

POST-CONVICTION REVIEW: QUESTIONS OF INNOCENCE, INDEPENDENCE, AND NECESSITY

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I. INTRODUCTION

In recognition of the reality of wrongful conviction, a number of jurisdictions have developed post-conviction review¹ schemes aimed at addressing such mistakes. Our aim in this Article is to address the question of how such schemes should ideally operate. Although a range of examples of post-conviction review will be discussed, we do so primarily by a comparative study of the post-conviction review schemes in Scotland, Canada, and North Carolina. Scotland and North Carolina are two of a very limited number of jurisdictions that have established independent criminal case review commissions, although the scope of the respective commissions are very different.² Canada retains a system whereby claims of wrongful conviction are adjudicated by a government minister, assisted by an advisory body.³

To date, analysis tends to focus on particular post-conviction review schemes in isolation. By bringing together, for the first time, the accumulated experience of these three jurisdictions (and

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1. By post-conviction review, we mean the system for conviction review that takes place outside the normal criminal appeals process—usually (but not always) after the appeals process has been exhausted.

2. *See infra* Part IV(B) (Scottish commission); Part IV(C) (North Carolina commission).

3. *See infra* Part IV(A) (Canada's Criminal Conviction Review Commission).

other examples where appropriate), we argue that there is a clear case for the existence of an independent body to undertake post-conviction review. Such a body, we argue, should not restrict its remit to cases in which fresh evidence emerges, but should be empowered to refer cases where there has been a procedural impropriety that casts doubt on guilt. Such a body should not, however, be permitted to refer cases where there is overwhelming evidence of guilt, despite the seriousness of the procedural breach concerned. We then go on to argue that, in principle, there are no good reasons for restricting the ambit of post-conviction review to serious cases or to cases where the applicant is living (although political or resource constraints might serve as practical considerations here). Finally, we argue that a post-conviction review body charged with the review of individual cases is not in the best position to engage in law-reform work aimed at preventing wrongful conviction at a systemic level. Doing so might compromise its relationship with the courts and would require a membership different to that best suited to the review of individual cases.

II. THE NEED FOR POST-CONVICTION REVIEW

It has long been recognized that there is a need for some sort of procedure by which convictions can be reviewed outside of the normal criminal appeals process. A number of notorious examples where factually innocent individuals have initially failed to overturn their convictions on appeal demonstrate that the criminal courts do not always get it right the first—or even second—time.⁴ There is also ample evidence, stemming primarily from DNA exoneration projects in the U.S.,⁵ that conviction of the factually

4. To take an example from Canada, David Milgaard was wrongly convicted for the murder of Gail Miller in 1970. His initial appeal against conviction was unsuccessful and he served almost 23 years in prison until he was freed in 1992 and later fully exonerated through DNA forensic analysis in 1997. See Sarah Harland-Logan, *David Milgaard*, INNOCENCE CAN., <https://www.aidwyc.org/cases/historical/david-milgaard/> (last visited July 9, 2017) (detailing the case of David Milgaard).

5. See *Innocence Project 25 Year Anniversary*, INNOCENCE PROJECT, <https://25years.innocenceproject.org/> (last visited July 9, 2017) (focusing on exonerations that used science); see also *The National Registry of Exonerations*, LAW.UMICH.EDU, <http://www.law.umich.edu/special/exoneration/Pages/mission.aspx> (last visited July 9, 2017) (providing detailed information on every known exoneration in the U.S. since 1989). The Innocence Project was founded in 1992 based at Cardozo Law School. At the time of writing (February 2017), the Innocence Project listed 348 exonerations. The NRE is part of

innocent is a real and pressing problem. As a result of this evidence, we can state with certainty that wrongful conviction does occur, and we can even confidently identify the main causes.⁶ Perhaps most importantly for the purposes of this Article, we also know that in many cases that have subsequently been shown to be instances of wrongful conviction, an initial appeal against conviction was unsuccessful.⁷ This recognition has led some jurisdictions to establish criminal case review commissions— independent bodies which can review convictions and in appropriate cases refer them back to the courts for reconsideration.

The first and best known of these is the Criminal Cases Review Commission for England, Wales, and Northern Ireland,⁸

the University of Michigan Law School and has a slightly wider remit compared to the Innocence Project. At the time of writing, 1,976 exonerations were listed. For a detailed analysis of the Innocence Project's first 250 DNA exonerations, see BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 5–6 (2011). For analysis of the NRE exonerations, see SAMUEL R. GROSS & MICHAEL SHAFFER, *EXONERATIONS IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS* 2–4 (2012), available at https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

6. There is a remarkable consensus that the main evidential causes of wrongful conviction are mistaken eyewitness identification, false confessions, misleading forensic evidence and the evidence of accomplices or informers (or others who have a motivation to lie). GARRETT, *supra* note 5, at 165–67; Gross & Shaffer, *supra* note 5, at 40. Other environmental and psychological factors also play a role, such as a culture of incentivizing guilty pleas and the psychological phenomenon of tunnel vision that can affect those investigating and prosecuting cases. GARRETT, *supra* note 5, at 150–53, 165–70, 265–68; Bruce MacFarlane, *Convicting the Innocent: A Triple Failure of the Justice System*, 31 *MAN. L.J.* 403, 436–37 (2006). There is a vast amount of literature devoted to identifying safeguards that might be put in place to combat some of these factors. *See, e.g.*, Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 *GA. L. REV.* 723, 725 (2013) (looking into the rules of evidence and its connection to wrongful convictions); Lisa D. Dufrainmont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?*, 33 *QUEEN'S L.J.* 261, 263–64 (2008) (suggesting a new and improved evidentiary rule to prevent wrongful convictions); Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *LAW & HUM. BEHAV.* 3, 3 (2010) (using psychological science to prevent wrongful convictions); Fiona Leverick, *Jury Instructions on Eyewitness Identification Evidence: A Re-Evaluation*, 49 *CREIGHTON L. REV.* 555, 555–56 (2016) (safeguarding wrongful convictions through proper jury instructions); Richard A. Wise, Kirsten A. Dauphinaise & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 *J. CRIM. L. & CRIMINOLOGY* 807, 808 (2007) (attempting to provide a solution to errors related to faulty eyewitness testimonies as they related to wrongful convictions).

7. *See* GARRETT, *supra* note 5, ch. 7 (discussing the long appeals and post-conviction processes).

8. The establishment of the Commission was recommended by the Royal Commission on Criminal Justice. ROYAL COMM'N ON CRIM. JUSTICE, REPORT 182 (1993). This Commission will subsequently be referred to as “the English CCRC” to distinguish it from its Scottish counterpart. Within the overall jurisdiction of the United Kingdom of Great

which was established in 1997 following a series of notorious miscarriages of justice, mostly relating to terrorist cases.⁹ Other jurisdictions followed, with independent criminal case review commissions also being set up in Scotland, Norway, and North Carolina.¹⁰ For the sake of completeness, the DNA Review Panel should also be mentioned—which operated in the Australian jurisdiction of New South Wales between 2007 and 2014—an independent body that had the power to refer cases to the appeals court but was disbanded after making no referrals.¹¹ Other jurisdictions—such as Canada and Australia—retain a variation of the system that existed prior to the establishment of the English CCRC whereby post-conviction review is in the hands of a government minister.¹²

The existence of these different forms of post-conviction review raises a number of questions about the proper scope of such bodies. We address these questions by examining three schemes for post-conviction review in more detail—those of Scotland, Canada, and North Carolina. These jurisdictions were chosen because they offer a range of approaches to the issues concerned.¹³

Britain and Northern Ireland, there are three separate and distinct legal systems—those of Scotland; England and Wales; and Northern Ireland.

9. See John Weeden, *The Criminal Cases Review Commission (CCRC) of England, Wales and Northern Ireland*, 58 CRIM. L.Q. 191, 191–94 (2012) (providing a detailed account of the so-called “Birmingham 6” and “Guildford 4”).

10. The Scottish and North Carolina Commissions are discussed in detail later in this Article. For discussion of the Norwegian Commission, see Ulf Stridbeck & Svein Magnussen, *Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission*, 80 U. CIN. L. REV. 1373 (2012); Ulf Stridbeck & Svein Magnussen, *Opening Potentially Wrongful Convictions: Look to Norway*, 58 CRIM. L.Q. 267 (2012).

11. David Hamer, *Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission*, 37 U. NEW S. WALES L.J. 270, 292–95 (2014); Lynne Weathered, *Reviewing the New South Wales DNA Review Panel: Considerations for Australia*, 24 CURRENT ISSUES IN CRIM. JUST. 449, 450–52 (2013).

12. Canada is discussed in detail later in this Article. For discussion of the Australian system, see Bibi Sangha & Robert Moles, *Mercy or Right: Post-Appeal Petitions in Australia*, 14 FLINDERS L.J. 293 (2012); Lynne Weathered, *Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia*, 17 CURRENT ISSUES IN CRIM. JUST. 203 (2005).

13. In this Article, the Scottish Criminal Cases Review Commission is selected for detailed analysis over its more well-known counterpart, the English CCRC, on the basis that it has not yet been the subject of academic discussion to the same extent as the English CCRC. This is despite the fact that the SCCRC has been favorably compared to the English CCRC in terms of the greater resources it has at its disposal and the wider powers it has to obtain evidence. See, e.g., Peter Duff, *Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner*, 72 MOD. L. REV. 693, 694 (2009) (comparing the English CCRC and the SCCRC in detail) [hereinafter *Straddling Two Worlds*]; Lissa Griffin, *International Perspectives on Correcting Wrongful Convictions: The Scottish*

Of course, the schemes have to be seen in the wider legal and political context of the jurisdiction in question. However, examination of their accumulated experience does generate a number of important insights about the appropriate role of a post-conviction review body in relation to claims of innocence and the implications this has for the contours of review schemes. Before proceeding to discuss the three schemes, however, it is necessary to consider the meaning of innocence and how this affects eligibility for exoneration.

III. THE MEANING OF INNOCENCE

The ultimate aim of a post-conviction review body is to offer a remedy to those who are innocent of the crime of which they have been convicted, but that raises the question of precisely what is meant by *innocence*. While there is considerable confusion over terminology,¹⁴ a useful distinction can be made between legal and factual innocence.¹⁵ Broadly speaking, *factual innocence* refers to the conviction of someone who did not commit the crime in question, either because it was perpetrated by someone else or because no crime was ever committed.¹⁶ *Legal innocence* refers to the conviction of someone who should not, under the rules of the legal system in question, have been convicted.¹⁷ While legal

Criminal Cases Review Commission, 21 WM. & MARY BILL RTS. J. 1153, 1212 (2013) (praising the works of the SCCRC). For detailed analysis of the English CCRC, see LAURIE ELKS, RIGHTING MISCARRIAGES OF JUSTICE? TEN YEARS OF THE CRIMINAL CASES REVIEW COMMISSION (2008); CLIVE WALKER & KATHRYN CAMPBELL, *The CCRC As an Option for Canada: Forwards or Backwards?*, in THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT? ch. 14 (Michael Naughton ed., 2012) (discussing the English CCRC as an optional model for Canada); Weeden, *supra* note 9, at 1419–23; David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 52 DRAKE L. REV. 657 (2004).

14. For differing perspectives, see *e.g.*, Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971, 973–74 (2002); Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1159–60 (2010); Steven Greer, *Miscarriages of Justice Reconsidered*, 57 MOD. L. REV. 58, 66 (1994).

15. Although within these two broad categories there are many subtle distinctions, it lies beyond the scope of the Article to discuss these. *But see* MICHAEL NAUGHTON, THE INNOCENT AND THE CRIMINAL JUSTICE SYSTEM: A SOCIOLOGICAL ANALYSIS OF MISCARRIAGES OF JUSTICE, 16–17 (2013) (providing more detailed categorizations); CLIVE WALKER, *Miscarriages of Justice in Principle and Practice*, in MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR 31–37 (Clive Walker & Keir Starmer eds., 1999) (showing different categorizations of miscarriages of justice).

16. Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 45 (1987).

17. *Id.* at 45.

innocence might incorporate cases of factual innocence, it would also encompass those who are (or may be) factually guilty but should not have been convicted because there was a procedural irregularity during the process that led to conviction.¹⁸

The term miscarriage of justice is sometimes used to describe the conviction of a factually-innocent person, but it is also the legal test for appeal against conviction in some jurisdictions.¹⁹ In other words, it has a legal meaning (which normally encompasses convictions where there has been a procedural irregularity as well as those where fresh evidence casts doubt on guilt), but that legal meaning does not necessarily correspond with the way it is understood outside the narrow confines of the law.²⁰

It should also be said that factual innocence is something that is often very difficult to establish conclusively. The increased sophistication of DNA testing has meant that there now exists a growing number of cases—especially in the U.S.—in which it can be said with absolute certainty that a factually innocent person has been wrongly convicted.²¹ In cases where no physical evidence exists, however, the extent to which factually innocent people have been wrongly convicted is impossible to determine.²² The extent to which post-conviction review bodies should confine themselves to cases of factual innocence and the difficulties that arise in defining and identifying this are considered later in the Article,²³ which now turns to a brief account of the post-conviction review schemes in Canada, Scotland, and North Carolina.

18. There are many types of procedural irregularities that might justify quashing a conviction, such as trial judge misdirection, jury misconduct, or evidence admitted that was obtained via an irregular procedure. A procedural irregularity may or may not cast doubt on the guilt of the accused. *See infra* notes 155–76 and accompanying text (discussing the factors that play into a wrongful conviction).

19. *See infra* p. 11 and accompanying text (specifying the different usage of the term miscarriage of justice—Scotland being an example of such jurisdiction).

20. *See, e.g.,* Sion Jenkins, *Miscarriages of Justice and the Discourse of Innocence: Perspectives from Appellants, Campaigners, Journalists, and Legal Practitioners*, 40 J.L. & SOC'Y 329, 329–30 (2013) (explaining the different usage and meaning of “innocence”).

21. *See supra* note 5 (finding examples of such cases as uncovered by the Innocence Project and the NRE).

22. Zalman has established a generally accepted “[e]stimate” of wrongful convictions in the U.S. of between 0.5% and 1% for felony convictions, but the extent to which these figures translate to other contexts and jurisdictions is an open question. Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 230 (2012).

23. *See infra* notes 138–52 and accompanying text (discussing the consequences and drawbacks of different systems that confine themselves to factual innocence).

IV. THE POST-CONVICTION REVIEW SCHEMES

A. The Criminal Conviction Review Group (Canada)

In Canada, ministerial review is the primary remedy for those who believe their conviction is erroneous following an exhaustion of the appeals process.²⁴ The provisions for ministerial review are found in Part XI.1 of the *Criminal Code*.²⁵ The right to review a conviction was first introduced into law in 1923.²⁶ After many years of ad hoc review, the Criminal Conviction Review Group (CCRG) was formed in 1993. The CCRG was comprised of a group of lawyers within the Department of Justice who reported directly to the Assistant Deputy Minister of Justice.²⁷ In 2002, the conviction review process was again amended legislatively, in part due to dissatisfaction with procedural delays, secrecy, and lack of accountability.²⁸ Changes included, inter alia, clearer criteria regarding remedies, increased investigative powers, movement to a physically separate building from the Department of Justice, and the appointment of a Special Advisor.²⁹ While some of these changes were made in response to criticisms that the CCRG should more closely resemble the independent English CCRC,³⁰ they did not result in any major shift in the way that the CCRG operates.

As it stands today, ministerial review is available for convictions for both indictable and summary offenses.³¹ Applicants must have exhausted all avenues of appeal, at the provincial

24. It is also possible to appeal to the Royal Prerogative of Mercy, but such appeals have waned since the abolition of the death penalty in Canada in 1976. The Royal Prerogative is not discussed in detail here, but see Gary T. Trotter, *Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review*, 26 QUEEN'S L.J. 339 (2001).

25. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 696.1–696.3.

26. Patricia Braiden & Joan Brockman, *Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code*, 17 WINDSOR Y.B. ACCESS JUST. 3, 5 (1999).

27. See generally *Regulations Respecting Applications for Ministerial Review—Miscarriages of Justice: Regulatory Impact Analysis Statement*, 136:39 CAN. GAZETTE, PT. I, at 2977–79 (Sept. 28, 2002) (providing a list of the proposed new regulations).

28. MINISTER OF JUSTICE, APPLICATIONS FOR MINISTERIAL REVIEW: MISCARRIAGES OF JUSTICE, ANNUAL REPORT 3 (2015) [hereinafter MINISTERIAL REVIEW APPLICATION]; Braiden & Brockman, *supra* note 26, at 20–28.

29. MINISTERIAL REVIEW APPLICATION, *supra* note 28, at 3–4.

30. See generally *Regulations Respecting Applications for Ministerial Review—Miscarriages of Justice: Regulatory Impact Analysis Statement*, *supra* note 27, at 2977 (providing a breakdown of the amended regulations for application of ministerial review).

31. MINISTER OF JUSTICE, APPLYING FOR A CONVICTION REVIEW 3 [hereinafter CONVICTION REVIEW APPLICATION].

appeals court and at the Supreme Court.³² The information presented in support of the application must represent new and significant information that was not previously considered by the courts and is reasonably capable of belief.³³ Guidelines from the Department of Justice in 2003 listed a number of examples of new and significant information that would support a conviction-review application: information that would establish or confirm an alibi; another person's confession; information that identifies another person at the scene of the crime; scientific evidence that points to innocence or another's guilt; proof that important evidence was not disclosed; information that shows a witness gave false testimony; and information that substantially contradicts testimony at trial.³⁴

When the CCRG assesses whether information is new and significant, the test applied is similar to that used by the courts in determining the admissibility of new or "fresh" evidence on appeal: it must be relevant; reasonably capable of belief; and such that, if taken with the other evidence presented at trial, it could reasonably be expected to have affected the verdict.³⁵ However, the applicant must also satisfy the Minister that there is a reasonable basis to conclude that "a miscarriage of justice likely occurred,"³⁶ given the new and significant information. This is not part of the normal test for an appeal against conviction and means that the standard applied to conviction review is higher than the test that would be applied at the subsequent court hearing, should the case be referred.³⁷ Problematically, no further guidance or precedent is available as to what might constitute a miscarriage of justice—it is purely a matter of policy for the Minister, who does not publish reasons for his or her decisions. As a result, applicants have little or no idea what might suffice.³⁸

The CCRG's investigations can involve interviewing witnesses, forensic testing and analysis of evidence, and consultation with lawyers, police, and prosecutors.³⁹ The CCRG

32. *Criminal Code*, R.S.C. 1985, c. C-46, s. 696.1, par. 1.

33. MINISTERIAL REVIEW APPLICATION, *supra* note 28, at 6.

34. These are re-produced in Applying for a Conviction Review. CONVICTION REVIEW APPLICATION, *supra* note 31, at 2.

35. MINISTERIAL REVIEW APPLICATION, *supra* note 28, at 6.

36. *Criminal Code*, R.S.C. 1985, c. C-46, s. 696.3, par. 3, subpar. a.

37. HERSH WOLCH & JOANNE MCLEAN, IN THE MATTER OF THE COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID EDGAR MILGAARD: SUBMISSIONS 79 (2008).

38. See *infra* Table 1 (demonstrating a low number of applicants, which might be explained by applicants' lack of guidance).

39. CONVICTION REVIEW APPLICATION, *supra* note 31, at 3.

has the authority to compel the production of documents as well as the appearance and testimony of witnesses.⁴⁰ The CCRG completes an investigative report, which is viewed by the applicant and forwarded to the Minister of Justice.⁴¹ “[I]f the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred” he or she may either order a new trial or refer the matter to the Court of Appeal of a province or territory as if it were an appeal by the convicted person.⁴²

At this stage, Crown Counsel of the originating province have a number of remedies available to them to move forward, including conducting a new trial, withdrawal of the charges, offering no evidence (resulting in a not guilty verdict), or entering a stay of proceedings.⁴³ In the latter case, the charges are “on hold” for one year and the Crown retains the power to “recommence the proceedings on the same indictment.”⁴⁴

B. The Scottish Criminal Cases Review Commission

In Scotland, post-conviction review is undertaken by the Scottish Criminal Cases Review Commission (SCCRC). The SCCRC was established in 1999,⁴⁵ two years after the English CCRC, on the recommendation of the Sutherland Committee.⁴⁶ Before the SCCRC existed, convicted persons who had exhausted the normal appeal process had to apply to the Secretary of State for Scotland (a Government Minister) to have their convictions reconsidered, a scheme similar to that presently operating in Canada.⁴⁷ Since its establishment, anyone who has been convicted

40. MINISTERIAL REVIEW APPLICATION, *supra* note 28, at 3.

41. CONVICTION REVIEW APPLICATION, *supra* note 31, at 34.

42. *Criminal Code*, R.S.C. 1985, c. C-46, s. 696.3, par. 3, subpar. a.

43. KENT ROACH, REPORT RELATING TO PARAGRAPH 1(F) OF THE ORDER IN COUNCIL FOR THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL 21–24, available at <http://www.driskellinquiry.ca/pdf/roachreport.pdf>.

44. KATHRYN CAMPBELL, MISCARRIAGES OF JUSTICE IN CANADA: CAUSES, RESPONSES, REMEDIES 343 (University of Toronto Press, forthcoming 2018); *see also* PATRICK J. LESAGE, REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL 127, 129, 132–33 (2007) (describing this as “not a satisfactory final remedy”).

45. *Legislative Framework*, SCCRC, <http://www.sccrc.org.uk/legislative-framework> (last visited July 9, 2017).

46. STEWART R. SUTHERLAND, CRIMINAL APPEALS AND ALLEGED MISCARRIAGES OF JUSTICE: REPORT BY THE COMMITTEE APPOINTED BY THE SECRETARY OF STATE FOR SCOTLAND AND THE LORD ADVOCATE Cm.3245, ¶ 5.50 (1996).

47. *Id.* at ¶¶ 5.1, 5.60.

of a criminal offense in Scotland can apply to the SCCRC.⁴⁸ It can review sentences and convictions⁴⁹ and it is empowered to deal with both solemn and summary cases.⁵⁰ A claim does not have to be made by the convicted person—it can be made in respect of a deceased person in order to posthumously clear their name.⁵¹ Still, the applicant does need to have a legitimate connection with the convicted person—victims of the crime or relatives of victims do not have standing to apply.⁵²

The SCCRC has a number of legal officers,⁵³ an annual budget of over £1 million⁵⁴ to conduct investigations, and extensive legal powers to compel other parties (both public bodies and private individuals) to provide information it deems necessary.⁵⁵ One third of the SCCRC Commissioners must be solicitors or advocates of at least ten years standing and a further third must have knowledge or experience of the criminal justice system.⁵⁶ In practice there have been between six and eight Commissioners⁵⁷ and, traditionally, two have always been lay members, such as academics and figures from the church.

The SCCRC has no power to quash a conviction but can refer a case back to the court and it is then for the court to determine the appeal. The grounds upon which the SCCRC can refer a case are that it believes: (a) “a miscarriage of justice may have occurred”; and (b) “it is in the interests of justice that a reference

48. See Peter Duff, *Criminal Cases Review Commissions and Deference to the Courts: The Evaluation of Evidence and Evidentiary Rules*, CRIM. L. REV. 341, 352–55 (2001) (comparing that as in Canada, the option of applying to the Royal Prerogative of Mercy still exists alongside the SCCRC but applications are very rarely—if ever—now made).

