The Legitimacy of Innocence Commissions and Reform Entities: A Comparative Perspective

The last three decades have seen the rise of an international innocence movement that has forced participants in diverse criminal justice systems to confront the same fundamental problem: each of these systems is more fallible than previously had been understood at preventing wrongful convictions and catching them once they occur. Each country has responded differently to that realization and to two specific challenges that it presents: first, how should claims of wrongful conviction by those already convicted be reviewed; and, second how should the weaknesses of the criminal justice system revealed by the exonerations be addressed going forward? This short essay examines the experience of three English-speaking countries with common law roots and an adversarial structure – the United Kingdom, Canada, and the United States. Consistent with what theoretical literature on institutional change suggests, each country has responded to the problem in a manner that reflects the circumstances in which “innocence consciousness” arose and that is consistent with each country’s underlying institutional arrangements and cultural frames. Analysis of the experience of these three countries offers valuable insights for reformers other countries considering how to respond to the common problem of wrongful convictions.

I. Introduction

The story of the world-wide “innocence revolution” has now been frequently told. For example, in the United States, for centuries the idea that an innocent person could be wrongly convicted was largely a theoretical construct to justify exacting standards of proof and procedural protections for the rights of the accused. Occasionally, scholars pointed to cases suggesting that an innocent person in fact had been wrongly convicted. But it was not until the mid 1990s, when Barry Scheck and Peter Neufeld, former legal aid lawyers in New York City knowledgeable about the fledgling science of DNA analysis, founded the Innocence Project at Cardozo Law School in 1992 and began regularly to exonerate people of crimes for which they had served decades in prison, that wrongful convictions became irrefutable. Suddenly, the “unreal dream” of the wrongfully convicted innocent person was unreal no more. Since 1989, at least 340 people have been exonerated through DNA evidence in the United States alone. Other

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1 As Judge Learned Hand famously wrote in 1923, “Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.” United States v. Garsson, 291 F.646, 649 (D.C.N.Y. 1923).
estimates of the number of wrongful convictions in the United States, including through means other than DNA evidence, put the number at over 1,700. The United States is now home to a network of local innocence projects, many of them non-profits based at law schools, together serving every region of the country. Similar organizations working to free the wrongfully convicted exist around the globe. Many are participants in an international Innocence Network, a loosely affiliated network guided by an Executive Board, with membership organizations in North America, Europe, Africa, and Australia. No legal system appears to be immune from the problem of wrongful convictions.

Not surprisingly, the institutional responses by different legal systems to the reality of wrongful convictions have been varied. Several countries have created new official institutions to address it. In 1995, the United Kingdom became the first Western democracy to create such an entity, when Parliament passed legislation creating the independent Criminal Case Review Commission (“CCRC”) to review cases in England, Wales, and Northern Ireland for potential miscarriages of justice, a standard broader than factual innocence. The CCRC started operations in 1997, charged with reviewing convictions and referring those with “a real possibility” of reversal to the U.K. Court of Appeals. Scotland, which has a separate legal system, established a similar entity, which began operations in 1999. In the United States, where most criminal law is handled at the state and local level, one state, North Carolina, has established a CCRC-type Commission to review claims for factual innocence and several states have established Commissions to study underlying causes of wrongful convictions and make recommendations for reform.

However, the fast-evolving favored entity in the United States is the conviction-integrity unit (CIU) within local prosecutors’ offices. Since 2004, at least 25 local District Attorney’s Offices have established such units to investigate claims of innocence. In Canada, since 1989, several provinces have established limited-term commissions to investigate the causes of wrongful convictions and how they contributed to individual miscarriages of justice. No Canadian CCRC-type entity exists, nor have provincial prosecutors’ offices established CIUs. Instead, the tertiary mechanism for addressing wrongful convictions in Canada is review by the federal Minister of Justice, who has the authority to order a new trial or refer the matter to the

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10 See Sara Lucy Cooper, Innocence Commissions in America: Ten Years After, in CONTROVERSIES IN INNOCENCE CASES IN AMERICA 200-06 (SARAH LUCY COOPER, ED. 2014).
11 See Roach, The Role of Innocence Commissions, at 104-05.
Court of Appeal in the appropriate province or territory.\textsuperscript{12} In 2002, the Canadian Parliament amended the relevant laws to make this authority more robust.\textsuperscript{13}

The diversity of these approaches among countries that share basic design features such as common law roots and an adversarial process demonstrates that there is no single way to respond to the problem of wrongful convictions. But the institutional responses are not random; instead, they are reflective of the moment at which “innocence consciousness”\textsuperscript{14} arose in each society and are consistent with features of the legal systems and cultures in which they exist. The remaining sections of this essay develop this thesis in further detail. In Part II, I discuss the sociological literature on institutional change that provides the framework for this analysis. In Part III, I discuss the development of innocence commissions and related institutions in the UK, the United States, and Canada. Finally, in Part IV, I discuss how this experience is consistent with the theoretical framework discussed in Part II, and the guidance it offers for those seeking to improve the existing mechanisms in these three countries, and for reformers in other parts of the world as well.

