Should the United States establish a CRIMINAL CASES REVIEW COMMISSION?

The English experience suggests that due process reforms may be stifled, rather than promoted, by the establishment of a CCRC-style institution. Innocence commissions may be a more effective measure for correcting and preventing wrongful conviction in the United States.

by ROBERT CARL SCHEHR and LYNNE WEATHERED
illustrated by MARY CHANEY

In the United States over the past 10 years, post-conviction investigation of cases of factual innocence and exposure of wrongful convictions have, in large part, been the province of innocence projects. Such projects have emerged in the United States, Australia, Canada, and, to a lesser extent, the United Kingdom to investigate claims of factual innocence and miscarriages of justice. The United States now claims innocence projects in 35 states, with 7 states possessing more than one.

While innocence projects have effectively induced exonerations, and through post-mortem case review have exposed American due process to intense scrutiny, they are typically underst-stored, overwhelmed by demand, and relatively powerless to significantly influence statutory changes to due process. A compelling question, then, is: Does there exist an effective alternative to innocence projects—one that operates with the same investigatory vigor and efficacy, is better resourced, and possesses the necessary state-derived legitimacy to make it an effective force for due process change?

In 1995, the United Kingdom created the Criminal Cases Review Commission (CCRC) to address miscarriages of justice. The model has spawned notable interest in the United States, Australia, Norway, New Zealand, and Canada. To inspire debate within the American legal community concerning the potential efficacy of creating such an institution in the United States, this article introduces readers to the CCRC, outlines some of the current criticisms, and considers possible implications to American due process.
A brief CCRC history

The CCRC was established by Parliament under the Criminal Appeal Act of 1995 following recommendations from the 1993 “Runciman Commission,” a royal commission charged with investigating how effectively the English criminal justice system secured convictions of the guilty while ensuring acquittals of the innocent.

By its own account, the CCRC is an independent body charged with the thorough, impartial, open, and accountable investigation of suspected miscarriages of justice in both convictions and sentencing in England, Scotland, Wales, and Northern Ireland. The depth of the commission’s investigative powers enables it to actively investigate miscarriage-of-justice claims before a decision is made on whether or not to refer the case to the appeal courts. The commission, which rarely accepts cases that have not previously been appealed, investigates matters where a miscarriage of justice or wrongful conviction has been alleged and is not restricted to innocence-based applications. In fact, “innocence” is not one of its concerns. As such, investigations that lead to non-referral of cases are considered successes since they confirm the validity of the original conviction—Valid and validate the CCRC’s role of maintaining confidence in the criminal justice system.

Before the CCRC was established, post-appeal applications in the U.K. were submitted to the Home Secretary’s Criminal Cases Unit (CCU), where, in a similar manner to the provisions previously operating in Canada and currently operating in Australia, the executive body determined whether to refer cases to the Court of Appeal. Under the old system, few cases reached the Court of Appeal. This changed significantly with the establishment of the CCRC.

As of March 2003, the CCRC had received more than 5,500 applications. Of those completed, 196 (4 percent) were referred to the Court of Appeal on the basis of conviction and sentencing appeals. Of the conviction referrals, 77 (64 percent) were quashed, and 44 (36 percent) were upheld.

Expanded appeal provisions in England allow the CCRC to refer claims of wrongful conviction to the Court of Appeal (or, in cases of a Magistrates’ Court conviction, the Crown Court) when there is a real possibility of overturning the conviction because:

- An argument was not raised in the court proceedings;
- Evidence was not presented to the court;
- Other exceptional circumstances were present.

Criticism of the CCRC

For critics of the administration of justice in Britain, the appearance of the CCRC signalled parliamentary acknowledgment of the failure of due process. Widely publicized exonerations of the Maguire Seven, the Tottenham Three, the Cardiff Three, Stefan Kiszko, Judith Ward, the Darvell brothers, the Taylor sisters, and the Birmingham Six signified the need for structural changes that would lead to safe convictions.

