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MISCARRIAGES OF JUSTICE IN INQUISITORIAL AND ACCUSATORIAL LEGAL SYSTEMS

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Address to the Miscarriages of Justice Conference: Current Perspectives
University of Central Missouri, February 21, 2007

Before I begin, I would like to make two points. We should realize that in an overwhelming majority of cases, technical evidence is absent. In only somewhere between 2 and 3 percent of the cases, technical evidence like DNA traces or fingerprints or bullet comparisons, is present for the convictions. In an overwhelming majority of the cases, the conviction is based solely on witness evidence. If one examines the sub-sample of miscarriages of justice, of course in a majority there are errors by witnesses. Generally for humans our perception and our memory of events are very good. They need to be because they are essential for our survival. If we did not have such good perception and memory, we would not be here today; there would not be a human race. Despite having wonderful powers of perception and memory, often they fill with special circumstances of criminal cases because, for example an investigator comes up and starts asking questions about things witnesses never really think about like number plates of cars, or the color of the eyes of the robber. So to observe a miscarriage of justice in a high percentage of cases because of witness statements is not a surprise because they are so important.

Additionally it should be recognized that all evidence has a margin of error. A witness has such, but so do fingerprints and DNA evidence also have, a margin of error. If all the evidence in a criminal case is added together, there always remains some margin of error. A fact-finder, a jury or a judge, wants to be certain before a person is convicted. So with every decision in a criminal court, there is a risk of convicting the innocent. The risk may be small, the risk may be large, but there is always a risk. And the difference between a good criminal justice system and a bad criminal justice system is not that in a good criminal justice system there are no miscarriages of justice. A good criminal justice system can only take care of the risk, minimizing it as much as possible. But the risk can never be completely avoided.

In this introduction about Dutch law, there are two things essential to observe. Most of the Netherlands, two-thirds of the country, is below sea level. For instance the Amsterdam airport is some 20 feet below sea level. Dikes are essential for survival of the country, but dikes need maintenance. Dikes sometimes break, and if that happens, a collective effort of the whole community is required to repair the breach in the dike. So we have a long tradition of getting together and joining forces. That represents one basis of Dutch law. The other basis is that we are a trading

nation from very long ago. For success in this business it is not very sensible to quarrel with everybody. What trading people prefer to do is settle, find compromises. So what we have in Dutch society is a collective effort to find compromises, that is basically what happens in law because Dutch society is made up of groups of people who could be very much incompatible—Socialists, Liberals, Communists, Catholics, Protestants. Still the country must be run and the dikes have to be kept intact and we have to trade. So there is a long tradition of finding compromise, compromise in government, compromise in how we do things, but also compromise in law. For instance, if you look at American contracts, it is usually very thick, very detailed with a lot of articles, specifying what parties cannot do and should do. In Dutch law, there is usually one page for a contract, even if it involves millions of Euros, or there could be just a shake of hands. Because if the matter goes to court, the judge will ask, “What did you mean when you made a contract? What do you want to achieve? And what is reasonable in the present state of your contract?” Judges hardly look at details in written contracts. The same compromising nature occurs in Dutch criminal law.

One can distinguish criminal law systems in the world roughly in two kinds of systems: inquisitorial systems and the adversarial systems. Basically, England and its former colonies use the adversarial system and the rest of the world is inquisitorial. The basis of the adversarial system is to have two parties who have to be somewhat equal, the prosecution and defense, and have a battle in front of a judge. The judge has a more or less neutral role, being a referee if there is a conflict, while these parties are discussing their case. In inquisitorial systems, it is completely different. The judge is running the show; the judge is doing the investigation. There of course is a prosecutor, but with a completely different role than the prosecutor in the United States. Further, the defense also has a different role. For instance, if witnesses are questioned in court, it is done by the judge primarily, not by the parties. Where does this system come from? It is simple, it comes from Roman law and all European countries have adopted some kind of version of Roman law. The Dutch version comes from the French occupation in the end of the 18th and the beginning of the 19th century. So we have a different version, for instance, than what the Germans have. We even have a somewhat different system from what is seen in Belgium or Denmark.

The Dutch system is the most inquisitorial among inquisitorial systems and provides a good baseline to understand how such a system works. It is expected of course with both systems that the end is to serve justice for the individual who is prosecuted for a crime. Under the American legal system, the goal is a fair trial. In the Netherlands, we do not so much bother about fair trial, as opposed to seeking the truth. An American lawyer would say in the efforts to attain a fair trial the truth is sought, but indirectly through the goal of a fair trial. In the Netherlands we are mainly seeking the truth to the extent that all kinds of rules that govern procedures for a fair trial are much less important.