II. A Theoretical Framework for Institutional Change

For decades, modern sociologists have studied how institutions evolve in different settings to address similar needs. One of the leading theories, institutional isomorphism, suggests that organizational types tend to spread, resulting in homogeneity in structure.\textsuperscript{15} Although initially a variety of institutional forms may develop to address a new problem, once the “organization field” in which those institutions operate becomes “structured” or “well established,” “there is an inexorable push toward homogenization.”\textsuperscript{16} An “organizational field” constitutes “those organizations that, in the aggregate, constitute a recognized area of institutional life”—i.e. the “totality of relevant actors.”\textsuperscript{17} For example, in the commercial arena, the “organizational field” for a particular industry would include the “key suppliers, resource and product consumers, regulatory agencies, and other organizations that produce similar services or products.”\textsuperscript{19} In the criminal justice arena, the organizational field in which a new entity like an

\textsuperscript{12} See Canada Department of Justice, Criminal Conviction Review http://www.justice.gc.ca/eng/cj-jp/ccr-rc/index.html
\textsuperscript{14} See Marvin Zalman, An Integrated Justice Model of Wrongful Convictions, 74 Albany L. Rev. 1465, 1468 (2010/2011) (defining “innocence consciousness” as “the idea that innocence people in sufficiently large numbers as a result of systemic justice problems to require efforts to exonerate them, and to advance structural reforms to reduce such errors in the first place.”)
\textsuperscript{15} The seminal paper setting forth this theory is Paul J. DiMaggio and Walter W. Powell, The Iron Case Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields, 48 Am. Soc. Rev. 147 (1983).
\textsuperscript{16} Id. at 148.
\textsuperscript{17} Id. at 148.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
innocence commission operates includes prosecutors, defense attorneys, the judiciary, legislators, victims and the interested public. An organizational field is deemed “well established” or “structured” - leading to homogenization of institutional forms within it – when the actors within the field are involved in regular interaction, develop patterns and structures for those interactions, and develop a mutual awareness that “they are involved in a common enterprise.” 20 This process of “establishing” or “structuring” the field can be driven by competition, government fiat, or the professions. 21 Once the field is established, homogenization can be result of different forces. According to some theorists, competition drives that process – i.e., the “nonoptimal forms are selected out.” 22 Other theorists argue that the process is more complex, and can be the product of a desire on the part of organizations not only for “economic fitness” but also for institutional legitimacy. 23 Thus, once a particular organizational form becomes recognized in the field, other firms will adopt it not necessarily because it increases their efficiency, but because it enhances their perceived legitimacy within the field.

While there is considerable empirical support for institutional isomorphism, there is also ample support for its opposite – i.e. institutional divergence. More recent scholarship has attempted to reconcile these two realities by accounting for the circumstances in which one or the other phenomenon will occur within a field. 24 It posits that, in certain circumstances, firms are likely to adopt a form that is already well established within the field. However, in other circumstances, they are likely to adopt a different form. Proponents of both institutional isomorphism and the newer scholarship agree that certain mechanisms play a role in determining whether homogenization is likely to occur. They include: (1) the exertion of power – i.e., has the state or some other entity with coercive power demanded adoption of the form; (2) attraction – i.e., is the form perceived as normatively attractive to the would-be adopter, such that it chooses the form rather than having it forced upon it; and (3) mimesis – i.e., does the adopter mimic the established form, not because it finds the form normatively attractive but as a way of compensating for uncertainty. 25

Depending on the underlying conditions in a field – or in a nation, when the nation is establishing a new institution looking to transnational models – these mechanisms can exert greater or lesser force. For example, when “existing institutions [in a region] have been thoroughly discredited, morally or functionally, and, at the same time, if there is a powerful external actor able to enforce a new institutional design,” 26 it is more likely that the region will adopt the form preferred by the external actor. However, this force is mitigated by “domestic institutional arrangements” and “cultural constraints.” 27 That is to say that, if the preferred organizational form makes no sense in the cultural and social context in the adopting nation, it is

20 Id.
21 Id.
22 Id. at 149 (citing Hannan and Freeman (1977)).
23 Id. at 149-50.
25 Id. at 152-59.
26 Id. at 153.
27 Id. at 154-55.
unlikely to take hold, no matter how strongly the external power-holder may seek to impose it.\textsuperscript{28} The force of attraction as a mechanism of convergence also is limited by local conditions, in that decision-makers will choose a form in existence elsewhere if it offers a solution that “fit[s] with other institutional regulations prevailing in the specific setting,”\textsuperscript{29} as well as the national “frames that embody a shared cultural understanding.”\textsuperscript{30} If decision-makers determine that a model does not fit with their local conditions and frames, they are unlikely to adopt it and will look elsewhere. Finally, actors will mimic a model, even in conditions of uncertainty that obfuscate the optimal solution for them, if they perceive the model as “instrumentally successful”\textsuperscript{31} in its home region and representative of values they share. By choosing a model that is perceived as successful and consistent with the cultural identity they seek to project, the decision-makers hope that their choice will be viewed as legitimate.\textsuperscript{32} But mimicry also can be used as a tool of “distraction from authorship,”\textsuperscript{33} when the decision-makers “strategically want to downplay their role in the design of institutional regulation,”\textsuperscript{34} as when the proposed design could be perceived as serving their partisan interests.\textsuperscript{35}

