The Innocence Commission: An Independent Review Board for Wrongful Convictions

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INTRODUCTION

Convicting the innocent is no less a problem in the United States than in Great Britain. By some estimates, as many as "one out of four defendants accused of a serious crime such as sexual assault" in the United States and "at least one out of 100 of those actually sentenced to death is innocent." Yet the United States Congress has recently passed legislation making federal habeas corpus remedies for actual innocence more difficult to obtain. In the same

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Estimates vary as to the number of wrongful convictions in Great Britain, ranging from the civil liberties group Justice's estimate that "at least fifteen people each year are wrongfully convicted by a jury," to the estimate of the National Association of Probation Officers that "[f]ive per cent of prisoners serving more than five years protest their innocence and prison staff think that half of them (at least 400) might have been wrongfully convicted." ROSEMARY PATTENDEN, ENGLISH CRIMINAL APPEALS 1844-1994: APPEALS AGAINST CONVICTION AND SENTENCE IN ENGLAND AND WALES 393 (1996) (footnotes omitted). One British academic and former senior prison service official estimates that some 1,300 prison inmates are innocent in Britain. Mohammed Ilyas, Academic's Case for Innocent Inmates, BIRMINGHAM POST (Eng.), Apr. 11, 1998, at 4 (reporting a study by Dr. David Wilson of the University of Central England); see also Duncan Campbell, Guilty Until Proved Innocent, GUARDIAN (London), Aug. 19, 1998, at 17 (reporting that released wrongfully convicted prisoner Paddy Nicholls estimated "that there could be as many as 2,000 people wrongly serving prison sentences in British prisons," but also suggesting that "it is impossible to give even an approximate figure").

period, the British Parliament passed legislation establishing the Criminal Cases Review Commission (CCRC), "an independent body investigating suspected miscarriages of justice in England, Wales and Northern Ireland."
Nowhere has the problem of convicting the innocent been more apparent recently in the United States than in Illinois, where political leaders and public sentiment are reeling from the release and subsequent exoneration and executive pardon of several innocent men—most notably Anthony Porter—from the state’s death row. Illinois has now exonerated and released more
death row inmates (thirteen)\(^5\) as the state has executed since 1977 (twelve).\(^6\)

\(^5\) See Freed from Death Row: Jones is 12th Inmate to be Cleared, CHI. SUN-TIMES, May 18, 1999, at 1 (listing the twelve inmates who have been exonerated and released from Illinois' death row since 1977); Steve Mills & Ken Armstrong, Yet Another Death Row Inmate Cleared, CHI. TRIB., May 18, 1999, at 1; Eric Zorn, Score Now Tied in Numbers Game on Death Penalty, CHI. TRIB., May 18, 1999, \$2 at 1. Following the highly-publicized release of Anthony Porter in February 1999, the Illinois state supreme court reversed the case against another death row inmate, Steven Smith, and barred prosecutors from retrying him because of faulty eyewitness testimony. See Ken Armstrong & Todd Lighty, Death Row Conviction Thrown Out: 11th Reversal in 12 Years Will Free Chicago Man, CHI. TRIB., Feb. 20, 1999, at 1; Adrienne Drell & Dave McKinney, Another Death Row Acquittal 11th To Be Freed by State High Court,
As a result, state political leaders in Illinois are now considering how to correct the Illinois criminal justice system's propensity for convicting innocent men to death.\(^7\)

\(^7\) See Mills & Armstrong, supra, at 1; Zorn, supra, at 1. The State's Attorney's Office told the court that "the prosecution feels that it cannot meet its burden of proof beyond a reasonable doubt at this time." Mills & Armstrong, supra, at 1.


7. See, e.g., Ken Armstrong, High Court Orders Death Penalty Study, CHI. TRIB., Apr. 7, 1999, §2 at 1 (detailing the various efforts to review the state's death penalty system); Aaron Chambers, State's Death Penalty Under Microscope, CHI. DAILY L. BULL., Apr. 6, 1999, at 1 (same); Dave McKinney, Death Penalty Reprieve in House, CHI. SUN-TIMES, Mar. 5, 1999, at 1 (reporting the approval of a bill "that would impose a yearlong moratorium on the death penalty while a commission studies the state's capital punishment system" from the Illinois House Judiciary-Criminal Law Committee); Moratorium on Death, CHI. SUN-TIMES, Feb. 12, 1999, at 35 ("With public pressure building for a moratorium on the death penalty in Illinois, it is encouraging that political leaders are finally acknowledging the need to review Death Row cases to make sure no one is executed because of mistakes.").

On January 31, 2000, Illinois "Gov. George Ryan declared a moratorium ... on the death penalty in Illinois, marking the first time any state has taken such dramatic action." Armstrong & Mills, supra note 4 at 1. Support for a moratorium on executions in Illinois has been unsteady, however. See Grumman & Pearson, supra note 6, at 1 ("Despite calls for a moratorium on executions to allow a review of death penalty cases, Senate Judiciary Committee Chairman Carl Hawkinson (R-Galesburg) said most legislators oppose the idea."); Joe Mahr, State's Attorneys Oppose Death Penalty Moratorium, ST. J.-REG. (Springfield, Ill.), Apr. 28, 1999, at 10 (reporting that the Illinois State's Attorney's Association's opposition to a proposed moratorium on executions in Illinois); Christi Parsons & Michelle Brutlag, Senate Committee Rejects Moratorium on Executions; GOP-Led Panel Derails Democrat Jones' Plan, CHI. TRIB., Mar. 3, 1999, §2 at 6 (reporting that, on March 2, 1999, the Illinois "Senate Judiciary Committee killed a resolution that would have ordered a halt to all executions while a special conference conducted thorough examinations of cases and procedures"); id. (reporting that Illinois Governor George Ryan opposes both a death penalty moratorium in Illinois and a proposed "summit meeting to discuss capital punishment in Illinois," preferring to "carefully research each case as it nears its execution date, with an eye toward possibly issuing a reprieve or a stay"); Thompson, Republicans Back, supra note 4, at 9 (Illinois Governor George "Ryan, who last week called for a debate on the underlying question of whether Illinois should have a death penalty, on Tuesday said he sees no ground swell to eliminate it. He has so far balked at
The state governments of the United States, beginning with Illinois, need to follow Great Britain's lead in establishing an independent review commission to investigate suspected wrongful convictions. Such an extra-legal or 'quasi-judicial' review commission would offer convicted defendants with viable claims of actual innocence a state-funded mechanism to consider and investigate their claims after their convictions and unsuccessful appeals, instead of relegating such defendants to attempts to make a disfavored and often restricted or even procedurally prohibited successive petition for post-conviction relief. The commission should be equipped with full investigative and subpoena power, including free and full access to police and prosecutors' files and court records. The commission should also have the power to calls for a moratorium or formal study commission, which he said skirts around the core issue.

... Ryan said Tuesday. 'I don't think there's been any big hue and cry from the masses to [eliminate capital punishment in Illinois]."'); Don Thompson & Travis Akin, Phillip: State Senate Unlikely to Enact Halt on Executions, CHI. DAILY HERALD, Feb. 25, 1999, at 4 (noting that Illinois Governor George Ryan "still plans to consider options and talk to experts," but "believes most people support the death penalty"); id. (quoting Illinois State Senate President James Phillip and his spokesperson as saying "most people support the death penalty even if innocent people have been executed" and, at one time, seemed to be fading completely with the execution of Andrew Kokoraleis on March 17, 1999, see Aaron Chambers, Court Nixes Bid To Delay Executions, CHI. DAILY L. BULL., Mar. 23, 1999, at 1 (reporting that the Illinois Supreme Court "denied a lawmaker's request for a stay on all executions while proposals calling for a moratorium and an examination of the death penalty are being considered in the legislature"); Grumman & Pearson, supra note 5, at 1; John O'Connor, No Rallying for Condemned Killer; Moratorium Effort Hasn't Embraced Next Man Set To Die, PEORIAJ. STAR (Ill.), Mar. 15, 1999, at B5 (quoting Alan Freedman, attorney for Illinois convict Andrew Kokoraleis, as saying his client's execution, which occurred on March 18, 1999, "could rob the moratorium movement of its momentum"). But recent polls indicated growing public support for a moratorium due to recent events. See Rick Pearson, Moratorium on Executions Gains Favor: Poll Finds Support for Death Penalty Has Slipped, CHI. TRIB., Mar. 28, 1999, §4 at 1. The Chicago Tribune had announced that "Illinois now has a de facto moratorium on executions," because "none are scheduled for the rest of the year," Death Penalty Panel, supra note 4, at 18. The Illinois Supreme Court previously rejected a plea for a moratorium from religious leaders. See Justices Reject Plea for Execution Halt, CHI. TRIB., June 5, 1999, at 5.

Meanwhile, "Nebraska took a step toward becoming the first state to place a moratorium on executions while experts determine if the death penalty is applied fairly" with a recent vote by state legislators to advance a bill imposing a two-year moratorium on executions. Across the U.S.A.: News From Every State (Nebraska), U.S.A. TODAY, Apr. 22, 1999, at 13A; see also Kevin O’Hanlon, Execution Moratorium Considered, COLUMBIAN, May 18, 1999, at A5, although the measure was abandoned after a gubernatorial veto, Across the USA: News From Every State (Nebraska), U.S.A. TODAY, May 28, 1999, at 6A; Nebraska Execution Moratorium Vetoed, CHI. TRIB., May 27, 1999, at 24. At the same time, in the state legislatures of "Indiana, New Mexico, Missouri, [and] Montana... [similar] bills have been filed that would either abolish the death penalty or call for a moratorium on executions." Mark Johnson, Death Penalty Debate: Mass. Legislature Struggles Again with Capital Punishment, PROVIDENCE J.-BULL., Mar. 21, 1999, at A1.

8. See PATTENDEN, supra note 1, at 399 (suggesting similar requirements for an independent tribunal to review alleged wrongful convictions in Britain, prior to the
discuss cases with the applicant and should maintain an internal staff of “experienced criminal lawyers, forensic scientists, and other experts to give it independence from any of the institutions and individuals it may have to investigate and criticize.”

Although the problem of convicting the innocent is most visible in the cases of erroneous death sentences, a review commission should by no means be limited to reviewing wrongful convictions resulting in the death penalty. Indeed, in some sense, providing an outlet to convicted non-capital prisoners who have claims of actual innocence may be equally, if not more, important. Lawyers and activists who are concerned about wrongful convictions understandably concentrate their efforts on suspected wrongful capital convictions because of the immediacy of an impending execution date and the irreversibility of a death sentence. But this often leaves most prisoners wrongfully convicted of non-capital crimes left to rely on the inadequate assistance of state indigent defense systems, without any attention to their cases or any one outside of their families knowing of their plight.

An American review commission of the sort advocated in this Article has been suggested before. In 1991, Martin Yant called for the “[establishment of] a quasi-judicial ‘Court of Last Resort’ as an adjunct to state supreme courts to consider the question of innocence of those who claim to have been wrongfully convicted, through investigation if necessary, rather than the question of legal error through argument to which most appellate courts are

9. Id. (footnote omitted).
11. That is, to the extent any attorney is provided beyond the trial stage. See Pennsylvania v. Finley, 481 U.S. 551 (1987) (holding that there is no constitutional requirement that a state provide a free attorney to an indigent defendant for state post-conviction proceedings).
13. Very little attention, however, has been paid in popular or academic literature in the United States to the British CCRC or the possibility of a similar review commission in the United States. A Fordham University School of Law student’s Note has recently considered the CCRC’s effectiveness in addressing miscarriages of justice in Northern Ireland. See Siobhan M. Keegan, The Criminal Cases Review Commission’s Effectiveness in Handling Cases from Northern Ireland, 22 Fordham Int’l L.J. 1776 (1999). For an earlier and very brief discussion in an American forum, see David J. Lynch, Britons Are Used to Miscarriages of Justice, U.S.A. Today, Nov. 4, 1997, at 4A (describing the CCRC in a story about the case of the British nanny Louise Woodward).
limited.”

Yant further suggested that, “[i]f the evidence warrants it, a new trial could be ordered.” Moreover, this Article itself is a response to the call for the institution of such an Inspector General-type body by Professor Norval Morris, Canadian attorney James Lockyer, and American attorney Barry Scheck, among others, at the National Conference on Wrongful Convictions and the Death Penalty, at the Northwestern University School of Law in Chicago, Illinois, in November 1998.

In the wake of Anthony Porter’s release, Professor Morris made a related proposal for the establishment of “an independent review of each case [to be] conducted by an appointed ombudsman and his staff.” Similarly, some commentators in Illinois have called for a more limited independent commission to study “the cases of the exonerated 10 inmates [to] . . . reveal the current system’s shortcomings,” a project that the Chief Justice of the Illinois Supreme Court is already undertaking and that has resulted in the formation of five special committees impaneled by the Illinois State Senate Democrats, the Illinois State House of Representatives, the Illinois Supreme Court, Illinois Attorney General Jim Ryan, and Illinois Governor George Ryan.

I would suggest that the beginnings of the independent review boards I propose—which I will call “Innocence Commissions”—could arise first in

15. Id.


18. Drell & Golab, supra note 17, at 12 (quoting Professor Lawrence Marshall).
19. See Chambers, State’s Death Penalty, supra note 7, at 1; Joe Mahr, Ryan Seeks Death Penalty Summit; Next Execution Is Scheduled for March 17, St. J.-Reg. (Springfield, Ill.), Feb. 12, 1999, at 1; see also Don Thompson, High Court To Review State’s Death Penalty, Chi. Daily Herald, Apr. 7, 1999, at 7 (reporting that Illinois Governor George “Ryan has rejected calls to set up his own task force or impose a moratorium until the reviews are complete”); see Armstrong & Mills, supra note 4 (discussing Governor Ryan’s plans to appoint a “committee to study the capital system’s flaws”).
Illinois. Such a commission presents at least a partial solution to what is certainly a timely problem—the conviction of innocents, most visibly in a number of wrongful capital convictions—that the state of Illinois is facing quite publicly, and an Innocence Commission in Illinois could serve as the model for state legislatures to consider, modify, and adopt to meet their needs.

In this Article, I will describe the CCRC, and its evolution in Britain, as a model for American independent review commissions and examine the need for such Innocence Commissions in the United States. I will trace at some length the development of the CCRC and the arguments offered for and against its creation and its particular structure and role as well as the CCRC’s experience to date, because this history and the considerations that animated the debate about and establishment of the CCRC are important for considering the appropriateness of such an institution within the American state criminal justice systems and the potential obstacles to the successful establishment of American Innocence Commissions. I will then address the political and legal feasibility of establishing Innocence Commissions in the United States, given the current conditions here and comparing them to the political and legal circumstances under which the Parliament established the CCRC, which began its work in early 1997. To begin, it will be helpful to compare briefly the American and British criminal justice systems, and I will then argue for the necessity and utility of independent Innocence Commissions within the present climate surrounding the operation of the American criminal justice system.

20. In addition to the latest series of released death row inmates, and in part because of it, Illinois has recently passed progressive legislation to help address wrongful convictions, demonstrating the Illinois legislature’s willingness to take bold steps for needed reforms. See 725 ILL. COMP. STAT. ANN. § 5/116-3 (West 1993 & Supp. 1999) (providing for a "motion for fingerprint or forensic testing not available at trial regarding actual innocence"); see also Gregory W. O’Reilly, A Second Chance for Justice: Illinois’ Post-Trial Forensic Testing Law, 81 JUDICATURE 114 (1997) (discussing the development of the law).

By no means, however, should this be taken as a suggestion that other states have less need for Innocence Commissions or greater immunity from the problem of convicting the innocent in their criminal justice systems. In fact, some state death rows may have many more than twelve current or former inmates whose valid claims of actual innocence have gone entirely unnoticed. See infra note 99. Indeed, in April 1999, Oklahoma released one man from death row and another serving a life sentence because belated DNA testing demonstrated their innocence of the murder for which they had each spent over a decade behind bars. See Michael Smith, DNA Tests Prove They Were Wrongly Convicted, TULSA WORLD, Apr. 16, 1999, at 1.
I. COMPARISON OF THE AMERICAN AND BRITISH CRIMINAL JUSTICE SYSTEMS

Any proposal to adopt a British governmental body as a model for a proposed American institution must first overcome the presumption that the British political, or even criminal justice, system is simply too different from the American federal or state systems for a British institution to be transferable. To be sure, "[t]he governmental framework within which the English criminal justice system operates is different from that in the United States in a number of important aspects." A recent book comparing the two countries' criminal justice systems enumerated several differences that may initially seem problematic for this Article's proposal:

the existence of a monarchy in England; the fact that England possesses a unitary governmental system with no separate state and federal systems; the English doctrine of supremacy of Parliament, which basically asserts that Parliament may pass any law that it likes; the failure of the English to attempt to emulate the much hallowed American doctrine of separation of powers; and the fact that England has no formal written constitution.

Upon closer inspection, however, these differences should pose little difficulty for any attempt to import the British CCRC as a model for Innocence Commissions in the American state systems. In fact, the difficulties facing a proposed Innocence Commission in the American system are likely to be very much the same as those faced in Britain during the development of the CCRC, not difficulties peculiar to the transfer of a British institution into the American system.

Clearly the difference in the existence of a monarchy, even a constitutional monarchy, is important for any comparison of large political decision-making in Britain and the United States. This difference, however, makes little difference in practice for an analysis of the compatibility of the British CCRC as a model for an American independent review commission.

The unique federalist system in the United States would not affect how an independent review commission would be implemented at the state level.

22. Id.
23. Of course, within the territory of Great Britain covered by the CCRC, different laws govern certain matters within England, Wales, and particularly Northern Ireland. See, e.g., Criminal Appeal Act, 1995, ch. 35, § 8(6) (Eng.) (requiring that at least one CCRC Member
Parliamentary supremacy, however, does contrast considerably with the American doctrine of separation of powers among the three branches of most state governments.24 Most notably, the sort of direct interference by Parliament, often ex post, with judicial decisions that parliamentary supremacy allows in Great Britain "would [not likely] be tolerated in the United States."25 The highest officials in the British executive and judiciary are also Members of Parliament (MPs).26

The separation of powers doctrine might pose some limits on the scope of authority of any proposed independent review commission within a state system. Significant consideration would be required within each state legislature as to the place of such a body within the state's governmental framework between the executive, judicial, and legislative branches. Similar concerns, however, animated the creation of the British CCRC.27 As such, although this Article will address some concerns relating to the doctrine of separation of powers in turn, this difference hardly forecloses the utility of the CCRC as a model for American reforms.

Likewise, the supremacy of the United States Constitution28 differs sharply from the ability of the British Parliament to "pass any law it desires."29 In Great Britain, "[i]f it appears that a statute has been passed in the correct manner, the courts must submit and apply the statute."30 Thus, the CCRC, and the Criminal Appeal Act of 1995 by which it was established, were not subject to challenge in the courts in the same way an independent review body would be in the United States.31 Still, state legislatures or popular initiatives could easily create independent Innocence Commissions with any range of powers to address wrongful convictions that would pass federal or state constitutional muster. As such, this requirement within the American system does not render the British model unsuitable as a matter of course.

24. See HIRSCH& WAKEFIELD, supra note 21, at 18-19.
25. Id. at 19.
26. See id.
27. See ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT 182 (1993) [hereinafter 1993 REPORT].
28. See U.S. CONST. art. VI, cl. 2.
29. HIRSCH& WAKEFIELD, supra note 21, at 18.
30. Id.
It may be objected, however, that the British courts and criminal justice system are simply too different from the systems of the American federal government or the various states. Although the British system is a self-described adversarial system,\textsuperscript{32} many Americans consider the British courts to exhibit many characteristics of a Continental inquisitorial process, contrary to American practice. As such, it may be objected, perhaps the CCRC is compatible with the British system, but such a body would have no place in the United States.

Yet, despite the bifurcation of the English bar into solicitors and barristers and Britain's professional judiciary,\textsuperscript{33} the broad outlines of the procedures by which a criminal case proceeds through the courts from charge to conviction to appeal are substantially the same in the United States and Great Britain. Indeed, a review of the two country's systems reveals that "[t]he overall structure of the English courts is very similar to that of the criminal courts in the United States."\textsuperscript{34} This is particularly true as to the aspects of each system that bear upon a proposal for American Innocence Commissions based on the British CCRC.\textsuperscript{35}

Criminal cases are investigated by the police or law enforcement officials in both countries, although cases are formally initiated by the police in Britain.\textsuperscript{36} Thereafter, for at least the last decade in Britain, a central prosecutors' office—the Crown Prosecutor Service (CPS)—prosecutes the case for the government, just as lawyers from a federal, state or county prosecutors' office do in the United States.\textsuperscript{37} A judge will sentence a

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\item \textsuperscript{32} See, e.g., 1993 \textsc{Report}, \textit{supra} note 27, at 3.
\item \textsuperscript{33} See \textsc{Robert J. Martineau}, \textsc{Appellate Justice in England and the United States: A Comparative Analysis} 57-64 (1990). These systemic differences between the composition of the English and American bar and bench have little to no bearing on how a review commission modeled on the CCRC would function in the United States.
\item \textsuperscript{34} \textsc{Hirschel & Wakefield, \textit{supra} note 21, at 127.}
\item \textsuperscript{35} Criminal charges are divided into summary or indictable offenses in Britain, which determines what court and type of official tries the case and the route of immediate appeal for lesser, summary or 'either-way' offense. See \textsc{Pattenden, \textit{supra} note 1, at 1-2}. These differences, however, are beyond the scope of the analysis necessary for consideration of the CCRC as a model for an American Innocence Commission. This Article, in fact, will leave aside discussion of summary and 'either-way' offenses in the British system of appeals and the reforms to the appeals process for convictions of summary offenses accompanying the creation of the CCRC. See \textsc{Criminal Appeal Act, 1995, ch. 35, § 26 (Eng.); Pattenden, \textit{supra} note 1, at 422.}
\item \textsuperscript{36} See \textsc{Hirschel & Wakefield, \textit{supra} note 21, at 122}. In the United States, prosecutors play a role in investigating crimes before charges are brought in a way that the Crown Prosecution Service in Britain cannot. \textsc{Id.}
\item \textsuperscript{37} See \textsc{id}. This relatively recent reform took the power of prosecution from the police and placed it with the Crown Prosecution Service. \textsc{Id.} at 119-22. See generally \textsc{CPS, What Is the Crown Prosecution Service (CPS) ? (1997) (visited Oct. 5, 1999) <http://www.cps.gov.uk>.
convicted defendant in the British courts, while American practice varies by jurisdiction: in most states, judges sentence defendants convicted at a jury or bench trial, while some state constitutions or statutes require juries to render sentences.\(^\text{38}\) Whether a case is tried to a jury varies according to the offense and the court in both countries.\(^\text{39}\)

In the class of criminal cases to which the CCRC pertains, “[t]he Crown Courts are the superior courts of original jurisdiction that try the more serious indictable offenses.”\(^\text{40}\) These courts function much the same as state criminal trial courts and federal district courts trying criminal cases. Appeals of a conviction or sentence from a Crown Court go to the Criminal Division of the Court of Appeal (hereinafter “Court of Appeal”), which “is the final arbiter on matters of fact.”\(^\text{41}\) The Lord Chief Justice presides over the Lord Justices of Appeal, who sit on the Court of Appeal upon appointment “by the Crown on the recommendation of the Prime Minister and hold office as long as they display good behavior until they reach the compulsory retirement age of seventy-five.”\(^\text{42}\) The Court of Appeal may therefore be usefully analogized to the federal circuit courts of appeal in the United States or to most states’ courts of appeals or intermediate appellate courts, although there is only one such ‘circuit’ in Britain.\(^\text{43}\)

Similar to the United States Supreme Court, the House of Lords decides only appeals on points of law of general public importance.\(^\text{44}\) The Lord Chancellor acts as the sort of Chief Justice of members of the Appellate Committee of the House of Lords—the Lords of Appeal in Ordinary, or “Law Lords”—whose “[t]enure is for as long as good behavior is displayed until attainment of the age of seventy-five.”\(^\text{45}\)

\(^{38}\) See HIRSCHEL & WAKEFELD, supra note 21, at 143.

\(^{39}\) See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968) (setting the constitutional standard for the right to a jury trial in state criminal cases); PATTENDEN, supra note 1, at 1 (outlining the English practice regarding jury trials).

\(^{40}\) HIRSCHEL & WAKEFIELD, supra note 21, at 110.


\(^{42}\) HIRSCHEL & WAKEFIELD, supra note 21, at 115.


\(^{44}\) PATTENDEN, supra note 1, at 3; see also The Stationery Office, The Judicial Work of the House of Lords (visited Oct. 5, 1999) <www.parliament.the-stationery-office.co.uk/pa/ld199697/ldinfo/ld08judg/ld08judg.html>.

\(^{45}\) HIRSCHEL & WAKEFIELD, supra note 21, at 115.
On the executive side, the Home Office performs a role similar to that of the United States Department of Justice and analogous state agencies. The British Secretary of State, more commonly called the “Home Secretary,” serves much the same role as the United States Attorney General, at least in his “overall responsibility for . . . the maintenance of law and order.” The Home Secretary, however, is also an MP and will generally introduce and sponsor crime legislation drafted by the Home Office and supported by the Government, as controlled by the party that holds the majority of seats in the House of Commons.

Finally, it should be noted that, in the United States, post-conviction challenges to conviction actions occur through collateral remedies at the state level or habeas corpus actions at the federal level, following the direct appeal or review of a conviction. Because the British have neither a federal system of government nor a constitution against which to measure legislative and executive actions, there is of course no analogous arrangement to the federal writ of habeas corpus, by which “a state defendant may challenge his state conviction on federal constitutional grounds.” In fact, the writ of habeas corpus is not used in Britain to secure the release of a defendant whose detention “is erroneous (as opposed to unlawful) where the person taking it, although it’s within his power to do, has made a procedural error, has misunderstood the relevant law, has failed to take account of relevant matters,

46. See id. at 75, 186-87, 192-93, 218 (describing the Home Office’s responsibility for the British police, prisons, and parole system).

47. Id. at 11. The Home Secretary has general supervisory powers over the police at all levels, though two other government officials exercise some of the responsibilities and powers of the American federal and state attorneys general. Id. at 18. The British “Attorney General, who is appointed by the political party in power, is the chief law office of the Crown, the titular head of the English bar, and a member of the House of Commons.” Id. at 120. “The Attorney General represents the government in court in important cases, answers questions in Parliament, and provides legal advice to government departments.” Id. The Director of Public Prosecutions (DPP) supervises the CPS and “is appointed by and works under the Attorney General.” Id. at 122.

48. See id. at 25 (discussing the role of the Home Secretary’s Criminal Law Revision Committee).

49. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 28.1 (2d ed. 1992). State collateral remedies regimes vary widely. Id. As such, this Article will not discuss the place of an Innocence Commission within any particular state post-conviction review system.

50. Id. The writ of habeas corpus is also available to federal defendants upon exhaustion of the defendant’s direct avenues of appeal, subject to increasing restrictions and exceptions. See, e.g., Stephen B. Bright, Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts To Protect Fundamental Rights, 54 WASH. & LEE L. REV. 1 (1997).
has taken into account irrelevant matters, or has acted perversely."51 Rather, in Britain, "a person detained as the result of a decision that was lawfully made but erroneous" must "appeal against the decision to a higher court or... . . challenge it in judicial review proceedings."52 As such, while the British CCRC is not concerned with writs of habeas corpus, any proposal for an Innocence Commissions within any given state will need to contemplate the new body's relation to the role of federal habeas corpus and that state's post-conviction, collateral remedies for addressing miscarriages of justice.

As this discussion demonstrates, the British criminal justice system does not look at all unfamiliar when compared with the federal and most states' criminal justice systems.53 With only minor modifications, the British CCRC can provide a useful model for any proposed Innocence Commission in the United States.

II. THE NECESSITY AND UTILITY OF AN INDEPENDENT REVIEW BOARD FOR WRONGFUL CONVICTIONS

Two further preliminary questions present themselves in considering whether the United States should follow Britain's lead in establishing independent Innocence Commissions over wrongful convictions. First, do the states' criminal justice systems have a need for such a "Court of Last Resort"?54 Second, if so, would an independent review commission for alleged wrongful convictions be the answer to the systems' needs? A review of the institutional resources and competency of the mechanisms in place to address wrongful convictions within the American criminal justice system demonstrates that the establishment of state Innocence Commissions would be both a needed and useful reform.

A. THE NEED FOR AN INDEPENDENT REVIEW BOARD FOR WRONGFUL CONVICTIONS

First, as to the question of need, the simple answer is that, as long as Americans are as fallible as other humans, and our system convicts innocents,

52. Id. (emphasis in original).
53. See Stephen Shute, With or Without Constitutional Restraints: A Comparison Between the Criminal Law of England and America, 1 Buff. Crim. L. Rev. 329, 330 (1998) ("Yet, despite these changes, it is still true that American criminal law bears a striking resemblance to its English counterpart.").
54. Yant, supra note 13, at 221; see also CCRC, Applying to the Commission (1997) ("The Commission is a last resort.").
we need institutions to counteract this dangerous and unjust phenomenon. Of course, that does not account for scarce resources.

