Chapter 3

# Police Investigation and False Convictions

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## Introduction

There is no question that the advent of DNA forensic analysis has changed the face of miscarriages of justice and wrongful convictions. The American Innocence Project has demonstrated the innocence of over 350 individuals through the use of DNA. New research, some of which is based on data collected by the Innocence Project, reveals several important facts. First, the phenomenon of false convictions is widespread[2] and demands significant change in existing approaches to avoid them in future.[3] Second, many false convictions are based on deficiencies in police investigations, a result of false confessions, or both. Third, even "normative" suspects who do not belong to traditional groups who are at risk of making a false confession, such as minors, the mentally or emotionally ill and those who are intoxicated, may make false confessions under the pressure of interrogation. Fourth, "sophisticated" methods used by the police, such as trickery, the use of informants, or the psychological manipulations of the Reid Technique, yield a high rate of false confessions. Fifth, judges have few and inefficient tools for distinguishing between true and false confessions.

This chapter does not cover the entire spectrum of steps involved in police investigations (lineups, wiretaps, forensic examinations, search and seizure, etc.) but focuses on interrogations and police misconduct that may play a role in generating false confessions. The interrogation of suspects, a key factor in police investigations, yields not only "true" confessions but

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2 Boaz Sangero, *Safety from False Convictions* (CreateSpace: 2016).

3 *Ibid*; See also Boaz Sangero, "Safe Convictions" (2019) 30:4 Crim Law Forum 375 [Sangero].

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also a high rate of false ones. Moreover, the focus on obtaining confessions has a negative effect on all investigative actions. Finally, the process of interrogation can harm human dignity and have an impact on the freedom of both innocent and guilty suspects.

One main reason for false convictions is negligence or misconduct on the part of police investigators.[4] While police investigators and prosecutors should be required to adhere to the norms of fair procedure, regardless of the guilt or innocence of suspects and defendants, to prevent a subculture of inappropriate behavior, this is not always the case.[5] The focus of this chapter is to examine how this misconduct happens and how it can be avoided in the future. Describing this misconduct as "inappropriate behavior" neutralizes it somewhat; therefore, more precise terms will be used such as "negligence of police investigators" and "investigators' crimes," as the case may be.

Police misconduct may refer to, among other things, the following actions: suggestive eyewitness identification; fabricating evidence; concealing evidence from the defense, the prosecution, or the court; deliberate improper handling or destruction of evidence; abuse of suspects; coercion of confessions; intentional contamination of confessions; and deliberate reliance on unreliable informants.[6]

This chapter therefore examines how police investigative practices can result in false confessions and suggests ways of improvement. Secs 3.1 and 3.2 discuss commonly held misconceptions regarding a suspect's guilt and the function of police investigators, which have consequences for both criminal law procedure and the collection of evidence. In secs 3.3–3.8, investigative practices are critically examined, including the concealment of exculpatory evidence by investigators and fabricating evidence; the considerable focus on obtaining confessions; the interrogation of suspects using the Reid Technique; deploying informants to obtain confessions; and

4 See, for example, Innocence Project, "What You Need to Know about Police Misconduct and Wrongful Convictions" online: <https://innocenceproject.org/news/police-misconduct-wrongful-convictions-what-you-should-know/> [Innocence Project]; National Registry of Exonerations, online: <www.law.umich.edu/special/exoneration/Pages/about.aspx> [National Registry].

5 Susan A. Bandes, "Protecting the Innocent as the Primary Value of the Criminal Justice System" (2009) 7 Ohio State J Crim Law 413, 417; see also Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press: 1968) 168.

6 Innocence Project, *supra* note 3; National Registry, *supra* note 4. For additional examples of misconduct, see Andrew M. Hetherington, "Thirty-First Annual Review of Criminal Procedure: III. Trial: Prosecutorial Misconduct" (2002) 90 Geo LJ 1679; Brandon L. Garrett, "Innocence, Harmless Error, and Federal Wrongful Conviction Law" (2005) 1 Wis Law Rev 78, 87, 93.

the use of trickery and lying to obtain incriminating evidence. The final section suggests recommendations for improving police investigations aimed at reducing the conviction of the innocent.

### 3.1 Misconception about a Suspect's Guilt and Its Consequences: Psychological Insights

The misconception of the suspect's guilt, or the belief that a suspect under interrogation is always guilty, is a prevalent one among police investigators, prosecutors and even judges. It can result in many mistakes and is a key factor in convicting innocent people, both in the areas of evidence and procedure. In North America, this misconception is known as "tunnel vision."[7]

In his book on the birth of prisons, Michel Foucault noted that according to prevailing perceptions in the past, a suspect, by virtue of being a suspect, deserves some punishment because it is impossible for a suspect to be innocent.[8] Part of this perception is still with us. The presumption of innocence, a fundamental notion with respect to individual rights that most societies[9] adhere to, is replaced, in practice, by a presumption of guilt. This is a convenient working assumption for the police, as it facilitates their job given that it is easier to focus on investigating a single version of events, rather than several, especially given that the suspect is usually already in the hands of the police. The assumption, supported by the erroneous assessment that most suspects are also guilty, intensifies after an indictment is filed: statistics show that the vast majority of defendants charged are ultimately convicted.

In many cases, there is a built-in tension between the two goals of an investigator: first, to undertake an objective investigation to locate the perpetrator and, second, to collect evidence incriminating a given suspect. The former requires an inquisitorial, investigative approach, with openness to different possibilities; the latter requires an adversarial, competitive dynamic, leading to honing in on a particular suspect. Due to the fact that in many cases a suspect is identified early on, the second goal may prevail and lead to the discovery of evidence that incriminates the original, and at times wrong, person – whereby exculpatory evidence is ignored, and only inculpatory evidence pursued. This is the heart of tunnel vision: "a single minded and overly narrow focus on a particular investigative or

7 Keith A. Findley & Michael S. Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases" (2006) Wis Law Rev 291, 307–322 [Findley & Scott].

8 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Press, 1977) [Foucault].

9 Rinat Kitai, "Presuming Innocence" (2002) 55:2 Okla L Rev 257.

prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information."[10]

The effects of these preconceived notions about a suspect's guilt on investigators' work can be devastating. Most of the post-arrest police investigation work is aimed at securing a confession from a suspect. Indications that are inconsistent with this conception are sometimes not documented or are rejected as unreliable or insignificant. When the confession is obtained, the interrogation usually ends, and any other directions in the investigation are set aside. Even if an attempt is made at a later time to return to other leads, the evidence is not always preserved. Indications that are inconsistent with this conception are not recorded or are rejected as unreliable or insignificant.

