The Institutions of Innocence Review: A Comparative Sociological Perspective

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THE INSTITUTIONS OF INNOCENCE REVIEW: A COMPARATIVE SOCIOLOGICAL PERSPECTIVE

Jessica A. Roth*

ABSTRACT

The last three decades have seen the rise of an international innocence movement that has forced participants in diverse criminal justice systems to confront their systems' fallibility, previously thought more 'theoretical than real. The public acknowledgment of that fallibility has led to the creation of new institutional mechanisms to re-examine old convictions. This short essay prepared for a symposium issue of the Rutgers University Law Review on the theory of criminal law reform compares the error correction institutions created in the United Kingdom, Canada, and the United States, three English-speaking countries with common law roots and an adversarial structure, through the lens of sociological theory. It finds that, consistent with what that literature suggests, the institutions created in each country reflect the circumstances in which "innocence consciousness" arose therein and the pre-existing institutional arrangements and cultural frames. This analysis offers valuable insights for reformers around the world who are considering how to address wrongful convictions.

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*Professor of Law, Benjamin N. Cardozo School of Law. I am grateful to Stephanie Roberts, Marvin Zalman, and participants in the Theorizing Criminal Law Reform conference held at Rutgers Law School on April 21–22, 2017 for very helpful conversation and comments. Thanks also to Rachel Karpoff for excellent research assistance.
The story of the worldwide "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 lawyers started to use DNA analysis to regularly exonerate people of crimes for which many 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 362 people have been exonerated through DNA evidence in the United States alone. The National Registry of Exonerations, a joint project of the University of California Irvine, the University of Michigan Law School, and Michigan
State University College of Law, lists over 2,252 exonerations. Extrapolating from the known data, some scholars have estimated that the number of number of wrongful convictions in the United States is considerably larger. The United States is now home to a network of local innocence projects, many of them non-profit organizations based at law schools, together serving every region of the country. Similar organizations working to free the wrongfully convicted exist around the world.

6. About, NAT’L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Feb. 17, 2019) (listing 2,276 exonerations in the United States since 1989). Perhaps not surprisingly, what counts as an exoneration or a wrongful, erroneous, or false conviction is a hotly contested subject. See, e.g., Gould & Leo, supra note 6, at 832 (distinguishing between procedural error and factual innocence); Joshua Marquis, The Myth of Innocence, 95 J. CRIM. L. & CRIMINOLOGY 501, 508 (2005) (suggesting that “[t]o call someone ‘innocent’ when all they managed to do was wriggle through some procedural cracks in the justice system cheapens the word and impeaches the moral authority of those who claim that a person has been ‘exonerated.’”). The National Registry of Exonerations defines an “exoneration” to include circumstances in which a person has been “(1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action.” Glossary, NAT’L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited Feb. 17, 2019) (defining an exoneration for purposes of the registry). The official action can include a pardon, acquittal, or dismissal if it was “the result, at least in part, of evidence of innocence” that was not presented at the defendant’s earlier trial or known at the time that a plea was entered, although this evidence “need not be an explicit basis for the official action that exonerated the person.” Id. A person who otherwise meets the Registry’s definition will not be deemed “exonerated” where “there is unexplained physical evidence of that person’s guilt.” Id. For a discussion of the benefits and risks associated with the National Registry’s definition, see Richard A. Leo, Has the Innocence Movement Become an Exoneration Movement, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 66, 66–73 (Daniel S. Medwed ed., 2017).

