

Edited by / Herausgegeben von  
Emil W. Pływaczewski / Ewa M. Guzik-Makaruk

# **CURRENT PROBLEMS OF THE PENAL LAW AND CRIMINOLOGY**

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# **AKTUELLE PROBLEME DES STRAFRECHTS UND DER KRIMINOLOGIE**



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Reviewers/die Gutachter:

Prof. Dr. habil. Dr. h.c. mult., Dipl.-Psych. Helmut Kury, Max-Planck-Institut Freiburg  
im Breisgau

David Weisburd, Ph.D., Distinguished Professor, George Mason University

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## Contents/Inhaltsverzeichnis

Current Problems of the Penal Law and Criminology-origins and present status at Criminology School in Białystok .....	XI
Aktuelle Probleme des Strafrechts und der Kriminologie – ihre Herausbildung und ihr derzeitiger Zustand in der Kriminologischen Schule in Białystok .....	XXXI
<b>PENAL LAW/STRAFRECHT .....</b>	<b>1</b>
<i>Vanessa McAllister, Kurt Schmoller</i>	
Abgekürzte Strafverfahren in Österreich: Diversion und Mandatsverfahren .....	3
<i>Gülsün-Ayhan Aygörmmez-Uğurlubay</i>	
Umweltdelikte im türkischen Strafgesetzbuch .....	23
<i>Olga Dubovik, Alla Roehricht</i>	
Russian medical legislation and the life quality .....	44
<i>Gunnar Duttge</i>	
Die zweite Katastrophe im Zuge des Germanwings-Absturzes: Der Umgang mit der ärztlichen Schweigepflicht .....	53
<i>Maria Elisabete Ferreira</i>	
Portuguese criminal law on domestic violence and the requirements of the Istanbul Convention .....	62
<i>Martin Heger</i>	
Strafbarkeit des Leugnens des Holocausts .....	74
<i>Jan C. Joerden</i>	
On the problem of <i>dolus alternativus</i> .....	87
<i>Věra Kalvodová</i>	
Current trends of sanctioning in the Czech Republic .....	98
<i>Rimma Nickolayevna Klyuchko</i>	
Criminal legal description of signs of inaction of officials (Art. 425 of the Criminal Code of the Republic of Belarus) .....	110
<i>Maciej Małolepszy</i>	
Vernachlässigt der polnische Strafgesetzgeber die Generalprävention? ..	118

# Contents/Inhaltsverzeichnis

*Klaus Marxen*

- Der Beitrag des Strafrechts zur Überwindung von Systemunrecht –  
deutsche Erfahrungen ..... 133

*Joanna Melz, Alice Anna Bielecki, Claudia Zielińska*

- „Verbotene“ Lieder? Ein Überblick über strafrechtlich kontroverse  
Musik in Deutschland ..... 145

*Angelika Pitsela, Theofili Chatzisprou*

- Alternative measures and sanctions in the Greek criminal justice  
system ..... 174

*Emil W. Pływaczewski, Ewa M. Guzik-Makaruk, Szczesny Szymański,  
Tomasz Kałużny, Anna Jacyniewicz*

- New solutions in Poland in the interrogation of child victims of sexual  
crimes ..... 197

*Uwe Scheffler*

- Balthus, der Maler der „Gitarrenstunde“, und das neue deutsche  
Kinderpornographiestrafrecht ..... 211

*Keiichi Yamanaka*

- Kontext- und Paradigmenwechsel bei Rechtsrezeption und -fortbildung  
mit Beispielen der japanischen Strafrechtswissenschaft ..... 252

*Yuri Yamanaka*

- Transplantation von Organen lebender Spender in Japan ..... 273

## CRIMINOLOGY/KRIMINOLOGIE ..... 283

*James F. Albrecht*

- The “realism” of contemporary policing: analyzing the potential for  
applying the “left realism” theory of justice to modern law enforcement  
practices ..... 285

*Kate Angulski, Jurg Gerber*

- Human rights and drug policy: a comparative study using freedom  
indexes ..... 302

*Hasan T. Arslan, Kailey Adametz*

- Intelligence for the homeland security: the Skilled Worker Expedited  
Review Program (SWERP) ..... 319

*Liqun Cao*

- Crime control, ideology, recent laws in Canada ..... 335

ht – .....	133	<i>Mesut Hakkı Caşın</i> The massive Syrian refugees crisis: how to respond humanitarian law and impact on European security .....	348
rse .....	145	<i>Diana Dajnowicz-Piesiecka</i> Legal and criminological aspects of parental abduction from the standpoint of Polish criminal judicial decisions .....	362
e .....	174	<i>Obi N.I. Ebbe</i> Crimes of the privileged class .....	377
i, sexual .....	197	<i>Wojciech Filipkowski</i> The use of data mining technology for fighting cyber crimes – selected forensic aspects .....	386
.....	211	<i>Marek Fryšták, David Čep</i> An influence of legal framework in the Czech Republic on development of economic criminality after 1989 .....	396
ildung .....	252	<i>Jarrold Gilbert, Benjamin Elley, Greg Newbold</i> Desistance among higher-risk youthful offenders .....	408
.....	273	<i>Yakov Gilinskiy</i> Crime and social control in the postmodern society .....	423
.....	283	<i>Jack R. Greene, Ineke Haen-Marshall, Heike P. Gramckow</i> Improving local police services in the developing world .....	433
for cement .....	285	<i>Edita Gruodytė</i> Drug policy for illegal possession of narcotic drugs and psychotropic substances: challenges and trends in international and national level ....	452
n .....	302	<i>Anna Gurinskaya, Yakov Gilinskiy</i> Social exclusion, crime and victimization: the Russian experience .....	469
ed .....	319	<i>C. Ronald Huff, Michael Naughton</i> Wrongful conviction reforms in the United States and the United Kingdom: taking stock .....	482
.....	335	<i>Magdalena Ickiewicz-Sawicka</i> Exclusion and discrimination against Serb minority in the Republic of Kosovo in the lights of international human rights protection .....	505
		<i>Emilia Jurgielewicz-Delegacz</i> Traffic accidents in Poland in the light of results of statistical research .	517
		<i>Karl-Ludwig Kunz</i> Kriminalität, Strafe und Gesellschaft .....	535

*Katarzyna Laskowska*

- Organizational structure of organized criminal groups involving foreigners that are active in Poland in the light of the results of studies of criminal case files ..... 542

*Mark Lauchs*

- Bikies in Europe ..... 557

*Jianhong Liu*

- Institutional analyses and criminology: fundamental conceptual and methodological issues ..... 573