In his article titled "Reverse Engineering," Ciraco illustrates the effect of a misconception about a suspect's guilt on the conduct of law enforcement agencies. The author likens their action to those of engineers receiving a product and trying to copy it, disassembling and reassembling it from the end to the beginning.[11] Similarly, law enforcement officers trapped in the erroneous belief of a suspect's guilt start with the finished product of the criminal conviction, assume that the suspect committed the offense and look only for evidence to support their assumption. As Karl Popper wrote, it is easy to obtain confirmation for any theory, even if it is not scientific, if that is what one is looking for.[12]

Being hostage to this conception represents a human tendency recognized in psychology and can be explained by tunnel vision (discussed above) and also by several known cognitive biases: confirmation bias, selective processing of information and results bias. Confirmation bias or "I knew it in the first place" is the tendency to look for and interpret evidence in a way that supports existing beliefs, expectations and hypotheses, instead of looking for information to refute the hypothesis. Similarly, the selective processing of information makes individuals prone to ascribing greater weight to evidence that supports their early beliefs even when they are presented with information that contradicts these. Finally, results bias is similar to confirmation bias: decisions are made based on the results, rather than the quality of the process.[13] In the criminal justice system, these

10 Fred Kaufman, *Commission on the Proceedings Involving Guy Paul Morin, Vol. 2* (Toronto: Ontario Ministry of the Attorney General, 1998) 1134.

11 Danny Ciraco, "Reverse Engineering" (2001) 11 WRLSI 41, 61.

12 Karl R. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (New York, Harper and Row Publishers: 1969) 33–35.

13 Findley & Scott, *supra* note 7. See also Alafair S. Burke, "Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science" (2006) 47 Wm & Mary L Rev 1587, 1596–1599; Lawrence J. Sanna, Norbert Schwarz, & Shevaun Stocker, "When

biases are compounded by pressures, including public and media pressure on police investigators to solve crimes, as well as the processes that reinforce misconceptions about the suspect's guilt.

A long-practiced method of police interrogation, known as the Reid Technique, commonly used in the US, Canada and Israel, takes place when the investigator is convinced of the suspect's guilt and seeks to obtain a confession.[14] The police focus on a particular suspect, who may have been selected as a result of the above cognitive biases. As stated, due to misconceptions about the suspect's guilt, investigators disregard other lines of investigation. This not only causes immense damage to an innocent suspect but may cause irreparable damage to society by thwarting the possibility of discovering the real perpetrator, who remains free to commit other offences. Time is an enemy in the discovery of the truth. When the police do not investigate other directions and other suspects, there is no guarantee of correcting the omission later: obscured or lost information is not always recoverable.

The role of the police investigator is not to locate evidence to contribute to the indictment of the suspect, but rather to determine the truth of what occurred by investigating relevant evidence that can be obtained legally. Suspects are entitled to the assistance of the police. Investigators must exhaustively examine all exculpatory evidence, in whatever form it may take. Yet, often indications that undermine the perception of the suspect's guilt are not recorded or are rejected. Police investigators appear reluctant to return to the starting point, and they tend to avoid documenting statements by the suspect that work in favor of innocence.

Rejecting the presumption of guilt and operating under the presumption of innocence require a cultural shift. First, police investigators must become aware of it. Second, police investigators should be warned against it during training. It should be emphasized to them that their job is not to solve the case at any cost, but to search for the truth. Therefore, if they discover evidence that supports the suspect's innocence, it is their duty to share this evidence with the prosecution. Third, investigators should be encouraged to investigate several avenues, not focus on any one suspect and attempt to get him to confess. Investigators who find evidence that incriminates the suspect should be acknowledged for doing their job, but the same also applies to those who prevent the prosecution of an innocent

Debiasing Backfires: Accessible Content and Accessibility Experiences in Debiasing Hindsight" (2002) 28:3 J. Exp Psychol Learn Mem Cogn 497.

14 Findley & Scott, *supra* note 7, at fn 334. Fred E. Inbau, John E. Reid, Joseph P. Buckley, and Brian C. Jayne, *Criminal Interrogation and Confessions, 3rd ed* (Burlington, MA: Jones & Bartlett Learning: 2001). See also sec. 3.5.

person. Fourth, prosecutors should oversee the investigation and, if necessary, point the investigators in differing directions. At the same time, prosecutors should also be supervised in their work in this regard, as they can be guilty of tunnel vision as well. Fifth, investigations should be made transparent to the defense and the court through electronic documentation of all significant investigative actions, including lineups and interrogations of suspects and witnesses. At the same time, defense attorneys should be allowed to observe all significant investigative actions.[15] Sixth, the investigative team must include an investigator whose job is to look for evidence of the suspect's innocence – not just their guilt. Seventh, one should strive for a situation where lawyers dealing with criminal law serve alternately as defense attorneys and prosecutors.[16] The fact that lawyers serve as prosecutors throughout their professional life has a deleterious effect on their ability to see reality objectively, in all its complexity, and not merely through the prism of guilt and convictions. This is not a final list of recommendations, rather, its purpose is to demonstrate that there is a great need for improvement to avoid the destructive effect of these perceptions of the suspect's guilt.

## 3.2 Misconceptions Prevalent among Police Investigators Regarding Their Job

> Jon Burge was a serial racist and sadist who tortured over 120 Black men in Chicago in the 1980s. He placed bags over their heads, burned them with cattle prods, and shouted the n-word while electrocuting them. But Burge was also a commander in the Chicago Police Department who was torturing these men to extract confessions to alleged crimes. And because of the latter, he was never charged for the former.[17]

15 Recording an interrogation and having a defense attorney attend as an observer is of great importance primarily for documenting the interrogations, as it can provide a significant tool to the court for evaluating the confession (Was pressure exerted on the suspect? Did the information originate with the suspect or from the interrogator?). It is also important for exercising a positive influence on the character of the investigation and on the bodily and mental integrity of the suspects. In the US, England, and France, detainees are entitled to the presence of a defense attorney during the interrogation; however, this does not apply in Israel and Canada. See Ed Cape & Jacqueline Hodgson, "The Right to Access to the Lawyer at Police Stations: Making the European Union Directive Work in Practice" (2014) 5 New J Eur Crim Law 450.