In addition, the emergence of a charismatic leader or collection of individuals can be a critical determinant of when and how reform comes about. Particularly when the political conditions are favorable – which may include when conditions are unstable – these individuals or groups can “work to promote a frame that can make sense of the field in a new way.”\textsuperscript{36} The most successful may find that their ideas become “widely adopted,”\textsuperscript{37} not only helping to “resolve instability” but also becoming “the perspective through which new decisions are made.”\textsuperscript{38}

III. The Development of Innocence Commissions and Related Institutions in the United Kingdom, the United States, and Canada

A. The Experience in the United Kingdom

The United Kingdom was a pioneer in the field of innocence commissions and related institutions. As a first-actor, it did not have other models to draw upon. The impetus for reform came from a political crisis: the revelation that alleged Irish Republican Army terrorists –

\begin{itemize}
  \item Id. at 154-55.
  \item Id. at 156.
  \item Id. at 156-57.
  \item Id. at 159.
  \item Id. at 158-59.
  \item Id. at 158.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id. at 158.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
\end{itemize}
including the so-called Guildford Four and the Birmingham Six – had been wrongly convicted and imprisoned for 15 years and 16 years, respectively, for bombings in the 1970s that they did not commit. Those wrongful convictions came to light not through DNA evidence, but through the discovery of police documents that fatally undermined the prosecution’s case, including records supporting an alibi that were never turned over to the defense and pre-prepared scripts from which the detectives’ allegedly contemporaneous notes of the defendants’ confessions appeared to have been copied.

On the very day in 1991 that the UK Court of Appeals quashed the convictions of the Birmingham Six, Parliament established a Royal Commission to comprehensively review the criminal justice process in England and Wales and make recommendations to restore public confidence in the system, including the adequacy of appeal mechanisms. The Royal Commission released its report in 1993, with numerous recommendations to improve the conduct of police investigations. It also recommended that the UK Court of Appeal review convictions more liberally, and that a new independent body be created to investigate claims of wrongful conviction and, where appropriate, refer them to the Court of Appeal for consideration.

In 1995, Parliament passed legislation adopting many of the changes recommended by the Royal Commission. Thus, the Court of Appeals’ standard of review was adjusted, to provide that the Court of Appeals should quash a conviction where it found “that the conviction is unsafe,” a broader standard than whether the Court found the defendant innocent. The statute also authorized the creation of the new entity that the Royal Commission recommended, with a remit to review claims of wrongful conviction and refer them to the Court of Appeal where it determined there was “a real possibility that the conviction, verdict, or finding of sentence would not be upheld were the reference to be made” applying the new “unsafe” standard.

The Criminal Case Review Commission (“CCRC”) began operations in 1997. It is a non-departmental public body with significant full-time staff, funded by the Ministry of

42 Royal Commission Report at 180-87. The recommendation to create such an entity was echoed in the report prepared by a retired Court of Appeals judge who was commissioned to investigate the police conduct in the Guildford Four case. See Terry Kirby, Guildford Four ‘Plot’ Dismissed: An Inquiry Into One of Britain’s Worst Miscarriages of Justice Makes Many Criticisms But Rejects the Idea of an Official Cover-Up, The Independent, June 30, 1994.
43 Criminal Appeals Act, 1995 c.35 § 2 (Eng.)
44 Criminal Appeal Act, 1995, c.16 § 13(1)(a)(Eng.).
45 Id. As of the 2014-15 fiscal year, the CCRC had 34 full-time case review managers.
Justice.\textsuperscript{46} By statute, one-third of its members must be lawyers, at least two-thirds must have expertise in the criminal justice system, and at least two-thirds must be laypersons.\textsuperscript{47} The CCRC generally conducts its own investigations, which are inquisitorial rather than adversarial. To assist it in that process, it has the statutory authority to compel public bodies to provide it with information.\textsuperscript{48} Per amendments enacted in 2016, it can apply to a Crown Court for an order to obtain material from private organizations or individuals.\textsuperscript{49} Although at one time a network of innocence projects at universities in the UK helped present petitions to the CCRC, such projects have dissipated in recent years.\textsuperscript{50} Since it started operations in 1997, the CCRC has reviewed at least 20,470 cases. Of those, it referred 626 cases to the Courts of Appeals, 412 of which were successful.\textsuperscript{51}