*Jolanta Łopusiewicz-Redo*

- Pro publico bono* legal assistance for the materially impoverished clients, as a contribution to the United Nations sustainable development goals 2016–2030: A Eurasian view ..... 593

*Anthony Minnaar*

- Malware and data breach cyberattacks and the (more) organised cybercriminals: how “organised” are they? ..... 601

*Antonello Miranda*

- The limits of the law and the future of compliance ..... 630

*Magdaléna Ondicová, Dagmar Kralovičová*

- Juvenile delinquency in the context of the Slovak Republic and its prevention with emphasis on tertiary prevention ..... 642

*Witold Pawlak*

- The approach of the court (A) in relation to the artificial nutrition and hydration of terminally ill patients and (B) in relation to the sterilisation of women who lack capacity ..... 662

*Magdalena Perkowska*

- Border criminality in Poland – myths and reality ..... 683

*Michael Platzer*

- International aspects of social exclusion of migrants ..... 698

*Szilveszter Póczik*

- Muslim radicals from the Balkans and Hungary in the Syrian war. A comparative study with focus on social history and security policy ... 708

*Sławomir Redo*

- New instruments and approaches for countering social exclusion: A criminological contribution to the United Nations post-2015 educational agenda ..... 723

*Jerzy Sarnecki*

- Crime and measures to combat crime in socio-economically deprived areas. A criminological analysis ..... 738

*Rick Sarre*

- The criminological quest today: what should we be focusing our research on? ..... 768

*Charles B. A. Ubah, Osy E. Nwebo, S. Ezeanyika*

- Transnational crime and international organization: the challenge of internal and international security ..... 781

*S. George Vincentnathan, Lynn Vincentnathan*

- Exclusion, dalit type-script, and deviance under the caste system in Tamil Nadu ..... 803

*Minoru Yokoyama*

- Exclusion and inclusion of offenders in Japan with low tolerance ..... 829

*Jinwu Zhang, Jianhong Liu*

- Strain, illegitimate opportunity and delinquency: consolidating social structure in China ..... 853

*Malgorzata J. Zuber, Edward W. Greenberg*

- Cross-cultural dispositions to crime: an investigation of macro-environmental influences on neutralization ..... 865

- About the editors/Über die Herausgeber ..... 883

- About the reviewers/Über die Gutachter ..... 891



C. Ronald Huff<sup>1</sup>, Michael Naughton<sup>2</sup>

## Wrongful conviction reforms in the United States and the United Kingdom: taking stock

### ABSTRACT

*The past few decades have seen a growing interest in, and concern about, the problem of wrongful convictions and miscarriages of justice in many common law jurisdictions. This interest is reflected in scholarly research, in public opinion polls, and in reforms designed to prevent such miscarriages of justice. Although this trend is clear, there has been less progress in cross-national research focusing on how wrongful convictions occur in different criminal justice systems and what those nations are doing to reduce such errors. This paper discusses the problem of wrongful convictions in the United States and the United Kingdom. It provides an analysis of the effectiveness and shortcomings of recent reform efforts and offers recommendations for future reforms.*

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<sup>1</sup> C. Ronald Huff is Professor Emeritus in the Department of Criminology, Law and Society at the University of California, Irvine and at the John Glenn School of Public Affairs at The Ohio State University. Dr. Huff's publications include more than 100 journal articles and book chapters and 13 books, the most recent of which are *Wrongful Conviction and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (Routledge 2013, with Martin Killias); *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Temple University Press 2008, with Martin Killias); and *Gangs in America III* (Sage Publications 2002). He is a Fellow and Past-President of The American Society of Criminology. His other honors include both the August Vollmer Award and the Herbert Bloch Award from the American Society of Criminology; the Gerhard O.W. Müller International Award from the Academy of Criminal Justice Sciences; the Donald Cressey Award from The National Council on Crime and Delinquency; the Paul Tappan Award from the Western Society of Criminology; and an Outstanding Academic Book Award from the American Library Association (for *Convicted but Innocent: Wrongful Conviction and Public Policy*). He has served as a consultant to the attorneys general of California, Ohio and Hawaii; the U.S. Senate Judiciary Committee; the F.B.I. National Academy; and the U.S. Department of Justice.

<sup>2</sup> Dr. Michael Naughton is a Reader in Sociology and Law, University of Bristol, UK. His research is focused on the specific topics of miscarriages of justice and the wrongful conviction and imprisonment of the innocent, for which he has almost 60 publications in print. He is author or sole editor of four books: *The Innocent and the Criminal Justice System* (2013); *Claims of Innocence: An introduction to wrongful convictions and how they might be challenged* (2010); *The Criminal Cases Review Commission: Hope for the Innocent?* (2009); and, *Rethinking Miscarriages of Justice* (2007). In 2004, Dr. Naughton established innocence Network UK (INUK) to pioneer the introduction of innocence projects into UK universities with the task of investigating and overturning identified wrongful convictions given to factually innocent people. Under the auspices of INUK, Michael has so far facilitated a total of 36 innocence projects to be established in the UK, 35 in universities and 1 in a corporate law firm.



## I. INTRODUCTION

The past few decades have seen a growing interest in, and concern about, the problem of wrongful convictions and/or miscarriages of justice, in many common law jurisdictions (see, for instance, Huff and Killias 2013, 2008), with wrongful convictions and miscarriages of justice used interchangeably in this article and understood simply as the wrongful conviction of a factually innocent person who did not commit the crime that they were convicted of and played no part at all in it (for a discussion of the different meanings that wrongful convictions and miscarriages of justice can have, see Naughton 2013, pp. 15–33).

A key driver in the U.S. has been the work of The Innocence Project, a national litigation and public policy organisation dedicated to exonerating innocent wrongfully convicted people through DNA testing to determine the truthfulness or otherwise of alleged wrongful convictions. Indeed, at the time of writing (February 2016) DNA testing has been successfully harnessed to exonerate 337 individuals in the U.S. who were convicted of serious criminal offences and given life sentences, including 20 individuals who had been sentenced to death (see The Innocence Project 2016a). An analysis of those cases reveals these additional facts:

1. The average sentence served by DNA exonerees has been 14 years (The Innocence Project 2016a).
2. Exonerations have been won in 37 states and the District of Columbia (The Innocence Project 2016b).
3. About 70 percent of those exonerated by DNA testing are racial/ethnic minorities (The Innocence Project 2012).

