

THE ROLE OF INNOCENCE COMMISSIONS: ERROR DISCOVERY,
SYSTEMIC REFORM OR BOTH?

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The discovery of wrongful convictions through DNA exonerations has raised unprecedented concerns about the reliability of the criminal process. A concrete manifestation of these concerns has been the creation of innocence commissions to learn from the past mistakes of the justice system and to provide better remedies for those who have suffered wrongful convictions. Innocence commissions have emerged over the last decade as a new institution in the criminal justice system. In England and Wales, for example, any standard account of the criminal process would now include a discussion of the Criminal Cases Review Commission (CCRC). One state, North Carolina, now has two innocence commissions, one appointed by the state to provide remedies for factually innocent victims of wrongful convictions and the other to provide advice about how to reform the criminal justice system to minimize the risk of wrongful convictions in the future. Innocence commissions are new but fragile institutions in the criminal justice system. They can be subject to budget cuts and statutory sunsets. They can also encounter resistance from other criminal justice actors and civil society groups.

The phrase “innocence commission” has been used to describe a wide variety of very different institutions. Innocence commissions have ranged from self-appointed study commissions with an interest in systemic reform of the criminal justice system to temporary or permanent state-appointed inquiries into specific cases and/or systemic causes of wrongful convictions to permanent state-appointed commissions with a mandate to investigate claims of miscarriages of justices and to re-open judicial proceedings in individual cases. It is not particularly helpful to lump such a variety of institutions under the common rubric of “innocence commissions.” It is difficult to evaluate the need for or the success of an innocence commission without an understanding of its precise objectives.

In all their various guises, innocence commissions have become a favorite recommendation for reformers. In 2002, Barry Scheck and Peter

Neufeld called for the creation of independent reviews of officially acknowledged wrongful convictions in the style of Canadian public inquiries and the work of the National Transportation Safety Board.¹ The Canadian public inquiries that have examined some acknowledged wrongful convictions have in turn called for the creation of a British-style CCRC to investigate claims of wrongful convictions in individual cases. Nevertheless, there is a need for greater and more critical attention to the purposes and institutional design of these fragile new institutions of criminal justice. It is especially important to understand the limits of innocence commissions and whether strategic choices have to be made between correction of past errors and the pursuit of reforms to minimize the risk of miscarriages of justice in the future.

The function of a particular innocence commission should influence its composition. An institution with the power to refer cases back to the courts may gravitate towards a quasi-judicial model that focuses on the relevant legal criteria for re-opening and reversing convictions. On the other hand, an innocence commission aimed at achieving systemic reform may favor both political advocacy and political compromises. There is also a need to examine how innocence commissions relate to other institutions in the criminal justice system including courts, police, the legislature and advocacy groups. A systemic reform commission may need active assistance from police, prosecutors and advocacy groups in order to gain support for its political proposals, but too close a connection between an error correction commission and these groups could threaten the credibility of the commission's quasi-judicial decisions whether to re-open individual cases because of concerns about miscarriages of justice. The perceived independence of error correction innocence commissions is especially important because such institutions will likely reject the vast majority of ap-

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1. Scheck and Neufeld discussed the alternative of an error correction commission such as the British Criminal Cases Review Commission (CCRC). Although they believed that such an institution would ultimately be created, they recognized that "proposals based on a CCRC model could be too easily, albeit unfairly, attacked as requiring large government bureaucracies based on un-American notions of an inquisitional justice system that would squander precious law enforcement funds on prisoners making frivolous claims." Barry C. Scheck & Peter J. Neufeld, *Towards the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 101 (2002). But for contemporaneous arguments that American jurisdictions should establish institutions such as the CCRC to hear claims of wrongful convictions in individual cases, see Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L. L. REV. 1241 (2001); C. Ronald Huff, *Wrongful Conviction and Public Policy: The American Society of Criminology 2001 Presidential Address*, 40 CRIMINOLOGY 1 (2002).

plications they receive. It is also now necessary to think about how error correction and systemic reform commissions relate to each other and can inform and support the work of the other given that one state, North Carolina, now has two innocence commissions.

The thesis of this article is that there is a tension between the two roles of innocence commissions: discovering error in individual cases, and proposing and advocating remedies for the systemic causes of wrongful convictions. The resources and expertise that are required for error correction and for systemic reform are very different. That said, both the objectives of error correction and systemic reform are compelling and need to be accomplished with respect to wrongful convictions. In addition, systemic reform needs to be grounded in the lessons of individual cases, and there may be ways for some innocence commissions to combine both error correction and systemic reform. Nevertheless, the record to date suggests that innocence commissions have tended to gravitate towards either error correction or systemic reform and have had difficulties effectively combining the two functions. If innocence commissions are to become an established institution of criminal justice, there is a need for greater clarity about the precise roles that they will play.

I. ERROR CORRECTION MODELS

Innocence commissions can be designed to discover errors that may have resulted in wrongful convictions or miscarriages of justice in individual cases.² They can be given resources to conduct investigations or to perform new scientific tests that can generate fresh evidence. Such fresh evidence is often required to justify re-opening a case that could end in another conviction. They can also be constituted as independent bodies that do not have the same real or perceived conflict of interest as members of

2. Wrongful conviction will be defined in this article to refer to the conviction of the innocent in the sense that the person did not commit the crime or the crime did not occur, while miscarriages of justice will be defined more broadly to also include those who were convicted after unfair trials. The definitional issue is a matter of controversy and complexity. For example, the British CCRC is concerned with the wide range of miscarriages of justice while both North Carolina commissions are concerned with wrongful convictions narrowly defined as actual innocence. For discussions of the appropriate definition, see MICHAEL NAUGHTON, *RETHINKING MISCARRIAGES OF JUSTICE: BEYOND THE TIP OF THE ICEBERG* (2007); Cathleen Burnett, *Constructions of Innocence*, 70 *UMKC L. REV.* 971 (2002); Stephen Greer, *Miscarriages of Justice Reconsidered*, 57 *MOD. L. REV.* 58 (1994); Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 *PENN. ST. L. REV.* 967 (2005). In this article the distinction that is most relevant is between innocence commissions such as the British CCRC that concern themselves with a broad range of legal error that can produce convictions that could be reversed on appeals and other innocence commissions such as the North Carolina commissions that are only concerned with factual innocence.

the executive that have traditionally had powers to provide relief in the form of clemency.³ An independent commission may also have less perceived conflicts of interest than the judiciary may have in deciding whether there are grounds to believe that a particular conviction was a wrongful conviction of an innocent person or a broader miscarriage of justice in the sense that a person was convicted as a result of an unfair or flawed process. Although it would be possible to give an innocence commission the power to reverse or quash a conviction, it is widely accepted in Anglo-American jurisdictions that innocence commissions should only have the power to refer a case back to the judiciary. In other words, respect for the separation of powers and especially for the role of the judiciary requires that the judiciary retain ultimate responsibility for quashing convictions.⁴

A. *The British Criminal Cases Review Commission*

The pioneer and gold standard of the error correction model is the Criminal Cases Review Commission (CCRC) created for England, Wales and Northern Ireland in the Criminal Appeal Act of 1995.⁵

The CCRC was created following recommendations by the Royal Commission on Criminal Justice chaired by Viscount Runciman that was appointed in the aftermath of a series of wrongful convictions in terrorism cases.⁶ A 1992 inquiry into the Guildford Four and Maguire Seven cases

3. Clive Walker & Kathryn Campbell, *The CCRC as an Option for Canada: Forwards or Backwards?*, in CRIMINAL CASES REVIEW COMMISSION: HELPING THE INNOCENT? (Michael Naughton ed., Palgrave MacMillan, forthcoming Nov. 2009).

4. As will be seen, the British CCRC as well as similar Scottish and North Carolinian commissions only have the power to refer cases back to the courts, who make the ultimate decision whether to sustain or quash a particular conviction.

5. Criminal Appeal Act, 1995, c. 35, § 8. There is a growing literature on the CCRC, much of it written by members of the CCRC. See, e.g., LAURIE ELKS, RIGHTING MISCARRIAGES OF JUSTICE: TEN YEARS OF THE CRIMINAL CASE REVIEW COMMISSION (2008); David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 52 DRAKE L. REV. 657 (2004); Graham Zellick, Comment, *Facing Up to Miscarriages of Justice*, 31 MANITOBA L.J. 555 (2006). For more critical approaches to the work of the CCRC, see THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT? (Michael Naughton ed., forthcoming Nov. 2009); Richard Nobles & David Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal*, 2005 CRIM. L. REV. 173; Richard Nobles & David Schiff, *The Criminal Cases Review Commission: Reporting Success?*, 64 MOD. L. REV. 280 (2001).

6. The Commission recommended that the power to refer cases of suspected miscarriages of justice to the courts should be removed from the Home Secretary and given to a body that was independent from the executive and the courts and composed of both lawyers and lay people. It recommended that the new commission should be able to appoint police and others such as forensic scientists to investigate cases of suspected miscarriages of justice. It contemplated that decisions made by the body would not be subject to appeal or judicial review, but that applicants whose cases were not referred to the courts could re-apply to the commission. THE ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT 180-83 (1993).

had also come to the conclusion that reliance on a reactive executive to refer suspected miscarriages of justice was inadequate. Lord May in his second report on the Maguire Case in 1992 recommended that new independent machinery be established by statute that would have the power and resources to investigate cases of suspected miscarriages and refer them to the Court of Appeal.⁷ Lord May also served on the Royal Commission of Criminal Justice chaired by Viscount Runciman.

The Runciman Royal Commission on Criminal Justice made more elaborate recommendations in 1993 for the creation of what was to become the CCRC. Many of the other proposals of the Royal Commission were criticized at the time for proposing restrictions on the due process rights of the accused and for emphasizing state interests in efficient and accurate determinations of factual guilt,⁸ but there was wide-spread support for the Commission's proposals for the creation of the CCRC.⁹ Some concerns, however, were expressed that the organization would be too closely tied to the Court of Appeal because the Court of Appeal would have the ultimate power to overturn the conviction.¹⁰ This concern was heightened by the fact that the Court of Appeal had expressed some reluctance to overturn convictions in the Irish Republican Army miscarriage of justice cases.¹¹ Concerns were also expressed that applicants would not have a hearing or

7. JOHN MAY, RETURN TO AN ADDRESS OF THE HONOURABLE HOUSE OF COMMONS DATED 3 DECEMBER 1992 FOR A REPORT OF THE INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE CONVICTIONS ARISING OUT OF THE BOMB ATTACKS IN GUILDFORD AND WOOLWICH IN 1974, 1992, H.C. 296, § 12.25, at 93-94.

