

The Agony of Injustice: The Adversarial Trial, Wrongful Convictions and the Agon of Law

Claudio Colaguori¹

Abstract

This study examines the relationship between the adversarial legal system and wrongful convictions. Understanding the shortcomings of legal procedure as a contest, (especially in cases involving marginalized defendants), can be illuminated through a critical *agonal* analysis that reveals power imbalances and rule breaking. The paper addresses the trial of William Mullins-Johnson, a Canadian aboriginal man who spent 12 years incarcerated for a crime that never took place. The court is examined as an *agonal* space of contestation where victory in the adversarial trial is equated with factual, actionable truth. The analysis invokes the critical theory of agonism prefigured in Foucault's under-explored theory of power as a 'clash between forces.' Although the adversarial system is premised on the value of fair play, the winner-loser structure can invite rule-breaking and violations of due-process to the gross disadvantage of the accused thereby reproducing forms of systemic discrimination and horrific miscarriages of justice. The aim of the study *is not to provide a full synopsis* of the Mullins-Johnson case but to suggest that agonistic theory can make critical contributions to understanding of the relation between adversarial legal contests and wrongful convictions.

Introduction

On 26 June 1993, the night of the death of his four-year-old niece Valin, William (Bill) Mullins-Johnson was babysitting her and his three-year-old nephew in the home where he lived with his niece and nephew's parents, who had left for baseball practice around 7:00 pm. Valin had had a fever since the day before, and she was sleepy so Bill sent her off to bed early and put his nephew to sleep shortly after at 8:00 pm. At that time, he checked in on Valin and noticed she was asleep. When the mother and father returned home at 9:30 pm and 2:00 am respectively, they did not check in on their children. At midnight, Bill left the house to hang out with friends. It wasn't until 7:00 am in the morning that Valin's mother Kim found Valin 'lying face down on her bed with vomit all around her mouth and on the bed and floor... her small body was already purple and rigid with rigor mortis' (Anderson and Anderson, 2009, p. 138). CPR was attempted by Paul, Valin's father, and an ambulance was called. At the hospital an autopsy conducted by Dr. Bhubendra Rasaiah at 12:55 pm 'quickly concluded that Valin had died of asphyxiation, likely caused by covering of the mouth, strangulation, or compression on her chest,' and he noted 'what he described as bruising on her face, chest, thighs and vagina, and pointed out the large opening of her rectum' (CBC 2009). Dr. Patricia Zehr, a gynecologist (not a forensic pathologist) at the autopsy stated that 'it was one of the worst cases of child sexual abuse she had ever seen' (Anderson and Anderson, 2009: 138). 'Less than twelve hours after Valin's dead body had been found, Mullins-Johnson was charged with first-degree murder and aggravated sexual assault' (Anderson and Anderson, 2009: 139). Mullins-Johnson was only 24 years old in 1994 when he was convicted of first degree murder in the death of his four-year-old niece Valin.

¹Associate Professor of Criminology and Sociology at York University, Toronto, Canada. claudioc@yorku.ca

He had stridently maintained his innocence from the day he was charged and continued to do so throughout his twelve years of incarceration. It eventually came to be known that his niece died of natural causes and was not the victim of any homicide. Mullins-Johnson's appeals to the Ontario Court of Appeal and subsequently the Supreme Court of Canada were dismissed; then, in February of 2003 the Association in Defence of the Wrongfully Convicted (AIDWYC), recognizing profound errors about the integrity of the evidence in the prosecution, began the painstaking process of correcting the miscarriage of justice inflicted upon Mullins-Johnson (Harland-Logan 2013). AIDWYC was successful in re-opening the case and after numerous stages of appeal on 15 October 2007, the Ontario Court of Appeal acquitted Mullins-Johnson of all charges. In 2010 he received 4.25 million dollars in compensation for his wrongful conviction and 12 years of incarceration.

The problem of wrongful convictions has long been recognized as a significant failing of the Anglo-American and Canadian justice systems. In this paper I argue that such miscarriages of justice is rooted in the justice system's adversarial (*agonistic*) nature. Under an adversarial system 'truth' is associated with victory achieved through competitive legal struggle. As a result, 'truth' becomes the expression of power imbalances and competing interests for the legal practitioners and experts. This is the concept that I call the *agon of power*.

