

# ESSAY: SAFETY IN POST-CONVICTION PROCEEDINGS

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## *Abstract*

It is extremely difficult to correct an error after conviction. Given the Hidden Accidents Principle in criminal law, it is very hard to uncover mistakes and even harder to prove them. Time is one of the greatest enemies of reconstructing the truth. Evidence gets lost, potential witnesses forget, move away, or die. The legal rules, including the finality of verdicts rule, hinder the rectification of miscarriages of justice. Another factor is that once the indictment has been made, the police usually close their investigation. Even when the appellate court finds a defect in the original trial proceedings, it will most likely be deemed “harmless error.” Thus, the finality of proceedings rule in fact already applies with the handing down of the verdict at trial, even before appeal. The main procedural mechanism intended for correcting miscarriages of justice is a motion for a new trial. But this mechanism is not effective. Since safety theory and safety measures are not yet developed in the criminal justice system, we have to learn it from other areas, such as aviation, transportation and engineering. In order to bring SAFETY to post-conviction proceedings, this essay offers some safety measures.

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## I. INTRODUCTION

It is extremely difficult to correct an error after conviction. First of all, given the Hidden Accidents Principle in criminal law, it is very hard to uncover mistakes and even harder to prove them. At times, the very cause of the miscarriage of justice is what perpetuates the injustice and prevents its rectification. Thus, in a case in which the police or prosecution concealed possibly exculpatory evidence, it can be very reasonably assumed that they will continue to withhold that evidence and obstruct its discovery, if only to prevent their own incrimination.

An additional, albeit innocent, contributing factor is that once the indictment has been made, the police usually close their investigation. No additional investigation angles are explored, and they do not pursue any alternative suspects. The police assume that the defendant who has been charged with the crime is the actual perpetrator. Added to this is the natural reluctance of any person or institution to admit to a mistake. Hence, innocent suspects generally cannot expect the police to come to their rescue. This is even more so for innocent convicted inmates, for their conviction is accompanied by a presumption of their guilt. Conducting an investigation into their matter is therefore regarded as undermining the judicial system.

But if not the police, then who will find the true perpetrator of the crime and prove the innocence of the wrongly convicted defendant? The answer is: usually no one. The falsely convicted are usually completely powerless. They are sometimes financially destitute, particularly due to the huge amounts of money they have spent on the trial and appeal, with no source of livelihood while imprisoned.

A study conducted by Hugo A. Bedau and Michael L. Radelet found that in cases in which a miscarriage of justice was revealed, it was often by a conscience-driven attorney who had continued to work on the case free of charge for all the long years.<sup>1</sup> But although this was indeed the reality in the past, today the Innocence Project plays a central role in exposing false convictions in the United States, based on DNA comparisons.<sup>2</sup>

In the United Kingdom, the traditional conventional belief that false convictions do not occur was shaken to the core with the exposure of the wrongful convictions of Irish individuals due to the predatory investigations of the British police in the notorious “Birmingham Six”<sup>3</sup> and “Guildford Four”<sup>4</sup> cases. Following these

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1. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 67 (1987).

2. See *About*, INNOCENCE PROJECT, [www.innocenceproject.org/about](http://www.innocenceproject.org/about) (last visited Sept. 19, 2018) (detailing the Innocence Project’s objectives).

3. *R v. McIlkenny* (1991) 93 Cr. App. R. 287.

4. *R v. Richardson*, THE TIMES, Oct. 20, 1989, 1989 WL 651412 (C.A. Crim.

revelations, the Runciman Royal Commission on Criminal Justice was appointed to investigate the English criminal justice system and to recommend improvements. Its final report in 1993 led to a drastic change in the English approach to the phenomenon of false convictions.<sup>5</sup> The Criminal Cases Review Commission (“CCRC”) was established pursuant to this report to review claims of false conviction.<sup>6</sup> It is an independent public body that serves as a mechanism of last resort, after the judicial process has been exhausted.<sup>7</sup> The CCRC conducts its own inquiry into the cases and convictions and refers suitable cases to the court of appeal.<sup>8</sup> In a considerable number of these cases (twenty-one per year on average) the courts have found a miscarriage of justice and have exonerated and released wrongfully convicted inmates.<sup>9</sup>

The passage of time also works to the detriment of someone who has been the victim of a miscarriage of justice. The more time that passes, the harder it is to uncover the truth. Time is one of the greatest enemies of reconstructing the truth. Evidence gets lost and potential witnesses forget, move away, or die. The legal rules, including, first and foremost, the finality of verdicts rule (on which I elaborate below) hinder the rectification of miscarriages of justice. From the moment that a person is wrongfully convicted, it is very difficult to reverse the outcome. As I will show in what follows, the appeals procedure is very limited, tending to focus primarily on questions of law and constitutional issues and not on questions of fact, even though the majority of false convictions apparently stem from fact-finding errors. As I show below, even when the appellate court finds a defect in the original trial proceedings, it will most likely be deemed “harmless error.” Thus, the finality of proceedings rule, in fact, already applies with the handing down of the verdict at trial, even before appeal. The main procedural mechanism intended for correcting miscarriages of justice is a motion for a new trial. But is this mechanism effective? This will also be considered

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Div. 1989).

5. ROYAL COMM’N ON CRIMINAL JUSTICE, REPORT, 1993, CM. 2263, at 10 [hereinafter RUNCIMAN COMMISSION REPORT].

6. Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241, 1276 (2001). See also CRIMINAL CASES REVIEW COMM’N, [www.ccrcc.gov.uk](http://www.ccrcc.gov.uk) (last visited Sept. 19, 2018) (describing the work of the CCRC).

7. Griffin, *supra* note 6, at 1277; *Who we are*, CRIMINAL CASES REVIEW COMM’N, [www.ccrcc.gov.uk/about-us/who-we-are/](http://www.ccrcc.gov.uk/about-us/who-we-are/) (last visited Sept. 19, 2018); *What we do*, CRIMINAL CASES REVIEW COMM’N, [www.ccrcc.gov.uk/about-us/what-we-do](http://www.ccrcc.gov.uk/about-us/what-we-do) (last visited Sept. 19, 2018).

8. *What we do*, *supra* note 7.