The CCRC was heralded as a significant institutional safeguard. That said, evaluation of its efficacy has raised serious concerns. In one of the few critical assessments of the CCRC, Nobles and Schiff identify the following key characteristics that generate serious impediments to the CCRC’s ability to perform its oversight role:

- The subordinate structural relationship of the CCRC to the Court of Appeal;
- No objective determination of what constitutes a thorough investigation;
- The role of caseworkers in screening viable cases for review;
- The limited amount of time for case review;
- Limited resources to fully investigate cases and over-reliance on petitioners to generate grounds for appeal; and
- Limitations on case investigation to meet fresh evidence standards.

Some of these criticisms, along with additional considerations regarding the application of a CCRC-style establishment to other countries, in particular the United States, are discussed below.
Subordinate role of the CCRC.

Some critics view the CCRC's statutorily mandated subordination to the Court of Appeal as a significant problem. The paramount supremacy of the Court of Appeal to determine when a miscarriage of justice has occurred places the CCRC in the position of having to anticipate whether the Court of Appeal will consider cases under review by the CCRC as ripe for appellate review. That is, the CCRC "has no power to declare miscarriage on the basis of its own standards," but rather must filter petitions through the lens of court precedent set out in sections 9 and 10 of the Criminal Appeal Act of 1995.11

Specifically, only those cases for which a "real possibility" that "conviction, verdict, finding or sentence would not be upheld" may be submitted to the Court of Appeal for review.12

In situations where the CCRC and Court of Appeal disagree with regard to case merits, the Court of Appeal has the final word. The CCRC appears bound by this legislative and judicially endorsed restriction, but innocence activists have expressed concern that its anticipatory approach results in an overly deferential, rather than proactive, position.13

Investigative and referral procedures. The investigative powers of the CCRC appear enviably wide. These powers include "unrestricted access to any documents or other material in the possession of a public body that may assist in the exercise of the commission's functions." 14 However, the demands of achieving budgetary efficiency and reducing delays in processing requests, in conjunction with the structurally embedded subordination to the Court of Appeal, result in a dilution of these powers. CCRC caseworkers make an initial review of petitions and discard all cases not appearing to meet appellate review standards. They must work quickly, typically spending no more than a few days on each petition.15

In an effort to speed up the review process, the information caseworkers need to conduct an evaluation of cases has been restricted. To make an initial judgment on the merits of a petition, caseworkers have access to "judicial summary statements at the trial stage, the court of appeal file, documents preserved under Section 17 of the Act, and unused police and Crown Prosecution Service documents and other materials."16 Following a brief few days of consideration, a caseworker's decision not to proceed is referred to a commissioner, who can quash any further consideration of it.

This is a significant point, one raised by CCRC detractors as a conservative structural bias that will inevitably lead to far fewer cases being recommended for appellate review than might otherwise be the case. According to the 1995 founding statute, three commissioners are required to review case materials and agree to the merits of cases recommended for review by the Court of Appeal. To end any further consideration of a case, however, requires the participation of only one commissioner.

The CCRC is the essentially lone gateway to the Court of Appeal, past the one typical appeal allowed in England. A single commissioner is, in the majority of cases, the ultimate decision maker regarding an applicant's case and, as such, has extraordinary power.17 Given this reality, the composition of the commission (and the caseworkers who report to them)—along with any personal biases that members bring to their positions—is highly relevant to outcomes for applicants. The English legislation requires at least two-thirds of the commission members to have some knowledge or experience of the criminal justice system (and onethird to be legally qualified). One-third need have no legal qualification or knowledge of the criminal justice system.18

When compared to the time it takes U.S. and Australian innocence projects to review cases, it is difficult to imagine how thoroughly the CCRC can review a case in a matter of only days. For example, the Innocence Project at Cardozo Law School, which limits its caseload to DNA cases, takes on average six years to complete a case review. For those cases where there is no apparent physical evidence (roughly 75 percent), and where convictions were based on eyewitness testimony, snitches, circumstantial evidence, and/or false confessions, the time frame for review of the complete trial, sentencing, and appellate record can be considerably longer.19

In addition, CCRC caseworkers do not have access as a matter of course to the trial transcripts, only the judicial trial summary. Since their governing statute limits case referral to those cases where there is newly discovered evidence, the CCRC has interpreted that to mean they "are usually only interested in what did not happen, rather than what did."20

Should the CCRC require trial transcripts, it can request access to them. However, unlike the U.S. court system, court transcripts in England, Wales, and Northern Ireland are generated by private companies that sub-contract with the British government. An August 2004 change to the contracts with these companies requires them to retain all transcripts of cases under investigation by the CCRC—yet when cases are received by the CCRC after the contractually mandated time frame for retention of all trial transcripts, there may be no transcripts to review.

