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Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission

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Abstract—The Criminal Cases Review Commission (CCRC) was the first publicly funded body created to investigate claims of wrongful conviction, with the power to refer cases to the Court of Appeal. In other countries, such as Australia, Canada and the United States, many regard the CCRC as the optimal solution to wrongful conviction and, for years, Innocence Projects in these countries have called for the establishment of a CCRC-style body in their own jurisdictions. However, it is now Innocence Projects which are being introduced in England and Wales to try to assist applicants who are innocent but convicted. This article reviews why the CCRC was created, discusses the role of factual innocence within this body and within the criminal justice system generally and explores why Innocence Projects are being created in England and Wales, despite the presence of the CCRC. It explains how these different organizations may work together to assist factually innocent people who have been wrongly convicted, and the role Innocence Projects may play generally in criminal justice reform and legal education.

1. *Introduction*

The criminal justice systems of the common law world have developed over hundreds of years. They are complex. They require and provide a myriad of procedural and evidential protocols and rules to ensure the proper functioning of the courts, to seek the truth and to provide an answer to the ultimate

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question: guilty or not guilty. As such, while it is not a question of innocence, the criminal justice system does fundamentally aim to protect the innocent while convicting the guilty. Despite this, the conviction of innocent people is now a current and live issue and there are several reasons why the problem of the conviction of innocent people has risen to prominence (once again) as an issue that needs to be addressed. One of these reasons is the work of Innocence Projects.

Innocence Projects operate in the United States, Canada, New Zealand and Australia with the aim of assisting innocent people who have been wrongly convicted. They exist in various forms but are often based in a university law school and utilize the student resources within that school. While differences do exist in their structure and ambit, they have essentially the same fundamental goals: a major one being the provision of investigative and/or legal services to individuals seeking to prove their innocence for crimes of which they have been convicted.[1]

Innocence Projects are typically under-funded and under-resourced and struggle to meet the demands of the many calls for assistance which they receive. Recently, consideration has been given in the United States, Australia and Canada to the possibility of establishing a body similar to the Criminal Cases Review Commission (CCRC), which was created in England after a series of high-profile miscarriages of justice in the early 1990s.[2] For those who had previously campaigned for the release of the wrongly convicted in England, the CCRC was welcomed as a necessary and important body to investigate claims of wrongful conviction and to refer cases to the Court of Appeal. Despite this, Innocence Projects are now being established in England and Wales[3] and the obvious question is why these jurisdictions require Innocence Projects when they already have a much more empowered and substantially better funded body to address wrongful conviction which other countries have emulated.[4]

[1] For example, see the Mission Statement of the Innocence Network <http://www.innocencenetwork.org/> accessed 13 April 2008.

[2] R Schehr and L Weathered, 'Should the United States Establish a Criminal Cases Review Commission?' (2004) 88 Judicature 122–125; Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information Report no 96* (Australian Law Reform Commission, Sydney 2002); Victorian Parliament Law Reform Committee, *Forensic Sampling and DNA Databases in Criminal Investigations Report No 58* (Parliament of Victoria, Melbourne 2004); P Braiden and J Brockman, 'Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code' (1999) 17 Windsor Ybk Access J 3–34; Canadian Department of Justice, *Addressing Miscarriages of Justice: Reform Possibilities for section 690 of the Criminal Code* (Consultation Paper) (Canadian Department of Justice, Ottawa, 1998); Goudge Commission, Inquiry Into Paediatric Forensic Pathology in Ontario <http://www.goudgeinquiry.ca/> accessed 1 March 2008.

[3] Currently at the University of Westminster, the University of Leeds, the University of Bristol and the University of Cardiff.

[4] For example, both Scotland and Norway have implemented bodies (with some varying aspects) based on the Criminal Cases Review Commission. See the Scottish Criminal Cases Review Commission <http://www.sccrc.org.uk> accessed 26 April 2008; and the Norwegian Criminal Cases Review Commission <http://www.gjenopptakelse.no/index.php?id=30> accessed 26 April 2008.

This article explores why Innocence Projects have been created in England and Wales. In order to do so, it overviews in broad terms the general role of Innocence Projects and the reasons for the creation of the CCRC. This article focuses on the role 'actual innocence' or 'factual innocence' plays in each organization and more generally in the criminal justice system.[5] In light of the differences that factual innocence plays within these organizations, this article proposes that ultimately Innocence Projects and the CCRC may be compatible companions in working together to assist factually innocent people who have been wrongly convicted. Moreover, it discusses some of the other benefits of university-based Innocence Projects within both the legal and educational environments.

2. *Innocence Project Origins, Expansion and Accomplishments*

University-based Innocence Projects which are now being created in England and Wales were initiated in 1992 in the United States by co-founders of the Innocence Project (which was then based at the Cardozo Law School in New York), Barry Scheck and Peter Neufeld.[6] The past 15 years has seen a significant expansion of Innocence Projects. There are currently over 40 university-based projects and other similar organizations operating across the United States, Canada, Australia, New Zealand and England.[7]

University-based Innocence Projects provide a pro bono resource for wrongly convicted applicants and additionally serve as a valuable educational tool for students.[8] The emphasis of their work is reviewing factual innocence claims and it is these cases that form the essence of Innocence Project work. In this sense (and as discussed in more detail later in the article), 'innocence' is defined in lay, rather than legal terms.

The Innocence Project in New York has a mission statement which provides an example of the combination of objectives typical of innocence project work,

[5] The terms 'actual innocence' and 'factual innocence' are used interchangeably throughout this article. These terms are used to describe those cases where the defendant was wrongly convicted either because no crime was in fact committed or if there was a crime it was committed by someone else.

[6] See B Scheck, P Neufeld and J Dwyer, *Actual Innocence* (Signet Publishing, New York 2001).

[7] For a list of Innocence Projects, see the Innocence Network website <http://www.innocencenetwork.org/> accessed 13 April 2008.

[8] In regard to the educational aspects, see C McCartney, 'Liberating Legal Education? Innocence Projects in the US and Australia' (2006) 3 Web JCLI; L Weathered, 'Investigating Innocence: The Emerging Role of Innocence Projects in the Correction of Wrongful Conviction in Australia' (2003) 12 Griffith LR 64–90; K Kerrigan, 'Miscarriage of Justice and University Law Schools' (2002) 66 J Crim L 1–3; J Stiglitz, J Brooks and T Shulman, 'The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education' (2002) 38 Calif West Law Rev 413–431; D Medwed, 'Actual Innocents: Considerations in Selecting Cases for a New Innocence Project' (2003) 81 Neb Law Rev 1097–1151. K Findley, 'The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education' (2006) 13 Clin Law Rev 231–278; K Roach, 'Wrongful Convictions and Criminal Procedure' (2004) 42 Brandeis Law J 349–368.

though other projects may extend their ambit beyond DNA cases. Their objectives include to:

> Achieve the exoneration and release of factually innocent inmates through post-conviction DNA testing; create a network of schools, organizations, and citizens that will effectively address claims of actual innocence; document and study the causes of wrongful convictions; suggest and implement policies, practices, and legislation that will prevent wrongful convictions; train and educate future attorneys and advocates; provide information and educational opportunities for the public.[9]

In a practical sense, a major role of Innocence Project student activity is to evaluate claims of wrongful conviction and to attempt to locate and access potentially exonerating evidence. To date, there have been 216 people exonerated in the United States through DNA evidence and Innocence Projects have been involved in the majority of them. These individuals collectively have spent approximately 2660 years in prison.[10]

Accomplishments of Innocence Projects do however expand beyond actual exonerations and include the educational benefits received by Innocence Project students who enter the workforce with new skills and a better understanding of the weaknesses of criminal justice systems. Innocence Project work in the United States has also influenced other aspects of the criminal justice system. For example, Governor Ryan of Illinois made a decision to commute all death penalty sentences to life imprisonment following a major review of death row cases and the criminal justice system in that state.[11] The highest courts in the United States are also questioning the constitutional validity of the death penalty due to the known risk of executing an innocent person.[12]

Importantly, DNA exonerations to date have also allowed for some examination into the systemic causes of wrongful conviction, an essential element if 'front-end' reforms are to be implemented to reduce the likely incidence of wrongful convictions occurring. As Scheck and Neufeld state, DNA exonerations allow for an important 'learning moment' to occur, by which flaws in the criminal justice system can be identified and

[9] See The Innocence Project website <http://www.innocenceproject.org/Content/351.php> accessed 30 April 2008.

[10] See The Innocence Project website <http://www.innocenceproject.org/Content/351.php> accessed 30 April 2008.

