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# 1

## INTRODUCTION



C. RONALD HUFF AND MARTIN KILLIAS

The subject of wrongful conviction attracted some attention in the United States beginning in the 1930s, but most of the earlier literature focused primarily on discussions of individual cases (see, for example, Borchard, 1932; Gardner, 1952; Frank and Frank, 1957; Ehrmann, 1962; Radin, 1964). Some literature has dealt extensively with the most high-visibility cases, such as the Dreyfus affair in the nineteenth century (Chapman, 1955; Tuchman, 1962; Bredin, 1986); the infamous case of the “Scottsboro boys” in the 1920s (Carter, 1969); the Lindbergh baby kidnapping and murder in the 1930s (Kennedy, 1985); and more recent cases such as that of Randall Dale Adams, whose wrongful conviction, imprisonment, and near execution in Texas led to both his own book (Adams, 1991) and Errol Morris’s prize-winning documentary, *The Thin Blue Line* (1988). Some cases have captured the attention of the general public, including some of those already mentioned as well as the Sam Sheppard case, which led to a long-running television series and a very successful movie by the same name (*The Fugitive*); the “Birmingham Six” case, which inspired extensive analyses and the film *In the Name of the Father*; the controversy surrounding John Demjanjuk, accused of being the notorious “Ivan the Terrible,” a Nazi death camp guard who helped in the mass murder of Jews; and the wrongful conviction of Michael and Lindy Chamberlain for the death of their daughter in Australia, which attracted international attention and inspired the movie *A Cry in the Dark*.

Both scholarly attention and public attention to this issue have been greatly accelerated by the exonerations of hundreds of wrongfully convicted

individuals who had been imprisoned and, in a number of cases, sentenced to death. Advances in forensic science, including DNA testing of biological evidence, have greatly facilitated the discovery of these errors. In one state, Illinois, the governor became so concerned about these errors and the possibility of executing innocent persons, that he declared a moratorium on the death penalty. A number of other states have discovered similar problems and have undertaken studies, imposed moratoria, or proposed possible moratoria while attempting to address the underlying problems that generate wrongful convictions and imprisonment.

Since the 1990s, scholars have begun to pay more attention to the issue of wrongful conviction, especially in the United States (Huff, Rattner, and Sagarin, 1986, 1996; Radelet, Bedau, and Putnam, 1992; Scheck, Neufeld, and Dwyer, 2000; Westervelt and Humphrey, 2001; Forst, 2004) and in Great Britain (Walker and Starmer, 1999; Nobles and Schiff, 2000). These studies were preceded by a monumental survey of some 1,600 cases overturned in Germany over a period of more than three decades (Peters, 1970–1974). However, none of these scholarly publications has systematically addressed the problem of wrongful conviction from a cross-national perspective. Following a 2001 presidential address to the American Society of Criminology and a subsequent article in *Criminology* (Huff, 2002), the co-editors of this book organized an international network of scholars for the purpose of analyzing wrongful convictions across different nations and different types of criminal justice systems. With the sponsorship of the Swiss National Science Foundation, we held the first international workshop on wrongful conviction in Switzerland and subsequently decided to undertake this book project. We believed that it was important to pursue this cross-nationally because there were major unanswered questions to be addressed.

This book represents what is, to our knowledge, the first that addresses the issue of wrongful conviction from a cross-national perspective. Beginning with a discussion of cross-national issues and the importance of a cross-national perspective, the book offers analyses of wrongful conviction and related issues from eighteen contributors from nine different nations. The chapters provide a balance of (1) detailed discussions of specific nations and (2) considerations of cross-cutting issues that transcend national boundaries. The traditional dichotomy of “adversarial” versus “continental-inquisitorial” legal systems will be both explained and revisited to determine (1) what impact each system may have on preventing or generating wrongful convictions and (2) whether this traditional dichotomy remains a viable one or is in need of revision. The book also includes a number of public policy recommendations intended to reduce the number of wrongful convictions and compensate more fairly those who are the victims of these miscarriages of justice.

What is wrongful conviction? In developing our approach to the subject and in producing this volume, we have relied on the definition utilized by Huff, Rattner, and Sagarin (1996), focusing exclusively on those who have been arrested on criminal charges, who have either pleaded guilty to the charges or have been found guilty, and who, notwithstanding their guilty plea or verdict, are actually innocent. This restrictive definition excludes many other types of injustice, such as those cases in which persons were detained for long periods of time without ever having been found guilty of anything. It also excludes cases in which the initial conviction was overturned due to procedural errors without any determination of factual innocence, for example. We also prefer the term *wrongful conviction* instead of *miscarriages of justice*, which is often used synonymously but is, in our judgment, much broader and more inclusive. The latter term might be interpreted to include other types of injustice and errors of law, rather than errors of fact and could, for some, even include cases where the accused, although guilty, “got away with murder,” as that result certainly represents a miscarriage of justice for the victim and his or her family.