9. From its establishment in April 1997 and up until July 2018, the CCRC had transferred 652 files it deemed suitable to the court of appeals for reconsideration. CRIMINAL CASES REVIEW COMM’N, *supra* note 6, *Facts and Figures: Case Statistics*. Of those, 642 have been heard by the appeal courts. 432 appeals have been allowed (21 per year), and 196 dismissed. *Id.* 627 cases are currently under review at the Commission and 235 are awaiting review. *Id.*

below.<sup>10</sup>

In certain fields, the meaning of a “safety-critical system”<sup>11</sup> is well understood, and resources are, therefore, invested in modern safety methods, which significantly reduce the rate of accidents. This is the case, for example, in the field of pharmaceuticals and drugs, where in the first half of the twentieth-century the need for safety was already acknowledged and internalized and the necessary powers and authorities were granted to the FDA to ensure this. This was also the case in the aviation field, which abandoned the obsolete “Fly-Fix-Fly” approach in the mid-twentieth century and developed more advanced safety methods that generally follow an “Identify-Analyze-Control” model and are aimed at “First-Time-Safe.”<sup>12</sup> The latter approach involves systematic identification of future hazards, analysis of the probability of their occurrence, and complete neutralization of the risk or at least its reduction to an acceptable level.<sup>13</sup> Modern safety approaches such as these were implemented in other fields as well, such as transportation and engineering, and, later on, labor and medicine.<sup>14</sup> These safety systems are constructed on, among other things, safety education and training, a culture of safety, a duty to report not only accidents but also incidents (near-accidents), professional risk assessment, a process of perpetual improvement, and the understanding that safety in each component of a system alone in detachment from the entire system is not sufficient for achieving system safety.<sup>15</sup>

Accidents also happen in the criminal justice system, of course, in the form of false convictions. For this reason, this system must also be classified as a safety-critical system. As systems of this type entail matters of life and death, any system error is likely to cause severe harm to both individuals and society at large. A false conviction is a system error and accident just like a combat-plane crash, not only from a metaphorical perspective but also in the very

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10. There is a pessimistic estimation that the adjudicatory process has only limited capability to distinguish between accurate and inaccurate evidence and that “criminal verdicts are determined in the investigative phase, with the trial serving primarily as a ritual that delivers more symbolic than diagnostic value.” DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 203 (2012).

11. In a co-authored article, we have suggested applying this term to the criminal justice system. Mordechai Halpert & Boaz Sangero, *From a Plane Crash to the Conviction of an Innocent Person: Why Forensic Science Evidence Should Be Inadmissible Unless It Has Been Developed as a Safety-Critical System*, 32 *HAMLIN L. REV.* 65 (2009). See *infra* section II, subsections C-E regarding “Safety-critical system.”

12. Boaz Sangero & Mordechai Halpert, *A Safety Doctrine for the Criminal Justice System*, 2011 *MICH. ST. L. REV.* 1293, 1296-97 (2011).

13. *Id.* at 1297.

14. *Id.* at 1297-99.

15. *Id.* at 1299.

realistic terms of economic cost.<sup>16</sup> Yet, in criminal law, a Hidden Accidents Principle governs.<sup>17</sup> Thus, the overwhelming majority of false convictions are never detected, which leads to the erroneous traditional and conservative assumption that they occur at an almost negligible rate and that the criminal justice system is “almost” perfect. Consequently, little thought has ever been given to safety in the system, and therefore the criminal justice system — from a safety perspective — lags far behind other areas of life.

The patently flawed assumption of a low false conviction rate has been challenged in recent decades, primarily because of the work of the Innocence Project. The Project exposes hundreds of cases of false convictions through genetic testing.<sup>18</sup> Empirical studies based on the Project’s findings point to a very high false conviction rate: at least 5 percent for the most serious crimes<sup>19</sup> and apparently an even higher rate for less serious crimes.

This Essay proceeds as follows. Part I connects between the modern theory of safety (which is well developed in other areas of our life) and the new theory of safety from false convictions. It starts from the phenomenon of false convictions, moves to risk assessment, establishes the moral duty to adopt safety measures, explores the new area of safety from false convictions, suggests adopting modern safety, and ends with showing the unsafety in the criminal justice system. Part II shows the current state of unsafety in post-conviction proceedings. It begins with a discussion of the finality of verdicts rule, which gains undue force, then turns to the appeal procedure and shows why it cannot correct mistaken convictions, continues with the procedure of new trial, showing the difference between reality (DNA) and dream (“harmless error”) and ends with new post-conviction proceedings legislation. Part III offers some possible safety measures. A short conclusion ends the Essay.

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16. *Id.* at 1304-05. Incorporating into the criminal justice system a modern safety theory that is commonly accepted in other areas, such as space, aviation, engineering, and transportation, is an idea that was developed jointly by myself and Dr. Halpert and presented in a number of co-authored articles, particularly *A Safety Doctrine for the Criminal Justice System*, 2011 MICH. ST. L. REV. 1293, 1296-97 (2011). This Essay is intended to expand on the preliminary proposition and engage in the application of the modern safety theory in the criminal justice system, specifically regarding post-conviction proceedings.

17. Sangero & Halpert, *supra* note 12, at 1314-16.

18. *Exonerate the Innocent*, INNOCENCE PROJECT, [www.innocenceproject.org/exonerate](http://www.innocenceproject.org/exonerate) (last visited Oct. 18, 2018).

19. D. Michael Risinger *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 786-88 (2007).

## II. SAFETY FROM FALSE CONVICTIONS

### A. False Convictions

It is most convenient for us to hold our criminal law system in high regard, to the point of calling it the “criminal justice system.” It is convenient for us to think that everything runs as it should in this system. And even if certain doubts creep in at times, we tend to repress them and stand firm in our ignorance.

The state can inflict no greater injustice on its citizens than to systematically falsely convict the innocent. In the past, it was possible to call into question the actual occurrence of false convictions and consider this, at most, a negligible phenomenon.<sup>20</sup> However, today such skepticism has no place and likely derives mainly from ignorance. This is principally due to the “DNA revolution” and the first Innocence Project at the Cardozo School of Law at Yeshiva University in the United States.<sup>21</sup> In the framework of this Innocence Project, genetic comparisons are conducted between samples taken from inmates and samples that have been preserved from crime scenes.<sup>22</sup> On the basis of the testing initiated by the original Innocence Project (today there are similar additional projects in the United States and elsewhere), about four hundred false convictions have been exposed, the majority of which were for the serious offenses of rape and murder, which carry the harshest possible penalties: life imprisonment or capital punishment.<sup>23</sup> Moreover, in about half of the cases,<sup>24</sup> genetic testing even led to the identification of the true perpetrators of the crimes, who had roamed free due to the false convictions and, in some cases, even continued to commit crimes. In addition, recent studies have shown that false convictions are not an uncommon phenomenon.<sup>25</sup> These findings make a renewed, more realistic consideration of the issue imperative.

### B. Risk Assessment

Empirical studies based on the Innocence Project’s findings

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20. See, e.g., JUSTICE IN ERROR 16 (Clive Walker & Keir Starmer eds., 1993) (stating this approach — while expressing reservations about it).

21. BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); INNOCENCE PROJECT, [www.innocenceproject.org](http://www.innocenceproject.org) (last visited Sept. 19, 2018).

22. INNOCENCE PROJECT, *supra* note 21.

23. *Exonerate the Innocent*, *supra* note 18. On October 18, 2018 the exact number was 362. *Id.*

24. *Id.* On October 18, 2018 the exact number was 158. *Id.*

25. See generally Richard A. Leo, *The Criminology of Wrongful Conviction: A Decade Later*, 33 J. CONTEMP. CRIM. JUST. 82 (2017) (containing a new almost-updated survey of the literature in this field).

point to a very high false conviction rate. According to Michael Risinger's research, the rate of false convictions is 5 percent for the most serious crimes — rape and murder.<sup>26</sup> One of the most impactful works on the exposure of wrongful convictions is Samuel R. Gross and Michael Shaffer's study, entitled *Exonerations in the United States, 1989-2012 — Report by the National Registry of Exonerations*.<sup>27</sup> The researchers gathered data on the exoneration of wrongfully convicted defendants in the United States, including (but not limited to) exonerations based on DNA comparative testing.<sup>28</sup> The database encompasses an impressive number of exonerations: 891 exonerations of individuals, of which approximately one-third were based on DNA comparisons and an additional 1170 individuals cleared in "group exonerations."<sup>29</sup> Altogether, these amounted to a total of 2061 official exonerations of wrongly convicted, innocent defendants who were sentenced to prison or even death.<sup>30</sup> Moreover, as of September 2018, there were 2267 registered exonerations in the National Registry of Exonerations.<sup>31</sup>

In 2014, Gross et al. published their study on "Rates of False Conviction of Criminal Defendants who are Sentenced to Death."<sup>32</sup> The researchers estimated that if all death-sentenced defendants were to remain under sentence of death indefinitely, at least 4.1 percent would be exonerated, but concluded this to be "a conservative estimate" of the proportion of false convictions among death sentences in the United States, and that it is almost certain that the actual proportion is significantly higher (i.e., 4.1 percent is the greatest lower bound).<sup>33</sup> Moreover, a fascinating empirical study initiated and funded by the State of Virginia supports an even higher estimate of the false conviction rate — about 15 percent (!).<sup>34</sup>

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26. Risinger, *supra* note 19.

27. SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989-2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS (2012).

28. *Id.*

29. These group exonerations were in the framework of twelve different instances of police corruption, where in each case, police officers had deliberately and systematically incriminated innocent citizens with false claims and fabricated evidence in order to gain promotions. GROSS & SHAFFER, *supra* note 27, at 3.

30. *Id.*

31. NATIONAL REGISTRY OF EXONERATIONS, [www.law.umich.edu/special/exoneration/Pages/about.aspx](http://www.law.umich.edu/special/exoneration/Pages/about.aspx) (last visited Sept. 19, 2018) ("Currently 2,267 exonerations - more than 20,080 years lost").

32. Samuel R. Gross, Barbara O'Brien, Chen Hu & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACADEMY SCI. 7230 (2014).

33. *Id.*

34. See generally JOHN ROMAN, KELLY WALSH, PAMELA LACHMAN & JENNIFER YAHNER, POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION (2012) (providing a research report submitted to the U.S. Department of Justice).

Thus, the false conviction rate in the most severe offenses can be reasonably estimated as somewhere between 5 percent and 10 percent. And as it is reasonable to assume that courts are less cautious with regard to less serious offenses than those examined in the studies reviewed above, it is likely that the general false conviction rate is significantly higher than 5 percent.

These numbers remove any doubt as to the occurrence of false convictions. The question now, however, is with what frequency they occur, and what can be done to diminish their incidence.

False convictions cause an enormous harm — not just to the innocent defendants, their families, and their friends, but also to society as a whole. The falsely convicted individual bears the primary injury in the very fact of being convicted, the accompanying stigma, and the actual punishment, which can range from a monetary fine to imprisonment, to loss of life in jurisdictions allowing the death penalty.<sup>35</sup> Studies have been conducted on the harm caused by imprisonment for many years, but only in the last decade have the particular harms of *wrongful* imprisonment — some irreversible — been researched.<sup>36</sup>

### C. *The Moral Duty To Adopt Safety Measures*

There is a moral duty to adopt safety measures based on social theories, such as the social contract theory, and legal doctrines, such as the state-created danger doctrine.<sup>37</sup> The conviction of an innocent person is an enormous injustice.

Although many are willing to accept rare occurrences of wrongful convictions as an unavoidable phenomenon, sooner or later it will become common public knowledge that not only are false convictions not a rarity, but law enforcement authorities make no significant effort to diminish their incidence. This is likely to strongly shake existing public confidence and trust in the criminal law enforcement system, which is still referred to as “the criminal justice system.” In other words, even disregarding due process, if we want to preserve public faith in the criminal justice system so that it can continue to perform its function of crime control,<sup>38</sup> it is vital

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35. Mary C. Delaney, Keith A. Findley & Sheila Sullivan, *Exonerees' Hardships after Freedom*, 83 WIS. LAW. 18 (2010); Saundra D. Westervelt & Kimberly J. Cook, *Framing Innocents: The Wrongly Convicted as Victims of State Harm*, 53 CRIME L. & SOC. CHANGE 259 (2010).

36. Westervelt & Cook, *supra* note 35; Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427 (2009); Delaney, Findley & Sullivan, *supra* note 35; JAMES R. ACKER & ALLISON D. REDLICH, *WRONGFUL CONVICTION: LAW, SCIENCE, AND POLICY* 590-606 (2011); Leslie Scott, “*It Never Ends*”: *The Psychological Impacts of Wrongful Conviction*, 5 AM. U. CRIM. L. BRIEF 10 (2010).

37. Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165 (2005).

38. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-73

that safety standards be implemented to decrease the rate of false convictions.

Social contract theory also provides a rationale for imposing a moral duty on the state to institute safety in criminal justice. Under this theory, the state was created in order to safeguard the rights of society's members, not to cause them injury, and as noted, false conviction is the greatest wrong that a state routinely inflicts upon its citizens.<sup>39</sup> Thus, from the social contract perspective, the state, as the creator of the risk of false convictions, bears a heightened moral duty in the context of criminal justice — as compared to other contexts — to take safety measures to alleviate this risk.<sup>40</sup> Yet beyond its theoretical declaration that guilt must be proven beyond a reasonable doubt, the state makes no meaningful attempt to reduce the risk of an innocent person being falsely convicted.<sup>41</sup> Criminal law, in fact, lacks even the most basic concept of modern system-safety, without even the most rudimentary and simple safety measures implemented to reduce the risk of false convictions.<sup>42</sup>

#### D. Safety From False Convictions

On this background, this Essay explores ways of reducing the false conviction rate. The view advanced here is that the criminal justice system can be categorized as what is termed in safety engineering as a “safety-critical system.”<sup>43</sup> As systems of this type entail matters of life and death, any system error is likely to cause severe harm to both individuals and society at large. A false conviction is a system error and accident just like a combat-plane

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(1968).