7. As Dan Simon has observed, the “true number of false convictions is unknown and frustratingly unknowable.” DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 4 (2012). However, several scholars have estimated that there is a 3% to 5% error rate. See Marvin Zalman et al., Measuring Wrongful Conviction, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 3047 (G. Bruinsma and D. Weisburd eds., 2014) (surveying studies); Gould & Leo, supra note 6, at 832 (surveying studies); Samuel R. Gross et al., Rate of False Conviction of Criminal Defendants who are Sentenced to Death, 111 PROC. NAT’L ACAD. OF SCI. 7230 (2014) (estimating a 4.1% error rate for defendants sentenced to death in the United States between 1973 and 2004). Comparison of the existing studies is complicated by the lack of a uniform definition of what counts as a false or wrongful conviction. See discussion supra note 6.

globe. Many are participants in an international Innocence Network, a loosely affiliated network guided by an Executive Board, with membership organizations in North America, South America, Europe, Africa, and Australia. A full-fledged global "innocence movement"—comprised of "[a] conglomeration of advocacy organizations, lawyers and legal activists; exonerees and their families, journalists, students, and legal practitioners who believe that wrongful convictions are common and deserve attention on a large scale"—has emerged, described by some as the "civil rights movement of the twenty-first century." Not surprisingly, the institutional responses by different legal systems to that movement have been varied. Several countries have created new official institutions charged with re-examining old convictions. In 1995, the United Kingdom became the first Western democracy to create such an entity, when Parliament passed legislation creating the independent Criminal Cases Review Commission ("CCRC") to review cases in England, Wales, and Northern Ireland. 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, established a CCRC-type commission in 2006 to review claims for factual innocence. Although several states have established commissions to study underlying causes

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16. Sarah Lucy Cooper, Innocence Commissions in America: Ten Years After, in CONTROVERSIES IN INNOCENCE CASES IN AMERICA 197, 200 (Sarah Lucy Cooper ed., 2014).
of wrongful convictions and make recommendations for reform, no other state has established a statewide error-correction commission like North Carolina's. Rather, the fast-evolving favored entity in the United States is the conviction-integrity unit (CIU) within local prosecutors' offices. Since 2004, at least 33 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. However, 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 Court of Appeal in the appropriate province or territory. In 2002, the Canadian Parliament amended the relevant laws to make this authority more robust.

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" arose in each country and the legal systems and cultures in which they exist. The remaining sections of this essay develop this thesis in further detail. Part II discusses the sociological literature on institutional change that provides the framework for this analysis. Part III discusses the development of innocence commissions and related institutions in the U.K., the United States, and Canada. Finally, Part IV discusses how this experience is consistent with the theoretical framework discussed in Part II, and the guidance it offers for those

17. See id. at 201–07.
18. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017, supra note 8, at 11.
20. See id. at 90.
23. See Zalman, supra note 11, at 1468 (defining "innocence consciousness" as "the idea that innocent people are convicted in sufficiently large numbers as a result of systemic justice system problems to require efforts to exonerate them, and to advance structural reforms to reduce such errors in the first place.").
seeking to improve the existing mechanisms in these three countries as well as reformers in other parts of the world.

I. A THEORETICAL FRAMEWORK FOR INSTITUTIONAL DEVELOPMENT

For decades, modern sociologists have studied how institutions evolve in different settings to address similar needs. One of the leading theories, institutional isomorphism, posits that organizational types tend to spread, resulting in homogenous structures. Although initially a variety of institutional forms may develop to address a new problem, once the "organizational field" in which those institutions operate becomes "structured" or "well established," "there is an inexorable push toward homogenization." An "organizational field" constitutes "those organizations that, in the aggregate, constitute a recognized area of institutional life"—i.e., the "totality of relevant actors." For example, in the commercial arena, the "organizational field" for a particular industry includes the "key suppliers, resource and product consumers, regulatory agencies, and other organizations that produce similar services or products." In the criminal justice arena, the organizational field 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." This process of "establishing" or "structuring" the field can be driven by competition, government fiat, or the professions. Once the field is established, homogenization can be the result of different forces. According to some theorists, competition drives that process—i.e., the "nonoptimal forms are selected out." Other theorists argue that the process is more complex, and can be the product of a desire on the part of

