

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

2009

Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence

Lissa Griffin

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Comparative and Foreign Law Commons](#), [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Lissa Griffin, Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence, 41 U. Tol. L. Rev. 107 (2009), <http://digitalcommons.pace.edu/lawfaculty/653/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

CORRECTING INJUSTICE: STUDYING HOW THE UNITED KINGDOM AND THE UNITED STATES REVIEW CLAIMS OF INNOCENCE

Lissa Griffin*

“England and America are two countries [separated] by a common language.”¹

IN the United States, the problem of wrongful convictions continues to elude a solution.² Many approaches to the problem have been suggested, and some have been tried. Legislators,³ professional organizations,⁴ and scholars⁵ have suggested various systemic changes to improve the accuracy of the adjudication process and to correct wrongful convictions after they occur.⁶ Despite these efforts, the demanding standard of review used by U.S. courts, combined with strict retroactivity rules, a refusal to consider newly discovered

* Professor of Law, Pace University School of Law. The author wishes to thank John Wagstaff, Legal Adviser to the Criminal Cases Review Commission; Laurie Elks, Esq. and Professor Peter W. Alldridge, Queen Mary College London, for their help with the U.K. portion of this article; Professor Bennett L. Gershman, Pace University School of Law, for his review and suggestions; Terrence DeRosa, for his research assistance; and Iris Mercado for her administrative support. This article was written with the support of the Pace University Faculty Scholarship Fund and the Pace Criminal Justice Institute.

1. OXFORD DICTIONARY OF QUOTATIONS 638 (4th ed.) (George Bernard Shaw) (“[A]ttributed in this and other forms but not found in Shaw’s published writings.”).

2. In this article, “wrongful conviction” is defined as a conviction of a person who did not engage in the conduct for which the person was convicted or in any conduct that is part of the same criminal event that could give rise to any other charge. *See, e.g.*, UTAH CODE ANN. § 78B-9-402 (2008).

3. *See, e.g.*, post-conviction DNA testing statutes and actual innocence statutes such as VA. CODE ANN. § 19.2-327.10 (2008) (issuance of writ of actual innocence based on non-biological evidence). *See also* discussion *infra* Part III.

4. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 3.8 (2004) (recent amendment creates affirmative duty for prosecutors with respect to new evidence of innocence); Manny Fernandez, *Examining Human Error in Wrongful Convictions*, N.Y. TIMES, Jan. 31, 2009, <http://www.nytimes.com/2009/02/01/nyregion/01wrongful.html?scp=1&sq=manny+fernandez&st=nyt> (describing New York State Bar Association’s report on wrongful convictions).

5. *See, e.g.*, Symposium, *Beyond Biology: Wrongful Convictions in the Post-DNA World*, 2008 UTAH L. REV. 1; Symposium, *Why Do We Convict as Many Innocent People as We Do?*, 41 TEX. TECH L. REV. 33 (2008).

6. Examples include improvements in police investigatory practices (recorded statements, more reliable identification procedures, etc.), changes in evidentiary requirements (for example, broadening corroboration requirements or the right to present a defense), and recognizing a free standing right to relief based on innocence on federal habeas corpus). *See* Innocence Project, News & Information: Fact Sheets, <http://www.innocenceproject.org/Content/248.php> (last visited Aug. 10, 2009); symposia cited *supra* note 5.

impeachment evidence, and a reluctance to test convictions against developments in modern science, all hinder the establishment of a successful corrective system.

Wrongful convictions have been a serious concern in the United Kingdom as well.⁷ In 1997, in response to several notorious wrongful conviction cases,⁸ the United Kingdom created the Criminal Cases Review Commission ("CCRC"), an independent, government-funded body with broad powers to investigate and refer claimed miscarriages of justice to an appellate court for post-conviction review.⁹ The CCRC has been in existence for more than ten years and has referred over 370 cases to the U.K. Court of Appeal.¹⁰ The Court of Appeal has reversed convictions in more than two-thirds of those cases and modified almost nine out of ten of the sentences. In total, about seventy percent of all referred cases have been either quashed or modified.¹¹ A U.S. observer would probably characterize this as a broad and effective corrective process.

The CCRC's success in correcting miscarriages of justice is attributable to several procedural and evidentiary mechanisms.¹² Unlike U.S. courts, which are bound by strict retroactivity rules, the U.K. Court of Appeal is empowered to apply contemporary notions of fairness and contemporary legal standards when analyzing past cases—even cases that are several decades old.¹³ By correcting these historic, and in some cases, infamous miscarriages of justice, the Court of Appeal has been able to fulfill its mandate to restore public confidence in the criminal justice system.¹⁴ The Court of Appeal is also empowered to receive newly discovered evidence,¹⁵ and it does so much more frequently and willingly than U.S. courts, which are constrained by concerns of finality and deference to

7. "United Kingdom" is used in this article to refer to England and Wales, who share the same legal system, and is used interchangeably, for convenience, with "England." Interestingly, "miscarriages of justice" rather than "wrongful convictions" are the focus of concern and debate in the United Kingdom. While that term includes conviction of the factually innocent, it is intended to encompass much more, i.e., those whose convictions are fundamentally unfair under contemporary standards. As will be discussed *infra*, this difference in terminology and focus allows the U.K. courts broader power to correct unjust results. See also Susan S. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5 (analyzing the terminology used in the United States to define wrongful convictions and their causes, and the significance of those choices of terminology).

8. See, e.g., *R. v. McKenny et al. (the "Birmingham Six")*, 93 Cr. App. R. 287 (1991); *R. v. Armstrong et al. (the "Guildford Four")* (as discussed in *THE TIMES*, 20 Oct. 1989); *R. v. Kiszko* (as discussed in *THE TIMES*, 19 Feb. 1992).

9. Robert Carl Schehr, *The Criminal Cases Review Commission as State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1289-90 (2005).

10. See CCRC Case Library: Case Statistics, http://www.ccr.gov.uk/cases/case_44.htm (last visited Aug. 10, 2009) [hereinafter CCRC Case Statistics]. Although only roughly 4% of its applications, this is a fairly large number of cases.

11. *Id.*

12. L.H. Leigh, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 38 ALTA. L. REV. 365, 366-69 (2000).

13. *Id.* at 369.

14. David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 52 DRAKE L. REV. 657, 670 (2004).

15. *Id.* at 672.

jury verdicts that severely restrict their acceptance of new evidence.¹⁶ Finally, the CCRC and the Court of Appeal routinely receive new evidence of scientific developments to ensure that claimed miscarriages of justice are not the result of junk science or outmoded scientific knowledge.¹⁷

Review of wrongful convictions in the United States is nowhere near as broad as it is in the United Kingdom.¹⁸ In the United States, a convicted defendant who protests his innocence must overcome several procedural and evidentiary obstacles.¹⁹ While every convicted defendant has a right to a first appeal after conviction, the appeal is based on the evidence adduced at trial.²⁰ Appellate courts cannot accept new evidence.²¹ Even if review were broader, a convicted defendant who claims to be innocent is limited in his ability to discover new evidence because he has no right to counsel past a first appeal who can investigate such evidence.²² Although evidence that is discovered may be presented to the original trial judge after conviction, relief is rarely granted unless the proof is virtually conclusive of innocence.²³ Moreover, most states explicitly exclude impeachment evidence as a ground for post-conviction relief, even where the evidence convincingly demonstrates that a witness lied at trial.²⁴ Further, while the U.S. Supreme Court has recognized the possibility that a claim of actual innocence sufficiently compelling could be redressed on federal habeas corpus review,²⁵ the necessary showing is so extraordinarily difficult to produce that, to date, not a single claim has been accepted.²⁶

With the increased awareness of false convictions, the United States has experimented with innocence commissions using two different models.²⁷ Under the first model, the commission's task is to study documented wrongful convictions and recommend changes to the criminal justice system.²⁸ Five states have adopted this approach.²⁹ The second model resembles the CCRC; the commission receives and investigates individual wrongful conviction claims and

16. Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1275 (2001).

17. *Id.* at 1286-87.

18. *Id.* at 1255.

19. *Id.*

20. *Id.* at 1269.

21. *Id.*

22. David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91, 106 (2000).

23. *People v. Edwards*, 684 N.E.2d 802 (Ill. App. Ct. 1997).

24. Griffin, *supra* note 16, at 1293.

25. *Herrera v. Collins*, 506 U.S. 390 (1993).

26. Griffin, *supra* note 16, at 1297.

27. Innocence Project: Innocence Commissions in the U.S., <http://innocenceproject.org/Content/415.php> (last visited Aug. 10, 2009).

28. Innocence Project: Criminal Justice Reform Commissions, <http://www.innocenceproject.org/fix/Innocence-Commissions.php> (last visited Aug. 25, 2009).

29. *Id.*

refers them to a special court.³⁰ So far, only North Carolina has adopted the second model.³¹

Whether the United States can emulate the United Kingdom's success in correcting miscarriages of justice is unclear.³² Although the United Kingdom and the United States share a common heritage and criminal law system, the two countries have very different approaches to the balance among accuracy, finality, and fairness. Thus, borrowing the United Kingdom's system for correcting wrongful convictions may be problematic.³³

This article examines the U.K. and U.S. systems to determine what lessons, if any, the United States can learn from the United Kingdom's experience. Part I provides a background of the CCRC and the U.K. Court of Appeal, and describes how these two entities work in tandem with broad powers to investigate and correct miscarriages of justice in the United Kingdom.

Part II takes an in-depth look at the Court of Appeal's decisions of CCRC referred cases and identifies five categories into which these decisions fall—categories that exemplify the institutional mechanisms that facilitate review of miscarriages of justice. These categories include: (1) cases that demonstrate the broad standard of “unsafety” that is used to vacate convictions; (2) “change-of-law” cases; (3) sex crime cases, (4) police misconduct cases; and (5) new scientific evidence cases.

Part III describes how, in the United States, a rigid adherence to finality and an undue deference to the original decision-maker operate to restrict courts' corrective function. This restricted capacity is reflected in demanding standards of review, strict non-retroactivity principles, and a powerful institutional reluctance to entertain and credit compelling new evidence of innocence—from powerful impeachment evidence to new scientific proof.³⁴

Part IV compares the two systems in an effort to determine what lessons the United States can learn from the United Kingdom's experience that would allow U.S. courts and policy makers to adopt a broader corrective function. For instance, U.S. courts could relax retroactivity rules, temper their unwillingness to credit newly discovered evidence of innocence, and modify their standard of review to allow the receipt of significant new evidence.³⁵ Moreover, contemporary scientific developments that significantly contradict evidence of guilt, such as DNA, could routinely be considered.³⁶ To implement these changes, the United States should follow the United Kingdom and North Carolina and create independent, investigatory, and referring bodies like the CCRC.³⁷ By investigating and producing new evidence, vetting it, and

30. *Id.*

31. Jerome M. Maiatico, Note, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1366-67 (2007).

32. See Griffin, *supra* note 16, at 1302-03.

33. *Id.*

34. See *infra* Part III.

35. Griffin, *supra* note 16, at 1246.

36. See *infra* Part II.

37. See generally Maiatico, *supra* note 31.

identifying it as potentially worthy of post-conviction relief, the creation of an independent review commission might be the fairest and most efficient mechanism to temper the U.S. system's fixation with finality.

I. THE PROCESS FOR REMEDYING MISCARRIAGES OF JUSTICE IN THE UNITED KINGDOM

A. *The Criminal Cases Review Commission*

1. *Creation of the CCRC*

Following several highly publicized wrongful conviction cases,³⁸ the government-authorized Runciman Commission recommended the creation of the Criminal Cases Review Commission to restore confidence in the judicial system.³⁹ The CCRC is an executive, non-departmental public body accountable to the Home Secretary.⁴⁰ Currently chaired by Richard Foster CBE, it has thirteen additional members.⁴¹ According to statute, two-thirds of the members of the CCRC must be lay persons, one-third must be lawyers, and at least two-thirds must have expertise in the criminal justice system.⁴² The CCRC's mandate is to review the applications of convicted defendants and to refer cases to the Court of Appeal for review where there is a "real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made."⁴³ The "real possibility" test is not defined in the statute.⁴⁴ However, in *R. v. CCRC ex p. Pearson*,⁴⁵ the Court of Appeal described the standard as "'more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty'" that the conviction will be found unsafe.⁴⁶

The CCRC's decision to refer a case must be based on "an argument, or evidence, not raised in the proceedings" or an "exceptional circumstance."⁴⁷ The "exceptional circumstance" provision was intended to include cases in which

38. See LAURIE ELKS, RIGHTING MISCARRIAGES OF JUSTICE? TEN YEARS OF THE CRIMINAL CASES REVIEW COMMISSION 13 (2008); Horan, *supra* note 22, at 124-25. See generally Innocence Project: Innocence Project Case Files, <http://www.innocenceproject.org/know/> (last visited Aug. 10, 2009).

39. THE ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT OF THE ROYAL COMMISSION ON CRIMINAL JUSTICE (Gr. Brit.) 1993, Cm. 2263 (Viscount Runciman of Doxford, chairman) [hereinafter RUNCIMAN REPORT].

40. See Criminal Cases Review Commission, <http://www.ccr.gov.uk> (last visited Aug. 10, 2009).

41. *Id.*

42. FRANK BELLONI & JACQUELINE HODGSON, CRIMINAL JUSTICE 185 (2000).

43. Criminal Appeal Act, 1995, c. 16, § 13(1)(a) (Eng.).

44. Annabelle James et al., *The Criminal Cases Review Commission: Economy, Effectiveness and Justice*, 2000 CRIM. L.R. 140, 145.

45. [1999] 3 All E.R. 498 (Eng.).

46. James et al., *supra* note 44, at 145.

47. Criminal Appeal Act, 1995 c. 35, § 13(1)(b), (c) (Eng.).

evidence was unavailable at the time of trial or where the evidence was available but was not used for a particular reason, such as attorney incompetence, mistaken tactical decision, or failure to appreciate its full significance.⁴⁸ In addition, absent such "exceptional circumstance," a case will only be referred if it has already been heard on appeal or leave to appeal has been denied.⁴⁹ Thus, in general, the CCRC only refers cases that are "strong fresh evidence cases which have exhausted their appeal remedies."⁵⁰

The CCRC begins its process by reviewing an application from an individual who claims to be the victim of a miscarriage of justice.⁵¹ Although legal aid is available, most applicants are not represented by counsel.⁵² The CCRC's review process is most effective because the CCRC conducts its own extensive, independent investigation of the miscarriage of justice claims.⁵³ In addition to its investigative functions, the CCRC has the power to subpoena public documents and to seek disclosure of information that is not otherwise available to the defense.⁵⁴

The CCRC's review process consists of three stages.⁵⁵ In the first stage, a small team of staff reviews the application to determine an applicant's eligibility.⁵⁶ If an application is ineligible, it is denied. The most common ground for denying eligibility is a failure to exhaust the appeal process.⁵⁷ Assuming eligibility, the staff takes steps to obtain all required documents, to determine if the case warrants any priority, and to decide the likelihood of success if the allegations are true.⁵⁸ If the eligible application is deemed to

48. BELLONI & HODGSON, *supra* note 42, at 187.

49. *Id.* Unlike the U.S. appellate process with its widely available review as of right, there is no as-of-right review in England. *Id.* at 171. Appeal to both the Court of Appeal and the House of Lords is by leave only, and leave may be granted by the Court of Appeal only if there is a reasonable prospect of relief. *Id.* at 174-75. In the United Kingdom, a full one-half of defendants are advised by their lawyers not to appeal at all. *Id.* at 176. This advice results from many factors, including the lack of partisanship and presumption of guilt that characterizes most defense representation, and the prevalence of guilty pleas. *Id.* It also results from a misunderstanding of the severity of "loss of time provisions that permit the court to order that the time spent in custody during consideration of a frivolous application for leave to appeal not be counted against the running of a sentence." *Id.* at 173. Of the applications that are filed, about one-quarter are successful. *Id.* In general, because assigned counsel is not available for an application for leave to appeal, it is difficult for the court of appeal to identify wrongful conviction cases. *Id.* at 173-74.

50. Kate Malleson, *The Criminal Cases Review Commission: How Will It Work?*, 1995 CRIM. L.R. 929, 932.

51. Griffin, *supra* note 16, at 1278.

52. See, e.g., CRIMINAL CASES REVIEW COMM'N, ANNUAL REPORT 1998-99, at 10 (1999) (showing that 80% of applicants in 1998-99 were not represented by counsel).

53. Griffin, *supra* note 16, at 1278.

54. ELKS, *supra* note 38, at 20.

55. Griffin, *supra* note 16, at 1278-79.

56. *Id.* at 1278.