Just as crucially, in 166 of those 337 DNA exonerations the actual perpetrators of the crimes for which the innocent victims were convicted and imprisoned have been identified, adding an additional dimension to the overturning of wrongful convictions that has been facilitated by DNA testing in the interests of truth and justice (see Baumgartner, Grigg, Ramirez, Rose and Lucy, 2014; also Naughton, 2014). The cases at the center of these efforts have spawned important reforms, at both the state and federal levels, that attempt either to provide mechanisms to overturn genuine wrongful convictions or to provide forms of compensation and other forms of redress to victims.

In the UK, restricted here to an analysis of the criminal justice system of England and Wales, a similar picture emerges of certain high profile miscarriage of justice cases which exemplify new “errors” prompting profound criminal justice system reforms over the last 20 or 30 years that seek either to prevent wrongful convictions or allow them to be overturned when they occur (see Naughton 2007, pp. 79–95; 2001, pp. 50–65). However, in sharp contrast to the ways in which alleged wrongful convictions are dealt with in the U.S., DNA is not a dominant feature in attempts to overturn alleged wrongful convictions in the UK or in influencing the reforms that have flowed from them. This is despite the fact that the harnessing of DNA science is very much a UK

discovery, which was first reported in 1984 by Sir Alec Jeffreys at the University of Leicester, UK. Another crucial difference is that there is no real concern with whether alleged victims of miscarriages of justice are innocent in the UK in the way that there is in the U.S. In the U.S., for instance, there is specific federal legislation in the form of the Justice for All Act of 2004, which incorporated the Innocence Protection Act of 2004. It allows all prisoners convicted of federal offenses who are maintaining "actual innocence" access to DNA testing if, among other criteria, the following are satisfied:

"The specific evidence to be tested must not have been previously tested, except that testing using a newer and more reliable method of testing may be requested;

The proposed DNA testing may produce new evidence raising a reasonable probability that the applicant did not commit the offense" (Innocence Protection Act of 2004, Title IV, Subtitle A).

All 50 U.S. states now have statutes that provide for post-conviction DNA testing but many are limited in scope and substance. The growing importance of the role of DNA science in the U.S. criminal justice system can be evidenced from the provisions for post-conviction DNA testing in all 50 states and the nearly 1.3 billion USD of funding to facilitate post-conviction DNA testing authorized by the Innocence Protection Act, which demonstrates the strength of a federal commitment to exonerating the factually innocent in the U.S. (see Naughton and Tan 2010, p. 330).

Alternatively, the focus in the UK is on the procedural propriety or otherwise of the pre-trial and trial processes and on fresh evidence (s. 23, Criminal Appeal Act 1968) that was not available at the time of the original trial at the appeal and post-appeal stages. This was clarified in the successful appeal case of *R v Hickey and Others* in the following terms:

"This Court is not concerned with the guilt or innocence of the appellants, but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair, if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened" (*R v Hickey and Others*, part 4).

In the UK, then, wrongful convictions are overturned because they are deemed to be "unsafe" in law (s. 2 of the Criminal Appeal Act 1995) and not because the successful appellants were or even might be innocent. As such, the quashing of the convictions of appellants believed to be factually guilty is also a normal feature of the criminal appeals system if they were obtained in breach of due process (see, for instance, *R (Mullen) v Secretary of State for the Home Department*; also, *R v Clarke* and *R v McDaid*; and *R v Weir*).

Against this background, the remainder of this analysis considers some of the major reforms that have been introduced in response to the problem of wrongful convictions in the U.S. and the UK since the mid-1980s. We see this as an appropriate time to ground our analyses since it was at that time when

DNA was discovered, making possible the "truth and justice through science" approach that we have seen emerging in the U.S. It was also during this period that two royal commissions were formed in response to miscarriages of justice in the UK, which introduced a range of core and fundamental legislative reforms to try to prevent or remedy them when they occur. First, we evaluate the effectiveness of the key wrongful conviction reforms in the U.S. and UK in turn. Finally, in the conclusion, we highlight lessons that each jurisdiction can learn from the other and offer best practice recommendations for future reforms from a combined analytical approach.

## 2. WRONGFUL CONVICTION REFORMS IN THE U.S.

A great deal of progress has been made in the United States with respect to identifying and preventing wrongful convictions, but much more needs to be accomplished. In addition to some of the specific reforms discussed here, there is growing official and public awareness of the problem, which has resulted in improved identification of proven cases of error and increased legislative and policy reforms intended to help identify and reduce such miscarriages of justice.

## 3. LEGISLATION AND PUBLIC POLICY

Progress in forensic science has also benefited from legislative and public policy reforms. The Justice for All Act became law in the U.S. in 2004. It incorporated provisions from the prior Innocence Protection Act, including the Kirk Bloodsworth Post-Conviction DNA Testing Program. This legislation was extremely important in providing increased funding for, and guidelines governing, the use of DNA technology within the criminal justice system. As already mentioned, this Act provides that convicted felons can obtain post-conviction DNA testing if they claim their innocence, assert that the DNA testing would produce new evidence in support of that innocence, and argue that the DNA testing would create a reasonable probability that the applicant is factually innocent because s/he did not commit the crime.

The Act also (1) provides for additional grants to state and local governments to analyze DNA samples and to improve DNA labs and (2) improves "quality control" in DNA testing by requiring government labs to undergo accreditation and auditing at least once every two years to prove that they are in compliance with federal standards. This legislation also authorized state crime labs to include in their databases the DNA profiles of all individuals whose DNA samples were lawfully collected, including samples from both adult arrestees and juveniles who were adjudicated delinquent. Finally, this important law also extended indefinitely the statute of limitations at the federal level in cases wherein DNA testing implicates a perpetrator – as long as it takes to discover the perpetrator's actual identity.

#### 4. THE DEATH PENALTY

In the U.S., as in the UK, criminal conviction requires proof “beyond a reasonable doubt”. Since convictions are, then, based on a probability of guilt rather than a certainty of guilt, public policy and practice provide for appellate review leading to the possible exoneration of the innocent. However, what if the wrongfully convicted person is executed before s/he is proven innocent? The U.S. criminal justice system can exonerate and, in most states and to varying degrees (discussed below) compensate and reintegrate the wrongfully convicted but if an innocent person has been put to death, that is obviously not possible. For this reason, the death penalty is a major item on the agenda of the innocence movement in the U.S. This is not an issue in the U.K. of course, since no death penalty exists there, nor does it exist among any member nation of the European Union, where abolition is a pre-condition of membership (see European Union 2016).