39. Rinat Kitai, *Protecting the Guilty*, 6 BUFF. CRIM. L. REV. 1163, 1172-79, 1186-87 (2003); Sangero & Halpert, *supra* note 12, at 1303.

40. Sangero & Halpert, *supra* note 12, at 1303.

41. *Id.*

42. See generally Halpert & Sangero, *supra* note 11; James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010); Sangero & Halpert, *supra* note 12; James M. Doyle, *An Etiology of Wrongful Convictions: Error, Safety, and Forward-Looking Accountability in Criminal Justice*, in WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 56 (Marvin Zalman & Julia Carrano eds., 2014); James M. Doyle, *Learning from Error in the Criminal Justice System: Sentinel Event Reviews*, in U.S. DEP'T JUSTICE, NAT'L INST. JUSTICE, NCJ 247141, MENDING JUSTICE: SENTINEL EVENT REVIEWS 3 (2014); Boaz Sangero, *Safety from False Confessions*, 54 CRIM. L. BULL. 25 (2018); Boaz Sangero, *Safety from Plea-Bargains' Hazards*, 38 PACE L. REV. 301 (2018); Boaz Sangero, *Safety from Flawed Forensic Sciences Evidence*, 34 GA. ST. U. L. REV. 1129 (2018); Rinat Kitai-Sangero, *Changing the Paradigm of Models to Safety and Hazards*, 55 CRIM. L. BULL. (forthcoming, March 2019).

43. See Halpert & Sangero, *supra* note 11 (suggesting applying the term “safety-critical system” to the criminal justice system). See also Sangero & Halpert, *supra* note 12, at 1300-01) (developing this suggestion).

crash, not only from a metaphorical perspective, but also in the very realistic terms of economic cost.<sup>44</sup>

This Essay argues for the formulation and application of a safety theory in the criminal justice system at large and specifically regarding post-conviction proceedings. This would not be simply by raising the beyond-reasonable-doubt bar, thereby increasing the number of acquittals and decreasing the number of convictions. Rather, by implementing reasonable safety measures whose costs are lower than their expected harm due to the resulting reduction of both the number of false acquittals *and* the number of false convictions.<sup>45</sup>

### *E. Modern Safety*

Modern safety began to develop following World War II.<sup>46</sup> Until then, the safety approach in the field of aeronautics had been “Fly-Fix-Fly”: an airplane would be flown until an accident occurred, the causes of the accident would be investigated and the defects repaired, and then the airplane would resume flight.<sup>47</sup> This method was based on a system of learning from past experience to repair product defects and flaws and prevent future mishaps.<sup>48</sup> However, such a system does not safeguard against future mishaps that can be caused by other, as-yet undetected, defects.<sup>49</sup> This approach became clearly inadequate with the rapid advances in aviation technology and rising costs of airplanes.<sup>50</sup> This made learning from experience too expensive, leading to a shift in approach over a half century ago and the birth of modern safety.<sup>51</sup>

At this point, the primary objective in the safety field became preventing accidents before they occur, thereby avoiding the high costs of learning through experience.<sup>52</sup> The “Fly-Fix-Fly” approach was thus replaced by the “Identify-Analyze-Control” method, with its aim of “First-Time-Safe.”<sup>53</sup> Under the latter approach, there is systematic identification of future hazards, analysis of the probability of their occurrence, and a complete neutralization of the risk — or at least its reduction to an acceptable level.<sup>54</sup>

Modern safety approaches such as these were implemented in other fields as well, such as transportation and engineering, and

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44. Sangero & Halpert, *supra* note 12, at 1304-05.

45. *Id.* at 1301.

46. *Id.* at 1296.

47. *Id.*

48. *Id.*

49. Sangero & Halpert, *supra* note 12, at 1296-97.

50. *Id.* at 1297.

51. *Id.*

52. *Id.*

53. *Id.*

54. Sangero & Halpert, *supra* note 12, at 1297.

later on, labor and medicine.<sup>55</sup> These safety systems are constructed on, among other things: safety education and training, a culture of safety, a duty to report not only accidents but also incidents (near-accidents), professional risk assessment, a process of perpetual improvement, and the understanding that safety in each component of a system alone in detachment from the entire system is not sufficient for achieving system safety.<sup>56</sup>

The First-Time-Safe approach should be adopted in the field of criminal justice. Modern system-safety has been developed in fields such as military aviation, engineering, and medical diagnostic devices. The legal system should and can learn from the engineering field. For example, there is a duty in engineering safety to report not only accidents but also “incidents,” defined as situations in which there was potential for harm to be caused and it was averted purely by coincidence.<sup>57</sup> It is important to recognize the fact that near-miss conditions, if not rectified, most likely will develop into accidents at a later point. In contrast, “incidents” in criminal law are completely ignored. Even worse, accidents are not always investigated either.<sup>58</sup>

The three basic stages of the system-safety process are: Identify, Analyze, and Control. Risk assessment is vital, for it produces meaningful data to guide in prioritizing hazards, allocating resources, and evaluating the acceptability of risks associated with these hazards.

### F. *Unsafety in the Criminal Justice System*

The obvious question that arises is why safety measures have yet to be implemented in criminal law. Moreover, why has the system never even adopted a Fly-Fix-Fly approach? The answers to these questions are related to the general inability to detect the occurrence of false convictions, which are typically indiscernible. This can account for the optimistic false impression that false convictions are a very rare phenomenon. Despite all indications of a conceivably very high rate of false convictions, policymakers and the public alike are certain and confident that the system performs well and that there is no need to invest resources in safety measures.<sup>59</sup> This aspect of criminal law is so fundamental that it amounts to a principle: what I have termed elsewhere, with Dr. Halpert, the “Hidden Accidents Principle” of the criminal justice

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55. *Id.* at 1297-99.

56. *Id.* at 1299.

