. Secondly, he would draw up a list of suspects, or a field of search – those people who possibly fit the profile of the suspect. Thirdly, he would question examine those people one by one. Fourthly, he would apply his criteria to each of those individuals.[533]

[531] Pakaluk, M. (2005), *Aristotle's Nicomachean Ethics,* Cambridge, Cambridge University Press, pp. 1-20
[532] *Ibid*
[533] *Ibid*

Aristotle's search for the ultimate goal of human life follows similar lines. First, at the beginning of the *Ethics,* he formulates criteria which, he thinks, an ultimate goal must satisfy: he maintains that it must be most ultimate; self- sufficient; and most preferable. Secondly, he identifies a field of search: he argues that our ultimate goal is to be found among those activities that we can perform only through our having good traits of character, or other virtues. This is what he was referring to when he famously said that the highest human good is 'activity in accordance with virtue'.[534]

Thirdly, he goes on to examine, one by one, the virtues and their characteristic activities, such as courage, generosity and justice. Fourthly, Aristotle applies his original criteria and argues that the intellectual activity which is an expression of the virtue of philosophical wisdom is the ultimate goal of life.[535]

There emerges the question of why *Aristotle* holds that our ultimate goal is 'activity in accordance with virtue'. This claim of *Aristotle's* is based on a principle which he takes over from *Plato*[536] and which might be called the 'interdefinability of goodness, virtue and function'.[537]

[534] *Ibid*
[535] *Ibid*
[536] Plato, J. Jowett, B. & Edman, I. (1928), *The Works of Plato,* New York, Modern Library Publishing.
[537] Reeve, C. (2014), *Aristotle Nicomachean Ethics,* Indianapolis, Hackett Publishing, pp.19-30

By the 'function' of a thing i.e. task, objective – we can understand its characteristic activity or achievement. According to *Plato,* we can identify the function of a thing by considering what that sort of thing alone can achieve, or can achieve better than anything else.[538] So in the instance of Law, we say that its function is justice – and its characteristic activity is avoiding wrongful convictions/miscarriages of justice. We know this to be the function of Law because it is the sort of thing that Law alone can achieve, and it can achieve it better than anything else.

Any particular one thing carries out its function either well or badly; Law will either avoid wrongful convictions/miscarriages of justice or will see them occur. What explains the difference? If Law is applied and it is successful in avoiding wrongful convictions/miscarriages of justices, we will find that the process of application has certain virtues/traits/features which allows for a just outcome – conversely, if Law as applied does not avoid wrongful convictions/miscarriages of justice, it lacks those same virtues/features/traits.[539]

Another important principle which *Aristotle* presupposes is that there is a very close relationship between 'goals' and 'good'. *Aristotle* believes that for something to be 'good', it has to be a 'goal'. If we take a 'goal' to be something at which other things are directed, it follows that the good of a thing would be that at which other things involving it are directed. Consider the role of a judge in the processes of Law for instance – he/she is there to make a decision of guilt or otherwise on the part of an individual defendant. The goal of the judge then is to see to it justice prevails.[540]

If a 'goal' is a 'good', then the 'good' that a judge ought to seek is to avoid wrongful convictions/miscarriages of justice, seeing as Law's function is justice and he/she (the judge) is a part of Law's system.

[538] Plato, J. Davis, H. & Burges, G. (1901), *The Republic,* Washington, Dunne Publishing, p.352
[539] *Ibid 538*
[540] *Ibid*

The ultimate goal of human beings consists in our carrying out our functions well. Similarly, the ultimate goal of Law consists in it carrying out its function well – and Law's carrying out its function well is found in what it can achieve through having those traits which makes it better able to avoid wrongful convictions/miscarriages of justices

5.3 Ascertaining the Middle – Aristotle's Golden Mean

Aristotle offers that we are best served in our goal to attain the 'good' i.e avoid wrongful convictions/miscarriages of justice by choosing moral virtues such as temperance, courage and justice – each emerging from the habitual choosing of a *mean*, relative to us, between extremes in our judging of situations.[541]

Aristotle develops the doctrine of the *mean* in the course of his discussion of *arête* i.e excellence or virtue. He posits there that excellence is the condition which best suits us to perform those activities which are distinctively human. Thus, the best life for a human being will involve the active exercise of his psyche's capacities in accordance with excellence.[542]

Excellence and virtue ought to involve the observance of a *mean*, *Aristotle* argues. The idea of a *mean* and the observance of it would have been familiar to those who attended *Aristotle's* lectures. They were at the conceptual centre of the most advanced and sophisticated science of the day – medicine. *Aristotle's* father was a medical physician, and so medical concepts and examples played an important and widely-recognised role in the philosophizing of *Aristotle's* day.[543]

Health was believed to lie in a balance of powers, in a mixture so constituted that none of its constituent elements eclipsed the others. So in other words, there had to be a proportionate mixture of extremes, a balance between them so that no one extreme would dominate the other. Opposites are cures for opposites – Medicine is about addition and subtraction; subtraction of what is in excess, addition of what is wanting.[544]

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[541] Swindal, J. Spurgin, W. *The History of Ethics,* Ed In Gensler H, Spurgin W, (2001), *Ethics: Contemporary Readings,* New York, Routledge Publishing, p.27
[542] *Ibid.,* p.181-206
[543] Hippocrates J, Jones W, Potter P, (1923), *Hippocrates and the Fragments of Heracleitus,* Cambridge, Heinemann, p.229
[544] *Ibid*

Aristotle imports this way of thinking into his account of ethical excellence or excellence of character by expressing the view that proper balance or proportion makes for health, the lack of it, is towards disease. Bodily strength and health are destroyed by excess and deficiency. Too much food, or too much exercise, are bad for health. The same holds for other matters – excellence in other matters, including Law, will be destroyed by excess and deficiency. Bodily health is a matter of observing a *mean* between extremes of excess and deficiency.[545] By way of extension, the health of Law, just like the health of the body, is a matter of observing a *mean* between Law's *Universal* nature and the *Particularities* of the case in conducting Legal decision making.

Further to this, *Aristotle* argues that excellence of any kind aims at the *mean.* Excellence of character is concerned with emotions and acts, in which there can be excess or deficiency or *mean.* These are the three possible outcomes that can be had in any matter. For example, one can be frightened or bold, feel desire or anger or pity, and experience pleasure and pain generally, either more or less than is right, and in both cases wrongly; while to have these failings at the right time, on the right occasion, toward the right people, for the right purposes and in the right manner, is to feel the best amount of them, which is the *mean* amount – and the best amount is of course the mark of excellence.[546]

[545] Aristotle, Smith R, (1997), *Topics,* Oxford, Clarendon Press, pp.139-145
[546] *Ibid 542.,* p.22-34

Likewise, in any other acts – such as legal decision-making – there can be excellence, deficiency and a *mean.* Hence excellence is the state of a *mean* in the sense that it aims at the *mean* – virtue and excellence lies in a *mean. Aristotle* invites us to compare excellence of character – or the person who has such excellence, to a skilled archer able to hit a target. A person, like a judge, aiming at a target can miss to the right, to the left, above, below. To hit the middle mark is the goal of every archer – and to hit that mark, one must land a shot within a relatively small, more or less precisely defined area i.e. Justice.[547]

Aristotle suggests that what is excellent and commendable to do is to be definite and limited so as not to miss the mark; for a judge, to miss the mark would be to preside over an unjust outcome to a trial. There is a correspondingly vast and unlimited area of wrongs and shots that miss the mark. Missing the mark, *Aristotle* explains, is possible in many ways while success can be had only one way - which is why it is easy for a judge to err but so hard to succeed – it is easy for a judge to miss the mark and hard to hit it.[548]

While hitting the mark is in this sense a much more precise matter than missing it, there is still room for variation with the shots that hit the mark. More than one shot can hit the 'bulls-eye' of a decent-sized target – a shot does not necessarily need to hit the exact centre of the 'bulls-eye' to be an excellent one. In similar fashion, *Aristotle* suggests that virtue rarely demands a single precisely determined act or reaction of a particular intensity – it rather demands that one's acts or emotions fall somewhere within a more or less precisely delineated range.[549]

[547] *Ibid*
[548] *Ibid*
[549] *Ibid*

Therefore what *Aristotle* suggests for someone presiding over a decision making process like a judge exercise virtue which involves the observance of a *mean* between extremes. One extreme ('Law's *Universal* nature') may consist of some sort of excess, another extreme may consist of some deficiencies (the '*Particularities* of the case').[550] As such this *thesis* puts forward that the task of a Judge therefore in trying to be 'good', is to find a *mean* which allows him/her to avoid those extremes.

By speaking of the *mean* of a thing, *Aristotle* explains that he refers to what is equally distant from either extreme, which is one and the same for everyone; by the *mean* relative to us what is neither too much nor too little, and this is not the same for everyone. For example of ten (10) is too many, and one (1) is too few, we select what is the *mean* of them both if we select five (5). By doing this we have avoided both deficiency i.e. one (1) and excess i.e. ten (10). In the same way, a Judge can avoid deficiency or excess in applying the Law by searching out and choosing the *mean* – the *mean* that is relative to the present case.[551]

The *mean* can be attained by allowing *reason* to adjudicate between the conflicting claims of the passions and choose that area of *moderation* between the excesses and deficiencies (Law's *Universal* nature and the *Particularities* of the case). What is needed is for *reason* to select, deliberately and objectively, *mean* states and activities. As such, a deciding Judge is not misled, by his feelings, into extreme behaviour and consequently into an inharmonious life. Reason will keep us from excessive states or actions.[552]

[550] *Ibid*
[551] *Ibid*
[552] Porter, B. (1980), *The Good Life: Alternatives in Ethics,* New York, Macmillan Publishing, pp.138-140

Emotions cause us to miss the mark by swaying us either to the right or to the left – either bringing about an excess or a deficiency of what is required. Moderation is most certainly best – just as it can be said of a good work, that nothing could be taken from it or added to it, it can similarly be said that excellence is destroyed by excess or deficiency. This *thesis* puts forward that an excellent legal decision i.e. Justice – one that is without wrongful convictions/miscarriages of Justice can only therefore be secured by concentrating the legal decision making process at the point of a *mean* between the two extremes (Law's *Universal* nature/ *Particularities* of a case in hand). Excess is wrong, and deficiency is to be blamed, but the *mean* amount will be praised and is right.

This is of course what *Aristotle* calls *aurea mediocritas* or the 'golden mean'. By this, *Aristotle* gives us a type of handbook of *morality*, specifying particular states and actions that are covered by the *golden mean*. With regard to feelings of fear and confidence, the *mean* is courage – the excess being an extreme foolhardiness, and the deficiency being cowardice. With respect to pleasures and pains, the *mean* is temperance – the excess being profligacy, and the deficiency, *Aristotle* said, has not been named yet because it is hardly ever found.[553]

In matter of finance involving large sums of money, moderation is magnificence, while excess and deficiency are vulgarity and meanness respectively. With regard to honour and disgrace, the *mean* is pride, the excess vanity and the deficiency humility. *Aristotle* does not at all suggest that we strike a midpoint between two extremes, but rather that we find a middle range along the continuum from excess to deficiency.[554]

[553] *Ibid*
[554] *Ibid*

Aristotle also stated that certain virtues may not fall toward the centre of the range. In other words, if ten (10) is an excess and two (2) is a deficiency, the *mean* may not be six (6) – it might be closer to eight (8) or five (5). In order to make an excellent decision, *Aristotle* advises that we avoid the extreme which is more opposed to the *mean.* So for example, if we are looking for courage, the *mean* would be closer to foolhardiness than cowardice, so we would probably want to act more rashly than cowardly.[555]

Thus, a legal decision maker, if he is to avoid wrongful convictions/miscarriages of justice must avoid concentrating the legal decision making process within either extreme of the Law's *Universal* nature and the *Particularities* of the case – and find instead the *mean* between these extremes which is the *middle ground.*

It should be clear nevertheless, that neither the concept that virtues lie between extremes nor that the good person aims at what is intermediate, is intended as a procedure for making decisions. The doctrine of the *mean* helps show what is attractive about virtues and why it is that we would rather decide whiles having them in mind – the *mean* thus shows us the way to the *middle* ground where we have the best chance possible of avoiding wrongful convictions/miscarriage of justice.[556]

[555] *Ibid*

[556] Kraut, R. (2014), *Aristotle's Ethics,* The Stanford Encyclopaedia of Philosophy, Stanford University Library of Congress.

5.4 Ascertaining the Middle - MacIntyre's Virtue Ethics

Aristotle's Golden Mean theory is based on the idea that virtue lies somewhere between two extremes (Law's *Universal* nature/ the *Particularities* of the case in hand) so we are able to avoid concentrating the legal decision making process within one extreme. In order to act virtuously and with excellence, one must seek a balance between the two. The golden *mean* suggests that the virtue (justice in Law's case) sought must be the right quantity, at the right time, towards the right people, for the right reason and in the appropriate manner.

In *After Virtue*[557], *MacIntyre* seeks to move *Aristotle's* theory by focusing it on morality. He begins by claiming that moral argument today is not rational but emotive in nature. 'There seems to be no rational way of actually securing a moral agreement in our culture today', he says.[558] Emotivism posits that all moral judgements are nothing but expressions of preference or feeling.[559] For emotivists, the statement saying 'this is good' means 'I approve of this'. According to *MacIntyre*, an emotivist society will use language such as 'I feel', and will be consumed with issues of rights and cruelty.[560]

MacIntyre traces the roots of emotivism back to the inception of the Enlightenment project in Europe during the 17th and 18th Centuries – a time in Europe's history where there was a rejection of *Aristotle's* theory of seeking excellence and virtue, as well as a rejection of other traditional theories. The philosophers of the 18th Century sought to apply the new scientific ideas of *Galileo*, *Kepler* and *Newton* to everyday aspects of human life.[561]

[557] MacIntyre, A. (1984), *After Virtue,* Indiana, University of Notre Dam Press.
[558] *Ibid.,* p.6
[559] Satris, S. (1987), *Ethical Emotivism,* Dordrecht, Nijhoff Publishing.
[560] Kraut, R. (2014), *Aristotle's Ethics,* The Stanford Encyclopaedia of Philosophy, Stanford University Library of Congress.
[561] *Ibid 558*

The physics of the 17th Century rejected *Aristotle's* concept of teleology – this in turn brought about benefits in experimental science. When this idea was transferred to morality however, the question of purpose (teleology) was rejected. Thus, in the new morality of the 18th Century, the question; 'How do I become a good kind of person?' did not at all arise.[562]

Furthermore, the Enlightenment project's rejection of all traditional authorities and theories meant that such a question would not, in any case, have any meaning because there was no agreed tradition suitable to give an answer – all traditional theories and traditions of wisdom were not to be accepted. The individual who was referred to as autonomous had to make up their own mind.[563]

With the individual left totally to himself/herself i.e. autonomous, without any guidance form tradition, without any guidance as to the path of purpose, the reasoning of individuals soon becomes reduced to emotivism and people become prey to manipulation from 'bureaucratic managers' and their drive for efficiency, and the 'therapist' who replaces 'truth' with psychological effectiveness, and even the Judge who replaces an unwarranted, misplaced, misdirected and inappropriate application of the Law with Justice.[564]

MacIntyre argues that a revival of Virtue Ethics is what's needed in today's society. He sees moral society as one in which people recognise commonly agreed virtues and aspire to meet them. This of course means that the wisdom of traditions is important to uphold as the engine which can give people the direction and security.[565]

[562] *Ibid*
[563] *Ibid*
[564] *Ibid 592*
[565] *Ibid*

5.5 Ascertaining the Middle – MacIntyre on Reviving Virtue

MacIntyre states that the aim of his revival of Virtue Ethics has to do with seeing each person's life as a whole – as one unit of human life. This aim encounters two difficulties which are Social and Philosophical. The social obstacle is the modern preoccupation of dividing human life into segments i.e. work, social, private and public, each with its own modes of behaviour.[566]

The philosophical difficulty has two heads; the first being that modern philosophy treats an action as an isolated event which is not part of a larger whole. In other words there is no narrative i.e. beginning, middle and end.[567]

So for instance, when a little girl of diminished responsibility find herself playing with matchsticks and ends up setting a barn on fire, the 'end' of her story is the only thing that is seen as important in deciding whether she has acted recklessly or not. The narrative of how she cannot appreciate the risk to begin with, i.e. her diminished responsibility, does not come into consideration. The burning of the barn is treated as a purely isolated event.