16 For a similar proposal, see George C. Thomas, *The Supreme Court on Trial: How the American Justice System Sacrifices Innocent Defendants* (Ann Arbor, University of Michigan Press: 2008) 190–192. In Israel, this is practiced in military prosecution and defense offices.

17 Somil Trivedi & Nicole Gonzalez, "To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct" (2020) 100 Boston U L Rev 895.

Judges tend to dismiss the allegations of suspects and defendants when they declare that police investigators acted illegally; they believe instead that investigators are engaged in the "sacred work" of the "war on crime," and assume that if an indictment was filed against a person, they are probably guilty. Research indicates, however, that cases where investigators act illegally occur quite often.

It is instructive to distinguish between two types of perceptions that police may hold regarding a suspect of an investigation. The first type occurs when an investigator knows that the suspect is innocent and seeks to indict him, regardless. This is often seen in popular media, literature and films, and is probably quite rare. The second type occurs when an investigator believes that the suspect is likely guilty, fears that the judge will err and acquit the suspect, comes to the aid of the "truth" and the public, and misleads the prosecution and the court. The investigator's mistaken belief that the ends justify the means may lead them to conceal credible evidence, to "improve" incriminating evidence and even to falsify evidence. On occasion, the investigator mistakenly views the prosecutor and the judge as obstacles observing legal procedure too strictly and consequently lies to them. Police investigators who operate under the second belief are likely more common, and therefore dangerous. Moreover, it is difficult or impossible to expose improper investigator activity after the fact.

An investigator's job is to assist the court in revealing the truth and when they hide information or present false information, they prevent the court from fulfilling its role. The belief that the police are, in fact, meant to solve as many cases as possible and prepare them for indictment, and reward and promote investigators based on this criterion, in all likelihood, serves to sabotage police investigations. In appropriate cases, disciplinary or criminal action should be taken against investigators who transgress the law.

Yitzhak Ilan, formerly head of the Investigation Division of the Israeli General Security Service, recently described the features of an "ideal investigator," based on ideas of credibility, critical faculty, creativity and morality.[18] Regarding credibility, Ilan wrote: "Some of the time the interrogator performs his work alone... It is enough for him to hint to the interrogee about a concealed detail of the investigation and not report it, to complicate the interrogation with false admissions."[19] Regarding critical faculty,

18 Yitzhak Ilan, "Philosophy of Criminal Investigation: Investigating the Truth, Part I" (2019) 5 Mishpat Mafteach – Journal of the State Attorney's Office, 5. [Ilan I] [translated from Hebrew – Boaz Sangero].

19 Yitzhak Ilan, "Philosophy of Criminal Investigation: Investigating the Truth, Part II" (2020) 6 Mishpat Mafteach – Journal of the State Attorney's Office, 51 [Ilan II] [translated from Hebrew – Boaz Sangero].

he wrote: "Being critical and questioning of statements should be manifest during the entire investigative process, especially during the examination of the suspect's confession, so as not to err or classify a false confession as true, and *vice versa*."[20] Regarding creativity, he emphasized the importance of: "…raising as many hypotheses as possible that are consistent with the material of the investigation… testing the hypotheses based on conclusions of decisive tests."[21] Finally, regarding morality, he wrote: "The investigator should treat interrogees with respect and humanity… There are many moral dilemmas, especially in the extent to which investigative tools and methods are used."[22]

Ilan's knowledge in this area was gained from the study of philosophical discourses addressing scientific research and viewing similar dilemmas arising in police investigations: "…both a scientific investigation and a criminal one base their investigative methods on hypotheses, which can be reached by guesswork only. Hypotheses have a special feature: they can be refuted… but can never be proven definitively and completely." Having understood and internalized this, police investigators should avoid "getting stuck" on their initial hypothesis, but rather put it through as many rebuttal tests as possible, which may either refute or confirm the hypothesis and possibly point them in the direction of a different investigation. For example,

> an alibi examination of a suspect is a crucial test for the hypothesis that the suspect committed the crime. If he is found to have an alibi, the hypothesis that he committed the crime is refuted. If he is found not to have an alibi, the hypothesis is confirmed but not conclusively proven.[23]

This approach is different from what is commonly practiced, whereby confirmation is sought for the original hypothesis that the suspect committed the offense, without openly examining options for refutation. In an investigation, to arrive at the truth, all hypotheses that are consistent with the evidence must be refuted or confirmed.

Laurie Levenson proposed the need for a systematic investigation of police corruption.[24] In her investigation of "police culture" that leads to

20 *Ibid*. In a footnote, the author clarified that "the classification of a true confession as a false confession is admittedly rarer than the classification of a false confession as a true confession, but it does happen."

21 *Ibid*.

22 *Ibid*.

23 *Ibid* sec. 4.

24 Laurie L. Levenson, "Police Corruption and New Models for Reform" (2001) 35:1 Suffolk U L Rev 1 [Levenson].

inappropriate behavior, based in part on findings from numerous commission reports, Levenson identified the following factors as common predictors of police misconduct and corruption: an isolated police unit; a strong code of silence; a "professional" versus "community" policing model; ineffective or unfair professional discipline; and insufficient screening, training and supervision of police.[25] Levenson has also shown how traditional legal ways of dealing with police misconduct—misconduct involving excluding evidence obtained illegally, civil rights violations, such as through disciplinary proceedings, internal investigations and commission reports—do not lead to any lasting significant change in police practices.[26]

The law enforcement system plays a significant role in society, and therefore it has been given extensive powers and authority. Authority without critique, however, tends to lead to corruption. A police force that does not have or enforce effective disciplinary and/or criminal proceedings against police officers' misconduct or illegal actions does not lead to a safe society and can be oppressive, and frightening. One option would be to establish a Safety in the Criminal Justice System Institute[27] that deals with, among other things, necessary restrictions on the excessive power of police investigators.

### 3.3 Concealment and Falsification of Exculpatory Evidence by Investigators

The National Registry of Exonerations provides information about American exonerations of innocent criminal defendants from 1989 to the present day.[28] Gross and Shaffer examined the cases of 2,043 exonerations

25 *Ibid* at 13–16.