Consider, then, what the American criminal justice system currently has in place to review convictions that may be questionable, unsafe, or even outright erroneous. Following a conviction imposed by a trial court, defendants can appeal their convictions or sentences, but generally based only on alleged legal, procedural, or constitutional infirmities in the process.\textsuperscript{55} Factual claims of innocence tend to get little hearing in American appellate courts, particularly in post-conviction proceedings following direct appeals where courts have set very high thresholds for the consideration of such claims.\textsuperscript{56} Moreover, most indigent criminal defendants receive inadequate or no legal representation at the state appellate level.\textsuperscript{57}

\textsuperscript{55} See, e.g., \textit{Amnesty Int'L, Fatal Flaws: Innocence and the Death Penalty} 9 (1998); \textit{Association in Defense of the Wrongly Convicted, Submissions of the Association in Defense of the Wrongly Convicted to the Minister of Justice and Attorney-General of Canada, the Honorable Anne McLellan} 42 (1999) [hereinafter \textit{AIDWYC}] (quoting Professor Michael Radelet).

\textsuperscript{56} See, e.g., \textit{Herrera v. Collins}, 506 U.S. 390, 400-01 (1993) (Rehnquist, J.) (plurality opinion) (holding that the defendant had no access to federal habeas corpus review on grounds of actual innocence absent an independent constitutional violation); \textit{People v. Washington}, 665 N.E.2d 1330, 1337 (Ill. 1996) (holding that claims of actual innocence are cognizable under the Illinois Constitution's due process clause through the state's Post Conviction Hearing Act, but that the defendant must show the newly discovered evidence of actual innocence is "new, material, noncumulative and, most importantly, 'of such conclusive character,' as would 'probably change the result on retrial'" (citations omitted)); \textit{Ex parte Elizondo}, 947 S.W.2d 202, 209 (Tex. Civ. App. 1996) (holding that, in a state habeas petition, claiming relief for actual innocence of a capital or non-capital crime under the Due Process Clause of the Fourteenth Amendment, "if applicant can prove by clear and convincing evidence to this Court [of Criminal Appeal], in the exercise of its habeas corpus jurisdiction, that a jury would acquit him based on his newly discovered evidence [of actual innocence], he is entitled to relief").

Alternatively, the executive branch of most state governments has a clemency or pardon power over convictions.\textsuperscript{58} But the clemency power is rarely exercised and is subject to tremendous political pressure counseling against its use.\textsuperscript{59} Of course, "[t]he use of the commutation power is more or less vulnerable to public pressure depending upon where the power is vested and who appoints the decision makers."\textsuperscript{60} This power is most often vested in the governor, possibly with "an advisory board that makes nonbinding recommendations."\textsuperscript{61} Generally, when the power is vested in the hands of elected officials, "the political consequences of granting commutations are simply too great" for most elected governors or other officials to exercise clemency powers.\textsuperscript{62} Moreover, the political gains from getting tough on defense and prosecution sides of capital trials" and "also compensates trial attorneys—other than public defenders—appointed by the court to represent defendants charged with capital crimes." Aaron Chambers, Funding Bill for Capital Cases Signed by Ryan, CHI. DAILY L. BULL., Aug. 16, 1999, at 1. Illinois Governor George H. Ryan signed the Capital Crimes Litigation Act into law on August 14, 1999. See id.


\textsuperscript{59} See Palacios, supra note 58, at 348-49; see also Michael L. Radelet & Barbara A. Zsembik, Executive Clemency in Post-Furman Capital Cases, 27 U. RICH. L. REV. 289, 303-05 (1993) (cataloguing the "extremely rare" exercises of executive clemency power in capital cases and concluding that, "until [the clemency] power is used more regularly, its crucial role in achieving both justice and mercy will remain unfulfilled"); cf. Death Penalty Information Center, Commutations in Capital Cases on Humanitarian Grounds (visited Oct. 5, 1999) <http://www.essential.org/dpic/clemency.html> (noting only forty humanitarian-motivated commutations nationwide since 1977).

\textsuperscript{60} Palacios, supra note 58, at 344.

\textsuperscript{61} Daniel T. Kobil, The Quality of Mercy Strained: Wrestling the Pardoning Power from the King, 69 TEX. L. REV. 569, 605 & n.232 (1991) (listing 29 such states, including Illinois). A few states use "administrative panel[s], usually appointed by the governor, [to exercise] . . . the principal authority to make clemency decisions." Id. "In sixteen [other] states, the governor shares the power to make clemency decisions with an administrative board or panel." Id.

\textsuperscript{62} Palacios, supra note 58, at 349; see also Stephen P. Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1046 (1996) ("Governors may have the power to grant mercy, but they no longer seem willing to exercise that power in a meaningful fashion. Faced with constituencies anxious to see capital sentences carried out swiftly, governors simply do not grant mercy, even in cases where [sic] mercy clearly seems appropriate. Executive clemency in the modern era is almost nonexistent.") (footnotes omitted)); Kobil, supra note 61, at 608-09 ("[I]t is evident that political considerations continue to erode the justice-enhancing function of clemency in the states, as they have throughout history."); id. at 609-10 ("Wariness of political repercussions may also be why the number of
criminals far outweigh any possible benefits from assisting people convicted of violent crimes, "a population that most people just don't care very much about." 63

The concern of limited resources cuts both ways, then. Certainly, no political or legal system in a society marked by scarcity of resources can afford to establish limitless layers of ex post review of criminal convictions. 64 In fact, public sentiment, after a point, would inevitably prevail upon decision makers to get on with the punishment of those whom the system convicted and granted some quantum of appellate review. 65

Yet the institutions in place to provide post-conviction remedies function inadequately precisely because of their own lack of institutional resources. Federal and state appellate courts are driven by concerns about escalating caseloads and judicial economy. 66 Elected governors and state clemency commissions have limited political capital to expend in reviewing and seriously considering claims of actual innocence by those convicted in the courts. 67 In the area of capital appeals alone, the majority of American

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64. This point has been cynically made by Justice Scalia in a recent dissent. See Bousley v. United States, 118 S. Ct. 1604, 1617 (1998) (Scalia, J., dissenting) (“It would be marvelously inspiring to be able to boast that we have a criminal justice system in which a claim of 'actual innocence' will always be heard, no matter how late it is brought forward, and no matter how much the failure to bring it forward at the proper time is the defendant's own fault. But of course we do not have such a system, and no society unwilling to devote unlimited resources to repetitive criminal litigation ever could.”).

65. See Consultation Paper, supra note 3, at 16 (“[B]ecause a convicted individual can appeal so many times, public reaction to these multiple appeals, irrespective of the merits, is seen to have placed added pressure on politicians to adopt tougher legislation regarding appeals.”).


67. See, e.g., Vivian Berger, Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere, 35 WM. & MARY L. REV. 943, 968-69 (1994) (noting that partisan politics control clemency decisions and most often weigh against granting a commutation); Kobil, supra note 61, at 606 (documenting “the toll that the exercise of the
politicians operate on the understanding that 'the people' have spoken and their judgment is that, if death sentences cost the system more than imprisoning a killer for life because of the cost of appeals, the number and scope of appeals should be restricted to make state-sanctioned executions cheaper.\(^68\) In the minds of most elected officials looking to the next election, who are they to argue with these strong claims of the 'political will of the people,' however unjust or likely to produce the execution of innocents they may be?\(^69\)

The American criminal justice system hides behind what some have called “the myth of systemic infallibility: the myth that prosecutors in capital cases never indict an innocent person; that if they do the trial courts can be counted on to acquit; that if the courts convict they sentence to prison rather than to death; that if courts do convict and sentence to death the appellate courts may be relied on to rectify an erroneous conviction; and that if the appellate courts fail then the chief executive will come to the rescue.”\(^70\) I would suggest that this review of the institutional resources of the state indigent defense systems, appellate courts, and governors and clemency clemency power has taken on the political careers of various governors”).

\(^68.\) See, e.g., Bright, Death Penalty Moratorium, supra note 57, at 34-35 (discussing the eviscerating effects of the AEDPA on federal habeas corpus review as “the result of a determination by the majority in Congress that results are more important than process, that finality is more important than fairness, that it is more important to get on with executions than determining whether convictions and sentences were fairly and reliably obtained”); cf. Linda R. Monk, Why the Rush To Execute?, CHI. TRIB., Apr. 1, 1999, at 19 (“Virginia has ‘cut the appeals time down from 10 to 15 years to two to four.’ More states will be following Virginia’s lead, thanks to a 1996 federal law that limited death-penalty appeals.”); O’Reilly, supra note 20, at 114 (noting the “national trend to support the finality of criminal judgments by speeding up the appeal process, especially in capital cases”).

\(^69.\) See, e.g., Berger, supra note 67, at 968-69 (noting that governors rarely grant clemency to death row inmates because governors “follow the path of least resistance” by “just say[ing] no” to clemency petition to be “responsive[] to [the people’s] will” and “cries for law-and-order”); Richard C. Dieter, Killing for Votes: The Dangers of Politicizing the Death Penalty Process 14-17 (October 1996, Death Penalty Information Center) (visited Feb. 17, 1999) <http://www.essential.org/dpic/dpicrkfv.html>; cf. William J. Bowers et al., A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer, 22 AM. J. CRIM. L. 77, 142 (1994) (concluding that “public support for capital punishment is an illusion that has become a self-perpetuating political myth”); Craig Haney, Commonsense Justice and Capital Punishment: Problematising the “Will of the People,” 3 PSYCHOL., PUB. POL’Y & L. 303, 316-333 (1997) (discussing “the relationships among the will of the people, our system of capital punishment, and the nature of commonsense justice”); Patrick A. Tuite, Changes Needed in Capital Cases, CHI. LAW., Apr. 1999, at 9 (“There are many political reasons why the death penalty in Illinois will be neither abolished nor put under a moratorium. Too many legislators think they will be seen as soft on crime or think their constituents require that they vote for the death penalty.”).

boards demonstrates that the state executive officials and judiciaries cannot adequately protect against the risk of convicting innocent defendants after the fact of conviction. This risk is, of course, most acute—and the myth of infallibility most markedly false—in the case of capital convictions, particularly as judicial and political forces coalesce to provide speedier executions of those convicted to die.

On the other hand, some might suggest that, by design, "[o]ur system does not guarantee either the conviction of the guilty or the acquittal of the innocent." Perhaps "[i]t is impossible to eliminate the false positives from the criminal justice system." If so, however, the system should have a safety net or a fail-safe to catch wrongful convictions without relying on elected officials or the overburdened courts.

In short, the American criminal justice system requires an independent mechanism to consider serious claims of wrongful convictions based on actual innocence. Such a body could preserve the efficacy of the system to convict the guilty with the efficiency the politicians and public opinion polls demand, while salvaging the legitimacy of the criminal judicial process. An

71. I am, of course, only the latest in a long line of commentators to reach this conclusion. See, e.g., id. ("We do not believe this myth, we do not sympathize with the effort to protect it, and we trust that anyone who studies our research will agree with us in rejecting the myth.").

72. See, e.g., Bedau & Radelet, supra note 70, at 169; Samuel R. Gross, The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases, 44 BUFF. L. REV. 469 (1996) (arguing that the risk of wrongful convictions is actually greater in capital than in non-capital cases); Palacios, supra note 58, at 315.

73. Arye Rattner, Convicted but Innocent: Wrongful Conviction and the Criminal Justice System, 12 L. & HUMAN BEH. 283, 284 (1988), quoted in Palacios, supra note 58, at 316 n.16.

74. Palacios, supra note 58, at 316.

75. See, e.g., 564 PARL. DEB., H.L. (5th Ser.) 310 (1995) (Lord Chief Justice Taylor) ("First, a sound system of criminal justice requires an appeal process which is accessible, reliable and comprehensible in order to safeguard the right of those charged with criminal offenses to be punished only if the admissible evidence proves them to be guilty. . . . Secondly, public confidence in the criminal justice system requires a mechanism for dealing with alleged miscarriages of justice when fresh material comes to light after all conventional avenues of appeal have been exhausted."); 1993 REPORT, supra note 27, at 6-7 ("But the damage done by the minority of cases in which the system is seen to have failed is out of all proportion to their number. The maintenance of law and order is critically dependent on public goodwill."); Home Secretary Jack Straw, Foreword to CCRC, MANAGEMENT STATEMENT FOR THE CRIMINAL CASES REVIEW COMMISSION (1998) <http://www.homeoffice.gov.uk/ccrc/ms.html> (describing the CCRC's "key role in enhancing public confidence in the integrity and effectiveness of the criminal justice system as a whole, as Parliament intended"); see also Death Penalty Committee Has Much To Consider, PEORIA J. STAR (Ill.), Apr. 12, 1999, at A4 (Illinois Supreme Court Justice "Heiple expresses the opinion that 'perfect justice . . . can never be achieved in capital cases or any other area of the law.' That may be so. But just because we can't do everything does not mean we should do nothing.").
institution that operated as a screening device for the appellate courts—and failing them, perhaps as a launching ground for a clemency consideration—could maintain the courts' strong concern with finality for most criminal convictions while also relieving judicial resources.\footnote{Cf. Consultation Paper, supra note 3, at 16 (Canadian Department of Justice noting that American appeals of "convictions are reviewed by the courts without the proactive assistance of the State," so that "[f]ivolous (even vexatious) applications are not vetted and the meritorious ones are not assisted by specialized counsel who have no vested interest in the outcome").}

This should be a welcome development for the state and federal courts. At present, a majority of the Justices on the Supreme Court seem to consider executive clemency to be the fail-safe filling this role for claims of actual innocence by death row inmates,\footnote{See Herrera v. Collins, 506 U.S. 390, 415 (1993) (Rehnquist, J.) (plurality opinion); \textit{id.} at 427 (O'Connor, J., concurring).} at least in most instances.\footnote{See \textit{id.} at 420 (O'Connor, J., concurring); \textit{id.} at 429 (White, J., concurring); \textit{id.} at 441 (Blackmun, J., dissenting).} On a petition for habeas corpus, therefore, absent a cognizable constitutional violation, a claim of actual innocence will not get an inmate habeas corpus relief in a federal court.\footnote{See \textit{id.} at 400-01 (Rehnquist, J.) (plurality opinion).}

Yet, the clemency process has not been and will not be a functional fail-safe to catch wrongful capital or non-capital convictions. Notwithstanding the difficulty that petitioners for clemency face in overcoming the political hurdles to convince elected executives to commute a sentence in an era of get-tough-on-crime politics, some petitioners who went before the courts and even the Supreme Court may in fact have found no relief for their innocence before their executions.\footnote{See \textit{Supreme Court Justice Blackmun Speaks, Part One} (NPR "All Things Considered" radio broadcast, Dec. 27, 1993) (Justice Blackmun admitting that "[h]e had times when [h]e thought that possibly genuinely innocent people were executed" in cases that came before the Supreme Court); see also Monk, Why the Rush To Execute?, supra note 68, at 19 ("But, assuming that the late Harry Blackmun was right when he said 'the inevitability of factual, legal and moral error gives us a system that we know must wrongly kill some defendants,' can a judge properly declare the death penalty to be unconstitutional?").}

B. THE UTILITY OF AN INDEPENDENT REVIEW BOARD FOR WRONGFUL CONVICTIONS

Turning to the second question of the usefulness of an independent review commission, I would answer that Innocence Commissions similar to the British CCRC would be useful to meet the need for such a screening device and fail-safe mechanism. The British experience itself demonstrates the inadequacy of depending on the police, prosecutors, and the courts alone
to identify, investigate, and challenge alleged miscarriages of justice and the consequent need for an independent review body.

Prior to the establishment of the CCRC, "[t]he process for investigating alleged miscarriages of justice when appeal rights ha[d] been exhausted [was] . . . through the Home Secretary, who ha[d] the power to refer such cases to the Court of Appeal," under § 17 of the Criminal Appeal Act of 1968.81 The Home Office had a separate section—the "C3 Division"—that considered applications for the Home Secretary to exercise his power to refer alleged cases of wrongful conviction to the Court of Appeal.82 Critics of this arrangement noted that the Home Office was responsible for the police, for the maintenance of law and order, and for the preservation of "public confidence in the criminal justice system," and yet was also asked to correct miscarriages of justice and thereby "expose [the criminal justice system's] failings."83 Understandably, acting as "both judge and jury in its own cause," the Home Office was not "very eager" to expose the failings or misconduct of its own police or forensic scientists in obtaining wrongful convictions.84 Before making a referral, the Home Secretary and the C3 Division uniformly required proof of fresh evidence of innocence from applicants who typically lacked the necessary legal representation, resources or mobility to find new evidence because of poverty85 or confinement in prison.86

Moreover, critics of the Home Office's practices toward miscarriages of justice argued that the Home Office should not have allowed "the same police force to investigate a petition [to refer an alleged wrongful conviction to the Court of Appeal] as investigated the original offence."87 The public perceived that the police "force ha[d] a vested interest in upholding the conviction," possibly through "biased or half-hearted investigations."88 Others suggested

81. HIRSCHEL & WAKEFIELD, supra note 21, at 151; Criminal Appeal Act, 1968, ch. 19, § 17 (Eng.).
82. PATTENDEN, supra note 1, at 349.
83. Id. at 387 (noting the absence, in 67 years, of any referral to the Court of Appeal of a case "which raised serious doubts about police conduct during investigations").
84. Id.
85. See id. at 397.
86. See id. at 396. The Home Office typically "confine[d] investigations to the specific points raised in the petition," rather than "comb[ing] for everything favourable to the defense [in the case files], although sometimes reasons for doubting the conviction which are not mentioned by the petitioners [would have been] discovered." Id. at 352. Following the practice of many commentators, MPs, the Home Office, and the CCRC itself, I will use the terms 'referral' and 'reference' interchangeably throughout the Article to describe the power of the CCRC, and formerly of the Home Secretary, to send a case back for possible review to the Court of Appeal to address an alleged miscarriage of justice.
87. Id.
88. Id. at 387-88.
that the investigations of cases referred to the Court of Appeal under § 17 led
to their failure on appeal because the cases required "an investigation on
inquisitorial lines" and were, as investigated, "'unsuitable for or incapable of
determination as to truth by the accepted appellate process' of a formal
hearing at which advocates present rival versions of the truth."89

Some commentators have noted that, while "[t]here is no evidence to
suggest that any Home Secretary this century ha[d] been anything but
impartial in considering representations," concerns about institutional
competency, vested incentives, and a concern for the appearance of justice
make it "seem[] inappropriate to give a quasi-judicial function to a
politician."90 "Whatever the reality, the popular perception will be that the
decision is a political one" when the Home Secretary (or an American
governor) is asked to address an alleged miscarriage of justice.91 In many
cases, the actual motivation behind a decision not to refer lay in the Home
Secretary's desire "to avoid interference with the judicial function" in order
"to uphold the separation of powers."92 Moreover, because the Home
Secretary did not have time to personally consider most applications for
referral, the Home Secretary "ha[d] to rely heavily on the opinions of
unaccountable and anonymous civil servants," many of whom were not
lawyers.93

The Home Secretary was also an inappropriate choice to review
miscarriages of justice because, upon the rare decision to refer a case,94 "the
Executive, in the shape of the Director of Public Prosecutions, [wa]s entitled
[to]—and often [did]— seek to uphold the conviction."95 One academic
commentator reflected on the potential absurdity of this arrangement: "It must
[have] look[ed] odd to the public that one branch of the Executive (the Home
Office) thinks that there is sufficient doubt about a conviction to warrant a
reference to the [Court of Appeal] while another branch (the Crown
Prosecution Service) says that there is no reason to quash the conviction."96

89. Id. at 373 (quoting JUSTICE, HOME OFFICE REVIEWS OF CRIMINAL CONVICTIONS ¶
42 (1968)).
90. Id. at 388-89.
91. Id. at 389. This often meant that "'external support and publicity'" determined
whose cases will be referred. Id. at 390.
92. Id. at 364, 401.
93. Id. at 389.
94. See id. at 392-93.
95. Id. at 389-90.
96. Id. at 390. Of course, the Court of Appeal often complained of unopposed appeals
based on Home Secretary referrals because "it cannot allow the Executive to dictate the result
of an appeal," which is an exclusively judicial function. Id. at 373-74. "Without adversarial
argument the [Court of Appeal] is poorly placed to test the appellant's case." Id. at 374; see also
More often than not, the Court of Appeal would deny even the few petitions that were referred out of a "conscious or unconscious desire to deny any error in the judicial system." 97

Notably, no criminal justice system in the United States has an Inspector General-type body such as the CCRC to look into alleged miscarriages of justice post-appeal, outside of the wholly inadequate and politicized clemency powers of the executive branches of the states. 98 In the vast majority of cases in which innocent people are exonerated, people from outside the criminal justice system—private attorneys, law professors, journalists, even students—conduct the investigations that proves inmates’ innocence and push for their exoneration. 99

97. PATTENDEN, supra note 1, at 373.

98. See Lynch, supra note 13, at 4A (describing the British CCRC and noting that it was “unlike anything in the USA”); CONSULTATION PAPER, supra note 3, at 10 (“In the United States, there is no governmental body tasked with vetting applications and investigating them for the purpose of providing a remedy in meritorious cases.”).

It is worth noting that, whatever the institutional incentives pressing against a referral by the Home Secretary though his § 17 power, “[t]he section 17 process ha[d] a number of advantages over a pardon: the Home Secretary need not be satisfied that the convicted person is innocent; . . . the conviction could be extinguished; any suggestion of political bias [wa]s avoided; and in a case of substantial conflict of evidence a retrial [could] be ordered by the [Court of Appeal].” PATTENDEN, supra note 1, at 359-60 (footnotes omitted). These differences explain why the Home Secretary’s § 17 power, which sent a case back to the courts for decision, could be used more effectively than American governors’ clemency or pardon powers.

99. See Bright, Death Penalty Moratorium, supra note 57, at 30; cf. Gross, supra note 72, at 497-500 (noting the need for attention and luck to catch a miscarriage of justice). Indigent criminal defendants may similarly be forced to rely on the generosity of a court-appointed lawyer to do the necessary investigation and preparation at the lawyer’s own expense to avoid being wrongfully convicted or convicted by a jury after an unfair trial. See Laura LaFay, Virginia’s Poor Receive Justice on the Cheap, VIRGINIAN-PILOT, Feb. 15, 1998, at A1 (quoting Virginia defense attorney Steven D. Benjamin noting that, had his firm not been willing to voluntarily pay for the necessary investigation to show that his court-appointed client was innocent, his client very likely “would be serving a life sentence”’); cf. Bright, Counsel for the Poor, supra note 57, at 1853-55 (describing the inadequate compensation provided to court-appointed capital defense attorneys); Across the USA: News from Every State: Pay Scale, U.S.A. TODAY, Feb. 3, 1999, at 10A (listing each state’s “maximum pay for court-appointed lawyers in felony cases that do not involve the death penalty”).

Despite some claims that the release of innocents shows the ‘system’ worked, Belluck, supra note 4, at A7 (quoting Illinois Governor George Ryan’s spokesperson Dave Urbanek saying, in the release of innocent death row inmate Anthony Porter, that “‘[t]he process did work’” and that “‘it also took 17 years for that journalism professor to sic his kids on that case’”); Naftali Bendavid, Escaping Execution, CHI. TRIB., Nov. 13, 1998, at 3 (quoting “Dudley Sharp, vice president of Justice For All, a Texas victims group,” saying that “‘[e]ven in cases where the system did not find the error [in convicting an innocent person to death], the system cooperated with those who did find the error and those people were released’”); Death Penalty Committee, supra note 75, at A4 (“But the main point of [Illinois Supreme Court Justice] Heiple’s dissent
is that 'the system works,' as evidenced by the fact that the appointments of these condemned men with the needle were never consummated."); ([t]hese cases have been uncovered in spite of the flaws of the present system,") AIDWYC, supra note 55, at 48; see also Innocents on Death Row, N.Y. TIMES, May 23, 1999, at 16 ("The exoneration is not a sign that the system works. The innocence of many death-row prisoners was discovered only because outsiders went to great effort and expense to investigate when the courts would not.... No system that requires college students to provide justice can be called functional."); Jackowiak, supra note 12, at 5 ("An official governmental assertion that Porter's release after being falsely convicted, and spending 17 years in a cell awaiting his state-administered execution, somehow proves that 'the system works,' is so obscene there are no words for it."); Zorn, A Few Words, supra note 4, at 1 (same).

Indeed, the recent release of so many death row inmates in Illinois probably reflects that fact that "'[t]here's just a more vigilant public-interest community in Illinois'" that investigated these cases and forced the courts to recognize the defendants' claims of innocence, not that "'[t]he system ... correct[ed] itself.'" Allen, supra note 4, at 9 (quoting Northwestern University journalism professor David Protess); see also Sharon Cohen, Last-Minute Exoneration Fuel Death-Penalty Debate: Justice: Wrongful Conclusions Shift Focus from Morality to Legitimacy. Since 1973, 82 on Death Row Have Been Cleared, L.A. TIMES, Aug. 15, 1999, at A1 ("Twelve wrongful convictions do not mean Illinois, with 158 death row inmates, has a bigger problem than other states, says Larry Marshall, a Northwestern University law professor who has been involved in 10 of the cases. But, he says, they do mean 'we're doing a better job of detecting them.'"); Lehmann, supra note 4, at 8 (quoting Cook County Assistant State's Attorney Thomas V. Gainer Jr., asking for the quashing of Anthony Porter's convictions on the grounds of actual innocence, saying state officials "'were lucky there were others outside the system ... that brought this to our attention'"). Likewise, the absence of many, if any, released death row inmates in recent years from capital states such as Texas or Virginia likely reflects the fact that valid claims of innocence are pushed below those states' courts' radar by the sheer volume of capital cases and executions, grossly inadequate defense funding, and an ever-increasing push for finality in capital appeals. Cf. Bright, Counsel for the Poor, supra note 57, at 1845-46; Capital Punishment: Halt the Executions, VIRGINIAN-PILOT, July 6, 1999, at B10 ("The low number of errors acknowledged by the state Supreme Court and 4th Circuit Court of Appeals may mean that Virginia's lower courts are remarkably superior to those in other states. Or it could mean that the fastidious—some might say fanatical—application of strict procedural rules is slighting constitutional protections that are better respected elsewhere."); Consider Options to Death Penalty, AUSTIN AMERICAN-STATESMAN, Apr. 4, 1999, at H2 ("Texans pay dearly for the death penalty morally and financially. Numerous problems surround its use, including a closed-door and casual clemency review process and inadequate legal representation for indigent convicted killers. And innocent people have come perilously close to execution."). At the very least, the absence of a spate of releases similar to the recent events in Illinois should hardly be taken as proof that the 'system' in Texas or Virginia does not pose the same dangers of convicting the innocent, even to death sentences, that cases like Anthony Porter's have revealed in Illinois. See, e.g., Linda R. Monk, Death Penalty Foes Turn to New Tactics, BALTIMORE SUN, Apr. 1, 1999, at 23A ("Apparently some states have learned nothing from the recent spate of exonerations for death row inmates in Illinois. For example, Virginia is in the midst of an execution frenzy, planning to kill seven inmates in as many weeks."); Bill Nemitz, On Death Row: Innocence Can Still Be Fatal, PORTLAND PRESS HERALD (Me.), Apr. 30, 1999, at 1B (Northwestern University journalism professor David Protess said he'd like nothing better than to take his class on the road to Texas and Florida and other states with bulging death rows. He's certain that they would find many more Anthony Porters among the 3,549 prisoners sentenced to death, too poor to mount a decent defense and too deep in despair to think anyone cares whether they live or die."); see also infra notes 445, 457.
Whereas British prisoners could at least turn to the Home Secretary to review alleged miscarriages of justice outside the court process but within the 'system,' the American criminal justice system, left to its own devices, relies entirely on the police, prosecutors, and the courts to identify and correct wrongful convictions. On the whole, the institutional incentives and pressures on police and prosecutors will more often push them toward behavior and decisions that potentially lead to trying and convicting innocents than resisting political and career incentives by deciding not to charge or to charge less than a capital offense. Specifically, police misconduct may certainly play a role in some wrongful convictions, while in other cases faulty investigative techniques or cynicism may be responsible for placing innocent people behind bars. Similarly, prosecutorial misconduct or simply

100. Nevertheless, in practice, victims of British miscarriage of justice effectively relied upon the same types of assistance from outside the 'system' prior to the establishment of the CCRC. 564 PARL. DEB., H.L. (5th Ser.) 319 (1995) (Baroness Mallalieu). The British civil liberties organizations Liberty and Justice—whose chairman sits in the House of Lords—do, however, seem to exercise more political clout and to be able to mobilize more widespread assistance in Britain than any such organization in the United States. 564 PARL. DEB., H.L. (5th Ser.) 312 (1995) (Lord Alexander). See, e.g., PATTENDEN, supra note 1, at 349-50 (noting the role of Justice and Liberty in "call[ing] upon a reserve of solicitors to provide assistance on a pro bono basis" in cases of suspected wrongful convictions); id. at 399-400 (discussing Justice's and Liberty's recommended reforms leading up to the Royal Commission on Criminal Justice's call for the CCRC). Some commentators, however, still suggest that, even with the CCRC in place, "applicants [to the CCRC] need at least one—and preferably all—of three factors: a committed lawyer, supportive family or friends, and some good luck." See Campbell, Guilty Until Proved Innocent, supra note 1, at 17.