8. There were dissents within the Commission against its proposals to require increased defense disclosure and to limit the ability of appellate courts to overturn convictions on the basis of due process violations by the police and prosecutor that were not related to the safety of the verdict. See THE ROYAL COMMISSION ON CRIMINAL JUSTICE, *supra* note 6, Cm. 2263, 221-35 (Michael Zander, dissenting). Professor Michael Zander, a member of the Commission, dissented on the basis that "nine of my ten colleagues believe that if there is sufficient sound evidence, even the most serious misconduct by the prosecution should not result in the conviction being quashed. I cannot agree. The moral foundation of the criminal justice system requires that if the prosecution has employed foul means the defendant must go free even though he is plainly guilty." *Id.* at 234 ¶¶ 67-68. This dissent provides some support for the idea that the Commission's focus on efficient and accurate determinations of factual guilt was in some tension with a focus on the due process rights of the accused. On the relation between innocence protection, crime control and due process, see generally Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133 (2008). For a collection of essays that were highly critical of the Royal Commission's non-CCRC proposals for their focus on efficient determinations of guilt, see CRIMINAL JUSTICE IN CRISIS (Mike McConville & Lee Bridges eds., 1994). For another collection of essays that focused more on the problem of justice in error, see JUSTICE IN ERROR (Clive Walker & Keir Starmer eds., 1993).

9. John Wadham, *Unravelling Miscarriages of Justice*, 143 NEW L.J. 1650 (1993).

10. ROSEMARY PATTENDEN, ENGLISH CRIMINAL APPEALS 1844-1994, 407-08, 421 (Andrew Ashworth ed., 1996); ANDREW SANDERS & RICHARD YOUNG, CRIMINAL JUSTICE 448 (1994); Peter Thornton, *Miscarriages of Justice: A Lost Opportunity*, 1993 CRIM. L. REV. 926.

11. PATTENDEN, *supra* note 10.

even full disclosure before the CCRC and that the CCRC might have to rely on the police for investigations even though the police misconduct had been a contributing cause of the wrongful convictions that had led to the creation of the CCRC.¹² There were also concerns that the new body would not act as an advocate on behalf of the wrongfully convicted.¹³

The CCRC is an independent body appointed by the Queen on the advice of the Prime Minister consisting of at least eleven commissioners, one third of whom must be lawyers with ten years of experience, and two thirds of whom must have knowledge or experience of the justice system.¹⁴ At present, eight of the eleven commissioners are either barristers or solicitors. Other commissioners include a chartered accountant specializing in fraud and a journalist specializing in the investigation of miscarriages of justice as well as a former legal officer in the armed forces.¹⁵ The CCRC has the power to refer a conviction to the Court of Appeal where it considers that there is a “real possibility”¹⁶ that the conviction will not be upheld. The basis for such a conclusion will generally be “an argument, or evidence,” not raised in the proceedings, but a reference can be made in “exceptional circumstances”¹⁷ in other cases. One commissioner can make a decision to reject an application, while three commissioners must agree to a referral to the Court of Appeal.¹⁸

The CCRC’s reasons for making a referral are not released publicly, and there have been some cases where its decisions not to make a referral

12. *Id.*

13. *Id.* The courts had recognized that applicants to the Home Secretary for referrals back to the courts on grounds of miscarriages of justice should have the ability to see and make representations about new material. *R v. Home Secretary ex parte Hickey*, [1995] 1 All ER 490 (Q.B.).

14. Criminal Appeal Act, 1995, c. 35, § 8.

15. Criminal Cases Review Commission, Commissioners, at http://www.ccrc.gov.uk/about/about_29.htm (last visited Oct. 26, 2009).

16. Criminal Appeal Act, 1995, c. 35, § 13. The “real possibility” standard has been defined by the courts “as more than an outside chance or a bare possibility but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld. The threshold test is carefully chosen: if the Commission were almost automatically to refer all but the most obviously threadbare cases, its function would be mechanical rather than judgmental and the Court of Appeal would be burdened with a mass of hopeless appeals; if, on the other hand, the Commission were not to refer any case unless it judged the applicant’s prospect of success on appeal to be assured, the cases of some deserving applicants would not be referred to the Court and the beneficial object which the Commission was established to achieve would be to that extent defeated. The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not.” *R. v. Criminal Cases Review Comm’n ex parte Pearson*, [1999] [volume?] EWHC 452 at XX (Admin.) (Eng.).

17. Criminal Appeals Act, 1995, c. 35, § 13.

18. Clive Walker & Carole McCartney, *Criminal Justice and Miscarriages of Justice in England and Wales*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 183, 198 (C. Ronald Huff & Martin Killias eds., 2008).

to the Court of Appeal have been subject to judicial review.¹⁹ Originally, the accused was able to raise any ground of appeal once a case had been referred back to the courts by the CCRC, but this has been amended to only allow appeals on grounds certified by the CCRC or on other grounds where the Court of Appeal has granted leave.²⁰

Despite having some lay representation, the CCRC ultimately makes its decisions on legal criteria relating to the hearing of appeals. The CCRC does not directly consider factual innocence and has referred cases back to the Court of Appeal on technical legal grounds relating to changes in the law and procedural irregularities.²¹ The fact that the CCRC bases its decision on legal considerations relating to whether an appeal will hear new evidence and overturn a conviction means that the CCRC has an interesting relationship with the Court of Appeal. The CCRC can also refer a relevant question of law to the Court of Appeal²² while the Court of Appeal can refer a matter to the CCRC for investigation.²³

As of September 30, 2009, the Court of Appeal had heard 398 referrals from the CCRC, quashing 281 convictions but upholding 116 cases.²⁴ Although the CCRC is not a party in cases that it refers to the Court of Appeal, it has a seventy percent success rate in the cases it refers to the Court of Appeal. The courts have generally been receptive to the role of the CCRC, but in some cases have expressed reservations about the CCRC's decisions to refer historical cases or cases where there was no new evidence to consider.²⁵

19. The CCRC has discretion not to refer cases even where the statutory criteria are satisfied. The Commission's exercise of this discretion was upheld in a case involving Timothy Evans, who was wrongfully convicted of his daughter's murder in 1950 in the infamous "10 Rillington Place" murders, which were actually committed by his neighbor, a serial killer. The CCRC's decision not to refer was upheld on the basis that it had reasonably exercised its discretion given that Mr. Evans had already received a posthumous free pardon and his family had received compensation and that the Court of Appeal would have no jurisdiction either to declare Mr. Evans innocent or to consider his innocence with respect to the killing of his wife because he had only been formally charged with his daughter's murder. *Westlake v. Criminal Cases Review Comm'n*, 2004 EWHC (Q.B.) 2779 (Admin).

20. Criminal Appeals Act, 1995, c. 35, § 14, amended by Criminal Justice Act., 2003 c. 44, § 315.

21. The CCRC has even referred some case on grounds relating to the fact that the indictment was not properly signed. ELKS, *supra* note 5. ch. 1. Although the CCRC does refer cases where there is new evidence of innocence, some argue that innocence projects are required in civil society to highlight such issues. Stephanie Roberts & Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29 OXFORD J. LEGAL STUD. 43 (2009).

22. Criminal Appeals Act, 1995, c. 35, § 14.

23. *Id.* § 15.

24. Criminal Cases Review Commission, Case Library, Case Statistics, http://www.ccr.gov.uk/cases/case_44.htm.

25. R. v. Ellis, [2003] EWCA 3556 (Crim.) (Eng.); R. v. Gerald, [1999] Crim.L.R. 315 (Eng.).

Since its inception in 1997, the CCRC has completed a review of over 11,946 cases, but has referred only 437 cases.²⁶ In other words, the CCRC has rejected just over ninety-six percent of the applications it has received. The CCRC has subpoena powers, but only with respect to public bodies such as the police.²⁷ It can appoint police officers when necessary to conduct investigations,²⁸ although this is rarely done. The CCRC relies on its own caseworkers as well as its ability to commission reports from experts.²⁹ The cases that the CCRC has referred to the Court of Appeal, and the convictions that have been quashed, cover a wide range of cases, but only two cases in the first ten years of the Commission have been classified as DNA exonerations³⁰ of the type that often characterize exonerations in the United States.³¹ In addition, my own analysis of the cases referred by the CCRC suggests that while thirty percent of the cases it has referred have involved homicide and another seventeen percent have involved sexual offenses, over fifty percent of its referrals have come in other cases,³² again a very different pattern than that found in the United States, where murder and rape cases constitute more than ninety-five percent of both DNA and non-DNA exonerations.³³

A good number of other cases referred by the Commission have concerned frailties in other forms of forensic evidence, including those surrounding sudden infant death, shaken baby syndrome, firearm residue,

26. Criminal Cases Review Commission, Case Library, Case Statistics, http://www.ccr.gov.uk/cases/case_44.htm.

27. See Criminal Appeals Act, 1995, c. 35, § 17.

28. See *id.* § 19.

29. See *id.* § 21.

30. ELKS, *supra* note 5, at 83. One of these cases, *R. v. Shirley*, [2003] EWCA 1976 (Crim.) (Eng.), involved a rape and murder and serology evidence at trial that are typical of many American cases, but the other case was less typical because it involved a robbery in which DNA was extracted from a shoe. In another case, the Court of Appeal upheld a conviction in part because of concerns about contamination of new DNA evidence. *R. v. Bamber*, [2002] EWCA 2912 (Crim.) (Eng.).

31. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 57 (2008) (examining 208 DNA exonerations since 1989); Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM L. & CRIMINOLOGY 523, 524 (2005) (144 of 340 exonerations discovered by DNA evidence).

32. The cases referred to the Court of Appeal and reported on the CCRC website at http://www.ccr.gov.uk/cases/case_referred.asp were reviewed. The results were that 30% of such cases were homicide cases, 17% were sexual offenses and 53% involved other crimes such as robbery and drug offenses. One successful referral related to allowing a dog to be in a public place without a muzzle or lead. Elks similarly found that two thirds of the referrals in the first ten years come in non-homicide cases. ELKS, *supra* note 5, at 184. Elks also notes that 25% of applications to the CCRC involve sexual assault but does not provide the referral rate. *Id.* at 218.

33. Garrett, *supra* note 31, at 55, 73 (99% of DNA exonerations involved convictions of rape or murder or both rape and murder); Samuel R. Gross et al., *supra* note 31, at 528-29 (murder and sexual offenses constituting 96% of both DNA and non-DNA exonerations).

forensic pathology and medicine, facial mapping, auditory recognition, and blood splatter.³⁴ One of the virtues of the Commission is its ability to commission experts to examine evidence and provide expert opinion evidence that may not have been available to the accused at trial.³⁵ Another virtue of the commission is its ability to investigate crimes less serious than homicide and sexual offenses which have in the United States commanded the most attention from innocence projects and other volunteer efforts. Other cases have been referred by the CCRC on matters such as incompetence of trial counsel, the unreliability of witnesses and, more controversially, changes in the law since the original conviction.³⁶ The Commission generally refers cases on the basis of new evidence.

It is an offense for the CCRC to disclose information it has collected except in relation to its own statutory functions or for purposes of criminal, civil or disciplinary proceedings.³⁷ Concerns have been raised that restrictions on the ability of the CCRC to disclose information can restrict the work of civil society advocacy groups representing those who may have been wrongfully convicted³⁸ and that “many failed applicants are now voicing their dissatisfaction with the paucity of reasons given for the Commission’s refusal to refer their case.”³⁹ A study has found that while about one third of applicants to the CCRC have legal representation, almost two thirds of the small number of applicants who are successful in the sense that the CCRC refers their case to the Court of Appeal have legal representation.⁴⁰ This finding reveals only a correlation between legal representation and success in the form of a referral, but the same study finds that lawyers can have a determinative effect in some cases, especially those

34. *See generally* ELKS, *supra* note 5, at ch 4.