57. James et al., *supra* note 44, at 142.

58. Griffin, *supra* note 16, at 1278.

contain no grounds on which success is likely, the case will pass to stage two, but with a recommendation for a “short form of review.”⁵⁹

At stage two, a case review manager and a commission member are assigned to the case.⁶⁰ The case manager prepares a case action plan and discusses it with the commission member.⁶¹ If the case manager and the commission member determine that an outside investigation is appropriate, an investigating officer will be appointed.⁶² The commission’s reliance on police as investigating officers has been a source of substantial criticism, especially when the officers are investigating misconduct in their own police force.⁶³ To counteract this concern, the CCRC has the power to order independent reports, such as those from engineers and forensic or psychiatric experts, and the CCRC has adopted the practice of doing as much fieldwork as practical on its own.⁶⁴

Stage three is the “real probability” test. The case review manager must determine whether there is “more than an outside chance” that the conviction will be found unsafe.⁶⁵ Should the case review manager find that the real possibility test has not been satisfied, the applicant is sent a “short form” letter that states the reasons for denial, and allows the applicant twenty-eight days to respond.⁶⁶ A final decision is then made by the CCRC.⁶⁷ At the conclusion of those twenty-eight days, a final decision of “not minded to refer” is made by the Assigned Commission Member.⁶⁸ Should the case manager and commissioner find that the “real possibility” test has been satisfied, the case is presented to three commissioners who decide whether to refer the case to the Court of Appeal.⁶⁹ A decision to refer must be made unanimously by a panel of three commissioners.⁷⁰ Following a referral, the CCRC withdraws from the case and the applicant’s counsel takes control of preparing and arguing the appeal. In a case where the applicant is unable to secure counsel for the appeal, legal aid is available.⁷¹

59. James et al., *supra* note 44, at 141.

60. Griffin, *supra* note 16, at 1278-79.

61. *Id.*

62. *Id.*

63. James et al., *supra* note 44, at 142.

64. See, e.g., R. v. Mattan (unreported) (C.A. Mar. 5, 1998) (on file with author) (noting the CCRC’s investigation included a visit to the scene and re-examination of witness statements both used and unused); Grania Langdon-Down, *Law: Justice Will Be Done*, THE INDEP. (London), Mar. 30, 1998, <http://www.independent.co.uk/life-style/law-justice-will-be-done-1153461.html>.

65. James et al., *supra* note 44, at 145.

66. Griffin, *supra* note 16, at 1279.

67. *Id.*

68. Although there is no right to review the CCRC’s decision, an action in the nature of mandamus may be brought by an applicant whose case the CCRC decides not to refer based on a claimed abuse of its powers. In such a case, the standard of review is whether the Commission’s decision was “perverse or absurd.” R. v. CCRC ex. p. Pearson, [1999] 3 All E.R. 498 (Eng.).

69. Griffin, *supra* note 16, at 1279.

70. *Id.*

71. See, e.g., R. v. Mattan, [1998] EWCA (Crim) 676 (on file with author).

B. Court of Appeal Review

Several significant procedural mechanisms give the U.K. Court of Appeal substantial power to correct miscarriages of justice.⁷² First, by statute, the Court is required to treat all cases referred as direct appeals.⁷³ Because of this provision, each case is reviewed under the law that exists at the time of referral, regardless of the conviction's age.⁷⁴ Second, the Court of Appeal has the power to receive "fresh evidence," that is, newly discovered evidence.⁷⁵ The Court of Appeal must admit fresh evidence when the following factors are met:

- (1) the "evidence appears to the Court to be capable of belief";
- (2) it appears to the Court that the evidence "may afford any ground for allowing the appeal";
- (3) "the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal"; and
- (4) "there is a reasonable explanation for the failure to adduce the evidence in those proceedings."⁷⁶

Even in the absence of these factors, the Court may in its discretion receive new evidence when it is "expedient in the interests of justice" to do so.⁷⁷ As will be illustrated in Part II, the Court has been quite willing to receive new evidence, at least compared to U.S. standards. Several reasons explain this willingness, including the intervention of an independent investigative and referring body, which makes the court more willing to accept the reliability of the evidence, a relaxed notion of finality, and a lower standard for vacating a conviction where it is "unsafe" or seriously in doubt. That willingness, combined with the CCRC's investigative powers, has been the basis for many court of appeal decisions to quash convictions.⁷⁸

72. Griffin, *supra* note 16, at 1268-71.

73. *See id.* at 1246.

74. *Id.* at 1288 n.179.

75. *Id.* at 1269.

76. *See* Criminal Appeal Act, 1995 c. 35, § 4(1)(b). The U.S. equivalent would be a state trial court entertaining a motion for a new trial or a federal trial court entertaining a motion for a new trial in a federal case or a habeas corpus petition in a state case. As will become apparent from the following discussion, the Court of Appeal is much more willing to receive fresh evidence than the U.S. federal habeas or state collateral review courts. *See* Parts III.B.1.-4.

77. Griffin, *supra* note 16, at 1269.

78. *Id.* at 1277. *See also* [CCRC Chart.xls] spreadsheet (on file with the University of Toledo Law Review) (analyzing and indexing all court of appeal decisions on CCRC-referred cases since the CCRC's inception and categorizing them according to eighteen procedural and substantive issues).

Finally, a conviction will be quashed if the Court of Appeal concludes that it is “unsafe.”⁷⁹ This is a substantially different standard than the U.S. standard of reversible error.⁸⁰ An “unsafe” conviction is one in which 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.”⁸¹

II. U.K. COURT OF APPEAL DECISIONS

The Court of Appeal has decided over 370 cases on referral from the CCRC.⁸² There are several ways to categorize these decisions. They could be grouped according to outcome, type of crime (e.g., homicides, sexual abuse cases), whether fresh evidence was received, or claimed basis for error (e.g., cases involving prosecutorial misconduct, police misconduct, jury instructions, non-disclosure). Categories could also dovetail with the claims of error that arise repeatedly in U.S. wrongful conviction cases, such as prosecutorial suppression of exculpatory evidence, ineffective assistance of counsel, erroneous eyewitness identifications and the like.⁸³ But the most meaningful categorization for purposes of comparative analysis is to identify the principal mechanisms that allow the U.K.’s CCRC and the Court of Appeal together to exercise their broad power to correct miscarriages of justice.⁸⁴

Accordingly, this section discusses five categories of cases: “unsafe” conviction cases, change-of-law cases, sex offense cases, police misconduct cases, and new scientific evidence cases. These categories of cases reveal the United Kingdom’s greater willingness to correct miscarriages of justice, as compared to the United States.⁸⁵

A. “Unsafe” Conviction Cases

The extent of deference a reviewing court gives to a jury’s guilty verdict depends generally on whether the court employs a demanding or lenient standard

79. Criminal Appeal Act, 1995, c. 35, § 2 (Eng.). Section 2 provides that “subject to the provisions of this Act, the Court of Appeal—(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such appeal in any other case.” *Id.*

80. Griffin, *supra* note 16, at 1268-69.

81. See generally James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000). Interestingly, neither of the most frequently cited bases for habeas corpus reversal in capital cases—*Brady* non-disclosure of exculpatory evidence and ineffective assistance of counsel—appear with any frequency in the Court of Appeal decisions. See [CCRC Chart.xls] spreadsheet (on file with the University of Toledo Law Review) (analyzing and indexing all court of appeal decisions on CCRC-referred cases since the CCRC’s inception and categorizing them according to eighteen procedural and substantive issues).

82. CCRC Case Statistics, *supra* note 10.

83. CRCC: Cases We Have Referred, http://www.ccrcc.gov.uk/cases/case_referred.asp (last visited Aug. 10, 2009).

84. See Criminal Cases Review Comm’n, *supra* note 40.

85. See, e.g., UTAH CODE ANN. § 78B-9-301 (2008).

of review.⁸⁶ The U.K.'s Court of Appeal employs a relatively lenient standard of review that requires that a conviction be quashed if it is deemed "unsafe." In *R. v. Pendleton*, the House of Lords, which is the United Kingdom's highest court, evaluated this standard.⁸⁷ In *Pendleton*, the Court analyzed section 1(7) of the Criminal Appeal Act 1907, which gives the Court the power to make any decisions required to allow "justice in the case before the court," and section 4(1), which expresses, in relevant part, the Court's power to set aside a conviction "if they think" the verdict is unreasonable or unsupported, if there is a mistake on a question of law, or for any other miscarriage of justice.⁸⁸ Based on these statutory provisions, the Court concluded that whether a conviction is unsafe in light of fresh evidence is a question of whether the Court concludes that the new evidence "*might reasonably have affected the decision* of the trial jury to convict. *If it might*, then the conviction is thought to be unsafe."⁸⁹ Thus, the Court must (1) determine the impact of new evidence on the jury, and (2) find the conviction unsafe and quash the conviction if the new evidence might lead to a different verdict or if it is no longer reasonably likely that the same verdict would have resulted.⁹⁰

86. Griffin, *supra* note 16, at 1268-69.

87. [2001] UKHL 66, [2002] 1 W.L.R. 72 (Eng.). *Pendleton* is a frequently cited decision. There, the defendant was charged with a murder that had taken place fourteen years earlier. *Id.* ¶ 2. He had initially been cleared as a suspect, but was later arrested and "interviewed over a number of hours, in the absence of a solicitor." *Id.* He admitted to police that he had been "in the vicinity of the crime" at the time of the murder, but he accused one Thorpe of being the murderer. *Id.*

At trial, the defense was that he had not, in fact, been anywhere near the crime but had been pressured by the police into saying that he had. *Id.* ¶ 3. Because the defendant had no proof of this, however, he did not testify on his own behalf in the hope that "the jury would accept the truth of what he had said to the police in interview: that he had been present when the crime had been committed but had not himself been party to any violence." *Id.* Thus, he relied on the truth of his statements. *Id.* Thorpe, however, testified and said that Pendleton had been the killer. *Id.* Both men were convicted of murder, and leave to appeal was refused. *Id.*

Later, the CCRC referred the case to the Court of Appeal. Although the defendant had not challenged his statement as involuntary (quite the contrary), and although there had been no evidence on that issue, the Court received new psychological (scientific) evidence establishing that the defendant's statements were not voluntary and new documents that had not been available earlier about his whereabouts on the day of the crime. The certified question was whether, where the court of appeals receives fresh evidence in determining whether the conviction is unsafe, "is the Court confined to answering the question, might a reasonable jury have acquitted the appellant had they heard the fresh evidence?" *Id.* ¶ 5. The case against the defendant was not strong, and he never admitted committing any violence. *Id.* ¶ 24. The prosecution witnesses were criminals "about whose evidence the jury could well have had reservations." *Id.* ¶ 28. The jury had not had the opportunity to consider, on appellant's instructions, what had actually happened.

In concluding that the defendant's "appeal should be allowed and his conviction quashed," the CCRC noted, "[h]ad the jury been trying a different case on substantially different evidence the outcome must be in doubt." *Id.* ¶ 28. It then observed that the Court of Appeal had "strayed beyond its true function of review" and "perilously close to considering whether the appellant, in its judgment, was guilty." *Id.*

88. *Id.* ¶ 7.

89. *Id.* ¶ 19 (emphasis added).

90. *Id.* ¶ 28.

B. *Change of Law Cases*

When the CCRC was created, the U.K.'s criminal justice system (and the system's integrity) was in serious disrepute.⁹¹ Thus, Parliament's intent in establishing the CCRC was to create a body with the power to correct current and historical miscarriages of justice.⁹² To meet this goal, the Criminal Appeals Act requires that any case referred to the Court of Appeal be treated as if it were a direct appeal from conviction.⁹³ Accordingly, the Court must apply the law that exists at the time of its decision, not the law that existed when the conviction was entered or on the prior appeal, regardless of the age of the conviction.⁹⁴

1. *Old Convictions*

Consistent with its mandate, the CCRC referred several very old convictions to the Court of Appeal for review.⁹⁵ As these referrals began to arrive, serious questions arose. For example: which law governed a conviction from the 1950s? What if the conviction was proper under the law that applied at the time? Should such a case be treated the same as one that was improper under then-existing law? Should it be treated the same as a contemporary conviction? If so, why?

One of the most famous, old change-of-law cases is *R. v. Bentley*.⁹⁶ In *Bentley*, the Court reviewed the fairness of a forty-five-year-old conviction.⁹⁷ Since Bentley was the last man hanged in the United Kingdom,⁹⁸ the case had tremendous potential to gain public notice and restore confidence in the system.⁹⁹ Equally obvious, however, were the major changes in the law during the forty-five-year span.¹⁰⁰

91. CCRC: Our History, http://www.ccrcc.gov.uk/about/about_28.htm (last visited Aug. 11, 2009).

92. *Id.*

93. *See id.*

94. *See infra* note 104 and accompanying text.

95. *See, e.g., R. v. Bentley*, [1998] EWCA (Crim) 2516, [2001] 1 Crim. App. 21 (U.K.) (conviction over 45 years old); *R. v. Hanratty*, [2002] EWCA (Crim) 1141, [2002] 3 All E.R. 534 (Eng.) (conviction over 40 years old).

96. [1998] EWCA (Crim) 2516, [2001] 1 Crim. App. 21 (U.K.).

97. *Id.* at 309.

98. *Bentley Hanged on "Highly Suspect" Evidence*, BBC NEWS, July 30, 1998 http://news.bbc.co.uk/2/hi/uk_news/142283.stm.

99. *Id.* *See also* Heather Mills, *Hanged Man's Sister Sees Hopes Shattered: Iris Bentley's Brother, Derek, Who Was Executed Almost 40 Years Ago, Has Been Refused a Pardon—but the Campaign Goes on*, THE INDEP. (London), Oct. 2, 1992, <http://www.independent.co.uk/news/uk/hanged-mans-sister-sees-hopes-shattered-iris-bentleys-brother-derek-who-was-executed-almost-40-years-ago-has-been-refused-a-pardon-but-the-campaign-goes-on-heather-mills-reports-1554859.html> (noting that even at the time of the execution, Bentley's hanging "appeared to many [to be] a manifest injustice" and thousands of letters were sent asking for clemency; further, Bentley's "death was a major factor in the abolition of the death penalty 13 years later").

100. *See Bentley*, [1998] EWCA (Crim) 2516, [2001] 1 Crim. App. 21 (U.K.); *Hanratty*, [2002] EWCA (Crim) 1141, [2002] 3 All E.R. 534 (Eng.).

Bentley had been charged as an accomplice in a police officer's murder.¹⁰¹ His alleged accomplice, Christopher Craig, had deliberately murdered the officer, but Bentley's culpability rested on his alleged statement to Craig, "Let him have it, Chris," which was interpreted as an incitement to shoot the officer (rather than a plea for Craig to turn over his gun).¹⁰² Bentley was convicted, his appeal was dismissed, and he was hanged.¹⁰³ In quashing the conviction, the Court of Appeal ruled that when the integrity and accuracy of a criminal trial has been called into question, modern standards of fairness govern the Court's review of the conviction, regardless of when the conviction occurred.¹⁰⁴

As a result of the CCRC's referral, the Court of Appeal held that the trial court had erred in its charge to the jury by (1) leaving the impression that the jury could convict unless the defendant "satisfied them of his innocence" and (2) stating to the jury its own conclusion that the testifying police officers were "conspicuously brave," and that they "showed the highest gallantry" and "devotion to duty."¹⁰⁵ Moreover, the trial court's marshalling of the evidence failed to present to the jury the issue of whether the defendant had withdrawn from the conspiracy after his arrest, and whether the defendant had yelled, "let him have it," which was a critical fact used to prove the defendant's accomplice liability.¹⁰⁶

From there, the Court of Appeal announced several basic retroactivity principles that would thereafter guide its review of old convictions.¹⁰⁷ The Court explained that, henceforth, in cases where relevant changes in the law have been made since the time of conviction, it would apply (1) past substantive law governing the offense; (2) changes in the law concerning accessorial liability; (3) current, "modern standards of fairness" for the conduct of the trial and directions to the jury; and (4) changes in the law concerning a conviction's safety.¹⁰⁸ The Court of Appeal found that, while the trial judge's instructions may have been proper under then-existing law, they were improper under current law.¹⁰⁹ The Court of Appeal quashed the conviction and held that, under current law and modern standards of fairness, the trial court's instructions to the jury were improper and unfair, even though they were entirely proper when they were given.¹¹⁰

The Court of Appeal has since refined its approach to retroactivity, as seen in *R v. Hanratty*.¹¹¹ *Hanratty* was a well publicized case in which DNA testing requested by the defendant's family confirmed that Hanratty was indeed the

101. *Bentley*, [1998] EWCA (Crim) 2516, [2001] 1 Crim. App. 21 (U.K.) at 1.

102. *Id.* ¶ 8.

