BOOK REVIEW

REASONS TO DOUBT: WRONGFUL CONVICTIONS AND THE CRIMINAL CASES REVIEW COMMISSION. By Carolyn Hoyle and Mai Sato. New York: Oxford University Press, 2019. Pp. xxx, 383. $99.00 (hardback).

Reasons to Doubt is a comprehensive, socio-legal study of the workings of the U.K. Criminal Cases Review Commission (CCRC). The CCRC is an independent body established in 1997 to investigate post-conviction claims of miscarriages of justice in England, Wales, and Northern Ireland, with the power to refer cases to the Court of Appeal for review if there is a "real possibility" that the court will find the conviction to be "unsafe."[1] The book is the first empirical study of the CCRC's decision-making process. Based on an unusual open-access review of the CCRC's internal guidance documents, case files, and personnel, the authors base their study largely on Keith Hawkins' typology of decision-making to make sense of the CCRCs twenty-one-year body of work.[2] Taking a naturalistic approach, they analyze the "surround"—the sociological, economic, and political environments that impact decision making; the "field"—the "formal" policies and standards of the institution, including its enabling statutes, court of appeal decisions, CCRC policy memoranda, and confidential Casework Guidance notes; and the "frame"—the individual structure of knowledge, experience, values, and meanings that the case managers and commissioners each employ in deciding whether and how to investigate a case and whether to refer it to the court of appeal. The resulting monograph is a detailed, thorough, and—to U.S. lawyers and scholars—a unique study of the decision-making process of an important criminal justice institution.

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

2. KEITH HAWKINS, LAW AS LAST RESORT: PROSECUTION DECISION-MAKING IN A REGULATORY AGENCY (Oxford Univ. Press 2002).

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In 1995, through the Criminal Appeal Act, the CCRC was created in response to a crisis of confidence in the criminal justice system. High-profile miscarriages of justice based on police misconduct—including the Guildford Four, the Maguire Seven, and the Birmingham Six—and the intransigence of the Court of Appeal in recognizing miscarriages of justice, led to the establishment of the Royal Commission on Criminal Justice (also known as the Runciman Commission). One of the Royal Commission's 352 recommendations was creation of an independent, extra-judicial body (1) to review and investigate individual claims of miscarriages of justice, and (2) to "draw attention in its [Annual] Report to general features of the criminal justice system which it has found unsatisfactory in the course of its work and to make any recommendations for change which it thinks fit."[3] The CCRC opened its doors in 1997. As of this writing, it has received approximately 25,250 applications—about 1,400 a year. Of those, it has referred 657 (2.92 percent), of which 437 (66.1 percent) have been found to be unsafe.[4]

Under Section 13 of the Criminal Appeal Act 1995, the CCRC is empowered to investigate claims of miscarriage of justice based on new evidence or arguments made by defendants who have already taken an appeal. It has extremely broad powers of investigation, including the power to subpoena public and private records. After an investigation, the CCRC may refer a case if it is satisfied that there is a "real possibility" that the court will find a conviction to be "unsafe"—the sole ground for quashing a criminal conviction.[5] The decisions on whether and, if so, how to conduct a full investigation are within the discretion of the individual Case Review Managers (CRMs), to whom applications are assigned; the ultimate, post-investigation decision whether to refer a case is made by the Commissioners (three to refer; one to refuse to refer). The court is required to hear all cases referred and will receive new evidence if there a reason the evidence was not produced before, it is believable, and it is in the interests of justice to receive it.[6] The authors' main goal is to "subject the real possibility test

3. Royal Commission on Criminal Justice Report, ch. 10, § 22 (1993), https://www.gov.uk/government/publications/report-of-the-royal-commission-on-criminal-justice.

4. *CCRC Casework Statistics*, Criminal Cases Review Commission https://ccrc.gov.uk/case-statistics/ (last visited Mar. 3, 2020).