35. Notably, these cases referred by the Commission reflect the recent conclusions of the National Research Council concerning problems with respect to the reliability of many forensic sciences. NATIONAL RESEARCH COUNCIL, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009).

36. The Court of Appeal was at first receptive to such claims but has become much less receptive over time and now has been given the explicit power to dismiss an appeal that was referred by the CCRC if the only ground of appeal is a change in law. Criminal Justice and Immigration Act, 2008, c. 4, § 42 (amending § 16c of the Criminal Appeal Act, 1968).

37. Criminal Appeal Act, 1995, c. 35, §§ 23-24.

38. Robert Carl Schehr & Lynne Weathered, *Should the United States Establish a Criminal Cases Review Commission?*, 88 JUDICATURE 122 (2004); *see also* Roberts & Weathered, *supra* note 21.

39. Walker & McCartney, *supra* note 18, at 198.

40. JACQUELINE HODGSON & JULIET HORNE, *THE EXTENT AND IMPACT OF LEGAL REPRESENTATION ON APPLICATIONS TO THE CRIMINAL CASE REVIEW COMMISSION* (2008), available at http://adversarialsystems.org/yahoo_site_admin/assets/docs/Jacqueline_Hodgson.9280423.doc (last visited Oct. 26, 2009).

in which the CCRC reverses its initial decision not to refer a case.⁴¹

In summary, the CCRC does not function as an American-style innocence project that focuses on DNA evidence that reveals evidence of “actual innocence.”⁴² Rather, the CCRC focuses on a wide range of legal issues relating to whether the appellate courts would quash a conviction and accept the new evidence on appeal.

B. The Scottish Criminal Cases Review Commission

There is a separate criminal case review commission for Scotland, which has a different legal system than the rest of the United Kingdom. The Scottish commission is a smaller body than the CCRC, but it has similar appointment procedures and qualifications and similar restrictions on disclosure of information. There are nine commissioners including four lawyers, others with criminal justice experience and professors of forensic science and social work.⁴³

The Scottish commission may refer a case back to the courts on the basis that a miscarriage of justice may have occurred and that it is in the interests of justice that the case be referred.⁴⁴ Although this referral test may at first glance seem broader than that available for the CCRC, a miscarriage of justice is the sole ground of appeal in Scottish law. Thus, the Scottish commission, like the one in England and Wales, essentially applies the test for a successful appeal when deciding whether to refer a case back to the courts.⁴⁵ In one case, the Commission tried to innovate by referring a case on the basis of a lurking doubt, but this ground was rejected by the courts.⁴⁶ A common issue for all error correction innocence commissions that can refer cases back to the courts is whether the appellate courts have the ability to re-consider possible miscarriages of justice.

The Scottish commission has broader investigative powers than the

41. *Id.* at 1 (29% of applicants from 2001 to 2007 had legal representation, but 63.5% of applicants whose cases were referred during that time had legal representation).

42. BARRY SCHECK, PETER NEUFELD AND JIM DWYER, ACTUAL INNOCENCE, XVI (2000); *see also* Innocence Project, Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Oct. 26, 2009) (detailing 244 DNA exonerations).

43. Scottish Criminal Cases Review Commission, Management, <http://www.sccrc.org.uk/management.aspx> (last visited Oct. 26, 2009).

44. Crime and Punishment (Scotland) Act, 1997, c. 48, § 25.

45. *In re B.M.*, [2006] C.S.O.H. 112, S.L.T. 907 (Scotland), available at <http://www.scotcourts.gov.uk/opinions/2006CSOH112.html>.

46. *Harper v. Her Majesty's Advocate* [2005] H.C.J.A.C. 23 at para 33, available at <http://www.scotcourts.gov.uk/opinions/2005HCJAC23.html>.

CCRC which include the ability to obtain a judicial order to examine any person with relevant information under oath⁴⁷ as well as to require production of relevant material from any person and not just public bodies as is the case for the CCRC. The Commission is not limited to the grounds raised by applicants and has referred one case on an application by a co-accused even though the accused did not apply.⁴⁸

As of April 2009, the Commission had referred eighty-two of 1042 completed applications since the start of its work in April 1999.⁴⁹ This referral rate of eight percent is considerably higher than the CCRC's. The first seventy-five referrals included forty-two involving convictions and thirty-three involving sentences. Of the conviction referrals, sixty percent of these were overturned when the appeal was heard, lower than the seventy percent success rate enjoyed by the CCRC.⁵⁰

Almost half of the conviction referrals involved cases with murder or attempted murder charges, and the average time for the Commission to deal with its conviction referrals was 728 days with another average time of 986 days before the appeal court decided the case⁵¹ In half of all cases, the ground for referral was new evidence not heard at trial, but the Commission also alleged legal error, failure of disclosure and defective defense representation in a number of other cases.⁵²

The Commission's most famous referral was its 2007 decision to refer a conviction in the Lockerbie terrorist bombing trial on the basis of new evidence indicative of frailties in eyewitness identification. This referral was made in the form of an 800-page decision after a three-year, 1.1-million-pound investigation.⁵³ The courts in that case found that, once referred, the accused was able to advance any ground of appeal even if the Commission had rejected that ground.⁵⁴ Nevertheless, grounds raised by the accused but not by the Commission have generally been rejected by the

47. The Commission can interview jurors but not about the actual deliberations. Re Scottish Criminal Case Review Commission High Court of Judiciary, 2001 S.C.C.R. 775 (Scot.).

48. *Johnston v. Her Majesty's Advocate* [2006] HCJAC 30, available at <http://www.scotcourts.gov.uk/opinions/2006HCJAC30.html>.

49. Fiona Leverick et al., Scottish Criminal Cases Review Commission 10th Anniversary Research: Final Report, <http://www.sccrc.org.uk/ViewFile.aspx?id=393> (Apr. 30, 2009).

50. *Id.* at 33.

51. *Id.* at 26, 47.

52. *Id.* at 23.

53. News Release, Scottish Criminal Cases Review Commission, *Abdelbaset Ali Mohamed al Megrahi*, <http://www.sccrc.org.uk/viewfile.aspx?id=293> (June 28, 2007).

54. *Al Megrahi v. H.M. Advocate*, [2008] HCJAC 58, SLT 1008.

appeal courts on their merits.⁵⁵ The grounds raised by the Commission which have been most successful on appeal have been those relating to failure to disclose, various errors of law and misdirection, and new evidence.⁵⁶ A recent study has found widespread support for the Commission, but also some concerns about delay and lack of communication by the Commission with applicants while cases are investigated.⁵⁷

C. The North Carolina Innocence Inquiry Commission

Despite calls for the creation of a permanent body like the CCRC by six temporary public inquiries headed by sitting or retired judges in Canada, the first jurisdiction in North America to create a CCRC-type body was the State of North Carolina. In August 2006, legislation was enacted creating the North Carolina Innocence Inquiry Commission (NCIIC) to determine claims of factual innocence from living persons.⁵⁸ This legislation grew out of recommendations made by another body, the North Carolina Actual Innocence Commission which was a self-appointed body chaired by Chief Justice Lake of the North Carolina Supreme Court. The systemic reform work of this separate innocence commission will be discussed below. Nevertheless, the fact that the NCIIC emerged out of the work and recommendations of a systemic reform commission underlines the symbiotic relationship between systemic reform and error correction in the wrongful conviction field.

The North Carolina Innocence Inquiry Commission is composed of eight voting members appointed by the Chief Justices of the North Carolina Supreme Court and Court of Appeals. Although judicial appointment of commission members may provide some independence from the government, by statute the membership of the NCIIC must include a superior court judge, a prosecuting attorney, a victim advocate, a defense attorney, a sheriff, a person who is not an attorney or employed by the judiciary and two others.⁵⁹ The commission thus has a composition that represents the major actors in the justice system. Like the British and Scottish commissions, the NCIIC also has some lay representation, but the members of the commission receive no salary for their services.⁶⁰ The absence of remu-

55. Leverick et. al., *supra* note 49, at 37.

56. *Id.* at 41.

57. *Id.* at 56-57.

58. N.C. GEN. STAT. §§ 15 A-1460-75 (Supp 2006).

59. *Id.* § 15A-1463.

60. *Id.* § 15A-1464(b).

neration may be appropriate for those such as judges, sheriffs and prosecutors already employed by the state, but could potentially cause hardship for those not so employed.

Unlike the British or Scottish Commission, the NCIIC is limited to claims of factual innocence.⁶¹ Although claims that an offender is guilty of a lesser offense are made in about sixteen percent of all applications to the NCIIC, they, like claims of self-defense or diminished responsibility, are rejected because they are inconsistent with the statutory requirement and definition of factual innocence.⁶² Indeed, the absence of complete factual innocence accounts for twenty-three percent of the cases rejected by the North Carolina commission, with procedural grounds accounting for another 8.46% of cases rejected by the Commission.⁶³ Claims relating to procedural unfairness and claims that would otherwise be accepted by appellate courts but fall short of factual innocence would, however, be considered by either the CCRC or the Scottish Commission. Another difference is that the NCIIC is precluded by statute from considering applications on the behalf of deceased persons,⁶⁴ whereas the CCRC and the Scottish Commission can consider such claims. In short, the NCIIC has a mandate that is much more limited than other error correction commissions because it is restricted to factual innocence.

Claims made to the North Carolina commission are initially evaluated to determine whether they satisfy the statutory criterion of actual innocence. If they do qualify, a preliminary review is conducted that gathers information about the innocence claim including compiling the documents on the case. If the case is moved into investigation, then the applicant is required to enter into a signed agreement to waive procedural rights and privileges relating to the innocence claim and to cooperate and provide full disclosure to the Commission. This agreement is signed with the applicant's lawyer present, and the commission chair can appoint counsel for an indigent person. State laws relating to discovery and disclosure apply. The

61. "Claim of factual innocence" is defined as "a claim on behalf of a living person convicted of a felony in the General Court of Justice of the State of North Carolina, asserting the complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief." *Id.* § 15A-1460.

62. The North Carolina Innocence Inquiry Commission, Report to the 2009-2010 Long Session of the General Assembly of North Carolina at III, <http://www.innocencecommission-nc.gov/Report2009.htm> (March 12, 2009).

63. The North Carolina Innocence Inquiry Commission, Case Statistics, <http://www.innocencecommission-nc.gov/statistics.htm> (Dec. 31, 2008).

64. N.C. GEN. STAT. § 14-1467(a).

investigation phase is described by the NCIIC as “a detailed and lengthy process that involves interviewing witnesses, obtaining affidavits, seeking court orders for evidence, testing of physical evidence, and compiling of documentation. The entire case is comprehensively investigated with every lead followed and every fact rechecked.”⁶⁵ The law also provides that

[e]vidence of criminal acts, professional misconduct, or other wrongdoing disclosed through formal inquiry or Commission proceedings shall be referred to the appropriate authority. Evidence favorable to the convicted person disclosed through formal inquiry or Commission proceedings shall be disclosed to the convicted person and the convicted person’s counsel, if the convicted person has counsel.⁶⁶

Disclosure by the Commission to the applicant is thus governed by statute, whereas disclosure by the CCRC is governed by the common law.

