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PREVENTION OF WRONGFUL CONVICTIONS:
NORWEGIAN LEGAL SAFEGUARDS AND THE CRIMINAL
CASES REVIEW COMMISSION

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Wrongful convictions happen in all countries. Miscarriages of justice are a normal and expected consequence of imperfect procedures of investigation, prosecution, and court trials, and they are ordinarily conceived as exceptional and unacceptable events.¹ Wrongful convictions may be overturned and a case may be reopened when new evidence or circumstances surface. When a case is reopened, our confidence in a just legal system is supported. However, too many reopened cases suggest too many wrongful convictions. This is a threat to the legitimacy of the justice.

According to Ogletree and Sarat, wrongful convictions are not random mistakes but rather “organic outcomes of a misshaped larger system that is rife with faulty eyewitness identifications, false confessions, biased juries, and racial discrimination.”² Similar descriptions of wrongful convictions by US authors are US biased; they originate within the US justice system, which is in many respects different from the systems in many European countries, and very different indeed from the justice systems in the Nordic countries.³ The reasons for wrongful convictions in countries such as Norway are not

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1. RICHARD NOBLES & DAVID SCHIFF, UNDERSTANDING MISCARRIAGES OF JUSTICE (1st ed. Oxford Univ. Press 2000).

2. CHARLES HAMILTON HOUSTON INST. SERIES ON RACE AND JUSTICE, WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2009).

3. ELIZABETH F. LOFTUS, *Foreword* to FORENSIC PSYCHOLOGY IN CONTEXT: NORDIC AND INTERNATIONAL APPROACHES XV (Pär Anders Granhag ed., 2010); Ulf Stridbeck & Pär Anders Granhag, *Legal Procedures in the Nordic Countries and in the USA: A Comparative Overview*, in FORENSIC PSYCHOLOGY IN CONTEXT: NORDIC AND INTERNATIONAL APPROACHES 14-35 (Pär Anders Granhag ed., 2010).

errors of justice on a system level, rather it is failure to detect or present evidence that might have changed the outcome of the original trial. The ability to reopen wrongful conviction cases is typically based on evidence from new medical or psychiatric experts, another person's confession, new medical findings, new witness statements, or new expert witness testimonies. The Norwegian justice system has a number of built-in safeguards against miscarriages of justice, and claimed wrongful convictions are evaluated by an independent administrative body, the Norwegian Criminal Cases Review Commission (NCCRC). The NCCRC has the power both to investigate and decide on the reopening of criminal cases. This paper seeks to briefly review the Norwegian legal safeguards and the role of the NCCRC.

I. LEGAL SAFEGUARDS

We believe wrongful convictions to be associated with an absence of legal safeguards, leading to a higher frequency of wrongful convictions in societies with few legal safeguards. Below we will briefly describe the Norwegian legal safeguards in the investigative phases of the crime and during trial, in light of the American system.

A. Investigation

Norwegian criminal investigators – the police – are supposed to be neutral, looking for both inculpatory and exculpatory evidence with regard to a suspected perpetrator. For example, the principal purpose of an interrogation of a suspect is to obtain information, not to obtain a confession. The Reid technique's nine steps of interrogation,⁴ as described by Inbau et al., are supposed to result in "an accusational interaction with a suspect, conducted in a controlled environment, designed to persuade the suspect to tell the truth."⁵ The Reid technique is abandoned. In Norway investigators are not allowed to lie or manipulate the suspect, polygraph tests are not conducted by the police during the investigation, and the results of polygraph tests, if conducted privately by the defense, are not allowed in the court. As is the practice in Great Britain, all interviews should be taped. The documentation of

4. In short the nine steps are direct positive confrontation, shift the blame away from the suspect to some other person, discourage the suspect from denying his guilt, move towards the confession, reinforce sincerity to ensure that the suspect is receptive, move the theme discussion towards offering alternatives. If the suspect cries at this point, infer guilt, pose the "alternative question," giving two choices for what happened; one more socially acceptable than the other, lead the suspect to repeat the admission of guilt and document the suspect's admission. FRED E. INBAU ET AL., *ESSENTIALS OF THE REID TECHNIQUE: CRIMINAL INTERROGATIONS AND CONFESSIONS* (1st ed. 2005).

5. *Id.* at 3.

the interview might be important both in the court of appeals and at a later stage when the NCCRC reviews the case. False confessions cannot be completely avoided, but legal safeguards practiced in Norway, such as defense attorneys provided at public expense, a focus on information-gathering during the investigation, and videotaped interviews, may minimize the risk of false confessions. In Norway, very few cases of false confessions have been documented.⁶

B. Prosecutors

In Norway, prosecutors are appointed. After a public announcement of vacant positions, the Director of Public Prosecutions selects the prosecutor, who will be appointed by the King in Council. Prosecutors are in this sense independent as they do not have to consider re-election; because of this, there is no personal benefit to prosecuting as many as possible.