25. Id. at 148.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id. at 149 (citing Michael T. Hannan & John H. Freeman, The Population Ecology of Organizations, 82 AM. J. OF SOC. 929 (1977)).
organizations not only for "economic fitness" but also for institutional legitimacy.\textsuperscript{32} 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 the 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.\textsuperscript{33} It posits that, in certain circumstances, firms are likely to adopt a form that is already well established within the field.\textsuperscript{34} However, in other circumstances, they are likely to adopt a different form.\textsuperscript{35} Proponents of both institutional isomorphism and the newer scholarship agree that certain mechanisms play a role in determining whether homogenization is likely to occur.\textsuperscript{36} 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.\textsuperscript{37}

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.\textsuperscript{38} 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,"\textsuperscript{39} it is more likely that the region will adopt the form preferred by the external actor.\textsuperscript{40} However, this force is mitigated by "domestic institutional arrangements" and "cultural constraints."\textsuperscript{41} That is to say that, if the preferred organizational form makes no sense in the cultural and social

\begin{itemize}
  \item \textsuperscript{32} Id. at 150.
  \item \textsuperscript{33} See, e.g., Jens Beckert, Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change, 28 SOC. THEORY 150, 151–52 (2010).
  \item \textsuperscript{34} Id. at 155.
  \item \textsuperscript{35} Id. at 156–57.
  \item \textsuperscript{36} Id. at 154–55.
  \item \textsuperscript{37} Id. at 152–59.
  \item \textsuperscript{38} Id. at 153.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} Id. at 155.
\end{itemize}
context of the adopting nation, it is unlikely to take hold, no matter how strongly the external power-holder may seek to impose it. Local conditions serve as restraints on the power of attraction as a mechanism of convergence. Decision-makers will choose a form in existence elsewhere only if it offers a solution that “fit[s] with other institutional regulations prevailing in the specific setting,” and the national “frames that embody a shared cultural understanding.” However, 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” 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. Mimicry also can be used as a tool of “distraction from authorship,” when the decision-makers “strategically want to downplay their role in the design of institutional regulation,” as when the proposed design could be perceived as serving their partisan interests.

The emergence of a charismatic leader or collection of individuals can also 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.” The most successful may find that their ideas become “widely adopted,” not only helping to “resolve instability” but also becoming “the perspective through which new decisions are made.”

42. Id. at 154–55.
43. Id.
44. Id. at 156.
45. Id. at 156–57.
46. Id. at 154–55.
47. Id. at 158–59.
48. Id. at 159.
49. Id. at 158–59.
50. Id. at 158.
51. Id.
52. Id.
53. Id. at 153.
55. Id.
56. Id.
II. THE ERROR-CORRECTION INSTITUTIONS OF THE UNITED KINGDOM, THE UNITED STATES, AND CANADA

A. The United Kingdom

When the United Kingdom established the CCRC in 1995, it was a pioneer in the field of error-correction 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—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. The Royal Commission also was charged with making recommendations to restore public confidence in the system, including the adequacy of appeal mechanisms.

57. See Griffin, supra note 14, at 1154.
60. See ROYAL COMMISSION REPORT, supra note 58, at i–ii; McCartney & Roberts, supra note 59, at 1340.
61. See ROYAL COMMISSION REPORT, supra note 58, at i–ii; McCartney & Roberts, supra note 59, at 1340; see also JUSTICE COMMITTEE, CRIMINAL CASES REVIEW COMMISSION, TWELFTH REPORT OF SESSION 2014–2015, HC at 5 (UK) [hereinafter HOUSE OF COMMONS REPORT]. In 1907, after decades of debate over whether there should be other more regular means of review, Parliament enacted legislation authorizing the UK Court of Appeals to hear criminal appeals and set aside convictions based on errors of law, insufficient evidence, or any other grounds representing a “miscarriage of justice.” See ROYAL COMMISSION REPORT, supra note 58, at 162; Michael Naughton, The Innocent and the Criminal Justice System: A Sociological Analysis of Miscarriages of Justice 144 (2013) (citing the Criminal Appeal Act 1907 s.4(1)). Previously, there had been no judicial appellate review of convictions for serious crimes in the United Kingdom; defendants seeking relief could only petition the Home Secretary of the British Cabinet for a pardon—
The Royal Commission released its report in 1993, recommending numerous improvements in the conduct of police investigations. The Commission also recommended that the UK Court of Appeal review convictions more liberally, particularly in cases in which the claim was of factual error. Finally, it recommended that a new independent body be created to investigate claims of wrongful conviction and refer the most compelling cases to the Court of Appeal for consideration, a function then nominally performed by a Division of the Home Office but rarely exercised.