Truth, Power, and Wrongful Conviction: the Case of William Mullins-Johnson

The literature on wrongful convictions has a long history from early in the twentieth century and continues to grow (Leo 2005). While the problem has been approached from various perspectives the social scientific literature identifies some common themes. Roach lists 'mistaken eyewitness identification, lying witnesses, false confessions and false guilty pleas, faulty forensic evidence, tunnel vision or confirmation bias, and inadequate defence representation' (2010: 388). Anderson and Anderson (2009) identify the larger systemic problem of *active* and *deliberate* forms of bureaucratic and professional wrongdoing which include: forced confessions by police; evidence fabrication; poor and/or inadequate legal representation; identification errors made by eyewitnesses; lack of forensic corroboration; and biased direction to the jury by judges.

In American states where the death penalty is meted out, the issue becomes all the more critical, given that justice system 'errors' can result in the killing of innocents, and the state becomes complicit in one of the worst forms of injustice (Scheck, Neufeld, and Dwyer 2000). Outside of such worst-case scenarios, wrongfully convicting and imprisoning those who are factually innocent is a growing concern for legal practitioners and the public at large. The literature on wrongful convictions has a long history from early in the twentieth century and continues to grow (Borchard, 1932; Leo, 2005; Roach 2010; Huff and Killias, 2008). Leo (2005) offers a summative history of the "field of scholarship on wrongful conviction as three distinct genres" as follows:

1. The big - picture studies of wrongful convictions... that are, "for the most part, still written primarily by journalists, lawyers, and activists—not academic criminologists and social scientists" (2005: 206)... This body of literature shares a typical formulaic storyline that Leo calls the *familiar plot*; (2005: 207)
2. the *true crime genre*, or narrative non-fiction studies of wrongful conviction cases that "tell the story of law in action;"(2005: 211-212)²

² While popular representations of criminals, police, and lawyers have been a mainstay of entertainment on the screen and in print form, it is useful to note the growing production and popularity of crime programs based on the theme of wrongful convictions as a subgenre within the hugely successful and very broad crime genre itself. This shift of focus onto the protagonist as unjust convict as opposed to the typical hero or villain dichotomy is evidenced in the popularity of entertainment shows such as *Rectify* and *Making a Murderer* and marks the importance of further scholarship in the field of adversarial law.

3. the third genre is “a more specialized academic and scientific literature on the various causes of wrongful conviction undertaken primarily by cognitive and social psychologists” (2005: 208). Three themes evident in this body of literature include eyewitness misidentification, child suggestibility, and false confession. (2005: 208–210).

Furthermore, Roach offers us a list on the “common causes of wrongful convictions” (2010: 388), which serves as a useful elaboration of Leo’s second point, as follows: “mistaken eyewitness identification, lying witnesses, false confessions and false guilty pleas, faulty forensic evidence, tunnel vision or confirmation bias, and inadequate defense representation” (2010: 388). Although there is a vast body of scholarship on the philosophy of law in general, there is a significant lack in the literature of critical examinations of *the philosophical premises of the adversarial process itself*. Zalman states, ‘wrongful convictions scholars for the most part have avoided serious discussion of the adversary trial, and comparative law scholars and experts on evidence law have, on the whole, not applied their knowledge to considering miscarriages of justice’ (in Huff and Killias, 2008: 86). This gap can be bridged through scholarship from various fields of inquiry. As Leo and Gould (2009) suggest, legal scholarship on wrongful convictions can ‘learn from social science’ and criminology in particular since ‘social scientific methods allow for more precise and accurate depictions of the multifactorial and complex nature of causation in wrongful conviction cases’ (2009: 7). It makes sense to add to Leo and Gould’s suggestions for diversifying legal scholarship through explorations of the complex relation between adversarial law and the philosophy of agonism, and it is to this end that this paper aims to stimulate such contributions.