To obtain an indictment, prosecutors are supposed to have strong and objective reasons to believe that the court will convict the accused. Personal beliefs or firm convictions of guilt are not sufficient to go to trial; the prosecutor is not encouraged to “go fishing.” The role of the prosecutor is to establish the truth, not to obtain a conviction. On one hand, he has to ensure that the guilty person is held accountable, but on the other hand, he has to ensure that innocent persons are not brought to trial. Groundless prosecution is an offence.

C. Plea Bargaining

Plea bargaining is not part of the Norwegian justice system. All criminal cases are tried before a judge, and there is no way to circumvent a court decision. Pleading guilty in order to get a minor sentence is not an option. However, if a person charged with a crime has made an unreserved confession, the court is expected to take the confession into account when passing the sentence. In addition, if there is an unreserved confession, together with clear evidence for guilt, there is an option of a fast track trial, but still in front of a judge.

6. See GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* (2003); Gisli H. Gudjonsson & Jon Fridrik Sigurdsson, *False Confessions in the Nordic Countries: Background and Current Landscape*, in *FORENSIC PSYCHOLOGY IN CONTEXT: NORDIC AND INTERNATIONAL APPROACHES* 94 (Pär Anders Granhag ed., 2010).

D. Human Rights

The European Convention of Human Rights (ECHR)⁷ is the umbrella of Norwegian legislation; it is “stronger” and has more impact than the UN Convention on Civil and Political Rights.⁸ Central to the European Convention of Human Rights is “the principle of fair trial”⁹ including “equality of arms”. One of the grounds for reopening a case in Norway is:

“[W]hen an international court or UN human rights committee has in a case against Norway found that

- a) the decision conflicts with a rule of international law that is binding on Norway, and it must be assumed that a new hearing should lead to a different decision, or
- b) the procedure on which the decision is based conflicts with a rule of international law that is binding on Norway if there is reason to assume that the procedural error may have influenced the substance of the decision, and that a reopening of the case is necessary in order to remedy the harm that the error has caused.”¹⁰

E. Adversarial Process

In the Nordic countries, there is an adversarial process, whereas in central and southern Europe, for example France, Italy, and Spain, the criminal process is inquisitorial. In Norway, the prosecutor and the defense are equal in the courtroom, and the parties in the Norwegian criminal trials are more active than other European countries during the hearing of the evidence. Norwegian judges, on the other hand, are compared with the judges in Central Europe inactive as far as seeking the truth; they play no part in the investigative process, they are not as active as in an inquisitorial process, and they are expected to hear both sides of a case without interfering.

7. Convention for the Protection of Human Rights and Fundamental Freedoms, (commonly known as the European Convention on Human Rights [hereinafter ECHR]) is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force in 1953.

8. United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 172.

9. ECHR, *supra* note 7, at art. 6

10. NORWEGIAN CRIM. P. ACT § 391 (1981), available at <http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf>.

F. Judges

Judges at all levels in the judiciary system, including the High Court, are nominated by an independent professional legal search committee following a public announcement of vacant positions, and are appointed for life, i.e. to the retirement age of 70 years. Like the prosecutors, they do not have to worry about re-election. This is important both for the perceived independence of judges and for the public confidence in just court proceedings. Following appointment, Norwegian judges are educated in a series of courses including a mini-course on eyewitness psychology; there is a standard Norwegian textbook on eyewitness psychology on every judge's office bookshelf.¹¹ This may be a reason why Norwegian judges surpass US judges in their knowledge of factors affecting the reliability of eyewitness testimony.¹²

G. Lay Judges

The Norwegian courts consist of both lay people and legal educated judges. The lay people – lay judges – are always in majority in the courts, except in the Supreme Court, which consists exclusively of lawyers. In the district courts, they are part of a mixed panel of one professional and two lay judges.¹³ In the court of appeals, lay judges either form a jury of ten in cases with a penalty of more than six years imprisonment,¹⁴ or four lay judges serve in a mixed panel with three professional judges.¹⁵ In all panels the votes of the lay judges carry the same weight as the votes of the legally qualified judges. All court districts have a pool of lay judges, appointed by the local Government for four years. Thus, each lay judge may serve on several trials during that period. Interestingly, there are actually two pools, one with male and one with female members, because in all cases there has to be an equal number of male and female lay judges.¹⁶

H. Defense Attorneys

A suspect has the right to a defense attorney at public expense in cases with a sentence of more than six months imprisonment.¹⁷ In minor

11. SVEIN MAGNUSSEN, *VITNEPSYKOLOGI [WITNESS PSYCHOLOGY]* (1st ed. 2004).

12. Svein Magnussen et al., *What Judges Know About Eyewitness Testimony: A Comparison of Norwegian and US Judges*, 14:3 *PSYCHOL. CRIME AND L.* 177 (2008).