101. See Gross, supra note 72, at 475-79, 489-96.

102. See, e.g., Adam Cohen, The Frame Game, TIME, Mar. 29, 1999, at 54 ("The trial [of the DuPage Seven, who are accused of framing Rolando Cruz,] ... may be tough going for prosecutors. They will need to persuade a jury that a phalanx of law officers tried their best to send an innocent man to the electric chair. Such a thing should be unthinkable. Sadly, it is not."); Thomas F. Geraghty, Dead Certain: Circumventing Future Tragedies in our Criminal Justice System, CHI. TRIB., Apr. 16, 1999, at 23 ("Police, who for the most part are professional and courageous, are too often sloppy and heavy-handed in their investigations."); Lawrence C. Marshall, Innocence and Death: Lessons the State Must Heed Before It Kills Again, CHI. TRIB., Feb. 11, 1999, at 29 (noting that the police misconduct and perjury in the cases of Alejandro Hernandez and Rolando Cruz led to grand jury indictments of the police detectives involved). The DuPage Seven were ultimately acquitted of charges stemming from an alleged conspiracy by police and prosecutors to frame released Illinois death row inmate Rolando Cruz for capital murder. See Allison Kaplan, Attorneys, Advocates Sort out DuPage 7 Legacy: Groups Call for More Vigilance; Officials Want Faith in System, CHI. DAILY HERALD, June 7, 1999, at 6.

103. See, e.g., Belluck, supra note 4, at A7 (quoting David Erickson, first assistant Cook County State's Attorney, saying that the police investigation in the Anthony Porter case "was done the way that police work was normally done in the 1980's"); Eugene Kane, Chicago Case Shows Justice's Rough Edges, MILWAUKEE J. SENTINEL, Feb. 9, 1999, at 1 (noting that police sometimes arrest a suspect knowing the suspect "‘didn’t do [the charge charged],’" but knowing "‘[he] probably did something’"); cf. 1993 REPORT, supra note 27, at 7 ("We recognize that
overzealous pursuit of a conviction leads to other wrongful convictions.\textsuperscript{104} The American criminal justice system, and the political atmosphere that surrounds it, simply does not reward police or prosecutors for the number of suspected perpetrators they decide are innocent, before or after a conviction.\textsuperscript{105} On the contrary, many prosecutors have further political ambitions to advance to the bench or into the state house; in fact, “[a] common route to the bench is through a prosecutors’ office, where trying”—not declining to indict in—“high-profile capital cases can result in publicity and name recognition for a prosecutor with judicial ambitions.”\textsuperscript{106} Additionally, when defendants raise claims of actual innocence on appeal, prosecutors’ offices, as a matter of course in the American adversary system, “attack and discredit the criminal defendant’s legal arguments on appeal, including the argument of innocence” and “fight to keep them incarcerated.”\textsuperscript{107}

In the area of non-capital offenses, police and prosecutorial misconduct, overzealous but short-sighted investigations, or fallibility may similarly lead to the conviction of suspects believed to be guilty in the face of rules and procedures which seem to those charged with the investigation to be weighted in favour of the defence.”\textsuperscript{104}

\textsuperscript{104} See, e.g., Ken Armstrong & Maurice Possley, \textit{The Verdict: Dishonor}, Chi. TRIB., Jan. 10, 1999, at 1 (describing the effects and prevalence of prosecutorial misconduct in Illinois); Geraghty, \textit{supra} note 102, at 23 (“Prosecutors, most of whom are hard-working and dedicated, are overwhelmed by caseloads, and are too often uncritical of the investigations done by the police.”); Mark Hansen, \textit{How a Vision Failed: Indictment Calls Prosecution a Conspiracy Against Suspect}, A.B.A. J., Feb. 1997, at 26-27 (describing the indictments against former prosecutors for misconduct in prosecuting Rolando Cruz); Richard Willing, \textit{Ill. Prosecutors Accused Of Framing Innocent Man}, U.S.A. TODAY, Mar. 24, 1999, at 9A (“Critics say the behavior the [DuPage S]even are accused of is not rare, that prosecutors are prone to cut corners to strengthen the odds of conviction in cases where they are convinced the suspect is guilty.”); \textit{id} (“Veteran defense counsel Nancy Hollander of Albuquerque offers one possible explanation [for why authorities continued to pursue Cruz if they suspected he was innocent]. ‘(Prosecutors) buy into a theory of the investigation, and then there’s no turning back,’ she says. ‘Nobody sits down and actually says, “Let’s frame so-and-so.” ’ But they have so much invested personally, politically and professionally that there is no arguing with them.’”).

\textsuperscript{105} This may be particularly true in homicide cases. \textit{See Gross, supra} note 72, at 490-92; Cohen, \textit{supra} note 102, at 54 (“When crime rates are high—or when there is a horrific crime, like the Nicarico murder—the pressure on law enforcement is immense.”).

\textsuperscript{106} Bright & Keenan, \textit{supra} note 43, at 776.

\textsuperscript{107} Jackowiak, \textit{supra} note 12, at 5; \textit{see also id}. (also noting that, “[f]or the last 17 years, for example, all the government has done for Anthony Porter is file legal papers erroneously arguing that Porter is guilty as the devil and must be executed immediately.”); Eric Zorn, \textit{Sometimes When Prosecutors Win, Justice Loses}, Chi. TRIB., Aug. 23, 1999, at 1 (arguing that prosecutors, including former Cook County Assistant State’s Attorney and current chairman of the Illinois General Assembly’s Legislative Task Force on the Death Penalty, State Rep. James Brosnahan (D-Evergreen Park), oppose defense attorneys’ efforts to test the evidence behind convictions because of “human nature—the desire to win—and human fallibility—the errors in judgment and proportion that we all make, even when we may be technically in the right”).
to innocents being convicted, and these cases are perhaps even less frequently identified at later levels of trial and appellate review than erroneous capital convictions. Indeed, in capital and non-capital cases marred by these types of errors and wrongdoing, the appellate "process tend to be one promoting 'ratification of error.'" American courts are not interested in showing they have allowed an innocent man to be convicted. To be sure, judges no more wish for nor are utterly unconcerned about such an incorrect and unjust outcome than the vast majority of police and prosecutors. But American appellate courts, driven by concerns of judicial economy and preserving the finality of judgments, primarily concern themselves with procedural errors. Trial courts, on the other hand, can control certain aspects of a trial in an effort to prevent erroneous convictions, by setting aside jury verdicts unsupported by the evidence presented, keeping inflammatory material from the jury, and dismissing cases that do not merit prosecution as a matter of law. Yet trial courts are largely constrained by the investigation conducted and the evidence presented by each side, and American trial courts do not conduct their own investigations, as courts do within the non-adversarial systems of criminal procedure. Moreover, most capital and non-capital

110. Cf. PAT ENDEN, supra note 1, at 385-86 (noting that the British Home Office, which had the power as 'a last resort' to refer wrongful convictions to the Court of Appeal and was responsible for the police and the maintenance of law and order, was therefore "both judge and jury in its own case" and not "very eager to expose its failings").
111. See, e.g., Wisotsky, supra note 109, at 556-59. For a striking account of one Illinois court's skepticism toward a capital defendant's claim of actual innocence, see Mills & Armstrong, supra note 5, at 1 ("The exoneration of [Ronald] Jones followed considerable resistance from both prosecutors and a Cook County judge who derisively rejected efforts by Jones' appellate lawyers to have sophisticated DNA testing performed on evidence in the case.").
defendants are poor and are therefore unrepresented or poorly represented at
the trial and post-conviction stages of the process leading to their convictions,
such that court-appointed defense representation has proved inadequate as a
safeguard against the risk of wrongful convictions.\textsuperscript{115}

In considering the comparative institutional competency of police,
prosecutors, and the courts as against that of an independent review body to
address miscarriages of justice, it will be helpful to again consider the present
concerns that have risen to national attention recently in Illinois and that argue
for the institution of the first Innocence Commission in that state. In Chicago,
Cook County State’s Attorney Richard Devine has promised a four-point
program of reform in the way his office handles death penalty prosecutions in
the wake of the release of Anthony Porter in February 1999. The State’s
Attorney will now “make a ‘comprehensive, personal review of evidence and
legal proceedings in all death penalty cases after all appeals have been
exhausted and before a petition of clemency is filed with the governor.’”\textsuperscript{116}
Similarly, Illinois Attorney General Jim Ryan released a “proposed legislative
package [that] would increase state money to programs that provide legal and
investigatory help for death row inmates; create a new Capital Clemency
Review Board with subpoena powers; expand review by the attorney general’s
office of every case before execution; and create a law to ensure that claims
of ‘actual innocence’ (as opposed to technical legal issues) are heard.”\textsuperscript{117}

Many reforms are welcome, and certainly some careful review of capital
cases is needed before any state sends a person to his execution. Yet Cook
County Public Defender Rita Fry pointedly noted that “’[t]he basic reality is
differences in evidentiary and criminal procedural rules of adversarial and non-adversarial legal
systems)."

\textsuperscript{115} See, e.g., Bright, \textit{Counsel for the Poor}, supra note 57, at 1836-48; Richard Klein,
\textit{The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to
Effective Counsel}, 13 HASTINGS CONST. L.Q. 625, 656-665 (1986); Dennis Cauchon, ‘\textit{Indigent’
A1.

\textsuperscript{116} Maurice Possley & Christi Parsons, \textit{Devine Vows Closer Look at Death Penalty:
New Guidelines To Heighten Prosecutors’ Scrutiny}, CHI. TRIB., Feb. 10, 1999, at 1; see also
Don Thompson, \textit{Legal Minds Will Debate Capital Punishment}, CHI. DAILY HERALD, Mar. 23,

\textsuperscript{117} Kevin McDermott, \textit{Attorney General Urges Illinois To Overhaul its Death Penalty
System}, ST. LOUIS POST-DISPATCH, Feb. 11, 1999, at B1; see also Aaron Chambers, \textit{Death

The Illinois State’s Attorney’s Association has publicly endorsed “comprehensive reviews
of cases by both a state’s attorney and the attorney general’s office before anyone is executed.”
Mahr, \textit{State’s Attorneys Oppose}, supra note 7, at 10. The Illinois State’s Attorney’s Association
has also indicated its support for extending to capital defendants “the right to appeal their cases
based on a claim of actual innocence, but . . . only if new evidence surfaces.” \textit{Id.}
the state's attorney is the one who seeks the death penalty. 118 There is an inherent danger of a conflict of interest when the same prosecutors' office that "is the one seeking death," or even the popularly-elected Attorney General, is also responsible for objectively examining the case to ensure an innocent person has not been convicted. 119 Professor Lawrence Marshall similarly noted that, following a reversal for retrials in capital cases, "[t]here is an inherent conflict of interest when the same prosecutors who secured a conviction are the ones responsible for deciding whether to retry a defendant." 120 Professor Marshall therefore called for "[s]ome independent body [to] . . . be established to review such cases and decide whether charges should be dropped." 121

So, too, state governors have simply proven too politically vulnerable to seriously consider clemency in most capital cases. 122 In response to Attorney General Ryan's call for a clemency review commission as a solution to the danger of executing innocent people, Public Defender Fry noted that,
"because of the politics of the death penalty, I cannot believe a governor would grant reprieves in capital cases on a routine basis."”

The review boards recommended in Illinois have largely been suggested as temporary measures or in-house processes within prosecutors' offices. A commission to study the ten exonerated men released from Illinois' death row is a worthwhile first step, and the blue-ribbon committees that have been formed might find many positive reforms to prevent potential wrongful convictions during the moratorium on executions in Illinois.

But released Illinois death row inmate Gary Gauger understands well that the current political movement in Illinois will die down, as "[t]he publicity surrounding the Anthony Porter case . . . fade[s], . . . and the politicians' discussion will wane." Gauger predicts that "[t]he public won't keep the debate alive." Temporary commissions looking only to solve the problems of wrongful capital convictions are inevitably only a temporary fix.

Moreover, such commissions would not provide a state-funded fail-safe for the cases of other innocent non-capital inmates, such as recently released Illinois inmate John Willis, "who was freed after blood and DNA evidence implicated another man in a [Chicago] South Side rape." In Illinois, Porter's case has understandably garnered more attention because he was set to be executed and death penalty abolitionists have rallied support for their cause behind the recent spate of death row releases. Yet the wrongful convictions of defendants such as Willis, who was serving a 100-year sentence, are by no means unheard of and perhaps more common than

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124. See Armstrong & Mills, supra note 4; see also Why the Errors on Death Row?, CHI. DAILY HERALD, Feb. 6, 1999, at 6; supra note 7 and accompanying text. But see Thompson, High Court to Review, supra note 19, at 7 (reporting that State Rep. Coy Pugh, the leader of the push in the Illinois House for a moratorium, is disappointed that the Illinois Supreme Court's panel to study the Illinois death penalty is made up of seventeen judges and not “anyone outside the system,” because “‘I’m sure they don’t want to give the impression of the fox guarding the chickens, and that’s the impression that people will get’”).
125. Callahan, supra note 17, at 16.
126. Id.
wrongful capital convictions, if only because of the sheer quantitative disproportionality between capital and non-capital prosecutions. 129

Moratoriums, de facto or de jure, in Illinois or Nebraska are by definition only temporary measures designed to buy time to find more permanent solutions to the problems with the states' death penalty systems. 130 Temporary movements in and of themselves will not address most past or future wrongful convictions. What is needed is an independent, permanent review commission in each jurisdiction to consider claims on miscarriages of justice and actual innocence in capital and non-capital cases.

Such an Innocence Commission is needed and would be useful precisely because the American criminal justice system, like any human system, is fallible and convicts the innocent. An independent Independence Commission would be useful because, as the British Parliament understood in removing the responsibility to address miscarriages of justice from its Home Office, those who are charged with investigating and prosecuting crimes in the first instance should not be burdened with the sole institutional responsibility of investigating when they have erred or suffered a breach from within of their ethical duties to prosecute the guilty and exonerate the innocent. 131

State Innocence Commissions would be useful because American courts have cut back on their own responsibility for reviewing alleged miscarriages of justice in an effort to ensure the finality of judgments and preserve judicial economy. 132 In the wake of the courts' efforts to reduce caseloads and

129. It might also be suggested that the extra resources that are allocated to capital defense efforts in some jurisdictions make wrongful non-capital convictions more likely than wrongful capital convictions. Several compelling explanations have been offered to support the opposite conclusion, however. See supra note 72 and accompanying text.

130. See supra note 7; cf. Geraghty, supra note 102, at 23 ("If today we begin the search for innovative and merit-based criminal justice reforms, when future generations look back on the operation of the criminal justice system of 1999, they will shake their heads in disbelief about the way in which our criminal justice system processed cases and people.").

131. See, e.g., 256 PARL. DEB., H.C. (6th Ser.) 32 (1995) (Shadow Home Secretary Jack Straw) ("The [1995 Criminal Appeal] Bill also implicitly recognizes that it would be inappropriate for those directly responsible for the prosecution process to be involved in judging whether that process has operated properly in specific cases, or whether it has contributed prima facie to a miscarriage of justice. . . . The Bill establishes a new separation of powers in respect both of Ministers and of prosecuting lawyers. In commendably achieving that separation of powers, there is no implication that the public no longer have confidence in Ministers or lawyers to make fair-minded decisions. However, there is a strong implication that justice must not only be done but be seen to be done and that a clear separation of powers, visible and transparent, is therefore required.").

132. See, e.g., Herrera v. Collins, 506 U.S. 390, 417 (1993) (Rehnquist, J.) (plurality opinion) ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no
state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." id. at 417; (O'Connor, J., concurring) ("At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation. . . . Unless federal proceedings and relief—if they are to be had at all—are reserved for 'extraordinarily high' and 'truly persuasive demonstration[s] of 'actual innocence' that cannot be presented to state authorities, ante, at 869, the federal courts will be deluged with frivolous claims of actual innocence.") id. at 426; Miller v. Commissioner of Correction, 700 A.2d 1108, 1131 (Conn. 1997) ("The state's particular interest, however, is in maintaining the fairly obtained conviction of one whom it sincerely believes is guilty, and in not being required to maintain that status by way of a second trial years later, when its evidence of guilt may be less reliable and persuasive than it was when it was fresh. Indeed, we have recognized the fact that in many cases an order for a new trial may in reality reward the accused with complete freedom from prosecution because of the debilitating effect of the passage of time on the state's evidence."); Summerville v. Warden, 641 A.2d 1356, 1371 (buttressing this particular interest are the more general "interests . . . in preserving the finality of judgments, [and] in not degrading the properly prominent place given to the original trial as the forum for deciding the question of guilt or innocence within the limits of human fallibility. . . ." Id. . . . Applying these three factors—the balancing of the relevant interests of the petitioner and the state, the functions of a burden of proof, and the remedy in the event of a successful petition—we conclude that, in order to grant a petitioner's request for relief, the habeas court first must be convinced by clear and convincing evidence that the petitioner is actually innocent. . . . We agree, therefore, with the Texas Court of Criminal Appeals that, at least when applied to a habeas claim of actual innocence, the clear and convincing evidence standard requires 'an exceedingly persuasive case that [the petitioner] is actually innocent.' Ex parte Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996).")); People v. Bull, 705 N.E.2d 824, 842 (Ill. 1998) (Harrison, J., concurring in part and dissenting in part) ("The prognosis for wrongly accused defendants facing capital charges is not improving. To the contrary, legislatures and the courts appear to have abandoned any genuine concern with insuring the fairness and reliability of the system. Achieving 'finality' in death cases, and doing so as expeditiously as possible, have become the dominant goals in death penalty jurisprudence."); Commonwealth v. Williams, 732 A.2d 1167, 1176-77 (Pa. 1999) ("While prior versions of the [Post Conviction Relief Act] expressly provided for excuse of waiver in circumstances where the alleged error resulted in the conviction or affirmance of sentence of an innocent individual or where the waiver does not constitute a state procedural default barring federal habeas corpus relief, see 42 Pa.C.S. S 9543(a)(3)(ii), (iii) (repealed), the General Assembly eliminated those express provisions in the November 17, 1995, amendments. Additionally, this Court has announced that, to effectuate the terms of the PCRA and in keeping with principles of fairness, finality and efficient judicial administration, review under the relaxed waiver doctrine is no longer available in PCRA cases."); Commonwealth v. Albrecht, 720 A.2d 693, 700 (1998) ("Therefore, post-conviction relief is not available to the extent that Williams has asserted general claims of trial error that were not preserved at trial and raised on direct appeal.") (footnote omitted)); State v. Moxon, 983 S.W.2d 661, 670-71 (Tenn. 1999) ("In addition, finality concerns militate against applying the interpretation advanced by Moxon and the State [that the statute of limitations on filing a petition for a writ of error coram nobis does not begin to run until the conclusion of the appeal as of right proceedings]. [T]he administration of justice and the integrity of our court system demand, in addition to fair treatment under the law, a certain degree of finality to criminal judgments."); Harrison v. State, 394 S.W.2d 713, 717-18 (Tenn. 1964). Since a convicted defendant had no other avenue for seeking relief at common law, it was entirely appropriate for due diligence to be the only time
successive criminal appeals, Innocence Commissions would screen out weak claims of wrongful convictions and identify for the courts those cases most deserving of further scrutiny and possible correction.

To prove a continuing commitment to "the fundamental value determination of the American criminal justice system that it is far worse to convict an innocent person than to let a guilty person go free," state legislatures, beginning with the Illinois Legislature, should welcome, in principle, the establishment of independent Innocence Commissions with the institutional incentives to ensure that, while others properly ‘within’ the system work to guarantee that the guilty are brought to justice, no innocent person remains imprisoned or under sentence of death. It is to the British model for such an Innocence Commission that this Article now turns.

III. THE EVOLUTION OF THE CRIMINAL CASES REVIEW COMMISSION IN ENGLAND

The British CCRC arose out of concerns similar to those growing in Illinois and elsewhere in the United States as more and more capital and non-capital inmates are being shown to have been wrongfully convicted. The CCRC came about through growing public and political concern with a number of apparent miscarriages of justice in England, Wales, and Northern Ireland that came to light in the late 1980s and early 1990s. These high-profile cases of apparent innocence “highlighted how long and difficult the limitation on the writ; however, criminal procedure has drastically changed in the past thirty years. See City of White House v. Whitley, 979 S.W.2d 262 (Tenn. 1998) (“Convicted defendants now have the right to move for a new trial, the right to appeal, the right to seek post-conviction relief, and the right to file habeas corpus petitions. The post-conviction statute now provides a method by which courts may address claims of actual innocence that are based upon newly discovered scientific evidence. Finally, convicted defendants who discover new non-scientific evidence of actual innocence too late to file a motion for new trial or petition for writ of error coram nobis may always seek executive clemency. Clearly, in this modern procedural regime, the writ of error coram nobis is no longer a convicted defendant’s only hope for relief.” (footnotes omitted)); Newsome v. State, 995 S.W.2d 129, 134 (Tenn. Crim. App. 1998) (“Although we are not advocating the persecution of the innocent, there is a need for finality of legal decisions. At some point, the proceedings must come to a halt despite the prospect of allegations without end that something went wrong. The traditional method for addressing actual innocence based upon newly discovered evidence that is procedurally barred from the courts is through executive clemency.”); Herrera v. Collins, 506 U.S. 390, 417 (1993). (“If the appellant has not already pursued this option, it is still available to him.”).

133. Bull, 705 N.E.2d at 842.
135. See HIRSCHEL&WAKEFIELD, supra note 21, at 151; 1993 REPORT, supra note 27, at 6.
path [was] to overturning an unsafe conviction" under the system for appeal and review of alleged wrongful convictions in place in Britain until 1997.136

As a matter of actual practice, the Home Secretary exercised his power under § 17 of the Criminal Appeal Act of 1968 to refer cases of alleged wrongful convictions to the Court of Appeal only "in cases where there was new evidence or where some other consideration of substance had emerged after the trial."137 Yet, even this limited power was critically important to defendants who did have new evidence to support a claim of actual innocence because the Court of Appeal traditionally took a narrow view of the need to admit and consider new evidence on appeal138 and does not allow successive appeals of a conviction without a referral.139 Within this context, in the early 1990s, "concerns ha[d] been raised about the orientation of the Home Office in investigating alleged miscarriages of justice, and in particular the presumption that convictions are well founded."140

A. THE ROYAL COMMISSION ON CRIMINAL JUSTICE REPORT (1993)

As a result of "cases such as the Birmingham Six which had raised serious issues of concern to all, and the undermining of public confidence when the arrangements for criminal justice failed," the Home Secretary created a blue-ribbon panel, the Royal Commission on Criminal Justice, chaired by Viscount Runciman.141 The Royal Commission's charge specifically directed the blue-ribbon panel to consider means of improving

136. HIRSCHEL & WAKEFIELD, supra note 21, at 151.
138. See PATTENDEN, supra note 1, at 138-39; see also id. at 130 ("Successful appeals based on fresh evidence are not common.").
139. See id. at 85. For that matter, only convicted defendants who wish to raise only a point of law can appeal by right; any other appeal of a conviction first requires leave to appeal, which can be granted by a certificate of appealability from the trial judge or by a grant of leave to appeal from a single judge of the Court of Appeal or from the full Court of Appeal. Id. at 92-103.

Like most American appellate courts, there are time limits that defendants must observe in seeking leave to appeal. Id. at 107-10. Exceptions are rarely granted when the time limit has expired, unless the defendant can show "the emergence of overwhelming evidence of the accused's innocence." Id. at 108. Legal aid is not always not available to prepare an application for appeal. Id. at 103. Although, if leave is granted, "legal aid is usually automatically allowed for the appeal." Id. at 104; see also id. at 118.
140. HIRSCHEL & WAKEFIELD, supra note 21, at 151. In fact, due to dissatisfaction with the limited investigative and review powers exercised by the Home Office's C3 Division, non-governmental groups such as the civil liberties organizations Liberty and Justice had for many years been independently investigating and providing legal assistance to defendants who claimed to have been wrongfully convicted. See PATTENDEN, supra note 1, at 349-50.
141. CCRC, BACKGROUND TO THE COMMISSION, supra note 137.
Britain's system for addressing alleged miscarriages of justice after a defendant had exhausted his judicial appeals.\textsuperscript{142}

After an extensive investigation covering two years, the Royal Commission issued its report to the Home Office in July 1993.\textsuperscript{143} In the 1993 Report, the Royal Commission recommended the creation of a "Criminal Cases Review Authority" to replace the Home Secretary's functions in investigating alleged miscarriages of justice under § 17 of the Criminal Appeal Act of 1968.\textsuperscript{144}

The Royal Commission found that "the role assigned to the Home Secretary and his Department under existing legislation is incompatible with the constitutional separation of powers as between the courts and the executive."\textsuperscript{145} Although not required by the terms of § 17 of the Criminal Appeal Act of 1968,\textsuperscript{146} in practice, successive Home Secretaries "normally only [referred] a conviction if there [was] new evidence or some other consideration of substance which was not before the trial court,"\textsuperscript{147} and the defendant had exhausted his right to ordinary appeals.\textsuperscript{148} Home Secretaries sought to avoid a perceived conflict with the judiciary's prerogatives (and a very real hostility from the Court of Appeal) in referring cases back merely because the Home Secretary had doubts about the safety of a conviction based on evidence that the Court of Appeal had already reviewed.\textsuperscript{149} The Royal

\textsuperscript{142.} See PATTENDEN, supra note 1, at 406.

\textsuperscript{143.} See 1993 REPORT, supra note 27, apps. 1, 3-4, at 236-37, 240-55.

\textsuperscript{144.} 1993 REPORT, supra note 27, at 182. Such a proposed commission was by no means a new idea and was, in fact, the Royal Commission's "most predictable proposal." 549 PARL. DEB., H.L. (5th Ser.) 779 (1993) (Lord Windlesham); Kate Malleson, The Criminal Cases Review Commission: How Will It Work?, 1995 CRIM. L. REV. 929, 929 (citing LIBERTY, LET JUSTICE BE DONE (1991)). The civil liberties and law reform group "Justice ha[d] been calling for an independent body to investigate claims of wrongful convictions for over twenty-five years." PATTENDEN, supra note 1, at 399 (citation omitted).

\textsuperscript{145.} See 1993 REPORT, supra note 27, at 182.

\textsuperscript{146.} Section 17 of the Criminal Appeal Act of 1968 allowed the Home Secretary "discretion to refer cases 'if he thinks fit.'" Id. at 181 (emphasis added).

\textsuperscript{147.} Id.

\textsuperscript{148.} See PATTENDEN, supra note 1, at 364. Strong media attention and pressure from influential people to refer a case would also often dictate if the Home Secretary would invoke his § 17 powers. See INGMAN, supra note 51, at 174.

\textsuperscript{149.} See PATTENDEN, supra note 1, at 396. The Court of Appeal was historically quite hostile or at least resistant to referrals from the Home Office in cases that it had already heard an appeal of conviction. See id. at 167-77. The Home Secretary's "strict self-imposed limits" were also a function of the reluctance by the Court of Appeal to hear a referred case if the Court had already denied the claim on the original appeal. See 1993 REPORT, supra note 27, at 181-82; see also INGMAN, supra note 51, at 174. In fact, referring such cases would likely fail, for "[i]n the 1980s there was no hope that a section 17 reference that simply revived concerns already put to the [Court of Appeal] in an appeal by the defendant (or a previous reference)
Commission found, however, that the Home Secretary's "scrupulous
observance of constitutional principles has meant a reluctance on the part of
the Home Office to enquire deeply enough into the cases put to it." As
such, the Royal Commission "concluded that it is neither necessary nor
desirable that the Home Secretary should be directly responsible for the
consideration and investigation of alleged miscarriages of justice as well as
being responsible for law and order and for the police."  

The Royal Commission also found that the Royal Prerogative of Mercy
by no means precluded more fully vesting the Home Secretary's § 17 power
in an independent body. In practice, Home Secretaries very rarely
employed their power over the Royal Prerogative if they could instead refer
a case back to the Court of Appeal under § 17. "[S]uccessive Home
Secretaries ha[d] been understandably reluctant to reverse a decision of the
courts, preferring instead to ask the courts to reconsider the case as the
would lead to the conviction being quashed." PATTENDEn, supra note 1, at 396. As such, "[t]he
Home Office [took] its lead from the [Court of Appeal]." Id.

150. 1993 REPORT, supra note 27, at 182. Others later argued that the CCRC was
necessary because "the Home Office had neither the necessary commitment nor the resources
to undertake a broader role." Malleson, The Criminal Cases Review Commission, supra note
144, at 929.

151. 1993 REPORT, supra note 27, at 181.