Following the exonerations of 13 men on death row in Illinois, then Governor George Ryan decided that there were too many questions concerning the administration of the death penalty. In 2000, he imposed a moratorium on executions and appointed a commission to study the death penalty. He subsequently commuted the death sentences of all those who were then on death row and appointed a commission to study the death penalty and make recommendations. The Committee’s report and recommendations (see Report of the Governor’s Commission on Capital Punishment 2002) had significant impact throughout the nation and was followed by similar efforts in other states, along with a death penalty moratorium established by the American Bar Association (American Bar Association 1997). Illinois subsequently abolished the death penalty, but 31 of the 50 states still retain it and a total of 1427 persons have been executed in the U.S. since 1976 while nearly 3000 continue to reside on the nation’s death rows (Death Penalty Information Center 2016).

Executions in the U.S. have declined significantly since reaching a peak in 1999, when 98 persons were put to death. In 2015, that number had declined to 28 (Death Penalty Information Center 2016). Sentences to death in American courts have followed a similar decline, from a high of 295 in 1998 to a low of 49 in 2015 (Death Penalty Information Center 2016). Increasing public awareness of wrongful convictions, especially those based on DNA testing, as well as highly publicized problems that have occurred in carrying out death sentences, have undoubtedly been important factors in citizens’ support for the death penalty, from a high point in 1994 (80% support) to recent polling showing about 60% support (see Saad 2013). Moreover, many death penalty supporters prefer a punishment other than death when given options such as life imprisonment with or without parole (Death Penalty Information Center 2016).



## 5. THE "INNOCENCE MOVEMENT"

What is now commonly referred to as the "innocence movement" in the U.S. broadly consists of The Innocence Project, the affiliated innocence projects that The Innocence Project has spawned in nearly every state in the U.S., as well in as a number of other nations under the auspices of the Innocence Network (for a list of innocence projects in the U.S. and around the globe see The Innocence Network 2016) and various innocence commissions. More specifically, the Innocence Network represents "(...) an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions" (Innocence Network 2016). It holds an annual conference that brings together representatives of all these organizations, as well as exonerees from the U.S. and other nations, researchers, public officials, and other interested citizens.

Another important organization in the innocence movement in the U.S. has been the Center on Wrongful Convictions, based at Northwestern University's School of Law. Since its founding in 1998, the Center's efforts have resulted in the exonerations of many innocent men and women. The Center reviews these requests and represents imprisoned clients with claims of actual innocence. Although the Center focuses primarily on post-conviction cases, it occasionally assists in the retrials of cases that have been reversed and remanded. The Center also has pioneered projects focused on representing wrongfully convicted youth and women – the first projects of their kind in the United States. It has also produced several groundbreaking articles on the causes of wrongful convictions, helped initiate major policy reforms in Illinois and many other states, and was the co-creator of the National Registry of Exonerations, which will be discussed below (Center on Wrongful Convictions 2016).

Long before the founding of The Innocence Project and the Center on Wrongful Convictions, Centurion Ministries was founded in 1983 by Jim McCloskey in Princeton, New Jersey, as a non-profit organization dedicated to freeing the incarcerated innocent. McCloskey's interest in doing so began in 1980 when, as a student at Princeton University's Theological Seminary, he was serving as a student chaplain at Trenton State Prison in New Jersey when he met an inmate, Jorge De Los Santos, who was serving a life sentence but whom he came to believe was innocent. Since that time, Centurion has been responsible for dozens of exonerations of the innocent. It is an investigative agency with no religious affiliation, and it conducts extensive investigations in both DNA-related and non-DNA (mostly the latter) cases at no cost to its clients (Centurion Ministries 2016).

Innocence commissions (also known as criminal justice reform commissions) allow careful review of cases that may involve wrongful convictions. Depending on the jurisdiction, their mandates, selection of cases for review, and methods can vary considerably and they may help identify the causes of such errors and recommend reforms that may help reduce these miscarriages

of justice. This not only helps prevent wrongful convictions but also enhances public safety by shifting the focus of the criminal justice system to the task of identifying the actual offender, who might otherwise remain free to commit further crimes, as has happened far too often.

However, with its tradition of federalism in which constitutional authority is shared and divided among 50 states and the District of Columbia, the U.S. has not developed a national innocence commission. Instead, governmental entities in eleven states have established such commissions (for details see The Innocence Project 2016c). These are independent investigative bodies that differ in their respective formations, structures, and mandates but all investigate the causes and remedies of wrongful convictions and recommend reforms, which have thus far included important changes involving false confessions, eyewitness identification, and forensic oversight. They have important investigative resources, political independence and, where possible, subpoena power. They are typically composed of well respected individuals representing criminal justice agencies, crime victims, and other citizen groups.

## 6. NATIONAL REGISTRY OF EXONERATIONS

The National Registry of Exonerations was established in 2012 as a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law. It provides detailed information about every known exoneration in the United States since 1989—cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence. Currently, its searchable database includes more than 1,700 exonerations, including DNA, non DNA, and “crimes” that never actually occurred. The Registry has become an extremely important and unique research tool, since its database includes information concerning individual characteristics such as age and race, as well as the crimes for which they were convicted and exonerated; the state in which the case occurred; the dates of conviction and exoneration; whether DNA was involved in the exoneration; and what factors contributed to the wrongful conviction (see The National Registry of Exonerations 2016a).

## 7. LAW ENFORCEMENT REFORMS

Factors contributing to wrongful convictions have included the ways in which U.S. law enforcement agencies have historically conducted interrogations and lineups. Both aggressive and psychologically sophisticated interrogation practices have often produced false confessions, and lineups in which suspects were identified were often misleading, biased, and/or unfair. It is for that reason that some of the most important and consequential reforms impacting law enforcement practices have involved changes in those two areas.

### 7.1. Custodial interrogations and false confessions

While most people find it hard to believe that an innocent person would ever confess to a crime that s/he did not commit, research has shown that certain interrogation techniques are more likely to produce false confessions, especially when suspects are young or mentally challenged (see, for instance, Kassin *et al.* 2010). The Innocence Project reports that in more than 25% of the wrongful convictions overturned with DNA evidence, defendants made false confessions, admissions or statements to law enforcement officials or pled guilty (The Innocence Project 2016d). Also, about 13% of the exonerations in The National Registry of Exonerations database (which includes both DNA-based and non-DNA based exonerations) have involved false confessions, and when guilty plea exonerations are examined, the Registry reports a significant increase in these cases recently, with almost 25% of all known guilty plea exonerations occurring in just one year, 2014 (The National Registry of Exonerations 2016b).

To address the problem of false confessions, The Innocence Project and other experts have recommended the electronic recording of entire custodial interrogations, ideally beginning with the reading of Miranda rights to suspects. To date, 20 states and hundreds of jurisdictions require the recording of police interrogations (The Innocence Project 2016d).

