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## Innocence Commissions and the Future of Post-Conviction Review

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# INNOCENCE COMMISSIONS AND THE FUTURE OF POST-CONVICTION REVIEW

David Wolitz\*

## **Abstract:**

In the fall of 2006, North Carolina became the first state to establish an innocence commission – a state institution with the power to review and investigate individual post-conviction claims of actual innocence. And on February 17, 2010, after spending seventeen years in prison for a murder he did not commit, Greg Taylor became the first person exonerated through the innocence commission process. This article argues that the innocence commission model pioneered by North Carolina has proven itself to be a major institutional improvement over conventional post-conviction review. The article explains why existing court-based procedures are inadequate to address collateral claims of actual innocence and why innocence commissions, due to their independent investigatory powers, are better suited to reviewing such claims. While critics on the Right claim that additional review mechanisms are unnecessary or too costly, and critics on the Left continue to push for a court-based right to innocence review, the commission model offers a compromise that fairly balances the values of both finality and accuracy in the criminal justice system. At the same time, I argue, the North Carolina commission suffers from the tension – inherent in all expert agencies – between efficiency and discretion, on the one hand, and procedural fairness and accountability, on the other. I offer several suggestions for reform of commission procedures to help insure that none of these values is overwhelmed by the others. Overall, the record of the North Carolina commission demonstrates that the commission approach can provide justice where the traditional court system has failed, and, with the reforms I suggest here, it ought to be a model for states across the country.

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*“You want to hear that word – innocent – because that’s what you are.”*

Greg Taylor, the first person to be exonerated through the procedures of the North Carolina Innocence Inquiry Commission.\*

## **Section I: Introduction**

The problem of innocence will not go away. Since 1989, over two hundred and fifty Americans have been exonerated of serious crimes because subsequent evidence demonstrated their actual innocence.<sup>1</sup> These exonerations, made possible largely because of new DNA technology, constitute the most dramatic story in American criminal law over the past two decades. The problem of innocent people languishing in prison for crimes they did not commit is not, of course, a new one. But the exonerations of the past twenty years have dramatically changed our perception of the scope of the problem. If we ever could comfort ourselves with the thought that our elaborate criminal procedures made punishment of the innocent virtually impossible, we can no longer be so complacent. Today, we know that hundreds, if not thousands, of innocent people have been convicted and imprisoned for crimes they did not commit.<sup>2</sup> The sheer numbers of innocent people convicted is the major empirical aspect of our innocence problem.

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\* Greg Taylor, Television Interview with WRAL, Raleigh, N.C. (Feb. 17, 2010), *available at* <http://www.wral.com/news/local/video/7066396/> (last visited March 8, 2010). Taylor served seventeen years in prison for a murder he did not commit. *Id.*

<sup>1</sup> According to the Innocence Project, there have been 251 post-conviction exonerations due to DNA evidence alone. The Innocence Project, *Facts on Post-Conviction DNA Exoneration*, <http://www.innocenceproject.org/Content/351.php> (last visited Feb. 20, 2010). A 2005 study found a total of 340 post-conviction exonerations in the United States between the years 1989 and 2003. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

<sup>2</sup> The total rate of factually false convictions is a matter of considerable debate. Compare D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (finding that, in 3.3% to 5.0% of convictions in capital rape-murder trials in the United States between 1982 and 1989, the defendants were innocent) with Ronald J. Allen and Larry Laudan, *Why Do We Convict as Many Innocent People as We Do? Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008) (arguing that the rate of false convictions in Risinger’s study would be closer to 0.045% if plea bargains were included). Even a 2% error rate in the conviction of those currently incarcerated in U.S.

The legal aspect of our innocence problem is the enduring resistance of our judicial system to recognizing post-conviction claims based on factual innocence.<sup>3</sup> While there is a common perception that criminal convictions may be endlessly appealed and challenged collaterally, the reality is that after a valid conviction, there are very few ways for criminals to make fact-based challenges to the verdict. The celebrated writ of habeas corpus – the most well-known avenue of post-conviction procedure – is simply not a vehicle for such fact-based challenges. The United States Supreme Court has consistently refused to recognize “actual innocence” as a ground for habeas relief despite the pleas of numerous plaintiffs, activists, and academics.<sup>4</sup> And while most state criminal procedure codes provide for motions for retrial, the statutes of limitations for such

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prisons would mean that roughly 46,000 people are incarcerated in the United States for crimes they did not commit. See N.C. Aizenman, *New High in U.S. Prison Numbers: Growth Attributed to More Stringent Sentencing*, WASH. POST, Feb. 29, 2008, at A1 (estimating the total prison population of the United States at 2.3 million). The best estimates suggest that thousands of innocent people are convicted annually. See also Richard A. Wise et al, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CT. REV. 435, 440 (2009) (“Each year thousands of men and women in the United are wrongfully convicted of felonies that they did not commit.”).

<sup>3</sup> See *infra* Section II. A word on terminology: I use the terms “actually innocent” and “factually innocent” interchangeably to refer to defendants who did not commit the crime for which they were convicted. See, e.g., Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1346 n.92 (1997) (“Actual innocence means what it says – the defendant did not commit the crime of which he has been convicted.”). I call convictions of the factually innocent “false convictions” and consider them a sub-set of the larger class of “wrongful convictions.” Wrongful convictions include all convictions based on legal error. See Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Conviction Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1219 n.1 (2005) (“I count myself among those who use the term ‘wrongful conviction’ to refer not only to the conviction of the innocent but also to any conviction achieved in part through the violation of constitutional rights or through the use of systems and procedures that render the proceedings fundamentally unfair.”). For the purposes of this article, I refer to any false conviction or wrongful conviction as a “miscarriage of justice.”

<sup>4</sup> District Attorney’s Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009) (“Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.”); House v. Bell, 547 U.S. 518, 554 - 55 (2006) (“House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one. We decline to resolve this issue.”); *Herrera v. Collins*, 506 U.S. 390, 401 (1993) (“Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.”).

motions are usually very short and strictly enforced.<sup>5</sup> Many courts, most famously the Supreme Court in *Herrera v. Collins*, suggest that prisoners bringing claims of actual evidence should address their pleas to their state governors (or the President) who have the power of the pardon.<sup>6</sup> But, of course, executive clemency is a matter of pure discretion, it is politically risky, and many state pardon boards are ill equipped to scrutinize such pleas, even if they are open to them.<sup>7</sup> The most promising avenue for relief appeared to be the statutes passed in almost every state over the past decade-and-a-half allowing for claims of innocence based on DNA technology.<sup>8</sup> Unfortunately, these statutes place so many procedural limitations on the types of plaintiffs who can use them, the time within which such motions may be brought, and the scope of conviction covered that they have proven to be wholly inadequate to the task of providing a real mechanism for exonerating the innocent.<sup>9</sup> The lack of any clear procedure for entertaining post-conviction claims of actual innocence, coupled with the undeniable fact of wrongful convictions, is the Innocence Problem that will be the focus of this article.

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<sup>5</sup> See *infra* Section II.

<sup>6</sup> *Herrera*, 506 U.S. at 415 (1993) (“Executive clemency has provided the ‘fail safe’ in our criminal justice system.”).

<sup>7</sup> Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 145 – 46 (2005) (“For a number of reasons, clemency is simply institutionally incapable of providing meaningful and comprehensive review of bare-innocence claims. Throughout the country, the clemency process poses three major problems: (1) it is subject to the whims of the political process, (2) it lacks guaranteed procedural safeguards, and (3) its use is approaching the vanishing point.”); Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED. SENT. R. 211 (2009) (“[P]roposals to ‘ramp up’ clemency in the federal system may be stymied by the resources this would require from prosecutors and courts.”).

<sup>8</sup> See Kathy Swedlow, *Don’t Believe Everything you Read: A Review of Modern “Post-Conviction” DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 355 - 56 (2002) (“There is no doubt that these statutes are revolutionary: they create a realistic hope for some of the ‘wrongfully convicted,’ erect brand new legal avenues for relief, and demand a new level of accuracy from the criminal justice system.”).

<sup>9</sup> See *id.* at 356 - 67 (detailing the many procedural barriers to relief under the new DNA-specific statutes); Daniel S. Medwed, *Up the River Without a Procedure: Innocence Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655 (2005) (detailing the many procedural barriers to post-conviction relief for petitioners who do not have DNA evidence).

For a variety of reasons, North Carolina was an early leader in the movement of states to respond to the dramatic rise in exonerations due to DNA technology. A series of high-profile exonerations – including those of Ronald Cotton,<sup>10</sup> Terrence Garner,<sup>11</sup> and Daryl Hunt<sup>12</sup> – galvanized the legal community, and the Chief Justice of the State called a conference in October 2002 that led to the creation of a body called the North Carolina Actual Innocence Commission (the NCAIC).<sup>13</sup> The NCAIC’s original mission was to study the issue of wrongful convictions and to make recommendations to “reduce or eliminate the possibility of the wrongful conviction of an innocent person.”<sup>14</sup> The NCAIC’s first report summarized its research into the problem of erroneous eyewitness testimony and recommended a number of specific reforms to eyewitness identification procedures.<sup>15</sup> Other states have also convened similar commissions to study systemic problems leading to wrongful convictions.<sup>16</sup> A number of those commissions produced significant reports detailing the most salient causes of wrongful conviction, as well as suggestions for improvements to law enforcement and trial procedures.<sup>17</sup> Only the NCAIC, however, recommended the creation of a standing state innocence commission –

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<sup>10</sup> See Wise et al, *supra* note 2, at 437 – 443 (discussing Ronald Cotton’s conviction and subsequent exoneration).

<sup>11</sup> Eli Paul Mazur, “I’m Innocent”: *Addressing Freestanding Claims of Actual Innocence in State and Federal Court*, 25 N.C. CENT. L. J. 197 (2003) (analyzing post-conviction remedies with particular reference to the failings of the courts in the case of Terrence Garner).

<sup>12</sup> THE TRIALS OF DARYL HUNT (Break Thru Films 2006) (documentary film detailing Daryl Hunt’s false conviction and eventual exoneration by DNA evidence).

<sup>13</sup> Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspective Joined by a Common Cause*, 52 DRAKE L. REV. 647, 648 (2004). Chief Justice I. Beverly Lake, Jr., was instrumental in the creation of North Carolina Innocence Inquiry Commission. See Ken Smith, *Innocence Commission is Lake’s Legacy*, WRAL.com (Feb. 19, 2010), available at <http://www.wral.com/news/local/story/7084440/> (“Lake spent the early part of the decade championing the formation of the panel after several high-profile cases in which people convicted in North Carolina courts were shown to be innocent.”).

<sup>14</sup> Mumma, *supra* note 13, at 650.

<sup>15</sup> *Id.* at 653.

<sup>16</sup> See The Innocence Project, *Innocence Commissions in the U.S.*, at <http://www.innocenceproject.org/Content/415.php> (last visited Feb. 20, 2010) (describing commissions formed in California, Connecticut, Illinois, Wisconsin, and Pennsylvania).

<sup>17</sup> See *id.*

a dedicated entity with the power to factually review individual convictions and to refer worthy cases to further judicial review. And despite considerable political obstacles, the state of North Carolina implemented the recommendation put forward by the NCAIC.<sup>18</sup>

In 2006, the North Carolina legislature passed, and the governor signed into law, a bill establishing the North Carolina Innocence Inquiry Commission (the NCIIC).<sup>19</sup>

Modeled after a British body called the Criminal Cases Review Commission, the NCIIC is an independent state agency with a statutory mandate “to investigate and determine credible claims of factual innocence.”<sup>20</sup> By design, it has the necessary investigatory and subpoena power to conduct factual investigations,<sup>21</sup> and when the Commission finds that a prisoner’s claim of actual innocence is more probable than not, it forwards the case to a dedicated three-judge panel chosen by the Chief Justice of the state.<sup>22</sup> Only the three-judge panel has the authority to vacate the underlying conviction, and only if it finds that the petitioner has proven his claim of innocence “by clear and convincing evidence.”<sup>23</sup>

On February 18, 2010, Greg Taylor, a North Carolina man serving a life sentence for the 1991 murder of a 26-year-old woman, became the first person ever exonerated through the procedures of the NCIIC.<sup>24</sup>

The goal of this article is to explain the commission approach to the innocence problem and to test it against criticisms both large and small. I begin by explaining the

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<sup>18</sup> See, e.g., Ruth Sheehan, *He Fought to Fix Wrongs; Now He Waits*, RALEIGH NEWS & OBSERVER (Feb. 10, 2010), available at [http://www.newsobserver.com/news/counties/wake\\_county/story/330257.html](http://www.newsobserver.com/news/counties/wake_county/story/330257.html)? (noting that many prosecutors and victims’ advocates vigorously opposed the creation of the North Carolina Innocence Inquiry Commission)

<sup>19</sup> Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1358 (2007) (noting that the bill creating the Commission passed the state House and state Senate in July 2006 and that the governor signed the bill into law on Aug. 3, 2006).

<sup>20</sup> N.C. Gen. Stat. § 15A-1461 (2010).

<sup>21</sup> See § 15A-1467 – 68.

<sup>22</sup> See § 15A-1469(a).

<sup>23</sup> § 15A-1469(h).

<sup>24</sup> Mandy Locke, *Historic Steps Lead Taylor to Freedom*, RALEIGH NEWS & OBSERVER (Feb. 18, 2010), available at [http://www.newsobserver.com/news/counties/wake\\_county/story/344803.html](http://www.newsobserver.com/news/counties/wake_county/story/344803.html)?



origins of the Innocence Problem in Section II and the history of the commission approach in Section III. In Section IV, I canvas the major holistic criticisms of the commission approach from both the Right and the Left. I argue that innocence commissions represent a sensible and pragmatic step forward in the classic debate between those who advocate for ever more generous collateral review and those who doubt the need for further post-conviction procedures at all. The commission approach cuts through the procedural morass that makes substantive factual review in court virtually impossible for all but a lucky few, and it focuses attention where it should be – on the merits of petitioners’ claims of actual innocence – rather than on peripheral procedural issues. On the other hand, the commission approach does not create any new Constitutional rights for petitioners, nor does it place any significant new burdens on the state judiciary.<sup>25</sup> It thus strikes the right balance between the values of finality and the values of additional review and accuracy.

In Section V, I lay out the case for the specific advantages of the Commission approach over court-based procedures. I argue that innocence commissions share the merits of other single-focus agencies: namely, the development of subject-matter expertise, the power to conduct extensive fact-finding, and the mandate to identify, and recommend fixes for, systemic failures. In Section VI, I discuss some of the disadvantages of the Commission approach – in particular, the great discretion afforded

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<sup>25</sup> The commission approach burdens the judiciary only in those rare cases where the Commission refers a case to a three-judge panel for the ultimate decision on exoneration. So far, in just over three years of operation, the Commission has referred only two cases to a judicial panel. See David Zucchino, *North Carolina Man Exonerated After 17 Years*, L.A. TIMES (Feb. 18, 2010), available at <http://articles.latimes.com/2010/feb/17/nation/la-na-innocence18-2010feb18> (“Taylor’s case was only the second to reach the three-judge panel, which is appointed by the chief justice of the state Supreme Court.”).

bureaucrats with very little accountability – and suggest several reforms of the commission process to make it more procedurally fair and more accountable.

By itself, the commission approach cannot solve the Innocence Problem, for the sources of wrongful conviction are too diverse, and not all errors can be caught after trial. But North Carolina’s approach has the potential to recast the debate about the Innocence Problem from one about Constitutional rights, the limits of habeas corpus, and judicial resources to a pragmatic discussion of how an expert agency can best deliver accurate, efficient, and accountable results. The North Carolina commission, along with the process that brought it into existence, ought to serve as a model for other states as they wrestle with the difficulties of the Innocence Problem.

## **Section II: Traditional Notions of Finality and the Creation of the Innocence Problem**

This section will explain (a) why fact-based post-conviction review is anomalous within the Anglo-American criminal justice system and (b) why currently available post-conviction review procedures – motions for retrial, habeas corpus, and the new wave of DNA-inspired innocence statutes – do not provide sufficient solutions to the Innocence Problem. American criminal law has traditionally refused to recognize the legitimacy of post-conviction claims of innocence. The reasons for this traditional aversion are deeply built into the Anglo-American criminal justice system and its adversarial structure.

First, in the division of labor between the judge and the jury, fact-finding has traditionally been the province of the jury in our system.<sup>26</sup> The role of the jury is so

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<sup>26</sup> See, e.g., WILLIAM BLACKSTONE, 3 COMMENTARIES \*379-80 (“[T]he principles and axioms of law... should be deposited in the breasts of the judges.... But in settling and adjusting a question of fact... a

sacrosanct that the Founders wrote it directly into the Constitution, giving criminal defendants the right to a jury trial.<sup>27</sup> Judges – both at the trial level and on appeal – are thus understandably reluctant to usurp the jury’s role by second-guessing a factual finding.<sup>28</sup> The judge-jury division of labor is built into the trial process from the beginning –judges often tell criminal juries explicitly that they are the fact-finders<sup>29</sup> – and there is a correspondingly high standard of review necessary for a trial judge or appellate panel to reverse a jury’s fact-finding in a criminal case.<sup>30</sup> Because of the jury’s role as the sole fact-finder, fact-based appeals practically do not compute in the traditional model of the Anglo-American trial.<sup>31</sup> Indeed, the comparativist Mirjan Damaska finds the key distinction between common-law and civil-law criminal systems in the contrast between the common-law ideal of a flat, non-professional body of decision-makers and the

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competent number of sensible and upright jurymen ... will be found the best investigators of truth and the surest guardians of public justice.”).

<sup>27</sup> In fact, the right to a jury trial in criminal cases is set out in at least two places in the Constitution. U.S. Const. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”).

<sup>28</sup> See, e.g., *Lee v. Moore*, 213 So. 2d 197, 198 (Ala. 1968) (arguing that a trial court’s power to grant motions for new trial “should be hesitantly exercised, because the verdict of a jury results from one of the most precious rights in our system of government, that is, the right of trial by jury.”); LAFAVE ET AL., *CRIMINAL PROCEDURE* (3d ed. 2000) (“Courts are naturally skeptical of claims that a defendant, fairly convicted, with proper representation by counsel, should now be given a second opportunity because of new information that has suddenly been acquires.”).

<sup>29</sup> Judicial Council Of California, *Criminal Jury Instructions, California Model Jury Instructions §200, Duties of Judge and Jury* (2009) (“You must decide what the facts are. It is up to all of you, and you alone to decide what happened, based only on the evidence that has been presented to you in this trial.”).

<sup>30</sup> In cases where the defendant appeals on the basis that there was “insufficient evidence” for the jury’s verdict, “the relevant question [on appeal] is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). See generally Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437 (2005) (criticizing unduly high level of deference given to criminal jury’s findings of fact). In most states and in the federal system, the trial court judge may order a “directed acquittal” before or after a jury verdict if he or she finds the evidence so insufficient that no rational juror could vote for conviction. See LAFAVE ET AL., *supra* note 28, at 1128; FED. R. CRIM. P. 29(a), (b).

<sup>31</sup> John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477 (2002) (“[O]ne feature that has remained constant amid the many variations that have taken place throughout the common law world is the jury’s relative lack of accountability to the legal system, the public and the parties in the case.”).