5. Criminal Appeal Act 1968, § 2(1)(a)(Eng.), http://www.legislation.gov.uk/ukpga/1968/19/section/2.

6. *Id.* § 23, https://www.legislation.gov.uk/ukpga/1968/19/section/23.

to in-depth socio-legal analysis"[7] to determine how decisions under that standard are made.

As the authors explain, the idea for this study arose in 2010 when, while attending a U.S. conference on wrongful convictions, one of the authors was surprised by an "impassioned" criticism of the CCRC by the only other English academic present.[8] Among the complaints was that the CCRC is "unfit for purpose"; refers too few cases; is simultaneously too slow, inconsistent, and not thorough; refers too many convictions for minor crimes; is too deferential to the court of appeal; is not interested in protecting the innocent; and has failed to take a greater role in fostering criminal justice reform.[9] Noting that none of these criticisms had ever been empirically tested, much less empirically supported, the authors embarked on what became a four-year study to test these claims against the empirical evidence. And so they did. As their findings show, some of the criticisms hold up and some do not. But most importantly, the study comprehensively deconstructs the CCRC's decision-making process and takes a critical look at how an important criminal justice institution exercises its decision-making discretion. We should welcome such a study here addressed to our important discretionary actors—most importantly, the U.S. prosecutor, whose decision-making process remains a "black box." The same sort of study could be done on other important actors: the courts, administrators, and institutional defenders.

The book is divided into fourteen chapters. The first three chapters describe the CCRC's structure and powers, its place as the first and one of very few similar institutions worldwide, and the key criticisms noted above. In Chapters 4 and 6, the authors describe the decision-making process from application to outcome, focusing on two main decision-making steps. The first—screening which cases should be subjected to a full investigation and which are facially insufficient—is more or less a triage function. As the authors note, more than half of the applications are

7. Carolyn Hoyle & Mai Sato, Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission 21 (Oxford Univ. Press 2019).

8. *Id.* at ix.

9. *Id.* at 14–21. More recently, on the CCRC's 20th anniversary in 2017, The Justice Gap published a series of articles on the CCRC, most of which concluded that it was an improvement on its predecessor and that its record was "partly excellent, partly abysmal." Paul May, *'Partly excellent, partly abysmal': 20 years of the CCRC*, The Justice Gap (Mar. 31, 2017), https://www.thejusticegap.com/partly-excellent-partly-abysmal-20-years-ccrc/.

rejected at this stage for failure to meet the statutory criteria, for example, because no appeal has been taken or because no new evidence has been presented. Chapter 5 categorizes the body of miscarriage claims that have been presented by applicants, which essentially dovetails with the well-recognized causes of wrongful convictions in the United States: unreliable prosecution witnesses, false confessions by vulnerable suspects, fallible science and expert testimony, police misconduct and failure to disclose, and ineffective defense. Applications without new evidence or argument can only be advanced if the CCRC finds "exceptional circumstances" for the failure. The second step is whether to refer a case to the court of appeal having found a "real possibility" it will be quashed. In Chapters 7 through 10, the authors analyze the CCRC's decision making by identifying how the "surround, field and frame" interact with each of the categories. Chapter 13 addresses the CCRC's post-decision procedure, through which applications may be reviewed a second time following a decision not to refer. The authors come full circle in the final chapters to evaluate the criticisms that prompted their inquiry and to analyze how current changes in the surround resulting from austerity may impact the CCRC's work. The organization is effective and easy to follow.

For U.S. legal academics like me, this book is a powerful eye-opener. First, our legal, positivist approach to discretion—application of statutory and judicial standards to the relevant facts—often ignores other relevant influences on institutional and individual decision makers in the social, organizational, and individual environments (the social surround, decision fields and individual decision frames), as well as their interactions. Second, like others, I am painfully aware of the dearth of empirical data—at least in the United States—to intelligently document, much less hold accountable, the discretionary decision making of important criminal justice actors—in particular, prosecutors. This book is an excellent example of what is needed for a deeper analysis.