Similarly, when a Canadian man (*Wilbert Coffin*) gracefully offers help to a group of American tourists and is later sentenced to death for their murder, the narrative of his life i.e the fact that he was a religious minority in his society and could therefore could be easily marginalised and scapegoated did not come into consideration. His being seen with the tourists was treated purely in isolation; he was with them, so he must have killed them.

[566] *Ibid 592.,* p.204
[567] *Ibid*

The second head of the philosophical difficulty concerning *MacIntyre's* aim has to do with the sharp distinction that exists in modern philosophy between the individual and the role he/she plays. According to *Goffman*[568] and *Satre*[569], there is an 'essential self' which differs from the roles an individual plays – so in other words there is no narrative; a person's life has some portions which ought to be isolated. There is no scope for *Goffman* to hold that the *Aristotelian* view that 'we are and become what we do' i.e. no relationship exists between 'goal' and 'good'.[570] Conventional living is thus frowned upon as being 'inauthentic'.[571] For an *Aristotelian* like *MacIntyre* however, the living of a conventional life is the very essence of virtuous living.[572]

It is in contrast therefore that *MacIntryre* puts forward the idea of a 'self' whose unity resides in the unity of a narrative of that person's life. A narrative which links birth to life and to death – a narrative of a whole life, one having a beginning, a middle and an end – a past, a present and a future.[573]

In other words, *MacIntyre* argues that individuals derive their identity, sense of life and purpose not from being the modern isolated absolutely free individual of the era of Enlightenment, who has no attachment, no history/story and no moral/traditional anchor in life except the application of rival principles, but by possessing a narrative which provides a lens through which the individual, and others, can make sense of his/her life.

[568] Goffman, E. (1959), *The Presentation of Self in Everyday Life,* Garden City New York, Double Day Publishing.
[569] Warnock, H. (1965), *The Philosophy of Satre,* London, Hutchinson University Library.
[570] *Ibid 592.,* p.204
[571] *Ibid*
[572] *Ibid.,* p.204
[573] *Ibid.,* p.205

If we as individuals possess a history, and are part of a story, then at birth, our story flows into an already existing story and we join that already existing story and have our story merge with it. This is of course why *Whitehead* posits in his metaphysics that each occasion of experience prehends all occasions of experience preceding itself. The reason for this being that by means of a physical prehension, each occasion of experience prehends the immediately prior occasion of experience – and by means of a physical prehension, that immediately prior occasion prehended the occasion before it; and so forth backward to the beginning of time.[574]

In following this a trail of thought, *MacIntyre* posits that the beginning of our story i.e birth is already made for us by what and who has gone before. We cannot therefore begin where we please (this is the idea behind the Enlightenment's rejection of all authorities), and neither can anybody else (Judge) who looks into our lives. Similarly, just as we cannot begin where we please, we cannot go on exactly as we please either – each individual is constrained by the actions of others and by the social settings surrounding their lives. We are always therefore in character, *MacIntyre* says.[575]

It is very important to stress and flog the notion that every single human being, in their uniqueness, lives out a narrative or history. The importance is mainly because this idea of an individual narrative provides an individual with a sense of identity and belonging essential to the conduct of the virtuous life. In this regard, we think of how many criminal acts can be traced to a poor social setting and upbringing.[576]

[574] Tidmarsh, J. (1998), Whiteheads Metaphysics and the Law: A Dialogue, *Albany Law Review,* 62, pp.1-90
[575] *Ibid 592.,* p.215
[576] *Ibid*

The notion of an individualistic narrative provides a *teleos,* since a narrative – by definition has an end or purpose to which it aims. That is why *MacIntyre* sees the unity of a human life as the unity of a narrative quest – life is a quest which ends in the good for man. For *MacIntyre,* as for *Aristotle,* the practice of the relevant virtues is essential for the achievement of good. A lack of justice, lack of truthfulness, lack of courage, lack of the relevant intellectual virtues are corrupt traditions.[577]

[577] *Ibid*

5.6 Ascertaining the Middle – Fineness of Moral Emotion

Whiles *MacIntyre* resorts to an aesthetic concept like that of a 'narrative' in explaining ethical principles, *Martha Nussbaum* goes further and turns that analogy into one of identity.[578]

More than *MacIntyre, Nussbaum* not only define moral behaviour as an aesthetic task, but also sees aesthetic production as a moral achievement. We create ourselves as beings acting morally just as an artist creates a work of art – any ethicist who want to argue this specific point has the need of an aesthetic experience if the argument is to be convincing. Nussbaum, therefore, chooses a scene from Henry James's novel *The Golden Bowl*[579] as a literary example.[580]

The scene from the *Golden Bowl* centres on the relationship between a father and his daughter.[581] The daughter had grown up with her father at his home, and is now about to marry, leaving the father to live with her husband. Life will change greatly for both father and daughter. They meet just before this event, conscious of their impending separation – their lives which now have to be lived apart. This meeting is the subject of the scene as chosen by *Nussbaum.* The future relationship between the father and the daughter will become clear during this meeting – they will look into the future, and speak of how they would want to relate. They must find a way to 'live together' i.e. deeply relate, even though they are separated.[582]

[578] Nussbaum, M. (1986), *The Fragility of Goodness,* Cambridge, Cambridge University Press, p.516 -519
[579] James, H. (1992), *The Golden Bowl,* New York, Knopf Publishing.
[580] *Ibid 579*
[581] *Ibid*
[582] *Ibid*

Nussbaum points out five observations that reveal the importance of the ethical/aesthetical if a moral solution to be reached by a person in a position of a decision maker. The aesthetical character proves a constitutive element of a solution for a matter that requires a decision in order to be settled.[583]

The first of *Nussbaum's* five observations is that the degree of imaginative power that the father and daughter need in Henry James' scene to solve their conflict can be seen in the aesthetic quality. In other words, the aesthetic quality possesses the power which would allow a decision maker the imagination with which to ethically solve a conflict. Whether a solution to a conflict is possible or not depends on whether one party can see what the other sees. So in the case of Law, whether a Judge can see what a defendant sees. The exercise of imaginative power and empathy is not merely a technical prerequisite for moral behaviour but is itself part of it.[584]

The second of *Nussbaum's* observations is that the beauty of the picture created by using imaginative power determines the moral quality of behaviour. Without the imaginative power which aesthetic quality brings, there can be no quality in terms of moral behaviour – the picture/circumstance before us will not be as a work of art, and will lack completeness.[585]

[583] *Ibid*
[584] *Ibid*
[585] *Ibid*

Nussbaum thirdly observes, that what is relevant for a successful solution of a conflict of life cannot be adequately described by propositional knowledge. Rather, aesthetical representation makes it clear, that a highly sensitive perception of the situation by the judging party, is necessary for successful conflict resolution. Propositional knowledge about the objective and subjective facts of a matter and the semantic content of general norms is not sufficient. The situation has to be visualised as a concrete shape – and this can only be done through Moral knowledge. Moral knowledge is not simply an intellectual grasp of propositions – it is not even simply intellectual grasp of particular facts – it is perception.[586]

Nussbaum observes fourthly, that it is only by aesthetic representation that an adequate solution to a matter of conflict can be found, not through cognition alone. *Nussbaum* points out here that the ability of the father and daughter in the scene of Henry James' novel to find a way of living with each other without inadequate mutual expectations is seen less in their virtual utterances, and more in the picture they create during their meeting. It is a picture where both of them see as the other does – a picture painted by empathy and commonality. Made possible only when they both turn towards one another attentively and honestly, perceiving their specific qualities.[587]

The *Aesthesis/*perception that is required therefore is not one of passivity or isolation, but one of interaction between parties/subjects that is creative and productive for both as was the case with the father and daughter. Just as the father meets to interact with the daughter in that one crucial scene of Henry James' novel, so also must Law meet and interact with the individual subject it is applied to.

[586] Nussbaum, M. (1986), *The Fragility of Goodness,* Cambridge, Cambridge University Press, p.521
[587] *Ibid*

Michael Polanyi has posited on this, making a similar point to *Nussbaum* – he writes that a legal decision maker must go through an 'act of knowing' as relates to the individual defendant. *Polanyi* argues the act of knowing, on the part of a judge, includes an appraisal. For him, all knowledge is personal knowledge and this will only be gained through interaction which is the sort of perception *Nussbaum* says is required for a moral solution to be reached.[588]

This point strongly echoes with *Bankowski's* work, where he says that Law ought to pay attention and interact. Law communicates with a subject but does not accept communication back from that subject so there is no interaction. *Bankowski* suggests that how we learn to 'pay attention' is similar to the way that we learn a skill like music – we learn by practicing, repeating the same act until we internalize it in such a way that we can go beyond. In other words, interaction has to become an everyday occurrence, where Law is not only speaking from the inside, but listening to the outside and learning to pay attention.[589]

The danger however, as *Bankowski* points out, is that we could get stuck in the old ways and the old categories. Because we have seen the old ways and categories so many times that we might think it is the same again. The paradox is that seeing it all before is also the condition for our being able to move beyond. What we need, says *Bankowski*, is a creative, loving and caring and anxious attention – being of an aesthetical and ethical quality. What allows us to move beyond, is to see things differently – to seek virtue and a moral solution to cases. Virtue and a want on our part for a moral solution to cases enables us to see things differently and not apply a rule when its intents and purposes are not met.[590]

[588] Polanyi, M. (1962), *Personal Knowledge,* Chicago, University of Chicago Press, p.17
[589] Bankowski, Z. Maclean, J. (2006), *the Universal and Particular in Legal Reasoning,* Hampshire, Ashgate Publishing, p. 37-38
[590] *Ibid*

Nussbaum however, very much like *MacIntyre*, realizes on her own that aesthetic/ethical representation alone is not enough to guarantee the moral rightness of the act. It is very possible that the aesthetic/ethical can break free from its object and become an end in itself. The moral judgement of an act then would be replaced by an aesthetic one or they would at least both compete for an adequate judgement.[591]

The result could well be that the aesthetic judgement would not, as *Nussbaum* posits, but leads to a criticism of morality itself. The only way to avoid this consequence, *Nussbaum* suggests, is to ascribe a moral task to art itself. Art depends on morality as well as morality depends on art – perception without responsibility is dangerously free-floating; duty without perception is blunt and blind – a duty to judge without perception will be blunt and blind.[592]

Onward from this follows the option for a certain kind of morality and an option for a certain kind of art. Morality and aestheticism become two interdependent and complementary parts. For morality, this means that it cannot do without rules in the sense of norms and principles, but also that it is not only a system of norms and principles that can be applied to random actions and situations.[593] We ought to exercise this option to gain this kind of morality which allows us to avoid the extremes of being with rules only or being without rules at all – we exercise this option by finding the *mean* between the extremes and inhabiting it.

[591] *Ibid 587*
[592] *Ibid* p.524
[593] *Ibid*

The ethical/aesthetic attitude postulated by *Nussbaum* understands moral rules only in the context of the concrete situation and the persons involved. *Nussbaum* demands an inspired awareness and honesty of the morally acting person and the artist (judge). She maintains that the artist' (judge's) obligation is to render reality, precisely and faithfully; in this task they are very much assisted by general principles and by the habits and attachments that are their internalisation.[594]

General principles, habits and social bonds are the very elements which *Aristotle* points out as forming the ethos of a way of life. It is to this ethos that *Nussbaum* relates the function of *aesthesis* or perception – she makes this relation because the ethos cannot be articulated by way of a systematic cannon of rules. It is not acquired simply by learning, but is formed out of an individual's experiences in dealing with practical problems.[595]

Character formation, therefore, goes together with the gradual acquisition of a disposition to assess situations and circumstances sensitively (as a judge ought to do) and to perceive their ethically relevant aspects attentively and honestly. *Aesthesis* or perception, proves to be an outstanding medium for relating the commonly shared ethos of our way of life to concrete situations. *Nussbaum's* argument therefore is simply this; without aesthetic experience, the ethical rules that guide our way of life are of no use to us in concrete situations such as a legal case.[596]

[594] *Ibid*
[595] Bender, R. (1998), The Aesthetics of Ethical Reflection and the Ethical Significance of Aesthetic Experience: A Critique of Alasdair MacIntyre and Martha Nussbaum, *EESE Journal,* Vol.1, pp.1-18
[596] *Ibid*

Nussbaum therefore describes the functions of *Aesthesis*; firstly, *Aesthesis* has a heuristic function. In other words it enables us to discover and learn a lot for ourselves through interaction. Without it, we would not have an idea at all as to which normative aspects are relevant to a concrete situation nor what a situation might be about in moral terms.[597]

Secondly, *Aesthesis* guides the application of rules. It will guide us to ensure that we do not apply a rule when its application is not warranted by the facts. The system of case and rule is broken, *Nussbaum* suggests. The rightness of an act in a concrete situation does not follow from the rightness of a norm. The concrete norm from which the rightness of an act is derived, is formed only within the situation itself by the judge attentively and honestly respecting the circumstances. A strict attention to rules would most certainly lead to moral insensitivity. They who rigorously follow rules, are blind to the individual differences in different situations and circumstances.[598]

Thirdly and finally, *Aesthesis* makes it possible for us to change rules in the light of new descriptions of situations. It enables us to discover new, and unknown aspects of a situation and to change the normative thumb rules according until they fit the new situation. Under *Aesthesis* we are not closed, but open to the reality that every concrete situation has its own uniqueness. *Nussbaum* makes a similar point in another of her works, where she says that rules ought to be as a measuring tape – flexible and wavering enough so as to be able to be fitted around the individual and the individual's situation.[599]

[597] Nussbaum, M. (1986), *The Fragility of Goodness,* Cambridge, Cambridge University Press, p.516 -519 p.525
[598] *Ibid*
[599] Nussbaum, M. (1993), Equity and Mercy, *Philosophy and Public Affairs Journal,* Vol. 22, pp.83-125

The changed perception can extend to particularities which are impossible to describe. With the help of *aesthesis*, we are able to use general terms and conceptions in an open-ended and evolving way, not in a set and fixed manner. Without this flexibility in dealing with norms, we would not able to react adequately to different descriptions of situations. The task of practicing the shared ethos is set to the artist as well as to the morally actin person i.e the Judge.[600]

[600] Nussbaum, M. (1985), Finely Aware and Richly Responsible: Moral Attention and the Moral Task of Literature, *The Journal of Philosophy,* Vol.1, pp515-529

CHAPTER 6

6.1 INTRODUCTION: THE MEAN AT WORK – MIDDLE DECISION MAKING

It has been shown and argued in *Chapter 2* that a solution forged by the System to solve problems within the System does not work because it often serves to do not much more than saving the System face by distracting us from its failings. This was demonstrated with reference to the UK example provided by the CCRC and satellite bodies like INUK. This *thesis* argues instead that *middle decision-making* is the solution which offers the best possible chance of dealing adequately and responsibly with the issue of wrongful convictions/miscarriages of justice.