13. NORWEGIAN CRIM. P. ACT § 276 (1981).

14. *Id.* § 352.

15. *Id.* § 332.

16. *Id.* § 355.

17. *Id.* § 100.

cases, the suspect still has the right to a defense attorney, but on his own expense. The defense has the right to submit evidence and request additional (or better) police investigations,¹⁸ and has access to investigative documents during the formal investigation.¹⁹

I. Expert Witnesses

Expert witnesses are, as a rule, appointed by the court, serving as objective or neutral experts in the case, rather than being “hired guns” by the parties.²⁰ However, both the prosecutor and defense may recruit additional experts. The experts appointed (and paid for) by the parties have a somewhat different status than those appointed by the court; they are witnesses rather than experts, and generally their testimony carries less weight in the court. However, in some cases an expert appointed by one of the parties is given the status of a court appointed expert during the trial. In Norway, the practice of appointing neutral experts is considered superior to the “battle of experts” in US courts.²¹ But interestingly one US scientist, serving as an expert witness in a high-profile murder case that has busied the Norwegian courts for more than 50 years, expressed the opposite view.²² His point was that since science (and scientists) is never completely objective, the court has to hear experts from both sides. The US argument assumes that the court – the judge – is able to distinguish science from junk science. The available evidence suggests they are not.²³

J. Burden and the Standard of Proof

The burden of proof rests on the prosecutor. In Norwegian criminal trials there is supposed to be a high standard of proof with regard to the question of guilt. One estimate is that the standard is over 96%, which is slightly higher than the US standard of 90% confidence.²⁴ However,

18. *Id.* §§ 265, 266.

19. *Id.* § 242.

20. *Id.* § 138.

21. Pål Grøndahl, Ulf Stridbeck & Cato Grønnerød, *The Truth and Nothing but the Truth: Court-Appointed Forensic Experts Evidence with Testifying and their Perceptions of Legal Actors in Criminal Courts*, 24:2 A JOURNAL OF FORENSIC PSYCHIATRY & PSYCHOL. 192 (2013).

22. *Fredrick Fasting Torgersen*, WIKIPEDIA, http://en.wikipedia.org/wiki/Fredrik_Fasting_Torgersen (last visited Nov. 27, 2012).

23. Margaret Bull Kovera et al., *Assessment of the Commonsense Psychology Underlying Daubert: Legal Decision Makers' Abilities to Evaluate Expert Evidence in Hostile Work Environment Cases*, 8 PSYCHOL. PUB. POL'Y & L. 180 (2002); Bradley D. McAuliff et al., *Can Jurors Recognize Missing Control Groups, Confounds and Experimenter Bias in Psychological Science?*, 33 LAW AND HUM. BEHAV. 247 (2009).

24. Stridbeck & Granhag, *supra* note 3; see also Dorothy K. Kagehiro, *Defining the Standard of*

such differences are probably spurious as empirical studies show that many lay judges are willing to convict on a much lower estimated probability of guilt.²⁵

The Norwegian system allows free presentation of evidence and witnesses in court by both the prosecution and defense. Eyewitnesses are obviously important in many cases, but an analysis of the cases reopened by the NCCRC suggests that wrongful eyewitness memory is not a main factor in producing wrongful convictions. Conversely, in the US, eyewitness errors—mistaken identification—occurs in more than 75% of wrongful convictions.²⁶ However, the difference in statistics is probably not real as the NCCRC considers all criminal cases, whereas the majority of Innocence Projects focus on DNA cases such as murder, rape, and serious physical assault. Innocence Project-type cases occur in Norway²⁷ however, eyewitness testimony alone is not sufficient for a conviction in Norwegian courts as corroborating evidence is required.

The Norwegian police guidelines for eyewitness identification were formulated in 1933, and will in 2013 be substituted by procedures supported by scientific research: double blind procedures (research has shown that the risk of misidentification is sharply reduced if the administrator of a photo or live line up is not aware of who the suspect is), and sequential rather than simultaneous line-ups (research has shown that presenting lineup members one-by-one (sequential), rather than all at once (simultaneous), decreases the rate at which innocent people are identified). It has also been shown that witnesses tend to choose the person who looks the most like – but may not actually be – the perpetrator when the lineup is presented simultaneously. It is important that the suspect is not standing out (the suspect should not be the only member of his race in the lineup, or the only one with a tattoo or with facial hair), he should not be subjected to a “show up” identification (single person lineups without options should be avoided), and there should be “may or may not”-statements (the person viewing a lineup should be told that the perpetrator may not be in the lineup) and confidence statements (immediately following the lineup procedure, and the eyewitness should provide a statement, in his own words,

Proof in Jury Instructions, 1 PSYCHOL. SCI. 194 (1990).