Continental ideal of a hierarchy of expert judicial decision-makers.<sup>32</sup> The Anglo-American system thus valorizes juries and devalues appeals, while the Continental system prizes professional expertise and enforces professionalism through frequent appeals to higher authority.<sup>33</sup>

Second, the procedures of our jury trials are thought to insure against wrongful conviction. A jury may only vote to convict if the prosecution has proved its case “beyond a reasonable doubt.”<sup>34</sup> This is the highest standard of proof in our legal system, and while there is much debate about its exact meaning, its signal to juries is clear: Vote to convict only if you are very sure that the accused committed the crime.<sup>35</sup> On the conventional view, this rigorous standard of proof in criminal trials – as opposed to a lower standard, such as “clear and convincing” or “more probably than not” – reflects the high value our society places on convicting only the guilty.<sup>36</sup> Indeed, on the standard account, the whole bevy of procedural protections for the accused at trial do the work of insuring that no innocent person is convicted. These protections include, but are not limited to, the presumption of innocence,<sup>37</sup> the right to confront one’s accuser,<sup>38</sup> the rules

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<sup>32</sup> Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975) (distinguishing between the Continental “hierarchical” model and the Anglo-American “coordinate” model of criminal justice and describing the jury as the “paradigmatic concept” of the Anglo-American model).

<sup>33</sup> *See id.*

<sup>34</sup> *See, e.g., Jackson*, 443 U.S. at 309 (“The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt.”).

<sup>35</sup> The Supreme Court has shied away from defining the standard with any great precision. *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (“[T]he Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof.”). *But see Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (finding Louisiana jury instruction regarding reasonable doubt standard unconstitutional).

<sup>36</sup> *Patterson v. New York*, 432 U.S. 197, 208 (1977) (“The requirement of proof beyond a reasonable doubt in a criminal case is ‘bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.’”).

<sup>37</sup> *See, e.g., Osborne*, 129 S. Ct. at 2320 (“At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt.”).

<sup>38</sup> U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witness against him.”); FED. R. CRIM. P. 43(a).

of evidence,<sup>39</sup> the right to counsel and to silence,<sup>40</sup> and the right to an unbiased jury.<sup>41</sup> These rules may serve a variety of purposes, but the primary justification for them all is fairness to the accused. Critics on the Right routinely criticize these procedural protections for letting criminals off on technicalities.<sup>42</sup> Critics on the Left sometimes argue that these protections are merely window-dressing in a system that convicts ninety per cent of defendants via plea bargain.<sup>43</sup> But on either view, the grand procedural contraption that is the contemporary criminal trial is, in theory, a formidable bulwark against wrongful conviction.

Third, the adversarial nature of the trial itself militates against fact-based challenges to conviction, for the adversarial model treats the trial as a game with two sides. In this model, the prosecution and the defendant are the two players, the judge is the umpire, and the jury is ultimately the scorekeeper.<sup>44</sup> The idea is that, so long as the rules of procedure noted above are scrupulously adhered to, then the outcome of the

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<sup>39</sup> Each state system, as well as the federal government, maintains its own rules of evidence for use in criminal trials. The Federal Rules of Evidence provides: “These rules shall be construed to secure fairness in administration... to the end that the truth may be ascertained and proceedings justly determined.” FED. R. EVID. 102.

<sup>40</sup> U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defence.”); U.S. Const. amend. V (“No person... shall be compelled in any criminal case to be a witness against himself.”).

<sup>41</sup> U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”).

<sup>42</sup> See, e.g., Deborah L. Rhode, *Access to Justice: Again, Still*, 73 *FORDHAM L. REV.* 1013, 1018 (2004) (“About three-quarters of Americans think that too many defendants get off on ‘technicalities,’ a view reinforced by Hollywood dramas and celebrity trials.”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *HARV. L. REV.* 757, 799 (1994) (“In the popular mind, the [Fourth] Amendment has lost its luster and become associated with criminals getting off on crummy technicalities.”).

<sup>43</sup> Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 *YALE L.J.* 1097, 1150 n.330 (2001) (stating that 91% of adjudicated felony defendants plead guilty before trial); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 *CAL. L. REV.* 652 (1981) (criticizing the routinization of plea bargaining).

<sup>44</sup> See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (“Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.”).

game is valid. The judge may punish breaches of the rules and outright cheating.<sup>45</sup> But the judge, in this model, is no more interested in the outcome of the case than an umpire is interested in who wins a baseball game. Instead, the game is meant to be won on the skill of the players (the lawyers) rather than on an absolute notion of a “right” answer.<sup>46</sup> On this adversarial model, the only legitimate challenge to a trial outcome is a charge that the rules were not honored, and thus that the game was not procedurally fair. To claim that the outcome of a trial was wrong – to make an innocence-based challenge – presupposes a view that there is a right outcome to a trial. But, on the adversarial model, to claim that a conviction was substantively wrong – wrong “as a matter of fact” – makes about as much sense as claiming that the wrong team won a baseball game. In the game-model of the adversarial system, so long as all the rules were followed at trial, then there is no such thing as a wrong outcome.

That these deep-seated features of our criminal justice system make innocence-based claims difficult to recognize is borne out by the history of criminal appeals and post-conviction review. Criminal appeals as such scarcely existed in the federal system prior to the 1880s,<sup>47</sup> and while most states had a variety of mechanisms for reviewing criminal convictions, appeals did not figure prominently as a mechanism for protecting

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<sup>45</sup>For example, the trial judge may declare a mistrial, or an appellate court may reverse a conviction, on account of prosecutorial misconduct. *See, e.g.*, *United States v. Crutchfield*, 26 F.3d 1098 (11th Cir. 1994) (reversing and remanding conviction due to prosecutorial misconduct); *see generally* PROSECUTORIAL MISCONDUCT § 12, 14 (2009) (describing sanctions for prosecutorial misconduct).

<sup>46</sup>This adversarial model stands in contrast to the Continental model with its inquisitorial judge focused on truth-seeking. *See, e.g.*, Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 231-32 (“In contrast to continental Europe’s criminal procedure, our system has traditionally been more concerned with ‘procedural’ rather than with ‘substantive’ truth. We are likely to accept the outcome of a criminal case as legitimate as long as it is reached in conformity with procedural rules.”).

<sup>47</sup>*See* David Rossman, “*Were There No Appeal*”: *The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 521 (1990) (“For roughly the first hundred years of the federal courts, there was no right of review in criminal cases.”).

defendants' rights.<sup>48</sup> Today, by virtue of statute or state constitution, almost all American criminal defendants enjoy one direct appeal as of right after conviction.<sup>49</sup> The main grounds for appeal are errors of law in the trial court – that is, assertions that the trial court misstated or misapplied the rules of the game. Although most jurisdictions today also recognize insufficiency of evidence as a ground for reversal on appeal, the standard of review for such a claim is so strict that such appeals are virtually impossible to win.<sup>50</sup> And because appellate courts have few mechanisms for independent fact-finding, appellate judges are generally reliant on the trial record for fact-based determinations.<sup>51</sup>

After direct appeals are exhausted, the mechanisms for attacking a conviction are all extraordinary and extremely narrow. The most famous of these mechanisms is, of course, the Great Writ of Habeas Corpus, which today is really a synonym for the whole system of constitutional, statutory, and common-law post-conviction review. And while one might think that habeas would concern itself intensely with whether the prisoner is, in fact, guilty or innocent, a free-standing claim of innocence is not a ground for habeas relief.<sup>52</sup> This is not the place to recount the entire history of habeas and its relation to innocence claims, but a quick sketch is due. Habeas corpus, a process recognized in the

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<sup>48</sup> See *id.* at 543 – 48. For an overview of the history of the availability of criminal appeals in state and federal courts in 18th and 19th century America, see *id.*

<sup>49</sup> See LAFAVE ET AL, *supra* note 28, at 1256 (“[E]very state and the federal government provides some means of appellate review.... In the federal system and in most states, statutes or state constitutional provisions guarantee defendants in all felony cases a right to appellate review.”). But there is still no recognized federal Constitutional right to criminal appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“There is, of course, no constitutional right to an appeal.”); see also Rossman, *supra* note 47, at 519 (“As far as the Constitution is concerned, a state could eliminate everything but its trial courts.”).

<sup>50</sup> See *Jackson*, *supra* note 30 (articulating standard of review for insufficiency of evidence claims).

<sup>51</sup> For a discussion of the relative institutional competence of trial courts and appellate courts in fact-finding in criminal cases, see Oldfather, *supra* note 30, at 444- 49.

<sup>52</sup> See *Herrera*, 506 U.S. at 401 (“Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.”).

Constitution and for all intents and purposes codified into federal law,<sup>53</sup> provides a remedy for prisoners who can show that their detention is “in violation of the Constitution or laws or treaties of the United States.”<sup>54</sup> From the mid-1950s until the mid-1970s, the scope of habeas review and the grounds for habeas relief grew dramatically as the Warren Court constitutionalized more and more areas of criminal procedure.<sup>55</sup> But as habeas expanded, critics began to argue that it was undermining the value of finality, vitiating the norm of federalism, and becoming too unwieldy, expensive, and time-consuming.<sup>56</sup>

In this atmosphere, Judge Henry Friendly wrote an influential article arguing that only prisoners with a “colorable claim of innocence” should be able to attack their convictions collaterally.<sup>57</sup> And he directly challenged “the assumption that simply because a claim can be characterized as ‘constitutional,’ it should necessarily constitute a basis for collateral attack.”<sup>58</sup> Judge Friendly’s arguments were rooted in his concern that the process of post-conviction review had become too cumbersome, with too many grounds for relief, and too much procedural rigmarole. His call for a greater emphasis on

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<sup>53</sup> U.S. Const., art. I, § 9, cl. 2 (“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”). The federal habeas statute is codified primarily between section 28 U.S.C. § 2241 - § 2255 (2006).

<sup>54</sup> 28 U.S.C. § 2254(a) (providing relief to state prisoners convicted or sentenced “in violation of the Constitution or laws of the United States”). For federal prisoners, the analogous statute is 28 U.S.C. § 2255(a) (providing relief to federal prisoner convicted or sentenced “in violation of the Constitution or laws of the United States”).

<sup>55</sup> See, e.g., Erwin Chemirinsky, *The Supreme Court, 1988 Term: The Vanishing Constitution*, 103 HARV. L. REV. 43, 55 (1989) (“[T]he Warren Court substantially expanded the availability of federal court habeas corpus review for prisoners who claimed to be held in custody in violation of the Constitution or laws of the United States.”).

<sup>56</sup> For the two most influential articles decrying the mid-century expansion of habeas, discussed in more detail below, see Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (focusing on the values of finality and federalism) and Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (focusing on the expense of collateral review and the irrelevance of actual innocence in federal habeas).

<sup>57</sup> See Friendly, *supra* note 56, at 142.

<sup>58</sup> *Id.* at 156.



actual innocence over procedural violations would, he thought, dramatically cut down on the number of habeas claims and, at the same time, focus attention on the most deserving petitioners. His views were immensely influential in the academy and, to a certain extent, on the judiciary.<sup>59</sup> In its rhetoric, the Burger Court (1969 to 1986) “flirted incessantly” with the idea of making guilt-or-innocence the lodestar of habeas review.<sup>60</sup> For instance, it refused to extend habeas relief to prisoners whose convictions rested on evidence obtained in violation of the Fourth Amendment – in part because such an extension of the exclusionary rule would deflect attention away from “the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding.”<sup>61</sup> But, as Prof. Michael Seidman persuasively argued, despite its rhetoric, the Burger Court “in fact firmly committed itself to a process-oriented approach in which result played a decidedly secondary role.”<sup>62</sup> And when the push to reform habeas finally reached critical mass in Congress, the resulting legislation did nothing to focus attention on the guilt-or-innocence of petitioners, but instead erected further procedural barriers to habeas review.<sup>63</sup> In other words, both the expansion of habeas and its restriction had nothing to do with whether habeas effectively picked out innocent prisoners for relief; rather it had to do with shifts in consensus views about due process and federalism.

To this day, the Supreme Court has never recognized a claim of factual innocence as an independent ground for a writ of habeas corpus. The 1993 case of *Herrera v.*

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<sup>59</sup> See, e.g., Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 456 (1980) (citing Judge Friendly’s article as “seminal”).

<sup>60</sup> *Id.* at 449.

<sup>61</sup> *Stone v. Powell*, 428 U.S. 465, 490 (1976).

<sup>62</sup> Seidman, *supra* note 59, at 449.

<sup>63</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.) (enacting, *inter alia*, strict rules for successive habeas petitions).

*Collins* is still the Court’s most relevant opinion on point, and there the Court invoked the principle that “federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact.”<sup>64</sup> Thus, “claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”<sup>65</sup> The Court went on to suggest that executive clemency is the proper “fail safe” in our criminal justice system,<sup>66</sup> and that clemency – rather than habeas – is the “historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”<sup>67</sup> To be sure, the Court famously refused to completely close off the possibility that habeas relief might be warranted “in a capital case [upon] a truly persuasive demonstration of ‘actual innocence’ made after trial.”<sup>68</sup> But in the sixteen years since *Herrera*, the Court has yet to find anyone who could meet the “hypothetical freestanding innocence claim” that it has scrupulously avoided recognizing or foreclosing.<sup>69</sup> And in practice, that means that habeas litigants cannot bring a challenge based on actual innocence.

Despite this history, the last twenty years have witnessed an extraordinary number of exonerations due to DNA technologies – many have called it the most dramatic development in criminal law in generations – and this development has not gone

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<sup>64</sup> *Herrera*, 506 U.S. at 400.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 415.

<sup>67</sup> *Id.* at 412.

<sup>68</sup> *Id.* at 417.

<sup>69</sup> *House v. Bell*, 547 U.S. at 555 (“We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it.”). The Court has created an innocence gateway that allows some habeas petitioners to cure otherwise fatal procedural defaults if the petitioner can show that he or she is probably innocent. See *Schlup v. Delo*, 513 U.S. 298 (1995). The innocence gateway created by *Schlup* only allows petitioners to overcome procedural default in order to pursue a claim of Constitutional error; it does not establish relief or a showing of innocence.

unnoticed by our courts or by state and federal legislators. As the Supreme Court recently noted in *Osborne*, “[f]orty-six States have already enacted statutes dealing specifically with access to DNA evidence.”<sup>70</sup> And the federal government passed the Innocence Protection Act of 2004.<sup>71</sup> These statutes are all different from one another and difficult to summarize. On the one hand, they represent a significant response to the phenomenon of DNA-based exonerations, and they do open the door a crack to post-conviction innocence-based challenges. On the other hand, these statutes so restrict the type of claims that can be brought, the classes of prisoners who can bring such claims, and the time-frame within which such challenges can be brought, that they fail to provide the orderly mechanism for post-conviction relief that they promise.

First, almost all of these statutes restrict the availability of post-conviction innocence review to claims based on DNA testing. Convicted persons who have viable innocence claims based on new evidence other than DNA are categorically excluded.<sup>72</sup> Second, the DNA testing necessary to mount an innocence claim under these statutes will itself be granted only if the petitioner meets a threshold showing of “materiality” – that is, a “reasonable probability... that the petitioner would not have been convicted if exculpatory results has been obtained through DNA testing.”<sup>73</sup> This standard, already high, has been interpreted by many state courts to require “extraordinary circumstances”

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<sup>70</sup> *Osborne*, 129 S. Ct. at 2316. Almost all states also have a generic new trial motion, analogous to FED. R. CRIM. P. 33, available during or after direct appeals. These new trial motions usually have strict and short statute of limitations – typically from sixty days to three years – and such motions must be filed in the court of original jurisdictions. Daniel S. Medwed, *supra* note 9, at 676. These motions have the benefit of recognizing new evidence as a reason to revisit the underlying verdict, but the statute of limitations makes such motions effectively unavailable for the vast majority of potential petitioners. Additionally, it is the original trial judge who usually hears such motions, and the trial judge may be pre-disposed not to disturb a verdict yielded from her own courtroom. *Id.* at 678.

<sup>71</sup> Innocence Protection Act of 2004, P.L. No. 108-405, §§411-12, 118 Stat. 2260, 2278-85 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

<sup>72</sup> See Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1679 (2008).

<sup>73</sup> See *id.*

and is often used as an excuse to deny DNA testing when there is a hypothetical chance that DNA evidence would not be dispositive.<sup>74</sup> The Supreme Court itself recently ruled that there is no constitutional right to DNA evidence, so denials of access to DNA evidence are difficult to appeal.<sup>75</sup> Furthermore, many innocence statutes categorically bar claims from convicted persons who pled guilty at trial.<sup>76</sup> Given the prevalence of plea bargains, such a restriction effectively make over ninety per cent of convicted persons ineligible for innocence-based challenges.<sup>77</sup> Additionally, many states limit the availability of their innocence statutes to a certain sub-class of serious crimes and to petitioners still in custody.<sup>78</sup> In sum, the new DNA innocence statutes continue to throw up huge procedural barriers to whole classes of potentially meritorious challenges, and they fail to create a clear procedure for innocence-based post-conviction review.

### **Section III: Innocence Commissions and the North Carolina Approach**

Because of our system's deep-seated aversion to innocence-based post-conviction review, some states are now looking at a more novel idea – independent commissions dedicated to post-conviction factual review. An innocence commission could come in many different varieties, but the essential idea is that of an independent commission with the power (a) to investigate the factual basis of existing convictions and (b) to refer worthy cases to a judicial panel with the power to vacate the conviction. In this section, I

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<sup>74</sup> See *id.* at 1676-78

<sup>75</sup> *Osborne*, 129 S. Ct. at 2321 – 23 (finding no procedural or substantive Due Process right to post-conviction DNA evidence).

<sup>76</sup> See *Garrett*, *supra* note 72, at 1679 – 80.

<sup>77</sup> See *Bibas*, *supra* note 43, at 1150 n.330 (estimating a plea bargain rate of 91% for guilty verdicts).

<sup>78</sup> See *Garrett*, *supra* note 72, at 1679 – 80; see also *id.* at 1719 (chart describing limitations imposed by different state innocence statutes).

will summarize the history of the innocence commission idea and describe how the only functioning innocence commission in the United States – the NCIIC – operates.

### ***A. The British Criminal Cases Review Commission***

The first innocence commission of the type contemplated in this Article came into being in the United Kingdom. Why the UK, a country with a similar legal system and with whom we share much legal history, came to adopt the commission approach earlier than any American jurisdiction is an interesting story. After all, worries about false convictions, particularly in death penalty cases, have been a point of concern in the United States since at least the 1930s,<sup>79</sup> while the issue became salient in the UK only in the 1980s around the height of the Irish Troubles.<sup>80</sup> A significant difference between the two legal systems, however, is that appeals and post-conviction review were traditionally even less available in the UK than in US jurisdictions.<sup>81</sup> Before the Criminal Justice Act of 1995, people convicted of crimes in the UK had one appeal available pursuant to the Criminal Appeal Act of 1907, and no collateral review procedures were available.<sup>82</sup> The only mechanism for reviewing final convictions was a discretionary review by the Home Secretary, who had the authority to refer extraordinary cases to the Court of Appeal if he

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<sup>79</sup> See, e.g., Edwin M. Borchard, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932) (summarizing sixty-five cases of innocents convicted and suggesting legal reform to combat such miscarriages of justice).

<sup>80</sup> See, e.g., David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 52 *DRAKE L. REV.* 657, 657 - 659 (2004) (detailing high-profile cases of wrongful convictions related to the Irish Troubles).

<sup>81</sup> In the UK, regular criminal appeals did not exist until the Criminal Appeal Act of 1907, and even then, the appellate courts interpreted their mandate narrowly. See Siobhan M. Keegan, *The Criminal Cases Review Commission's Effectiveness in Handling Cases from Northern Ireland*, 22 *FORDHAM INT'L L.J.* 1776, 1787 – 88 (1999).

