



OUTSIDE COUNSEL

Expert Analysis

Protecting the Innocent: A Proposal for New York

Eighty-five years ago, Judge Learned Hand wrote, “Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”¹ Since then, our courts have recognized that “with the advance of forensic DNA technology, our desire to join Learned Hand’s optimism has given way to the reality of wrongful convictions, a reality which challenges us to reaffirm our commitment to the principle that the innocent should be freed.”²

In many foreign nations and states in this country, a first step forward in effecting reform to prevent wrongful convictions and free the innocent has been the establishment of an “innocence commission.” The United Kingdom, Canada, Scotland and Norway have established innocence commissions. At least six U.S. states have also taken that significant step. New York State has not, but a likely shift in control of the state Senate makes this state more likely to address the problem of wrongful convictions, and institute an innocence commission.

What do such commissions do? How are they structured? And what are the prospects they present for reform?

The international and U.S. experience shows that innocence commissions have two distinct structures. Some are blue ribbon panels that review wrongful convictions and make recommendations for criminal justice reform based on their work. These commissions may publish their findings or draft new legislation. Their focus, broadly speaking, is preventing future wrongful convictions through legislative reforms or changes in police procedure. Others are standing bodies within the government that present a means by which the state itself investigates and seeks to redress individual wrongful convictions. Their focus is freeing the innocent person who has been convicted.

Following several high-profile post-conviction exonerations in the late 1990s, Canadian provincial authorities created independent commissions to investigate the causes of each wrongful conviction. Endowed with subpoena power, these “Public Inquiry” commissions examined the circumstances leading to



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each wrongful conviction and issued public reports of their findings, along with policy recommendations intended to address the causes of wrongful convictions. The Public Inquiry is not a standing body, but the model continues to be used throughout Canada as additional wrongful convictions come to light.

Since 2000, at least six states have created innocence commissions more or less patterned after the Canadian model. These commissions are typically bipartisan groups of individuals representing many constituencies in the criminal justice system: judges, prosecutors, defense attorneys, victims’ rights advocates, law enforcement and sometimes victims and exonerees themselves. Some of these commissions have already completed their work and ceased to exist, while others have yet to report their findings.

Illinois was among the first states to establish a commission. In March 2004, former Governor George H. Ryan created the Commission on Capital Punishment shortly after he took the unprecedented step of declaring a moratorium on the death penalty in Illinois. In April 2002, after extensive fact-gathering and many public hearings, the commission issued a report that included 85 recommendations for criminal justice reform.³

While many of its recommendations relate solely to death penalty cases, the commission also addressed underlying causes of wrongful convictions, including eyewitness misidentification, false confessions and reliance on jailhouse informants. In November 2003, Illinois enacted a number of the reforms proposed by Mr. Ryan’s commission and created a study committee to monitor their implementation.⁴

The California Commission on the Fair

Administration of Justice produced substantial reports but did not have comparable legislative success. The FAIR Commission was created by the California State Senate in 2004 and issued 10 reports on topics including eyewitness misidentification, false confessions, reliance on informants, problems with scientific evidence and the professional responsibilities of prosecutors and defense attorneys. In 2006 and 2007, Governor Arnold Schwarzenegger vetoed bills based on the commission’s recommendations. The bills would have required the development of new guidelines for eyewitness identifications, electronic recording of custodial interrogations in violent felony cases, and the corroboration of testimony by jailhouse informants.⁵

Wisconsin’s blue ribbon commission drafted new legislation to address the causes of wrongful conviction (instead of issuing a report of its findings and recommendations). The Avery Task Force, named for a high-profile exoneree, was created in December 2003 by the chair of the Wisconsin General Assembly’s Judiciary Committee. The bill drafted by the task force had 43 bipartisan sponsors and passed both houses of the Wisconsin Legislature unanimously. Enacted into law in December 2005, the law mandates the electronic recording of custodial interrogations of juveniles, requires the implementation of new lineup and photo-array procedures, and prioritizes post-conviction DNA testing by state laboratories.⁶ Recognizing that each wrongful conviction represents a failure to convict the real perpetrator, the law also tolls the statute of limitations for the prosecution of serious sexual felonies where DNA evidence is collected before the statute of limitations expires.