### 7.2. Lineups and eyewitness misidentification

Another law enforcement-related issue has involved the use of misleading and biased lineups that generated misidentifications and wrongful convictions. Again, most people tend to believe that if someone witnessed a crime, that witness must be the best possible source in identifying the offender. But again, research has consistently shown that eyewitness identification is inherently unreliable, especially when there is no convincing corroborating evidence. Many factors can affect a witness's initial perception and subsequent memory concerning a crime. Furthermore, when lineups are used to identify the offender, a number of biases can occur prior to and during the lineup procedure. For that reason, lineup reforms in the U.S. have been science-driven, based on the best available research, and designed to reduce or eliminate such errors from the identification process (see National Academies of Science 2014). Such reforms have included "double blind" administration in which the person administering the lineup does not know who the actual suspect is, and sequential lineups, in which the witness is shown one lineup member at a time (see, for instance, Wells 2014, pp. 11–16). Such reforms, when coupled with improved law enforcement training and standardized procedures for conducting lineups can help reduce wrongful convictions and protect public safety by increasing the chances of identifying the actual offender.



## 8. CONVICTION INTEGRITY UNITS

Of all the components of the U.S. criminal justice system, it can be argued persuasively that prosecution (and the prosecutors who direct prosecution) is the most powerful but least visible. Beginning in 2007 with the establishment of the first conviction integrity unit by District Attorney Craig Watkins in Dallas, Texas, some prosecutors have decided that an important function of their office is to ensure the integrity of convictions by reviewing questionable evidence that may have led to wrongful convictions. In addition, in some jurisdictions, such as Dallas, biological evidence that had been collected in crimes that either preceded the use of DNA testing or had never been tested due to backlogs or other factors has now been tested and has exonerated the innocent and often identified the guilty. Also, in some cases lacking biological evidence for testing there emerges, nonetheless, evidence that identifies different or additional perpetrators who can then be brought to justice.

## 9. COMPENSATION AND REINTEGRATION

Those who have been wrongfully convicted often face many barriers even after they are exonerated. Many people are reluctant to believe that they are innocent. Potential employers who learn of their conviction often ignore the fact that they were exonerated and still consider them criminals and refuse to hire them. Some of the wrongfully convicted were pardoned after serving time in prison and discovered upon their release that they actually had fewer resources than those who were guilty but eventually paroled. When a sentence is commuted to "time served" the inmate is typically not eligible for parole or the services that are associated with parole, unless special legislation extends such services to them.

Upon exoneration and release from prison, the exoneree's needs are many. The Innocence Project reports that on average, those exonerated by DNA testing spent more than 14 years in prison before being released. The impact of such prolonged periods of confinement is profound since the penal codes enacted by legislatures are based on a linear conception of time, while societal change is decidedly non-linear, meaning that exonerees will be even further behind when released. Exonerees need financial assistance; housing assistance; job counseling and placement assistance; transportation assistance; assistance with health issues; counseling and psychological services; and legal aid to address possible expungement and other legal issues (see The Innocence Project 2016e). Despite these needs and despite the recommendation in 2004 by Congress and President George W. Bush that exonerees should receive 50 000 USD per year of wrongful incarceration (about 63 000 USD when adjusted for inflation) as well as other assistance, only 30 states, the District of Columbia, and the federal system have passed compensation statutes, meaning that in other jurisdictions, the exoneree will either receive no compensation from the state

or must seek a private bill in the state legislature to authorize specific compensation in his/her case. Furthermore, even in those states with such statutes, the amount of compensation varies widely, takes too long to collect, and includes little, if any, assistance with the other needs noted above. For example, the State of Texas, which has produced many documented wrongful convictions, now has the most liberal state compensation statute, which authorizes 80 000 USD per year of wrongful incarceration (with no maximum limit); 25 000 USD per year spent on parole or as a registered sex offender; compensation for child support payments; tuition for up to 120 hours at a career center or public institution of higher learning; re-entry and reintegration services; and the opportunity to buy into the Texas State Employee Health Plan. Contrast that with the New Hampshire compensation statute, for example, which provides only up to 20 000 USD for the entirety of one's wrongful incarceration! And, of course, 20 states have no such statute at all, while some of those who have statutes do not provide a formula for compensation. Instead, they include such disqualifiers as not having filed for compensation within one year and not having pled guilty (despite the evidence noted above concerning false confessions and guilty plea exonerations) (see The Innocence Project 2016e).

## 10. WRONGFUL CONVICTION REFORMS IN THE UK

The legal framework for attempting to prevent wrongful convictions and/or to correct them if and when they do occur in the UK derives from the legislative outgrowths of the Royal Commission on Criminal Procedure (RCCP) (see Royal Commission on Criminal Procedure 1981) and the Royal Commission on Criminal Justice (RCCJ) (see Royal Commission on Criminal Justice 1993), both of which were governmental responses to apparent wrongful conviction cases that were evidenced by well publicised successful appeals against criminal conviction. The fallout from the Confait Affair (see Price and Caplan 1976; Price 1985), in which three youths, Colin Lattimore, Ronald Leighton and Ahmet Salih, were wrongly convicted for the murder of Maxwell Confait, prompted the government of the day to set up the RCCP. In particular, the inquiry into the case by Sir Henry Fisher (see Fisher 1977), which preceded the RCCP, had been especially critical of the police practices in the investigation into the murder of Maxwell Confait, which were found to be geared simply to manufacturing an incriminating case against the suspects. The offshoots from the recommendations of the RCCP were significant in their attempts to ward off the possibility of such police "errors" in the future. This included new statutory guidelines on police practices to safeguard suspects of crime and to prevent wrongful convictions from occurring under the Police and Criminal Evidence Act (1984) (PACE). More specifically, PACE replaced the merely administrative directions on the procedures that the police should use when questioning suspects of alleged crimes under the Judges' Rules of 1912, which, themselves, had been implemented to safeguard against miscarriages of justice at the time,

in particular those caused by false confessions (for the remit and scope of the Judges' Rules see Abrahams 1964; St. Johnston 1966). In practice, however, the Judges' Rules were subject to widespread abuse and evidence obtained in breach of them was routinely held to be admissible in criminal proceedings if the presiding judge deemed it so (see McBarnet 1981). The RCCP also led to removing the power of the police to charge suspects and the setting up of the Crown Prosecution Service (CPS) under the Prosecution of Offenders Act 1985, which gave prosecutors the sole authority to decide whether or not to prosecute suspects of crime, again ensuring as far as possible that wrongful convictions do not occur.

