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Toward the formation of "INNOCENCE COMMISSIONS" in America

By Barry C. Scheck
and Peter J. Neufeld

By monitoring and investigating errors in the criminal justice system, innocence commissions could help remedy systemic defects that bring about wrongful convictions.

In the United States there are strict and immediate investigative measures taken when an airplane falls from the sky, a plane's fuel tank explodes on a runway, or a train derails. Serious inquiries are swiftly made by the National Transportation Safety Board (NTSB), an agency with subpoena power, great expertise, and real independence to answer the important and obvious questions: What went wrong? Was it system error or an individual's mistake? Was there any official misconduct? And, most important of all, what can be done to correct the problem and prevent it

tions before its investigation of a crash is complete, recommendations identifying problems that may not even turn out to be the ultimate cause of the crash.

The American criminal justice system, in sharp contrast, has no institutional mechanism to evaluate its equivalent of a catastrophic plane crash, the conviction of an innocent person. In fact, an emphasis on finality and procedural due process in our post-conviction procedures has for too long obscured both the frequency and implications of wrongful convictions. This point is vividly illustrated by the 110 post-conviction DNA exonerations that have occurred in the United States in the 10 years preceding September 1, 2002.¹ Although these cases all involve convictions on serious felony charges that were affirmed on direct appeal, and often upheld after post-conviction proceedings in both state and federal courts, there has never been a

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from happening again? Indeed, since the primary purpose of the NTSB is to protect the public safety, it will sometimes issue safety recommenda-

1. A running list and description of post-conviction DNA exonerations compiled by the Innocence Project is available at <http://innocenceproject.org>.



Like the National Transportation Safety Board, which investigates aircraft, railroad, and other accidents and issues recommendations, innocence commissions could review the causes of any officially acknowledged case of wrongful conviction and recommend remedies to prevent such miscarriages of justice from happening again.

2. E.g. see Bailey, *DNA Clears Man Jailed 22 Years, But Door Still Shut*, *The Commercial Appeal*, May 3, 2002, at A1, where District Attorney General Bill Gibbons, commenting on the exoneration of Clark McMillan, a man wrongly convicted of rape and robbery and who served 22 years in jail, longer than any other exoneree, before DNA evidence proved he was innocent, said "I think it shows our system works." See also Marshall, *Do exonerations prove that "the system works?"* in this issue (page 83).

3. It has been suggested by colleagues that the term "innocence commission" is both "too narrow" because the reforms expected to emerge from such bodies would not just protect the innocent but also lead to the apprehension of the guilty, and politically undesirable as the phrase "innocence commission" would be seen as a term favorable to the criminal defense movement. See Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 353 (Spring 2002). This point may be correct. We have always wanted "innocence commissions" to be understood as organizations dedicated to a public safety imperative, generating findings that would be perceived as just, good law enforcement. The political process will ultimately determine whether the term "innocence" is loaded and identified as a criminal defense code word. We like the term because it goes to the heart of what the average citizen expects of the criminal justice system "to protect the innocent, apprehend the guilty, and correct mistakes when the innocent are wrongly convicted."

4. The Innocence Project's list of post-conviction DNA exonerations is composed entirely of such "officially acknowledged" wrongful convictions. A DNA exoneration is defined as any case where a conviction was vacated on the grounds of new evidence of innocence from DNA testing and the indictment was dismissed without subsequent prosecution, the defendant was pardoned by a governor, or the defendant was acquitted after trial.

detailed opinion written about what went wrong in any of these cases, much less an analysis offering suggestions on what could be done to prevent similar miscarriages of justice.

Instead, the exculpatory DNA results are received, an order vacating the conviction (or a gubernatorial pardon) is issued, and, in a few cases, the judge or the governor offers an apology. To confound matters further, many, but by no means all, of the public officials who should be most concerned about the underlying causes of such wrongful convictions blithely proclaim that the "system has worked" and assiduously avoid the suggestion there is anything further to investigate.² Those officials who want to get to the root of these problems do not have an independent body to which they can turn for further investigation or policy

recommendations.