49. See SCOTTISH CRIM. CASES REVIEW COMM’N, ANNUAL REPORT 2014–15, 14 (2016) (explaining that approximately one fifth of applications are for sentence review) [hereinafter SCOTTISH ANNUAL REPORT]; see also James Chalmers & Fiona Leverick, *The Scottish Criminal Cases Review Commission and Its Referrals to the Appeal Court: The First Ten Years*, CRIM. L. REV. 608, 615–20 (2010) (discussing the Commission’s sentence review function).

50. In Scotland, cases can be prosecuted under solemn or summary procedure. Solemn procedure is reserved for the most serious cases (known as “indictable” cases) and involves the use of a jury to determine guilt. Summary procedure (where cases are prosecuted on a “complaint”) is used for less serious cases. Around a fifth of applications relate to summary cases. SCOTTISH ANNUAL REPORT, *supra* note 49, at 17.

51. Criminal Procedure (Scotland) Act 1995, c.46, s.194(B)(4).

52. *Scottish Crim. Cases Review Comm’n v. Swire* [2015] S.L.T. 556 (HCA) at ¶ 23.

53. SCOTTISH ANNUAL REPORT, *supra* note 49, at 49. At the time of writing, the number of legal officers was seven.

54. *Id.* at 59. At the time of writing, this equates to approximately \$1.25 million.

55. Criminal Procedure (Scotland) Act 1995, c.46, s.194(H)–(IA).

56. *Id.* s.194(A).

57. *Straddling Two Worlds*, *supra* note 13, at 694.

should be made.”⁵⁸ The phrase *miscarriage of justice* is a reference to the legal test for determining appeals against conviction in Scotland,⁵⁹ not to the factual innocence of the applicant. In order for a conviction to be quashed in Scotland, the court must be satisfied that there has been a miscarriage of justice based on a legally recognized factor. Two are specified in legislation: the existence of evidence that was not heard at the original proceedings⁶⁰ and an unreasonable jury verdict.⁶¹ Others are set out in caselaw and all relate to some sort of procedural irregularity such as evidence wrongfully admitted or excluded, trial judge misdirection, or defective legal representation.⁶² This does mean that, unlike in Canada or North Carolina, the SCCRC is not restricted to looking at cases in which additional evidence has emerged—its references can span the whole range of grounds for appeal.

C. The North Carolina Innocence Inquiry Commission

The North Carolina Innocence Inquiry Commission (NCIIC) was established in 2006,⁶³ on the advice of the North Carolina Actual Innocence Commission—a body set up in 2002 to make recommendations aimed at reducing the risk of wrongful conviction.⁶⁴ The NCIIC has eight commissioners,⁶⁵ and these must include a superior court judge, a prosecuting attorney, a victim

58. Criminal Procedure (Scotland) Act 1995, c.46, s.194(C).

59. *Id.* s.106.

60. *Id.* s.106(3)(a).

61. *Id.* s.106(3)(b).

62. See FIONA LEVERICK, JAMES CHALMERS, SARAH ARMSTRONG & FERGUS MCNEILL, SCOTTISH CRIMINAL CASES REVIEW COMMISSION 10TH ANNIVERSARY RESEARCH: FINAL REPORT 18–20 (2009) (providing a comprehensive list of the sort of procedural irregularity).

63. The NCIIC was established by Article 92 of the North Carolina General Statutes (subsequently “NCGS”). N.C. GEN. STAT. § 15A-1461; see Kent Roach, *An Independent Commission to Review Claims of Wrongful Convictions: Lessons from North Carolina?*, 58 CRIM. L.Q. 283, 284–85 (2012) (discussing the NCIIC in depth) [hereinafter *Independent Commission*]; Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1345–47 (2007) (surveying the history of the NCIIC).

64. Christine C. Mumma, *North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 648 (2004).

65. N.C. INNOCENCE INQUIRY COMM’N, ANNUAL REPORT TO THE 2015–16 REGULAR SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA AND THE STATE JUDICIAL COUNCIL ii (2015) [hereinafter N.C. ANNUAL REPORT].

advocate, a defense attorney, a sheriff, a person who is not an attorney or employed by the judicial department, and two others.⁶⁶

The NCIIC will only consider applications from those who have been convicted of a felony in a North Carolina state court⁶⁷ and—unlike the CCRG and SCCRC—where the applicant is alive.⁶⁸ Most significantly, the statutory criteria require that the applicant be asserting “complete[] innocence of any criminal responsibility for the felony.”⁶⁹ Claims of secondary involvement, or of a reduced level of culpability are not considered claims of complete factual innocence. Furthermore, credible and verifiable evidence of innocence must exist,⁷⁰ and this must not have been previously heard at trial or in a post-conviction hearing.⁷¹

If, after a preliminary review, the Executive Director determines that the statutory criteria are met, the case moves into a formal inquiry phase. Priority is given to cases where the claimant is currently incarcerated.⁷² The investigation phase is a “detailed and lengthy process that involves interviewing witnesses, obtaining affidavits, seeking court orders for evidence, testing of physical evidence, and compiling of documentation.”⁷³ The NCIIC has substantial powers of investigation—it can, for example, issue subpoenas and compel the attendance of witnesses.⁷⁴ It also has the power to compel the testimony of witnesses who invoke their privilege against self-incrimination.⁷⁵

If, during the formal inquiry, credible and verifiable new evidence of actual innocence is uncovered, the case progresses to a hearing before the eight commissioners.⁷⁶ Like the SCCRC and CCRG, the NCIIC cannot itself quash convictions but can refer a case back to the courts. The test that must be met for it to do so is that there is “sufficient evidence of factual innocence to merit

66. N.C. GEN. STAT. § 15A-1463.

67. *Id.* § 15A-1460(1).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. N.C. GEN. STAT. § 15A-1466(2).

73. N.C. INNOCENCE INQUIRY COMM’N, REPORT TO THE 2009–2010 LONG SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 3 (2010).

74. N.C. GEN. STAT. § 15A-1467(d)–(f).

75. *Id.* § 15A-1468(a1). The Commission Chairperson (a Superior Court Judge) may provide limited immunity to the person against a prosecution for perjury.

76. *Id.* § 15A-1468.

judicial review.”⁷⁷ The panel of eight commissioners do not have to agree; a majority decision is permissible.⁷⁸ Nevertheless, a unanimous decision is required when the applicant pled guilty.⁷⁹ Unlike the SCCRC or the CCRG, the NCIIC has the discretion to make its hearings public.⁸⁰ Even when the NCIIC does not hold a public hearing, a transcript of proceedings is made which must be released if the case is referred to the courts.⁸¹

If the NCIIC refers a case, the Chief Justice of the North Carolina Supreme Court then appoints a special three-judge panel to hear it.⁸² A more stringent standard applies to referred cases than to appeals against conviction generally.⁸³ All three judges must unanimously decide that there is “clear and convincing evidence that the convicted person is innocent of the charges”⁸⁴ in order to exonerate the convicted person.

V. THE SCHEMES IN PRACTICE

As might be expected, given their different constitutions and remits, the three different post-conviction review bodies differ considerably in terms of key measures such as the number of applications they receive, the proportion of these that are referred back to the courts, and the “success rate” of the referred applications. Table 1 summarizes these differences:

77. *Id.* § 15A-1468(c).

78. *Id.*

79. *Id.* This is significant as 39% of applications have been from those who pled guilty. *NC Innocence Inquiry Commission Case Statistics*, INNOCENCECOMMISSION-NC.GOV (2017), <http://www.innocencecommission-nc.gov/stats.html> (last visited July 9, 2017). “For the first two years of its existence, the NCIIC [did] not allow any claims from defendants who [pled] guilty” at all. See Maiatico, *supra* note 63, at 1360.

80. N.C. GEN. STAT. § 15A-1468(a). The Norwegian Criminal Cases Review Commission also has discretion to make its hearings public. Ulf Stridbeck & Svein Magnussen, *Opening Potentially Wrongful Convictions—Look to Norway*, 58 CRIM. L.Q. 267, 271 (2012).

81. N.C. GEN. STAT. § 15A-1468(e). For transcripts of the cases that have been referred to date, see *Cases*, INNOCENCECOMMISSION-NC.GOV, <http://www.innocencecommission-nc.gov/cases.html> (last visited July 9, 2017).

82. N.C. GEN. STAT. § 15A-1469(a).

83. *Independent Commission*, *supra* note 63, at 286.

84. N.C. GEN. STAT. § 15A-1469(h).

Table 1: The Post-Conviction Review Bodies Compared

Statistics	NCIIC	SCCRC	CCRG
Applications	1724 (2007–2015)	1594 (1999–2015)	272 (2002–2015)
Applications annually (approx.)	205 (0.7% of convicted persons)	100 (0.1% of convicted persons)	21 (0.008% of convicted persons)
Referral rate	11 convictions (0.64%)	71 convictions (4.5%)	16 convictions (5.8%)
Success rate (of determined cases) ⁸⁵	9 convictions quashed (90%)	33 convictions quashed (48%)	13 convictions overturned (93%)

A. Application Rates

Of the three bodies, the NCIIC has the highest application rate, which is perhaps not surprising given that a number of the factors known to contribute to wrongful conviction—such as ineffective defense representation and substantial incentives offered to induce guilty pleas—are particularly pervasive in the U.S.⁸⁶ In its most recent annual report, the NCIIC reported that it received 1,837 applications since the Commission’s creation: 1,724 cases have been concluded,⁸⁷ and the “Commission receives an average of 205 claims each year”⁸⁸ (an annual application rate of approximately 0.7% of convicted persons).⁸⁹ The SCCRC’s application rate is considerably lower. As of March 31, 2015, the

85. The percentage figures in this row do not take account of cases that are yet to be determined.

86. JAMES CHALMERS & FIONA LEVERICK, CAUSES OF WRONGFUL CONVICTION, in POST-CORROBORATION SAFEGUARDS REVIEW: REPORT OF THE ACADEMIC EXPERT GROUP 30, 39 (James Chalmers, Fiona Leverick & Alasdair Shaw eds., 2014), available at <http://www.gov.scot/Resource/0046/00460650.pdf> [hereinafter CAUSES OF WRONGFUL CONVICTION].

87. N.C. INNOCENCE INQUIRY COMM’N, 2015 ANNUAL REPORT 7 (2016).

88. This figure was provided in the previous year’s annual report. N.C. ANNUAL REPORT, *supra* note 65, at 9. It was omitted from the latest report but remains broadly similar.

89. In 2013–14, the number of persons convicted of a felony in North Carolina was 28,130. N.C. SENTENCING AND POLY ADVISORY COMM’N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS, FISCAL YEAR 2013/14, at 3 (2015), available at http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy13-14.pdf.

SCCRC had received 1,594 applications for review of a conviction,⁹⁰ which over the 16 years of the SCCRC's operation is roughly 100 applications for conviction review per year (an annual application rate of 0.1% of convicted persons).⁹¹ The CCRG, however, has by far the lowest application rate of the three bodies. In the 13-year period between 2002 and 2015,⁹² the CCRG received 272 applications, which equates to around 21 applications per year (an annual application rate of approximately 0.008% of convicted persons).⁹³ The reasons for the low rate of applications cannot be known for sure, but a lack of awareness or sufficient knowledge about the scheme, the opaqueness of the criteria for review, and a lack of confidence in the impartiality of the Minister are likely factors.

B. Referral Rates

While it has by far the lowest application rate, the CCRG has the highest rate of referral of the three bodies. Of the 272 applications, 16 resulted in the Minister concluding that a miscarriage of justice likely occurred, a referral rate of 5.8%.⁹⁴ The referral rate for the SCCRC is similar to that of the CCRG, although it is based on a far greater number of applications. Of the SCCRC's 1,580 conviction review applications that had concluded, the SCCRC has referred 71 of these to the court, a rate of 4.5%.⁹⁵ It is the NCIIC that has by far the lowest referral rate, although,

90. SCOTTISH ANNUAL REPORT, *supra* note 49, at 14 (noting that 2,018 applications were received in total); *id.* at 17 Table 2 (noting that 79% of 2,018 applications, which calculates to 1,594 applications, were for conviction review—the remaining applications were only for review of sentence).