Why study the problem of wrongful conviction across different nations as opposed to focusing on only one nation? Of course, such research is justified for its own sake in terms of the intellectual opportunities represented by such comparative studies. That is, satisfying our curiosity about other nations’ systems of justice is, by itself, an important benefit. However, among the several benefits to be derived from cross-national studies is one that we regard as most important: We often can learn more about our own system of justice by looking at it in the context of other nations’ systems. It is only by way of comparison and contrast that we can intelligently decide whether our system might be improved so that justice might be better served. It is, ultimately, the *improvement* of justice through the reduction of error that motivated us to undertake this research. We have, therefore, formed a network of scholars, represented in the chapters that follow, who are committed to this kind of cross-national analysis and committed to learning from each other about the ways in which other nations’ criminal justice systems generate or avoid producing wrongful convictions. As one prominent scholar recently noted:

. . . For a long time, transnational comparative studies were a peripheral and none-too-important suburb of the empirical study of crime and social control . . . [but] . . . how do we know whether, and to what extent, the United States is unique without implicit or explicit comparisons between the United States and elsewhere? (Zimring, 2006: 615).

It is our hope that this volume will help address that need. In conducting cross-national research, one must first consider the unit of analysis and in what way the study will be cross-national in scope. Kohn (1989) formulated a useful typology of cross-national research, advocating that the typology be viewed as representing gradations of emphasis, rather than sharp demarcations. The purpose of this book, the analysis of wrongful conviction across nations, is consistent with Kohn's discussion of cross-national studies in which the nations provide the *context* for the study. In this case, we are interested in studying wrongful conviction in the context of various nations and their respective criminal justice systems.

Part I focuses on some cross-national perspectives and issues. Sometimes wrongful convictions occur in a context of "moral panic" due to certain highly inflammatory crimes or allegations of crimes that are especially detested by the public. This phenomenon seems to occur in many different nations. In Chapter 2, Grometstein discusses a series of cases allegedly involving the ritual and sexual abuse of children by day care workers and other caregivers. Those cases led to "moral panics" on several continents beginning in the 1980s and continuing for two decades (most recently in France in 2004). These cases were termed "organized child sexual abuse" and led to the convictions of many suspects, only to have a number of those convictions overturned later by appellate courts. The chapter discusses moral panic theory and the factors present in those cases that increased the likelihood of error, such as the weakening of evidentiary standards for proving the elements of crimes.

The advent of DNA technology and other high-tech tools for fighting crime and identifying perpetrators promises to revolutionize the criminal justice systems of a number of nations. In Chapter 3, Schiffer and Champod discuss the risks involved in using forensic science to link suspects to the crimes that they committed, but also to exonerate innocent persons. Two British case examples illustrate points such as the admissibility of scientific evidence, uniqueness, the notion of match, confirmation bias, false inferences, lack of transparency, and contradictory physical evidence.

Part II includes contributions focusing on the United States and Canada. Much of the world's attention to the issue of wrongful conviction has been centered on the United States due to a number of highly publicized cases and due, in part, to the vast magnitude of the U.S. criminal justice system. Even a small error rate generates thousands of cases of wrongful conviction each year. In Chapter 4, Huff provides an overview and analysis of the U.S. experience with wrongful conviction, including the leading causes of error; the consequences of wrongful conviction for the convicted but innocent and for public safety; the increasing role of forensic science, including DNA, in

exonerations; and some recent developments and public policy recommendations intended to address this problem.

One of the most intriguing issues explored in this book is the question of whether the adversarial system of justice is itself an important factor contributing to wrongful conviction. Zalman (Chapter 5) analyzes the adversary jury trial and assesses its capacity to determine the objective truth. The debates concerning the adversarial jury trial versus the continental, “inquisitorial” system date back to differences in perspective between Blackstone and Bentham. Does the U.S. adversarial system require the courts to do their best to discover the truth? Zalman analyzes the role of the judge, rules of evidence, reforms to allow more jury involvement, and other ideas to determine whether technical modifications might make jury trials more accurate and reduce the number of wrongful convictions.

Another issue that continues to generate a great deal of public and scholarly debate is whether the death penalty should be retained in the United States. The problem of wrongful conviction has caused many observers to wonder whether it is worth retaining capital punishment when there is the possibility that innocent persons might be executed, as argued by Radelet, Bedau, and Putnam (1992), for example. In Chapter 6, Lofquist and Harmon analyze executions that occurred in the United States between 1972 and 2000 that involved “compelling claims of factual innocence” and a comparison group of eighty cases during the same time period in which prisoners were released from death row due to doubts about their guilt. They systematically examine the factors involved in cases resulting in execution compared with those resulting in exoneration. Their analyses produce some important insights into the dynamics of those cases and the judicial review process.