Although it has its critics, the CCRC has widely been accepted in the UK as a welcome improvement upon the criminal justice system.\textsuperscript{52} Some of the most frequent criticisms have been that the CCRC is too slow in processing cases and needs additional, and more certain, funding.\textsuperscript{53} The most substantive challenge has been to the CCRC’s standard in screening cases.\textsuperscript{54} Some critics have argued that the CCRC should be more aggressive in its referrals, and that its high “success” rate is an indication that it is too conservative in referring cases to the Court of Appeals.\textsuperscript{55} Others have argued that the CCRC’s standards are insufficiently protective of the factually innocent, as opposed to those whose cases suffer from procedural irregularities, of which the Court of Appeals is more likely to take note.\textsuperscript{56} Another frequent criticism is that the CCRC has not done enough to proactively improve the workings of the criminal justice system on the front end. That is, although the CCRC may be fulfilling its mandate to correct miscarriages of justice that have already occurred, it has not conducted research or engaged in

\textsuperscript{46}CCRC 2015 Report (chap. 3). Its funding has been cut since its early years of operation, as part of the UK’s overall austerity measures. Id.
\textsuperscript{47}Id.
\textsuperscript{48}Id. at ¶ 40.
\textsuperscript{51}Presently, the Innocence Network lists only one innocence project in the UK, at the University of Greenwich School of Law in London.
\textsuperscript{53}See, e.g., McCartney and Roberts, supra note 40 at 1347; CCRC 2015 Report at ¶ 55 (noting that even the CCRC’s “strongest critics have said that they simply want it to improve.”)
\textsuperscript{54}CCRC Report at ¶¶ 30-34.
\textsuperscript{55}CCRC Report at ¶¶ 11-12.
\textsuperscript{56}See McCartney and Roberts, supra note 40 at 1348 (discussing the controversy over the CCRC’s success rate at the Court of Appeals)
\textsuperscript{56}Id. at 1350-52 (describing this criticism by Michael Naughton, the former Director of the Innocence Network UK); see also Michael Naughton, Conclusion, in \textit{THE CRIMINAL CASE REVIEW COMMISSION: HOPE FOR THE INNOCENT?} 233 (Michael Naughton ed., 2010).
policy advocacy to prevent future miscarriages of justice.\footnote{CCRC 2015 Report at ¶¶ 52-53.} In recent years, the CCRC has become more open to allowing outside scholars to conduct research using its data.\footnote{CCRC 2015 Report at ¶ 52.} However, citing research constraints, the CCRC has not conducted such research or policy work on its own.

B. The Experience in the United States

In the United States, there is no CCRC-like error correction body for the entire country. Like American criminal justice generally, the question of how – if at all – to revisit claims of wrongful conviction is entrusted to the states and localities. This is unlike the situation in the UK, where most criminal law enforcement and prosecution is centralized under a single prosecuting authority.\footnote{See CROWN PROSECUTION SERVICE, OUR ORGANIZATION, available at http://www.cps.gov.uk/your_cps/our_organisation/index.html} Moreover, as Kent Roach has observed, whereas since the CCRC’s inception “error correction in Britain is done by a state-financed public institution,”\footnote{Roach, The Role of Innocence Commissions at 119.} in the United States, “error correction . . . is essentially privatized and based on volunteer work.”\footnote{Id.} Another key difference is that, in the United States, the discussion of error-correction has been framed in terms of “innocence” rather than “unsafe” convictions. That is consistent with the circumstances in which public awareness of the existing structures’ deficiencies arose: in the United States, DNA exonerations were the driving force of “innocence consciousness,” whereas in the United Kingdom, the seminal awakening involved discovery of egregious procedural irregularities. Moreover, in part because of its federal structure, the United States already provides significantly more layers of judicial review of criminal convictions for procedural or legal irregularities than does the UK.

The United States began to seriously grapple with the issue of innocence in the early 2000s. By 2002, 100 people had been exonerated through DNA evidence in the United States, twenty-five in 2002 alone.\footnote{Cooper, at 197.} North Carolina, which had experienced several high-profile DNA exonerations, was the first to act.\footnote{See generally Robert P. Mosteller, N.C. Innocence Inquiry Commission’s First Decade: Impressive Sucesses and Lessons Learned, 94 N.C. L. Rev. 1725 (2016); Sarah Lucy Cooper, Innocence Commissions in America: Ten Years After, in CONTROVERSIES IN INNOCENCE CASES IN AMERICA at 200.} In 2002, its Chief Justice – who was personally committed to the cause of reform\footnote{See JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 40 (2008) (noting the important role in North Carolina’s reform efforts by the state’s then Chief Justice, I. Beverly Lake).} – appointed a Commission to investigate the causes of wrongful convictions and make recommendations for reform. The North Carolina Actual Innocence Commission (NCAIC) was the first such panel in the United States and drew from constituencies across the criminal justice system. It concluded its work with proposals to improve the conduct...
of investigations and review claims of innocence. Among its recommendations was the creation of a new state entity to investigate claims of innocence like the British CCRC. With some modification, that recommendation was adopted by the North Carolina legislature and was signed into law by North Carolina’s governor in August 2006.