In order to address effectively underlying, institutional problems that contribute to the conviction of innocent persons, we propose the creation of "innocence commissions"³ to investigate and monitor errors in the criminal justice system just as the NTSB investigates and monitors airplane and other major transportation accidents in the United States. Simply put, innocence commissions should be automatically assigned to review the causes of any officially acknowledged case of wrongful conviction,⁴ whether the conviction was reversed with post-conviction DNA tests or through some other new evidence of innocence, and recommend remedies to prevent such miscarriages of justice from happening again.

There is no one best way to create state or federal level innocence com-

missions. One can easily envision such a commission being formed through legislative enactment, executive order, or appointment by the chief judicial officer of a state. Even the formation of an interdisciplinary group by a non-profit organization, or a state university system, could be the vehicle for an innocence commission as long as that entity is delegated appropriate legal authority and resources to conduct fact-based investigations. These entities must not merely be "study commissions" offering policy recommendations, but investigative agencies whose findings arise from direct review of actual cases.

Thus, the key, necessary features of an innocence commission will be subpoena power, access to first-rate investigative resources, and political independence. Like the NTSB, an institution whose example is well worth emulating, these commissions must be trusted to speak out continually about cases where the system fails, without fear or favor, even if their recommendations are, for a while, ignored by political, law enforcement, or judicial bodies.

What follows is an effort to explain why innocence commissions can serve as a capstone reform that keeps in place a recurring systemic examination of defects and remedies in the criminal justice system before the current "learning moment" brought about by post-conviction DNA exonerations fades. This discussion is intended to offer practical suggestions on what the organizing principles of such commissions should be, taking into account the political realities of criminal justice reform in the United States.

Canadian and British models

Fortunately, we are not writing on a blank slate. In Canada and Great Britain there are two distinctly different kinds of institutions that address the problem of wrongful convictions that could serve as good working models.

The Canadian "Public Inquiries" model. Canadian "Public Inquiries," also known as Royal Commissions or

Commissions of Inquiry, were first established more than 150 years ago as a way for sovereignties to conduct independent, non-government-affiliated investigations regarding the conduct of public businesses or the fair administration of justice.⁵ Each province and the federal Canadian government has passed legislation enabling the establishment of these independent public inquiries. Based on a direction from the executive branch, a public inquiry can be "chartered" to have designated persons (frequently judges) investigate almost any issue of public concern. Canadian Public Inquiries have investigated a wide-range of issues including contaminated blood supplies in the nation's hospitals and the status of women.

Recently, however, separate public inquiries were conducted in the wake of two celebrated post-conviction DNA exonerations, Guy Paul Morin and Thomas Sophonow, producing comprehensive reports that both reviewed the specific circumstances of each case and issued findings regarding systemic practices "that may have contributed to or influenced the course of the investigation or prosecution."⁶ The designated leaders of the Morin and Sophonow Public Inquiries had subpoena power, held hearings, recruited, when necessary, government laboratories or independent experts, and issued reports that dealt with the specific causes of these wrongful convictions and made policy recommendations about remedies to prevent wrongful convictions in the future.

With some significant modifications, and drawing heavily upon the American experience with the NTSB, we believe the Morin and Sophonow inquiries represent a good model to track when designing innocence commissions in the U. S.

The British Criminal Case Review Commission model. The Criminal Case Review Commission (CCRC) of Great Britain is, according to its own description, "an independent, open, thorough, impartial and accountable body investigating suspected miscarriages of justice in England, Wales,

and Northern Ireland."⁷ By most accounts, since its establishment in January 1997, the CCRC has evolved into an admirably effective and substantial governmental agency.⁸ If, after going through its four-stage process of screening and investigation, it finds a "real possibility" of an "unsafe" conviction or an unjust sentence, the CCRC can refer the case back to the appellate courts for further action, or make a recommendation for a Royal pardon. While the CCRC does on occasion discuss the causes of wrongful convictions and remedies, such analysis has not been its principal mission, as the work of the CCRC occurs *before*, not *after*, an official acknowledgment by the courts that a wrongful conviction has occurred.

The CCRC has a 14-member board of distinguished citizens; two thirds are lay persons, one third are lawyers, and one third must have some sort of criminal justice expertise. The majority of investigations are handled by the CCRC itself and its staff. Where a case calls for specialized knowledge, the CCRC may hire an expert to examine the evidence and issue a report. The CCRC has the authority to inspect and order the preservation of all materials held by a public body. It does not have a similar mandate for materials in the possession of private organizations or individuals, nor does it have the power to carry out searches, check criminal records, or make an arrest, but it can appoint an investigating officer, such as a police officer, who does have such powers, to work on the CCRC's behalf.