Because we have this Dutch compromising nature, the trial is much more aimed at implementing policy. I will give you some examples. While in an American trial, it is much more aimed at individual conflicts and the best example is what Bryce called the “American creed” saying the individual has sacred rights, the source of political power is the people, all governments are limited by law and the people, local governments are preferred to national governments, the majority is wiser than the minority, and the less government the better. So in the end, it boils down that there is an emphasis on individual rights and duties. I call this the John Wayne version of justice. In the movie, “Alamo,” John Wayne’s character observes, “There is right and

there is wrong, you gotta do one or the other, you do one and you're living, you do the other and you'll be walking around, but you're dead as a beaver hat." Or shortly said, "First shoot then think about justice."

In the Dutch version, it is completely different (see Figure 1). We do not have any lay-participation in the system, there is no jury. Of course in other civil legal systems there is lay-participation. In Germany, with major criminal cases, there are courts of three people, the chair being a lawyer, and the two assessors are laypersons. In the Belgium version of the jury trial, there are 12 laypersons deciding on the guilt of the suspect and in the second phase, the 12 lay jurors and the three justices of the court together decide the punishment. These jury trials in Belgium only happen when the prosecution goes for a life sentence. Nowhere in Europe is there a death penalty.

Figure 1.

Dutch Criminal Legal System

- Professional judges. no lay participation
- Sitting in 3-persons courts
- Prosecutor is a magistrate
- No plea-bargaining
- Basically trial on written documents: *Dossier*
- Prosecutor is guardian of dossier
- Dossier contains 'relevant' documents
- Always full appeal possible to Appellate Court
- No leave to appeal
- Always appeal to Dutch Supreme Court possible on issues of law
- Always possible to request review at Dutch Supreme Court
- Efficient

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Professional judges undergo special training. One can become a professional judge in the Netherlands with five years of law school and after that, six years of special judicial training. Part of the training consists of various courses. My colleagues and I conduct many of the courses about the psychology of law and witnesses. With this specialized training, the judges do not need to relearn at a trial the scientific knowledge regarding witnesses. This underscores a big disadvantage with jurors since they do not have this information. We place much trust in our professional judges. Of course the essence of a jury system is distrust, distrust in government. The main function of the jury is to protect this defendant against the unlimited power of the government. But we do not think we need a jury, we prefer professional judges.

In major crime cases judges always sit in a panel of three and their discussions in chambers are in secret. Secret by law so we never have anything like dissenting opinions. The prosecutor is completely different from the American prosecuting attorney. A prosecutor must come to an independent judgment before he is allowed to prosecute a case. Under this practice it sometimes happens that the prosecutor asks for an acquittal. This may seem bizarre for an American audience. A simple case is prepared by a junior prosecutor, and the prosecutor who oversees the evidence might disagree with the police and the junior prosecutor. But because the

summons to trial has been served; and the trial is scheduled, the prosecutor asks for an acquittal. This is a consequence of the basic form of Dutch trial.

The Dutch trial is not a discussion between the prosecution and the defense. It is a discussion between gentlemen in black robes who are judges and prosecutors and defense attorneys. There is a gentleman-like discussion among people in black robes over the head of the suspect—"What are we going to do with this poor guy who committed these two robberies?"—The suspect has a very, very minor role in the whole proceedings. In fact, now days it is not gentleman-like because most of the participants are women—the majority of prosecutors, of attorneys, and of trial judges are women. Since the prosecutor is a magistrate, he cannot as an equal party negotiate with the defense, we do not have any plea-bargaining. The prosecutor decides whether to prosecute or not, independent of what the defense might think. The consequence is that every case goes to trial, and more important in every case, the evidence is reviewed. Of course it is more thoroughly done if there is discussion about the evidence than in cases where there is no discussion about the evidence and the only question is "Is he going to get two or four years of imprisonment?"

All this is done in writing. The essence of Dutch trial is what we call the dossier in which all documents are entered, documents entered by the police, by the experts, and by the defense. At the start of trial, there is usually a complete dossier and the trial itself is, in most cases, not more than just discussing what is in the dossier. Rarely are there witnesses at a trial. In a sense this is a disadvantage that courts cannot question witnesses themselves.