The North Carolina Innocence Inquiry Commission (NCIIC) started its operations in 2007, with the authority to investigate claims of innocence. It has broad subpoena power, investigative resources, and an inquisitorial process. By statute, the Commission has eight voting members, who consist of a superior court judge, a prosecutor, a victim advocate, a criminal defense attorney, a sheriff, a non-lawyer, and two additional members, who may be drawn from any sector. The NCIIC is an independent agency housed for administrative purposes within the Administrative Office of the North Carolina courts, with its own full-time staff. It operates on annual appropriated funds from the North Carolina legislature and grants from the federal government.

The NCIIC may consider any claim supporting by “some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through post-conviction relief.” After the Commission has completed its review, its voting members vote on whether to refer the case to a panel of three superior court judges for consideration. For cases that went to trial, five of the eight commissioners must agree that “there is sufficient evidence of factual innocence to merit judicial review.” If the case resulted in a guilty plea, the commissioners’ vote must be unanimous. For the three-judge panel to grant relief – dismissal of the charges – it must unanimously agree that innocence has been established by “clear and convincing evidence.”

Since its inception in 2007, the NCIIC has reviewed at least 2005 claims, resulting in at least 10 exonerations. It has been widely praised by scholars and seems to enjoy public support in the state, as reflected by its continued annual appropriation. Like the CCRC, however, the NCIIC has not been engaged in research and policy reform advocacy.

65 For example, a condition of submitting a claim to the Commission is that the claimant waive all procedural safeguards and privileges N.C. Gen. Stat. § 15A-1467(b)(2015).
67 See NCIIC 2015 General Assembly Report at 14-15, available at http://www.innocencecommission-nc.gov/gar.html. The NCIIC currently has six full-time staff. The federal government has provided resources for states to engage in post-conviction DNA testing through the federal Innocence Protection Act of 2001, which was reauthorized in 2016. See, e.g., Barry C. Scheck, Conviction Integrity Units Revisited (9-20-16) at 9-10.
68 N.C. Gen. Stat. § 15A-1460(1)(2015). Unlike the CCRC, the CNIIC does not have discretion to review cases lacking new evidence. In practice, the CCRC has rarely allowed cases lacking such evidence. See Scheck, supra note 67 at 8 n. 20.
70 Id. § 15A-1469(h).
Despite the relative success of the NCIIC, no other state has adopted a similar institution. This is despite that fact that several other states have appointed panels to investigate the causes of wrongful convictions and make recommendations for reform. But most of these commissions have not recommended the creation of a new error-correction entity like North Carolina’s NCIIC or the UK’s CCRC. For example, Florida’s Innocence Commission, established in 2010, explicitly avoided taking a position on whether such an entity was desirable, stating in its final report that whether to create such an entity was “left to the sound discretion” of the three branches of state government. And in Texas, where the State Legislature appointed a criminal justice task force in 2009 in the wake of the first posthumous DNA exoneration, and where innocence reform had a dedicated leader in state government in State Senator Rodney Ellis—the Task Force did not recommend the creation of a new entity. Instead, it made the far more modest recommendation that the state “formalize” its relationships with the various innocence projects at state law schools that received state funds, to require more in depth reports on the causes of identified wrongful convictions. That recommendation was adopted by the state legislature in 2016.

Instead of new independent entities, the mechanism for examining innocence claims that has become diffuse in the United States is the conviction-integrity unit (CIU) or Conviction Review Unit (CRU) within local prosecutors’ offices, which I will refer to collectively as CIUs. The first such office was created in 2004 in Santa Clara, California and the second in Dallas, Texas in 2007, both the product of campaign promises by new elected District Attorneys in the wake of high-profile DNA exonerations. Since 2009, such units have proliferated. As of December 2015, there were 26 such units around the country, with 13 of them initiated after January 2014. These offices still represent only a small fraction of the over 2,300 local prosecutorial offices in the United States, but such units have been established in many of the most populous counties in the United States, including, for example, Los Angeles County in

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72 See Cooper, supra note 63, at 201-06 (reviewing state systemic reform commissions, most of which have had limited terms).
74 See Cooper, supra note 63, at 205-06 (discussing leadership of Texas State Senator Rodney Ellis, Chairman of the Board of the Innocence Project, on innocence issues).
77 Id. at 14.
78 Id. at 8 Figure 1.
79 NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015 (Executive Summary, Feb. 3, 2016) at 13.
80 Id. at 13.
California (which at approximately 10 million people, has roughly the same population as the entire state of North Carolina),\(^{81}\) and in the Manhattan and Brooklyn District Attorney’s Offices. Combined, these CIUs are credited with having helped to secure at least 152 exonerations, most of them since 2014.\(^{82}\)

