ANOTHER LOOK AT THE CENTRAL PARK FIVE: WHAT CIVILIAN COURTS CAN LEARN FROM THE MILITARY

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I. INTRODUCTION

Thanks in part to the publication of Sarah Burns's book *The Central Park Five*[1] and to the documentary movie of the same name,[2] it is now clear that the five defendants who were convicted in 1990 of the brutal assault on, and rape of, the Central Park jogger on April 19, 1989—Antron McCray, Kevin Richardson, Korey Wise, Yusef Salaam, and Raymond Santana—were innocent.[3] Instead, a lone serial rapist, Matias Reyes, committed the crime.[4] Most of the commentary on the trials of the five[5] and on the subsequent granting of a motion to vacate judgment as to all defendants in 2002 (based in large part on the rapist's confession and on a DNA match) has focused on the trials, and in particular on the defendants' pretrial statements, and not on the appeals.[6] Given that the defendants spent from seven to thirteen years in prison for a crime they did not commit, one may ask whether there was any possibility that the defendants could have been spared their imprisonment by successful appellate review of their convictions. Several questions arise. First, could a different result have been obtained in civilian jurisdictions other than

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1. SARAH BURNS, THE CENTRAL PARK FIVE: THE UNTOLD STORY BEHIND ONE OF NEW YORK CITY'S MOST INFAMOUS CRIMES (First Vintage Books ed., 2011).

2. THE CENTRAL PARK FIVE (PBS documentary Nov. 23, 2012).

3. BURNS, *supra* note 1, at 193-95. Not everyone is prepared to accept what now seems obvious. *See, e.g., id.* at 202-03.

4. *Id.* at 194.

5. Antron McCray, Yusef Salaam, and Raymond Santana were tried first; Kevin Richardson and Korey Wise were tried later. BURNS, *supra* note 1, at 131, 161.

6. *See* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-first Century*, 2006 WIS. L. REV. 479 (2006).

New York? Second, could the result in New York have been different under current law? Third, would it have made a difference if the appellate courts in New York had the considerable power to weigh the evidence and judge the credibility of witnesses in the manner prescribed in Article 66(c) of the Uniform Code of Military Justice?[7] Fourth, are there other features of military law and procedure that might have freed these wrongfully convicted defendants?

II. OTHER CIVILIAN JURISDICTIONS

To see how appellate courts in other states might have dealt with Central Park Five appeals, we must first note the facts that the New York Supreme Court (trial court) relied on in granting a motion to vacate the convictions in 2002. That court noted that "the People's case at both trials rested almost entirely on the statements made by the defendants."[8] Further, the court said that, "the accounts given by the defendants differ on significant details, such as who initiated the attack, who knocked the victim down, who held her down, who raped her, what weapons were used during the attack, and when, in the sequence of the events, the attack took place."[9] Moreover, "[n]one of the defendants accurately described where the attack on the jogger took place."[10] Also, DNA from semen found on the victim's sock and semen from the cervical swab from the victim "did not match the defendants or any other known sample."[11]

States can be roughly divided into three categories in regard to criminal appeals: (1) those in which the trial and appellate courts deal only with the constitutional issue – namely, whether there was sufficient evidence at trial to permit a rational judge or jury to find the defendant guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the prosecution;[12] (2) those in which the trial court can weigh the evidence and judge the credibility of witnesses, at least in a limited way, but with the appellate courts only able to review the trial

7. 10 U.S.C. §866 (West 2015).

8. People v. Wise, 752 N.Y.S.2d 837, 845 (Sup. Ct. 2002).

9. *Id.* at 846.

10. *Id.*

11. *Id.* at 845.

12. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In Tibbs v. Florida, 457 U.S. 31 (1982), the Court distinguished between a claim of legal insufficiency, to which the *Jackson v. Virginia* standard applies (and which, if successful, precludes retrial because a retrial would violate the Double Jeopardy Clause), and a claim that the verdict is against the weight of the evidence (which, if successful, may result in a retrial, with the appellate court acting as a "thirteenth juror"). *Tibbs*, 457 U.S. at 45, 42.

court's decision under an abuse of discretion standard (or a functional equivalent); and (3) those in which an appellate court can weigh the evidence, but with that court still deferring substantially to the decision of the trial court.

Had this case been tried in Illinois, for example, the appeal would very likely have failed. Illinois appellate courts are in the first category and will affirm if the minimum constitutional standard for legal sufficiency is met.[13] Although none of the defendants in the jogger cases admitted to personally raping the victim, each one admitted his presence during the rape, which an Illinois appellate court would probably have found sufficient to affirm a finding of guilt on a theory of aiding and abetting.[14] The result of an appeal in the vast majority of the remaining states in categories (2) and (3) would have been the same (given the deference paid to the factfinder's decision at trial), that is, in states that permit a motion for new trial based on a claim that the verdict was against the weight of the evidence (variously described as the weight, great weight, manifest weight, or overwhelming weight of the evidence).[15]

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13. Apparently Illinois courts have not recognized a claim based on weight of the evidence in criminal cases, though it is possible to find a few cases in which defense counsel tried to make such a claim. *See* People v. Washington, 537 N.E.2d 1354, 1359 (1989)) (manifest weight of the-evidence claim fails). In several years of appellate work at the Cook County (Chicago) Public Defender's Office and at the Office of the Illinois State Appellate Defender, I never encountered any cases in which this latter claim was made. A phone call with one of my former colleagues at the Office of the State Appellate Defender on January 8, 2015, confirmed that my understanding of Illinois law on this subject is correct.