152. The Royal Commission described the operation of the Royal Prerogative as follows:
If the Royal Prerogative of Mercy is exercised by the grant of a free
pardon, the effect is that so far as possible the person is relieved of all
penalties and other consequences of the conviction. Alternatively, a
sentence can be varied so as to give special remission of all or part of the
penalty imposed by the court. This may be done for compassionate
purposes, for example to give early release to prisoners with terminal
illnesses, or in order to reward prisoners who have given exceptional
assistance to prison staff, the police, or the prosecuting authorities. The
exercise of the Royal Prerogative in this way is not the same as the grant
of a free pardon. Nor does the exercise of the Royal Prerogative amount
to the quashing of the conviction, even if a free pardon is granted. The
conviction stands and can only be quashed by a separate application to
the Court of Appeal.

Id. (citation omitted). One commentator has decried the difficulty posed for a prisoner who has
been shown to be actually innocent of the crime for which he was convicted, but who cannot
get his evidence before the Court of Appeal because it is inadmissible. PATTENDEn, supra note
1, at 412. This problem would face both the prior regime under § 17 of the Criminal Appeal
Act of 1968 and the new review authority-centered system of addressing miscarriages of justice.
Id. Thus, if "[t]he easiest solution is to leave such cases to be dealt with by the Home Secretary
by means of the Royal Prerogative," the commentator concluded that "[t]he time is ripe to
devis[e] a new form of declaration [of the Royal Prerogative of Mercy] which acknowledges the
injustice of the conviction and does not purport to pardon a transgression which never
occurred." Id. (citation omitted).

153. See 1993 REPORT, supra note 27, at 180.
Criminal Appeal Act of 1968] envisages."\textsuperscript{154} Home Secretaries employed their power to recommend the exercise of the Royal Prerogative only "where there are convincing reasons for believing that a person is innocent but a reference to the Court of Appeal is not practicable, for example because relevant material would not be admissible as evidence."\textsuperscript{155}

The 1993 Report then described the structure and role it envisioned for a "Criminal Cases Review Authority."\textsuperscript{156} "[T]he role of the Authority should be to consider allegations \textit{put to it} that a miscarriage of justice may have occurred."\textsuperscript{157} The Authority would be independent of the courts and the Government, such that it would not be merely an arm of the Home Office, as the C3 Division was.\textsuperscript{158} The Authority would only consider cases in which the applicant had exhausted his other avenues for appeal.\textsuperscript{159}

The Authority would launch investigations, by its own personnel or by officials outside the organization, in cases that the Authority believed required further inquiry.\textsuperscript{160} "In practice, [the Authority] will need no further justification for investigating a case than a conclusion on the part of its members that there is, or may be on investigation, something to justify referring it to the Court of Appeal."\textsuperscript{161} Upon a referral, the Court of Appeal "would consider [the case] as though it were an appeal referred to it by the Home Secretary under section 17,"\textsuperscript{162} that is, "as an appeal from the Crown Court," or an ordinary criminal appeal.\textsuperscript{163} Conversely, "the Court of Appeal, where it thinks fit, either of its own motion or at the request of the appellant, . . . [could] refer cases to the Authority before an appeal is decided," and

\begin{itemize}
  \item\textsuperscript{154} \textit{Id.}; see also \textit{PATTENDEN, supra} note 1, at 359-60 (noting the advantages to Home Secretaries of referring a case instead of recommending the exercise of the Royal Prerogative of Mercy).
  \item\textsuperscript{155} 1993 \textit{REPORT, supra} note 27, at 180-81. When a Home Secretary referred a case to the Court of Appeal, the Court of Appeal treated the case as if it were an ordinary appeal from the Crown Court—the same procedural posture that the Royal Commission recommended should be the disposition of a case referred by the proposed review authority. \textit{PATTENDEN, supra} note 1, at 360; 1993 \textit{REPORT, supra} note 27, at 183.
  \item\textsuperscript{156} See 1993 \textit{REPORT, supra} note 27, at 182-87.
  \item\textsuperscript{157} \textit{Id.} at 182 (emphasis added). This contrasts with the broader power of the Home Secretary under § 17 to review a conviction on his own initiative. \textit{INGMAN, supra} note 51, at 163; \textit{PATTENDEN, supra} note 1, at 360. In practice, the Home Office never initiated a review of a suspected miscarriage of justice under its § 17 powers without some outside impetus. \textit{PATTENDEN, supra} note 1, at 351-52.
  \item\textsuperscript{158} See 1993 \textit{REPORT, supra} note 27, at 183.
  \item\textsuperscript{159} See \textit{id.} at 182.
  \item\textsuperscript{160} See \textit{id.}.
  \item\textsuperscript{161} \textit{Id.} at 182. The Royal Commission left it to the Authority "to devise its own rules and procedures for selecting cases for investigation subject to this overriding justification." \textit{Id.}
  \item\textsuperscript{162} \textit{Id.} at 183.
  \item\textsuperscript{163} \textit{Id.}
\end{itemize}
"[t]he Authority would be required to accept such cases and to investigate them."\textsuperscript{164}

After undertaking an investigation, if the Authority found "no grounds for such a reference, for example, because [the Authority’s investigation] revealed fresh material confirming the correctness of the conviction, an explanation with reasons would be given to the applicant."\textsuperscript{165} Indeed, the Royal Commission argued that the Authority should apprise the convicted applicant and the prosecutors of its progress and findings throughout the investigation of an applicant’s case.\textsuperscript{166}

The Royal Commission suggested that the Authority need not have its own investigatory force nor its own power to search and seize evidence or compel the production of documents or witness testimony from private persons.\textsuperscript{167} Instead the Authority would rely upon conscripted police investigators, often from the force that originally investigated the conviction under review, to exercise these powers and investigate cases.\textsuperscript{168} The Royal Commission recommended, however, that the Authority should direct and supervise the course of any investigation it orders and should have the option of conscripting police investigators from a different police force than the one that investigated the original crime.\textsuperscript{169} Additionally, the Authority could commission experts, scientific or otherwise, to advise on areas of concern in a case beyond the police investigation.\textsuperscript{170} Contrary to the practice of the Home Office under its § 17 powers,\textsuperscript{171} "the Authority should be able to discuss cases directly with applicants if it thinks this would help to decide whether a cases called for further investigation."\textsuperscript{172}

The Royal Commission also recommended that the Authority could discuss the case with the parties and receive any further claims the parties might have before the Authority drafted a referral to the Court of Appeals.\textsuperscript{173} Upon referral of a case, the involvement of the Authority would end upon

\begin{itemize}
\item \textsuperscript{164} \textit{Id.} at 186.
\item \textsuperscript{165} \textit{Id.} at 183.
\item \textsuperscript{166} \textit{See id.} at 186. The parties and the Court, however, would not receive the police investigative report, which "contains evaluation and interpretation of the material and is not evidence, and may also contain sensitive information on individuals." \textit{Id.} at 187. "It is well established in any case that such reports attract public interest immunity and are never disclosed." \textit{Id.}
\item \textsuperscript{167} \textit{See id.} at 186.
\item \textsuperscript{168} \textit{See id.}
\item \textsuperscript{169} \textit{See id.}
\item \textsuperscript{170} \textit{See id.}
\item \textsuperscript{171} \textit{See id.} at 185.
\item \textsuperscript{172} \textit{Id.} at 186.
\item \textsuperscript{173} \textit{See id.}
\end{itemize}
delivery to the Court of Appeal of “a statement of [the Authority’s] reasons for so referring [the case]” and “such supporting material as [the Authority] believes to be appropriate and desirable in the light of its investigations, and which in its view may be admissible, though without any recommendation or conclusion as to whether or not a miscarriage of justice has occurred.” This conclusion seems to have followed from the Royal Commission’s belief that the Authority should not “be empowered to take judicial decisions”—such as the decision whether a conviction should be quashed—“that are properly matters for the Court of Appeal.” At the same time, upon referral of an applicant’s case, “it should continue to be open to the applicant to raise before the Court of Appeal any matter of law or fact, or mixed law and fact, as he or she wishes, regardless of whether or not it was included in the papers sent to the court by the Authority.”

The Royal Commission suggested that there should be no right of appeal or judicial review of a decision by the Authority not to refer a case. An applicant whose first application is not referred could present a second application to the Authority, “although he or she is likely to need to present fresh evidence or argument to stand any better chance of success.”

The Royal Commission also recommended that the Home Secretary should retain the power to recommend the Royal Prerogative of Mercy although “it will seldom if ever be necessary or desirable to exercise the Royal Prerogative in cases where it is concluded that a miscarriage of justice may have taken place.” But the Royal Commission “[did] not entirely rule out the need in the very exceptional case for the Authority to refer the results of its consideration and investigation to the Home Secretary to consider the exercise of the Royal Prerogative.” Such cases would arise only when the Court of Appeal would be unable to consider quashing the conviction because the likely showing of innocence will be based on inadmissible evidence.

174. Id. at 183 (emphasis added).
175. Id.
176. Id. at 183-84. Presumably this also includes the freedom for the applicant to raises issues or facts before the Court that were not disclosed to or considered by the Authority. See HOME OFFICE, supra note 96, ¶ 50.
177. See 1993 REPORT, supra note 27, at 184. This was a deviation from the practice of allowing an appeal to the High Court of Justice of the Home Secretary’s decision to not refer a case under § 17. INGMAN, supra note 51, at 164; PATTENDEN, supra note 1, at 366.
178. 1993 REPORT, supra note 27, at 184.
179. Id. at 185.
180. Id.
181. See id. The Royal Commission “emphasise[d], however, that it is undesirable for the courts to be deprived of powers to quash a conviction where the evidence, whatever its status, seems clearly to show that the appellant is innocent.” Id. This follows from the fact that the Royal Prerogative expresses merely a pardon and not a declaration of innocence. Id. at 181;
The Authority's membership would be made up of "lawyers and lay persons," who would be appointed by the Government, perhaps through the Lord Chancellor. The Royal Commission also recommended that the Authority should employ a support staff of attorneys and administrative personnel and should be empowered to enlist the aid of specialists, such as forensic scientists, when necessary.

The Chairman of the Authority would "be appointed by the Queen on the advice of the Prime Minister," although the Chairman would not serve as an "ombudsman, since... the consideration of possible miscarriages of justice will benefit from bringing to bear several different points of view." The Royal Commission recommended that, "given the importance of the Authority being seen to be independent of the courts in the performance of its functions, ... the Chairman should not be a serving member of the judiciary."

Although the Royal Commission stressed the importance of the Authority's independence from the Government and the judiciary, "[i]t will, however, be necessary for the Government to provide the resources to enable [the Authority] to operate and a Government Minister will have to be responsible for appointing [the Authority's] members and accounting to Parliament for its activities." Under the Royal Commission's proposal, the Authority would be held accountable through an annual report issued to the Home Secretary, who would in turn lay the report before the Parliament, allowing the Parliament to consider and debate the report if necessary.

The Royal Commission's proposal and design for an independent body to consider alleged miscarriages of justice was met with mixed reactions in Britain. Some commentators immediately questioned whether the proposed

SEE ALSO Pattenden, supra note 1, at 412.
182. 1993 Report, supra note 27, at 184.
183. See id. at 183.
184. See id. at 185.
185. Id. at 183.
186. Id. at 184.
187. Id.
188. Id. at 183.
189. See id. at 185.
190. Compare Anthony Edwards, Independent Review Authority Could Face a Heavy Workload, Times (London), July 7, 1993 ("The first impressions of the report of the Royal Commission on Criminal Justice leave an uneasy impression that there could be all too much work for its new independent review authority, which is being established to consider allegations of miscarriage of justice."), and Michael Mansfield, Justice Undone: What the Judicial System Needs Is a Complete Overhaul; What the Royal Commission OffersIs Unlikely To Allay Public Fears, Guardian (London), July 7, 1993, at 16 ("The review body has a very limited role to play after a conviction. The problem has been, and still is in many instances, a reluctance within the Court of Appeal to overturn convictions in fresh evidence cases. We should be looking at a new tribunal—that does not involve members of the judiciary—to deal
review authority would "add[] a new tier to the judicial system and confus[e] the public's perception of the Court of Appeal." \(^{191}\) The review authority might, it was suggested, "too often take its lead from the level of public pressure." \(^{192}\)

Detractors of the Royal Commission Report suggested that the Government simply set up an investigative function within the Court of Appeal to consider new evidence and legal arguments in second applications for leave to appeal an alleged wrongful conviction. \(^{193}\) Some critics of the proposed review authority asserted that the Royal Commission had not persuasively proved that a review function must be independent of the judiciary and argued that any public body set up by the Parliament should not be immune from judicial review of its decisions whether to refer a case to an appellate court. \(^{194}\)

Most commentators approved of the Royal Commission's recommendations for the establishment of an independent review authority and focused more upon the design and details of such a body. While agreeing that the review authority should be subject to judicial review, one commentator responded that an investigatory function vested in the Court of Appeal could not address the public's concern regarding miscarriages of justice, for it "would graft an inquisitorial role onto an adversarial system" and place the Court of Appeal "in three conflicting roles[:] inquisitor, prosecutor and judge." \(^{195}\)

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with the substance of the cases. One wonders also whether there will be a commitment to fund the review body, even in this limited form, by the Government which has systematically undermined legal welfare in the civil and criminal arenas."\(^{191}\), with Frances Gibb, *Law Shake-Up Hit by Jury Trial; Royal Commission on Criminal Justice*, TIMES (London), July 7, 1993 ("[Tony Blair, shadow home secretary,] welcomed many of the proposals, especially those that set up a proper independent review body on miscarriages of justice."), and Gareth Williams, *In the True Interests of Justice*, TIMES (London), July 7, 1993 ("[The recommendation for an independent review authority] ought to be made effective at once and should be the beginning of the long journey back to the restoration of public confidence.").


192. *Id.* This was observed to be the Home Office's practice under § 17 of the Criminal Appeal Act of 1968. INGMAN, supra note 51, at 174; PATTENDEN, supra note 1, at 410.


195. Benedict Birnberg, *Traditional Justice and Demands of the 20th Century*, TIMES (London), July 31, 1993; *see also* PATTENDEN, supra note 1, at 398 (noting the difficulties with empowering the Court of Appeal to investigate alleged miscarriages of justice). Commentators also doubted "the wisdom of leaving the [Court of Appeal] with the last word when the caution of the judges was one of the flaws in the old system." *Id.* at 407.
Many criticisms of the Royal Commission’s proposals for a review authority focused on the inadequacy of the powers recommended for the authority “to search premises, seize documents and compel the attendance of witnesses.” Moreover, critics suggested that the review authority “will need to employ its own investigators and cannot rely on police goodwill to do its work for it.”

Critics also urged that the review authority should be composed of a majority of people from ethnic minorities to command respect by “reflecting its client group” and “appointments should be vetted by an independent parliamentary committee.” However the authority’s members would be appointed, many commentators shared the view of the civil rights group Liberty: “It will be necessary to find the people willing to put in the effort in the very many cases which need to be reviewed . . . . [and who have] sufficient integrity and clarity of purpose to pursue the investigations diligently and sometimes against considerable odds—particularly in those few cases where mistakes have been made by people at the very highest level.” Thus, commentators suggested that “[t]he staff need to be recruited specifically to create an organisational culture committed to uncovering miscarriages of justice.” One academic noted that, “[i]f all goes well, the review tribunal will in time develop an esprit de corps directed at uncovering injustice which will enable it to establish miscarriages of justice more quickly, more willingly and more frequently than the Home Office.”

Lord Chief Justice Taylor publicly endorsed the establishment of an independent review commission shortly after the release of the Royal Commission’s Report. Professor Gareth Williams commended the Royal

196. Wadham, A Free Hand, supra note 194.
197. Id.; see also Peter Thornton, Q.C., Miscarriages of Justice: A Lost Opportunity, [1993] CRIM. L. REV. 926, 929 (arguing for the review authority to have “its own ‘police’ force”).
198. Wadham, A Free Hand, supra note 194.
199. John Wadham, Unraveling Miscarriages of Justice, 143 NEW L.J. 1650, 1651 (1993). This point was later made by MP Chris Mullin in the initial debate on the Criminal Appeal Bill of 1995 in the House of Commons: “[T]here will need to be among the 11 members [appointed to the review commission]—and, indeed, among the staff whom they employ—people with a track record of scepticism towards the official version of events.” 256 PARL. DEB., H.C. (6th Ser.) 44 (1995) (Mr. Chris Mullin).
200. Wadham, Unraveling, supra note 199, at 1651.
201. PATTENDEN, supra note 1, at 410-11.

Cardinal Archbishop of Westminster Basil Hume, who “was relentless” in fighting against
Commission for recognizing the failure of the Home Office’s power to address miscarriages of justice because the Home Office did not seek fresh evidence of innocence itself and the power vested in the Home Office violated the “fundamental principle” of “the separation of executive and judicial power.”

Acknowledging that the proposed authority would be independent of the judiciary, Professor Williams argued that the proposed structure for referrals from the authority to the Court of Appeal properly left “the final word... within the judicial system.” Lord Scarman, however, “should have preferred an independent tribunal, with judicial powers to quash convictions or order retrials.”

British attorney Peter Thornton argued that the review authority would “not provide an effective ‘safety net’ for miscarriages of justice” because “it will not make decisions or even recommendations.” Thornton insisted that the review authority should be authorized to review cases sua sponte, to decide leave to appeal itself to the Court of Appeal to order a retrial or, if a retrial were impossible, to order the conviction quashed; to conduct hearings, at which parties could present evidence and make submission; and “to declare that innocence has been proved (as in the grant of a pardon) and refer the case to the Court for the conviction to be quashed.” Thornton took issue with the Royal Commission’s recommendation that the Court of Appeal should be able to decide cases presenting fresh evidence de novo if a retrial was impracticable, preferring that, unless the review authority or a jury can be the ‘court of last resort,’ a conviction should be quashed.

miscarriages of justice, also campaigned heavily for the establishment of an independent review authority and “regarded [the establishment of the Criminal Cases Review Commission] as his most significant achievement in the areas of public and social order.” Obituary: Cardinal Basil Hume, INDEPENDENT (London), June 18, 1999, at 6.

203. Williams, supra note 90.
204. Id.
205. Lord Scarman, Our Right to a Fair Trial, TIMES (London), July 27, 1993. Scarman noted, however, that he “see[s] why the [Royal] Commission wanted that power to remain with the Court of Appeal.” Id. “If the test that the court applies to convictions is altered [to allowing the appeal if the court feels the conviction is unsafe for any reason]; and judges are persuaded to take a broader and deeper look at what is ‘fresh’ evidence, then I am content with this proposal.” Id.
206. Thornton, supra note 197, at 926.
207. See id. at 927.
208. Id. at 932.
209. See id. at 934.
B. THE HOME OFFICE DISCUSSION PAPER (1994)

Following the initial reaction to the Royal Commission’s recommendation, in late 1993 the Home Office announced its intention to establish an independent review commission and issued a March 1994 Discussion Paper entitled *Criminal Appeals and the Establishment of a Criminal Cases Review Authority* to outline its proposed structure and functions.210 The Home Office outlined three major objectives guiding the establishment of the new body. First, the Government must “ensure that convictions which cannot be considered safe are quashed leaving those which are safe to stand.”211 Second, “[a] ‘last resort’ should be precisely that: a vehicle for remediying miscarriages of justice, not an extra stage in the ordinary criminal justice process to be used routinely.”212 Third, the Government should seek to “ensure consistency of approach in criminal proceedings, so that the final decision on whether or not a conviction should stand is in all cases taken by the courts, whether on an ordinary appeal or following reexamination of the case by another body.”213

The Home Office indicated that the review authority should not “become involved in cases which are already before the courts or in which an avenue of appeal remains open to the convicted person.”214 The review authority would generally consider investigating and ultimately referring only cases that present fresh evidence or new legal issues, while allowing for the “exceptional case where the Authority felt real disquiet about the safety of a conviction even in the absence of new matters.”215 As a general matter, the Home Office asserted that “it would be inappropriate for the Authority to refer cases purely in order to express disagreement with conclusions which the courts had reasonably drawn on previous occasions from evidence and argument fully and properly exposed to them.”216

The Home Office agreed that the Court of Appeal should be able to refer cases on appeal to the review authority for investigation to assist the Court of

211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* § 39. The review authority might, however, investigate a case, though it has no power to refer it, before the applicant makes his original appeal to the Court of Appeal. *Id.*
215. *Id.* § 43.
216. *Id.* § 42.
Appeal in cases "which require investigation beyond that which the parties can conveniently perform."\textsuperscript{217} The Home Office further suggested that the review authority should review and refer sentences, as against the conviction itself, only "where there is reason to doubt the validity of the sentence in law, or where new information not previously available to the courts suggests that the factual basis on which a sentence was calculated was substantially wrong and no other remedy exists."\textsuperscript{218}

The Home Office intended for the review authority to be "a non-adversarial body conducting neutral inquiries into cases put to it," such that the authority would not conduct hearings, although the authority or any police investigators it employed could contact applicants directly.\textsuperscript{219} At each stage of the investigation, the Home Office proposed to allow the review authority itself to decide to what degree it should communicate with and exchange information with the applicant.\textsuperscript{220}

The review authority could either have a core force of its own investigators or, following the Royal Commission's recommendations, have the power to conscript and supervise police investigators from the police force responsible for an alleged miscarriage or justice or an outside force.\textsuperscript{221} These investigators, and not the review authority itself, would have the power to search premises, compel the production of documents, and subpoena witnesses.\textsuperscript{222}

The review authority, according to the Home Office's proposal, would be composed of lawyers and non-lawyers and chaired by someone who would "not necessarily be a judge," although the Home Office expressed reservations about foreclosing the appointment of a particularly well-suited sitting or retired member of the judiciary.\textsuperscript{223} The Home Office accepted the Royal Commission's recommendation that the review authority's "members should be appointed by Her Majesty the Queen on the advice of the Prime Minister," and that the Home Secretary would be charged with maintaining the new

\begin{itemize}
\item \textsuperscript{217} PATTENDEN, supra note 1, at 409 (citing HOME OFFICE, supra note 96, ¶ 23).
\item \textsuperscript{218} HOME OFFICE, supra note 96, ¶ 48.
\item \textsuperscript{219} Id. ¶ 52-53.
\item \textsuperscript{220} See id. ¶ 71.
\item \textsuperscript{221} See id. ¶ 55. The Home Office ultimately rejected the option of providing a core unit of investigators within the review authority because of cost concerns and "on the grounds that 'it would be impossible to make an accurate assessment of what size that group [of investigators] should be.'" Jonathan Ames, Righting Wrongs—a New Body To Review Miscarriages of Justice Allegations Is One Step Closer, L. SOC’Y’S GAZETTE, March 1, 1995, at 6.
\item \textsuperscript{222} See HOME OFFICE, supra note 96, ¶ 66.
\item \textsuperscript{223} Id. ¶¶ 81-82. Compare id. with 1993 REPORT, supra note 27, at 184.
\end{itemize}
body’s accountability to Parliament by “receiv[ing] and lay[ing] before Parliament an annual report made by the Authority.”224

The Home Office envisaged that the review authority’s role in correcting alleged miscarriages of justice “should cease once a reference is made,” which the reference “would be simply a guide to help focus the court on the issues likely to feature in the appeal” without restricting the applicant’s ability to present new evidence to the Court of Appeal that the review authority had not considered.225 The Home Office agreed with the Royal Commission’s recommendation that applicants should not have an appeal from a decision by the review authority not to refer a case, but the Home Office was more ambivalent about establishing the review authority without a means for judicial review, “given the importance of the Authority’s decisions and their effect on personal liberty.”226

The Home Office recommended that the Home Secretary should retain the power to recommend that the Queen exercise the Royal Prerogative of Mercy, which “has been used as a final safeguard in exceptional cases where injustice cannot be corrected by the normal processes of law, and to exercise clemency in circumstances which could not have been considered by the courts or which it would be inappropriate now to remit to the courts to consider.”227 At the time of the release of the Home Office’s Discussion Paper, “the Prerogative [was] exercised in circumstances where there is doubt about the safety of a conviction but the case cannot be referred to the courts.”228 The Home Office noted that, with the creation of the proposed review authority, “[i]t is clearly important that the independence and authority of the new body should not be undermined by any expectation that the Home Secretary, through the exercise of his functions in relation to the Prerogative, will act as a kind of court of appeal in cases which have been considered and dismissed by the [review authority] or by the courts.”229 Accordingly, the Home Office announced that it was considering legislatively precluding the

224. HOME OFFICE, supra note 96, ¶ 89. The Royal Commission, however, had recommended that, while the Prime Minister would advise on the appointment of the chairperson, the Lord Chancellor might be the appropriate choice to advise the Queen on the appointment of the members of the authority. 1993 REPORT, supra note 27, at 183.
225. HOME OFFICE, supra note 96, ¶ 50.
226. Id. ¶¶ 74-75. Indeed, as late as March 1, 1995, it was reported that then-Home Secretary Michael Howard expected that “decisions taken by [the review commission]” established in the Criminal Appeal Act (which was introduced on February 22, 1995) “would be open to judicial review” if the commission decided “not to refer cases to appeal.” Ames, supra note 212, at 6.
227. HOME OFFICE, supra note 96, ¶ 77.
228. Id.
229. Id. ¶ 79.
exercise of the Prerogative "for the purpose of acknowledging doubts about a conviction in a case which the [review authority] has considered or which it would be within its remit to consider." 230

The Home Office's recommendations themselves received varied responses from British commentators. Generally, "there was 'strong political consensus to support a Bill to introduce a criminal cases review authority.' " 231 Yet some criticized the Home Office's suggestion that the review authority would not have its own core group of investigators but would instead rely on conscripted police officers: "common sense suggests that serving policemen may sometimes be tempted to overlook flaws in their fellow-officers." 232 Others noted that "[w]hen the Government says that it is impractical for the Authority to have its own force of investigators what it really means is that it is too costly." 233 Critics also raised concerns that the review authority "will not be under a duty directly to supervise police investigations" initiated by the review authority. 234

Several prominent commentators called for the new authority to be empowered to initiate and conduct investigations through its own staff. 235 Nevertheless, in late 1994, the Home Office announced that, based on its review of submissions received in response to the Discussion Paper, "the review body in investigating cases put to it should have the power to commission inquiries by police officers, where appropriate from an outside

230. Id. ¶ 80.
232. Taking Wrongs Seriously, TIMES (London), Mar. 26, 1994; see also Severin Carrell, Independent Group To Study Dubious Convictions, SCOTSMAN, March 26, 1994 (quoting Chris Mullin, a MP "who unearthed evidence crucial to the Birmingham Six case," saying "that any proposal to make the authority dependent on the police would be 'a fatal flaw'"); Severin Carrell, Howard Pledge on New Justice Commission, SCOTSMAN, Feb. 24, 1995 (quoting then-Shadow Home Secretary, now Home Secretary Jack Straw saying "[i]t is of critical importance that the system of investigation used by the CCRC should be, and should be seen to be, independent of the police forces involved"); Justice Asks for Separate Review Body, LAWYER (Eng.), Feb. 28, 1995; at 3 (noting the civil liberties group Justice called for the CCRC to have its own investigative unit); Tendler, supra note 210 (noting that Liberty, a civil rights organization, expressed concern that the police would conduct the review authority's investigations); Ailsa Thomson, Who Polices the Police?, TIMES (London), May 16, 1995 ("[P]ublic confidence cannot be bolstered by having the same police force investigate the integrity of its original investigation.").
233. PATTENDEN, supra note 1, at 411; see also Cheap Options for Criminal Case Review, 144 NEW L.J. 449 (1994).
force, who would work in accordance with the review body's specific requirements and would report to it.\(^{236}\)

Similarly, the influential civil liberties group Justice "raised concerns that commission members will be appointed by the Government and will not be independently selected."\(^{237}\) Justice also questioned the wisdom of placing the responsibility for reviewing allegedly *ultra vires* sentences with the new review authority, since this will divert resources from the authority's review of wrongful convictions.\(^{238}\)

More general concerns also centered on the efficiency of such a review authority, because the new body might be overwhelmed by inheriting the backlog of cases for review from the Home Office's C3 Division as well as new cases filed by those who have new hope that their cases will get a favorable hearing from an independent tribunal.\(^{239}\) Most commentators and the Government in fact had to admit that "initially the commission will be swamped with applications," especially since "the majority of those people who had their cases refused by C3 will re-apply to the new commission."\(^{240}\)

Other leading commentators urged that the review authority should not "become . . . an additional Court of Appeal . . . [which] would quickly lead to overload," but "[n]either should it serve as a means for the police to rubber stamp the integrity of investigations about which there is public disquiet."\(^{241}\) One comprehensive account of the British treatment of miscarriages of justices up to the release of the Home Office Discussion Paper concluded that, to be successful, the review authority would need to improve upon the principal shortcomings of the Home Office's exercise of its § 17 power: "[The Home Office's § 17 power under the direction of its C3

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237. Justice Asks, supra note 232, at 3. Later, at the initial House of Commons debate on the Criminal Appeal Bill of 1995, MP A.J. Beith of the Liberal Democratic Party expressed a similar concern: "The foremost issue is that of the new commission's independence from the judiciary, the Home Secretary and the Government." 256 PARL. DEB., H.C. (6th Ser.) 53 (1995) (Mr. A.J. Beith). "Although considerable attempts have been made to safeguard that independence in the format of the [Criminal Appeal] Bill, much will depend on who is appointed to the commission." Id.
239. See, e.g., PATTENDEN, supra note 1, at 400.
240. Ames, supra note 221, at 6. This point was revisited in parliamentary debate on the Criminal Appeal Bill. See, e.g., 258 PARL. DEB., H.C. (6th Ser.) 918 (1995) (Mr. David Maclean, Minister of State, Home Office).
Division] is operated by persons who are not suitably qualified, it relies too heavily on police who may be biased, there is no independent element, and the process is not open to public scrutiny."  

