

## Criminal Justice Theory Blog

# Safety from False Convictions

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**T**here is no greater injustice that a liberal state routinely inflicts upon its citizens than convicting the innocent. There have always been, and always will be, accidents. 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 and—when we are aware of the danger but do not act purposefully to reduce it—even indifference.

At present, following the astonishing findings of



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the Innocence Project in the United States, the findings of Runciman Committee in England, and those of other studies throughout the world, we can no longer bury our heads in the sand. It is already clear today that there is a significant phenomenon of wrongful convictions.

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The criminal justice system should be categorized as what is termed in safety engineering a “safety-critical system.”<sup>[1]</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 crash, not only from a metaphorical perspective but also in the very realistic terms of economic cost.<sup>[2]</sup>

A few definitions and clarifications are needed at this stage. In criminal justice, a *false conviction* is the central equivalent to *an accident* such as an airplane crash. There are, of course, other types of accidents in criminal law besides false convictions, such as false arrest, an aggressive interrogation, or a humiliating search, which also cause significant harm to the suspect. Yet generally, false conviction is the most significant accident in that it causes the greatest amount of harm. False convictions as a group can, of course, be distinguished and classified by the severity of the harm caused. For example, it is clear that short-term imprisonment is graver than a fine, and long-term imprisonment is harsher than short-term imprisonment. Yet because all false convictions entail significant damage, including the stigma that attaches to the person who is falsely convicted and labeled a criminal, the suggested definition of accidents will cover all classes of false convictions. With regard to what defines a “false conviction,” although all kinds of wrongful convictions should be prevented, including those marred by serious constitutional or other procedural or due process errors, the focus in this article is on convictions despite factual and actual innocence.

It should be stressed that a false acquittal—a situation in which there was the evidence necessary to prove the defendant’s guilt beyond a reasonable doubt but the fact-finder mistakenly acquitted him—does not constitute an accident. It can instead be regarded as the criminal justice system’s failure to perform its function, just as when a plane fails to transport passengers to their intended destination.

In those fields in which there has traditionally been awareness of the need for modern safety—space, aviation, and transportation, for example—there is an ongoing attempt to improve safety, based on feedback that enables the determination of whether the previous safety goals have been attained and whether it is possible to move forward and set new goals. In the criminal justice

system, however, there is no such feedback in general, due to what has been dubbed *the Hidden Accidents Principle in criminal law*,<sup>[3]</sup> which considerably hinders any advancement in promoting safety. I will suggest ways to improve the criminal justice system despite this principle, such as implementing an incident-reporting duty and applying insights and experience from spheres of life in which accidents are discernible.

## Modern Safety from False Convictions

Modern safety began to develop following World War II. 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. This method was based on a system of learning from past experience to repair product defects and flaws and prevent future mishaps. However, such a system does not safeguard against future mishaps that can be caused by other, as-yet undetected defects. This approach became clearly inadequate with the rapid advances in aviation technology and rising costs of airplanes. This made learning from experience too expensive, leading to a shift in approach over seven decades ago, and the birth of modern safety.

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. The “Fly-Fix-Fly” approach was thus replaced by the “Identify-Analyze-Control” method, with its aim of “First-Time-Safe.” 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.

Modern safety approaches such as these were implemented in other fields as well, such as transportation and engineering, and later on, in labor and medicine. 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.

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. 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, except for those few that are discovered by courts in successful appeal proceedings. Even worse, accidents are not always investigated either.

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.

The obvious question that arises is why safety measures have yet to be implemented in criminal law – in addition to the existence of appeal procedures and of other regulations of criminal procedure law, like the presumption of innocence and the fair trial principle – which are all not effective. 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 high rate of false convictions, policymakers and the public alike are certain that the system performs well and that there is no need to invest resources in (additional) safety measures. 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. This aspect of criminal law is so fundamental that it amounts to a principle: what has been termed the “Hidden Accidents Principle” of the criminal justice system.

According to the Hidden Accidents Principle in criminal law, effective feedback for the criminal justice system is implausible, even in theory. 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. The only way to introduce safety into this system, therefore, is through comparison with fields in which mishaps are seen and can be detected. Here are some examples.

## **Establishment of a “Safety in the Criminal Justice System Institute” (SCJSI)**

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 United States, 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. 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.

It is certainly possible—at least theoretically—for safety to develop in any given field step by step, without the support of a central guiding institute. Yet an “evolutionary” process of this kind takes many years to reach completion, during which a heavy price will be paid in preventable accidents. In effect, from the moment the moral and economic justification for practicing safety in a particular field has been recognized—including the criminal justice system—the failure to take decisive action to promote safety becomes negligence, for the harms that could have been prevented exceed immeasurably the means necessary for preventing them.