91. In fiscal years 2013–14, the number of persons convicted in the Scottish courts was 105,549. *Criminal Proceedings in Scotland, 2013–14*, GOV.SCOT Table 2a (2014), available at <http://www.gov.scot/Resource/0048/00481722.pdf>.

92. It is not possible to obtain application figures before 2002.

93. For 2013–14, approximately 360,000 cases were concluded in the Canadian adult criminal courts. Of that number, about two-thirds (63%) “resulted in a finding of guilt.” ASHLEY MAXWELL, ADULT CRIMINAL COURT STATISTICS, 2013/2014, at 4, 8 (Sept. 28, 2015) available at <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14226-eng.pdf>.

94. CAMPBELL (forthcoming 2018), *supra* note 44, at 345.

95. SCOTTISH ANNUAL REPORT, *supra* note 49, at 25. It should be noted that the Annual Report refers to 74 convictions having been referred, but personal correspondence with the SCCRC indicated that this figure was an error and that 71 was the correct figure and the SCCRC's website now reflects this. See *Conviction*, SCCRC.ORG.UK (2017), <http://www.sccrc.org.uk/conviction> (last visited July 9, 2017) (listing 74 referred conviction cases).

given the far more stringent standard of review operated by the NCIIC, this is hardly surprising. At the time of writing, 11 convictions had been referred to the court by the NCIIC,⁹⁶ a referral rate of 0.64%.

C. The Outcome of Referred Cases

The NCIIC might refer very few cases, but of the cases it does refer, the vast majority result in the conviction being quashed by the courts. Of the eleven NCIIC referrals, at the time of writing one was still awaiting a hearing. Of the remaining ten, nine convictions were quashed at the court stage.⁹⁷ This equates to a 90% success rate,⁹⁸ though the small numbers involved make the statistic of limited value. All of the exonerated individuals served at least ten years in prison prior to exoneration; four prisoners served over thirty years.⁹⁹

While very few cases ever make it through the CCRG process, most cases that are referred back to the provincial/territorial courts of appeal are successful. Of the sixteen cases referred back to the courts “over a [thirteen]-year period (2002–2015),” four involved the applicant being acquitted at the Court of Appeal or Supreme Court.¹⁰⁰ In the remaining twelve cases, the courts ordered a new trial, but only one applicant was reconvicted (and that was of a lesser charge). Of the remainder, in five cases the proceedings were stayed by the Crown, one had the charges withdrawn, and three cases resulted in an acquittal.¹⁰¹ Overall,

96. Nine cases were referred, but two of these involved two co-accused. *Cases, supra* note 81. In line with the Scottish analysis, the figures for individual convictions are used here rather than the case figures.

97. *NC Innocence Inquiry Commission Case Statistics, supra* note 79. Seven of the referred cases were dealt by the appeals court as appeals against conviction, and three were dealt by the original trial court as motions for appropriate relief. The distinction is unimportant here, as the outcome in all nine instances was that the applicant was exonerated.

98. The one unsuccessful case was the only one where the referral decision was not unanimous. N.C. Innocence Inquiry Comm'n, *State v. Reeves*, INNOCENCECOMMISSION-NC.GOV, <http://www.innocencecommission-nc.gov/reeves.html> (last visited July 9, 2017).

99. *See Cases, supra* note 81 (illustrating the cases of Willie Womble (38 years), Joseph Sledge (38 years), Leon Brown (30 years), and Henry McCollum (30 years)).

100. CAMPBELL (forthcoming 2018), *supra* note 44, at 345–46. Information on these sixteen cases also came with additional help from Nathalie Vautour of the CCRG.

101. In the two remaining cases, the outcome is unknown as they are still before the courts.

this translates into a 93% success rate,¹⁰² though, again, such small numbers make generalization difficult.

The figures relating to North Carolina and Canada stand in contrast to those for the SCCRC. Of the 71 cases referred to the court by the SCCRC, two appeals were abandoned and must be discounted from the analysis. Of the remaining 69 cases, 33 resulted in the conviction being quashed—a “success rate” of only 48%.¹⁰³ While this is considerably lower than the relevant figure for either North Carolina’s NCIIC or the Canadian CCRG, it does need to be understood in the context of the higher number of referred cases and the wider terms of reference of the SCCRC compared to the other two bodies.¹⁰⁴ Unlike the NCIIC and the CCRG, the SCCRC is not limited in its referrals to cases where fresh evidence emerges post-conviction. New evidence is the most frequent ground for referral, but it accounts for only 35% of cases.¹⁰⁵ Even after adding “failure to disclose” cases (a ground of referral that relates closely to the existence of new evidence), the figure only amounts to 50%.¹⁰⁶ Half of the referred cases are referred on other grounds (most commonly errors of law or trial judge misdirection at the original trial)¹⁰⁷ that would not meet the criteria for referral in the Canadian CCRG or in North Carolina’s NCIIC.

VI. THE APPROPRIATE ROLE OF A POST-CONVICTION REVIEW BODY

A. Is Post-Conviction Review Necessary?

An initial question is whether there is a need for post-conviction review at all. Finality is an important value in the legal system and the existence of post-conviction review clearly reduces this.¹⁰⁸ Closure is delayed and increased demands are made on the

102. This does not include the case where the applicant was convicted of a lesser charge as a “success.” If this case was included, the “success rate” would be 100%.

103. This rate has fluctuated over time—over the first ten years, the proportion of conviction referrals where the court quashed the conviction was 60%. Chalmers & Leverick, *supra* note 49, at 616.

104. See *infra* text accompanying note 157 (comparing the referral rates).

105. SCOTTISH ANNUAL REPORT, *supra* note 49, at 21.

106. *Id.*

107. *Id.* at 20–21.

108. Kate Malleson, *Appeals Against Conviction and the Principle of Finality*, 21 J.L. & Soc’y 151, 159 (1994).

public purse.¹⁰⁹ But in the modern era, with the advent of DNA exonerations,¹¹⁰ to the best of our knowledge, no one has seriously argued against the need for *some* form of post-conviction review. It is sometimes suggested that the role of post-conviction reviews should be very limited,¹¹¹ but the need for “closure” is a very weak argument when put against clear and convincing evidence that someone is suffering a deprivation of liberty for a crime they did not commit.¹¹² Such evidence sometimes emerges many years later after the normal appeals process has been exhausted,¹¹³ and justice dictates that there needs to be some sort of right of redress for wrongly convicted persons when this happens.

One such route might be through an executive system of pardons, like the Royal Prerogative of Mercy.¹¹⁴ But it is not appropriate to operate a system where this is the *only* way to deal with claims of wrongful conviction.¹¹⁵ It is a discretionary (and therefore potentially inequitable)¹¹⁶ remedy that lacks transparency¹¹⁷ and is exercised by a member of the executive.¹¹⁸

109. Peter H. Howden, *Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post-Appellate Conviction Review Process*, 21 WINDSOR Y.B. ACCESS JUST. 569, 583–86 (2002).

110. See *supra* note 5 and accompanying text (referring to the Innocence Project).

111. David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1081 (2010); Maiatico, *supra* note 63, at 1373.

112. As noted earlier, in North Carolina, where clear and convincing evidence of innocence is a pre-requisite for exoneration after an application to the NCIIC, two of the exonerated applicants had served over 35 years in prison. See *supra* note 99 and accompanying text (showing the years that cases illustrated).

113. In Canada, for example, Steven Truscott was wrongly convicted for the rape and murder of Lynn Harper in 1959. He received the death penalty, which was later commuted to life imprisonment. Truscott's conviction was finally overturned in 2007 following a conviction review of his case. The Ontario Court of Appeal heard new forensic entomological evidence that indicated a different time of death for Harper, effectively ruling out Truscott as her killer. Truscott (Re), 2007 ONCA 575, ¶¶ 13–40 (CanLII) (available at <https://www.canlii.org/en/on/onca/doc/2007/2007onca575/2007onca575.html>).

114. The Royal Prerogative of Mercy still exists in some form in most common law jurisdictions, including those that have established independent criminal cases review commissions. Jennifer Schweppe, *Pardon Me: The Contemporary Application of the Prerogative of Mercy*, 49 IRISH JURIST 211, 211 (2013).

115. Whether the Royal Prerogative of Mercy might still play a useful role alongside another method of dealing with wrongful conviction claims is a separate issue. See Schweppe, *supra* note 114, at 226 (providing an argument that it does).

116. Trotter, *supra* note 24, at 343.

117. Sue Milne, *The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review*, 36 ADEL. L. REV. 211, 212 (2015).

118. For the importance of independence, see *infra* notes 125–35 and accompanying text (providing further discussion on the importance of independence).

In addition, and perhaps most significantly, the effect of a pardon is not to remove the conviction; its effect is still to imply that the person concerned did something wrong.¹¹⁹ But, as Smith put it, “[w]here a person has been wrongly convicted, he seeks justice and not mercy.”¹²⁰ If an error is made by the criminal courts, the legitimate and just response is to rectify the error by quashing the conviction in question.

The question then arises of whether post-conviction review is something that can be effectively achieved by the courts alone. In South Australia, the introduction of an independent criminal cases review commission was considered, but ultimately the decision was made to establish a new process for out-of-time appeals where fresh evidence of innocence emerges.¹²¹ The convicted person, instead of applying to an independent body or to a Minister, simply applies to the court: the Statutes Amendment (Appeals) Act of 2013 amended the Criminal Law Consolidation Act of 1935 to give convicted persons a second or subsequent appeal in cases where there is “fresh and compelling evidence” of a wrongful conviction and it is in the interests of justice.¹²² But, as critics of the South Australian legislation have pointed out, this is to ignore the difficulties that convicted persons face in trying to obtain fresh evidence of innocence, especially when they are incarcerated.¹²³ As we have seen, the CCRG, SCCRC, and NCIIC all have considerable powers of investigation and resources to investigate claims. This is an important strength of the system in all three jurisdictions and serves to counter—at least in part—the disadvantage the wrongly convicted person faces in terms of having the time, money, and legal powers needed to collect evidence.¹²⁴ It might be countered that such assistance can be provided by volunteer innocence

119. Trotter, *supra* note 24, at 343–44.

120. A. T. H. Smith, *The Prerogative of Mercy, the Power of Pardon and Criminal Justice*, PUB. L. 398, 421 (1983).

121. Rachel Dioso-Villa, ‘Out of Grace’: *Inequity in Post-Exoneration Remedies for Wrongful Conviction*, 37 U. NEW S. WALES L.J. 349, 374 (2014).

122. See *Statutes Amendment (Appeals) Act 2013* (SA) § 7 (inserting section 353A into the Criminal Law Consolidation Act 1935). For discussion, see Milne, *supra* note 117, at 212.

123. Lynne Weathered, *Wrongful Conviction in Australia*, 80 U. CIN. L. REV. 1391, 1409–10 (2012); Bibi Sangha, Robert Moles & Kim Economides, *The New Statutory Right of Appeal in South Australian Criminal Law: Problems Facing an Applicant—Unanticipated Interpretive Difficulties*, 16 FLINDERS L.J. 145, 185 (2014).

124. Barry C. Scheck & Peter J. Neufeld, *Towards the Formation of “Innocence Commissions” in America*, 86 JUDICATURE, Sept.–Oct. 2002, at 98, 104.

projects, but that ignores the superior legal powers that the CCRG, SCCRC, and NCIIC have to compel the production of evidence from individuals and organizations.¹²⁵ Proving innocence is a daunting task, and if a post-conviction review body is to operate effectively, it needs to have the power and resources to investigate individual cases.¹²⁶

B. Is Independence Required?

The next question, if it is accepted that there is a case for a post-conviction review body, is what form that body should take and, in particular, whether its effectiveness requires it to be independent of government. As we have seen, post-conviction review is carried out by an independent body in North Carolina and Scotland. In Canada, however, the ultimate decision on referral is made by the Minister of Justice, albeit advised by the CCRG and its special advisers.