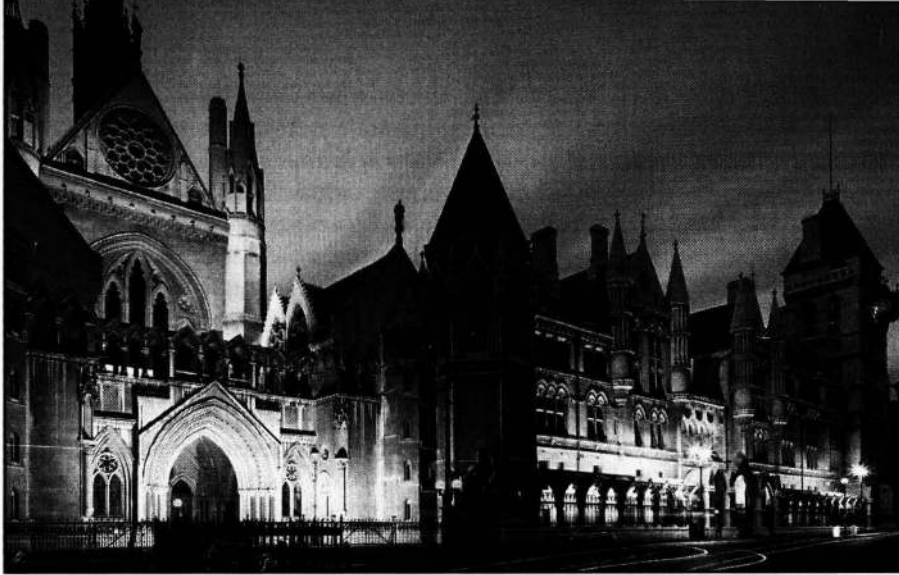
An investigation is not considered complete until the CCRC shares its findings with applicants and offers

5. Sellar, *A Century of Commissions of Inquiry*, 25 CANADIAN BAR REV. 1, 1 (1947).

6. See, "Thomas Sophonow Inquiry Report," Province of Manitoba. Report available at: <http://www.gov.mb.ca/justice/sophonow/toc.html>; and "Report of the Commission On Proceedings Involving Guy Paul Morin" Report available at: <http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/morin.htm>.

7. See, <http://www.ccrc.gov.uk/>.

8. See, Findley, *supra* n. 3, at 7-9; Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U.L. REV. 91 (2000); Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2001).



The Royal Courts of Justice, London. The British Criminal Case Review Commission investigates suspected miscarriages of justice in England, Wales, and Northern Ireland.

them a chance to comment on the investigation. Once an investigation is completed, the CCRC decides whether to recommend the case for appeal. This decision must be made by at least three board members. Since 1997, the CCRC has received 3,680 applications, 2,381 of which have been reviewed as of October 31, 2000. Of those, 203 have been referred. Among the referrals, 49 have been heard and 38 of those (77.5 percent of referrals, 1.6 percent of the original completed applications) resulted in quashed convictions.⁹ If a decision for referral is made, it is up to the applicants and their legal representative to make their case in appellate court. If an application is not

referred to an appeals court, the applicant may apply again if new evidence or arguments appear in the future.

Notwithstanding the remarkable progress made by the CCRC in just five years, it is not the model we envision for "innocence commissions." This is certainly not because the United States has no need for institutions like the CCRC to pursue post-conviction claims of innocence. On the contrary, compared to the network of comparatively small and resource-starved innocence projects that have been formed at law schools, journalism schools, and public defender offices throughout the United States, which endeavor to exonerate the factually innocent,¹⁰ the CCRC is an impressively efficient, powerful, and superior institution.