25. Svein Magnussen, Dag-Erik Eilertsen, Karl-Halvor Teigen & Ellen Wessel, *The Probability of Guilt in Criminal Cases: Do People Care About Being “Beyond Reasonable Doubt”?* (“accepted pending revision” in *Applied Cognitive Psychology*).

26. *Understand the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Nov. 27, 2012).

27. Cecilie Rachlew & Asbjørn Rachlew, “Ja, han ligner – tror jeg.” – *Om utpeking av gjerningsmenn* [“Yeah, He Looks Like – I Think.” *How to Identify Culprits*], 9 TIDSSKRIFT FOR STRAFFERETT [NORWEGIAN J. OF CRIM. L.] 153 (2009).

articulating the level of confidence in the identification).²⁸ When the new procedures are implemented the Norwegian identification procedure will be research-based.

K. Legal Safeguards – Summary

Wrongful convictions are mostly associated with the loss of legal safeguards. The fight against wrongful convictions must start where the wrongful convictions are produced. Some institutions and practices are difficult to change, but others are not. We summarize this section with the following recommendations: Prosecutors and judges should be appointed rather than elected, a high standard of proof should be maintained, free production of evidence should be allowed, expert witnesses should be appointed by the court rather than being “hired guns,” plea bargaining should be limited, and a strong rule about objective police investigation should be implemented.

II. THE NORWEGIAN CRIMINAL CASES REVIEW COMMISSION

In the present paper we report some facts and figures from the Commission’s short history and try to relate those topics to this special issue of the Cincinnati Law Review. When considering the figures we report, it must be remembered that Norway is a small country in terms of a population with 5 million inhabitants. Only 3,500 people are imprisoned each day. Annually, the number of murder cases is less than 30, manslaughter cases less than 40, convicted rape cases less than 80, and narcotic cases around 5,500. Sentences are fairly liberal, and maximum imprisonment is 21 years (life time imprisonment was exchanged with 21 years imprisonment in 1981) and the death penalty is not an option today (ended in 1902, Civil Criminal Code, and in 1979, Military Criminal Code). As an alternative to imprisonment for a specific term, there is preventive detention.²⁹ This was the sentence the convicted in the Norwegian July 22 case got. Preventive detention has a time limit of 21 years, but it may be extended five years at a time. Just before the prison sentence is ending, the prosecutor may ask the court for an extension of the sentence if the convicted is still considered dangerous to society and there is a serious risk of relapse. The practical consequence may be prison for life. The grounds for using preventive detention is that it is a serious violent crime, with a high possibility that

28. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photo Spreads*, 22 LAW AND HUM. BEHAV. 603 (1998); see also INNOCENCE PROJECT, www.innocenceproject.org (last visited Nov. 27, 2012).

29. NORWEGIAN CIVIL PENAL CODE § 39c (1902).

the convicted person will commit such a crime again, and a time limited sentence is not enough to protect society.

Following the examples of England (see paper in current issue by John Weeden) and Scotland, Norway established the NCCRC in 2004. The NCCRC is a combination of an Innocence-type project, well-known in the US and an appeals court, where the responsibility for further investigation and the power to decide on reopening reside within the same administrative body. For clarification it should be noted that, in the US, an innocence commission is a criminal justice *reform* commission, whereas the commissions in England, Scotland, and Norway have the legislative power to reopen cases, have public financing, and accept all types of criminal cases. The characteristics of the NCCRC are:

- Centralized expertise
- Independence, i.e. separation between the courts and the government
- Uniform decisions
- Safe financing from the state
- Mixed competence; both legal and non-legal members of the Commission
- Has the power to get documents and files from all official bodies
- Has its own law enforcement expertise
- May order the police force to investigate new evidence
- May appoint defense attorneys

We have elsewhere presented the background and the function of NCCRC.³⁰ Briefly, the NCCRC has five voting members including the chair person, three members from the legal profession, and two lay members. Except for the chair person, who has a full-time position and is appointed for a period of seven years, the members of the Commission serve on particular cases and are appointed for a period of three years with the possibility of a second term. All cases that qualify for review are decided by the Commission in plenary sessions, and reopening is decided by simple majority vote. The NCCRC has an administrative staff of eleven persons, including two investigators with police training and seven legally trained investigators. The NCCRC also has the power to recruit extra police investigators on particular cases, as it did in the *Moen* case discussed in part III. Members of the NCCRC are not politically appointed, and the Commission is, within the confines of the Norwegian legislation, supposed to operate completely independent of the political and legal systems, including High Court rulings in particular cases.