C. THE CRIMINAL APPEAL ACT OF 1995

The Royal Commission’s recommendations, as modified by the Home Office, were largely adopted in the draft Criminal Appeal Bill presented to the House of Commons by the Home Office on February 22, 1995. The Bill as presented allowed the “criminal cases review commission . . . to investigate possible miscarriages of justice” and “refer a case on the grounds of conviction or sentence or both” back to the Court of Appeal. The Court of Appeal could also employ the commission to investigate a case on appeal before the court.

The commission would be composed of legal and non-legal members, appointed by the Queen on the Prime Minister’s recommendation, and “[would] be independent both of the Government and the courts.” Although the commission would replace the Home Secretary’s powers under § 17, the Home Secretary would retain the responsibility for recommending the exercise of the Royal Prerogative so that the Secretary could use the Royal Prerogative in the “very exceptional case” in which inadmissible evidence of innocence could not be considered by the commission or the Court of Appeal.

The commission would be able to conscript, direct and supervise police officers to investigate suspected miscarriages of justice, and would refer a case if “there is some new element, whether argument or evidence in conviction cases, or argument on a point of law or information in sentence cases, which the courts have not previously considered and which gives rise to a real possibility that the conviction or sentence will not be upheld by the relevant court.” While calling this “a broad and sensible criterion,” the Home Office Michael Howard acknowledged that this criteria deviated from the Royal Commission’s recommendation “that the only ground for referring a case should be a belief on the part of the new body that a miscarriage of

242. Pattenden, supra note 1, at 410.
244. See id.
245. Id.
246. Id. at 26 (Mr. Michael Howard, Secretary of State for the Home Department).
247. See id. at 26, 29 (Mr. Michael Howard, Secretary of State for the Home Department).
248. Id. at 29 (Mr. Michael Howard, Secretary of State for the Home Department).
249. Id.
justice may have occurred." This deviation rested on the Government's belief that, absent any new element in a case, the Court of Appeal would not change its mind about a case it had already decided on essentially the same evidence, and that such referrals would simply create tensions between the court and the commission.

Upon a referral, "[t]he commission [would] give its reasons to the courts for referring the case, but that [would] not amount to a recommendation on the merits of the resulting appeal." The Bill thus preserved the power of the courts to decide the ultimate outcome of an appeal. Similarly, the commission was directed in the Bill to keep applicants apprised of the status of their cases' investigations and to give reasons for a decision not to refer a case. Applicants would have no right to appeal but decisions not to refer a case would be open to judicial review.

The need for the establishment of the review commission was overwhelmingly accepted. Many MPs noted the need to remove the power

250. Id. at 109 (Mr. David Maclean, Minister of State, Home Office). Compare id. with 1993 REPORT, supra note 27, at 185, and HOME OFFICE, supra note 96, ¶¶ 42-46 (providing broader grounds for referral of cases of suspected wrongful conviction to the Court of Appeal).

251. See 256 PARL. DEB., H.C. (6th Ser.) 109-10 (1995) (Mr. David Maclean, Minister of State, Home Office). Allowing applications to the CCRC before an appellant had exhausted his ordinary avenues of appeal might also encourage defense attorneys to deliberately bypass courts they presume to be less sympathetic than the CCRC, a point that was raised briefly in the House of Commons. Id. at 77 (Mr. David Trimble); see also PATTENDEN, supra note 1, at 419 (noting that § 13(1)(c) of the Criminal Appeal Act, requiring an applicant to the CCRC to have exhausted his appeals, "is [designed] to stop an applicant from simply allowing the 28-day limit for appeals to expire and then making an application direct to the Commission"); cf. Fay v. Noia, 372 U.S. 391, 438 (1963) (holding that federal habeas corpus relief should be withheld when a defendant failed to exhaust state post-conviction procedures on the merits only when the petitioner had "deliberately by passed the orderly procedure of the state courts"). overruled by Wainwright v. Sykes, 433 U.S. 72, 88 (1977).


253. See id.

254. See id. at 29-30 (Mr. Michael Howard, Secretary of State for the Home Department).

255. See id. at 108 (Mr. David Maclean, Minister of State, Home Office); cf. PATTENDEN, supra note 1, at 366 (noting that, under the § 17 regime, a defendant could "challenge by means of judicial review a decision not to refer his case back to the [Court of Appeal]").

256. See, e.g., 256 PARL. DEB., H.C. (6th Ser.) 107 (1995) (Mr. David Maclean, Minister of State, Home Office) (acknowledging cross-party support for the Criminal Appeal Bill); Righting the Past, It's Society Versus the Courts, GUARDIAN (London), July 21, 1998, at 15 (noting that "[t]he establishment of the [CCRC] ... reflected a widespread unease—across society and the political parties—at the growing number of miscarriages of justice exposed in recent years"); cf. PATTENDEN, supra note 1, at 410 ("There is widespread support for an independent review tribunal with its own staff of lawyers and with the ability to refer
to investigate and address miscarriages of justice from the hands of elected politicians and particularly to remove "responsibility in a quasi-judicial role . . . [from the department] responsible for law and order and the police." MPs from all parties agreed that the Bill was needed to address the "inappropriateness of . . . those directly responsible for the prosecution process . . . being involved in judging whether that process has operated properly in specific cases."

As such, the debate about the Criminal Appeal Bill's provisions in both Houses of Parliament centered on only a few issues. First, substantial debate focused on the appropriateness of having the commission's investigations carried out primarily by police forces, often the same force by which the conviction was originally secured. Many MPs suggested that the commission should have its own police force or should generally only conscript police investigators from outside the original force that investigated the case, because police investigating other police, particularly from within the same force, gives rise to at least an appearance of impropriety and partiality. Although the Criminal Appeal Act passed with a provision that the CCRC must turn to a chief of police to appoint an investigating officer, "[t]he Act eventually provided that the Commission could terminate the appointment of an unsatisfactory investigating officer, veto the choice of investigator, or approve or veto the choice of Police Force if the Commission stipulates an outside Police Force be requested to do the relevant investigatory work."

Second, several MPs expressed concern that the scope of the commission's power to refer cases was too narrow. According to a few

convictions direct to the [Court of Appeal] and the Crown Court." (emphasis in original)).

258. 256 PARL. DEB., H.C. (6th Ser.) 83 (1995) (Lady Olga Maitland); see also id. at 39 (Mr. Kenneth Baker, former Home Secretary).
259. Id. at 32 (Shadow Home Secretary Jack Straw).
261. See, e.g., 256 PARL. DEB., H.C. (6th Ser.) 36 (1995) (Shadow Home Secretary Jack Straw); id. at 46 (Mr. Chris Mullin).
262. See, e.g., id. at 54 (Mr. A.J. Beith).
263. See, e.g., id. at 33 (Shadow Home Secretary Jack Straw); id. at 98 (Mr. Mike O'Brien).
264. O'Gorman, supra note 3, at 5 (referring to Criminal Appeal Act, 1995, ch. 35, §§ 19-20 (Eng.)).
265. See, e.g., 256 PARL. DEB., H.C. (6th Ser.) at 76 (1995) (Mr. David Trimble); id. at 93 (Ms. Jean Corston).
MPs, the commission should be able to investigate "where there is a lurking doubt about a prosecution . . . [or] a decision of the courts." Others argued that the review commission should be able to consider and refer cases in which evidence or arguments were made incompetently by the defendant's counsel, such that "references are not precluded in circumstances where injustice would result" although no new evidence or argument is available. Accordingly, the House of Lords amended the Bill to allow that "[n]othing . . . [in the requirements for a reference to the Court of Appeal] shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it," and the House of Commons accepted the amendment, marking a departure from the Home Office's position in originally presenting the Bill and a return to the position of the Home Office in its Discussion Paper and the Royal Commission in its 1993 Report.

Third, some MPs questioned how the commission would be appointed, suggesting that the Lord Chancellor, and not the Prime Minister or Home Secretary, should be responsible for the appointment of Members of the CCRC. In the House of Lords, Lord McIntosh suggested that some parliamentary scrutiny or comments on the Prime Minister's appointments should be required, lest certain groups of people be entirely excluded from consideration. The Government rejected this suggestion as confusing the role of an independent body with "a creature of Parliament" and risking "draw[ing] the commission into the political arena in a wholly unacceptable way." Some MPs recommended that the Bill should follow the Royal Commission's suggestion that no judge should chair the commission because

266.  *Id.* at 105 (Mr. Alun Michael). *See generally* PATTENDEN, supra note 1, at 144-51 for a discussion of the 'lurking doubt' test in Britain.
269.  *See* 263 PARL. DEB., H.C. (6th Ser.) 1367-68 (1995) (Mr. Nicholas Baker, the Party Under-Secretary of State for the Home Office); *see also* Criminal Appeal Act, 1995, ch. 35, § 13(2) (Eng.).
272.  *See* 564 PARL. DEB., H.L. (5th Ser.) 1506 (1995); *id.* at 304-05.
273.  *Id.* at 1508 (Baroness Blatch, Minister of State, Home Office).
it would undermine the appearance of the CCRC’s independence from the Court of Appeal, but this too was rejected.\textsuperscript{274}

Much of the debate concentrated on MPs’ concerns about the CCRC’s requirements to disclose materials it received in the course of an investigation to an applicant.\textsuperscript{275} Others emphasized the importance of appointing “people of independent minds,” who would not be too quick to affirm the propriety of a conviction\textsuperscript{276} and of ensuring the ability of “the commission . . . to progress cases with greater speed than has occurred in the past” with cases considered by the Home Office’s C3 Division.\textsuperscript{277} MP Chris Mullin noted, however, that “[t]he success of the [Criminal Appeal] Bill will also depend on a continuing improvement in the attitude displayed by the new management at the Court of Appeal” toward cases referred to the court.\textsuperscript{278}

Following several lengthy debates and relatively few non-technical amendments, the Criminal Appeal Bill was assented to by both Houses of Parliament and was enacted by Royal Assent on July 19, 1995.\textsuperscript{279} The CCRC authorized by the Criminal Appeal Act of 1995 met with some skepticism and, at points, severe criticism from commentators. Professor Kate Malleson noted that, because “[t]he Act . . . does not specify any selection criteria,” the CCRC might not “allocate time and resources to investigate cases where it is alleged that there has been a miscarriage of justice but where there is not yet much substantive or admissible evidence on which the ‘lurking doubt’ about the conviction is based.”\textsuperscript{280} Professor Malleson worried that the CCRC would reject such cases for review due to a belief that “they may ‘waste’ the Commission’s resources in that they may ultimately fail to produce the necessary evidence to be referred back.”\textsuperscript{281} Many real miscarriages of justice, however, might not come to light without a serious investigation and the hard-fought discovery of new evidence.\textsuperscript{282}

On the same score, Professor Malleson observed that “[t]he types of cases which the Commission refers are likely to be those which the Court is

\textsuperscript{274} See id. at 1504-05 (Lord McIntosh); see also 256 PARL. DEB., H.C. (6th Ser.) 44 (1995) (Mr. Chris Mullin).
\textsuperscript{275} See, e.g., 565 PARL. DEB., H.L. (5th Ser.) 963-64 (1995) (Baroness Blatch, Minister of State, Home Office).
\textsuperscript{276} 256 PARL. DEB., H.C. (6th Ser.) 91-92 (Mr. David Ashby).
\textsuperscript{277} See, e.g., id. at 89 (Mr. John Gunnell).
\textsuperscript{278} 258 PARL. DEB., H.C. (6th Ser.) 952 (1995) (Mr. Chris Mullin).
\textsuperscript{280} Malleson, The Criminal Cases Review Commission, supra note 144, at 933.
\textsuperscript{281} Id.
\textsuperscript{282} See id.
going to be prepared to review, and which have a good chance of success. 283 The CCRC will largely take its lead from the Court of Appeal's response to the first few cases referred back, according to Professor Malleson, because the chance of a conviction being quashed is within the "the criteria for deciding whether or not to refer back a case" and the CCRC "has no power to alter a verdict" on its own power.284

Professor Malleson also predicted that the CCRC may experience better relations with and less resentment from the Court of Appeal than the C3 Division had.285 Of course, "[h]istorically, the judiciary has been very reluctant to exercise its power to review the factual merits of a conviction."286 If this was to change, the CCRC and the court would face "serious resource implications since a more liberal approach would inevitably result in a much heavier caseload."287 If not, Professor Malleson predicted, the CCRC will "adapt its referral pattern accordingly" and "is likely to continue the current Home Office practice of referring back only those cases which have concrete fresh evidence rather than those which give rise to a "lurking doubt" about the safety of the conviction on the merits of the facts" despite the absence of new evidence or legal arguments.288 As such, Professor Malleson predicted "[t]he most likely benefits of the establishment of the [CCRC] will be an improvement in the treatment of cases which have fresh evidence put before the [CCRC]."289

Others reiterated the concern that the CCRC would not be independent of the Government since the Prime Minister would appoint the Members of the CCRC.290 Critics also complained that the Criminal Appeal Act did not place a general duty [on the CCRC] to disclose all the information gathered during an investigation to an applicant.291

Some commentators followed Professor Malleson's lead in lamenting that the test for CCRC referrals to the Court of Appeal—dependent upon the discovery of a new element in the case292—so closely resembled that of the practice of the Home Secretary.293 This might, commentators such as English

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283. Id. at 934.
284. Id.
285. See id.
286. Id. at 936.
287. Id.
288. Id.
289. Id.
291. Id.; see also PATTENDEN, supra note 1, at 422; Malleson, The Criminal Cases Review Commission, supra note 144, at 932.
292. See Criminal Appeal Act, 1995, ch. 35, § 13(1) (Eng.).
293. See Clarke, A Painfully Slow Process, supra note 290, at 946.
solicitor Adrian Clarke argued, “make[] it more than likely that the Commission will be as cautious as the Home Secretary in exercising its powers.”

Critics also attacked the CCRC’s referral standard—“the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made”—for “requir[ing] the Commission to second guess the likely decision of the Court of Appeal,” instead of deciding “whether there is an arguable case that there has been a wrongful conviction.” The Government’s argument that the CCRC should not place the Court of Appeal in the “‘invidious’ position to have to look again at cases where it has already upheld the safety of the conviction without there being any change of circumstances” missed the point, critics charged, even if the Court of Appeal will be “bound to be reluctant to come to a different decision second time round.” As such, some analysts suggested that the provision of the Criminal Appeal Act, allowing the CCRC to refer cases in the absence of new elements if it finds “exceptional circumstances,” should be “broadly construed,” and that the CCRC “should have been given power . . . , in certain circumstances, to take action itself to quash the conviction or order a re-trial.” In line with these concerns, the harshest criticism of the CCRC created by the Criminal Appeal Act of 1995 suggested that perhaps “the motive behind creating the Commission was to deflect criticism from the Home Office for failing to remedy miscarriages of justice rather than a sincere attempt to eradicate the imprisonment of the innocent.”

IV. THE BRITISH MODEL: THE CRIMINAL CASES REVIEW COMMISSION (CCRC)

A. THE DESIGN AND OPERATION OF THE CCRC

The body established by the 1995 Criminal Appeal Act, the CCRC, began operations in January 1997 in Birmingham, England, and took over the investigatory powers formerly held by the Home Secretary under § 17 of the

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294. Id.
297. Id. (quoting HOME OFFICE, supra note 96, ¶ 42).
298. Id. (citing Thornton, supra note 188, at 932).
299. Id.
1968 Criminal Appeal Act on March 31, 1997. The Criminal Appeal Act established the CCRC “as an executive Non-Departmental Public Body” to consider applications for “review of the convictions of those who believe they have either been wrongly found guilty of a criminal offense, or wrongly sentenced.” The Criminal Appeal Act left many of the details of the CCRC’s design and operation to the Home Office and the newly appointed CCRC Chairman and Members to work out. As it began operations, the CCRC’s primary functions were:

- to consider suspected miscarriages of justice;
- to arrange for their investigation where appropriate; and
- to refer cases to the Court of Appeal where the investigation revealed matters that ought to be considered further by the courts.

The CCRC is required to have at least eleven Members, appointed in effect by the Prime Minister, on a full- or part-time basis, for five year terms but for no longer than ten consecutive years. The Criminal Appeal Act requires that no less than one-third of the CCRC’s Members have legal qualifications and that no less than two-thirds of the Members “have knowledge or experience of some aspect of the criminal justice system.” The Queen “may at any time remove a person from office as a Member of the Commission if satisfied” that, inter alia, the Member “has without reasonable excuse failed to discharge his functions as a Member for a continuous period of three months beginning not earlier than six months before that time,” that the Member “has been convicted of a criminal offense,” or that the Member “is unable or unfit to discharge his functions as a Member.”

300. See CCRC, BACKGROUND, supra note 130.
301. Id. These continue to be the CCRC’s primary functions.
302. Id.
303. Compare Criminal Appeal Act, 1995, ch. 35, § 8(3)-(4) (Eng.) with [564 PARL. DEB., H.L. (5th Ser.) 1506 (1995) (Lord McIntosh) (“It is clearly not an issue upon which the Prime Minister sits down with Her Majesty at the breakfast table and they think of a few names for an appointment. It does not actually happen that way, although the legislation requires that it should be expressed that way. It means that the Government will appoint the members of the commission. Let us be quite open about that aspect of the matter.”).]
304. See Criminal Appeal Act, 1995, ch. 35, sched. 1, paras. (2)-(5) (Eng.).
305. PATTENDEN, supra note 1, at 417-18 (citing Criminal Appeal Act, 1995, ch. 35, §§ 8(5), 8(6) (Eng.)). “A person is defined as legally qualified if her or she is a barrister or solicitor of 10 years standing.” Malleson, The Criminal Cases Review Commission, supra note 144, at 930 n.8.
306. Criminal Appeal Act, 1995, ch. 35, sched. 1, para. (7) (d) (Eng.).
CCRC Members principally partake “in policy-making and final decision-making on references of cases” and “in providing expertise and guidance to Case Review Managers.”

Under the Criminal Appeal Act, CCRC Members generally will not partake in decisions to reject applications, but “decisions to refer can only be made by committees of three or more Commission Members.” Case Review Managers are hired by the CCRC itself and are “primarily responsible for carrying out case reviews, taking advice from Commission Members, and from the Commission’s Legal and Investigations Advisers.”

The CCRC is independent of the Home Office and “shall not be regarded as the servant or agent of the Crown.” Moreover, the CCRC, as envisioned by the Royal Commission and established by Parliament, is not “within the court structure,” and is not “empowered to take judicial decisions that are properly matters for the Court of Appeal” or “to change a decision made by a court.” Appeals against a decision by the CCRC not to refer a case are not allowed, but applicants may seek judicial review of the CCRC’s decision not to refer a case. Moreover, the CCRC does not foreclose consideration of a case after it has been turned down for referral for appellate review, particularly in the face of fresh evidence or arguments, and the CCRC informs applicants of the reasons for its decisions not to refer a case.

Anyone facing an alleged wrongful conviction or sentence may apply to the CCRC for case review, with or without the aid of a solicitor. The CCRC admits, however, that “it may help the Commission to get to the point of making a decision more quickly” if a solicitor assists an applicant.

308. Id.
309. Id.
310. Criminal Appeal Act, 1995, ch. 35, § 8(2) (Eng.).
311. 1993 REPORT, supra note 27, at 183.
312. CCRC, APPLYING, supra note 54.
313. See PATTENDEN, supra note 1, at 420. The first such challenge to the CCRC’s decision not to refer a case to the Court of Appeal resulted in a May 1999 ruling that the CCRC “did not act unlawfully or irrationally when it decided against ordering a referral” of Maria Pearson’s case. Jailed Killer of Love Rival Loses Battle for Appeal, EVENING MAIL (Eng.), May 19, 1999, at 5.
314. See CCRC, APPLYING, supra note 54.
317. CCRC, PAYING A SOLICITOR TO HELP WITH YOUR APPLICATION (1998). As such, the CCRC provides information on how to obtain legal aid, which is available to most applicants at least “to cover the cost of the actual hearing at the Court of Appeal” should the application succeed. CCRC, LEGAL ADVICE AND ASSISTANCE (1999) <http://www.ccrc.gov.uk/solicitors/solicitors.html>.
Nevertheless, convicted defendants seeking a CCRC review of an allegedly wrongful conviction can obtain a very straightforward, standardized application form that the CCRC has made widely available.  

Upon application, the CCRC "examine[s] each case impartially and decide[s] whether it would have a real possibility of succeeding if" the Court of Appeal were to hear the appeal. Thus, "[b]efore putting time and money into a case [of an alleged wrongful conviction], the Commission will need to believe that there is some prospect of discovering . . . a strong argument or evidence which was not raised earlier in the proceedings, or some exceptional circumstances that justify referring the case without any fresh arguments or evidence."  

If the CCRC determines that a case is eligible for review, the CCRC ranks cases "regularly in priority for allocation of caseworkers, taking into account the human costs of delay, the effective use of resources, and the date of receipt," as well as "whether or not the applicant is in custody, and the impact of the case on public confidence in the criminal justice system," although "[d]ate order generally prevails, except where age or health, or evidential considerations, favour immediate investigation." Case reviews begin with a caseworker (a Case Review Manager or, rarely, a CCRC Member) reviewing the submitted materials to "define[] the issues raised by the applicant" and developing a case plan with a CCRC Member to "set[] out the issues, and the steps to be taken to test their validity and to identify any further material issues." Before initiating action under this investigative review plan, the CCRC informs the applicant of the issues and the case plan. The CCRC has some investigatory powers of its own. The CCRC can appoint experts to assist in investigations of cases and examinations of evidence. The CCRC can require any British public body to preserve
materials under the public body’s control for the CCRC’s inspection. The CCRC can also conduct some inquiries through its own staff and can discuss the case with applicants and interview prisoners, a prerogative that the Home Office had foreclosed from itself in exercising its power under § 17 of the Criminal Appeal Act of 1968.

Yet the CCRC must appoint investigating offices in order “to carry out searches of premises, to check criminal records, to use police computers, or to make an arrest,” or to otherwise exercise police powers to obtain and inspect materials from private individuals. The CCRC, however, has full supervisory control over conscripted investigating officers and can instruct the officers on the lines of inquiry to pursue. After completing the investigation, “the investigating office must hand over the information obtained and submit a report to the Commission.”

The CCRC will then inform the applicant of the CCRC’s findings and accept the applicant’s comments on the investigation. The CCRC next reviews the case in light of all the information before it, and the “decision on whether or not to refer the case to an appeal court will then be made by three or more Commission Members.”

The CCRC may make a referral if “there is a real possibility that the conviction . . . would not be upheld,” and, unless a case presents “exceptional circumstances,” only if there is new evidence or arguments not presented previously at trial or on appeal and “an appeal against the conviction, [or verdict] . . . has been determined or leave to appeal against it has been refused.” When deciding whether to refer a case, the CCRC is required to consider representations made by the applicant, his or her

327. See CCRC, BACKGROUND, supra note 137.
329. See Williams, supra note 190.
330. CCRC, APPLYING, supra note 54.
331. See id.
332. See PATTENDEN, supra note 1, at 418 (citing Criminal Appeal Act, 1995, ch. 35, § 20(1), 20(4) (Eng.)).
333. Id. (citing Criminal Appeal Act, 1995, ch. 35, § 20(6)-(7) (Eng.)).
334. See CCRC, APPLYING, supra note 54.
335. Id.; see also Criminal Appeal Act, 1995, ch. 35, sched. 1, para. 6(2)-(3) (Eng.) (requiring a committee of at least three CCRC members to appoint an investigator or make referrals or other requested reports or communications to the Court of Appeal, but allowing any CCRC Member or employee to make other decisions, including deciding not to refer a case).
337. Id. § 13(2).
338. See id. § 13(1)(c).
339. Id.
representatives, the Government or other outside agencies or public or private bodies, and "any other matters which appear to the Commission to be relevant."340 The CCRC has set for itself the goal of referring every conviction that it reviews that the Court of Appeal would quash as unsafe and "a margin of plausible references that will fail," a strategy designed to ensure that as few applicants with valid claims of actual innocence as possible are denied another review by the Court of Appeal.341

The CCRC's involvement in a case concludes once the CCRC refers the case,342 although the Commission refers the case with a report of its reasons for referral given to the Court of Appeal and the applicants.343 Following the CCRC's referral of a conviction or sentence to the Court of Appeal, the applicants and their legal representatives assume responsibility for arguing the case before the Court of Appeal.344

The CCRC's statutory obligations to disclose information and materials obtained in the course of an investigation to an applicant are somewhat vague and framed in terms of a general prohibition on disclosure to non-applicants345 with several, limited exceptions.346 The CCRC has not interpreted its duty to disclose materials to applicants very broadly, particularly in light of new regulations in effect since 1997 for access to government materials.347

Despite its independence from the Government and the courts, the "CCRC has three further responsibilities" in coordination with those institutions:348

The Court of Appeal may ask the Commission to help in settling an issue that it needs to resolve before it can decide a case;
The Home Secretary can ask the Commission for advice when he is considering advising Her Majesty The Queen to issue a Royal Pardon;\(^{349}\)

The Commission can refer cases to the Home Secretary where it feels a Royal Pardon should be considered.\(^{350}\) Moreover, when considering an application, "the Commission may refer a particular point to the [Court of Appeal] for its opinion," most often on a point of law.\(^{351}\)

B. CRITICISMS OF THE CCRC, 1995-97

As the CCRC prepared to take over for the Home Secretary's § 17 power on March 31, 1997, many commentators expressed great skepticism about the effectiveness the British public could expect from the CCRC in uncovering and addressing miscarriages of justice and restoring public confidence in the criminal justice system.\(^{352}\) Criticisms focused on several by-then familiar concerns: the need for real independence and the probable effect of the background of the appointed CCRC Members; lack of funding and resources compounded by a likely flood of applications; the difficulties of relying primarily on police investigators; and the lack of a duty to disclose investigative materials to applicants.\(^{353}\)

Many critics complained that "the panel . . . [of 14 appointed CCRC Members] is not representative enough,"\(^{354}\) because "not one of them is a

\(^{349}\) Criminal Appeal Act, 1995, ch. 35, § 16(1) (Eng.). In such a case, the CCRC must "(a) consider the matter referred, and (b) give to the [Home Secretary] a statement of their conclusions on it." Thereafter, "the [Home Secretary] shall, in considering whether so to recommend [the exercise of the Royal Prerogative of Mercy], treat the [CCRC's] statement as conclusive of the matter referred." Id. (emphasis added).

\(^{350}\) Id. § 16(2). In such instances, the members of the CCRC "shall give him the reason for their opinion."

\(^{351}\) PAT''ENDEN, supra note 1, at 420 (citing Criminal Appeal Act, 1995, ch. 35, § 14(3) (Eng.)).

\(^{352}\) See CCRC, 1997-98 ANNUAL REPORT, supra note 3, at 5 (letter of Sir Frederick Crawford, CCRC Chairman, to Home Secretary Jack Straw, June 18, 1998, recognizing these concerns); Taylor, supra note 132, at 24.

\(^{353}\) JUSTICE, 1997 ANNUAL REPORT 13-14 (1998). Justice indicated that it was most concerned with: how the CCRC "interpret[ed] . . . the criteria for referring cases," such that its "threshold . . . is not so low that it risks losing the confidence of the Court of Appeal, or so high that it blocks arguable cases, or new lines of argument"; how the CCRC "use[s] its disclosure powers" in "decid[ing] what to examine, and whether to disclose material previously withheld"; and "whether [the CCRC] uses the police [to conduct its investigations], and how actively it directs and controls their investigations."

barrister or solicitor with experience of acting for the defense in criminal trials, i.e. someone who has challenged police and prosecution evidence and knows what to look for in trying to show that an accused may not have been guilty."355 Indeed, many CCRC Members were "former prosecutors and police chiefs," whereas many commentators would have preferred a CCRC staffed more heavily by "investigative journalists or defence lawyers—people who know a miscarriage of justice when they see one."356 At least one journalist, however, praised the appointment to the CCRC of Dr. James McKeith, a distinguished psychiatrist and specialist in the research of false confessions.357

Others worried that the CCRC might not be sufficiently independent of the Home Office because of its financial dependency on the Government358 and the power of the Government to appoint the CCRC's Members.359 Along similar lines, several commentators expressed misgivings about the resources and funding the Government was making available to the CCRC.360 Backlogs of cases and lack of funds might lead to delays in processing cases.361 The CCRC itself, as well as outside commentators, expressed concerns about the CCRC "having [its] hands full as it starts work sifting through the" cases left it by the Home Office, new cases seeking greater access to relief through the

355. Marcel Berlins, Writ Large, GUARDIAN (London), Jan. 14, 1997, at 21; see also Turning the Clock Back, 147 NEW L.J. 481 (1997); cf. Alison Laferla, An Ideal Solution—or Commission Impossible?, LAWYER (Eng.), Jan. 14, 1997, at 2 (reporting the concerns of Robert Roscoe, president of the London Criminal Courts Solicitors' Association and chair of the Law Society criminal committee, that, "judging by the composition of the commission, the arrangements made to fund the investigation and the apparent lack of finance that that indicates, [the CCRC] is going to be no more than a sop to the Government.").