In 1995, Parliament passed legislation adopting many, although not all, of the changes recommended by the Royal Commission. The 1995 Act adjusted the Court of Appeals’ standard of review to authorize the Court to allow an appeal only when it found the conviction “unsafe.” The statute also created a new entity to review claims of wrongful conviction and refer them to the Court of Appeals where it determined there was “a real possibility that the conviction, verdict, finding or sentence would not be upheld” under the “unsafe” standard.

That entity, the Criminal Case Review Commission (“CCRC”), began operations in 1997 and continues to this day. It is a non-departmental public body with significant full-time staff, funded by the Ministry of...
Justice.69 By statute, one-third of its members must be lawyers, at least two-thirds must have expertise in the criminal justice system.70 The CCRC generally conducts its own investigations, which are inquisitorial rather than adversarial. To assist in that process, the CCRC has the statutory authority to compel public bodies to provide it with information.71 Per amendments enacted in 2016, it can apply to a Crown Court for an order to obtain material from private organizations or individuals.72 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.73 In the twenty years since it started operations in 1997, the OCRC has reviewed more than 23,000 cases and made approximately 650 referrals to the Courts of Appeals, an average of 33 cases a year.74 In total, at least 433 of the cases referred by the CCRC were successful,75 yielding a "success rate" of approximately 69 percent.76

Although it has its critics, the CCRC has widely been accepted in the UK as a welcome improvement upon the pre-existing criminal justice system.77 Some of the most frequent criticisms have been that the CCRC is too slow in processing cases and needs additional, and more certain,

70. Criminal Appeal Act 1995, c. 35, § 8(6)-(6) (Eng.).
71. Id. § 17(2).
75. Id.
76. CRIMINAL CASES REVIEW COMMISSION, supra note 69, at 7.
77. See, e.g., HOUSE OF COMMONS REPORT, supra note 61, at 30 (noting that even the CCRC’s "strongest critics have said that they simply want it to improve"); McCartney & Roberts, supra note 59, at 1347–48.
The most substantive challenge has been to the CCRC's standard in screening cases. 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. 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 remains more likely to take note. 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 policy advocacy to prevent future miscarriages of justice. In recent years, the CCRC has acknowledged that it cannot take on this role due to limited resources and has allowed outside scholars to conduct research using its data.

B. The United States

The United States began to seriously grapple with wrongful convictions in the early 2000s. By 2002, 100 people had been exonerated through DNA evidence in the United States, twenty-five in 2002 alone. North Carolina, which had experienced several high-profile DNA exonerations, was the first to create a new institution to address wrongful convictions. In 2002, its Chief Justice—who was personally committed to the cause of reform—appointed a Commission to investigate the

78. HOUSE OF COMMONS REPORT, supra note 61, at 17–18.
79. Id. at 8–9; C. Ronald Huff & Michael Naughton, Wrongful Conviction Reforms in the United States and the United Kingdom: Taking Stock, in CURRENT PROBLEMS OF THE PENAL LAW AND CRIMINOLOGY 482, at 11 (Emil W. Plywaczewski & Ewa M. Guzik-Makaruk eds., 2017) (criticizing CCRC's "real possibility" test because it "literally handcuffs the CCRC to the criteria of the appeal court for quashing convictions.").
80. See McCartney & Roberts, supra note 59, at 1348 (discussing the controversy over the CCRC's success rate at the Court of Appeals).
81. Id. at 1350–52; see also Michael Naughton, Conclusion, in THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT? 221, 222–23 (Michael Naughton ed., 2010).
82. Id. at 225.
83. HOUSE OF COMMONS REPORT, supra note 61, at 24–25.
84. Id. at 24.
85. Cooper, supra note 16, at 197.
86. See id.
causes of wrongful convictions and make recommendations for reform.89 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.90 It concluded its work with proposals to improve the conduct of investigations and review claims of innocence.91 Among its recommendations was the creation of a new state entity to investigate claims of innocence like the British CCRC.92 With some modification, that recommendation was adopted by the North Carolina legislature and was signed into law by North Carolina’s governor in August 2006.93