But it is a big advantage because having witnesses in court is a little frivolous. Suppose I have been a witness to a robbery and two years later, or even a year later the trial is scheduled. The day of the robbery I gave an extensive statement to the police, which was recorded by the police, written down in a document, put into the file. What would be a better statement? My fresh memory the day of the robbery or my degraded memory, influenced by all kinds of stories told by others who are reading in newspapers or discussing with other witnesses a year later at trial? Probably the better answer is the original memory. Further, lawyers are very pompous people generally, in the sense that they think they have powers not possessed by ordinary people. One of these powers is the ability to determine whether somebody is lying or not. Even judges believe they have this ability. But, there is no such special ability. The essence is we cannot see whether somebody's truthful or not. So it is a bit naïve to have somebody at trial. Furthermore, working on the written documents alone is a lot more efficient than having all these witnesses. A robbery trial may last a quarter of an hour and a murder trial half an afternoon in the Netherlands, not always, but in many cases.

But of course there are problems because we know police officers and prosecutors can be biased. The central role of the prosecution in the whole Dutch criminal trial is that he is the guardian of the dossier. The prosecutor must take care that all relevant documents are entered into the dossier. Of course there is discussion of relevancy. For instance, some prosecutors think that only elements in the dossier that are really relevant are the elements that are damaging for the suspect. Exculpatory evidence is sometimes left out of the dossier for that reason. Further, there may be other suspects in the case, but they get released. Although left out of the dossier it can be highly relevant to know whom the police suspected at other stages of the investigation.

So the central figure in a trial is the prosecutor and that only works if you can trust the prosecution. But in a Dutch compromising system, we usually trust our officials. Actually most officials can be trusted but there are some very disagreeable individuals. Further, there is always a full appeal to a court of appeal. A defendant does not need leave to an appeal like in the United Kingdom. Both prosecution and defense can appeal any decision of the trial court and it happens in about 30% of the cases. The appellate court will completely review the case in usually a more relaxed way because they have a lighter caseload than the trial courts. Further, the judges are usually brighter; the discussion is on a little higher level than at the trial. Then there is an appeal available to the Supreme Court, but it only examines issues of law and it happens regularly, though there may be six or seven requests of the Supreme Court to review a case, it may be denied outright. This creates a highly preventive effect from appellate courts against miscarriages of justice. There are many cases in which the trial courts convicted and the appellate courts acquitted with good reason. This two-stage procedure is a measure, which works to prevent miscarriages of justice. The trial court knows that there can always be an appeal. If the appellate court basically reverses what the trial court did, the trial court will be embarrassed. This also has a preventive effect.

Figure 2.

Practice

- Prosecutor is formal leader police investigation
- Prosecutor summons all witnesses for trial
- Few witnesses
 - Children are interviewed in child interrogation studios
 - Experts are usually appointed by judge-commissioner. write report
- Court is both decision maker and guardian of evidence
- No admissibility of evidence, but decision rules
- Court decisions are argued
 - But: little discussion of evidence

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What is now happening in practice? Formally the prosecutor is the head of the police investigation; usually in minor cases is that only formal (see Figure 2). But in major cases, prosecutors in fact are the head of police investigations. Furthermore, a judge commissioner is the one who initiates the investigation. For some things the police want to do, a judge commissioner's approval is necessary. For instance with the tapping of phones, it has to be ordered by a judge commissioner. In the Dutch inquisitorial system the prosecution summons the witnesses to trial. Under this bizarre rule a defense attorney must ask the prosecutor to summon defense witnesses and may have to argue against the prosecution in order to have these witnesses at trial. The prosecution can argue that it is not in the interest of the defense to have a certain witness at trial. An appeal to a denial of a witness can be made to the full court. But what happens in practice is that in most cases the court orders the

witness to be called but then postpones the case for three months because of the caseload. This becomes a gamble for the attorney either to argue that the witness is so important that the delay is worth it or to hope to get an acquittal without this witness. There are some witnesses who never come to trial and these are children. We have a special provision in our country where they are interviewed in what we call children-friendly interviewing studios. With specially trained police officers, these are videotaped and become the child's evidence for the remainder of the trial. In very rare cases, they sometimes are interviewed again. In even rarer cases they are interviewed by a judge-commissioner.