The Commission has the power to issue subpoenas and compel the attendance of witnesses⁶⁷ and therefore has broader investigative powers than the CCRC. The NCIIC can refer a case to the courts for review by a majority vote on the basis that there is “sufficient evidence of factual innocence to merit judicial review.”⁶⁸ This is a narrower standard than that used by the CCRC or the Scottish commission, which can refer cases on the basis that they will be overturned on any existing legal standard for appeals, including miscarriages of justice that are not related to factual innocence.⁶⁹ The NCIIC has discretion whether to hold public hearings and there is a requirement for victim notification. Cases will be referred to a three-judge panel with no previous involvement in the case. The judicial panel can dismiss all charges on the basis of a unanimous decision that there is a clear and convincing case of innocence.⁷⁰ Both the decisions of the NCIIC and the three-judge panel are deemed to be final and not subject to appeal or judicial review.⁷¹

As of September, 2009, the NCIIC had rejected 441 cases while having four cases in formal inquiry and three cases that went to a formal hear-

65. The North Carolina Innocence Inquiry Commission, *supra* note 62, at 3.

66. N.C. GEN. STAT. § 15A-1468(d).

67. *Id.* §§ 15A 1467(d)-(f).

68. A unanimous decision is required if the person pled guilty, and such claims will not be considered for the first two years. *Id.* § 15A-1468. This was one of the few changes made by the General Assembly from the proposal made by the North Carolina Actual Innocence Commission. Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1358 n.89 (2007).

69. Criminal Appeal Act, 1995, c. 35, § 13; Crime and Punishment (Scotland) Act, 1997, c. 48, § 25.

70. N.C. GEN. STAT. § 15A-1469(h).

71. *Id.* § 15A-1470(a).

ing before the entire Commission.⁷² The first case that went to a full hearing by the Commission was referred to a three-judge panel. At the hearing, the defense presented evidence that the crime, sexual abuse of the applicant's then six-year-old daughter, did not take place and that the victim had been coached by her grandmother. The convicted person also testified to his innocence. The special three-judge panel found that the applicant had failed to prove by clear and convincing evidence that he was innocent of sexually abusing his daughter.⁷³ The accused continues to seek redress through other means as there is no appeal from the special hearing. The Commission decided that there was not sufficient evidence of innocence in the second case in which it held a formal hearing. In that case, a man convicted of robbery argued that hair found in a cap at the scene should have been preserved for DNA testing, but the Commission stressed the strength of the identification evidence used to convict the man in the case.⁷⁴ In the third hearing, the Commission referred a murder conviction to a special three judge panel on the basis of a confession to the crime made by another inmate.⁷⁵ Despite its mandate which is restricted to claims of factual innocence, the NCIIC has not been limited to claims based on DNA exonerations.

The entire legislation establishing the NCIIC is subject to a four-year sunset unless renewed by the legislature.⁷⁶ The initial budget appropriation for the NCIIC was \$210,000,⁷⁷ which has been increased to \$372,879 a year. In addition, the NCIIC has recently received a federal grant of \$566,980 from the National Institute for Justice to facilitate DNA testing of claims in the years 2010 and 2011.⁷⁸ The Commission has five staff members: the executive director, who is a lawyer and a former prosecutor; a staff attorney, who is also a former police officer and prosecutor; an inves-

72. The North Carolina Innocence Inquiry Commission, Case Statistics, <http://www.innocencecommission-nc.gov/statistics.htm> (last visited Oct. 26, 2009).

73. *Id.*; News Release, The North Carolina Innocence Inquiry Commission, *Man's Conviction Upheld in Innocence Hearing*, at <http://www.innocencecommission-nc.gov/inthenews.htm> (Sept. 3, 2008).

74. News Release, The North Carolina Innocence Inquiry Commission *Hearing Concludes Without Finding of Innocence*, at <http://www.innocencecommission-nc.gov/inthenews.htm> (Jan. 16, 2009).

75. Cary man to get new trial in 1991 murder, at <http://www.innocencecommission-nc.gov/inthenews.htm> (Sept. 4, 2009).

76. This was attached with the Governor's signature to the bill. I am advised that this information is correct, however the actual paper copy can only be obtained from the North Carolina General Assembly.

77. Maiatico, *supra* note 68, at 1374.

78. News Release, The North Carolina Innocence Inquiry Commission, *Innocence Inquiry Commission Receives Federal Grant*, Sept. 30, 2009.

tigator, who is a lawyer and who has worked in Innocence Projects; an administrative officer, who is a paralegal and who acts as a case manager; and an administrative assistant.⁷⁹ The Commission is also available to offer policy advice to the legislature, if requested, on matters relating to wrongful convictions such as legislation and other requirements for the preservation of physical evidence. The Commission also uses pro bono work, including work by law students at various North Carolina law schools.⁸⁰

The NCIIC is a unique body in the American legal system. It is run at a low cost and has an uncontroversial mandate that is limited to claims of factual innocence. Cases referred by the NCIIC back to the courts are subject to special factual innocence rules, whereas cases referred by the British CCRC or the Scottish commissions are governed by the rules that apply to all appeals. It is notable, however, that all three error correction commissions reject the vast majority of the applications they receive.

II. SYSTEMIC REFORM MODELS

Innocence commissions can be designed to make recommendations about systemic reform in order to prevent wrongful convictions or miscarriages of justice in future cases. Such commissions include inquiries appointed by the government to examine well-publicized miscarriages of justice and to make recommendations to prevent them in the future, government-appointed commissions with a mandate to examine systemic issues, and self-appointed commissions that examine systemic issues, sometimes in conjunction with examining specific cases of proven or suspected wrongful convictions. Although systemic reform commissions may examine specific cases of wrongful convictions, they differ from the error correction models examined above because they have a mandate to make systemic reform recommendations. Systemic reform commissions also do not have a mandate to refer specific cases back to the court or to require that their systemic reform recommendations be implemented into legislation or in practice.

A. Public Inquiries into Individual Cases

The pioneer and gold standard of the systemic reform model are the public inquiries appointed by Canadian governments to investigate individ-

79. See The North Carolina Innocence Inquiry Commission, Commission Members, <http://www.innocencecommission-nc.gov/commissioners.htm> (last visited Oct. 26, 2009).

80. The North Carolina Innocence Inquiry Commission, *supra* note 62, at 6.

ual cases of wrongful convictions.⁸¹ Since 1989, there have been seven such inquiries appointed by provincial governments in Canada, and they have all been conducted by either sitting or retired judges.⁸² The appointment of such inquiries is at the discretion of the provincial Cabinet, and they are generally reserved for the most notorious cases. In Canada, the inquiries, with one exception,⁸³ have all been appointed after a conviction has been quashed, but in Australia and England, public inquiries have been appointed before convictions have been quashed and as such have played an error correction as well as a systemic reform role.⁸⁴

The Canadian inquiries typically have multimillion-dollar budgets that are used to conduct extensive investigations and hearings into the causes of the particular wrongful convictions. The committees also can commission research into the systemic causes of wrongful convictions. They issue detailed reports that make extensive factual findings about the particular case, and they make policy recommendations in an attempt to prevent a reoccurrence of similar miscarriages of justice in the future. Canadian public inquiries are temporary institutions, and their mandate is completed with the issue of their public report. Governments are not required to follow their recommendations.⁸⁵

The first Canadian commission of inquiry to examine a wrongful con-

81. Australia and Britain have also appointed public inquiries into specific wrongful convictions. In Australia, the most famous inquiry involved the Chamberlain or the “dingo ate my baby” case, while in England, Lord May was appointed to an inquiry into the Guildford Four and Maguire Seven cases. On the Canadian inquiries, see Kathryn Campbell, *Policy Responses to Wrongful Convictions*, 41 CRIM. L. BULL. 145 (2005); Kent Roach, *Inquiring into the Causes of Wrongful Convictions*, 35 CRIM. L. BULL. 152 (1999); Richard J. Wolson & Aaron M. London, *The Structure, Operation and Impact of Wrongful Conviction Inquiries: The Sophonow Inquiry as an Example of the Canadian Experience*, 52 DRAKE L. REV. 677 (2004).

82. T. ALEXANDER HICKMAN, *THE ROYAL COMMISSION ON THE DONALD MARSHALL JR. PROSECUTION* (1989); FRED KAUFMAN, *THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN* (1998); PETER DE C. CORY, *THE INQUIRY REGARDING THOMAS SOPHONOW* (2001); ANTONIO LAMER, *THE LAMER COMMISSION OF INQUIRY PERTAINING TO THE CASES OF RONALD DALTON, GREGORY PARSONS AND RANDY DRUKEN* (2006); PATRICK J. LESAGE, *REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL* (2007); EDWARD P. MACCALLUM, *REPORT OF THE INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD* (2008); STEPHEN T. GOUDGE, *REPORT OF THE INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY* (2008).

83. The one exception was the Inquiry into Pediatric Forensic Pathology, but that inquiry was restricted from reporting on individual cases that could be remedied in the existing criminal process. See GOUDGE, *supra* note 82, at 679. This Commission did have a mandate to provide for counseling for those adversely affected by failings in the system of pediatric forensic pathology and a number of wrongful convictions have subsequently emerged and been related to such failings.

84. MAY, *supra* note 7; JUSTICE T.R. MORLING *ROYAL COMMISSION OF INQUIRY INTO THE CHAMBERLAIN CONVICTIONS* (1987).

85. ONTARIO LAW REFORM COMMISSION, *REPORT ON PUBLIC INQUIRIES* (1992).

viction was a Nova Scotia commission of inquiry conducted between 1986 and 1989 that investigated the wrongful conviction of Donald Marshall Jr., a young Aboriginal or Native Canadian man, wrongfully convicted of murder. It was headed by three sitting judges from outside of the province of Nova Scotia in order to provide independence.⁸⁶ The judges unsuccessfully sought to subpoena some of the judges who had voted on Marshall's case despite conflicts of interest and who had essentially blamed Marshall for his own wrongful conviction.⁸⁷ The Commission made factual findings that helped exonerate Marshall of claims made by the Court of Appeal that he was engaged in a robbery at the time that another person killed his companion.⁸⁸ It also made sweeping reform recommendations for the justice system, including greater independence for prosecutors from political pressures and pre-trial disclosure of relevant information held by prosecutors.⁸⁹

Two inquiries in Ontario and one in Manitoba have focused on the frailties of forensic evidence. Two of these inquiries have examined problems in hair and fiber analysis, and the other examined failures in pediatric forensic pathology.⁹⁰ The Ontario inquiries recommended multiple reforms with respect to the organization of forensic services in Ontario, many of which have been implemented.⁹¹ These inquiries examined flaws in specific cases, but made recommendations designed to help prevent similar failures in future cases. In the course of investigating specific wrongful convictions, Canadian inquiries have provided in-depth analysis of subjects such as the use of jailhouse informers, the phenomenon of tunnel vision where the police and prosecutor discount other possible suspects, proper identification procedures, the adequacy of defense representation, disclosure issues, and the process through which a convicted person applies to the federal Minister of Justice to re-open a case on grounds of a suspected miscarriage of justice once the accused's appeals have been exhausted.