Although the composition and structure of CIUs vary considerably, some have dedicated professionals including prosecutors and investigators. Nevertheless, most CIUs review cases only after “defense attorneys, innocence organization, journalists, or others”\(^{83}\) have investigated them. Some have been widely praised by innocence advocates, while others have been derided as mere “window dressing,” and others described as too new to assess.\(^{84}\) Those deemed most successful, and which have been embraced by innocence advocates as models, have brought in experienced defense attorneys to lead the CIUs (as a unit separate and distinct from the office’s appellate or habeas units) and have worked in partnership with innocence projects.\(^{85}\) Although the criteria they employ in screening cases is rarely published, the CIUs generally focus on credible claims of innocence – but with a willingness to consider some additional cases where it may be impossible to establish factual innocence and yet a miscarriage of justice evidently occurred.\(^{86}\)

The chief drawback of entrusting conviction integrity review to the very same prosecutorial offices responsible for the convictions is obvious – i.e, that the office will invariably be biased. Yet the potential benefits of CIUs, if designed so as to minimize this risk, also are clear. Not only will prosecutors have unparalleled access to necessary records and witnesses (especially police witnesses), but CIUs are far easier to set up than an independent entity like the NCIIC, which requires state legislative action and additional appropriations. The only person who must be convinced that the creation of a CIU is a good idea and a worthwhile use of resources is the elected DA.\(^{87}\)

So far, CIUs do not seem to be playing a major role in advocating for reforms on the front-end of the criminal justice system.\(^{88}\) Partly, this is a limitation inherent in their relative novelty in many offices. But like the experience of the CCRC in the UK and the NCIIC in North Carolina, it may be the product of an institution focusing its limited resources on its primary mission –i.e., error correction in past cases. However, there is optimism that CIUs, if they last, inevitably will have an impact on the conduct of future cases by providing critical feedback to the rest of the offices in which they reside. And while innocence advocates still occasionally call

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\(^{81}\) Quattrone Center Report at 34.

\(^{82}\) National Registry Report at 12.

\(^{83}\) Id. at 13; Quattrone Report at 39 (describing many CIUs’ expressed preference for, and tendency to deem most credible, application that come in through established innocence projects)

\(^{84}\) See, e.g., id. at 15-16.

\(^{85}\) See, e.g., Scheck, supra note 67 at 34-37.

\(^{86}\) See Scheck, supra note 67 at 32-33; Quattrone Report at 35-42.

\(^{87}\) Id. at 16 (noting that the decision to create a CIU is an “internal organizational choice” for an elected District Attorney). It bears noting that the NCIIC was created in 2006, just before the financial crisis.

\(^{88}\) Quattrone Report at 75-78.
for the creation of independent entities like the NCIIC in other states, or a federal commission to investigate wrongful convictions,\textsuperscript{89} they also have tentatively embraced CIUs, acknowledging that they may be the most promising institution in the American context.\textsuperscript{90}

C. The Canadian Experience

In Canada, we find a third model. Since 1986, the provincial governments have appointed several prominent commissions to investigate notorious cases of wrongful convictions. With one exception, these commissions were appointed after courts already had set aside the convictions.\textsuperscript{91} DNA played a role in some but not all of these exonerations.\textsuperscript{92} In many of these cases, as in the UK, the convictions were overturned based on the discovery of egregious police misconduct that thoroughly undermined the defendant’s guilt. These inquiries typically have been conducted by sitting or retired judges, and have resulted in the publication of reports making factual findings about what occurred in the individual cases that prompted the commission as well as recommendations to improve the criminal justice system. Most of the recommendations of the commissions have \textit{not} been enacted into law by the federal Parliament, which has exclusive authority over criminal law in Canada.\textsuperscript{93}

Since 1989, at least six of these commissions have recommended the creation if an independent entity like the CCRC to review claims of wrongful conviction and refer them back to the courts for consideration.\textsuperscript{94} But to date, this recommendation has not been adopted and no such entity exists in Canada. Instead, Canada has a mechanism whereby a person can contest a conviction (after exhausting all appellate review) by applying directly to the federal Minister of Justice to re-open the conviction if there has been a miscarriage of justice – which like in the UK, is broader than a claim of factual innocence.

This is not exactly analogous to the CIUs in the United States (whereby a convicted person applies for relief to the same entity responsible for his or her prosecution) because the petitioner is applying to a different entity (the federal Minister of Justice) for relief from a conviction generally obtained by a provincial prosecutor (albeit under federal criminal law). In 2002, the Canadian federal Parliament adopted reforms to this mechanism in response to some of

\textsuperscript{89} See, e.g., Scheck, supra note 67 at 6 (“Why, in 2017 are we even talking about [CIUs in district attorneys’ offices]” as opposed to independent government entities or public inquiry tribunals?).

\textsuperscript{90} See Scheck at 8 (expressing optimism that well-run CIUs “may have a surprisingly good chance of succeeding”).

\textsuperscript{91} Roach, \textit{The Role of Innocence Commissions}, at 105.