<sup>82</sup> *THE ROYAL COMMISSION OF CRIMINAL JUSTICE REPORT* 162 - 63 (1993) (*Royal Commission Report*); see also David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 *N. ILL. U. L. REV.* 91, 104-05 (discussing limited role of writ of habeas corpus in Britain).

determined that a miscarriage of justice may have occurred.<sup>83</sup> But the Home Secretary rarely invoked his power to refer cases.<sup>84</sup> In the British system, the Home Secretary is responsible for law and order and the national police force.<sup>85</sup> He or she has almost no incentive to appear “soft on crime” by prompting the reconsideration of final convictions. Ironically, then, the British adoption of the Commission approach can be traced to its very “backwardness” in the domain of post-conviction review prior to the 1990s.<sup>86</sup>

A number of high-profile exonerations in the 1980s and 1990s raised concerns in the UK about the prevalence of wrongful convictions and the paucity of mechanisms to correct them.<sup>87</sup> In particular, the case of the so-called Birmingham Six – six Irish men falsely convicted of bombing a pub in Birmingham – galvanized public opinion when their convictions were overturned in 1991.<sup>88</sup> In response, the British Home Secretary created a blue-ribbon panel, the Royal Commission on Criminal Justice, and charged it with the task of examining the causes of wrongful convictions and recommending better procedures for dealing with such miscarriages of justice.<sup>89</sup>

Under then-existing British law, the only post-conviction review mechanism available when substantial new evidence came to light was the authority of the Home

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<sup>83</sup> See Royal Commission Report, *supra* note 82, at 180.

<sup>84</sup> *Id.* at 181.

<sup>85</sup> *Id.* at 182 (“We have concluded that it is neither necessary nor desirable that the Home Secretary should be directly responsible for the consideration and investigation of alleged miscarriages of justice as well as being responsible for law and order and for the police.”).

<sup>86</sup> One might describe the UK’s adoption of the CCRC in the 1990s as an example of “legal leapfrogging,” whereby a country leapfrogs over intermediate stages of legal development directly to the most advanced processes and technology. *Cf.* Jamais Cascio, *Leapfrog 101*, WORLDCHANGING (Dec. 15 2004), available at <http://www.worldchanging.com/archives/001743.html> (last visited Feb. 26, 2010).

<sup>87</sup> See Kyle, *supra* note 80, at 657 – 659 (noting high-profile cases of wrongful convictions, including the Guildford Four, the Maguire Seven, and the Bridgewater Four); see also J. David Hirschel and William Wakefield, CRIMINAL JUSTICE IN ENGLAND AND THE UNITED STATES 151 (1995).

<sup>88</sup> See Royal Commission Report, *supra* note 82, at 1.

<sup>89</sup> *Id.*

Secretary to refer cases to a Court of Appeal.<sup>90</sup> The Home Secretary could refer cases only if he or she determined that a miscarriage of justice may have taken place.<sup>91</sup> The Royal Commission found that the Home Secretary was ill-suited to the task of post-conviction review because of structural contradictions. Because the Home Secretary was symbolically the chief law enforcement agent of the government, with ultimate responsibility for the national police and crime policy, he or she was inevitably reluctant to expose failings or problems in the police and prosecution services.<sup>92</sup> In addition, the Royal Commission noted the constitutional incongruity of having the Home Secretary, a member of the Government, functioning in a judicial capacity, as the arbiter of legal relief.<sup>93</sup> The Royal Commission found that the Home Secretary was aware of this anomaly in the separation of powers and felt reluctant to invoke his referral power for fear of unduly interfering in a coordinate branch of government.<sup>94</sup> In fact, the Home Secretary had referred only thirty-six cases between the years 1981 and the end of 1988, an average of between four and five cases per year.<sup>95</sup> Consequently, the Royal Commission found a real likelihood that miscarriages of justice might slip through the cracks, and it recommended taking the referral power away from the Home Secretary and placing it instead in a new independent Criminal Case Review Authority (or CCRA).<sup>96</sup>

As envisioned by the Royal Commission, the CCRA would be “operationally independent” of both the Government and the Court of Appeal, but it would be required

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<sup>90</sup> *Id.* at 180.

<sup>91</sup> *Id.* at 181.

<sup>92</sup> *Id.* at 182; *see also* Horan, *supra* note 82, at 112 (“Understandably, acting as ‘both judge and jury in its own cause,’ the Home Office was not ‘very eager’ to expose the failings or misconduct of its own police or forensic scientists in obtaining wrongful convictions.”).

<sup>93</sup> *See* Royal Commission Report, *supra* note 82, at 182.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 181.

<sup>96</sup> *Id.* at 182.

to submit an annual report to the Government.<sup>97</sup> The CCRA would have the capacity and authority to direct police investigations – or, in some instances, conduct investigations on its own – into the cases under review.<sup>98</sup> Only cases in which normal appeals were exhausted would be accepted by the CCRA.<sup>99</sup> The Royal Commission proposed that the CCRA have the authority to refer worthy cases to the Court of Appeal, though the CCRA itself would not have the fundamentally judicial power of acquittal.<sup>100</sup> Upon such referral, the Court of Appeal would conduct an evidentiary hearing and take any action it deemed necessary, be it upholding the conviction, quashing it, or ordering a new trial.<sup>101</sup>

Parliament adopted the recommendations of the Royal Commission in 1995 as part of the Criminal Justice Act,<sup>102</sup> and two years later, a newly-formed Criminal Cases Review Commission (CCRC) began operations.<sup>103</sup> Today, the CCRC is headed by eleven Commissioners, at least four of whom must be lawyers, appointed to five-year terms by the Queen upon recommendation of the Prime Minister.<sup>104</sup> A group of roughly one hundred staff-members, including about fifty Case Managers, perform most of the day-to-day functions of the Commission, including in-take, case review, and directing investigations.<sup>105</sup> Anybody convicted of a criminal offense in England, Wales, or Northern Ireland is eligible to apply for review,<sup>106</sup> though applications are not accepted if

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<sup>97</sup> *Id.* at 183.

<sup>98</sup> *Id.* at 186.

<sup>99</sup> *Id.* at 184.

<sup>100</sup> *Id.* at 183- 84.

<sup>101</sup> *Id.*

<sup>102</sup> Criminal Appeal Act, 1995, c. 35, 8 (Eng.).

<sup>103</sup> See Kyle, *supra* note 82, at 661 - 62.

<sup>104</sup> See Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform, or Both?*, 85 CHI.-KENT L. REV. 89, 94 (2010).

<sup>105</sup> CCRC, *About Us*, available at <http://www.ccrc.gov.uk/about.htm> (last visited Feb. 27, 2010).

<sup>106</sup> There is a separate Scottish Commission for Scottish offenders. See Scottish Criminal Cases Review Commission, available at <http://www.sccrc.org.uk/home.aspx>.



the applicant is still awaiting a decision on his or her appeal.<sup>107</sup> Cases that meet the threshold eligibility criteria are categorized into one of four categories (A through D) based on the complexity of the issues, and the case is “allocated to a named caseworker who will carry out the review.”<sup>108</sup>

The case review can take as little as a few weeks or longer than a year, depending on the complexity of the issues, and the case worker has the authority to direct the police to conduct specific investigations and to obtain documents from any public body.<sup>109</sup>

When the caseworker has completed the case review, the case is referred to a Commissioner or a panel of Commissioners to decide whether or not sufficient grounds exist to refer the case to the Court of Appeal.<sup>110</sup> The standard of review at this stage is “whether there is a real possibility that the conviction . . . would not be upheld.”<sup>111</sup> A panel of at least three Commissioners must meet before any case may be referred to the Court of Appeal, though a single Commissioner may send out a provisional rejection.<sup>112</sup> If a panel of Commissioners decides that there is a “real possibility” that the conviction would not be upheld, it then issues a Statement of Reasons and formally refers the case to the Court of Appeal.<sup>113</sup> At that point, the Commission’s involvement in the case is usually over.<sup>114</sup> If, on the other hand, a Commissioner determines that a case does not meet the “real possibility” standard, then a provisional rejection notice, along with a

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<sup>107</sup> CCRC, *How We Review Your Case*, available at [http://www.ccrcc.gov.uk/canwe/canwe\\_33.htm](http://www.ccrcc.gov.uk/canwe/canwe_33.htm) (last visited March 8, 2010).

<sup>108</sup> *Id.*

<sup>109</sup> See Roach, *supra* note 104, at 96.

<sup>110</sup> CCRC, *How We Review Your Case*, available at [http://www.ccrcc.gov.uk/canwe/canwe\\_33.htm](http://www.ccrcc.gov.uk/canwe/canwe_33.htm) (last visited March 8, 2010).

<sup>111</sup> Criminal Appeal Act, 1995, c. 35, § 13.

<sup>112</sup> See Roach, *supra* note 104, at 94.

<sup>113</sup> Criminal Appeal Act, 1995, c. 35, § 13.

<sup>114</sup> Lisa Griffin, *Correcting Injustice: Studying How the United States and the United Kingdom Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 113 (2009). The Commission does not represent applicants at the Court of Appeals. *Id.*

Statement of Reasons, will be sent to the applicant.<sup>115</sup> The applicant then has twenty business days to respond to the provisional rejection with any supplemental information or arguments. After reviewing any response from the applicant, the Commissioner/s will once again determine whether referral is appropriate.<sup>116</sup> If so, the case will be referred to the Court of Appeals with a Statement of Reasons. If not, then a final rejection and Statement of Reasons is issued to the applicant.<sup>117</sup> There is no judicial appeal as such from a rejection, but applicants may challenge the rejection in court as they would any other administrative action by an agency for being “perverse or absurd.”<sup>118</sup>

If a case is referred to the Court of Appeal, the Court has the benefit of the Statement of Reasons from the Commission. But the Crown Prosecution Service has the right to defend the conviction if it so chooses, and the Court – sitting as a three-judge panel –has the ability to call a hearing and entertain evidence outside of the record.<sup>119</sup> After such a hearing, the Court of Appeal has the sole authority to quash a conviction, uphold it, or take any other action it deems just.<sup>120</sup> Such decisions are made by majority vote.

The British CCRC has functioned for over a decade now, and while it has endured some domestic criticism,<sup>121</sup> it has won over many early critics from both the Right and Left, and its future seems secure.<sup>122</sup> As of January 31, 2010, the CCRC has taken in a

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<sup>115</sup> CCRC, *How We Review Your Case*, available at [http://www.ccr.gov.uk/canwe/canwe\\_33.htm](http://www.ccr.gov.uk/canwe/canwe_33.htm) (last visited March 8, 2010).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Lisa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241, 1280 (2001).

<sup>119</sup> *R. v. Craven*, 2 Crim. App. R. 12, 196 (C.A. 2001) (holding that, upon referral from the CCRC, the Crown Prosecution Service may introduce new evidence).

<sup>120</sup> *See* Griffin, *supra* note 114, at 114.

<sup>121</sup> *See* Maiatico, *supra* note 19, at 1367.

<sup>122</sup> *Id.*

total of 12,376 applications.<sup>123</sup> Of those, it has referred 445 cases to the Court of Appeal, which in turn has heard 411 of those cases.<sup>124</sup> Of those 411 cases, the Court of Appeal has quashed 290, upheld 118, and has reserved judgment on three awaiting further hearing.<sup>125</sup> In sum, the Court of Appeal has quashed convictions in close to three-quarters of the cases it has received from the CCRC.

### ***B. Innocence Commissions in the United States***

During the years that the British were busy studying the problem of false conviction and creating the CCRC, the issue attracted scant attention in the United States. In part, this is because the 1970s and 1980s were a period of increasing crime and, not coincidentally, a period when “tough on crime” policies were popular with a broad swath of citizenry.<sup>126</sup> And in part, American criminal defense lawyers and advocates held out hope that the existing system of post-conviction review – what I have called the habeas system – could be used to guard against wrongful convictions. Three developments in the early 1990s changed the atmosphere in the United States. First, crime rates began to dramatically decline, taking with them the power of “law and order” as a campaign issue.<sup>127</sup> Second, the increasing sophistication and use of DNA evidence uncovered

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<sup>123</sup> CCRC, *Case Statistics*, available at [http://www.ccr.gov.uk/cases/case\\_44.htm](http://www.ccr.gov.uk/cases/case_44.htm) (last visited March 8, 2010).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See, e.g., Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV 9, 10-12 (1999) (charting the evolution of tough on crime policies); Christopher J. Tyson, *At the Intersection of Race and History: The Unique Relationship between the Davis Intent Requirement and the Crack Laws*, 50 HOW. L.J. 345 (2007) (discussing the implicit connection between “tough on crime” political rhetoric and racial politics).

<sup>127</sup> See Mauer, *supra* note 126, at 10 (“In 1998 the FBI announced that serious crime had declined by 3 percent in 1997, continuing a six-year trend during which violent crime was down by 19 percent and overall crime by 17 percent.”).

numerous cases of unambiguously false convictions.<sup>128</sup> And, third, the Supreme Court's decision in *Herrera* shattered whatever hope was left that the habeas system itself could be counted on to investigate fact-based miscarriages of justice.

Of the three developments, the rise of DNA evidence has been by far the greatest factor prompting a new look at the efficacy of post-conviction procedures.<sup>129</sup> It has galvanized groups in civil society, most prominently the Innocence Project, to advocate on behalf of individuals and for systemic reforms, and these efforts have borne some fruit.<sup>130</sup> There is no jurisdiction in the country that has not been affected by the extraordinary power of DNA evidence, from new investigatory procedures, to new rules of evidence, to new criminal defense strategies.<sup>131</sup> As discussed in Section II, since 1997, forty-six states and the federal government have passed statutes making DNA evidence available, within strict limits, to convicted people with colorable claims of innocence.<sup>132</sup> And, in some states, the momentum for reform has gone even further, resulting in the establishment of various commissions and working groups to study the causes of wrongful conviction and offer recommendations, along the lines of the Royal Commission in the UK.

So far, at least six states – North Carolina, Virginia, Wisconsin, Illinois, Connecticut, and California – have convened some form of commission to study the

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<sup>128</sup> JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* 16 (2008) (“The renewed interest in wrongful convictions was catapulted forward by the introduction of DNA testing in the late 1990s.”).

<sup>129</sup> *Id.* (“DNA Changes Everything.”).

<sup>130</sup> The Innocence Project, *About Us*, available at <http://www.innocenceproject.org/about/> (last visited Feb. 27, 2010).

<sup>131</sup> Paul C. Giannelli, *The DNA Story: An Alternative View*, 88 J. CRIM. L. & CRIMINOLOGY 380, 380-381 (1997).

<sup>132</sup> *Osborne*, 129 S. Ct. at 2316,

problem of post-conviction review.<sup>133</sup> The factors motivating these commissions and their exact make-up and mission have differed from state to state, but they have all conducted extensive studies into the problem of wrongful convictions, and most of them have resulted in legislative reform and/or changes in law-enforcement procedures. In Illinois, for instance, following a number of high-profile death-row exonerations, Governor George Ryan instituted a moratorium on executions and established the Governor's Commission on Capital Punishment.<sup>134</sup> In 2003, the Illinois legislature passed legislation adopting some of the eighty-five recommendations of the Governor's Commission, though many of the Commission's recommendations remain unexecuted.<sup>135</sup> In Wisconsin in 2003, a Republican legislator and a former public defender together convened a panel – the so-called “Avery Task Force” – to study and recommend criminal justice reforms.<sup>136</sup> The bipartisan panel successfully ushered a bill through the Wisconsin legislature reflecting its recommendations for minimizing the number of wrongful convictions.<sup>137</sup> The California Commission of the Fair Administration of Justice, by sheer dint of the size of the state, had perhaps the best opportunity to effect substantial change in the American criminal justice system, but its success is not yet

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<sup>133</sup> See *supra*, note 16.

<sup>134</sup> See Dirk Johnson, *No Executions in Illinois Until System is Repaired*, N.Y. TIMES (May 20, 2000), available at <http://www.nytimes.com/2000/05/21/us/no-executions-in-illinois-until-system-is-repaired.html?> (last visited March 1, 2010). The Illinois case is unique in that it represented unilateral action on the part of the Governor and because its focus was solely on capital punishment. *Id.*

<sup>135</sup> See Thomas P. Sullivan, *Preventing Wrongful Convictions: A Current Report from Illinois*, 52 DRAKE L. REV. 605 (2004).

<sup>136</sup> See GOULD, *supra* note 128, at 234; *Avery Task Force Examines Wrongful Convictions*, 78 WISCONSIN LAWYER 7 (July 2005). Spearheaded by Keith Findley and State Representative Mark Gundrum, the task force was a direct response to the exoneration of Steve Avery after seventeen years of incarceration for an assault he did not commit. see generally Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 704 - 713 (2006).

<sup>137</sup> See Assemb. B. 648, 2004-2005 Leg., Reg. Sess. (Wis. 2005), available at <http://www.law.wisc.edu/fjr/innocence/05-34921.pdf>; see generally Kruse, *supra* note 136.

clear.<sup>138</sup> State commissions have usually focused on studying and offering recommendations related to the now-familiar list of the major causes of wrongful conviction: false confessions, eyewitness misidentification, false informant testimony, unproven or misused forensic technology, prosecutorial misconduct, and poor defense lawyering.<sup>139</sup> There is reason to hope that the commissions' recommendations, if adopted, will promote improvements throughout the criminal justice system – improvements both in limiting wrongful convictions and in finding the real criminal perpetrators.

None of the commissions I have described so far resembles the British CCRC, for none of them had the mandate to investigate individual cases. In fact, the original North Carolina Actual Innocence Commission (the NCAIC) resembled the other state commissions in that respect. As in the UK and in other American jurisdictions, the impetus for the creation of the NCAIC was a string of dramatic DNA-based exonerations of wrongfully convicted individuals in the state prison system.<sup>140</sup> The driving force behind the creation of North Carolina's commission was the interest and energy of the Chief Justice of the state Supreme Court I. Beverly Lake Jr.<sup>141</sup> Chief Justice Lake, known as “a conservative Republican,”<sup>142</sup> invited representatives from law enforcement agencies, the criminal defense bar, and legal academia to a meeting in October 2002 to

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<sup>138</sup> So far, the only recommendations that have made it through the state legislature have been vetoed by Gov. Schwarzenegger. See Radley Balko, *Three Vetoes: Gov. Schwarzenegger nixes sensible criminal justice reforms*, REASON MAGAZINE (Nov. 8, 2007), available at <http://reason.com/archives/2007/11/08/three-vetoes> (last visited March 1, 2010).

<sup>139</sup> See Innocence Project, *The Causes of Wrongful Conviction*, available at <http://www.innocenceproject.org/understand/> (last visited March 8, 2010).

<sup>140</sup> See Maiatico, *supra* note 19, at 1345 – 46.

<sup>141</sup> *Id.* at 1356.

<sup>142</sup> Henry Weinstein, *North Carolina to Weigh Claims of Innocence*, L.A. TIMES (Aug. 4, 2006), available at <http://articles.latimes.com/2006/aug/04/nation/na-innocence4> (describing Chief Justice Lake as “a conservative Republican”).

discuss the topic of wrongful convictions.<sup>143</sup> The meeting ended with a commitment on the part of participants to establish a commission to study in depth the problems they had discussed.<sup>144</sup> The Chief Justice took the initiative in setting up the Commission, applying for a grant of state funds from the Governor’s Crime Commission, and naming the members.<sup>145</sup>

The NCAIC began operations in early 2003 with thirty-one members, representing all parts of the criminal justice system.<sup>146</sup> Its overall mandate, similar to that of other state commissions, was “to make recommendations which reduce or eliminate the possibility of wrongful conviction of an innocent person.”<sup>147</sup> Its Mission Statement called for the study of a wide range of topics, including “eyewitness identification procedures, DNA evidence/testing, false confessions, discovery and disclosure,... rules of professional conduct and their interplay with innocence, and the post conviction review of claims of actual innocence.”<sup>148</sup> It was the NCAIC’s treatment of the final item on this list – post-conviction review of claims of actual innocence – that has set North Carolina’s criminal reform agenda apart from that of other states.