When a convicted person files for reopening, the NCCRC takes care

30. Ulf Stridbeck & Svein Magnussen, *Opening Potentially Wrongful Convictions – Look to Norway*, 58:2 CRIM. L. Q., CAN. 267 (2012).

of the investigation and looks at the evidence in favor of the petitioner. In some cases, a lawyer has been recruited by the convicted person at their own expense. However, during the post-conviction process, the petitioner may have a defense attorney at public expense, at the discretion of the NCCRC. In 2012, the NCCRC appointed a defense counsel in 30 cases, while a defense counsel was appointed in 33 cases in 2011, and in 28 cases in 2010.³¹ The NCCRC is also authorized to appoint expert witnesses.³² Since its establishment, the NCCRC has appointed expert witnesses in the fields of forensic medicine, forensic psychiatry, forensic toxicology, photogrammetry, finance, fire technicalities, vehicle knowledge, and traditional forensic science. In 2012, the NCCRC appointed 15 expert witnesses in 6 cases.³³

A. Wrongful Convictions Identified by NCCRC

Anyone may file for the reopening of a case. Convicted persons filed 86% of the cases received by the NCCRC from 2004-2012, and 14% were filed by the prosecution authority.³⁴ The NCCRC is obligated to provide guidance to any person who petitions for the reopening of a case, and the assistance of an attorney is in principle not needed.³⁵ In some cases, relatives of the convicted person or other persons with a personal involvement submit the petition. There is no limit with regard to the date of the original conviction of cases considered by NCCRC; cases have been reviewed and reopened where the convicted was deceased, and have even included cases dating back to the Second World War. In some cases the prosecution authority later discovered that the convicted person was mentally insane at the time of the criminal offence and should not have been convicted according to Norwegian law, and filed for reopening (14% of the petitions).³⁶

As part of the case review by the NCCRC the prosecution authority is invited to comment on the application for reopening (the principle of contradiction). They oppose reopening in 23% of the cases. Most often the prosecution agrees to reopening (41%), but frequently they see no

31. NORWEGIAN CRIMINAL CASES REVIEW COMMISSION ANN. REP. (2012), available at www.gjenopptakelse.no.

32. NORWEGIAN CRIM. P. ACT § 398b (1981).

33. NORWEGIAN CRIMINAL CASES REVIEW COMMISSION ANN. REP. (2012), available at www.gjenopptakelse.no.

34. Ministry of Justice and Pub. Sec., *Etterkontroll av kommisjonen for gjenopptakelse av straffesaker [Evaluation of the Criminal Cases Review Commission]*, (2012) (report from a Government appointed working group chaired by Professor Ulf Stridbeck) [hereinafter *Evaluation of the Criminal Cases Review Commission*].

35. NORWEGIAN CRIM. P. ACT § 397 (1981).

36. *Evaluation of the Criminal Cases Review Commission*, supra note 34, at 33.

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grounds for reopening or have no comments (36%).³⁷ Support of innocence by the prosecution depends on the evidence. When the NCCRC has reopened a case, it is referred for retrial to a court district other than the district that imposed the original conviction. The reopened cases are supposed to be treated like any other criminal case referred to the court. The outcome of the new trials shows that 82% of the reopened cases led to a complete exoneration and 17% of the cases led to part exoneration.³⁸

As of 2012, the NCCRC received 1,523 petitions and 1,399 of the cases have been concluded. Of the cases reviewed by the Commission in plenary session, a total of 182 cases were reopened (15%) and 293 were (25%) were disallowed. The remaining 704 cases were dismissed by the chair/vice chair as not qualifying for review according to the criteria for reopening specified by the Norwegian legislation.³⁹ Figure 1 shows the distribution of reopened cases across the type of criminal offence. The most frequent categories are crimes of gain, violence, drugs, and sexual abuse of children, where new medical expert testimonies and analysis of the quality of the child interviews undermined the original conviction.

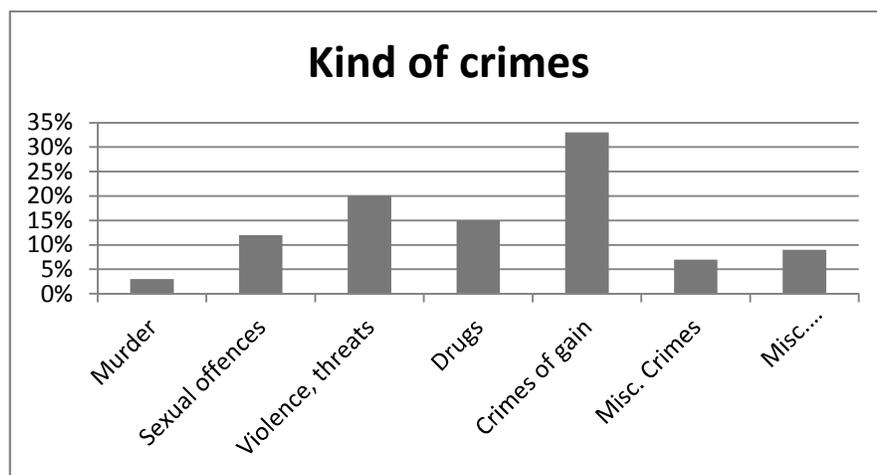


FIGURE 1. CASES REOPENED BY NCCRC 2004-2012, N = 182⁴⁰

37. *Id.* at 35.