The solution of *middle decision-making* through employing the use of a *mean* is put forward in the light of the inadequacy of systematic solutions (such as that provided in the UK by the CCRC) to address the issue of wrongful convictions/miscarriages of justice. Systematic solutions, though they have their place within every Criminal Justice System, have proven to be inadequate in addressing the issue of wrongful convictions/miscarriages of justice as has already been demonstrated in this *thesis.*

Wrongful convictions/miscarriages of justice are now acknowledged as a significant problem across many jurisdictions within the Common Law world and the search for a solution, as well as the scrutiny of already proposed solutions, has become the focus of intense study and debate. Systematic solutions, however, although they have their place within every Criminal Justice System, have as demonstrated in this *thesis,* proven to be inadequate in addressing the issue of wrongful convictions/miscarriages of justice. The purpose of this Chapter is to explain and demonstrate how the alternative solution which this *thesis* puts forward can be worked.

6.2 Law Must Observe The Law of Balance

Throughout all of human history, the golden rule which has ensured success in every endeavour is the rule of *balance*. *Balance* has made the difference, in many cases, and in many circumstances, between victory and defeat, progress and regress, success and failure, achievement and un-fulfilment.

As the saying goes, too much of any one single thing is bad; this is a fact of human life which cannot be denied or argued against. Too much sleep is bad, too much work is equally bad – too much leisure is bad, as is too much a time spent without leisure – gluttony is bad, so is extreme hunger which leads to malnourishment – extreme inflation is bad an unwanted in any country, but so is deflation which in itself leads to economic weakness. There is general agreement amongst all of mankind, that a life lived with *Balance* is the life that is best achieves results.

This is the principle behind *Aristotle's Golden Mean* – it is about getting a *balance* between two opposing things so as to achieve the desired results. This being said, the *Golden Mean* holds much more beyond *balance*; it also about harmony – specifically, the harmony that can be found in-between two extremes; between work and leisure, between courage and mindfulness, between praise and blame, between narrow and wide.

A fact of life is that we are always faced with extremes – we will always have them, and nothing can change that. There therefore cannot be a question of how we get rid of the extremes, for such a question is misplaced. The proper question which we ought to address is one of what we do with the extremes; do we ignore them completely and endure the problems that the tensions created between them produce? Or do we creatively work the extremes and their tensions by introducing and engaging in acts of *balance* and harmony in order that we may attain results of virtue?

The latter option is without a doubt, the option we would prefer for Law; a choice to not ignore the extremes of the *Universal/Particular* at Law's heart and thereby endure the problematic tensions that occur between them and wrongful convictions/miscarriages of justice which result – rather, we opt for the choice which allows us to work the extremes with creativity, by engaging in acts of *balance* where we decide in the *middle ground,* and thus bring about a harmony between the two extremes and we avoid wrongful convictions/miscarriages of justice. With such harmony in place, there is then the foundation and the basis, upon which Law can work to achieve results of virtue and avoid wrongful convictions/miscarriages of justice.

Whenever Law's works are devoid of *balance,* the usefulness of the *mean,* the decision-making process of Law becomes rooted either within the extremity of Law's *Universal* nature, or the extremity of the *Particularity* of the case, the results, as well demonstrated by the Canadian cases in *thesis,* are wrongful convictions/miscarriages of justice.

It is just like if I were invited to be the judge of a cooking competition on television, and laid before me was a huge buffet prepared by the competitors comprising tonnes of my favourite food and dishes. On sinking my teeth into such heaven, if I realised that all the dishes prepared could be classed into one of two categories, i.e they were either too salty, or completely without salt and therefore without taste, my verdict to all the participants would be that none of their dishes merited a win. The dishes that were too salty would not taste at all well, and those that were without salt would also not taste at all well.

If, however, there were a dish made during the competition, where the chef maintained a *balance* in his use of salt, to the extent that he is able to achieve a harmony between extremes of having too much salt and having no salt at all, then that would be a dish worthy of winning the competition because it is a dish that would taste right and taste best.

Balance is the key therefore. Extremes do not bring us the best results and should thus be avoided. The dish with too much salt is unpleasant and inedible – if the standard of our cooking competition is to award the best tasting dish a win, then a dish with too much salt would not taste the best and would therefore not win. Similarly, the dish without salt would be without taste and thus not awarded a win either.

Both such dishes would be unpleasant and inedible because they lack *balance*. The chefs who made them did not avoid the extremes. The failure of both dishes is completely down to a lack of *balance* – *balance* which would have introduced harmony; the harmonious taste of a dish prepared just right, with the right amounts of salt – not too much and not too little; a *balance*, a *mean,* between two extremes of too much salt and no salt at all; a dish prepared just right.

The notion that the observance of this Law of *balance* yields achievements of virtue is even demonstrated scientifically by this Planet that we all live on. In its solar system, the Earth is the only planet that supports life. The Earth is able to support life because all the conditions surrounding it are just right – all the conditions around the Earth are *balanced.* The earth is not too far away from the sun, neither is it too close to the sun – it is at a *mean/middle* point which allows it to gather the sufficient levels of warmth needed to support life, whiles simultaneously, not being in the position where its's too close to the sun and receives too much warmth from the sun such that it doesn't support life. If the Earth were too close to the sun, we would not be able to live on it because it would be too warm – if on the other hand the Earth were too far away from the sun, it would be too cold and we would not be able to live on it in that instance either.

This is what it means to have *balance;* it means to have the right amounts of two extremes in order to achieve virtue, beauty and harmony in all things. It means to avoid being too cold, because that will not support life – it means to avoid being too hot, because that will not support life either. It means having the right amounts of both heat and cold – a *balance* and *mean* between two extremes which ultimately will support life. The Earth follows the Law of *balance,* and that is why it is filled with such beauty and harmony between the different species that live on it. Such beauty and harmony is only possible because there is *balance* which facilitates the earth's ability to support life.

In a similar, and not at all far-fetched way, *balance* can help Law support life as well. If Law were to in all cases, uphold the Law of *balance* – and if Law and its handlers were to allow themselves to be guided by the concept of *balance,* then Law and its handlers would at all times avoid wrongful convictions/miscarriages of justice, and Law's actions would always result in acts of virtue. In other words, Law would in all cases achieve justice.

If Law's handlers were to uphold the Law of *balance* in all cases, there would not be a concentration of the legal decision making process in either the left or right – in either the Law's *Universal* nature or the *Particularities* of the case. Rather, the legal decision-making process would be anchored at the *mean* point between the two extremes – at the point where we find a *balance* between the Universal and Particular – where we have enough of the *Universal* nature of Law whiles having enough of the Particular to ensure that the subject individual is not lost to Law. This is how Law can support life.

Harmonious beauty on Earth is due, in great part, to the Law of *balance* being upheld. Beauty is possible in Law as well, as writes *Tidmarsh*.[601] *Tidmarsh* agrees that any progressive and successful society must have within its array of social systems, certain key qualities – qualities of which Beauty must be chief. A commitment to beauty will lead us, as a society, towards a feverish desire to find a synergy of feelings between two opposing extremes which have sharp contrasts.[602] In other words, our commitment to Beauty will help us attain harmony between opposing extremes; harmony occurs when there is a symmetry and a working together of feelings between two opposing extremes.

This *thesis* argues that the highest goal of the Legal System, its processes, and Law for that matter, is the attainment of beauty (avoiding wrongful convictions/miscarriages of justice). If beauty were not the goal of Law, society would not give it the place of prominence that it enjoys as a valuable social system, and we would not allow it to have any form of interaction with our everyday lives. Law is beautiful when it avoids wrongful convictions/miscarriages of justice.

Wrongful convictions/miscarriages of justice do not make Law beautiful. When Law's processes of adjudication result in wrongful convictions/miscarriages of justice, there is an ugliness that is created in place of the beauty we expect from Law. An ugliness where individual subjects (people) suffer, and one where Law loses credibility and fails to attain its highest goal.

[601] Tidmarsh, J. (1998), Whitehead's Metaphysics and the Law: A Dialogue, *Albany Law Review,* Vol.62, pp.2-90
[602] *Ibid*

Law's path to Beauty i.e. avoiding wrongful convictions/miscarriages of justice can only be paved by harmony – and harmony in turn can only be realised when the Law of *balance,* and a *mean* is observed which helps legal decision makers to avoid extremes. *Tidmarsh* expresses and articulates this point quite clearly by asserting that we can do the job of having two contrasting extremes that are forged and resolved into a harmony which is greater than either of the extremes held in contrast – we need to come up a novel solution which harmonizes law and morality within some new and greater Beauty.[603]

What this *thesis* puts forward therefore, is a solution which harmonises the tensions produced both extremes (*Universal* and the *Particular*) – harmonising these tensions to harness them, through the introduction of *balance* and a *mean,* in order to use them creatively to make Law beautiful.

There is, however, a huge risk; such a solution might be far worse than the negatives which accompany tensions between two opposing extremes. Rather than avoiding wrongful convictions/miscarriages of justice, we well could make things worse. Nevertheless, what stands to be understood, is that error, no matter how grave, is the price that we often pay for progress.[604] We therefore not need to fear to err – for to err is human – and an error does not become a mistake unless we fail to correct it.

Charles Hartshorne writes that the contrast that must be preserved is that between actual and possible, or concrete and abstract. Mere nominalism, asserts and the denial of universals, makes language unintelligible – for words express universal aspects of things if they express anything. However, the attempt to explain particulars as mere conjunctions of universal also fails. Thus,

[603] *Ibid*
[604] *Ibid*

affirms *Hartshorne*, the contrast between the *Universal* and *Particular* must be preserved, and the tensions created therefore, as a result of the contrast, must be worked.[605]

In light of this, the real question before us is one of how we work the contrasts and their resulting tensions constructively, in a manner that is positive for Law, and in a manner which addresses wrongful convictions/miscarriages of justice. This *thesis* puts forward that harmonising the tension between the two extremes by introducing a *balance* and *mean,* is the course of action which best allows us to avoid wrongful convictions/miscarriages of justice. The observance of *balance* and a *mean* allows for legal decision to take place in the *middle* ground, thereby avoiding extremes, and by avoiding extremes, avoiding wrongful convictions/miscarriages of justice.

The *balance* and *mean* suggested by this thesis is reference to a point that is in between the two extremes which allows us to explore the *middle* ground; what this means in practice, is that a Judge would base and anchor a legal decision making process at that point – balancing the need for Law's *Universal* nature in any adjudication process, with the need for Law to benefit from the *Particularities* of a case.

[605] Hartshorne, C. (1987), *Wisdom as Moderation,* Albany New York, State University of New York Press, p.7

6.3 Middle Decision Making - Positioning the Mean

The *mean* between extremes can be achieved on different levels of intensity or complexity of experience. There are intense sufferings, intense enjoyments – as well as tepid suffering and enjoyments. Whatever the intensity is of an event, motion or experience, it is possible to achieve a *mean* between two extremes for that motion or experience. In other words, the achievement of a *mean* is always possible in any matter regardless of the complexity of the facts.[606] Complexity should not be a barrier to the achieving of a *mean,* neither should the mere threat of chaos.

Intensity or complexity depends partly on contrast and variety. The richer the contrasts that are embedded into a matter or experience, the more crucial it is that a *mean* be achieved, and the greater the aesthetic and virtuous value of that *mean. Hartshorne* argues that there is a sense in this regard where *beauty* is, in effect, our *mean.* He turns to our use of the word 'pretty' to illustrate the point; we use the term 'pretty' for less intense forms of harmony.[607]

So for instance, in commenting on a particular Law, one might say 'the legislation is *pretty* lengthy.' The word '*pretty',* which in itself, is used to describe a thing of beauty, is used in this sense, as many others, to describe a *mean* between two extremes. By saying that the legislation is *pretty* lengthy, the person from which the statement originates is using a word which describes *beauty* to articulate what *Hartshorne* refers to as 'less intense forms of harmony' – in effect to articulate the achieving of a *mean* between long length and brevity.

[606] *Ibid 641.,* p.52
[607] *Ibid*

The *mean* ought to be positioned in an area between the extremes which is an area of *moderation.* A legal decision-maker must begin that process by deriving guidance, by reason, from the facts of the case as to which area between the two extremes (*Universal/Particular*) serves best as the area of *moderation.* If done successfully, the legal decision-maker would then be able to anchor his/her legal decision-making process at that point of moderation (*mean*) – thus avoiding extremes and wrongful convictions/miscarriages of Justice.

So for instance, if the defining facts of a matter are stated as fear and confidence, then a presiding judge at the helm of a decision-making process should, by reason, rightfully identify the point of moderation (*mean*) between two extremes to be 'courage' – a *mean* point between one extreme of excess which is foolhardiness, and the other extreme which is deficiency.

The *mean* need not necessarily have to be at the exact halfway point between each extreme, although it may indeed be so in most cases. In other cases, it may very well be that the appropriate and relevant *mean* may very well not be at the exact halfway point between each extreme – rather, it could be, if the facts direct, at a distance which is beyond the halfway point to either extreme in the direction of either extreme.

For the purposes of illustration, let us take the two extremes of a matter – let us for instance say that these two extremes are the numbers ten (10) and one (1), where ten (10) is too much and one (1) is too few. The number five (5) is the *mean* of the two extremes – and by selecting that number we maintain balance and avoid the extremes; deficiency (1) and excess (10).

In similar fashion, we could possibly select the number six (6) as a *mean*, or the number four (4) or even possibly the number seven (7) as a *mean.* Any number between two (2) and nine (9) could well be the *mean*. It is argued that our selection of the *mean* very much depends on the facts of the matter. The facts of a case will determine what the appropriate *mean* of the two extremes ought to be.

Striking a *balance* between two competing and opposing interests/extremes isn't something that is at all foreign to Law or impossible to achieve within Law, and there a number of legal examples to back this. One of such is the Canadian case of *R v Keegstra*[608]. During a History lesson Keegstra told his students that the Holocaust was a tool used to bring about sympathy for the Jews. He was accused of being anti-Semitic and charged under hate propaganda legislation.[609]

The Supreme Court unanimously concluded that hate propaganda formed part of protected freedom of expression pursuant to subsection 2 (b) of the Canadian Charter of Rights and Freedoms because hate propaganda is a form of expression. The Court held that subsection 319(2) of the Criminal Code violated subsection 2(b) of the Charter because it prohibited hate speech. *Chief Justice Dickson*, stated the reason for the majority's decision; *"... the prohibition of hate propaganda was a pressing objective of a real and very important character – this objective is supported by international documents to which Canada is a party ..."*[610]

[608] [1990] 3 SCR 697
[609] Criminal Code Section 319(2)
[610] *Ibid 609*

The Supreme Court in *Keegstra* struck a *balance* between the protection of free speech rights and the criminalisation of hate speech. Canada has a Charter of Rights and Freedoms which guarantees its citizens rights of speech. On the other hand, Canada is also a party to International documents which prohibits hate propaganda, even if it comes by free speech. The Supreme Court *Keegstra balanced* the right of free expression with the need to meet its obligations of criminalising hate speech under International documents by deciding that hate speech is not free speech – and that free speech should not be a guarantee for hate speech.