It is significant that the Mission Statement of the NCAIC defined the problem of wrongful conviction with reference both to prisoners exonerated by DNA evidence and

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<sup>143</sup> See Mumma, *supra* note 13, at 648.

<sup>144</sup> *Id.* at 649.

<sup>145</sup> *Id.* at 652. (“The Crime Commission is a pass-through agency supporting criminal justice from several federal sources that fund North Carolina law enforcement and related nonprofit agencies.”).

<sup>146</sup> *Id.* at 650 - 51. The NCAIC included representatives from the judiciary, the Governor’s office, the defense bar, law enforcement, prosecutors’ offices, legal academia, victim advocates, and members of the general public. *Id.*

<sup>147</sup> *Id.* at 650.

<sup>148</sup> NCAIC, Mission Statement § 5 (2003), *available at* [http://www.innocenceproject.org/docs/NC\\_Innocence\\_Commission\\_Mission.html](http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html) (last visited March 1, 2010).

prisoners exonerated without DNA evidence.<sup>149</sup> Consequently, the search for reform in post-conviction procedure was not limited to DNA-related issues, as it has been in so many other states. To the contrary, the NCAIC defined the problem broadly as wrongful conviction, and it quickly concluded that North Carolina lacked the necessary procedures and fora for reviewing fact-based claims of actual evidence.<sup>150</sup> NCAIC members “familiarized themselves with the United Kingdom’s Criminal Cases Review Commission (CCRC).”<sup>151</sup> And after much debate, the members voted 19-9 in favor of proposing an innocence commission modeled after the CCRC.<sup>152</sup> Voting against it were the victim advocates and a few law-enforcement representatives.<sup>153</sup>

### ***C. The North Carolina Innocence Inquiry Commission: How It Works***

The North Carolina legislature passed the bill setting up the North Carolina Innocence Inquiry Commission (NCIIC) in July 2006, the Governor signed it the following month,<sup>154</sup> and the Commission began accepting innocence claims on November 1, 2006.<sup>155</sup> While the legislature made a few changes to the NCAIC’s proposal, the bill set up a commission substantially along the lines proposed by the NCAIC.<sup>156</sup> Specifically, the Act created a commission of eight members to be composed of one superior court judge, one prosecutor, one criminal defense attorney, one “victim

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<sup>149</sup> *Id.* at § 5. (“Exoneration cases in North Carolina include Ronald Cotton, Leslie Jean, Leo Waters all of whom were exonerated by DNA; and Terrence Garner, Charles Munsey, and Tim Hennis, whose exonerations were not based on DNA.”).

<sup>150</sup> *See* Mumma, *supra* note 13, at 654.

<sup>151</sup> *Id.* at 653.

<sup>152</sup> *See* Maiatico, *supra* note 19, at 1357.

<sup>153</sup> Telephone interview with Richard Rosen, Professor Of Law, University of North Carolina School of Law (July 20, 2009) (notes on file with author).

<sup>154</sup> *See* Maiatico, *supra* note 19, at 1358.

<sup>155</sup> John Rubin, University of North Carolina School of Government, *Innocence Commission*, 2007 ADMINISTRATION OF JUSTICE BULLETIN 3, 10 (Jan. 2007), available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0703.pdf> (last visited March 8, 2010).

<sup>156</sup> *See* Maiatico, *supra* note 19, at 1358.



advocate,” one sheriff, one member of the general public, and two people to be appointed at the discretion of the Chief Justice.<sup>157</sup> The Chief Justice of the Supreme Court and the Chief Judge of the Court of Appeals share the power to appoint the members pursuant to a formula described in the statute.<sup>158</sup> The Commission chair is the one superior court judge, and each Commission member has equal voting weight.<sup>159</sup> In addition, the Commission is empowered to hire – and has hired – an executive director and other staff to carry out day-to-day administrative, investigatory, record-keeping, and other tasks.<sup>160</sup>

All claims addressed to the Commission must be from, or on behalf of, a living person who was convicted of a felony in a North Carolina state court and who claims that he or she is completely factually innocent of the crime for which he or she was convicted.<sup>161</sup> The statute defines a “claim of factual innocence” as a claim “asserting the complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief.”<sup>162</sup>

The threshold criteria implied by those definitions are as follows:

(1) The Commission will not inquire into claims on behalf of deceased individuals;

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<sup>157</sup> See N.C. Gen. Stat. § 15A-1463(a).

<sup>158</sup> See § 15A-1463(a).

<sup>159</sup> See § 15A-1463(c).

<sup>160</sup> See § 15A-1465(a)–(b).

<sup>161</sup> See § 15A-1460(1).

<sup>162</sup> § 15A-1460(1).

(2) Only convictions for felonies, and not for misdemeanors, are subject to commission review;

(3) Only convictions handed down by the General Court of Justice of the State of North Carolina are subject to review;

(4) Claims of constitutional, legal, or procedural defects in the process leading to conviction are not subject to Commission review; only claims of factual innocence will be entertained;

(5) The petitioner must present “credible, verifiable evidence of innocence” that was not presented at trial or at a relevant post-conviction review hearing; and

(6) Only claims of complete factual innocence will be reviewed, meaning that applicants must claim that they are innocent of the offense for which they were convicted and for any other criminal offenses related to the same crime.<sup>163</sup>

In addition to the appointed Commissioners, the Commission is composed of an executive director and a staff of seven.<sup>164</sup> The total budget for the Commission is roughly \$375,000 per year, and the Commission has also received an additional federal grant of half a million dollars specifically for improving DNA testing.<sup>165</sup>

The executive director and staff of the Commission utilize the six criteria noted above to screen applications that come in the door. In addition, before the Commission staff will begin any review of the case, the convicted person must give consent for the review and fill out a questionnaire. Many convicted persons fail to return the consent

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<sup>163</sup> See § 15A-1460(1). For instance, a claim that one is responsible only for manslaughter, rather than homicide in the first degree, with respect to a killing is not considered a claim of factual innocence by the Commission.

<sup>164</sup> NCIIC, *About Us*, available at <http://www.innocencecommission-nc.gov/commissioners.htm> (last visited March 5, 2010).

<sup>165</sup> See Roach, *supra* note 104, at 103.

form and the initial questionnaire.<sup>166</sup> Before launching a “formal inquiry,” the Commission staff gathers relevant legal documents and background about the case, and may even do some preliminary factual investigation, to determine whether the application meets the criteria.<sup>167</sup> The vast majority of claims are rejected before a formal inquiry begins because the application fails to meet one criteria or the other.<sup>168</sup> In such cases, the claim is rejected, and no further action is taken. A rejected applicant has no right to appeal a rejection from the Commission in any court or in any other forum.<sup>169</sup> As of March 2010, out of a total of 635 applications, only twelve (less than two per cent of all claims) had met the criteria for “formal inquiry.”<sup>170</sup>

Moreover, the Commission will not begin a formal inquiry into a case unless and until “the convicted person waives his or her procedural safeguards and privileges, agrees to cooperate with the Commission, and agrees to provide full disclosure regarding all inquiry requirements of the Commission.”<sup>171</sup> The rights and safeguards that an applicant must give up include “the right against self-incrimination, attorney-client privilege, spousal privilege, patient-physician privilege, priest-penitent privilege, and other types of privileged communication.”<sup>172</sup> And the statute adds that “[i]f, at any point during an

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<sup>166</sup> Telephone Interview with Kendra Montgomery-Blinn, Executive Director, NCIIC (July 19, 2009) (notes on file with author).

<sup>167</sup> NCIIC, *Case Progression Flowchart*, available at <http://www.innocencecommission-nc.gov/Flowchart.htm> (last visited March 5, 2010).

<sup>168</sup> NCIIC, *Case Statistics*, available at <http://www.innocencecommission-nc.gov/statistics.htm> (last visited March 5, 2010).

<sup>169</sup> § 15A-1470(a) (“[D]ecisions of the Commission and of the three-judge panel are final and are not subject to further review by appeal, certification, writ, motion, or otherwise.”).

<sup>170</sup> Anne Blythe, *Taylor Case Brings Commission Renown*, RALEIGH NEWS & OBSERVER (Feb. 22, 2010), available at <http://www.newsobserver.com/2010/02/22/351527/taylor-case-brings-commission.html> (“Less than 2 percent of all claims are accepted for a formal commission inquiry.”); NCIIC, *Case Statistics*, available at <http://www.innocencecommission-nc.gov/statistics.htm> (last visited March 5, 2010).

<sup>171</sup> § 15A-1467(b).

<sup>172</sup> Chris Mumma, *Guidelines for Counsel Appointed by Indigent Defense Services* (Aug. 14, 2007) (pamphlet on file with author). The waiver of such rights and privileges “does not apply to matters unrelated to a convicted person’s claim of innocence.” § 15A-1467(a).

inquiry, the convicted person refuses to comply with requests of the Commission or is otherwise deemed to be uncooperative by the Commission, the Commission shall discontinue the inquiry.”<sup>173</sup> In short, an applicant must waive rights that are taken for granted in the adversarial process, must pledge complete cooperation with the Commission, and must maintain such cooperation throughout the inquiry. Only then – and only if the applicant meets all of the other criteria noted above – will the Commission launch a formal inquiry.

Once the Commission begins a formal inquiry, it has the power to “issue process to compel the attendance of witnesses and the production of evidence, administer oaths, and prescribe its own rules of procedure.”<sup>174</sup> In addition, it can obtain information through any of the procedures available in the Criminal Procedures Act or the Rules of Civil Procedure.<sup>175</sup> A formal inquiry is not an adversarial proceeding. To the contrary, it is a Commission-driven fact-finding inquiry that has more in common with the “inquisitorial approach” of Continental civil-law systems than the adversarial approach of the traditional Anglo-American trial. The Commission staff drives the process, searching for and compelling disclosure of information as it sees fit.<sup>176</sup> There is no role for the prosecutor or for an applicant’s counsel in the formal inquiry process; they are on the sidelines. And in sharp contrast to the public nature of a criminal trial, none of the records or proceedings of the Commission are subject to the public record and public meeting laws.<sup>177</sup> Indeed, all such records and proceedings are confidential, with the sole

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<sup>173</sup> § 15A-1467(g).

<sup>174</sup> § 15A-1467(d).

<sup>175</sup> § 15A-1467(d).

<sup>176</sup> In the summer of 2009, the legislature granted the Commission the power to compel testimony from witnesses and to offer limited immunity in exchange for such testimony. *See* Ch. SL 2009-360 (signed by the Governor July 27, 2009).

<sup>177</sup> § 15A-1468(e).

exception that if the Commission votes to refer the case to a special three-judge panel, then all supporting records, files, and transcripts of hearings will become public.<sup>178</sup>

When a formal inquiry comes to an end, the Commissioners hold hearings – public or private, at their discretion – to determine whether “there is sufficient evidence of factual innocence to merit judicial review.”<sup>179</sup> At the end of the hearing, all eight Commissioners vote, and in order for the case to clear the commission and go on to judicial review, five or more Commissioners must vote in favor of referral.<sup>180</sup> If the convicted person had pled guilty at trial, however, then all eight commissioners must unanimously vote in favor of referral.<sup>181</sup> If the case does not pass the necessary five-person majority (or unanimity in the case of a guilty plea), then the Commission “shall document that opinion, along with supporting findings of fact” and send those documents to the trial court and the district attorney’s office in the district of original jurisdiction.<sup>182</sup> At that point, the case is closed.

If, however, the case does clear the five-person majority (or unanimity in the case of a guilty plea), then the commission will refer the case to the Chief Justice, who will in turn appoint a special three-judge panel to conduct an evidentiary hearing on the matter.<sup>183</sup> Back in front of the three-judge panel for an evidentiary hearing, the process becomes recognizably adversarial again, with state prosecutors representing the State and

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<sup>178</sup> *Id.* In addition, if a formal inquiry uncovers evidence of criminality on the part of the applicant related to the case under review, then such evidence will be provided to the prosecution, and if a formal inquiry uncovers evidence favorable to the applicant’s claim of innocence, then such evidence will be provided to the applicant and his attorney. § 15A-1468(d).

<sup>179</sup> § 15A-1468(c).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> § 15A-1469(a). The three-judge panel must not include any judge with “substantial previous experience in the case” to insure impartiality. *Id.*

the applicant's attorney arguing his client's innocence.<sup>184</sup> The standard of review in front of the judicial panel is "whether the convicted person has proved by clear and convincing evidence that [he or she] is innocent of the charges."<sup>185</sup> The conviction will be vacated only if all three judges on the panel find that the applicant has met the "clear and convincing" standard of actual innocence.<sup>186</sup> Anything less than a unanimous panel results in a denial of relief, and there is no appeal from the three-judge panel's verdict.<sup>187</sup>

To date, only three cases have made it through formal inquiry to a vote in front of the eight-member Commission, and the Commission has voted only two cases through to the three-judge panel.<sup>188</sup> The three-judge panel denied relief to the first petitioner whose case the Commission referred.<sup>189</sup> The petitioner in that case challenged his conviction for molesting his six-year-old daughter. Since the trial, the daughter had recanted her original testimony, and she and her siblings testified that their grandmother had coached her into testifying against her father at trial.<sup>190</sup> The three-judge panel in that case found that the applicant did not meet the "clear and convincing" standard of proof.

The second case to reach the three-judge panel was a high-profile murder case. In 1993, Greg Taylor was convicted of murder in the beating death of Jacquetta Thomas in Raleigh, North Carolina.<sup>191</sup> The body of the murder victim was found near a truck that

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<sup>184</sup> § 15A-1469(d). However, even at this stage, the three-judge panel has the power to compel testimony from the applicant, and the applicant may not assert any privilege or prevent any witness from testifying. § 15A-1469(d).

<sup>185</sup> § 15A-1469(h).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> NCIIC, *Case Statistics*, available at <http://www.innocencecommission-nc.gov/statistics.htm> (last visited March 5, 2010).

<sup>189</sup> NCIIC, News Release, *Man's Conviction Upheld in Innocence Hearing* (Sep. 3, 2008), available at <http://www.innocencecommission-nc.gov/inthenews.htm> (last visited March 8, 2010).

<sup>190</sup> *Id.*

<sup>191</sup> See Mandy Locke, *Historic Steps Lead Taylor to Freedom*, RALEIGH NEWS & OBSERVER (Feb. 18, 2010), available at [http://www.newsobserver.com/news/counties/wake\\_county/story/344803.html?](http://www.newsobserver.com/news/counties/wake_county/story/344803.html?) (last visited March 8, 2010).

belonged to Taylor, and he was convicted primarily on evidence that blood from the victim's body was found in his truck and testimony from a jailhouse informant.<sup>192</sup> Taylor maintained his innocence throughout the trial and in numerous post-conviction hearings, but he had exhausted all his appeals and collateral review options by 2004.<sup>193</sup> He filed a claim with the Commission, and after formal inquiry, the Commission voted unanimously to refer his case to the three-judge panel – in large part on the strength of new evidence showing that the victim's blood was not, in fact, on his truck and that contemporaneous blood lab reports to that effect had been covered up at trial.<sup>194</sup> After six dramatic days of testimony in front of the judicial panel in February 2010, the court found that Taylor had demonstrated “clear and convincing” evidence of actual innocence, dismissed his conviction, and set him free.<sup>195</sup> The exoneration of Greg Taylor has raised the profile of the Commission and ignited new interest in its procedures.<sup>196</sup>

#### **Section IV: Holistic Criticisms**

The NCIIC is the first commission of its kind in the United States, and almost everything about it – from its inception to its composition to its procedures – can be fairly debated. In this section, I will present and assess the most powerful holistic criticisms of the North Carolina Commission, the criticisms that bear most directly on the question: Does the commission model represent a real improvement over the status quo? Not all of

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<sup>192</sup> See Many Locke, *In Taylor Case, Blood is the Issue*, RALEIGH NEWS & OBSERVER (Feb. 11, 2010), available at <http://www.newsobserver.com/2010/02/11/332181/in-taylor-case-blood-is-the-issue.html>? (last visited March 8, 2010).

<sup>193</sup> See Locke, *supra* note 191.

<sup>194</sup> See Locke, *supra* note 192.

<sup>195</sup> See Locke, *supra* note 191.

<sup>196</sup> See Blythe, *supra* note 170.

these criticisms fit into a tidy model, but for organizational purposes, I will group the criticisms into two broad categories: first those from the Right and then those from the Left. I use those terms here in the colloquial way they are often invoked in discussions of criminal justice, the “Right” representing a more conservative, law-and-order, pro-prosecution perspective,<sup>197</sup> and the “Left” representing a reform-minded, fairness-focused, pro-defense perspective.<sup>198</sup>

The fundamental clash of values animating most discussions of post-conviction review is the clash between the norm of finality, on the one hand, and the values of additional review on the other.<sup>199</sup> The Court often speaks explicitly about “balancing” the interests served by finality against the interests asserted by litigants in additional review.<sup>200</sup> Predictably, the more liberal members of the court tend to come down on the side of further review, and the more conservative members tend to come down on the side of enforcing finality. The battle in each case is over how much damage additional review would inflict on finality and whether that damage is worth the benefits of review. In this section, I will begin by summarizing the general arguments in favor of finality before detailing and assessing the main Right-wing criticisms of the Commission

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<sup>197</sup> What I am calling the Right-wing perspective here is often called the “Crime Control” model of criminal justice. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 163-65 (1968) (describing the Due Process and Crime Control models of criminal procedure).

<sup>198</sup> And what I am calling the Left-wing perspective here is often called the “Due Process” model. *Id.*

<sup>199</sup> Finality is, of course, identified with the Right-wing perspective, and additional review with the Left-wing perspective.

<sup>200</sup> See, e.g., *Herrera*, 506 U.S. at 438 (Blackmun, J., dissenting) (“The Court sought to strike a balance between the State’s interest in the finality of its criminal judgments and the prisoner’s interest in access to a forum to test the basic justice of his sentence.”). *McCleskey v. Zant*, 499 U.S. 467, 520 (1991) (Marshall, J., dissenting) (“[T]he test for identifying an abuse must strike an appropriate balance between finality and review in that setting.”); *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (“Balanced against the prisoner’s interest in access to a forum to test the basic justice of his confinement are the interests of the State in administration of its criminal statutes. Finality serves many of those important interests.”).



approach. Then, I will summarize the general arguments in favor of additional review before detailing and assessing the Left’s major criticism of the Commission approach.<sup>201</sup>

***A. Criticism from the Right: Taking Finality Seriously***

Simply put, many on the Right will argue that the innocence commission approach goes too far on the side of unfettered review and does too much damage to the interests served by finality in criminal law. By most accounts, those interests – which I will discuss in more detail below – include most prominently (a) judicial economy, (b) the aims of punishment, (c) general repose, and (d) incentivizing robust trials.

Judicial economy – or “conservation of resources” as Prof. Paul Bator called it – is, for many, the primary justification for finality.<sup>202</sup> The basic idea is that our criminal justice system – indeed, any human system – has limited resources with which to fulfill its tasks and that all efforts should be made to wring unnecessary procedures out of the system. “If a job can be well done once, it should not be done twice.... Why duplicate effort?” Prof. Bator asked.<sup>203</sup> Any incremental increase in review adds to already overwhelmed courts’ dockets, increases expenses, and takes away resources from adjudication of newer and more pressing matters.<sup>204</sup> Without some very compelling reasons, the argument goes, there should be a presumption against dedicating more resources to disputes already authoritatively decided by the criminal justice system.