[11] Governor George H. Ryan's address at Northwestern University School of Law, 11 January 2003. <http://www.law.northwestern.edu/depts/clinic/wrongful/RyanSpeech.htm> accessed 10 April 2008. The work of the Northwestern Innocence Project in Chicago and the Innocence Project in New York was fundamental to this decision.

[12] See, for example, *United States of America v Quinones et al* (2002) S3 00 Cr 761 (JSR) <http://www.nysd.uscourts.gov/rulings/quinones.pdf> accessed 10 April 2007; The Constitution Project website <http://www.constitutionproject.org/> accessed 10 April 2007; National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (1996) <http://www.ojp.usdoj.gov/nij/pubs-sum/161258.htm> accessed 3 March 2008.

improvements made.[13] As such, state-based Innocence Commissions, bodies which examine cases post-exoneration to uncover the reasons for the wrongful conviction and make policy recommendations for systemic reform in that state, have been established in at least two states,[14] with calls for their establishment throughout the country.[15]

Legislative reform has also occurred in the United States with some states introducing a requirement for police to videotape or audiotape interrogations with suspects.[16] Other legislation enacted allows convicted persons the opportunity for DNA testing and access to the courts. For example, the Justice For All Act 2004 signed into law on 30 October 2004, provides for the enhancement of DNA collection and analysis; post-conviction DNA testing to exonerate the innocent and funding by the authorities in order to improve the representation of capital offence defendants.[17] DNA innocence testing statutes now exist in 43 of the 50 states in the United States.[18]

Despite their success and increasing expansion, the volume of applications received by many projects, combined with their limited resources, means that Innocence Projects struggle to meet the needs of the wrongly convicted. In order to address the problem of wrongful convictions more widely, there have been calls in several countries, including the United States, Canada, Australia and New Zealand, to establish an organization fashioned on the model of the CCRC that operates for England, Wales and Northern Ireland. The funding and investigative powers of the CCRC are considerable and many see the establishment of such an organization as the key to correcting wrongful convictions. Given this, the more recent establishment of Innocence Projects in England and Wales despite the existence of the CCRC may be said to be somewhat curious. In order to answer the question why Innocence Projects are now being established in England and Wales it is necessary to outline the reasons why the CCRC was created, understand the differing emphasis in case reviews undertaken by the CCRC and by Innocence Projects, and look at the wider role Innocence Projects can play regarding law reform and legal education.

[13] P Neufeld and B Scheck, 'Toward the Formation of "Innocence Commissions" in America' (2002) 86 Judicature 98–105 at 101.

[14] North Carolina Actual Innocence Commission <http://www.law.duke.edu/innocencecenter/causes_and_remedies.html> accessed 15 February 2007; Virginia Innocence Commission <http://www.icva.us> accessed 15 February 2007.

[15] See JB Gould, 'After Further Review: A new wave of Innocence Commissions' (2004) 88 Judicature 126–131; R Schehr and J Sears 'Innocence Commissions: Due Process Remedies and Protection for the Innocent' (2005) 13 Crit Criminol 181–209; KA Findley, 'Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions' (2002) 38 Cal W L Rev 333–353; D Horan, 'The Innocence Commission: An Independent Review Board for Wrongful Convictions' (2000) 20 N Ill U L Rev 91–189.

[16] TP Sullivan, *Police Experiences With Recording Custodial Interrogations*, Northwestern University School of Law Center on Wrongful Convictions 2004 at Appendix A, <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> accessed 26 April 2008.

[17] Justice For All Act (HR 5107, Public Law 108–405).

[18] The Innocence Project website <http://www.innocenceproject.org/Content/304.php> accessed 30 April 2008.

3. *The Creation and Role of the CCRC*

Prior to 1995, the Home Secretary had the power to refer cases to the Court of Appeal.[19] The problems associated with the Home Secretary's referral power are well documented[20] and calls began as early as the 1970s to set up an independent tribunal to reopen cases and these continued throughout the 1980s.[21] The catalysts for change proved to be the cases of the Guildford Four and the Birmingham Six. The Royal Commission on Criminal Justice (hereinafter 'RCCJ')[22] recommended that the Home Secretary's power to refer cases back to the Court of Appeal be removed and that a new body should be set up. This new body was to consider alleged miscarriages of justice, supervise their investigation if further inquiries were needed and refer appropriate cases to the Court of Appeal. This recommendation was accepted by the Government and the CCRC was created by the Criminal Appeal Act 1995 and began work on 1 April 1997.

The principal reason for establishing a new review body to replace the Home Office was the need for such investigations to be carried out independently of the executive. In order to ensure this, the Criminal Appeal Act provides that the CCRC 'shall not be regarded as the servant or agent of the Crown'.[23] However, the Commission's connection with the Government is not completely severed, in that its eleven members are appointed by the Queen on the recommendation of the Prime Minister.[24] Also, the Commission is reliant on the Ministry of Justice[25] for resources and the terms and conditions of the Commission members' employment are set by the Minister for Justice.

Eligibility for review depends on whether the application arises from a conviction in England, Wales or Northern Ireland. Only in exceptional circumstances can a case be referred without the applicant having exhausted the normal appeals process. The Home Secretary could refer cases 'if he thinks fit' but the Commission's referral power is much more restrictive.

[19] Firstly, under Criminal Appeal Act 1907, s 19 and then under Criminal Appeal Act 1968, s 17.

[20] See N Taylor and M Mansfield, 'Post-Conviction Procedures' in C Walker and K Starmer (eds), *Miscarriages of Justice A Review of Justice in Error* (Blackstone Press, London 1999) 229; M McConville and L Bridges (eds), *Criminal Justice in Crisis* (Edward Elgar, Aldershot, 1994); K Malleson, 'Appeals Against Conviction and the Principle of Finality' in S Field and PA Thomas (eds), *Justice and Efficiency* (1994) 21 J Law & Society 151–164; P O'Connor, 'The Court of Appeal: Re-trials and Tribulations' (1990) Crim LR 615–628; D Malet, 'The New Regime For The Correction of Miscarriages of Justice' (1995) 159 JP 716–718; D Schiff and R Nobles, 'The Criminal Appeal Act 1995: The Semantics of Jurisdiction' (1996) 59 MLR 573–581.

[21] See Devlin Report, Departmental Committee On Evidence of Identification in Criminal Cases, HC 338 (1976); Sixth Report of the Home Affairs Committee, Session 1981–1982, Miscarriages of Justice (HC 421), paras 24–27; JUSTICE, *Miscarriages of Justice* (London, 1989); Independent Civil Liberty Panel on Criminal Justice, Civil Liberties Trust, (1993).

[22] *Report of the Royal Commission on Criminal Justice* (Chair: Lord Runciman) Cmnd 2263 (1993).

[23] Criminal Appeal Act 1995, s 8(2).

[24] Criminal Appeal Act 1995, s 8(4).

[25] The CCRC was formerly under the remit of the Home Office but was moved to the Ministry of Justice when that was created.

Under section 13 there must be a 'real possibility' that the conviction or sentence would not be upheld.[26] In the case of a conviction, the 'real possibility' must arise from an argument or evidence that was not raised during the trial or at appeal,[27] or from 'exceptional circumstances'.[28] The inclusion of the 'exceptional circumstances' ground was the result of a lengthy campaign in order to put pressure on the Government. The 'exceptional circumstances' are defined on a case by case basis.

The Commission investigates cases by: using its own resources and expertise, including its own Case Review Managers; using its powers under section 17 of the Criminal Appeal Act 1995 to obtain material from public bodies; commissioning outside experts to prepare reports; and requiring the appointment of an investigating officer under section 19 of the Act. There have been a total of 37 investigating officers appointed since 1997 to investigate 40 cases.[29] At the end of every review, Commissioners decide whether cases should be referred to the Court of Appeal or not. A single Commissioner can decide not to refer a case but only a committee of three Commissioners can decide to refer a case.[30]

As a result of these statutory provisions, the focus of the CCRC is different from that of Innocence Projects. The emphasis of Innocence Project work is on factual innocence claims. Innocence in its purest form is simple to define. A person is innocent if he or she did not commit the crime. Innocence in the legal context is considerably more complex because there are a myriad of ways in which innocence could be defined.[31] In the criminal justice system, a person may be considered to have been wrongly convicted if there were procedural or legal errors upon which he or she can found a successful appeal. But, whilst this may qualify as wrongful conviction in the broader sense, it would generally not be understood as innocence outside the legal arena. There is a natural tension between the commonly held notions of 'innocence' (which are also usually utilized by the media) and the concept of 'innocence' or 'wrongful conviction' as it applies in the legal system. Whilst the public and the media's perception of terms such as 'wrongful conviction' and 'miscarriage of justice' may appear to relate more to actual innocence than to cases in which procedural errors have been made, the legal system has adopted much broader definitions that include both. This difference in perception is illustrated by the