The correct positioning and achievement of the *mean* requires that we weigh every rule against the facts of the case before us – asking the question of whether the application of the rule is warranted by the facts, or whether we ought to suspend the application of that rule, or even reform/reshape it because of the facts of the case. We must avoid the extreme of Law's *Universality* in our applying rules. We must seek an area of *moderation,* strike a *balance,* and achieve a *mean* between the extreme *Universal* application of the Law and the consideration of the *Particular* that lies within the facts of the case.

Law's *Universal* nature without the *Particular* represents excess – and the *Particular* without Law's *Universal* nature represents deficiency. We must avoid both the excess and the deficient by striking a *mean* between the two which will allow us to have both; Law's *Universal* nature complemented by the *Particularity* of a case. Such is the recipe for avoiding wrongful convictions/miscarriages of justice.

We must have the rule/*Universal* in our right hand, but simultaneously, we must have reason/particular in our left hand, and we must construct judgment with both hands. Both hands, and their contents (*Universal and Particular),* need to work together. Very much like the ploughing of a filed, avoiding wrongful convictions/miscarriages of justice requires two hands, not one.

We must apply both hands in a manner warranted by the facts. If the facts warrant that we apply our right hand (*Universal*) much more firmly than our left, then we must do so if we want to avoid wrongful convictions/miscarriages of justice. If the facts warrant that we apply our left hand (*Particular*) much more firmly than our right (*Universal).* And if the facts warrant us to apply both our left (*Particular),* and right (*Universal*) hands equally and evenly, we must do that as well.

The question that needs answering at this point therefore is this; how do we know, and how do we come to decide, that the facts warrant a much firmer application of this hand or the other – or even, an even application of both hands? What guidance is available to us in this regard?

In order for a legal decision-maker to know what the facts of the matter warrant, he/she must engage with the story of the subject/party and interact with it in a creative and productive manner. It is only through interaction with the story of the subject/party (facts) that a legal decision-maker will know what is warranted. A legal decision-maker must engage in the 'act of knowing'.

This act of knowing will provide, to the legal decision-maker, the knowledge required to reach a moral solution by placing him/her in the position of knowing what the facts warrant. It is such engagement – identifying with the story of the party/subject - that places a legal decision maker/judge in the position to determine what the facts of a matter warrant; whether they warrant that we apply our left hand (*Particular*) more firmly than our right – whether they warrant that we apply our right hand (*Universal*) more firmly than our left – or, whether the facts warrant that we apply both right (*Universal*) and left (*Particular*) evenly.

Our application of the rules must be guided by our perception (feeling, hearing and seeing) of the facts of matter. In other words, our positioning of the *mean*, on the basis of what is warranted by the facts, must be influenced by the judge's feelings, insight, recognition, cognizance and thoughtfulness of the subject's story and the facts of the case. It is the judge's feelings, insight, recognition, cognizance and thoughtfulness of the subject's story, which will provide him/her with sufficient enough knowledge for them to realize the sort of *mean* that is practically suitable to be applied and the sort of *mean* that is warranted by the facts. This way, the judge is not blinded to the individual's difference or his/her unique situation/circumstance.

6.4 The Mean at Work – A Theoretical Underpinning

This *thesis* has thus far put forward that the answer to the question of how we avoid/prevent wrongful convictions/miscarriages of justice, as evidenced by the Canadian cases, is that we avoid extremes in legal decision-making by striking a *balance/mean* between the *Universality* of Law – which is Law's nature – and the *Particularities* of the case at hand.

From a theoretical standpoint, there is the question of what exactly the theoretical underpinning of the *mean* is. This thesis argues that the notion which underpins the *mean* is that of Justice. The striking of the *mean* is all about avoiding extremes – having both the *Universal* and the *Particular* - not just the *Universal*. It is argued that Justice simply cannot be served without the *Particular.*

James Murphy[611]writes of a paradox sitting at the heart of the relationship between Justice and Mercy. Similarly, we can say also that there is of course a paradox lying at the heart of Law between the *Universal* and the *Particular.* They are two extremes which are complete opposites.

[611] Murphy, J. (1986), Mercy and Legal Justice, *Social Philosophy and Policy,* 4(1), pp.1-14

Law has its *Universal* nature, and it will, by default, defer to that nature and the extremity of it. The result of that can be quite problematic for Law, as seen with the Canadian cases where wrongful convictions/miscarriages of justice occurred because the legal decision making process was concentrated within extremes. Law needs the *Particular,* if it is to avoid wrongful convictions/miscarriages of justice. Though Law needs the *Particular,* it doesn't need it in extremity, because that would be equally problematic for Law. The striking of a *balance* (*mean)* between the two extremes, where Law can complement the functionality of its *Universality* with the guided precision of the *Particular*, is therefore most ideal.

It is argued here that the striking of a *mean* and the opening of Law to the *Particular* does not equate to Mercy or represent Mercy. A Judge who conducts the legal decision making process by striking a *mean* and imputing the *Particular* into the flow of the legal decision making process does not engage in the act of Mercy. Rather, such a Judge pursues Justice because he aims to avoid wrongful convictions/miscarriages of justice.

The concept of striking a *mean* in a legal decision making process can easily be mistaken for mercy – any such argument is mythical and unrealistic. As *Murphy* writes, Mercy has certain distinct qualities. For instance, Mercy tempers justice. It is not owed to anyone as a right, and Mercy derives its value from a kind of character i.e a figure who performs acts of mercy.[612]

[612] *Ibid*

Nevertheless, it is important to be noted of Mercy, that it has a certain elasticity about it which can see it stretched, but not stretched too far. An individual who expects Mercy to be shown must acknowledge that he/she has no right to demand Mercy. Showing Mercy is always the different and costly choice and it is not an option that can easily be chosen. Nonetheless, it is a costly but the richer choice because the failure to grant mercy when it is needed costs us even much more.[613]

The objective behind the striking of the *mean* isn't to dilute justice but to arrive at it by avoiding wrongful convictions/miscarriages of justice – unlike Mercy, the *mean* does not derive its value from a kind of character who performs an act; the *mean* rather derives its value from the desire to avoid wrongful convictions/miscarriages of justice. Unlike mercy, the striking of the *mean* can be argued to be a right; every single defendant, in any court, is entitled to the full fulfillment of the court's obligation to avoid wrongful convictions/miscarriages of justice. Unlike Mercy, the *mean* does not require or represent a departure from justice - to strike a *mean* is not to be unjust.

To strike a *mean* and to anchor the legal decision making process at the *mean* is to introduce practicality into the legal decision making process. As *Detmold*[614] asserts, Law is practical and Legal Reasoning is practical reasoning. A judge must engage in practical thought so as to be able to perform the action of giving judgement. The focus of Law ought to be practicality – and that is exactly what we get with the *mean;* practicality with *Particularity* and *Universality*.

[613] Shakespeare, W. 2000, *William Shakespeare,* New York, Sterling Publishing.
[614] *Ibid 399*

So what does practicality in Law look like? The *mean* is inseparably joined to practical judgement of particular citizens. Every defendant to which the Law is applied is unique with unique characteristics and circumstances, and Law must relate to the defendant as he/she is. Law exists for the benefit of society and individuals in society – Law is for citizens and it must act in their interest – and the interest of every citizen is Justice.

The *mean* brings reason to the legal decision making process. Law should not be applied senselessly in a way which flies in the face of common sense. Striking a *mean* allows a Judge to refuse the application of Law if such application is not warranted by the facts. That's the nature of the linked relationship between the *mean*, Law, and reason.

A reasoned outcome is never guaranteed in any case – as we have seen with the Canadian cases. We must work towards it by steering the legal decision making process in the best direction – the direction of the *mean.* If it would be unreasonable to apply a Law, even though that Law could technically apply to the facts of a case, the judge must suspend its application; this would be reasoned legal decision making – which is what we get with the *mean.*

Absolutely no objective of Law is served when a judge applies a Law, however technically correct its application maybe, but does so in an unreasonable manner. The question is not about our applying the Law, but rather the reason for our applying it. Do we apply the Law because its application is warranted by the facts, or do we apply the Law simply because it is there to be applied?

Neither Law nor society is served by our applying the Law simply because it is there. Law and society are both served when we apply Law with reason – applying it because its application is warranted by the facts. Reasonable legal decision making is guaranteed when we strike a *mean.*

Take the story of our little girl for example; the striking of a *mean* in her case would lead us away from a senseless application of the Law. Strictly speaking, the Law of recklessness could easily apply to her and her case. However, such an application of the Law would be without reason, because it would be unreasonable to hold an individual to a standard of appreciating risk, when that individual does not possess the capacity to appreciate risk in the first place. A Judge committed to avoiding wrongful convictions/miscarriages of justice would in this case would strike a *mean* between Law's *Universal* demands and the *Particularities* surrounding our little girl which are begging to be considered – thus setting the foundation for reasonable legal decision making, by which a Judge would see every rightness in suspending the application of the Law in the case of our little girl.

Detmold mentions that we cannot discuss '*Particularity'* and *'Universality'* as relates to Law without talking about the particularity void. *Detmold* describes the void as being the gap between the rule i.e Law's *Universality*, and its application i.e the *Particular*.[615] This thesis puts forward that there is no particularity void with the *mean* – and that what *Detmold* and others would perceive as a void could be well understood as something else; a gap that is bridged.

If the particularity void is the gap between a rule i.e Law's *universality* and its application i.e the *particular* – if this gap is respect for respect for the particular, and what we get with the *mean* is a complementing of Law's *universal* nature with the guidance and precision of the *particular*, then there really isn't a gap or void whenever we strike a *mean*. What we have with the *mean* therefore can be described and understood as a bridged gap or a filled void at best, and not a gap or void at all.

[615] *Ibid 399*

With the *mean,* the actions of the legal decision-maker are rooted not only in the *Universal,* but equally in the *Particular.* The *mean* directs the legal decision-maker to make an evaluation each time a case is brought up for decision – to ascertain not only whether the conditions of application have been met, but also, whether such application is reasonable and practical.

Vietch argues that the sort of theorizing of the particularity void that *Detmold* offers loses sight of the locations of decisions. In other words, *Veitch* is saying that theorists treat the link between the *universal* and the *particular* as something that is from within as the central concern of analysis – it is process and context which count.[616]

To illustrate, *Veitch* uses a scene from *War and Peace* where Pierre is brought before Davout, who is suspected of being a spy, and is saved by a look he gives Davout. A look which made them both realize that they were both brothers. *Detmold* assessment of Davout the judge is that at the moment of practicality, he, Davout, entered the un-answering void of *particularity,* the realm of love, about which only mystical things can be said or nothing at all.[617]

Veitch's view of what goes on in *War and Peace* contrasts with *Detmold's* view. *Vietch* puts forward that the silence exchanged between Davout and Pierre, in which the particularity void is thought to consist has its roots not in any *particularity* or event or singularity, but rather exists in the perceived possibility of abstracts such as love or compassion.[618]

[616] *Ibid 418*
[617] *Ibid 399*
[618] *Ibid 418*

The arguments on the particularity void put forward by this thesis contrasts with those put forward by *Vietch and Detmold.* With regards to the scene from *War* and *Peace* involving Pierre and Davout, this *thesis* puts forward that Davout the judge suspended the application of the Law by striking of a *mean* between Law's *Universality* and the *Particularity* of the case. Yes, the Law was there to be applied by Davout, and it was, strictly speaking, applicable – but Davout takes notice of the *Particularity* of the case, and by striking a *mean*, Davout exercises practical and reasonable legal decision making which results in him suspending the application of the rule because such application was not warranted by the facts.

This *thesis* puts forward that such an act of practical and reasonable legal decision making through the striking of a *mean* between Law's *Universal* nature and the *Particularity* of a case isn't an action at all rooted in an abstract – but rather, such action is rooted in practicality and reason – such action is located in the space that this thesis describes as the 'particularity void that is filled/bridged by the *mean.*'

Very much like *Veitch* and *Detmold,* the opinion of *Christodoulidis* is important to consider here. *Christodoulidis* holds that even before we begin to explore the notion of the *Particular* or the particularity void, we encounter a prima facie paradox; forgiveness is of necessity, a personal response that belongs to the realm of ethics and thus in tension with formal justice.[619]

[619] *Ibid 204*

If justice is prevailing then that is fine, seeing as that is the one primary objective of Law. However, if considering the *particular* in a given process of adjudication equals mercy then we have a problem which is in the form of a paradox, *Christodoulidis* writes.[620]

This *thesis* puts forward, that the imputing of the *Particular* into the flow of the legal decision making process by striking a *mean* between the *Universal* and *Particular* does not equate to mercy – rather, it has everything to do with our being just . As evidenced in the Canadian cases, the attainment of Justice is mostly not possible without the *Particular* – if we try to be just without the *particular* we get the sorts of wrongful convictions and miscarriages of justice that we see in the Canadian cases.

The legal decision making process must have the capacity to admit the *Particular* into its flow and into a process of adjudication, otherwise we simply will attain Justice in too few cases, and we will have wrongful convictions/miscarriages of justice in too many cases.

Much like *Veitch* and *Detmold, Christodoulidis* shares his interpretation of the scene from *War and Peace* involving Davout and Pierre. *Christodoulidis'* take is that Davout the judge finds his reasons for his decision in compassion, and not in Law. Law is already there dictating reasons for Davout to act on Pierre – he is a traitor, and the Law says he must die. In *Christodoulidis'* view, it is only compassion that allows Davout to defy Law's justice. To claim that this can be accommodated in Law is to stretch the plasticity of Law to a point that is beyond recognition.

[620] *Ibid 204*

What this *thesis* argues is not that compassion can be accommodated within Law, but that Law needs both its *Universality* and the *Particular* in order to be just. The best way to bring this about is to strike a *balance/mean* between Law's *Universality* and the *Particularity* of the case – and if the striking of this *balance/mean* brings with it, on occasion, an abstract like compassion, then that is the price we have to pay to ensure justice in every case – it is a price worth paying, and one that we should accept.

For if the *Particular* does not belong in the legal decision making process, then where does it belong? Where else can it be most useful? *Christodoulidis* has asserted that its place in the realm of ethics – but let us not forget that ethics itself has its place and role in Law and in its process of adjudication, and so does the *Particular* by extension therefore.

Where else is the *particular* more needed than in the legal decision making process? Which other place or social system would suffer more problems from the absence of the *particular* than Law and the legal decision making process? Which social system other than Law stands the most to lose from not having the *particular* as a part of its process of adjudication?

6.5 The Mean at Work – Implications For Law as a System

Sally Falk Moore writes, the institution of Law represents society's attempt, through government, to control human behavior, prevent anarchy, violence, oppression and injustice by providing and enforcing orderly, rational and fair and workable alternatives to the indiscriminate use of force by individuals or groups. [621]

The systems theorist, *Luhmann*, supports this view of Law. He is thought to offer the most comprehensive and sober theory on the Legal System. *Luhmann* asserts that the legal system performs in society by differentiating itself from other social systems. It therefore creates its own territory with its own operations. Only by doing so does it develop a social environment of Law within society.[622]

One of Law's problems, as highlighted in this *thesis*, is its failure to see the *particular;* the particular individual, the particular set of facts and the particular case. Law seems mostly incapable of recognizing the particularity of any case because it nature does not allow it to do otherwise – and because Law fails to see the particular, it cannot address it or take it into account.