356. Jury Choice Is Vital, Now Justice Itself is on Trial, OBSERVER (London), Feb. 23, 1997, at 25; see also Chris Blackhurst, After Bridgewater: Justice Watchdog 'No Match for Police,' INDEPENDENT (London), Feb. 23, 1997, at 3 (quoting MP Chris Mullin criticizing the appointment to the CCRC of "'almost entirely . . . people who have never exhibited the slightest curiosity about the official version of events in their entire lives'"; A Credibility Gap Too Far, INDEPENDENT (London), Feb. 23, 1997, at 22 ("The [CCRC] . . . is composed mainly from lawyers who usually prosecute rather than defend."); Patricia Wynn Davies, Criminal Review Body Deluged with Cases, INDEPENDENT (London), Apr. 9, 1997, at 6 (reporting that John Wadham, director of Liberty, indicated Liberty "was 'concerned that the membership doesn't reflect sufficiently people who have had direct experience of miscarriage of justice cases'"").

361. See Davies, Criminal Review Body, supra note 356, at 6.
independent review body, and applications from prisoners whose applications to the C3 Division had been rejected.362

Commentators also continued to raise concerns “that the police force originally involved in the case under review will also usually be investigating the same case on behalf of the commission.”363 British lawyers worried that “investigating police officers are open to persuasion by fellow officers,” such that, “even if there is complete integrity, an unsuccessful applicant will always have a feeling that his case has not been properly or impartially investigated.”364 Some critics asserted that the Parliament should have empowered the CCRC to search premises, check criminal records, and access police computer files, instead of being left with no decision in most cases but to appoint a police officer to use those powers.365 Shortly after the CCRC began reviewing cases, however, a CCRC spokesperson indicated that, “[t]o ensure that fair play does take place, [the CCRC] plan[ed] to use chief constables from other police forces across the country to intervene in cases that may have been previously compromised by investigating officers.”366

362. Turning the Clock Back, supra note 355, at 481; see also Maurice Weaver, Legal Body Risks Being Submerged by Appeals, DAILY TELEGRAPH (London), Apr. 9, 1997, at 11 (noting that Sir Fredrick Crawford, CCRC Chairman, reported that the CCRC “faces a risk of being submerged by its workload and hampered by inadequate funding”).

363. Laferla, supra note 355, at 2; see also Blackhurst, supra note 356, at 3 (quoting MP Chris Mullin complaining that the CCRC will be too dependent on the police for its investigations); A Credibility Gap, supra note 356, at 22 (“[The CCRC] is permitted, and is more likely, to subcontract investigations to the police.”); Patricia Wynn Davies, New Crime Law, Old Police Culture, INDEPENDENT (London), Apr. 1, 1997, at 15 (“[T]he biggest test of [whether the CCRC Members understand the need to challenge the police culture] will be their approach to re-investigations, particularly the extent to which they will be content to allow the police to continue to investigate themselves.”).


365. See Turning the Clock Back, supra note 355, at 481; see also Davies, Criminal Review Body, supra note 356, at 6 (quoting Sir Frederick Crawford, CCRC Chairman, admitting he “envisages little alternative to using the police to investigate themselves when police misconduct or failure is alleged”). But Sir Crawford also was “uncertain[] about the willingness of the police to carry out costly re-investigations on [the CCRC’s] behalf,” although another CCRC Member, former assistant Metropolitan police commissioner Bill Skitt, dismissed this concern. Duncan Campbell, Justice Commission Could Be Overwhelmed by its Workload, GUARDIAN (London), Apr. 9, 1997, at 3.

366. Dorothy Bruce, Fighting the Cause of Justice: The Newly Formed Criminal Cases Review Commission Has a Tall Order on its Hands—To Restore the Reputation of a Much-Maligned Criminal Justice System, Struggling Against Red Tape and Lack of Funds, How Will It Cope?, WKLY. J. (Eng.), May 27, 1997, at 9. Others noted that the CCRC “has the power to have a re-investigation carried out by non-police personnel, such as Customs officers, former police officers, lawyers or private investigators.” Duncan Campbell, Complaints Flood in to Justice Review Body, GUARDIAN (London), May 31, 1997, at 4.
Critics also called for the CCRC to grant full disclosure of materials gathered in its investigations to its applicants, especially where that may include information “which the defence [sic] and even the prosecution may never have seen. . . .” But others noted that “the absence of a duty of disclosure may raise particular problems in relation to material for which Public Interest Immunity or some other duty of confidentiality is claimed.”

Some leading commentators were more enthusiastic. Ann Owers of Justice “hoped that [the CCRC] uses [the powers it has to deal effectively with individual cases] robustly and independently.” Another observer of recent revelations of police misconduct in famous miscarriages of justice felt that the CCRC “offers an opportunity to take a further step forward” beyond any steps the police have taken in response to recent events. One prominent London paper wrote that “[the CCRC] is a formal acknowledgment of the need to investigate, rather than cover up or deny, suspicions of wrongful convictions” and that, with the CCRC’s creation, “[t]he culture of complacency has been overturned.”

C. THE CCRC’S FIRST TWO YEARS: OVERCOMING CRITICS’ AND THE COURT’S CONCERNS

After the CCRC began its work, “campaigners for justice [were] being cautiously won over,” as the CCRC developed its image as “hands-on and quick to safeguard the rights of prisoners on appeal.” Investigative journalists, to whom the task of uncovering wrongful convictions had fallen for so long, became more hopeful as they learned that, “where once the authorities would have rudely dismissed the skills and experience of television investigators, the [CCRC] is willing to listen to them.” Similarly, criminal defense lawyers were encouraged by the CCRC’s receptiveness to their assistance in addressing miscarriages of justice and its emphasis on the utter

368. Malleson, A Broad Framework, supra note 358, at 1023.
369. Criminal Review Body Starts Work on Miscarriages, INDEPENDENT (London), Mar. 31, 1997, at 5; see also Malleson, A Broad Framework, supra note 358, at 1023 (emphasizing the need for the CCRC to be “proactive in the way it pursues investigations and . . . [to] interpret[ ] its referral remit broadly.”). One CCRC Member was also openly optimistic about the CCRC’s success because of “the commitment of her fellow members to restoring confidence in criminal justice.” Campbell, Justice Commission, supra note 365, at 3.
dissimilarity between the role of the CCRC and the role of the Crown's prosecutors. Defense lawyers expressed "disbelief" as they learned that, in contrast to applying for review of a client's case to the "'black hole'" that was the C3 Division, "'[t]he [CCRC] will tell you the name of the person reviewing the case,'" and that the CCRC is "'very willing to discuss ideas and to come down to London to meet [defense solicitors]'".375

The CCRC had its first successful referral in late February 1998, when the Court of Appeal quashed the conviction of Mahmood Mattan, whom English authorities executed in 1952.376 The CCRC's investigation of the case "included a visit to the scene of the crime and a re-examination of the available documentation, including witness statements both used and unused during the original trial."377 The CCRC indicated that the "'case demonstrates our commitment to carrying out thorough reviews.'"378 Thereafter, commentators, including representatives of both Liberty and Justice, complemented the CCRC's performance in its first year of operation.379

Similarly, commentators began to note that many of the concerns that animated much of the early criticism of the CCRC had proven to be unfounded.380 The independence of the CCRC's appointees seemed to have been proven by the CCRC's full slate of referrals to the Court of Appeal.381

374. See Criminal Cases Review Commission: Defense Solicitors and the Commission—A New Working Relationship, M2 PRESSWIRE, Oct. 21, 1997, available in 1997 WL 14467668 (quoting CCRC Member Karamjit Singh); see also Graham Langdon-Down, Justice Will Be Done: In Just a Year, the Criminal Cases Review Commission Is Beginning To Convince Defense Solicitors that It Means Business, INDEPENDENT (London), Mar. 30, 1998, at 23 (quoting defense solicitors noting that the CCRC "'actually talk to us'" and "'ring us up and discuss details of cases we have sent them'" and "'even come to meet us'".

375. Langdon-Down, supra note 374, at 23 (quoting Justice legal officer Razia Karim).


378. Id.

379. See Justice Group Wins Praise for Showing Its Mettle, BIRMINGHAM POST (Eng.), Mar. 24, 1998, at 6 (quoting Kate Akester of Justice: The CCRC has put together "'a considerably better record than the Home Office ever achieved and the number of referrals is up'""); id. (quoting John Wadham of Liberty: "'The CCRC has done some sterling work and in many cases has taken a robust view, which is to be welcomed'"); Taylor, supra note 134, at 24.

380. See, e.g., Taylor, supra note 134, at 24 (noting that "much of the early criticism [of the CCRC] was ill-founded").

381. See Jason-Lloyd, supra note 359, at 1244; see also JUSTICE, 1998 ANNUAL REPORT 4 (1999) ("[s]ome of the Commission's initial critics have commended its independence and thoroughness.").

In an interesting twist, however, the CCRC has recently come under fire for being too independent and potentially unaccountable because "the exertion of parliamentary pressure on
Reflecting on concerns about the realistic potential for independence in an organization appointed by the government, one commentator noted rather sanguinely that "no responsible government would appoint persons who would do otherwise than a thorough and professional job within the Commission," because "[i]t is in the interests of the Executive to ensure that this new body functions correctly and performs its duties in at least a credible manner." 382

Other critics had wondered whether the Court of Appeal would be more receptive to referrals from the CCRC that it had been from the Home Secretary, to whose referrals the Court of Appeal had historically been quite hostile. 383 Indeed, the CCRC itself was concerned about "fears expressed by members of the judiciary": the Court of Appeal feared its reputation would be damaged if it had to deny "a mass of referrals by incompetent Commissioners," while "[t]rial judges expressed concern that their reputations would be damaged." 384 The Court of Appeal largely answered this concern by stating, upon quashing Mattan’s conviction, that the CCRC "is a necessary and welcome body without whose work the injustice in this case might never have been identified," 385 and subsequently quashing fifteen of the twenty-two convictions on referral from the CCRC that the Court of Appeal has so far considered. 386 CCRC Members are now "certain that after two years of

the Home Secretary on behalf of those who have been wrongfully convicted is no longer an option." Adrian Clarke, Letters: Silcott Solicitor Quashes Opinion on Legal Commission, GUARDIAN (London), Dec. 3, 1998, at 25. This has led to some concern as to whether judicial review of a CCRC decision not to refer a case will be effective to hold the CCRC accountable in individual cases. See id.; Jason-Lloyd, supra note 354, at 1245; cf. Bob Woffinden, Justice Delayed, GUARDIAN (London), Oct. 6, 1998, at 17 (noting that "the first judicial review of a CCRC decision not to refer a case to appeal is now under way"). Nevertheless, Justice asserted recently that "[t]he importance of an independent and effective investigatory body is shown by the long-term injustices, often in highly controversial cases, which have been put right as a result of the Commission’s work." JUSTICE, 1998 ANNUAL REPORT, supra, at 23.

383. See Malleson, The Criminal Cases Review Commission, supra note 144, at 934; see also PATTENDEN, supra note 1, at 367-77 (documenting the Court of Appeal’s hostile reception of referrals under § 17 of the Criminal Appeal Act of 1968).
384. AIDWYC, supra note 55, at 25 (a paper developed after AIDWYC Director James Lockyer visited the CCRC in January 1999 and met with several CCRC members and former applicants).
385. Damages Claim After Court Rules Man Hanged for Murder Was Innocent, BIRMINGHAM POST (Eng.), Feb. 25, 1998, at 6 (quoting the opinion of Lord Justice Rose for the Court of Appeal in Regina v. Mattan).
operation, judicial opinion about the Commission has changed," so that the
CCRC "is now seen as fail-safe mechanism essential to the proper functioning
of the administration of justice."387

Among the largest remaining concerns for the CCRC is the lack of legal
representation of most of its applicants.388 Yet, Justice has reported that "the
Commission now recognises the value of legal representation for those whose
cases it is considering, and is seeking ways of encouraging this."389

Although many critics had charged that the CCRC would develop a
narrow referral standard based on the manner in which the Court of Appeal
treats its initial referrals, defense solicitors have praised the CCRC's
willingness to refer cases "which nobody could say are dead certainties" to
be quashed on appeal.390 One barrister, Paul Taylor, discussed the CCRC's
approach with CCRC Members in early 1998 and reported that, in deciding
whether to refer a case, the CCRC applies the following criteria:

- There is no percentage value which must be reached
  in terms of 'real possibility' before the commission
  will make a reference;
- It is the safeness of the conviction that is in issue and
  not the innocence of the applicant;
- "Lurking doubt" cases where a number of factors
  which alone would not justify a reference, may do if
  considered cumulatively; and
- [A]pplications relying on inadmissible evidence may
  provide a basis upon which the commission will
  launch its own investigations.391

Taylor also reported that "[the CCRC] seems to be genuinely seeking to be
'user friendly' in the application procedure, the subsequent consideration by
case workers and commissioners, and liaison with the applicant or his legal
representatives."392

387. AIDWYC, supra note 55, at 25.
388. See Langdon-Down, supra note 374, at 23; see also Jason-Lloyd, supra note 359,
at 1245.
390. Langdon-Down, supra note 374, at 23.
391. Taylor, supra note 134, at 24-25.
392. Id. at 25.
Moreover, contrary to many commentators’ concerns, observers considered the CCRC to be “proactive in its investigative role.”\textsuperscript{393} Although Members of the CCRC indicated that the CCRC would usually be forced to employ police investigators in many cases,\textsuperscript{394} by July 1998, “police officials had been used in only four inquiries,” none of which included the 17 cases the CCRC had then referred to the Court of Appeal.\textsuperscript{395} Thus, contrary to concerns that the CCRC would be too dependent on the police for investigations, “the vast majority of investigative work has been done within the Commission.”\textsuperscript{396}

The CCRC has also developed its policies for disclosure to applicants, “tend[ing] to wait until [the CCRC] has completed its investigation before disclosing material to avoid a ‘running guerrilla war’ with applicants’ solicitors.”\textsuperscript{397} In high-profile case reviews, the CCRC has even publicized its decisions not to refer cases.\textsuperscript{398} The CCRC also “[wa]s considering asking the Government to extend [the CCRC’s] power [under § 17 of the 1995 Criminal Appeal Act] to obtain materials from public bodies to cover private organisations.”\textsuperscript{399}

The CCRC was able to offer a strong appraisal of the its first year of operation upon releasing the CCRC’s first Annual Report in July 1998: “Leaving aside the Commission’s capacity to deal with the number of cases submitted to it, there has been a generally favourable reception of its openness, accessibility and independence, and of the thoroughness and professional competence of its case reviews.”\textsuperscript{400} The Annual Report noted that the CCRC’s “prime objective” of “demonstrat[ing] its openness and

\begin{itemize}
\item \textsuperscript{393} Id.; see also id. at 24 (noting that the CCRC “had commissioned expert forensic reports in relation to semen, blood, finger prints, ballistics, ESDA testing, linguistics and fire reconstruction, as well as from psychiatrists and psychologists”); AIDWYC, supra note 55, at 23 (reporting that the CCRC sends out subpoenas for documents relating to a case held by public bodies, under § 17 of the Criminal Appeal Act of 1995, “in every case which has some prima facie merit”).
\item \textsuperscript{394} See Langdon-Down, supra note 374, at 23 (quoting CCRC Member Professor Leonard Leigh).
\item \textsuperscript{395} Duncan Campbell, Justice Body 'Lacks Staff To Process Appeals,' GUARDIAN (London), July 22, 1998, at 8.
\item \textsuperscript{396} Jason-Lloyd, supra note 359, at 1244; see also UK Government: Commission Refers Convictions of Michael Davis, Randolph Johnson, and Raphael Rowe, M2 PRESSWIRE, Apr. 9, 1999, available in 1999 WL 15758342 (reporting the CCRC’s successful efforts to disclose information to applicants that had been withheld under Public Interest Immunity).
\item \textsuperscript{397} Langdon-Down, supra note 374, at 23.
\item \textsuperscript{399} Langdon-Down, supra note 374, at 23.
\item \textsuperscript{400} CCRC, 1997-98 ANNUAL REPORT, supra note 3, at 7.
\end{itemize}
commitment to high-quality service” had been achieved as “[t]hat is now widely accepted in the light of case reviews in progress and completed.”

Moreover, Sir Frederick Crawford, CCRC Chairman, observed that, “[b]efore the Commission was established, gloomy forebodings were widely expressed about its prospective independence and ability to investigate suspected miscarriages of justice thoroughly.” By July 1998, he reported, “[t]hose doubts have been allayed during the Commission’s start-up year, and greater experience of its ethos and casework should reduce any residue.”

Similarly, the Association in Defence of the Wrongly Convicted (AIDWYC), a Canadian “public interest organization dedicated to preventing and rectifying wrongful convictions,” has been in constant contact with the CCRC “since [the CCRC’s] inception” and has reported that “there is no doubt in [the] minds [of the members of AIDWYC] that the Commission has been remarkably effective, and has helped restore confidence in the administration of justice in [Britain].”

Still, some knowledgeable commentators noted that, while “the chances of wrongs being righted has increased with the arrival of the CCRC,” many innocent inmates may be forced to remain in jail because their cases “simply
do not qualify for CCRC considerations,” due, for example, to a lack of any new evidence.405 Others have recently severely criticized the CCRC for its “almost painfully slow progress” and for being “too meticulous” and “setting its hurdles too high.”406 Some critics charge that the CCRC has exacerbated the delays in reviewing application because it “has arrogated to itself matters which should form part of the groundwork for the appeal,” because it is “interpreting [‘real possibility’ of success at appeal] as ‘cast-iron certainty,’” and because it “sometimes appears to be performing supererogatory functions,” refusing to refer cases on the basis of “irrelevant areas of the case without considering th[e] one central matter.”407

As of July 31, 1999, the CCRC had received 2673 total applications, had 1178 open reviews, 456 cases “actively being worked on,” and 1039 cases completed (“including those ineligible” for CCRC review).408 In the period between March 31, 1997, and July 31, 1999, the CCRC made fifty-three referrals, rejected 153 possible referrals (in which a committee of three CCRC Members declined to accept a caseworker’s recommendation that a case be referred), and had twenty referrals heard by the Court of Appeal.409 Of the twenty cases heard by the Court of Appeal, four involved reviews of sentences, of which two were successful, and sixteen were appeals for allegedly wrongful convictions, of which eleven were quashed.410 Although these numbers are insufficient to draw any significant conclusions, the CCRC does at least seem to be referring cases that are not simply “dead certainties.”411

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405. Campbell, Guilty Until Proved Innocent, supra note 1, at 17.
406. Woffinden, Justice Delayed, supra note 381, at 17; see also Chris Gray, MPs’ Anger over Criminal Review Body Delays, BIRMINGHAM POST (Eng.), Mar. 30, 1999, at 3 (The House of Commons Home Affairs Select Committee’s report “said Commission investigations tended to get bogged down in detail and were in danger of being meticulous to a fault.”).
408. CCRC, Latest News: Recent Case Statistics, supra note 386.
409. See id. Of the fifty-three referrals, only five were for only sentence review. Id. AIDWYC considers this “a remarkable number of convictions [to have referred] to the Court of Appeal” in that time-span. AIDWYC, supra note 55, at 11.
411. See Langdon-Down, supra note 374, at 23; see also CCRC, 1997-98 ANNUAL REPORT, supra note 3, at 25 (discussing CCRC’s plan to refer a body of cases that “includes all of the cases that will succeed on appeal, and allows a margin of plausible references that will fail”). “It is worthy of note that the vast majority of the [CCRC’s] referrals arise in cases that were ‘run of the mill’ cases, albeit involving serious charges, in which no political considerations were at stake as they were in the pre-Commission Irish cases.” AIDWYC, supra note 55, at 24.
At present, the single greatest challenge facing the CCRC is a lack of adequate funding and resources.\footnote{412} The staffing of twenty-eight Case Review Managers, instead of the needed sixty, coupled with the arrival of an average of more than four new cases per day, has led the CCRC to estimate that new applicants will "have to wait up to two years before their cases can be looked at and it may be more than 30 years before the backlog is cleared."\footnote{413}

The delays in reviewing applications has led to criticism from Justice\footnote{414} and the House of Commons Home Affairs Select Committee, including MP Robin Corbett, who decried the CCRC's "'laid-back approach'" as "'thwarting the will of Parliament.'"\footnote{415} Mr. Corbett admitted, however, that the CCRC's current budget is insufficient and supported the Home Office's recent decision to provide extra funding for the CCRC.\footnote{416} Similarly, MPs on the Home Affairs Select Committee admit that the CCRC needs more money "because when the commission was launched the previous Government underestimated the number of cases that would go before it."\footnote{417} Yet, as the CCRC currently operates, "a person falsely convicted and sentenced to five years imprisonment, is likely to have served their sentence by the time all appeal avenues have been exhausted and the [CCRC] has looked at the case."\footnote{418} As a result, the Home Office is threatening to "clear the backlog of

\footnote{412. See Alan Travis, Justice Body's Case Plea Rebuffed by Straw, GUARDIAN (London), Dec. 16, 1998, at 12; Boris Worrall, Cash Shortage Keeps Innocent in Jail, BIRMINGHAM POST (Eng.), July 21, 1999, at 5.}

\footnote{413. Travis, supra note 412, at 12.}

\footnote{414. See Jayne Howarth, Fifty Year Backlog for Justice, BIRMINGHAM POST (Eng.), Dec. 16, 1998, at 3 (quoting Justice director Kate Akester calling the current delays in CCRC case review "'unacceptable'.")}


416. MP Brands Review Delays Unacceptable, supra note 415, at 5. Mr. Corbett, however, said that the CCRC is not correcting its "'unacceptable delays'" and "'needs to be an efficient and speedy organisation but as it is, it is the public who are being cheated, let alone those who have been wrongly convicted.'" Id. Mr. Corbett concluded that the CCRC "'has to demonstrate it is getting everything in hand.'" Id.


418. Id. In this vein, at least one prisoner, Gary Winter, who refuses to stop maintaining his innocence, will be denied parole and will likely be released before the CCRC can complete a review of his case. Julie Cush, Murderer Will Miss Parole Because He Refuses To Admit Guilt; Freedom Chance for a Killer Is Lost, EVENING CHRON. (Newcastle, Eng.), Feb. 13, 1999, at 10.
cases" through "a shake-up" that would "streamline [the CCRC] to make it more efficient."

A CCRC spokeswoman said that the recently authorized extra funding, for which it had been asking for over a year, "would not make an impact on the backlog in the short term," but will result in the hiring of twelve new Case Review Managers, bringing the total roster up to forty. The CCRC indicated that "[i]t takes time to look at the cases that are sent to us and we will not sacrifice standards," because "[t]his is a person's last chance if they believe they have been a victim of a miscarriage of justice." In the CCRC's second Annual Report, the CCRC also rebuffed arguments from commentators "that the Commission should review cases faster by being less thorough, and should refer them more readily to the appropriate courts of appeal." The CCRC responded that a hasty review would "perpetuate [miscarriages of justice]" if cases that should be referred were not and would result in costly burdens on the CCRC if meritorious cases were resubmitted and on the Court of Appeal if unmeritorious cases were referred for a hearing. The CCRC also noted that referring convictions or sentences that CCRC members do not believe have a "real possibility" of being quashed or modified on appeal would violate the 1995 Criminal Appeal Act and "would rapidly diminish public confidence in the professional competence of the [CCRC]."

V. AN AMERICAN CRIMINAL CASES REVIEW COMMISSION?: PROPOSING AN INNOCENCE COMMISSION

Although the British CCRC has faced some criticism before and since it began operation, based on the relative success the CCRC has achieved, the similarity in all crucial respects between the British and American criminal justice systems, and the demonstrated need for an independent fail-safe

419. Mendick, supra note 417, at 9 (quoting MP Paul Stinchcombe of the House of Commons Home Affairs Select Committee); see also Gray, supra note 406, at 3 (discussing the findings in the House of Commons Home Affairs Select Committee report on the CCRC's progress and rate of case review issued on March 29, 1999).
420. MP Brands Review, supra note 415, at 5.
422. MP Brands Review, supra note 415, at 5; but see Gray, supra note 406, at 3 (House Home Affairs Select "Committee members . . . warned the Commission may have to sacrifice the depth to which it investigates allegations of miscarriages of justice to become more efficient.").
424. Id.
425. Id.
mechanism to address alleged wrongful convictions in the American criminal justice system, the time is ripe for the adoption of CCRC-based Innocence Commissions in each state. The question then becomes: With the British institution's design and experience as a model, what would a state Innocence Commission look like in the United States? The structure and design of Innocence Commissions would vary across the states. As such, I will offer only broad suggestions here, based heavily on the concerns and achievements that have characterized the experience of the British CCRC so far.

First, an Innocence Commission should look simply at claims of actual innocence, only after all judicial appeals have been exhausted. A Commission should not review ultra vires sentences or Constitutional defects in a convicted defendant's trial that are not accompanied by a claim of actual innocence. An Innocence Commission would therefore probably review mostly cases involving fresh evidence of innocence or cases in which there appears to be a real possibility that an investigation will turn up new evidence of the defendant's actual innocence. Yet, as in Britain, upon investigation, a Commission may discover evidence of innocence that, while ostensibly available through the exercise of 'due diligence' at trial, was not actually presented to the courts at trial or on appeal due to inadequate defense representation. A Commission should be able to investigate and address such cases as well.

These restrictions will ensure that an Innocence Commission is reviewing and addressing only the most compelling cases of miscarriages of justice and will minimize the resources the Commission will require by allowing the Commission to reject many applications upon a first review if they offer no possibility of uncovering a claim of actual innocence. An Innocence Commission should not, however be limited to review claims of wrongful capital convictions, even though the danger of actually executing an

426. A strong argument can be made that an Innocence Commission should review primarily alleged factual errors leading to wrongful convictions, rather than legal errors. Errors that occur in the fact-finding process before and at trial may survive through a guilty verdict for a variety of reasons. See supra text accompanying notes 100-115. Appellate courts generally consider only claims of legal and procedural errors, granting great deference to the fact-finding at the trial court level. See supra text accompanying notes 109-111. As a result, factual errors that occur at the trial level tend to be "ratified" at the appellate level. See supra text accompanying notes 55-56.

innocent person may be one of the most compelling concerns accompanying the problem of convicting the innocent.\textsuperscript{428}

Second, a ‘quasi-judicial’ Innocence Commission could exercise a range of powers to address wrongful convictions it uncovers through the review of new evidence and independent investigations. I would suggest that any of the following models would serve an effective Innocence Commission:

- An independent review commission could investigate cases of alleged wrongful felony convictions, \textit{sua sponte} or upon application from a defendant or his representative, family, or friends, and refer convictions with a ‘real possibility’ of being quashed on an appeal to the state’s appellate courts, accompanied by a statement of reasons for the referral and any other materials that may be helpful to the courts in deciding the appeal but without a recommendation for the proper outcome.\textsuperscript{429}

- An independent review commission could investigate cases of alleged wrongful felony convictions, \textit{sua sponte} or upon application from a defendant or his representative, family, or friends, and refer convictions with a ‘real possibility’ of being quashed on an appeal to the state’s appellate courts with a non-binding recommendation that the conviction should be quashed.

\textsuperscript{428} In non-capital convictions, however, many convictions are obtained by guilty pleas. See Lynch, \textit{supra} note 113, at 2121-22. See generally Stephen Schulhofer, \textit{Plea Bargaining as Disaster}, 101 \textsc{Yale L.J.} 1979 (1992). Indeed, many critics of the American plea bargaining system suggest that many innocent defendants, particularly when faced with the death penalty, will plead guilty to obtain a lesser sentence than they may receive if they insist on a trial. See, \textit{e.g.}, Klein, \textit{supra} note 57, at 559-60; Schulhofer, \textit{supra}. The British CCRC can review convictions resulting from guilty pleas. See, \textit{e.g.}, Yvonne Roberts, \textit{The Story of Josie}, \textsc{Guardian} (London), May 27, 1998, at T2.

An American Innocence Commission perhaps should be restricted from reviewing applications from inmates convicted after entering guilty pleas. Such defendants, it may be argued, gave up the right to protest their innocence by entering a plea in exchange for a reduced sentence. See Frank Easterbrook, \textit{Plea Bargaining as Compromise}, 101 \textsc{Yale L.J.} 1969 (1992). Moreover, this would substantially reduce the caseload facing any Innocence Commission. On the other hand, defendants who were pressured, either overtly or by institutional pressures, into pleading guilty to a crime they did not commit seem to have no less a moral claim to their freedom than inmates who were wrongfully convicted after a trial. If so, a rule proscribing an Innocence Commission from reviewing convictions arising from guilty pleas will fail to address many of the miscarriages of justice within a given jurisdiction.