The need for independence is certainly the basis on which some have argued for the establishment of criminal cases review commissions in jurisdictions where they do not yet exist, such as Australia,¹²⁷ most states in the U.S.,¹²⁸ and Canada.¹²⁹ Further, this lack of independence has been proffered as the reason for the

125. On the question of whether there is still a useful role to be played by Innocence Projects in a jurisdiction with an independent post-conviction review scheme, see Stephanie Roberts & Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29 OXFORD J. LEGAL STUD. 43, 45 (2009) (arguing that the Innocence Project and the Criminal Cases Review Commission can work together effectively to assist the factually innocent); Hannah Quirk, *Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer*, 70 MOD. L. REV. 759, 762 (2007) (arguing that the use of the Innocence Project "to do the work of Criminal Cases Review Commission" is dangerous and ill-advised).

126. The difficulty of proving innocence is illustrated by the case of Kenneth Kagonyera, who was exonerated after almost ten years imprisonment, following an application to the NCIIC. He worked with other agencies in an attempt to secure DNA testing prior to his application, but it was only following his application to the NCIIC that this testing (which was to prove his innocence) was carried out. N.C. INNOCENCE INQUIRY COMM'N, REPORT TO THE 2011–2012 SHORT SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA AND THE STATE JUDICIAL COUNCIL 5 (2012).

127. Hamer, *supra* note 11, at 311 (focusing on why New South Wales and Australia should adopt a similar model to the CCRC).

128. See Robert C. Schehr & Lynne Weathered, *Should the United States Establish a Criminal Cases Review Commission?*, 88 JUDICATURE Nov.–Dec. 2004, at 122, 145 (discussing potential approaches in the United States).

129. Four of the six independent commissions of inquiry into the wrongful conviction of individuals held in Canada to date have recommended the establishment of an independent entity such as a criminal case review board to replace the current system. See Walker & Campbell, *supra* note 13, at 197–98 (documenting other recommendations).

low numbers applying to the CCRG in Canada,¹³⁰ as potential applicants with genuine claims may lack confidence that these will be impartially reviewed.¹³¹ Wrongful conviction can sometimes be the result of a State's malpractice, and it is important that a post-conviction review body is free from political pressures in investigating such claims. That said, there is no obvious evidence of actual bias in Canada, where the CCRG has referred cases involving errors on the part of police officers and Crown Attorneys.¹³²

Even if no actual bias exists, perception is still important. As the Sutherland Committee put it, a post-conviction review body needs to “command public confidence: justice should not only be done, but be seen to be done.”¹³³ There is a danger that the Canadian system “does not command the same [level of] confidence [to] potential applicants” (or the wider public) as an independent commission would: the result being that some with genuine claims of innocence are put off from applying.¹³⁴ The appearance of independence is especially important because post-conviction review bodies are almost certainly going to reject the vast majority of claims they receive, given their stringent application criteria (as is evidenced by referral rates in Canada, North Carolina, and Scotland of 5.8%, 0.64%, and 4.5% respectively). Independence helps to secure public confidence that the rejected claims were in fact lacking merit, whereas rejection by a government minister might leave a lingering suspicion that claims are being rejected to cover up state impropriety.¹³⁵ It can also contribute to public confidence not just in the post-conviction review body itself, but also in the wider criminal justice system. If the vast majority of claims are rejected by a genuinely independent body, this is

130. As noted earlier, the CCRG has received only 272 applications over a sixteen-year period, far fewer in comparative terms than the SCCRC or NCIIC. *See supra* Table 1.

131. *See Walker & Campbell, supra* note 13, at 199 (arguing that “the failure to construct a less Ministerial-based system remains inconsistent with the federal government’s aim to increase ‘transparency and accountability’ around the process”).

132. *E.g., Re Walsh*, [2008] NBCA 33.

133. SUTHERLAND, *supra* note 46, at ¶ 5.30.

134. *Independent Commission, supra* note 63, at 288.

135. Mary Kelly Tate, *Commissioning Innocence and Restoring Confidence: The North Carolina Innocence Inquiry Commission and the Missing Deliberative Citizen*, 64 ME. L. REV. 531, 552 (2012); Scheck & Neufeld, *supra* note 124, at 100.

credible evidence that should reassure the public that the police, prosecutors, and courts do get it right most of the time.¹³⁶

C. The Test for Referral and Conceptions of “Innocence”

As we have seen, the three post-conviction review bodies employ very different tests for referral of a case back to the court of appeal. At one end of the spectrum, the NCIIC refers cases only where there is sufficient evidence of factual innocence. What is more, it limits such claims to those who had no involvement in the crime—convicted persons cannot apply on the basis they performed the act but lacked mens rea, that they had a recognized defense (such as self-defense), or that they should have been convicted of a lesser offense. This narrow conception has resulted in a referral rate of only 0.64%, by far the lowest of the three jurisdictions, but a success rate of 90% when the cases reach court.¹³⁷ In Canada, the test is wider. Cases are referred where there exists new and significant information that was not previously considered by the courts, creating a reasonable belief that a miscarriage of justice likely occurred. This would include cases of prosecutorial non-disclosure, but would not encompass claims of errors of law or procedure (such as trial judge misdirection or wrongful admission of evidence). The referral rate of the CCRG is 5.8%, and most referrals have resulted in the conviction being quashed, with a success rate of 93%, although all of this does have to be placed in context of the extremely low number of applications.¹³⁸ In Scotland, the test is wider still. Cases can be referred by the SCCRC on the basis that any arguable ground of appeal exists, including but not limited to the existence of new evidence. The referral rate there is 4.5%,¹³⁹ and half of these cases have been referred on the basis of procedural errors (something that would not be possible in either North Carolina or Canada). However, less than half of the cases referred resulted in the conviction being quashed when the case reached court, with a

136. Graham Zellick, *The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective*, CRIM. L. REV. 937, 950 (2005).

137. *See supra* Table 1 (comparing the post-conviction review bodies).

138. *Id.* (comparing the number of applicants, referral rates, and success rates between the CCRC, NCIIC, and the SCCRC).

139. *Id.* (failing to show the different standards each body follows).

success rate for referrals at 48%,¹⁴⁰ a figure far lower than that of North Carolina or Canada.

What then should the test for referral be? There is no “correct” answer to this question, and to a certain extent the answer must depend on the prevailing legal and political culture.¹⁴¹ The test used in North Carolina is about as narrow as it is possible to envisage, but, it does run the risk of considerable injustice. Those who acted without *mens rea*, or who had a recognized justification defense such as self-defense, cannot apply, but it is difficult to see how they are any less innocent in moral terms than those who can demonstrate that they were not involved in the incident at all.¹⁴² The NCIIC test would also rule out referral if the applicant had fresh evidence supporting a partial defense (such as diminished capacity), and excluding these cases is also an injustice (perhaps not to the same extent as excluding those cases where the applicant should not have been convicted at all).¹⁴³ It is not just the fact of a conviction that is important but also what the conviction is for, both in terms of fair labelling¹⁴⁴ and in terms of ensuring proportionality of punishment.¹⁴⁵

The focus on *demonstrable* factual innocence is also problematic. As Roach has pointed out, on one level, it is appealing because of the “clear injustice”¹⁴⁶ of convicting the factually innocent. Wolitz claims that it “serves an important signaling function to the wider public: it assures state citizens that only the most worthy petitioners, those with clear and positive evidence of innocence, will be exonerated.”¹⁴⁷ It also acts to protect the public by minimizing the risk of factually guilty and possibly dangerous

140. *Id.*

141. Scheck & Neufeld, *supra* note 124, at 101.

142. Christopher Sherrin, *Declarations of Innocence*, 35 QUEENS L.J. 354, 469–70 (2010).

143. By contrast, the SCCRC has referred a number of cases on this basis. *See, e.g.*, Lilburn v. H.M. Advocate [2015] HCJAC 50; Kalyanjee v. H.M. Advocate [2014] HJAC 44. This is also true of the Norwegian Commission and the English CCRC. *See* Ulf Stridbeck & Svein Magnussen, *Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission*, 80 U. CIN. L. REV. 1373, 1385 (2012) (referring to the Norwegian Commission); ELKS, *supra* note 13, at 188 (referring to the English CCRC).

144. *See* James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 MOD. L. REV. 217, 223 (2008) (discussing the history of criminal offense labelling and the effects of over-categorizing crimes).

145. ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* 19 (7th ed. 2013).

146. *Independent Commission*, *supra* note 63, at 299.

147. Wolitz, *supra* note 111, at 1081.

applicants being released into the community.¹⁴⁸ But, as evidenced by the fact that only eleven convictions have been referred by the NCIIC since its inception,¹⁴⁹ this does need to be balanced against considerations of justice to individual applicants. Even for those who are factually innocent, conclusive proof of factual innocence can be very hard to come by because it requires proving a negative.¹⁵⁰ Innocence is, as a former English CCRC Commissioner stated, “damnably difficult to prove.”¹⁵¹ A test requiring proof of innocence benefits primarily those who have DNA evidence at their disposal,¹⁵² but this will not exist in the majority of cases.¹⁵³ The NCIIC itself even recognizes this, stating that in 20% of the applications it rejects there would have been no possible way of demonstrating factual innocence.¹⁵⁴ It may be, of course, that this test was the only one that was politically acceptable in North Carolina and that if a wider test had been contemplated there would have been no way to secure the political agreement needed for the NCIIC’s establishment.¹⁵⁵ A Commission with a very narrow test is better than having no Commission at all, but in terms of securing justice in individual cases, it leaves a justice deficit that is difficult to defend in principled terms.

A more inclusive test is that of the Canadian CCRG where the focus is on fresh evidence that indicates a miscarriage of justice likely occurred (which includes cases of prosecutorial non-disclosure). The formulation of the test can be criticized for its vagueness and the fact that it is a more difficult test to meet than that applied by the court.¹⁵⁶ But it also gives rise to a broader question—should a post-conviction review body restrict its ambit

148. Maiatico, *supra* note 63, at 1373.

149. *Cf.* Zalman’s estimate of a 0.5–1% rate of wrongful conviction in the U.S. See Zalman, *supra* note 22 and accompanying text (estimating a general wrongful conviction rate, based on qualitative analysis).

150. Roberts & Weathered, *supra* note 125, at 58; Weeden, *supra* note 9, at 198.

151. David Jessel, *Innocence or Safety: Why the Wrongly Convicted Are Better Served by Safety*, THE GUARDIAN (Dec. 15, 2009, 5:35 AM), <https://www.theguardian.com/uk/2009/dec/15/prisons-and-probation>.

152. *Independent Commission*, *supra* note 63, at 301.

153. Quirk, *supra* note 125, at 769.

154. *NC Innocence Inquiry Commission Case Statistics*, *supra* note 79.

155. For a discussion of the role of politics in wrongful conviction related law reform, see Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 ALB. L. REV. 955, 964–74 (2014).