Rather, our reluctance to advocate this model arises from practical and political concerns. Proposals based on a CCRC model could be too easily, albeit unfairly, attacked as requiring large government bureaucracies based on un-American notions of an inquisitorial justice system that would squander precious law enforcement funds on prisoners making frivolous claims. On the other hand, following the example of the NTSB and Canadian Public Inquiries, proposals for smaller public bod-

ies charged with exposing the root causes of wrongful convictions that have already been established as miscarriages of justice, will be a better first step in building an effective reform movement to redress basic flaws in the American criminal justice system. Ultimately, as public understanding grows about the prevalence of wrongful convictions, institutions based on the CCRC model will be created. The CCRC, after all, was formed as a result of public outcry over revelations from public inquiry investigations into the notorious wrongful convictions of IRA defendants in the Birmingham Six and Guilford Four cases.¹¹

A "learning moment"

Courts, scholars, and policy makers are all beginning to recognize that the most important aspect of the wave of post-conviction DNA exonerations is what it can teach us about all the other cases (the vast majority) where DNA testing is not available. This wave of exonerations has probably not crested. As states pass post-conviction DNA statutes (there are now 27),¹² providing inmates an opportunity to prove their innocence, exonerations have and will continue to increase. But it would be shortsighted not to assume the wave of DNA exonerations will eventually pass and foolish not to capitalize on what is plainly a "learning moment."

Most recently, a United States District Court judge, Jed Rakoff, citing the serious doubts regarding the reliability of guilt or innocence findings in non-DNA cases raised by post-conviction DNA testing, actually found the federal death penalty an unconstitutional violation of due process.¹³ While some have derided the decision as "eccentric" and unlikely to be sustained by appellate courts, those commentators generally acknowledge the factual premise of Judge Rakoff's argument and agree that post-conviction exonerations in capital and non-capital cases, primarily through DNA testing, strongly "suggest[s] that the number of false convictions is higher than previously understood," which creates a need to

9. Griffin, *supra* n. 8, at 1277.

10. A running list of innocence projects working within the "innocence network" can be found at http://innocenceproject.org/about/other_projects.php.

11. The "Guilford Four" case involved the dismissal of charges against suspected IRA members when evidence was found conclusively proving that the police had fabricated the defendants' supposed confessions. In the "Birmingham Six" case, the court overturned IRA convictions based on defendants' confessions when it was revealed that the supposed confessions had been drafted by the police after the fact. See Griffin, *supra* n. 8, at 1248.

12. A running list, text, and analysis of post-conviction DNA statutes, as well as the Innocence Protection Act, a bi-partisan bill in Congress that would mandate post-conviction DNA testing in every state, is available at <http://innocenceproject.org>.

13. *United States v. Quinones, et al*, No. S3 00 Cr. 761 (JSR) (July 1, 2002).

address the "innocence" issue directly.

Empirical study by scholars of the wrongful convictions uncovered in the past decade has begun with renewed seriousness.¹⁴ The case study approach for analyzing wrongful convictions laid out in 1932 by Professor Edward Borchard in his classic work, *Convicting the Innocent: Sixty-five Actual Errors of Criminal Justice*, and powerfully supplemented by Hugo Bedeau and Michael Radelet's research regarding capital cases 52 years later,¹⁵ will surely be followed by more statistically sophisticated analyses similar to those employed by Professors James Liebman and Jeffrey Fagan and their colleagues in studies examining reversals in death penalty cases.¹⁶ As the pool of documented wrongful convictions rapidly grows, deconstructing the underlying patterns will become increasingly possible, and academics from many disciplines will certainly take advantage of this "learning moment."

Policy makers have also responded to the issue of convicting the innocent with a series of "study" commissions that have focused on wrongful convictions in capital cases and reform in the administration of the death penalty. Reports from commissions in Nebraska, Indiana, Virginia, Maryland, Arizona, and Illinois have either been produced or are due soon.¹⁷

The Report of the Governor's Commission on Capital Punishment, a study requested by Governor George Ryan after he declared a moratorium on the death penalty in Illinois is by far the most impressive for its content and transparency. The Ryan Commission "carefully scrutinized" all 13 death row exonerations in Illinois, studied every reported decision in a pending capital case, held public and private hearings, consulted with nationally recognized experts, and commissioned their own empirical study of capital sentencing. In terms of our definition, as opposed to other study commissions, the Ryan Commission functioned as a true innocence commission because it derived its findings directly

from the study of actual cases within the jurisdiction. Significantly, the Ryan Commission was strongly influenced by the methodology and findings of the Guy Paul Morin and Thomas Sophonow public inquiries in Canada, whose reports, again, arose from thorough study of two wrongful convictions.