Within a decade of the RCCP report, another crisis of confidence in the workings of the criminal justice system in the UK was caused by a spate of successful appeals spearheaded by the notorious cases of the Guildford Four (see Conlon 1990) and the Birmingham Six (see Hill and Hunt 1995; Callaghan and Mulready 1993), as well as a number of other less well-publicised cases (see, for example, Woffinden 1987). In response, the RCCJ, announced on the day that the Birmingham Six had their convictions overturned by the Court of Appeal (Criminal Division), had a wider remit than that of the RCCP in that it was established to "examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources" (Royal Commission on Criminal Justice 1993). The main outcome of the RCCJ as far as this article is concerned was the establishment of the Criminal Cases Review Commission under the Criminal Appeal Act 1995, the World's first non-governmental publicly-funded body to act as an additional safety net and review alleged miscarriages of justice that fail to be overturned in the normal appeals system.

Neither the RCCP nor the RCCJ considered the issue of compensating victims of wrongful convictions, but it was within the period under analysis that a statutory compensation scheme was introduced in the UK for the first time and so it will also be evaluated here. Indeed, in response to the case of Adolph Beck (see Coates 2001), a Norwegian immigrant who was twice wrongly convicted in 1896 and 1904 on mistaken eyewitness identification evidence, an *ex-gratia* scheme was in place in the UK since 1905 that compensated certain victims of miscarriages of justice on an *ad hoc* basis. However, compensation for victims of miscarriages of justice was finally put onto a statutory footing in the UK under the terms of s. 133 of the Criminal Justice Act 1988, as amended by s. 61 of the Criminal Justice and Immigration Act 2008, which was enacted to give effect to the UK's obligations under Art. 14(6) of the International Covenant on Civil and Political Rights (ICCPR).

In the remainder of this section, we will unpack these important wrongful conviction reforms, which provide the existing legal framework for the police, prosecution, criminal appeals and compensation, from the perspective of how they protect against wrongful convictions, provide the means for them to be overturned when they occur and/or adequately compensate victims of miscarriages of justice.



## II. POLICE

The Police and Criminal Evidence Act 1984 (PACE) provides the core framework of police powers and safeguards for suspects of crime in the form of 8 Codes of Practice (A–H). These Codes govern stop and search, arrest, detention, investigation, identification and interviewing detainees. Of particular interest to this discussion, Code C sets out the procedures for the detention, treatment and questioning of suspects not related to terrorism in police custody by police officers and Code E deals with the mandatory audio recording of interviews with suspects in police stations. More specifically, Code C (3a) sets out the procedures for dealing with persons brought to police stations or who go to police stations voluntarily, emphasising that the custody officer must ensure that the person is told clearly about a range of continuing rights, which may be exercised at any stage during the period in custody. These include the right to consult privately with a solicitor, that free independent legal advice is available and the protection from abuse of rights by a designated Custody Officer. It was argued when PACE was introduced that miscarriages of justice that are caused by police officers manufacturing incriminating cases against suspects could no longer occur (see Steele 1997).

Despite this, a sustained body of academic research over the last two decades (see, for instance, Phillips *et al.* 1998; Pleasence *et al.* 2011) has identified a range of “ploys” that are used by police officers who go against both the letter and spirit of PACE to discourage suspects from accessing the free legal advice from a solicitor that they are entitled to under s. 58(1) of PACE and paragraph 6.4 of Code C. This includes reading the suspects’ rights too quickly, incomprehensively or incompletely and commenting on the lack of need for legal advice and the likely increase of time in custody if suspects request legal advice (Bridges and Sanders 1990, pp. 489–499). This can prejudice a suspect’s right to a fair trial and may render the police in breach of Art. 6 of the European Convention on Human Rights, as for instance in the cases of *Murray v UK* and *Salduz v Turkey*. Research has also found other ways that police officers continue to try to get around the requirements of PACE, which include custody officers who abuse suspects (see Choongh 1997, p. 87), police officers who turn off recording devices to engage suspects in “a whole exchange of charge bargaining, bail inducements, threats and promises” while custody officers record that the PACE codes had been complied with (McConville 1992, p. 545) and police officers who pressure custody nurses to find vulnerable suspects fit for interview (see Raynor 2009). Moreover, and perhaps most significantly, quashed convictions for intentional breaches of PACE are an ever present feature of the criminal justice system (see, for instance, *R v Paris*, *Abdullahi and Miller*; *R v O’Brien and Others*; *R v Clarke*; *R v Hewins*).

## 12. PROSECUTION

The Code for Crown Prosecutors (see Crown Prosecution Service 2013) provides the framework for decisions by Crown prosecutors in England and Wales. The "General Principles" highlight the extent to which prosecutors are bound by legislation to make sure that the right person is prosecuted for the right offence; that the law is properly applied; that all relevant evidence is put before the court; that obligations of disclosure are complied with; and, that they always act in the interests of justice and not solely for the purpose of obtaining a conviction (Crown Prosecution Service 2013, p. 3). For its own part, the CPS pledge that all defendants will be treated fairly; that it will be open and honest; that decisions will be independent of bias or discrimination; that it will act with integrity and objectivity; and, that it will exercise sound judgment (Crown Prosecution Service 2015). The overall stated aim of the CPS is to avoid the lack of confidence in the criminal justice system that was caused by the previous system for prosecuting alleged offenders, which saw police forces employing private prosecutors to prosecute the cases that they investigated and set the charges. Indeed, the shock-waves of cases such as *R v Ward*, who spent 18 years of wrongful imprisonment when prosecutors intentionally withheld evidence that undermined their case, were such that they led to a new regime for the disclosure of evidence between prosecution and defence lawyers under the Criminal Procedure and Investigations Act 1996 (CPIA), which gave statutory force to the common law prosecution duty of disclosure.

Despite these reforms and the CPS sentiments accompanying them, however, the CPIA is, arguably, at odds with the operational practices of police officers, the CPS and defence solicitors (Davies *et al.* 1998, p. 12). Under the previous system, the defence could inspect all the material but under the CPIA a police officer will decide the materials that undermine his/her own case and only then, in theory, pass it on to the accused's lawyers. As such, "errors", whether intentional or accidental, may not be recognised and the current system presents ever present risks of miscarriages of justice (see Taylor 2001). Perhaps the most obvious consequence of the CPIA is that no one knows how many miscarriages of justice are being caused simply because no one knows how much material is being withheld (Woffinden 1999). On top of this, the case law on successful appeals shows that prosecutors can continue to ignore the guidelines that they are supposed to be bound by and, indeed, are still putting attempts to "win" cases and obtain convictions before the rights of defendants to fair treatment (see, for instance, *R v Hadley and Others*; *R v Vennett-Showers and Others*; *R v Giles*).