14. *See generally* People v. Batchelor, 202 Ill. App. 3d 316 (App. Ct. 1st Dist. 1990), *appeal denied*, 135 Ill.2d 559 (1990).

15. The situation may very well be the same in England today. While for a time applying a "lurking doubt" standard in the evaluation of evidentiary sufficiency, the Court of Appeals Criminal Division "seems to have, in essence, put an end to lurking doubt." Email from Stephen Heaton, Ph.D., University of East Anglia, United Kingdom, to author, (Feb, 10, 2015) (on file with author). In any event, decisions relying on "lurking doubt" are "rare, running counter to the CAAD's adherence to the primacy of the jury." Stephen Heaton, *A critical evaluation of the utility of using innocence as a criterion in the post-conviction process*, 133 (2013), https://ueaeprints.uea.ac.uk/48765 (unpublished Ph.D dissertation, University of East Anglia). In Canada, "the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence." Criminal Code, R.S.C., 1985, c. C-46, s. 686(1)(a)(i) (Can.). The leading case interpreting this section, according to Professor David M. Tanovich, of the University of Windsor is R. v. Biniaris, [2000] S.C.R 381 (Can.). E-Mail from David M. Tanovich, Professor, Faculty of Law, University of Windsor, to author (Mar. 3, 2015) (on file with author). The appellate court "does not act as a 'thirteenth juror'" and does not "'usurp[e] the function of the jury." "[The statute] requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional

An Illinois drug case that I handled on appeal, *People v. Hill*,[16] illustrates the usual course of review in category (1) states. In this case, a plain-clothes police officer claimed that he observed the defendant from a distance of perhaps twenty yards while the defendant on several occasions exchanged a baggie containing an unknown substance for an undetermined amount of U.S. currency.[17] Following one of these exchanges, the officer moved toward the defendant and, when he was within three feet of the defendant, pulled out his badge, identifying himself as a police officer.[18] At that point, according to the officer, the defendant dropped a baggie to the ground.[19] Since this was an apparent abandonment of the baggie, the defendant no longer had a reasonable expectation of privacy in the baggie (and hence no Fourth Amendment protection),[20] and therefore the officer could pick up the baggie and arrest the defendant after the officer determined that the baggie contained a white powder, probably heroin.[21] This type of testimony is so common that it has a name: dropsy testimony.[22] Even the U.S. Supreme Court has expressed skepticism about this sort of testimony.[23] Despite the unlikelihood that a defendant would drop incriminating evidence within three feet of an officer, the Illinois appellate court not only refrained itself from judging the credibility of the officer, but also rejected a claim of ineffective assistance of counsel based on the trial attorney's failure to

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protection against unwarranted conviction." R. v. Biniaris, [2000] S.C.R 381, para. 40 (Can.). The reference to "judicial experience" might suggest a greater willingness to set aside convictions than is found in most U.S. state appellate courts, but the actual result in *Biniaris* provides little evidence of this. *Id.* (The Supreme Court of Canada set aside a court of appeals decision that had substituted a finding of second degree murder for that of manslaughter.). It is difficult to generalize about criminal appeals in Australia because of differences among the six states, some of which are common law and some of which are code states. Overall, it may be said that the power to reweigh the evidence in Australia is somewhat greater than it is among the fifty U.S. states. E-mail from Peter Rush, Assoc. Professor of Law, Melbourne Law School, to author, (Mar. 1, 2015) (on file with author).

16. People v. Hill, 835 N.E.2d 466 (Ill. App. Ct. 2002) (reported only in a table "Disposition of Cases by Order in the Appellate Court Under Supreme Court Rule 23").

17. *Id.*

18. *Id.*

19. Appellant's Opening Brief at 6, People v. Hill, 835 N.E.2d 466 (Ill. App. Ct. 2002).

20. *Id.*; *see, e.g.*, California v. Greenwood, 486 U.S. 35, 40-41 (1988)

21. *Hill*, 835 N.E.2d at 466.

22. *See* People v. McMurty, 314 N.Y.S.2d 194 (Crim. Ct. 1970) (recounting the history of "dropsy" testimony).