There is a need for a systemic audit of the degree to which the many policy recommendations made by the Canadian public inquiries have been

86. HICKMAN, *supra* note 82.

87. *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796 (Can.).

88. HICKMAN, *supra* note 82, at 15-33.

89. *Id.* Part 2.

90. GOUDGE, *supra* note 82; KAUFMAN, *supra* note 82; INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL (2007).

91. An Act to Amend the Coroner's Act, 2009 S.O., ch. 15 (Ontario) (implementing many of the recommendations of the Inquiry into Pediatric Forensic Pathology relating to the keeping of a registry of qualified forensic pathologists and facilitating oversight by the Chief Forensic Pathologist and providing mechanisms for complaints against forensic pathologists).

implemented. The inquiries have been conducted by the provinces, and their impact in other provinces is uncertain. None of the inquiries have led the federal Parliament, which has exclusive jurisdiction over criminal law, to amend the Criminal Code of Canada. One rather spectacular failure has been the federal government's rejection of a CCRC model in 2002. Instead, it reformed its procedures for dealing with applications to the Minister of Justice to re-open criminal convictions, despite the fact that three inquiries had recommended an independent criminal cases review commission by 2002. Subsequent to the 2002 amendments, three other inquiries have made similar recommendations for a Canadian CCRC.⁹²

Inquiry recommendations with respect to police procedures such as the use of double-blind procedures, sequential photo line-ups and videotaping of interrogations have not been implemented in the Canadian Criminal Code, though they have been voluntarily adopted in some jurisdictions.⁹³ Other reforms proposed by Canadian inquiries have been implemented. Although it was only tangentially related to the specific wrongful conviction reviewed, Nova Scotia introduced a Director of Public Prosecutions statute following the recommendation of the 1989 Marshall Commission.⁹⁴ Ontario has responded to its recent public inquiry on flaws in forensic pathology with amendments to its Coroner's Act to recognize the ability of the chief forensic pathologist to keep a registry of qualified forensic pathologists and to oversee the conduct of forensic pathology in that province.⁹⁵

An important feature of the Canadian inquiries is that some of their reform recommendations are addressed or can be implemented by the unelected judiciary. The most important reform stemming from a Canadian

92. The creation of an independent review commission had been recommended before 2002 by THE ROYAL COMMISSION ON THE DONALD MARSHALL JR. PROSECUTION, *supra* note 82, at 145; by THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN, *supra* note 82, at 1237; and by THE INQUIRY REGARDING THOMAS SOPHONOW, *supra* note 82, at 121. Since 2002, the creation of an independent commission has been recommended by the REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL (2007) at 121; the REPORT OF THE INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD, 390 (2008); and by the REPORT OF THE INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY, 538 (2008).

93. Courts still on occasion admit identifications based on one-person photo line-ups. See *R. v. Aburto*, [2008] B.C.W.L.D. 2602, 2008 BCCA 78 (Can.). Courts have held that the recommendations for sequential photo line-ups made by the Sophonow inquiry are not binding. *R. v. Doyle*, [2007] B.C.A.C. 307, 2007 BCCA 587 (Can.); *R. v. Grant*, [2005] A.W.L.D. 2647, 2005 ABCA 222 (Can.). Similarly, the courts have found that the Sophonow inquiry's recommendation that statements not be admissible unless recorded is also not binding. *R. v. Ducharme*, [2004] 184 Man. R.(2d) 36, 2004 MBCA 29 (Can.).

94. Public Prosecutions Act, R.S.N.S., ch. 21 (1990) (Nova Scotia).

95. An Act to Amend the Coroner's Act, 2009 S.O., ch. 15 (Ontario).

public inquiry has been the Supreme Court of Canada's recognition of a broad constitutional requirement that the prosecutor disclose all relevant information to the accused, regardless of whether it could be classified as incriminatory or exculpatory.⁹⁶ The 1991 decision was in large part based on the 1989 recommendations of the Marshall inquiry that the Criminal Code be amended to require pre-trial disclosure by the prosecutor.⁹⁷

Canadian courts have recognized the findings of public inquiries when devising warnings about the dangers of testimony by jailhouse informers⁹⁸ and accomplices⁹⁹ as well as the frailties of eyewitness identification.¹⁰⁰ The Supreme Court also took note of the findings of a number of inquiries when it recognized a new tort of negligent police investigation that can include failure to use proper identification procedures.¹⁰¹ The Canadian public inquiries, combined with the work of the CCRC and DNA exonerations in the United States, also helped to convince the Supreme Court of Canada to reverse its position and no longer allow the extradition of fugitives without the assurance that the death penalty would not be applied.¹⁰²

Although there is no guarantee that their recommendations will be implemented, the Canadian public inquiries have played an important role in raising awareness among the public and policy-makers in Canada about the reality of wrongful convictions. Moreover, a number of important reforms designed to limit the risks of wrongful convictions have been implemented by the executive, provincial legislatures and the courts as a result of the Canadian inquiries.

B. Public Inquiries into Systemic Issues

A number of States have appointed widely representative commissions to make recommendations with respect to the prevention of wrongful convictions. These commissions have frequently focused on matters relating to the interaction of the death penalty and wrongful convictions. The best known is a fifteen-person Illinois commission appointed by Governor Ryan in 2000 that issued an extensive report in 2002 with eighty-five rec-

96. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (Can.).

97. *Id.* at 336-37 (quoting HICKMAN, *supra* note 82, at 238).

98. *R. v. Baltusatis*, (2002) 58 O.R.(3d) 161 (C.A.); *but see R. v. Brooks*, [2000] 1 S.C.R. 237, 2000 SCC 11 (Can.) (rejecting recommendations for automatic warnings about the credibility of all jailhouse informers).

99. *R. v. Khela*, 2009 SCC 4 (Can.).

100. *R. v. Hibbert*, [2002] 2 S.C.R. 445, 2002 SCC 39 (Can.); *R. v. Trochym*, [2007] 1 S.C.R. 239.

101. *Hill v. Hamilton-Wentworth Police Serv. Bd.*, [2007] 3 S.C.R. 129 (Can.).

102. *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.).

ommendations.¹⁰³ The commission focused on systemic reform recommendations relating to identification procedures, the recording of interrogations, the use of jailhouse informers and forensic evidence. It also conducted an in-depth examination of the cases of thirteen men who had been released from death row in Illinois, and cases in the state where the death penalty was imposed. It also issued research reports as a technical appendix.¹⁰⁴

A number of reforms have followed from the Illinois commission's recommendations. They include reforms related to taped police interviews,¹⁰⁵ disclosure¹⁰⁶ and the use of informant testimony.¹⁰⁷ Other proposed reforms, including those relating to jury instructions and independent forensic labs, have not yet been implemented.¹⁰⁸ The Illinois legislature also appointed a subsequent Capital Punishment Reform Study Committee to examine the implementation of these and other reforms.¹⁰⁹ This follow-up commission responds to one of the main weaknesses of systemic reform commissions—that they have no follow-up powers to ensure that their recommendations are actually implemented.

A much less successful public inquiry into systemic issues was the California Commission on the Fair Administration of Justice, appointed by the state Senate in 2004. The California commission included representatives of the police, prosecutors, defense lawyers and victims. It issued a series of reports designed to address the causes of wrongful convictions culminating in a final report in 2008. The Commission's report dealt with many of the main causes of wrongful convictions, but also featured a number of dissenting opinions from a variety of its members.¹¹⁰ A number of bills implementing the commission's recommendations were enacted by the legislature. They would have provided for electronic recording of interrogations in homicide and other serious felony cases, the development of

103. COMMISSION ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002).

104. *Id.*

105. 725 ILL. COMP. STAT. 5/103-2.1 (2008).

106. 725 ILL. COMP. STAT. 5/114-13.

107. 725 ILL. COMP. STAT. 5/115-22.

108. Thomas Sullivan, *Proposed Reforms to the Illinois Capital Punishment System: A Status Report*, 96 ILL. B.J. 38 (2008).

109. Capital Punishment Reform Study Committee Act, P.A. 93-605, 2003 Ill. Laws 4281 (codified as amended at 20 ILL. COMP. STAT. 3929/1-3929/99 (2008)).

110. CALIFORNIA COMMISSION ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT (2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>. Some prosecutors for example dissented from recommendations about the use of sequential line-ups. *Id.* at 29. There were a series of dissents on the recommendations made with respect to the death penalty. *Id.* at 162.

guidelines for the use of photo line-ups and a requirement that the testimony of jailhouse informants must be corroborated. Nevertheless, all of these reforms were vetoed by Governor Schwarzenegger, who cited concerns that they would unduly bind police and prosecutors when conducting line-ups and interrogations and prosecutors when prosecuting cases.¹¹¹ Subsequent attempts to revive the bills have failed because of their perceived budgetary implications.¹¹² The California experience suggests that representation by individual police and prosecutors on systemic reform commissions will not guarantee that organizations representing law enforcement will not oppose proposed reforms. In the American system of divided government, all parts of the elected branches of government must become persuaded of the need to adopt reforms designed to reduce wrongful convictions.

C. Self-Appointed Inquiries into Systemic Issues

The North Carolina Actual Innocence Commission was formed when the Chief Justice of North Carolina invited thirty-one representatives of different parts of the justice system to work together on a volunteer basis to make “recommendations which reduce or eliminate the possibility of the wrongful conviction of an innocent person.”¹¹³ The Commission was initially composed of three judicial representatives, two representatives from the Governor’s office, three defense attorneys, six law enforcement representatives, five prosecution representatives, three law professors, one victim assistance representative, one journalism professor, and two general interest representatives. In 2003, the Commission made various recommendations with respect to eyewitness identification and also established a subcommittee to monitor implementation of these recommendations. The Commission’s work sought broad consensus through compromise, and for

111. Press Release, California Commission on the Fair Admin. of Justice, Commission Chair John Van de Kamp Responds to Governor’s Vetoes of Critical Criminal Justice Reform Bills Passed by California State Legislature, available at <http://www.ccfaj.org/documents/press/Press17.pdf> (Oct. 18, 2007); Bob Egelko, *Governor Vetoes Bills Opposed by Law Enforcement*, S.F. CHRON., Oct. 16, 2007, at D2. For an account of law enforcement opposition to the bills, see Henry Weinstein, *3 Wrongful Conviction Bills Advance*, L.A. TIMES, June 27, 2007, at B4.

112. Op-Ed., *California Can’t Pay For Justice*, L.A. TIMES, <http://articles.latimes.com/2008/jul/05/opinion/ed-report5> (Jul. 5, 2009). Another bill to study the salaries of state forensic scientists was also vetoed by the Governor for budgetary reasons. See CALIFORNIA COMMISSION ON THE FAIR ADMIN. OF JUSTICE, *supra* note 110, at 62.

113. Christine Mumma, *North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L.REV. 647, 650 (2004) (quoting North Carolina Actual Innocence Commission Mission Statement).

that reason it did not take a position on the death penalty.¹¹⁴ The Commission's work was funded by an annual grant of less than \$40,000.