[621] Moore, S. 1978, *Law as Process,* London, Routledge, p.2
[622] *Ibid* 184

The root of this problem is down to the way Law operates as a system. A System's theory view of Law reveals that very much like other social systems within society, Law has its own unique mode of operation. As already stated, Law's *modus operandi* is the manner in which it communicates and takes in information from different sources. Law has a filtration system in place by which it communicates and takes in information from different sources.

Law uses its filtration system to sift-out information from other sources. Law's objective in this regard is to make its work simpler by reducing the volume of information that it needs to process through its filtration system – the filter within Law's filtration system is its binary code (legal/illegal).

With its binary code, Law compresses and refines the information into a form that it recognizes, can accommodate and work with. Specifically speaking, Law has to transform all inbound communication into legal communication. This transformation is essential to how Law works as a system. Without it, Law would not be Law. Filtering inbound communication represents an effort on Law's attempt to get rid of the 'noise' so it can hear much clearly, that which it needs to hear in the adjudication of any matter. This Filtration process makes Law blind so that it cannot see, and deaf so that it cannot hear.

Though Law's filtration process is an absolutely essential part of how Law functions as a system, the unfortunate result of it, is that it is the *Particular* that is mostly filtered and sifted out – particular individuals, particular events, particular circumstances, particular situations, particular ailments, particular conditions and particular circumstances which surround an individual. This is the 'noise' that Law filters out – the 'noise' which does not make it past Law's filtration and binary code. This is how Law works as a System – it attempts to reduce complexity.

The Legal system, and its handlers, prefer that Law works this way – they would prefer that they had fewer things to consider when adjudicating a matter – the fewer things Law has to consider, the faster and leaner decision it thinks it can make. This is what makes *tunnel vision* possible, as we have witnessed with the Canadian cases - without much to consider, the decision becomes is a relatively straightforward one. This is Law's comfort-zone – this is where it feels most comfortable to function, and its filtration process is what makes this 'bed of roses' possible.

As such, Law tries to steer clear of complications within its adjudication process. Steering clear of complexity means relying on its filtration system to filter out the 'noise' which Law sees as complications (mostly the *Particular*.) Law is then very much like the black/white televisions of the 1950's and 1960's; it seeks to present a simple picture in a format that it can support. The picture it presents is devoid of details of color (*the Particular)*. Law is the sort of television that would rather present a simple/straightforward black and white picture rather than deal with the complications of a colorful picture. But how are we able to appreciate the fullness of the picture without color? By extension, how is the construction of judgment to be advanced if the picture that is presented is not whole?

Surely it is only right that we are able to view the picture in its fullness and entirety, complete with all the different colors/*particulars*. Is it not towards the goal of avoiding wrongful convictions/miscarriages of justice that we appreciate the 'whole picture' (including the *Particular*), before we pass judgment on that picture?

This brings us rightly then to the question of how we give Law sight, and how we help Law present a picture that is rich with all the necessary details of color, which makes for helpful viewing. This question, nevertheless, presents us with a singular challenge. Namely, the challenge of giving Law sight while still maintaining its core processes as a system i.e its filtration process. In other words, how do we provide a solution to a problem whiles accepting the need to maintain the one thing causing the problem?

Strange as it may seem, the solution to Law's blindness does not lie in the absence of Law's filtration system. To take away of Law's filtration system would be, to a very large extent, the take away of Law itself. Law would simply not be Law if we took its filtration system away – it would be something else because the core systematic process which is unique to Law would no longer be there and we would undo what *Luhmann* has referred to as Law's reduction achievement. This *thesis* does not at all propose a removal of Law's filtration system as an appropriate remedy.

Rather, the solution proposed here is a simple one; by striking a *mean* between two extremes and anchoring the legal decision-making process there in that *middle ground*, we are able to give Law sight so it can see the individual and circumstances pertaining to the individual. This is demonstrated with examples in the next section.

Though Law's blinded as a result of the way it works as a system, the striking of a *mean* and the basing of the legal decision-making process from that *mean* mitigates Law's blindness and makes it possible for Law to have sight of the unique subject individual, their unique stories and the unique set of circumstances surrounding their lives – sight enough to enable Law present for judgment, an accurate picture that best mirrors the fluidity and detail of reality; complete with details color – as opposed to a mere black/white picture devoid of the rich detail we must have if we are to avoid wrongful convictions/miscarriages of justice.

Such is the impact of the introduction of the *mean* on the System theoretical of Law. Seeing as Law's problem, from a Systems theoretical standpoint at least, is that it lacks sight – the striking of a *mean* is an ideal solution.

It is an ideal solution because it addresses the problem that plagues Law, and it also gives Law a way out of its predicament – it gives sight to bind Law. *Zenon Bankowski* makes a similar point, albeit in another way. He says there is a curtain which lies in the middle separating, for Law's convenience, the 'outside' from Law's 'inside'. Though the curtain is quite a heavy one, we must from time to time find the strength to lift it so Law can see what is on the other side – so it can see what is on the outside. This way, Law is able to follow its *Universal* rules, but is simultaneously open to what is going on 'outside' (the *Particular).*[623]

Secondly, the solution of introducing the *mean* is an ideal one because it is one that can be worked without us having to take away Law's core systematic process; its filtration system. The concept of introducing a *mean* does not at all depend on Law's filtration system being suspended or halted in anyway. In other words we can help Law get past its blindness and stop it facilitating wrongful convictions/miscarriages of justice, whiles still maintaining the running of its core systematic process.

The introduction of a *mean* is our solution of choice because with it, we are able to insert back into Law's environment, the *particulars* that its filtration process filters out. If there are, after Law's filtration process has run its course, a filtered set of *particulars*, which we ought to consider if we are going to succeed in avoiding wrongful convictions/miscarriages of justice (objectively speaking), but remains unseen by Law, then we ought to strike a *mean,* and use the legal-decision making process based at the *mean* to say to Law; 'you missed this one'.

[623] *Ibid 556*

Systems theory gives us an understanding of the legal process, its limits and the problem of how the individual human being into its autopoietic equation. Law has a capacity and the ability to think independently and separately from the actors in its process. The impact of the striking of a *mean* on this theory is that there remains something more to be said after Law's autpoiesis has been explained – there remains something more to be said after it is explained that Law is a closed and independently thinking and acting system. What remains to be said, as a result of the striking of a *mean*, is that though Law, by design, operates as a closed and independently thinking system, there is a window of opportunity through which it can be given the capability, on occasion, to be open, inclusive, and thoughtful of subject individuals.

Law can work as a system in this way too. It can work as a 'two way street' system – where it moves in one direction but accepts and allows traffic from the opposite direction. By striking a *mean* we are able to make Law a 'two-way street' where there is on-coming traffic of information. Law has to pay attention to this traffic, it has to respect its right of way and it has to, on occasion, give way to this oncoming traffic if necessary. Law does not have to operate a one way street system – there can be room on the road for traffic to flow in the opposite direction, and Law can benefit from that traffic.

Very much like any normal system of rivers in any part of the world, Law must allow water (information) to flow into it from other sources. Every river has tributaries, every river is itself a tributary, and every river benefits from such. A tributary brings freshwater and enriches the ecosystem within and around the river. Without the introduction of fresh tributary water, any river would be stale and jaded.

Law also needs fresh tributary water – it needs information (*the Particular)* to enter its flow, refresh its function, direct its path and keep it from being stale, jaded and full of pollutants (wrongful convictions/miscarriages of justice). *Middle/Mean* legal decision making allows Law to move beyond just being a closed system, to being a system that also has room on its street for oncoming traffic and can accommodate such traffic – a system that will allow information to enter its flow, refreshing its processes and functions as well as keep it from a state of staleness and pollution (wrongful convictions/miscarriages of justice).

6.6 The Mean At Work In The Canadian Cases

In an earlier look at the Canadian cases, this *thesis* identified the tensions between the Law's *Universal* nature and the *Particularities* of a case, as being the cause of the wrongful convictions/miscarriages of justice which occurred in those cases. Having identified the avoiding of extremes through the striking of a *mean* and the basing of the legal-decision making process from that *mean* as the most ideal way to address the identified cause of wrongful convictions/miscarriages of justice, the appropriate question to address at this point is thus; what difference would our solution make if it were applied in each of those cases?

The case of *Steven Truscott*[624] is one of such cases. 14 year old Steven was found guilty of raping and murdering his classmate, 12-year-old Lynne Harper. The Ontario Court of Appeal acquitted Steven of the crime in 2007, albeit the acquittal did not come with a declaration of his innocence from the court. [625]

The evidence used to make the case against Truscott was largely circumstantial - and the judge(s) in that case failed to avoid extremes. There was clearly a rush to convict as can be observed from the manner in which the legal decision-making process was handled. The judges anchored the legal decision-making process within the *Universal* extreme and made their decision in the light and spirit of Law's *Universal* nature, thus, leaving the *Particular* out of the legal decision altogether - paving the way for the wrongful conviction/miscarriage of justice.

[624] 125 C.C.C. 100

[625] Truscott, S. Trent, B. (1971), *The Steven Truscott Story,* Richmond Hill, Simon and Schuster of Canada Publishers.

So how would the striking of a *mean* had helped the handlers of the legal decision making process avoid a wrongful conviction/miscarriage of justice in *Steven's* case? Well, for starters, the striking of a *mean* would take the legal decision-making process in the direction of truth – it will take the legal decision making process closest to the truth of the mater as possible, and in so doing, help avoid a wrongful conviction/miscarriage of justice.

What the handlers of the legal decision-making process should have done in *Steven's* case is that they should have struck a *mean* between the *Universality* of the rules/laws that were there to be applied, and the *Particularities* of the case. They should have lifted the 'heavy curtain' and had a look at what is on the outside of Law. Upon lifting the curtain, they would have seen *Truscott's* tender age on the outside, they would have seen the circumstances surrounding him and how he was connected to the crime scene on the outside; they would have seen that circumstance was the only thing which connected him to the murder.

Seeing and acknowledging these *Particularities* would have provided a window of opportunity to the legal decision maker to resist the impulse to concentrate the legal decision making process within Law's *Universal* nature – preferring, rather wisely, to concentrate the legal decision making process in the *middle ground/mean* and thus avoiding a wrongful conviction/miscarriage of justice.

In striking the *mean* the judges in *Steven's* case should have allowed themselves to be guided by the facts as to where to position the *mean.* The facts of course are that you have a 14 year old boy who gives a ride to his class mate (*Lynne Harper*) on his bicycle in the early hours of the evening. *Steven* is seen by a number of witnesses that evening riding on his bike with Lynne perching on it as well in close proximity to Lawson's Bush where *Lynne's* body was found two days after the bike ride.

Steven maintained of course that he had let *Lynne* off the bike, unharmed, at the intersection of a highway. *Steven* also maintains that after a few minutes after dropping her, he looked back towards the intersection and observed that a grey automobile had stopped and *Lynne* was in the process of getting into it. *Lynne's* body was discovered on the 11th of June 1959. Quite surprisingly, *Steven* was taken into custody the very next day the 12th 1959 – arrested before any decent and meaningful investigation into the murder could be conducted, let alone concluded. A day after that, he was charged with first degree murder and tried for a period of 15 days in court after which he was found guilty.

The judge in the case should have struck a *mean* at a position that is right between the extremes of the *Universal* nature and the *Particularities* of the case. The judge has to avoid extremes i.e. avoid the situation of applying the Law on the sole basis that it is there to be applied and can be applied in the instance. Rather, an application of the Law would have to be warranted and justified by the facts (practicality). This is how the judge should have avoided a wrongful conviction/miscarriage of justice in *Steven's* case.

Striking a *mean* between the *Universal* and *Particular* means the judge strikes a balance between the *Universality* of the rules/laws that are there to be applied, and the *Particularity* surrounding *Steven* i.e. his story.

In this case therefore, the judge, having successful positioned the *mean* between the extremes, ought to have imputed the *Particularities* of the case into the flow of the legal decision-making process. *Particularities* such as the age of Steven - the fact that he was fingered as the main suspect only because he was spotted with *Lynne* Harper before her disappearance – the fact that he was arrested only a day after *Lynne's* body was found and charged with first degree murder the very night of his arrest, both of these being done without the conclusion of any decent investigation into the murder. All these were indicative of a rush on the part of the police to conclude an investigation that never really even begun by conveniently fingering the person who was last seen with *Lynne Harper.*

Striking a *mean* would have resulted in these *particulars* being imputed into the flow of the legal decision-making process – with the judge striking a *balance* between the Law of murder that was there to be applied and abovementioned particulars. Had such *balance* been struck in *Steven's* case, it would have served to alert the judge to the fact that case for conviction was mostly based on circumstantial evidence, and therefore, there was more than sufficient probability that a wrongful conviction would result from the legal decision-making process rooted in Law's *Universal* nature.

In *Steven's* case, the striking of a *balance* would have locked the circumstantial evidence out of the legal decision making process. This is just another reason why the striking of the *mean* can be so useful in legal decision making; without the circumstantial evidence being imputed into the flow of the legal decision making process, there is no wrongful conviction/miscarriage of justice.

There are a number of factors which lead Judges not to take up the position that will enable them to lift 'the curtain', strike a balance and decide in the *middle ground* rather than within an extreme.

One of such factors is extreme objectivism. Judges, as observers and actors in the social world, tend to take up a point of view on an object and an action. They put into the object the principles of his relation to the object, and proceed as if the object were intended solely for knowledge and as though all the interactions within and around that object were purely symbolic exchanges.[626]

This is how Tunnel Vision takes hold – it is aided by the extreme objectivism that may accompany a Judge's consideration of a case – where the Judge takes a point of view about an object (the individual), focusing only on the principles of his relation to that object, and in doing so very much disregarding all other interactions with that object, and proceeding as though all other interactions about the object (individual) were nothing more than symbolic exchanges. Extreme objectivity hinders a Judge's ability to lift 'the curtain', and see what is on the outside of Law, strike a *balance/mean* using those *Particularities* its sees after the lifting 'the curtain', and by that avoid wrongful convictions/miscarriages of justice.

[626] Bourdieu, P. *The Logic Of Practice,* Stanford, California, Stanford University Press, p.52

Another factor which hinders a Judge's ability to 'lift the curtain' is the idea that Judges tend to think in forms. *Maclean* points out that a Judge's decisions are part of a complex practical activity which involves both language and procedures.[627]

Looking at a Judge's decision overtime, *Maclean* points out that we can observe how she follows certain rules and procedures and how these rules and procedures do not just shape her decisions, but function as normative constraints/criteria against which her decisions are guided. As a Judge, she knows to follow these rules, and because she has been trained to follow them, she possesses certain skills that make it impossible for her to engage in norm-bound activity.[628]

In other words, Judges, having frequently been through the practice of Judging, tend to form blocks and lines of thought with regards to rules and procedure which they default to whenever there is a case to be judged. The opportunity to take to the *middle ground* in their decision making is therefore lost as a result. Judges must free themselves from these blocks, lines and forms of thinking which they have trained themselves into by cultivating the habit of frequently refreshing their forms of thinking with each case – such a shift in habit would encourage Judges towards taking the *middle ground.*

The diagnosis of this *thesis*, in so far as the legal decision making process in the *Truscott* case is concerned, is that no *mean* was struck to determine the rightful shape and trajectory of the legal decision making process there – extreme objectivism, coupled by a habitual *Universal* form of decision making, gave rise to Tunnel Vision. As a consequence therefore, the legal decision making process was firmly anchored wholly within the Law's *Universal* nature,

[627] *Ibid 555*
[628] *Ibid*

leaving the *Particular* out and behind the curtain. As a result of this, the circumstantial evidence was not locked out of the legal decision-making process – it attached to Law's *Universality* and resulted in a wrongful conviction/miscarriage of justice.