\textsuperscript{429} This would mirror the British CCRC. See Criminal Appeal Act, 1995, ch. 35, §§ 13, 14(2), 14(4)-(5) (Eng.).
quashed and a statement of reasons and a full report of the review commission's investigation and findings.

- An independent review commission could investigate cases of alleged wrongful felony convictions, *sua sponte* or upon application from a defendant or his representative, family, or friends, and refer convictions with a 'real possibility' of being quashed on an appeal to the state's appellate courts with a recommendation, binding or non-binding, that a new trial be held and a statement of reasons for the recommendation and a full report of the review commission's investigation and findings.\(^{430}\)

- An independent review commission could investigate cases of alleged wrongful felony convictions, *sua sponte* or upon application from a defendant or his representative, family, or friends, and refer convictions to the state's appellate courts with a binding recommendation that the conviction is unsafe or erroneous and should be quashed on appeal and a statement of reasons and a full report of the review commission's investigation.

- An independent review commission could investigate cases of alleged wrongful felony convictions, *sua sponte* or upon application from a defendant or his representative, family, or friends, and quash, on its own power, those convictions it finds through clear and convincing evidence of actual innocence to be unsafe or erroneous.\(^{431}\)

Third, if an Innocence Commission does not have the power to quash an erroneous conviction itself, a Commission should generally refer convictions with a 'real possibility' of being quashed on appeal back to either the state appellate or trial courts. At that point, the involvement of the Commission in the case would end, unless an appellate court sought to clarify any matter

\(^{430}\) This would reflect the Canadian Minister of Justice's current power under § 690. *See* Consultation Paper, *supra* note 3, at 3.

\(^{431}\) There could certainly be objections to having a non-judicial court dispose of judicially-imposed convictions, although I would note that this model would cut through the legal morass of so much post-conviction review that often results in the ratification of errors. *See*, *e.g.*, Wisotsky, *supra* note 109, at 565. Moreover, any state could choose to vest this power, by appropriate legal and state constitutional means, in a quasi-judicial Innocence Commission.
regarding the Commission's referral. The defendant and the prosecution, if it chooses to oppose the appeal seeking to quash the conviction, would argue the case as they see fit, and the court could vacate the conviction if it finds "there is sufficient and credible evidence concerning [the defendant's] claim of actual innocence," as the Cook County Criminal Court did in Anthony Porter's case.

Cases may arise, however, that would require additional fact-finding or presentation of new or renewed evidence of actual innocence. In such cases, a remand to a state trial court would be called for. This could be achieved by either empowering the Innocence Commission to refer the conviction to the state supreme court or intermediate appellate courts or authorizing the Commission, in the appropriate case, to refer the case directly to the state trial court for additional hearings. In the case of the former, the appellate courts could either automatically refer the case to the trial courts for appropriate disposition of the claims of actual innocence or could certify what the appellate court determines to be a viable claim of actual innocence to the trial court to conduct an evidentiary hearing and appropriate fact-finding and return the case to the appellate courts for further consideration.

Fourth, the members of an Innocence Commission should be appointed by the state's governor or a select executive committee, but the Commission should be independent of the state's executive branch and judiciary. The membership should consist of lawyers with criminal defense and prosecution backgrounds and lay persons with knowledge, experience, or expertise in criminal justice matters, including former police officers, forensic scientists,

432. The British Court of Appeal has often expressed exacerbation when the Crown did not oppose a § 17 or, more recently, CCRC case referral, because this was seen to "undermine[] the independence of the Court," by allowing "the Executive to dictate the result of an appeal." PATTENDEN, supra note 1, at 373-74. It was also seen to "hamper[] . . . [the Court of Appeal] in its role, because, in the absence of cross-examination of witnesses by the Crown, it has no means to test the weight of new evidence adduced on behalf of the appellant." HOME OFFICE, supra note 96, ¶ 19. See also Regina v. James (C.A. July 31, 1998) (LEXIS, UK Library, Engcas File) ("The Court cannot discharge its own duty unless it can be sure that both sides of the issue have been fully and fairly presented. . . . We question, however, whether it can ever assist the Court for the prosecution to reach their own conclusion before the hearing of the appeal."). It should be noted, however, that prosecutors from the CPS are, in such cases, opposing appeals by referrals from another Government-funded agency (formerly the C3 Division and now the CCRC) that has already referred the case because of new evidence of actual innocence. This is not the case in the United States, where prosecutors have been criticized for opposing claims of actual innocence put forth by defendants with far fewer resources. See, e.g., Jackowiak, supra note 12, at 5.

433. Lehmann, supra note 4, at 8 (quoting Assistant State's Attorney Thomas V. Gainer Jr.).
academics, private investigators, and investigative journalists. An Independence Commission should be accountable to the state legislature by presenting an annual report detailing its activities and procedures.

Fifth, in conducting investigations into alleged wrongful convictions, an Innocence Commission should have full, statutory powers to subpoena witnesses and to compel the production of documents from public and private bodies and individuals as well as full access to court, prosecutors', and police files related to a case. When a case requires more elaborate police-related investigations, an Innocence Commission should be empowered to conscript an appropriately-trained and legally-authorized law enforcement officer—who would not necessarily be a local or state police officer—to conduct part of an investigation under the Commission's direct supervision. Upon the resolution of a case, by referral or a decision not to refer, a Commission should have a duty to provide an applicant with a detailed statement of reasons for its decision and copies of the materials it obtained in the course of the investigation.

Sixth, a decision by an Innocence Commission should not be subject to appeal or judicial review. Although the British CCRC's decisions not to refer cases are subject to judicial review, the British Royal Commission on Criminal Justice seems to have advocated the more sensible design. It is not at all obvious why post-appeals 'last resort' decisions should be reviewed by the courts. Judicial review would seriously weaken the benefits to judicial economy that an Innocence Commission could offer. Instead, an Innocence Commission should allow applicants unlimited opportunities to apply for review of an allegedly wrongful conviction, "although he or she is likely to need to present fresh evidence or argument to stand any better chance of success."

434. An Innocence Commission should probably not be staffed or at least not chaired by former, or especially sitting, members of the judiciary, in order to preserve the Commission's appearance of independence from the judiciary and the usual appellate approaches to and standards for reviewing claims of actual innocence. For a discussion of the British controversy on this point, see supra text accompanying notes 187, 223, 274.

435. Note that this will not likely result in empowering defendants who have no genuine claim of actual innocence to further drain court resources. Because an applicant's case will only be reviewed by an Innocence Commission once the applicant has exhausted all the normal avenues of legal appeal, state and federal procedural bars on successive petitions for post-conviction relief would, more often than not, prevent a defendant from using the Innocence Commission's investigation to raise most claims in further appellate proceedings.

436. See 1993 REPORT, supra note 27, at 184 (recommending that decisions not to refer a case by the CCRC should be subject to neither appeal nor judicial review).

437. Id. In capital cases, however, a stay should be automatically granted only upon the first application, although a Commission could provide a stay if its review of a subsequent application revealed newly discovered (or at least newly presented) facts that merit an
Seventh, it is worth noting the provision of legal aid to applicants to provide representation during the CCRC's review process has been problematic. Although "it is desirable for professional legal advice and assistance to be available to applicants," the CCRC has reported that "only about one in ten new applicants are legally represented, and then commonly by lawyers acting pro bono." The provision of funding for indigent criminal defense is simply too big a problem in the United States to reasonably suggest that an Innocence Commission should have any power or responsibility to furnish representation to a defendant applying for review.

The benefit an Innocence Commission would afford to indigent defendants, however, lies in providing an accessible forum to which a prisoner or his family could write to tell of the prisoner's unresolved claim of actual innocence or new evidence that they believe could be discovered through a proper investigation. An Innocence Commission should therefore issue a straightforward application, widely distributed throughout a state's criminal investigation. See supra note 427, infra note 449 and accompanying text.

438. CCRC, 1997-98 ANNUAL REPORT, supra note 3, at 18; see also AIDWYC, supra note 55, at 23 ("The Commission has advised us that in 80% of its cases, the applicants are not represented by counsel."). This problem was first raised by the Royal Commission: "There will need to be adequate arrangements for granting legal aid to convicted persons who have lost their appeals so that they may obtain advice and assistance in making representations to the Authority." 1993 REPORT, supra note 27, at 187. The Royal Commission "envisage[d] that this aid would not normally continue once the Authority had initiated its own investigations" based on recommendation from the review authority. Id. Yet, in some cases, the Royal Commission thought that the applicant should have a solicitor to aid in the review authority's investigation (if it continued an investigation started by the solicitor) and "to enable the convicted person to interpret and respond to new information." Id. Some commentators picked up the suggestion that applicants should be provided legal aid while "the Authority is investigating a case." See, e.g., Wadham, Unraveling, supra note 199, at 1650.

The Home Office's Discussion Paper, however, rejected the need for legal aid once an application was accepted and the review authority undertakes an "investigative and non-adversarial" proceeding during which "the need for legal representation will not arise." HOME OFFICE, supra note 96, ¶ 90. Ultimately, despite a few unsuccessful attempts to raise the issue or amend the Bill, 564 PARL DEB., H.L. (5th Ser.) 1615-19 (1995) (Baroness Mallalieu); 256 PARL DEB., H.C. (6th Ser.) 94 (1995) (Ms. Jean Corston); id. at 99 (Mr. Mike O'Brien); cf. Wadham et al., supra note 235 (criticizing the Bill's lack of legal aid provisions), the Criminal Appeal Act of 1995 made no provision for legal aid during the CCRC's investigations.

Malleson, The Criminal Cases Review Commission, supra note 144, at 932. This met with disapproval from several commentators, who feared the CCRC might therefore "in practice find it difficult to investigate some cases without the assistance of the applicant's solicitor." Id.; see also Clarke, A Painfully Slow Process, supra note 290, at 946; Jason-Lloyd, supra note 359, at 1245; Malleson, A Broad Framework, supra note 358, at 1023; cf. Ames, supra note 221, at 6 (reporting the Law Society's concern that legal aid would not be available during the authority's review of a case). This problem may already be occurring. See Woffinden, Justice Delayed, supra note 381, at 17.
justice system and perhaps on the Internet, similar to that of the CCRC, by which convicted defendants can access the Innocence Commission.\(^{439}\)

Some combination of these elements would provide an effective fail-safe for a system that currently provides too little protection against the possibility that a prisoner's actual innocence will not be discovered in appellate and post-conviction proceedings. Indeed, American states have a great advantage over their British counterparts because state legislatures can draw on Britain's two years of experience and at least five years of preparation for the CCRC in operation today.

VI. THE FEASIBILITY OF INDEPENDENT INNOCENCE COMMISSIONS IN THE UNITED STATES

Acknowledging that the United States has a need and use for independent Innocence Commissions to review cases of alleged wrongful convictions and examining and suggesting the development and design of the CCRC as a model answers only half the inquiry, however. More difficult questions arise in considering whether such a commission is feasible in the current political and legal climate in the United States. Of course, law and politics are often intertwined, perhaps never more so than in the context of legislative criminal justice initiatives. Nevertheless, I will individually address the legal and political feasibility of the proposed Innocence Commissions, to the extent that these are separable.

Perhaps not surprisingly, many of the major legal and political concerns that those seeking to establish Innocence Commissions will face mirror many of the considerations faced in the development of the British CCRC: in the legal arena, judicial economy, acceptance of a quasi-judicial role for the Commissions, and finality; in the political realm, accountability, independence despite government funding and appointments, resources, and political support. With this in mind, I argue that the state court systems could accommodate such quasi-judicial independent bodies and that the establishment of these review boards is politically feasible. Given state legislatures' and, more generally, American politicians' bent for strong 'law and order' legislation, however, mobilizing support for such Innocence Commissions will admittedly be an uphill battle.

\(^{439}\) See CCRC, APPLICATION, supra note 316.
A. LEGAL CONSIDERATIONS

The first legal consideration lies in the receptiveness of state courts to independent Innocence Commissions reviewing convictions that the courts have entered and affirmed. In this regard, concerns of judicial economy dictate that an Innocence Commission cannot represent just another level of appeal. The requirement that applicants exhaust their appeals before applying to an Innocence Commission is designed in part to ensure that defendants will not simply bypass appellate court remedies to try their claims with a possibly more sympathetic, quasi-judicial body. Moreover, an Innocence Commission would actually promote judicial economy by serving as a screening device to vet what would otherwise be successive post-conviction petitions and, if a Commission did not have the power to quash a wrongful conviction itself, to send only the most meritorious and compelling cases to the courts for resolution.

Second, however, there is a danger that courts will fear that an Innocence Commission will either usurp their exclusively judicial functions or flood them with questionable referrals. Several considerations weigh against this concern, however, and suggest that state courts would come to appreciate the role served by an Innocence Commission. First, some state courts have recognized a coexisting responsibility of the courts and the executive, through the clemency power, to remedy cases of convicted innocents. The role of an Innocence Commission is simply an extension of that principle. Second, the British Court of Appeal has welcomed the role of an independent commission addressing miscarriages of justice, despite that court's previous hostility to the Home Secretary's exercise of the § 17 power. Third, contrary to the British judiciary's fears, a properly appointed and qualified

441. Critics may raise a related concern: Innocence Commissions may create negative incentives for juries, giving fact-finders an added sense of security that the commission will cure any erroneous guilty verdicts. Cf. Woffinden, Why the Wheels, supra note 386, at 35 (“One so far unacknowledged difficulty is that the commission’s mere existence may be helping to create miscarriages. Juries may come to believe it is better to err on the side of the prosecution and the commission will correct them if wrong.”). This objection seems to place too little faith in the integrity of juries and, at all events, would operate only in marginal cases where the question of reasonable doubt is very close. To fully address this objection, further empirical study would be required to determine the extent to which such cases already result in erroneous verdicts. At present, it should suffice to note that, if this psychological effect is present, jurors will already be more likely to convict because of the possibility of defendants’ appeals, which are more common and easier to seek in the United States than in Britain. An additional device for post-appeal review of cases for claims of innocence would be unlikely to significantly increase any American jurors’ incentives to shirk their duties to deliver just verdicts.
443. See supra text accompanying notes 383-387.
CCRC has not flooded the courts with “a mass of referrals” of unmeritorious cases, and judges’ reputations have not been reported to have suffered from the CCRC’s investigations. Finally, concerns for judicial reputations or territorialism are outweighed by sustained proof that wrongful convictions occur and are ratified even under the scrutiny of capital appeals, undermining “the myth of infallibility” that the courts and the criminal justice system, left to their own devices, will exonerate any innocent person wrongly convicted.

444. See AIDWYC, supra note 55, at 25.

445. See Bedau & Radelet, supra note 70, at 169 (describing the criminal justice system’s “myth of infallibility”); AMNESTY INT’L, supra note 55, at 9-10 (same).

Anthony Porter’s case ran the entire gamut of Illinois and federal capital appeals. See People v. Porter, 489 N.E.2d 1329 (Ill. 1986) (direct review), cert. denied, 479 U.S. 898 (1986); People v. Porter, 647 N.E.2d 972 (Ill. 1995) (affirming denial of state post-conviction relief), reh’g denied Apr. 3, 1995; U.S. ex rel. Porter v. Warden Pontiac Correctional Ctr., No. 95-C-4111, 1996 WL 167340 (N.D. Ill. Apr. 4, 1996) (denying federal habeas corpus), aff’d sub nom., Porter v. Gramley, 112 F.3d 1308 (7th Cir. 1997), and reh’g and suggestion for reh’g en banc denied June 17, 1997; Porter v. Gramley, 122 F.3d 351 (7th Cir. 1997) (denying second petition for rehearing), cert. denied, 118 S.Ct. 886 (1998), and yet no state or federal court correctly addressed his valid claim of actual innocence, see, e.g., Porter v. Gramley, 122 F.3d at 353 (“Much of the evidence suggesting that someone other than Porter committed the murders, for example, is second- and third-hand in nature, and the first-hand information (such as the affidavit stating that victim Jerry Hilliard was arguing in the park that night with someone other than Porter) can only be considered weak circumstantial evidence of Porter’s innocence.”); Porter v. Gramley, 112 F.3d at 1313 (“The affidavits and statements presented to us in the record, however, are often barely comprehensible, are often second- or even third-hand in nature, and are, at best, circumstantial evidence that is overwhelmed by the direct, eyewitness testimony offered at trial. . . . The affiant also states that Porter is innocent because ‘Inez Jackson’ (presumably the affiant meant Inez Johnson) told a woman (who later told the affiant) that Simon committed the murders. How much credence can we reasonably give to such third-hand information when it contradicts two eyewitnesses and a police officer who put Porter right at the scene of the crime?”).

In fact, “[u]nderfunded advocates and investigators who belong to ‘the system’ and try to guard against injustice” within the trial and appellate courts “did not even have a current address for a key, exonerating witness to the crime [for which Porter was convicted] two days before Porter’s scheduled last ride on the gurney.” Zorn, A Few Words, supra note 4, at 1. This lack of investigatory resources was at least partly to blame for the fact that “Anthony Porter’s claim of innocence was summarily brushed aside by the [appellate courts] in . . . opinion[s] that preceded the dramatic revelation of new evidence of his innocence.” Locke E. Bowman, Desperate Hours: Kokoraleis Execution Places Us at a Moral Crossroads, CHI. TRIB., Mar. 14, 1999, at 21. At all events, Porter’s case starkly portrays the operation of a criminal justice system that did not work and allowed an innocent man to come within two days of execution at the state’s hands. Jackowiak, supra note 12, at 5; Zorn, A Few Words, supra note 4, at 1; see also People v. Kokoraleis, 707 N.E.2d 978, 978-79 (Ill. 1999) (Harrison, J., dissenting) (“Last September, another capital defendant, Anthony Porter came within 48 hours of being executed. At the time, there was no real question as to his guilt. The delay was granted for reasons wholly unrelated to Porter’s culpability. Subsequent developments showed, however, that he was, in fact, completely innocent. Significantly, those developments had nothing whatever to do with the efficacy of the courts. The courts were content to take Anthony Porter’s life. He walks free today only because, as in so many other cases that preceded his, a dedicated group of volunteers decided to take up his cause.” (emphasis added)).
The last and most prominent of the legal concerns lies in disrupting the policy of finality. It will be objected that the state's strong interest in obtaining finality in its criminal judgments will be undermined by the possibility of an Innocence Commission disrupting a conviction that the courts have imposed and affirmed.446

Several responses offer themselves to this oft-repeated concern of finality. First, if an Innocence Commission functions like the CCRC in simply investigating and referring cases that present a 'real possibility' of a wrongful conviction to the courts, the Innocence Commission's review of a case would effectively occur outside the judicial process. That is, a review of a conviction by an Innocence Commission does not, in itself, re-open a case or threaten to change its outcome.447 In fact, in the majority of cases, a Commission would reject the application, before or after conducting an investigation.448

Second, in those cases in which an Innocence Commission found a 'real possibility' of a wrongful conviction after its investigation, "[t]he policy of finality, as asserted by the State, must yield, as a matter of fundamental due process, to the manifest injustice that would result from the continued incarceration of a demonstrably innocent person."449 In capital cases, however, there might be some concern about securing a stay of execution while an Innocence Commission reviewed a case. Either a state legislature could provide its Innocence Commission with the power to grant stays of execution or the power to apply to the courts for a stay, or the Innocence Commission could give such cases priority to consider the application and conduct a timely investigation, which might, before it is complete, turn up enough evidence or doubts about a condemned defendant's guilt to convince a court to grant a stay.

446. See, e.g., CONSULTATION PAPER, supra note 3, at 11 (arguing that a system for an independent review commission that has "no limits on the number of times one can apply for review, risks violating the principle of finality while creating a substantial backlog of cases"); cf. Herrera v. Collins, 506 U.S. 390, 426 (1993) (O'Connor, J., concurring) ("At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation.").

447. Cf. 258 PARL. DEB., H.C. (6th Ser.) 931 (1995) (Mr. Nicholas Baker, the Party Under-Secretary of State for the Home Office) (implying that granting extended rights of appeal would disrupt the policy favoring finality while the review of convictions by the CCRC would not); id. at 943 (Mr. David Maclean, Minister of State, Home Office) (same).

448. Cf. CCRC, Latest News: Recent Case Statistics, supra note 386 (reporting that the CCRC, through July 31, 1999, had referred only 53 of the 1039 cases it had completed); see supra text accompanying notes 408-11.

Third, if the Innocence Commission did have the power to make binding recommendations to the courts to quash a conviction, or had the power to quash a conviction itself, this would be no more disruptive, in principle, to the finality of criminal judgments than executive grants of clemency.\textsuperscript{450} Moreover, even if it would disrupt the finality of criminal judgments, fundamentally erroneous judgments should never be foreclosed from attack, for "no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence."  \textsuperscript{451}

B. POLITICAL CONSIDERATIONS

Several serious political concerns, however, also stand in the way of the establishment of Innocence Commissions by state legislatures. Nevertheless, it is worth noting at the outset that these concerns attend almost any new institution that has been proposed in recent history.

Some critics will suggest that an Innocence Commission will be accountable to no one, much like the reviled federal Independent Counsel.\textsuperscript{452} This concern is largely unfounded, however, for several reasons. First, it is hard to imagine that any state legislature would create an Innocence Commission with an unlimited budget, as the Independent Counsel possesses.\textsuperscript{453} Second, in the current or perhaps any political climate, it is equally hard to imagine an office with a zealotry for securing freedom for criminal defendants in the manner in which some prosecutors develop a zealotry for a single target. This will be especially unlikely so long as an Innocence Commission has several appointees with government or prosecutorial backgrounds. Third, there is a difference between an

\textsuperscript{450} Objections that "a person convicted in a constitutionally fair trial must be viewed as guilty" are decidedly unconvincing if an Innocence Commission discovers "a 'truly persuasive demonstration of innocence' [that] would, in hindsight, undermine the legal construct precluding a substantive due process analysis." Washington, 665 N.E.2d at 1336. As such, interference with a jury verdict or previously affirmed conviction by a quasi-judicial Commission would be justified where "a 'truly persuasive demonstration of innocence' . . . effectively reduce[s] the idea [that a constitutionally fair trial proves beyond challenge a person's guilt] to legal fiction." \textit{Id.}

\textsuperscript{451} \textit{Id.} (resting the Illinois Supreme Court’s holding on due process grounds under the Illinois Constitution).

\textsuperscript{452} See, e.g., Walter Dellinger, \textit{A Too-Independent Counsel}, N.Y. TIMES, Feb. 24, 1999, at A21; cf. Clarke, \textit{Letters}, supra note 381, at 25 (noting that, now that the independent CCRC reviews wrongful convictions, “the exertion of parliamentary pressure on the Home Secretary on behalf of those who have been wrongfully convicted is no longer an option”); CONSULTATION PAPER, supra note 3, at 12 (noting that the CCRC’s members “accountability to the public is unclear”).

unaccountable prosecutor (and the dangers posed thereby) and an unaccountable state-funded investigative body charged with uncovering and addressing claims of actual innocence. If an Innocence Commission develops an *esprit de corps* for challenging the official version of facts in highly questionable cases and thereby uncovers wrongful convictions, such a result should be celebrated, not feared.

A much larger political problem lies in the need to appoint the members of an Innocence Commission while also addressing the overriding need for any Innocence Commission to be truly independent. If sufficiently motivated persons who are truly independent of political and judicial influence were not appointed, an Innocence Commission might function merely as an invidious rubber-stamp of wrongful convictions or a further branch of the police and prosecutors' offices. This could be particularly damaging in jurisdictions where the prosecutors and judges are elected and have a very tight relationship and where the need for an independent review commission is therefore all the more acute. Moreover, although the appointment process itself will ensure a certain amount of accountability, the appointment process could also degenerate into a partisan tug-of-war, as has recently occurred with the United States Sentencing Commission.55

The simple and perhaps somewhat unsatisfactory answer is that appointing an effective Innocence Commission will undeniably require strong, bipartisan political will. There are good reasons to believe this could happen. Most politicians and political activists are concerned that innocent people are convicted and executed, at least in principle and in the abstract, though there are exceptions. Moreover, some states and the federal government do

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456. See, e.g., Pearson & Washburn, *supra* note 4, at 1 (noting that "the actions [of proposing reforms] by two law-and-order conservative Republicans add up to a political acknowledgment that the public's confidence in the death penalty has been shaken"); Thompson, *Republicans Back*, *supra* note 4, at 9 ("Two law-and-order suburban representatives plan today to join the push for a moratorium and study of what's wrong with the way Illinois administers the death penalty.").
457. Remarkably, some death penalty advocates turn staunchly utilitarian when faced with claims that capital punishment regimes may kill or have killed innocent people. See, e.g., Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 Harv. L. Rev. 1662, 1665 (1986) (analogizing the execution of innocents to the inevitable cost in human lives from "human activities, such as trucking, lighting, or construction," which society maintains "because the advantages, moral or material, outweigh the unintended losses"); Naftali Bendavid, *Former Death Row Inmates Honored at NU Conference*, Chi. Trib., Nov. 15, 1998, at 4 ("Besides, capital punishment saves far more innocent people than it kills because it deters would-be
successfully appoint effective judges despite the politicization of appointment processes.

Undoubtedly, a litmus test could develop for appointments in many states. The test could be that ‘death penalty abolitionists need not apply.’ Even if this were to come to pass, while unfortunate, the systematic exclusion of the most dedicated opponents of the death penalty from an Innocence Commission in a state with capital punishment would by no means doom the project. There is every reason to believe that fair-minded people who believe only in a death penalty process that works fairly and condemns only guilty individuals would serve an Innocence Commission very well. Thankfully, the view that executing innocent people is a problem to be avoided—though not

murderers, [death penalty supporters] contended.”); Monk, supra note 68, at 19 (“But in a recent documentary on the death penalty, I was astounded to hear several people comment that some innocent people must die in order for guilty people to be punished.”); Mitchell Zuckoff, Death-Row Survivors Tell How Justice Errs, BOSTON GLOBE, Nov. 15, 1998, at A1 (quoting "Dudley Sharp, vice president of Justice For All, a Texas advocacy group for crime victims," noting that just as "[w]hen we use vaccines, we accept that a certain number of people are going to get sick or die from their use. It’s a social institution, like the death penalty, and we’re willing to take the risk"); Leon Harris, By Penalty of Death, Part 1—Free at Last (CNN “CNN Presents” television broadcast, June 25, 1995) (quoting Andy Kahan, victims’ advocate in the Houston Mayor’s Office: “Some people will have to sacrifice for the betterment of others. If we can get 99.9 foolproof, we’re doing a darn good job. And if some people, you know have to lose their lives for the betterment of the 99.9 percent just like people who lose their lives tragically in accidents or people who lose their life in a war, you know, that’s humanity.”). Even these die-hard utilitarians, however, should not oppose a fail-safe way to prevent, as far as possible, the execution of any innocent people, however inevitable or acceptable the apologists may consider such an outcome in the abstract.

458. It is not too hard to imagine membership in the National Coalition to Abolish the Death Penalty (NCADP) becoming the political litmus-test equivalent of being “a card-carrying member of the ACLU” in the Reagan era. See Susan Mandel and William McGurn, How the Democrats Hold On to Congress, NAT’L REV., Nov. 24, 1989, at 37 (recounting then-Vice President George Bush’s attack on Democratic Presidential nominee and then-Massachusetts Governor Michael Dukakis). Indeed, some commentators believe that one federal judicial nominee, Ronnie White, may have already fallen victim to such a litmus test for confirmation to the federal bench because, as a member of the Missouri Supreme Court, he filed dissenting opinions in several cases upholding capital convictions. The Ronnie White Vote, WASH. POST, Oct. 8, 1999, at A28 (“Apparently the Republican caucus has decided that ever dissenting in a death penalty case makes one ineligible to serve on the federal bench.”); Richard Simon, Minorities Denounce Senate Delays on Judges, L.A. TIMES, Oct. 6, 1999, at A3 (“Senate Republican leaders defended their rejection of Judge Ronnie White as being based on opposition from law enforcement groups who regard the judge as opposing the death penalty.”). The New York Times, however, described Judge White as “a mainstream candidate” and claimed that Senate Republicans disingenuously relied “on trumped-up charges about his record in death penalty cases” to reject his nomination. A Sad Judicial Mugging, N.Y. TIMES, Oct. 8, 1999, at A26.
a reason to abolish the death penalty per se—cuts across ideological and party lines.\textsuperscript{459}

Inadequacy of resources has been the largest problem facing the British CCRC since its inception and could pose an equally large problem for any Innocence Commission. The precedents for organizations analogous to an Innocence Commission certainly offer little reason for hope. The federal

\textsuperscript{459.} See, e.g., van den Haag, \textit{supra} note 457, at 1663 (admitting that "the most grievous maldistribution [of the death penalty] occurs when it is imposed upon the innocent" while arguing for the continued imposition of capital punishment against abolitionist objections).