In Chapter 7, Campbell presents an analysis and discussion of the causes and effects of wrongful convictions in Canada, as well as the responses of the state, including the limitations of current policies and procedures designed to rectify miscarriages of justice. Her analysis includes the conviction review process, which allows those who assert that they have been wrongly convicted and imprisoned to apply to the Minister of Justice for case review, following all appeals. The chapter points out serious problems in that process and argues for the establishment of an independent system of review, similar to that utilized by the Criminal Cases Review Commission in Great Britain.

In Part III, the focus shifts from North American studies and concerns to European and Israeli perspectives and issues. In Chapter 8, Killias shows how Switzerland’s legal system focuses on the search for “objective truth” and emphasizes even-handed investigations of the facts, whether they are favorable or unfavorable to the defendant. Guilty pleas without trial are possible only in cases involving minor offenses with minimal sanctions. Greater

reliance is placed on scientific evidence than on oral statements, even including confessions. He discusses the Swiss system and its advantages and vulnerabilities, considering the results of a recent survey of all final convictions that have been overturned between 1995 and 2004. He concludes that wrongful convictions are far more likely to occur in apparently trivial cases where few resources are devoted to investigate the relevant facts, such as the possibility of error, shortcomings, or both in scientific investigations.

The Dutch “inquisitorial system” of criminal law and its vulnerability in producing wrongful convictions is the subject of Brants in Chapter 9. She notes that the Dutch system is one of the most inquisitorial in all of continental Europe and is based on a number of assumptions that are, in theory, strong protections against error. However, when any one of those assumptions is not met in practice, the safeguards against wrongful conviction are eroded accordingly. She also discusses the meaning of “wrongful conviction” and whether the usual dichotomy of the “adversarial” and the “inquisitorial” systems is a viable one.

Moving from the Netherlands to the United Kingdom, Walker and McCartney (Chapter 10) argue that although extensive safeguards exist to prevent the conviction of the innocent in England and Wales, errors nonetheless occur. Their chapter examines the nature of “residual error” in England and Wales, the mechanisms put in place to respond to such residual error, and the performance of those mechanisms in recent years.

Does the way in which prosecutors carry out their roles have an impact on the generation of wrongful convictions? That question is addressed by Kessler in Chapter 11, wherein she argues that miscarriages of justice are sometimes closely connected with prosecutorial performance. She asserts that at each stage, from the initial decision to begin criminal proceedings to the final conviction, prosecutors can manipulate or influence the presentation of evidence. The outcome of criminal proceedings largely depends on the charges and the way in which evidence is presented to judges and, especially, to lay justices. Kessler delineates the differences in the respective roles of prosecutors in Germany and in the United Kingdom, from initial investigations to trial proceedings, as examples of the “inquisitorial” and “adversarial” systems of justice. She also discusses both systems’ vulnerabilities in generating miscarriages of justice.

Dongois (Chapter 12) argues that wrongful convictions tend to delegitimize the criminal justice system as well as the authority of final decisions. Therefore, she asserts, the procedures to “revise” final rulings by admitting and, if possible, correcting wrongful convictions need to remain exceptional. French law is similar to other European countries with respect to the consequences of a successful “revision”; that is, in terms of recognizing judicial errors and restoring

the rights of the wrongfully convicted. However, the limits within which such redress is open are more narrowly defined, in terms of both material and formal requirements. Dongois reviews a number of prominent cases in an attempt to make clear the limits of this remedy in the French legal system.

Another example of wrongful conviction from an international perspective is provided by Rattner (Chapter 13), who discusses the Israeli criminal justice system and the review mechanisms that exist to correct errors. He identifies one of the major constraints as the problem of denial—the opinion that such errors rarely occur—and the strong tendency to defend “the sanctity of the criminal law.”

The concept of wrongful conviction may also have different meanings within different political systems. For nations such as Poland and others in Eastern Europe that have evolved from communist control to developing democracies, the question of wrongful conviction is one that must be carefully analyzed over time. In Chapter 14 Plywaczewski, Górski, and Sakowicz trace the evolution of Poland’s legal and public policy responses to the problem of wrongful conviction, including both those miscarriages of justice that occurred during the earlier, repressive Stalinist legal system and those that have occurred since Poland’s legal and political systems underwent democratization. In redressing errors from the Stalinist era, Poland decided that rather than nullifying those convictions that were related to political repression, they would simply be declared invalid (i.e., they were not ever valid and the persons involved were formally declared “not guilty”). Poland’s current legal and public policy approaches are discussed, using actual cases to illustrate how the system works today.

Finally, in Chapter 15, the editors discuss some of the recurrent themes that emerged from the collective research represented in this volume and offer some conclusions and recommendations. As the studies in this volume clearly demonstrate, it should be possible to reduce the frequency of wrongful conviction in each of the criminal justice systems we have analyzed. Through improved understanding of the structural, organizational, and human causes of error in our systems of justice, we should be able to undertake reforms that will result in the improvement of justice—one of the most important objectives of this volume.

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