156. See WOLCH & MCLEAN, *supra* note 37 and accompanying text (criticizing the high standards that are applied to conviction review as compared to other subsequent court hearings).

to cases where there is fresh evidence, or should it also be possible to refer cases because there was a procedural error (such as a trial judge misdirection or other error of law) affecting the fairness of the applicant's trial? This distinction is illustrated starkly by contrasting the Canadian CCRG with the Scottish SCCRC: 50% of the latter's referrals were referred not because of new evidence emerging, but because of a procedural error.¹⁵⁷

While there may be political considerations that play into restricting the ambit of a post-conviction review body to fresh evidence cases, there are two principled arguments for preferring the SCCRC's approach. The first is that procedural errors, while they cannot provide the proof of factual innocence required by the NCIIC, can certainly cast doubt over the guilt of the person concerned.¹⁵⁸ If, for example, the case against the applicant was based primarily on a confession obtained without the suspect being offered legal assistance and there exists little else by way of evidence, then the applicant's guilt is no longer as clear as it was.¹⁵⁹ Likewise, if the jury was not given a clear instruction about how to evaluate identification evidence against the accused in a case where the identification evidence was weak, this too casts some doubt on the issue of guilt.¹⁶⁰

The second reason, however, is unrelated to guilt. Permitting a conviction to stand where there is convincing evidence of guilt but there has been a serious error of procedure would arguably harm the integrity of the criminal justice process.¹⁶¹ Integrity and legitimacy are both important if the criminal justice system is to

157. The English CCRC, where the test for referral is broadly similar to that of the SCCRC, also refers a considerable number of cases on "procedural" grounds. See ELKS, *supra* note 13, at 186–90 (reviewing homicide referrals).

158. Roberts & Weathered, *supra* note 125, at 55; Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 324 (2010).

159. See, e.g., *M. v. H.M. Advocate* [2012] HCJAC 157, at ¶¶ 10, 12 (exemplifying a case referred by the SCCRC where a case was solely based on an applicant's confession obtained without legal assistance).

160. See, e.g., *Docherty v. H.M. Advocate* [2014] HCJAC 94, at ¶ 24 (exemplifying a case referred by the SCCRC where the jury instruction lacked instruction to aptly evaluate identification evidence). On the importance of jury instructions concerning eyewitness identification evidence, see Leverick, *supra* note 6, at 555–56.

161. See, e.g., Findley, *supra* note 14, at 1185 (arguing that convictions based on procedural errors are "tremendously significant and legitimate"); BRIAN FORST, *ERRORS OF JUSTICE: NATURE, SOURCES AND REMEDIES* 2–3 (2004).

retain its moral authority to punish and for the public to retain confidence in the system.¹⁶² As Spencer puts it:

the criminal appeal process exists not only to ensure that the factually innocent are not punished, but also to uphold the rule of law. . . . [A] criminal conviction is only acceptable if it carries moral authority, and a decision reached in defiance of the basic rules that society prescribes for criminal investigations and criminal trials does not.¹⁶³

It is not our intention here to enter the debate about whether a conviction should ever be quashed on the basis of a procedural irregularity where there is overwhelming evidence of guilt.¹⁶⁴ There is certainly a case to be made for the *courts* to be able to quash the conviction of a factually guilty person where the procedural irregularity that took place was so serious it calls the integrity of the criminal justice system into question.¹⁶⁵ But it does not necessarily follow that it should be the role of a *post-conviction review body* to do so.

On one hand, Weeden (a former English CCRC Commissioner) has argued that there *is* a role for the English CCRC in protecting “the general integrity of the criminal justice system.”¹⁶⁶ According to Weeden, the English CCRC

works to overturn not only the wrongful convictions of those who others believe to be innocent, but also the wrongful convictions of those who only may be innocent (though others doubt it) and even, indeed, *of those who, though they seem clearly guilty, have been convicted only after substantial systemic error or wrongdoing.*¹⁶⁷

By contrast, in *Cochrane*, the SCCRC took the stance that it is not appropriate for a post-conviction review body to refer a case

162. Quirk, *supra* note 125, at 761. See generally IAN H. DENNIS, THE LAW OF EVIDENCE 54 (5th ed. 2013) (emphasizing the importance of having strict rules of evidence and adherence to them).

163. John R. Spencer, *Quashing Convictions for Procedural Irregularities*, CRIM. L. REV. 835, 836 (2007).

164. For a collection of essays on this subject, see THE INTEGRITY OF CRIMINAL PROCESS: FROM THEORY INTO PRACTICE (Jill Hunter, Paul Roberts, Simon M.N. Young & David Dixon, eds., 2016).

165. See Spencer, *supra* note 163, at 842–46 (specifying the classes of cases identified).

166. Weeden, *supra* note 9, at 199.

167. *Id.* at 198–99 (emphasis added).

where a procedural error makes no difference to the strength of the evidence against the applicant.¹⁶⁸ Cochrane had applied to the SCCRC claiming that the indictment on which he was convicted was invalid as the facts specified did not constitute a crime.¹⁶⁹ The SCCRC agreed, but declined to refer the case. Relying on the second limb of its test for referral,¹⁷⁰ the Commission argued that it was not in the interests of justice, given the overwhelming evidence that Cochrane had been involved in a criminal conspiracy. Cochrane responded by petitioning the *nobile officium*, an equitable remedy of last resort in Scotland where no other legal options are available. His case was unsuccessful on a technicality, although the court stated that it would also have refused the case on its merits.¹⁷¹ More significant is the explanation of Peter Duff, one of the commissioners involved in the case, who provided a more significant explanation as to why the decision was taken to reject it:

First, the Commission's primary function is to prevent factually innocent people from being punished for offences they had not committed. This was not such a case. Second, an important task of the Commission is to foster confidence in the Scottish criminal justice system and this would not be accomplished by referring, on a pure technicality, the case of someone who was clearly guilty.¹⁷²

168. *Cochrane v. H.M. Advocate* [2002] S.L.T. 1424, at ¶¶ 18–19 (original appeal against conviction); *Cochrane (Petitioner)* [2006] HCJAC 27, at ¶ 9 (petition to the *nobile officium*).

169. He was charged (along with two co-accused) with conspiring to break into a house while his two co-accused went on to break into the property and commit a robbery. Housebreaking on its own is not a crime in Scotland—it only becomes criminal if committed “with an intent to steal,” but this was not specified on the indictment. *Guidance: Relevant Offences List for Scotland*, GOV.UK (Jan. 9, 2016), <https://www.gov.uk/government/publications/relevant-offences-list-for-scotland/relevant-offences-list-for-scotland>.

170. See *supra* note 58 and accompanying text (identifying the grounds for SCCRC referrals).

171. The application was refused as incompetent because in applying to the SCCRC the applicant had already used his remedy of last resort. *Cochrane (Petitioner)* [2006] HCJAC 27, at ¶ 14. The court noted that it would also have refused the application on its merits. *Id.* at ¶ 15. The case is discussed in detail by *Straddling Two Worlds*, *supra* note 13, at 706–09.

172. *Straddling Two Worlds*, *supra* note 13, at 707. Cf. *Carberry v. H.M. Advocate* [2013] HCJAC 101, at ¶¶ 7–8 (identifying where the SCCRC did refer on the basis of a procedural irregularity, the jury in the original trial had accessed potentially prejudicial information about the applicant online, despite noting the strength of evidence against the applicant). The case might be distinguished from *Cochrane*, though, in that the error was one that related to the evidence available at the original trial. It was not, in the words of Duff, a “pure technicality.” *Straddling Two Worlds*, *supra* note 13, at 707.

It is argued here that the approach taken in *Cochrane* is the correct one. While it is undoubtedly true that an important role of a post-conviction review body is to foster public confidence in the criminal justice system, this is not going to be achieved by the referral of cases where there is overwhelming evidence of the applicant's guilt.¹⁷³ A Commission, or other post-conviction review body, sits outside the court system and acts as a body of last resort. It plays a role in fostering public confidence and in upholding integrity in the narrow sense of minimizing the extent to which the system makes mistakes. It does not, however, bear the responsibility of securing the integrity of the criminal justice system where to do so would mean the release into society of a probably guilty (and possibly dangerous) person.¹⁷⁴ It might be said in response that integrity, in the broad sense, can be upheld without necessarily releasing the person concerned. A referral could result in the conviction being quashed, but a retrial (untainted by the original breach) being ordered.¹⁷⁵ But this will not always be possible or appropriate. The breach might have occurred prior to trial (in which case a fresh trial can hardly be said to "cure" it)¹⁷⁶ or the passage of time or other factors may make retrial impossible.¹⁷⁷ But all practical considerations aside, the principle argument playing in favor of a court quashing the conviction of a guilty person where there has been a serious procedural impropriety—that it has lost the moral authority to convict—simply does not apply to a post-conviction review body. A post-conviction review body sits outside the court system. It does not lose moral authority in the same way and by referring such cases runs the risk of serious damage to public support for and confidence in the institution.¹⁷⁸

173. Hamer, *supra* note 11, at 309.

174. Duff, *supra* note 48, at 360.

175. Spencer, *supra* note 163, at 837.

176. *Id.* (giving the example of *Mullen*, a case where the British authorities brought the defendant back into the jurisdiction for trial unlawfully, bypassing the legal extradition procedure).

177. James Chalmers & Fiona Leverick, *When Should a Retrial Be Permitted After a Conviction Is Quashed on Appeal?*, 74 MOD. L. REV. 721, 726–28 (2011).

178. This is aside from any questions as to whether this is an acceptable use of scarce resources.

D. The Cases Eligible for Review

A further question is the scope of a post-conviction review body in terms of whether it considers cases regardless of their seriousness or whether restrictions are placed on its remit.¹⁷⁹ There are no formal limits on the types of cases that can be reviewed by the SCCRC or the Canadian CCRG,¹⁸⁰ although in practice the CCRG has referred only cases on indictment (mostly murder and sexual assault)¹⁸¹ whereas the SCCRC's referrals have included summary cases and covered a broader range of offense categories.¹⁸² The NCIIC is formally restricted to considering applications from those who have been convicted of a felony.

There is a strong argument in favor of permitting a post-conviction review body to consider all types of cases, regardless of their seriousness. Mistakes in summary cases are not necessarily of less impact—conviction for *any* criminal offense carries with it considerable stigma: it is the “the strongest formal censure that society can inflict.”¹⁸³ As Hamer puts it:

For one defendant a first summary conviction may be extremely damaging to career, family and relationships, whereas for another, already in prison on other unchallenged convictions, an additional indictable conviction may make little difference.¹⁸⁴

Having said that, while there is no principled reason for restricting the ambit of a post-conviction review body, where limited resources are available priorities have to be placed somewhere. Both the Scottish SCCRC and the English CCRC have been permitted to investigate summary and indictable cases from

179. There is also the question of whether a post-conviction review body should consider claims relating solely to sentence, but this lies outside the scope of our Article.

180. Initially the CCRG could only review cases originally prosecuted on indictment, but the 2002 amendments to the *Criminal Code* allow those convicted of summary offenses to request conviction review.

181. See CAMPBELL (forthcoming 2018), *supra* note 44, at 400, 400 n.32 (questioning the discretion of “the Attorney General to send a case directly to trial” by way of indictment).

182. See *Conviction*, *supra* note 95 (listing of referred conviction cases).

183. ASHWORTH & HORDER, *supra* note 145, at 1. On the effect of a criminal conviction on subsequent employment prospects, see Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 *CRIMINOLOGY* 387 (2016).

184. Hamer, *supra* note 11, at 309.

the outset.¹⁸⁵ However, it is notable that, in the face of “serious funding constraints,” the UK Parliament’s House of Commons Justice Committee recommended in 2015 that the English CCRC be given a statutory discretion to refuse to investigate cases dealt with summarily.¹⁸⁶ Politics also come into play here. When a post-conviction review body is first being contemplated, there may be something to be said for giving it a narrow scope because this is more politically palatable.¹⁸⁷

There is also the question of whether a post-conviction review body should be able to investigate cases where the convicted person is dead and the application is made by other interested parties such as his or her relatives. This would be ruled out in North Carolina, but it is possible in Scotland and Canada. While no Scottish referrals have been made in such cases to date,¹⁸⁸ in Canada the CCRG has begun (but not completed) a conviction review on the case of Wilbert Coffin.¹⁸⁹ There are two possible arguments in favor of permitting this. The first is that the impact of a wrongful conviction can be considerable for the family of a wrongly convicted person.¹⁹⁰ Although not as directly stigmatizing as being physically incarcerated or directly impacting employment, the indirect stigma and lingering effects on family members of the wrongly convicted persists after the conviction and death of the person concerned.¹⁹¹ Extending the remit to cases

185. This was the case for the SCCRC despite the Sutherland Commission recommending that it be restricted initially to only dealing with solemn cases to ensure the new body was not “overwhelmed.” SUTHERLAND, *supra* note 46, at ¶ 5.59.