Similar to the *Truscott* case is that of *Donald Marshall*[629] as discussed previously. *Marshall's* conviction was for the murder of *Sandy Seale*, an African youth from Whitney Pier. *Marshall* and *Seale* were acquaintances – both were walking through the park together one time when they encountered two other men who struck a conversation. During the conversation, one of the men – *Roy Ebsary* – who was later described as an eccentric and volatile man who had a fetish for knives, fatally stabbed *Seale* in the stomach without provocation. Once the stabbing had occurred, the police quickly focused their attentions on *Marshall* – even though *Ebsary* admitted to stabbing *Seale* originally but then lied to the police later. *Marshall* was eventually acquitted by the Nova Scotia Court of Appeal in 1983 after a witness came forward to testify that he had seen another man stab *Seale*.

As was with *Truscott*, the reason for the wrongful conviction in *Marshall's* case can be put down to a concentration of the legal decision making process within Law's *Universal* nature. The striking of a *mean* would have prevented a wrongful conviction/miscarriage of justice in this case by placing the legal decision making process in the *middle ground.*

[629] 146 DLR (4th) 257

The *mean* in *Marshall's* case should have been positioned at a point that is past the exact mid-point between the two extremes *(Universal/Particular)*, and is more towards the *Particular* but without entering that extreme. The justification for such a positioning is the facts – the facts of the matter will always guide us to an appropriate positioning of the *mean.*

Among the facts that guide us to position the *mean* this way in *Marshall's* case is his age; he was only a teenager at the time. And his ethnic minority background; *Marshall* was Mi'kmaq Indian, a minority within a majority Caucasian society which was known to be racist and have racist tendencies towards the Mi'kmaq Indians.

The striking of a *mean* would have brought the above *particulars* into the flow of the legal decision making-process, and by that, lock out the circumstantial evidence which would support a conviction. But, because no *mean* was struck, the legal decision making process was anchored firmly within the *Universal* extreme. This meant that the *Particular* was not a part of the legal decision making process – and as a result therefore, the judge couldn't avoid a wrongful conviction by locking the circumstantial evidence out of the legal decision making process.

A Royal Commission [630] was constituted to look into *Marshall's* trial and subsequent conviction. The Royal Commission reached the conclusion that *Marshall* was not guilty and that the investigation which paved the way towards the conviction was riddled with flaws.

[630] Royal Commission on the Donald Marshall Jr Prosecution, Novia Scotia Government, December 1989

It is argued, in a sense, that the Royal Commission was able to reach this right conclusion by striking a *mean.* They took note of the fact that the police acted with gross incompetence during the investigation; the first police officer to arrive at the scene, for instance, did not take any statements from *Marshall* or *Chant* who was a witness and was at the scene that night, and failed to secure the crime scene.

The Royal Commission took special note of the following facts; *a)* the Detective who run the investigation had a proven reputation for lying and bullying people into giving false witness testimony. This lead detective seemed hell-bent on proving, at any cost, that *Marshall* was guilty. The Commission was convinced in this regard that the lead detective's persistent pursuit of guilt for *Marshall* was fueled by a prejudice and racism that was shared by a majority of Sydney's White community at the time – a prejudice and racism which made the White community in Sydney see the Mi'kmaq minorities as little more than inferior.

b) the Commission took note of the Crown Prosecutor's conduct. It was objectively observable that he had no interest to see that justice was done. He did not provide full disclosure of the evidence to the defense as he ought to have done. He failed to discharge this duty and was grossly unprofessional and incompetent as the police had been with the investigation.

The Commission found that even though both of *Marshall's* Lawyers were very experienced, had distinguished careers and had been paid substantial fees, the defense they provided *Marshall* was wholly inadequate, nowhere near the minimum standards required.

On the basis of these *particulars*, the Commission positioned their *mean* at a point that is beyond the center of the two extremes, just short of entering the *Particular* extreme. They struck a *mean* and anchored their decision-making process within that *mean*, which allowed an introduction of the above *particulars* into the flow of that legal decision-making process, making it possible for the Commission to avoid a wrongful conviction/miscarriage of justice by 'locking out' the circumstantial evidence.

This is how the legal decision making process should have been conducted in *Marshall's* actual case. The judge should've struck a *mean* and anchored his decision making process within that m*ean* ground. The circumstantial evidence would have been seen for what it was; 'circumstantial', the inherent racism of the police would have been exposed in a *mean*-based legal decision-making process and the wrongful conviction/miscarriage of justice would have been avoided.

So then even though Law's reduction process/filtration system filtered out crucial *particulars* concerning *Marshall's* case, depriving the legal decision making process of those particulars, the Commission striking a *balance/mean* reintroduced these very necessary *particulars* back into the flow of the legal decision making process.

The Commission's approach to the legal decision making process demonstrates that the best possible way to avoid wrongful convictions/miscarriages of justice lies in the striking of a *balance/mean* between the two extremes of Law's *Universal* nature and the *Particularities* of the case. This is the best constructive way of navigating and addressing the tension created between the extremes.

The case of *James Driskell* is another where a wrongful conviction/miscarriage of justice could have been avoided if a *mean*. To recap, *Driskell* was wrongfully convicted for the murder of *Perry Harder* in 1991. *Driskell* was an auto-mechanic who was well known for his friendships with people who had criminal records.[631]

Driskell had an extremely hard upbringing – it was an upbringing that was mostly defined by violence. Growing up in one of the meanest areas in Winnipeg, *Driskell* was surrounded by such violence that even at the tender age of eleven, he witnessed his father, who was a bouncer at a hotel bar and a violent alcoholic, beat up another man quite severely. This the kind of lifestyle he came to know eventually.[632]

For much of his life, *Driskell* was corrupted by bad company – his friends included drug dealers, prostitutes and thieves. It was in keeping such friends that he met and became closely related with *Harder*, a bouncer who was also a known thief.

A year before *Harder's* death, the police caught both *Driskell* and *Harder* and accused them of being in possession of stolen goods. The Crown Prosecutor's case was to the effect that because *Harder* had decided to plead guilty and give evidence which would implicate *Driskell* in the crime of stealing the goods, *Driskell* murdered *Harder* in order to prevent him testifying.

In this case also, as with *Truscott* and *Marshall*, the evidence used against *Driskell* was purely circumstantial; mostly based on the fact that he and *Harder* had been seen together. Added to this was the testimony of a Police Officer, who testified that the strands found in the back of *Driskell's* van belonged to *Harder.*

[631] *Ibid 63.*, p.114
[632] *Ibid*

Members of the public who had gone over the case and its facts sensed that perhaps a wrongfully conviction had occurred. As a result, *Driskell's* case got a lot of public/media attention in the years following his conviction. Under intense public pressure, the Justice Minister finally announces that there would be an internal review of the case. It was this internal review that exposed the incorrectness and corruption of the police investigation/judicial process.

In *Driskell's* case, the legal decision making process was placed firmly within the *Universal* extreme. As a result of this, the *Particulars* filtered out by Law's filtration system were kept out of the legal decision making process.

A legal decision making process anchored in the *Universal* extreme is a 'heaven' for circumstantial evidence. Law's universality comes alive all the more in this state – it is normatively closed all the more – it is open only to the circumstantial evidence that the *Universal* extreme will allow it to see. And whiles the *Universal* extreme makes the legal decision making process open to the circumstantial evidence, it is an extreme that makes the legal decision making process oblivious to everything else around it.

The striking of a *mean* in *Driskell's* case would have taken the legal decision making process out of the prison of *Universality*, where it's only open to circumstantial evidence and oblivious to every other thing (mostly the particular). Rather, under the influence of a *balanced/mean/middle ground*, the legal decision making process would not be closed to the *particular*. Rather, it would be closed to the circumstantial evidence that would cause a wrongful conviction.

The striking of a *balance/mean* between the extremes in *Driskell's* case, would have re-introduced certain particulars into the flow of the legal decision making process; James was a marginalized person who very much grew up in a constant atmosphere of violence. As a result, he had a great deal of associations with criminals even though he did not have a criminal record himself. The nature of his upbringing had a huge impact on his life as an adult and the company he kept – this made him an easy suspect for the police, and once the Crown Prosecution began building a case around him using the *Universal* extreme as glue, that case stuck quite well.

With the striking of a *balance/mean* between the extremes, the above *particulars* would have been re-introduced into the legal decision making process – the judge would have been mindful of them, and having taken them into consideration, would have arrived the *balanced* conclusion that most of the evidence presented against *Driskell* was merely circumstantial, and that the Criminal Justice System had presented an individual they found easy to 'stitch up', and had 'stitched up', for trial and conviction.

Perhaps the most appalling of all the Canadian cases of wrongful convictions/miscarriages of justice is that of *Wilbert Coffin. Coffin's* case is also perhaps the saddest of all the cases of wrongful conviction discussed in this thesis – a wrongful conviction/miscarriage of justice which the striking of a *balance/mean* between the *Universal* and the *Particular* would have prevented.

Coffin was a minority in his society – his religion, poverty, poor education and language made him a marginalized and vulnerable individual within mainstream Quebec society. In June of 1953, three American hikers went missing in Quebec. Search and Rescue teams combed the thick forest area for them – *Coffin* assisted the rescue teams in their search for the American hikers as he himself was a mining prospector. The search and rescue teams found that he had a deep knowledge of the area – and with *Coffin's* help, the search parties soon found the truck that the American hikers had used.

Ultimately, the heavily mutilated bodies of the hikers would be found about 5 miles from the truck that was found. *Coffin* told the search and rescue teams that he had had contact with the American hikers, as he helped the American hikers move through the woods when their truck broke down. *Coffin* was therefore the last person to see the hikers alive.

The American State Department, appalled by the murders, put enormous amounts of pressure on the Quebec government to find and prosecute the perpetrator of the crime. A Quebec police force under pressure rushed through a misguided the investigation by focusing their efforts on *Coffin. Coffin* was detained as a material witness, after which he was subsequently arrested for the murder of the hikers. He would ultimately be trialed, wrongfully convicted and hanged for a crime he did not commit.

The Prosecution's foremost argument was that *Coffin* he killed the hikers and then robbed them. The evidence the presented to support this argument was in the form of witness accounts which stated that *Coffin* had been seen spending substantial amounts of money, including American dollar notes. Additionally, *Coffin* had admitted to the Prosecution that he had met the three American hikers in the forest, and had even given one of them a ride into the Gaspe Township to buy a new pump for the hikers' truck. The Prosecution argued that *Coffin* was fabricating the pump story, because when the truck of the hikers was examined, the pump was found to be in good condition.

The Prosecution based its case for conviction on the evidence that *Coffin* was seen spending American dollars before the crime occurred, and he was the last person to have been in contact with the American hikers – he was seen spending American dollars, and he was the last person to see the hikers – 'he therefore definitely must have done it', such was the conclusion of the Prosecution's case.

The evidence used to secure *Coffin's* conviction was purely circumstantial. It seemed clear that the Police had cracked under the pressure from the American State of Department, and had presented someone to whom they could make the crime stick.

Such was the folly of the police in this case. But why did it have to be Law's folly as well? It most certainly did not have to. Law did not have to 'rubber stamp' the Police's 'stitch up' of *Coffin* – but Law did – and this became a possibility in Law because no *balance/mean* was struck between the *Universal and Particular* extremes. In *Coffin's* case, the legal decision making process was concentrated within Law's *Universal* nature. This is what made the circumstantial evidence stick, and the appalling wrongful conviction possible.

The striking of a *balance/mean* between the extremes in this case, would have prevented the wrongful conviction. The striking of the *mean* would denote an imputing of the *Particular* into the legal decision making process – and such imputation would have made all the difference. *Particulars* such as *Coffin's* marginalization (he was an minority in his community and was marginalized) – the fact that the American State Department put so much pressure on the Police in Quebec to find and convict the person responsible for the murders.

Had the legal decision making process been concentrated in the *middle ground* through the striking of *mean/balance*, the presiding judge would definitely have seen the circumstantial evidence for what it was; evidence upon which no conviction could soundly rest. Yes, *Coffin* was seen spending American dollars in the market place before the bodies were discovered – and yes he was the last person to have seen the American hikers before their bodies were found – but do these mean that he committed the murders? The answer is a resounding no – and if the handlers of the legal decision making process paid attention to *Coffin* they would have come to that same conclusion.

As *Bankowski* puts it, Law ought to pay attention to the entire story of the subject – not just a snapshot of it. A judge must emerge from any *Universal* forms of thinking that he/she may be conventionally used to and interact with the story of the subject – plugging himself into its flow, where it is not only communicating to the subject but receiving and accepting communications back from the subject.[633]

[633] Bankowski, Z. Maclean, J. (2006), *the Universal and Particular in Legal Reasoning,* Hampshire, Ashgate Publishing, p. 37-38

6.7 The Mean – Learning to Strike it

So how can Judges develop the capacity to lift 'the curtain', see those *Particularities* which are on the outside of Law – and by that – concentrate the legal decision making process in the *middle ground* by striking a *balance/mean* between Law's *Universal* nature and the *Particularities* of the case in hand so as to avoid wrongful convictions/miscarriages of justice?

Pierre Bourdieu puts forward that Objectivism constitutes a social world as a spectacle offered to an observer who takes up a 'point of view' on the action and who, putting into the object the principles of his relation to the object, proceeds as if it were intended solely for knowledge and as if all the interactions within it were purely symbolic exchanges.[634]

It is possible to step down and escape from objectivism without jeopardizing rule application or rule procedure. In order to do this, Judges must situate themselves within real activity – they must plug themselves into the flow and realities of the stories of subject individuals and practically relate to them.[635]

Useful to this end is the concept of *Habitus.* Advanced by *Bourdieu*, *habitus* is a generative phenomenon that is capable of regulated improvisation, or the ability to transform to fit new circumstances and experiences on occasions when agents' habitual responses break down or clash and when agents consciously reflect on themselves and their changed contexts, and reconstruct their *habitus* accordingly.[636]

[634] Bourdieu, P. (1994) *The Logic Of Practice,* Stanford, California, Stanford University Press, p.52
[635] *Ibid*
[636] *Ibid*

In learning how to strike the mean, Judges would be greatly helped if they cultivated a custom of flexibility and adaptability – where they are willing and able to change/abandon their traditional patterns and blocks of thought which have been formed by years passing of judgement, whenever they reach the realization that those traditional patterns and blocks of thought are not suited for the case in hand. They must reconstruct their *habitus* to fit the case.

The notion of *Habitus* does not present Judges with 'ready-made' solutions or fixed ways of viewing a problem as their already formed traditional patterns and blocks of thought do.[637] Rather, Judges are urged to adopt a new culture of flexibility and adaptability which will bring with it, new and improbable solutions which must not be excluded as they would be if a Judge is rooted in traditionally formed blocks and patterns of thought.