The North Carolina Innocence Inquiry Commission (NCIIC) started its operations in 2006 with the authority to investigate claims of innocence.94 It has broad subpoena power, investigative resources, and an inquisitorial process.95 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.96 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.97 It operates on annual appropriated funds from the North Carolina legislature and grants from the federal government.98

important role in North Carolina’s reform efforts by the state’s then Chief Justice, I. Beverly Lake); Christine C. Mumma, The 'North Carolina Innocence Inquiry Commission, in WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 263 (Marvin Zalman & Julia Carrano eds., 2014) ("It’s impossible to overstate the importance of Chief Justice Lake in the passing” of the legislation creating the NCAIC).)

90. Cooper, supra note 16, at 200–01.
91. See id. at 201.
92. Id. at 200.
93. See generally Mumma, supra note 88 (describing process of creating NCAIC).
95. See id. For example, a condition of submitting a claim to the Commission is that the claimant waive all procedural safeguards and privileges. See N.C. Gen. Stat. § 15A-1467(b) (2015).
The NCIIC may consider any claim supported 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 more than 2,200 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.

Despite the relative success of the NCIIC, no other state has adopted a similar institution. This is despite the 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

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see also Barry C. Scheck, Conviction Integrity Units Revisited, 14 OHIO ST. J. CRIM. L. 705, 715 (2017) (discussing history of federal legislation to support DNA testing).
99. N.C. GEN. STAT. § 15A-1460(1) (2016). Unlike the CCRC, the NCIIC 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 98, at 712 n.21.
100. N.C. GEN. STAT. § 15A-1469(a); see also N.C. INNOCENCE INQUIRY COMM’N, 2017 ANNUAL REPORT 13 (2018).
102. Id. § 15A-1469(h).
104. See Cooper, supra note 16, at 201-06 (reviewing state systemic reform commissions, most of which have had limited terms).
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 2011.

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 newly elected District Attorneys in the wake of high-profile DNA exonerations. Since 2009, such units have proliferated. By the end of 2017, there were 33 such units around the country, with 18 of them initiated since 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 California (which at approximately ten million people, has roughly the same population as the entire state of North Carolina), and in the Manhattan and Brooklyn District Attorney's Offices. Altogether, the CIUs in the United States are credited with having helped to secure at least 269 exonerations from 2003 through 2017, with more than eighty percent having occurred since 2014.

106. See Cooper, supra note 16, at 205–06 (discussing leadership of Texas State Senator Rodney Ellis, Chairman of the Board of the Innocence Project, on innocence issues).

107. See id.


110. Id. at 16.

111. NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017, supra note 8, at app. tbl. A.

112. Id. at 12.

113. Quattrone Center Report, supra note 109, at 34.

114. NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017, supra note 8, at app. tbl. A.

115. Id. at 2.
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 organizations, journalists, or others” 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. 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. 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.

