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The Correction of Wrongful Convictions: A Comparative Perspective

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THE CORRECTION OF WRONGFUL CONVICTIONS: A COMPARATIVE PERSPECTIVE

LISSA GRIFFIN*

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INTRODUCTION

Recent events make it clear that sometimes an innocent person is convicted.¹ All criminal justice systems, to some extent, are designed to avoid this result.² These systems, however, differ significantly in

1. This problem exists both in England and the United States. For the United States, see, e.g., Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1; NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 2 (Sept. 1999) (noting that more than sixty convictions in the United States have been vacated on the basis of DNA results); JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE (2000) (providing anecdotal accounts and legal and social science scholarship of wrongful convictions in capital and other cases); *The Death Penalty in 1999: Year End Report*, DEATH PENALTY INFORMATION CENTER 1 (2000) (noting that eighty-four inmates on death row exonerated since 1973); Alan Barlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1999, at 68 ("surely the number of innocent people discovered and freed from prison is only a small fraction of those still incarcerated."). See also, e.g., JAMES LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM; ERROR RATES IN CAPITAL CASES, 1973-1995, (2000) (documenting overall error rate in capital punishment system as sixty-eight percent, that eighty-two percent of all capital judgments reversed on appeal were replaced on retrial with a sentence less than death or no sentence at all, and that seven percent of the reversals resulted in acquittals); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 35 (claiming that more than 350 people in this century have been erroneously convicted of crimes punishable by death; 139 of those were sentenced to death and twenty-three actually were executed).

For England, see, e.g., ROSEMARY PATTENDEN, ENGLISH CRIMINAL APPEALS 1844-1994 (noting that "five percent of prisoners serving more than five years protest their innocence and prison staff think that half of them [at least 400] might have been wrongfully convicted"); Mohammed Ilyas, *Academic's Case for Innocent Inmates*, BIRMINGHAM POST, Apr. 11, 1998, at 4 (1300 innocent prisoners); Duncan Campbell, *Guilty Until Proved Innocent*, GUARDIAN (London), Aug. 19, 1998, at 17 (reporting that Paddy Nicholls, a former wrongfully convicted prisoner estimates that there could be "as many as 2000 people wrongly serving prison sentences" in British prisons, but also suggests "it is impossible to give even an approximate figure.").

2. Throughout this Article, the terms "innocent" and "wrongful conviction" will be used. "Innocent" is intended to refer to someone who is neither factually nor legally responsible for a charged crime. That is, the operative facts probative of the historical criminal event are different from those upon which the conviction relies ("factual inaccuracy") and the facts, including any newly discovered facts, do not establish guilt beyond a reasonable doubt ("legal inaccuracy"). Accordingly, the term "wrongful conviction" is intended to refer to a conviction that is both

several ways: the value placed on avoiding wrongful convictions; the value placed on finality; the emphasis on preventing and correcting factual as opposed to legal error; and the nature and availability of a mechanism for correcting a wrong result.

Outwardly, the English and U.S. criminal justice systems appear quite similar.³ Both are adversarial systems that depend on law enforcement agencies for the investigation of crime, both provide essentially the same basic protections for the accused, and both invoke basically the same processes for adjudicating criminal accusations.

Despite these visible similarities, however, the two justice systems rest on quite dissimilar foundations. Until recently England did not have a formal code of fundamental rights.⁴ The process adopted for the resolution of criminal charges represented a considered political balance between the competing interests in controlling crime and protecting the innocent.⁵ Thus, none of the protections afforded the accused are recognized as fundamental. All processes for resolving criminal charges are necessarily subject to change by Parliament, which makes changes based on a perceived need to adjust the balance between crime control and due process.⁶

factually and legally inaccurate.

3. "England" refers to England and Wales, which share the same criminal justice system. The "United States" refers to the federal criminal justice system. I chose to compare these two adversarial systems rather than comparing the U.S. system to a non-adversarial system because of the interesting disconnect between the similarity of their investigation and adjudication processes and the striking dissimilarity in their approaches to correcting wrongful convictions.

4. The Human Rights Act (1998) became effective in England on October 2, 2000, and adopted the European Code of Human Rights as domestic law. Human Rights Act 1998, ch. 42 (1998). Thus, for the first time in its history, England has a written code of fundamental rights. How this will affect its criminal process has been the subject of extensive commentary. *See, e.g.*, DEBORAH CHENEY, LISA DICKSON, JOHN FITZPATRICK & STEVE UGLOW, *CRIMINAL JUSTICE AND THE HUMAN RIGHTS ACT 1998* (1999); Peter Lewis, *The Human Rights Act 1998: Shifting the Burden*, CRIM. L.R. 667 (2000). However, imposing a set of rights on a long-standing, preexisting system, as in England, is likely to have less of a pervasive effect than originally articulating a set of fundamental rights as in the United States, and then creating and maintaining a system on that basis.

5. U.S. readers will recognize these competing factors as Herbert Packer's two models: crime control and due process. *See* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 153 (1968).

6. Consider, for example, the ever-recurring debate between the Labor and Conservative parties concerning which criminal charges should be triable before a

The U.S. system is, of course, quite different. The criminal process in the United States rests on the U.S. Constitution and the enumeration of specific fundamental rights contained in a supplementary Bill of Rights.⁷ A central tenet of the U.S. constitutional system is the affording of an accused with certain procedural protections deemed to be fundamental to liberty. Moreover, unlike Parliament, the U.S. Congress does not have unrestricted power to limit or modify fundamental Constitutional protections.

Despite these differences, wrongful convictions have arisen from similar sources in both the English and U.S. systems: one-sided police investigations that result in coerced or false confessions and unreliable identification evidence;⁸ suppression of exculpatory evidence;⁹ inadequate screening of the decision to charge; and inadequate adversarial performance by defense counsel.¹⁰ Moreover, in the United States, the relatively unfettered discretion of the U.S.

jury. See, e.g., Stewart Tendler, *Straw Aims to Curb Right to Trial by Jury*, THE TIMES, (London), May 19, 1999, at 6; *Jury's Out*, THE TIMES (London) May 20, 2000, at 23.

7. Indeed, the Bill of Rights prescribes the process itself, e.g., the right to an indictment by a grand jury and the right to a jury trial. See U.S. CONST. amend. V-VI. An additional fundamental protection is provided by the Due Process Clauses in the Fifth and Fourteenth Amendments of the Constitution. See U.S. CONST. amend. XIV § 1.

8. See DWYER, *supra* note 1, ch. 4-9; Bedau & Radelet, *supra* note 1, at 57 (noting that coerced or false confessions were responsible for erroneous convictions in forty-nine out of 350 miscarriages of justice in potentially capital cases); Ayre Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW HUM. BEHAV. 283, 289-292 (1988) (describing a study of more than 200 felony cases of wrongful convictions that found misidentification to be the single largest source of error, accounting for more than half of the cases that had one main cause).

9. See LIEBMAN, *supra* note 1, at 5 (explaining that prosecutorial suppression of evidence accounted for sixteen percent to nineteen percent of reversible errors); Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, at C1 (noting that 381 homicide cases reversed because prosecutors concealed evidence suggesting defendants' innocence or presented evidence known to be false).

10. LIEBMAN, *supra* note 1, at 5 (stating that "egregiously incompetent" defense counsel accounted for thirty-seven percent of state post-conviction reversals in capital cases); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994); Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, N.Y. TIMES, Feb. 5, 2000, at A1.

prosecutor combined with an extreme adversarial ethic results in prosecutorial abuses that have contributed to wrongful convictions.¹¹

The two systems also differ dramatically in both their willingness to recognize and the processes employed to correct wrongful convictions. The English system has extremely limited direct appellate review of a criminal conviction, and no avenue for collateral attack. However, the English system provides an independent body —the Criminal Cases Review Commission (“CCRC”)— with broad power both to investigate and refer miscarriages of justice for post-appellate review by the English court of appeal. That appellate court, in turn, has broad jurisdiction to hear new evidence and employs a relatively relaxed standard for overturning a wrongful conviction.

The U.S. system is vastly different. U.S. appellate procedures provide for an extensive system of appellate review: every defendant convicted in the U.S. courts has a right to one direct appeal, a second opportunity for discretionary direct review, and a subsequent opportunity for discretionary collateral review. Defendants convicted in state courts have the same direct appellate and collateral review rights as federal defendants, with the added opportunity for habeas review by a federal court. However, the scope of most of this direct and collateral review is the correction of legal and procedural as opposed to factual errors. Thus, the availability of a post-conviction remedy to correct a factually erroneous conviction or to consider new factual proof of innocence is extremely limited.

This Article analyzes the different modes in which two facially similar adversarial systems remedy wrongful convictions. Part I briefly examines the origins of wrongful convictions in both England and the United States. Part II describes the appellate processes in the two countries for correcting wrongful convictions. Part III addresses the processes for correcting wrongful convictions after the appellate processes have been completed. Part IV critiques the English process and examines whether aspects of that process may be carried over to the United States.

11. LIEBMAN, *supra* note 1, at 5.

I. CAUSES OF WRONGFUL CONVICTIONS¹²

A. INVESTIGATIVE MISCONDUCT

1. England

As one English commentator has noted, "The seeds of almost all miscarriages of justice are sown within a few days, and sometimes

12. At the outset, it bears noting that a very significant difference between the English and U.S. systems is that the English have studied their criminal justice system extensively and maintain substantial data based on those studies. *See, e.g.,* MIKE MCCONVILLE, JACQUELINE HODGSON, LEE BRIDGES & ANITA PAVLOVIC, *STANDING ACCUSED: THE ORGANISATION AND PRACTICES OF CRIMINAL DEFENCE LAWYERS IN BRITAIN* (1994) (providing an exhaustive study of the organization and practices of criminal defense lawyers in England). Indeed, in the past fifteen years, two royal commissions have been created to study and recommend improvements in the criminal justice process, one in 1985 and one in 1993. The earlier commission made many recommendations that were adopted, including stricter rules for police interrogation of suspects and the creation of a centralized prosecution service ("The Crown Prosecution Service" or the "CPS"). The later commission, the "Runciman Commission" made several recommendations that were adopted, including the creation of the Criminal Cases Review Commission, the body designed to investigate, review, and refer cases involving apparent miscarriages of justice to the English court of appeal. *See* REPORT OF THE ROYAL COMMISSION ON CRIMINAL JUSTICE (Chairman Viscount Runciman of Doxford) (London, 1993) [hereinafter Runciman Commission Report]. In addition, the Runciman Commission recommended that the court of appeal broaden its scope of review and liberalize its willingness to receive new evidence. *See infra* note 140. Both commissions authorized empirical studies and reports concerning the operation of the criminal justice system before issuing their recommendations. These studies have produced empirical data on virtually every aspect of the criminal process. Indeed, much of the analysis in this Article of the causes of wrongful convictions in England is based on the report of the Runciman Commission and the studies prepared for it.

The U.S. system is quite different. There is very little official record-keeping or analysis concerning how the criminal justice system works. Review of the U.S. Department of Justice website reveals a total absence of records dealing with the issue of ineffective defense counsel, coerced confessions, prosecutorial misconduct, or other causes of wrongful convictions. *See generally*, <http://www.usdoj.gov>. The Department of Justice has one publication, *CONVICTED BY JURIES, EXONERATED BY SCIENCE* (1996), containing studies of cases in which DNA demonstrates a convicted defendant's innocence. This difference may well be both a part of and reflective of the cultural and institutional differences in values and approaches to wrongful convictions discussed in this Article.

hours, of the suspect's arrest."¹³ That is, wrongful convictions result from one-sided investigations because once the police arrest someone, they believe they have resolved the question of guilt or innocence and ignore evidence that might contradict their belief in a suspect's guilt.¹⁴ In England, this phenomenon is exacerbated by the historically central, powerful, and autonomous role the police have played in maintaining order.¹⁵

In England, interrogation has been the principal investigative tool employed by the police, and confessions have been the "central plank" of the majority of cases.¹⁶ In several notorious miscarriage-of-justice cases, the police fabricated or coerced confession evidence.¹⁷ For example, in a well-known case, the charges against the "Guilford Four" were dismissed when a rough set of typewritten notes with handwritten addenda were discovered, conclusively showing that the police had fabricated the confession.¹⁸ In another egregious case, the court overturned the convictions of the "Birmingham Six" upon learning that a supposedly contemporaneous record of one of the defendant's confessions had actually been drafted by the police after

13. Chris Mullin, Testimony to the Royal Commission on Criminal Justice 1991, para. 13; *see also* ANDREW ASHWORTH, *THE CRIMINAL PROCESS* 3 (2d ed. 1998) ("What remains fairly constant [. . .] is the high significance of judgments made at this early stage. As the case against a particular person begins to take shape, so [in most cases] does the investigator's belief that that person is guilty." REPORT OF THE LEGAL ACTION GROUP, LAG 8 (1993) (concluding that the bulk of miscarriages are traceable to the early actions of police)).

14. MIKE MCCONVILLE, A. SUNDERS & ROGER LENG, *THE CASE FOR THE PROSECUTION* 18 (1991); *see also* Barrie Irving & Colin Dunningham, *Human Factors in the Quality Control of CID Investigations*, Royal Comm'n on Crim. Justice, Research Study No. 21 (1993) (describing the four stages of police investigation as follows: (1) police gather evidence to identify one or more suspects; (2) police identify and arrest the suspects; (3) police make a case against a suspect; (4) if police fail at step three, they try again).

15. FRANK BELLONI & JACQUELINE HODGSON, *CRIMINAL INJUSTICE* 22-27 (2000) (describing the context of police culture in which "almost all miscarriages of justice" originate).

16. *Id.* at 55.

17. For a more complete discussion of these cases, *see id.* at 41-2.

18. Rvttill and Others, *THE TIMES*, 23 Oct. 1975, at 1; 28 Feb. 1977, at 2; 20 Oct. 1989 ("The Guildford Four").

the fact.¹⁹ In addition, twenty-two other convictions were overturned due to misconduct of the West Midlands Serious Crime Squad that produced coerced confessions.²⁰

2. United States

False confessions have also contributed to wrongful convictions in U.S. courts.²¹ As in England, police investigation in the United States is largely designed to confirm that the police suspect is the criminal. In contrast to the detailed legislative codes of practice in England, the Constitutionally-derived judicial limits placed on police investigation are broad, abstract, and uncertain. As a result, it is less likely that questionable police tactics producing unreliable evidence will be discovered or exposed. Thus, for example, alleged confessions,

19. *R. v. McKenny, et al.*, 93 Cr. App. R. 287 (1991) ("The Birmingham Six").

20. BELLONI, *supra* note 15, at 8, n. 24 (detailing the number of people wrongly convicted as a result of deliberate police misconduct). In response to these and other cases, Parliament enacted the Police and Criminal Evidence Act of 1984 ("PACE") and its accompanying codes of practice. In relevant part, PACE requires (i) appointment of a custody officer to supervise police conduct of an investigation; (ii) recording of police station interrogations; (iii) access to defense counsel at the station during interrogation; and (iv) time-limits on detention without charge. Commentators note, however, that PACE is not effective. Specifically, police often take statements outside the station; when stationhouse statements are recorded, the recordings are rarely ever screened; and even when present, counsel are ineffective in protecting suspects in the police station. *See, e.g., id.*, at 44 (citing several research studies).

As noted above, an additional attempt to avoid the wrongful result of one-sided investigations is the provision of the CPIA that requires the police to "take all reasonable steps . . . for the purposes of the investigation." The Accompanying Code of Practice requires them to "pursue all reasonable lines of inquiry, whether these point towards or away from the suspect." CPIA 23(1)(a); Code § 3.4. While these provisions are unenforceable, their presence might permit defense counsel to raise questions at trial concerning the inadequacy of the police investigation or might serve to motivate the police to comply with the duty. *See Stanley Z. Fisher, The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORD. L. REV. 1379, 1400 (2000).

21. DWYER, *supra* note 1, at 92 (of the DNA exonerations studied by the Innocence Project at Cardozo Law School, twenty-three percent were based on false confessions or admissions. Other studies show that seventy-three percent of juries "will vote to convict even when admissions have been repudiated by the defendant and contradicted by physical evidence.").

waiver of counsel, and waiver of the right to remain silent must be "voluntary."²² Furthermore, proving that a confession was involuntary is extremely difficult. Unlike England, there is no specific requirement that police questioning be recorded in the United States.²³

In the United States, mistaken identification likely accounts for more wrongful convictions than false confessions.²⁴ Despite the acknowledged unreliability of identification evidence,²⁵ the safeguards

22. See *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

23. But see *State v. Scales*, 518 N.W.2d 587, 589 (Minn. 1994) ("In the exercise of our supervisory powers we mandate a recording requirement for all custodial interrogations"); *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) ("Today we hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible.").

24. DWYER, *supra* note 1, at 73 (explaining that of the DNA exonerations studied by The Innocence Project, eighty-four percent of the wrongful convictions rested in part on mistaken identification).