38. *Id.* at 36.

39. NORWEGIAN CRIMINAL CASES REVIEW COMMISSION ANN. REP. (2011), available at www.gjenopptakelse.no.

40. Based on NORWEGIAN CRIMINAL CASES REVIEW COMMISSION ANN. REP. (2012), available at www.gjenopptakelse.no.

B. Access to DNA Testing and Legal Records

Fingerprints and biological material for DNA analysis may be secured from persons who are suspected or convicted of any criminal act which may result in imprisonment.⁴¹ DNA may be obtained, if necessary by force, when it can be done without risk or considerable pain.⁴² A person who receives a penalty for a criminal act, which by law can lead to imprisonment, is registered in the Identity Register when the court decision is final or the case is closed. Before the final court decision, DNA can be registered temporarily in the Register of Investigation.⁴³ The registration of DNA profiles is authorized in the Prosecution's Instructions. The national databases for fingerprints and DNA profiles are administrated by the National Bureau of Crime Investigation.

In reopening cases, the NCCRC has access to these registers. The NCCRC is responsible for ensuring that all relevant information on the case emerges. "The Commission shall on its own initiative ensure that the case is as well clarified as possible before it decides whether the petition shall be allowed . . . The Commission may obtain information in such manner as it deems appropriate."⁴⁴ This means that they have the power to obtain documents and files from all official bodies. Since the NCCRC controls its own working procedures they can order DNA analysis or legal records as needed. To this day (June 20, 2013), DNA has been a reason for reopening in only one case in Norway.

Reports from medical experts have to be approved by the *Commission of Forensic Medicine*, which makes external quality assurance of all forensic expert assessments made in criminal cases. In Norway there has been a National Commission of Forensic Medicine since 1900. The Commission acts as a guiding body in questions of forensic medicine, including forensic psychiatry. Every expert in forensic medicine must send to this Commission a copy of the written report he will make to the court or to the prosecution authority.⁴⁵ The Commission will then examine the reports received. If it finds substantial defects, it shall bring them to the attention of the court. The Departments of Justice and Commerce in the US announced the launch of a National Commission on Forensic Science on February 15, 2013.⁴⁶

41. NORWEGIAN CRIM. P. ACT § 160 (1981).

42. *Id.* § 160a.

43. Register of Investigation is an official government agency.

44. NORWEGIAN CRIM. P. ACT § 398 (1981).

45. *Id.* § 147.

46. *Promise and Peril: The National Forensic Science Commission*, CRIME LAB REPORT, <http://crimelabreport.com/library/pdf/2013%200228,%20National%20Commission.pdf> (last visited March 14, 2012).



FIGURE 2. CAUSES OF WRONGFUL CONVICTIONS 2004-2009, N=58⁴⁷

C. Causes of Wrongful Convictions

Figure 2 summarizes the reasons for reopening cases by the NCCRC. Note that the category “New experts pretending insanity” accounts for more than 40% of the cases. In Norway a person with a psychiatric diagnosis implying a psychotic disorder is not considered legally responsible for her actions and cannot be legally prosecuted. The question of sanity is a part of *mens rea*. Often new evidence in the cases reopened by the NCCRC are new expert reports stating that the person convicted was probably suffering from a psychosis at the time for the crime. In these cases there is an *actus reus* without a complete *mens rea* – *actus non facit reum nisi mens sit rea*. This is the same observation as in Switzerland (see paper in current issue by Gwladys Gilliéron). In most of these cases the person actually committed the crime, but should not have been legally prosecuted. Leaving out the category “insanity,” which relates to legal responsibility for a crime rather than innocence,

47. Jane Dullum, *Justisfeil i straffesaker [Error of Justice in Criminal Cases]*, Institut for Kriminologi og rettssosiologi [Dep't of Criminology and Soc. of L.], UNIV. OF OSLO 32 (2010), available at http://www.jus.uio.no/ikrs/forskning/aktuelle-saker/2010/Dullum_materie_20100521_web.pdf. [last visited June 20, 2013].

the most frequent proof of wrongful convictions comes from another's confession, new medical evidence, and new witness statements.