In other states, including Virginia and New York, non-governmental organizations have taken the lead in creating blue ribbon commissions to address these issues. Formed in 2003 by a coalition of non-profits, the Innocence Commission for Virginia reviewed the cases of 11 individuals wrongfully convicted of rape or murder in the state in the 1980s and 1990s.⁷ The Virginia commission relied on a small volunteer staff and the efforts of pro bono attorneys to produce a 150-page report of its findings and policy recommendations.

The New York State Bar Association has also established a non-governmental commission to study the causes of wrongful convictions and propose solutions. The association’s Task Force

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on Wrongful Convictions is expected to issue its final report in April 2009.⁸

Freeing the Innocent

Several foreign countries and one U.S. state, North Carolina, have in contrast established commissions reflecting the government's commitment to itself investigate and remedy individual wrongful convictions. The United Kingdom was first to institute the post-conviction review of individual cases by an independent government agency. The Criminal Case Review Commission, authorized by the Criminal Appeal Act 1995, investigates suspected miscarriages of justice upon application by a convicted person.⁹ It was formed at the recommendation of an earlier Royal Commission charged with investigating the cases of two groups of people wrongfully convicted of IRA bombings.

The U.K. commission is composed of 11 commissioners supported by about 100 permanent staff members. It has the power to hire experts, order the preservation of evidence, examine evidence and appoint an investigating officer. If at least three members agree that there is a "real possibility" that an applicant may have his or her conviction overturned or sentence reduced, the commission will refer the case to the Court of Appeal for further action or recommend a pardon. As of Oct. 31, 2008, the U.K. commission has received over 11,000 applications and referred over 400 cases to the Court of Appeal, resulting in 269 quashed convictions.

The U.K. commission does not consider actual innocence or guilt, but instead provides post-conviction review that might otherwise be unavailable to U.K. defendants. Appellate review is not available as of right in U.K. criminal cases, and leave to appeal is granted only if there is a reasonable prospect of relief.¹⁰

The U.K. commission model has been followed in Scotland and Norway.¹¹ The Norwegian commission, instead of referring cases to an appellate court or a pardon office, refers cases for retrial before a different court. Unlike a blue ribbon panel, these investigative commissions are not charged with inquiring into the underlying causes of wrongful convictions or making policy recommendations. Their focus is remedial, not preventative.

North Carolina is the only American state that has instituted an investigative commission of this kind. In August 2006, the North Carolina Innocence Inquiry Commission was established at the recommendation of a blue ribbon commission created by the Chief Justice of the North Carolina Supreme Court to review exonerations in the state.¹²

The Innocence Inquiry Commission is modeled after the U.K. commission and began accepting applications from convicted persons in North Carolina in January 2007. The commission may refer a case to a three-judge panel appointed by the Chief Justice if five of its eight members (all eight, if the applicant pleaded guilty) agree that "there is sufficient evidence of factual innocence to merit judicial review." The conviction may be overturned by a unanimous vote of the judicial panel. In September 2008, the first case referred to a three-judge panel by the commission was rejected.

The North Carolina commission differs from the U.K. Criminal Cases Review Commission in several respects. The North Carolina commission only considers claims of actual innocence "for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief."

Applicants must agree to waive attorney-client privilege, except as "to matters unrelated to a convicted person's claim of innocence." The statute also requires the commission to report to prosecutors any additional evidence of crimes discovered during the investigation. The North Carolina commission has received over 300 applications in the past two years.

The New York State Bar Association has also established a non-governmental commission to study the causes of wrongful convictions and propose solutions. The association's Task Force on Wrongful Convictions is expected to issue its final report in April 2009.