The case of Mullins-Johnson was not an exception. It was rife with problems from the very start, from an incorrect determination of cause of death at the original autopsy conducted by the presiding coroner in the northern Ontario city of Sault Ste. Marie, to grossly incorrect corroborating expert opinion offered by, among others, the now infamous former head pediatric forensic pathologist at the Toronto Hospital for Sick Children Dr. Charles Randall Smith, who astoundingly had ‘no formal training in forensic pathology’ (Anderson and Anderson 2009: 139). Smith’s ‘expert’ testimony was responsible for numerous other infamous cases of wrongful conviction and subsequently destroyed many lives despite repeated warnings from qualified forensic experts who warned of his professional incompetence and his criminal negligence.³

What is noteworthy in this case is that Dr. Charles Randall Smith from the Toronto Hospital for Sick Children was consulted to render an expert opinion. Now disgraced and barred from practice, at the Mullins-Johnson trial Smith would be the primary expert witness for the prosecution.⁴ Smith’s position of

³Mr. Mullins-Johnson wrote in his victim impact statement: ‘I’m still humiliated by the fact that I will never see justice done,’ and Smith ‘was allowed to continue his reign of terror even after complaints were registered’ (Canadian Press 2011).

⁴As someone with ‘no formal training in forensic pathology,’ Smith was nevertheless responsible for a ‘stunning number of convictions against child killers’ (Anderson and Anderson, 2009: 139). A ‘self-appointed’ savior of children, he would eventually be revealed as the primary legal actor behind numerous cases tainted by his flawed expert testimony, leaving the justice system with a mess of a problem:

An Ontario coroner’s inquiry reviewed 45 child autopsies in which Smith had concluded the cause of death was either homicide or criminally suspicious. The coroner’s review found that Smith made questionable conclusions of foul play in 20 of the cases – 13 of which had resulted in criminal convictions. (CBC News 2010)

Smith ‘told media lampooning him he had “a thing against people who hurt children”’ (CBC News 2010). Smith’s exuberance in cases of child death was motivated by a twisted sense of justice based on his own personal psychological motivations rather than a professional duty and a scientific desire to seek the truth in the cases he was involved in.

authority, and a lack of oversight on the part of his superiors (on which, see Boyle 2015), made him a dangerous protagonist within the justice system hierarchy.

Furthermore, Mullins-Johnson's status as an Aboriginal man with a previous criminal record, a man described by his mother as 'gentle, soft-spoken and different,' already put him at a disadvantage when pitted against the power of the criminal justice system and its prosecutorial team of self-righteous experts (Anderson & Anderson 2009: 137). As a socially and culturally marginalized defendant, the accused was an easy target for law enforcement. The imbalance of power was evident from the very start. An Aboriginal man with a criminal record, Bill was seen as 'different.' A brain injury as a child made him partially deaf and blind, and he had a quiet soft-spoken demeanor. As a disempowered suspect with virtually no authority except his persistent claim of innocence – 'I didn't do it. It wasn't me' (CBC Fifth Estate 2009) – did not hold up against the weight of the authoritative pronouncements of the medical experts upon whom the police trusted as a basis for their arrest.

Systemic problems in the bureaucracy of the Ontario criminal justice system and its over-dependence on flawed expertise, its lack of oversight and discriminatory bias, resulted in numerous flawed trials, wrongful convictions, and many lives destroyed. An inquiry into pediatric forensic pathology in Ontario was held and presided over by appeal judge Stephen Goudge (see Goudge 2008). Among the 169 recommendations made to improve the approach of the justice system in cases of child death, there are specific recommendations for First Nations and Remote Communities. Many of the recommendations address matters of oversight and power imbalances and in particular that autopsies should be conducted through an objective scientific lens of inquiry where 'think dirty' should be replaced with 'think truth' (Makin 2008).

No wonder to Mullins-Johnson the very term 'justice system' is a misnomer. He cringes when he hears the term 'justice system;' he said that it should properly be called a 'conviction system' because in a case such as his the Crown holds substantially more power and has the primary aim to win a conviction. He believes that the role of the Crown is not to inquire into the factual truth of what may have actually transpired in a cooperative manner with the defence counsel (personal conversation, Toronto, July 2010). In his words: 'They invented a crime here. They just basically took it out of the air and said, "Let's get him"' (Boyle and Tyler 2008).