26 *Ibid* at 18–25.

27 See Sangero, *supra* note 2 at chap. III. Introducing modern safety into systems lacking a culture of safety requires the establishment of a special institute to carry out this function, and the securing of resources necessary to operate in a meaningful way. Thus, for example, in United States, in the field of aviation, the Federal Aviation Administration (FAA) was established; in the field of transportation, the National Transportation Safety Board (NTSB) was founded; in the area of food and drugs, there is a Food and Drug Administration (FDA); the Occupational Safety and Health Administration (OSHA) serves the occupational field; and various other bodies were established in the medical field, such as the National Center for Patient Safety (NCPS) and the Center for Patient Safety Research and Practice. In all of these fields, the recognition of safety issues and the need to improve performance led to a national focus on safety leadership, the development of a knowledge base, and the distribution of information. Moreover, substantial resources were devoted to this agenda. The criminal justice system lags far behind in this regard and there is little awareness of the importance of safety from false convictions built into the system.

28 See National Registry, *supra* note 3. On March 15, 2024, the update number of exonerations was 3488.

from the National Registry between 1989 and 2012,[29] and of these, 1,170 cases were part of group acquittals of innocent people convicted in 13 organized police crime cases uncovered in recent decades. In these cases, corrupt police officers indicted innocent civilians,[30] and in addition, in 368 of 873 individual acquittals, the false convictions were based on "official misconduct" by police investigators or prosecutors. This reflects a rate of 42% of individual acquittals and 75% of all cases, topping the list of causes of false convictions. The authors noted that they did not have the full data, and that this was just the tip of the iceberg. Most false convictions are unknown, according to "the hidden accident principle of criminal law."[31] What these official exonerations demonstrate is that the criminal justice system is unable to filter out false testimony, especially when it comes from the mouths of police investigators themselves.

The classification of a case where "concealment/falsification of evidence" occurs covers various cases of misconduct, including prohibited and criminal conduct by police investigators. Examples include concealment of exculpatory evidence, exerting improper pressure on suspects to confess and on witnesses to testify against suspects, unfair lineups and falsifying incriminating evidence.

For example, in Israel, recently (retired) Judge David Rosen, the Prosecution's Comptroller and Ombudsman, reported that police representatives have been known to lie to judges in detention hearings. In his 2019 annual report, he reviewed several cases where police lied in the courts.[32] Police lying occurs frequently and given the many cases that have been exposed, judges should treat the testimony of police officers with suspicion, otherwise, prohibited actions by some investigators will continue

29 Samuel Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012* (2012) Report by the National Registry of Exonerations, online: <www.law.umich.edu/special/exoneration/documents/exonerations_us_1989_2012_full_report.pdf>.

30 *Ibid*.

31 On the hidden accident principle of criminal law, see Boaz Sangero & Mordechai Halpert, "A Safety Doctrine for the Criminal Justice System" (2011) Mich. St. L. Rev. 1293, 1314–1319. In fields outside criminal law, an accident is both detected and detectable. A defect in a car can cause its observable crash, just as a defect in a bridge can cause its observable collapse. Already by the 1940s, the fact that we are able to discern accidents and the damage they cause was an impetus in the development and institution of modern safety practices aimed at minimizing defects in products. However, there is no general test for the accuracy of criminal convictions. The general inability to detect false convictions is a prominent characteristic of criminal law, and these "accidents" typically remain undetected. As a consequence, the criminal justice system receives no feedback regarding its flaws and error rate.

32 Judge David Rosen, *Public Complaints of the State Representations in the Courts, Activity Report* (Tel Aviv, Israel: Ministry of Justice, 2019).

to result in convictions of innocent suspects. Examples from such cases should be incorporated in investigators' training so that they understand the severe damage they may cause if they act illegally. Prosecutors and judges would also benefit from similar training.

### 3.4 Focusing on Obtaining Confessions

In the Middle Ages, when a person was presumed to have committed an offence, torture was commonly used to extract a confession. While modern-day methods of confession extraction have changed, over 90% of convictions are based, in fact, on confessions of various kinds, most of them occurring in the form of plea bargains. The confession is still considered by many, including judges, to be the "queen of evidence," although in recent decades it has come to light that far too many wrongful convictions are based on false confessions.[33] People will confess to things they have not done, for various reasons, some of which are irrational and based on suspect vulnerabilities, while others are entirely rational.

Given that confessions are considered to be strong evidence and are the main evidence for many convictions (in Israel, to secure a conviction, the only requirement besides confession is called "something more," which according to a Supreme Court's ruling may be "light as a feather"), it should not be surprising that most of the efforts of police investigators are aimed at obtaining confessions. This strong focus on confessions can be understood as the result of a number of factors. First, the police often approach a suspect based on an assumption of guilt. Second, the confession is still considered by many judges to be conclusive evidence. Third, a key measure of success for police and prosecution, and often the basis for promotion, is a high conviction rate. Fourth, a confession is an easy and inexpensive form of evidence. Fifth, judges tend not to disqualify confessions, sending a message to investigators that confession evidence is important, regardless of how it was extracted from suspects. Even when illegal actions used by investigators in obtaining confessions are exposed, few sanctions are imposed on them, and they continue to be promoted. Sixth, judges allow the police to routinely use detention under deplorable conditions, or the threat of detention, as means of pressuring detainees to confess. Essentially, arrest in some instances is similar to medieval

33 See Richard A. Leo & Richard J. Ofshe, "Missing the Forest for the Trees: A Response to Paul Cassell's 'Balanced Approach' to the False Confession Problem" (1997) 74 Denver Univ Law Rev1135, 1137; Boaz Sangero, "Miranda Is Not Enough: A New Justification for Demanding 'Strong Corroboration' to a Confession" (2007) 28 Cardozo Law Rev 2791; Boaz Sangero, "Safety from False Confessions" (2018) 54:1 Crim Law Bull 25. [Sangero 2018].

torture.[34] Seventh, for some the confession ritual reflects the suspect's submission to society's rule.[35]

Thus, it is no wonder that police investigators invest a great deal of effort in obtaining confessions by suspects, both in overt investigations, usually under detention conditions, and in covert ones, through informants, mostly criminals, who are placed in suspects' detention cells and try to trick them into confessing. An interrogation under conditions of detention undermines the detainee's ability to resist. The arrest isolates the suspect from family, friends and workplace, disconnects him from day-to-day activities and causes him to lose control over his life. This isolation helps investigators extract confessions; as a consequence, psychological tactics employed to break the suspect's resistance fall on fertile ground.[36]