Nobles and Schiff make a principal distinction between people who have been convicted of offences they did not actually commit and convictions that were flawed because some part of the process that produced those convictions did not operate as it should.⁴⁸ They distinguish between a concern with truth and a concern with the process. Most of the cases from the last years reopened in Norway belong to the latter. They are based on *formal wrongs*, discovery of new psychiatric examinations of some mental problems not identified before (40%), or *procedural wrongs*, lack of justification for the appeal refusal (22% of the reopened cases).⁴⁹ The convicted person in both kinds of cases is the actual culprit.

D. Compensation

The exonerated person receives compensation according to the CPA Chapter 31, Compensation in Connection with a Prosecution, section 444 which states:

“Unless it is otherwise provided by section 446, a person charged is entitled to compensation by the State for any financial loss that the prosecution has caused him a) if he is acquitted ... A convicted person is also entitled to compensation for financial loss due to execution of a sentence that exceeds any sentence imposed after the case has been reopened.”⁵⁰

and section 445, which states:

“even if the conditions for compensation prescribed in section 444 are not fulfilled, the person charged shall, if it appears to be reasonable, be awarded compensation for financial loss resulting from special disproportionate damage that the prosecution has caused him.”⁵¹

In the most serious one, the Moen case, the compensation was \$3.5 million.

III. TWO HIGH PROFILE CASES

Even in countries with well-developed legal safeguards, wrongful convictions happen. The idea of establishing an independent criminal

48. NOBLES & SCHIFF, *supra* note 1.

49. These figures are from the years 2010 and 2011, see *Evaluation of the Criminal Cases Review Commission*, *supra* note 34, at 33.

50. NORWEGIAN CRIM. P. ACT § 444 (1981).

51. *Id.* § 445.

cases review commission may be traced to a few high profile cases of miscarriages of justice. Perhaps the infamous *Liland* case was the proverbial straw that broke the camel's back and opened the gate for the NCCRC.⁵² The *Liland* case was a murder trial which has become known as *the* high profile miscarriage of justice case in Norway. It dates back to December 1969, when two men were found killed with an axe in the small Norwegian town Fredrikstad. In 1970, Per Liland was convicted of the two killings. He was sentenced for life with 10 years supervision. The Supreme Court ruled against a retrial in 1976. Having served the sentence, he was released and in 1993 he petitioned for the reopening of his case. Despite resistance from the prosecution, the case was reopened and Mr. Liland was acquitted by the Court of Appeals in 1994. The new evidence in the case consisted of new expert witnesses identifying the time of the killings at a much later time than earlier presumed, on a day when Mr. Liland had an alibi. He received monetary compensation (more than \$2.4 million) in 1995. He died in 1996.

The *Moen* cases are about the killings of two young women.⁵³ Fritz Moen had multiple handicaps – he was deaf, dumb, and disabled (his right arm was lame), and had an IQ in the lower range. In 1978 he was convicted of raping and killing a 20-year old woman. Moen was arrested the day after the body was found. Moen claimed to have an alibi, which was confirmed by witnesses. There was no technical evidence and no witnesses to the killing. However, Moen was subjected to intense and lengthy questioning across several weeks. He had no interpreter during the first interrogation. Unfortunately, Moen undermined his alibi by giving different explanations. He provided contradictory statements, sometimes denying and sometimes admitting the crime, but his statements were often inconsistent with evidence of the crime and the crime scene. Nevertheless, in 1978 Moen was convicted and sentenced to 20 years imprisonment, in addition to 10 years supervision. Following appeal to the Supreme Court the sentence was reduced to 16 years imprisonment.

Two years before this case there was an unsolved murder case in the same area. In 1976 a girl was found killed in the same town. The *modus operandi* was the same as in the first Moen case. During the first police interrogation Moen had no defense attorney. A number of interviews followed and during the seventh interview, the police claimed he confessed, this time without an interpreter. In 1981 he was convicted of

52. *Liland Affair*, WIKIPEDIA, http://en.wikipedia.org/wiki/Liland_Affair (last visited Nov. 27, 2012).

53. Hans Sherrer, *Exonerated of Two Murders, Fritz Moen Posthumously Awarded \$4 Million*, JUSTICE DENIED: THE MAGAZINE FOR THE WRONGLY CONVICTED, Spring 2008, available at http://justicedenied.org/issue/issue_40/moen_i-40.pdf.

the second killing and received 5 years imprisonment in addition to the 16 years for the first murder. That made 21 years imprisonment total, which is the maximum sentence in Norway. An appeal was denied.