More importantly, the *habitus* contains the solution to the paradoxes of objective meaning without subjective intention.[638] The *habitus* is best able to help Judges learn how to strike a *mean* and decide in the *middle ground* precisely because it is the one concept which is capable of instructing one towards a solution to the paradox presented by a coupling of *Universal* and *Particular*, without sacrificing Law's personality.

Habitus suggests to Judges that following a rule cannot be done in a universalistic manner. If our understanding directions or following rules depends upon us having already formulated thoughts, then we need an infinite number of thoughts in our heads to follow even the simplest of instructions – this is simply impractical.[639]

[637] Bourdieu, P. (1997), *Pasacalian Meditations,* Stanford, California, Stanford University Press, p.78
[638] *Ibid*
[639] Bourdieu, P. Calhoun, C.J, Lipuma, E. (1993) *Bourdieu : Critical Perspectives,* Chicago, University of Chicago Press, p.46

What is needed is for Judges to perceive cases with fresh thoughts. Every case is as unique as it is similar to other cases. Every case therefore requires and deserves a freshness of thought, especially where pre-formulated blocks and patterns of thought will not suffice. A Judge who develops such a culture will excel at striking the *mean* and deciding in the *middle ground.*

Wittgenstein suggests that following a rule is not like the operations of a machine. Rather, it is a social practice – a process which must take account of the factors that bear upon individual social actors. Such socialization of rule application, as it is, requires of a Judge that he/she become a responsible thinking mind, self-reliant for his/her judgements – resisting with stern will, the tendency to see the human agent as a subject of representations – representations about the world outside and depictions of ends desired or feared. Judges must see the agent not primarily as the locus of representations, but as engaged in practices, as a social being who acts in and on a world.[640]

A rule does not apply itself, it has to be applied by someone – and this may involve difficult and finely tuned judgements. Nonetheless, a person (Judge) of practical wisdom is marked out less by their ability to formulate rules, and more by their knowing how to act in applying of those rules in each particular situation.[641]

[640] Wittgenstein, L. (1973), *Philosophical Investigations,* Oxford Publishing, Oxford, p.193-194
[641] *Ibid 641., p.57*

All Judges must consider that Rules, as they are formulated, are in close interrelation with our *habitus.* Rules are not self-interpreting – without a sense of what they are about, and an affinity with their spirit, they remain just letters or at worse, become a travesty in practice as we have seen with the Canadian wrongful convictions/miscarriages of justice.

Judges must pay attention to the story of the subject individual, plug themselves into the flow of their stories and derive an understanding of these stories. Rules operate in our lives, and function only along with an inarticulate sense which is encoded in the body. Judges must employ a *habitus* which allows them to move to the *middle* and decide there – and if a Judge's *habitus* does not allow this, then such a Judge must reconstruct his/her *habitus.*

6.8 CONCLUSIONS

This *thesis* has demonstrated that wrongful convictions/miscarriages of justice occur because legal decision making gets locked up in extremes (*Universal/Particular*). And that avoiding these extremes in legal decision making therefore is our surest path to avoiding wrongful convictions/miscarriages of justice. The best way to avoid extremes is to simply do that; avoid them – by concentrating legal decision making in a space where both extremes find representation.

It was demonstrated in *Chapter 1* through a discussion of the Canadian Cases, that wrongful convictions/miscarriages of justice occur when legal decision making taking place within an extreme (*Universal/Particular).* As with the story of our little girl (Ginger), it was shown that wrongful convictions/miscarriages of justice occurred in each of the Canadian cases because the legal decision making process was locked up within extremes.

We found this to be true all the more when close attention was paid to the different perspectives on wrongful convictions/miscarriages of justice in *Chapter 2.* The perspectives (Foucauldian, Marxist Systems Theory etc.), represented the different comprehensions of wrongful convictions/miscarriages of justice. As frequent references were made to the Canadian cases as the perspectives were discussed, it was further demonstrated, through the insight the perspectives provided, that wrongful convictions occur when the legal decision making process takes refuge in one extreme or the other.

The Legal Reforms put in place by the Canadian Criminal Justice System to address the issue of wrongful convictions/miscarriages of justice have proved to be inadequate as was discussed in *Chapter 2.* As demonstrated by Australia's rejection of a CCRC-styled solution, a solution for the system provided by the system does nothing more than distract us from the system's failings.

Solutions for the system provided by the system do not do enough to address the issue of wrongful convictions/miscarriages of justice because they do not speak to the problem i.e what this *thesis* identifies as the main cause of wrongful convictions/miscarriages of justice; the locking up of the legal decision making process in the extremity of either Law's *Universal* nature, or the *Particularities* of the case.

This *thesis* puts forward an alternative solution – a real solution which rather than distracting us, speaks to the problem and thus addresses the issue of wrongful convictions/miscarriages of justice. It is a solution which helps Law to, as a System, see the individual defendant – see our little girl (Ginger), *Truscott, Driskell*, *Coffin* etc. It is a solution which involves avoiding the extremes of Law's *Universal* nature and the *Particularities* of the case, by conducting legal decision making in the *middle* ground between those two extremes.

The *Middle ground* is a place of progress, a place where we can creatively address the problem - i.e what this *thesis* posits to be the primary cause of wrongful convictions/miscarriages of justice – by avoiding extremes. The *middle* is also a place of process where we can make ethical decisions which avoid wrongful convictions/miscarriages of justice by avoiding extremes.

Deciding in the *middle* ground requires striking a *balance/mean* whiles conducting the legal decision making process, between Law's *Universal* nature and the *Particularities* surrounding a case. A legal decision-maker positions the *mean* through balancing Law's *Universal* nature with the *particularities* of the case by paying attention to the facts and plugging themselves into the flow of the individual defendant's life story.

Middle decision-making makes a huge difference as demonstrated by this *thesis* in *Chapter 7*, where it was proven that an application of the *mean* to the legal decision making process in the Canadian case would have avoided the wrongful convictions/miscarriages of justice which occurred in those cases.

This *thesis* encourages Judges to engage in *middle* decision making as it is the surest way to avoid wrongful convictions/miscarriages of justice. Judges can get better at deciding in the *middle* by practicing it with each case. They must be prepared to be practical and flexible when applying the Law – they must abandon traditional, rigid forms of thought, and embrace malleable concepts and solutions, such as is put by this *thesis.* They must be open and pay attention not only to Law and its *Universal* nature, but equally to the subject individual and the *Particularities* surrounding his/her case.

It cannot be left without mention, that the means of addressing the issue of wrongful convictions/miscarriages of justice (avoiding extremes) as put forward by this *thesis,* and the method put forward to achieve it (middle decision making through the mean), has its own limitations. The solution offered herein this *thesis* will not, and does not, guarantee success in all cases. Nonetheless, the solutions put forward in this *thesis* ought to be taken seriously because it addresses the problem robustly enough to make a difference. It may not answer all the questions which may follow a reading of this *thesis,* but what is certain enough, as demonstrated in this *thesis,* is that its application would have avoided a wrongful conviction/miscarriage of justice in *Ginger's* case, in the cases of *Truscott, Sophonow, Drisklell, Coffin, Guy Paul-Morin,* and all such cases in the future where we see aspects of our little girl's (*Ginger)* story present.

Law's world is one full of Grey. It is one in which Law always defaults to its black-and-white way of looking at things (its systematic processes). How do we help Law without changing Law? In such a world of Greys, we have to employ colourful thinking; 'Colourful thinking in a world of Greys.' That is what is needed: a form of middle decision-making that avoids extremes opens the door to Colourful thinking, a form and method of decision-making that lets light in to illuminate Law's grey world and to address, avoid and eliminate wrongful convictions/miscarriages of justice.

BIBLIOGRAPHY

CASES

Director of Public Prosecutions v Shannon [1974] 59 Cr.App.R.250

Elliot v C [1983] 1 WLR 939

R v Caldwell [1982] AC 341

R v Chamberlain (1983) 153 CLR 514e

R v Coffin [1956] S.C.R 191

R v Criminal Cases Review Commission, ex p Pearson [2000] 1 Cr App R 141

R v G & R [2003] 3 WLR

R v Hickey & Ors [1997] E.W.C.A Crim 2028

R v James Driskell [2004] 179 Man. R (2d) 276

R v Keegstra [1990] 3 SCR 697

R v Marshall 146 DLR (4^{th}) 257

R v Milgaard [1969] 2 206

R v Morin [1992] S.C.J No. 25

R v Mullen [1999] EWCA Crim 278

R v Sophonow [1984] 2 S.C.R 524

R v Truscott 125 C.C.C 100

Re Chamberlain [1983] FCA 78

Re Truscott, [1967] S.C.R 309 at 312

Thomas Conham v College of Physicians 8 Co. Rep. 107

STATUTES

Canada Evidence Act 1893

Criminal Appeal Act 1968

Criminal Appeal Act 1968

Criminal Appeal Act 1995

Juvenile Delinquents Act 1908

Police and Criminal Evidence Act 1984

Supreme Court Act 1952

Youth Criminal Justice Act 2003

JOURNAL ARTICLES

Bankowski, Z. (1994), How Does It Feel to Be On Your Own? The Person in the Sight of Autopoiesis, *Ratio Juris,* Vol 7(2), pp.254-266.

Bender, R. (1998), The Aesthetics of Ethical Reflection and the Ethical Significance of Aesthetic Experience: A Critique of Alasdair MacIntyre and Martha Nussbaum, *EESE Journal,* Vol.1, pp.1-18

Card, C. (1972), Mercy, *Philosophical Review,* 43, pp.182-207.

Christodoulidis, E. (1999), The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular, *Law and Philosophy Journal,* 18, pp.215-241

Detmold, M. (1989), Law as Practical Reason, *Cambridge Law Journal,* 48(3), pp.436-471.
Fletcher, P. 1985, Paradoxes in Legal Thought, *Columbia Law Review,* 85 pp. 1263-1292.

Foucault, M. 1979, Governmentality, *Ideology and Consciousness Journal,* 6, pp. 14-16
Greer, S. 1994, Miscarriages of Justice Reconsidered, *Modern Law Review,* 57, pp58-74

Little, G. (2009), Middle Way Leaders, *International Journal of Applied Psychoanalytic Studies,* Vol 6, pp.111-128.

Minogue, K. & Rose, G. (1985), Hegel Contra Sociology, *The British Journal of Sociology,* Vol 36, pp.477-495.

Murphy, J. (1986), Mercy and Legal Justice, *Social Philosphy and Policy,* 4(1), pp1-14.

Naughton, M. (2012), The Criminal Cases Review Commission: Innocence Versus Safety and Integrity of Criminal Justice System, *Criminal Law Quarterly,* 58, pp.207-224.

Naughton. M. (2006), Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education, *Web Journal of Current Legal Issues,* 3.

Nobles, R. and Schiff, D. (1995), Miscarriages of Justice: A Systems Approach, *Modern Law Review,* 58, pp.299-320.

Nussbaum, M. (1985), Finely Aware and Richly Responsible: Moral Attention and the Moral Task of Literature, *The Journal of Philosophy*, Vol.1, pp515-529.

Nussbaum, M. (1993), Equity and Mercy, *Philosophy and Public Affairs Journal,* Vol. 22, pp.83-125.

Patterson, J. (1995), Who is Zenon Bankowski Talking to? The Person in the Sight of Autopoiesis, *Ratio Juris,* Vol 8(2), pp.212-229.

Snider, L. (1985), Legal Aid Reform and the Welfare State, *Crime and Social Justice Journal,* pp.24-85.

Stone, A. (1985), The Place of Law In The Marxian Structure – Superstructure Archetype, *Law and Society Review,* 19(1), pp. 39-67.

Susskind, R. (1986), Detmold's Refutation of Positivism and the Computer Judge, *Modern Law Review,* Vol 23, pp.125-137.

Teubner, G.(1989), How the Law Thinks: Toward a Constructive Epistemology of Law, *Law and Society Review,* Vol 23(5), pp.727-757.

Thornton, P. (1993), Miscarriages of Justice: A Lost Opportunity, *Criminal Law Review,* pp.926-935

Tidmarsh, J. (1998), Whiteheads Metaphysics and the Law: A Dialogue, *Albany Law Review,* 62, pp.1-90.

Williams R. (1995), Between Politics and Metaphysics: Reflections in the Wake of Gillian Rose, *Modern Theology,* Vol 11(1), pp.3-22

Ziegert, K. (1992), Courts and the Self-Concept of Law: The Mapping of the Environment by Courts of First Instance, *Sydney Law Review,* pp 196-229.

Zuckerman, A. (1991), Miscarriage of Justice and Judicial Responsibility, *Criminal Law Review,* 492, pp.493- 496.

BOOKS

Anderson, D., Anderson, B. 2009, *Manufacturing Guilt*, 2nd edition, Black Point, Fernwood Publishing.

Aristotle, Smith R, (1997), *Topics*, Oxford, Clarendon Press.

Avbelj, M. Fontanelli, F. Martinico, G, *Kadi On Trial: A Multifaceted Analysis of the Kadi Trial*, New York, Routledge Publishing.

Banakar, R. Travers, M. 2002. *An Introduction to Law and Social Thoery*, Portland, Oxford Printing Press.

Bankowski Z, Davies C. *Living In and Out of Law*, In Oliver P. Victor T. (2000), *Faith in Law: Essays in Legal Theory*, London, Hart Publishing.

Bankowski, Z. Maclean, J. (2006), *the Universal and Particular in Legal Reasoning*, Hampshire, Ashgate Publishing.

Barber, B. 1983, *The Logic and Limits of trust*, New Jersey, Rutgers University Press.

Beirne, P, Quinney, R. 1982, *Marxism and Law*, New York, Wiley Publishing.

Bergson H, (1983), *Creative Evolution*, London, Macmillan Publishing.

Bourdieu, P. (1994), *The Logic Of Practice*, Stanford, California, Stanford University Press.

Bourdieu, P. (1997) *Pasacalian Meditations*, Stanford, California, Stanford University Press.

Bourdieu, P. Calhoun, C.J, Lipuma, E. (1993), *Bourdieu: Critical Perspectives*, Chicago, University of Chicago Press.

Boyd, N. 2014, *Canadian Law: An Introduction*, 5th edition, Toronto, Nelson Publishing.

Campbell, B. (2013), *The Call to the Broken Middle Ground,* Ed. In, Winter, S. *Immense, Unfathomed, Unconfined: The Grace of God in Creation, Church and Community,* Oregon, Mosaic Press.

Cassirer, E. (1951), *The Philosophy of the Enlightenment,* New Jersey, Princeton University Press.

Chapman, B. & Niven, S. 2000, *A guide to the Criminal Justice system in England and Wales,* Great Britain, Home Office Research, Development and Statistics Doctorate.

Christodoulidis, E. (1998), *Law and Reflexive Politics,* Dordrecht, Kluwer Academic Publishers.

Coates, R. (1998), *Christianity in Bakhtin,* Cambridge, Cambridge University Press.

Collins. H, 1982, *Marxism and Law,* Oxford, Clarendon Press.

Deluze, G. (1994), *Difference and Repetition,* London, Athlone Press.

Deluze, G. Guattari, F. (1987), *A Thousand Plateaus: Capitalism and Schizophrenia,* London, Athlone Press.

Detmold, M. (1984), *The Unity of Law and Morality,* London, Routledge & Kegan Paul.

Dicker, G. (1998), *Hume's Epistemology and Metaphysics,* London, Routledge Publishing.