103. *Id.* ¶ 1.

104. *Id.* ¶ 5.

105. *Id.* ¶¶ 49-50.

106. *Bentley*, [1998] EWCA (Crim) 2516, [2001] 1 Crim. App. 21 (U.K.), ¶ 78.

107. *Id.* ¶ 4.

108. *Id.*

109. *Id.* ¶¶ 68, 75.

110. *Id.* ¶ 75.

111. [2002] EWCA (Crim) 1141, [2002] 3 All E.R. 534 (Eng.).

murderer.¹¹² Here, the Court reviewed statutory disclosure and identification rules that were not enacted until well after Hanratty's conviction forty years earlier.¹¹³ The Court of Appeal reiterated what it had said in *Bentley*—that a trial's fairness is judged retrospectively according to modern standards of fairness.¹¹⁴ It qualified this principle by explaining that, although non-compliance with new rules that were not in force at the time of trial provides a basis for quashing an old conviction, non-compliance with rules that were in existence at the time of trial is a more serious basis for doing so.¹¹⁵ As such, the Court was more likely to quash a conviction that was vulnerable under past law compared to a conviction that became vulnerable as a result of a change in law.¹¹⁶ The Court made clear that all relevant circumstances must be taken into account when determining whether a conviction in breach of subsequent law is unsafe.¹¹⁷ Applying the standard, the court dismissed Hanratty's appeal.¹¹⁸

2. *Police and Criminal Evidence Act Cases*

The second and overwhelmingly largest category of retroactivity cases involves claims of police investigative misconduct.¹¹⁹ These claims pre-date the enactment of the Police and Criminal Evidence Act ("PACE"), legislation which established new rigorous and revolutionary changes to the rules and standards governing coerced and fabricated confessions, hidden or altered records, failure to conduct appropriate identification procedures, and the like. These cases are reviewed under "modern standards of fairness," and, as a result, the Court has quashed several convictions that were largely based on confessions.¹²⁰ As the following examples show, these confessions were taken from young or otherwise emotionally vulnerable suspects after intensive and extended police interrogation in the absence of any solicitor, parent, or other appropriate adult, and were not

112. *Id.* ¶ 108. The *Bentley* decision established the Court of Appeal's retroactivity analysis in jury instruction cases. [1998] EWCA (Crim) 2516 (U.K.). See also, e.g., *R. v. Beckles*, [2004] EWCA (Crim) 2766, [2005] W.L.R. 2829 (misdirection on defendant's silence rendered trial unfair); *R. v. Caley-Knowles*, [2006] EWCA (Crim) 1611, [2006] W.L.R. 3181 (quashing conviction where the court effectively instructed the jury to convict).

113. *Hanratty*, [2002] EWCA (Crim) 1141, [2002] 3 All E.R. 534 (Eng.), ¶¶ 86-93.

114. *Id.* ¶ 98.

115. *Id.* Indeed, the court observed, "non-compliance with rules does not necessarily mean that a defendant has been treated unfairly." *Id.* "Proper standards will not be maintained unless this Court can be expected, when appropriate, to enforce the rules by taking a serious view of a breach of the rules at the time they are in force." *Id.* That standard is not applicable to old cases. *Id.* Another difference is that there may be an explanation for the historic breach, which may be impossible to discover due to the passage of time. *Id.* ¶ 99. "This has to be borne in mind, particularly where to draw an adverse inference could reflect, as in this case, on the integrity of those who are not alive." *Id.*

116. *Id.* ¶ 98.

117. *Id.* ¶ 100.

118. *Id.* ¶¶ 214, 480.

119. Police and Criminal Evidence Act, 1984, c. 60 (U.K.).

120. *R. v. Bentley*, [1998] EWCA (Crim) 2516, [2001] 1 Crim. App. 21, H10-H13. See also ELKS, *supra* note 38, at 134-36.

corroborated by any reliable evidence.¹²¹ Although these confessions were taken in compliance with the then controlling Judges Rules,¹²² “[t]he overriding issue is the safety of the conviction as judged by [the] Court at the present time.”¹²³

A good example is *R. v. Blackburn*,¹²⁴ where police repeatedly questioned the fifteen-year-old defendant without advising him that he was entitled to have a solicitor present.¹²⁵ Following a more than three-hour interrogation, the fifteen-year-old defendant confessed orally and in writing.¹²⁶ At trial, the defense challenged the admissibility of the confessions under the then-existing law, which required the exclusion of a confession if it was made involuntarily or otherwise obtained “unfairly.”¹²⁷ The judge, however, rejected the defendant’s arguments for exclusion, the confession was admitted, and the defendant was convicted.¹²⁸

On the CCRC’s referral, the Court of Appeal quashed the conviction and outlined the appropriate analysis for cases alleging past police investigative misconduct.¹²⁹ First, as the Court explained in *Hanratty*, the initial inquiry is whether the police procedures were in breach of the then-existing Judges Rules.¹³⁰ The CCRC found they were.¹³¹ Second, even if the police procedures were proper at the time, the Court must still determine if the procedures are unfair under contemporary standards.¹³² Again, in judging the confessions under the reliability requirements of section 82(1) of the PACE, the Court held that the confessions were improperly admitted and quashed the conviction.¹³³

3. *New Judicial Interpretation of Offenses*

A third category of retroactivity cases are change-of-law cases in which, subsequent to a conviction, the courts interpret a statute defining an offense so that the defendant’s underlying conduct is no longer a crime.¹³⁴ This

121. *Bentley Hanged on “Highly Suspect” Evidence*, *supra* note 98.

122. Practice Note (Judge’s Rules), [1964] 1 WLR 152; *R. v. Blackburn*, [2005] EWCA (Crim) 1349, [2005] 2 Crim. App. 30, ¶ 46 (standards for police investigation were contained in the Judges Rules and the Administrative Directions attached to them).

123. *R. v. Richardson*, [2004] EWCA (Crim) 1784, 2004 WL 1476687, ¶ 16.

124. [2005] EWCA (Crim) 1349, 2005 WL 1287489.

125. *Id.* ¶¶ 13, 46-47.

126. *Id.* ¶ 25.

127. *Id.* ¶ 18.

128. *Id.* ¶ 19.

129. *Id.* ¶¶ 40-50, 65.

130. *Id.* ¶ 46.

131. *Id.* ¶¶ 36-38, 49.

132. *Id.* ¶ 46.

133. *Id.* ¶¶ 63-65.

134. See, e.g., *R. v. Farnell*, [2005] EWCA (Crim) 1021, 2005 WL 4124936; *R. v. James*, [2006] EWCA (Crim) 14, [2006] 2 W.L.R. 889; *R. v. Mair*, [2002] EWCA (Crim) 2858, 2002 WL 31676355; *R. v. Richards*, [2002] EWCA (Crim) 3175, 2002 WL 31962071; *R. v. Rowland*, [2003] EWCA (Crim) 3636, 2003 WL 23014759; *R. v. Smith*, [2002] EWCA (Crim) 2671, 2002 WL 31676314; *R. v. Miah*, No. 9802512 Y5 (C.A. May 12, 1998) (on file with author).

determination is then applied retroactively, and the conviction is quashed.¹³⁵ *R. v. Preddy* is a good illustration of this kind of case.¹³⁶ There, the defendant was charged with presenting a forged check for payment in an attempt to obtain property by deception.¹³⁷ After he was convicted, the House of Lords held that an individual who debits a bank account and credits another's bank account by telegraphic or electronic transfer through deception has not obtained "property belonging to another" under section 1 of the Theft Act 1978.¹³⁸ Rather, the individual obtains "a new chose in action constituted by the debt."¹³⁹

Similarly, in *R. v. Rowland*,¹⁴⁰ the Court of Appeal applied the approach outlined in an intervening House of Lords decision, *R. v. Smith (Morgan)*,¹⁴¹ which changed the law on provocation in two ways. First, it required that the jury be instructed that it may consider the defendant's individual characteristics in judging, not only the gravity of the provocation, but also the standard for self-control.¹⁴² Second, it indicated that these are factual issues for the jury, not legal issues for the judge.¹⁴³ Because the court in *Rowland* had instructed the jury incorrectly under *Smith*, the conviction was quashed.¹⁴⁴ Several referred convictions that preceded this change in the law have been quashed.¹⁴⁵

135. See, e.g., *R. v. Farnell*, [2005] EWCA (Crim) 1021, 2005 WL 4124936; *R. v. James*, [2006] EWCA (Crim) 14, [2006] 2 W.L.R. 889; *R. v. Mair*, [2002] EWCA (Crim) 2858, 2002 WL 31676355; *R. v. Richards*, [2002] EWCA (Crim) 3175, 2002 WL 31962071; *R. v. Rowland*, [2003] EWCA (Crim) 3636, 2003 WL 23014759; *R. v. Smith*, [2002] EWCA (Crim) 2671, 2002 WL 31676314; *R. v. Miah*, No. 9802512 Y5 (C.A. May 12, 1998) (on file with author).

136. *R. v. Preddy*, [1996] A.C. 815 (U.K.), [1996] W.L.R. 255 (Eng.).

137. *Id.* at 816.

138. *Id.* at 815.

139. *Id.* at 834. The same conclusion of reinterpreting the statute, so that the conduct is no longer a crime, was reached in *R. v. Burke*, No. 95/0123/Z3 (C.A. Nov. 25, 1999) (on file with author); *R. v. Clark*, [2003] EWCA (Crim) 1020, 2003 WL 1822883; *R. v. El-Kurd*, [2007] EWCA (Crim) 1888, [2007] 1 W.L.R. 3190. In *El-Kurd*, the House of Lords held that to establish conspiracy to launder drug proceeds under section 1(1) of the 1977 Act, the prosecution must show not simply a reasonable ground of suspicion that the proceeds were derived from drug trafficking but rather actual knowledge of the source of the funds. *Id.* ¶¶ 110-19. This decision was applied retroactively in several subsequent cases. *Id.*

140. [2003] EWCA (Crim) 3636, 2003 WL 23014759.

141. [2001] A.C. 146 (H.L.) (U.K.), [2000] 3 W.L.R. 654.

The jury may think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have been expected of him and which it would be unjust not to take into account. If the jury take this view, they are at liberty to give effect to it.

Rowland, [2003] EWCA (Crim) 3636, 2003 WL 23014759, ¶ 92.

142. *Smith (Morgan)*, [2001] A.C. 146 (H.L.) (U.K.), [2000] 3 W.L.R. 654, at 660-61.

143. *Id.* at 660. Interestingly, this holding was subsequently reversed. See *R. v. James*, [2006] EWCA (Crim) 14, [2006] 2 W.L.R. 889, ¶ 38.

144. *Rowland*, [2003] EWCA (Crim) 3636, 2003 WL 23014759, ¶ 57. See also *R. v. Smith*, [2002] EWCA (Crim) 2671, 2002 WL 31676314, ¶ 41 (although the Court correctly instructed the jurors, evidence of provocation was not properly considered and, in light of fresh psychiatric evidence, conviction was quashed).

145. While the CCRC and the Court of Appeal have used their broad authority to apply contemporary legal standards to correct historic miscarriages of justice, this has not has not gone

On the other hand, statutory changes that redefine an offense are not applied retroactively.¹⁴⁶ For example, in *R. v. Ellis*,¹⁴⁷ the defendant was charged with the murder of her ex-boyfriend. The trial court barred the jurors from considering the defendant's provocation defense.¹⁴⁸ After Ellis's conviction, Parliament changed the Homicide Act to recognize the defense of diminished capacity based on provocation. Later, the CCRC referred the case to the Court of Appeal. The Court noted that, because a court must always apply current common law developments, the question to be addressed was whether the changes in the law resulted from the development of the common law or changes to the Homicide Act of 1957.¹⁴⁹ Once the Court concluded that the change in the law resulted from changes to the Homicide Act, the Court held that the statutory defense would not apply retroactively and the substantive law on provocation that existed at the time of the trial would apply to the appeal.¹⁵⁰ Since the jury had not erred under the then-existing law, the Court dismissed the appeal.¹⁵¹

C. *Quashing Sex Offense Convictions*

1. *Disproportionate Referrals on Affirmative Investigation*

Just over twenty-five percent of all applications to the CCRC seek review of convictions or sentences for sex-related offenses.¹⁵² It is noteworthy, however, that the percentage of sex offense referrals is disproportionate to the total pool for sex offenses.¹⁵³ This discrepancy may be explained, at least in part, by the CCRC's power to investigate cases independently in order to uncover new evidence.¹⁵⁴ Most sex offense convictions are quashed on the basis of undisclosed pre-trial impeachment material or post-trial disclosures discovered by the CCRC post-conviction. The large number of reversals may also be explained by the Court of Appeal's willingness to review and credit the evidence the CCRC uncovers, and the relatively lenient *Pendleton* standard the Court applies to quash convictions based on new evidence.¹⁵⁵

unnoticed by the conservatives in government. There is currently a proposal in Parliament to allow the Court of Appeal to dismiss an appeal where the only ground for allowing it would be based on a change in the law subsequent to the conviction under review.

146. See, e.g., *R v. Ellis*, [2003] EWCA (Crim) 3556, 2003 WL 228271.

147. *Id.* The defendant, Ruth Ellis, was the last woman executed in England. See ROBERT HANCOCK, RUTH ELLIS: THE LAST WOMAN TO BE HANGED (3d ed. 2000).

148. *Ellis*, [2003] EWCA (Crim) 3556, 2003 WL 228271, ¶¶ 3-4, 36.

149. *Id.* ¶ 65.

150. *Id.* ¶¶ 65, 67-69.

151. *Id.* ¶ 89.

152. ELKS, *supra* note 38, at 218.

153. *Id.*

154. Interestingly, this discrepancy in the frequency of sex offense reversals does not appear to be present in the United States, where, in the absence of a CCRC-type investigative body or a right to counsel on collateral attack, there is no such investigative potential. See generally *infra* Parts III.B.3-4.

155. See *supra* note 87 and accompanying text.

Interestingly, in all intra-family abuse cases, the CCRC exercises its power to review any social services material relating to the complainant.¹⁵⁶ This review is usually much broader than the evidence the defense reviewed at trial, which is limited to information that is “material” to the case.¹⁵⁷ Also, by the time the CCRC reviews a case, additional post-trial information may be added to the case file.¹⁵⁸

The CCRC also routinely reviews the files of the Criminal Injuries Compensation Authority (“CICA”) in child-sex-abuse cases.¹⁵⁹ This agency is akin to a crime victim’s compensation board and, if a complainant has made a claim for compensation, the file will contain the complainant’s statements in support of that claim.¹⁶⁰ In many cases, these post-trial statements are inconsistent with, or otherwise impeach, the complainant’s trial testimony.¹⁶¹ The Court of Appeal has quashed convictions on the basis of those statements.¹⁶² Further, the CCRC reviews police recordings that contain any previous complaints made by the complainant.¹⁶³ Where prior false accusations exist, the Court has often quashed the conviction.¹⁶⁴

Thus, a substantial number of convictions for sexual offenses have been quashed as a result of evidence discovered during the CCRC’s investigation.¹⁶⁵ Unlike the United States—where relief is not available unless the prosecutor has suppressed the evidence—these U.K. cases do not involve claims of prosecutorial fault or misconduct.¹⁶⁶ In fact, in many of these cases, the new evidence the Court of Appeal receives did not exist at the time of the original trial.¹⁶⁷ These

156. Criminal Cases Review Comm’n, Formal Memorandum: Child Sexual Abuse Cases, www.ccrc.gov.uk/documents/CHILD_SEXUAL_ABUSE_CASES.DOC (last visited Aug. 25, 2009).

157. *Id.* This is the same standard as in the United States. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

158. ELKS, *supra* note 38, at 220.

159. *Id.* at 221.

160. *Id.*

161. See, e.g., *R. v. Siddall*, [2006] EWCA (Crim) 1353, 2006 WL 1635009, ¶¶ 22-32.

162. *Id.* ¶ 53.

163. ELKS, *supra* note 38, at 221-26.

164. See *R. v. Warren*, [2005] EWCA (Crim) 659, 2005 WL 828218; *R. v. Blackwell*, [2006] EWCA (Crim) 2185, 2006 WL 2850891; *R. v. K (Jason)*, [2006] EWCA (Crim) 67, 2006 WL 755490; *R. v. Carrington-Jones*, [2007] EWCA (Crim) 2551, 2007 WL 3130940; *R. v. Solomon*, [2007] EWCA (Crim) 2633, 2007 WL 3001852.