[26] Criminal Appeal Act 1995, s 13(1)(a).
[27] Criminal Appeal Act 1995, s 13(1)(b).
[28] Criminal Appeal Act 1995, s 13(2).
[29] Criminal Cases Review Commission, Annual Report 2005–2006, at 17 <http://www.ccrc.gov.uk/CCRC_Uploads/Annual%20Report%202005%20-%202006.pdf> accessed 9 March 2008. Statistics are not available for the number of requests made for documents under s17 or expert reports commissioned. This was confirmed by e-mail correspondence with Mike Allen, Commissioner at the CCRC 11 March 2003.
[30] Ibid 16.
[31] For a discussion of different categories of innocence, see C Burnett, 'Constructions of Innocence' (2002) 70 UMKC LRev 971–982.

following passage from the speech of Lord Bingham in *R (on the application of Mullen) v Secretary of State for the Home Department*:

> The expression "wrongful conviction" is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials. It is impossible and unnecessary to identify the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.[32]

And similarly in relation to miscarriage of justice:

> "Miscarriage of justice" is an expression which, although very familiar, is not a legal term of art and has no settled meaning. Like "wrongful conviction" it can be used to describe the conviction of the demonstrably innocent. But, again like "wrongful conviction", it can be said and has been used to describe cases in which defendants, guilty or not, certainly should not have been convicted.[33]

A similar confusion of lay and legal perception surrounds the definition of the term 'presumption of innocence'. The presumption of innocence[34] is a technical term which requires the prosecution to prove its case beyond reasonable doubt. If the prosecution case fails it does not follow that the defendant is factually innocent,[35] as a verdict of 'not guilty' by the jury does not mean that the defendant is not responsible for the crime.[36] So, whilst it is the role of the trial courts to determine whether the defendant is 'legally guilty', not whether he is actually innocent,[37] there is clearly a distinction drawn

[32] [2005] 1 AC 1, [4].

[33] Ibid [9].

[34] Article 6(2) of the European Convention on Human Rights states that 'everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law'.

[35] See M Zander: 'The presumption of innocence exists quite independently of whether the defendant is innocent or guilty, and indeed has nothing to do with the question of guilt or otherwise.' The Times, 20 August 1994.

[36] See Lord Donaldson: 'A verdict of not guilty says nothing about innocence. It simply says that the jury was not wholly sure that the accused committed the crime.' Sunday Times, 28 August 1994.

[37] '. . . . guilt established by the legal system is always legal guilt – guilt according to law. And as such, innocence is simply the condition which exists when the legal system has not established guilt.' R Nobles and D Schiff, 'Guilt and Innocence in the Criminal Justice System: A Comment on R (Mullen) v Secretary of State for the Home Department' (2006) 69 MLR 80–91, 90.

between innocence, as it would be understood outside the legal arena, and legal innocence.

Whilst Innocence Projects focus primarily on lay notions of factual innocence, the CCRC places emphasis on Lord Bingham's broader definitions of the terms 'miscarriage of justice' and 'wrongful conviction'. Its website states that 'our main job is to review the cases of those that feel they have been wrongly convicted of criminal offences' and that 'we do not consider innocence or guilt, but whether there is new evidence or argument that may cast doubt on the safety of an original decision'.[38] The Court of Appeal (Criminal Division) currently has the power to quash convictions on the basis that they are unsafe,[39] therefore the CCRC can only refer a case if there is a real possibility that the Court of Appeal will quash the conviction on the basis that it is unsafe.

The Court of Appeal has interpreted 'unsafe' in two broad terms. One interpretation of 'unsafe' is that a factually innocent person has been wrongly convicted (in the narrow sense of not committing the crime). The other interpretation emphasizes the Court's supervisory role in assessing the overall fairness of the pre-trial and trial process. Thus the Court of Appeal has quashed convictions where the appellant is considered to be factually guilty but there has been a procedural irregularity.[40] The Government recently proposed changes to the Court of Appeal's powers in the Criminal Justice and Immigration Bill whereby it would lose the power to quash convictions where the Court considered the appellant to be factually guilty. This would have curtailed the definition of a miscarriage of justice or a wrongful conviction to one of factual innocence only, and restricted the Court's supervisory role. This proposal was dropped however, in order to expedite the legislation.

As the above shows, whilst factual innocence is the overriding consideration for Innocence Projects, it is not for the CCRC who, operating under a wider definition of wrongful conviction, refer cases under both interpretations of unsafe.[41] In order to examine this in more detail it is necessary to explore the different approaches to wrongful convictions and miscarriages of justice and how we define them.

4. *Defining a Wrongful Conviction or Miscarriage of Justice*

There have been a number of attempts to define a 'wrongful conviction' or a 'miscarriage of justice'. Whilst Lord Bingham's definitions are useful for

[38] See <http://www.ccrc.gov.uk/canwe/canwe_27.htm> accessed 26 April 2008.

[39] Criminal Appeal Act 1968, s 2(1) as amended by Criminal Appeal Act 1995, s 1.

[40] For a discussion of the two interpretations of unsafe, see S Roberts, 'Unsafe Convictions: Defining and Compensating Miscarriages of Justice' (2003) 66 MLR 441–451.

[41] The current Chairman of the CCRC, Professor Graham Zellick, has stated that 'to deal only with people who are innocent - even if they could be identified - would not . . . . widen our role, but would greatly narrow it. What of the principle of legality, of due process and of the integrity of the criminal justice process? We think these things are rather important, as does the Court of Appeal'. The Guardian, 20 June 2005.

understanding these terms in a broad sense, there have been various arguments put forward which provide a more detailed analysis of what these terms may mean and the approaches to them.

Nobles and Schiff adopt a systems theory approach, utilizing the work of Niklas Luhmann and Gunter Teubner, namely autopoiesis:

> Autopoiesis is a social theory which makes sense of the circularity of legal authority – that it is law which decides what is to count as law. Autopoiesis tells us not to worry unduly about this, for it is a feature not only of law, but all autopoietic sub-systems of social communication. Education, politics, law, the economy – these entities exist not as things which one can touch or feel, but as circulating systems of communication.[42]

Nobles and Schiff argue that:

> The contribution of autopoietic systems theory to our analysis of criminal justice lies in its focus on the impossibility of making the same communications in different systems, and the lessons which this has for legal reforms based on what, in outward form only, is a common communication in the media, politics, and law: miscarriages of justice. There may be a minimum similarity or congruence in the meaning of miscarriage of justice which allows high profile criminal cases to be utilised within disparate discourses; but there is no one conception of a miscarriage of justice that consistently operates between the discourses of these different groups. And, even within the distinct groups, within their systems of communication, it is often difficult to formulate one coherent conception of miscarriage of justice.[43]

Applying autopoietic systems theory, an Innocence Project would be considered to be a 'production regime' or a 'linkage institution'. Innocence Projects have a number of different roles; they educate law students, they investigate the case of, and communicate with, the person who has applied to them, they campaign publicly for those wrongly convicted, they propose reforms and they send applications to the CCRC with the aim of securing a referral to the Court of Appeal. When Innocence Projects talk of miscarriages of justice to the media, politicians or the prisoner they are defining a miscarriage of justice in lay terms.[44] But, when Innocence Projects are educating law students on the appeals process or preparing and sending an application to the CCRC, they are defining miscarriages of justice in terms of a legal communication of what is legal or illegal in order to comply with the statutory tests of the CCRC and the Court of Appeal which represents a rather different set of underlying themes.

[42] G Teubner, R Nobles and D. Schiff, 'The Autonomy of Law: An Introduction to Legal Autopoiesis' in J Penner, D Schiff and R Nobles (eds), *Jurisprudence & Legal Theory* (Butterworths, London 2002) 900.

[43] R Nobles and D Schiff, *Understanding Miscarriages of Justice* (OUP, Oxford 2000) 1. For an application of autopoiesis to the Sally Clark case see R Nobles and D Schiff, 'A Story of Miscarriage: Law in the Media' (2004) 31 J Law Soc 221–244.

[44] In the theory, lay communication is general social communication. This kind of unsystematic communication reuses all kinds of system communication. The dominant form of system communication likely to be circulating as general social communication is that of the media, where factual innocence is the basis of their stories on miscarriages of justice, just as factual guilt is the basis of their stories post-conviction.