It is important to disclose, too, that as a U.S. criminal procedure academic, I find the CCRC and its sister institution, the Scottish CCRC, remarkable institutions that perform a function that is both absolutely essential and entirely absent in most countries.[10] That function is to

10. Norway, Australia, and Scotland are the only countries that have adopted a criminal cases review commission model for reviewing claims of wrongful conviction. North Carolina is the only state in the United States to adopt a similar model, the North Carolina

independently investigate the facts of a criminal case post-conviction. With one exception, the North Carolina Innocence Inquiry Commission,[11] there is no such body in the United States. As someone who has written about both of the CCRCs,[12] I, like the authors, have been surprised by some of the criticisms it has endured. I have also been surprised by how unnecessarily defensive the CCRC has been to those criticisms. This book is a welcome empirical check on the strengths and weaknesses of the CCRC's decision making, and provides an effective response to several of the criticisms. It is a powerful tool for those interested in effective innocence review.

Returning to the questions that prompted the study: Is the CCRC "unfit for purpose"? Does it refer too few cases? Is it too slow, inconsistent, and not thorough? The evidence presented supports the following short answers: The CCRC is fit for purpose, but it refers too few cases and too slowly. Initial delays and backlogs were improved through several bureaucratic and organizational changes, although it still has too many old cases. Relatedly, the fact that it is extremely thorough is precisely what may result in some delay. Yes, given the small number of referrals, it may be more appropriate to focus on convictions for serious crimes. Yes, there are inconsistencies in decision-making by CRMs and the CCRC Commissioners: as socio-legal scholars have noted, "The exercise of legal discretion is ultimately a human process."[13]

The remaining criticisms are broader and demand longer answers: Is the CCRC too deferential to the court of appeal, not interested in protecting the innocent, and failing to adequately use its unique ability to take a greater role in criminal justice reform?

Actual Innocence Commission, but, as its name implies, it deals solely with claims of actual innocence rather than the broader issue of miscarriages of justice.

11. Innocence Projects and DA Conviction Integrity Units have emerged in attempt to fill the void. *See Home*, NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, https://innocencecommission-nc.gov/ (last visited Mar. 3, 2020).

12. Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2001); Lissa Griffin, *Correcting Injustice; Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOLEDO L. REV. 107 (2009); Lissa Griffin, *International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission*, 21 WM. & MARY BILL RTS J. 1153 (2013).

13. HAWKINS, *supra* note 2, at 201.

Given that the CCRC must predict the court's reaction to the merits of a case, and given the small number of referrals (currently 2.92 percent) and the high success rate of referred cases (currently 66.1 percent),[14] the authors conclude that the CCRC may indeed be too deferential to the Court of Appeal. Beyond meeting legal requirements and a legitimate concern about the loss of reliability that might result from referring more cases, the authors document a problematic institutional fear of offending the court or of losing the court's respect, a cultural imperative to "keep in favour with the Court that seemed to go beyond the legal mandate or matters of efficiency."[15] For example, some interviewees noted their need to analyze the case like the court of appeal judges would do, which equates to "getting it right"; they also reported a desire not to incur the court's hostility.[16] To be sure, the court has criticized the CCRC for some of its referral decisions,[17] but has also praised its work.[18] Moreover, when, although rarely, decisions on referred cases have been reviewed by the U.K. Supreme Court, the decision to quash almost always has been upheld. It is fair to say that the CCRC's concern about offending the court does appear to limit the independent role it was intended to exercise. Should it be less risk averse and push the court of appeal to review cases at the margins? Would doing so better inform the court about the universe of dysfunctions and potential miscarriages of justice in the criminal justice system without harming its credibility? The authors' answer is a respectful yes.