Elias, N. 1978, *The Civilising Process: Volume One,* Oxford, Blackwell Publishing

Engels, F. Kelley, F. 1888, *The Condition of the Working Class in England,* London, William Reeves Publishers.

Fanthorpe, R. & Fanthorpe, P, 2003, *The World's Most Mysterious Murders,* Toronto, DundurnGroup.

Faryon, C.J, 2012, *Guilty of being Weird: The Story of Guy Paul Morin,* Toronto, Lorimer &Co Publishers

Forst, B. 2004, *Errors of Justice,* Cambridge, Cambridge University Press

Foucault, M. 1978, *The history of Sexuality,* New York, Pantheon Books.

Foucault, M. 1991, 'Governmentality', in Burchell, G., Gordon, C.& Mille, P., *The Foucault Effect: Studies in Governmentality,* Harvester Wheatsheaf, London.

Giddens, A. (1971), *Capitalism and Modern Social Theory*, Cambridge, Cambridge University Press.

Gillespie, J. (2006) *Transplanting Commercial Law Reform,* Aldershot, Ashgate Publishing Company.

Goffman, E. (1959), *The Presentation of Self in Everyday Life,* Garden City New York, Double Day Publishing.

Gombay, A. (2007), *Descartes,* Malden, Blackwell Publishing.

Hage, J. (1997), *Reasoning with Rules*, 1st edition, Dordrecht, Kuwer Academic Publisers

Harris, M. 1990, *Justice Denied: The Law Versus Donald Marshall,* Toronto, Harper Collins Canada Ltd.

Hart, H.(1961), *The concept of Law,* 1st edition, Oxford, Clarendon Press.

Hartshorne, C. (1987), *Wisdom as Moderation,* Albany New York, State University of New York Press.

Hermans, B. Oostendrop, M, 1999, *The derivational residue in phonological optimality theory,* Amsterdam, John Benjamins Publication Company.

Hippocrates J, Jones W, Potter P, (1923), *Hippocrates and the Fragments of Heracleitus*, Cambridge, Heinemann.

Holmond, J. 1996. *Founding Sociology?,* London, Longman Publishing.

Holt, J.C 1992, *Magna Carta,* 2nd edition, Cambridge, Cambridge University Press

Jackson, B. 1985, *Semiotics and legal theory*, London, Routledge and Kegan Paul.

James, H. (1992), *The Golden Bowl,* New York, Knopf Publishing

Karp C, Rosner C. 1991, *When Justice Fails: The David Milgaard Story*, Toronto, McClelland and Stewart Publishers.

Katz, H. Carroll , M &Chaplin, N. *Justice Miscarried*, Toronto, Dundurn Publishing.

Kennedy, H. 2004, *Just Law*, London, Chatto & Windus Publishing

Kraut, R. (2014), *Aristotle's Ethics*, The Stanford Encyclopaedia of Philosophy, Stanford University Library of Congress.

Lebourdais, I. 1996, *The Trial of Steven Truscott,* Philadelphia:J.B, Lippincott Company Publishing.

Lenin, V. 1974, *Lenin on the question,* New York, International Publishers.

LeSage, P. 2007. *Report on the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell,* Government of Manitoba, Canada.

Lloyd, V. (2009), *Law and Transcendence,* New York, Palgrave Macmillan.

Locke, J. Nidditch, P. (1975), *An Essay Concerning Human Understanding*, Oxford Clarendon Press

Luhmann, N. (1990), *Essays on Self-Reference,* New York, Columbia University Press.

Luhmann, N. 1987, *Rechtssoziologie,* 2nd edition, Opladen, Westdeutscher Verlag.

Luhmann, N. 1993, *Risk,* New York, Gruyter Printing Press.

Luhmann, N. Ziegert, K. Kastner, F. 2004, *Law as a Social System,* Oxford , Oxford University Press.

Luhmann, N., Albrow, M. & King-Utz, E, *A Sociological Theory of Law,* New York, Routledge Publishing.

Luhmann, N., Ziegert, K. and Kastner, F. 2004. *Law as a Social System.* Oxford: Oxford University Press.

MacIntyre, A. (1984), *After Virtue,* Indiana, University of Notre Dam Press

Maclean J, (2011), *Rethinking Law as a Process: Creativity, Novelty, Change.* Abingdon, Routledge

Maclean J, *Holding the Middle or Dancing on the Edge,* Ed In Michelon C, (2013), *The Anxiety of the Jurist,* Ashpath Publishing.

Maclean, J. (2012), *Rethinking law as process,* 1st edition, Milton Park, Abingdon, Routledge

Malleson, K. *The Legal System,* 3rd edition, New York, Oxford University Press.

Marx K, 1973, *Grundrisse,* Harmondsworth, Penguin Publishers.

Marx K, Tucker R. Engels F, 1972, *The Marx-Engels Reader,* New York, Norton Publishers,

Marx, K, Walton J, 1930, *Capital,* London, Dent Publishing.

Marx, K. Engels, F. 1969, *Marx/Engels Selected works Vol.1,* Moscow, Progress Publishers.

Marx, K. Engels, F. 1987, *The Communist Manifesto,* Arlington, Heights, H. Davidson Publishers.

Milbank, J. (1993), *Theology and Social Theory: Beyond Secular Reason*, Oxford, Blackwell Publishing.

Mills, C.W. 2000, *The Sociological Imagination*, Oxford, Oxford University Press.

Moeller, H. (2012), *The Radical Luhmann*, New York, Columbia University Press.

Moore, S. (1978), *Law as Process*, London, Routledge.

Moore, S. 1978. *Law as process.* London, Routledge.

Murdoch, I (1953), *Sartre Romantic Rationalist*, 1st edition, New Haven, Yale University Press.

Myers, b. (2012), *Christ The Stranger*, London, T&T Clark Publishing.

Naughton, M. 2007, *Rethinking miscarriages of Justice*, Basingstoke Hampshire, Palgrave Macmillan

Naughton, M. 2013. *The Innocent and the Criminal Justice System*, Basingstoke: Palgrave Macmillan

Nelken, D. 1996, *Law as Communication*, Aldershot, Dartmouth Publications.

Nussbaum, M. (1986), *The Fragility of Goodness*, Cambridge, Cambridge University Press.

Nussbaum, M. (1986), *The Fragility of Goodness*, Cambridge, Cambridge University Press.

Pakaluk, M. (2005), *Aristotle's Nicomachean Ethics,* Cambridge, Cambridge University Press.

Parrini, P. (1994), *Kant and Contemporary Epistemology*, Dordrecht, Kluwer Academic Publishers.

Parsons, T. 1954, *Essays in Sociological Theory*, Glencoe, Free Press.

Parsons, T. 1964, *The Social System*, New York, Free Press of Glencoe.

Plato, J. Davis, H. & Burges, G. (1901), *The Republic*, Washington, Dunne Publishing.

Plato, J. Jowett, B. & Edman, I. (1928), *The Works of Plato*, New York, Modern Library Publishing.

Podgorecki A, Whelan C, Khosla D, 1985, *Legal Systems and Social Systems*, London, Croom Helm Publications.

Polanyi, M. (1962), *Personal Knowledge*, Chicago, University of Chicago Press.

Porter, B. (1980), *The Good Life: Alternatives in Ethics*, New York, Macmillan Publishing.

Pound, R. 1942. *Social Control through Law*, New Haven, Yale University Press.

Raz, J. (1975), *Practical Reason and Norms*, 1st edition, London, Hutchinson Publishing

Raz, J. (1994), Ethics in the Public Domain, 1st edition, Oxford, Clarendon Press

Raz, J. (1994), Ethics in the Public Domain, 1st edition, Oxford, Clarendon Press.

Reeve, C. (2014), *Aristotle Nicomachean Ethics*, Indianapolis, Hackett Publishing.

Reeve, C. (2014), *Aristotle Nicomachean Ethics*, Indianapolis, Hackett Publishing.

Renner, K. 1949, *The institutions of private law and their social functions*, London , Routledge

Rose, G. (1992), *The Broken Middle*, Oxford, Blackwell Publishing.

Rosenfeld, M. (1998), *Just Interpretations: Law between Ethics and Politics*, Los Angeles, University of California Press.

Ross, W. Urmson, J. (1998), *The Nicomachean Ethics*, Oxford, Oxford University Press.

Rossmo, D. K. 2009, *Criminal Investigative Failures,* Boca Raton, CRC Press Publishers.

Satris, S. (1987), *Ethical Emotivism,* Dordrecht, Nijhoff Publishing

Segell, G. (2000), *Is There a Third Way?,* London, Glen Segell Publishing.

Shakespeare, W. Lamb, S. Nicol, D. (2000), *Cliffs Complete Shakespeare's The Merchant of Venice,* Foster City, IDG Books Worldwide Publishing.

Shanks, A. (2008), *Against Innocence: Gillian Rose's Reception and Gift of Faith,* London, SCM Publishing.

Smart, A. (1969), *The Philosophy of Punishment,* 1st edition, New York, St. Martin's Press

Swan, B. 2012, *Real Justice: Fourteen and Sentenced to Death: The Story of Steven Truscott,* Toronto, Lorimer Publishing.

Swan, B. 2013, *Real Justice: Convicted For Being A Mi'kmaq,* Toronto, James Lorimer & Company Ltd.

Swindal, J. Spurgin, W. *The History of Ethics,* Ed In Gensler H, Spurgin W, (2001), *Ethics: Contemporary Readings,* New York, Routledge Publishing.

Teubner, G. (1987), *Autopietic Law: A New Approach to Law and Society,* Berlin, W. de Gruyter Publishing.

Thomson, A. (2014), *Culture in a post-secular context,* Oregon, Pickwick Publications.

Thomson, A. (2014), *Culture in a post-secular context,* Oregon, Pickwick Publications.

Truscott, S. Trent, B. (1971), *The Steven Truscott Story,* Richmond Hill, Simon and Schuster of Canada Publishers.

Van Marle, K, (2013), *Liminal landscape: law, literature and critique in post-apartheid South Africa,* Ed In Genres of Critique: Law, Aesthetics and Liminality, Cape Town, Sun Press.

Varela, F. &Maturana, H. (1980), *Autopoiesis and Cognition,* Reidel, Dordrecht Publishing.

Veitch, S (1998), Doing Justice to Particulars, In *Communitarianism and Citizenship,* Ed. Emilios Christodoulidis, Aldershot: Ashgate Publishing.

Wallace, J. Pettit, P. Smith, M. 2006, *Reason and Value,* 1st edition, Oxford, Oxford University Press

Warnock, H. (1965), *The Philosophy of Satre,* London, Hutchinson University Library.

Watts, D. (2003), *Understanding US/UK Government and Politics,* Manchester, Manchester University Press.

Whitehead, A. (1993), *Adventures of Ideas,* New York, Macmillan Publishing Company.

Whitehead, A. Griffin, D. & Sherburne, D. (1978), *Process and Reality,* New York, New York Free Press.

Woffinden. B. 1987, *Miscarriages of Justice,* London, Hodder &Stoughton

Wundah, M. (2011), *Landscaping Sierra Leone: Third Way Politics In the Mould of Attitudinal and Behavioural Change,* Pittsburgh, Red Lead Press.

WEBSITE SOURCES

AIDWYC Website, http://www.aidwyc.org/cases/historical/guy-paul-morin/#_ftn1, 19th March 2014

Ann Bressington Website, http://www.bressington.net/sub/Policies/Criminal_Cases_Review_Commission.htm, 5th April 2014

BBC News Website, http://news.bbc.co.uk/1/hi/458626.stm, 9th December 2014

BBC News Website, http://www.bbc.co.uk/news/uk-wales-15409841, 26th October 2013

BBC News Website, http://www.bbc.co.uk/news/world-asia-18404330, 5th April 2014

CBC News In Review, http://newsinreview.cbclearning.ca/wp-content/uploads/2007/10/truscott.pdf, 16th January 2014.

CBC News Website, http://www.cbc.ca/archives/categories/society/crime-justice/the-wrongful-conviction-of-david-milgaard/police-apprehend-david-milgaard.html, 3rd March 2014.

CBC News Website, http://www.cbc.ca/archives/categories/society/crime-justice/the-wrongful-conviction-of-david-milgaard/supreme-court-orders-a-new-trial.html, 15th March 2014

CBC News website, http://www.cbc.ca/news/canada/steven-truscott-to-get-6-5m-for-wrongful-conviction-1.742381,

Centurion Ministries, http://www.centurionministries.org/, 15th March 2014.

David Jessel Website, http://www.davidjessel.co.uk/index.php?/JusticeIssues/article/speech_to_inuk_seminar_on_the_ccrc_march_30_2012/, 2nd April 2014

INUK Website, http://www.innocencenetwork.org.uk/about-us, 31st March 2014

INUK Website, http://www.innocencenetwork.org.uk/news-2, 1st April 2014

INUK Website, http://www.innocencenetwork.org.uk/no-ccrc-for-south-australia-but-new-statutory-right-of-appeal-for-certain-qualifying-offences, 5th April 2014

INUK Website, http://www.innocencenetwork.org.uk/wp-content/uploads/2013/01/CCRC-Symposium-Report.pdf, 1st April 2014

Manitoba Justice Department Website, http://www.gov.mb.ca/justice/publications/sophonow/compensation/tsbackground.html, 16th March 2014.

Manitoba Justice Department Website, https://www.gov.mb.ca/justice/publications/sophonow/jailhouse/cheng.html, 15th March 2014.

Marxists website, www.marxists.org/archive/marx/works/1844/jewish-question, 15th November 2013

Mysteries of Canada Website, http://www.mysteriesofcanada.com/Quebec/coffin_sits_up_in_his_coffin.htm, 20th of February 2014.

Prezi Webisite, The Wrongfully Convicted: James Driskell, http://prezi.com/dh_crkz8azbg/the-wrongfully-convicted-james-driskell/, 11th February 2014

The Association in Defence of the Wrongly Convicted Website, http://www.aidwyc.org/, 16th February 2014.

The Australian News, http://www.theaustralian.com.au/news/features/discovery-of-jacket-vindicated-lindy/story-e6frg6z6-1225905092032, 5th April 2014

The Globe and Mail Website, http://www.theglobeandmail.com/news/national/the-life-and-death-of-donald-marshall-jr/article4283981/?page=all, 6th February 2014

The Guardian Website,

http://www.theguardian.com/uk/2004/sep/03/ukcrime.prisonsandprobation/print, 31st March 2014.

The Justice Gap Website, http://thejusticegap.com/2012/04/zander-on-the-ccrc/, 1st April 2014

The National Gallery Website, http://www.nationalgallery.org.uk/artists/nicolas-poussin, 6th December 2014

The Newfoundland and Labour Heritage Website,

http://www.heritage.nf.ca/aboriginal/mikmaq_history.html, 6th February 2014.

REPORTS

Honourable Fred Kaufman, *Report to the Minister of Justice on an application by Steven Murray Truscott*, April 2002.

Kandelaars, G. 2012, *Legislative Review Committee Report on its Inquiry on the CCRC Bill 2010*, Parliament of South Australia.

MacCallum, E. 2008, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*, Saskatchewan Government.

May, J. *Report of the Inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guilford and Woolwich in 1974,* HC 556, London, 1974.

Royal Commission on the *Donald Marshall Jr Prosecution*, Novia Scotia Government, December 1989.

The Honourable Fred Kaufman, C.M., Q.C, *Report of The Kaufman Commission on Proceedings Involving Guy Paul Morin*, 1998.