Whilst it is a common perception amongst those outside the legal arena that it is the role of the Court of Appeal to declare people innocent, this is not expected within its legally defined role.[45] Therefore, applying autopoietic theory, the media and political actors readily misread a quashed conviction as a declaration of innocence, and the Court of Appeal readily rejects a lay perception of factual innocence when deciding whether a conviction is unsafe. However, as the Innocence Project allows its actors to participate simultaneously in the communication of the media and politics and the legal communication of the law, their own communications involve, in autopoietic systems theory terms, an opportunity for structural coupling between media, politics and law which is perhaps greater than is possible within the CCRC or the Court of Appeal. This does not mean that there will be a common meaning as to what amounts to a miscarriage of justice, but what it does mean is that the Innocence Project can help in stabilizing the use of different meanings of miscarriages of justice by the law and the media, thereby achieving a structural coupling.

Within this theory, the CCRC might also be considered to be a 'production regime' or a 'linkage institution'. The CCRC generates both lay and legal notions of miscarriages of justice. When the CCRC talks to the media and issues press releases they use the media code of communication. But when they refer cases to the Court of Appeal they tend to use the legal code of communication. This means that, when dealing with the media and the Court, the CCRC is effectively talking in two different languages. The CCRC therefore also helps in stabilizing the meaning of miscarriages of justice between the law and the media.

In contrast to a systems theory approach, in defining a miscarriage of justice, Greer adopts a human rights approach. He accepts that the conviction of the factually innocent is one possible definition but suggests a number of other definitions. These are divided into two categories. The first category is 'the unjustified avoidance of conviction' which includes alleged defects in the substantive criminal law; alleged defects in criminal procedure; decisions not to charge or prosecute or unjustified acquittals (deliberate external influence with the trial process or inherent bias on the part of tribunals). The second category consists of 'unjustified convictions' which includes criminal conduct which should be lawful; plea, charge and sentence bargaining; convictions obtained in special anti-terrorist criminal justice processes; and convictions stemming from impropriety or mistaken convictions.[46]

Similarly to Greer, Walker argues that one possible definition of a 'miscarriage of justice' is one which reflects 'an individualistic rights

[45] In *R v A(D)*, Lord Bingham stated 'the Court is in no position to declare that the appellant is innocent . . . That is not the function of this court. Our function is to consider whether in the light of all the material before us this conviction is unsafe'. [CA, unreported, transcript 14 March 2000].

[46] S Greer, 'Miscarriages of Justice Reconsidered' (1994) 57 MLR 58–74, 74.

based approach'.[47] He suggests that a miscarriage occurs whenever suspects or defendants or convicts are treated by the State in breach of their rights, whether because of:

> first, deficient processes or, second, the laws which are applied to them or, third, because there is no factual justification for the applied treatment or punishment; fourth, whenever, suspects or defendants or convicts are treated adversely by the state to a disproportionate extent in comparison with the need to protect the rights of others; fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers or, sixth, by State law itself.[48]

Walker states that those who are wrongly convicted because they are factually innocent fall into the third category but that there should be a qualification to this which is that the system should be allowed some time to correct itself, whether through acquittal or the payment of damages, and so the notion of 'miscarriage' involves a completion of a process (a failure) and not simply a mistake.[49] Walker appears therefore to suggest that convictions quashed through the normal appeals process[50] should not necessarily be defined as miscarriages of justice. A conviction quashed at the first appeal could indeed be evidence that the criminal justice system does work as, although the defendant was initially wrongly convicted, the appeal process has righted this at the first opportunity. Using this argument, the term 'miscarriage of justice' would only be used to describe those cases that have been through the appeal process and have failed and are then reliant on the CCRC to send them back to the Court of Appeal. This view is also reflected in the statutory compensation scheme for miscarriages of justice which only pays compensation to those whose convictions have been quashed after the normal appeals process has failed.[51]

Naughton divides miscarriages of justice into the 'exceptional', the 'routine' and the 'mundane'. He states that criminal justice reform typically focuses on 'exceptional' cases which are those cases that the CCRC has referred back to the Court of Appeal. He defines 'routine' miscarriages of justice as those which are quashed by the Court of Appeal on the first appeal and 'mundane' miscarriages as those which are quashed by the Crown Court after appeal from the Magistrates Court on the first appeal. He argues that the consequences of focusing on the 'exceptional' cases are that the true scale of miscarriages of justice may be overlooked and an extensive range of harmful consequences

[47] C Walker, 'Miscarriages of Justice in Principle and Practice' in *C Walker and K Starmer*, (n 20) 17.
[48] Ibid 33.
[49] Ibid 35.
[50] A defendant has 28 days to apply for leave to appeal after conviction. A single judge will decide whether to give leave to appeal and the appeal is then heard by a panel of three judges. If the single judge refuses leave, the defendant can appeal that decision which goes before a panel of three. If the appeal against the refusal is successful the appeal will then be heard in full by three judges.
[51] See s 133(1) of the Criminal Justice Act 1988. For a discussion of the statutory compensation scheme, see *S Roberts* (n 40) and *R Nobles and D Schiff* (n 37).

(what he calls zemiological harms) that accompany 'routine' and 'mundane' miscarriages of justice may also be overlooked.[52] If we use Walker's argument, Naughton's 'routine' and 'mundane' appeals would not be classified as miscarriages of justice and this term would only apply to Naughton's 'exceptional' cases.

Naughton may well be right in his claim that not calling 'routine' and 'mundane' appeals miscarriages of justice or not including them in 'critical miscarriage discourse' means that the true scale of miscarriages may be overlooked and the harmful effects of those cases may also be overlooked. This may also prevent an in depth analysis of why these people were convicted wrongly in the first place. However, we would argue that the appeal process works effectively for those 'routine' and 'mundane' cases and it does not work effectively for those cases he terms 'exceptional'. Instead of focusing on the 'mundane' and 'routine' appeals, we would argue that 'critical miscarriage discourse' should focus on why the 'exceptional' appeals are exceptional and why they take so long to succeed on appeal—these usually being factual innocence cases. The reasons for that will now be explored.

5. *The Court of Appeal and Factual Innocence*

Criminal justice systems necessarily require many essential 'front-end' measures and procedural protections to ensure, as far as possible, the integrity of the system and that innocent people are not convicted. These protections aim to provide outcomes that are consistent with the truth of guilt or innocence while at the same time balancing the need for finality and the right of individuals not to have their privacy overly invaded. At the appellate level, there has also typically been a concentration on ensuring adherence to procedures and the correction of legal errors, rather than revisiting the substantive facts of the case which go to the issue of guilt or innocence. One criticism of this procedural and legal focus at the appellate level is, however, that the courts are thereby distancing themselves from considerations of factual innocence. This focus of the criminal justice system on procedure has arguably contributed to the current inadequacy of appellate measures for innocent applicants.

Although the English Court of Criminal Appeal was originally created in 1907[53] as a direct result of the exoneration of Adolf Beck, it has been suggested that it has never fulfilled the function intended for it as the Court has proved to be deficient in identifying and correcting the wrongful convictions of the innocent. The main problems associated with the Court have stemmed from its difficulties in deciding appeals on factual grounds, such as fresh evidence and

[52] M Naughton, *Rethinking Miscarriages of Justice* (Palgrave Macmillan, Hampshire 2007), ch 2.

[53] The Court of Criminal Appeal became the Court of Appeal (Criminal Division) in the Criminal Appeal Act 1966.

lurking doubt.[54] The Court of Appeal's reluctance to quash convictions based on these grounds is well documented.[55] Three main reasons have been suggested as to why this has occurred. First, too much deference has been shown to the jury verdict. Second, there has been undue reverence to the principle of finality and, third, a lack of resources has led to the fear that the floodgates will be open and there will be a deluge of applications to appeal. In common with other legal jurisdictions, this has meant that it is far easier to succeed on an appeal based on procedural irregularity in England and Wales than it is for an appeal based on actual innocence.[56] It was the conclusion of the RCCJ that:

> In its approach to the consideration of appeals against conviction, the Court of Appeal seems to us to have been too heavily influenced by the role of the jury in Crown Court trials. Ever since 1907, commentators have detected a reluctance . . . to consider whether a jury has reached a wrong decision. This impression is underlined by research conducted on our behalf. This shows that most appeals are allowed on the basis of errors at the trial, usually in the judge's summing up. We are all of the opinion that the Court of Appeal should be readier to overturn jury verdicts than it has shown to be in the past.[57]

The RCCJ made recommendations to amend the Court's powers with the hope of liberalizing its approach to factual appeals. The majority of these recommendations were enacted in the Criminal Appeal Act 1995 but recent research has shown that the amendments to the Court's powers have had little effect with the Court continuing to adopt a restrictive approach to appeals based on errors of fact, such as lurking doubt and fresh evidence appeals.[58]

The Court's restrictive approach has undoubtedly been influenced by too much deference to the verdict of the jury, undue reverence to the principle of finality and the fear of the floodgates opening, but the Court's review function undoubtedly inhibits it from expanding the grounds of appeal relating to fresh evidence and lurking doubt. The Court's review function stops it from delving too deeply into the merits of the case and explains why there are so few lurking doubt and fresh evidence cases and why so few are successful.[59] The lurking doubt ground tends to be argued on the first appeal but the fresh evidence

[54] The 'lurking doubt' ground of appeal was created by Lord Widgery in 1968 in *Cooper* and requires the Court to form its own subjective opinion about the correctness of the jury verdict, notwithstanding the fact that no criticism can be made of the trial, and there is no fresh evidence: *Cooper* 53 Cr App R 82. For a discussion on it see LH Leigh, 'Lurking Doubt and the Safety of Convictions' (2006) Crim LR 809–816.