Ultimately, the Commission made 85 detailed recommendations for reform and produced a valuable set of appendices. While many of these recommendations addressed problems specific to the administration of the capital punishment system in Illinois, most of the findings that related to problems associated with wrongful convictions, as the commission itself emphasized, were applicable to the entire criminal justice system.¹⁸

Soon after the Ryan Commission Report was released in April of 2002, leaders of the Illinois legislature expressed serious doubt about whether many of the 85 recommendations would be enacted in any form.¹⁹ Nor can it be said that the Morin and Sophonow public inquiries in Canada have resulted in rapid or comprehensive reforms despite the fact that the two Canadian inquiries reached similar findings. This should not come as a surprise. State legislatures and criminal justice bureaucra-

cies are not known for their flexible response to complex problems. Most state criminal justice systems consist of elected district attorneys from different counties, some rural and some very urban, as well as small and large police departments; it is not a simple matter to get these comparatively autonomous actors to engage in coordinated or uniform change.

So it should not be cause for despair that reforms recommended by study commissions, which are mainstream, sensible, and bi-partisan, seem to be ignored. Rather, the important institutional question is how to maintain a steady public focus on underlying problems and remedies so the natural inclination of the political actors and law enforcement bureaucracies to resist them can be overcome. Can the creation of innocence commissions consistently spotlight systemic defects in the criminal justice system long after the "learning moment" of DNA exonerations ends? We think the history of the NTSB provides an encouraging answer to this question.

The NTSB example

The NTSB was created by statute in 1974 to "investigate . . . and establish the facts, circumstances, and probable cause of" aircraft, highway, rail-

14. The first survey study of post-conviction DNA exonerations can be found in Sheck, Neufeld, and Dwyer, *Appendix 2: DNA Exonerations at a Glance*, in ACTUAL INNOCENCE, first and second editions, (2000, 2001).

15. Bedeau and Radelet, *Miscarriage of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); Radelet and Bedeau, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

16. Liebman and Fagan, et al, "A Broken System: Error Rates in Capital Cases, 1973-1995," available at <http://www.justice.policy.net/proactive/newsroom/release.vtml?id=18200>; and "A Broken System, Part II: Why There is So Much Error in Capital Cases and What Can Be Done About It," available at <http://www.justice.policy.net/cjreform/dpstudy/study/index.vtml>.

17. When Republican Governor of Illinois Ryan declared a moratorium on the death penalty, he also appointed a blue ribbon committee to examine the causes behind and offer reforms to prevent wrongful convictions. That report was released in the spring of 2002 and is available at: http://www.idoc.state.il.us/ccp/ccp/reports/commission_reports.html. While a proposed moratorium on the death penalty in Nebraska failed, an extensive state-sponsored study released in 2001 of the administration of that state's death penalty found that economic and geographic

disparities were the most prevalent impediments to preventing wrongful convictions and offered a number of reforms. The study can be found at: http://www.nadp.inetnetdr/Study_Page.html. Maryland's Governor also ordered a comprehensive two-year study of the death penalty in March 2001. Results are expected sometime in 2003. Indiana released its study commission findings in December of 2001. Results of commission studies in Virginia, and Arizona are pending. See, Liebman and Fagan, et al, *supra* n. 16, at 1.

18. Ryan Commission, at Chapter 14, General Recommendations, and Recommendation 83. See also Thomas Sullivan, *Preventing wrongful convictions*, in this issue (page 106).

19. See, McKinney, *Capital Punishment Reform? Don't Bet on it this Year*, Chicago Sun-Times, April 16, 2002, at 8: "Election year realities mean few lawmakers want to cast votes to scale back capital punishment, as the commission advises, and be portrayed as soft on crime, post-Sept. 11. 'I don't think this will be popular,'" said Senate President James 'Pate' Philip (R-Wood Dale),...who said he'd be surprised if there was any action on the issue this year."

20. 49 U.S.C. § 1131, generally § 1101-1155 (2000). The NTSB was originally created in 1966 under the Department of Transportation, where it languished. The independent NTSB as we know it today was established by the Independent Safety Board Act of 1974.

road, or major marine accidents and to issue reports and reform recommendations to the Secretary of Transportation.²⁰ It has five members, appointed by the president, with the advice and consent of the Senate, and, most importantly, it operates independently from the Federal Aviation Administration.