The Agonistic Model of Human Interaction and Institutional Power

How could anything originate out of its opposite? For example, truth out of error? or the will to truth out of the will to deception?

F. Nietzsche

The philosophy of *agonism* furnishes us with a model for examination the winner-loser structure of the adversarial legal contest. The concept of the *agon* allows for the exploration of adversarial law as a *field of battle* between *protagonist* and *antagonist*. The term 'agon' literally refers to the space of adversarial conflict, the arena of battle – the boxing ring, for example, is an agon for pugilists just as the courtroom is the agon for litigants engaged in a 'contest of words' (Barker 2009). The *ideal* goal of agonism in its proper classical Greek meaning is the development of a type of *productive* relation between opponents whereby honorable struggle between adversaries who recognize the other as a legitimate opponent compete with each other towards the resolution of a conflict. This interpretation of the term is carried over in Foucault where he writes: "'agonism'" is 'a relationship which is at the same time reciprocal incitation and struggle, less of a face-to-face confrontation which paralyzes both sides than a permanent provocation' (1982: 790).

Current usages of the concept of agonism in political theory have been predominantly been applied to discussions of the role of contestation and debate as the motor force of progressive democratic politics (Mouffe 2013; Villa 2000; Honig 1993). A more critical conception of the classical concept of agon is found in the work of Adorno who employs the concept of agonism in a sense that conveys a relation of domination, victory and defeat between adversaries. For Adorno, agonistic opponents 'want to

annihilate each other... to enter the agon, each the mortal enemy of each' (1978: 75). Adhering to Adorno's critical usage, I propose that one can apply a critical agonistic analysis to the adversarial contest in law by examining:

- the philosophical foundations of the adversarial mode of engagement as the basis for the production of actionable truth and how this problematic epistemological edifice underpins the mythology of law; and thus,
- how *agonistic* legal contests may aim to uphold the ideal of healthy competition within dispute resolution, but because of the primacy of the goal of victory, these contests often descend into a combative rivalry wherein legal victory is the ideal endgame of the trial process.

The critique of adversarial and competitive power was already evident in Foucault's theory of power as a 'clash between forces' (2003: 18). He asks:

What tools are currently available for a non-economic analysis of power?...We also have the other assertion, that power is not primarily the perpetuation and renewal of economic relations, but that it is primarily, in itself, a relationship of force (2003: 14–15).

And further:

If power is indeed the implementation and deployment of a relationship of force, rather than analyzing it in terms of surrender, contract, and alienation, or rather than analyzing it in functional terms as the reproduction of the relations of production, shouldn't we be analyzing it first and foremost in terms of conflict, confrontation and war? [2003: 15]... I would like to try to see the extent to which the binary schema of war and struggle, of the clash between forces, can really be identified as the basis of civil society, as both the principle and motor of the exercise of political power (2003: 18).

In Foucault's model of power, in which institutional and social relations of 'civil society' are based on a 'warlike clash between forces,' we are presented with a critical philosophical line of analysis that can be applied to the role and function of adversarial law and its preponderance for injustice in cases where both sides are unevenly matched.

The belief that progress can emerge through the adversarial contest finds its origins in the classical dialectical theory of Greek philosophy through to the philosophy of Hegel (1977), philosophies in which transcendence is understood to emerge from the outcome of the clash between opposing forces (see O'Neill 1996). This same principle can be seen in the operation of an adversarial justice system that aims at conflict resolution by producing a victor, a champion, and who is seen as embodying truth. With victory comes vindication and power, which is conferred on the champion whose pronouncements hold final authority. This series of successive elevations of the victor to the status of truth holder is fundamental in understanding the agonistic power dynamics that produce miscarriages of justice in legal contests, since such a contest has no interest in the collaborative, cooperative, and inquisitorial pursuit of truth as a primary goal – but instead associates truth with victory, a victory that rests upon the defeat of the adversary. The adversarial means takes precedence over the justice affirming ends.