57. *Id.*

58. *Id.*

59. Sangero & Halpert, *supra* note 12, at 1295. Another possible explanation is the erroneous idea that whereas unsafe airplanes pose a risk to all of “us,” an unsafe criminal justice system is a risk only to “them” — that is, potential criminals. *Id.* at 1314. I thank Prof. Alon Harel for this remark.

system.<sup>60</sup>

According to the Hidden Accidents Principle in criminal law, an effective feedback for the criminal justice system is implausible, even in theory.<sup>61</sup> The only way to introduce safety into this system, therefore, is through comparison with fields in which mishaps are seen and can be detected.<sup>62</sup> The Hidden Accidents Principle is evidence of the inadequacy of the Fly-Fix-Fly safety method for criminal law, because of the extreme difficulty of learning from the experience of past accidents in the system when they are a hidden phenomenon.

### III. CURRENT UNSAFETY IN POST-CONVICTION PROCEEDINGS

#### A. *Finality of Verdicts Rule*

Finality of legal proceedings is not a value in and of itself, but rather a means of attaining other goals. These goals must be closely examined so as to, on the one hand, justify the finality rule; while, on the other hand, set its boundaries and exceptions. A central goal of the finality of verdicts rule is to preserve the *deterrence* generated by the verdict by preventing additional appeal.<sup>63</sup> Once a judgment has been rendered and the right to appeal exhausted, the tendency is to leave no hope of continuing the legal proceedings.<sup>64</sup> The aspiration is to accord the judgment maximum stability so as to sustain its deterrent effect.<sup>65</sup> In addition, the knowledge that the legal determination is only temporary detracts from its value. It might also inhibit the healing of victims.

*Efficiency* considerations support the finality of verdicts rule. If a convicted defendant were allowed to appeal interminably, as long as he wishes, there would be no end to the process, the verdict judgment would have little value, and it is expected that the overloaded courts would be incapable of fulfilling their role. Thus, there is both a general and administrative interest in legal proceedings coming to an end.

Nevertheless, one may wonder whether the pursuit of the truth and doing justice can be abandoned only due to the costs of further investigation. The hazard that must be weighed against the justifications for the finality of verdicts rule is the horrific prospect of wrongful conviction and its possible outcomes: that the lives of the falsely convicted defendant and his or her family members will

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60. *Id.* at 1314-16.

61. *Id.* at 1315.

62. *Id.*

63. *Teague v. Lane*, 489 U.S. 288, 309 (1989).

64. *Id.* at 295.

65. *Id.* at 309.

be destroyed; that the true criminal will roam free and might even commit more crimes; and that public confidence in the justice system will be undermined. In my estimation, in the current legal situation, too much weight is accorded to the finality of verdicts rule.<sup>66</sup> As discussed in section C *infra*, in the context of motions for a new trial on a claim of actual innocence, upholding the rule comes at the expense of the inherent value of uncovering the truth.

### B. Appeal

In the American system, all convicted defendants have a right of first appeal.<sup>67</sup> However, the appeal cannot contest the evidence submitted at trial, for it is aimed at correcting legal or judicial error and not errors of fact.<sup>68</sup> Thus, appeals deal almost exclusively with procedural errors, and the appellate courts usually lack the authority to deliberate regarding new evidence or reverse a conviction due to jury error.<sup>69</sup> Despite a defendant's due process right not to be convicted on insufficient evidence, the Supreme Court ruled in *Jackson v. Virginia* that it is sufficient that "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>70</sup> Consequently, the appeal process does not efficiently ensure the exoneration of defendants who were wrongly convicted. As Thomas has asserted, "[t]he notion of 'elusive truth' helps explain why American criminal appeals are almost exclusively about procedural errors rather than whether the convicted defendant was guilty of the crime. If truth is elusive, who can say that the jury was wrong?"<sup>71</sup> He compares the American system to continental systems, where "getting the facts right is normally one of the preconditions to realizing the goal of the legal process."<sup>72</sup> In contrast, American appellate courts are strongly averse to intervening in the factual determinations made at trial.<sup>73</sup>

One explanation for the current ineffectiveness of appeals in

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66. Even in capital cases, the courts emphasize the need for finality. See generally SIMON, *supra* note 10, at 213 (making this observation).

67. Craig M. Bradley, *United States in CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, 519, 546-47 (Craig M. Bradley ed., 2nd ed. 2007).

68. Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 109 (2009).

69. GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS*, 214-19 (2008); Samuel R. Gross, *Pretrial Incentives, Post-conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009, 1021 (2011-2012); Griffin, *supra* note 6, at 1271.

70. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

71. THOMAS, *supra* note 69, at 1.

72. *Id.* at 1-2. See also *id.* at 172, 214-19 (comparing the American criminal appeal procedure to the French and to the German procedures).

73. SIMON, *supra* note 10, at 212.

correcting wrongful convictions is the nature of the jury system.<sup>74</sup> As the jury determines questions of fact and gives only a verdict of guilty or not-guilty without any details or reasoning, it is indeed difficult for the appellate court to review and find error in the factual determinations that led to the conviction of an innocent defendant.<sup>75</sup> Therefore, recommendations for improving the appeal process can be implemented primarily with regard to bench trials, where the fact-finder is a professional judge. But either way, the appeal procedure in its current form is not an effective mechanism for correcting factual errors that led to a false conviction.

### C. *New Trial: Reality (DNA) or Dream (“Harmless Error”)?*

“Exoneration” is defined as “an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted.”<sup>76</sup> There are different sources of exonerations: acquittal in new trial, dismissal of conviction by the court based on new evidence, pardon based on innocence, and posthumous acknowledgment by the state that a prisoner who died in prison was factually innocent.<sup>77</sup>

The harmless error doctrine is likely the biggest obstacle to obtaining a new trial. Even when faced with a constitutional violation,<sup>78</sup> appellate courts must deny relief if the prosecution can show, beyond a reasonable doubt, that the error was harmless (or, in habeas corpus procedure, “did not substantially contribute to the conviction”).<sup>79</sup> The rationale offered for this rule is that because convicted defendants are allegedly almost always actually guilty, there should be finality to a conviction.<sup>80</sup> Thus, appellate courts can hold a constitutional error to be “harmless” if they find that other evidence presented to the jury could support the conviction.<sup>81</sup> In the

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74. The accused has a right to a jury for the initial trial. Appeals are decided by bench trial.

75. As opposed to the reasoned verdict of judges and also of the jury in Spain. Mar Jimeno-Bulnes, *Deliberation In 12 Angry Men*, 82 CHI. KENT L. REV. 759, 760 (2007).

76. Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

77. *Id.*

78. Unless resulting from a structural defect. See *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (excluding structural defects in the trial mechanisms – such as the absolute denial of the right to counsel, judicial neutrality, unjustified dismissal of a jury member belonging to the same racial group as the defendant, denial of the right to self-representation, etc. – from the “harmless error” test).

79. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1698 (2008).

80. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 36 (2005).

81. *Id.*

legal literature, the doctrine of harmless error has been described as “basically a judicial assurance that nearly anything will be tolerated in regard to an obviously guilty defendant,”<sup>82</sup> and as “create[ing] a firewall between constitutional rights and remedies” as an empirical matter.<sup>83</sup>

Strict retroactivity rules, moreover, preclude the application of changes in law to preexisting convictions.<sup>84</sup> Thus, the emergence of a “successful corrective system” is hindered by “the demanding standard of review used by U.S. courts, combined with strict retroactivity rules, a refusal to discover newly discovered impeachment evidence, and a reluctance to test convictions against developments in modern science.”<sup>85</sup> Although a convicted defendant who has new evidence of his innocence has the right to apply for a new trial, the motion must be made before the same judge who convicted him, which inevitably leads to institutional bias.<sup>86</sup> Compounding all this are short statutes of limitations,<sup>87</sup> the high standard of proof the defendant must meet (namely, showing that the new evidence probably would have produced a different result at trial),<sup>88</sup> and the disallowance of impeachment evidence as a basis for relief in most state jurisdictions.<sup>89</sup>

Another obstacle is State limits on post-conviction investigations. State judges and legislators place obstacles to post-conviction investigation by restricting defense counsel's ability to interview certain witnesses: jurors, victims, and State witnesses.<sup>90</sup> These limits undermine the ability to uncover constitutional errors, which lead to wrongful convictions.

If relief is unavailable in the state court, a wrongly convicted defendant can resort to a federal writ of habeas corpus. But “federal courts award relief in only 0.4 percent of the noncapital habeas corpus cases.”<sup>91</sup> Moreover, since *Herrera v. Collins*, the Supreme Court has rejected factual innocence as a basis for relief, except in capital cases,<sup>92</sup> holding that federal habeas review is intended only

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82. *Id.* at 36 n.2 (quoting JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT: LAW, PROCEDURE, FORMS, at xii-xiii (2d ed. 1999)).

83. *Id.* (quoting Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 7 (2002)).

84. Griffin, *supra* note 68, at 141. *But see* Dov Fox & Alex Stein, *Constitutional Retroactivity in Criminal Procedure*, 91 WASH. L. REV. 463 (2016) (showing an influence of the possibility of “watersheds” on the criminal proceedings).

85. Griffin, *supra* note 68, at 107-08.

86. *Id.* at 134.

87. *Id.* at 141-42.

88. *Id.* at 137-40.

89. *Id.* at 144-47.

90. Kathryn E. Miller, *The Attorneys Are Bound and The Witnesses Are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 CAL. L. REV. 135 (2018).

91. SIMON, *supra* note 10, at 212.

92. *House v. Bell*, 547 U.S. 518, 555 (2006). *See also* Griffin, *supra* note 68,

“to ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact.”<sup>93</sup> Accordingly, the Court has never released a person on federal habeas grounds because he was actually innocent.<sup>94</sup> Considerations of finality and reliability are suggested as underlying the Court’s approach<sup>95</sup> because, in the Court’s words, “the passage of time only diminishes the reliability of criminal adjudications” due to the “erosion of memory and desperation of witnesses.”<sup>96</sup> But *Herrera* preceded the DNA revolution, and reliable DNA evidence can be generated even decades after the crime was committed. Therefore, even though the *Herrera* rule itself has not been overturned, the federal legislature and most state legislatures have amended the procedural rules to allow convicts to get a new trial based on DNA evidence.<sup>97</sup>

#### D. New Post-Conviction Proceedings Legislation

The Innocence Protection Act of 2004 led to three positive developments. First, it allows a convicted defendant in federal cases who is “under a sentence of imprisonment or sentence of death” to apply for post-conviction DNA testing, subject to certain limitations.<sup>98</sup> The Act requires that biological evidence in federal cases be preserved while an individual is imprisoned, and allocates federal funds to states to assist with the costs of post-conviction DNA testing.<sup>99</sup> The second improvement is that the Act allows for grants to states to “establish, implement, and improve an effective system for providing competent legal representation” to indigent capital defendants.<sup>100</sup> Third, the Act increased the amount of compensation that can be awarded to exonerated prisoners in federal criminal cases.<sup>101</sup>

Certainly, this legislation is a step in the right direction. Yet it amounts to only a partial solution. To begin with, only state defendants who have been charged with a capital offense or sentenced to death benefit from the improvement in lawyering

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at 136 (analyzing this rule); Thomas, *supra* note 69, at 166-67 (analyzing this rule).

93. *Herrera v. Collins*, 506 U.S. 390, 400, 416 (1993).

94. Michael E. Kleinert, *Improving the Quality of Justice: The Innocence Protection Act of 2004 Ensures Post-conviction DNA Testing, Better Legal Representation, and Increased Compensation for the Wrongfully Imprisoned*, 44 BRANDEIS L.J. 491, 500 (2006).

95. Garrett, *supra* note 79, at 1699-704.

96. *Herrera*, 506 U.S. at 403-04.

97. As discussed in section D *infra*, p. 788.

98. Kleinert, *supra* note 94, at 501 (citing section 411 of the 2004 Innocence Protection Act).

99. *Id.* at 503 (citing sections 411-413 of the 2004 Innocence Protection Act).

100. *Id.* at 504 (citing section 421 of the 2004 Innocence Protection Act).

101. *Id.* at 505 (citing section 431 of the 2004 Innocence Protection Act).

quality.<sup>102</sup> Moreover, all three new arrangements under the Act (ensuring post-conviction DNA testing, legal representation, and increased compensation for the wrongfully imprisoned) should not be limited to federal cases, but extended also to state convicts, all offenses, and all types of punishments. Most important, however, as DNA testing is viable only in rare instances, the Innocence Act should apply to any type of new evidence with the potential of proving innocence.