[55] See R Pattenden, *English Criminal Appeals 1844 – 1994* (OUP, Oxford 1996), 77; R *Nobles and D Schiff*, (n 43) 83; *K Malleson*, (n 20) 163; Justice, *Miscarriages of Justice* (Justice, London 1989) para 4.21; M Knight, *Criminal Appeals* (Stevens and Sons, London 1970) 1; G Williams, *Proof of Guilt* (3rd edn Stevens and Sons, London 1963) 330; A Samuels, 'Appeals Against Conviction: Reform' (1984) Crim LR 337–346; JR Spencer, 'Criminal Law and Criminal Appeals: The Tail That Wags The Dog' (1982) Crim LR 260–282.

[56] See K Malleson, Review of the Appeal Process, RCCJ Research Study No 17 (HMSO, London 1993).

[57] *RCCJ*, (n 22), ch 10, para 3.

[58] See S Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: Remedying Wrongful Convictions in the Court of Appeal' (2004) 1 JUSTICE J 86–94.

[59] See ibid where this argument was previously made.

ground tends to be argued via a referral from the CCRC as these are the cases that will be deemed 'exceptional', using Naughton's definition. Therefore, this is the ground on which Innocence Projects can have the most impact in sending cases to the CCRC for referral as such appellants are essentially arguing that they are factually innocent.

One of the most confusing aspects of the appellate process in England and Wales lies in trying to determine exactly what role actual innocence plays. Although a declaration of innocence is not allowed within the Court's legally defined role, there are various cases in which the Court has stated either expressly or impliedly that it thinks that the appellant is actually innocent.[60] Recently in *R (on the application of Mullen) v Secretary of State for the Home Department*, Lord Steyn summed up the role actual innocence plays in the appellate process:

> Sometimes compelling new evidence, eg a DNA sample, a forensic test result, fingerprints, a subsequent confession by a third party who was found in possession of the murder weapon, and so forth, may lead to the quashing of a conviction. The circumstances may justify the conclusion beyond reasonable doubt that the defendant had been innocent. Sometimes the Court of Appeal makes it clear and sometimes it can be inferred from the circumstances.[61]

But, whilst the judges in the Court of Appeal may conclude that the appellant is actually innocent in the course of explaining why the conviction is unsafe, as the above shows, appellants are often forced to look for irregularities because they know that, without compelling new evidence of innocence, an irregularity will give them a much higher chance of success than an argument based on innocence. This explains why more appeals are brought on the basis of irregularities and why more convictions are quashed on that basis but this also succeeds in reinforcing the importance of procedural irregularities and downplays arguments of actual innocence on appeal.

One of the difficulties with focusing on actual innocence when investigating claims of wrongful conviction and more generally within the criminal justice system is its invisibility. As Nobles and Schiff state, '... innocence is not something that exists, out there, to be touched, felt, or measured, any more than guilt'.[62] As such, to demand proof of actual innocence as a threshold for appellants to succeed in the Court of Appeal would raise the bar to a rarely possible and inappropriately high level. Similarly, such criteria or threshold would inhibit the investigation and referral of cases by the CCRC as actual

[60] In *R v Fell*, [2001] EWCA Crim 696 at [117] Waller LJ stated '.... since our reading of the interviews and the evidence we have heard leads us to the conclusion that the confession was a false one, that can only mean that we believe that he was innocent of these terrible murders, and he should be entitled to have us say so.' In *R v Fergus*, The Times, 22 June 1993 Steyn LJ stated 'Ivan Fergus may leave this court knowing that not only his conviction was unsafe and unsatisfactory, but that it is our judgment that the case against him was a wholly false one and he is entirely innocent.' See also *R v C (Martin)* [2003] EWCA Crim 1246 and *R v Roberts* [1998] EWCA Crim 998.

[61] [2005] 1 AC 1 at [55].

[62] *R Nobles and D Schiff*, (n 37) 91.

innocence is often invisible—particularly at the initial stages of review. As such, while procedural and due process issues are vital at the front end of the criminal justice system, a continued focus on correcting procedural and legal errors is also critically important to the correction of miscarriages of justice as these errors (for example when noting an incorrect direction given by a Judge or a breach of police procedure when interviewing a client) are often visible on the face of documents and materials reviewed as part of a wrongful conviction claim. While Innocence Projects focus on actual innocence claims, they in no way seek to downgrade the absolute and vital importance of procedural and legal arguments on appeal and do not call for an appellate test based solely on innocence.[63] Such a test would be unworkable in practice and it is essential that the appellate court uphold the integrity of the trial process and protect the right of an appellant to a fair trial conducted according to law, regardless of whether the appellant is innocent or guilty.

It is within this context that it needs to be recognized that applications relying purely on a claim of actual innocence will often not have a legal or procedural error to bring it to the attention of reviewers or, if they did, those arguments would usually have been made and failed at the first appeal. As such, there may be little on which to progress a case if there are no legal or procedural arguments, even with a factually innocent but convicted person. The difficulty then arises that the defendant will have to locate fresh evidence in order to succeed on appeal.

In the same way that actual innocence is downplayed through the emphasis on procedure rather than substance in the criminal appellate system, so too is the concept of 'actual innocence' irrelevant to the considerations of the CCRC. This body operates in an overall context which is concerned with the safety of convictions and in this sense is a continuation of the criminal appellate process and as such is party to the legal thinking and the constraints that typically exist in our criminal justice system.

A valid question is whether it is appropriate for a statutory body such as the CCRC also to be concerned with actual innocence. Having said this, it is again emphasized that it is in no way suggested that a body such as the CCRC should restrict its ambit to actual innocence, as such a threshold would be almost impossible to satisfy and it is not what is required within the criminal justice system for redress. Further, their expanded definition of wrongful conviction would undoubtedly secure relief for some of those who are innocent and convicted but do not have new evidence of factual innocence to support their claims. As such, this article does not suggest that the CCRC's ambit is inappropriate nor does it wish it to be constrained in any fashion through

[63] Contrary to the views of Quirk who seems to suggest that those who run Innocence Projects are arguing that the Court of Appeal's test should be changed to one that includes innocence, without providing any evidence for this. See H Quirk, 'Identifying Miscarriages of Justice: Why Innocence Is Not The Answer' (2007) 70 MLR 759–777.

insistence on actual innocence. It does however highlight that, by making actual innocence irrelevant, the CCRC's emphasis remains with procedure and thus it conforms to the typical distancing from innocence of the legal system that it supplements. As such, actual innocence cases may not receive the focus that they deserve and that justice demands. It also significantly distinguishes the work of the CCRC from the work of Innocence Projects and other like-minded organizations to whom actual innocence is the prime concern.

Rather than advocate a change to the CCRC's jurisdiction which would be inappropriate and unworkable, it is hoped that Innocence Projects, with their different emphasis, will be able to persuade the CCRC to refer more fresh evidence cases to the Court of Appeal as these are the cases that Innocence Projects will be investigating. This should, hopefully, result in more fresh evidence (and factual innocence) appeals going to the Court of Appeal and more being successful. The ways in which the CCRC and Innocence Projects can work together will now be explored.

6. *The CCRC and Innocence Projects: Working with Differences*

The question for Innocence Projects in England and Wales is going to be how to persuade the CCRC to take on a case which is based solely on actual innocence. However, this potential problem is one reason why these groups are compatible. Innocence Projects are looking for fresh evidence of actual innocence and as Lord Steyn illustrated in *R (on the application of Mullen) v Secretary of State for the Home Department*,[64] it is possible to find new evidence which either expressly or impliedly suggests innocence. As a result of the statutory referral test that the CCRC has been given, the majority of referrals from the CCRC are based on new evidence or argument and, whilst they refer cases on the basis that there is a real possibility that the conviction is unsafe and not that the applicant is innocent, one of the interpretations of unsafe is that a factually innocent person has been wrongly convicted. Therefore, it should be possible for an Innocence Project to locate new evidence which either expressly or impliedly suggests innocence which the CCRC can refer on the basis that the conviction is unsafe. In such a way, the work of Innocence Projects in England and Wales can be compatible with the CCRC.