Of course the checks and balances of agonistic contestation have often proved valuable in court cases where the accused has a right to a fair defence. The question of fairness and in particular the value of 'fair play' is paramount in all contests where the outcome has real consequences.⁵ Human competitions from sports to politics are all based on the premise that rules must be followed and adherence to those rules establishes the higher ethics of things like sportsmanship and rule of law. However, as is often the

⁵ The principle of 'justice as fairness' is elaborated at length in Rawls (1971) *Theory of Justice* where he emphasizes the need for justice to attend especially to disadvantaged members of a society.

case, the ideal does not tally with the actuality, and the principle of fair play is often corrupted to facilitate rule breaking by those who possess the power to do so, producing unfair victories, but victories with consequences nonetheless. Adversarial legal processes can co-opt the ideal of fair play as symbolized through the checked and balanced playing field of the court room to conceal the forms of power that actually come 'into play' in a trial where the balance of power is stacked against marginalized defendants like William Mullins-Johnson.

Adherence to fair play was certainly not upheld in the Mullins-Johnson trial, in which deliberate acts of rule breaking and gross imbalances of power between adversaries were evident. Adhering to the rules of the contest is an imperative that is in direct conflict with defeating your adversary. This contradiction furnishes the tendency towards rule breaking. The more one is convinced that their adversary is guilty the less likely they will be to abide by a code which exonerates that adversary. That sentiment is contained in the dictum of *win at any cost and by any means necessary*.

The ideal of agonism, in its currently celebrated liberal meaning, honors the values of mutual respect among opponents, and most importantly the cardinal value of fair play. Deranty and Renault remind us of 'Arendt's insistence on the equality of those who take part' in the agonistic contest (Deranty and Renault, in Schaap, 2009: 43). Equality among combatants has to do with balance, as symbolized in the scales of justice, whereas fair play has to do with obeying and abiding by rules as in the rule of law. In the Mullins-Johnson case, as in many other cases of wrongful conviction, both of these ideals were severely compromised as discussed below.

The structure of the competition in an adversarial trial is not sufficient at warding off rule breaking. In fact, even when rules are broken – either overtly or through deceptive cunning – this does not always result in the denigration of the champion, but rather is often seen as an act of cleverness that serves as further evidence that the victory was justified, since the weaker party didn't think of it. Familiar sayings such as 'It's only cheating if you get caught' and 'All is fair in love and war' exemplify the ways in which rule breaking is valorized in an agon culture (Colaguori 2012). The violation of the ideals of competition is a normal practice in the micro-interactions of everyday life as much as it occurs in official forums of competition. In Olympic and other sports organized sports there is the ongoing problem of doping, which gives one side an unfair advantage through the illegal use of performance-enhancing drugs. Despite numerous efforts to curb and police this practice, it has not stopped. In democratic politics which are presumably about free and fair elections (but which are clearly not informed by many virtues of the agonistic ideal of honorable struggle), we see numerous types of rule breaking and rule bending taking place. From blatant voter manipulation through to threats and violence to underhanded promotional advertisements and the influence of money in the selection of candidates for office, politics is an arena of competition that is rife with treachery and abuses of power. These are allowed to continue in part because of the ruse of free competition.

An adversarial trial may be a mere microcosm of the agon of democratic politics, but such a forum has numerous elements that allow for the ideals of free and fair play to be violated as a matter of course. As such, agonistic contests serve as a mechanism for assigning power to those who hold greater authority within a social hierarchy. The positive ideal inherent in competitive rituals is based on a belief that competition operates like a filtering system that efficiently separates winners from losers – this can be termed *the competitive mechanism of selection*,⁶ and it forms part of the mythology of adversarial competition that helps to maintain law's status and authority as the final arbiter of justice.