The English seem to have avoided more wrongful convictions on this basis for several reasons. First, the police rely more heavily on confession evidence, and when confession evidence is presented to the jury it is likely to be the strongest proof, even stronger than eyewitness identification. Moreover, while in England, mistaken identification was a major cause of several miscarriages of justice in the 1970s, very specific rules were enacted in 1984, in Section D of PACE governing the conduct and recordkeeping of identification procedures. The courts have also been active in preventing against the dangers of identification evidence. In response to the official Devlin Report (1976), the court of appeal handed down specific guidelines, known as the *Turnball* guidelines (*R. v. Turnball*, Q.B. 224 (Eng. 1977)), that require a judge to withdraw a case from the jury that depends on poor identification evidence, and that otherwise requires detailed warnings to the jury on the special need for caution in assessing identification evidence. WALKER & STARMER, *MISCARRIAGES OF JUSTICE; A REVIEW OF JUSTICE IN ERROR 194-95* (1999). Together, while mistaken identifications do occur, these limitations may render mistaken identification a less significant contributor to wrongful convictions in England.

25. See, e.g., EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* (1932) (documenting sixty-two U.S. and three British cases of convictions of innocent persons); FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30 (1927) (noting "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American Trials."); Jennifer L. Davenport, Steven D. Penrod & Brian L. Cutler, *Eyewitness Identification Evidence*, 3 PSYCHOL. PUB. POL'Y & L. 338 (1997) ("both archival studies and psychological research suggest that eye-

to prevent erroneous identifications are both vague and extremely limited. Thus, the police are permitted to use any type of identification procedure that does not violate the broad principles of due process. Accordingly, procedures may not be so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to violate due process of law under the "totality of the circumstances."²⁶ Again, in contrast to England, U.S. police are not required to retain records of non-identification, record identification procedures, or disclose exculpatory identification information.

B. SUPPRESSION OF EXCULPATORY EVIDENCE

1. England

In both England and the United States, suppression of exculpatory evidence is a major cause of wrongful convictions.²⁷

Several celebrated miscarriage of justice cases in England exposed the suppression of exculpatory evidence by police. For example, in the case of the Birmingham Six,²⁸ exculpatory forensic evidence which tended to show that the defendants had not handled the nitroglycerine allegedly used to manufacture a bomb was not disclosed.

witnesses are frequently mistaken in their identifications"); Rattner, *supra* note 8, at 283, 289-92 (1988) (asserting that out of more than 200 felony cases of wrongful conviction found misidentification was the single largest source of error, accounting for more than half of cases that had one main cause); ELIZABETH LOFTUS, EYEWITNESS TESTIMONY (1996) (describing cases of mistaken identity and specifically analyzing the problem of eyewitness testimony); Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEG. STUDIES 395, 432 (1987) (claiming that juries are often bad at evaluating and determining the accuracy eyewitness testimony, nor are they particularly careful about convicting defendants on the basis of eyewitness evidence"); *United States v. Wade*, 388 U.S. 218 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."); *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972) (leading case requiring cautionary instructions emphasizing dangers of eyewitness identification).

26. *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

27. Historically, in England the prosecution has had a duty to disclose all of the evidence it intends to offer to prove its case. There is no such obligation in the United States. Thus, on the whole, the English defendant knows more about the prosecution case than the U.S. defendant.

28. *R. v. McKenny, et al.*, 93 Cr. App. R. 287 (1991).

Similarly, in the case of the Guilford Four,²⁹ police interview notes that undermined the authenticity of the defendants' confessions were suppressed. Finally, in *R. V. Kiszko*,³⁰ forensic evidence was withheld that would have established both that the defendant was infertile and that the semen found at the rape scene was not his.

In the aftermath of these cases, England passed the Criminal Procedure and Investigations Act, which created very detailed requirements for police recording, retention, and disclosure to the prosecution of any information that may be relevant to the investigation.³¹ The CPIA replaced "the prosecutor's common law duty to disclose all [of the] unused material with a two-stage reciprocal discovery scheme."³² The prosecution's primary obligation is to disclose any unused material that "might undermine the case for the prosecution."³³ This subjective test requires disclosure of, for example, "that which can be seen on a sensible appraisal by the prosecution (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly to raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."³⁴

29. *Armstrong and Others*, CACD, 19 Oct. 1989.

30. *THE TIMES*, 19 Feb. 1992.

31. Criminal Procedure and Investigations Act, 1996, §23 (1) (Eng.) ("CPIA"). This material is defined as information that appears to have "some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case. . . ." Code of Practice § 2.1. It includes, e.g., notes of interviews with actual or potential witnesses, suspects, or defendants, statements of witnesses whether they assist the prosecutor or not, descriptions of the alleged criminal, communications with forensic witnesses, and impeachment materials relating to witnesses or the reliability of a confession. The prosecution and the defense both receive copies of the police schedules and the prosecution has the right to inspect any listed materials. See *Crown Prosecution, Guinness Advice* (1992), which has been substantially incorporated into the CPIA.

32. Fisher, *supra* note 20, at 1394.

33. CPIA § 3(1)(a).

34. BELLONI, *supra* note 15, at 130 (describing the test set out by Lord Taylor in *Keane*).

The prosecutor makes this determination based on the schedules that must be provided by the police, which the defense also receives. After the prosecution's primary disclosure, the defense must disclose in writing the general terms of the defense and matters on which he takes issue with the prosecution and the reasons therefore.³⁵ A failure to disclose subjects the defendant to adverse inferences at trial.³⁶ The prosecutor must then make secondary disclosure of "material... [that] might be reasonably expected to assist the accused's defence."³⁷ Whether English police actually comply with these requirements is not clear, but what is clear is that, unlike the situation in the United States, there is a formalized, statutory method for giving the defense access to exculpatory evidence.³⁸ The Public Interest Exception³⁹ provides basis for withholding exculpatory evidence from the defense in the public interest, and has been found to have resulted in several wrongful convictions.⁴⁰

In addition, English statutory standards for disclosure are more rigorous than U.S. standards. Unlike the U.S. standard of materiality, which focuses on the effect of nondisclosure on the reliability of the

35. CPIA § 5(6).

36. CJPOA § 1994.

37. CPIA § 7(2)(a). This is an objective test and includes material that might (i) assist in cross-examination of prosecution witnesses, either as to credibility or as to substance; (ii) enable the defense to offer evidence or advance a line of inquiry or legal argument; or (iii) explain or mitigate the defendant's conduct. See Crown Prosecution Service, Criminal Procedure and Investigations Act, 1996, Joint Operational Instructions: Disclosure of Unused Material § 3.19 (unpublished, March 24, 1977) (Eng.), cited in Fisher, *supra* note 20, at 1394, 1395.

38. For a complete discussion of the historical and political background of the CPIA and its accompanying Code of Practice, see Fisher, *supra* note 20, at 1390-93.

39. CPIA §§ 3(6), 7(5), 21(2).

40. See BELLONI, *supra* note 15, at 138-140. There is a presumption against disclosure of the names of informants and of other channels through which police information has been obtained, unless disclosure will prevent a miscarriage of justice. Other examples of categories of evidence that may be withheld under this exception solely by a police officer listing them with an explanation as to their sensitivity include materials relating to national security and intelligence; material "given in confidence." CODE OF PRACTICE para. 6.12.

result,⁴¹ the English standard requires initial disclosure of anything "that might undermine the prosecution's case."⁴² Thus, once the defense has been disclosed, the prosecution must disclose any evidence that might support that defense. Neither of these two standards has anything to do with the potential outcome of the case.

2. *United States*

In the United States, prosecutorial suppression of exculpatory evidence has been a dominant and recurring factor in wrongful conviction cases.⁴³ In the United States, unlike in England, the focus has been on the prosecutor's failure to disclose rather than on that of the police because the courts have placed the duty of disclosure on the prosecutor.⁴⁴ Unlike the English Code of Practice that formalizes police obligations to investigate, retain, and record unused evidence, U.S. law enforcement agencies have no duty to secure, list, or retain exculpatory evidence, much less to provide it to the prosecution.⁴⁵

41. See *United States v. Bagley*, 473 U.S. 667, 682 (1985) (holding that undisclosed evidence is deemed material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

42. See CPIA § (3)(1)(a); see also text accompanying note 33.

43. See, e.g., *Armstrong & Possley*, *supra* note 9 (asserting that convictions in 381 homicide cases were reversed because prosecutors concealed evidence suggesting that the defendant was innocent or presented evidence they knew to be false); *Dwyer*, *supra* note 1, at 265 (stating that forty-three percent of prosecutorial misconduct cases and thirty-six percent of police misconduct cases resulted from suppression of exculpatory evidence); see also *Liebman & Rifkin*, *supra* note 1, at 5 (asserting that the "prosecutorial suppression of evidence [in cases where] the defendant is innocent or does not deserve the death penalty" accounts for sixteen to nineteen percent of capital punishment reversals when all forms of law enforcement misconduct are considered).

44. See *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995) (noting a prosecutor's duty to secure exculpatory evidence in the hands of the police).

45. See Criminal Procedure and Investigations Act, Code of Practice, 1996, paras. 3.1, 4.1, 5.1 (Eng.); Stanley Z. Fisher, *Just the Facts, Ma'am: Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 52-53 (1993) (maintaining that police operate independently of prosecutors and commonly do not reveal exculpatory information to the prosecution).

The disclosure obligations of the U.S. prosecution are also quite insignificant. Unlike in England, the U.S. prosecution has no general obligation to disclose the evidence it intends to use to establish guilt. With respect to exculpatory evidence, the Due Process Clause of the Constitution only mandates the disclosure of "material" exculpatory evidence.⁴⁶ The "materiality" of evidence is defined solely by whether there is a reasonable probability that the nondisclosure affected the result.⁴⁷ This standard provides much weaker protection than the English standard requiring disclosure of any material that "might undermine the case for the prosecution," irrespective of outcome. Under the U.S. outcome determinative, "materiality" standard, the nondisclosure of substantial impeachment evidence, exculpatory but inadmissible evidence, and evidence that in hindsight might be deemed cumulative, provides no relief. Thus, there is little incentive to disclose it.⁴⁸ Naturally, the more exculpatory evidence that is hidden, the greater likelihood there is of a wrongful conviction.

46. *Brady*, 373 U.S. at 87 ("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.").

47. See *Bagley*, 473 U.S. at 682 (holding that undisclosed evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); *Kyles*, 514 U.S. at 434 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

48. See, e.g., *Wood v. Bartholemew*, 516 U.S. 1, 7 (1995) (concluding that a polygraph test containing evidence that a key prosecution witness lied, did not need to be disclosed because it would not have created a different result at trial); *United States v. Avellino*, 136 F.3d 249, 257-58 (2d Cir. 1998) (stating that undisclosed impeachment evidence relating to the government's key witness was deemed cumulative and not material because the witnesses' character had already been attacked).

Beyond federal constitutional requirements, federal and state statutes generally require disclosure of (a) information that might necessitate a pretrial hearing (e.g., statements taken from the accused, evidence seized, pretrial identification procedures, etc.); (b) documentary and similar information that is not subject to manipulation by the defense (photographs, laboratory test results, etc.); and (c) a limited amount of information that the defense needs time to prepare to meet in kind (e.g., expert testimony). See, e.g., FED. R. CRIM. P. 16. Most statutory disclosure

C. DEFECTS IN THE SCREENING PROCESS

England and the United States both have processes for screening the initial decision to charge a person with a crime. In both countries, however, those processes are largely superficial and, thus, fail to prevent convictions based on insufficient or unreliable evidence.

1. England

Until 1985, English police were responsible both for investigating and initiating criminal charges. When the Crown Prosecution Service ("CPS") was created, it was charged explicitly with independently reviewing the decision to charge and taking over all prosecutions initiated by the police. Moreover, it was granted the power to discontinue appropriate cases.⁴⁹

Despite detailed charging standards, the CPS has been criticized for failing to scrutinize the police decision to prosecute.⁵⁰ Part of this

is required to be reciprocal. In addition to its reciprocal obligations, the defense is required to disclose information relating to an alibi (FED. R. CRIM. P. 12.1) or to an insanity defense (FED. R. CRIM. P. 12.2).

49. Prosecution of Offenses Act, 1985, § 23 (Eng.) The Code for Crown Prosecutors sets out a two-stage test for reviewing the decision to prosecute. There must be a "realistic prospect of conviction" and it must be in the public interest to prosecute. *See* THE CODE FOR CROWN PROSECUTORS (1994) §§ 5.1, 6.1. The prospect of conviction is based on (a) the likely defense case; (b) the admissibility of evidence; (c) the reliability of evidence and witnesses (the "evidential test"). *See id.* at §§ 5.1, 5.3. 5.3(a). If this test is satisfied, the prosecutor must determine whether prosecution is in the public interest, which includes the likelihood of a substantial penalty, the characteristics of the offense and the offender, the impact on the victim, and the national interest in making the evidence public. *See id.* at §§ 6.2, 6.4, 6.5, 6.7.

50. The discontinuance rate currently is around thirteen percent. *See* ASHWORTH, *supra* note 13, at 72-73. At least in one extremely busy metropolitan court, the dismissal rate for felony dispositions in the Criminal Court, New York County, was as high as 35.4 percent. EXECUTIVE SUMMARY FOR THE YEAR ENDING APRIL 26, 1998 (Criminal Court for the City of New York, County of New York).

The comparatively low rate of voluntary dismissals in England would appear to be inconsistent with intended minister-of-justice function. ASHWORTH, *supra* note 13 at 72-73 (explaining that the low discontinuance rate may be due to "prosecution motivation inconsistent with the 'minister of justice' role that prosecutors are meant to fulfil."); BELLONI & HODGSON, *supra* note 15, at 111 (discussing how the English prosecution often serves "to assist the police in achieving a maximum conviction rate" instead of fulfilling a 'minister of justice' role). Moreover, the falling conviction rate in England is cited as a manifestation of too many weak cases being brought to trial, as is the high incidence of judge-granted

failure stems from the dependency of the CPS on the police: the CPS cannot initiate prosecutions; and is dependent on the police for the evidence needed to do its job, including its quality, sufficiency, and reliability. The CPS cannot supervise the investigation, direct the police to undertake further investigations, or question witnesses.⁵¹

2. United States

In the United States, prosecutors, not law enforcement agents, make the initial decision of whom and what to charge.⁵² To be sure,

dismissals. J. Baldwin, *Understanding Judge Ordered and Directed Acquittals in the Crown Court*, CRIM. L.R. 536, at 550-552 (1997).

51. See ASHWORTH, *supra* note 13, at 178 (citing F. Bennion, *The Crown Prosecution Service*, CRIM. L.R. 4 (1986) (analyzing the inadequacies of the Crown Prosecution Service)).

The decision to charge must be made solely on the evidence presented by the police. In these circumstances, and considering the historical power and independence of the police, the CPS are not eager to and do not challenge them, thereby increasing the likelihood that weak cases will be brought. At the same time, studies indicate that the police are not eager to and do not regularly consult with the CPS concerning the admissibility or sufficiency of evidence. One study indicates that the police consult with the CPS in anywhere from one to fourteen percent of the cases. BELLONI & HODGSON, *supra* note 15, at 110. A review by the Glidewell Commission, which was appointed to evaluate the success of the CPS in light of the falling numbers of convictions as well as its relationship to the police, recommended earlier police consultation with the CPS. *Id.* at 106-07.

52. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) ("Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981) ("Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community—racial and ethnic minorities, social outcasts, the poor—will be treated most harshly.") There is a vast amount of scholarship on the prosecutor's exercise of discretion. See, e.g., FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 3 (1969) (analyzing the process by which an individual is charged with the commission of a crime); ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 7 (1981) (examining how "prosecutor's roles are at last being teased apart in cases dealing with dismissals, guilty pleas, and discriminatory prosecution, which call into question the acquiescence of judges in the prosecutor's domination of criminal justice."); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 547 (1970) (arguing that limited prosecutorial discretion can serve a valid public interest); Bennett L. Gershman, *A Moral Standard for the*

screening processes such as a grand jury and a preliminary hearing are available. However, they provide only superficial protection.⁵³

In federal cases, the Fifth Amendment to the U.S. Constitution requires that a felony charge be brought by a grand jury indictment.⁵⁴ This requirement has little actual meaning, as the grand jury operates in secret⁵⁵ and is entirely controlled by the prosecution.⁵⁶ For example, when the prosecutor presents his evidence to the grand jury, neither defense counsel, the defendant, nor the court is entitled to be present.⁵⁷ Generally, the prosecutor charges the jury on the law.⁵⁸ The rules of evidence do not apply⁵⁹ and a finding of "probable cause" is sufficient to vote an indictment.⁶⁰

Prosecutor's Exercise of the Charging Discretion, 20 FORD. URB. L. J. 513, 513 (1993) ("[N]o subject in criminal law is as elusive of that of prosecutorial discretion in the charging process.").

53. In both systems, many weak cases disappear with the prosecutor's offer and the defendant's acceptance of a generous guilty plea. For example, it is estimated that in the U.S. District Court for the Southern District of New York, a full ninety-seven percent of cases result in plea dispositions. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORD. L. REV. 917, 933 n. 69 (1999).

54. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."). *But see, e.g.,* *Hurtado v. California*, 11 U.S. 516, 538 (1884) (holding that the grand jury requirement was not a fundamental right and therefore was not applicable to the states under the Fourteenth Amendment). Only about twenty states currently require grand jury review; the other states generally proceed by prosecutor's information. ISRAEL, KAMISAR & LAFAVE, *CRIMINAL PROCEDURE AND THE CONSTITUTION* 519 (2000).