165. See *R. v. Warren*, [2005] EWCA (Crim) 659, 2005 WL 828218; *R. v. Blackwell*, [2006] EWCA (Crim) 2185, 2006 WL 2850891; *R. v. K (Jason)*, [2006] EWCA (Crim) 67, 2006 WL 755490; *R. v. Carrington-Jones*, [2007] EWCA (Crim) 2551, 2007 WL 3130940; *R. v. Solomon*, [2007] EWCA (Crim) 2633, 2007 WL 3001852.

166. That is, there was no prosecutorial failure to disclose exculpatory evidence. See *Brady*, 373 U.S. at 87.

167. See *R. v. Warren*, [2005] EWCA (Crim) 659, 2005 WL 828218; *R. v. Blackwell*, [2006] EWCA (Crim) 2185, 2006 WL 2850891; *R. v. K (Jason)*, [2006] EWCA (Crim) 67, 2006 WL 755490; *R. v. Carrington-Jones*, [2007] EWCA (Crim) 2551, 2007 WL 3130940; *R. v. Solomon*, [2007] EWCA (Crim) 2633, 2007 WL 3001852.

cases thus fall into two categories: (1) cases in which the CCRC discovers impeachment evidence that existed pre-trial;¹⁶⁸ and (2) cases in which the CCRC discovers impeachment evidence that did not exist prior to the conviction.¹⁶⁹

i. Impeachment evidence that existed pre-trial

In *Regina v. A.*,¹⁷⁰ the defendant was convicted of sexual offenses against a nine-year-old. The girl was ten at the time of trial and the allegations were much more detailed than expected from a child her age had they not actually taken place, lending credibility to her testimony.¹⁷¹ However, the social services file revealed: (1) the child had been sexualized at an early age; (2) the child had previously made groundless allegations of sexual misconduct against teachers; and (3) the child's mother, in her testimony at trial, expressed great hostility against the defendant.¹⁷² The Court of Appeal quashed the conviction.¹⁷³ It explained that, based upon these revelations, there were "substantial grounds to question the honesty and reliability of the child and ... the motivation of the mother."¹⁷⁴ In other words, in cases like *A.*, the Court is willing to receive new evidence and, based on that evidence, quash a conviction if the jury might not have convicted the defendant had the jury heard the new impeachment evidence at trial.¹⁷⁵

Similarly, in *Regina v. K.*,¹⁷⁶ the Court of Appeal quashed a conviction of a twelve-year-old defendant for the rape of a five year old.¹⁷⁷ The troubled family history of the victim was detailed in the social services file, some of which was available before trial, but much of it was not disclosed.¹⁷⁸ The CCRC also obtained a psychologist's comprehensive assessment of the complainant post-trial, which raised further doubts about her credibility.¹⁷⁹ In quashing the conviction, the court explained:

In the light of these matters, we take the view that, if there had been cross-examination based on the undisclosed pre-trial material to which we have referred, the judge would probably have given a stronger warning about the reliability of [the

168. See, e.g., Carrington-Jones, [2007] EWCA (Crim) 2551, 2007 WL 3130940 (evidence did exist at time of trial).

169. *R. v. Siddall* (John Stephen), [2006] EWCA (Crim) 1353, 2006 WL 1635009, ¶¶ 22-32 (evidence did not exist at time of trial).

170. *R. v. A.*, No. 1998/07511/Y5 (C.A. Mar. 14, 2000) (on file with author).

171. *Id.* ¶ 13.

172. *Id.* ¶¶ 7-9.

173. *Id.*

174. *Id.* ¶ 17.

175. *Id.*

176. [2002] EWCA (Crim) 2878, 2001 WL 31784501.

177. ELKS, *supra* note 38, at 222.

178. *Id.*

179. *Id.*

complainant] In any event, with or without such directions, the jury's verdict might have been different.¹⁸⁰

Another example of how the Court has used new evidence to impeach a complainant's credibility is *R v. C., S.*¹⁸¹ In this case, the defendants were brothers convicted of sexually assaulting a fourteen-year-old girl with learning disabilities.¹⁸² The complainant continued to socialize with the defendants after the alleged crimes occurred.¹⁸³ New evidence impeached several aspects of her testimony, including the fact that she claimed to have seen her doctor due to pain from the assaults, but no medical notes were found.¹⁸⁴ The CCRC subsequently obtained the doctor's notes, which indicated that she had not seen her doctor.¹⁸⁵ The court quashed the conviction.¹⁸⁶

Finally, there are cases in which the CCRC discovered evidence of a complainant's prior unrelated false allegations to the police.¹⁸⁷ For example, in *R. v. Warren*,¹⁸⁸ the complainant, defendant's ex-girlfriend, made similar rape allegations in two previous complaints to police against different men, and she made other allegations in industrial tribunal proceedings for unfair dismissal.¹⁸⁹ The complainant acknowledged to police that one of the previous complaints was untrue, and in the industrial tribunal proceedings the police rejected her allegations as untrue.¹⁹⁰ While there was no direct proof that she was lying about her allegations against the defendant, the likely prejudice that resulted from the jury hearing the evidence caused the Court of Appeal to quash the conviction.¹⁹¹

ii. *Discovery of post-trial impeachment evidence*

Often the CCRC will discover evidence that did not exist prior to trial when it examines an application for compensation to the CICA.¹⁹² In *R. v. P.*,¹⁹³ the defendant was convicted of sexual offenses against his wife's granddaughter.¹⁹⁴

180. *Id.*

181. [2001] EWCA (Crim) 339, 2001 WL 171997.

182. *Id.* ¶ 14.

183. *Id.* ¶¶ 14, 26.

184. *Id.* ¶ 47.

185. *Id.* ¶ 49.

186. *Id.* ¶ 61.

187. *See R. v. Blackwell*, [2006] EWCA (Crim) 2185, 2006 WL 2850891; *R. v. K (Jason)*, [2006] EWCA (Crim) 67, 2006 WL 755490; *R. v. Carrington-Jones*, [2007] EWCA (Crim) 2551, 2007 WL 3130940; *R. v. Solomon*, [2007] EWCA (Crim) 2633, 2007 WL 3001852.

188. [2005] EWCA (Crim) 659, 2005 WL 828218.

189. *Id.* ¶¶ 9-12.

190. *Id.*

191. *Id.* ¶¶ 16, 18. *See also Carrington-Jones* [2007] EWCA (Crim) 2551, 2007 WL 3130940, ¶ 24.

192. Criminal Injuries Compensation Authority, <http://www.cica.gov.uk> (last visited Aug. 12, 2009).

193. *R. v. P.*, No. 200500812 D4 (C.A. Nov. 17, 2005) (on file with author).

194. *Id.* ¶ 3.

The jury's verdict hinged on the complainant's credibility.¹⁹⁵ New evidence however, revealed the complainant's account to the CICA included allegations against the defendant that were untrue and other statements that were inconsistent with her testimony at trial.¹⁹⁶ Because of the potential impact this new evidence could have had on the jury's assessment of credibility, the Court quashed the conviction.¹⁹⁷

D. *Quashing Police Misconduct Convictions*

The Court of Appeal has quashed over thirty convictions based on police misconduct in coercing confessions, fabricating evidence, and committing perjury at trial. These cases arose largely from two police squads: the West Midlands Serious Crimes Squad ("WMSCS") and the Flying Squad, Metropolitan Police stationed at the Rigg Approach Police Station in Northeast London.¹⁹⁸ These squads were assigned to deal with the most serious crimes and engaged in various illegal methods to secure convictions.¹⁹⁹ Most West Midlands cases the CCRC referred to the Court involved allegations of damaging statements made to the police.²⁰⁰ These cases occurred before the passage of PACE, which contained new requirements for recording suspect statements, permitting solicitors at the police station, taking statements, and the like.²⁰¹

1. *Broad Review of Police Misconduct*

The unraveling of the WMSCS cases and the resulting disbanding of the squad began when Derek Treadaway filed a civil action against the WMSCS.²⁰² The complaint alleged that WMSCS officers had assaulted Treadaway during interrogation and that the officers had held a plastic bag over his head in order to coerce a confession.²⁰³ In entering judgment for Treadaway, the judge found that five named WMSCS officers had put a bag over Treadaway's head to restrict his breathing and that the named officers had falsely testified that they had not done so.²⁰⁴ These findings had a domino effect on the previous confessions obtained by the WMSCS.²⁰⁵ In almost thirty subsequent cases, the Court of Appeal

195. *Id.* ¶ 15.

196. *Id.* ¶¶ 20-23, 25.

197. *Id.* ¶ 25. Compare *R. v. Siddall*, [2006] EWCA (Crim) 1353, 2006 WL 1635009 (conviction quashed), with *R. v. Parkin*, [2004] EWCA (Crim) 2975, 2004 WL 2714134 (court dismissed appeal, finding evidence inconsistent, but not enough to impact jury's assessment).

198. ELKS, *supra* note 38, at 224. For a more thorough discussion of the problems with the Flying Squad, see Jeremy Dein, *Police Misconduct Revisited*, 2000 CRIM. L.R. 801. A smaller number of cases presenting similar issues arose from the West Midlands Drugs Squad. *Id.*

199. ELKS, *supra* note 38, at 224.

200. *Id.*

201. *Id.* at 244, 247.

202. *Id.* at 244-47.

203. *Id.*

204. *Id.*

205. *Id.* See also, e.g., *R. v. Twitchell*, (2000) 2 Crim. App. 373, 1999 WL 982428.

quashed the convictions because, had the jury known of these findings, the result might have been different.²⁰⁶

In *R. v. Twitchell*,²⁰⁷ the defendant made the same claim as Treadaway—that the WMSCS officers had placed a plastic bag over his head to coerce a confession.²⁰⁸ At Twitchell’s trial, the police officers denied any misconduct.²⁰⁹ Twitchell presented an alibi and claimed that the notes about the alleged confessions were fabricated.²¹⁰ The Court quashed Twitchell’s conviction relying on the findings in *Treadaway* as being matters about which cross-examination should have been available.²¹¹ Significantly, the Court also relied on a key police officer’s failure to appear as a witness, a disciplinary finding based on the officer’s misconduct in another case in which he participated in rewriting notes, his differing accounts of when he intended to report that misconduct, and a disciplinary offense of falsehood.²¹² The Court held these would have been proper grounds for impeachment and that the jury might not have convicted Twitchell had it known of this misconduct.²¹³ The Court also relied upon similar evidence with respect to the other officers involved in Twitchell’s questioning who testified at his trial.²¹⁴

In *Twitchell*, the Court held that the following evidence was admissible for use on cross-examination of police officers testifying in support of alleged statements or admissions made by suspects:

- (1) prior disciplinary findings concerning conduct in other cases, and the facts supporting those findings;
- (2) prior judicial findings concerning misconduct in other cases;
- (3) prior judicial findings concerning lack of reliability of officers in other cases; and
- (4) prior acquittals, where those acquittals could be directly tied to rejection of the reliability of police testimony.²¹⁵

The Court explained that it was not concerned with whether the police had actually committed misconduct. “Our sole function is to form a judgment of whether, in the light of the material now known to us but not known to the judge,

206. ELKS, *supra* note 38, at 248-53.

207. (2000) 2 Crim. App. 373, 1999 WL 982428.

208. *Id.* at 376.

209. *Id.* at 383.

210. *Id.* at 377.

211. *Id.* at 385-86.

212. *Id.* at 383-84.

213. *Id.* at 385-86.

214. *Id.* at 384-85. That material included criminal or disciplinary convictions of the officers, acquittals in other cases that the court was willing to interpret as indicating that the jury had disbelieved those officers, and decisions in many other cases that “throw severe doubt on the honesty and professional integrity of those officers,” including an acquittal of a defendant in unrelated cases based on fabricated confessions. *Id.* at 378, 384-85. In this way, the Court of Appeal decisions created a domino effect, each giving rise to material on which the police witness could have been cross-examined. *See also* ELKS, *supra* note 38, at 244-47.

215. *Twitchell*, (2000) 2 Crim. App. 373, 382-83, 1999 WL 982428.

the jury or counsel at the time of the trial, we think the verdict unsafe.”²¹⁶ The Court then held that, had the evidence of misconduct and unreliability been available for defense counsel’s use on cross-examination, that information might have impacted on the trial jury’s decision to convict.²¹⁷

2. *Vicarious Police Misconduct*

The Court of Appeal also considered whether it is proper for police officers who have not been discredited to be cross-examined concerning their involvement with other discredited officers on the theory that the officers who were not discredited were vicariously liable for the misconduct of the others.²¹⁸ Thus, according to this theory, the Court was to reject not only the testimony of officers found to have committed misconduct, but also the testimony of members associated with those officers’ squads.²¹⁹ The Court explained that this guilt-by-association review was appropriate because, “in practice the precise surgical division between impugned and un-impugned evidence is seldom possible.”²²⁰ It continued:

Once the suspicion of perjury starts to infect the evidence and permeate cases in which the witnesses have been involved, and which are closely similar, the evidence on which such convictions are based becomes as questionable as it was in the cases in which the appeals have already been allowed.²²¹

A good illustration of vicarious police misconduct is *R. v. Findlay*.²²² Here, the central proof of the defendant’s guilt were admissions he allegedly made to police.²²³ At trial, the defendant claimed that these admissions were fabricated. The jury, nonetheless, returned a guilty verdict.²²⁴ On appeal, it was discovered that police misconduct surrounded the alleged confession.²²⁵ The two officers who took the defendant’s statements, Miller and Saunders, had been suspended from duty after an internal investigation into the Flying Squad.²²⁶ Two other squad members, Cutts and Verralls, were involved in the defendant’s arrest, but the Court of Appeal ultimately found their misconduct to be “less extreme than

216. *Id.* at 379.

217. *R. v. Twitchell*, (2000) 2 Crim. App. 373, 385-86, 1999 WL 982428. As each case was handed down, more and more officers were discredited, additional concessions followed, and additional convictions were quashed. ELKS, *supra* note 38, at 244-45. Interestingly, in most of these cases, the prosecution conceded it could no longer rely on the officers’ testimony to uphold the conviction. *See id.* at 247-53. *See also, e.g., Twitchell*, [2000] 2 Crim. App. at 383-84.

218. ELKS, *supra* note 38, at 247-53.

219. *Id.*

220. *R. v. Martin*, [2000] EWCA (Crim) 104, 2000 WL 989317, ¶ 13.

221. *R. v. Edwards*, [1996] 2 Crim. App. 345, 350, 1996 WL 1092974.

222. [2003] EWCA (Crim) 3480, 2003 WL 22936631.

223. *Id.* ¶ 10.

224. *Id.* ¶¶ 1, 17.

225. *Id.* ¶ 7.

226. *Id.* ¶ 14.

that of Saunders and Miller” and that they were “members of a larger group of officers who knew something of the corruption and misconduct which went on in the Flying Squad and acquiesced in it.”²²⁷ Their testimony was rejected as well.²²⁸ In the end, “[g]iven the centrality of the[se] admissions to the conviction, and the tainted sources upon which they depended,” the evidence given by two other officers who were not members of the Flying Squad was found to be insufficient to support the conviction, and the conviction was quashed.²²⁹

These decisions reveal a broad, non-deferential standard of review of police conduct that, like the Court’s treatment of sex crime cases, is characterized by a willingness to entertain newly discovered impeachment evidence.²³⁰ The Court is also willing to judge police conduct without deference, painting with a broad brush, to apply it to non-tainted but associated officers and to unrelated cases.²³¹

Finally, it is important to note that in some of these police misconduct cases, the prosecution conceded the unreliability of the police testimony, but sought to uphold the conviction based on the remaining evidence.²³² Applying the lenient standard of review discussed above,²³³ the Court of Appeal rebuffed this effort. Despite the existence of non-tainted evidence, the Court held that the jury “might possibly” have relied on the tainted evidence;²³⁴ if the reliability of police evidence is central to the prosecution’s case, then the possibility that the police evidence would have been discredited raises “at the very lowest, ‘a distinct possibility that the jury would have reached different verdicts.’”²³⁵

For example, in *R. v. Cummiskey*,²³⁶ the defendant claimed that the police officers fabricated statements and forensic evidence by taking fibers from his clothing and placing them in the targeted car.²³⁷ Despite the defendant’s claims, the jury convicted the defendant.²³⁸ Before Cummiskey’s appeal was heard, the Court quashed the conviction of his co-defendant, holding that if subsequent evidence of police misconduct had been available at trial, the jury might not have

227. *Id.* ¶ 15.

228. *Id.*

229. *Id.* ¶ 17. As Elks explains, another example of this reliance concerned the result of a police investigation into “Operation Goldcard,” which revealed corruption among at least 27 officers. ELKS, *supra* note 38, at 245. These officers were charged with crimes and suspended, or would have been suspended if they had not first retired. *Id.* Again, the Court of Appeal extended the taint beyond the clearly corrupt group by creating one group that was considered to be corrupt and another group subject to a charge of “general taint” who were known to have a bag containing items that could be planted as evidence to strengthen a problematic case. *Id.*

230. ELKS, *supra* note 38, at 245-46.

231. *Id.* at 246-53. See, e.g., *Findlay*, EWCA (Crim) 3480, 2003 WL 2293663, ¶ 17.