23. Sibron v. New York, 392 U.S. 40, 46 n.3 (1968).

question the officer's credibility in a motion to suppress the seized drugs.[24]

In another Illinois case, *People v. Goff*, [25] the defendant was convicted of murder on the basis of the testimony of two young girls, one eleven years old and the other ten.[26] Both testified at a grand jury proceeding and at two trials.[27] The older girl testified at the grand jury proceeding that the defendant shot the victim in the stomach.[28] At the second trial, after the medical examiner's stipulated testimony indicated that the victim had been shot from the rear, she testified that the defendant fired from the rear.[29] She also testified at trial that, after the victim had been shot and had fallen (against a fence that was almost on its side), she hugged the victim's chest while additional shots were fired at the victim at a distance of three or four feet, even though the medical examiner's testimony indicated that the victim fell forward on his stomach, and even though a police investigator stated that that shell casings were not found in the immediate vicinity of the victim.[30] The younger girl testified that she and the older girl were on bicycles, whereas the older one stated that they were on foot.[31] The younger one testified at one point that she was behind a brick wall for thirty minutes.[32] She also stated that she joined in hugging the victim, but the older girl did not so testify.[33] Despite these inconsistencies in the testimony of these young girls,[34] the Illinois Appellate Court, applying the constitutional sufficiency-of-the-evidence standard, affirmed the conviction.[35]

Michigan is a category (2) state in which a defendant can move for a new trial on the ground that the verdict "was against the great weight of the evidence."[36] In *People v. Walrath*,[37] for example, the defendant was

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24. *Hill*, 835 N.E.2d at 466.

25. People v. Goff, 798 N.E.2d 423 (Ill. App. Ct. 2001), *petition for leave to appeal denied*, 763 N.E.2d 322 (2001).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See id.*

37. People v. Walruth, No. 310876, 2013 Mich. App. Lexis 1691, at *4 (2013), *appeal denied*, 843 N.W.2d 507 (2014).

convicted of first-degree criminal sexual conduct.[38] The trial court noted "many inconsistencies" in the alleged victim's testimony, including the alleged victim's "testimony regarding digital penetration," and "inconsistencies in [the alleged victim's] testimony regarding how she reached different stages of undress."[39] Moreover, she had "photographs depicting herself partially clothed."[40] Nevertheless, the appellate court affirmed the conviction, stating that "[c]onflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. . . . [which is not warranted] unless 'testimony contradicts indisputable physical facts or laws.'"[41]

One might have supposed that the original lack of a DNA match (connecting any of the five defendants to the semen found on the sock and from the cervical swab) in the jogger cases would constitute "indisputable physical facts" justifying a grant of a new trial under Michigan law. But a court that is reluctant to second-guess the fact-finder at trial in light of that fact-finder's "superior opportunity to judge the credibility of witnesses"[42] might have accepted the suggestion[43] put forth by the New York City Police Department after the granting of the motion to vacate the convictions -- that Matias Reyes, the lone serial rapist whose DNA matched that from the cervical swab and from the jogger's sock, came upon the jogger after the five had left the scene.[44]

Also, in those category (2) states that describe the trial court's power in dealing with a motion for new trial based on a weight-of-the-evidence claim, as that of a "thirteenth juror," the result would still likely be the same. In Rhode Island, for example, the trial court has the power, in ruling on a motion for new trial, to independently judge the credibility of witnesses and the weight of the evidence, indeed, to decide whether the trial judge would have reached a result different from that reached by the jury.[45] On appeal, however, the court gives great deference to the trial court's decision.[46] Similarly, the defendants' appeals would likely have failed in Alaska. Although the trial court is "supposed to independently assess the weight of the evidence and the credibility of the witnesses,"

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at *1-2 (quoting People v. Unger, 749 N.W.2d 272, 291(2008); and People v. Lemmon, 576 N.W.2d 129, 137 (1998)).
42. *Walruth,* 2013 Mich. App. LEXIS 1691 (citing People v. Sexton, 461 Mich.746, 752 (2000) (after remand)).
43. BURNS, *supra* note 1, at 198.
44. *Id.*
45. *See* State v. Whitaker, 79 A.3d 795 (R.I. 2013).
46. *Id.* at 804.

the appellate court asks "whether it was an abuse of discretion for the trial judge to uphold the jury's verdict."[47]

Mississippi might be described as a category (3) state, in which the appellate court itself sits as a "thirteenth juror," but still defers to the trial fact-finder's decision unless the decision below is "so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice" when that evidence "is viewed in the light favorable to the verdict."[48] The jogger defendants likely would not have fared well in Mississippi.

In any event, a successful appellant in weight-of-the-evidence jurisdictions, with one exception, would only be entitled to a new trial.

III. POSSIBILITIES IN NEW YORK

In light of the discussion above, it is perhaps ironic that the best chance for a reversal on first appeal in a civilian jurisdiction would be in New York. At least in theory, the New York appellate courts, unlike virtually all other state appellate courts, had the power in 1993 and 1994 (when the jogger cases were on appeal) to dismiss charges – not just order a new trial - when the verdict was against the weight of the evidence. Said the New York Court of Appeals recently in People v. Kanchaela: "Unlike a sufficiency analysis, weight of the evidence review requires an intermediate appellate court to act, in effect, as a second jury . . . by rendering its own determination of the facts as proven at trial."[49] On the other hand, that court also said in People v. Bleakley:

> [I]ntermediate appellate courts have been careful not to substitute themselves for the jury. Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor. Without question the differences between what the jury does and what the appellate court does in weighing evidence are delicately nuanced, but differences there are.[50]

Clearly, that additional power possessed by the Appellate Division did not help the Central Park Five.