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<sup>201</sup> My own view is that the clash between the norms animating finality and those that counsel in favor of increased review cannot be determined in any neutral, logical way. The values at stake on each side are legitimate, though they are largely incommensurable; there is no single meta-value by which we can judge when we need marginally more finality or marginally more review. I do not, therefore, propose to locate, through an exercise in logic, exactly where we ought to draw the line on the finality-review spectrum. But it is important to understand the equities on both sides of the issue to understand the costs and benefits of the innocence commission approach and to better understand the strengths and weaknesses of arguments on both sides.

<sup>202</sup> See Bator, *supra* note 56, at 451.

<sup>203</sup> *Id.*

<sup>204</sup> See Friendly, *supra* note 56, at 148 (“The most serious single evil with today’s proliferation of collateral attack is its drain upon the resources of the community – judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft-overlooked necessity, courtrooms.”).

Second, many argue that finality is a necessary pre-condition for achieving the ends of punishment, no matter what one believes those ultimate ends to be. “Surely it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment,” wrote Prof. Bator.<sup>205</sup> There must be some point at which a conviction becomes irreversible and punishment inevitable if punishment is to effectively act as any sort of deterrent or if any retribution is to be had. Moreover, an “endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all” is inconsistent with the rehabilitative goals of punishment, which requires the “realization by the convict that he is justly subject to reeducation and treatment in the first place.”<sup>206</sup> The idea here is that all adjudication of the dispute must end – that is, conviction must be final – before the aims of punishment can begin to have any effect.

Related to the idea of finality-as-precondition-for-punishment is the idea of finality-as-repose. Repose is a difficult concept to pin down, as even those who emphasize it admit. Judge Friendly described it as the “human desire that things must sometime come to an end.”<sup>207</sup> Prof. Bator spoke of repose as a “psychological necessity” and contrasted it with “perpetual and unreasoned anxiety.”<sup>208</sup> A legal system is not fulfilling its social function if it fails at some point to put to rest the bulk of legal disputes, for the society has a profound need to move on from such disputes. Both Judge Friendly and Prof. Bator took pains to emphasize that repose is not just a fancy way to describe

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<sup>205</sup> See Bator, *supra* note 56, at 452.

<sup>206</sup> *Id.*

<sup>207</sup> See Friendly, *supra* note 56, at 149.

<sup>208</sup> See Bator, *supra* note 56, at 453.

“mere complacency.”<sup>209</sup> Rather, for both of them, repose is a state of reasonable psychological security (or closure) that allows a society and its members to “leave[] well enough alone” and “channel[] our limited resources of concern toward more productive ends.”<sup>210</sup> While there is some overlap here with the idea of judicial economy, the emphasis of finality-as-repose is not on conserving the physical or monetary resources of a society, but rather its psychological or spiritual energy. On this account, repose is a society’s basic conviction that it has resolved past disputes and can now take on new tasks.<sup>211</sup>

Finally, some argue that a commitment to finality is part and parcel of a commitment to the criminal trial of first instance. First, there is the worry that trial judges – and we might add, trial juries – might not put a sufficient amount of effort into the matters before them if they think that they are engaged in mere “suggestion-making” rather than authoritative decision-making.<sup>212</sup> Prof. Bator “could imagine nothing more subversive of a judge’s sense of responsibility” than “the notion that all the shots will

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<sup>209</sup> *Id.*; Friendly, *supra* note 56, at 149. Implicitly, the difference between repose and complacency is that the latter indicates a general lack of concern about whether justice is being done. Repose is a state in which one is fairly confident that justice has been done. Why the confidence that there are so few innocent people being convicted? Because, on this account, the system is designed to err on the side of innocence. As Prof. Hazard put it, “The presumption of innocence, the privilege against self-incrimination, the right to counsel, and all the rest of the legal protections given an accused are means to lead the system into regularly making Type II errors.” Geoffrey C. Hazard, Jr., *Preclusion in a Federal System: Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 651 (1985).

<sup>210</sup> Bator, *supra* note 56, at 453.

<sup>211</sup> The value of repose is most clear when one thinks of a crime victim and/or his or her loved ones. It must be terribly upsetting to see the person that the court system has already found guilty of the crime re-open the case years after trial and appeal. From the perspective of the convicted person (even a falsely convicted person), there may also be some psychological benefit to knowing that the “fight” over the conviction has, or will, come to an end. For it is only after that end-point has been reached that the convicted person can turn his full attention to other concerns in life. Finally, there is broad agreement that for many criminal cases, the sheer passage of time makes accurate determinations of guilt or innocence more difficult. Finality acts as a general bar against re-litigation of an issue long after memories have faded, evidence has gone stale, and files have been lost. It gives prosecutors the assurance that there is a point after which they no longer have to keep proving the legitimacy of the conviction. In this sense, finality-as-repose serves a similar function to routine statutes of limitation – it lets the legal status quo be so that everybody in the system can go on to the next issue.

<sup>212</sup> Hazard, *supra* note 209, at 650.

always be called by someone else.”<sup>213</sup> The idea here is that the system needs to invest some decision-maker(s) – namely, the trial judge and jury – with sufficient final authority to impress upon them the weight of their responsibility. Any increase in the ability of the litigants to re-open the case post-trial necessarily diminishes the trial court’s authority and thus undermines its sense of responsibility. At the same time, there is a worry that the litigants themselves will invest less time and energy into the trial process to the extent that final decisions are, in fact, made at some later point in the process. “The prospect of relitigation,” Judge Easterbrook has written, “would reduce the effective stakes of the first case, leading to an erosion in accuracy.”<sup>214</sup> Because the trial is precisely the procedure in our system best suited for thrashing out the issues at stake in litigation, especially issues of fact, parties to the criminal case should “concentrate their energies and resources on getting things right the first time.”<sup>215</sup> The availability of post-conviction review, on this account, saps the urgency out of trials, and thus does real damage to the most important and most comprehensive forum of decision-making in the whole system.

I have laid out these conventional accounts of finality to show that a general presumption against revision – that is, against more post-conviction review – is supported by a constellation of important social interests. There are real costs, both tangible and intangible, to re-opening final convictions to review, and “second-guessing merely for the sake of second-guessing” is not a sufficient reason to create collateral procedures.<sup>216</sup> Of course, a single focus on the norm of finality is not tenable, for the criminal justice

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<sup>213</sup> Bator, *supra* note 56, at 451. Geoffrey Hazard asked, “what if everything a trial judge does is in principle merely provisional, subject to approval by higher authority, both as to substance and as to technical regularity? In that model of system the first instance functionary epitomizes the low level bureaucrat. . . . they are not treated as judges.” Hazard, *supra* note 209, at 650.

<sup>214</sup> *United States v. Keane*, 852 F.2d 199, 201 (7th Cir. 1988).

<sup>215</sup> *Id.*

<sup>216</sup> Bator, *supra* note 56, at 451.

system must also endeavor to meet other ends – among them, accuracy, fairness, and fidelity to Constitutional norms. But for critics on the Right, the commission approach to collateral review runs roughshod over traditional notions of finality, and thus represents an anomaly in our criminal justice system. In the next four sub-sections, I will sketch the major versions of the finality-based criticism of the commission approach and assess the strength of the claims.

### **1. All Post-Conviction Factual Review Is Categorically Unnecessary**

The unstated premise at the root of the commission approach is that there ought to be some post-conviction mechanism available for reviewing a freestanding claim of actual innocence. An attack on this premise is the most fundamental criticism that can be brought against the commission approach, and dealing with this criticism entails entering into some of the most profound debates about the nature of post-conviction review. What are the purposes of post-conviction review, and what procedures (if any) best fulfill those purposes?

Paul Bator’s 1963 article *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners* is a good place to enter the debate, for although the bulk of his article is devoted to the thorny issue of federalism,<sup>217</sup> his discussion of the concept of finality has been a hugely influential articulation of the conservative position on post-conviction review.<sup>218</sup> He began his analysis with the observation that “the possibility of error” is

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<sup>217</sup> See Bator, *supra* note 56, at 463 – 83. For understandable reasons, the issue of federalism has dominated discussions of post-conviction review in the United States. The commission approach, however, does not directly implicate issues of federalism, for commissions are creatures of the same sovereign as the convicting authority (the state) – as opposed to federal courts sitting in judgment of state-level convictions. One can imagine, however, future cases in which the actions of a state innocence commission may themselves be at issue in federal habeas cases.

<sup>218</sup> Supreme Court opinions have cited Prof. Bator’s article over twenty times. See, e.g., *Danforth v. Minnesota*, 552 U.S. 264, 272 n.6 (2008); *Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976). Prof. Bator, it bears remembering, wrote *Finality in Criminal Law* in the early 1950s, a time when the scope of federal

“inherent in any process.”<sup>219</sup> Consequently, “if the existence *vel non* of a mistake determines the lawfulness of the judgment, [then] there can be no escape from a literally endless relitigation of the merits because the possibility of mistake always exists.”<sup>220</sup> In order to escape this endless relitigation, “the notion of legality must at some point include the assignment of final competences to determine legality.”<sup>221</sup> This is a classic statement of the principle of finality – the notion that a functioning legal system must, at some point, come to a final and irreversible decision regarding the dispute in front of it. “Somehow, somewhere,” wrote Prof. Bator, “we must accept the fact that human institutions are short of infallible; there is reason for a policy that leaves well enough alone and which channels our limited resources of concern toward more productive ends.”<sup>222</sup>

Applying this view of finality, Prof. Bator argued that “if one set of institutions has been granted the task of finding the facts and applying the law and does so in a manner rationally adapted to the task, in the absence of institutional or functional reasons to the contrary we should accept a presumption against mere repetition of the process on the alleged ground that, after all, error *could* have occurred.”<sup>223</sup> In our system, it is the task of the jury to find the facts and that of judges to articulate the law. Thus, the only

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habeas corpus was dramatically widening and the number of habeas filings was increasing. In particular, Prof. Bator’s article criticized the watershed case of *Brown v. Allen*, 344 U.S. 443 (1953), which held that federal courts had discretion to “redetermine the merits of federal constitutional questions [already] decided in state criminal proceedings.” *Brown*, 344 U.S. at 507. Prof. Bator argued that *Brown* had imprudently (and ahistorically) expanded the scope of federal habeas beyond its proper bounds. See Bator, *supra* note 56, at 443 - 44. But it is Prof. Bator’s more general discussion of finality in the criminal law that is of interest to us here.

<sup>219</sup> Bator, *supra* note 56, at 447.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 450 - 51.

<sup>222</sup> *Id.* at 453.

<sup>223</sup> *Id.* at 454. This is also a re-articulation of the principle of institutional settlement: “[D]ecisions which were the duly arrived at result of duly established procedures... ought to be accepted as binding upon the whole society unless and until they are duly changed.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATIONS OF LAW* 4 (tent. ed. 1958) (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) Prof. Bator’s writings are suffused with the precepts of the Legal Process school.

legitimate issue that can be raised after a trial is “whether the conditions and tools of the inquiry were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied” – in other words, “whether the processes previously employed for determination of questions of fact and law were fairly and rationally adapted to that task.”<sup>224</sup> On Prof. Bator’s account, then, a “failure of process” at trial is a legitimate reason for revisiting a conviction, and he offered up the scenarios of a bribed judge, a mob-dominated jury, or a defendant tortured into pleading guilty as paradigmatic examples of “failure of process.”<sup>225</sup> A “‘trial’ under such circumstances,” he wrote, “is not a rational method of inquiry into questions of fact or law, and no reason exists to respect its conclusions.”<sup>226</sup> But unless there is reason to doubt that the trial process was rational or fair, then there is no reason to think that any further process would yield any more accurate result. We can sum up the argument thus: Determining guilt or innocence is the institutional function of the trial court; so long as the trial itself is fair and free of procedural errors, there is no reason to “second-guess” the jury’s verdict.<sup>227</sup> A straight-

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<sup>224</sup> Bator, *supra* note 56, at 455. This is another classic statement of Legal Process theory, which holds that it is the institutional competence of courts in providing procedural regularity that gives their decisions legitimacy. What legitimates court decisions, on this account, is not substantive justice, but rather the provision of procedural regularity.

<sup>225</sup> Bator, *supra* note 56, at 455.

<sup>226</sup> *Id.*

<sup>227</sup> To be clear, Prof. Bator’s position does not rest on any unwarranted belief in the infallibility of juries. He admitted from the outset that “there is no ultimate guarantee that any tribunal arrived at the correct result.” *Id.* at 447 But, from precisely this insight, he argued, there is no reason to believe that a second review of a case is any more likely to result in the “correct” decision than the first review (i.e., the trial.). *Id.* Whatever system of appeals and collateral review we choose to set up, he argued, cannot “be validated by the assertion that it is logically necessary if the ‘truth’ is to be established,” for again, there is no “ultimate guarantee” that any tribunal or any process of review will produce the truth. *Id.* at 449.

Interestingly, Prof. Bator’s argument can be read not only as a classic statement of the principle of finality, but also as a classic statement of the Due Process model of criminal procedure. Normally, of course, we think of commentators advocating finality as adherents of the Crime Control model. But Prof. Bator saw procedural failure as a legitimate rationale – indeed, the sole legitimate rationale – for collateral review for any review of the trial verdict. In that sense, he was an arch-proceduralist.

forward claim of factual innocence, untethered to any claim of procedural error, simply has no place in this system.

Paul Bator's argument against a freestanding post-conviction claim of factual innocence is logically consistent and pragmatic in its eschewal of transcendent truth and in its sensitivity to the role of existing institutions.<sup>228</sup> But too much has changed since the early 1960s for Prof. Bator's brand of proceduralism to carry the day. Perhaps in 1963, a hard-nosed Harvard Law School professor could bite the proverbial bullet and accept a miniscule number of false convictions as a tragic but inevitable product of any human system of criminal justice.<sup>229</sup> But a contemporary defender of Prof. Bator's argument would have a considerably more bitter bullet to bite down on. The advent of DNA technology and the subsequent exoneration of more than 250 convicted persons has changed the terms of debate. First, the number of people convicted for crimes they did not have any part in – a number which may have appeared *de minimis* in 1963 – now appears to be considerable.<sup>230</sup> It is one thing to be serene about the possibility of a tiny number of innocent people serving jail-time; it is quite another to know that hundreds of convicted people, including many on death row,<sup>231</sup> have been found factually innocent and that many experts believe that those hundreds represent the tip of the iceberg.<sup>232</sup>

Second, the proposition that a later fact-finding inquiry is unlikely to be any more

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<sup>228</sup> Indeed, it is still the “winning” argument insofar as a freestanding post-conviction innocence claim is still not recognized as a right under federal or state law.

<sup>229</sup> Bator, *supra* note 56, at 453. (“Somehow, somewhere, we must accept the fact that human institutions are short of infallible.”).

<sup>230</sup> The precise number is, of course, unknown and perhaps unknowable. *See supra* note 2.

<sup>231</sup> The Death Penalty Information Center counts 139 death row exonerations since 1973. DPIC, *Facts About the Death Penalty*, available at <http://www.deathpenaltyinfo.org/home> (“Death Penalty Fact Sheet”) (last visited March 6, 2010). The Innocence Project, which counts only those released pursuant to new DNA evidence, claims seventeen death row exonerations due to DNA evidence alone. Innocence Project, *Case Profiles*, available at <http://www.innocenceproject.org/know/> (last visited on March 6, 2010).

<sup>232</sup> *See, e.g.*, Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 62 (2008).



accurate than an earlier inquiry is belied by the power of new forensic technologies. In the age of DNA evidence, it is no longer credible to argue that post-conviction procedures are just as likely to result in error as trials conducted years before.

In retrospect, what Prof. Bator failed to acknowledge or foresee in his argument is the way in which new and credible evidence can cast legitimate doubt on the verdict of the trial, quite apart from any procedural defect. One need not believe all the hype surrounding DNA evidence to recognize that it represents a powerful and credible forensic tool and that it can achieve levels of accuracy in identification heretofore impossible. But DNA evidence is simply the most dramatic token of a more mundane phenomenon – the appearance, years after the trial, of credible evidence calling into question the factual basis of the conviction. New evidence can take the form of new alibi reports, new videotape evidence, recanted testimony, and captured computer screen-shots. Prof. Bator’s discussion of finality did not consider any of these possibilities.<sup>233</sup> As the North Carolina commission makes “credible, verifiable” new facts a threshold criteria of review,<sup>234</sup> it confronts Prof. Bator’s arguments precisely at his weakest point – indeed, precisely where he has refused to offer an argument.<sup>235</sup>

We simply know that too many innocent people have been convicted, and we know that contemporary forensic technology can yield dispositive information unknown at the time of trial. Moreover, we are no longer comfortable privileging procedural

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<sup>233</sup> Geoffrey Hazard makes a similar mistake when he argues against Prof. Resnick’s suggestions that more collateral review is necessary. “More words and more law, but no more facts,” he writes in evident disgust. Hazard, *supra* note 209, at 651. But the commission approach makes new facts the *sine qua non* of Commission review and takes as its very task the uncovering of more facts about the original crime. Indeed, under the commission approach, no more law is brought to bear on the crime at all; *only* new facts matter.

<sup>234</sup> § 15A-1460(1).

<sup>235</sup> Of course, it is not fair to criticize Prof. Bator for not directly addressing the innocence commission model; no such thing existed in his lifetime.

regularity and institutional competence over ultimate results. The categorical denial of any judicial relief to the factually-innocent-but-duly-convicted is no longer a tenable position.

## **2. Innocence Commissions Are Too Costly**

Most critics on the Right admit that some mechanism for post-conviction factual review may be necessary in extraordinary circumstances, but will argue on cost-benefit grounds that the creation of a free-standing innocence commission – especially one with such loose procedural standards – is too large an investment in additional review. The cost-benefit criticism comes in many flavors, but the basic claim is that the small-but-real benefits provided by an innocence commission are simply outweighed by the costs of the commission. The focus of this type of criticism is not the *principle* of post-conviction factual review, but rather its *cost*.

It is no trivial matter to set up, staff, and administer a new state commission. There is a selection process for commissioners, a professional staff to hire, office space to find, internal procedures to initiate – all the usual costs of starting a new state institution. Moreover, the very job of the institution (factual investigation and research) is labor- and resource-intensive. So the start-up and operational costs are considerable.<sup>236</sup> At the same time, the relative procedural looseness of the commission approach means that the commission will inevitably spend a considerable amount of time on unmeritorious cases. Indeed, the NCIIC has cast aside almost all of the traditional procedural bars to post-conviction review: there are no custody requirements, no statutes of limitation, no bars to successive petitions, and of course, no requirements to append a constitutional claim. The reason to be rid of these traditional procedural “gate-keepers” is that they prevent

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<sup>236</sup> See *supra* notes 164 – 165 and accompanying text.

meritorious cases from reaching review on the merits. But the cost-benefit critique demands that each procedural liberalization cost no more in judicial resources than the value of the benefits it is likely to achieve in reversing wrongful convictions.