232. ELKS, *supra* note 38, at 248-52.

233. See *supra* notes 218-231 and accompanying text.

234. See, e.g., *Findlay*, EWCA (Crim) 3480, 2003 WL 2293663, ¶ 16.

235. *R. v. Twitchell*, (2000) 2 Crim. App. 373, 379, 1999 WL 982428 (quoting *R. v. Treadaway*, No. 9502720/X2 (C.A. Nov. 18, 1996) (on file with author)) (quoting *R. v. Parchment* (unreported) (C.A. July 17, 1998) (on file with author)).

236. [2003] EWCA (Crim) 3933, 2003 WL 23721521.

237. *Id.* ¶ 15.

238. *Id.* ¶ 16.

convicted.²³⁹ Thereafter, the prosecution conceded it could no longer rely on the officers' testimony concerning the defendant's statements.²⁴⁰ Interestingly, the Court quashed the conviction because it was "impossible at this stage to reach any clear conclusion as to the way in which the jury must have approached their task."²⁴¹ Since the Court concluded that the evidence concerning the police officers "might have" affected the jury's decision, the Court quashed the conviction.²⁴²

E. Quashing Convictions Based on New Scientific Evidence

In the United Kingdom, as in the United States, problematic forensic evidence has long played a role in creating miscarriages of justice.²⁴³ While scientific evidence is based on probabilities and is inherently uncertain, jurors tend to view it as conclusive and give it disproportionate weight.²⁴⁴ Similarly, expert evidence may be "junk science," that is, invalid expert testimony parading as scientific proof, to which, again, the jury gives disproportionate weight.²⁴⁵ Any combination of these factors can lead to a miscarriage of justice.²⁴⁶

Expert testimony is prominently featured in many Court of Appeal cases, and the Court has followed two avenues for granting relief.²⁴⁷ In the first set of cases, what we in the United States would call the "junk science cases," the CCRC has commissioned new expert reports and the Court of Appeal has received them to discredit expert proof at trial.²⁴⁸ In these cases, the expert trial evidence was shown to be either simply unfounded or invalid due to subsequent scientific developments.²⁴⁹ In the second line of decisions, which concern cases where there was no expert proof at trial to discredit, the CCRC has nonetheless found new scientific proof to question the finding of guilt.²⁵⁰ In those cases, the Court of Appeal has accepted the expert evidence on appeal and has quashed the conviction.²⁵¹ Overall, these cases reveal the Court of Appeal's extraordinary

239. *Id.* ¶¶ 6-7.

240. *Id.* ¶ 18.

241. *Id.* ¶ 25.

242. *Id.* ¶¶ 25-26. Another category of police misconduct cases involved participating informants and related non-disclosure issues in London City Bond Diversion and controlled delivery cases. See ELKS, *supra* note 38, at 254-55.

243. ELKS, *supra* note 38, at 73. In fact, the early "Birmingham Six" case, one of the miscarriage of justice cases that led to the creation of the CCRC, exposed the dangers of problematic forensic evidence even at that time. It was not until scientific evidence allegedly revealed evidence of explosives on the hands of the suspects that the police coerced false confessions from them. Email from Prof. Peter Alldridge, Queen Mary College, London, to Prof. Lissa Griffin, Prof. of Law, Pace University of Law (July 9, 2009) (on file with author).

244. ELKS, *supra* note 38, at 74-75.

245. *Id.* at 79-89.

246. *Id.* at 73.

247. *Id.* at 78-79.

248. *Id.*

249. *Id.*

250. *Id.* at 89.

251. See *id.* at 89-96.

willingness to test a conviction's integrity according to modern scientific principles.²⁵²

1. *Junk Science Cases*

In the junk science cases, the competence of the trial experts appeared as the central issue on appeal, and convictions were quashed.²⁵³ One of the leading and most notorious cases was *R. v. Clark*,²⁵⁴ a homicide prosecution against a mother for the serial death of her two children.²⁵⁵ The defendant claimed that her two children died of sudden infant death syndrome (SIDS).²⁵⁶ At trial, the expert, Professor Sir Roy Meadows, testified that the statistical probability of one SIDS death in a family was one in 8,543; the statistical probability for two children dying of SIDS in one family, according to Professor Meadows, was one in 73 million.²⁵⁷ Based on this testimony, the jury found the mother guilty.

After the appeal, a hospital record containing one of the infant's blood tests came to light—a record the prosecution failed to disclose at trial—which established that the child had died of natural causes.²⁵⁸ The Court would have quashed the conviction on that basis alone.²⁵⁹ However, it took the opportunity to state that the statistical evidence should not have been admitted.²⁶⁰ As the Court explained, the scientific evidence did nothing to identify the probability that any individual case had occurred.²⁶¹ Second, the evidence allowed the jury “without consideration of the rest of the evidence [to] be just about sure that this was a case of murder.”²⁶² The Court concluded that, had there been a challenge to the evidence, it should have been excluded.²⁶³ Moreover, the Court concluded that the expert's testimony, specifically the one in 73 million statistic, “grossly overstate[d] the chance of two sudden deaths within the same family from unexplained but natural causes.”²⁶⁴ The Court held that had the expert's testimony been the focus on the first appeal, it would have provided a distinct basis upon which to quash the conviction.²⁶⁵

252. *See id.*

253. *See id.* at 79.

254. [2003] EWCA (Crim) 1020, 2003 WL 1822883.

255. *Id.* ¶ 1.

256. *Id.* ¶ 8.

257. *Id.* ¶ 99. On the original appeal, while the court agreed that the figure was misleading, it dismissed the problem, noting that the important point was that SIDS deaths were unusual. *Id.* ¶ 105. The court upheld the conviction based on what it considered to be overwhelming proof. *Id.*

258. *Id.* ¶¶ 111-12.

259. *Id.* ¶ 135.

260. *Id.* ¶ 177.

261. *Id.* ¶ 174.

262. *Id.* ¶ 175.

263. *Id.* ¶ 177.

264. *R. v. Clark*, [2003] EWCA (Crim) 1020, 2003 WL 1822883, ¶ 178.

265. *Id.* ¶¶ 179-80. In *R. v. Anthony*, [2005] EWCA (Crim) 952, 2005 WL 816001, the same expert, Dr. Meadows, testified to statistical proof yet again; this time the statistic was given as 1 in 1,000,000. *Id.* ¶ 69. The appeal raised the same issues. *Id.* ¶ 3. There the court noted that recent

Another case in which the CCRC presented a new scientific report that conflicted with the proof at trial was *R. v. Boreman and Byrne*.²⁶⁶ In this case, the trial court considered whether the deceased died from injuries inflicted by the defendants or by a subsequent fire for which the defendants were not responsible.²⁶⁷ At trial, an expert pathologist testified that the deceased's death resulted from the injuries inflicted by the defendants.²⁶⁸ On referral from the CCRC, the court received a new forensic report to the contrary.²⁶⁹ In addition, the expert's reputation had been discredited in other cases.²⁷⁰ Accordingly, the Court of Appeal quashed the conviction, finding that the expert's testimony may have "tipped the balance" in favor of conviction.²⁷¹

Another category of cases in which expert evidence produced at trial has been discredited on appeal involves controversial forensic subjects.²⁷² For example, the Court has quashed convictions based on facial mapping evidence,²⁷³ auditory analysis,²⁷⁴ evaluation of machine-control tampering,²⁷⁵ and explosives testing.²⁷⁶

2. *New Scientific Evidence*

The most unusual new scientific evidence cases are those in which the new scientific evidence is produced for the first time on appeal.²⁷⁷ For example, in *R. v. Shirley*,²⁷⁸ the CCRC commissioned a post-conviction DNA analysis that confirmed that the defendant had not committed the charged rape and murder.²⁷⁹ In *R. v. Otoo*,²⁸⁰ DNA evidence taken from a pair of sneakers proved that the defendant had not committed the charged robbery and corroborated the defendant's claim that he had been forced to trade sneakers with the actual robber.²⁸¹

research has undermined those statistics and that "the occurrence of a second unexpected infant death within a family is not a rare event and is usually from natural causes." *Id.* ¶ 78. Based on this and other subsequent research, as well as fresh evidence of other medical experts, the court concluded that the evidence of unnatural death was erroneous. *Id.* ¶ 97.

266. [2006] EWCA (Crim) 2265, 2006 WL 1635086.

267. *Id.* ¶ 6.

268. *Id.* ¶ 7.

269. *Id.* ¶ 9.

270. *Id.*

271. *Id.* ¶ 33.

272. *See, e.g., R. v. Bacchus*, [2004] EWCA (Crim) 1756, 2004 WL 2270223; *R. v. O'Doherty*, [2002] NICA 851 (Crim) (N. Ir.), 2002 WL 820131; *R. v. Jenkinson*, [2005] EWCA (Crim) 3118; *R. v. Assali*, [2005] EWCA (Crim) 2031, 2005 WL 2119809.

273. *Bacchus*, [2004] EWCA (Crim) 1756, 2004 WL 2270223.

274. *O'Doherty*, [2002] NICA 851 (Crim) (N. Ir.), 2002 WL 820131.

275. *Jenkinson*, [2005] EWCA (Crim) 3118. *See also* ELKS, *supra* note 38, at 82.

276. *Assali*, [2005] EWCA (Crim) 2031, 2005 WL 2119809.

277. *See, e.g., R. v. Shirley*, [2003] EWCA (Crim) 1976, 2003 WL 21554724.

278. *Id.*

279. *Id.* ¶¶ 6-10.

280. No. 9906358/Y3 (C.A. Jan. 31, 2005) (on file with author).

281. *Id.* ¶¶ 26, 39.

Unlike U.S. courts, the Court of Appeal has gone way beyond DNA evidence in quashing convictions it has deemed scientifically unreliable.²⁸² For example, in several police misconduct cases, the Court relied on new methods of document analysis (ESDA evidence) to show that the police notes presented at trial had been altered.²⁸³ Similarly, the Court relied on forensic linguistics evidence to show that the defendant's statements allegedly made as a narrative were in fact the product of police questioning and manipulation.²⁸⁴ Because the jury did not have this evidence to impeach the police testimony, and because the new evidence might have affected their verdict, the court quashed the conviction.²⁸⁵ These decisions demonstrate the Court's willingness to use science to test a conviction's accuracy.²⁸⁶

Further, the Court of Appeal has relied on new psychological evidence to quash convictions.²⁸⁷ In *R. v. JH, TG*, the adult complainant, alleged that she had been sexually abused as a child.²⁸⁸ The Court based its decision to quash the conviction on new psychological evidence concerning the limitations of human memory.²⁸⁹ Also, in *R. v. Friend*, the Court relied on recent developments in the recognition and understanding of ADHD to quash a conviction that was primarily based on the ADHD-afflicted defendant's confession.²⁹⁰ In *R. v. Pinfold*, the Court relied on expert psychiatric evidence to conclude that the main witness against the defendants suffered from a personality disorder that made his testimony unreliable.²⁹¹ The Court quashed the conviction that had been based in part on a defendant's confession, relying on developments in the understanding of ADHD since the time of trial.

One large group of cases involves fresh psychological evidence offered on appeal to establish the partial defense of diminished capacity.²⁹² In such cases, despite the failure to present a diminished capacity defense at trial, the Court has willingly received new psychiatric evidence and quashed the conviction.²⁹³

282. See *infra* Part III.D.

283. See, e.g., *R. v. Dunne*, [2001] EWCA (Crim) 169.

284. See, e.g., *R. v. Bentley*, [1998] EWCA (Crim) 2516, [2001] 1 Crim. App. 21 (U.K.), ¶ 82.

285. *Id.* ¶ 81.

286. ELKS, *supra* note 38, at 83-94.

287. *Id.* at 86, 238-39.

288. [2005] EWCA (Crim) 1828, [2006] 1 Crim. App. 10, ¶ 8.

289. *Id.* ¶¶ 29-36.

290. [2004] EWCA (Crim) 2661, 2004 WL 2495787, ¶¶ 26-28, 32.

291. [2003] EWCA (Crim) 3643, 2003 WL 23014754, ¶¶ 53-54. See also, e.g., *R. v. Green*, [2002] NICA 14 (Crim) (N. Ir.); *R. v. O'Brien*, [2000] CRIM. L.R. 676, 2000 WL 464; *R. v. J*, [2003] EWCA (Crim) 3309, 2003 WL 22769342; *R. v. Latimer* [2004] NICA 3 (Crim) (N. Ir.).

292. See, e.g., *R. v. MF*, [2003] EWCA (Crim) 1173, WL 21047335; *R. v. Gilfillan*, [1998] EWCA (Crim) 3466; *R. v. Haddon*, [2003] EWCA (Crim) 284, 2003 WL 270812; *R. v. Reynolds*, [2004] EWCA (Crim) 1834, 2004 WL 2270357; *R. v. Samra*, [2004] EWCA (Crim) 1797, 2004 WL 1476688; *R. v. Ashton*, [2006] EWCA (Crim) 1267, 2006 WL 2367255; *R. v. Smith (Charlie)*, [2002] EWCA (Crim) 840. See also *R. v. Duggan*, [2004] EWCA (Crim) 1924; ELKS, *supra* note 38, at 194.

293. See *Samra*, [2004] EWCA (Crim) 1787, 2004 WL 1476688, at ¶¶ 5-6, 19-21.

III. U.S. REVIEW OF WRONGFUL CONVICTIONS: A COMPARATIVE ANALYSIS

This section now turns to the corrective function of the U.S. courts. Section A outlines the available procedures for challenging wrongful convictions in the United States. Section B then provides a comparative analysis of the obstacles to corrective review in the United States that do not exist in the United Kingdom. In brief, this section demonstrates the several ways in which U.S. courts are restricted by their adherence to finality and deference to the jury that greatly limit their ability to correct wrongful convictions.

A. *Challenging Wrongful Convictions*

It is appropriate to begin with a brief description of the steps available in the United States for a convicted defendant who claims to have new evidence that he has been wrongfully convicted.²⁹⁴ In the United States, a convicted defendant with new evidence of innocence has a right to move for a new trial, but unlike in the United Kingdom, that motion must be made before the same judge who heard the underlying criminal case.²⁹⁵ Aside from the possibility of institutional bias and momentum to uphold the result, there are several procedural hurdles to such a motion.²⁹⁶ First, there are short statutes of limitations.²⁹⁷ Second, the defendant generally must meet a high standard of proof, which requires that the new evidence probably would have produced a different result.²⁹⁸ Third, most jurisdictions refuse to allow impeachment evidence as a basis for relief,²⁹⁹ in fact, a judge has the discretion to deny these motions without a hearing.³⁰⁰

If the motion for a new trial is denied, a defendant may collaterally attack the conviction.³⁰¹ Under the relevant state statutes, the same rules that apply to the original motion for a new trial are applied. That is, a motion must be made before the same judge who originally tried the case,³⁰² and the defendant must show that he could not have produced the newly discovered evidence with due

294. The purpose of this section is not to analyze in detail the U.S. process for considering post-conviction innocence claims. That has been done elsewhere in several excellent articles. See Daniel S. Medwed's exhaustive article, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655 (2005) and Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008). The purpose of this section is to describe generally and contrast the U.S. post-conviction innocence process with that of the United Kingdom. Accordingly, substantial reliance is respectfully placed on Professors Medwed's and Garrett's exhaustive articles in this Part.

295. Almost every state and the federal courts have provision for a motion for a new trial based on newly discovered evidence. See 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF: WITH FORMS §§ 1-13 (1996).

296. See Medwed, *supra* note 294, at 689.

297. *Id.* at 690-95.

298. *Id.* at 689.

299. *Id.*

300. *Id.* at 664, 714.

301. *Id.* at 658, 665-66.