55. *See* FED R. CRIM. P. 6(e)(2).

56. *See* FED R. CRIM. P. 6(d) (excluding the judge and defense counsel from the list of individuals who may be present during a grand jury proceeding).

57. *Id.*

58. *Id.*

59. *Costello v. United States*, 350 U.S. 359, 409 (1956) (holding that the Fifth Amendment does not require the rules of evidence to apply in grand jury proceedings).

60. *Hurtado*, 11 U.S. at 538 (deciding that the due process clause does not require an indictment by a grand jury); *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (concluding that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention."); FED. R. CRIM. P. 4, 9.

Moreover, while a preliminary hearing is available before a judge, the probable cause standard is the same,⁶¹ the rules of evidence are the same⁶² and, in the absence of any meaningful right to disclosure,⁶³ the defense rarely has any basis for challenging the prosecution's proof.

D. INADEQUATE PERFORMANCE BY DEFENSE COUNSEL

Theoretically, England and the United States have adversarial criminal processes that depend on the clash of two relatively equal opponents to yield a reliable result. Unfortunately, both processes suffer from endemic, inadequate performance by the defense.⁶⁴ Logi-

61. FED. R. CRIM. P. 5.1(a) ("If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court.").

62. *See id.* ("The finding of probable cause may be based upon hearsay evidence in whole or in part . . . Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination.").

63. *See supra* notes 43-48 and accompanying text (articulating the lack of disclosure requirements on the prosecution in the United States).

64. In England and the United States, the overwhelming number of criminal defendants are indigent. In England, this indigency means that they are represented by attorneys whose firms have a franchise to be compensated by Legal Aid. In the United States it means that most criminal defendants are being represented by institutional public defenders or by private attorneys who are paid minimal fees by the government.

For a view of the U.S. system see, David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973). Judge Bazelon described his experience from the bench as follows:

The adversary system assumes that each side has adequate counsel. This assumption probably holds true for giant corporations or well to do individuals, but what I have seen in 23 years on the bench leads me to believe that a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment. . . . There are not statistics to illustrate the scope of the problem because, as I shall demonstrate, the criminal justice system goes to considerable lengths to bury the problem. But no one could seriously dispute that ineffective assistance is a common phenomenon. A very able trial judge described some of the counsel coming before the courts as "walking violations of the sixth amendment. [. . .]

Much like the provision of medical care to the poor, the provision of legal counsel to the indigent is a non-prestigious activity that the public and the

cally, the lack of a proper defense increases the risk that some people are being wrongfully convicted.⁶⁵

1. England

In England, inadequate defense lawyering has been well documented. Indeed, studies reveal that many solicitors have a negative attitude about their role as defense counsel. They believe their clients are guilty, and, as a result, fail to investigate and engage in a mechanical or routinized defense representation that is aimed in almost all cases at securing a guilty plea.⁶⁶

profession would rather not think about. Just as we assume our medical responsibility is met when we provide poor people a hospital, no matter how shabby, undermanned and underfunded, so we pretend to do justice by providing an indigent defendant with a lawyer, no matter how inexperienced, incompetent or indifferent.

Judge Bazelon describes some of the classic cases of ineffectiveness, e.g., the lawyer who told the judge he would sum up in ten minutes to avoid getting a parking ticket; the lawyer who spent fifteen minutes with his client before pleading him guilty to a capital offense despite the defendant's claim of exculpatory witnesses; the trial lawyer who met his client for the first time on the way to court and had no knowledge of the facts of the case, and the lawyer who slept through the prosecutor's examination of his witnesses. *Id.* at 2-3, 11, 21, 30. He also presents the various "models" of defective counsel, including the regulars, the sweetheart lawyers who depend on judges for continuing appointments and who try to oblige the judges by moving cases along; the uptown lawyers who are unenthusiastic about criminal practice but who do it as a matter of professional obligation, and the young lawyers who simply do not know what to do next. *Id.* at 7-16.

For a view of the English system, see MCCONVILLE, ET AL., *supra* note 12, a detailed study of defense counsel performance in England.

65. See LIEBMAN, *supra* note 1, at 5 (stating that thirty-seven percent of state post-conviction reversals were the result of ineffective assistance of counsel); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L. Q. 625, 627 (1986) (arguing that the lack of resources allocated to institutions that provide counsel for low income individuals "endangers the Sixth Amendment guarantee to effective assistance of counsel"); Michael McConville & Chester Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 583 (1986-87) (scrutinizing the lack of an effective indigent criminal defense system in New York City).

66. See, e.g., MCCONVILLE ET. AL., *supra* note 12, at 182-183 ("legal advisers will say that, not only are most defendants guilty but they are prepared to admit their guilt . . .").

The lack of zealous representation begins in the police station, where most suspects do not even request legal advice and where those solicitors who do appear are entirely passive.⁶⁷ Indeed, substantial legal advice is given not by lawyers, but by unqualified clerks who, in many cases, are former police officers. Studies have demonstrated that these "solicitors" advise the suspect to answer or cooperate in almost half of all cases.⁶⁸ Defense routinization is thus manifested both by the absence of any meaningful investigation⁶⁹ and the belief that all clients are guilty, resulting in a guilty plea in the vast majority of cases.⁷⁰ If there is a trial, strategies generally are limited to challenging the prosecution's case, without any investigation or analysis of whether a defense is appropriate.⁷¹ All of these factors heighten the risk of innocent persons being convicted.

Studies have shown that many English solicitors lack the type of adversarial ethos that might motivate them to represent their clients

67. The results of one study revealed that only thirty-four percent of suspects request legal advice, and that most solicitors are entirely passive in the police station. In that study of tape-recorded interviews, where one might expect solicitors to be particularly vigilant since they are being taped, seventy-eight percent of solicitors did not intervene. BELLONI & HODGSON, *supra* note 15, at 59 (citing MIKE MCCONVILLE & JAQUELINE HODGSON, CUSTODIAL LEGAL ADVICE AND THE RIGHT TO SILENCE, Royal Commission on Criminal Justice Research Study No. 16 (1993)).

Recent legislation concerning the right to silence encourages solicitors not to interfere in the interrogation process. The Criminal Justice and Public Order Act 1994 ("CJPOA") permits a jury to draw an adverse inference from a defendant's silence at trial or when something is raised in defense for the first time in court if the jury finds that such silence was not reasonable. Adverse inferences may also be based on a defendant's failure to account for objects, marks, substances, or his presence at the scene. *See* CJPOA, 1996, §§ 36, 37 (Eng.). Thus, where a defendant claims he remained silent or failed to give certain facts on advice of counsel, that advice, and the reasonableness of it become factual issues at trial. In addition to the complicated issue of evaluating legal advice, this frequently requires the lawyer who gave the advice to testify.

68. MCCONVILLE ET AL., *supra* note 12, at 84-85, 104 (concluding that court representatives, advise clients to either answer or cooperate in 45.9 percent of cases).

69. *Id.* at 85, 270 (stating that the pressure to take on more clients often makes it difficult for practitioners to adequately prepare).

70. *Id.* at 159, 210.

71. ASHWORTH, *supra* note 13, at 67.

zealously. The U.S. focus on fundamental constitutional protections, including the right to counsel, is significantly absent in England. As a result, many English defense counsel do not view themselves as protecting fundamental rights or as serving a due process function.⁷² Moreover, in a country like England, where class plays a traditionally strong role in one's identity, many solicitors do not identify with their clients, and are more likely to share or want to emulate the values of the prosecutor or judge.⁷³ Solicitors may also be defensive about class distinctions; unlike barristers, solicitors may not ascend to the bench, and have traditionally been viewed as inferior the barristers in training and expertise. Finally, taking an extreme partisan position would be deemed unseemly and would likely harm the reputation of defense counsel in the relatively small English legal community.⁷⁴

The division of labor between solicitor and barrister also creates problems of lack of incentive and coordination between pretrial and trial representation, which also increases the risk of wrongful conviction. Although English solicitors now have rights of audience in the magistrate's courts, generally private barristers replace them when a case comes to crown court. Solicitors blame the barristers for defense deficiencies, and vice versa; solicitors resent what they perceive as the arrogance of barristers.⁷⁵ The division of labor also encourages solicitors to do less than thorough investigation, since they will not be responsible for presenting the case in court, giving the barristers a convenient excuse for lack of preparation.⁷⁶ The reality of practice under a division-of-labor system is that barristers frequently receive instructions late, giving them little time to prepare. Given their late entry into a case, barristers view their role as that of an ex-

72. MCCONVILLE ET AL., *supra* note 12, at 210. This self perception may be exacerbated among barristers by their overreaching duty to the court. See CODE OF CONDUCT § 708.

73. MCCONVILLE, ET AL., *supra* note 12, at 210.

74. *Id.*

75. See *id.* at 239 (explaining the process of cases reaching the crown court).

76. See *id.* (characterizing the trial as the "endpoint" of a solicitor's involvement).

pert stepping in at the critical juncture to persuade the defendant to plead guilty.⁷⁷

2. *United States*

Inadequate defense representation is endemic to the U.S. criminal justice system as well.⁷⁸ As in England, in the United States much defense representation is characterized by routinization of criminal cases, a lack of investigation by the defense, presupposition of the defendant's guilt, abbreviated interview of the defendant, the absence of a meaningful attorney-client relationship, little counseling of a defendant, and tremendous momentum toward guilty pleas.⁷⁹

The culture of ineffective representation has long been recognized⁸⁰ and was documented by a study by Chester L. Mirsky and Michael McConville, entitled *Criminal Defense of the Poor in New York City*.⁸¹ This study, similar to a study by McConville on the English defense bar, provides a chilling depiction of the kind of representation many U.S. indigent defendants receive, particularly in state courts in large urban areas.

To begin with, defense counsel rarely interviewed their clients. They met them for the first time in the courtroom or in the pens outside the courtroom.⁸² The lack of adequate discussion denied defense counsel the opportunity of delving into the defendant's background or his prior record, hindered the defense's development of a coherent theory of the case, and gave the defendant virtually no role in the plea bargaining process. There was little scrutiny of the prosecution's case because defense counsel assumed his clients were guilty.⁸³ Motion practice was non-existent,⁸⁴ and almost no independent investi-

77. *Id.* at 268. See BELLONI & HODGSON, *supra* note 15, at 132 (noting that twenty-five percent of barristers received their brief on the afternoon before trial).

78. See BAZELON, *supra* note 64, at 22-23.

79. See discussion *infra* notes 82-88 and accompanying text.

80. See BAZELON, *supra* note 64, at 23.

81. See McConville & Mirsky, *supra* note 65, at 581.

82. *Id.* at 758-79.

83. *Id.* at 772, n. 908.

84. *Id.* at 761, 769. When pretrial motions were made, they were boilerplate,

gation was conducted.⁸⁵ In addition, non-appearances were frequent; the utter lack of preparation rendered defense counsel unable to respond to the prosecutor's contentions or to the judge's sentence recommendation, causing courts to view defendants who refused to plead guilty as mere "recalcitrant[s]."⁸⁶ The issue of the defendant's actual guilt was seldom addressed, as the defendant was presumed guilty, and thus, reaching a deal with the prosecution was the optimal outcome. In short, "the typical [assigned] defendant in [the] study was not represented by an advocate who by 'prevailing professional norms' was able to make 'the adversarial testing process work in. . . [each] particular case.'"⁸⁷ Similarly, a recent study has demonstrated the gravity of constitutionally defective defense representation in capital cases.⁸⁸

E. PROSECUTORIAL MISCONDUCT

1. England

As the above discussion indicates, the English bar has avoided the extreme partisanship that characterizes both prosecution and defense counsel in the U.S. adversary system.

With respect to the prosecution, there was no nationwide, institutional prosecutor in England until 1985, and, even now, private barristers are usually hired to represent the Crown in court. Moreover, some of these barristers are retained to represent both the prosecution and defense. Accordingly, there has been little opportunity to estab-

revealed a lack of knowledge of the facts, and reflected little research. *See id.* at 770. Indeed, vouchers for compensation submitted by assigned counsel revealed that a full forty percent failed to request any compensation for out of court work. *See id.* at 774. Attorneys made claims for trial preparation in only forty-four percent of homicide cases, 15.4 percent of non-homicide felony cases, and 10.3 percent of misdemeanor cases. *See McConville & Mirsky, supra* note 65, at 771.

85. *Id.* at 762.

86. *See id.* at 770-71.

87. *See id.* at 774 (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

88. LIEBMAN, *supra* note 1, at 5 (noting that thirty-seven percent of state court post-conviction reversals in capital cases were due to inadequate counsel); *see also* DWYER, *supra* note 1, at 187 (asserting that twenty-seven percent of DNA exonerations were due at least in part on inadequate counsel).

lish an institutional adversarial ethos. In addition, the Code of Conduct for barristers contains several formal restraints on adversarial conduct, prescribing a duty to the court that overrides the duty to the client. Thus, certain adversarial conduct that would be tolerated in the U.S. courts is not allowed within the English judicial system.⁸⁹ Finally, as ascension to the English bench is by appointment, extreme adversarialness would not result in a favorable reputation within the comparatively small legal community in England.

2. *United States*

With some exceptions, the U. S. prosecutors, who possess the dual role of "minister of justice" and adversary, frequently exist in a culture of extreme adversarialness, a win-at-all-costs approach to lawyering.⁹⁰ This over-zealousness, combined with the broad and unbri-dled discretion prosecutors enjoy breeds the environment in which a prosecutor could cause the conviction of an innocent person.⁹¹ It goes

89. See, e.g., CODE OF CONDUCT § 708 (Eng.) (listing the requirements that govern a barrister's conduct in court).

90. For a description of the components of the minister-of-justice role, see, e.g., *Berger v. United States*, 295 U.S. 78 (1935) ("[prosecutor's] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."). See ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8, Cmt. (1) (1983) (noting that "a prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC7-13 (1981) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); ABA Standards for Criminal Justice, Standard 3-1.2(c) (1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

See also Bennett L. Gershman, *The Prosecutor's Duty to Truth*, __GEO. J. LEG. ETHICS __ (forthcoming 2001) (on file with the author) (identifying a prosecutorial duty to truth and analyzing current practices concerning that duty); WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 3 (1999) (describing U.S. trial system as badly overemphasizing winning and losing and undervaluing truth); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991); ARMSTRONG & POSSLEY, *supra* note 9, at 3.

91. MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 46 (1999) (noting one prosecutor's description as a "constant pressure to win cases, to keep the office statistics of 'guilty as charged' climbing from one political season to the next"); Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of*

without saying that the combination of over-zealousness and unchecked discretion on one side, and routinized non-adversarialness on the other results in an uneven playing field for most defendants, guilty or innocent. Significantly, the attitude of extreme partisanship exists in a system in which the prosecutor both monopolizes the investigation of crime⁹² and dominates a criminal justice system heavily influenced by his broad discretion in decision-making.⁹³ The only limitations on the prosecutor's discretion are those created by the Due Process Clause as judicially interpreted in case law.⁹⁴ While

Criminal Convictions, 9 GEO. J. LEG. ETHICS 537, 541 (1996) (noting that it is "unprofessional [for prosecutors to] keep tallies and reveal them in various contexts; political campaigns, interviews with journalists, resumes, cocktail parties, and other opportunities for self-promotion"); Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. L. REV. 98, 109, 112 (1975) (highlighting that one-third of prosecutors interviewed believed "their major function is to secure convictions"; many believed that "once an accused reaches the trial stage, his guilt has been determined by the screening processes of the police and prosecutor"; prosecutor's "working environment caus[es] him to view his job in terms of convictions rather than the broader achievement of justice"); Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131, 133 (1986) (positing that prosecutorial misconduct occurs so often because "it works"); Bennett L. Gershman, *The Thin Blue Line: Art or Trial in the Fact-Finding Process*, 9 PACE L. REV. 275, (1989) (quoting defense attorney Melvyn Bruder: "Prosecutors in Dallas have said for years, 'Any prosecutor can convict a guilty man; it takes a great prosecutor to convict an innocent man.'").

92. See YALE KAMISAR, WAYNE R. LA FAVE, & JEROLD H. ISRAEL, *MODERN CRIMINAL PROCEDURE* 1230 (8th ed. 1994) (describing prosecutor's domination of criminal justice system, including investigative manpower of police, investigative legal authority of grand jury and grand jury's subpoena power, early arrival on scene by police when evidence is fresh, and natural inclination of witnesses to cooperate with police and refuse to cooperate with defense).

93. See BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* 1 (2d ed. 1999) (noting that "[t]he prosecutor decides whether or not to bring criminal charges, who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution"); Gershman, *supra* note 90 (positing that "[t]he U.S. Prosecutor has superior knowledge of the facts that are used to convict a defendant, exclusive control over those facts, and a unique ability to shape the presentation of those facts to the fact finder."). See, e.g., *United States v. Wayte*, 470 U.S. 598 (1985); *United States v. Armstrong*, 517 U.S. 456 (1996) (describing the deference due to the prosecutor's decision to charge); *Bagley*, 473 U.S. at 667 (placing the decision whether to disclose exculpatory evidence in the hands of the prosecution).