### 13. CRIMINAL CASES REVIEW COMMISSION

It is, perhaps, not surprising that the introduction of the CCRC piqued the interest of many other common law jurisdictions as a possible solution to their own miscarriages of justice problem, for instance, the U.S., Australia, New Zealand and Canada (see Naughton 2012, pp. 209–210). The cases of the Guildford Four, Birmingham Six, and so on, attracted global interest and the RCCJ's recommendation for a new body that was funded from the public purse may also have seemed appealing to those who strive against wrongful convictions in other countries and who may see it as a final solution to their own perennial problem of miscarriages of justice too. Moreover, as the first of its kind the CCRC is truly innovative and legal systems based on English law may see it as a natural add-on to their own systems on the basis that a legal system with a CCRC-style body must, surely, be better than one without one, must it not? (for examples of this kind of thinking, see, for instance, Robins 2012; 2013) This perspective is further strengthened by a widespread belief that the CCRC is a state-sponsored innocence project, particularly amongst academic commentators in the U.S. (see, for instance, Griffin 2001, pp. 1301–1302; Mumma 2004; Maiatico 2007; Gould 2008, p. 34; Wolitz 2010, p. 20; Petherick *et al.* 2010, p. 339).

Unlike innocence projects, however, which focus solely on whether claims of factual innocence by alleged victims of wrongful convictions who were convicted for serious criminal offences and given long prison sentences or the death penalty can be validated (see, for instance, Scheck *et al.* 2003), analysis of the CCRC shows the extent to which it is not the panacea for the problem of the wrongful conviction of the factually innocent that it is widely thought to be. For a start, the work of the CCRC is not restricted to alleged wrongful convictions for serious criminal offences. It deals, also, with a range of other issues such as sentence matters, convictions in magistrates courts (see Kerrigan 2006), technical miscarriages of justice such as cases where murder convictions should be substituted for manslaughter on the grounds of diminished responsibility, for instance, and cases that might be deemed more trivial such as road traffic offences and destruction orders given to dogs that bite and applications raising issues of asylum and immigration and human trafficking.

Moreover, and perhaps most crucially, despite the fact that the driving force behind the RCCJ and the CCRC was a widespread belief that innocent victims had been convicted for serious crimes that they did not commit, the statute that determines how the CCRC operates mandates that it can only refer a case back to the appeal courts if there is a “real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made” (s. 13(1)(a) of the Criminal Appeal Act 1995). This fatally compromises the CCRC's claim of “independence” and with it its ability to assist factually innocent victims of wrongful conviction. This “real possibility test” literally handcuffs the CCRC to the criteria of the appeal courts for quashing convictions. It means that the CCRC is always in the business of second-guessing how

the appeal courts might decide any applications that it may refer (Nobles and Schiff 2001). It means that the CCRC does not attempt to determine the truth of allegedly wrongful convictions in the way that innocence projects do and in the way that the RCCJ and the public envisaged when it was established but, rather, whether convictions might be considered "unsafe" under the terms of the relevant appeal courts (for a critical evaluation see Naughton 2009). This is perhaps most apparent at the extremes of the CCRC's operations when it means assisting the factually guilty to have convictions overturned on points of law and/or breaches of due process (see, for instance, *R v Clarke* and *R v Mc-Daid*) and/or turning a blind eye to potentially factually innocent victims who are unable to fulfill the "real possibility test" to the satisfaction of the CCRC (see, for instance, Innocence Network UK 2012).

#### 14. COMPENSATION

According to the law of tort, victims of miscarriages of justice should be put back into the position that they would have been in had the wrongful conviction not occurred (see *Livingstone v Rawyards Coal Company*; Burrows, 1987, p. 16). This, understandably, involves calculations for both pecuniary and non-pecuniary losses: an amount for financial loss and an award in recognition of, for example, loss of reputation, loss of liberty, hardship, mental suffering, injury to feelings, and inconvenience (see HC Deb 2005). This seems pretty straightforward in theory, but in practice s. 133 of the Criminal Appeal Act 1988 defines a "miscarriage of justice" in such a narrow way that the majority of successful appellants in the UK who overturn criminal convictions will not qualify:

"133 – (1) (...) when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice (...) unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted".

The effect of this criterion is that successful appellants must be able to demonstrate that their conviction is no longer open to challenge under the normal judicial process (see Roberts 2003, pp. 441–442), which immediately excludes 99% of the thousands of successful appellants per annum who overturn a criminal conviction in a normal appeal in the UK (Naughton 2013, pp. 191–206). It takes no account of the harm caused to the victims of such "errors" of justice and their families when convictions are overturned within the normal appeals system, such as imprisonment, family break ups, financial hardship, psychological trauma, and so on (see, for instance, Naughton 2007, pp. 161–185; Grounds 2004; 2005; Grounds and Jamieson 2003; Westervelt and Cook 2008; Campbell and Denov 2004; Denov and Campbell 2005; Jenkins 2013; Tan 2011).



Another barrier for potential applicants to the statutory scheme for victims of miscarriages of justice is that they have to have clear evidence that they are innocent. Indeed, under s. 175 of the Anti-social Behaviour, Crime and Policing Act 2014 successful appellants will only be eligible for compensation "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence". The Ministry of Justice's reasoning behind the new statute was an overt attempt to reduce the burden on taxpayers and to ensure that the guilty are not compensated. It was also an attempt to reduce what was described as the kind of "unnecessary and expensive legal challenges to Government decisions to refuse compensation" (Lipscombe and Beard 2015, p. 7) that we have seen over the last few years from applicants who overturned their convictions on points of law or because the evidence that supported the conviction was unreliable but who cannot show, categorically, that they are innocent (see, for instance, *R (Mullen) v Secretary of State for the Home Department*; also, Nobles and Schiff 2006; *R (on the application of Adams) (FC) (Appellant) v Secretary of State for Justice (Respondent)*; *Ali and Others v Secretary of State for Justice*).

Turning to the issue of how much those few applicants who are deemed eligible to receive an award from the statutory scheme actually get, things are not a lot brighter. At the time of writing, for instance, it was reported that Jeffrey Deskovic had been awarded over 40 million USD in the U.S. for his 16 years of wrongful imprisonment for the rape and murder of 15-year-old Angela Correa in Peekskill, New York, in 1989 (see Bandler 2015). By contrast, in the UK the maximum amount of compensation awarded is capped at £ 1 million for those serving over 10 years in relevant detention or £ 500 000 in all other cases. Under the terms of s. 61 Criminal Justice and Immigration Act 2008, the official assessor also has the discretion to make a series of deductions to awards for saved living expenses whilst the miscarriage of justice victim was imprisoned, for other convictions and for any conduct of the applicant appearing to the assessor to have directly or indirectly caused or contributed to the conviction concerned. The result of this is that awards may be insufficient to put even eligible applicants back into the position that they might have been in had their wrongful conviction not occurred (see Naughton 2013, pp. 220–227).