Quirk argues that 'the establishment of "freelance" projects to do the work of the CCRC is ill-considered and potentially very dangerous, particularly in the current climate of restrictions of legal aid'.[65] She further argues that the overlap between Innocence Projects and the CCRC 'has not been addressed sufficiently carefully as attempting to review cases alongside or before the CCRC risks contaminating evidence, and delaying or compromising the appeal process'.[66]

[64] [2005] 1 AC 1.
[65] *H Quirk*, (n 63) 772.
[66] Ibid 762.

This seems to suggest that it is only the CCRC who are capable of investigating cases and, whilst it is not suggested that the two are analogous in terms of expertise and funding, Quirk fails to recognize the important role that Innocence Projects can have in England and Wales.

One of the issues that initially caused difficulties for the CCRC was that only one out of ten applicants was legally represented. This figure has increased and in the annual report for 2004–2005, it states that 62% of applicants are now legally represented. The problems caused by applicants not being legally represented was discussed by the Home Affairs Committee in their first report on the work of the CCRC. They stated:

> We recognise that problems are caused to the CCRC by the fact that so few applicants are legally represented. This means that the CCRC is often required to undertake additional work either to comprehend and analyse the nature of the applicant's true complaint, or to assess whether there are additional grounds for legitimate complaint which have been missed.[67]

The benefits of legal representation were also discussed by one of the former Commissioners, David Kyle, when he gave evidence to the Home Affairs Committee in January 2004. He stated:

> It is certainly the case that if an applicant is well represented, in the sense that he is represented by a person who is acting on his or her behalf and is able to identify relevant issues and present them in a developed way, that is of great assistance to us, simply because it will speed up the process of review which we undertake. To that extent, representation which is provided at that sort of level is beneficial to the applicant because it is likely to result in a speedier review and decision by the Commission.[68]

But, for those who are in prison, applying to the CCRC can be a difficult process. Atkins and Quinn have argued that:

> Deciding to apply to the CCRC may be where the innocent prisoner's problems begin. Collating evidence and constructing arguments to place before it is a complicated task to be fitted in with the competing elements of the prison regime.[69]

Two prisoners who applied to the CCRC summed up their situation as follows:

> Applicants will need to search for a solicitor willing to assist them for very little legal aid and they may need to send out as many as 200 to 300 letters during this process. The Prison Service takes a dim view of this but until legal aid is made available,

[67] See Home Affairs Committee, The Work of the Criminal Cases Review Commission HC 106 (1998–1999) at para 43 <http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmhaff/106/10605.htm#a11> accessed 2 May 2008.

[68] Home Affairs Committee, The Work of the Criminal Cases Review Commission HC 289 (2003–2004) at question 51 <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmhaff/289/4012704.htm> accessed 26 April 2007.

[69] J Atkins and P Quinn, 'Public Funding for CCRC Applications' (2000) 150 NLJ 798–799, 798.

> in full, to CCRC applicants, they have no choice but to seek a charitable solicitor by letter writing.[70]

The lack of legal aid funding for appeals makes it difficult for lawyers to take on miscarriage of justice cases, and consequently those who are wrongly convicted find it very difficult to find lawyers to take their case. Legal aid work done in connection with an appeal or a CCRC application is paid at a flat hourly rate, which in London is £49.70 per hour. This amount is paid for all work necessary to determine whether there is any merit in an appeal or CCRC application, to undertake any investigations, to obtain counsel's opinion and to apply for leave to the Court of Appeal, or for a reference by the CCRC. The amount of advice and assistance legal aid is limited to £300 for an appeal and £500 for work done putting together an application to the CCRC. After that, the solicitor must apply to the Legal Services Commission for an extension if more work is necessary, or when seeking to instruct an expert witness or obtain counsel's opinion.[71] Ewen Smith, a solicitor with 30 years experience has said of appellate work that:

> It is so badly paid and with very low rates generally for crime, senior practitioners cannot spend time doing this work, not least travelling to see clients. The need to keep one's head above water drives senior solicitors to do work that pays, as opposed to work that does not, and unfortunately miscarriage work is regarded by many as at the bottom of the pile, purely because of finances.[72]

This view is shared by Jane Hickman who is a member of the Criminal Appeal Lawyers Association which was set up in 2000 with the aim of encouraging the highest standards of practice among lawyers undertaking appeal work, to improve the law relating to appeals and represent the interests of its members. Hickman says that her law firm deals with two per cent of requests for help with the appellate process and that between 100 and 200 potential clients are turned away each year. She states:

> Many of our members receive applications daily from people in prison who want help getting into and through the CCRC and the Court of Appeal. It is hard to gauge the number involved but the impression is of more than a thousand – perhaps several thousand – prisoners who want help. For some this represents a final attempt to escape the consequences of conviction for a serious criminal offence. These people are wasting scarce funds. However, there is an objective need for them to get proper advice as early as possible so they can settle down and do their sentences. Others really will have suffered the nightmare scenario that has featured in so many great films. They have been wrongly accused, convicted and imprisoned for something they

[70] D Golding and S May, 'An "Inside" View of the CCRC' (2000) 127 Prison S J 47–50, 47.
[71] See J Arkinstall, 'Unappealing Work: The Practical Difficulties Facing Solicitors Engaged In Criminal Appeal Cases' (2004) 1 JUSTICE J 95–102.
[72] Ibid 101.

> have not done. The reality is that the vast majority will never receive skilled legal advice, whether guilty or innocent. There are simply not enough lawyers to do this work.[73]

The difficulties solicitors face when taking on miscarriage of justice cases were further explained by Gareth Pierce, when giving evidence to the Home Affairs Committee. She stated:

> The person wrongly imprisoned is not going to have automatic access to the CCRC's energies. If he or she cannot articulate or explain why there is a wrongful conviction—and there is still obviously a real, huge difficulty for the inarticulate, the vulnerable or the extremely passive individual who will not proactively raise his position—there have been many defendants in the most notorious miscarriages of justice who have never themselves made that jump to have their case heard. To get to the CCRC, sometimes there must be someone else. There perhaps should not be, but there inevitably is, a requirement for someone else, an organisation or a journalist, to be prompting the CCRC's interest in the first place.[74]

If Jane Hickman is correct in her claim that there are possibly several thousand prisoners requiring help to get into and through the CCRC, then Innocence Projects have an important role to play in investigating and preparing cases for the CCRC to take on which are not currently being investigated because of the difficulties of finding a 'charitable solicitor' to take the case.

As David Kyle has acknowledged, applications to the CCRC which have had lawyer involvement are subject to a much speedier review which, to those who are imprisoned, is clearly beneficial. Innocence Projects do not work in isolation from the legal profession as the usual set up is for a law firm to advise the students on the case work on a pro bono basis.[75] Whilst this does involve the law firm working for free, given that the students are doing the investigative work on the cases, this reduces the amount of time which the lawyer must devote to the case because his or her role becomes one of advisor only. If Jane Hickman is turning away between 100 and 200 potential clients a year, then arguably it would be far more beneficial for an innocent person wrongly convicted to have an Innocence Project assisting with his or her application, than no one at all.

[73] Ibid 96. This is also the view of Gareth Pierce who, amongst other high profile cases, was the solicitor for one of the Guildford Four, Gerald Conlon. In an affidavit to the House of Lords in the case of *R v Secretary of State for the Home Department ex p Simms and O'Brien*, she stated:

> 'There is no legal aid for investigations. On the rare occasions that the Green Form scheme has allowed for extensions, these amount to little more than several hours work . . . Any commitment to attempting to undo a wrongful conviction is a substantial one; as a solicitor, I am aware that each such commitment will involve me in enormous personal expenditure of time and money, as well as anxiety and responsibility above even the norm in defending cases.' [2000] 2 AC 115, 127.

[74] See (n 67) at question 8. See <http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmhaff/106/8121502.htm> accessed 26 April 2007.

[75] The University of Westminster Innocence Project is run in association with Tooks Chambers, the Chambers of Michael Mansfield QC.