\textsuperscript{94} Id. at 292.
the criticisms that had been lodged against it. Thus, under the current Canadian framework, an individual may petition the Minister of Justice to review a conviction for a miscarriage of justice.\textsuperscript{95} The Minister maintains an office (a bit like a CIU) charged with investigating such claims, known as the Criminal Conviction Review Group (CCRV).\textsuperscript{96} If, based upon the recommendations of the CCRV, the Minister determines that “there is a reasonable basis to conclude that a miscarriage of justice likely occurred,”\textsuperscript{97} the Minister can order a new trial or refer a case to the Court of Appeal of the province or territory to consider as if on appeal.\textsuperscript{98} In making that determination, the Minister may take into account any relevant evidence, including whether the application is “supported by new matters of significance that were not considered by the courts.”\textsuperscript{99} The Minister has subpoena power to collect evidence to investigate the claim.\textsuperscript{100} In a concession to critics who claimed that the Minister of Justice could not be sufficiently impartial, the Minister also now has the authority to delegate investigation of claims to an outside independent adviser.\textsuperscript{101} By regulation, the CCRV also is required to be physically separated from the traditional law enforcement operations of the Ministry.\textsuperscript{102} Lawyers with innocence projects at several Canadian law schools,\textsuperscript{103} and with Innocence Canada,\textsuperscript{104} a not-for-profit innocence organization founded in 1993, assist some petitioners with their cases.

Since the 2002 reforms went into effect, the CCRV has referred at least 13 cases to the courts out of a total of at least 86 applications on which the Minister rendered a decision.\textsuperscript{105} This is a higher rate of referral than either the CCRC or the NCIC, but out of a much smaller pool of applications. The cases referred by the Canadian Minister of Justice enjoy a high success rate: out of the 13 referred, all but two resulted in a favorable outcome – either in court or at the discretion of the prosecutor.\textsuperscript{106}

Despite the 2002 reforms, critics still contend that this process is insufficiently independent because the final decision as to whether to refer a case back to the courts lies with a law enforcement official.\textsuperscript{107} In addition, the Canadian process has been criticized as characterized by undue delay, unreasonable burdens imposed upon petitioners, and a lack of

\textsuperscript{95} Canadian Criminal Code § 696.1.
\textsuperscript{96} The CCRV was first formed within the Canadian Ministry of Justice in 1993, following an internal review of the process for reviewing applications alleging miscarriages of justice. See Anderson, \textit{Wrongful Convictions}, 20 Appeal, at 9.
\textsuperscript{97} Canadian Criminal Code § 696.(3).
\textsuperscript{98} Id. § 696.3(3).
\textsuperscript{99} Id. § 696.4.
\textsuperscript{100} Id. § 696.2(2).
\textsuperscript{101} Id. § 696.2(3).
\textsuperscript{102} See Anderson, \textit{Wrongful Convictions}, 20 Appeal at 9.
\textsuperscript{103} See Innocence Network, \textit{Alphabetical Listing of all Innocence Network Member Organizations} (listing organizations at two law schools in addition to Innocence Canada).
\textsuperscript{104} See Innocence Canada (formerly the Association in the Defence of the Wrongly Convicted or AIDWYC, https://www.aidwyc.org/about/frequently-asked-questions/.
\textsuperscript{105} Roach, \textit{Lessons from North Carolina?}, at 289.
\textsuperscript{106} Id. at 290.
\textsuperscript{107} See, e.g., Anderson, \textit{Wrongful Convictions}, 20 Appeal at 11; Scullion, \textit{Wrongful Convictions} at 192 (describing frequent criticisms).
transparency. Nevertheless, there does not appear to be any significant movement presently in Canada to revisit the structures in effect.

III. How the Experience of the United Kingdom, Canada, and US Comports with Theoretical Literature on Institutional Change

So why have the United Kingdom, The United States, and Canada – three countries that share common law roots and an adversarial legal system – all developed such different institutions to address wrongful convictions? Why didn’t the CCRC model for error correction, once adopted in the UK and (with some modification) in North Carolina, become diffuse in the United States and in Canada? Why has the CIU model spread so quickly in the United States, but not in Canada? The theoretical literature on institutional development offers some helpful insights in solving these puzzles.

First, the UK’s adoption of a new institutional entity makes sense in the context in which the CCRC was enacted. The country was in political turmoil, with the adequacy and legitimacy of its existing criminal justice apparatus, including its provisions for appellate review of criminal convictions – seriously called into doubt. The time was ripe for significant change. Although no coercive force was brought to bear on Parliament, the Royal Commission that Parliament itself appointed to investigate the wrongful IRA convictions exerted considerable moral force, at a time when public sentiment was behind it. The mandate of the CCRC – to investigate “unsafe convictions,” not just those in which a defendant could establish factual innocence – also was consistent with the environment in which the CCRC was created. Finally, creating a national entity to conduct error review made sense in the context of the UK, which is effectively a single national criminal justice system.

When North Carolina acted a decade later, it too was responsive to the political situation on the ground and the moral authority of the commission appointed (at the insistence of an effective leader in the state’s Chief Justice, drawing from constituencies throughout the state criminal justice system) in response to several high-profile exonerations. Consistent with the circumstances in which those exonerations came to light, the NCIIC focuses on claims of factual innocence. But its structure, as an independent but state-funded entity, borrows heavily (and self-consciously so) from the CCRC model. Some combination of attraction and mimicry appear to have been at work when the North Carolina commission recommended that structure, as it was not necessarily clear that such an entity represented the optimal design for North Carolina, even if it represented values that North Carolina wished to project.