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47. White v. State, 298 P.3d 884, 885-86 (Alaska Ct. App. 2013).

48. Hughes v. State, 43 So. 3d. 526, 529 (Miss. Ct. App. 2010) (citing Bush v. State, 895 So. 2d 836, 844 (Miss. 2005)).

49. People v. Kancharla, 14 N.E.3d 354, 359 (N.Y. 2014) (internal citation omitted).

50. People v. Bleakley, 508 N.E.2d 672, 675 (N.Y. 1987).

IV. ARTICLE 66(C), UCMJ

Having served for three years in the U.S. Army Judge Advocate General's Corps, I think of what might have happened had the first appellate courts been empowered, essentially, to act as a jury in the way in which the several U.S. Courts of Criminal Appeals can act under Article 66 (c) of the Uniform Code of Military Justice. This provides in part:

> [The court] may affirm only such findings of guilty . . . as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controversial questions of fact, recognizing that the trial court saw and heard the witnesses. [51]

This provision has been interpreted to mean that the appellate court must itself be "convinced beyond a reasonable doubt" of an appellant's guilt.[52] Appellate review in the military is, thus, quite different from what it is in civilian courts. It has been estimated that in approximately ten percent of the military cases, one of several charges is dismissed because the appellate court is not convinced of the defendant's guilt beyond a reasonable doubt (with the figure for dismissal of all charges being smaller),[53] although the percentage may, of course, vary from year to year.[54] In *United States v. Scott*,[55] for example, the defendant was

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51. Uniform Code of Military Justice, 10 U.S.C.A §866(c) (West 1996). This section also authorizes the Court of Criminal Appeals to "affirm only such . . . sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Id.*

52. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

53. Telephone interview with Major William J. Stephens, Judge Advocate General's Legal Center and School, Charlottesville, Virginia (August 7, 2014).

54. It has been reported that "[o]f the 579 cases reviewed by the Army Court of Criminal Appeals in 2012, factual insufficiency of the evidence was found in only fifteen cases." Matt C. Pinsker, *Ending the Military Courts of Criminal Appeals De Novo Review of Findings of Fact*, 47 SUFFOLK L. REV. 471, 505 (2014). These figures are somewhat misleading. The source on which Pinsker relied has now stated that the total number in 2012 was 580, but of these, twenty were appeals by the government (on issues unrelated to innocence or guilt), and 349 were appeals from full guilty pleas; thus, the total number of appeals in which factual insufficiency could have been found was 211. E-mail from Homan Barzmehri, Management and Program Analyst, Army Court of Criminal Appeals, Office of the Clerk of Court, to author (March 3, 2015) (on file with author). The percentage of cases in which some factual insufficiency was found in 2012 was, thus, seven percent. As is apparent from the title of this article, Pinsker advocates abolition of article 66(c) power to dismiss based on the appellate court's determination that the

charged, among other things, with involuntary manslaughter and two assaults with a dangerous weapon. The defendant had allegedly fired a nine-millimeter pistol into a group of Turkish youths during a festival in Bremerhaven, Germany.[56] There was some evidence corroborating the defendant's claim that he acted in self-defense and in defense of others, but two Turkish youths testified that defendant and other soldiers initiated the confrontation that ended with shots being fired.[57] This latter fact surely would have satisfied the test for constitutionally sufficient evidence. The court, however, acknowledging that the "court members [roughly the equivalent of a civilian jury] heard and observed the witnesses," nevertheless stated that "we, in the exercise of our fact-finding power under Article 66(c), Uniform Code of Military Justice . . . find the court's findings factually incorrect."[58] The appellate court set aside the finding of guilty of manslaughter and assault with a dangerous weapon and dismissed those charges.[59]

In another case, *United States v. Graham*,[60] the defendant was convicted of desertion, which requires proof that a defendant intended to stay away from his unit permanently. Essentially, the defendant extended a convalescence leave beyond what was authorized.[61] When military authorities located him, an agent of the Criminal Investigation Command told him on multiple occasions "to return to Ft. Lewis," but in one

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defendant has not been proven guilty beyond a reasonable doubt. His conclusion is based in part on the fact that article 66(c) was originally intended to combat the problem of command influence, which is less of a problem today. *Pinsker, supra* at 474-75. He also relies on the facts that the power is infrequently exercised and "rarely yields a meaningful change in an accused's conviction or punishment," that it places an "enormously time-consuming burden" on appellate counsel, and that, therefore, "the fact-finding power is not worth the costs it exacts." *Id.* at 506. Although one might regard a seven percent dismissal rate as low, one would not expect to find a large number of cases in which it was necessary to exercise the power under article 66(c) – that is, if all of the participants in the process (counsel, the judge, members of the court, and the convening authority) were properly doing their jobs. It is interesting to compare this cost-benefit analysis with Sir William Blackstone's statement of values: "Better that ten guilty persons escape than that one innocent suffer." *See* Vidar Halvorsan, *Is It Better That Ten Guilty Persons Go Free Than That One Innocent Person Be Convicted?*, 23 CRIM. JUST. ETHICS 2 (2004). Beyond that, the author assumes, in essence, what many courts have assumed, namely, that an appellate court is handicapped by not having seen and heard the witnesses at trial– an assumption that is arguably invalid. *Pinsker, supra* at 473; *see also infra* notes 99 and 100.