Prof. Kremnitzer makes an important distinction between types of investigators:

> A key question... is the investigative ethos or the figure of the ideal, exemplary investigator, as it takes shape in the investigator's person. Is it the wise, cunning investigator who confronts the interrogee in a struggle of minds, which sometimes requires time, who strives to discover the truth, even when the truth clears the suspect? Or is it the investigator who obtains a confession no matter what, at any cost, and does so with "efficiency" and maximum speed? The more the society in question lives in a sense of anxiety about criminality, the more aggressive and "macho" it is, the greater the chance that the exemplary investigator will be of the second type.[37]

This important distinction was more applicable at the time of writing in 1993, when police investigations often used physical violence to extract confessions. Today, a distinction must be made between an "old-school" investigation that focuses on obtaining a confession from the suspect, even through police trickery (here physical pressure is now replaced with psychological pressure), and sophisticated professional investigations where a

34 Rinat Kitai-Sangero, "Detention for the Purpose of Interrogation as Modern 'Torture'" (2008) 85 U Det Mercy L Rev 137 [Kitai-Sangero 2008].

35 For an instructive description of this approach common in the Middle Ages, see Foucault, *supra* note 7 at 38 ff.

36 Rinat Kitai-Sangero, "Can Dostoyevsky's Crime and Punishment Help Us Distinguish between True and False Confessions?" (2011) 9 Ohio State J Crim Law 231 at 244–245 [Kitai-Sangero 2011].

37 Mordechai Kremnitzer, "Conviction Based on a Confession Only: Is there a Danger in Israel of Convicting Innocent People?" (1993) 1 Hamishpat 205 at 207 [Translated by Boaz Sangero].

variety of independent evidence is sought to establish suspect guilt. Given that research indicates an inability for anyone involved in criminal justice processes to distinguish between true and false confessions, other evidence must necessarily be sought.[38] Therefore, the focus on obtaining confessions should be discontinued and police investigations should be refined.

### 3.5 The Reid Technique of Police Interrogation

Police investigators' misconception that they can distinguish between true and false confessions is reflected in the interrogation method developed and commonly used in the US, known as the Reid Technique, which has greatly affected Israeli police investigative practices. The method instructs investigators to "latch onto" the suspect to extract a confession. The presumption of innocence is replaced in the interrogation room by a presumption of guilt. The process opens with the unsubstantiated assumption that the suspect is lying.[39] The Reid protocol proposes, in part, a method known as the behavioral analysis interview (BAI), which includes instructing police to be alert to a list of alleged signs of lying, such as avoiding eye contact. However, there is no scientific support for such "characteristics of lying," and studies have shown that they are not helpful. Prof. Dan Simon concluded:

> The BAI protocol amounts to a cacophony of commonly held but poorly diagnostic intuitions. Its validity is hardly reinforced by its conjectural propositions and folksy aphorisms. Yet the protocol continues to be the leading interrogation tool used by law enforcement agencies across North America.[40]

The effect of the Reid Technique on police investigations is evident, and it reinforces the perception of the suspect's guilt, in many cases leading to false confessions. The typical interrogation is strongly confrontational, whereby the Reid protocols instruct investigators to thwart the suspect's attempts to deny his guilt and provide an alternative version of events.[41]

38 Saul M. Kassin, Christian Meissner & Rebecca J. Norwick, "'I'd Know a False Confession if I Saw One': A Comparative Study of College Students and Police Investigators" (2005) 29(2), L & Hum Beh 211. See also references to additional studies with similar findings on pp. 212 and 222. Finally, see Brandon L. Garrett, "The Substance of False Confessions" Stan L Rev 62, 76 (2010).

39 Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process* (Boston, Harvard University Press: 2012) 207 [Simon].

40 *Ibid* at 131.

41 *Ibid* at 133; see also Brandon L. Garrett, "Interrogation Policies" (2015) 49 U Rich L Rev 895.

The protocol also recommends alternately using minimization (minimizing the severity of the suspect's actions) and maximization (exaggerating their severity). Psychological studies have shown that suspects interpret minimization as an implied promise of mitigation of the offense or punishment, and exaggeration as a threat of severe punishment. The combination of alternating minimization and maximization greatly increases the chances of a false confession.[42]

Prof. Kitai-Sangero describes the method as follows:

> The psychological phenomenon of confession cannot, therefore, be detached from the process by which it is obtained. Interrogation manuals shed light on this process. These manuals conclude that an accused person will not confess out of shame and that his fear of confession should be overcome. The interrogator must convince the accused that confession is rational and desirable. To achieve this goal, various tactics must be employed, such as suffocating the accused person's denials, pretending to gain overwhelming evidence against the one being interrogated, faking sympathy and understanding for the crime, and trying to blur the adversary nature of the interrogation. These tactics, however, though "intended for the guilty... are psychologically powerful enough to elicit confessions from the innocent."[43]

Clearly, there is no basis for assuming that the use of the Reid Technique produces confessions only from the guilty. This is an obvious example of how a lack of awareness by the criminal justice system of the importance of "safety" from false convictions in fact creates practices that are far from safe.[44]

A much preferable method was developed in England: the Preparation and Planning, Engage and Explain, Account, Closure and Evaluate (PEACE)[45] method. The PEACE method for investigating suspects includes: (a) the stated purpose of the investigation is to obtain full, accurate and reliable explanations; (b) investigators must act fairly and without prejudice when interviewing and treating suspects and must not assume that all suspects are going to lie, remain silent, or provide a version of the truth designed to justify their actions; (c) special care and additional safety measures must

42 Simon, *supra* note 39 at 137.

43 Kitai-Sangero 2008, *supra* note 34 at 244.

44 On the importance of safety in criminal law in general and in the area of the police interrogation and confessions, see Sangero 2018, *supra* note 33.