From a legal justice point of view what is important is the aspect of agonistic outcomes that associates victory with legal truth. The adversary who emerges victorious is deemed champion, and the loser shall suffer the *agony* of defeat. Adversarial legal contests operate on the basis of this agonistic philosophy in both the spatial structure that determines the way courtroom actors are allowed to interact with each other in a manner that is delimited by contained competition *and* in their ethic that rests on the

⁶ This idea is based on Adorno and Horkheimer's notion of the 'economic mechanism of selection' (1969: 122). For them, economic divisions within capitalism operate as pseudo-natural laws that separate people into classes in a manner that mimics actual natural laws of selection.

belief that adversarial competition is an accurate and valid mechanism of selecting the winner and loser. All of these features came into play in the Mullins-Johnson case.

The Adversarial Justice System: ‘Truth’, Justice and the *Agon of Power*

Keeping in mind that “agonism” is a contested concept with a number of meanings, (an issue to be discussed further below), one ideology of agonism is that truth is equated with the power held by the strongest of the adversaries in a competitive struggle, and furthermore that agonistic victory forms the basis of how an adversarial justice system arrives at juridical conceptions of truth. In a winner-loser system of justice the adversarial legal system becomes an area of competing and often conflicting interests for those before the court as well as for legal practitioners. As the Andersons write:

The Canadian system of justice is based on an adversarial process that pits the formidable forces of the state against a lone individual. In theory, the power of the state should be nullified by the skill of the defence lawyer as he or she does courtroom battle with the prosecutor. This adversarial system demands a winner and a loser but, the reasons for winning go beyond simply seeing justice done... the desire to win causes many lawyers to engage in questionable and unscrupulous tactics, which are frequently condoned by the legal profession as a whole. Lawyers learn quickly what works well in the courtroom and what does not. What works are techniques that may distort the truth, confuse the jury and make apparent liars out of honest witnesses. Members of the highly structured legal system share a culture that emphasizes winning cases rather than doing justice. For too many lawyers the courtroom has become a place for winning cases and building reputations rather than a forum for discovering truth and serving justice. (2009:13)

Citing critical flaws in adversarial systems of justice, Haack (2004) points to two radical epistemological criticisms of our legal system:

i) an adversarial system is an epistemologically poor way of determining the truth; and ii)... exclusionary rules of evidence are epistemologically undesirable... both throw harsh light on disturbing aspects of the way our adversarial system functions in practice (2004: 44).

Haack’s analysis of how truth gets determined through evidence weighed in an adversarial contest is essential to the formation of a just outcome. Objective truth as a precondition for legal justice is a less likely outcome when advocacy is conflated with inquiry. In such contexts the falsehoods, lies and ‘nasty tricks’ common in legal trials swerve legal actors away from establishing objective, factual truth and thus tamper with outcomes that produce injustice. Haack states how the importance of objective, factual truth and the procedural problem of exclusionary rules of evidence were aspects of legal justice prefigured in the thought of Jeremy Bentham, whose *Rationale of Juridical Evidence* (1827) established the principles of legal inquiry. If truth is the objective of both sides in an adversarial contest, then truth is the more likely outcome. Legal actors in an adversarial contest work towards achieving legal victory, which then becomes the basis of actionable truth. While victory and the factual truth do often coalesce in a just verdict from an adversarial trial, such an outcome is far from guaranteed because the mechanism of the adversarial trial lends itself to competition not cooperation, and to rule breaking rather than fair play. These elements are exacerbated by power imbalances such as the quality of legal representation, the inclusion and exclusion of evidence and the social status of the accused, as in the case of Mullins-Johnson. Another point by Judge Marvin Frankel elucidates the problem of the adversarial mechanism itself:

We proclaim to each other and to the world that the clash of adversaries is a powerful means for hammering out the truth... [But] despite our untested statements of self-congratulation, we know that others searching after facts – in history, geography, medicine, whatever – do not emulate our adversarial system (as cited in Haack, 2004: 49).