However, the CIU’s emergence as the preferred model in the United States suggests that the CCRC-type entity is not in fact the optimal structure for an addition to the American criminal justice system. Although it is tempting to attribute the CIU’s triumph over the CCRC-type entity to the financial crisis, political expediency or cynicism on the part of prosecutors, I do not

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think those explanations adequately account for the ways in which the CIU in fact fits better with existing institutional arrangements and cultural frames in the United States. That is, in the United States, we are accustomed to granting enormous, effectively unsupervised power to local prosecutors – far more so than in the United Kingdom, where prosecution is centralized under the command of the Crown Prosecution Service, where there is a single criminal procedure code, and where private barristers also are hired to represent the government in court. These aspects of the American system of prosecution (its localism and specialization) may represent the very reason why claims of innocence ought to be investigated by an entity independent of the original prosecutorial office, but they also explain why such an arrangement creates institutional and cultural dissonance.

That is, the notion of creating an independent entity and removing local authority pushes against the prevailing institutional arrangements and cultural frames. Creating a new entity within the local prosecutor’s office (even an entity with a different mission and protocols than the rest of the office) can be more easily reconciled with existing frames and structures. The diffusion of private innocence projects throughout the United States also makes the CIU model feasible, as much of the investigatory work performed by the CCRC in the UK (funded by Parliament) in the United States effectively can be outsourced to these private entities. That some CIUs have now gained legitimacy in the eyes of innocence advocates provides additional reason to believe that the form will dominate the innocence landscape in the United States, as more prosecutorial offices enter the “innocence field,” which is becoming more structured, and seek legitimacy for their own efforts by mimicking their peers. Absent some new political crisis demonstrating that CIUs are inadequate to address the problem of wrongful convictions, it seems unlikely that the current trend (favoring CIUs over NCIIC/CCRC-type entities) will shift in the foreseeable future.

Canada’s experience also is consistent with this theoretical framework. There, despite calls by several prominent commissions for a centralized error-correction independent entity like the CCRC, no such entity has been created. Perhaps Canada has not yet suffered a sufficient national political crisis to force more substantial reform, or maybe the requisite leadership on the national stage has not yet have emerged. The reform commissions’ appointment by provincial authorities, rather than the federal government, also may have undercut their effectiveness in securing national change, as might have their failure to include more prosecutors and law enforcement officials in their membership. That is, to have maximum moral and persuasive force, it may be necessary to have a mandate directly from the authority that will be asked to enact the recommended reforms, and to credibly speak on behalf of all affected constituencies.

Why also haven’t we seen the emergence of CIUs in provincial prosecutors’ offices in Canada? It may be that the CIU is not well suited to institutional arrangements and cultural frames in Canada. Unlike in the United States, criminal law in Canada is strictly a matter of

110 See David A. Harris, The Interaction and Relationship Between Prosecutors and Police Officers in the United States, and How This Affects Police Reform Efforts, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 58 (noting that local district attorneys in the United States exercise their power “with complete independence from any other prosecuting authority” and neither report to, nor feel constrained by, either the state or federal Attorney General).

111 See Roach, Lessons from N. Carolina?, at 293.
federal law and the criminal justice systems of the provinces and the federal government are more integrated. Because provincial prosecutors do not have the same tradition of complete local independence as American local prosecutors, it is not so dissonant to assign responsibility to investigate miscarriages of justice (including those occurring in prosecutions brought by provincial authorities) to the federal Minister of Justice. The system created by the Canadian Parliament in 2002 (when it rejected calls for a CCRC-type entity and instead improved the procedures whereby federal Minister of Justice may investigate miscarriages of justice, including through the appointment of an outside special adviser) therefore may in fact be the best model for Canada. Absent further political crisis calling into question the adequacy of existing arrangements – coupled with strong national leadership on the issue— it thus seems unlikely that we will see this authority removed from the federal Minister of Justice to a new independent entity.

Conclusion

What is the right model for pursuing error correction in individual cases, and systemic reform prospectively? Obviously, there is no single answer for all jurisdictions, and it may well be that these two functions must be handled by distinct entities. The experiences of the United Kingdom, the United States, and Canada suggest that it is difficult to combine both functions in a single entity. They also suggest that radical change – especially the establishment of a wholly new governmental entity, with responsibility for correcting past errors, is unlikely to occur absent substantial political pressure, strong leadership, and the endorsement of all affected constituencies. Even if these elements are present, existing institutional arrangements and cultural frames will limit the viability of new institutional forms. Thus, as the international innocence movement becomes more established, reformers must assess the moment in which they choose to act, including whether it will support profound change, and cultivate strong leaders and a consensus among all affected constituencies. They also would be wise to consider carefully which institutional forms are most likely to flourish in the context of existing institutional arrangements and cultural frames.