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

116. See id. at 13.
117. Id. at 13; Quattrone Center Report, supra note 109, at 38–39 (describing many CIUs’ expressed preference for, and tendency to deem most credible, application that come in through established innocence projects).
119. See, e.g., Scheck, supra note 98, at 738–741.
120. See id. at 734–38; see also Quattrone Center Report, supra note 109, at 35–41.
121. See NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, supra note 116, at 15–16; see also Daniel Kroespch, Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs Are Fulfilling the Prosecutor’s Duty to Serve Justice, 29 GEO. J. LEGAL ETHICS 1095, 1105 (2016) (“[I]t can be difficult to convince prosecutors that the [CIU]’s purpose is not to second-guess their work . . . .”).
122. See Evelyn L. Malave & Yotam Barkai, Conviction Integrity Units: Toward Prosecutorial Self-Regulation?, in MARVIN ZELMAN AND JULIA CARRANO, WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 189, 203 (2014) (noting that one of the strengths of CIUS is that “prosecutors simply have greater access to information than defense lawyers.”).
123. See Mosteller, supra note 87, at 1733–35.
must be convinced that the creation of a CIU is a good idea and a worthwhile use of resources is the elected District Attorney. 124

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. 125 Partly, this is a limitation inherent in their relative novelty in many offices. 126 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. 127 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. 128 And while innocence advocates still occasionally call for the creation of independent entities like the NCIIC in other states, or a federal commission to investigate wrongful convictions, 129 they also have tentatively embraced CIUs, acknowledging that they may be the most promising institution in the American context. 130

C. The Canadian Experience

In Canada, we find a third model. Since 1989, the provincial governments have appointed several prominent commissions to investigate notorious cases of wrongful convictions. 131 With one exception, these commissions were appointed after courts already had set aside the convictions. 132 DNA played a role in some but not all of these exonerations.133 In many of these cases, as in the UK, the convictions were overturned based on the discovery of egregious police misconduct

124. See NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017, supra note 8, at 15 (noting that the decision to create a CIU is an “internal organizational choice” for an elected district attorney); see also Mosteller, supra note 87, at 1735 (noting that the NCIIC was created in 2006, just before the financial crisis).
125. See Quattrone Center Report, supra note 109, at 68.
126. See id. at 17 (surveying the relatively small number of units across the country).
127. See HOUSE OF COMMONS REPORT, supra note 61, at 24–25; Mosteller, supra note 87, at 1735–36 (stating the focus of the NCIIC is “finding convicted defendants with credible claims of actual innocence and resolving their claims.”).
128. See Quattrone Center Report, supra note 109, at 69–70.
129. See, e.g., Scheck, supra note 98, at 710–11 (“Why, in 2017 are we even talking about [CIUs] in district attorneys offices” as opposed to “independent, well-funded government entities” or “public inquiry’ tribunals . . . ?”).
130. See id. at 713 (expressing optimism that well-run CIUs “may have a surprisingly good chance of succeeding.”).
132. See id.
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 not been enacted into law by the federal Parliament, which has exclusive authority over criminal law in Canada.

Since 1989, at least six of these commissions have recommended the creation of an independent entity like the CCRC to review claims of wrongful conviction and refer them back to the courts for consideration. 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 reopen the conviction if there has been a miscarriage of justice—which like in the UK, is broader than a claim of factual innocence.

In 2002, the Canadian federal Parliament adopted reforms to this mechanism in response to some of 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. The Minister maintains an office charged with investigating such claims, known as the Criminal Conviction Review Group (CCRG). If, based upon the recommendations of the CCRG, the

137. See id. at 283, 291–92.
138. See id. at 291–92.
140. The federal Minister of Justice also serves as Canada's Attorney General and Chief Prosecutor. See id. at 196.
143. See id. § 696.1(1).
144. The CCRG 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, supra note 22, at 9. The CCRG has approximately six full-time staff. See HELENA KATZ, JUSTICE MISCARRIED: INSIDE WRONGFUL CONVICTIONS IN CANADA 15 (2011).
Minister determines that "there is a reasonable basis to conclude that a miscarriage of justice likely occurred," 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. 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 ...." The Minister has subpoena power to collect evidence to investigate the claim. 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. By regulation, the CCRG also is required to be physically separated from the traditional law enforcement operations of the Ministry. Lawyers with innocence projects at several Canadian law schools, and with Innocence Canada, a not-for-profit innocence organization founded in 1993, assist some petitioners with their cases.