55. U.S. v. Scott, 40 M.J.R. 914 (A.C.M.R 1994).
56. *Id.* at 915-16.
57. *Id.* at 917.
58. *Id.* at 915 (internal citations omitted).
59. *Id.*
60. U.S. v. Graham, 37 M.J. 603 (A.C.M.R. 1993).
61. *Id.* at 603.

telephone call "initiated by the appellant from a location he would not disclose, the appellant threatened to go to Canada rather than return to Ft. Lewis."[62] The appellant testified that he "mentioned Canada . . . only to indicate that Canada was a place where he could catch a plane to Ft. Lewis."[63] Presumably this reference to Canada would have permitted a trier of fact to infer that he intended to stay away permanently, and apparently the court below did just that.[64] On review, the court did not discuss the legal sufficiency of the evidence; instead, it focused on factual sufficiency, noting that there was evidence "that the appellant wanted to stay in the army; . . . he had worked the system to wrongfully obtain convalescence leave and to be paid for this time, he had injuries that might warrant a disability retirement, and he had extended active and reserve service credit."[65] Thus, drawing an inference favorable to the appellant, the appellate court concluded that it was "not convinced beyond a reasonable doubt of the appellant's guilt of desertion."[66] The court did find beyond a reasonable doubt that the appellant was guilty of absence without authority.[67]

United States v. Matthews [68] involved charges that included a charge of sexual assault by one service member on another, both having known, and worked with, each other. The court ultimately disapproved the charge of sexual assault.[69] As often happens in such cases, the defendant and the alleged victim gave differing accounts of what transpired. The Court of Criminal Appeals dealt with the evidentiary conflict by stating:

> Ultimately, this case boils down to a swearing contest between the two involved parties. Consequently, the resolution of the disputed facts inevitably requires an assessment of these witnesses' credibility. As already noted, the character witnesses for Appellant established his reputation for outstanding performance and dependability. Their assessment of his veracity stood in sharp contrast to the testimony concerning [the alleged victim's] character. Her co-workers, even a friend and former roommate, all expressed serious reservations about her truthfulness. We find the stark contrast between the assessments of those who knew them to be especially significant. While we

62. *Id.* at 604.
63. *Id.* at 603.
64. *Id.*
65. *Id.* at 605.
66. *Id.*
67. *Id.*
68. U.S. v. Matthews, 55 M.J. 600 (C.G. Ct. Crim. App. 2001).
69. *Id.*

> will never know with certainty what actually happened in Appellant's motel room, we have concluded there is ample reason to doubt [the alleged victim's] version of those events. We are constrained to disapprove any charge violation for which we are persuaded there is a reasonable doubt.[70]

Returning to the case of the Central Park Five, we can only speculate whether the New York Supreme Court, Appellate Division, would have reversed the convictions had it had the power that the military courts possess under Article 66(c). In light of the weaknesses in the prosecution's case, as described in the 2002 decision granting the motion to vacate judgment, one might suppose that the court would have reversed and dismissed the charges. After all, a court applying an Article 66(c) equivalent would presumably have carefully examined the many discrepancies in the defendants' statements, as noted above. These were not minor inconsistencies, but rather major differences about who did what, when, and where. There was the additional fact that the DNA from the semen found on the sock of the victim and from the cervical swab did not match the DNA of any of the defendants.[71] Also, even though there were two trials and four separate appeals, the Appellate Division might have consolidated the records on review (as the U.S. Army Court of Criminal Appeals would have done since the related cases would have been assigned to the same review panel),[72] thus allowing it to see the full extent of the inconsistencies in the defendants' pretrial statements.

Of course, we cannot be sure what the New York courts would have done under the equivalent of Article 66(c). The concept of "beyond a reasonable doubt," after all, is a high-level abstraction – not a self-defining, self-applying principle - and reasonable minds may differ about

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70. *Id.* at 608.

71. *Wise*, *supra* note 8.