186. HOUSE OF COMMONS JUST. SELECT COMM., CRIMINAL CASES REVIEW COMMISSION, 12TH REPORT OF 2014–15 ¶ 39, at 20 (HC Paper No 850, 2015). For discussion, see Michael Zander, *The Justice Select Committee’s Report on the CCRC—Where Do We Go from Here?* CRIM. L. REV. 473, 486 (2015).

187. Hamer, *supra* note 11, at 310.

188. *Cf.* Zellick, *supra* note 136, at 942–44 (noting that the English CCRC has referred cases of deceased people on the application of surviving family members).

189. Wilbert Coffin was hanged in Montreal, Quebec in February 1956 following a conviction for a triple homicide. The conviction rested largely on circumstantial evidence, including the fact that Coffin was the last person to be seen with one of the victims and had many items belonging to them in his possession. CAMPBELL (forthcoming 2018), *supra* note 44, at 133.

190. See Richard Nobles & David Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal*, CRIM. L. REV. 173, 179, 179 n.38 (2005) (noting the unreported case of *R. v. Matten*, where the court apologized to the family of the wrongly convicted person).

191. Adrian T. Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CAN. J. OF CRIMINOLOGY AND CRIM. JUST. 165, 165 (2004); Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful Imprisonment*, 46 CAN. J. OF CRIMINOLOGY AND CRIM. JUST. 139, 139–40 (2004).

where the convicted person is dead can, however, raises difficult issues. As a former chair of the English CCRC noted,¹⁹² the investigation might reveal evidence against another family member¹⁹³ or other information that is embarrassing to the family.¹⁹⁴ It may also be the case that family members disagree about whether an application should be made.

The second argument is that there may be a wider public interest in acknowledging and correcting mistakes made by the justice system, as the Court of Appeal accepted in the case of James Hanratty,¹⁹⁵ referred by the English CCRC after his death. But Hanratty was a notorious case: the public interest is less clear if the case has long since faded from the public memory.¹⁹⁶ The public interest argument is also weaker when the case is not one where the factual innocence of the defendant is clear, for example where the basis for the reference is that the defendant should have been convicted of a lesser charge, rather than not convicted at all.¹⁹⁷ The existence of difficulties such as those referred to above are not in themselves sufficient reason as a matter of principle to exclude cases involving deceased applicants from a post-conviction review body's remit.¹⁹⁸ They do, however, add weight to the argument that if there are scarce resources, the resources may be better directed at exonerating those still imprisoned or living under the stigma of a wrongful conviction, rather than focusing on cases involving the deceased.

192. Zellick, *supra* note 136, at 942–44.

193. *See* R. v. Knighton (deceased) [2002] EWCA Crim 2227 (confirming that it did reveal evidence against other family members).

194. This might, of course, also happen if the convicted person is the applicant, but here the personal benefit to the applicant of his conviction being quashed would be likely to vastly outweigh any of these other consequences.

195. R. v. Hanratty (deceased) [2002] EWCA Crim 1141.

196. *See, e.g.,* R. v. Knighton (deceased) [2002] EWCA Crim 2227 (criticizing the English CCRC for referring the case by the Court of Appeal, given that 75 years had passed since the conviction (and execution) of the defendant).

197. *See, e.g.,* R. v. Ellis [2003] EWCA Crim 3556 (providing that where the CCRC referred the case of Ruth Ellis, the last woman to be hanged in England, on the basis she should have been convicted of manslaughter, not murder). The appeal was refused by the Court of Appeal, who questioned whether the referral was “a sensible use of the limited resources of the Court of Appeal.” *Id.* § 90. The English CCRC remains convinced it was right to make the reference. *See* Zellick, *supra* note 136, at 942 (discussing CCRC concerns).

198. A third possible argument for allowing the review of cases where the convicted person is dead surrounds the notion of human dignity. Given that legal rules can and do affect dead persons, which are in turn influenced by cultural norms and human dignity arguments, it stands to reason that permitting the exoneration of a dead convicted person should be a consideration. *See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 764 (2009).

E. A Role in Systemic Reform?

Thus far, the discussion has focused on the role of a post-conviction review body in relation to individual cases. However, it has been suggested that such a body should play a wider role in terms of lobbying for systemic reform.¹⁹⁹ Neither the CCRG, SCCRC, nor NCIIC have played a substantial role in law reform to date. In North Carolina, there exists a separate body with a remit to make recommendations for systemic reform, the North Carolina Actual Innocence Commission,²⁰⁰ although the NCIIC does cite some examples where its search for missing evidence has led to the identification and rectification of systematic flaws.²⁰¹ In Scotland, there is no standing body charged specifically with making recommendations about the prevention of wrongful conviction, although such recommendations have been made in the context of specific enquiries.²⁰² The SCCRC has occasionally contributed to policy debates, but only to those that have a direct impact on its operations.²⁰³ In Canada, there is also no permanent body charged with making systemic reform recommendations, but there have been seven major ad hoc enquiries into the causes of wrongful

199. See, e.g., Maiatico, *supra* note 63, at 1375–76 (discussing the value of NCIIC's reports).

200. See Mumma, *supra* note 64, at 647–48 (noting the existence of the North Carolina Actual Innocence Commission).

201. N.C. INNOCENCE INQUIRY COMM'N, *supra* note 126, at 5. In one case, “the Commission’s investigation uncovered a systemic problem with a North Carolina police department routinely destroying evidence in violation of statute.” *Id.* In another, the Commission’s search for evidence found that evidence collection and storage in a particular sheriff’s department was in disarray and items were not being properly stored. *Id.*

202. See, e.g., those made by the body tasked with identifying safeguards against wrongful conviction in the context of government proposals to remove the requirement for corroboration in criminal cases. CAUSES OF WRONGFUL CONVICTION, *supra* note 86, at 38–39.

203. For example, the SCCRC intervened in a debate over whether the Court of Appeal should be given the power to refuse to hear a Commission reference. See James Chalmers & Fiona Leverick, *Substantial and Radical Change: A New Dawn for Scottish Criminal Procedure*, 75 MOD. L. REV. 837, 860–62 (2012).

conviction in specific cases,²⁰⁴ as well as two broad reviews,²⁰⁵ all of which have made recommendations for reform.

It was never envisaged that any of the CCRG, SCCRC, or NCIIC would have a systemic reform role,²⁰⁶ but such a role was envisaged for the English CCRC by the Royal Commission report that led to its introduction. While the Royal Commission was clear that the “primary function” of the English CCRC should be to consider and investigate individual cases,²⁰⁷ it recommended that it “should also be able to draw attention in its report to general features of the criminal justice system which it had found unsatisfactory in the course of its work, and to make any recommendations for change it thinks fit.”²⁰⁸ In reality, the English CCRC has done very little in this respect,²⁰⁹ primarily due to limited resources.²¹⁰ Nevertheless, a 2015 parliamentary enquiry recommended that resources be injected to rectify the situation.²¹¹

204. Six focused primarily on the lessons that could be learned from individual cases. *See* T. ALEXANDER HICKMAN, LAWRENCE A. POITRAS & GREGORY T. EVANS, *THE ROYAL COMMISSION ON THE DONALD MARSHALL JR., PROSECUTION: DIGEST OF FINDINGS AND RECOMMENDATIONS 1–2* (1989); FRED KAUFMAN, *COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN: REPORT* (1998); MANITOBA JUSTICE, *THE INQUIRY REGARDING THOMAS SOPHONOW: THE INVESTIGATION, PROSECUTION AND CONSIDERATION OF ENTITLEMENT TO COMPETITION* (2001); THE LAMER COMMISSION OF INQUIRY PERTAINING TO THE CASES OF RONALD DALTON, GREGORY PARSONS AND RANDY DRUKEN, *REPORT AND ANNEXES 1* (2006); LESAGE, *supra* note 44, at 1–5; EDWARD P. MACCALLUM, *REPORT OF THE INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD* (2008). The seventh was an investigation of forensic pediatric pathology services in Ontario following a number of wrongful convictions caused by evidence given by a particular expert witness. *See* STEPHEN T. GOUDGE, *REPORT OF THE INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO 3–5* (2008).

205. Both were undertaken by the Federal/Provincial/Territorial (FPT) Heads of Prosecutions Committee Working Group. *See* FPT HEADS OF PROSECUTIONS COMM. WORKING GROUP, *REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE*, Foreword (2005); FTP HEADS OF PROSECUTIONS SUBCOMMITTEE ON THE PREVENTION OF WRONGFUL CONVICTIONS, *THE PATH TO JUSTICE: PREVENTING WRONGFUL CONVICTIONS ix–x* (2011).

206. The issue was not addressed in the Sutherland Report, the report of the body that recommended the establishment of the SCCRC. *See* SUTHERLAND, *supra* note 46. There would have been no real need for this in North Carolina where a body devoted to systemic reform already existed.

207. ROYAL COMM’N ON CRIM. JUST., *supra* note 8, at 184.

208. *Id.* at 185.

209. Carole McCartney & Stephanie Roberts, *Building Institutions to Address Miscarriages of Justice in England and Wales: “Mission Accomplished?”*, 80 U. CIN. L. REV. 1333, 1359 (2012).

210. Zellick, *supra* note 136, at 939.

211. HOUSE OF COMMONS JUST. SELECT COMM., *supra* note 186, at ¶ 53. It may well be taking heed of this. Since this report was published, it has responded to a consultation on the appropriate sentence where a defendant has pled guilty. *See* SENTENCING COUNCIL (FOR ENGLAND AND WALES), *REDUCTION IN SENTENCE FOR A GUILTY PLEA GUIDELINE* (2016), available at <https://www.sentencingcouncil.org.uk/>

Resources aside, is it a good idea as a matter of principle for a post-conviction review body to play a role in systemic reform? Working to improve the safeguards against a wrongful conviction in a particular jurisdiction is certainly important, and a body charged with reviewing individual cases might be seen as well placed to develop an understanding of the factors contributing to this.²¹² But the insights likely to be generated should not be overstated. All of the cases seen by a post-conviction review body are historic and some of them will stem from a considerable time ago. As such, the legal issues they raise may already be well known or addressed.²¹³

There are also other reasons why a post-conviction review body may not be the best to engage in systemic reform work. If such a body intervenes too readily in policy issues this might pose a threat to its impartiality that affects its relationship not only with the courts,²¹⁴ but also with the police and prosecutors who might perceive the review body as biased towards the interests of the defense. It may also be the case, as Roach has argued,²¹⁵ that the ideal membership of an error correction body is not the same as that of a body concerned with achieving systemic reform. Roach suggests that error correction requires at least some degree of legal expertise, as there is little or no point in referring cases that the appeals court will simply reject.²¹⁶ Ensuring such groups have quasi-judicial membership may also be important to add legitimacy to the many rejected cases.²¹⁷

Systemic reform, on the other hand, is easier to achieve if there is broad-based membership from the range of bodies involved in the criminal justice system: police, prosecutors, defense representatives, and victim groups.²¹⁸ Politically, systemic reform

wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf; RESPONSE BY THE CRIMINAL CASES REVIEW COMMISSION (2016), available at <https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1ff6iq11/uploads/2016/06/CCRC-Sentencing-Council-consultation-April-2016.pdf>.

212. HOUSE OF COMMONS JUST. SELECT COMM., *supra* note 186, at 24–25, § 53.

213. Weeden, *supra* note 9, at 203.

214. Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT. L. REV. 89, 114 (2010) [hereinafter *Role of Innocence Commissions*].