Some abolitionists may wish that someone investigating completed executions will conclusively prove an innocent person was killed, \textit{cf.} \textit{MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE} (1992) (collecting cases of innocent people sentenced to death in the United States); \textit{Innocents on Death Row, supra} note 99, at 16 ("There is no way to know how many innocent people have been executed because the dead do not search for champions to prove their case."). To dispel arguments that the system has always worked to catch innocent death row inmates' claims before they were executed, see Stephen J. Markman \& Paul G. Cassell, \textit{Protecting the Innocent: A Response to the Bedau-Radelet Study}, 41 Stan. L. Rev. 121 (1988) (arguing that no innocent person has been executed in the United States since the reversal of \textit{Furman v. Georgia} and the reinstatement of the death penalty in 1976). \textit{But see} 144 CONG. REC. H598-01, H605 (1998) (Rep. John Conyers) (responding to the Markman argument by noting that just because "we have not proven that people executed were in fact innocent turns on the fact that they were in fact guilty," which "is a pretty long stretch" since "it is pretty hard after the execution to ask people to continue to look for evidence that the execution was wrong"); Bedau \& Radelet, \textit{supra} note 70, at 169 (arguing that "[i]t may be that the failure of the criminal justice system to acknowledge error [in executing anyone actually innocent] . . . is itself part of the problem rather than evidence that no such errors have occurred"); Nemitz, \textit{supra} note 99, at 1B ("As for those who've already been executed, [Northwestern University journalism professor David] Proess said, we'll never know how many were innocent because 'after they're dead, who's going to advocate for them?'"). But, even if an Innocence Commission was made up entirely of death penalty abolitionists and was dedicated only to investigating claims of wrongful capital convictions, with limited resources and such enormous death rows in states with capital punishment, \textit{see} NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, \textit{DEATH ROW U.S.A.: WINTER 1998} (1999) (reporting 3,549 death row inmates nationwide as of January 1, 1999), an American Innocence Commission simply could not practically undertake such a project.

Britain has a relatively small prison population, \textit{see} 314 PARL. DEB.. H.C. (6th Ser.) 519 (1998) (Mr. Alun Michael) (reporting that the average prison population in Britain in 1998 at 65,000, and no death penalty (and therefore no pending executions). The British CCRC has come under fire for posthumously exonerating executed prisoners instead of devoting its limited resources to those currently serving prison terms based on wrongful convictions. See Decca Aitkenhead, \textit{Leave the Dead Alone. There Are Enough Living Victims Who Need Help}, GUARDIAN (London), Aug. 14, 1998, at 16. \textit{But see} Woffinden, \textit{Justice Delayed, supra} note 381, at 17 ("Contrary to some reports, the CCRC is not preoccupied with execution cases.") In fact, in the United States, strong claims to investigations can come from prisoners with claims of actual innocence who are 1) currently on death row, 2) currently serving life terms, or 3) serving terms of several years that may expire before an investigation is ever completed to clear their names. Under these circumstances, as valuable as a full investigation into whether an innocent person has been put to death might be, an Innocence Commission could never undertake such posthumous investigations.
government recently withdraw funds from the Federal Resource Centers, which had provided representation to death row defendants and training for capital defense attorneys, and the states have largely been unwilling to replace this resource with their own tax dollars. Public defenders and other indigent criminal defense services have also faced severe funding shortages for many years.

Moreover, public choice theory suggests that criminal defendants and those who represent them are always unlikely to receive much attention or funding from state legislatures, and this may be especially true of convicted criminal defendants who are a particularly unsympathetic lot and singularly ineffective lobbying group. Similarly, political support for the concept of an Innocence Commission may seem hard to muster. Laws that promise to punish the violent criminals that voters fear play better at political rallies than a law establishing a group to seek out convicted felons who may not have committed the crime for which they are serving time.

Several countervailing considerations, however, demonstrate the possibility of securing adequate political support. First, unlike the operations of the Federal Resource Centers, an Innocence Commission, as the name implies, promises to help only the innocent and would not therefore run afoul of the growing sense among the public and politicians that criminals already have too many rights and too many appeals that last too long.

461. See, e.g., Klein, supra note 115, at 656-67; Cauchon, supra note 115, at 4A.
462. Cf. McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (“Our commitment to these values requires fidelity to them even when there is temptation to ignore them. Such temptation is especially apt to arise in criminal matters, for those granted constitutional protection in this context are those whom society finds most menacing and opprobrious. Even less sympathetic are those we consider for the sentence of death, for execution ‘is a way of saying, ‘You are not fit for this world, take your chance elsewhere.’”’ (citation omitted)); Tomaso, States Grant, supra note 63, at 37A (quoting University of Houston law professor David Dow noting in the context of the political pressures on governors’ clemency decisions that people convicted of violent crimes are “a population that most people just don’t care very much about”).
463. See Tomaso, States Grant, supra note 63, at 37A (“It’s almost axiomatic that no elected leader ever loses votes by getting tough on criminals.”).
464. See, e.g., AIDWYC, supra note 55, at 9 (“There is a widespread public perception that the lengthy appeals process which many US death sentences are subject to will somehow eliminate all risk of error.”).

This would, I suppose, be the answer as well to critics who argue that defendants who are ‘clearly guilty,’ and who are often perceived to deserve the death penalty, get too many appeals as it is. Critics of a proposed Innocence Commission may claim that for every Anthony Porter, John Willis, and Rolando Cruz, there is an Andrew Lee Mitchell, John William King, or Kenneth McDuff. See Ed Golder, Death Penalty Gets New Airing, GRAND RAPIDS PRESS, Mar. 22, 1999, at A1 (comparing “two extreme examples” of John William King and Anthony Porter...
Second, the existence of an Innocence Commission may allow ‘law and order’ political conservatives to argue all the more forcefully that the ‘system’ can and does work to convict only the guilty. Moreover, “[e]ven the most fanatical of law-and-order enthusiasts must realize for every innocent person in prison, there has to be a guilty one at large.” Third, as the recent outcry in the context of the recent debate over reinstating capital punishment in Michigan; Robert A. Jordan, *Best Way To Protect our Citizens Is To Keep Ban on Death Penalty*, BOSTON GLOBE, Mar. 28, 1999, at D4 (comparing the desire for vengeance in cases like John William King’s with the dangers of convicting innocents like Anthony Porter, in the context of the recent debate over reinstating capital punishment in Massachusetts); Dan Kacsir, *Letters: Killing the Innocent in the Process*, INDIANAPOLIS STAR, Mar. 5, 1999, at A23 (comparing the appropriateness of the death penalty for Anthony Porter and John William King in a system that convicted both men); *cf.* ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 173, 218-19 (Justin O’Brien trans., Vintage Books 1st ed. 1974) (describing certain “monsters” for whom alone the death penalty may “legitimately” be considered). Compare Belluck, *supra* note 4, at A7 (describing Anthony Porter’s case leading to his release from Illinois’ death row), Colarossi & Wilson, *supra* note 127, at 1 (describing Illinois convict John Willis’ case leading to his release from a sentence for a wrongful rape conviction), and Marshall, *supra* note 102, at 29 (discussing the case of Rolando Cruz, who was released from Illinois’ death row in 1998), with Lee Hancock, *Former Death Row Inmate Admits Role in '79 East Texas Slaying*, DALLAS MORNING NEWS, Jan. 14, 1999, at 11A (reporting the guilty plea of Andrew Lee Mitchell, “the 54-year-old mechanic [who had] maintained his innocence and insisted that he had been railroaded onto Texas’ death row”), Bruce Tomaso, *Death Penalty for White Murderer of Black Man Is Exception in Texas*, DALLAS MORNING NEWS, Feb. 28, 1999, at 30A (describing the uniqueness of the death sentence for John William King, the “tattoo-scared, vitriol-spewing racist” who was convicted of capital murder for dragging an African-American man, James Byrd Jr., to his death behind a truck in rural Texas), and Bruce Tomaso, *McDuff's Deeds Leave Dark Legacy; He Killed After Parole, Is To Die on Tuesday*, DALLAS MORNING NEWS, Nov. 16, 1998, at 1A (describing the impending execution of Kenneth McDuff, who was sent to death row and later paroled, only to kill and be sentenced to death again).

The answer to such a charge is that an Innocence Commission would not intervene in the cases in which a competent and complete investigation clearly demonstrates the defendant’s guilt and therefore would not exacerbate ‘Type I errors’ (releasing or acquitting the guilty) while reducing the ill effects of ‘Type II errors’ (convicting the innocent). For a discussion of the relationship between the number of Type II errors and the government’s burden of proof, see generally *In re Winship*, 397 U.S. 358, 368-75 (1970) (Harlan, J. concurring); and Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 352-59 (1994).

465. See *Innocents on Death Row*, supra note 99, at 16 (“Even supporters of the death penalty should be strong advocates of measures that would give everyone accused of a capital crime a competent and adequately paid lawyer. Every death-row resident needs access to DNA testing, a decent attorney and the chance to introduce evidence of innocence no matter when it is uncovered. This page has long opposed the death penalty in all cases. But even its most ardent supporters should be troubled by the likelihood that people are being executed for crimes they did not commit.”).

466. *Taking Wrongs Seriously*, supra note 232; *see also* *Glass is Half-Empty*, CHI. SUN-TIMES, May 20, 1999, at 39 (“There is more chilling fallout from these dirty dozen exonerations. Only one case was found to be a wrongful conviction because someone else confessed to the murders. That means 11 cases may never be solved, the crimes never answered.”); *Innocents on Death Row*, supra note 99, at 16, (“A wrongful conviction, of course, means that the real
in Illinois demonstrates, the public at large does not want innocents sitting in jail or facing execution, when such cases come to the public’s attention.467

A final area of political concern involves inadequate funding and common start-up problems, which could lead to delays in an Innocence Commission’s ability to review applications. The CCRC has suffered both from inadequate funding and unrealistically high expectations.468 Unlike the CCRC, however, an Innocence Commission would not be replacing any mechanism similar to its function in the American criminal justice system, since nothing like the Home Secretary’s § 17 referral power or the Canadian Minister of Justice’s § 690 powers exist in the state systems. As such, whereas the CCRC is being judged against the efficiency of the C3 Division, no comparative measure exists for an American review commission.469 Nevertheless, any Innocence Commission would of course need to be equipped with adequate resources, staff, and funding,470 but any help it

467. See Pearson, supra note 7, at 1 (“The overturned convictions influenced many respondents. More than a quarter of the respondents said those cases made them less inclined to support capital punishment, including 17 percent who favor the death penalty. And of the 84 percent who said they were aware that death sentences had been overturned, 47 percent said that indicated serious problems in the state’s criminal justice system.”); see also supra note 4 and accompanying text. In fact, the general perception that the American public wants tougher criminal sanctions as a general matter is often belied by surveys testing the public’s attitudes toward actual cases, even when the defendant charged with the crime is guilty. See Adriana Lanni, Note, Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?, 108 YALE L.J. 1775, 1780-81 (1999).

468. See supra text accompanying notes 412-25.

469. For that matter, even if governors’ executive clemency practice or the operations of most states’ Pardons and Parole Boards serve as any benchmark, an Innocence Commission should fare very well with even the slightest signs of effectiveness. See supra text accompanying notes 58-63, 77-80.

470. Innocence Commissions in states with capital punishment, particularly states with very large death rows, may require more resources than Innocence Commissions in other states. Every death row inmate may initially file an application with the Commission, thinking that they have nothing to lose and potentially everything to gain from doing so. Unlike non-capital inmates who have exhausted their avenues for appeal and post-conviction relief, capital defendants who are eligible to apply to an Innocence Commission will not serve out their sentences before the Commission reviews their application. As such, Innocence Commissions in capital states might require separate capital units dedicated to applications from death row inmates.
provides to wrongfully convicted inmates and any pressure it takes off the courts should be welcome.471

Accordingly, despite the considerable legal and political obstacles facing any proposed Innocence Commission, there is reason to believe that a state legislature might recognize the need for and utility of such an institution and transcend or address these concerns without rejecting this reform. In fact, recent events in Canada may provide even more reason for hope.

VII. POSTSCRIPT ON THE CRIMINAL CASES REVIEW COMMISSION: THE CANADIAN REFORM PROPOSAL

In recent years, Canadian attorneys and activists for the redress of miscarriages of justice have expressed great dissatisfaction with § 690 of the Canadian Criminal Code, which is similar to § 17 of the British Criminal Appeal of 1968.472 Under § 690, the Canadian Minister of Justice, an Executive Minister charged with prosecuting most Canadian federal criminal

471. Opponents of the creation of an Innocence Commission may nevertheless argue that, as a matter of economic trade-offs, in the face of limited resources, defendants facing the possibility of wrongful conviction would be made better off by increased spending on indigent criminal defense representation and investigations or funding more judgeships to reduce caseloads and the corresponding push to move cases quickly. Cf. Woffinden, Why the Wheels, supra note 386, at 35 (“And the essential difficulty remains: however valuable the[CCRC], nothing has been done to stop miscarriages occurring in the first place.”). Certainly, larger problems within the states’ criminal justice systems no doubt contribute to many wrongful convictions. Indeed, the Illinois General Assembly recently passed the Capital Crimes Litigation Act in an attempt to address wrongful convictions through increased funding for capital defense efforts. See Chambers, Funding Bill, supra note 57, at 1 (quoting Illinois legislators declaring that the Act “would tackle at least one of Illinois’ two capital case problems: a defendant’s inability to match a prosecutor’s resources” because “[t]he new law pumps state money into county coffers and that should reduce the risk of error at trial”). Critics of an Innocence Commission may also protest that increased funding of indigent non-capital and capital defense systems would address a greater need for procedural justice for defendants who may be guilty but presently receive little due process.

These are serious concerns but they overlook the fact that wrongful convictions may not occur simply due to crowded criminal dockets and overworked, underpaid indigent criminal defense attorneys. Increased funding of indigent defense systems will not assist inmates who have already been wrongfully convicted, and it will not necessarily prevent miscarriages of justice that are not caused by a shortage of criminal defense funding or criminal trial courts. See supra notes 100-111 and accompanying text. And, of course, arguments for the establishment of Innocence Commissions are by no means incompatible or at odds with arguments that states should provide increased funding for indigent capital and non-capital defense. Indeed, states should consider measures such as Illinois’ Capital Crimes Litigation Act in conjunction with the establishment of Innocence Commissions.

statutes,\textsuperscript{473} can review alleged wrongful convictions "only when all avenues of appeal have been exhausted"\textsuperscript{474} and can "direct a new trial . . . if after inquiry the Minister is satisfied that in the circumstances a new trial . . . should be directed; refer the matter to a court of appeal for hearing as if it were an appeal; or refer any question to a court of appeal for its opinion on which the Minister desires assistance."\textsuperscript{475} The Canadian § 690 mirrors the powers to refer alleged wrongful convictions under the Criminal Appeal Act of 1968,\textsuperscript{476} and the Canadian Minister of Justice utilizes a "Criminal Conviction Review Group (CCRG)" that functions much like the former C3 Division of the British Home Office.\textsuperscript{477}

Although several proposals have been recommended in recent discussions about reform to the § 690 system for addressing miscarriages of justice,\textsuperscript{478} essentially the criticisms of the § 690 power in Canada mirror the long-standing criticisms that of the Home Office's § 17 power. In this context, the Canadian public interest organization AIDWYC has been campaigning for the adoption of an independent review body similar to the CCRC,\textsuperscript{479} and recent government inquiries into particular wrongful convictions have endorsed the establishment of a CCRC-like commission.\textsuperscript{480} James Lockyer of AIDWYC has argued that the Canadian criminal justice system needs a body like the CCRC that "operates completely independently of the country's prosecution."\textsuperscript{481} AIDWYC contends that Canadian cases of alleged wrongful convictions should "not [be] examined from the adversarial perspective of trying to show that the convicted person was rightfully treated by the court system,"\textsuperscript{482} as occurs at present through the Minister of Justice's current

\textsuperscript{473} See AIDWYC, supra note 55, at 17. In practice the roles of the Canadian Attorney General and the Minister of Justice are "discharged by a single Minister." CONSULTATION PAPER, supra note 3, at 9.

\textsuperscript{474} MacAfee, supra note 3, at A8.

\textsuperscript{475} CONSULTATION PAPER, supra note 3, at 3.

\textsuperscript{476} See AIDWYC, supra note 55, at 14 (referring to § 17 of the British Criminal Appeal Act of 1968).

\textsuperscript{477} See CONSULTATION PAPER, supra note 3, at 6.

\textsuperscript{478} See id. at 9-17 (reviewing possible models for reform from various countries).

\textsuperscript{479} See MacAfee, supra note 3, at A8 (quoting James Lockyer of AIDWYC saying that AIDWYC will "keep pressuring [the Minister of Justice] to see that the sooner we have a criminal-cases review commission in Canada, the better it is to the administration of justice"); Weinberg, supra note 455 (same); AIDWYC, supra note 55, at 1-3, 6; see also id. at 4 (noting that "AIDWYC made these proposals [for a CCRC-like body] before the publication of the Royal Commission on Criminal Justice Report" in Britain); supra text accompanying note 404.


\textsuperscript{481} Weinberg, supra note 455.

\textsuperscript{482} Id. (quoting James Lockyer of AIDWYC).
practice under § 690. Rather, AIDWYC contends that an independent review board like the CCRC should "undertake[] a fresh review 'without bias . . . [since] that difference in emphasis creates extraordinary differences in procedure and fairness."483

The Canadian Department of Justice has agreed to consider reforms to § 690 and issued a Consultation Paper entitled Department of Justice, Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code in late 1998 and received submissions through February 15, 1999.484 In the Consultation Paper, the Department of Justice noted that the criticisms of "the present review procedure" under § 690, which many are saying "should be replaced with an independent review mechanism," include:

- the role of the Minister of Justice as Chief Prosecutor is incompatible with the role of reviewing cases of persons wrongly convicted;
- the procedure has led to inordinate delays in the reviews of individual cases;
- the procedure is largely conducted in secret and is consequently without accountability;
- counsel who review section 690 applications are former prosecutors who will look at miscarriage of justice evidence with a prosecutorial bias and will therefore not investigate allegations of error in a fair and objective manner;
- only a handful of cases have ever been re-opened in Canada;
- the response of the Courts to the occasional section 690 referral has been unsatisfactory.485

Following the dissemination of the Consultation Paper, a Toronto newspaper endorsed the establishment of an independent review board because of institutional competency problems that pervade the § 690 system. Section 690 "requires the minister of justice—the same person charged with protecting the innocent and prosecuting the guilty—to admit that the criminal-justice system has failed."486 The Globe & Mail editors further noted that, even if a prisoner can make an application to the Minister under § 690, "the

483. Id. (quoting James Lockyer of AIDWYC).
484. See CONSULTATION PAPER, supra note 3, at 2.
485. Id. at 9 (emphasis added). These observations are drawn largely from AIDWYC's 1993 Draft Proposals for Legislative Changes. See AIDWYC, supra note 55, at 1-3.
application for mercy is reviewed by bureaucrats in the Department of Justice in a *quasi-political, semi-secret* process. Moreover, "[t]he person whose fate is being decided plays very little part in the proceedings, which are not open to the general public." The editors therefore called upon the Minister to accept the establishment of a CCRC-like independent review body as the proper reform of the § 690 system "based on four fundamental assumptions: The justice system cannot adequately review its own decisions; exonerating an innocent person is as important as convicting the guilty; the reform process should not add a new level of appeal; and the process must be transparent and accessible."

Such an independent review board has been suggested a number of times in Canada in the last decade, and a working group established by the Department of Justice reviewed recommendations calling for such a body as well as concerns raised by others about such a reform. The working group rejected the proposed establishment of such a review board on the basis of several perceived difficulties:

- "such a review mechanism would create another level of appeal";
- "the establishment of a mechanism would result in a great number of requests for reviews of convictions";
- "[g]iven the financial constraints under which every [federal and provincial] government is labouring, . . . it would be very difficult to justify the creation of another bureaucratic level to deal with the requests for a review likely to arise from persons claiming to be wrongfully convicted"; and
- "the judiciary might strenuously object to court decisions which would be reviewed by a non-judicial body."

In a February 1999 submission to the Canadian Department of Justice in response to the Consultation Paper, AIDWYC, however, presented the Minister of Justice with a comprehensive argument for the inadequacy of the

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487. *Id.* (emphasis added).
488. *Id.*
489. *Id.*
491. *Id.* at 13 (quoting from the report of a 1990 Canadian Department of Justice working group reviewing the recommendations of the Royal Commission on the Donald Marshall Jr. Prosecution). This Article has addressed several of these concerns already. *See supra* text accompanying notes 440-448.
present § 690 system and the need for an independent review mechanism to address wrongful convictions. First, "[o]nce it is acknowledged, as it has been by the present Minister, that wrongful convictions occur, it must be for an independent tribunal to decide on an application for a Reference" to the appellate courts.\footnote{492} AIDWYC's submission very clearly laid out the case establishing the institutional incompetence of the executive branch to address wrongful convictions:

The reality of the conflict caused by section 690 is readily apparent in times of public and/or political demands for "law and order". The political realities undoubtedly weigh on the executive in those circumstances. This was most apparent in the Irish cases in the United Kingdom. Political considerations were allowed to dominate over considerations of individuals being the victims of miscarriages of justice. In addition, the decision maker in a section 690 application is inevitably affected by an institutional bias which will only be overcome by overwhelming evidence of the failure of the judicial process in a particular case. Institutional considerations result from the Minister of Justice who is the principal prosecutor of all Federal Statutes except the Criminal Code seeking to defend the status quo of a conviction once it has been confirmed by the appellate process.\footnote{493}

Thus, AIDWYC argued for "an independent tribunal" that was not deterred from acting on the discovery or suspicion of a wrongful conviction with the view that wrongful convictions are "embarrassments to the justice system as a whole."\footnote{494} An independent commission, detached from concerns of institutional loyalties and self protection,\footnote{495} could act on the understanding that "[t]he rectification of a miscarriage of justice can only reflect well on the system" by "remed[ying] individual cases of injustice, . . . flag[ging] systemic issues that can be addressed in the future," and "lead[ing] to the apprehension of the real culprit."\footnote{496}

\footnote{492. \textit{Id.} at 16 (emphasis in original).} \footnote{493. \textit{Id.} at 16-17.} \footnote{494. \textit{Id.} at 17.} \footnote{495. AIDWYC noted that "[t]he ultimate disposition of an application [under § 690] is largely dependent on the opinions of members of the Criminal Conviction Review Group, who work within the Ministry which is responsible for all federal prosecutions in Canada." \textit{Id.} at 18.} \footnote{496. \textit{Id.} at 17 (emphasis in original).}
Second, AIDWYC argued for a state-supported, independent review commission to alleviate the "almost impossible hurdles [applicants face] in establishing the basis for a section 690 review." In Canada, as is the case to varying degrees in the United States, "[t]here is limited access to funding [for indigent defense and appeals] in some provinces," and "[i]n most provinces, no publicly funded assistance is provided." As a result, AIDWYC concluded that, absent a state-funded, independent and effective fail-safe, "for a miscarriage of justice to be exposed, it is more a question of good fortune or 'pot luck' than justice at work.

AIDWYC ultimately recommended a commission "limited to a power of referral to the appellate court in the province in which the conviction was registered." Such a commission "would remove all political considerations from the review of applications submitted to it" and eliminate "[t]he incompatible roles of the Minister as Chief Prosecutor and as the person to review wrongful convictions.

AIDWYC called for the commission to have investigative powers, "includ[ing] the power to command production of documents from officials [and private bodies], and the power of subpoena." As such, the commission should "conduct its reviews in an inquisitorial fashion," respecting "[t]he need for impartiality" and, "[w]hatever results are produced, . . . act[ing] on [them]."

Accordingly, the operations of such a commission "will reduce to a minimum the present handicap of an indigent person attempting to establish under the section 690 that he/she has been wrongly convicted.

Addressing the issue of the cost of a new, independent commission, AIDWYC asserted that the financial costs "would be small compared with the enhanced confidence in the administration of justice that would result from the creation of a Commission." Moreover, "[t]he Commission's work, insofar as it uncovers cases of wrongful conviction, will save considerable
public funds that would otherwise be spent in the continued imprisonment of the wrongly convicted person.\textsuperscript{507} The same concerns plague the present system, or lack thereof, in the United States for addressing miscarriages of justice. The Illinois Attorney General's and Cook County State's Attorney's Office's suggestions that their offices should review capital cases for wrongful convictions\textsuperscript{508} ignores the lessons of the British and Canadian experiences under § 17 and § 690. Even reviews of capital cases by prosecutors in these offices with the professed goal of discovering errors will not overcome the fundamental institutional difficulties of relying upon officials of the State who are responsible for prosecuting the guilty to also spend the necessary time and effort to uncover and address wrongful convictions to which they or their colleagues most often contributed in large part. These problems are exacerbated in the United States, as in the present Canadian system and the former British system, when the official charged with addressing miscarriages of justice is an elected politician in an era of 'law and order politics' and dreadful funding and support of indigent criminal defendants.

Just as in Canada and Britain, public confidence in the criminal justice system has been harmed in states like Illinois where several wrongful capital convictions have been discovered.\textsuperscript{509} The British CCRC was explicitly charged with restoring public confidence in the criminal justice system.\textsuperscript{510} Although AIDWYC's claim that such a benefit would justify the costs of a review commission may seem at first blush to be mere rhetoric, it is worth noting that governments, including the United States, have a long tradition of devoting substantial resources to ensuring public confidence and calm. If an Innocence Commission would correct State-inflicted injustices that would
otherwise go unaddressed, state legislatures should be willing to authorize considerable financial support for such a public institution.

Moreover, in the United States, just as much as in Canada, rectifying wrongful convictions allows the authorities to punish the actual perpetrator. Thus, after an independent investigation demonstrated Anthony Porter’s actual innocence, the authorities were able to bring to justice the man who actually committed the murders for which Porter was condemned to die.511

AIDWYC is pressing the Canadian Minister to acknowledge that, in reforming the § 690 system, and as the British have acted upon, “[c]reating a[n Innocence] Commission to refer cases of wrongful convictions after all appellate remedies have been exhausted will . . . ensure that wrongful convictions can be set right, rather than continue to exist in perpetuity.”512 But, as the British experience shows, the Innocence Commission will need to be well-funded and, above all else, independent.

VIII. CONCLUSION

American state legislatures should create Innocence Commissions to serve as much-needed fail-safes for convicted defendants whose claims of actual innocence are not adequately addressed through the stages of trial, appeal, and post-conviction review. American appellate courts have recently curtailed their responsibility for addressing claims of actual innocence and governors are severely hampered in the exercise of their clemency powers by political concerns, even though the United States Supreme Court has held those powers up as the safety net for innocence claims. Innocence Commissions are needed because the institutional incentives operating on the police, prosecutors, and courts impede the detection and correction of many wrongful convictions. Such Commissions would actually enhance judicial economy by screening out unmeritorious claims for a successive post-conviction review. The Commissions would also offer an opportunity for a thorough investigation and review of many cases which investigation is not provided on appeal or post-conviction review due to appellate courts’

512. AIDWYC, supra note 55, at 47. Recently, Canadian officials have indicated that any Canadian reform will not take the form of the CCRC. See Wrongful Convictions Debate, TORONTO STAR, Mar. 21, 2000, at NE08. “Although federal officials went to England to study an independent review commission that was set up to replace a system similar to what Canada has now, they decided it was costly, backlogged and too slow.” Id.
procedural bars and emphasis on legal and procedural errors instead of factual errors.

Of course, an independent Innocence Commission is clearly, at best, an incomplete solution to the American criminal justice system's problem of convicting the innocent, a problem that has recently gained so much attention in Illinois. Even if every state and the federal government were to abolish the death penalty, endemic problems and inevitably fallible human judgments within the criminal justice system would still lead many innocent people to be convicted of crimes carrying less than the penalty of death. But, if the political leaders at the state level have the political courage to appoint people to root out fundamental injustices from wrongful convictions, an Innocence Commission can provide an institutional safety net to free people like Anthony Porter before they receive the ultimate punishment or languish for life or even a significant number of years in jail for a crime committed by another person who often remains free.

State criminal justice systems can no longer rely entirely on the heroic efforts of dedicated lawyers, journalists, activists, and students to bring to light and correct its most grievous miscarriages of justice. Moreover, state legislatures must accept that, in and of itself, a due process system "cannot, and will never guarantee that only the guilty will be convicted," due to its emphasis on procedural fairness and justice. If state governments are willing to commit resources and implement tough laws to ensure that the guilty do not go unpunished, state legislatures must also commit the resources and institutional apparatus to ensure that the innocent will not remain caught in an ever-expanding dragnet.

The Illinois state legislature should demonstrate the political resolve to take the lead. If the citizens of Illinois want to take a positive step toward ensuring that no more innocent men come within two days of a state execution, as Anthony Porter did, they should look across the Atlantic and 'north of the border' for inspiration and then to Springfield, Illinois, for action.

513. See, e.g., Anderson, supra note 57, at 14 (President of the American Bar Association arguing that, "under a fair system of justice, exoneration of the innocent would not depend upon the good fortune of a letter from a prisoner or family member reaching the hands of a group of volunteers"); Kane, supra note 103, at 1 (noting the difficulty for a journalist to competently cover an "innocent man behind bars’ story," which often result, after painstaking investigation, in "nothing").

514. AIDWYC, supra note 55, at 47.

515. See supra note 4 and accompanying text.