The cost-benefit analysis has added bite if one assumes, as Prof. Erik Lillquist does, that there is a “generally fixed” amount of resources available for or within any criminal justice system.<sup>237</sup> Thus, the creation and operation of an innocence commission “necessarily shifts” resources from other sources within the criminal justice system to the commissions themselves.<sup>238</sup> On this view, then, innocence commissions may not only fail a general cost-benefit analysis, but may also siphon off resources from more efficacious parts of the criminal justice system. Lillquist, for instance, argues that the very existence of the innocence commission renders those professionals who take part in its proceedings – lawyers, judges, and other law-enforcement personnel – unavailable to the rest of the criminal justice system.<sup>239</sup> All that the commission does is take scarce resources and re-allocate them away from more efficient and more important sectors – e.g., first-instance trials – to an untested and inefficient sector, the new commission.<sup>240</sup> Under this more exacting standard, then, innocence commissions must prove not only that their benefits exceed their costs, but also that their net benefits are greater than the net benefits of other parts of the criminal justice system. This is a criticism, then, driven by both judicial economy concerns and a deep sense that the right place to focus

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<sup>237</sup> Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 909 (2007)..

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 909 – 10.

<sup>240</sup> The most likely net result, Lillquist argues, is an overall “decrease in accuracy” in the justice system. *Id.* at 909. Why? Because, after the establishment of an innocence commission, the legal resources of the state – particularly its human capital – is spread even thinner over the remaining cases it confronts. *Id.*

resources is on the initial trial, when the issues are still fresh, rather than on collateral procedures.

There is, of course, some real limit to the amount of resources that any society can or should allocate to providing post-conviction factual review. The question is whether the innocence commission approach demands too much. Since its inception in late 2006, the NCIIC has cost the State of North Carolina between \$200,000 and \$400,000 per year.<sup>241</sup> As of March 2010, it had received 635 petitions, processed over 460 cases, and referred three cases to the three-judge panel.<sup>242</sup> So far, only one person, Greg Taylor, has achieved exoneration through the commission process. Over a million dollars spent for a single exoneration – at first blush, this record might suggest that the Commission is not worth the cost.

The problem with this mode of analysis is that, as rational as it purports to be, it cannot yield answers when both costs and benefits are denominated in anything other than dollars. In the case of innocence commissions, the costs are more than just the dollar-value of the time and resources spent on operating the commissions; there is also the cost to the value of finality and the interests it serves. And the benefits are more than the dollar-value of releasing an innocent person from prison,<sup>243</sup> there are also the benefits to the values of accuracy, systemic legitimacy, and professionalism. There is no way to tally up the value units on either side of the equation and come out with a neutral determination of whether innocence commissions are worth the price. There is also no

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<sup>241</sup> See Roach, *supra* note 104, at 103.

<sup>242</sup> NCIIC, *Case Statistics*, available at <http://www.innocencecommission-nc.gov/statistics.htm> (last visited March 5, 2010).

<sup>243</sup> Incarceration of the innocent costs money, too. Estimates of the annual cost of imprisoning one person in North Carolina range from \$21,597 for “minimum custody” to \$31,273 for “close custody.” N.C. Department of Corrections, *Cost of Supervision*, available at <http://www.doc.state.nc.us/dop/cost/> (last visited on March 6, 2010); see also N.C. Department of Corrections, *Glossary*, available at <http://www.doc.state.nc.us/r&p/GLOSSARY.HTM> (last visited on March 6, 2010).

way to compare the systemic benefits of the innocence commission to the benefits that could otherwise be generated by spending the same resources in another part of the criminal justice system. Nobody doubts that police departments, prosecutors, public defenders, trial courts, and correctional facilities could all benefit from an injection of resources. But it is not at all clear that the same expenditure of resources currently going to the NCIIC would yield greater systemic benefits if it went to those already-existing institutions. The cost-benefit criticism demands a level of quantitative ability that is not only difficult but conceptually impossible when the units of measurement include values in addition to dollars and cents.

Additionally, the monetary costs of creating an innocence commission by statute are almost certainly lower than the costs of a judicially created right to factual review. A court-based right of review would trigger the full panoply of procedural rights for the petitioner. The parties themselves would control the process, and the court system would have to endure whatever costs that the parties have a right to extract. The commission approach actually allows the legislature to maintain greater fiscal control of the entire process – from specifying commission procedures, to allocating budgets, to monitoring the commission’s efficiency and efficacy. And a new commission, created and funded by a state legislature, is likely to be more responsive to legislative concerns about cost than the already-existing independent judicial system. In sum, once there is broad agreement that some post-conviction factual review procedure is necessary, there is good reason to think that the commission approach is more fiscally prudent than additional court-based approaches.

### 3. Innocence Commissions Will Not Increase Accuracy

The spur for creating innocence commissions rests, in part, on the knowledge that trial courts sometimes make mistakes and that innocent people are occasionally convicted for crimes they did not commit. This knowledge suggests a couple of corollaries – first, that the commission itself will occasionally make mistakes and find someone innocent who, in fact, committed the crime and, second, that trial courts occasionally acquit guilty defendants.<sup>244</sup> Critics of the innocence commission approach have seized on both of these corollaries to argue that (a) the commission will lead to wrongful exonerations and (b) that it will do nothing to prevent wrongful acquittals at trial. On this account, then, the commission fails on its own terms to increase systemic accuracy.

Some argue that there is a real danger that innocence commissions will lead to “wrongful vindications” of factually guilty persons, thus leading the criminal justice system even further away from accuracy.<sup>245</sup> Indeed, on this account, innocence commissions may have real institutional incentives to find cases of wrongful conviction even where none exist. According to standard public choice analysis, state institutions tend to do what is necessary to justify their continued existence.<sup>246</sup> In the case of innocence commissions, the purported function they fulfill is to find innocence where the rest of the criminal justice system wrongfully found guilt. On this account, the best – perhaps the only – evidence that the commission is doing its job is, thus, the actual finding of wrongful convictions. Those attracted to working for the commission and its promoters will be hoping that the commission exposes the kind of spectacular cases that

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<sup>244</sup> The commission model does not allow the commission itself to vacate guilty verdicts, but rather to recommend an evidentiary hearing in front of a specially-designated court. Only the court has the power to vacate the conviction.

<sup>245</sup> See Lillquist, *supra* note 237, at 908.

<sup>246</sup> See, e.g., THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 10 (1991) (explaining the essential elements of rational decisionmaking).

prompted the creation of the commission in the first place.<sup>247</sup> Politicians and judicial officials will all be looking for evidence that the money spent on the commissions is worth it; state legislators in particular need good reasons to continue to fund a novel and independent state institution. For the commission, there would be no better way to prove its worth than to expose wrongful convictions that the rest of the criminal justice system was unable to uncover. Consequently, critics can argue, the commission will have an innate bias toward finding wrongful convictions whatever the technical burden of proof might be.<sup>248</sup> The result is an intolerably high risk of wrongly vindicating the guilty.<sup>249</sup>

The risk that the commission would be biased in favor of leniency might be mitigated if its mandate also included the factual review of acquittals. But, of course, innocence commissions represent a “one-way ratchet” – they allow for review of convictions, but not for the review of acquittals.<sup>250</sup> Consequently, even if the commission succeeds in overturning a few genuinely wrongful convictions, it cannot succeed in overturning wrongful acquittals. Thus, on this argument, the commissions tilt the criminal justice system ever more in favor of leniency and betray their purported rationale of accuracy. Everyone agrees, of course, that the current understanding of the Double Jeopardy Clause makes it impossible to re-prosecute a defendant for a crime of

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<sup>247</sup> In fact, the exoneration of Greg Taylor led a number of proponents of the Commission to proclaim its value. *See* Blythe, *supra* note 170.

<sup>248</sup> Indeed, the very name “innocence commission” suggests that the commission is there to find the innocent. Note that the British commission is called the Criminal Case Review Commission in part to combat the perception that it has a bias toward finding innocence.

<sup>249</sup> The possibility that innocence commissions will occasionally clear guilty criminals might be a stand-alone argument against them, or it might factor in to a more complex argument about the relative benefits and costs of the commission approach. Alternatively, it could serve to push internal commission procedures to be more restrictive than those, in fact, adopted by North Carolina. In any guise, the possibility of commission error resulting in the wrongful vindication of a guilty person is one that cuts against any liberalization of post-conviction review.

<sup>250</sup> *See* Lillquist, *supra* note 237, at 910.

which he has been acquitted.<sup>251</sup> But, the argument goes, if the animating principle behind innocence commissions is to increase the accuracy of the criminal justice system – to insure that the labels guilty and innocent are properly assigned – then proponents of innocence commissions in principle ought to be in favor of similar review of acquittals, especially where new evidence suggests that the defendant did, in fact, commit the crime. The lack of any serious push to create “guilt commissions” looks to some on the Right as an example of liberal hypocrisy – a simple preference for clearing defendants from criminal liability, rather than a serious concern for accurate law enforcement.

It is true that the creation of innocence commissions raises the chances that an actually guilty person may be mistakenly exonerated for his crime. But the chances of such a mistake remain infinitesimally small. Under the NCIIC system, a petitioner must bring forward new, credible, and verifiable evidence of innocence that is so persuasive that it sways the initial NCIIC staff-member who reviews the case, members of the NCIIC formal investigation team, five out of eight Commissioners (or eight out of eight Commissioners in the case of a guilty plea), and all three judges on the special judicial panel. All three judges at the ultimate stage must be convinced of the petitioner’s innocence by a positive “clear and convincing” standard. Even Prof. Lillquist, a Commission skeptic, agrees that the chances of vindicating a guilty person are “fairly trivial.”<sup>252</sup>

In addition, the argument that there is an institutional incentive to find someone – anyone – innocent is belied by the actual institutional composition of the Commission and the incentives it faces. Even if one suspects that overly idealistic staff-members

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<sup>251</sup> See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (holding that the Double Jeopardy Clause precludes a second prosecution for the same offense after acquittal).

<sup>252</sup> Lillquist, *supra* note 237, at 908.



might be inclined to push cases forward, the Commission itself has no inclination or incentive to refer unworthy cases to the three-judge panel. First, among the Commissioners are a victim advocate, a sheriff, a prosecutor, and a superior court judge.<sup>253</sup> They each have a stake in making sure that the interests of the crime victim, the prosecution, and the judicial function are respected in the process; all of these interests counsel against disturbing the conviction.<sup>254</sup> Among the remaining Commissioners is only one person whose professional description indicates a skepticism toward guilty verdicts, the criminal defense attorney. But none of the Commissioners has any incentive to push through an unworthy case, for the most damaging event that could befall the Commission or the reputation of the Commissioners is precisely the liberation of an actually-guilty prisoner.

The so-called “one-way ratchet” problem is an interesting point about logical consistency. But it is not an argument *against* innocence commissions; it is an argument *for* some type of post-acquittal review. There is no reason, in principle, why one could not both support innocence commissions and support some procedure to re-prosecute those who were wrongly acquitted at their first trials. In this context, it is interesting to note that eight years after the creation of the CCRC, the United Kingdom began to allow some derogation of the Double Jeopardy privilege in cases of certain serious violent crimes.<sup>255</sup> Where new evidence suggests that a previously-acquitted defendant did, in fact, commit a particularly heinous crime, the U.K. now allows for re-trial in some

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<sup>253</sup> § 15A-1463(a).

<sup>254</sup> To be sure, I am not suggesting that any of the Commissioners act with bias – only that the Commission has been created in order to balance various interests, and some of those interests are better served with skepticism toward any change in the verdict.

<sup>255</sup> See Criminal Justice Act, 2003, c. 44, §75 (U.K.) (allowing for re-trials under certain limited circumstances for cases of, *inter alia*, murder, rape, war crimes, and crimes against humanity).

circumstances.<sup>256</sup> Some observers see a clear thread connecting the creation of the CCRC and the erosion of the Double Jeopardy privilege in the UK.<sup>257</sup> As Prof. Lillquist suggests, it would not be surprising if the demand for greater accuracy in the criminal justice system would focus first on those suffering for crimes they did not commit and, next, on those enjoying freedom despite their factual guilt.<sup>258</sup> This just goes to show that the value of accuracy is one that can serve (and slice against) both a Left-wing Due Process model and a Right-wing Crime Control model. In the end, if one thinks that, on balance, innocence commissions are justice-enhancing phenomena, then one should support them, even if one feels that there are still other justice-enhancing phenomena that one seeks – e.g., some form of post-acquittal review.

#### **4. Innocence Commissions Will Lead to More Wrongful Convictions**

One of the most subtle arguments against innocence commissions is that trial juries' knowledge of such commissions will actually result in more wrongful convictions than would exist without the commission.<sup>259</sup> This is because, as Prof. Lillquist writes, the standard of proof at criminal trials – guilt beyond a reasonable doubt – is a “floating standard.”<sup>260</sup> Trial juries in a world without innocence commissions interpret guilt beyond a reasonable doubt as a very high standard of proof; Prof. Lillquist asks us to imagine it as 90% certainty.<sup>261</sup> But in a world where an innocence commission exists as a back-stop for the defendant, juries will begin to interpret the beyond-a-reasonable-doubt standard more loosely – perhaps, Prof. Lillquist suggests, as 80% certainty.<sup>262</sup>

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<sup>256</sup> *Id.*

<sup>257</sup> See Lillquist, *supra* note 237, at 910.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 908 – 10.

<sup>260</sup> *Id.* at 908.

<sup>261</sup> *Id.* at 909.

<sup>262</sup> *Id.*

Consequently, there will be a class of cases – those where the juries’ certainty is between 80% and 90% -- that would be acquittals in a world without innocence commissions but that become convictions in a world with innocence commissions. Some number of those cases will be wrongful convictions, and what’s more, those wrongful convictions are unlikely to be overturned by the innocence commission. Why not? Because the commission’s standard of proof to overturn a guilty verdict is sufficiently high that in some cases where a jury found guilt to an 80%+ degree of certainty, the commission will not recommend reversal of the conviction.<sup>263</sup> The net result is that there will be more wrongful convictions in a world with innocence commissions than without them.<sup>264</sup>

To what extent does the possibility of commission-style factual review make convictions at trial more likely? Prof. Lillquist’s hunch is that juries are more likely to convict if they know that there is a “back-stop” commission. My own hunch is that the existence of an innocence commission is unlikely to change juror or jury psychologically in any measurable way. An innocence commission is unlikely to figure into the minds of jurors any more than appellate courts or the Governor’s pardon power or the remote possibility of habeas review. Each time post-conviction review expands, there are those who claim that the trial process will suffer as a result. Geoffrey Hazard once asked rhetorically, “[W]hat if everything a trial judge does is in principle merely provisional, subject to approval by higher authority, both as to substance and as to technical

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<sup>263</sup> *Id.* Nor, presumably, would a special court vote unanimously to vacate all of the wrongful convictions that slip through on the now-lower beyond a reasonable doubt standard.

<sup>264</sup> *Id.* This argument against innocence commissions does not, at first glance, appear to be an argument from the Right, but its motivating concern is for the integrity of the trial of first instance. In this sense, it sits comfortably with the constellation of interests served by finality – particularly, the concern that additional procedures inevitably reduce the prestige, power, and accuracy of the criminal trial itself.

regularity?”<sup>265</sup> Though the question was rhetorical, there is in fact very little evidence, statistical or anecdotal, that the expansions of appellate and post-conviction review of the past seventy years have led to any diminution in the quality of trials or of judging or of jury fact-finding. Prof. Lillquist relies on a few empirical studies for the proposition that the beyond-a-reasonable-doubt standard is a floating standard,<sup>266</sup> but there is no data to support the proposition that the availability of commission-like review will actually warp that standard. Still, Prof. Lillquist’s hypothesis suggests that the rate of conviction and, to the extent possible, the behavior of juries ought to be monitored in North Carolina to help determine whether the Commission has, in fact, resulted in perceptible changes in jury behavior. No such studies exist at present. Prof. Lillquist’s argument is a potent reminder that criminal justice reformers ought to think many steps ahead to insure that accuracy-enhancing procedures at the post-conviction review stage do not backfire and increase miscarriages of justice at earlier stages of the criminal process (e.g., at trial). But the argument that innocence commissions will so warp jury behavior as to actually increase wrongful convictions is, at this point, completely speculative.

### ***B. Criticism from the Left: The Value of Innocence Review***

The interest of a convicted person in access to factual review is clear: Depending on the sanction he is enduring, his very life, liberty, property, reputation, and/or social status is at stake. Criminal conviction results in both direct criminal sanctions – the death penalty, incarceration, fines, and/or restitution – plus a host of collateral consequences –

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<sup>265</sup> Hazard, *supra* note 209, at 650. Hazard suggests that, in such a world of over-bearing review, state court trial judges will no longer act “like judges” because “they are not treated like judges.” *Id.*

<sup>266</sup> See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. Davis L. Rev. 85, 118-30 (2002) (cited in Lillquist, *supra* note 237, at 908 n. 63).

from official civil disabilities to social stigma and economic dislocation.<sup>267</sup> It is hard to overstate the negative effects of criminal conviction on the life chances of a person, and as a consequence, the potential benefits of judicial “vindication” – that is, a quashing of conviction – are also extraordinary. The individualized interest of the petitioner thus always weighs very high in post-conviction review cases.

But apart from the petitioner’s own interests, there are vital social values at stake in actual innocence review, most prominently the systemic commitment to accuracy. By accuracy, I mean the basic principle that only individuals guilty of committing a criminal act should be convicted of a crime. Here, the distinction between conventional habeas review and the kind of factual review conducted by the commission approach is important. The habeas regime we constructed in the second half of the twentieth century serves the important social interest of insuring systemic compliance to constitutional due process. But the social interest served by traditional habeas review strikes many people as abstract and technical – it is, in the end, about procedural regularity. Innocence review, on the other hand, is about the very substance of criminal justice: Did the petitioner commit the crime or not? Innocence review signals a systemic commitment to the accurate sorting of the guilty from the innocent, which is the system’s very *raison d’être*. This interest – society’s interest in a criminal justice system that accurately sorts the guilty from the not-guilty – is hard to overstate. And it is visceral: Everybody understands that the conviction of an innocent person is a profound injustice, while many

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<sup>267</sup> If he is on death row, his life is at stake, and if he is in prison or jail, his liberty is at stake. *See Sanders v. United States*, 373 U.S. 1, 8 (1963) (“Conventional notions of finality of litigation have no place where life or liberty is at stake.”). And even if he is no longer incarcerated, he maintains a considerable interest in vacating the collateral consequences of conviction – namely, the “civil disabilities” imposed by operation of law and the severe social, economic and reputational burdens of conviction. *See David Wolitz, The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One’s Name*, 2009 B.Y.U. L. REV. 1277, 1309 - 17 (2009).

people find it hard to see a conviction based on a procedural violation in the same category. In the case of habeas, citizens are asked to accept a diminution in finality for an abstract commitment to the procedural norms of the system. In the case of innocence review, citizens are asked to accept a diminution in finality for a commitment to the factual accuracy of convictions.

Innocence review also serves values beyond accuracy. Every time a new process of review becomes available, a diffusion of power results.<sup>268</sup> Some level of diffusion is important to check concentrations that strike us as problematic throughout the judicial system. For instance, lay juries serve to check the power of the professional judiciary, appellate courts check the power of trial judges, and multi-member panels check the power of any single judge or justice. The institution that the innocence commission checks is the jury, the primary fact-finder in our criminal trial process. No other institution has taken upon itself the fact-finding mission of the jury, and judges are reluctant – in doctrine and in fact – to second-guess juries on pure issues of fact.<sup>269</sup> Commission review, which is limited to precisely the kind of fact-finding traditionally vested in juries, thus marginally reduces and diffuses the power of trial-court juries.<sup>270</sup> Of course, this diminution in the power of the jury is itself controversial, but it reflects a general belief that “the involvement of more people will yield better results” and will diffuse concentrations of power.<sup>271</sup> Thus, one more value promoted by innocence commissions is the marginal diffusion and re-allocation of institutional power currently held by trial-court juries.