The authors document another oversensitivity that may be counterproductive, namely the CCRC's concern with how its applicants will react to its decisions. To a hardened student of U.S. criminal institutions, this has the feel of a stereotypically "English" concern, but it has real manifestations in the CCRC's work. Whether a decision is made to refer a case or not, the average accompanying statement of reasons (SOR) is *37 pages long*, and they can run anywhere from 9 to 99 pages.[19] Putting aside the typical U.S. legal impatience with reading long legal documents, there is no instrumental reason that a SOR supporting a *refusal* to refer should be that long.

14. *CCRC Casework Statistics*, *supra* note 4.

15. HOYLE & SATO, *supra* note 7, at 66.

16. *Id.*

17. *Id.* at 332. *And see, e.g.*, R v. Graham [1999] 2 Cr. App. R.(S). 312.

18. Dowsett v. CCRC, [2007] EWHC (Admin) 1923 (Eng.).; R v. Mattan, [1998] EWCA (Crim) 676 (Eng.).

19. HOYLE & SATO, *supra* note 7, at 263.

Moreover, as the authors show, the CCRC re-reviews a large percentage—14 percent—of renewed applications after its decision not to refer is made.[20] These two circumstances may again be related to the CCRC's defensiveness, but whatever the reason, they open the CCRC to some legitimate accusations of delay and inefficiency.

Is the CCRC unconcerned with innocence? This criticism gained some traction based largely on the statements of one particular critic, who has since removed himself from the public debate.[21] The impact of this criticism was exacerbated by a statement on the CCRC's original website, since removed, to the effect that "we are not concerned with innocence."

The authors' empirical evidence makes abundantly clear that, as would be true in the United States, the strength or weakness of the evidence of guilt is always integral to the CCRC's prediction as to whether the conviction might be found "unsafe." Referrals take place where the trial evidence was close enough that there is a reasonable possibility the court will hold that new evidence or argument might well have tipped the scales in favor of acquittal. We know this as harmless error or prejudice. In the early years, the CCRC and the Court of Appeal were more likely to grant relief in the face of grievous error or misconduct without a strong showing of prejudice. Now, in most cases, plausible alternative narratives of innocence or substantial prejudice must be found for a conviction to be quashed. The Court of Appeal has toughened things up.

In truth, the notion of "innocence review" is really a function of the U.S. criminal process, which, in several relevant respects, is different from that in the United Kingdom. In the United States there is extensive post-conviction review for legal error, including an initial appeal as a right of every convicted defendant. Generally, there are thus two levels of appeal for legal error or sufficiency—one for the asking, one by permission. There is then the possibility of federal review if there is a claim of federal constitutional error. As a result, the only issue that really remains after U.S. appellate review is innocence review: is the defendant actually guilty? In the United States, aside from the North Carolina Innocence Inquiry Commission, there is no CCRC-like body to investigate such claims. But in the United Kingdom there is no right to appeal without permission at all. As

20. *Id.* at 289.

21. *See* CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT? (Michael Naughton, ed., Palgrave Macmillian 2012).

a result, most convicted defendants never have their convictions reviewed for legal error. The CCRC provides that protection, as well as reviewing the conviction in light of new evidence of innocence.

Finally, the authors address the question whether the CCRC is failing to perform its larger institutional role in criminal justice reform. Socio-legal scholars recognize that institutions have a moral role beyond their daily decision-making tasks. Indeed, as the authors correctly recognize, the CCRC is in a unique position to identify the causes of miscarriages of justice and has stepped into that larger role at times—for example, by responding systemically to scientific developments related to infant deaths and sexual abuse cases by collecting data and even commissioning the development of new scientific evidence. The CCRC played a significant institutional role in the termination of the notorious West Midlands Serious Offense Squad and the Rigg Approach Police Station due to police misconduct.[22] And more recently, it took an immediate, pro-active role by coordinating, identifying, and correcting the fact that erroneous advice was repeatedly being given to asylum seekers and refugees that resulted in their waiver of a statutory defense.[23] The CCRC identified and referred those cases, assigned a single CRM to handle them, and coordinated a collaborative response with solicitor and prosecutor organizations and with the courts.