94. See, e.g., *United States v. Wayte*, 470 U.S. 598 (1985); *United States v. Armstrong*, 517 U.S. 456 (1996) (relating to the decision to charge); *Bagley*, 473

there are hortatory professional standards,⁹⁶ there are no legislative codes of practice to limit prosecutorial discretion.⁹⁷ Moreover, even when prosecutorial misconduct is established, a reviewing court rarely grants relief absent a finding that the misconduct was outcome-determinative: in the absence of prejudice, that is, the conviction is undisturbed.⁹⁷

II. APPELLATE CORRECTION OF WRONGFUL CONVICTIONS

A. ENGLAND

1. Discretionary Review

In England, wrongful convictions are unlikely to be detected or corrected on appeal for two reasons. First, in most cases there is no appeal, and second, in those cases that are appealed, the intermediate appellate court, the court of appeal, is reluctant to question the validity of a jury verdict. Moreover, although the court of appeal has the power to receive credible, admissible new evidence in the interest of justice, it rarely is willing to do so.

U.S. at 667 (addressing the disclosure of exculpatory evidence); *Mooney v. Holohan*, 294 U.S. 103 (1935) (discussing the introduction of false evidence during trial); *United States v. Kikamura*, 918 F.2d 1084 (3d Cir. 1990) (debating misconduct in sentencing).

95. See CODE OF CONDUCT, *supra* note 89.

96. Although the Department of Justice has its internal manual, England's codes of practice are legislatively enacted. See, e.g., *supra* notes 20, 40, and 49.

97. On appeal, the evaluation of prejudice occurs in one of four contexts: (1) harmless error analysis for preserved constitutional violations (*Chapman v. California*, 386 U.S. 18, 24 (1967) (noting that a conviction reversed unless prosecutor demonstrates that error harmless beyond a reasonable doubt); (2) harmless error analysis for preserved nonconstitutional violations, *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (explaining that a conviction is reversed if the defendant demonstrates that error had "substantial influence" on the verdict"); (3) plain error analysis for all unpreserved errors, *United States v. Olano*, 507 U.S. 725, 734-35 (1993) (holding that a reversal is rendered only if the error is "obvious," "affect[s] substantial rights," and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.") and; (4) collateral review of preserved constitutional violations, *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (applying the *Kotteakos* standard to review constitutional error on habeas corpus review).

Unlike the U.S. appellate process with its widely available review as of right, there is no as-of-right review in England. Appeal to both the court of appeal and the House of Lords is by leave only, and leave will be granted to the court of appeal only if there is a reasonable prospect of relief.⁹⁸ In England, a full one-half of defendants are advised by their lawyers not to appeal at all.⁹⁹ For those familiar with the U.S. system, this is difficult to imagine. This advice results from many factors, including the lack of adversarialness and presumption of guilt that characterizes most defense representation, and the prevalence of guilty pleas. 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.¹⁰⁰ Of the applications that are filed, about one-quarter are successful.¹⁰¹ In general, because legal aid is not available for an application for leave to appeal, it is difficult for the court of appeal to identify wrongful conviction cases.¹⁰²

If leave to appeal is granted, the standard for reversal on appeal is whether the court of appeal believes the conviction is "unsafe."¹⁰³ An

98. Criminal Appeal Act, 1968, § 1 (Eng.).

99. BELLONI & HODGSON, *supra* note 15, at 176.

100. *Practice Direction: Crime: Leave to Appeal*, 1 ALL ER 555 (1980) (noting that, in practice, this sanction is rarely imposed, and, when it is imposed the average time lost is approximately two months); ROBIN C.A. WHITE, *THE ENGLISH LEGAL SYSTEM IN ACTION* 210-11 (1999).

101. Thus, for example in 1997, of 2318 applications for leave to appeal considered by a single judge, 537 were granted. An additional eighty-seven were granted leave by the full court. Of the 2318 applications from which 624 received leave to appeal, 186 appeals against convictions were successful. BELLONI & HODGSON, *supra* note 15, at 175. In 1996, of 8724 applications for leave to appeal against sentence or conviction, under twenty-five percent were granted. The success rate in appeals against conviction was just under twenty-nine percent, with appeals against sentence successful in nearly seventy percent of the cases. JUDICIAL STATISTICS ENGLAND AND WALES FOR THE YEAR 1996, at 12, Tables 1.7, 1.8. (on file with the author).

102. See Joyce Plotnikoff & Richard Woolfson, *Information and Advice for Prisoners about Grounds for Appeal and the Appeals Process*, Royal Commission on Criminal Justice Research Study No. 18 (London: H.M.S.O., 1993).

103. Criminal Appeal Act, 1995, § (2)(1)(a)(Eng.).

“unsafe” conviction is one in which the court entertains a “lurking doubt” that the defendant was rightly convicted, i.e., one in which the court is not “sure” that the defendant was “rightly convicted.”¹⁰⁴ This is a much lower threshold than the United States standard for reversal, i.e., whether appellant can establish that error occurred that creates a reasonable probability that the result of the trial would have been different.¹⁰⁵ First, of course, the English standard places the burden on the prosecution to defend the conviction. Second, a “lurking doubt” about the correctness of the conviction is less than a “reasonable probability” that it is wrong.

2. Review of Factual Error

Unlike a U.S. appellate court, the English court of appeal also has the power to correct wrongful convictions by virtue of its discretion to receive “fresh evidence” (i.e., newly discovered evidence) whenever the court “think[s] it necessary or expedient in the interests of justice” to do so.¹⁰⁶ The court *must* receive fresh evidence unless it thinks the evidence “would not afford any ground for allowing the appeal;” if the evidence appears “likely to be credible” and “admissible;” and, although it was not adduced at trial, that “there is a reasonable explanation for the failure to adduce it.”¹⁰⁷

Despite the power to receive fresh evidence and the articulation of a low standard for reversal, the court of appeal has been criticized for its reluctance to overturn convictions on the ground that the jury was wrong or to entertain its powers on direct appeal to hear new evidence “for fear of exposing the fallibility of the jury system.”¹⁰⁸ In the

104. *R. v. Cooper*, 1 Q.B. 267, (Eng. C.A. 1969).

105. *See supra* note 96.

106. Criminal Appeal Act, 1995, § 23(1)(Eng.).

107. *Id.* at § 23(2).

108. Runciman Commission Report, *supra* note 12, at 173, para. 55; ASHWORTH, *supra* note 13, at 84; *see also* K. Malleon, *Appeals Against Conviction and the Principle of Finality*, 21 J. OF LAW & SOC. 51 (1994); Pattenden, *supra* note 1, at 210.

In addition to recommending the creation of the CCRC, the Runciman Commission concluded that the court of appeal “should be readier [sic] to overturn jury verdicts than it has shown itself to be in the past.” Runciman Commission Report,

absence of a procedural irregularity or legal error, the court is unlikely to grant relief simply because of the "merits of the conviction."¹⁰⁹

3. Review of Defense Counsel's Performance

The court has also been criticized for its unwillingness to review the performance of defense counsel. Employing a very high standard for granting relief based on incompetent counsel—whether the representation constituted "flagrantly incompetent advocacy" and whether the conviction was thereby rendered "unsafe"—the court has rarely granted relief on this basis.¹¹⁰

The proceedings in the court of appeal are essentially the final appeal. While convictions may be appealed to the House of Lords on

supra note 12, at 162, para. 3. Accordingly, the Commission recommended that the standard for reversal in the court of appeal be redrafted to permit reversal when the court concludes that the conviction "is or may be unsafe." *Id.* at 196, para. 32, n. 4. The standard ultimately adopted was the more restrictive "is unsafe." *Id.*

The Commission also concluded that the court should broaden its willingness to receive new evidence. *Id.* In the past, such evidence had been receivable if it were deemed "likely to be credible." Under the Criminal Appeal Act, such evidence is to be received if it is "capable of belief," a lower standard designed to give the court "greater scope for doing justice." *Id.* at 174, para. 60, n. 4. (expressing that the court of appeal "should be more prepared where appropriate, to admit evidence that might favor the defendant's case even if it was, or could have been, available at the trial."). Despite this reform spirit, Parliament viewed this language as maintaining the status quo. Runciman Commission Report, *supra* note 12, at 174, para. 60, n. 4.

109. WHITE, *supra* note 99, at 212.

110. Runciman Commission Report, *supra* note 12, at 174 (addressing the inadequacy of the court's standard for judging the performance of counsel—whether it was "flagrantly incompetent advocacy"). Specifically, the Commission stated:

wrong jury verdicts of guilty may be the result of errors by the lawyers - whether of judgment or of performance - which do not amount to flagrantly incompetent advocacy'. It cannot possibly be right that there should be defendants serving prison sentences for no other reason than that their lawyers made a decision, which later turns out to have been mistaken.

Id.

See also BELLONI & HODGSON, *supra* note 15, at 184. For further discussion of the issue of incompetence of counsel, see MCCONVILLE, *supra* note 63. See also, e.g., M. Blake & A. Ashworth, *Some Ethical Issues in Prosecuting and Defending Criminal Cases*, CRIM. L. REV. 16 (1998).

an issue of public importance, this rarely occurs.¹¹¹ Moreover, the doctrines of *res judicata* and finality prevent any method of collateral attack in England.¹¹²

B. UNITED STATES

1. *Review as of Right*

The U.S. judicial system presents many more opportunities for post-conviction review than does the English system. Every defendant convicted in the United States is entitled to an appeal as of right. However, the appellate process in the United States is aimed almost exclusively at correcting legal or judicial error as opposed to factual error and thus is no more successful at exposing or correcting wrongful convictions.

2. *Reviewing Factual Error*

The intermediate appellate courts to which appeals are taken do not have the power to entertain new evidence; nor do most of the courts have the power to reverse a conviction because they believe that the jury was wrong. There is a due process right not to be convicted upon *insufficient* evidence. Thus, an appellate court must determine “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.”¹¹³ Yet, this standard only protects a defendant against an irrational verdict, not a wrong one. As the Supreme Court explained in *Jackson v. Virginia*, once a defendant has been convicted, “the factfinder’s role as weigher of the evidence is preserved through a legal conclusion that

111. See PATTENDEN, *supra* note 1, at 314-19. The U.S. Supreme Court receives approximately 7,000 petitions for certiorari and grants between seventy-five to 100 each term. See *The Justices Caseload*, available at www.supremecourtus.gov/about/justice_caseload.pdf.

112. *R. v. Berry* (No. 2), 1 W.L.R. 125 (Eng. C.A. 1991), *approved in* *R. v. Mandair*, 1 App. Cas. 208, (Eng. H.L.B 1995); *McIlkenney v. Chief Constable of the West Midlands*, App. Cas. 529 (H.L. 1982), *affirming* *Q.B. 283* (Eng. C.A. 1980).

113. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.”¹¹⁴ In short, an appellate court will only reverse a conviction on grounds of factual insufficiency if it finds that there is no evidence from which a jury could have found the defendant guilty beyond a reasonable doubt.¹¹⁵ Considering this high standard, which presumes all credibility questions in favor of the prosecution, it is not surprising that very few convictions are reversed on this ground.¹¹⁶

Nor is there any real likelihood of correcting a wrongful conviction in the courts of last resort. Like an appeal to the House of Lords in England, appeal to the U.S. state and federal courts of last resort requires leave of either the court appealed from or the court to which appeal is sought, depending upon the jurisdiction, and is entirely discretionary.¹¹⁷ Moreover, the scope of review in these courts is limited to legal as opposed to factual errors; that is, these courts do not have the power to reconsider the facts or receive new evidence, and their review is limited to questions of law.¹¹⁸ Thus, because factual issues are explicitly beyond their jurisdiction, they cannot reverse a wrongful conviction without a finding of prejudicial legal or constitutional error or prosecutorial misconduct.

3. Review of Defense Counsel's Performance

Although ineffective assistance of counsel is a significant cause of wrongful convictions in the United States, the correction of this type of error is also unlikely to be accomplished on direct appeal. First, in

114. *Id.* at 319.

115. *See, e.g.,* United States v. Coombs, 222 F.3d 353, 362 (7th Cir. 2000) (holding that proof of intent to distribute drugs was sufficient as such intent could be inferred solely from the possession of 616 grams of methamphetamine).

116. *See, e.g.,* United States v. Autuori, 212 F.3d 105 (2d Cir. 2000) (quoting United States v. Cunningham, 723 F.2d 217, 232 (2d Cir. 1983)) (reversing grant of new trial by district court, the Second Circuit held that although there were “serious contradictions and conflicts in the government’s evidence. . . ‘A trial judge is not entitled to set aside a guilty verdict simply because he would have reached a different result if he had been the fact-finder.’”).

117. 28 U.S.C. §§ 1254, 1257. *See, e.g.,* N.Y. CRIMINAL PROCEDURE LAW § 460.50.

118. *See, e.g.,* N.Y. CRIMINAL PROCEDURE LAW § 470.35.

most cases, additional fact-finding is required concerning the claimed ineffectiveness (e.g., of whether there existed a strategic justification for the lawyer's apparently unreasonable conduct; the extent of the lawyer's knowledge at the time). Thus, most ineffectiveness of counsel claims must be brought in a post-appellate collateral attack proceeding which, in the federal courts, means a federal habeas corpus proceeding pursuant to 28 U.S.C. §2255.¹¹⁹

Even under habeas corpus, however, the U.S. appellate courts, as in England, are extremely reluctant to review claims of incompetent counsel and have adopted a standard that insulates them from the need to carefully scrutinize this problem.¹²⁰ In *Strickland v. Washington*,¹²¹ the U.S. Supreme Court articulated a stringent, two-part test that a defendant must meet to establish ineffectiveness of counsel claims under the Sixth Amendment. First, a defendant must demonstrate that his attorney's performance was deficient, that is, that it "fell below an objective standard of reasonableness."¹²² Second, a defendant must demonstrate that counsel's performance prejudiced the defense, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹²³ Review of counsel's performance is required to be "highly deferential,"¹²⁴ and to include "a strong presumption that counsel's performance falls within the wide range of reasonable

119. *E.g.*, *United States v. Galloway*, 56 F.3d 1239 (en banc); *United States v. Camacho*, 40 F.3d 349 (11th Cir. 1994); *United States v. Cyrus*, 890 F.2d 1245, 1247 (D.C. Cir. 1989). In the rare case where the record conclusively establishes that the defendant is or is not entitled to relief, the issue may be decided on direct appeal. *See, e.g.*, *United States v. Wood*, 879 F.2d 927, 933-34 (D.C. Cir. 1989) (holding defendant was conclusively not entitled to relief); *United States v. Pinkney*, 543 F.2d 908, 915 (D.C. Cir. 1976) (noting that the trial record may be used to conclusively establish ineffectiveness based on inept examination of witnesses).

120. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*, 44 VAND. L. REV. 45, 67 (1991) (noting the "institutional reluctance" to reverse convictions for ineffective assistance thus manifests itself in the courts' use of an almost impossible standard).

121. 466 U.S. 668, 690 (1984).

122. *Id.* at 690.

123. *Id.* at 694.

124. *Id.* at 689.

professional assistance.”¹²⁵ “Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”¹²⁶

The *Strickland* standard has not been effective in eliminating the effects of even the most egregious defense lawyering conduct.¹²⁷ This is largely because the standard focuses not on whether defense counsel was minimally competent or performed the basic functions contemplated by the Sixth Amendment, but instead on proof of the defendant’s guilt, that is, on whether there would have been a conviction absent counsel’s unreasonable performance.¹²⁸ Indeed, the Court explicitly allowed the lower courts to determine ineffectiveness claims by proceeding first to the question of prejudice, and indicated that the question of deficient performance might not even need to be reached.¹²⁹ In practice, whether the claim is based on the duty to investigate or counsel’s performance at trial, that is precisely what has happened: most claims are rejected on the grounds that the evidence against the defendant was strong enough that counsel’s deficient performance did not effect the result.¹³⁰ The other ground com-

125. *Id.*

126. *Id.* at 690-91.

127. This has been well documented. See, e.g., Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); *The Relationship of the Court and Defense Counsel: The Impact of Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531 (1988); *The Eleventh Commandment: Though Shalt Not be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993); see also Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).

128. See *id.* at 695.

129. See *id.* at 697.

130. See, e.g., *Burdine v. Johnson*, 231 F.3d 959, 957 (5th Cir. 2000) (asserting that in a capital murder case, counsel was not ineffective even though he was asleep during portions of the trial because defendant did not establish prejudice); see also, Martin C. Calhoun, Note and Comment, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 7 GEO. L. J. 413, 425-32 (1988) (noting that in a survey of all federal inef-

monly relied on is the justification for the attorney's misfeasance or malfeasance as "strategic."¹³¹

III. POST-APPELLATE CORRECTION OF WRONGFUL CONVICTIONS

A. ENGLAND

The failure of the English appellate process to correct factual error may not yield as serious consequences as the same deficiency in the United States system. Unlike United States courts, the English post-appellate process provides two critical safety nets to correct wrongful convictions: (1) the Criminal Cases Review Commission ("the CCRC") and its power, previously residing in the Home Secretary, to refer cases to the court of appeal;¹³² and (2) the court of appeal's power to receive new evidence.