In addition, 90 percent of all con-
victims take place in the Magistrates’ Courts, where “there is no requirement for any verbatim record … in the summary proceedings” — leaving CCRC caseworkers to imagine what happened at the trial stage based on a relatively limited set of investigatory materials. While U.S. innocence projects must also find newly discovered evidence for post-conviction review, reading trial transcripts is an invaluable process that reveals witness testimony, jury instructions, police reports, use of informants, introduction of physical evidence, and the like. Trial transcripts may actually reveal new leads, new witnesses to interview, and new evidence to test.

When the CCRC makes the decision to move forward with an investigation, it typically takes three years to complete a case, although it can take as little as several months. The CCRC’s powers to obtain information may be a factor in its ability to review cases in significantly less time than innocence projects, where access to information and evidence is typically hard fought. However, compared to the experiences of innocence projects in the United States and Australia, these lengths of time seem too brief to generate the kind of insight necessary to win cases on appeal.

**Impact on due process reform.**
Continual vigilance is required of any criminal justice system that desires to ensure the safety of its convictions. One of the reasons the CCRC was introduced was the crisis of confidence in Britain’s criminal justice system brought about by the number of high-profile miscarriages noted earlier. While the CCRC has not itself undertaken activities to examine the causes of wrongful conviction in its successful appeals, nor has it recommended any reforms in due process to prevent wrongful convictions from occurring, its establishment has ameliorated the crisis of confidence and, perhaps more disturbingly for some activists in England, silenced the critical voice that once existed. It is important to note that the CCRC’s role and ambit extend far beyond investigating and referring possibly wrongful convictions to the Court of Appeal—part of its scope is to help ensure confidence in the criminal justice system. According to Nobles and Schiff, this was partly ensured at the moment of the CCRC’s creation, when it was granted the “ability to achieve more than its predecessor: to investigate more cases, more fully, and make more referrals.”

The mere existence of an independent body to investigate claims of wrongful conviction, combined with its low referral rate of approximately 4 percent to the Court of Appeal, has arguably increased public confidence in the safety of England’s criminal justice system.44 However, it may also create the false public perception that those cases not approved for review by the CCRC must be safe convictions. The further potential consequence is the public perception that because there is no longer a crisis with the criminal justice system, there is no need for due process reform. An originally perceived role of the CCRC was to examine causes of wrongful conviction with the potential for due process reforms to follow, but to date neither has occurred.

**What is best?**

The uncovering and correcting of wrongful convictions through DNA exonerations, as has occurred in the United States, highlights the need for due process reforms. It is the view of one of the authors (RCS) that creating a CCRC-type institution in the United States would be an unwise institutional response to the vagaries of due process—one likely to seriously inhibit the momentum generated by innocence projects with regard to exoneration and public policy changes. It is the view of the other author (LW) that establishing a corrective body such as the CCRC need not produce the negative consequences noted above. However, if a corrective body similar to the CCRC were to be established, it should not be perceived as the solution to the problem of wrongful conviction, but continued on page 145