302. See, e.g., MD. CODE ANN., CRIM. PROC. § 7-102 (LexisNexis 2008).

diligence before trial.³⁰³ From there, the defendant must demonstrate that the newly discovered evidence, if admitted at the trial, would probably produce a different result.³⁰⁴ Finally, as with the original motion, the decision whether to grant relief (or even to grant a hearing) is left to the trial court's discretion and reviewed only for abuse—a highly deferential standard of review.³⁰⁵

Interestingly, since DNA technology revolutionized the awareness of wrongful convictions, newly enacted statutes have directly addressed post-conviction claims of innocence.³⁰⁶ For example, Virginia and Utah have enacted one variety of such statutes.³⁰⁷ Virginia's standard is even higher than that used in the previous generation of statutes. In Virginia, to succeed on a motion for a new trial based on evidence of innocence, the defendant must prove by clear and convincing evidence that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt."³⁰⁸ Although the Supreme Court recently refused to constitutionalize a due process right to post-conviction DNA testing,³⁰⁹ the federal government and almost all states have adopted another variety of statute that allows post-conviction DNA testing and provides procedures for litigating DNA results that exonerate the defendant.³¹⁰ Finally, several states have created innocence or law reform commissions that have the power to study the documented wrongful convictions and recommend changes to prevent such errors from reoccurring.³¹¹ Such "preventative" commissions have been created in California, Connecticut, Illinois, Wisconsin, Pennsylvania, Texas, Virginia, and North Carolina.³¹²

In addition to its study-and-recommend commission, North Carolina has created a separate commission, much like the CCRC, to investigate and review individual wrongful conviction claims.³¹³ It is the only state to do so.³¹⁴ The North Carolina Innocence Inquiry Commission ("NCIIC") is authorized to investigate and review individual wrongful conviction claims.³¹⁵ Like the CCRC,

303. See, e.g., COLO. REV. STAT. § 16-12-206(1)(c)(I) (2008).

304. See, e.g., *United States v. Provost*, 969 F.2d 617, 620 (8th Cir. 1992).

305. See, e.g., *Mills v. State*, 786 So. 2d 547, 549 (Fla. 2001) (abuse of discretion review); *State v. Weaver*, 554 N.W.2d 240, 244 (Iowa 1996) (abuse of discretion review); *State v. Stukes*, 571 S.E.2d 241, 244 (N.C. Ct. App. 2002) (abuse of discretion review).

306. See VA. CODE ANN. § 19.2-327.13 (2008); UTAH CODE ANN. § 78B-9-402 (2008).

307. See VA. CODE ANN. § 19.2-327.13; UTAH CODE ANN. § 78B-9-402.

308. VA. CODE ANN. § 19.2-327.11 (2008).

309. *District Attorney's Office for the Third Judicial Dist. v Osborne*, 129 S. Ct. 2308, 2316 (2009).

310. See *supra* notes 306-309. See also, e.g., *infra* notes 316-326.

311. Innocence Project: Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Aug. 12, 2009).

312. Innocent Project: Criminal Justice Reform Commissions, *supra* note 28.

313. N.C. GEN. STAT. § 15A-1460-1475 (2007).

314. Innocent Project: Criminal Justice Reform Commissions, *supra* note 28.

315. See N.C. GEN. STAT. § 15A-1461 (2007). See also North Carolina Actual Innocence Commission: Mission Statement, Objectives, and Procedures, www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html (last visited Mar. 10, 2009).

the NCIIC is an independent, state-funded body.³¹⁶ It has eight voting members, most of who must be involved in the criminal justice process.³¹⁷ Like the CCRC, it is empowered to investigate claims of innocence through the issuance of subpoenas or otherwise.³¹⁸ If, after a hearing before all eight commission members, “five conclude there is sufficient evidence of factual innocence to merit judicial review[,]” the case is referred to a superior court judge.³¹⁹ At that point, the Chief Justice will appoint a three-judge panel (not to include the original trial judge) to hold a hearing.³²⁰ The panel may compel the testimony of any witness, including the defendant.³²¹ If the panel unanimously concludes that the convicted person is innocent by clear and convincing evidence, it must vacate the conviction and dismiss the charges.³²²

If relief is not available in the state court, a convicted defendant may seek relief in federal court by way of a federal writ of habeas corpus.³²³ However, the Supreme Court has refused to recognize a claim for relief on habeas corpus based on factual innocence, except in capital cases.³²⁴ Even in capital cases, the showing of factual innocence must be extraordinarily compelling.³²⁵ The Court has relegated claims of factual innocence to the highly politicized clemency process before the state governors.³²⁶

Finally, the American Bar Association recently amended its Model Rules of Professional Conduct to include a prosecutorial duty to rectify wrongful convictions.³²⁷ Under the new law, if a prosecutor knows of “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit” the offense of conviction, the prosecutor “shall” promptly disclose the evidence to the court.³²⁸ If the conviction was obtained in the prosecutor’s jurisdiction, he must also “promptly disclose that evidence to the defendant” and further investigate the defendant’s innocence.³²⁹ The rule also provides that when a prosecutor knows of “clear and convincing evidence establishing that a

316. N.C. GEN. STAT. § 15A-1462 (2007).

317. *Id.* § 15A-1463.

318. *Id.* § 15A-1467(d).

319. *Id.* § 15A-1468(c). If the conviction is based on a guilty plea, all eight members must concur. *Id.*

320. *Id.*

321. *Id.* § 15A-1469.

322. *Id.* § 15A-1469(h).

323. 28 U.S.C. § 2254 (2006).

324. *Herrera v. Collins*, 506 U.S. 390, 416 (1993).

325. *Id.* at 417.

326. *Id.* at 411-12. See also Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 272 (1990-91) (discussing the decline in executive clemency); Daniel T. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567 (2000); Eli Paul Mazur, “I’m Innocent”: Addressing Freestanding Claims of Actual Innocence in State and Federal Courts, 25 N.C. CENT. L.J. 197, 217 (2003) (empirical studies showing rarity of clemency in North Carolina over past twenty-five years).

327. MODEL RULES OF PROF’L CONDUCT R. 3.8(g) (2008).

328. *Id.* R. 3.8(g)(1).

329. *Id.* R. 3.8(g)(2).

defendant in the prosecutor's jurisdiction" did not commit the offense for which he was convicted, he "shall seek to remedy the conviction."³³⁰ According to the comment to the rule, steps could include giving the information to a defendant, requesting that a court appoint counsel for a defendant, or notifying the court about the prosecutor's information.³³¹

All of these suggestions for reform and actual reforms may be effective to prevent future wrongful convictions. Aside from the creation of the NCIIC, however, the suggestions offer little help to existing defendants claiming wrongful conviction. Moreover, while U.S. judicial avenues to litigate wrongful conviction claims exist, and have been expanded somewhat to incorporate DNA technology, relief is rarely granted absent conclusive DNA proof.³³²

B. Obstacles to Proving Innocence: A Comparative Analysis

Demanding standards of review, strict retroactivity limitations, a refusal to consider newly discovered impeachment evidence, and a reluctance to test convictions against developments in modern science create barriers to a broad corrective function resembling the U.K.'s corrective system.

1. Demanding Standards of Post-Conviction Factual Review

U.S. courts are more concerned with finality than their U.K. counterparts and they are more likely to defer to a jury's guilty verdict.³³³ For this reason, it takes much stronger proof of innocence to overturn a jury verdict in the United States than in the United Kingdom.³³⁴ Unlike the U.K. Court of Appeal, whose standard of "unsafety" allows it to quash a conviction if a jury "might" have reached a different result, U.S. courts employ a very high standard for reversal, granting a new trial only where the defendant can prove, at the very least, that new evidence would "probably" produce a different result.³³⁵ Indeed, even under Virginia's recently enacted actual innocence statute, supposedly a new generation/post-DNA wrongful conviction statute, a petitioner must establish by clear and convincing evidence not only that he is innocent but also that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt."³³⁶

330. *Id.* R. 3.8(h).

331. *Id.* R. 3.8 cmt. 8.

332. See Medwed, *supra* note 294, at 656-57.

333. See *id.* at 664-65.

334. See, e.g., VA. CODE ANN. § 19.2-327.11(A) (2008).

335. See, e.g., *People v. Johnson*, 793 N.E.2d 591, 598 (Ill. 2002) (claim of innocence must be based on evidence that is "so conclusive that it would probably change the result on retrial"); *State v. Britt*, 360 S.E.2d 660, 665 (N.C. 1987) (defendant must prove "a different result would have been reached at a new trial"); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (state habeas relief in actual innocence cases is not available absent "clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence").

336. VA. CODE ANN. § 19.2-327.11(A)(vii) (2008). This is the standard for establishing legal insufficiency of evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979), the most demanding

Proving factual innocence on federal habeas corpus is even more difficult. In *Herrera v. Collins*,³³⁷ the U.S. Supreme Court refused to recognize a claim of factual innocence as an independent constitutional basis for federal habeas corpus relief.³³⁸ Ten years after Herrera had been convicted of capital murder and sentenced to death, he sought habeas corpus relief based on new evidence that he claimed proved that his dead brother was the one who had committed the murders.³³⁹ The Supreme Court held that habeas corpus is not a proper remedy for correcting factual error;³⁴⁰ rather, it exists to remedy independent federal constitutional violations.³⁴¹

Here, the Court did not close the courthouse doors entirely, which may explain why defendants continue to claim actual innocence on habeas corpus.³⁴² The Court assumed that, in a capital case, a “truly persuasive demonstration of ‘actual innocence’ ... would render the execution of a defendant unconstitutional,” but the Court explained that such a showing would have to be uniquely persuasive.³⁴³ This is “because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States.”³⁴⁴ Herrera did not meet the threshold showing,³⁴⁵ and courts rarely find the threshold to have been met.³⁴⁶

In short, U.K. courts are much more willing to second guess a jury’s guilty verdict than U.S. courts. Several systemic differences explain why U.K. juries receive less deference than U.S. juries. First, whereas the right to an impartial jury in the United States is an enumerated constitutional right, there is no written

standard for challenging a jury’s verdict as a matter of law. *Id.* at 319. Analysis for insufficiency generally assumes that all of the prosecution evidence is true. *Id.* This most demanding possible standard does not allow a court to weigh issues of credibility. *Id.* (“[T]he relevant question 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.”).

337. *Herrera v. Collins*, 506 U.S. 390 (1993).

338. *Id.* at 416-17.

339. *Id.* at 393.

340. *Id.* at 400, 416.

341. *Id.*

342. *Id.* at 416-17.

343. *Id.* at 417.

344. *Id.*

345. *Id.* at 417-19. However, claims of innocence are essential to gaining habeas corpus review of otherwise procedurally barred constitutional claims. Thus, in *Schlup v. Delo*, 513 U.S. 298 (1995), the Court held that if a petitioner “presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of ... constitutional error” the petitioner would be entitled to merits review of his underlying constitutional claims. *Id.* at 316.

346. In the ten years following *Herrera*, defendants presented at least 173 specific innocence claims in federal court, and only nine received any relief: two received an evidentiary hearing or remand; two received an order for DNA testing; and five were granted clemency from Gov. George Ryan of Illinois, when, in 2003, he commuted all death sentences in Illinois at the end of his term. Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 131 n.61, 147 (2005).

constitution in the United Kingdom.³⁴⁷ Second, by statute, far fewer criminal charges are triable by jury in the United Kingdom, whereas a jury is constitutionally required in most U.S. criminal trials.³⁴⁸ Third, far less time, effort, and expense is allocated to jury selection in the United Kingdom, compared to the extensive voir dire and meaningful constitutional challenges during jury selection in the United States.³⁴⁹ There is no substantial voir dire in the United Kingdom.³⁵⁰ Rather, because peremptory challenges were abolished in 1989, U.K. jurors may only be challenged for cause.³⁵¹ Jurors are simply chosen randomly, and no legal issues arise.³⁵² Fourth, historically U.K. verdicts do not have to be unanimous, whereas in the United States, unanimous verdicts are required in federal court and in many states, although non-unanimous verdicts have been found constitutional.³⁵³ Fifth, the U.K. courts are more willing to review the integrity of a jury's acquittal, whereas in the U.S. double jeopardy rules absolutely prohibit any review of acquittals.³⁵⁴ Finally, although more intangible, for over a decade, the European Convention on Human Rights ("ECHR") has been part of U.K. domestic law, including its Article 6 fair trial provisions.³⁵⁵ The U.K. system has accordingly been influenced by the more limited approach to jury trial reflected in the various countries subject to the ECHR.

Another difference between the legal systems of the United States and the United Kingdom is that more post-conviction review exists in the United States

347. Nigel Morris, *The Big Question: Why Doesn't the UK Have a Written Constitution, and Does It Matter?*, THE INDEP. (London), Feb. 14, 2008, <http://www.independent.co.uk/news/uk/politics/the-big-question-why-doesnt-the-uk-have-a-written-constitution-and-does-it-matter-781975.html>.

348. Under the Magistrate's Court Act 1980, offenses are classified as triable only summarily, only on indictment, or either way, as those terms are defined in the Interpretation Act 1980 Schedule 1. See ROBIN C.A. WHITE, *THE ENGLISH LEGAL SYSTEM IN ACTION* 155-62 (3d ed. 1999). Cases triable only on indictment are the most serious and must be heard in the crown court, where there is a right to a jury trial, while offenses triable summarily are heard in the magistrates court, where no such right exists. *Id.* at 69, 155-62. In U.S. Federal Court, on the other hand, a defendant has a right to a jury trial in all cases where he risks more than six months in prison. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968).

349. See WHITE, *supra* note 348, at 182-86. See also *How Is a Jury Selected?*, BBC NEWS, Jan. 14, 2008, http://news.bbc.co.uk/2/hi/uk_news/magazine/7180764.stm.

350. See *Juries Act*, 1974, c. 23, § 12 (Eng.).

351. *Id.* The prosecution retains the right to ask a prospective juror to "stand by." General Guidelines on the exercise of this right, *Practice Note (Juries: Right to Stand by: Jury Checks)*, 88 Crim. App. 123 (1989), stress that this right should be used "only sparingly and in exceptional circumstances," where, for example, a juror is illiterate or has a substantial criminal record. See also *How Is a Jury Selected?*, *supra* note 349.

352. See WHITE, *supra* note 348, at 182-84. See also *How Is a Jury Selected?*, *supra* note 349.

353. *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972).

354. See *Criminal Procedure and Investigations Act*, 1996, c. 25, §§ 54-56 (Eng.) (providing for renewed proceedings against an acquitted defendant upon proof that the acquittal was tainted).

355. See WHITE, *supra* note 348, at 29-32.

than in the United Kingdom.³⁵⁶ The original guilt-adjudication process in the United Kingdom is substantially less extensive than in the United States, so that the U.K. courts are more willing than the U.S. courts to entertain attacks on their accuracy.³⁵⁷ In the United States, convicted defendants, in state or federal court, after guilty plea or trial, generally have a right to appeal to one appellate court.³⁵⁸ Theoretically, the appellate court can review both the weight and sufficiency of the evidence, although relief is rarely granted on either basis.³⁵⁹ In serious criminal cases, the right to appeal does not exist in the United Kingdom, where only appeals from Magistrate's Court, generally the minor crimes, are appealable as of right. All others are by permission.³⁶⁰ In addition, a convicted defendant whose first appeal is unsuccessful can seek permission to appeal to a second court.³⁶¹ Facing a lack of success in that second court, the defendant can seek permission to appeal to the U.S. Supreme Court.³⁶² Thus, when a defendant claiming innocence launches a state or federal collateral attack on the conviction, the state has already extended substantial review and expended substantial resources, not to mention that much time may have passed.³⁶³

Moreover, in the United States, if a defendant successfully claims error on appeal, the remedy generally is a remand for a new trial.³⁶⁴ At that point, the prosecutor may not be able to prove the case because witnesses may have disappeared or memories may have dimmed.³⁶⁵ Thus, finality is an important consideration in granting review on appeal or collateral attack.³⁶⁶ In contrast, in the United Kingdom, there is a presumption against retrial after a conviction is

356. *Id.* at 207-08 (noting that appeal's following a trial on indictment are "heavily circumscribed ... [due to] the sanctity of the jury verdict"). In the United States, there is an automatic right to a first appeal. See Griffin, *supra* note 16, at 1269.

357. See, e.g., *supra* note 49 (discussing the presumptions of guilt and "prevalence of guilty pleas" in the U.K. criminal justice systems).

358. Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 541 (2009).

359. *Herrera v. Collins*, 506 U.S. 390, 402 (1993).

360. Cf. *supra* note 49.

361. See Uhrig, *supra* note 358, at 569-70 (summarizing the distinctions between appeals as of right and discretionary appeals).

362. See, e.g., *Collins*, 506 U.S. 390.

363. However, while each of these courts technically has the power to review the legal sufficiency of the evidence as a matter of law, relief is almost never granted on that basis. See, e.g., *id.* at 402. While the first level appellate courts may review the weight of the evidence, they usually defer to the jury's verdict. And, of course, unlike the U.K. Court of Appeal, none of these courts have the power to receive new evidence; their main purpose is the correction of legal error. See, e.g., *id.* See also *supra* notes 350-351.

364. See Medwed, *supra* note 294, at 666-69.

365. *Herrera*, 506 U.S. at 417-18 (where defendant filed a habeas petition some eight years after his conviction alleging that his now-deceased brother was actually the perpetrator, the Court found it suspect that defendant waited "until after the alleged perpetrator of the murders himself was dead" to file the affidavits).