Another self-appointed study commission was the Innocence Commission of Virginia formed by a "small band of lawyers, academicians and activists"¹¹⁵ to study the cause of wrongful convictions and to make recommendations about measures to prevent them in the future. Relying on pro bono work from eleven law firms and three law schools, this Commission started with an examination of known cases of exonerations in Virginia. It issued a report in 2005 that provided both a summary of known wrongful convictions and a discussion of the causes of wrongful convictions—identification, scientific evidence, discovery, interrogation, tunnel vision and post-conviction remedies—and proposed reforms related to those causes.¹¹⁶ The Director of the Commission has subsequently written, "to this day, I am still disappointed that we had to pursue the ICCA as a private exercise, for I deeply believe that it is the state's responsibility to provide oversight of the punitive system it employs."¹¹⁷ He has also described the report as pursuing "a conservative agenda for reform" in part because of his view that no recommendations "will be enacted simply by appealing to civil liberties or a call to the higher good. . . No one ever was elected in this country by appearing 'soft on crime' . . . The policy proposals have not changed; only the supporting rhetoric has."¹¹⁸

The North Carolina experience demonstrates that self-appointed and volunteer bodies can, in the appropriate circumstances, make important contributions to reform. The North Carolina commission not only made recommendations designed to reduce the risk of wrongful convictions in the future, but it also helped to create the conditions under which the state was prepared to create the North Carolina Innocence Inquiry Commission as a permanent state-appointed and state-financed error correction institution.

Whether they have been appointed by the state, as in Illinois and California, or self-appointed, as in North Carolina and Virginia, systemic reform commissions have attempted to represent all the major actors in the

114. *Id.* at 655.

115. JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM*, 5 (2008).

116. INNOCENCE COMMISSION FOR VIRGINIA, *A VISION FOR JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VIRGINIA I* (2005), available at <http://www.thejusticeproject.org/wp-content/uploads/a-vision-for-justice.pdf>.

117. GOULD, *supra* note 115, at 56.

118. *Id.* at 239.

justice system in order to win support for their recommendations. The price for such broad-based representation may be either a series of dissents, as in the case of the California commission, or conservative recommendations or the avoidance of divisive issues such as the death penalty, as in the Virginia and North Carolina examples. The Canadian public inquiries are an exception because they are run by sitting or retired judges, and their recommendations are formed by the judges with the assistance of commission counsel and others who work for the commission. Nevertheless, various actors in the justice system, including police, prosecutors and civil society groups are often granted standing in the Canadian inquiries and as such participate in the process leading to those commissions' systemic reform recommendations. It is also noteworthy that all of the systemic reform commissions have presented the facts of individual wrongful convictions in order to gain support for their recommendations. With the exception of Illinois' appointment of a follow-up commission, none of the systemic reform commissions continue after their reports are delivered, and none has the power to implement their recommendations.

III. CAN ONE COMMISSION DO IT ALL?: TRADE OFFS BETWEEN ERROR CORRECTION AND SYSTEMIC REFORM

One question that emerges after this survey of the range of error correction and systemic reform innocence commissions is whether it is possible for one innocence commission to both correct errors in individual cases and to be an effective proponent of systemic reform. Writing in 2002, Keith Findley recognized that the British CCRC model was oriented to error correction in individual cases more than systemic reform. Professor Findley, who is also the co-director of the Wisconsin Innocence Project, nevertheless predicted that the CCRC's work could

help in the systemic reform enterprise, as it would continue to highlight patterns in wrongful conviction cases, draw attention to those issues, and perhaps create a climate of enhanced receptiveness to reform. Indeed, such a commission could also be specifically charged to monitor the errors it detects in the system, and to issue reports with recommendations for reform.¹¹⁹

This optimistic account is attractive, but, subject to one limited exception to be discussed below, has unfortunately not proven to be accurate.

Although British law has some important safeguards with respect to

119. Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 348 (2002).

wrongful convictions in the form of legislated standards for identification procedures and the taking of statements, most of these standards pre-date the work of the CCRC. The last decade has seen the Blair government pursue an aggressive tough-on-crime approach, with some of the most important “reforms” being restrictions on rights against double jeopardy and the availability of disclosure, allowing more bad character and hearsay evidence, adverse inferences from silence and, most recently, the use of anonymous witnesses.¹²⁰ Although it would be unfair to blame the CCRC for such developments, there is a danger that the existence of an error correction institution such as the CCRC could create a false sense of security that miscarriages of justice will be caught. In other words, a legislature could implement measures that increase the risk of wrongful convictions in partial reliance on the ability of an error correction institution to discover such miscarriages. At the very least, the British experience suggests that a CCRC is not inconsistent with repressive legislative measures that arguably increase the risk of miscarriages of justice.¹²¹

Robust CCRCs in the American context could be used to help re-legitimize the death penalty, based on the argument that such institutions, as opposed to abolition of the death penalty or other criminal justice reforms, would respond to the risk of convicting the innocent. This is not an argument against the introduction of error correction innocence commissions, but rather a cautionary tale that suggests that error correction in individual cases should be supplemented by both systemic reform efforts and the ability to monitor and critique legislative developments that will increase the risk of wrongful convictions.

The CCRC’s experience suggests that once a public institution with investigative powers is established, it will receive many applications for

120. Criminal Evidence (Witness Anonymity) Act, 2008, c. 15 (U.K.). The legislation was enacted within a month of the House of Lords’ decision in *R. v. Davies* [2008] UKHL 36, available at <http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm>, overturning a murder conviction because the accused did not have an opportunity to know the identity of three eyewitnesses and confront them. For critical accounts of recent punitive trends in British criminal justice, see ANDREW ASHWORTH, *HUMAN RIGHTS, SERIOUS CRIME AND CRIMINAL PROCEDURE* (2002); NICOLA LACEY, *THE PRISONER’S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); JULIAN ROBERTS ET AL., *PENAL POPULISM AND PUBLIC OPINION* (2002); Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 *LAW Q. REV.* 225 (2000).

121. For arguments that wrongful convictions create a crisis of confidence in the justice system and that the justice system will respond in a manner that affirms its legitimacy, see RICHARD NOBLES & DAVID SCHIFF, *UNDERSTANDING MISCARRIAGES OF JUSTICE: LAW, THE MEDIA AND THE INEVITABILITY OF CRISIS* (2000); Richard Nobles & David Schiff, *The Criminal Cases Review Commission: Reporting Success?*, 64 *MOD. L. REV.* 280, 280 (2001); Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 *AM. CRIM. L. REV.* 1289 (2005).

relief. Even if, as has been the case in the United Kingdom and North Carolina, the vast majority of applications are found not to be meritorious, individual case work will consume almost all of the limited resources of the commission. Although an error correction institution is, as Professor Findley suggests, in an excellent position to identify, comment on and monitor patterns in the meritorious cases that it identifies, it may not have the resources to do so.¹²²

Even if error correction commissions have the resources to make systemic reform recommendations, they may be concerned that such interventions will be seen as advocacy that may threaten public confidence in the impartiality of their judgments about the merits of individual applications. Innocence commissions that have the extraordinary power to open up convictions will face significant pressures to adopt an impartial and quasi-judicial stance that focuses on the facts of the individual cases that they examine. Error correction commissions will have an especially close relationship with appellate courts that hear the cases that are referred by the commission. Again, this observation is not meant as a criticism of error correction institutions for adopting a quasi-judicial approach to their important casework. Rather, it is a warning about the need for the quasi-judicial work of error correction to be supplemented by bolder forms of advocacy that may be necessary to advance systemic reforms to reduce the risk of wrongful convictions in the future.

The British CCRC has not been an advocate of systemic reforms designed to reduce the risk of wrongful convictions in the future. The reticence of the CCRC in this regard can be explained by the quasi-judicial role it plays with respect to referrals of cases to the court system as well as

122. The Royal Commission on Criminal Justice that recommended the formation of the CCRC stated: “[w]e think it important that” the body in its annual reports to Parliament “should also be able to draw attention . . . to general features of the criminal justice system which it had found unsatisfactory in the course of its work, and to make any recommendations for change it thinks fit.” THE ROYAL COMMISSION ON CRIMINAL JUSTICE, *supra* note 6, at 185. The annual reports of the CCRC, however, have focused on describing the case review process and budgetary matters. With few exceptions, they have not discussed systemic issues or made recommendations designed to reduce wrongful convictions in the future. *See, e.g.*, CRIMINAL CASES REVIEW COMMISSION, ANNUAL REPORT 1999-2000 (2000), *available at* http://www.ccr.gov.uk/CCRC_Uploads/report1999_2000.pdf. Even when the commission has addressed more systemic issues, it has focused on feedback and clarifications of the law that have been provided by the Court of Appeal on the referral of cases. *See* CRIMINAL CASES REVIEW COMMISSION, ANNUAL REPORT 2001-2002, §§ 5.1-5.4 (2002), *available at* http://www.ccr.gov.uk/CCRC_Uploads/report2001_2002.pdf; CRIMINAL CASES REVIEW COMMISSION, ANNUAL REPORT 2002-2003 §§ 5.1-5.4 (2003), *available at* http://www.ccr.gov.uk/CCRC_Uploads/report2002_2003.pdf; CRIMINAL CASES REVIEW COMMISSION, ANNUAL REPORT 2003-2004 at 31-53 (2004), *available at* http://www.ccr.gov.uk/CCRC_Uploads/420165_CCRC_AR_V9lo.pdf.

by the resource constraints it has faced, first with reducing a backlog of applications soon after its creation and in later years with dealing with budget freezes and cutbacks experienced by many public institutions. Although the Royal Commission on Criminal Justice had contemplated that the CCRC would “draw attention . . . to general features of the criminal justice system which it had found unsatisfactory in the course of its work, and to make any recommendations for changes it thinks fit,”¹²³ the CCRC’s annual reports have instead focused on describing the case review process and budgetary matters.¹²⁴ When the CCRC has discussed systemic matters, it has focused on how cases it has referred to the Court of Appeal have clarified matters of law.¹²⁵ The CCRC has justified its role in the existing criminal justice system rather than criticizing and attempting to transform that system.

On rare occasions, the CCRC has expressed some views on legislative reform, but only with respect to legislation that directly affects the Commission’s work as opposed to other criminal justice legislation that affects the criminal justice system more generally and the risk of wrongful convictions in particular. For example, the CCRC has expressed some cautious support for proposals that its subpoena powers be expanded to include the power to demand production of material for private bodies.¹²⁶

The CCRC made a singular foray into systemic issues in a twenty-page response to a 2006 government consultation on appeal rights that essentially proposed to abolish the ability of the Court of Appeal to allow an appeal on abuse of process grounds in cases where it was convinced that the accused was nevertheless guilty of the offense. The CCRC responded in a submission that represented the unanimous views of its members that reform was not needed as the Court of Appeal already was very cautious in allowing appeals in cases where the accused was guilty. The CCRC did not approach the issue through the narrow lens of factual innocence that its American counterpart, the NCIIC, is required to take. Rather, the CCRC strongly argued that procedural rules relating to interrogation and disclosure

have been established to prevent miscarriages of justice. If the legislation

123. THE ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT, 185 ¶ 22 (1993).

124. See, e.g., CRIMINAL CASES REVIEW COMMISSION, ANNUAL REPORT 2007-2008 (2008), available at http://www.ccrcc.gov.uk/CCRC_Uploads/Annual%20Report%202007%20-%202008.PDF.