72. Telephone Interview with retired Army JAG officer (Feb. 2, 2015). Also, Army appellate lawyers are situated in the same office and regularly discuss issues among themselves. If an issue is raised in one case on review, other defense counsel will know about it and will be able to raise the same issue in related cases in which it could have been raised at trial. *Id.* I myself witnessed this when I was defense counsel at now-defunct Ft. Devens. I raised a command- influence issue (art. 37, UCMJ) in every case that I tried following a speech by the staff judge advocate to all officers at Ft. Devens (the identical speech was given on three separate occasions to ensure that all officers would hear it). A colleague of mine did not raise the issue in his cases. When our cases were reviewed on appeal, the appellate attorneys were able to use the record from my cases in the cases tried by my colleague, and indeed, the issue was discussed at length and resolved in one of my colleague's cases. United States v. Albert, 36 CMR 267 (C.M.A. 1966). In one of my cases, United States v. O'Connor, 36 CMR 282 (C.M.A. 1966), the court simply dealt with the case summarily, citing the decision in *Albert*.

its application. Beyond that, the courts would still have had to function in the pervasive atmosphere of racial animus surrounding the trials.[73] Ronald Kuby, one of the attorneys who represented Usef Salaam on appeal before the New York Court of Appeals, believes that an Article 66(c) equivalent would not have made a difference.[74] Perhaps he is right. Perhaps a New York appellate court interpreting such a statute would have nevertheless adhered to the view expressed in Bleakley that "intermediate appellate courts have been careful not to substitute themselves for the jury. Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor."[75] This statement might have been found by the New York court to be consistent with the Article 66(c) requirement the appellate court recognize that the fact-finder at trial saw and heard the witnesses. Of course, as we have seen, Article 66(c) does not require the appellate court to give great deference to what the fact-finder did at trial. Indeed, one of the substantial differences between the current New York law and that in the military is that in the latter the appellate court is affirmatively required to satisfy itself that the defendant has been proven guilty beyond a reasonable doubt. It need not wait for the defendant to raise the issue; the court must take the initiative,[76] an approach that also might have led to a different result in the Illinois "dropsy" case.[77]

Thus, it is not clear that a New York version of Article 66(c) would have been enough to lead to a decision that would have spared the defendants years in prison. What might have achieved a different result?

V. OTHER FEATURES OF MILITARY LAW

One should consider the way in which appellate judges are selected. The first level of appeal in New York is in the Appellate Division of the Supreme Court, the latter being the trial court which handles the most serious criminal cases. The governor appoints some members of the Supreme Court to a five-year term on the appellate bench.[78] Members of the Supreme Court are elected to fourteen-year terms by popular election.[79] Judges who are popularly elected (or are subject to popular

73. *See, e.g.*, BURNS, *supra* note 1, at 66-71.

74. Telephone Interview with Ronald Kuby (Aug. 13, 2014).

75. People v. Bleakley, 508 N.E.2d 672, 675 (N.Y. 1987).

76. United States v. Walters, 58 M.J. 391, 395, 398 n.4 (C.A.A.F. 2003).

77. People v. Hill, 835 N.E.2d 466 (Ill. App. Ct. 2002) (reported only in a table "Disposition of Cases by Order in the Appellate Court Under Supreme Court Rule 23").

78. N.Y. CONST, art. VI, § 4(c).

79. *Id.* art. VI, at §6(c).

approval in retention elections)[80] are likely to be affected in their decisions in highly publicized cases by the prospect of having to secure popular approval of their performance. Although a judge with a fourteen-year term may be less likely, at least toward the beginning of the term, to be influenced by the need for popular approval than would be a judge with a six-year term, as in Michigan, for example, a New York judge who aspired to be elevated to the Appellate Division could not ignore the need to refrain from offending the governor, who is subject to popular approval. Nationally, examples of the rejection of judges who have voted against the imposition of the death penalty come to mind.[81] It is true, of course, that the governor at the time of the jogger appeals, Mario Cuomo, was perhaps more sympathetic to persons accused of crime than most governors have been. Indeed, he vetoed bills that would have reinstated the death penalty.[82] Nevertheless, he was succeeded by a Republican governor,[83] a possibility that appellate judges in New York would presumably have been aware of. In any event, a Supreme Court justice in New York must still win in a popular election to be eligible for appointment to a five-year term in the appellate division.[84]

Some might argue that it is unfair to compare judges in New York with those in a state having a very different political culture, but a U.S. Supreme Court case arising in Louisiana illustrates just how bad a result can be when judges are popularly elected. In *Smith v. Cain*[85] the U.S. Supreme Court reversed a denial of post-conviction relief by a Louisiana trial court. The problem was that the prosecution had failed to turn over to the defense a detective's notes showing that, within five days of the killing, the only eye witness to a murder had twice said that he couldn't identify the perpetrator.[86] The Supreme Court disposed of this clear violation of *Brady* in a brief opinion, with only Justice Thomas dissenting.[87] The constitutional violation was so clear (to all but Justice

80. Retention elections are those in which voters vote either yes or no -- to retain or not retain a sitting judge. *See, e.g.*, CALIF. CONST. art. VI, §16(d)(1).

81. In 1986, for example, Chief Justice Bird of the California Supreme Court was defeated in a retention election primarily because of her votes in death penalty cases. JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA, 245-246 (2012).