45 College of Policing, *Investigative Interviewing: Authorized Professional Practice* (2013), online: https://bit.ly/3n1T0Cp

be taken with vulnerable suspects. Prof. Dan Simon describes this English method as follows:

> In sharp contrast to accusatory protocols that instruct interrogators to silence and shut down the suspect from stating anything but an admission, the Conversation Management method encourages the suspect to provide an abundance of information. This approach both offers the suspect a fair opportunity to make his case and provides the interrogator material for challenging that account. Importantly, the Conversation Management approach discourages aggressive treatment of the suspect, and it forbids resorting to minimization, maximization, intimidation, or any other technique that might be coercive.[46]

The Reid Technique and the PEACE method are diametrically opposed. The PEACE method is based on the sophisticated use of information to expose lies and contradictions in contrast to the Reid Technique, which is based on confrontation, accusation and even coercing suspects to confess. Given the risks of false confessions and false convictions inherent to the Reid Technique, the PEACE method, while already adopted in other countries, including New Zealand, Norway, Sweden and Denmark, should be considered by Canada, Israel, US and elsewhere.[47]

### 3.6 The Illusion of "Concealed Details"

Judges attach great importance to "concealed details," which refer to details from the crime scene itself that the police claim to have not released to the press or shared with the suspect, and therefore the suspect's knowledge of them indicates that he is in some way connected to the offense. In two consecutive studies,[48] Garrett examined 66 cases where DNA evidence from the American Innocence Project pointed to wrongful convictions based on false confessions. He found that in 62 of the cases, concealed details were incorporated in the confessions, causing judges and jurors to trust these confessions despite doubts. Garrett concluded that these were "contaminated confessions," which police investigators tainted with "concealed" details revealed to suspects, consciously or unconsciously. In Israel it is also evident that judges attach enormous weight to a confession that incorporates details that are supposed to be concealed, whereby a

46 Simon, *supra* note 38 at 141.
47 *Ibid* at 142.
48 Brandon L. Garrett, "The Substance of False Confessions" (2010) 62 Stan L Rev 76; Brandon L. Garrett, "Contaminated Confessions Revisited" (2015) 101 Va L Rev 395.

conviction may result despite significant doubts. Hence, contamination of the confession with concealed details woven into the investigators' questions creates a significant danger of convicting innocent suspects.

A pair of Israeli cases, *Ben-Ezra* and *Ben-Ari,* provide an instructive example. Based on his confession, which included concealed details, Ben-Ezra was initially convicted of murdering a money changer. Later, new evidence was discovered that pointed to the involvement of another person, Ben-Ari. Ben-Ezra was acquitted with the consent of the prosecution, and Ben-Ari was convicted of murdering the same money changer. When convicting Ben-Ari, the judges noted that Ben-Ezra made a false confession and that his acquittal was correct despite the fact that his confession included concealed details, which misled the court.[49] Justice Dorner wrote: "This case illustrates how easy it is to base a person's conviction on a confession given by him, and even to find external supporting evidence for it."[50]

A different attitude toward the status of a suspect's knowledge of concealed details is articulated by Ilan:

> The provision of the details of the incident, especially of concealed details, independently by the suspect, constitutes a decisive test for the hypothesis that the interrogee's confession is true. *If the interrogator has come to the conclusion that the interrogee does not know certain details, the hypothesis has been refuted and it can be concluded that this is a false confession.* If the interrogee provides correct concealed details, the hypothesis has been strengthened, but... has not been definitively verified. To reduce the possibility that the investigators make any contribution (intentionally or unintentionally) to the details provided by the interrogee, it is of great importance that the interrogee provide new details that were not known to the investigating agency! In my experience, criminal incidents are rich in details, and it is almost always possible to find a new concealed detail, one that the investigating agency did not know about before the interrogee confessed. In this case, confirmation of the hypothesis that the interrogee's confession is true will be considerably strengthened.[51]

Unfortunately, in Israel, police investigators do not seek out independent details or evidence of an event; it is also rare for judges to attach weight to the fact that the detainee could not indicate in his confession

49 *Ben-Ari v State of Israel* (1997), 3391/95 51(2) PD 377 at 388 (Israel CrimFH).

50 Further criminal hearing 4342/97 *State of Israel v El Abid* PD 51(1) 736 at 843 (1998) [translated by Boaz Sangero].

51 Ilan I, *supra* note 17 at 56–60 [translated by Boaz Sangero – emphasis added].

concealed details that were not known to investigators. More recently, Justice Hendel's approach is encouraging, as he explains that a traditional search for "something more," in addition to confession, is not enough, but it is necessary to also look for "something contradictory" or "something missing," which could support acquittal.[52]

Kitai-Sangero suggested another approach to the role of concealed details in ascertaining the validity of a confession. According to her proposal, a suspect should be required to provide actual details about the circumstances of the execution of the offense as a condition of attributing weight to his confession.[53] It is not enough that the suspect knows things that were also known to police investigators, but it must be established whether the suspect led the police to new evidence or explained unresolved issues. Simply providing concealed details is not enough as an innocent person may know concealed details: "Providing significant details regarding the commission of the crime is, therefore, not at all the end of the road to protecting innocent suspects from making false confessions. But it is a necessary beginning."[54]

The following combination of elements can serve as the necessary minimum for basing a conviction on a confession:

*confession + significant knowledge + strong corroboration.*

In this instance, in addition to confession, "significant knowledge" is the suspect's knowledge of the facts of the crime that are unknown to the police; and "strong corroboration" is objective, tangible, other evidence, extrinsic to the accused person, linking him to the commission of the crime.[55] This is the necessary minimum as a conviction requires that the charge be proven beyond a reasonable doubt – near certainty. If at the end of the trial a doubt remains based on the evidence, which the prosecution and the police failed to contradict (i.e., "reasonable doubt"), acquittal is warranted even if the above combination holds.

### 3.7 Using Undercover State Agents to Obtain Confessions

In the *Haibatov* case,[56] Israeli police investigators went to great lengths to obtain a confession from the suspect before it was finally disqualified

52 *State of Israel v Alexei Volkov* (2010), 4179/09 (Israel CrimA).
53 Kitai-Sangero 2011, *supra* note 36 at 250–252.
54 *Ibid* at 253.
55 Sangero 2018, *supra* note 33.
56 *Haibatov v State of Israel* (2018), 2868/13 (Israel CrimA).

by the court. Haibatov was cut off from the outside world for 11 days, in which he was allowed to speak only with the undercover state agent in his cell. A convicted criminal posed as the state agent and was promised a reward that depended on his success in obtaining a confession. The state agent lied to Haibatov and claimed to be a senior criminal. He further lied and said that he asked a famous lawyer to represent Haibatov, which in turn facilitated the police investigators' plot to prevent Haibatov from consulting a defense attorney on his own, although he had begged to do so (with help from an interpreter). The state agent even used heroin with Haibatov, which the state agent apparently brought into the cell. All of this took place in view of the investigators, who watched it happening on video. Haibatov ultimately confessed.