Almost all states have enacted statutes allowing relief based on new evidence of innocence, usually DNA evidence.<sup>103</sup> But these statutes set arbitrary restrictions that deny DNA testing for some and preclude relief in many cases even where innocence has been shown.<sup>104</sup> Most of the state statutes, for example, allow post-conviction DNA testing, but not other kinds of evidence as the basis for relief. The most prevalent restrictions in these statutes are guilty-plea exclusions (which, in practice, mean the majority of criminal cases are excluded — beyond 94%<sup>105</sup>), custody requirements, due diligence requirements, and a requirement that the technology has advanced since the trial.<sup>106</sup> Many states limit DNA testing to specified serious crimes or require that the petitioner be incarcerated or in custody in order to obtain testing.<sup>107</sup> Moreover, some states require that identity was an issue at trial, thereby precluding relief in cases where a guilty plea was made.<sup>108</sup>

As the empirical aspect of the exonerations was described by Gross: “[t]hese are the exonerations we hear about in the news. But they are very uncommon — perhaps fifty a year, at present, in a country with over a million felony convictions annually, overwhelmingly in murder and rape cases, on average about ten years after conviction.”<sup>109</sup>

#### IV. SAFETY MEASURES

There can be no doubt that significant changes are vital to improve the legal reality of post-conviction proceedings in line with the proposed safety principles. First and foremost, safety must be implemented not only during the investigation and trial proceedings, but also after conviction. As conviction does not require certainty of guilt, the terms for allowing convicted defendants

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102. *Id.* at 508.

103. Garrett, *supra* note 79, at 1716.

104. *Id.* at 1717.

105. In practice, only three percent of all federal cases go to trial, and only six percent of state cases. *See generally* Missouri v. Frye, 566 U.S. 134, 143 (2012) (mentioning this data); *see also* Lafler v. Cooper, 566 U.S. 156, 170 (2012) (mentioning the same data).

106. Garrett, *supra* note 79, at 1717.

107. *Id.* at 1679-80.

108. *Id.*

109. Gross, *supra* note 69, at 1022.

access to DNA testing should be lenient, for example, without setting any time limit on this access.<sup>110</sup> Ensuring the preservation of DNA samples after conviction is also, therefore, vital.

Second, given the proposed principle of an ongoing endeavor to exhaust all potential evidence so as to uncover the truth and in light of the overwhelming asymmetry between the state's power and defendants' power, I contend that defense attorneys (and defendants) should be allowed to submit potentially exculpatory evidence at all stages of the process: at trial, on appeal, and in motions for a new trial. This, of course, should not be limited only to DNA evidence but should rather extend to any evidence that can shed light on the truth. If the system truly seeks to uncover the truth, ensure that justice is done, and prevent further false convictions, it is duty-bound to implement the proposed safety rule.

Third, it is vital that claims of actual innocence be investigated at any stage that they are raised, without any time limit or procedural obstacles. The finality of verdicts rule has been given an inflated status in criminal law and must be relaxed to facilitate comprehensive evaluation of actual innocence claims and the exoneration of falsely convicted defendants. Post-conviction proceedings must not be restricted to examining flaws of only a certain type, such as violations of constitutional rights. With all due respect to the Constitution, protecting the innocent from false conviction is no less of an important goal than protecting constitutional rights. Moreover, defendants' constitutional rights — such as the right to counsel, right to silence, and right to confront the prosecution's witnesses against her — are, it could be argued, intended primarily to protect the innocent. Regardless, however, these two important objectives should not compete against one another, but rather, complement each other.

A number of different recommendations have been made in the legal literature for reforming the system that, in my opinion, have great potential for improving the situation, although each one, of course, would have to be assessed for effectivity following implementation. To begin with, some scholars have proposed adopting the "unsafe verdict" standard in post-conviction proceedings in which a claim of actual innocence has been made. Under this standard, which is currently applied in English law, if the prosecution is unable to show that the conviction is "safe," the defendant is granted a new trial or immediate exoneration.<sup>111</sup> As D. Michael Risinger has explained,

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110. *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, [www.innocenceproject.org/access-post-conviction-dna-testing/](http://www.innocenceproject.org/access-post-conviction-dna-testing/) (last visited Sept. 20, 2018).

111. D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1313-14 (2004).

In virtually every American jurisdiction, when the sufficiency of evidence to support a verdict is attacked, the rubric is the same whether the case is civil or criminal. The party prevailing below is entitled to every inference that a reasonable jury might have made given the evidence on the record considered in its most favorable light. This essentially means accepting at face value all testimonial evidence in favor of the verdict and assuming all testimonial evidence to the contrary to have been rejected on credibility grounds.<sup>112</sup>

Moreover, he notes that for “literally centuries,” American courts have “insulated themselves from responsibility for protecting the factually innocent, hiding behind an artificial concept of evidentiary sufficiency, a misplaced apotheosis of direct witness testimony, and deference to juries. It is time they realized that, in regard to claims of factual innocence, justice demands more.”<sup>113</sup> Lissa Griffin has similarly suggested broadening the U.S. standard for evaluating claims of innocence based on new evidence to resemble the standard currently applied in England.<sup>114</sup> Under the expanded standard, a court would be able to vacate a conviction where the prosecution cannot show that conviction would have resulted even given the new evidence.<sup>115</sup>

Second, other scholars have suggested establishing in the United States a publicly accountable body similar to the English Criminal Cases Review Commission, which was created following the recommendations of the Runciman Commission Report and has operated with considerable success over the years.<sup>116</sup> The CCRC’s mandate is to review claims of wrongful conviction and refer those cases it deems suitable to the court of appeal, and the CCRC is authorized to conduct extensive independent inquiries into wrongful-conviction claims.<sup>117</sup> This includes the authority to subpoena public documents and seek disclosure of information that is not available to the defense, as well as to request independent reports from forensic and psychiatric experts.<sup>118</sup> In practice, it does as much fieldwork as practical on its own.<sup>119</sup> I believe that establishing in the United States an autonomous body along the lines of the CCRC is likely to assist in contending with a number of the problems discussed in this Essay.

A third suggestion made by scholars is to look to continental

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112. *Id.*

113. *Id.* at 1335.

114. Griffin, *supra* note 6, at 1308.

115. *Id.*

116. The first one was probably Griffin, in 2001. Griffin, *supra* note 6; Griffin, *supra* note 68; Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CALIF. W. L. REV. 332, 344-48 (2002).

117. Griffin, *supra* note 6, at 1275-78; Griffin, *supra* note 68, at 111-13. See *What we do*, *supra* note 7 (describing the work of the CCRC).