Since the 2002 reforms went into effect, the CCRG 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. This is a higher rate of referral than either the CCRC or the NCIIC, 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

145. See Criminal Code, R.S.C. 1985, c. C-46 § 696.3(3)(a) (Can.). This standard has been interpreted in a manner consistent with "the English standard that focuses on the safety of convictions as opposed to proven innocence." See Kent Roach, Wrongful Convictions in Canada, 80 U. Cin. L. Rev. 1465, 1497 (2012).
146. See Criminal Code, R.S.C. 1985, c. C-46 § 696.3(3)(a) (Can.).
147. See id. § 696.4(a).
148. See id. § 696.2(2).
149. See id. § 696.2(3); see, e.g., Anderson, supra note 22, at 12 (describing the issue of impartiality with regard to the Minister as "chief lawmaker ... too close to the prosecution of a case to render an impartial decision" on post-conviction review).
150. See Anderson, supra note 22, at 9.
155. Id.
favorable outcome—either in court or at the discretion of the prosecutor.156

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.157 In addition, the Canadian process has been criticized as characterized by undue delay; unreasonable burdens imposed upon petitioners, and a lack of transparency.158 Nevertheless, there does not appear to be any significant movement presently in Canada to revisit the structures in effect.169

III. RECONCILING THE LIVED EXPERIENCE WITH THE THEORY OF 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.

To begin, the UK’s adoption of an entirely new institutional entity makes sense in the context in which the CCRC’s authorizing legislation

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156. Id. at 290. See also Fiona Leverick et al., Post-Conviction Review: Questions of Innocence, Independence, and Necessity, 47 STETSON L. REV. 45, 60 (2017) (describing high success rate of CCRG, but in context of relatively small pool of applications).


was enacted.160 The country was in political turmoil, with the adequacy and moral legitimacy of its existing criminal justice apparatus seriously called into doubt.161 The time was ripe for significant change. The CCRC also must be understood in the context of the ongoing effort to define the scope of appellate review in criminal cases in the UK, which historically has been far more limited than in the United States.162 The CCRC's mandate to investigate "unsafe convictions" (not just cases of factual innocence) also reflects the circumstances of its creation, which involved the discovery of egregious police misconduct rather than the results of DNA testing.163 The CCRC's structure as a publicly funded nationwide body also makes sense in the context of the UK, where most criminal law enforcement and prosecution is centralized under a single prosecuting authority.164

When North Carolina acted a decade later, it too was responsive to the political situation on the ground. Consistent with the circumstances in which North Carolina's innocence consciousness arose, which involved DNA exonerations, the NCIIC focuses on claims of factual innocence.165 But its structure, as an independent but state-funded entity, borrows heavily (and self-consciously so) from the CCRC model.166 Some combination of attraction and mimicry appear to have been at work when the North Carolina commission recommended that structure, with the choice representing values that North Carolina wished to project.167 The strong leadership of North Carolina's Chief Justice in pushing for major reform also clearly was an important factor.

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 the American criminal justice system. Although it is tempting to attribute the CIU's triumph over the CCRC-type entity to a

160. See McCartney & Roberts, supra note 59, at 1342–46.
161. See McCartney & Roberts, supra note 59, at 1345.
163. HOUSE OF COMMONS REPORT, supra note 61, at 24–25.
165. See Mosteller, supra note 87, at 1731.
166. See id. at 1736–37.
167. See Mumma, supra note 88, at 252–64, 263 (describing impact of the CCRC's example on the NCAIC, including a presentation by a CCRC member to the commission charged with making recommendations to the state legislature).
lack of state resources after the financial crisis, political expediency or
cynicism on the part of prosecutors, those explanations do not 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 and there is a single criminal
procedure code. These aspects of the American system of prosecution
may represent the very reason 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.