What are the more specific goals that should be set for the SCJSI? First, the SCJSI will have to devise a sophisticated mechanism for mandatory reporting of accidents and an incident reporting mechanism that is partly mandatory and partly voluntary, while allowing immunity from liability for the reporter.

Second, the SCJSI will have to initiate and fund advanced research in all the relevant areas, such as eyewitness testimony<sup>[4]</sup>, confessions<sup>[5]</sup>, forensic evidence<sup>[6]</sup>, plea-bargains<sup>[7]</sup> and post-conviction proceedings<sup>[8]</sup>.

Third, the SCJSI should foster a culture of safety among all those who work in criminal justice, including the police investigators, laboratory experts, prosecutors, judges, and jury members. This will require the dissemination of information, through research studies and publication as well as in workshops and training. It would be best to incorporate this already into the basic professional training in the relevant fields and in law studies.

Fourth, based on the research that the SCJSI will initiate and the reports that will be received through the SCJSI’s reporting mechanism, data should be gathered in all the relevant areas. These data will be made fully accessible and released to the public and will be used for further research.

Fifth, the SCJSI must either include internal experts or else appoint external teams of experts in each of the relevant areas, who, based on the collected data and research findings, will formulate recommendations for improving every subsystem in the criminal justice system, such as the police, prosecution, laboratory experts, defense attorneys, jury members, and judges; moreover, a national code of ethics will be formulated for each of these areas. A team of experts must also be set up to address the structure of the criminal justice system; this team will be able to make recommendations for structural changes (such as removing administrative control of public forensic laboratories from the hands of law enforcement agencies or prosecution offices). In addition, teams should be established to deal with each of the central types of evidence in criminal trials, with a separate team for each type of evidence. The teams will develop a “best practice” and suitable safety tools for their relevant field. Every team will include a safety professional, who will be qualified to propose the adoption of modern safety techniques that are implemented in other areas, such as aviation, transportation, engineering, and medicine.

Sixth, the SCJSI should publish the “best practices” and recommendations formulated by the various teams of experts and ensure that they are conveyed to the relevant position-holders, by way of training, continuing education programs, information campaigns, etc. Safety training should be made an integral part of the professional training, and periodical training workshops on safety should be a condition for professional promotion.

Seventh, the SCJSI should be allocated a significant budget that will not only be sufficient for the Institute’s operations but also for encouraging other entities and researchers to engage in research with the potential of advancing safety in the criminal justice system. Thus, for example, it would be worthwhile to pursue collaborations with university researchers.

Eighth, the SCJSI should publish an annual report on what it has accomplished over the preceding year in promoting safety in criminal justice and what the Institute’s goals will be for the forthcoming years. In this context, the principle of ongoing improvement is most relevant and noteworthy. Under this principle, once safety goals have been met, new goals must be set and pursued, in an ongoing, unending process. Accordingly, as long as there are false convictions (and it seems that this will always be the case, at least in the foreseeable future) there will be a need to continue on the path of ongoing improvement.

Last, of course, for any of the above to occur, Parliament should pass legislation establishing the Institute and granting it a budget that will allow its effective operation. As there is a significant rate of false convictions and as considerable

damage is caused by each false conviction, it is economically warranted to invest significant funds in the development of modern safety in criminal justice.

## Conclusion

Falsely convicting innocents is a huge injustice that the state itself inflicts on its citizens. Since safety theory and safety measures are not developed in the criminal justice system, we have to learn it from other areas, such as aviation, transportation and engineering. The high rate of false convictions is not an unavoidable fate.

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[1] 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 *Hamline L. Rev.* 65, 70 (2009).

[2] Boaz Sangero & Mordechai Halpert, *A Safety Doctrine for the Criminal Justice System*, *Mich. St. L. Rev.* 1293, 1304–05 (2011).

[3] *Id.* at 1314–16.

[4] Boaz Sangero, *Applying the STAMP Safety Model to Prevent False Convictions Based on Eyewitness Misidentifications*, 83 *Albany Law Review* 931 (2020).

[5] Boaz Sangero, *Safety from False Confessions*, 54(1) *Crim. L. Bulletin* 25 (2018).

[6] Boaz Sangero, *Safety from Flawed Forensic Sciences Evidence*, 34 *Ga. St. U. L. Rev.* 1129 (2018).

[7] Boaz Sangero, *Safety from Plea-Bargains' Hazards*, 38 *Pace L. Rev.* 301. (2018).

[8] Boaz Sangero, *Safety in Post-Conviction Proceedings*, 51 *The John Marshall Law Review* 773 (2019).

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