It is difficult to understand the objective of such a confession. After all, it reveals little evidence about the actual murder, and whether it was actually committed by this individual. For some reason, however, the three district court judges found it sufficient for conviction. The Supreme Court dismissed the confession and acquitted Haibatov, but with a bizarre determination that the confession (which may have been influenced by heroin) was "free and voluntary," in accordance with section 12 of the Evidence Ordinance. The exclusion was based on the *Issacharov* rule for "exclusion of evidence obtained by improper means."[57] This is a weak legal rule that grants judges absolute discretion.[58]

It would appear that judges are unable to identify false confessions. There is a logical fallacy that reinforces the police focus on obtaining confessions in general and the use of state agents in particular: the more energy the police invest in obtaining the confession, the smaller its real weight at trial. While a confession may be eventually procured, the possibility of distinguishing between a "true" perpetrator and an innocent suspect is lost. Thus, these creative efforts to obtain confessions must be curtailed, as their credibility is highly suspected.

The overall motivation of using state agents in helping investigators to obtain confessions from suspects is to protect society, but society receives little assistance from such dubious partnerships. State agents are mostly former or current criminals. An American study found that incentivized criminals, who lie first to the suspects and second on the stand to indict

57 *Issacharov v Chief Military Prosecutor* (2006), 5121/98 61(1) PD 461 (Israel CrimA) [*Issacharov*].

58 Rinat Kitai-Sangero & Yuval Merin, "Israel: The Supreme Court's New, Cautious Exclusionary Rule" in Stephen Thaman, ed, *Exclusionary Rules in Comparative Law* (Dordrecht: Springer, 2013) 93.

suspects, serve as professional state agents.[59] Even without their questionable testimony, the suspect may boast to an undercover agent about things he did not do, in order not to appear weak and prone to harassment.[60] In Canadian law, a distinction is made between passive and active state agents, and the use of the latter is prohibited.[61] In Israel, even this minimal distinction has not yet been achieved.

With the *Miranda* rule, the US Supreme Court recognized that interrogation under conditions of detention violates the voluntariness of the confession.[62] In Israel, suspects are routinely detained in deplorable conditions, cut off from family and friends, without free access to a defense attorney.[63] Consequently, a detainee may be forced to spend a long time with investigators, who claim that his condition is hopeless and he should confess, as well as lying to him that there is strong evidence against him. Following this, a state agent who claims to be a friend is placed in his cell to reinforce the investigators' statements. Confessions that emerge from these practices are hardly reliable.

Other interrogation methods are needed to produce more credible evidence. The use of state agents should be reduced to the necessary minimum, and active inducement should be avoided. Using criminals as state agents should be avoided, and only passive police officers should be used for this purpose. Meetings should be documented so that the court can establish the truth.

### 3.8 Police Trickery and Lies Regarding "Incriminating Evidence"

In Israel, it is not uncommon for the police to use trickery and lies to obtain confessions from suspects. In the *Golan* case, investigators forged a transcript of a court hearing and handed it to the state agent so that he could present it to the suspect in the detention cell.[64] In the *Zadorov* case,

59 Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (New York: Doubleday, 2000) 126–157.

60 Lisa Patrice Taylor, "*Illinois v Perkins*: Balancing the Need for Effective Law Enforcement Against a Suspect's Constitutional Rights" (1991) Wis L Rev 989, 1018.

61 *R v Broyles* [1991] 3 SCR 595, at para V2(b); *R v Liew* [1999] 3 SCR 227, 245.

62 *Miranda v Arizona*, 384 U.S. 436 (1966).

63 *Criminal Procedure Law*, 5756–1996, SH No. 1573, (Enforcement Powers – Arrests), s 34(d) allows for the suspension of the detainee's meeting with his defense attorney when the detainee is in the middle of investigation proceedings. According to the findings of the Public Defender's Office, the usual situation is that a detainee does not meet his defense counsel before his first interrogation. See *Issacharov*, *supra* note 57 at 11.

64 Detention Request (Tel Aviv Magistrate's Court) 18855/02 *State of Israel v Golan & Monseniego* (2002). Judge Noytal sharply criticized the forging of the protocol.

the investigators lied to the detainee and said that there was strong evidence against him, including scientific evidence.[65] Zadorov spent 15 years in jail before he was lately exonerated in a retrial. After listening to the recorded conversations between Zadorov and the state agent, the court has found that all the details of his confession were given to him by the state agent, whose payment was conditioned on his "success."[66]

In fact, tactics that might cause an innocent person to confess should never be used. For example, Justice Bach suggested disqualifying a confession obtained by showing the suspect falsified or forged evidence.[67] But in the *Mansour* case, a judge was willing to accept a confession obtained after the suspect was shown a false telegram, according to which his fingerprints were found at the crime scene.[68] In a later ruling, in the *Filtza* case, Justice Naor wrote that following the *Issacharov* rule, a confession obtained based "merely" on a lie that allegedly such fabricated evidence exists may also be rejected.[69]

When a detainee is shown false incriminating "scientific evidence," however, even if he is only told lies that such evidence exists, three dangers arise. First, the detainee may be convinced that he committed the offense, especially if he was not sober and does not remember the details of the incident. Second, the suspect may be convinced that it is useless to argue his innocence because a single piece of scientific evidence is sufficient for conviction. Third, in an attempt to explain the "incriminating evidence," the detainee is likely to get caught in lies, which will persuade the judges that he committed the offense, and it may serve to corroborate the prosecution's evidence.[70]

It has been argued that tricks, lies and forgeries should be allowed because of the noble purpose of convicting criminals and ridding society of crime. It is contradictory, however, if a society is unwilling to justify an offense by a civilian because of its moral purpose (for example – property offenses aimed at supporting the family), while at the same allowing violations of the law by police officers in charge of law enforcement. Moreover, given that when a suspect is questioned his guilt is not (yet) established,

65 *Zadorov v State of Israel* (2015), 7939/10 (Israel CrimA) [*Zadorov*].