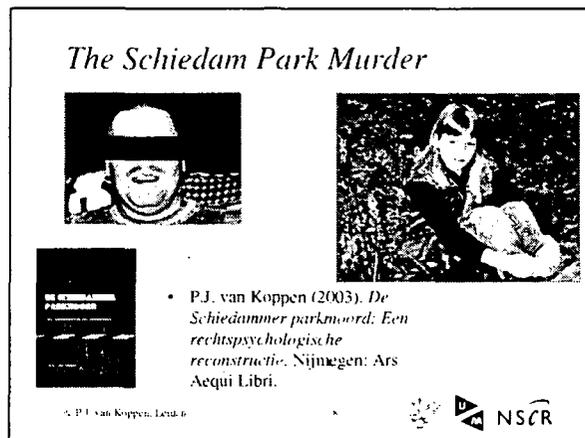
The guardian of the evidence in American courts is the judge. The judge in American court decides whether evidence is admissible or not. If deemed inadmissible, the jury will not see it as evidence. But a judge as a decision maker and a fact-finder, as we have in the Netherlands and other inquisitorial systems, it is inconsistent to ask the judge about admissibility, since the judge has already seen it. But in an inquisitorial system there are decision rules about evidence. With some decision rules the court cannot use certain types of evidence, for instance, evidence based on illegal searches and seizures. Thus, questions about evidence are moved from the beginning of the trial to consider admissibility (as in the U.S.), to the end to consider decision-making. The use of judges can be advantageous since jurors only have to pronounce guilty or not guilty and ordinarily do not have to explain anything. While in a Dutch court, judges have to give a written decision and they have to argue what evidence they used for that decision. The problem is that it is degraded enough through long practice that the judges only mention the evidence that supports the decision of the court and do not discuss the contrary evidence. There can be curious decisions, where there might be six witnesses who say the defendant did not do the crime, but one witness who says otherwise. It can happen that the court will side with the one witness, ignore the other six, and not explain why the court thinks these six witnesses are unreliable.

Allow me to discuss a case about the Schiedan Park murder, because it is a high profile miscarriage of justice in the Netherlands. Kees Borsboom was convicted by the court of appeals to what effectively was a life sentence. Then, one year later, there was a review by the Dutch Supreme Court for one simple reason—the real killer had made a spontaneous confession and demonstrated he had a lot of intimate knowledge about the crime. Further, his DNA matched all kinds of samples found at the scene of the crime.

Why was Borsboom convicted? On a sunny June day, Nienke and her friend, Maikel, a 10-year-old boy, were playing in the park near their home (see Figure 3). Believing it might be time for dinner, they asked about the time of a man at the children's farm in the park, where he replied that it was a quarter past five. They walked here because they left their bicycles a distance away. Then they are called by a man who grabs them by their necks. He takes them over a bridge, through bushes, a distance of some 90 meters. In the bushes he orders them to undress, tries to undress them himself and then strangles both of them with the shoelaces from the army boots worn by Maikel. The shoelaces are 180 centimeters long, very long shoelaces. In the process, he kills Nienke and Maikel pretends he is dead and survives. The killer leaves and then Maikel steps out of the bushes with the shoelace still on his neck and the boot dangling on the shoelace. He walks back over the

bridge and finds a taxi driver standing there. The taxi driver stops a man coming by on a bicycle and asks to use his cell phone to call the police. Borsboom, the bicyclist, is a pedophile. Sometime before the murder, he had met a boy in the very same park and offered to pay for sexual acts. This boy ran home. After the murder of Nienke, this boy saw Borsboom again in the park and again ran home this time to collect his father, who is a police officer. In the confrontation Borsboom apologizes and admits that he is in therapy for his pedophilia. A meeting is arranged at the police station. But, the police officer discovers that Borsboom is one of the witnesses in the Nienke case. From that moment on, Borsboom became the prime and only suspect. Incidentally, the taxi driver who had been standing by the bridge is also a pedophile. In fact, there were some seven more pedophiles in the park at the very moment of the murder. However, one of the basic, underlying arguments against Borsboom was that being a pedophile and in the neighborhood, he must have killed Nienke.

Figure 3.