82. Adam Nagoumey, *Mario Cumo, Ex-New York Governor and Liberal Beacon, Dies at 82,* N.Y. TIMES (Jan. 1, 2015), http://www.nytimes.com/2015/01/02/nyregion/mario-cuomo-new-york-governor-and-liberal-beacon-dies-at-82.html?_r=0.

83. *Id.*

84. N.Y. CONST. art. VI, § 4(c).

85. Smith v. Cain, 132 S. Ct. 627 (2012).

86. *Id.* at 629-30.

87. *Id.* at 630-31 (citing Brady v. Maryland, 373 U.S. 83 (1963)).

Thomas) that in oral argument, Justice Sotomayor, a former prosecutor, said to the attorney representing Orleans Parish, "Did your office ever consider just confessing error in this case?"[88] It is not unreasonable to conclude that part of the problem in *Cain* was precisely the fact that the judges in Louisiana are popularly elected.

Judges of the U.S. Army Court of Criminal Appeals are selected by the Judge Advocate General of the Army, for example, for a three-year term.[89] Usually those selected are lieutenant colonels and full colonels who are toward the end of their careers and who possess analytic skills.[90] Their efficiency reports are written by the Deputy Judge Advocate General, not by any local commander or staff judge advocate.[91] They would seem to be well insulated from the kind of pre-trial publicity that seemingly infected the trial of the Central Park Five. The process of judicial selection in the military seemingly resembles, in some respects, the system of judicial selection in France, where judges are essentially part of the civil service.[92] However, the French system is not likely to be adopted anywhere in the U.S.

As it happens, I have proposed a method of judicial selection (actually four versions based on a single theme) which, I believe, would accomplish the goals of securing a more competent and representative judiciary and which would also, to a considerable extent, insulate judges from the kind of pressure that apparently contributed to the wrongful convictions of the Central Park Five and to the affirmance of those convictions on appeal. What I have in mind is a system that has some of the characteristics of a system of merit selection. For example, one version would provide for the creation of a broadly representative nominating commission composed of lawyers elected by lawyers, judges elected by judges, academics elected by academics, and members of the public elected through a system akin to proportional representation. Each commissioner would then nominate one person, and final selection would be by lot from among the nominees.[93] The term of office might be

88. Adam Liptak, *Justices Rebuke a New Orleans Prosecutor*, N.Y. TIMES (Nov. 8, 2010), http://www.nytimes.com/2011/11/09/us/supreme-court-rebukes-a-new-orleans-prosecutor.html.

89. Telephone Interview with retired Army JAG officer (Feb. 2, 2015).

90. *Id.*

91. *Id.*

92. *See* Robert P. Davidow, *Beyond Merit Selection: Judicial Careers Through Merit Promotion*, 12 TEX. TECH L. REV. 851, 855-57 (1981).

93. *See* Robert P. Davidow, *Judicial Selection in Michigan: A Fresh Approach*, 58 WAYNE L. REV. 313, 320-22 (2012); Robert P. Davidow, *The Search for Competent and Representative Judges, Continued*, 77 KY. L. J. 723, 724 (1989); Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L.

as long as twelve to fifteen years and might be subject to extension by action of the commission. For our purposes, the salient point is that judges selected under this system would be substantially free of the kinds of pressure that apparently caused the judges in the jogger cases to ignore the discrepancies in the various statements of the defendants – discrepancies that would have been more apparent had the records on appeal been consolidated, as they would have been in the Army.[94] The judges would not have to worry about the views of the governor, the chief politician in the state, who, in my system, would play no part in the selection process. I do not expect a groundswell of support for my proposal.[95] Novelty is often resisted, although in this case the method of final selection by lot has an ancient lineage; it was the method by which dikasts, officials who exercised judicial functions, were selected in the fifth and fourth centuries B.C.E. in Athens.[96]

Another issue needs to be addressed. As noted above, Article 66(c) contains the admonition that in exercising its power to "weigh the evidence, judge the credibility of witness, and determine controverted questions of fact," the reviewing court is to recognize "that the trial court saw and heard the witnesses."[97] This qualification is, indeed, the justification given in civilian appellate courts for not exercising the broad power given to the military courts.[98] Clearly this limitation did not

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REV. 409, 440-46 (1981). The proposal calls for the creation of a commission consisting of the following:

> [T]wo lawyers, elected by the State Bar Association; six persons popularly elected by proportional representation, of whom one must be a lawyer and five must be nonlawyers; two judges, elected by all judges of courts of record in the state; one full-time member of a faculty of a law school in the state accredited by the American Bar Association, elected by all full-time members of the law school faculties of accredited law schools in the state; and one full-time member of a nonlawyer faculty of an accredited university within the state, elected by all nonlawyer full-time professors in accredited universities in the state.

Judicial Selection: The Search for Quality and Representativeness, *supra* note 93 at 440. Each commissioner could veto the other member's selection, but my assumption is that each one member would say to the other members: I won't veto your well-qualified nominee, if you won't veto my well-qualified nominee.