Quirk also argues that the CCRC 'has overcome much of the criticism it faced in its early years about its remit, composition and resource shortages'[76] and that issues surrounding its long waiting list 'seem largely to have been brought under control'.[77] But, whilst even the CCRC's most ardent critics would acknowledge that it is a vast improvement on the previous machinery for investigating miscarriages of justice, and that it has made significant improvements over the last 10 years, it is not without its problems. Since the CCRC's inception it has been besieged by problems of funding, delays and backlogs. The First Report of the Home Affairs Select Committee in 1998–1999 reported that there was a two-year delay before cases were reviewed.[78] It appears that there are still major problems in this area. In giving evidence to the Home Affairs Committee in October 2006, the current Chairman, Graham Zellick, gave evidence that for the more complex cases there was a 21-month wait for those in custody and a 31-month wait for those not in custody before a case is allocated to a Case Review Manager. He suggested that on current and projected resources it would take 5 years to diminish or eliminate the backlog and 'I very much hope, and ultimately I am an optimist, that there will be some additional funding to allow us to erode those backlogs more rapidly because my colleagues and I regard those waiting periods as wholly unacceptable.'[79] The problems with funding have forced the Commission to cut the number of Commissioners from 16 to 11 in order to save money and it was stated by Zellick in the latest CCRC annual report that:

> It is only because of a number of economies (as well as the extraordinary efforts of our staff) that we have been able to manage our caseload as well as we have. Streamlining the senior management structure and having far fewer Commissioners has enabled us to save over half a million pounds a year. Had we not done this, the reductions in our budget would have inflicted severe damage on our caseworking capacity. We remain concerned at our level of resourcing.[80]

This appears directly to contradict Quirk's assertions that the CCRC has overcome its resource shortages and brought the waiting list under control. Innocence Projects could not and would not seek to usurp the role of the CCRC nor, as Quirk suggests, would they advocate that the UK should 'abdicate' such work to them, but they do have the opportunity to play a role in bringing cases to the CCRC's attention and in doing some

[76] *Quirk*, (n 63) 775

[77] Ibid.

[78] See (n 67) para 35. See generally, A James, N Taylor and C Walker, 'The Criminal Cases Review Commission: Economy, Effectiveness and Justice' (2000) Crim LR 140–153 and R Nobles and D Schiff, 'The Criminal Cases Review Commission: Reporting Success' (2001) 64 MLR 280–299.

[79] Home Affairs Committee, The Work of the Criminal Cases Review Commission HC 1703 (2005–2006) at question 14 <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/1635/6101001.htm> accessed 9 March 2008.

[80] CCRC Annual Report 2006–2007 <http://www.ccrc.gov.uk/publications/publications_get.asp> accessed 3 November 2007.

preliminary investigation. Innocence Projects also have a role to play in criminal justice reform generally and in legal education.

7. *The Benefits of Innocence Projects for Legal Education and Criminal Justice Reform*

This article has so far focused on the supporting role of Innocence Projects for factual innocence applicants to the CCRC. However, experience from the United States shows that there are two further benefits of university-based Innocence Project activity: for legal education and for criminal justice reform. These aspects will now be explored.

In recent years, there has been concern about legal education in the United States. In 1989, the American Bar Association and the Association of American Law Schools put together a group of people to review legal education. The subsequent MacCrate Report in 1992 recommended that law schools should provide a variety of legal programmes which offered law students hands-on experience.[81]

The MacCrate Report coincided with the creation of the first Innocence Project at Cardozo Law School. Innocence Projects in the United States take different forms. Some are affiliated with universities and some are set up in the local community as, for example, part of a lawyer's office. For those affiliated with universities, they may be in the law school or in other departments such as criminology or journalism. If they are part of the law school they are either part of a wider module about the causes and remedies of wrongful conviction using lectures or seminars, or they provide clinical legal education in a pro bono clinic.

Innocence Projects teach law students a variety of skills. For example, Stiglitz et al have identified the skills they feel their students are learning at the California Western School of Law Innocence Project. These include writing skills, how to handle legal questions 'on the run', figuring out what the legal issues are and how those issues may change over time, finding and proving facts, learning to organize and time management skills, and learning about the kinds of people who will play roles in their professional lives such as clients, relatives, bureaucrats, judges, etc.[82] Similarly, Medwed has identified the skills he feels his students are being taught at the Brooklyn Law School Innocence Project. These include fact investigation, interviewing and counselling as well as legal analysis, research and writing, organization and time management. He further states that 'students may also confront and be asked to solve ethical

[81] See Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992 American Bar Association Section of Legal Education and Admissions to the Bar at xi (the MacCrate Report) <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> accessed 19 March 2008.

[82] See *J Stiglitz, J Brooks and T Shulman*, (n 8) 430–431.

quandries' which are 'an integral part of teaching professional responsibility'. He states that '. . . . work in this field offers training in the art of creative problem solving ("thinking outside the box") because these cases often lack a clear trajectory'.[83] Finally, Findley has identified the skills his students are learning at the University of Wisconsin Law School Innocence Project. These include:

> good opportunities for learning about the importance of facts, about the importance of being skeptical, vigilant, and thorough, about ethics, values, and judgment, and about the criminal justice system itself from obtaining a critical perspective on legal doctrine to a critical understanding of "the law in action," that is, how the criminal justice system actually works, and how it might be made to work effectively and fairly.[84]

The requirement for a more ethical approach to legal education in the United States has also been echoed in England and Wales. Similarly to the United States, in 1992, the Lord Chancellor's Advisory Committee on Legal Education and Conduct began a major review of legal education in England and Wales. The first report of the Committee stated:

> . . . . no amount of external regulation of professional practice will serve as an adequate substitute for the personal and professional values and standards that lawyers should internalise from the earliest stages of their education and training.[85]

The report went on to say that, amongst other skills, there needed to be a developing commitment to the legal values of 'justice, fairness and high ethical standards'.[86]

There is currently a need to develop new and innovative ways of law teaching in England and Wales to deal with the rising number of students going to university, the problems of assessment and plagiarism and the rise of websites where students can purchase their 'coursework', and also the changing attitudes of law students. As Thomas states 'students will increasingly see themselves and behave as purchasers of a product: a marketable degree. They will become more discerning and demanding thereby ensuring that the issue of teaching quality becomes more important as the "customers" become more vocal and powerful'.[87] This will require law departments to be seen to be offering a wide range of educational opportunities which do not just focus on traditional lectures and classes in order to attract students and also improve legal education.

[83] *D Medwed*, (n 8) 1135.
[84] *K Findley*, (n 8) 241.
[85] ACLEC, First Report on Legal Education and Training (1996) at para 1.19 <http://www.ukcle.ac.uk/resources/aclec/aclec.pdf> accessed 19 March 2008.
[86] Ibid para 2.4.
[87] P Thomas, 'Learning About Law Lecturing' (2000) Teaching and Learning Manual, National Centre for Legal Education at 2 <http://www.ukcle.ac.uk/resources/thomas.pdf> accessed 19 March 2008.

Clinical legal education has provided different methods of study. Whilst there are variances on what this is, it is essentially allowing students to work on 'live-client' cases.[88] It is important to note that, whilst Innocence Projects may be a new development for legal education, their development is part of a long tradition of clinical legal education in both the United States[89] and England and Wales.[90] The benefits of law clinics have been described by Giddings in the following terms: 'clinics are promoted to students as the best environment in which to develop "hands on" legal skills while being showcased to the general community as examples of university commitment to community service and access to justice'.[91]

There have been criticisms that, whilst law clinics are seen to be useful for teaching students legal skills, they have not been so useful in teaching students what to do with those skills once they have been acquired. As Webb states:

> the more technocratic (often vocational, competency-based) skills training may enable students to "do" but it does not necessarily encourage them to question the uses to which those skills are put. This constitutes a major failure to acknowledge that thinking ethically about actions and their consequences is itself an essential part of skilled problem-solving.[92]

Similarly, Boon has stated that 'students need not to just "do" but to develop a perspective which enables them to ask why, given particular circumstances, lawyers should "do" in a particular way. This must involve a scholarly enquiry into action, motivation, and ethics, laying the foundation of an ability to reflect, not only on performance but on the underlying rationale for action'.[93]

It would appear from the experience of those that run Innocence Projects in the United States that students are not only acquiring legal skills, they are also acquiring the ability to think ethically about what they are doing.[94] The study of wrongful convictions allows students to gain knowledge of the interaction between criminal law, criminal procedure and evidence law, criminology, penology, forensic science and psychology, the media and Government policy. Students are taught about all aspects of the criminal justice system from both

[88] For the different methods of providing clinical legal education see <http://www.ukcle.ac.uk/resources/trns/clinic/index.html> accessed 19 March 2008.

[89] For a history of the clinical legal education movement in the United States see *Stiglitz et al*, (n 8) 417–418. See also N Fell, 'Development of a Criminal Law Clinic: A Blended Approach' (1996) 44 Clevel State Law Rev 275–301.

[90] For a history of the clinical legal education movement in England and Wales, see A Boon, 'History is Past Politics: A Critique of the Legal Skills Movement in England and Wales' (1998) 25 J Law Soc 151–169, 158.