366. *Id.* at 417.

reversed on appeal.³⁶⁷ Thus, in most cases, the U.K. courts do not have to address the problem of retrying a case based on stale evidence.³⁶⁸

2. *Restrictive Time Limits and Retroactivity Standards*

As noted above, U.K. courts review referred cases according to the law that exists at the time of review, and they may apply current standards of fairness when reviewing older cases.³⁶⁹ Two aspects of the U.S. system prevent that kind of review. First, given the very short statutes of limitations for post-conviction factual review, generally only the most recent cases are subject to post-conviction review.³⁷⁰ Second, strict retroactivity principles prevent the application of changes in the law to pre-existing convictions.³⁷¹

Most new trial statutes have very short statutes of limitations.³⁷² While some of these statutes have exceptions,³⁷³ most convictions must be reviewed within a year after they become final.³⁷⁴ In seventeen states, convicted defendants must file their motions within sixty days of sentence.³⁷⁵ Seventeen other states have statutes of limitations between one and three years.³⁷⁶

While most states provide for collateral attack on a state conviction,³⁷⁷ many of those states have attached strict time limits to make these motions, whether the procedure is addressed strictly to proving actual innocence or otherwise.³⁷⁸ Thirty-one states have such requirements, running from sixty days to ten years.³⁷⁹ While some states have exceptions for evidence that could not have been found earlier with due diligence, some states do not.³⁸⁰

367. See Criminal Appeal Act, 1968, c. 19, § 7 (Eng.) (“Where the Court of Appeal allow an appeal against conviction, and it appears to the Court that the interests of justice so require, they may order the appellant to be retried.”).

368. *Id.*

369. Leigh, *supra* note 12, at 369-70.

370. Medwed, *supra* note 294, at 676. See also 15 M.R.S. § 2128 (1964); NEV. REV. STAT. § 34.726 (2007).

371. See *Teague v. Lane*, 489 U.S. 288, 304-05 (1989).

372. Medwed, *supra* note 294, at 676.

373. *Id.* at 677-78.

374. See *id.*

375. *Id.* at 676 & nn.158-59.

376. *Id.* at 676.

377. *Id.* at 682 & n.192 (noting that “[n]ewly discovered evidence of innocence has emerged as an appropriate basis for collateral relief in numerous jurisdictions ... it represents a ground for relief through the principal state post-conviction remedies in thirty-two states”).

378. *Id.* at 683 (noting that “states have become increasingly willing to place time restrictions on the use of collateral measures”).

379. *Id.* at 683-84.

380. *Id.* See also N.C. GEN. STAT. § 15A-1415(c) (2007) (motions based on newly discovered evidence must be filed “within a reasonable time” after discovery of the evidence); COLO. R. CRIM. P. 33(c) (2008) (“[A] motion for a new trial based upon newly discovered evidence shall be filed as soon after entry of judgment as the facts supporting it became known to the defendant”).

Rule 33 of the Federal Rules of Criminal Procedures governs relief based on newly discovered evidence.³⁸¹ That rule provides that a motion based on newly discovered evidence must be made within three years of the verdict, and contains no interest-of-justice exception.³⁸² Further, under the Anti-Terrorism and Death Penalty Act, habeas corpus petitions may only be brought within one year of the date on which a conviction becomes final.³⁸³

Substantive retroactivity principles also limit the scope of review of claims of innocence. Unlike the U.K. Court of Appeal, U.S. habeas courts do not have the power to apply contemporary standards of fairness or intervening changes in the law.³⁸⁴ In *Teague v. Lane*, the Supreme Court held that a post-conviction change in a criminal procedure rule generally will not apply to a case pending on habeas corpus.³⁸⁵ This retroactivity approach creates a significant barrier to correcting wrongful convictions.³⁸⁶ Federal habeas review of state court criminal proceedings based on the law at the time of the conviction serves as a sufficient incentive to state courts to conduct their trials in accordance with federal constitutional principles.³⁸⁷ Proper notions of comity and finality support the non-retroactivity of new constitutional rules to cases on collateral attack.³⁸⁸

As the Supreme Court has explained, under *Teague*, the first analytical step is to calculate the date upon which a conviction became final.³⁸⁹ The second step is to “ascertain the ‘legal landscape’” at the time of the conviction to determine if a rule is actually “new” or was, in fact, compelled under prior precedent.³⁹⁰ If it is new, the court must then decide whether the rule falls within one of two narrow exceptions.³⁹¹ First, the court asks whether the new rule embraces “private individual conduct beyond the power of the criminal law-making authority to proscribe.”³⁹² Second, the court considers whether the new rule

381. FED. R. CRIM. P. 33.

382. *Id.*

383. 28 U.S.C. § 2255 (2006).

384. See, e.g., *Teague v. Lane*, 489 U.S. 288, 307 (1989) (stating that only two exceptions exist to the “general rule on nonretroactivity for cases on collateral review”). “A rule should be retroactively applied if either: (1) ‘it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority’, or (2) ‘if it requires the observance of those procedures that are implicit in the concept of ordered liberty.’” *Id.* (internal quotations omitted).

385. *Id.* at 310 (“Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”).

386. See Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 820 (2009).

387. *Teague*, 489 U.S. at 306-07.

388. *Id.* at 308-09.

389. *Beard v. Banks*, 542 U.S. 406, 411 (2004).

390. *Id.* (quoting *Graham v. Collins*, 506 U.S. 461, 468 (1993)). The question is whether the rule announced was “dictated by then—existing precedent—whether, that is, the unlawfulness of [respondent’s] conviction was apparent to all reasonable jurists.” *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997).

391. *Beard*, 542 U.S. at 411.

392. *Teague*, 489 U.S. at 307.

constitutes a “watershed rule[] of criminal procedure” that is “implicit in the concept of ordered liberty”³⁹³ or violates fundamental fairness and is “central to an accurate determination of innocence or guilt.”³⁹⁴

The Supreme Court has considered a variety of new constitutional rules under the “watershed” exception, and all but one have been held not to be retroactive to cases on federal habeas.³⁹⁵ The only constitutional rule the Court has deemed sufficiently fundamental to require retroactive application is the right to counsel established in *Gideon v. Wainwright*.³⁹⁶ The Supreme Court made the right to counsel a retroactive rule because the absence of an attorney at a felony trial presents a uniquely high and impermissible risk of a factually inaccurate result.³⁹⁷ No other decision has been held to be on a par with this “bedrock procedural element[] essential to the fairness of a proceeding.”³⁹⁸

The Supreme Court somewhat mitigated these strict retroactivity principles in *Danforth v. Minnesota*.³⁹⁹ There, the Court held that each state may freely craft its own rules concerning the retroactivity of its own laws and the retroactivity of federal constitutional decisions, even where *Teague* would prohibit such application.⁴⁰⁰ Retroactivity, explained the Court, is a remedy states choose to provide for violations of federal law, and it is up to the states if they want to allow for broader retroactivity than that permitted by *Teague*.⁴⁰¹

393. *Id.* at 311.

394. *Graham*, 506 U.S. at 478. *See also* *Teague v. Lane*, 489 U.S. 288, 315 (1989) (absence of a fair cross section of the community on the petit jury is not implicit in the concept of ordered liberty and does not threaten the accuracy of a conviction).

395. *See, e.g.*, *Whorton v. Bockting*, 549 U.S. 406 (2007) (finding rule announced in *Crawford* not retroactive under *Teague*); *Beard v. Banks*, 542 U.S. 406 (2004) (invalidating sentencing schemes that require juries to disregard mitigating factors if they are not found unanimously); *Crawford v. Washington*, 541 U.S. 36 (2004) (applying confrontation clause to bar admission of “testimonial” hearsay without prior cross-examination); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (requiring sentencing factor that increases available sentence beyond statutory maximum be tried by a jury and proven beyond a reasonable doubt); *O’Dell v. Netherland*, 521 U.S. 151 (1997) (requiring capital defendant be allowed to inform jury of parole ineligibility); *Lambrix v. Singletary*, 520 U.S. 518, 527-39 (1997) (jury’s consideration of vague aggravating factor taints judge’s subsequent death sentence); *Stringer v. Black*, 530 U.S. 222 (1992) (jury’s consideration of vague aggravating factors taints death sentence); *Butler v. McKellar*, 494 U.S. 407 (1990) (interrogation on unrelated crime must cease after suspect invokes right to counsel); *Sawyer v. Smith*, 497 U.S. 227 (1990) (death penalty may not be imposed by a jury that believed responsibility for imposing death sentence rested elsewhere); *Griffith v. Kentucky*, 479 U.S. 314 (1987) (discriminatory use of peremptory challenges); *Allen v. Hardy*, 478 U.S. 255 (1986) (*per curiam*) (prohibiting discriminatory use of peremptory challenges); *Solem v. Stumes*, 465 U.S. 638 (1984) (once invoked, right to counsel may not be inferred from response to police-initiated questioning); *Linkletter v. Walker*, 381 U.S. 618, 636 (1965) (exclusionary rule applicable to states).

396. 372 U.S. 335 (1963).

397. *Schriro v. Summerlin*, 542 U.S. 348 (2004).

398. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990).

399. 128 S. Ct. 1029 (2008).

400. *Id.* at 1039.

401. *Id.* at 1045-46.

In short, while the U.K. Court of Appeal employs broad retroactivity principles that allow for correction of long-standing miscarriages of justice under contemporary standards, no such power exists in the United States.⁴⁰² One explanation for this, of course, is the United State's commitment to finality.⁴⁰³ Another explanation, at least where *Teague* is concerned, is the commitment to notions of comity that arise from U.S. federalism. This is not present in the U.K. because it is not a federal system.⁴⁰⁴ Third, the United Kingdom and the United States define the problem of wrongful conviction in different terms; the United Kingdom defines the problem as "righting miscarriages of justice," and the United States defines it as "correcting factually erroneous convictions."⁴⁰⁵ The United Kingdom's more expansive definition explains its broad retroactivity principles, especially its willingness to apply new law and contemporary standards of fairness to past convictions that may be a generation old by treating referred cases as new appeals.⁴⁰⁶ As noted above, these principles also resulted from the government's desire to show the public it would not permit injustices, even historic ones, to stand.⁴⁰⁷ Major changes in *Teague*'s retroactivity principles⁴⁰⁸ may not be as pressing in the United States, where the goal is more narrowly focused on correcting current inaccuracies and preventing new ones.

3. *Limits on Post-Conviction Review of Credibility*

In the United States, if a convicted defendant can prove on collateral attack or habeas corpus that a prosecutor knowingly suborned perjured testimony, the conviction will ordinarily be reversed as a due process violation.⁴⁰⁹ Due process

[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply "sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." They provide no support for the proposition that federal law places a limit on state authority to provide remedies for federal constitutional violations.

Id. (internal citations omitted). Finally, review of federal convictions is subject to slightly more relaxed retroactivity principles. Pursuant to 28 U.S.C. § 2255, a federal court to grant relief to a federal prisoner under 28 U.S.C. § 2255 on the basis of intervening change in the law. In this situation, unlike the review of a state conviction, issues of comity and federalism simply do not exist. Here, the federal court will apply intervening statutory changes and intervening judicial decisions altering the elements of a criminal statute.

402. *Teague*, 489 U.S. at 310.

403. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

404. See, e.g., *Morris*, *supra* note 347.

405. See *supra* notes 2, 7, 401, 402 (discussing a situation where the Court upheld retroactive application under the "watershed exceptions" finding that to not do so would create a "uniquely high and impermissible risk of a factually inaccurate result").

406. See, e.g., *R. v. Bentley*, [1998] EWCA (Crim) 2516, [2001] 1 Crim. App. 21 (U.K.).

407. See, e.g., *id.*

408. See *supra* notes 389-394.

409. *Mooney v. Holohan*, 294 U.S. 103, 110 (1935) ("'[K]nowing use' by the State of perjured testimony to obtain [a] conviction and the deliberate suppression of evidence to impeach that testimony constitute[] a denial of due process of law.").

also requires that a conviction be reversed if a convicted defendant can prove that the prosecutor failed to disclose material exculpatory evidence.⁴¹⁰ The U.S. system, in these instances, is able to correct injustice where a convicted defendant can show a breakdown in the adversary process that it otherwise relies on to yield a reliable result.⁴¹¹

In the absence of such a systemic malfunction, however, U.S. courts are relatively unwilling to receive new evidence that challenges the reliability of a jury's verdict—particularly when that evidence challenges the credibility of trial witnesses.⁴¹² In fact, most state standards explicitly exclude impeachment evidence as a basis for relief;⁴¹³ even where there is compelling impeachment evidence, the trial court may reject the proof.⁴¹⁴ Evidence that shows that a witness lied, or evidence that impeaches a witness's testimony, is not recognized as a basis for relief.⁴¹⁵

This unwillingness to receive evidence that undermines a trial witness's credibility is clearly demonstrated in the courts' treatment of post-conviction motions based on a trial witness's recantation.⁴¹⁶ Although there are two different standards for determining whether a recantation requires a new trial, generally, where a defendant seeks to vacate a conviction based on evidence that a trial witness has recanted, the court must be "reasonably well satisfied" that the original trial testimony was false. Usually, this means that the recantation is true and the court is able to conclude that a new trial "might"⁴¹⁷ or "probably" will result in acquittal.⁴¹⁸ Under any standard, the decision whether to grant a new trial based on allegedly false testimony or a recantation, is soundly committed to the original trial court's discretion.⁴¹⁹ Thus, short of a case that depends entirely on the testimony of a sex crime victim who has credibly recanted, a U.K.-type reversal of a sex crime conviction because of new evidence of a complainant's

410. *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (state's "suppression of [a] confession was a violation of the Due Process Clause of the Fourteenth Amendment").

411. See, e.g., *Mooney*, 249 U.S. 103; *Brady*, 373 U.S. 83.

412. See, e.g., *Berry v. State*, 10 Ga. 511 (1851).

413. See, e.g., *id.* at 527 (relief is not available on a motion for a new trial "if the only object of the testimony is to impeach the character or credit of a witness"); *Salinas v. State*, 373 P.2d 512, 514 (Alaska 1962) (newly discovered evidence that forms the basis for a new trial motion "must not be merely cumulative or impeaching"); *People v. Salemi*, 128 N.E.2d 377, 381 (N.Y. 1955) (in order to be sufficient to grant a new trial, newly discovered evidence "must not be merely impeaching or contradicting the former evidence").

414. See *Berry*, 10 Ga. at 519-20 (refusing to overrule trial court's admission of statements obtained through physical abuse and used against defendant, finding the evidence "admissible as a key to, or explanatory of, what was said and done by the prisoner").

415. See Tim A. Thomas, Annotation, *Standard for Granting or Denying New Trial in State Criminal Case on Basis of Recanted Testimony—Modern Cases*, 77 A.L.R.4TH 1031, §§ 4, 6 (1989); Janice J. Repka, Comment, *Rethinking the Standard for New Trial Motions Based upon Recantations as Newly Discovered Evidence*, 134 U. PA. L. REV. 1433, 1434 (1986).

416. Repka, *supra* note 415, at 1434.

417. *Larrison v. United States*, 24 F.2d 82, 87 (7th Cir. 1928).

418. *Berry*, 10 Ga. at 527. See also Repka, *supra* note 415, at 1440-41.

419. See Wade R. Habeeb, Annotation, *Recantation by Prosecuting Witness in Sex Crime as Ground for New Trial*, 51 A.L.R.3D 907, § 3 (2009) (listing a collection of cases).

false accusations against others or subsequent inconsistent statements is unlikely in the United States.⁴²⁰

Moreover, unlike the U.K.'s *Pendleton* standard, where the Court must evaluate whether new impeachment evidence might have affected the jury's credibility assessment, the U.S. courts have repeatedly made clear that the original trial court is charged, in its discretion, with deciding whether a recantation is true, and that "recanted testimony is exceedingly unreliable and is regarded with suspicion."⁴²¹ Even where the victim in a sex crime case has recanted, the recantation is frequently rejected as untrue.⁴²²

Habeas corpus courts also reject claims for relief based on unknowing use of perjury or a witness's recantation.⁴²³ As noted above, since federal habeas corpus review is intended to correct constitutional error, claims of innocence based on newly discovered evidence of any kind generally do not warrant relief.⁴²⁴ The same rule applies to claims of innocence based on perjury or recantation.⁴²⁵ Indeed, the majority of federal circuits hold that district courts have discretion to deny new trial motions based on recanted testimony without holding a hearing.⁴²⁶

Moreover, even if a court were willing to review newly discovered evidence of impeachment, U.S. evidence rules strictly limit the kind of impeachment evidence that may be admissible.⁴²⁷ As set forth above, the U.K. Court of Appeal reversed a substantial number of convictions that rested on the tainted testimony of corrupt police officers in two large police departments.⁴²⁸ It did so largely by holding that their misconduct in other cases established that they committed the same misconduct in the case on appeal, or at least that they were lying about having done so.⁴²⁹

The United Kingdom's broad use of prior misconduct either as substantive evidence or impeachment evidence would not be permissible in U.S. courts.⁴³⁰ Under Rule 404(b) of the Federal Rules of Evidence, evidence of specific

420. See *id.* § 3; Repka, *supra* note 415, at 1452-55 & nn.123-37. See also, e.g., *Commonwealth v. Mosteller*, 284 A.2d 786, 788-89 (Pa. 1971) (reversal required). However, most courts consider the grant or denial to be a matter for the trial court's discretion. See, e.g., *United States v. Waters*, 194 F.3d 926, 933 (8th Cir. 1999); *Smith v. State*, 745 So. 2d 284, 292-93 (Ala. Crim. App. 1998); *Leon v. State*, 513 S.E.2d 227, 233 (Ga. Ct. App. 1999).