An issue that could be studied further might be how the CCRC decides which issues it will confront systemically and which it will leave to its individual case review process. Identifying erroneous advice by immigration lawyers could be viewed as low-hanging fruit, in the sense that it is easy to fix, involves no injured victims, and requires criticism of defense counsel only. Courts generally are more willing to criticize defense counsel than to interfere with the prosecution or the police. Responding to changes in science that no longer support existing sex abuse and infant death convictions gave the CCRC firm ground for its actions. Although the CCRC has been outspoken about the epidemic of disclosure violations, and has referred approximately one-fifth of its cases on that basis, it had not collected similar cases or assigned a specialist CRM to handle them until

22. Laurie Elks, Righting Miscarriages of Justice?: Ten Years of the Criminal Cases Review Commission 242–54 (2008), https://justice.org.uk/righting-miscarriages-of-justice/. R. v. Keith Twitchell [2000], EWCA (Crim) 373 (Eng.).

23. Hoyle & Sato, *supra* note 7, at 217–28.

recently, when it created a "guidance for applicants" on its website in relation to raising issues of non-disclosure. Last year it undertook an internal study of 306 of its own closed rape cases with respect to disclosure issues, and the final report on that study was just published.[24] It identifies some systemic problems with prosecution and police disclosure procedures and makes recommendations. It would be interesting to know why the CCRC chose to act to correct these systemic problem, why it delayed on the discovery issues, and what other issues it has chosen to leave to the individual review process.

The authors conclude by discussing how current social, economic, cultural, and political changes (in socio-legal speak, these are changes in the "surround") are likely to impact the CCRC's ongoing work. The CCRC has a history of responsiveness to these factors that is documented by the authors. Thus, originally created in response to police misconduct and prosecution non-disclosure, it addressed those cases directly but withdrew as the court of appeal showed an increasing unwillingness to quash the cases. The same is true for the CCRC's treatment of complainant credibility in sexual abuse cases. It responded initially by distrusting complainants, but thereafter responded to the perceived change in public attitudes that complainants were presumptively believable. The CCRC also responded to developments in science, and to identifiable defense failures in the rapidly expanding legal context of immigration. The greatest current change is austerity, including more than one-third reduction in the CCRC's own budget in the face of an increasing case load and the substantial reduction in funding for the entire criminal justice system including drastic cuts in legal aid funding. Together with other aspects of the current surround, including increasing evidence of prosecution non-disclosure and declining trust in forensic science, these current factors will likely increase the risk of miscarriages of justice. Given these realities, the CCRC may do well to give less attention to each individual application and more attention in a systemic way to recurring claims, as it did with miscarriages in refugee and asylum cases, faulty forensic cases, and the like. But although the authors do not discuss the impact of political leadership changes, they do demonstrate the essential durability of the CCRC, which

24. CCRC, *Report on Phase 2 of the CCRC Disclosure Review* (2019), https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1l/uploads/2019/07/CCRC-2242080-v1-Report_on_Phase_2_of_the_CCRC_Disclosure_Review.pdf (last visited Mar. 3, 2020).

has survived Conservative and Labour governments and has maintained its focus in the face of terrorism.

This book tells us much we do not know about the exercise of discretion in the criminal justice system. In that vein, it would be interesting to learn more about three issues raised in the book. First, the authors amply demonstrate inconsistencies in the practices and decisions of the CCRC staff as would likely appear in any institution with discretionary decision-making power—the courts, prosecutors, administrators, and the like. But it is difficult to determine whether such inconsistencies are an inevitable by-product of the CCRC's structure and practices or arise from some other cause, for example, that legal standards are too general or inadequate supervision. This would be important to evaluating U.S. institutional discretionary decision making. Second, although the authors describe the CCRC's responsiveness to changes in its surround, they are less detailed about the impact of the CCRC on its own surround. In other words, the CCRC's unique ability to expose and correct miscarriages allows it to impact its own political and social environment. Third, the authors explicitly exclude the CCRC's handling of Northern Ireland cases, presumably given the perhaps *sui generis* factual context and the influence of politics. But to me, how institutions deal with so-called political cases is an important part of understanding how they work. Certainly, politics is playing a major part in the current U.S. criminal landscape. My own familiarity with the Northern Ireland cases convinces me that analysis of this portion of the CCRC's work would open an additional, important window on how it sees its role and on its relationship with the courts of appeal generally, in this case the Northern Ireland Court of Appeal.