118. Griffin, *supra* note 68, at 112.

119. *Id.* at 113.

systems, such as the German legal system, where the appellate court “starts over from scratch”: it hears witness testimony, it re-examines the evidence and relevant law, and it reaches its own independent determinations.<sup>120</sup> Such an appeal procedure is far more thorough than what is accepted in the American system, and the chances of correcting a wrongful conviction through such a procedure significantly greater. Inspired by the continental appeal procedure but presuming such a change to be too drastic for the American system, Thomas has proposed the following compromise: requiring appellate courts to determine from the trial transcripts whether the prosecution provided sufficient evidence of the defendant’s guilt, but leaving appeals of procedural errors to continue as present.<sup>121</sup> Under Thomas’s proposed solution, defendants would have the right to request that the court review the record and independently decide “if it has confidence in the conviction”; to this end, the court could even direct the trial judge to take new evidence if it finds it necessary. If the appellate court finds that guilt was not proven beyond a reasonable doubt, it will acquit the defendant.<sup>122</sup>

Fourth, some authors have suggested strengthening the clemency procedure, so that it will become an effective avenue for gaining the release of innocent-convicted inmates.<sup>123</sup> Echoing this aspiration is the *Herrera* Court’s assertion that executive clemency is a meaningful safeguard against wrongful convictions.<sup>124</sup> The Court insisted, furthermore, that one of the roles of clemency is to prevent a miscarriage of justice when the legal process has been exhausted.<sup>125</sup>

Executive clemency is entirely discretionary, however, and generally not open to public scrutiny.<sup>126</sup> State governors often even fear that granting clemency will harm their chances of re-election.<sup>127</sup> It is therefore hardly surprising that the empirical data show that clemency fails to serve as a safety net due, among other things, to political circumstances and forces.<sup>128</sup> On this background, it has been suggested that Congress and state legislatures establish review bodies resembling the CCRC to investigate, assess, and advise on clemency and pardon applications.<sup>129</sup>

On the one hand, I believe that the wrongly convicted deserve not only physical release from imprisonment, but also a full clearing

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120. THOMAS, *supra* note 69, at 216-17.

121. *Id.* at 217. *See also* Risinger, *supra* note 111, at 1313-14 (offering a similar suggestion).

122. THOMAS, *supra* note 69, at 223-24.

123. Griffin, *supra* note 6, at 1299-300; Griffin, *supra* note 68, at 152.

124. *Herrera*, 506 U.S. 390 (1993).

125. *Id.* at 411-12.

126. Griffin, *supra* note 6, at 1299.

127. *Id.*

128. *Id.* at 1306.

129. *Id.*

of their name in the framework of legal proceedings, such as a new trial. On the other hand, so long as the present system is failing (and, at times, not even trying) to live up to this ideal, clemency should not be rejected as an alternative means of ending the injustice. However, after release from prison through clemency, the former inmate should be allowed, if he so desires, to pursue legal proceedings to reveal the truth and fully clear his name.

I will close this discussion with two final thoughts on the role of new trials. One idea is that the weaker the guarantees of a fair trial, the greater the need to broaden the grounds for granting a new trial. As is known regarding procedural causes of false convictions in light of the findings of the Innocence Project, the existing guarantees of a fair trial are not strong enough. Given that the overwhelming majority of convictions are attained not through trial proceedings but through plea bargains, and that the appeals process is futile, principally because there is no scrutiny of the factual determinations made at trial, there is an urgent need for an effective new trial procedure.

The second point is that as is known about evidentiary causes of false convictions, there seems to be a historical pattern whereby with every new generation, there is an understanding that certain types of evidence considered in the past to be strong proof of a person's guilt are, in fact, not particularly reliable and even erroneous, and that they mislead judges and juries.<sup>130</sup> Thus, they should be given less weight than accorded in the past. The new trial mechanism can and should be used, then, to correct miscarriages of justice by reviewing past convictions and the evidence on which they were based from the current, up-to-date perspective.

## V. CONCLUSION

There have always been, and always will be, accidents — including false convictions. In some aspects of our life, this appears to be an inevitable reality. However, a high rate of accidents is not an unavoidable fact of life, but rather the product of human negligence, or even indifference — when we are aware of the danger but do not act purposefully to reduce it. Since safety theory and safety measures are not yet developed in the criminal justice system, we have to learn it from other areas, such as aviation, transportation and engineering.

It is extremely difficult to correct an error after conviction. In order to bring SAFETY to post-conviction proceedings, this Essay offers some safety measures:

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130. Thus, for example, The National Academy of Sciences 2009 report uncovered “junk science” pretending to be scientific evidence: NAT'L RESEARCH COUNCIL, COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY. ET AL., *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009).

1. First and foremost, safety must be implemented not only during the investigation and trial proceedings, but also after conviction. The terms for allowing convicted defendants access to DNA testing should be lenient, for example, without setting any time limit on this access. Ensuring the preservation of DNA samples after conviction is also, therefore, vital.
2. Defense attorneys and defendants should be allowed to submit potentially exculpatory evidence at all stages of the process: at trial, on appeal, and in motions for a new trial. This, of course, should not be limited only to DNA evidence but should rather extend to any evidence that can shed light on the truth.
3. It is vital that claims of actual innocence be investigated at any stage that they are raised, without any time limit or procedural obstacles. Post-conviction proceedings must not be restricted to examining flaws of only a certain type, such as violations of constitutional rights.
4. The (English law) “unsafe verdict” standard should be adopted in post-conviction proceedings in which a claim of actual innocence has been made.
5. A publicly accountable body similar to the English Criminal Cases Review Commission should be established in the United States too. Its mandate should be to review claims of wrongful conviction and refer those cases it deems suitable to the court of appeal. It should be authorized to conduct extensive independent inquiries into wrongful-conviction claims.
6. The appellate court should “start over from scratch” (as done in the German legal system): it should hear witness testimony, re-examine the evidence and relevant law, and reach its own independent determinations. Such an appeal procedure is far more thorough than what is accepted in the American system, and the chances of correcting a wrongful conviction through such a procedure significantly greater.
7. The clemency procedure should be strengthened, so that it will become an effective avenue for gaining the release of innocent-convicted inmates.

8. Developing a comprehensive safety theory for the criminal justice system will require considerable additional cross-disciplinary research work, which I recommend be undertaken within the framework of a Safety in the Criminal Justice System Institute (“SCJSI”).<sup>131</sup>

It is my hope that this Essay succeeds to convince society of the need to “THINK SAFETY” and to establish safety requirements with the power to generate a truly positive change and to significantly reduce the terrible phenomenon of false convictions.

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131. Introducing modern safety into systems lacking a culture of safety requires the establishment of a special institute to carry out this function, and the securing of resources necessary for the new institute to operate in a meaningful way. Thus, for example, in the field of aviation, the Federal Aviation Administration (“FAA”) was established; in the field of transportation, the National Transportation Board (“NTSB”) was founded; in the area of food and drugs, there is the Food and Drug Administration (“FDA”); the Occupational Safety and Health Administration (“OSHA”) serves the occupational field; and various such bodies were established in the medical field, such as the National Center for Patient Safety (“NCPS”) and the Center for Patient Safety Research and Practice. In all of these fields, the recognition of safety issues and the need to improve performance led to national focus on safety leadership, the development of a knowledge base, and the distribution of information, an agenda to which substantial resources were devoted.