1. *Criminal Cases Review Commission ("CCRC")*

The CCRC is an executive, non-departmental public body accountable to the Home Secretary. It is currently chaired by Sir Fed-

fective assistance claims reviewed by the circuit courts of appeals from the *Strickland* decision in 1984 until May 1988, counsel's performance was found to be reasonable in only 54.3 percent of the cases). Only 4.3 percent resulted in reversal, however, because the court found that the defendant was not prejudiced. *See id.*

131. *See, e.g.,* United States v. Drones, 218 F.3d 496, 499 (5th Cir. 2000) (positing that counsel's failure to investigate in any way whether voice on incriminating telephone conversation tape was the defendant's voice was deemed part of strategic decision to base defense on other weaknesses in the government's case even though tapes concededly were "crucial" to government's case); *Kitchens v. Johnson*, 190 F.3d 698, 702-03 (5th Cir. 1999) (asserting that the decision not to pursue evidence that could be "double edged in nature" is objectively reasonable; decision in capital case not to investigate mitigating evidence of child abuse, alcoholism; and mental illness was sound trial strategy).

132. Before 1994, applications by convicted defendants who claimed they had been wrongfully convicted were reviewed by the Home Secretary. Applications were made to the Home Office where they were reviewed and then presented to the Home Secretary. This procedure gradually came to be viewed as "unacceptably slow, insufficiently independent, and [deemed] to deliver too many wrong decisions." CCRC ANNUAL REPORT FOR 1998-99 at 1. For a more complete critique of the Home Secretary's handling of miscarriage-of-justice cases, see the Runciman Commission Report, *supra* note 12, ch. 11, paras. 1-11; David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91 (2000).

erick Crawford and has thirteen additional members. According to statute, two-thirds of the members must be lay persons, one-third must be lawyers,¹³³ and at least two-thirds must have expertise in the criminal justice system.¹³⁴

The CCRC was created on the recommendation of the Runciman Commission.¹³⁵ Its mandate is to review the applications of convicted defendants who claim they have been wrongfully convicted 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."¹³⁶ The CCRC must reach that conclusion "because of an argument, or evidence, not raised in the proceedings . . ." or under "exceptional circumstances."¹³⁷ In addition, absent "exceptional circumstances," a case will only be referred if it has already been heard on appeal or leave to appeal has been denied.¹³⁸ This exception is intended to include cases in which evidence was available to the defense at the time of the trial but had not been used for any number of reasons—legal incompetence, mistaken tactical decision, or failure to appreciate its full significance.¹³⁹

133. BELLONI & HODGSON, *supra* note 15, at 185.

134. Current members are Sir Frederick Crawford (Chair), Barry Capon, Laurence Elks, Anthony Foster, Jill Gort, Fiona King, John Knox, David Kyle, John Leckey, Professor Leonard Leigh, Dr. James MacKeith, Karamjit Singh, Baden Skitt, Edward Weiss, and David Jessel. See Criminal Cases Review Commission – Members, available at http://www.ccrcc.gov.uk/aboutus/aboutus_memebers.html (last visited Apr. 1, 2001).

135. After a series of miscarriages of justice came to light in the 1980s, the government announced the creation of the Royal Commission on Criminal Justice (i.e. the Runciman Commission). See *supra* note 12. One of the responsibilities given to the Commission was to examine "the arrangements for considering and investigating allegations of miscarriage of justice when appeal rights have been exhausted." Two years later, in 1993, the Runciman Commission announced its recommendations, including abolition of the Home Secretary's power of referral and the establishment of the Criminal Cases Review Commission (the "CCRC") to perform that function. The CCRC was established by the Criminal Appeal Act of 1995 and began its work on April 1, 1997. For a complete discussion of the political process that led to the creation of the CCRC, see Horan, *supra* note 132.

136. Criminal Appeal Act, 1995, § 13(1)(a) (Eng.).

137. *Id.* at § 13(1)(b).

138. *Id.*

139. See BELLONI & HODGSON, *supra* note 15, at 187.

Thus, absent these circumstances, the only cases that should be referred are "strong fresh evidence cases which have exhausted their appeal remedies."¹⁴⁰

The "real possibility" test is not defined in the Criminal Appeals Act. However, in *R. v. CCRC, ex p. Pearson*,¹⁴¹ 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."¹⁴²

Since its inception, the CCRC has received 3680 applications. As of October 31, 2000, review of 2381 applications had been completed. Of the 2382, 203 cases have been referred (4.3 percent). Of those cases, forty-nine have been heard, and of those forty-nine, thirty-eight have resulted in convictions being quashed (77.5 percent of referrals but 1.6 percent of the original completed applications). In seven of the twenty-seven cases in which the court of appeal granted relief before that date, the court's decision was based at least in part on prosecutorial concessions. Nine referred cases were upheld, and in two cases decision was reserved. Four hundred seventy-seven ap-

140. Kate Malleon, *The Criminal Cases Review Commission: How Will It Work*, CRIM. L. REV. 929, at 932 (1995).

141. 3 ALL E.R. 498 (1999).

142. In its report, *The Work of the Criminal Cases Review Commission* (1998-99 HC 106), a Home Affairs Select Committee appointed to evaluate the success of the CCRC suggested that the standard be higher, that is, that it require a possibility "that there had in fact been a miscarriage of justice." However, the Select Committee did not believe this standard to be more definite, recognized that such a standard was different than the test that the court of appeal itself uses, and recommended that the wording be reviewed again in three years. Annabelle James, et al., *The Criminal Cases Review Commission: Economy, Effectiveness and Justice*, CRIM. L.R. 140, 145 (2000).

plications are being worked on and 822 remained open.¹⁴³ Obviously, there is considerable backlog in processing applications.¹⁴⁴

a. Review Process

Initially, an application by a person claiming he was wrongly convicted is received by the CCRC. Although legal aid is available for up to ten hours of work on a CCRC application, most applicants are not represented by counsel.¹⁴⁵ Strikingly, the CCRC is empowered to and actually does conduct extensive independent investigations of wrongful conviction claims.¹⁴⁶

Stage One - Initial Assessment

The application is first reviewed by a small team of staff to determine its eligibility. The most frequent ground for ineligibility is that the appeal process has not been exhausted.¹⁴⁷ Assuming eligibility, steps are taken to obtain required documents, arrange for papers to be preserved by the relevant authorities, determine if the case warrants any priority, and decide the likelihood of success if the allegations are true. If the application is deemed to 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."¹⁴⁸

Stage Two - Substantive Review

At stage two, a case review manager and commission member are

143. In addition, five cases were referred by the court of appeals to the commission for investigation, and those investigations were completed. *See* Third Annual Report, Case Statistics April 1997 to Present, available at <http://www.ccr.gov.uk> (last visited April 3, 2001). These statistics may confirm what many critics have said about the Commission, and that the Commission has acknowledged: that they are being too careful in referring cases to the court and thus are interpreting the "real possibility" test too narrowly. CCRC ANNUAL REPORT FOR 1998-99, *supra* note 132, at x, xi.

144. *See id.*

145. Statistics contained in the CCRC's annual report for 1998-99 show that eighty percent of applicants were not represented by counsel. CCRC ANNUAL REPORT FOR 1998-99, *supra* note 132, at vii.

146. James, et al., *supra* note 142, at 142.

147. *See id.* at 141.

148. *Id.* at 141.

assigned. The caseworker prepares a case action plan and discusses it with the commission member. If the case review manager is not convinced that there is a "real possibility" that the conviction will be quashed, the applicant is sent a "short form" letter with reasons for this conclusion and given twenty-eight days to respond. If the case manager and a commissioner believe that there is a real possibility that the conviction will be quashed, the case is presented to three commissioners who make the final decision whether to refer to the Court of Appeal. Following a referral, the CCRC withdraws from the case and leaves it to counsel to prepare and argue the appeal. Legal Aid is provided for this purpose.¹⁴⁹

Stage Three - Outside Investigation

It may become apparent that there is a need for an outside investigation. In such a case the commission has the power to appoint an investigating officer. As of the end of August 1999, an investigating officer had been appointed in thirteen cases. All of the investigating officers have been police officers. One area of substantial criticism of the Commission is its reliance on the police as investigating officers, particularly when the investigating officers are in charge of investigating misconduct in their own police forces.¹⁵⁰ But the CCRC also has the power, which it has exercised, to order independent reports, such as engineers, forensic, or psychiatric reports, and has adopted the practice of doing as much fieldwork as is practicable on its own.¹⁵¹

149. See, e.g., *R. v. Mattan*, (unreported) (C.A. Mar. 5, 1998), available at <http://www.casetrack.com> (noting that applications deemed suitable for accelerated short review will be subjected to a less extensive review and placed for decision before a single member of the commission). The accelerated review status of a case can be changed at any time. CCRC ANNUAL REPORT FOR 1998-99, *supra* note 132.

150. See, e.g., *James, et al.*, *supra* note 142, at 142.

151. See, e.g., *Mattan*, available at <http://www.casetrack.com> (noting that the CCRC's investigation in that case "included a visit to the scene of the crime and a re-examination of the available documentation, including witness statements both used and unused during the original trial."). *Criminal Cases Review Commission: Mahmood Mattan-First Referral To Be Quashed by the Court of Appeal*, M2 PRESSWIRE, Feb. 25, 1998, available at 1998 WL 10217985, at *1 [hereinafter *Criminal Cases Review Commission: Mahmood Mattan*].

b. Decision To Refer or "Not Minded to Refer"

A decision of "not minded to refer" is made by the single commissioner appointed to the case. A decision to refer must be made by a panel of three commissioners.

The initial decision on reference is sent to the applicant and his or her counsel. If the decision is "not minded to refer," the applicant may respond to the CCRC's statement of reasons; a final decision is then made.

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 abuse of the Commission's powers. In such a case, the standard of review is whether the Commission's decision was "perverse or absurd."¹⁵²

c. Cases that Were Not Referred

Cases in which the CCRC's refusal to refer has been reviewed by the courts reveal an interesting trend. Namely, the primary basis for such a refusal was the court's sense that the defendant was merely seeking a chance to put in a new defense after the first one had failed or because new evidence was insufficiently compelling to render the conviction unsafe.¹⁵³

R. v. Pearson, the most often cited of these cases, was the first court challenge to the CCRC's power to come before the courts.¹⁵⁴ In *Pearson*, the defendant murdered her ex-husband's lover because she feared that the victim and the ex-husband would gain custody of her child. The issues at trial were whether she was the killer and, if so, whether she had been provoked. Before the Commission, the defendant did not elicit new evidence bearing on the identity of the killer

152. *R. v. CCRC ex parte Salami*, (unreported) (C.A. Jan. 20, 2000) (Smith Bernal transcript), available at <http://www.casetrack.com>.

153. The standard used in reviewing the decision of the CCRC is the same one used in the United States on an application for mandamus review: whether the decision is irrational or arbitrary. See, e.g., *infra* notes 154-155.

154. See Malleon *supra* note 140 (acknowledging that, since the Commission's status as a statutory body was recently established, the court's decision would have an incredible influence on the Commission's relationship with the courts).

or the unreliability of the identification proof; nor did she produce new evidence bearing on the question of provocation. Instead, Pearson elicited new evidence that tended to demonstrate that she suffered from battered women's syndrome at the time of the killing. The CCRC declined to refer the case, largely because it viewed the new evidence as not sufficiently credible. It reached this conclusion in part because the defendant had not made a claim of diminished capacity at trial.¹⁵⁵ In other cases, the CCRC found new evidence to be insufficiently compelling to render the conviction unsafe.¹⁵⁶ In one case, the court rejected a challenge to the CCRC's procedure, holding that the Commission could properly receive expert legal advice from one of its own commissioners, Leonard Leigh, who is a professor of law, and that the applicant had received a sufficient statement of reasons from the Commission even though he had not received the report by Commissioner Leigh.¹⁵⁷

2. Court of Appeal Decisions Following Referral

As noted above, the court of appeal employs a standard far lower than the U.S. courts for granting relief based on new evidence. In England, the Court of Appeal must receive new evidence if:

155. *Id.* (stating that the failure to assert a claim of diminished capacity was not a tactical decision, but rather a result of the absence of evidence).

156. *See, e.g.,* R. v. CCRC ex parte Salami (unreported) (C.A. Jan. 20, 2000) (Smith Bernal transcript), available at <http://www.casetrack.com> (attacking the unreliability of CCRC's forensic proof concerning van used in robbery); R. v. CCRC ex parte Dickinson (unreported) D.C. (C.A. Nov. 23, 1998) (Smith Bernal transcript), available at <http://www.casetrack.com> (referencing proof that keys were found inside apartment on day after charged arson so that the defendant could not have locked the door was ambiguous). Other cases that have not been referred include claimed defects in the indictment which did not affect the safety of the conviction (R. v. CCRC ex parte Foster (unreported) (C.A. Jan. 21, 1999) (Smith Bernal transcript), available at <http://www.casetrack.com>) and a claim that a guilty plea was based on improper pressure from the court (R. v. CCRC ex parte Brine (unreported) (C.A. May 5, 1999) (Smith Bernal transcript), available at <http://www.casetrack.com>). Many of the decisions of the court of appeal are unreported. As indicated throughout, those cited in this article can be found at www.casetrack.com.

157. R. v. CCRC ex parte Hunt (unreported), Norwich Crown Court at 5, 6 (Mar. 21, 2000) (Smith Bernal transcript).

1) it appears to the court that the evidence may afford any ground for allowing the appeal; 2) the evidence would have been admissible in the proceedings from which the appeal lies on an issue; 3) which is the subject of the appeal; and; 4) there is a reasonable explanation for the failure to adduce the evidence in those proceedings.¹⁵⁸

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.¹⁵⁹

a. New Evidence

The court of appeal appears to be willing to receive credible, new evidence even where it is far from clear that the evidence probably would have changed the result of the trial, the standard employed by the U.S. courts. For example, in *R. v. James*,¹⁶⁰ where the defense to the murder of the defendant’s wife had been that she had actually committed suicide, the court received evidence that a suicide note written by the deceased had been found in one of the defendant’s professional veterinary magazines stored in an upstairs bedroom.¹⁶¹ Employing a lenient standard for reversal, the court acknowledged that the note was subject to “more than one interpretation,” but observed that “none is conclusive and one is undoubtedly consistent with an intention to commit suicide.” On that basis, the court held that “the jury’s verdict given in ignorance of the Note must be regarded as unsafe. . . .”¹⁶²

158. Criminal Appeal Act, 1995, § 23(2) (Eng.).

159. *Id.* § 23.

160. (Unreported) (C.A. July 31, 1998) (Smith Bernal transcript), *available at* <http://www.casetrack.com>.

161. Receipt of this fresh evidence was not opposed by the Crown. *Id.* at 7. The court of appeal likewise received fresh psychiatric evidence regarding the likelihood that the deceased suffered from a depressive illness at the time of her death because it was deemed to be relevant to the note. *Id.* at 8.

162. *Id.* Interestingly, when asked at trial why he had not revealed an earlier letter from the deceased, which had contained a threat to commit suicide, the defendant answered, in substance, that the threat had only been a part of a longer, two page document and that, “If she (his wife) had given me a small sheet of [a certain type of paper] with just two sentences on it, it might be different, but that para-

In those cases in which the Court of Appeal refused to receive new evidence, it did so largely on the ground that the new evidence either was not sufficiently credible or would not have changed the result.¹⁶³

graph in what she gave me certainly did not come to mind.” *Id.* In fact, the newly discovered suicide note was written on the paper mentioned by the defendant and was, in fact, two sentences long. See *James*, at 7, available at <http://www.casetrack.com>.

The court of appeal may be less willing to quash a conviction based on new evidence as the process of reviewing cases on referral has matured. See *R. v. Such*, (unreported) 6 (C.A. Dec. 4, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com>. Here the court noted that:

These referrals by the Commission are always anxious matters for this Court to consider. We cannot proceed on the basis that, merely because the Commission has seen fit to refer the case to us, we should automatically feel obliged to set aside a conviction, particularly in a matter as serious as this. The Commission are well aware of that and recognize that they are referring the matter to us on the basis of the fresh evidence for our evaluation.

Id.

Over the past several months, the court has declined to quash convictions in several cases referred by the CCRC based on new evidence. See, e.g., *R. v. Gilfoyle*, (unreported) (C.A. Dec. 20, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com> (holding that new forensic evidence bearing on whether the deceased had been murdered or had committed suicide did not render conviction unsafe); *Such*, *supra* (asserting that new psychiatric evidence that supported claim that the defendant had intended to kill himself and not to kill his wife did not render conviction unsafe); *R. v. McCann* (unreported) (C.A. Nov. 28, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com> (stating that new medical evidence of excessive alcoholism casting doubt on the credibility of a prosecution witness did not render conviction unsafe); *R. v. Pendleton* (unreported) (C.A. June 22, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com> (deeming that receipt of new evidence of the defendant’s vulnerability to questioning did not render conviction unsafe); *R. v. Rowe* (unreported) (C.A. Dec. 8, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com> (positing that new evidence that additional fingerprints at scene were not the defendant’s prints did not render conviction unsafe).