Maikel was not only strangled, but also stabbed, and he was in the hospital for two days. While in the hospital he made two statements, providing much detail of the events (See Figure 4). One of the things he noted was that this killer, a very white man with a blue cap, had a very peculiar face. He had a very dirty face, with open sores. This description did not fit Borsboom at all. After the attack Maikel had come out of the bushes and saw Borsboom and in this statement he provided a description of Borsboom, where at no point did he ever say this person, who had phoned the police, was the same man who just strangled him. This simple fact is completely overlooked by both the trial and appellate courts.

Further overlooked is the fact that Borsboom did not have the time to commit the crime. He was working at a company a little further away from this park, where at the end of the working day is when the employees put their containers in trucks. There were two trucks that day and they had instruments that record the speeds, times, and other driving information. It can be determined exactly when these two trucks left this company, eighteen minutes after five o'clock. It takes, for a strong bicyclist, 11 minutes to ride through the park. So the earliest Borsboom could have been there is 5:30. But at that point in time, there were two fellows who were standing near bushes, looking at the unguarded bicycles of these two children. They were walking their dogs

and this is known because another witness who had to punch his clock for leaving his work and was heading home on a bicycle had described the two witnesses. Further, one of the witnesses has a black and white dog and Maikel, lying in the bushes, described a black and white dog passing by. So at the time, Borsboom was said to be taking these two children to the bushes, there were two witnesses standing there and they never reported anything about a guy taking two children into the bushes. So we can be quite sure Borsboom was innocent.

Figure 4.

Evidence in Park Murder

<ul style="list-style-type: none"> • Thursday 22nd June 2000. 18h00: Taxi driver stands on bridge • Maikel comes naked out of the bushes • Taxi driver stops Kees Borsboom, who dials 112. • Maikel played with Nienke in Fort Drakesteijn • Walken to bicycles near childrens farm • Man says the time is 17h15 • Are caught by perpetrator 	<p>Evidence</p> <ul style="list-style-type: none"> • Offender description by Maikel (man on PD-C?) • Witnesses saw bike in grass • Witnesses have black and white dog • Traces collected (booth, nails, not Borsboom) • Time line • Confession by Borsboom • Son police officer.
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But after very long interrogation sessions, Borsboom made a confession. He made a very detailed confession and the problem is that this confession was so much different from the detailed description given by Maikel of the whole events and Maikel was the only real eyewitness, that it could not possibly be a true confession.

Now why did this case go wrong? Because there has been an inquiry into the case, we know in great detail what went wrong. For instance, the technical detectives at the scene of the crime made almost every conceivable mistake imaginable. Within an hour they had placed Nienke's body in a body bag. On a warm day putting a warm body in a body bag is the worst mistake an evidence technician can commit. All the traces of evidence will be mingled.

Despite this there was a lot of DNA evidence at the scene of the crime, such as on the shoelaces that were used as a strangulation weapon. There was DNA evidence on the bare shoulder of Nienke, placed there after she had been undressed. The same DNA was on the boot. However, on the direction of the prosecutors, the state laboratory that processed this DNA evidence withheld it. The finding made by the laboratory of no DNA evidence of Borsboom was lied about in court. Of course if prosecutors start lying, the whole system falls down. Not only in the U.S., but especially in the Netherlands, because the prosecutor is the guardian of the dossier. Further, the real perpetrator, Wik Haalmeijer, prior to making his confession to the murder of Nienke committed two very vicious rapes of older women.

Now what kind of effect could produce miscarriages of justice in the Netherlands? Of course there are the same factors as everywhere. These include incompetent

police officers, police officers who fall into confirmation bias, and the low quality of the defense. The defense attorney for Borsboom was very young and this was his first big case. The largest problem is that these cases are very complicated. The dossier or case file contains a mixture of a lot of irrelevant data and some relevant data. It becomes a large cognitive problem to separate the irrelevant from the relevant data.

But these are things that happen everywhere. What might be special about the Dutch case that leads to miscarriages of justice could be the very essence of the Dutch trial. The compromising nature and a huge trust placed in all the officials might cause miscarriages of justice. We do not distrust the police and the prosecution enough. Another causal factor may be that all written documents are derivatives from what is really said by witnesses or suspects and do not really reflect what they did say.

My final conclusion derives from comparison of the number of discovered miscarriages of justice in the United States and in the United Kingdom to the number of miscarriages of justice we have in the Netherlands—in the last 50 years about 20. We have so fewer miscarriages of justice than you have in the United States or in the United Kingdom that there must be factors in our system that protect more against miscarriages of justice. The examination of these factors is one of the areas of my current research. This presentation constitutes a halfway report.