94. *See* Telephone Interview with retired Army JAG officer, *supra* note 89.

95. Indeed, in two recent books on judicial selection in the United States, my proposals were not acknowledged. *See* SHUGERMAN, *supra* note 81; *see also* G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES (2012).

96. *Judicial Selection: The Search for Quality and Representativeness*, *supra* note 93, at 438-39.

97. Uniform Code of Military Justice, 10 U.S.C.A. §866(c) (West 1996).

98. *See, e.g.*, People v. Lemmon, 576 N.W.2d 129, 137 (1998). This is also one of the bases of the argument in *Pinsker*. Pinsker argues that the power of the military Courts of

prevent the U. S. Courts of Criminal Appeals in the above-described cases from finding that some charges were not proven beyond a reasonable doubt. In any event, there is reason to believe that this admonition is based on an invalid assumption – namely, that factfinders at trial are better able to tell who is telling the truth because they have observed and heard the witnesses. Studies conducted by psychologists Saul Kassin and Aldert Vrij have shown that body language and facial clues are not good indicators of who is telling the truth.[99] Kassin's studies, for example, were conducted in the context of evaluating police interrogation techniques, but the basic principle is the same in the context of appellate review of criminal convictions.[100] In other words, an appellate court is not handicapped by not having seen and heard the witnesses at trial. Because the factual assumption on which the admonition is based is arguably wrong, any Article 66(c) equivalent should eliminate the admonition.

There is at least one further aspect of the military justice system that might have to be introduced into the civilian context in order to maximize the likelihood that innocent defendants would have their convictions reversed on appeal. I refer here to the provision and training of counsel. Army JAG officers, for example, go through training at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia – training that is designed specifically to prepare them for litigation in the military[101] (something that might be adopted in civilian jurisdictions in lieu of the bar examination).[102] Moreover, they are paid a

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Criminal Appeals to affirm only those findings of guilt that, in the courts' own view, have been proven beyond a reasonable doubt, should be eliminated. *Pinsker*, *supra* note 54, at 473.

99. *See, e.g.*, Saul Kasssin, *On the Psychology of Confessions*, 60 AM. PSYCH. 215, 216-217 (2005); ALDERT VRIJ, DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES 37 (2008).

100. Email from Saul Kassin, Prof, Williams College, to Robert Davidow, (Jan. 28, 2014) (on file with author) ("I believe you are very much on the right track" – said in response to my suggestion that his research would contradict the assumption that the fact-finder at trial is better able than is an appellate court (reading a cold record) to determine who is telling the truth).

101. Presently, the course of instruction for new Army JAG officers is about ten weeks long, more than one-third of which is devoted to criminal justice. Telephone Interview with Major William J. Stephens, Judge Advocate General's Legal Center and School, Charlottesville, Virginia (Feb. 19, 2015).

102. As far as I can determine, no state, as such, has implemented an educational course comparable to that required of new Army JAG officers at the Army Judge Advocate General's Legal Center and School, as a substitute for the bar exam. *See generally* NAT'L CONF. OF BAR EXAMINERS AND AM. BAR ASSOC'N SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (2015). New Hampshire School of Law's Daniel Webster Scholar Honors Program does

reasonable salary, and compensation is not based on the number of clients represented. Of course, well compensated and trained lawyers would also improve the quality of justice at the trial level.

VI. CONCLUSION

Given human imperfection, no system of justice can assure that only the guilty will be convicted. Perhaps the Central Park Five would have been convicted and had their convictions affirmed on review regardless of whether any of the reforms suggested in this article had been implemented. Nevertheless, structural changes can perhaps increase the likelihood that innocent defendants will not spend years in prison for crimes they did not commit. Civilian adoption of an Article 66(c) equivalent, which would require an appellate court to be itself convinced of the defendant's guilt beyond reasonable doubt, would be a good place to start. So too would be a change in the method of judicial selection that would substantially reduce the appellate judges' fear that unpopular decisions would adversely affect their judicial careers. Abandonment of the assumption that factfinders at trial are better able to determine who is telling the truth, would also help. Finally, better training and compensation of attorneys would increase the likelihood of more just results.

Despite the unlikelihood that the changes discussed in this article will be adopted in civilian systems of justice in the near future, it is important to at least begin a discussion of them.

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afford twenty-four students (out of total class of perhaps eighty) the opportunity to develop practical skills in their second and third years; those completing the program are not required to take the bar exam in New Hampshire. The school describes its program as "the only practice-based bar exam alternative in the nation." *About*, UNIV. OF NEW HAMPSHIRE SCH. OF L., hhtp://law.unh.edu/about (last visited Jan. 24, 2016). *See generally* John Burwell Garvey, *Making Law Students Client-Ready: The Daniel Webster Scholar Honors Program: A Performance-Based Variant of the Bar Exam,"* 85 N.Y. STATE BAR ASSOC. J. 44 (Sept. 2013). The program is a good start, but, unfortunately, students not in the program, together with students who have gone to law schools outside of New Hampshire, must still take the Bar exam.