---

21. Id.
22. Souter, n. 7 at 670. Speaking for the CCRC at the 2004 UK innocence conference in Bristol, England, John Wraggstaff indicated that the CCRC typically took four years to complete a case review.
24. As it turns out, public confidence in those institutions responsible for the administration of justice in the U.K. has waned with each exonerations. A BBC poll of 1,000 adults conducted in January of 2001 indicated that as a result of recent miscarriages of justice, 52 percent of those polled indicated that they no longer had confidence in the British judicial system. An even larger percentage—62 percent—indicated that not enough has been done to “ensure miscarriages wouldn’t happen in the future.” Action Urged Over Miscarriages of Justice, BBC News Online, Feb. 1, 2001.
25. This is a source of much more profound criticism than has yet been leveled against the CCRC, and by extension, British Parliament. While space limitations prohibit thorough articulation of this point, it is important to note that creation of multilayered state institutions are often inspired by public disaffection with one or other state actors (e.g., economy politics, media, education, religion, criminal justice). These state actors are referred to as strategic state selection mechanisms (Jessop, Bonnet, Bromley, and Ling, **Teatmentism: A Tale of Two Nations** (Cambridge: Polity Press, 1988); Schmitter, From Resistance To Transformation: Victim Offender Mediation as Transformative Justice 18 MEDIATION Q. 151-169 (2000)). State selection mechanisms provide key Paralyzing institutional responses necessary to stimulate stability. Thus, it is the view of RCS that manipulation of the state responsible for the administration of justice generates a legitimacy crisis for the CCRC as a way to placate a legitimacy crisis that fomented in media reports of widely publicized exonerations and failures of due process. Together, RCS and LW have presented evidence that a) the CCRC has not attempted to address the causes of wrongful conviction, and b) that there are compelling reasons to question the efficacy of the CCRC as a real vehicle for improving the administration of justice given its subordinate position relative to the Court of Appeal. For RCS, when placed in the context of the state selection mechanisms this should come as no surprise.

Innocence projects in the United States are the antithesis of a CCRC. Innocence projects operate at the micro level, are relatively autonomous, receive access to trial transcripts, appellate documents, sentencing reports, and police forensic reports, and have the capacity to not only generate exposure of wrongful convictions, but advocate for policy changes to due process. Creation of a CCRC would, if established in a way similar to the British model, force innocence projects to work under its guiding statute.

Finally, the British experience provides the U.S. with an interesting if inverted historical comparison. Unlike the U.S. which started with innocence projects that have now proliferated across the country, the British began with the CCRC. The CCRC is an institutional obstacle facing our colleagues in the U.K. who are attempting to generate an innocence movement because they are forced to find a way to work within the confines of the CCRC’s guiding statute, and without access to the trial record.

It is for these reasons, couched in an analysis of state theory and volumes of empirical evidence pertaining to other state sectors, that RCS believes the CCRC in the United States would seriously dilute the momentum generated by innocence projects.

26. LW’s views are influenced by and directed at her Australian experience. While she does not wish to suggest what is appropriate for the United States, she shares the concerns raised in this article in a global context. Her support of a CCRC-style body was originally inspired by the prospect that it would provide much needed investigation into claims of wrongful conviction, with referral to the...
more to his clerks. In the years since our clerkships, our appreciation of the judge, and of our time working for him, have only deepened. Many of us continued to call and correspond with the judge, looking forward to his wise, warm, and witty words.

A few years ago, many clerks and other court family gathered to celebrate the judge’s birthday, and we all sported bow-ties in imitation of his trademark style. Though the gesture was made for fun, it was also an acknowledgment of the more serious ways in which his clerks do truly aspire to the judge’s example, in the way we practice law and live our lives. We continue to do so, and are just one more small part of Judge Arnold’s lasting legacy.

Executive Director’s Report

(continued from page 109)

appointment to the bench, Judge Johnson taught at Drake University Law School.

Linda Neuman became Iowa’s first woman member of the Iowa Supreme Court in 1986, five years after Sandra Day O’Connor became the first woman justice on the United States Supreme Court. In 2003, Justice Neuman returned to private practice. She is also teaching at the University of Iowa Law School.

Patricia Houlihan was appointed to a district associate judge position in 1991 and retired from that position in 2000. After serving in the Peace Corps, she returned to Iowa where she is now an assistant attorney general. Judge Houlihan has taught at Drake University Law School.

Linda Reade was appointed a district court judge in 1993. She served in that capacity until November 26, 2002, when she was appointed by President George W. Bush to the United States District Court for the Northern District of Iowa. Judge Reade has taught at Emory Law School and Drake University Law School.

While these early women jurists had great intellect and remarkable spirit, it is important to keep in mind that they were not superwomen. Instead, they were women who were given an opportunity to serve and they did so with honor and distinction. Today Iowa has 41 women appellate and district court judges, including Iowa Supreme Court Justice Marsha Ternus, and Chief Judge Rosemary Shaw Sackett, Judge Anuradha Vaitheswaran, and Judge Gayle Nelson Vogel of the Iowa Court of Appeals.

If you are interested in honoring the former women judges of your jurisdiction, please contact me. I would very much like to see this idea spread across our great nation.