163. Thus, for example, in *R. v. Fannin*, (unreported) (C.A. June 17, 1999) (Smith Bernal Transcript), available at <http://www.casetrack.com>, the conviction was upheld after a change in the stories of the two key witnesses was not received because they were drunk at the time of the event and there was other evidence to show that the defendant intended to kill. In *R. v. Christofides*, (unreported) (C.A. Jan. 3, 1997) (Smith Bernal Transcript), available at <http://www.casetrack.com>, new evidence that the murder victim may have suffered a successive head wound from the fall following defendant’s attack would not have changed the result because the defendant would still be guilty of the murder. Finally, in *R. v. Moseley*, (unreported) (C.A. Apr. 21, 1999) (Smith Bernal transcript), available at <http://www.casetrack.com>, the conviction was upheld where evidence of a “learned

b. Investigative Misconduct

As noted above, several notorious wrongful convictions have been found to rest on unreliable confessions. Not surprisingly, a substantial proportion of the reversals on reference from the CCRC have been based on new evidence of police misconduct resulting in a confession's unreliability. For example, in *R. v. Campbell*,¹⁶⁴ the court received new evidence of the falsification of police notes by three of the four officers who allegedly took the defendant's statements. Unfortunately, the falsification of police notes was discovered after Campbell's conviction. The court held that such testimony could have substantially impeached the police testimony concerning whether Campbell's statements were coerced. Since the prosecution's case depended on Campbell's statements, the conviction was deemed unsafe.¹⁶⁵ Other police deception has also led to the quashing

helplessness" was not received upon the court's conclusion that the defendant, a battered woman, had had a chance to tell her story at trial and had not included this claim in her case. *See also*, *R. v. Campbell*, (unreported) (C.A. July 30, 1999) (Smith Bernal transcript), available at <http://www.casetrack.com> (upholding a conviction after new evidence that the defendant suffered from PMS was not considered because the defendant had claimed at trial that she did not do the killing and because the PMS defense was contradicted by other evidence).

164. (Unreported) 6 (C.A. Oct. 14, 1999) (Smith Bernal transcript), available at <http://www.casetrack.com>.

165. Again, the court articulated a relatively low standard for judging the safety of the conviction:

Our sole function is to form a judgment whether, in the light of the material now known to us but not known to the judge, the jury or counsel at the time of the trial, we think the verdict unsafe... In making their choice on credibility the jury did not, through no fault of theirs or of trial counsel, know of matters which, at lowest, threw severe doubt on the honesty and professional integrity of those officers. Had it been possible to put those findings to the officers they would have been driven to make admissions which would and should have caused the jury to entertain doubts, unless the other matters seemed to the jury to be very compelling. Even if the jury were still inclined to believe the officers, it is hard to see how rationally and conscientiously they could have been sure. If the judge had allowed the case to go to the jury at all he would have been bound to warn in strong terms of the danger of relying on the evidence of officers whose veracity had been so gravely impugned.

Id. at 11.

Again, a fairly low standard—the possibility of significant impeachment—was deemed sufficient to warrant receiving the evidence and granting relief. *Id.* In the United States, newly discovered impeachment evidence generally is not sufficient to warrant relief, regardless of its strength. *See infra* note 185 and accompa-

of convictions. For example, in *R. v. Quiddington*, the conviction was quashed when it was exposed that police had lied about the unavailability of an exculpatory videotape.¹⁶⁶

Similarly, in *R. v. Twitchell*,¹⁶⁷ the court received evidence from a subsequent civil action involving a different suspect that showed the suspect had been forced to confess by the police holding a plastic bag over his head. Twitchell had made the same claim of misconduct involving the same police officers. The court held that “potentially devastating cross-examination could plainly have been directed” at these officers, so that it was not possible to say that Twitchell’s conviction was safe.¹⁶⁸

c. Eyewitness Identification

A similarly lenient standard for receiving new evidence was articulated in *R. v. Hester*,¹⁶⁹ where the court received new evidence that corroborated the defendant’s alibi because that evidence “raised doubts” about the eyewitness’s identification. The new evidence came from a witness who was supposed to have been transported to trial by the defense solicitor but who had not been brought to the courthouse. The witness also failed to appear in the Court of Appeal, although his appearance was expected. Although the court noted, *inter alia*, that some features of his testimony aroused “very considerable skepticism” that some of his statements were inconsistent, and that it entertained “some doubts” about why he failed to appear at trial and in the Court of Appeal, his assertions concerning the defen-

nying text.

166. (Unreported) (C.A. Aug. 3, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com>. The court also found error in the court’s instructions on the issue of identification. *Id.* at 6. The remedy ordered was a new trial. *Id.* at 8. See also *R. v. Martin* (unreported) (C.A. July 12, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com> (referring the case to the CCRC, which ultimately quashed the conviction because the police officers who contributed to the defendant’s conviction had been previously accused of corruption, dishonesty, and perverting the course of justice, therefore rendering unreliable their claim to have found the evidence at the defendant’s home).

167. (Unreported) 3 (C.A. Oct. 26, 1999) (Smith Bernal transcript), available at <http://www.casetrack.com>.

168. *Id.* at 9.

169. (Unreported) at 5-6 (C.A. Mar. 12, 1998) (Smith Bernal Transcript), available at <http://www.casetrack.com>.

dant's whereabouts and his claim to have written down his testimony and sent it to the solicitors were corroborated. Since, in this one-witness identification case the witness's description did not match the defendant, and there was no other evidence against the defendant, the court held that it was "expedient in the interests of justice" to receive the new evidence.¹⁷⁰

In the final analysis the question for this court is whether, in the light of the new evidence, we can be sure that the appellant was rightly convicted. Unless we can be sure we are obliged to view the conviction as unsafe. Having reviewed the evidence and considered the matter in the light of the whole case, we conclude that we cannot be sure that the appellant was rightly convicted.¹⁷¹

d. Scientific Evidence

In *R. v. McNamnee*,¹⁷² an IRA-bombing case, the court defined the standard for admission of newly discovered evidence as whether the jury verdict *would have been the same* in the face of the new evidence. Conversely, the United States standard requires the defendant demonstrate that the new evidence *would have produced a different result*.¹⁷³

For example, in *McNamnee*, the court received new evidence from fingerprint experts concerning whether the defendant's fingerprints were on bomb making equipment. While concluding that the evidence was "inconclusive," the court held that the issue was

170. Criminal Appeal Act, 1995, § 23 (Eng.). See also *R. v. Johnson* (unreported) (C.A. Oct. 24, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com> (conviction quashed where the defendant, who presented an alibi, had not been represented at trial and therefore could not impeach the questionable identification evidence of an eyewitness and where court failed to instruct the jury on weaknesses of identification proof).

171. *Hester*, at 6, available at <http://www.casetrack.com>.

172. (Unreported) (C.A. 17, 1998) (Smith Bernal transcript), available at <http://www.casetrack.com>.

173. There is no court in the United States that would grant relief because it was not "sure" the defendant was rightly convicted. In the United States the burden of proving an erroneous conviction falls solely upon the defendant. Thus, it is easier to succeed on a claim of wrongful conviction in England, where the burden is shifted from the defendant to the prosecution.

whether the jury “would necessarily have arrived at the conclusion that they did if they had had the new evidence.”

Moreover, the need for a “reasonable explanation” for why new evidence was not presented at trial—one of the statutory criteria for the receipt of new evidence—has not been a significant obstacle in the court’s granting relief. In *R. v. Nicholls*,¹⁷⁴ for example, the CCRC itself secured new pathologist reports that showed the deceased could have died of natural causes and criticized the report that had been before the jury, concluding that the deceased had been suffocated. Significantly, there was no explanation, “reasonable” or otherwise, for the failure to adduce the evidence in (the prior) proceedings. However, it was dispositive that the new evidence supported the same defense presented at trial.¹⁷⁵

In several cases, the court has received scientific evidence that had only become available post-trial as a result of scientific advances.¹⁷⁶ The only requirement has been that the new evidence must relate to the defense that was raised at trial; defendants have not been given an opportunity to raise a new defense after one already failed. Thus, for example, in *R. v. Campbell*, the defendant was not permitted to adduce new evidence that her conviction for murder was unsafe because she had diminished capacity due to PMS, because at trial her defense had been that she was not the murderer.¹⁷⁷

e. Previously Undisclosed Exculpatory Evidence

As noted in Part I, the cause of some of the most notorious wrong-

174. (Unreported) 8 (C.A. June 12, 1998) (Smith Bernal transcript), available at <http://www.casetrack.com>.

175. *Id.* at 8; see also *R. v. Mulcahy*, (unreported) (C.A. Oct. 26, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com> (reversing a conviction based on new evidence that a fingerprint found at the scene fitted another person who fit the description given by the eyewitness better than the defendant, without any explanation for why the fingerprint had not been found before).

176. See, e.g., *Nicholls*, at 8, available at <http://www.casetrack.com>; *McNamee*, available at <http://www.casetrack.com>; *R. v. O'Brien*, (unreported) (C.A. Dec. 17, 1999) (Smith Bernal Transcript), available at <http://www.casetrack.com>; *R. v. King*, (unreported) (C.A. Dec. 10, 1999) (Smith Bernal Transcript), available at <http://www.casetrack.com>.

177. See *supra* note 163 and accompanying text.

ful convictions in England has been the suppression of unused exculpatory evidence by the police. Not surprisingly, several of the cases reversed by the Court of Appeal have been based on that misconduct. In doing so the court used a standard substantially more liberal than the standard of reversal used in the United States.¹⁷⁸

In fact, the first case to be decided on referral from the CCRC to the Court of Appeal was reversed on that basis. In *R. v. Mattan*, the case of a man who had been convicted of murder and hanged in 1952,¹⁷⁹ the conviction was reversed based on the non-disclosure of the following exculpatory proof: an eyewitness's prior inconsistent statement; the failure of four witnesses to identify the defendant in a lineup; the failure of one witness to identify him face to face on the day after the murder; acquittal of a similar murder by reason of insanity of a man fitting the description of the murderer; and the failure to disclose evidence supporting his alibi of leaving a theatre at the time of the murder. Significantly, once these nondisclosures came to light, the prosecution conceded that the eyewitness's testimony was no longer credible and that the conviction resting upon it was no longer safe.¹⁸⁰ Similarly, in *R. v. Davis*,¹⁸¹ where the police had failed

178. See *R. v. Kamara*, (unreported) 1 (C.A. May 9, 2000) (Smith Bernal transcript), available at <http://www.casetrack.com> (articulating a standard of review and allowing an appeal which resulted in the quashing of a life sentence).

179. (Unreported) 6-7 (C.A. Feb. 24, 1998) (Smith Bernal transcript), available at <http://www.casetrack.com>. Many of the cases referred by the CCRC involve convictions that are many years old. In *O'Brien*, the court of appeal articulated the standard for reviewing claims concerning old convictions. Since the standard for the court of appeals is whether the conviction is unsafe, it explained that it was required to apply the substantive criminal law that was in force at the time of trial, but "we judge the conduct of the investigation of the case, the conduct of the trial, the directions to the jury and the reliability of the evidence on which the jury acted in accordance with the standards that this court now applies." *ER v. Mills*, AC 382 (1998). For another case reversing a very old murder conviction, for which the defendant had been hanged, see *R. v. Bentley*, (unreported) (C.A. July 30, 1998) (Smith Bernal Transcript), available at <http://www.casetrack.com>.

180. In its holding, agreeing with the conclusion that the conviction was unsafe, the court stated:

[This] case has a wider significance in that it clearly demonstrates five matters. First, capital punishment was not perhaps a prudent culmination for a criminal justice system which is human and therefore fallible. Secondly, in important areas, to some of which we have alluded, criminal law and practice

to disclose to the prosecution that a witness was in fact an informant and that he had first implicated a person other than the defendant and had been given a reward, the court quashed the conviction.¹⁸²

Nondisclosure of exculpatory impeachment evidence also required reversal in *R. v. Druhan*, where the police failed to disclose the chief witness's criminal history, drug addiction, and drug-related psychosis.¹⁸³ The court also received new evidence that after the trial the witness was interviewed for a television talk show and retracted his trial testimony. And in *R. v. Kamara*,¹⁸⁴ the nondisclosure of 201 unused witness statements requested by the defense required a reversal of the conviction, even though the statements concededly were not material. The court rejected the outcome determinative "materiality" standard employed by the U.S. courts, and articulated the standard

have, since Mattan was tried, undergone major changes for the better. Thirdly, the Criminal Cases Review Commission is a necessary and the injustice in this case might never have been identified. Fourthly, no one associated with the criminal justice system can afford to be complacent. Fifthly, injustices of this kind can only be avoided if all concerned in the investigation of crime, and the preparation and presentation of criminal prosecutions, observe the very highest standards of integrity, professional skill.

Mattan, at 7, available at <http://www.casetrack.com>.

Interestingly, in light of the prosecution's concession it was not necessary for the court to address the nondisclosure issue, although it noted that at the time of the conviction it was not the practice to disclose prosecution witness statements to the defense. *Id.* at 6. The court held that possession of the nondisclosed evidence could have substantially impeached the main witness's testimony. *Id.*

181. (Unreported) (C.A. July 17, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com>.

182. *See id.* (holding that the appellants' appeals be allowed because the convictions were replete with irregularities and could not be considered "safe").

183. The court articulated a fairly liberal standard of review that fell far short of the U.S. harmless error standard:

Since we do not know what instructions the appellant gave to her trial counsel we cannot know what effect (if any) communication of this information (assuming it was not known to the appellant at the time) would have had on the conduct of the defense. But it seems overwhelmingly probable that the appellant's counsel would have made a very determined effort to discredit Mr. Fludgate and undermine the effect of his evidence.

Id. at 13.

184. (Unreported) 1 (C.A. May 9, 2000) (Smith Bernal transcript), available at <http://www.casetrack.com>.

for reversal based on nondisclosure as whether the material was “of no real significance.”¹⁸⁵

f. Correcting Legal Error

In a small number of cases, the court has quashed convictions based on errors occurring during the trial. In most of these cases, convictions were quashed due to errors in the court’s instructions to the jury or the court’s refusal to instruct the jury in a way that had a substantial impact on the case. In the famous case of *R. v. Bentley*,¹⁸⁶ the court reversed the conviction of a defendant who had been hanged in 1952, based, *inter alia*, on erroneous instructions by the

185. According to the court, it

[...] would emphasize, however, that the scope for the application of [the prosecutor’s] proposition is limited to matters which, at the end of the day, can be seen to have been of no real significance. The possibility that this view will ultimately be taken of any particular piece of disclosable evidence should be wholly excluded from the minds of the prosecution when the question of disclosure is being considered. Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defense.

Id. (quoting *R. v. Ward*, 96 Crim. App. R. 1 (1993)).

The prior, undisclosed statements of one of the witnesses would have corroborated another witness’ statement that she saw the crime begin outside the deceased’s betting establishment. These statements directly would have contradicted the accomplice’s testimony that the crime occurred inside the betting establishment, and thus could not be seen from the outside. The court concluded that, if the jury had heard this evidence, it might have reached a different conclusion about accepting the seemingly objective testimony proffered by the accomplice. Indeed, during deliberations, the jury asked about the method of entry into the premises, and no evidence was presented to resolve their concern. Other undisclosed statements contradicted the time at which the crime allegedly took place, and whether the alleged attackers were running in opposite directions. In short, the undisclosed evidence could have impeached the testimony of several important witnesses. Moreover, the prosecution conceded that the statements should have been disclosed. *Id.* at 10. The court thus concluded that since there were some statements that could not be said to be “of no real significance,” the conviction was unsafe. *Id.* Compare *United States v. Bagley*, 473 U.S. 667, 682 (1985) (defining the standard of “materiality” as whether there is a reasonable probability that the result would have been different).

186. (Unreported) (C.A. July 30, 1998) (Smith Bernal Transcript), available at <http://www.casetrack.com>.

trial judge which omitted an explanation that the burden to prove guilt beyond a reasonable doubt was on the prosecution. In *R. v. Kamara*,¹⁸⁷ the court had refused to charge the jury on the unreliability of identification evidence and on the significance of how an identification parade is constructed. In *R. v. Shahid*,¹⁸⁸ a new trial was ordered based on the court's error in instructing concerning joint liability for manslaughter based on the co-defendant's unexpected use of a knife to kill the deceased.¹⁸⁹ In *R. v. P.*,¹⁹⁰ the court reversed due to the failure to charge on the prosecution's burden of disproving an alibi and the failure to marshal the evidence bearing on the question of identification.¹⁹¹

Finally, in *R. v. Taylor*,¹⁹² the defendant's conviction was quashed on the ground that the court had permitted the trial to proceed without the defendant being represented by counsel. The court noted that this absence of counsel had deprived the defendant of the possibility of calling certain exculpatory witnesses whose evidence the court received and that the presence of counsel might have made for more effective cross-examination of police witnesses.¹⁹³

187. (Unreported) 1 (C.A. May 9, 2000) (Smith Bernal transcript), available at <http://www.casetrack.com>.

188. (Unreported) (C.A. Dec. 5, 1998) (Smith Bernal Transcript), available at <http://www.casetrack.com>.

189. The court of appeal has the power to order a retrial but does so only on request by the prosecution and generally in cases which are not very old so that it is possible to produce the evidence fairly.

190. (Unreported) (C.A. July 30, 1999) (Smith Bernal transcript), available at <http://www.casetrack.com>.