The diffusion of innocence projects throughout the United States also
makes the CIU model feasible as a practical matter. Whereas the
investigatory work performed by the CCRC in the UK is funded by
Parliament, in the United States these tasks effectively can be
outsourced to private entities. As Kent Roach has noted, in the United
States, "[e]rror correction . . . is essentially privatized and based on
volunteer work." This arrangement is consistent with what Marvin
Zalman has described as "the American path by which ideological
interests . . . are represented by thousands of civil society interest groups
rather than by parliamentary parties," operating "in a polity
distinguished by federalism and political fragmentation . . . organized
primarily at the state or local level." In the United Kingdom, by
contrast, the civil society infrastructure necessary to sustain localized,
privately funded investigation and advocacy appears to be considerably
less robust.

168. 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 54-58 (Erik Luna & Marianne L. Wade eds.,
2012) (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 (citing Yale Kamisar,
Wayne R. LaFave, and Jerold H. Israel, Grand Jury Review, in MODERN CRIMINAL
PROCEDURE 18 (12th ed. 2008))).

169. Erik Luna & Marianne L. Wade, Introduction to Adversarial and Inquisitorial
Systems—Distinctive Aspects and Convergent Trends, in THE PROSECUTOR IN
TRANSNATIONAL PERSPECTIVE 177, 184–85 (Erik Luna & Marianne L. Wade eds., 2012).

170. See Bradley, supra note 162, at 94; Roach, supra note 15, at 119.


173. See id. at 18–20 (explaining the demise of most of the Innocence Project network
affiliates in United Kingdom, in favor of efforts residing within the judicial system,
including the CCRC).
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 field in the United States. As that field becomes more structured, prosecutors newly entering it may seek legitimacy for their own error-correction 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. As scholars with the National Registry of Exonerations recently observed, “[t]he number of CIUs will probably continue to increase at a steady pace” in part because “[t]hey have become an accepted component of the American system of criminal justice.”

In addition, that CIUs have become “politically popular” helps explain why prosecutors seeking election have embraced them.

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 crisis of faith in its criminal justice system severe enough to force more substantial reform, or maybe the requisite leadership on the national stage has not yet 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 federal

174. See NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017, supra note 8, at 21.
176. See Roach, supra note 145, at 1474; INNOCENCE CANADA, supra note 154, at 7 (observing that the Canadian federal government may have “paid scant attention” to recommendations by prior commissions and public inquiries to create an independent national commission to investigate wrongful convictions because they were “created by various provinces” rather than the federal government).
177. See INNOCENCE CANADA, supra note 153, at 7 (arguing that rather than innocence advocates presenting “a finely-tuned proposal detailing precisely how a free-standing commission could be set up,” it would be preferable for Canada’s Minister of Justice to select a qualified individual to “canvas all sides” and report back with recommendations).
law, and the criminal justice systems of the provinces and the federal government are more integrated. Canada's prosecutors and judges also are all appointed rather than elected. Thus, Canada's provincial prosecutors, who need not seek election, may not feel any political pressure to embrace past error correction as part of the mandate of their individual offices. Moreover, because Canadian provincial prosecutors do not have the same tradition of complete local independence as do American local prosecutors, it may not be so dissonant to assign responsibility to investigate miscarriages of justice, including those that occurred in the course of prosecutions brought by provincial authorities, to the federal Minister of Justice.

CONCLUSION

As the international innocence movement continues to grow, countries around the world will have to decide whether and how to re-examine past convictions for error. The experiences of the United Kingdom, the United States, and Canada—three countries much in common—demonstrate that there are at least several possible models for how such error-correction may be approached. Sociological theory suggests that as the "innocence field" becomes more established internationally, one or more of these institutional types may come to dominate the field, or we may yet see the emergence of others. Which institutions and mechanisms are most likely to be embraced in a given country will depend on a variety of factors, including the circumstances in which innocence consciousness arises therein, whether there are strong leaders committed to a particular model, and the pre-existing institutional arrangements and cultural frames in that nation.

178. See Roach, supra note 145, at 1466 (noting that "criminal law and procedure is exclusively a matter of federal jurisdiction in Canada" and Canada's policing and forensic science system is "much more centralized" than in the United States).

179. Id.