215. *Id.* at 121.

216. *But cf. Straddling Two Worlds*, *supra* note 13, at 719–20 (explaining how commission referral of cases can aid the appeals courts).

217. *Role of Innocence Commissions*, *supra* note 214, at 121.

218. *Id.*

helps build consensus to see the proposals through in practice.²¹⁹ However, Roach states that such broad-based membership is inappropriate for error correction as it opens up the possibility of real or perceived conflicts of interest.²²⁰ For rejected applicants in particular it is important that the body is seen as genuinely independent and not partisan towards police, prosecutors, crime victims, or even the judiciary.²²¹ This is, perhaps, a little overstated.

Some reform exercises have certainly stalled due to a failure to build political consensus,²²² but this does not necessarily mean that a reform group must itself always have broad-based membership. There are plenty of examples of reform projects undertaken by narrowly constituted groups that have successfully achieved change.²²³ Likewise, there are also examples of bodies charged with individual conviction review that have broad-based membership and are generally perceived as successful. The SCCRC, for example, has had an ex-police officer as a commissioner without this posing any obvious threat to its relationship with the courts or its perception as an independent institution.²²⁴ The present chair of the English CCRC is a former Chief Executive of the Crown Prosecution Service and while there

219. *Id.*; see also James Chalmers, Fiona Leverick & Shona Wilson Stark, *The Process of Criminal Evidence Reform in Scotland: What Can We Learn?*, in SCOTTISH CRIMINAL EVIDENCE LAW: CURRENT DEVELOPMENTS AND FUTURE TRENDS (Peter Duff & Pamela R. Ferguson eds., forthcoming Nov. 2017) (arguing that presenting governmental reports through the recommendations of a broadly-based review group carries greater weight).

220. *Role of Innocence Commissions*, *supra* note 214, at 121.

221. *Id.* at 122.

222. In the Scottish context, a good example is the attempt to abolish the requirement for corroboration of evidence in criminal cases. This recommendation stemmed from a review of the law of evidence in Scotland led by Lord Carloway, a senior Scottish judge. See THE CARLOWAY REVIEW: REPORT AND RECOMMENDATIONS 313 (2011). The recommendation was accepted by the Scottish Government six years ago, but still has not been implemented. For discussion of Lord Carloway's failure to build political consensus and the impact this had on the progress of the reforms, see Chalmers et al., *supra* note 219, at 2.

223. One example is the work of the Law Commissions in the UK. See SHONA WILSON STARK, *THE WORK OF THE BRITISH LAW COMMISSIONS: LAW REFORM . . . NOW?* (2017).

224. See Leverick et al., *supra* note 62, at ch. 5 (reporting the broad support for the SCCRC among legal practitioners including defence solicitors).

was some disquiet surrounding his initial appointment,²²⁵ there is no suggestion that this has caused any ongoing difficulties.²²⁶

On the other hand, a body concerned primarily with the review of individual applications is perhaps not ideally situated to keep the entire system under review. Roach is correct to suggest that this is better achieved at one step removed, by a body or advisory panel affiliated to a post-conviction review body.²²⁷ Such a body could advocate for change without undermining the error correction work undertaken by its sister organization.²²⁸ This approach is an attractive one, although given that a post-conviction review body may come across systemic problems in the course of its review of individual cases,²²⁹ it would make sense for the two bodies to work side by side and inform each other's operations. In taking precisely this approach, despite its other flaws, there is much to be said for the system implemented in North Carolina.

It is also important, though, that whatever approach is taken there is some mechanism for monitoring the extent to which any recommendations made are put into practice. Much is already known about the causes of wrongful conviction²³⁰ and none of the three jurisdictions examined here are immune from criticism in terms of practices in which they continue to engage in that have been shown to increase the risk of wrongful convictions occurring, despite recommendations having been made to the contrary.²³¹

225. See, e.g., Michael Naughton, *Justice Must Be Seen to Be Done*, THE GUARDIAN (Nov. 20, 2008, 2:00 EST) <https://www.theguardian.com/commentisfree/2008/nov/20/justice-law> (appointing a former “chief executive of the Crown Prosecution Service, as well as his wealth of other senior positions” seemed “to be counterintuitive for a body that the public believes was established to overturn the wrongful convictions of innocent people”).

226. No mention of it was made. See, e.g., HOUSE OF COMMONS JUST. SELECT COMM., *supra* note 186 (giving evidence to the 2015 House of Commons Justice Select Committee for review).

227. *Independent Commission*, *supra* note 63, at 296.

228. *Role of Innocence Commissions*, *supra* note 214, at 119.

229. See *supra* note 201 and accompanying text (citing examples from North Carolina).

230. See *supra* note 5 (discussing the works of the Innocence Project and the National Registry of Exonerations).

231. In Scotland, for the use of dock (in court) identification, see e.g., PAMELA FERGUSON, *Eyewitness Identification Evidence*, in POST-CORROBORATION SAFEGUARDS REVIEW: REPORT OF THE ACADEMIC EXPERT GROUP 44, 50–53 (James Chalmers, Fiona Leverick & Alasdair Shaw eds., 2014). In Canada, for the use of coercive interrogation techniques when interviewing suspects, see generally e.g., Lesley King & Brent Snook, *Peering Inside a Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics, and Coercive Strategies*, 36 CRIM. JUST. & BEHAV. 674 (2009); Brent Snook, Joseph Eastwood, Michael Stinson, John Tedeschini & John C. House, *Reforming Investigative*

VII. CONCLUSION

Post-conviction review is a necessary part of the criminal justice system when it is faced with wrongful convictions. The DNA revolution of the previous three decades has clearly demonstrated that the police, prosecutors, juries, and judges sometimes get it wrong; the National Registry of Exonerations, for example, lists 1,729 known exonerations of convicted persons across the U.S., many of which have been exonerated years (or even decades) after the original proceedings concluded.²³² These numbers alone underscore the importance of having some sort of process, operating outside of the regular court system, to address such miscarriages of justice. While one option might simply be to permit out-of-time appeals where fresh evidence of innocence emerges, as has been done in South Australia, this neglects the need for a body with the power and resources to uncover such evidence in the first place.

Establishing that there is a need for some form of post-conviction review body is, however, only the starting point. The three post-conviction review schemes examined in this Article differ in a number of important respects and comparing these different approaches has allowed us to draw several conclusions about the proper role of such bodies. The first is that independence from government is fundamental—ideally outright independence, but if not, then certainly some form of externality. While actual bias has not been demonstrated at the CCRG (which is in effect a government body amongst the three schemes discussed), the perception of independence is particularly important. The absence of independence, as it is suggested here, is a real barrier to justice in the Canadian context, and may account for the very low numbers of applications for review compared to those at the independent SCCRC and NCIIC. To be effective, it is also important that a post-conviction review body is sufficiently resourced, so that it can undertake its own independent investigations, and has wide powers to compel evidence. All three of the post-conviction review schemes examined here have the resources to investigate claims and also have considerable powers

Interviewing in Canada, 52 CAN. J. OF CRIMINOLOGY AND CRIM. JUST. 215 (2010) (advocating for adoption of an inquisitorial interviewing method known as PEACE).

232. See *supra* note 5 and accompanying text (discussing the NRE's findings).

to obtain evidence. This is an important strength of the system in all three jurisdictions and serves to counter—at least in part—the disadvantage the wrongly convicted person faces in terms of having the time, money, and legal powers needed to challenge a wrongful conviction.

The second conclusion is that restricting the ambit of a post-conviction review body to cases in which fresh evidence of innocence emerges is to unjustly narrow its ambit. The three schemes examined here operate under different tests for referral, which in turn affect their respective referral rates (0.64% at the NCIIC; 4.5% at the SCCRC; 5.8% for the CCRG). The narrowest is that of the NCIIC, which requires proof of actual innocence and excludes cases in which the applicant lacked mens rea, had a justification defense, or should have been convicted of a lesser offense. Unsurprisingly it refers only 0.64% of the applications it receives. It is not difficult to see that such narrow criteria are a cause of injustice, although they may have been necessary to achieve the political consensus to establish the scheme at all. The CCRG's test for referral is wider, but is still limited to cases in which fresh evidence emerges, a limitation we argue is also unjust, given that procedural irregularities can themselves cast doubt on the safety of a conviction. The SCCRC can refer cases where there has been a procedural irregularity—such as a trial judge misdirection about the definition of the crime or the manner in which the evidence should be evaluated—and it is right that it is able to do so. This should not, however, extend to the referral of cases where the procedural error casts no doubt on the safety of the conviction. It is not, we argue, the proper role of a post-conviction review body to uphold the integrity of the criminal courts. Such a body sits outside the court system and its concern should be with factual innocence—procedural errors are relevant only to the extent that they suggest an applicant might have been wrongly convicted.

It also has to be said that the test for referral cannot be considered entirely in isolation. In referring cases, all three of the schemes are bound by what the courts will accept as evidence of innocence. While the referral rate for each of the schemes is relatively low, the “success rates” for the cases actually referred to the courts following review are much higher. The NCIIC and CCRG have a success rate of over 90%, which is perhaps not surprising given the stringent tests that cases must satisfy to be

referred by these two bodies (indeed the test applied by the CCRG is more difficult to satisfy than that for the subsequent appeal against conviction). The SCCRC's success rate is lower, at 48%, but aside from one referral from the early days of its operation,²³³ there is no evidence that it is doing anything other than attempting to apply the same test as the court would in determining the appeal.²³⁴ It is just that the wider basis on which it can make referrals means that it is harder to predict the attitude the courts will take towards a case. All of this, however, raises much broader questions about whether the system of appeals against conviction is expansive enough to provide justice to all those who deserve it or whether some of the strict rules governing, for example, the admissibility of fresh evidence, ought to be relaxed.²³⁵

The third conclusion is that the harm of wrongful conviction is not limited to those who are currently incarcerated, those who have committed serious offenses, or even those who are no longer living. Wrongful conviction for even a minor offense can have a seriously stigmatizing effect on one's life and on the integrity of the criminal justice system. It can continue to blight the lives of relatives of a wrongfully convicted person even after his or her death. There is a principled case to be made for these errors to be within the remit of a post-conviction review body too, although practical considerations of cost and the scarce use of limited resources may mean that this is not always achievable.

Finally, the fourth conclusion drawn is that while these schemes have a specific mandate to investigate wrongful convictions, they may not be best placed to engage in systemic reform work. Post-conviction exoneration, while onerous and limited, serves an important function for addressing wrongful convictions. This is not to neglect the parallel need to identify and

233. See *Harper v. H.M. Advocate* [2005] SCCR 245; *Straddling Two Worlds*, *supra* note 13, at 714–18 (providing a discussion of the case).

234. See *Chalmers & Leverick*, *supra* note 49, at 621 (examining the Commission's sentence review function).

235. See, e.g., the strict conditions governing admissibility of new evidence in Section 106(3A)–(3D) of the Criminal Procedure (Scotland) Act of 1995. This broader question lies beyond the scope of this Article, which is concerned with the operation of post-conviction review bodies rather than the system of appeals against conviction more generally, but see e.g., *McCartney & Roberts*, *supra* note 209, at 1352–53; Michael Naughton, *The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System*, 58 CRIM. L.Q. 207 (2012) (presenting arguments, in general, that the requirement of presenting fresh evidence is contrary to the normal operation of the criminal justice system).

implement reforms within the criminal justice system to minimize the potential for wrongful convictions to occur in the first place.²³⁶ The causes of wrongful conviction are well known, but there is still work to be done in all three of the jurisdictions examined here to “bullet proof” the system to guard against these. This work, while it would benefit from being informed by the work of a post-conviction review body, may be better suited to a separate institution with a broader based membership.

236. *See, e.g.*, McCartney & Roberts, *supra* note 209, at 1359 (providing the downfalls of the CCRC and its predecessors to warn against them).