66 The District Court of Nazareth, 30 March 2023, *State of Israel v Zadorov*, 502/07 (Israel).

67 *Bitter v State of Israel* (1987), 22/87 41(1) PD 52 at 55 (Israel).

68 *Mansour v State of Israel* (1994), 398/89 (Israel CrimA).

69 Criminal appeal 2939/09, *Filtza v State of Israel*, para 23 of Justice Naor's ruling (15.10.2009). Justice Danziger also doubted the justification for a distinction between a lie presented in writing and one spoken orally: see *Zadorov*, *supra* note 65 at 59.

70 Rinat Kitai-Sangero, "Extending Miranda: Prohibition on Police Lies Regarding the Incriminating Evidence" (2017) 54 San Diego L Rev 611.

hence the lies, forgeries and crimes of the police officers are liable to be aimed at innocent people as well. Finally, there is a danger that investigators' lies will not stop in the interrogation rooms and detention cells but will seep into the court room.

Another argument used to justify such tactics is that given that criminals do not play by the rules, investigators cannot avoid lies and gimmicks because otherwise criminals will not confess. If other evidence exists, however, then a confession is not necessary for a conviction. At the same time, if there is no other real evidence, police do not know if they are interrogating a guilty or innocent person. There is nothing to be gained by a flawed confession obtained in ways that undermine its credibility.

When we understand that the real weight of the confession is low and the use of tricks diminishes that weight, and when this is reflected in law or case law, the police will be forced to abandon the outdated investigative methods focused on the suspect, and adopt sophisticated ones, leading to real evidence, whether against the suspect or in his favor.

## 3.9 Recommended Actions

To reduce the risk of convicting the innocent as a result of investigators' negligence and misconduct, it is important to recognize the dangers of this phenomenon. Risk mitigation mechanisms should be put in place to avoid false confessions, such as educating police investigators about the dangers of convicting innocent people as a result of their actions and omissions; imposing effective sanctions on police investigators who violate the law; for judges to treat investigators' negligence and misconduct exposed during legal proceedings more severely, including more frequent use of the rule of exclusion of evidence; the acquittal of defendants when exculpatory evidence has been destroyed or concealed by the police; raising the level of "redundancy"[71] of the criminal justice system, so that the mistake of a single person does not seal the fate of the accused, with issues thoroughly examined by others, and so that a single piece of evidence does not suffice for conviction, as mistakes are possible in the collection of all types of evidence.

In the criminal justice process, police investigations should be altered so that they are not so singularly focused on obtaining confessions from the suspects. Better efforts would reflect openness to options other than the suspect's guilt, and result in more genuine efforts to get to the truth. Police training could address the "presumption of guilt" that often guides interrogations. Use of the aggressive Reid Technique for interrogation, whose

71 See Sangero, *supra* note 2 at chapter VIII.

stated purpose is to get the suspect to confess, should be phased out and replaced by the advanced interrogation method developed in England, designed to obtain information from the suspect, confront him with police evidence, and hear his response and explanations.

Investigations must be recorded so that the documentation can be used at all stages of the deliberations by the police, the prosecution and the court. The existing policy in Israeli law, which requires that interrogations of only certain offenses necessitate documentation, should be extended so that it applies to all interrogations for their entire duration. Fragmentary documentation of a confession is not enough because it is difficult or impossible to assess its voluntariness and truthfulness in the absence of full documentation. The presence of a defense attorney as an observer should be required during the interrogation phase.

Moreover, a fundamental change in the status of the confession at trial is required. To change the patterns of interrogation to reduce the rate of false convictions based on false confessions, the law must also be changed so that at the very minimum, a conviction based on confession will be the result from the following combination: *Confession + significant knowledge + strong corroboration*. The use of police trickery and state agents should be significantly reduced. Police investigators should not be allowed to lie to suspects, especially about having incriminating evidence against them. As stated, the more energy invested in obtaining the confession, the lower its real weight at trial.

Suggestions for improvement raised in the legal literature should be adopted, such as the close supervision of police investigators by prosecutors;[72] the establishment of an external unit to investigate suspicions of police misconduct; and the creation of a mechanism for reporting cases of police misconduct, such as falsifying evidence, to prosecutors.[73] Judges should carefully examine police reports, as accepting the police officers' versions of the facts of the case and of what happened in the interrogation room without question serves to encourage misconduct and corruption.[74] When police misconduct is exposed at trial, judges must notify the external supervisory unit. At the same time, defense attorneys should be allowed access to databases regarding police misconduct during investigations and trials. Methods for educating police officers should be developed, with emphasis on revealing the truth, not on "solving" or "winning" a case. All these actions can be promoted when a "Safety in the Criminal Justice System Institute" is established.[75]

72 Levenson, *supra* note 24 at 33–37.
73 *Ibid* at 37–39.
74 *Ibid* at 39–42
75 See Sangero, *supra* note 2 at chapter II.

It could be argued that these recommendations undermine the work of law enforcement, so that by attempting to prevent false convictions, guilty suspects will also be released. If confessions were strong evidence, like a laboratory test whose false positive rate is negligible, and I suggested disqualifying credible confessions only because they were obtained by infringing the rights of the suspects, this would be a strong argument; and still there would be strong answers to it. But because the studies I reviewed show that a confession is not strong evidence, accepting the recommendations and improving police investigation to reduce false confessions obtained under pressure is a win-win proposition: it can prevent the awful injustice of the conviction of the innocent and help capture the "real" culprits, instead of singularly focusing on the interrogation of the suspect.

## Epilogue

An approach that trivializes the crimes of the police and sees them as "a small number of rotten fruits in a basket full of healthy fruit"[76] should be avoided. Rotten fruit that is not removed also infects healthy fruit. Emphasizing the simple presence of healthy fruit as guarding against misconduct does not go far enough, it does not force the system to learn lessons aimed at reducing risk. At the same time, a conviction of an innocent person stems not only from the actions of one failed official, but also from a series of systemic failures, including mistakes made by those who were supposed to carefully examine and supervise the functioning of that official. Without acknowledging the scope of the problem, the conviction of innocent people cannot be prevented.

76 Justice Aharon Barak, in further hearing *Tubool v State of Israel* (1988), 23/85 42(4) PD 309 (Israel FH).