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<sup>268</sup> Judith Resnick, *Tiers: Part I*, 57 S. CAL. L. REV. 840, 872 (1984).

<sup>269</sup> See *supra* discussion in Part II.

<sup>270</sup> Lay juries themselves play a power-diffusing role vis-à-vis judges. See Resnick, *supra* note 268, at 851 (“[I]n the case of juries, judges must yield to the voice of the ‘people.’”).

<sup>271</sup> Resnick, *supra* note 268, at 848.

Additionally, the commission system reflects a commitment to the values of expertise and professionalism. Again, the contrast with lay juries is instructive. Unlike lay jurors who are expected to be amateurs in the criminal justice system, staff and commissioners of innocence commissions are chosen precisely for their experience with and expertise in criminal justice issues. The North Carolina statute, for instance, specifically requires that the Commission include a judge, a prosecutor, a defense attorney, a sheriff, and a victim right's advocate.<sup>272</sup> This requirement reflects a desire to have a diversity of views on the panel, but also a desire to have criminal justice professionals make the ultimate decision about whether to refer cases or not. The statute also provides for a director and associated staff to "assist the Commission in developing rules and standards for cases accepted for review, coordinate investigation of cases accepted for review, maintain records for all case investigations," and other tasks.<sup>273</sup> In short, the commission system reflects the dominant values of the administrative state more generally: deference to subject-matter expertise, an ethic of professionalism, and the agency's discretion to create internal rules, standards, and procedures consistent with the purposes of the authorizing legislation.<sup>274</sup>

Finally, there is the symbolic value of a criminal justice system that is willing to subject its own factual conclusions to systemic review. We might call this the norm of humility, or openness to self-correction, and it is the counter-part to Prof. Bator's description of "repose." Prof. Bator correctly pointed to a general social desire for repose

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<sup>272</sup> § 15A-1463(a).

<sup>273</sup> § 15A-1465(a).

<sup>274</sup> See, e.g., Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (describing the trend for courts to accommodate themselves to administrative discretion based on expertise). This model is now the standard way our states and federal government administer regulatory programs and adjudicate administrative disputes; it is still novel in the criminal law.

as a reason for finality, and he described repose as a pre-condition for forward-looking action. Because of the unique power of the government in the area of criminal law – the power to imprison and to put citizens to death – there is a corresponding social desire for assurance that the state has exercised its power justly. We feel the heavy weight of state coercion in criminal law, we feel uneasy using it, we know that the criminal justice system sometimes makes mistakes, and we want to be absolutely sure that the people we deprive of life or liberty are, in fact, guilty. Consequently, we want to instill an ethic of humility and self-scrutiny into the process. Commission review, which serves as a back-stop to the normal workings of the criminal justice system, signals to citizens that the state is open to the possibility that the court system reached the wrong verdict and that it (the state) has established a comprehensive procedure for self-correction. Just as Prof. Bator took pains to distinguish “repose” from “mere complacency,”<sup>275</sup> I want to take pains to distinguish openness to self-correction from what Prof. Bator called “perpetual and unreasoned anxiety.”<sup>276</sup> Humility or self-scrutiny is the frank admission that the normal workings of the courts sometimes result in miscarriages of justice and that we should be open to some degree to reviewing such claims. This is not an “unreasoned anxiety,” but rather an honest recognition of the fact that many exonerations have taken place in the past fifteen years, combined with a determination to mitigate further miscarriages of justice. To use Prof. Bator’s vocabulary, our repose has been upset by the revelation that hundreds of factually innocent people have been convicted and imprisoned by our court system; a bout of self-reflection and a serious show of self-

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<sup>275</sup> See Bator, *supra* note 56, at 452.

<sup>276</sup> See *id.* at 453.



correction is now itself instrumental to secure the repose that Prof. Bator calls a “psychological necessity.”<sup>277</sup>

From the Left, the major deficiency of the innocence commission approach is that it fails to create any kind of legally enforceable right to make a stand-alone innocence claim in court. To the contrary, the commission approach buries claims of actual innocence in the non-appealable, non-judicial process of an independent state bureaucracy. From this perspective, innocence commissions are simply executive pardon boards in new garb – unaccountable state institutions with absolute discretion to pursue or ignore miscarriages of justice as they please. Whether innocence commissions are able to actualize any of the values of additional review summarized above is, thus, a doubtful proposition. On this view, until factual post-conviction review is available as a judicially-enforceable right on par with Constitutional review, the Innocence Problem will never be soluble.

The *Herrera* case, in its refusal to find or craft a stand-alone innocence claim in habeas corpus, looms large in the Left-wing discourse on innocence. One commentator memorably wrote that *Herrera* “ranks as one of those infamous Supreme Court opinions, like *Lochner* and *Plessy*, that is utterly repugnant to any basic sense of fairness.”<sup>278</sup> The criticism of *Herrera* by legal academics and advocates for prisoner’s rights has been severe, voluminous, and continual.<sup>279</sup>

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<sup>277</sup> See *id.* To be clear, this discussion does not assume that innocence commissions will actually eliminate miscarriages of justice, only that their existence can help reassure the public that the system is facing up to its revealed faults.

<sup>278</sup> Brent E. Newton, *A Case Study in System Unfairness: The Texas Death Penalty: 1973 – 1994*, 1 TEX. F. ON C.L. & C.R. 1, 34 (1993).

<sup>279</sup> See, e.g., Janet C. Hoeffel, *Innocence: The Roberts Court’s Failed Innocence Project*, 85 CHI.-KENT L. REV. 43 (2010); Brandon Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629 (2008); Nicolas Berg, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121 (2005);

What most Left-wing critics of *Herrera* want is for the U.S. Supreme Court to find or create a federal freestanding post-conviction innocence claim as a matter of right, just as Justice Blackmun suggested in his *Herrera* dissent.<sup>280</sup> The precise nature of that right, and its textual basis, are matters of debate among commentators on the Left. Brandon Garret, for instance, argues that such a right can be inferred (or created) from the Due Process Clause, the Eighth Amendment prohibition against cruel and unusual punishment, and possibly even the Sixth Amendment right to a jury trial.<sup>281</sup> It should be a “freestanding innocence claim that would grant relief to those who can show that, more likely than not, no reasonable jury would convict in light of the new evidence.”<sup>282</sup> George C. Thomas, et al., argue on both efficiency and fairness grounds that the Supreme Court ought to recognize an innocence claim as a Constitutional right based on the *Mathews v. Eldridge* factors.<sup>283</sup> Even those who do not pin their hopes on a federal Constitutional right to innocence argue that innocence-based review should be a legal right. Daniel Medwed, for instance, argues for wholesale liberalization of state-level procedures to allow for innocence claims based on newly discovered evidence.<sup>284</sup> And Laura Constantine, et al., propose a model act for post-conviction review that “authorizes

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Tara L. Swafford, *Responding to Herrera v. Collins: Ensuring That Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603 (1995).

<sup>280</sup> *Herrera*, 506 U.S. at 437 (Blackmun, J., dissenting) (“Given my conclusion that it violates the Eighth and Fourteenth Amendments to execute a person who is actually innocent, I find no bar in *Townsend v. Sain*... to consideration of an actual-innocence claim. Newly discovered evidence of petitioner’s innocence does bear on the constitutionality of his execution.”).

<sup>281</sup> See Garret, *supra* note 279, at 1704 – 07 (2008).

<sup>282</sup> *Id.* at 1636.

<sup>283</sup> George C. Thomas et al, *Is It Ever too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 302 (“[D]ue process at its heart protects innocence.”).

<sup>284</sup> See Daniel Medwed, *supra* note 9, at 661.

state courts to consider petitions alleging actual innocence” notwithstanding “any other provision of law limiting consideration of new evidence.”<sup>285</sup>

The common demand from the Left is a right to a freestanding innocence claim in a court of law, and the commission approach does not accomplish that. Although the commission approach vests a court of law with the ultimate authority to vacate a conviction, it neither creates a right to innocence review, nor does it reach into the court system to change existing post-conviction procedures.<sup>286</sup> Rather, the commission approach creates an extra-judicial body, unencumbered by court rules or by precedent, as a supplementary avenue of post-conviction relief. And as presently organized, the decisions of this extra-judicial body, the NCIIC, are not subject to review by any court of law. From the Left’s court-centric and rights-centric viewpoint, a petitioner’s inability to appeal the decisions of the Commission seriously undermines the Commission’s pretention to provide a serious new forum for post-conviction review.<sup>287</sup> The new commission system, in short, does not guarantee deserving petitioners their day in court; it just gives them a new bureaucracy to whom they can address their grievances. These criticisms from the Left go to the core of the commission approach, for the commission approach is precisely about taking post-conviction innocence cases away from the courtroom and stripping out procedural barriers of all kinds.

One response to this type of criticism is to point out that the Left has simply failed to convince the Supreme Court that a free-standing innocence claim lies latent in the

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<sup>285</sup> Lauri Constantine et al., *Model Prevention and Remedy of Erroneous Convictions Act*, 33 ARIZ. ST. L.J. 665, 675 (2001).

<sup>286</sup> The Commission’s only demand on the judiciary is the rare empanelling of a three-judge bench to make the final determination regarding exoneration.

<sup>287</sup> Under the NCIIC model, there is no judicial appeal available from a rejection of one’s petition; it does not matter whether the rejection comes from the Commission itself or from an adverse ruling of the three-judge panel. § 15A-1470(a).

Constitution or in common-law habeas corpus. While the Court has not technically held that no such right exists,<sup>288</sup> the prospects for a judicial “discovery” of a right to a post-conviction innocence claim are not great.<sup>289</sup> Moving to the legislature – both federal and state – the innocence movement has had some success in the past fifteen years passing limited DNA-related “innocence” statutes, culminating in the passage of the federal Innocence Protection Act of 2004.<sup>290</sup> But, as I detailed in Section Two, these statutes have fallen short of providing a straight-forward path to factual review of convictions because they are full of procedural and evidence-based limitations.<sup>291</sup> In short, the innocence movement has run up against a wall in providing more court-based innocence review. Even those who dream of a federally recognized right to innocence review thus have good reason to take seriously the more administrative approach that commissions offer.

Moreover, a dedicated independent agency offers real advantages over court-based procedures, advantages consistent with the values of additional review that those on the Left should embrace. The next section will take up the major advantages of the commission approach.

## **Section V: Advantages of the Commission Approach**

The relative advantages of independent agencies has been a matter of debate at least since the Progressive era. This is not the place to rehearse that debate, but there is

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<sup>288</sup> See, e.g., *Osborne*, 129 S. Ct. at 2321 (“Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.”).

<sup>289</sup> See, e.g., *Medwed*, supra note 279, at 1699 (noting that “the Court may continue to dodge the issue for many decades to come”).

<sup>290</sup> See supra notes 70-71 and accompanying text.

<sup>291</sup> See supra notes 72-78 and accompanying text.

broad consensus that “agencies offer an appealing alternative to courts” because an agency can “secure for itself... whatever knowledge, analysis, or analytical capacity it thinks appropriate. An ‘expert’ agency, unlike a ‘generalist’ court, is not dependent for what it knows about the world on the parties to particular disputes.”<sup>292</sup> Moreover, “an agency has a sustained, not intermittent relationship with the parties it regulates and the problems it puts in its charge.”<sup>293</sup> In the context of post-conviction factual review, the advantages of a dedicated agency are considerable. Not only can a commission sweep away procedural barriers to substantive factual review; the entire agency is geared to do – and do well – precisely the kind of substantive factual review that many on the Left have accused the courts of eschewing. In contrast to an expert agency, the court system appears poorly equipped to conduct the searching factual review of jury verdicts that those on the Left seek. Appellate courts, for instance, have virtually no fact-finding capacities of any sort, and even trial courts, sitting in collateral review, cannot match the initiative, expertise, and investigatory powers that a dedicated commission has. The NCIIC can, for instance, conduct its own investigations, request municipal police forces to conduct investigations on the Commission’s behalf, subpoena relevant witnesses, and offer immunity in exchange for cooperation.<sup>294</sup> All of these powers go far beyond the means that courts typically have at their disposal and should hearten all those committed to substantive review of jury verdicts.

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<sup>292</sup> JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIAL* 29 (4th ed. 1998).

<sup>293</sup> *Id.*

<sup>294</sup> § 15A-1466.

### *A. Dedicated Procedure for Fact-Based Claims*

The fundamental merit of the commission approach is that it provides convicted persons with a dedicated “address” for post-conviction innocence claims with a minimum of procedural roadblocks. In Section II, I discussed the stifling procedural limits placed on petitioners who try to bring innocence claims to court through pre-existing post-conviction procedures. A person filing a claim with the NCIIC need not worry about a host of procedural barriers that he would face in front of a habeas court or other post-conviction forum. First, there is no “custody” requirement – anybody with a felony conviction is eligible to apply.<sup>295</sup> Second, there is no need to claim a constitutional, legal, or procedural error at trial – to the contrary, the Commission has no mandate to address such claims.<sup>296</sup> Third, there is no statute of limitations to worry about.<sup>297</sup> Fourth, one may file a claim with the NCIIC even if one has previously petitioned a court for habeas relief; indeed, one may bring a claim to the NCIIC before, after, or at the same time as one brings appeals or other post-conviction motions in court.<sup>298</sup> The only requirement is that the new evidence one brings to the NCIIC not have been presented at trial or another post-conviction procedure.<sup>299</sup> Fifth, there is no categorical bar to successive application to the NCIIC; if the petitioner brings forth new evidence in a subsequent petition, the Commission has the discretion to look at the case again.<sup>300</sup> Sixth, DNA evidence is not

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<sup>295</sup> Habeas corpus is available only to those “in custody.” 28 U.S.C. §§ 2254(a), 2255(a).

<sup>296</sup> A claim for habeas relief must be a claim that one’s conviction or sentence violates “the Constitution or the laws” of the United States. 28 U.S.C. § 2254(a), 2255(a).

<sup>297</sup> Since AEDPA, federal habeas petitioners face a one-year statute of limitations. 28 U.S.C. § 2255(f).

<sup>298</sup> Federal habeas for state prisoners contains a strict exhaustion of state remedies requirement. 28 U.S.C. § 2254(b)(1).

<sup>299</sup> N.C. Gen. Stat. § 15A-1460(1).

<sup>300</sup> Federal habeas has strict procedures to limit the filing of subsequent petitions. 28 U.S.C. §§ 2244, 2255(h).

required for relief; the Commission will look at any “credible, verifiable” evidence.<sup>301</sup> Seventh, relief is available to those who pled guilty at trial, although unanimity among the Commissioners is required in such cases rather than the usual five-person majority.<sup>302</sup> Eighth, relief is available for any felony conviction, not only for certain high-profile crimes.<sup>303</sup> And, finally, the Commission itself has fact-finding and investigatory authority far beyond that of any private petitioner, thus allowing for the development of a factual record greater than what would be possible by an individual petitioner in a traditional post-conviction procedure.

Critics on the Left worry that, in order to access this new avenue of relief, petitioners must give up too many of the procedural rights they take for granted in courts – including, among others, the right against self-incrimination, attorney-client privilege, and spousal privilege.<sup>304</sup> No other petitioners for post-conviction review are required to relinquish these rights – in particular, the Constitutional right against self-incrimination. From a doctrinaire Due Process model framework, petitioners claiming innocence should not be required to trade in their Constitutional and common-law rights for the “privilege” of proving their innocence.

But in the context of an expert agency devoted to ferreting out wrongful convictions, the requirement that petitioners cooperate with Commission investigations and give up some procedural rights is reasonable. By definition, a petitioner to the Commission has already been convicted of the crime that is the subject of inquiry, and

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<sup>301</sup> Most state statutes passed in the past fifteen years to allow for some factual review are restricted to DNA evidence. *See supra* note 72 and accompanying text.

<sup>302</sup> Many of the new state innocence statutes explicitly deny relief to those who pled guilty. *See supra* note 76 - 77 and accompanying text.

<sup>303</sup> Many of the new state innocence statutes limit relief only to those who committed specific serious crimes. *See supra* note 78 and accompanying text.

<sup>304</sup> Chris Mumma, Guidelines for Counsel Appointed by Indigent Defense Services (Aug. 14, 2007) (pamphlet on file with author).

the petitioner’s waiver of his right against self-incrimination “does not apply to matters unrelated to a convicted person’s claim of innocence.”<sup>305</sup> Thus, the primary interest served by the right against self-incrimination – petitioner’s interest in avoiding prosecution or conviction – is not operative in the post-conviction context. And because the waiver does not apply to unrelated matters, the petitioner need not expose himself to liability for matters unrelated to the crime for which he seeks review. Mandatory petitioner cooperation with the Commission is similarly defensible in light of the petitioner’s role in triggering Commission review in the first place.<sup>306</sup>

In sum, the innocence commission cuts through many, if not all, of the procedural barriers that keep courts from looking at actual innocence claims on the merits. Because such procedural barriers have kept meritorious claims of innocence out of court, the Commission approach represents a major improvement in the availability of factual review.

### ***B. Independent Investigatory Power***

The NCIIC has the virtues of an independent commission with broad investigatory powers. The Commission is independent in at least two respects – (1) as an “independent commission” existing between branches of government and (2) as a neutral entity unaffiliated with either the State prosecutor or the defendant. It is not a judicial body, though the Administrative Office of the Courts provides administrative support to the Commission.<sup>307</sup> It is not part of the executive branch, though it is a standing commission. And it is not part of the legislative branch, though the legislature created and funds it. Its activities are not subject to direct review by the Governor, the Chief

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<sup>305</sup> § 15A-1467(b).

<sup>306</sup> § 15A-1467(b), (g).

<sup>307</sup> § 15A-1462(b).



Justice, or the General Assembly. Consequently, it is removed from both the political considerations that plague the executive clemency process and the hierarchical relationships that bind district and appellate courts. At the same time, the Commission is independent of both the State prosecutors and defense bar, nor is it an adversarial forum. Commission staff, not advocates of the State or the applicant, direct the investigations at the Commission and develop the factual record, and the Commission has the power to demand cooperation out of both the State and the petitioner.<sup>308</sup> Indeed, the petitioner must waive all of his rights and privileges with respect to the investigation of the underlying crime before the Commission will launch a formal inquiry.<sup>309</sup>

Moreover, the investigatory powers of the Commission are robust. It has the power to subpoena documents and witnesses, it can compel testimony in exchange for limited immunity, and it can use any means of discovery provided for in the state civil or criminal rules of procedure.<sup>310</sup> In essence, it has the combined investigatory powers of the police, a grand jury, a district attorney, defense counsel, and a court of law. The existence of investigatory power does not, of course, mean that all investigations will be perfectly thorough or that they will all reach the truth of the matter. But it does mean that the Commission has the tools to function as a fact-finder with as few procedural barriers as possible. In its power and neutrality, the Commission functions more like a *juge d'instruction* in the civil law system than a judge or jury in the traditional common-law scheme.<sup>311</sup> The Commission's independent investigatory authority coheres with the

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<sup>308</sup> § 15A-1467(b), (g).

<sup>309</sup> § 15A-1467(b).

<sup>310</sup> § 15A-1467(a)(1).

<sup>311</sup> The office of *juge d'instruction* is often translated as “investigating magistrate.” A *juge d'instruction* is a judicial-branch figure responsible for directing investigation at trials in the French criminal justice system; the position is noteworthy for its independence from both the prosecutors and the defendant. See A.E. Anton, *L'Instruction Criminelle*, 9 AM. J. COMP. L. 441 (1960).

common-sense intuition that a claim of factual innocence should be reviewed – at least initially – by an entity that has robust fact-finding capabilities and the potential to build up investigatory expertise.