191. *Id.* at 8; see also *R. v. M.S. (Mark Robert)*, (unreported) (C.A. Dec. 8, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com> (quashing a conviction based on the court's failure to instruct the jury not to give extra weight to the requested replaying of the child victim's videotaped testimony). The court of appeal has also resolved other strictly legal issues. Thus, for example, in *R. v. Burke*, (unreported) (C.A. Nov. 25, 1999) (Smith Bernal Transcript), available at <http://www.casetrack.com>, subsequent authority established that an electronic transfer was not a taking of something by fraud, so that, on the prosecution's suggestion, a conviction of the lesser offense of attempted theft was substituted.

192. (Unreported) (C.A. June 18, 1998) (Smith Bernal Transcript), available at <http://www.casetrack.com>.

193. *Id.* at 9, 10; see also *R. v. Johnson* (unreported) (C.A. Oct. 24, 2000) (Smith Bernal Transcript), available at <http://www.casetrack.com> (quashing a

3. *Royal Prerogative of Mercy*

In England, the Royal Pardon, or the Royal Prerogative of Mercy, is exercised by the Queen on advice from the Home Secretary. Such a pardon relieves the convicted defendant of all penalties arising from the conviction. Alternatively, a sentence can be commuted. A pardon does not constitute a declaration of innocence or a quashing of the conviction. In view of the power of the CCRC to receive new evidence that would have been admissible at trial, the only cases that are now appropriate for consideration under the Royal Prerogative are those that are based on inadmissible evidence.¹⁹⁴ Thus, if an applicant has a claim involving sufficiently compelling new evidence that would not have been admissible at trial under the English rules of evidence, the applicant or the CCRC can bring the case to the Home Secretary for consideration of the Royal Prerogative.¹⁹⁵ The Home Secretary can also seek the CCRC's advice when it is considering advising the Queen whether to issue a royal pardon.¹⁹⁶

B. UNITED STATES

1. *New Evidence*

The federal and state courts have a procedure for granting a new trial based on newly discovered evidence.¹⁹⁷ However, because of the restrictive nature of this relief, a new trial is rarely granted. An applicant often faces severe time limitations and must also show a very high probability of success on the merits. In federal court, Rule 33 of the Federal Rules of Criminal Procedure authorizes a new trial based on newly discovered evidence "if required in the interest of justice."

conviction based on the defendant having not been represented at trial and thus unable to effectively challenge problematic identification proof).

194. Runciman Commission Report, *supra* note 12, at 184.

195. Criminal Appeal Act, 1995, ch. 35, § 14(3) (Eng.), *available at* http://www.hmso.gov.uk/acts/acts1995/Ukpga_19950035_en_1.htm (authorizing the CCRC to refer cases to the Court of Appeals).

196. *Id.* at § 16(1) (authorizing the Secretary of State to refer to the CCRC "any matter which arises in the consideration of whether to recommend the exercise of Her Majesty's prerogative of mercy in relation to a conviction and on which he desires their assistance . . .").

197. FED. R. CRIM. P. 33; *see, e.g.*, N.Y.C.P.L.R. art. 44, § 4402, 4404.

Such a motion must be made within three years of final judgment.¹⁹⁸ A court may grant a new trial on the basis of newly discovered evidence only where:

(1) the evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) [the evidence] must be material to the issues involved; and (5) [be] of such nature that in a new trial it would probably produce an acquittal.¹⁹⁹

Under this standard, a motion may not be entertained if it is made more than three years after conviction, regardless of the strength of any new evidence or the reason for the failure to produce it earlier.

Moreover, even if a claimant is within that time limit, the courts have imposed heavy obstacles to obtaining relief. Thus, substantial newly discovered evidence has been held by the courts to be insufficient to warrant relief. For example, evidence that is merely unavailable during trial, but which was in existence at that time, is not sufficient to support a motion for a new trial.²⁰⁰ Impeachment evidence, regardless of its strength, is not sufficient to warrant relief. Rather, the newly discovered evidence must relate to one of the substantive elements of the charged crime.²⁰¹

In many states, a very short statute of limitations makes relief virtually unattainable. Indeed, twenty-two states have statutes of limitations prohibiting the receipt of newly discovered evidence after one

198. FED. R. CRIM. P. 33. A motion made on any other ground, however, must be made within seven days of the verdict or finding of guilty, or at such other time set by the court during that seven-day period. *Id.*

199. *Thompson v. United States*, 188 F. 2d 652, 653 (D.C. Cir. 1951). The court held that a police report containing a record of the complainant's convictions (i.e., one for petit larceny and several charges for drunkenness for which he forfeited his bail) did not warrant a new trial since the report could have been produced at trial and because it served only to impeach the complainant's testimony. In this case, the court held that the evidence would probably not "produce an acquittal." *Id.*

200. *E.g.*, *United States v. Turns*, 198 F. 3d 584, 587 (6th Cir. 2000).

201. *E.g.*, *United States v. Gillespie*, 210 F.3d 376 (7th Cir. 2000) (holding that an issue previously addressed but which defendant was trying to reargue was a "collateral attack" and thus did not qualify as "newly discovered" evidence).

year or less.²⁰² Even in the eight states that have no time limitations, or in the federal system with its three-year limitations period, relief is rarely granted because the burden imposed on the defendant—whether the new evidence probably would produce an acquittal—is so high.²⁰³

202. Four states have 10-day limits: Florida (FLA. R. CRIM. P. 3.590); Hawaii (HAW. R. PEN. P. 33); South Dakota (S.D. Cod. Laws § 23(A)-2901 (1988)); Utah (UTAH R. CRIM. P. 24(c)). One state has a 15-day time limit: Minnesota (MINN. R. CRIM. P. 26.04[3]). One state has a 20-day limit: Wisconsin (WIS. STAT. § 809.30(2)(b) (1989-90)). One state has a 21-day limit: Virginia (VA. ADMIN. CODE § 3(A):15(B)). One state has a 25-day limit: Missouri (MO. R. CRIM. P. 29.11(b)). Eight states have a 30-day limit: Alabama (ALA. CODE § 15-17(5) (1982)); Arkansas (ARK. R. CRIM. P. 36.22); Illinois (ILL. REV. STAT. ch. 38, §116 (1991)); Indiana (IND. R. CRIM. P. 16); Mississippi (MISS. R. APP. P. 4); Montana (MONT. CODE ANN. § 46-16-702(2)(1991)); Tennessee (TENN. R. CRIM. P. 33(b)); Texas (TEX. R. APP. P. 24(c)). One state has a 42-day limit: Michigan (MICH. CT. R. CRIM. P. 6.432(a)(1)). One state has a 60-day limit: Arizona (ARIZ. R. CRIM. P. 24.2(a)). Four states have a 1-year limit: Louisiana (LA. CODE. CRIM. ANN., art. 853 (1984)); Maryland (MD. R. CRIM. P. 4-33(c)); Oklahoma (OKLA. CT. R. CRIM. P., ch. 15, § 953); Washington (WASH. CRIM. R. 7.8(b)). Eleven states have a 2-year limit: Alaska (ALASKA R. CRIM. P. 33); Delaware (DEL. CT. CRIM. R. 33); (District of Columbia: D.C. SUPER. CT. CRIM. R. 33; Kansas (KAN. STAT. ANN § 22-3501 (1988)); Maine (ME. R. CRIM. P. 33); Nevada (NEV. REV. STAT § 176.515(3)(1991)); New Mexico (N.M. R. CRIM. P. 5-614(c)); R.I. (R.I. SUPER. CT. R. CRIM. P. 33; Vermont (VT. R. CRIM. P. 33); Wyoming (WYO. R. CRIM. P. 33(c)). Three states have a 3-year limit: Conn (CONN. GEN. STAT. §§52-270, 52-582 (1991)); Nebraska (NEB. REV. STAT. § 29-2103 (1989)); N.H. (N.H. REV. STAT. ANN. §526-4 (1974); N. Dak. (N.D.R. CRIM. P. 33(b)). Eight states have no time limit: California (CA. P. C. §1181 (8) (1985); Colorado (COLO. R. CRIM. P. 33(c)); Mass. (MASS. R. CRIM. P. 30); New Jersey (N.J.R. CRIM. P. 30:20-2); New York (N.Y. CRIM. P. §440.10(1)(g) (1983); North Carolina (N.C. GEN. STAT. §15(A)-1415(1999); Pennsylvania (PA. R. CRIM. P. §1123 (d); South Carolina (S.C.R. CRIM. P. 29(b)). Six states have very short time limits that can be waived: Georgia (GA. CODE ANN. §§ 5-5-40-5-5-41 (1982)(30 days); Idaho (IDAHO CODE § 19-2407 (1992) (10 days); Iowa (IOWA R. CRIM. P. 23 (45 days); KENTUCKY (KY. R. CRIM. P. 10.06 (1 year); Ohio (OHIO R. CRIM. P. 33(b) (120 days); Oregon (OR. REV. STAT. § 136.535 (1)(1991) (5 days).

203. *Thompson*, 188 F. 2d at 653 (holding that “the trial court has a broad discretion as to whether a new trial should be granted because of newly discovered evidence, and its actions will not be disturbed on appeal unless an abuse of that discretion appears.”). In most states, a convicted defendant can file a collateral attack in the trial court if his/her appeal has been exhausted. Although this avenue is primarily intended to correct errors, newly discovered evidence of innocence can also be introduced. Generally, if the trial court denies relief, permission to appeal to the intermediate appellate court is required to appeal. If relief then is denied at

2. Relief for Factual Innocence

After state direct appeals and collateral attack have been exhausted, a convicted defendant may seek relief through the writ of habeas corpus,²⁰⁴ as may a defendant convicted in federal court whose direct appeals and motion for new trial have been exhausted.²⁰⁵ However, in *Herrera v. Collins*,²⁰⁶ the Supreme Court drastically limited the right of a convicted defendant to invoke habeas corpus based on a claim of actual innocence. The Court held that the petitioner's claim that newly discovered evidence established his "actual innocence" did not raise a constitutional issue upon which substantive habeas corpus relief could be granted. While leaving the door open for a possible narrow exception based on truly persuasive proof of innocence, the Court emphasized that habeas corpus exists to prevent convictions based on constitutional errors, not to correct factual errors.²⁰⁷

The Court emphasized that the trial is the forum for determinations of guilt and innocence and that many protections exist to produce an accurate determination, including the presumption of innocence, the burden of proof beyond a reasonable doubt, and the rights to confrontation, counsel, and compulsory process.²⁰⁸ Thus, once a defendant is given a fair trial and is convicted, he or she no longer comes "before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law. . . ." because the prosecution has already overcome the presumption of innocence.²⁰⁹

this level, permission to appeal to the court of last resort is also required. However, denial of a motion for a new trial is itself reviewed under the strict abuse-of-discretion standard. *United States v. Papajohn*, 212 F.3d 1112, 1117-18 (8th Cir. 2000).

204. 28 U.S.C. § 2254 (1994).

205. 28 U.S.C. § 2255 (1994).

206. 506 U.S. 390 (1993).

207. *See id.* at 402 (distinguishing *Jackson v. Virginia*, 443 U.S. 307 (1979), in which the Court had entertained on habeas corpus the question of whether the evidence was legally sufficient to establish guilt beyond a reasonable doubt—that is—whether the verdict was rationally based as opposed to factually correct).

208. *Id.* at 398-99.

209. *Id.* at 399-400.

The Court found no due process violation in the absence of meaningful factual review in the Texas and federal courts.²¹⁰ Relying on its own long-standing precedent, the Court found no historical support for using habeas corpus to litigate factual error.²¹¹ It also found no historical support for a broad right to a new trial based on newly discovered evidence.²¹² Finally, the Court noted that Texas is one among many states that have a short statute of limitations for new trial motions (thirty days).²¹³ On these grounds, the Court refused to hold that Texas's refusal to entertain petitioner's new trial claim eight years after his conviction violated due process.²¹⁴ In rejecting the due process claim, the Court also noted the existence of executive

210. The Court disagreed about whether the claim was one of substantive or procedural due process. The dissent argued that it was a substantive due process claim because execution of an innocent person would be the ultimate arbitrary imposition of punishment. *Id.* at 435. According to the majority, the claim sounded only in procedural due process, since the defendant was not an innocent person, but rather one who has been convicted of two capital murders. *Id.* at 407. To the majority, then, the question before the Court was whether the defendant was entitled to judicial review of his actual innocence claim, and not whether due process prohibits execution of an innocent person. *Herrera*, 506 U.S. at 407.

211. *See id.* at 400-06 (examining the Court's habeas jurisprudence and arguing that the defendant did not qualify for habeas relief because he was not seeking "excusal of a procedural error so that he [might] bring an independent constitutional claim challenging his conviction or sentence," and that defendant did not qualify for the "fundamental miscarriage of justice exception" because he did not "supplement[. . .] his constitutional claim with a colorable showing of factual innocence.").

212. *Id.* at 409-11; *see also id.* at 417 (setting forth the principle that, in fact, executive clemency is the usual remedy for a defendant to pursue if he has claims of innocence based on new evidence discovered too late to make a motion for a new trial).

213. *Id.* at 410-11 (recognizing Texas' short statute of limitations but still holding that a refusal to entertain a request for a new trial based on new evidence acquired eight years after the conviction did not "transgress[. . .] a principle of fundamental fairness 'rooted in the traditions and conscience of our people.'").

214. *Id.* at 411 (observing that the petitioner was not left without a "forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for executive clemency."). Noting that the Court's habeas corpus jurisprudence did not "[cast] a blind eye toward innocence," the Court observed that innocence does not play a role in excusing otherwise procedurally defaulted claims raised on habeas corpus review. *Herrera*, 506 U.S. at 404.

clemency, “the fail safe” in our criminal justice system”²¹⁴ as a method of adjudicating petitioner’s claim.²¹⁶

The *Herrera* Court left open the possibility that, “in a capital case, a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim.”²¹⁷ However, the Court placed the threshold showing of actual innocence very high because of the “very disruptive effect” entertaining such claims would have on the need for finality and the burden of retrying stale cases. The Court described the necessary showing as “extraordinarily high.” Indeed, since *Herrera*, no habeas court has granted substantive relief based on a claim of actual innocence.²¹⁸

Concurring in *Herrera*, Justices O’Connor and Kennedy formulated the issue as “whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, [ten] years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial.”²¹⁹ In holding that the answer to this question

215. *Id.* at 415 (quoting K. MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 131 (1989)).

216. *See id.* at 415, n.15 (highlighting the disagreement between the majority and the dissent regarding the historic role of clemency in preventing the execution of innocent persons). It was the majority’s position that clemency had provided relief in many cases, and that the use of one study finding that twenty-three innocent persons had been wrongfully executed in the 20th Century was disingenuous because that study remains in dispute among scholars. *Id.*

217. *Id.* at 417.

218. The *Herrera* Court held that the petitioner’s showing of actual innocence was insufficient. *Herrera* had relied on affidavits which the Court held were inconsistent with each other both as to the number of people in the car, the direction in which it was headed, and when one of the officers was killed, and that there was no explanation for why the affiants had waited until the brother was dead to come forward. Nor was any explanation offered as to why the petitioner had pleaded guilty to one of the two murders. The court made clear that the affidavits had to be compared to the proof at trial, which included two eyewitnesses, numerous pieces of circumstantial evidence, and a handwritten letter of apology, all of which “point[ed] strongly to petitioner’s guilt.” *Id.* at 417-18.

219. *Herrera*, 506 U.S. at 420.

is “no,” Justice O’Connor observed, “[O]ur society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.”²²⁰ Justices O’Connor and Kennedy held that Texas’s thirty-day limit for newly discovered evidence claims did not violate due process and would also have held that petitioner’s demonstration of “innocence” was inadequate to justify any relief under any standard.²²¹

Justices Scalia and Thomas, separately concurring, found no right to the post-conviction consideration of newly discovered evidence whatsoever. They explained: “[T]here is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.”²²²

Justice White concurred in the judgment on the assumption that “a persuasive showing of actual innocence made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.”²²³ Justice White would have adopted the *Jackson* rationality standard as the required threshold showing: that based upon newly discovered evidence and the entire record, “no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.”²²⁴

Finally, in dissent, Justice Blackmun, joined in relevant part by Justices Stevens and Souter, held that executing an innocent person would violate the Eighth Amendment as well as substantive due process. The dissenters would have required a defendant to show that he “probably is innocent.”²²⁵ This standard is supported by the fact that new evidence may be discovered long after conviction, when it is difficult to retry a case. Second, conviction after a fair trial strips the

220. *Id.*

221. *Id.* at 420-25.

222. *Id.* at 427-28.

223. *Id.* at 429.

224. *Id.* at 420.

225. *Herrera*, 506 U.S. at 442.

defendant of the presumption of innocence and places the burden of proving innocence on the defendant, not just raising doubts about his guilt. Under that standard, Justice Blackmun would have held that the affidavit of a licensed attorney and former state court judge that his client confessed that he committed the murders rather than Herrera was sufficient to require a hearing.²²⁶

As to the suggestion that the existence of clemency satisfied the due process clause, Justice Blackmun explained that "vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal."²²⁷

3. Executive Clemency

In the United States, clemency power is vested in the Executive Branch (i.e., the U.S. President for federal defendants, the state governors for state defendants).²²⁸ The clemency power is entirely discretionary and frequently is hidden from public scrutiny. Clemency is a political process that is rarely invoked because it is so vulnerable to extreme political pressures.²²⁹ Put simply, there is no constituency favoring the release of convicted criminals.