125. See, e.g., CRIMINAL CASES REVIEW COMMISSION, ANNUAL REPORT 2002-2003 §§ 5.1-5.4 (2003); CRIMINAL CASES REVIEW COMMISSION, ANNUAL REPORT 2003-2004 at 31-53 (2004).

126. CRIMINAL CASES REVIEW COMMISSION, ANNUAL REPORT 2004-2005 at 34 (2005), available at http://www.ccrcc.gov.uk/CCRC_Uploads/420165_CCRC_AR_V9lo.pdf.

were to enshrine the principle that any irregularity could be overlooked—provided that the convicted persons are deemed plainly guilty—this would inevitably cause collateral damage to the criminal justice process by which innocent defendants would be more likely to be convicted.¹²⁷

In short, respect for due process rights, even in a case where the accused may not be factually innocent, was, in the CCRC's view, important to reduce the risk of wrongful convictions in future cases. The CCRC added that the removal of appeals on abuse of power grounds would not only eliminate its ability to refer cases on those grounds to the Court of Appeal but "would represent a gross violation of the present constitutional settlement for the separation of powers."¹²⁸ The CCRC was joined by members of the senior judiciary and various bar groups and legal experts in opposing the government's proposals, which have now been abandoned for the time being.¹²⁹ This episode suggests that it would be wrong to conclude that the CCRC is incapable of engaging on systemic issues that will affect its future work. That said, this intervention was rare and limited to grounds of appeal that directly affect the CCRC's work.¹³⁰

Just as error correction commissions can make some limited forays into systemic issues, so too may systemic reform commissions be involved in error correction. Canadian public inquiries have typically been appointed after a conviction has been reversed by the courts, but they have at times played a role in more fully correcting the errors in the case. For example, Canada's first wrongful conviction inquiry ended up exonerating Donald Marshall Jr. of wrongdoing after the Court of Appeal had blamed Mr. Marshall for his own wrongful conviction.¹³¹ The Sophonow commission of inquiry also played a role in Mr. Sophonow's exoneration in a non-DNA case in which proceedings were stayed after three trials.¹³² The Lamer

127. Criminal Cases Review Commission, "Quashing Convictions": The Response of the Criminal Cases Review Commission ¶ 36, http://www.ccr.gov.uk/publications/publications_get.asp (Dec. 11, 2006).

128. *Id.* at ¶ 56. For an admittedly extreme case which the CCRC referred on the basis that an indictment was not properly signed but the conviction was quashed, see *R. v. Clarke*, [2008] UKHL 8 (Eng.). For arguments that it is "clearly part of the remit of the Commission to consider cases where there has been significant irregularity of process" because the Court of Appeal will quash convictions where there is strong evidence of factual guilt, see *ELKS*, *supra* note 5, at 35.

129. Criminal Justice and Immigration Act, 2008, c. 4, sched. 8 (U.K.); *ELKS*, *supra* note 5, at 48. I am indebted to Professor Clive Walker for assistance with this issue.

130. It is somewhat ironic that the CCRC's position in this respect echoed the approach taken by Professor Zander who voiced similar ideas in the dissent he wrote from the 1993 Royal Commission on Criminal Justice which recommended the creation of the CCRC. See *Royal Commission on Criminal Justice* (1993) at 234 ¶¶ 67-68.

131. *HICKMAN*, *supra* note 82, at 20.

132. MANITOBA DEP'T OF JUSTICE, *THE INQUIRY REGARDING THOMAS SOPHONOW* (2001).

Commission declared that the accused in one of the three cases it examined was factually innocent.¹³³ The Innocence Commission of Virginia provided full accounts of eleven wrongful convictions and probably contributed to the full exonerations of those people.¹³⁴ A recent Canadian public inquiry has also called for reviews of others cases involving evidence of shaken baby syndrome,¹³⁵ and six of the Canadian public inquiries have called for the creation of a CCRC-type body to hear and investigate claims of wrongful convictions in other cases.¹³⁶ Thus systemic reform commissions can contribute to the exoneration process in notorious cases and call for the creation of permanent innocence commissions to be involved in error correction.

One limitation on the ability of systemic reform institutions to advance the cause of error correction is that systemic reform commissions are likely to focus on the more notorious wrongful convictions. In Canada, all the public inquiries called by the government have involved high profile homicide cases. There have been no public inquiries into less notorious wrongful convictions including a number of sexual assault cases.¹³⁷ In the United States, many systemic reform commissions have centered around death penalty cases and issues. The Illinois commission was able to achieve some significant reforms in capital cases, but the California commission was badly split on death penalty issues and has seen even the more modest of its proposals vetoed by the Governor. The North Carolina Actual Innocence Commission made a deliberate decision to avoid the death penalty because of the difficulty of achieving consensus on the issue. The focus of systemic reform institutions on the most well publicized cases of wrongful convictions might be a weakness in its own right given recent arguments that the innocence movement should expand beyond concerns about the conviction of the innocent as well as criticisms that innocence scholarship

133. LAMER, *supra* note 82, at 70 (“Gregory Parsons played no part whatsoever in the murder of his mother, Catherine Carroll. He is completely innocent.”).

134. INNOCENCE COMMISSION FOR VIRGINIA, *supra* note 116, at 13-24.

135. GOUDGE, *supra* note 82, at 533.

136. GOUDGE, *supra* note 82, at 538-542; HICKMAN, *supra* note 82, at 145; KAUFMAN, *supra* note 82, at 1237; MANITOBA DEP’T OF JUSTICE, *supra* note 132, at 101; INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL 121 (2007); EDWARD P. MACCALLUM, COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD 390-91 (2008).

137. For example, there has been no call for an inquiry into a recent Ontario case that reversed the conviction of an accused who pled guilty to sexual assault after the mother of the victim made a mistaken eyewitness identification. *R. v. Hanemaayer*, 239 O.A.C. 241, 2008 ONCA 580 (Can.). The policy significance of this case is discussed in Kent Roach, *The Causes and Remedies of Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT’L L. & COM. REG. (forthcoming March 2010).

has been impoverished by not using controls such as studies of the rightfully acquitted and convicted.¹³⁸ Indeed, a broader-based systemic reform commission could evolve into a permanent law reform commission with the ability to conduct studies of the operation of the criminal justice system and make recommendations with respect to a broad range of issues.¹³⁹

The trade-off between error correction and systemic reform can be finessed, but it remains real. So far Canada and the United States have tended to opt for systemic reform institutions as opposed to error correction ones. Such institutions are temporary bodies and, in the United States at least, have been run at low financial costs. The ultimate success of these institutions will depend on how many of their recommendations are implemented and, when implemented, how much they reduce wrongful convictions in the future. With respect to systemic reform, there is also a case of diminishing returns. There is considerable consensus about the main policy recommendations that most believe will reduce the risk of wrongful convictions. The marginal value of another systemic reform commission is not always clear. Much of the work may simply repeat in one state or province what has already been recommended in another. More work needs to be done in monitoring whether systemic reforms have been implemented and whether they are successful in reducing wrongful convictions. One challenge is that state-appointed systemic reform commissions almost always become functus once they have made their recommendations.¹⁴⁰ Self-appointed commissions may, however, be able to conduct follow up studies from their recommendations.

Britain has opted for a state-financed error correction model which has enjoyed considerable success both in processing large numbers of applications and in referring over 400 cases back to the Court of Appeal. A striking feature of these cases is that most have arisen in non-homicide and non-sexual assault cases,¹⁴¹ whereas exonerations in the United States have

138. Richard Leo, *Rethinking the Study of Miscarriages of Justice*, 21 J. CONTEMP. CRIM. JUST. 201 (2005).

139. In Canada, a federal Law Commission has recently been abolished and in the United Kingdom, the Law Commission has focused on matters of statutory reform of the criminal law. A recent project will, however, examine the role of expert witness including their possible contribution to wrongful convictions. See Law Commission, "Expert Evidence in Criminal Trials", at http://www.lawcom.gov.uk/expert_evidence.htm (last visited Oct. 26, 2009).

140. The California commission, however, issued a series of interim reports and continued until its final report to respond to various developments in the field. A new commission was also appointed in Illinois to report on the capital punishment reforms initiated in response to the Governor's Commission final report in 2002.

141. ELKS, *supra* note 5, at 184 (two thirds of cases are non-homicide).

almost all been limited to such serious crimes.¹⁴² This striking divergence makes sense when one recognizes that exonerations in the United States have been driven by the volunteer work of innocence projects and lawyers who quite understandably have focused on the most serious cases such as death penalty cases. Error correction in the United States is essentially privatized and based on volunteer work while error correction in Britain is done by a state-financed public institution.

The ultimate success of the CCRC will depend in part on its ability to make accurate decisions with respect to the 1000 applications it receives each year and its ability to maintain the proper balance of referring meritorious cases to the Court of Appeal while not being so risk averse that it fails to refer possibly meritorious cases. The fact that the CCRC rejects the vast majority of the applications it receives is bound to create some unhappy customers.¹⁴³ Even the discovery of one case that has been rejected by the CCRC but is subsequently discovered to have been a wrongful conviction could harm the solid reputation that the CCRC generally enjoys. In turn, the CCRC is also vulnerable if it loses credibility with legal elites including the Court of Appeal that hears the cases it refers. Error correction commissions have different audiences and constituencies. They must pay attention to the courts to which they refer cases, but they also must pay attention to advocacy groups and others who act on behalf of those who claim to be wrongfully convicted.

Although his prediction that the CCRC could contribute to systemic reform while engaged in error correction has not come true, Professor Findlay's argument that commissions should engage in both processes remains the ideal. Future design of commissions should, however, pay more attention to the need to promote systemic reform while also doing the onerous case work of error correction. One possibility would be for an error correction commission to have a representative advisory committee or some loosely affiliated body that could make interventions on systemic reform issues. Such a body could, in appropriate cases, act as an advocate for systemic reforms without undermining the more quasi-judicial work of error correction. An error correction commission should also have some dedicated funding for systemic reform work and research. In order to ensure that such work remains rooted in the realities and tragedies of wrongful convictions, an error correction commission might have the discretion

142. Garrett, *supra* note 31, at 55; Samuel R. Gross et al., *supra* note 31, at 523.

143. See, e.g., Innocent: Fighting Miscarriages of Justice since 1993, at <http://www.innocent.org.uk/> (last visited Oct. 26, 2009).

to appoint an inquest or an inquiry that could be conducted on the basis of individual cases that raised particularly important systemic reform issues. An error correction commission would be in an excellent position to select what cases should receive scrutiny because of their policy and systemic implications. An error correction commission would also have the expertise to conduct a mini-systemic reform commission in a more efficient and cost-effective manner than the systemic reform commissions that in both Canada and the United States typically take years to complete. The goals of error correction and systemic reform are both compelling. More work needs to be done on ensuring that commissions have the resources and personnel that are necessary to achieve both goals.