[91] J Giddings, 'Clinical Legal Education in Australia: A Historical Perspective' (2003) I J Clin Legal Educ 7–28, 21.

[92] J Webb, 'Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education' (1998) 25 J Law Soc 134–150, 138.

[93] A Boon, 'Skills in the Initial Stage of Legal Education: Theory and Practice for Transformation' in J Webb and C Maughan (eds), *Teaching Lawyers Skills* (Butterworths, London 1996) 129.

[94] This is confirmed by our own personal experience of running Innocence Projects.

an innocent and guilty perspective and are able to understand the limitations of the law within a framework of political agendas.[95] As Roach states:

> The study of wrongful conviction is an excellent way to make students reflect on issues of ethics and competence, the importance of fact-finding in the criminal process, the effects of discrimination on the criminal process, the way other countries confront the dangers of wrongful convictions, and finally, on the fallibility of the criminal process.[96]

This shows that Innocence Projects can provide an important contribution to legal education in England and Wales. They are part of a long tradition of law clinics but law clinics have been limited in their availability and in their focus on civil cases. They have also been focused on teaching skills for potential lawyers so have been more useful to the Legal Practice Course than an undergraduate degree. Innocence Projects can be set up as part of an undergraduate degree programme and can have a wider focus than just 'lawyering skills' to take account of the differing career paths of undergraduate students who may not all want to become lawyers. For those who do want to become lawyers, they are being taught to think critically and ethically and also about the causes of wrongful conviction which is something they are not being taught by traditional teaching methods. As McCartney has stated:

> there are clear resource issues for implementing an Innocence Project, but if law educationalists are to respond to the many demands being made of them, and take seriously the responsibility of producing proficient, and ethical lawyers with a lifelong commitment to pro bono work, and the pursuit of justice, then such innovation must be embraced. [97]

As well as being beneficial for legal education, Innocence Projects can also contribute to criminal justice reform. Innocence Projects in England and Wales are part of a long tradition of groups that have campaigned for the release of those wrongly convicted, and for reform. The Court of Criminal Appeal was created in 1907 as a result of public pressure over the cases of Adolf Beck and George Edalji and the history of criminal appeals reveals a recurring theme of crisis and reform with reform generally occurring at times of great public pressure. There was generally a need for publicity and campaigns before the Home Secretary would refer cases to the Court of Appeal and the CCRC itself was created after the Home Secretary's referral power was discredited by the huge campaigns which resulted in the quashing of the convictions of the Guildford Four and the Birmingham Six and the resulting RCCJ. Therefore, campaign groups have always had an important role to play in criminal appeal

[95] Contrary to the views of Quirk who seems to suggest they are not though she provides no evidence that they are not. See *Quirk*, (n 63) 775.
[96] *K Roach*, (n 8) 351.
[97] *C McCartney*, (n 8). McCartney is Director of the University of Leeds Innocence Project.

reform, largely due to the Court of Appeal's reluctance to quash the convictions of the factually innocent.[98]

When the CCRC was created there was a general feeling that less campaigning would now be required, as organizations such as JUSTICE, who had been so critical previously, were no longer investigating miscarriages of justice. The last 10 years or so has also seen miscarriages of justice disappear from the media agenda, and it has become more difficult to generate publicity about particular cases.

It was one of the hopes of those who campaigned for the CCRC that it would be able to contribute to the debate on how and why people are wrongly convicted, and propose reforms to the criminal justice system. The reasons for the CCRC's lack of contribution to these areas was recently explained by the Chairman, Graham Zellick, in evidence given to the Home Affairs Select Committee. He stated:

> We have no funds available for supporting research. We did make inquiries. We approached the Home Office Research and Statistics Unit but they made it plain they did not have the funds to support work of this kind. We are also quite keen that it is work that should be carried out independently of us.[99]

Zellick stated that he was not convinced that there was much to glean from the approximately 8000 cases that the CCRC has closed because, given that the applications were rejected, 'they did not disclose a problem of a particular conviction' and also 'they are all now very dated'.[100] He went on to say there had been 'very considerable strides in criminal justice, criminal procedure and criminal law over recent years' and 'the likely problems of which they have complained or which they have exemplified have long since been attended to'.[101] He stated that:

> what we will continue to do is draw on our experience, particularly our recent and contemporary experience, in commenting on problems in the criminal justice system or proposed changes like the proposed revision of the test of safety in the Court of Appeal, Law Commission proposals and so on. We do have considerable experience and we do therefore take these opportunities to comment whenever we can on the basis of our knowledge and experience.[102]

Zellick stated that two independent researchers have been granted permission to do some research at the CCRC with one working on a study that includes legal representation. This is to be welcomed and the CCRC's contributions to

[98] There are numerous campaign groups who investigate cases of alleged wrongful conviction such as Innocent, Miscarriages of Justice Organisation, South Wales Liberty, Merseyside Against Injustice, Yorkshire and Humberside Against Injustice, Convicted But Innocent. See <http://www.innocent.org.uk/> accessed 3 November 2007.

[99] See (n 79), question 79.

[100] Ibid.

[101] Ibid.

[102] Ibid.

criminal justice reform are also to be welcomed. But it is difficult to believe that approximately 8000 cases would not provide anything useful, if only to confirm, whether the law has changed, that we should not revert back to what we had. If the lack of research is due to a lack of resources then it is hoped that more researchers will be granted permission to review the files on an independent basis.

As experience from the United States has shown, Innocence Projects have been able to contribute to reform in that country by identifying the causes of wrongful convictions and lobbying for change. As Innocence Projects are mainly situated in law schools, academics will have access to their own files and will have the opportunity to research into how and why people are wrongly convicted. This research would arguably be different from research that could be conducted at the CCRC, because of the differing focus of the Innocence Project activity compared to that of the CCRC. Innocence Projects in the United States have had a significant role in campaigning for law reform and it may be that the CCRC is reluctant to get involved in doing this because of its political sensitivities. Therefore, Innocence Projects will have much to contribute to campaigning for reform.

8. *Conclusion*

The CCRC with its extensive investigative powers, ambit and resources has been welcomed as a much needed addition to the traditional appeal avenues in England and Wales. The CCRC's impact has been significant with their referrals to the Court of Appeal resulting in over 200 quashed convictions. It is important not to confuse the role of the CCRC with what Innocence Projects and similarly-minded groups seek to achieve. While overlapping to some extent, in that both work towards the correction of wrongful convictions, there are differences between their philosophical foundations. As such, consideration should be given to the roles each organization might play within the criminal justice system and how they might work together.

The CCRC's significant funding and investigative powers enable it to address a very large number of wrongful conviction cases. Innocence Projects, with their typically hard-fought-for funding and limited resources, will never be able to match this ability. No real comparison can be made between the potential impact of these bodies in respect of their ability to investigate claims of wrongful conviction. The CCRC's wider ambit allows it to address a broad range of miscarriages of justice, in essence supporting the traditional concepts of wrongful conviction that apply in the criminal justice system that it supplements. At the same time, many claims of factual innocence will not contain procedural or legal errors or other potential new evidence of innocence on the face of the documents upon which to found an appeal. Experience of the United States Innocence Projects has demonstrated that a dedication to

factual innocence, leading to extended and extensive investigative efforts, can lead to the uncovering of important evidence and ultimately result in a volume of exonerations, despite the defendant having already failed in a number of earlier appeals in their courts of criminal justice.

With factual innocence being irrelevant at the CCRC, there may well be a gap in which Innocence Projects, to whom factual innocence and the plight of innocent but convicted people is the primary concern, might assist. It is this gap that is one of the reasons we are seeing the emergence of Innocence Projects in England and Wales.

Noting this difference in ambit and emphasis between Innocence Projects and the CCRC, this article is not intended to represent criticism or praise of either group. Rather it aims to clarify one reason why Innocence Projects are being created despite the existence of the CCRC in England and Wales. It hopes to emphasize that it is exactly this difference in ambit and emphases that suggests the compatibility of such groups in working together for the plight of innocent but convicted people. While Innocence Projects cannot match the resources or investigative powers of the CCRC, they can still play an important role, particularly in the investigation of alleged crimes and in providing assistance with preparation of cases prior to applications being made to the CCRC.

Additionally, Innocence Project work and research can highlight flaws within the legal system and promote a greater understanding of causes of wrongful convictions—something that students are currently not being taught. In this way, the role of Innocence Projects expands beyond the case work to wider reform and educational aspects, including contributing to the international debate on how and why innocent people are convicted.

It is hoped that the future will see Innocence Projects and the CCRC working together in order to achieve as far as possible, justice for those who are innocent but have been convicted.