## 15. CONCLUSIONS

Taking stock of the major reforms in response to wrongful convictions that frame the existing systems for avoiding or remedying them in the U.S. and the UK shows that much remains to be done. It seems odd, for instance, that DNA testing does not play a more prominent role in the overturn of wrongful convictions in the UK. Indeed, the first case in which DNA testing was conducted globally was a UK case which led to the exclusion of Richard Buckland of the rape and murder of two 15-year-old school girls, Lynda Mann and Dawn Ashworth, and the conviction of Colin Pitchfork.

Despite the progress made by the innocence movement and the emerging emphasis on, and use of, science-driven approaches to identifying wrongful convictions in the U.S., the criminal justice systems of both the U.K. and the U.S. still seem to have little tolerance for procedural error but great tolerance for the wrong outcome (conviction of the innocent). Restrictions on time allowed for post-conviction appeals need to be removed, since new evidence can be (and often is) discovered many years later. In the U.S., for example, some of the 50 states specify a 60 day limit after conviction, while most states allow a year and some others, as much as 3 years. In the UK the time limit on an appeal to the Court of Appeal is 28 days from conviction. And, although there is no time limit as such on applications to the CCRC the narrow appeal window for convictions for serious offences in the Crown Court in England and Wales means that many meritorious victims of miscarriages of justice will not have time to mount an appeal in the given timeframe and will either spend more time in prison or fighting to clear their names with the concomitant knock-on effects on the harm caused by the wrongful convictions. Overall, we believe that both systems should allow appeals based on claims of actual innocence and not based solely on procedural error.

Although the UK has a compensation scheme, the criteria means that not many, if any, will qualify and those that do may not receive an award that will be sufficient to put them back into the position that they would have been in had they not been wrongly convicted. On the other hand, in the U.S., there exists far too much variance among states regarding financial compensation and reintegration services for exonerees. As such, both the U.S. and the U.K. have much more to do in this regard and both should develop fair and consistent policies that come much closer to approximating normal tort and restorative justice principles.

The U.K. has the Criminal Cases Review Commission (CCRC), for which there is no counterpart at the federal level in the U.S. However, the evidence shows that the very foundation of the CCRC, the governing statute by which it was created, imposed on the CCRC critical constraints such as the "real possibility test" (is there a real possibility that fresh evidence, if it had been available, might have made the original conviction unsafe?) and a subsequent clarification of "fresh evidence" and a "jury impact test", which requires the Court of Appeal (and, by extension, the CCRC, since it must "second guess" what the Court of Appeal would do) to give great deference to the trial jury's decision. These constraints and others seem to have precluded the CCRC's becoming "the answer to the problem" of wrongful conviction by forcing the CCRC to adopt a highly legalistic and conservative approach to such cases, requiring it to determine whether convictions were "safe" as opposed to identifying, based on original investigations, for example, whether a wrongful conviction had occurred. To make matters worse, the establishment of the CCRC and the attendant expectations that accompanied it may have resulted in a diminution of public concern in the U.K., since many believed that the problem would now be "taken care of" by the CCRC.

In the U.S., by contrast, only eleven states have either an innocence commission or a law reform commission. The most progressive has been North Carolina, whose Innocence Inquiry Commission has the authority to investigate and review individual claims of wrongful conviction, but the standard of proof is quite high. It has subpoena authority and is state-funded but independent. Because of the United States' tradition of federalism, the ingrained suspicion of concentrated federal power (left over from colonial days), and preference for grassroots democratic approaches, the U.S. has concentrated on state-level commissions, although it would clearly be useful to have an additional federal presence in the form of an investigatory body that would analyze wrongful convictions, much as the National Transportation Safety Board analyzes airplane or train crashes, to determine what went wrong and offer recommendations to prevent future disasters. Wrongful convictions also represent personal tragedies but are not met with the same level of concern.

We have learned, through research, that some basic reforms should be adopted everywhere to reduce wrongful convictions. These include tape recording interrogations to ensure that confessions are truly voluntary; providing "double blind" sequential lineups to avoid eyewitness errors; and refusing to allow discredited "junk science" to be presented as evidence. But we must do far more than that. Bar associations need to step up from virtual silence to requiring adherence to professional ethics. This should be viewed as essential to restoring public trust in prosecutors and in the system. In the U.S., the American Bar Association recently took a major step forward when it modified its Model Rules of Professional Conduct to include a prosecutorial duty to rectify wrongful convictions if the prosecutor knows of evidence that will likely be exculpatory (American Bar Association 2011). This can help hold prosecutors accountable and reduce wrongful convictions.

In the U.S., although all 50 states and the federal system have statutes allowing post-conviction DNA testing, many of these testing laws are limited in scope and substance. Some, for example, deny testing if the individual either confessed or pleaded guilty to the crime despite the fact that many wrongful convictions involve either false confessions or guilty pleas. Access to post-conviction DNA testing must continue to be expanded and should allow for a DNA test at least as long as an inmate remains incarcerated, for example.

Finally, the reduction of wrongful convictions is an important societal goal. Such miscarriages of justice represent a dual threat: (1) they are injustices that undermine the legitimacy of and respect for the criminal justice system, and (2) they threaten public safety by allowing the actual offenders to remain free while the innocent are convicted and incarcerated. Reducing these errors will depend heavily on our ability to (1) recognize and help neutralize the negative effects of tunnel vision by insisting on investigations and prosecutions that proceed according to inductive logic and balanced fact finding; and (2) increasing the detection of and sanctioning of unethical behavior. Free democratic societies such as those in the UK and the U.S. should be aggressive in preventing, detecting, and punishing crime but they must also be equally aggressive in correcting their errors when actual innocence results in conviction, imprisonment, or execution.

onment, and even execution in the U.S., where the death penalty should be abolished. Since convictions are based on a probability of guilt, rather than a certainty of guilt, all convictions ought to be reversible and compensable if they are proved to be wrongful. While never sufficient to adequately compensate a wrongfully convicted and imprisoned citizen for the (often) prolonged loss of liberty and the challenges of living in prison, at least s/he can be freed and provided with reasonable financial resources and reintegration assistance. And all such convictions are reversible and potentially compensable except the death penalty, which alone is subject to neither since the wrongfully convicted person has been put to death.

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