421. See Repka, *supra* note 415, at 1440 ("[C]ourts effectively indulge a presumption that recantations are untrustworthy."). See also, e.g., *United States v. Provost*, 969 F.2d 617 (8th Cir. 1992); *Russell v. State*, 849 So. 2d 95 (Miss. 2003); *State v. Brown*, 394 S.E.2d 434, 449 (N.C. 1990).

422. See, e.g., *Waters*, 194 F.3d at 933; *Louisiana v. Wright*, 598 So. 2d 561, 563-65 (La. Ct. App. 1992); *Smith*, 745 So. 2d at 294-95.

423. See *Herrera v. Collins*, 506 U.S. 390, 418-19 (1993).

424. *Id.* at 400.

425. *Id.* at 418-19.

426. *United States v. MMR Corp.*, 954 F.2d 1040, 1046 (5th Cir. 1992); *United States v. Carbone*, 880 F.2d 1500, 1502-03 (1st Cir. 1989); *United States v. DiPaolo*, 835 F.2d 46, 51 (2d Cir. 1987).

427. See FED. R. EVID. 404(b); FED. R. EVID. 608(b).

428. ELKS, *supra* note 38, at 247-53.

429. *Id.*

430. See FED. R. EVID. 404(b); FED. R. EVID. 608(b).

instances of a witness's conduct may not be used to prove conduct in conformity with prior conduct.⁴³¹ Moreover, under Rule 608(b), evidence of specific instances of misconduct relating to truthfulness may not be proven by extrinsic evidence.⁴³² If probative of truthfulness, prior conduct may, in the court's discretion, be inquired into on cross-examination, but may not be established by other proof.⁴³³

In short, unlike in the United Kingdom where the Court of Appeal has quashed convictions in light of the potential jury impact of new impeachment proof, the U.S. courts routinely reject significant newly discovered evidence in reviewing innocence claims.⁴³⁴ One reason for these different approaches may be that, in the United Kingdom, the independent CCRC investigates, produces, and vets newly discovered evidence.⁴³⁵ Thus, the Court of Appeal may find it easier to credit such evidence than evidence that, as in the United States, comes solely from the defense.⁴³⁶

D. *Refusal to Consider New Scientific Evidence*

Normally, where the defense presents scientific or forensic proof, U.S. courts do not accept new scientific proof simply to discredit that evidence.⁴³⁷

431. Rule 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

432. Rule 608(b) states:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

FED. R. EVID. 608(b).

433. *See id.*

434. *See, e.g., MMR Corp.*, 954 F.2d at 1046; *Carbone*, 880 F.2d at 1502-03; *DiPaolo*, 835 F.2d at 51.

435. *See Griffin*, *supra* note 16, at 1246.

436. On the other hand, the Court of Appeal also receives fresh evidence in non-CCRC cases.

437. *Harvey v. Horan*, 278 F.3d 370, 375-76 (4th Cir. 2002). *See also* Holly Shaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 704-08 (2002); Marjorie A. Shields, Annotation, *DNA Evidence as Newly Discovered Evidence which Will Warrant Grant of New Trial or Other Postconviction Relief in Criminal Cases*, 125 A.L.R.5TH 497 § 2 (2005).

Finality and reliability concerns again create the basis for this refusal,⁴³⁸ just as with the courts' general reluctance to entertain post-conviction impeachment evidence.⁴³⁹ Clearly, where scientific or forensic proof is offered for the first time on an application for a new trial, the evidence is usually not accepted.⁴⁴⁰ U.S. courts are simply reluctant to receive evidence that was not available at trial and that has only become available as a result of scientific progress.⁴⁴¹ Thus, the notion of an application for post-conviction relief based on newly discovered scientific evidence is virtually nonexistent.⁴⁴²

This institutional reluctance is at the core of the refusal of many courts to entertain post-conviction DNA testing. Indeed, the Supreme Court recently held that there is no due process right of access to DNA testing.⁴⁴³ An examination of that issue is instructive because DNA evidence is not just another type of scientific impeachment evidence; it is the most probative scientific evidence available on the question of innocence.⁴⁴⁴ Thus, the courts' reluctance in accepting post-conviction DNA evidence exemplifies their refusal to entertain less conclusive or compelling post-conviction scientific proof as the U.K. Court of Appeal has done.⁴⁴⁵ Despite the Supreme Court's decision in *Osborne*, this may change, as a practical matter, in light of the recent National Academy of Sciences report criticizing the nation's crime labs.⁴⁴⁶ Twice recently, authorities have ordered retesting in cases that involved evidence from a discredited police crime laboratory.⁴⁴⁷ This type of scientific evidence would be raised under the same new trial statutes that traditionally have varying but extremely demanding standards of proof⁴⁴⁸ and that contain statutes of limitations that are quite short.⁴⁴⁹

Moreover, as the Supreme Court recognized in *Osborne*, despite the Court's refusal to constitutionalize a post-conviction right to DNA evidence, most states have enacted statutes specifically authorizing a right to post-conviction DNA testing and for vacating a conviction if the DNA results demonstrate innocence.⁴⁵⁰ Forty-eight states and the District of Columbia now have post-

438. See generally Shields, *supra* note 437.

439. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

440. Shields, *supra* note 437, § 3(b).

441. See *id.*

442. See *id.*

443. District Attorney's Office for the Third Judicial Dist. v. *Osborne*, 129 S. Ct. 2308 (2009).

444. See *id.* at 2312.

445. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 100-01 (2009), available at http://www.nap.edu/catalog.php?record_id=12589.

446. See *id.* at 37.

447. Associated Press, *Detroit Crime Cases to Require Retesting*, N.Y. TIMES, Mar. 15, 2009, <http://www.nytimes.com/2009/03/16/us/16detroit.html?emc=etal>. See also *In re an Investigation of the W. Va. State Police Crime Lab.*, 438 S.E.2d 501, 520 (W. Va. 1993).

448. See, e.g., *People v. Johnson*, 793 N.E.2d 591 (Ill. 2002); *State v. Britt*, 360 S.E.2d 660 (N.C. 1987); *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).

449. Medwed, *supra* note 294, at 676.

450. 129 S. Ct. at 2316. See also Garrett, *supra* note 294, at 1719-23 app. (citing state post-conviction DNA statutes).

conviction DNA statutes.⁴⁵¹ In addition, the federal Innocence Protection Act provides for post-conviction DNA testing in federal criminal cases.⁴⁵² While these new statutes appear to modify to some extent the principle of finality, there are still obstacles to obtaining relief.⁴⁵³ Most of these DNA statutes contain procedural rules or threshold requirements that must be overcome before obtaining DNA testing.⁴⁵⁴ These restrictions are substantial.⁴⁵⁵ Moreover, only six states and the District of Columbia permit motions related to non-DNA forensic testing or scientific evidence.⁴⁵⁶

Most jurisdictions require a threshold showing of “materiality” before testing may be granted.⁴⁵⁷ This outcome-determinative standard, set forth in *Brady v. Maryland*, requires a showing that there is a “reasonable probability” that the petitioner would not have been convicted if exculpatory DNA results had been obtained.⁴⁵⁸ Several states have a more demanding standard, requiring a showing that it is “more probable than not” that the DNA testing would prove innocence.⁴⁵⁹ Two states require a showing of “clear and convincing” evidence.⁴⁶⁰ In a typical catch-22 situation, most petitioners cannot satisfy these standards without the DNA test results they are seeking.⁴⁶¹

Moreover, even if these standards did not on their face pose such an onerous burden, state courts have interpreted them strictly.⁴⁶² For example, one state supreme court has cautioned that DNA testing should not be granted absent “extraordinary circumstances.”⁴⁶³ Courts in another state deny testing if the defendant fails to include other new evidence that shows by a “preponderance of the evidence,” that the testing will exculpate him.⁴⁶⁴ In addition, many states limit post-conviction DNA testing to felonies, violent felonies, or even capital cases.⁴⁶⁵ Some states require that identity have been placed in issue at trial, precluding relief in cases involving a guilty plea.⁴⁶⁶ Twelve states require that testing have been technologically impossible at the time of trial.⁴⁶⁷ Finally, despite a statutory right to post-conviction DNA testing, courts in several highly

451. Garrett, *supra* note 294, at 1635.

452. *See id.* at 1673-75.

453. *Id.* at 1674-75.

454. *Id.* at 1676-78.

455. *See id.*

456. *Id.* at 1679.

457. *Id.* at 1676 & n.219.

458. Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 *FORDHAM L. REV.* 1493, 1516 (2007).

459. Garrett, *supra* note 294, at 1676-77 & nn.221-24.

460. *Id.* at 1676.

461. *Id.* at 1677.

462. *Id.*

463. *Jenner v. Dooley*, 1999 SD 20, ¶ 19, 590 N.W.2d 463, 472.

464. *Hamilton v. State*, No. 09-05-003 CR, 2006 WL 61937, at *3 (Tex. Crim. App. 2006).

465. Garrett, *supra* note 294, at 1680 (stating that 25 states limit DNA contain one or another of these limits; Kentucky and Nevada allow testing only in capital cases).

466. *Id.* at 1680 & n.238.

467. *Id.* at 1681 & n.242.

publicized cases have resisted granting relief even on the basis of exonerating DNA proof.⁴⁶⁸

IV. CONCLUSION

Are England and America “two countries [separated] by a common language?”⁴⁶⁹ Certainly, several major differences exist between the two jurisdictions and their approaches to correcting injustice.

Most basically, England and the United States define the problem in different terms. England defines the problem as righting miscarriages of justice and the United States defines it as correcting factually erroneous convictions.⁴⁷⁰ The United Kingdom’s more expansive definition has necessarily led to some mechanisms that might not be appropriate under the narrower U.S. definition, for example, the U.K. Court of Appeal’s willingness to apply new law and contemporary standards of fairness to past convictions.⁴⁷¹ Major changes in *Teague*’s retroactivity principles⁴⁷² may not be as pressing in the United States, where the goal is more narrowly focused on correcting factually inaccurate convictions, or even just preventing them.⁴⁷³

Aside from the differences in terminology and focus, there are other systemic differences. The courts do not defer to the jury as much in the United Kingdom as they do in the United States because the jury plays a less significant role in the United Kingdom.⁴⁷⁴ In the United States, the jury is a core democratic institution.⁴⁷⁵ In addition, the U.S. commitment to the adversarial process as the guarantor of reliability means that absent a malfunction, the result is final; U.S. courts will reverse a conviction only where that process has been corrupted.⁴⁷⁶ The U.K. criminal justice process is considerably less adversarial than that in the United States and thus much more tolerant of the fairness of do-overs.⁴⁷⁷ There is greater discovery,⁴⁷⁸ barristers switch from prosecution to defense,⁴⁷⁹ and the

468. *Id.* at 1713 & n.403.

469. OXFORD DICTIONARY OF QUOTATIONS, *supra* note 1, at 638.

470. *See supra* notes 2, 7.

471. *See, e.g.*, R. v. Bentley, [1998] EWCA (Crim) 2516, [2001] 1 Crim. App. 21 (U.K.).

472. *Teague v. Lane*, 489 U.S. 288, 305-10 (1989). *See also supra* notes 384-389.

473. *See supra* notes 419-420.

474. *See* Part III.B.1.

475. Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer’s Quinceanera*, 81 TUL. L. REV. 331, 377 (2006).

476. *See supra* notes 419-420.

477. *See, e.g.*, WHITE, *supra* note 348, at 45-46 (noting that while England has an adversarial process, “Articles 5 and 6 of the European Convention on the protection of liberty and on the right to a fair trial apply equally to adversarial and inquisitorial process,” which suggests the two systems are no longer so dissimilar).

478. *See generally* Criminal Procedure and Investigations Act, 1996, c. 25, §§ 1-11 (Eng.).

479. *See* MARCEL BERLIN & CLAIRE DYER, *THE LAW MACHINE* (1994); MICHAEL ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM* (6th ed. 1993); *The General Council of the Bar*, *CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES* (1997).

right to silence is more restricted.⁴⁸⁰ Another sign of relaxed adversarialness is the fact that a significant number of the convictions discussed above, and many others that were quashed by the court on CCRC referral involved either prosecutorial agreement to receive new evidence on appeal or a prosecutorial concession that the conviction could not be sustained.⁴⁸¹ In the United States, such concessions are extremely rare.⁴⁸²

Finally, in theory, the original guilt-adjudication process in the United States has more opportunities for review than the process in the United Kingdom, where there is no right to a direct appeal in serious cases.⁴⁸³ By the time a defendant raises a claim of wrongful conviction in the United States, substantial resources, time, and effort have already been expended.⁴⁸⁴

Nevertheless, several lessons can be learned from studying the way the United Kingdom reviews miscarriage of justice claims. England is demographically, geographically, and administratively similar enough to a state that the states could look to its experience in correcting wrongful convictions. A more relaxed approach to finality is a promising approach, and would be a significant step. First, as reflected in the newly enacted DNA testing statutes⁴⁸⁵ and the national recognition of the widespread existence of faulty or fabricated forensic evidence,⁴⁸⁶ states certainly could entertain new scientific evidence that presents a serious question to a criminal conviction's accuracy, without impossible and unrealistic statutes of limitations and monumental evidentiary hurdles. Second, significant, non-cumulative impeachment evidence, like the evidence discovered in the sex-crime cases, should be admitted post-conviction and considered under a more relaxed standard. As in the United Kingdom, the question should not be whether the trial judge believes the evidence is true, but whether the evidence might have brought the jury to a different credibility assessment.

These changes to the judicial system may not be realistic unless and until U.S. legislatures are willing to trade them for fewer protections before conviction (e.g., fewer available jury trials) or less review on direct appeal (e.g., no appeal as of right). Such a reallocation of resources may add to confidence in the accuracy of convictions, but it is beyond the scope of this article. Without such a reallocation, asking the system to loosen its approach to finality may be unrealistic.

480. Criminal Justice and Public Order Act, 1994, c. 33, §§ 34-37 (Eng.).

481. Approximately 20% of the cases involved a prosecutorial concession either on the need for quashing the conviction or on some issue; in approximately 13% of the cases the prosecutor consented to the receipt of new evidence. See [CCRC Chart.xls] spreadsheet (on file with the University of Toledo Law Review) (analyzing and indexing all court of appeal decisions on CCRC-referred cases since the CCRC's inception and categorizing them according to eighteen procedural and substantive issues).

482. See Garrett, *supra* note 294, at 1659.

483. See *id.* at 1714.

484. See *id.* at 1708.

485. See, e.g., VA. CODE ANN. § 19.2-327.10 (2008).

486. See Part II.E.

Given the system as it is, creation of an independent commission may be the most effective way to loosen the strictures of finality that grip the U.S. courts.⁴⁸⁷ An independent commission, like the NCIIC or the CCRC, would take review of the case out of the system that produced it and engage in its own independent investigation.⁴⁸⁸ Moreover, and even more important, without such a commission, the scientific or impeachment evidence has little chance of even being discovered, given the lack of counsel or other investigatory resources available to convicted defendants in the United States.⁴⁸⁹ This investigatory role is essential to meaningful correction of wrongful convictions.⁴⁹⁰ Such a commission could both uncover and then vouch for the reliability of newly discovered material evidence so that the courts might more willingly accept it.

Such a commission might also be available to work with state governors to make executive clemency a meaningful avenue of review. By investigating, referring, and vouching for the reliability of evidence of innocence, a commission would absorb some of the political pressure that currently prevents meaningful clemency review.

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

488. *Id.* at 654.

489. See The North Carolina Center on Actual Innocence, <http://www.nccai.org/index.html> (last visited Aug. 13, 2009).

490. *Id.*