A postscript: the U.K. Ministry of Justice recently published a report entitled "Tailored Review of the Criminal Cases Review Commission."[25] Although it concludes that the CCRC is a necessary, effective, and efficient body, it does make several relevant recommendations, including (1) supporting legislative changes to remove the requirement that the CCRC review so-called minor convictions, i.e., summary cases and sentence-only cases; (2) increasing efficiency by moving decision-making

25. U.K. Ministry of Justice, *Tailored Review of the Criminal Cases Review Commission*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777176/tailored-review-of-the-criminal-cases-review-commission.pdf (last visited Mar. 3, 2020).

responsibility from commissioners to CRMs in no-appeal, exceptional circumstances cases and in the less serious, no-referral cases; (3) establishing a small team of CRMs to handle the less serious cases and specialist CRM teams to handle similar cases, as was done with the asylum cases; (4) establishing ways to improve consistency, in particular with respect to decision documents and statements of reasons; (5) enhancing the CCRC's role by "appointing a small number of commissioners who work concurrently in the criminal justice system to provide relevant knowledge and experience of existing and emerging themes and avoid the risk of concentrating on traditional areas of miscarriages of justice;" and (6) exploring opportunities to increase feedback on emerging themes to the wider criminal justice system.[26] Hoyle and Sato's important contribution can be seen in the way its empirical findings inform meaningful analysis and ultimately support these recommendations.

This book is an extremely important addition to the study of discretion in the criminal process. The authors' ability to access and collect data from the CCRC should serve as a model for similar empirical studies here. While empirical research has certainly increased in the United States, transparency is not something to be found in the U.S. criminal justice system, even though it is a recognized democratic norm. An important example is the U.S. prosecutor, who arguably is the most powerful official in the criminal justice process and whose decision making has been described as a "black box," i.e., largely hidden from scrutiny.[27] The book also reinforces the importance of empirical data in criminal justice discourse and of interdisciplinary study if a full understanding of the subject is the goal.

As for lessons to be learned about correcting wrongful convictions, I still experience the same surprise and envy I did when the CCRC opened its doors in 1999. Yes, we have a reasonably good system for ensuring the legal soundness of criminal convictions. But factual accuracy is not adequately ensured by our very limited and diverse system of post-conviction factual investigation, much of which is entirely unfunded, not subject to the right to counsel, and without subpoena power. As a comparativist, I understand that criminal procedures or institutions from other jurisdictions cannot be cherry-picked and then transplanted to our system. But, I also know both

26. *See generally id.* (listing a number of recommendations for the CCRC to improve).

27. Nicole Zayas Fortier, *Unlocking the Black Box*, ACLU (2019), https://www.aclu.org/sites/default/files/field_document/pros_transparency_final_draft-opt2.pdf.

systems. To have an independent, government-funded office with virtually unlimited investigatory powers, including the ability to call its own experts and subpoena virtually all public and private records—that is, really, to get to the truth when the truth is legitimately challenged—would add so much to the fairness and reliability of our criminal justice system and certainly to the public's trust in it.

The authors conclude that the CCRC, despite its flaws, is alive and well, and will continue to play an important role in correcting U.K. miscarriages of justice. This book is important reading for anyone interested in how criminal procedure institutions make decisions in the United States and about correcting wrongful convictions.

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