### ***C. Ancillary Benefits of the Commission***

Because of its independence, its robust investigatory powers, and its authority to refer cases to the judiciary, the Commission has the potential to ameliorate the criminal justice system beyond the particular cases that come before it. First, its mere existence serves to remind law enforcement authorities that “winning” in front of a jury is not their goal; rather, bringing to justice actual criminal perpetrators is the goal. It is a truism that punishing an innocent person is a double-injustice, but police departments and prosecutors understandably aim to secure convictions. To the extent that the existence of the Commission cuts down on spurious but easily winnable cases, that is a positive result.

Second, by bringing to light miscarriages of justice, the Commission may highlight specific areas in which the justice system can improve. The causes of any particular wrongful conviction are heterogeneous and often over-determined, but as many other studies have noted, many wrongful convictions can be traced back to a finite number of places in the law enforcement and trial process – e.g., eye-witness identification, indigent defense, or forensic science.<sup>312</sup> After a number of years in operation, simply by doing its routine investigations, it is likely that the Commission will have helped identify where problems lie in the current system. Of course, generalized research into the problem of wrongful conviction is not the primary focus of the NCIIC. But it will inevitably produce a substantial and detailed record pertaining to wrongful

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<sup>312</sup> The Innocence Project, *The Causes of Wrongful Conviction*, available at <http://www.innocenceproject.org/understand/> (last visited on March 6, 2010).

convictions through (a) its findings of fact and supporting documentation in cases that it refers to the three-judge panel<sup>313</sup> and (b) its required annual reports to the legislature.<sup>314</sup> The NCIIC's annual report "may contain recommendations of any needed legislative changes related to the activities of the Commission" and "recommendations concerning the district attorneys or the State Bureau of Investigation."<sup>315</sup> The Commission may use its annual reports to offer broad recommendations to the legislature and to state law enforcement agencies regarding almost all aspects of the criminal justice system.<sup>316</sup> At a minimum, the Commission could use its reports to aggregate and analyze information that would be of great help to reformers outside of the Commission. Through these reports, the Commission cannot help but serve as an agent of transparency for the entire state criminal justice system.

Finally, the Commission provides an important legitimating function to the overall criminal justice system. Every system of criminal justice – every human institution – is bound to make mistakes. The Commission is not going to catch every mistake, and it too may make mistakes. But the question is whether the system is diligent, honest and self-confident enough to provide sufficient means to correct mistakes. By providing such means, the Commission signals to the citizens of the state that the criminal justice system is not going to ignore, or sweep under the carpet, blatant

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<sup>313</sup> § 15A-1468(c), (e).

<sup>314</sup> The annual report is addressed to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and the State Judicial Council. *See* NCIIC, 2009 Annual Report, available at <http://www.innocencecommission-nc.gov/Report2009.htm> (last visited March 6, 2010) (2009 Annual Report). The State Judicial Council is an advisory and oversight body for the Judicial Branch of Government, chaired by the Chief Justice of the Supreme Court and consisting of representatives from every component of the court system, the bar, and the public. Its various specific and general duties encompass studying and monitoring the operations of the court system, and identifying areas for improvement. *See* The N.C. Court System, *The State Judicial Council*, available at <http://www.nccourts.org/Courts/CRS/Councils/JudicialCouncil/Default.asp> (last visited March 6, 2010).

<sup>315</sup> § 15A-1475.

<sup>316</sup> Most likely due to staffing limitations and political sensitivity, the first two annual reports were fairly modest and did not offer any suggestions for systemic reform. *See, supra* note 314, 2009 Annual Report.

miscarriages of justice. Rather, the state seeks to uncover such miscarriages and right the wrong. After the cases of Ronald Cotton and Daryl Hunt, among others, revealed the scope of the Innocence Problem in North Carolina, the state's demonstrated commitment to freeing the innocent is particularly timely and may go a long way to boosting the overall legitimacy of the criminal justice system.<sup>317</sup>

## **Section VI: Proposed Reforms**

Up to this point, I have defended the Commission approach against systemic criticism from both the Left and Right, and I have offered an account stressing its advantages. In this section, I want to discuss a few smaller-scale critiques of the NCIIC and suggest relevant reforms.

Every agency has to balance the goals of efficiently carrying out its tasks with providing individualized procedural fairness.<sup>318</sup> The liberal critique of the NCIIC essentially holds that the Commission, as presently constituted, gives short shrift to individualized procedural fairness. In this section, I will consider that critique specifically as it relates to four topics: (a) the internal procedures of the Commission leading to denials of petitions, (b) the possibility of judicial review of such denials, (c) the proper standard of review for exoneration, and (d) the Commission's "new evidence" requirement.

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<sup>317</sup> Former Chief Justice Beverly Lake told a local newspaper that the exoneration of Greg Taylor "restores the public's confidence in our system." See Sheehan, *supra* note 18 (quoting former Chief Justice Lake, "If we find someone has been wrongly convicted, we can't give them that time back, but we can make it right. That's a victory.").

<sup>318</sup> See MASHAW ET AL., *supra* note 293, at 38-39.

### ***A. Who Guards the Guardians? Improving the Commission's Accountability***

Like all independent agencies, the NCIIC needs a certain amount of discretion to complete its task efficiently, but too much discretion can result in a lack of accountability and a lack of procedural fairness to those affected by an agency's actions. As currently constituted, the NCIIC vests its staff with too much discretion and too little transparency.

The executive director and staff-members of the Commission have extraordinary discretion to dismiss claims at a number of stages. Before a formal Commission hearing ever takes place, a claim to the NCIIC must make its way through five distinct stages: claim initiation, claim review, further review, investigation, and formal inquiry.<sup>319</sup> The executive director or a designated staff-member is empowered to reject the petition at any of those stages if he or she determines that the petition does not meet the eight criteria for Commission action.<sup>320</sup> In practice, this means that petitions are routinely rejected by a single staff-member or by the executive director without any hearing in front of the Commission or the participation of a single Commissioner.<sup>321</sup>

In addition, much of the Commission's work is closed to public scrutiny. None of the records or proceedings of the Commission are subject to the public record and public

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<sup>319</sup> NCIIC, *Case Progression Flowchart*, available at <http://www.innocencecommission-nc.gov/Flowchart.htm> (last visited March 5, 2010).

<sup>320</sup> The eight criteria that must be met for formal inquiry are as follows: (1) Conviction must have been in North Carolina state court. § 15A-1460(1); (2) Conviction must be for a felony. § 15A-1460(1); (3) Applicant must be a living person. § 15A-1460(1); (4) Applicant must be claiming complete factual innocence for any criminal responsibility for the crime. § 15A-1460(1); (5) Credible evidence of innocence must exist. § 15A-1460(1); (6) Verifiable evidence of innocence must exist. § 15A-1460(1); (7) Claim must not have been previously heard at trial or in a post-conviction hearing. § 15A-1460(1); (8) Applicant must sign waiver of procedural rights. § 15A-1467.

<sup>321</sup> NCIIC, Rules and Procedures, art. 4(F), available at <http://www.innocencecommission-nc.gov/rulesandprocedures.htm> (last visited March 8, 2010) ("The Executive Director or his/her designee will have authority to make the decision whether to reject a case, call for further review, or move a case into formal inquiry."). None of this is meant to suggest that the executive director or staff-members are incapable of carrying out their responsibilities; my point here is only to stress the large amount of discretion (power) they hold.

meeting laws.<sup>322</sup> Indeed, all such records and proceedings are confidential, with the sole exception that if the Commission votes to refer the case to a special three-judge panel, then all supporting records, files, and transcripts of hearings will become public.<sup>323</sup> Hearings before the Commission are presumptively closed to the public.<sup>324</sup> In sum, the Commission has no duty to give reasons for rejecting or denying a claim, has no duty to release its internal deliberations on a claim, and has no duty to hold open hearings. The combination of tremendous individual discretion and lack of transparency violates the very norms that underlie additional review.

Moreover, the NCIIC process currently does not allow for any judicial appeal of Commission decisions.<sup>325</sup> In practice, this means that a denial or rejection of a petition at any stage of Commission review is final and unalterable. The unreviewability of Commission decisions is somewhat mitigated by the fact that petitioners are free to re-petition the Commission, but without any appeal mechanism, the Commission faces no accountability from any other source.<sup>326</sup> This lack of accountability is particularly problematic where the Commission issues a rejection before the stage of formal Commission review – which is to say, the vast majority of rejections – because rejections before the Commission vote stage do not come with any explanation for the reasons for rejection.

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<sup>322</sup> § 15A-1468(e).

<sup>323</sup> *Id.*

<sup>324</sup> § 15A-1468(a).

<sup>325</sup> § 15A-1470(a) (“Unless otherwise authorized by this Article, the decisions of the Commission and of the three-judge panel are final and are not subject to further review by appeal, certification, writ, motion, or otherwise.”) This contrasts with the British CCRC approach in which adverse decisions are appealable to a court of law on the same basis as other administrative actions – i.e., with a “perverse or absurd” standard of review. *See supra* note 118 and accompanying text.

<sup>326</sup> The Commission exists, of course, to provide a check on the jury; the argument here is that the Commission itself needs a “check” in the form of judicial review.

This astounding amount of discretion can be mitigated in at least two ways: externally through judicial review and internally through bureaucratic review. In federal administrative law, a party receiving an adverse agency decision usually has the right to judicial review, but only of a limited and deferential nature.<sup>327</sup> If a denial from the Commission resulted in a *de novo* appellate review in a court of law, then the Commission would function as little more than a prelude to a court-based procedure.<sup>328</sup> The idea behind judicial review of agency action is to subject the agency to review strong enough to insure procedural regularity and legality, but deferential enough to insure that the court is not substituting its own substantive judgment for that of the expert agency. Maintaining this balance is inevitably a difficult task, but even very deferential judicial review serves to remind agency actors that they are accountable. In the UK, for instance, decisions of the CCRC are reviewable under a highly deferential “perverse or absurd” standard.<sup>329</sup> This British standard is analogous to the “arbitrary and capricious” standard that governs much judicial review of agency action under the Administrative Procedure Act.<sup>330</sup> Allowing for similarly deferential judicial review of NCIIC denials would boost Commission legitimacy and help insure procedural regularity within the Commission at an acceptable level of cost in additional judicial work.

As for more responsible internal procedures, the example of the British CCRC is again instructive. Under CCRC procedures, only a Commissioner can issue a rejection –

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<sup>327</sup> The usual standard of review of agency action holds that agency decisions will stand unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Administrative Procedure Act, 5 U.S.C. § 702(2)(A) (2006).

<sup>328</sup> See MASHAW ET AL., *supra* note 293, at 747 (“If courts were to police agencies by assessing every administrative decision from scratch (de novo), any efficiency or other gains Congress seeks by vesting authority in administrators would be all but lost.”).

<sup>329</sup> See *supra* note 118 and accompanying text.

<sup>330</sup> 5 U.S.C. § 702(2)(A).

not a staff-member.<sup>331</sup> If a Commissioner determines that a case does not meet the “real possibility that the conviction . . . would not be upheld” standard, then a provisional rejection notice, along with a Statement of Reasons, is sent to the applicant.<sup>332</sup> The applicant, in turn, has twenty business days to respond to the provisional rejection with any supplemental information or arguments. If the applicant responds, then the Commissioner has an obligation to review the response and once again determine whether referral is appropriate. If not, then a final rejection and Statement of Reasons is issued to the applicant.<sup>333</sup> This procedure forces Commission staff-members to present their reasons for rejection to at least one accountable Commissioner, and it forces Commissioners to issue reasons for rejection to the petitioner. In the provisional nature of the initial rejection, this procedure also mimics agency notice-and-comment rulemaking, allowing the most affected party one more chance to make his or her case. The NCIIC would do well to adopt the CCRC approach to denials of petitions. Doing so would increase the transparency and accountability of Commission decisions, it would grant petitioners more “voice” in the process, and it would incentivize greater reasoned decision-making inside the Commission. It is true that the institution of such procedures will also increase costs and “red tape.” But the present balance of values is skewed too far on the side of agency discretion, and a modest increase in procedural fairness would tilt the balance back in the right direction.

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<sup>331</sup> CCRC, *How We Review Your Case*, available at [http://www.ccr.gov.uk/canwe/canwe\\_33.htm](http://www.ccr.gov.uk/canwe/canwe_33.htm) (last visited on March 6, 2010).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*



## ***B. The New Evidence Requirement and the Standard of Review***

Some may argue that the commission approach, as it manifests itself in the NCIIC, sets too high a burden on the petitioner to prove his or her innocence. The burden is two-fold: First, a petitioner must present evidence that is new, credible, and verifiable in order for his or her claim to survive the Commission process.<sup>334</sup> Second, the standard of review in front of the three-judge panel is “whether the convicted person has proved *by clear and convincing evidence* that [he] is innocent of the charges.”<sup>335</sup>

Prof. Michael Risinger has set out the most compelling case for a lower standard of review in appellate or post-conviction proceedings. Specifically, Prof. Risinger argues for an “unsafe verdict” standard, modeled on the British standard of the same name, for the review of cases that turn on factual innocence.<sup>336</sup> The basic idea is that the post-conviction review of binary factual determinations ought to be particularly searching because juries are not very well-suited to making such determinations.<sup>337</sup> Under the unsafe verdict standard, a reviewing court will vacate a conviction if the court “entertains a ‘lurking doubt’ that the defendant was rightly convicted, or where the court is not ‘sure’ that the defendant was ‘rightly convicted.’”<sup>338</sup> The idea of this standard is to prod

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<sup>334</sup> § 15A-1460(1). When the Commission votes to refer a case to the three-judge panel, the standard is whether “there is sufficient evidence of factual innocence to merit judicial review.” § 15A-1469(a).

<sup>335</sup> § 15A-1469(h).

<sup>336</sup> D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standard for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004). While Risinger’s proposal of the unsafe verdict standard was not made specifically in the context of innocence commissions, it is emblematic of a Left-wing approach to post-conviction factual review.

<sup>337</sup> *Id.* at 1307 (arguing that juries are not well-suited to decisionmaking “when the actual triable issue in a criminal case is the simple binary issue of perpetration, or a similar pure-fact binary issue”). According to Risinger, juries are well-suited to the task of tackling “normatively charged polyvalent issues,” but not to making binary factual determinations. *Id.* at 1311.

<sup>338</sup> Griffin, *supra* note 114, 115 (2009). Others have described the unsafe verdict standard as one compelling relief if the court determines that it is “no longer reasonably likely that the same verdict would have resulted.” *Id.* at 116.

appellate courts – or courts sitting in collateral review – to meaningfully engage with the evidence and factual findings undergirding jury verdicts.

The unsafe verdict standard differs from the standards at use is the NCIIC process in two ways. First, under an unsafe verdict standard, the petitioner need not present new evidence in order to obtain a hearing or relief. Whether new evidence is proffered or not, the reviewing court needs to be convinced that the underlying conviction was rightly and securely entered. Second, while the unsafe verdict, like all standards, may not pick out a precise quantum of burden of proof, it undoubtedly falls well below the “clear and convincing” standard of proof required of petitioners in the NCIIC process. On this account, the burden should not be entirely on the petitioner to show that he or she is clearly and convincingly innocent; rather, once the Commission has determined that there is real reason to review the underlying verdict, then the reviewing court must satisfy itself that the factual basis for conviction is “safe” before affirming conviction.

These critiques of the NCIIC approach have real bite,<sup>339</sup> but pragmatic considerations caution against adopting them any time soon. The Innocence Commission is a novel institution, operating within a limited budget, and taking on a relatively unpopular task. For it to succeed, it must be extremely cautious in its early phases. The new evidence requirement is a mechanism allowing the Commission to limit its “docket,” and thus focus its limited resources on the most promising and most sympathetic sub-set of innocence claims. Moreover, this sub-set of cases responds directly to the sensational stores of post-conviction vindication that sparked the creation of the Commission in the

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<sup>339</sup> If we take seriously the proposition that juries can make mistakes on the facts in front of them, then there is no reason in principle to demand new evidence from a petitioner claiming factual innocence. Perhaps the burden of proof on such a petitioner ought to be higher than on a petitioner who brings new and credible evidence, something analogous to the “beyond a reasonable doubt standard” in reverse. *See, e.g.*, Risinger, *supra* note 336, at 1310 – 13.

first place: namely, cases in which new evidence proved the convicted person's innocence. Perhaps a more secure Commission, one that has become an uncontroversial part of the criminal justice landscape in North Carolina, may re-consider the "new evidence" requirement at some point. But in the here and now, the most prudent course is to continue to require new evidence before acting on innocence claims.

The "clear and convincing" standard is also a pragmatic way to limit relief to those whom the panel deems positively innocent. An unsafe verdict standard raises the possibility that the court could vacate a conviction not because it finds the petitioner innocent, but rather because it is not convinced of the petitioner's guilt. The gray area between actual innocence and doubtful guilt is a fascinating place for theoretical inquiry, but it is not the area that the commission system was created to explore. The commission system's mandate is to vindicate only those who can show actual innocence. For that mandate, a "clear and convincing" proof of innocence is the right standard. Moreover, the high standard serves an important signaling function to the wider public; it assures state citizens that only the most worthy petitioners, those with clear and positive evidence of innocence, will be exonerated. For these pragmatic reasons, the new evidence requirement and the high standard of proof strike me as prudent ways for the Commission to achieve greater legitimacy within the state criminal justice system and to build a record as a cautious and prudent institution.

## **Section VII: Conclusion**

Innocence commissions will not make our country's Innocence Problem go away. Even if every state and the federal government adopted the Commission model, innocent

people will continue to be convicted and punished for crimes they did not commit, and innocence commissions will fail to right many miscarriages of justice. The problems of wrongful conviction stem from a long list of issues in law-enforcement and trial procedures – from police line-up practices to eyewitness evidence rules to our system of indigent defense, to name only a few. And the problems besetting our existing court-based regime of post-conviction review will remain largely untouched by the establishment of innocence commissions. The commission approach represents not a “fix” for habeas corpus and other post-conviction procedures, but rather an attempt to escape the whole tangled mess.

The commission approach aims to reform only one small piece of the puzzle – namely, how to address freestanding post-conviction claims of actual innocence. And with respect to that narrow problem, the commission approach offers a significant improvement over the status quo. By providing a dedicated address for petitioners to make claims of factual innocence and a staff with the power and expertise to assess those claims, the commission approach cuts through the systemic difficulties of reviewing final convictions.

Some of the reluctance to create new post-conviction procedures stems from a legitimate fear that new procedures will exact too much of a price in real dollars and in the constellation of values we call finality. The creation of innocence commissions undoubtedly comes at a price in both resources and in systemic finality. But what we have learned over the past fifteen years is that the existing system over-values finality at the price of too many miscarriages of justice. The commission approach represents a modest but necessary correction to that imbalance.

As a new institution and an independent agency, the NCIIC must itself strike a delicate balance between efficacy and fairness. I have suggested that the Commission ought to bolster procedural fairness in two ways: (1) by requiring a Commissioner – rather than a staff-member – to approve all denials and (2) by providing for some type of limited and deferential judicial review of denials. I further suggested that, in time, the Commission ought to consider dropping the new evidence requirement, for some jury decisions are simply wrong on the evidence before them.

Overall, in just over three years of operation, the NCIIC is proving itself to be an extremely promising new mechanism for providing post-conviction factual review. The exoneration of Greg Taylor in February 2010 was a giant step in the maturation of the Commission. One hopes that this experiment will continue to attract serious scholarly attention and criticism in the months and years ahead and that it will, in its own modest way, contribute to an improvement in justice in America.