Moen was released in 1996, having served 18 years. A few years later a private investigator took his case. A petition was delivered to the Court of Appeals, pointing both to irregularities in Moen's confessions and exculpatory biological evidence. The petition was dismissed in 2002. He appealed to the Supreme Court. The Appeals Committee in the Supreme Court opened one of the cases where there was no match between Moen's blood type and the semen, but did not open the other case. He was exonerated of the reopened case in 2004. A new petition was delivered to the newly established Criminal Cases Review Commission in 2004. The year after the petition was delivered, Moen died. During the time his case was under review by the NCCRC, another man confessed on his death bed to having killed two young women; the confession was received by a priest and two police officers. He died the very next day. NCCRC investigated the case and found the confession to be convincing. The man's movements at the time of the murders matched the case facts, and witness statements regarding his behavior in the years that followed gave the picture of a very troubled man. The NCCRC also pointed to severe misunderstandings and miscommunication between the interpreters and the court in the case, casting doubt on Moen's alleged confession. As there were clear similarities between the murders, it must have been the same perpetrator, i.e. not Fritz Moen (since he had been exonerated of the first crime). The case was reopened and the Court of Appeals exonerated Moen posthumously in 2006.

Two weeks after the exoneration, the Norwegian Parliament appointed a commission with a mandate to investigate the causes of Moen's wrongful convictions and evaluate whether changes were needed in the criminal justice system to avoid similar wrongful convictions in the future. In 2008 Moen posthumously received \$3.5 million in compensation. The Minister of Justice acknowledged the injustice saying, "I will tender an unqualified apology and regret in regard to Fritz Moen and those who were close to him, for the injustice he was subjected to."⁵⁴

V. CONCLUSIONS

The creation of the NCCRC has made the reopening of cases visible and transparent, which also has made it more open to criticism, as

54. www.aftenposten.no (April 18, 2008) [last visited June 20, 2013].

compared to a court based system. The NCCRC has not been without critics. Two cases in particular have received considerable media attention. The NCCRC's twice refusing to reopen a murder case that has busied the Norwegian courts for more than 50 years has been attacked by individuals who disagree with the decision on grounds that the NCCRC's evaluation of the evidence is flawed.⁵⁵ As long as there is new evidence not presented previously, there is no limit to the number of times a case may be filed with the NCCRC. In a high-profile international spy case dating back to 1985 (the Treholt case),⁵⁶ the media almost unanimously criticized the NCCRC, not because of disagreement with the decision not to reopen the case, but because the proceedings of the NCCRC were not open to the public.

The NCCRC has currently been under evaluation by an independent working group.⁵⁷ The main conclusion from the evaluation is that the NCCRC works well and has confidence and credibility but needs some minor changes:⁵⁸

- More transparency. The NCCRC should have public hearings on matters of public interest more often.
- Fewer minor cases. "Harmless" criminal cases (less than six months imprisonment) shall not be reopened if it has been ten years since the case was closed.
- Defense attorneys should be represented in the Commission.
- Research competence should be represented among the lay members.
- A more liberal approach should be taken when appointing defense attorneys.
- Strengthening of the commissioners' independence. The case workers shall not propose the commissioners' decision, as they do today. This is the responsibility for the commissioners to decide. There is a need for a better distinction between the commissioners and the case workers.
- Strengthening of the law enforcement expertise among the case workers.

55. *Fredrick Fasting Torgersen*, WIKIPEDIA, http://en.wikipedia.org/wiki/Fredrik_Fasting_Torgersen (last visited Nov. 27, 2012).

56. *See Trial and Conviction of Arne Treholt*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Treholt#Trial> (last visited Nov. 27, 2012).

57. *See Evaluation of the Criminal Cases Review Commission*, *supra* note 34.

58. *See also* Ulf Stridbeck, *The Norwegian Criminal Cases Review Commission Evaluated*, THE WRONGFUL CONVICTIONS BLOG, <http://wrongfulconvictionsblog.org/2012/11/22/the-norwegian-criminal-cases-review-commission-evaluated/> (last visited June 13, 2013).

A. Improvements to Avoid Wrongful Convictions

As we have described the basic Norwegian legal safeguards – adversarial process, a high standard of proof, free production of evidence, appointed prosecutors and judges, providing defense attorneys at public expense, requirements of objective investigation, an information-gathering focus during the investigation, court appointed expert witnesses and videotaped interviews – and on top of that the independent NCCRC, there should be no need for any groundbreaking improvements to avoid wrongful convictions. Some improvements have recently been suggested by the evaluation working group. But one important reform, not mentioned by the evaluation group, is the recent decision to audio record the trial, as is the practice in some other countries, like Sweden. Documentation of what was said both during the police interview and on the witness stand in the courtroom is important. The system of recording during the police interview is more or less being practiced. The next step is recording in the courtrooms. Recordings may be very useful both during the appeal and when the NCCRC reviews the case looking for new evidence. Recording the courtroom to assist the NCCRC in evaluating claims of bias and misconduct of judges and counselors is as important as monitoring the professional conduct of the police investigator while doing interviews. Many of the cases reviewed by NCCRC are based on claims of misconduct or bias in court by counselors or judges, and currently such claims are impossible to evaluate without recording.