226. *Id.* at 445-46.

227. *Id.* at 440.

228. Under the U.S. Constitution, the federal clemency power is vested entirely in the President. U.S. CONST. art. II, § 2. In eight states, the governor has sole authority for a clemency decision in a state criminal case. In twenty-six other states the governor receives non-binding advice from a board. Five states vest their boards with final authority. Nine states have a shared-power model, with the governor sitting on the pardon board or some similar collaborative decision-making process. In those states that have boards, the members of those boards are either governor appointed or governor appointed with the approval of the legislature required. Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. OF CRIM. & CIV. CONFINEMENT 413 (1999).

229. This may not always have been true. The high water mark of clemency grants by the President of the United States was during the Truman Administration, when President Truman granted 41.5 percent of the clemency applications that came before him. The modern trend is much more restrictive. The percentage of clemency applications granted has declined steadily from the Kennedy administration to the Clinton administration from 40.9 percent to 3.4 percent. Stuart Taylor, Jr., *All the President's Pardons: The Real Scandal*, NAT L. J. 316 (1999);

The clemency process is usually hidden from public review or accountability. It is rarely possible to identify or closely examine the existence or scope of the investigation into individual clemency or pardon applications. In the federal system, the investigation is conducted essentially by the prosecution. Applications for clemency or pardon are forwarded by the President to the Pardon Attorney at the Department of Justice. The Pardon Attorney forwards the application with a recommendation through the Associate Attorney General to the U.S. Attorney General. An investigation is also conducted by the FBI or other Justice Department personnel. The Attorney General then makes a written recommendation to the president. There are no requirements or guidelines for the type of investigation that is conducted.²³⁰

A similar procedure is followed by state clemency officials. Forty-two states designate a board to investigate; four states give this duty to probation or parole officers, and one state assigns investigations to the state attorney general's office. In slightly less than half of the states, the authority to investigate is not mentioned in any statute.²³¹ As one commentator has noted, "perhaps this is due to the fact that administrative law, informal inter-agency understandings/ agreements, or unwritten agency conventions dictate who has authority to engage in fact finding upon the filing of a pardon application."²³²

IV. CRITIQUING THE TWO SYSTEMS: LESSONS TO BE LEARNED

It is undeniable that public confidence in the ability of the U.S. criminal justice system to render accurate results has eroded signifi-

Margaret Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1492.

The same trend is present in state death penalty cases. In 1970, twenty-nine of 133 applications for commutation of a death sentence were granted. In 1988, four of 296 death sentences were commuted. Henry Weinstein, *Issue of Clemency Is Davis' Most Difficult as Governor*, L.A. TIMES, Feb. 6, 1999, at A1; Executive Clemency in Post-Furman Capital Cases, Death Penalty Information Center (on file with the author).

230. Dorne & Gewerth, *supra* note 228, at 439.

231. *Id.* at 434.

232. *Id.*

cantly in recent years.²³³ There is increasing concern that innocent people are being wrongfully convicted and that there is no systemic mechanism to correct these results.²³⁴ In determining how to respond to this concern, the U.S. criminal justice system may look to its Eng-

233. See Krista Larson, *Advocates Cite Poll Data, Seek Death Penalty Changes; Critics Say Results Show Most Back Capital Punishment*, DALLAS MORNING NEWS, Sept. 15, 2000, at 3A (reporting that "69 percent of 802 registered voters who were polled last month said they worry that an innocent person could be executed.").

234. Although the prevention of wrongful convictions is not the subject of this article, several changes could be made in the pre-trial, investigative stage of the criminal process. See DWYER, *supra* note 1. The majority of wrongful convictions arise from conduct that occurs during that stage, either because of (1) the failure to give the defense meaningful access to exculpatory proof; or (2) a one-sided investigatory process in which exculpatory proof is simply ignored. For example, The Innocent Protection Act, H.R. 4167, 106th Cong. §101 (2000), takes a step toward greater disclosure of exculpatory evidence by requiring preservation of DNA-testable materials and DNA testing upon a defendant's request. With respect to another cause of wrongful convictions, the inadequacy of defense counsel, the bill also contains several prescriptions for improving the performance of defense counsel in capital cases. New York and Illinois already have statutes designed to permit more DNA testing for the defense. This is one modest way to broaden the possibility of discovering evidence of innocence before a wrongful conviction occurs. It is limited by the fact that it will only affect cases in which DNA-testable evidence is present.

Steps to prevent mistaken identification could include requiring that all identification witnesses be instructed prior to an identification procedure that the suspect may not be present, that lineups and photo spreads be conducted sequentially rather than simultaneously, and that all identification procedures be conducted by specially trained officers and be recorded. To prevent erroneous confessions, all statements taken during police interrogation should be recorded as well.

There are enough cases to demonstrate that the problem of not uncovering exculpatory evidence is matched by knowing suppression of exculpatory evidence that the prosecutor has discovered. Given the excesses of the U.S. adversary system, placing the determination of whether exculpatory evidence is "material" and thus disclosable in the discretion of the prosecution, and then reviewing the exercise of that discretion in hindsight based on its effect on the verdict, provides very little protection. The English requirement that schedules of exculpatory evidence be kept and disclosed and the English standard for requiring disclosure (whether the material "would undermine the case for the prosecution" or "which might be reasonably expected to assist the accused's defense") would certainly ensure that more exculpatory evidence sees its way into the factfinding process, or that more reversals result when it does not. Another solution might be to impose heightened ethical requirements on the prosecutor to uncover and disclose exculpatory proof. See Fisher, *supra* note 20, at 1386-87.

lish counterpart for new approaches. Three proposals immediately come to mind. First, access to a forum for presenting wrongful conviction claims needs to be broadened; there needs to be an effective forum for investigating and considering claims of innocence where new evidence strongly supports the claim. Second, once access to a forum is created, the standards for considering claims of innocence need to be broadened. Third, the scope of executive clemency and pardon needs to be expanded to address compelling claims of innocence.

A. BROADENING ACCESS

1. Independent Commission

A prerequisite to establishing factual innocence after all legal appeals have been exhausted is the availability of some official forum to receive credible new evidence of innocence, regardless of when it is discovered. One such forum could be an independent governmental entity modeled after the English CCRC.²³⁵ Such a body would have the power to entertain claims of factual innocence, as opposed to claims of error or misconduct. In addition, such a body would have full investigative powers, including subpoena power and the ability to examine police and prosecution files. After investigation, such a body would be authorized to refer any cases in which substantial new evidence has been found to an appropriate trial-level court.²³⁶ Such a court would have the power to entertain a collateral

235. Others have already recommended the creation of this type of institution. *See, e.g.,* Horan, *supra* note 132, at 110-11. Others have recommended this approach with respect to capital cases. *See, e.g.,* MARTIN YANT, PRESUMED GUILTY; WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED 221 (1991).

Because of the federalist structure of criminal procedure in the United States, each state should have its own commission, and there should be one for each of the twelve federal circuits.

236. Unlike the case in England, where the cases are referred to the court of appeal, no appellate court in the United States has the power to receive new evidence. While the jurisdiction and powers of the U.S. appellate courts could be changed legislatively, such a major change is not necessary to effective review of wrongful conviction claims; trial-level courts are capable of and accustomed to entertaining claims of newly discovered evidence.

attack on the conviction.²³⁷ The court would have the power to hold a hearing and to decide whether to dismiss the application, order a new trial, or vacate the conviction. The court's decision would be subject to discretionary appeal under the same conditions that habeas corpus or other collateral decisions are now subject to appeal.

The same objections that could be raised to creation of such an independent review board in the United States were raised concerning the creation of the CCRC in England. First, there might be a concern that the courts would be flooded with claims. However, the English experience demonstrates that this concern is unrealistic. In a system where the standard of review is lower than the U.S. standard, only 103 cases have been referred to the court out of 2683 actually considered (only 4.3 percent). For the same reason, the effect on finality should not be substantial. Second, an objection that the courts will be second guessing jury determinations is illusory. The requirement that relief is only to be based on newly discovered evidence—by definition, evidence that was not before the jury—has eliminated that concern in England. Third, no separation-of-powers issues arise because, as it is in England, it is the court, and not the commission, that would make the actual decision. Finally, any objection to the addition of another layer of review is misplaced; as demonstrated above,²³⁸ post-conviction claims of actual innocence are not effectively litigated anywhere under the current system. By considering only post-conviction, actual-innocence claims, an independent review commission would serve a unique function; it would not simply be an added layer of review.

2. *Access to New Evidence*

If such a commission is not created, then some other forum needs to be provided for consideration of credible new evidence whenever

237. The state commissions could be authorized to entertain cases either on the first round of collateral attack or after all collateral attack remedies have been exhausted. Smaller states, with lower case volumes, may find it more efficient to employ such a commission on the first level of collateral attack; larger states, with larger anticipated case loads, may prefer to permit such a procedure only after all direct and collateral remedies have been exhausted.

238. See discussion *supra* at II.D.2 - II.E.1, IV.A.

it appears. Currently, twenty-two states have statutes limiting the receipt of newly discovered evidence to one year or less.²³⁹ These restrictive laws permit prosecutors to oppose and courts to reject new evidence, however credible, wholly on process grounds (i.e., statute of limitations), rather than on the probative value of the new evidence.²⁴⁰ Courts should be able to consider credible and material new evidence whenever such evidence comes to light. As in New York and seven other states,²⁴¹ time limits on the presentation of new evidence should be abolished.

To be sure, the passage of time is a relevant factor in evaluating whether to grant relief, as well as the reliability of proof and prejudice to either side. However, no jurisdiction should foreclose consideration of credible and compelling new evidence on the basis of time alone. Jurisdictions that do not permit the receipt of new evidence more than sixty days after a conviction is final effectively preclude any review of substantial claims of wrongful conviction. Given the currently available data on erroneous convictions in capital cases, the justification for strict time limitations is simply not tenable.²⁴²

3. *Legislation to Allow Claims of Innocence*

Another way to provide for effective litigation of wrongful conviction claims would be for the U.S. Congress to amend the Anti-Terrorism and Effective Death Penalty Act specifically to provide for

239. See *supra* note 198 and accompanying text.

240. See The Innocent Protection Act, H.R. 4167, 106th Cong. §101(a)(8) (2000) (noting that “[i]n some cases, States have relied on time limits and other procedural barriers to deny release to inmates even when DNA testing has demonstrated their actual innocence”). See also Sara Rimer, *Lawyer Sabotaged Case Of a Client on Death Row*, N.Y. TIMES, Nov. 24, 2000, at A27 (noting a case in which a district attorney argued that a defendant had no constitutional right to effective assistance of counsel or conflict-free counsel at that stage of the proceeding in opposing relief for a convicted capital defendant whose lawyer purposely missed filing deadline for appeal from sentence because he believed his client deserved to die).

241. See *supra* note 198.

242. See The Innocent Protection Act, H.R. 4167, 106th Cong. §102 (f)(2)(a) (2000) (stating that Innocence Protection Act would both provide for DNA testing at any time and after a favorable result, require a hearing “notwithstanding any provision of law that would bar such a hearing [...]”).

habeas corpus review of actual innocence claims.²⁴¹ As noted above,²⁴⁴ while the Supreme Court left open in *Herrera* the possibility of such review, it drew the standard for review of such claims so high that relief is extremely unlikely. Indeed, since *Herrera*, no habeas court has granted relief based on evidence of actual innocence.²⁴⁵

B. BROADENING THE SCOPE OF REVIEW

Whatever forum is created for the receipt of credible new evidence, the standard for granting relief based on newly discovered evidence of innocence should be lowered. There is a vast difference between the English standard of “unsafe”—whether there exists a “lurking doubt” or whether the jury would “necessarily have reached the same result in light of the evidence”—and the U.S. standard—whether the new evidence probably would produce an acquittal. First, the language of the English standard makes clear that the burden is on the prosecution to defend the result; the U.S. standard places the burden on the defendant to rebut the presumption that the conviction is correctly based. Second, the U.S. requirement that an acquittal would be probable is much higher than the conclusion that a conviction is “unsafe” and such a standard is unlikely to result in vacating a conviction except in the most extreme instances. Finally, under the U.S. standard, impeachment evidence generally is not sufficient to warrant relief. Moreover, exculpatory proof that adds to the evidence of innocence presented at trial is generally found to be cumulative and also not sufficient to warrant relief.

243. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). On such applications, magistrate judges, who already are empowered to make recommendations to the courts, could serve some of the referral function served by the CCRC in England. If there were an institution like the CCRC, investigative functions could be referred to it by the magistrate judges, a power currently possessed by the court of appeals in England. *Id.*

244. See *Herrera*, 506 U.S. at 417 (reviewing the new standard for determining “actual innocence” in capital cases).

245. Alternatively, it is possible that state courts interpreting their own state constitutional due process clauses might disagree with the *Herrera* Court and hold that conviction of an actually innocent person violates due process. Those courts could then set standards for review of factual innocence claims on collateral attack that would permit a realistic possibility of success.

C. CREATING AN EFFECTIVE EXECUTIVE SAFETY NET

In *Herrera v. Collins*,²⁴⁶ the Supreme Court maintained that executive clemency is a meaningful safety net for the wrongfully convicted that, together with the judicial process, satisfies the demands of due process.²⁴⁷ The political realities surrounding clemency as well as the empirical data demonstrate that this view is untenable.

It might be feasible to make clemency an effective protection against wrongful convictions if Congress and the state legislatures created formal bodies like the CCRC to investigate, evaluate, and advise on clemency and pardon applications. Many states already have such boards. However, unlike the specific, very broad, and effective investigatory powers of the CCRC, the investigatory powers and responsibilities of the states vary tremendously, are not clearly defined, and are not open to public accountability. A truly effective investigatory and advisory body whose work is accessible to public view might go far to restore confidence in the clemency system. Moreover, by reducing some of the potential for political fallout for elected executives, this system would make clemency a stronger safety net against wrongful convictions.

Alternatively, such boards could be created as adjuncts within prosecutorial offices. For example, motions for new trials that are received by a district attorney's office could be referred to this body for investigation, evaluation, and advice. Like the chief executive, the prosecutor is an elected official and might be amenable to creating such an advisory body with both lay and professional participation to avoid adverse political fallout from wrongful conviction claims.²⁴⁸ This would ameliorate somewhat the impact of the extreme adversarialness that now infects the litigation of wrongful conviction claims, and bring it more in line with the English model, which, as

246. *Herrera*, 506 U.S. at 390.

247. See *supra* note 211, 212, and accompanying text.

248. See Ross E. Milloy, *A Texas Prosecutor who Seeks Evidence of Innocence*, N.Y. TIMES, Oct. 21, 2000, at A9 (quoting a Texas prosecutor who voluntarily decided to reexamine 400 convictions who stated, "Of course, I was worried about people's reactions, knowing we had sentenced this man to prison for something he didn't do, but my major concern was, 'what can we do to set this right? And are there others?'").

noted, frequently prompts confessions of error from the Crown. The same sort of confessions of error might occur more frequently in the United States. In addition, correction of a wrong result within the adjudication process itself might make a unique contribution to restoring public trust in that process.

CONCLUSION

Although procedures vary, every criminal justice system tries to assure that its guilt determinations are accurate. Nevertheless, errors occur, sometimes serious enough that innocent people are wrongly convicted. When this happens, procedures are available to correct the error. However, these procedures often do not accomplish that result.

This Article has studied two criminal justice systems that have essentially the same procedures for determining guilt and have essentially the same vulnerabilities to error, but that have dramatically different procedures for reviewing, investigating, and correcting factual errors that result in the conviction of an innocent person. The English system, while affording somewhat fewer procedural protections for the appellate review of factual error, provides a very broad safety net when claims of innocence are brought after appeal. The CCRC allows a claim to be made at any time, allows new evidence to be produced, independently investigates the claim, and refers the meritorious cases to a court that applies a relatively lenient standard for relief.

By contrast, the United States offers several avenues of appellate and collateral review following a conviction. However, these remedies focus mostly on legal and procedural errors rather than factual errors. Moreover, there is virtually no avenue for judicial relief in the face of a factual erroneous conviction: the opportunity for bringing new evidence is extremely limited; the standard of review is intolerably high; and clemency is so rarely granted as to be virtually meaningless.

From this comparative analysis it is possible to suggest several ways in which the United States could enhance protections for persons who are wrongly convicted. First, a meaningful forum for the receipt and investigation of new evidence must be created. This forum could be modeled after the English CCRC, or it could be provided for within the present judicial structure by broadening rules for

newly discovered evidence, lengthening state time limits for its introduction, or amending the federal habeas corpus statute specifically to allow review based on a claim of innocence.

Second, the standard for evaluating claims of innocence based on new evidence should be broadened to allow courts to vacate convictions where, in light of new evidence, the prosecution cannot convince the court that a conviction still would have occurred. This is the standard employed in England.

Finally, the system of executive clemency should be improved to serve the meaningful purpose envisioned by the Supreme Court in *Herrera*. Clemency statutes should be amended to ensure that the process is open to public scrutiny and includes a thorough investigation and meaningful standards so that no wrongly convicted person is denied relief.