IV. THE IDEAL COMPOSITION OF ERROR CORRECTION AND SYSTEMIC REFORM COMMISSIONS

This article has suggested that it is important when evaluating the role and work of innocence commissions to distinguish between the correction of individual cases of wrongful convictions in the past and systemic reform that is designed to reduce the risk of wrongful conviction in the future. The distinction between these two tasks is underlined by consideration of the ideal composition of error correction and systemic reform commissions.

In theory, an error correction commission would have a different expertise and composition than a systemic reform commission. Most error correction commissions must apply legal standards that will subsequently be used by the courts in deciding whether to vacate a conviction. To be sure, such error correction commissions, most notably the CCRC, have been criticized as too conservative and too captured by legal concerns such as the existence of fresh evidence.¹⁴⁴ Nevertheless, the fact remains that error correction institutions apply legal expertise in deciding whether to refer a case back to the courts. In many ways the ideal candidates for error correction commissions would be the sort of retired judges who have frequently been appointed as commissioners in the Canadian public inquiries. It is thus not surprising that eight of the eleven present commissioners of the CCRC are either barristers or solicitors despite the fact that the enabling statute of the CCRC allows for lay representation.¹⁴⁵ The lawyers who

144. Richard Nobles & David Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal*, 2005 CRIM. L.R. 173, 173 (YEAR?); Richard Nobles & David Schiff, *The Criminal Cases Review Commission: Reporting Success?*, 64 MOD. L. REV. 280 (2001); Schehr, *supra* note 38, at 122.

145. See Criminal Cases Review Commission, Commissioners, at

predominate in the CCRC are well-suited to apply the relevant legal tests relating to whether a case, if referred back to the Court of Appeal, will be overturned on that appeal. Nevertheless, the Commissioners on the CCRC are assisted by expert investigators who may not be lawyers and who may have the investigative and forensic skills that are necessary to discover and produce the new evidence that is often essential to having the case overturned on appeal.¹⁴⁶ A quasi-judicial approach and appearance would add legitimacy to the many cases that error correction commissions reject as not meritorious. At the same time, however, it could create suspicions among advocacy groups that the error correction commission is not as committed to the cause of remedying and preventing the wrongful conviction of the innocent as it should be. The latter concern helps to explain why a number of volunteer innocence projects have grown in the United Kingdom even at the same time as the CCRC has become an entrenched and key institution in the criminal justice system.¹⁴⁷

The ideal expertise of a systemic reform commission would be the broad-based membership that has been used with respect to many of the American study commissions perhaps coupled with bi-partisan political representation and expertise. In order to achieve systemic reform, it will be important to include the perspectives of police forces, prosecutors, defense attorneys and others involved in the criminal justice system. Indeed, some representation by victim groups, as is required in the North Carolina Innocence Inquiry Commission,¹⁴⁸ may be prudent given the political power of victim groups. One criticism of the Canadian inquiry model may be that the judges who serve as commissioners cannot lobby for the implementation of their proposed reforms because of the restraints of judicial office. That said, the Canadian model of judges or retired judges serving as commissioners is conducive to having the judiciary implement some of the reform recommendations of the commissions.

Broad-based representation can be defended as necessary for the practical politics that will accompany successful systemic reform, but it is much less desirable with respect to error correction because it creates a possibility for real or perceived conflicts of interests. The CCRC experience suggests that an accessible and reasonably well-resourced error correction commission will generate many applications and reject the vast majority of these

http://www.ccrcc.gov.uk/about/about_29.htm (last visited Oct. 26, 2009).

146. Roberts & Weathered, *supra* note 21.

147. *Id.*

148. N.C. GEN. STAT. § 15A-1463 (Supp 2006).

applications. Given this, it will be very important to demonstrate to the rejected applicants that the commission acts as a genuinely independent body. It should not be beholden or perceived to be beholden to police, prosecutors, politicians, crime victims or even the judiciary. The CCRC has been criticized for its use of police forces as investigators and perhaps in response has made infrequent use of police investigators.¹⁴⁹ Instead, the CCRC has relied on its own in-house investigative capacity as well as independent forensic experts.¹⁵⁰ An error correction commission will need to be independent and to be perceived as independent if it is to have the degree of credibility and respect that is necessary to reject many cases at an early stage so that it can focus on the minority of meritorious cases.

It would be both ironic and dangerous to assume that an error correction commission would be infallible. Both the CCRC and the North Carolina commissions wisely do not attempt to preclude multiple applications. The North Carolina legislation, however, attempts to preclude judicial review of the commission's decisions not to refer cases as well as the decision made about actual innocence by a special three-judge panel in referred cases.¹⁵¹ In contrast, the CCRC is subject to judicial review and its decisions have been challenged, sometimes successfully.¹⁵² One of the leading cases describing the CCRC's powers and the test it should use was a judgment obtained when an unsuccessful applicant to the commission sought judicial review of the commission's decision.¹⁵³

The experience to date belies much of the above analysis that suggests that the ideal composition of an error correction commission would tend to be judicial or quasi-judicial while systemic reform innocence commissions require broad based representation of all stakeholders in the justice system. The NCIIC was deliberately designed to represent prosecutors, sheriffs, victims, and defense lawyers even though it has a quasi-judicial mandate to refer cases of factual innocence to the court. Even the British and Scottish criminal cases review commissions have a toned-down representational

149. The CCRC only appointed thirty-three investigating officers from police forces in the first ten years of its existence and eighteen of these have been from an outside police force. The CCRC generally only appoints when police expertise is necessary, for example, because the investigation may involve a new offense such as perjury or involve a person who may be guilty of the offense for which the applicant was convicted. ELKS, *supra* note 5, at 21-24.

150. *Id.* at 20-24.

151. N.C. GEN. STAT § 15A-1470 (2006).

152. *See, e.g.,* Farnell v. Criminal Cases Review Commission [2003] EWHC 835 Admin, available at <http://www.bailii.org/ew/cases/EWHC/Admin/2003/835.html>.

153. R. v. Criminal Cases Review Commission *ex parte* Pearson, [1999] EWHC 452 (Admin.) (Eng.).

structure that includes lay persons who are not lawyers.¹⁵⁴ Such a composition was thought necessary to ensure both public confidence and relevant expertise for its investigative work, even though in the end the CCRC applies complex legal tests relating to whether fresh evidence will be admissible on appeal and whether the conviction will be sustained on appeal. Experts in forensic science and the media can play a valuable role in the work of the CCRC, but the decision whether to refer a case back to the courts ultimately must be based on legal criteria.

Domination by lawyers, however, may not be desirable when it comes to making and defending system reform proposals. The American systemic reform inquiries have included broad-based representation of most criminal justice constituencies, though sometimes, as in California, at the cost of producing divided decisions and dissents that have made their recommendations more difficult to implement. The Canadian public inquiries are anomalous in this respect because they are headed by sitting or retired judges despite the fact that their primary mandate has been to make recommendations for systemic reforms in the future.¹⁵⁵ Nevertheless, the Canadian inquiries often feature broad participation by advocacy groups and groups representing some parts of the criminal justice system. Police and prosecutors especially have an incentive to propose reforms to the Canadian inquiries and such proposals are often endorsed by the Canadian inquiries.

The composition of innocence commissions no doubt reflects the inevitable compromises that must be made to win political and public acceptance when new institutions are being introduced into the criminal justice system. This is especially true given how defensive the justice system can be against claims of miscarriage of justice. Nevertheless, if innocence commissions are to become permanent and vibrant institutions in the criminal justice system, more attention needs to be paid to the purposes of particular commissions and whether they are fit to achieve that purpose.

V. CONCLUSION

The revelation of many wrongful convictions in all Anglo-American

154. The current CCRC is dominated by barristers and solicitors but includes a career civil servant, an investigative reporter, and a chartered accountant. *See* Criminal Cases Review Commission, Commissioners, at http://www.ccrcc.gov.uk/about/about_29.htm (last visited Oct. 26, 2009).

155. As discussed above, however, many of the reform recommendations made by the Canadian inquiries are aimed at the judiciary and in such cases the judicial composition of these inquiries may be an advantage.

justice systems affirms the urgent need for better and more accessible remedies for those who have suffered wrongful convictions or miscarriages of justice as well as systemic reforms designed to reduce the number of wrongful convictions in the future. In the face of these urgent needs, it may seem churlish to raise questions about the role and composition of desperately needed innocence commissions. In addition, it may be unrealistic to expect uniform approaches to these questions because “[e]ach jurisdiction differs; no one model fits all.”¹⁵⁶ That said, however, innocence commissions may fail if unrealistic hopes are pinned on them or if they are not given the proper resources and personnel to fulfill their purposes.

If innocence commissions are to become a permanent part of criminal justice systems, then policy makers and the public should have a clearer understanding of their precise roles, as well as the limits of those roles. The available evidence suggests that however good an error correction commission may be in investigating cases and referring cases of concern back to the courts, it may not have the resources or the personnel either to develop proposals for systemic reform or to advocate for such changes. In turn, systemic reform commissions can build on individual cases of wrongful convictions, but they will have an incentive to focus on notorious cases and not to investigate new cases including those where it may not be crystal clear that a wrongful conviction has occurred.

There is need for both error correction to help discover wrongful convictions that have already occurred and systemic reform to help prevent wrongful convictions in the future. The hope that the British CCRC would serve both roles has generally not been realized, and that institution should be encouraged within the restraints presented by its role and budget to engage more with systemic issues. Although the Canadian public inquiries demonstrate how state financing can assist with the development of systemic reform proposals, there are also examples in the United States of self-appointed and self-financing commissions making important systemic reform recommendations. A successful systemic reform commission will likely require political expertise and broad-based representation, but the American experience suggests that it need not be appointed and funded by the state.

As in North Carolina, the ideal may be two separate innocence commissions or one innocence commission that clearly differentiates its error correction and systemic reform mandates. It is important that state financ-

156. Findley, *supra* note 119, at 339.

ing and subpoena powers be available for error correction commissions given the difficulties of obtaining necessary documents and expert evidence. Unfortunately, error correction in the United States has largely relied on volunteer efforts while the British and Scottish commissions have been able to use state finances and powers to investigate claims of wrongful convictions. The latter approach has resulted in the discovery of many miscarriages of justice in less serious cases that do not involve homicide and/or sexual offenses. It is important that state resources and powers be made available for error correction.

The creation of the North Carolina Innocence Inquiry Commission is a positive development that should attract interest throughout North America. North Carolina is the first North American jurisdiction to have recognized the need for an error correction institution like the British CCRC. The North Carolina commission's mandate is, however, limited to cases of proven factual innocence while the British and Scottish commissions are concerned with a much broader range of legal errors and miscarriages of justice.

Error correction commissions appointed and financed by the state will not be infallible and self-appointed innocence projects that are concerned with both systemic reform and errors that may not be detected by state error correction commissions have an important role to play. The successful experience with self-appointed systemic reform commissions in both Virginia and North Carolina suggests that reformers need not wait for the state to appoint an official commission to make systemic reform recommendations. There is much value in institutional experimentation that involves both the state and civil society; moreover, there is often a complementary and symbiotic relationship between systemic reform and error correction. Innocence commissions in all their various guises are rightly emerging as important new criminal justice institutions. Nevertheless, more attention should be paid to their particular mandates and composition.