In 2002, Barry Scheck and Peter Neufeld, founders of the Innocence Project, recommended the Canadian "Public Inquiry" model on the grounds that it would be more palatable to the American public and less costly to institute than the U.K. investigative model. They predicted, however, that "as public understanding grows about the prevalence of wrongful convictions, institutions based on the CCRC model will be created."¹³

A New York Approach

In New York State, proposals for the creation of an innocence commission have not been successful. Assembly Member Michael N. Gianaris sponsored a 2007 bill (introduced as A.B. A04317) that would have created a State Commission for the Integrity of the Criminal Justice System. The bill provided for a 10-member commission to meet at least four times a year to review exonerations in the state. During that same year former Governor Eliot Spitzer proposed the creation of an Office of Wrongful Conviction Review within the State Division of Criminal Justice Services. Both the Assembly and Spitzer proposals envisioned the creation of a study commission that would review exonerations to propose criminal justice reform, rather than the establishment of a governmental investigative body reviewing individual cases to seek redress for the wrongfully convicted.

New York now has a relatively new governor and is likely to see a shift in control of the State Senate. Both changes suggest that wrongful convictions will receive more governmental attention in 2009. That consideration should be informed by an understanding of the full range of reforms available.

The first model, the blue ribbon commission, can lay the groundwork for legislative reform

and changes in police procedure. In New York, a distinguished task force is now at work reviewing wrongful convictions under the auspices of the state bar. Its work may lay the basis for a number of reforms including a governmental innocence commission. Alternatively, its work may be sufficiently comprehensive and credible to support legislative reform without a public commission.

Either way, the Legislature and governor might wisely look to the successful Wisconsin experience and establish a bipartisan commission specifically charged with drafting legislation. This approach would link a state commission's work directly to the accomplishment of legislative reform and avoid the pitfalls of inaction and delay that too often follow the work of blue ribbon commissions.

The second model, the establishment of a standing investigative commission within the government to consider and advance appropriate claims of innocence, is also promising. In a time of extreme budgetary pressure, this may be a more long-term prospect.

North Carolina has led the way here, but its approach requires waivers of privilege and imposes layers of review that may not achieve acceptance in this state. Still, the investigative model highlights the point that analyzing and advancing claims of innocence by individuals represents a field of activity not solely for innocence projects at private and educational institutions but for government as well.



1. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

2. *McKithen v. Brown*, 481 F.3d 89, 92 (2d. Cir. 2007) (footnotes omitted).

3. See Commission Reports, <<http://www.idoc.state.il.us/ccp/ccp/reports/index.html>>.

4. See 2003 Ill. Laws 517 (electronic recording of interrogations in homicide cases); 2003 Ill. Laws 605 (study committee; perjury by police officers at trial); 2003 Ill. Laws 655 (jailhouse informants and lineup procedures).

5. See FAIR Commission, Press Releases, Oct. 2, 2006 & Oct. 18, 2007, available at <<http://www.ccfaj.org/news.html>>.

6. See 2005 WIS. ACT 60.

7. See <<http://www.icva.us/>>.

8. Two other states, Connecticut and Pennsylvania, have established governmental commissions whose work is still in progress. In both states, the commission was created by a committee of the state legislature. See CONN. GEN. STAT. §54-102pp; Penn. 2006 S. Res. 381, P.N. 2254.

9. See <<http://www.ccr.org.uk/index.htm/>>.

10. See generally Lissa Griffin, "The Correction of Wrongful Convictions: A Comparative Perspective," 16 AM. U. INT'L L. REV. 1241, 1267-1300 (2001).

11. See Scottish Criminal Cases Review Commission, <<http://www.sccrc.org.uk/home.aspx>>; Kommissjonen for Gjenopptakelse av Straffesaker, <<http://www.gjenopptakelse.no/index.php?id=30>>.

12. See 2006 N.C. Sess. Laws 184, codified at N.C. GEN. STAT. §15A-1460 et seq.; <<http://www.innocencecommission-nc.gov/>>.

13. See Barry C. Scheck & Peter J. Neufeld, "Toward the Formation of 'Innocence Commissions' in America," 86 JUDICATURE 98, 101 (2002).