Extending this point, Haack again cites Frankel as follows: “A hoary old joke defines a jury as twelve people whose job it is to decide which side has the better lawyer” (2004: 53). On the matter of evidence that the trial judge rules cannot be heard by the jury Haack cites Bentham, “exclusionary rules are inherently at odds with the epistemological desideratum of completeness” (2004: 56); and he comments that “exclusionary rules are to be avoided; the right way to deal with misleading evidence is to put it in the context of further evidence” (2004: 56). In any case, many of these technical rules pertaining to evidence and other matters of order throughout the trial process and which are invoked at the subjective authority of the presiding judge tamper with the ideal of adversarial competition insofar as they can violate the spirit of free and open competition and fair play. In such cases where a judge’s ruling is questionable a post verdict appeal is the remedy for action. This is of little consolation to unjustly tried persons. The reader is reminded that legal trials are fraught with numerous details of judicial process designed to guard against wrong outcomes but the ideal of adversarial justice does not always tally with the actuality. Nevertheless, Haack’s thoughtful analysis of *epistemology legalized* does not discount the possibility that adversarial modes of legal process can produce justice. It depends on the nature of the case at hand and, as she states, ‘the larger social context in which it operates’ (2004: 61). In the case of Mullins-Johnson the larger social context involves systemic bias and discrimination against Aborigines.

Elizabeth G. Thornburg in her ‘Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System’ invites us to consider the negative implications that military and sport metaphors have when they come to dominate the language of legal professionals; such metaphors come to have a ‘powerful hold on legal culture’ and ‘transform the trial lawyer from a mere person who presents information favorable to his client to a triumphant hero and change the other party to the dispute into the enemy’ (1995: 1). Thornburg states that, ‘litigation is commonly referred to as war or battle’ – with the attendant litany of military metaphors forming part of the legal vernacular. A small sample from her study of courtroom transcripts and other documents includes terms like ‘hired guns, champions, generals, seasoned or battle-tested, plan pre-emptive strikes, win by attrition, seek total annihilation of their enemies, fire opening salvos’ (1995: 232–36). Pre-conceived notions on the part of litigants about the characterization of their opponents as enemy combatants cannot possibly serve to preserve the presumption of innocence before proven guilty. The militarization of legal discourse among legal practitioners does not constitute any substantial proportion of the literature on wrongful convictions. A combative mentality is accepted as the norm within the adversarial context. C.W. Mills’ noted that administrative relations become power relations because they are subsumed under a ‘military definition of reality’ (1956: 185). This observation highlights the primary concern about the objective of law to achieve justice, one that it would seem has not escaped the influence of dominant militaristic ideologies that influence legal-administrative processes.

Conclusion: Considerations for an Agonistic Critique of Adversarial Law

The logic of law as blind and balanced relegates it to among the highest forms of reason in modern society. Law is perceived as the voice of civil society and the final arbiter in matters of dispute. This perception forms part of the mythology of modern law (Fitzpatrick 1992) that conceals its operation as a system of power in a manner that causes the system of law to reproduce social inequalities, corruption and forms of discrimination that continue to plague modern societies. The contradictions of law – its dual nature as both source of justice and often of injustice, remain one of the primary aporias inherent in the ideal of the rule of law. This double-articulation of law as a potential instrument of oppression and a potential oracle of justice is perhaps no where more evident than in cases of the wrongful conviction of innocent citizens.

This paper has identified various elements within adversarial law that contribute to wrongful convictions. As evidenced by the continuing occurrence of wrongful convictions and the

overrepresentation within American and Canadian prisons of people from cultural and racial minorities, the adversarial legal process does not necessarily furnish adequate protection from abuses of power and miscarriages of justice against those who face the full force of the law and are often powerless against it. The matter of power imbalances is further intensified when a universalistic principle, in this case the truth-proclamation power of adversarial legal processes, is imposed on accused persons who would perhaps be better served by justice traditions that form part of their own culture and history. Although this paper did not contrast the self evident benefits of inquisitorial systems of justice and the value of a hybrid approach that uses principles of Aboriginal justice, such recommendations have been made repeatedly by others. For example The Aboriginal Justice Implementation Commission (2016) states “*the methods used by the Canadian legal system to resolve conflicts—particularly the adversarial system—are incompatible with traditional Aboriginal culture and methods of conflict resolution*” (www.ajic.mb.ca/volume1/chapter7.html) [emphasis added]. Ongoing critique and structural change of existing systems of law and justice will be required before the monolith of law can be transformed into something more reflexive, more inclusive, less agonistic and less likely to produce “miscarriages of justice.”

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