Prior to the establishment of the NTSB, air traffic safety regulations were left to the FAA. Watchdogs complained that the FAA suffered under its so-called “dual mandate,” to simultaneously promote air commerce and air safety, and the NTSB was established to take over safety investigations and relieve the FAA of this conflict of interest.

At its own discretion, the NTSB forms a “special board of inquiry” following “an accident involv[ing] a substantial question about public safety.” Investigators are selected by the NTSB Board; other interested parties may petition to be included, at the complete discretion of the Board, in the investigation. NTSB investigators have broad powers to conduct thorough investigations. Indeed, according to its enabling legislation, the NTSB may “do anything necessary to conduct an investigation.” The investigating committee may issue subpoenas and compel sworn testimony; order autopsies and other forensic tests “when necessary

to investigate an accident;” and may bring a civil action in federal court against any party that obstructs its investigation. Although the NTSB does not have the right to guarantee the confidentiality of witness statements, interviewees do have the right to have counsel or a non-legal representative present during the interview

rule. As for criminal trials, investigators may testify without restrictions in state or local grand jury hearings or criminal proceedings.

The NTSB has been criticized as powerless to implement its own recommendations, but this weakness is really a source of strength and independence. Since it doesn’t have to concern itself with anything except safety, the NTSB is not hamstrung by cost or political worries; it can afford, year after year, to repeat findings that make the FAA, the airline industry, and the federal government uncomfortable. A recent study by the Rand Institute for Civil Justice concurs in this assessment, describing the NTSB as an agency that “enjoys

The NTSB may “do anything necessary to conduct an investigation.”

and the right to have any party, besides the actual interviewer, excluded from the interview.

Upon completion of an investigation, the NTSB delivers a report consisting of two parts to the Secretary of Transportation: a factual record containing all of the witness statements, factual observations, and discoveries made by the investigators; and a set of reform recommendations. The secretary is required by statute to give a “formal written response to each [NTSB] recommendation,” within 90 days of receiving an NTSB report. The secretary must state publicly whether the reform recommendations will be adopted in whole, in part, or not at all.

The findings and recommendations of the NTSB cannot be used as a basis for civil or criminal liability, although the factual record it creates can obviously be marshaled as evidence in such proceedings.²¹ In civil trials, NTSB investigators cannot be called on to testify, although parties may depose such investigators once, and use that deposition at trial. During their deposition, investigators are allowed to reference their notes and the factual record. The factual report is also admissible at trial as a public document exception to the hearsay

the reputation of being the most independent safety investigative authority in the world.”²²

The Rand study notes that although the NTSB is not a regulatory agency and its charge to make recommendations regarding airline safety does not carry with it enforcement authority, the fact that commercial air travel has become accessible for millions increases the intensity of media and public scrutiny of major airline accidents, thereby enhancing the persuasive power of NTSB investigations and recommendations. Given these circumstances, an NTSB statement of cause may not legally bind the FAA to implement changes, but it certainly can bring about calls for change that “publicly” bind the FAA to adhere to NTSB recommendations.²³

Essential elements

The NTSB example, accordingly, helps underscore what elements are essential in any proposal to form viable innocence commissions and suggests ways to modify some features of the Canadian Public Inquiry model:

(1) *Innocence commissions should be standing committees chartered to investigate, at their own discretion, any wrong-*

21. Carlisle, *Comment: The FAA v. the NTSB: Now that Congress has Addressed the Federal Aviation Administration’s “Dual Mandate,” has the FAA Begun Living Up to Its Amended Purpose of Making Air Travel Safer, or is the National Transportation Safety Board Still Doing Its Job Alone?* 66 J. AIR L. & COM. 741, 757 (2001).

22. The Rand Institute for Civil Justice, *Personnel and Parties in NTSB Aviation Accident Investigations*, pg. xiii., at <http://www.rand.org/publications/MR/MR112.1/MR112.1/pdf>.

23. *Id.* at pg. xxv. It should also be observed that some commentators are concerned that recent case law, mandating deference to FAA interpretations of laws and regulations, has begun to undermine the latitude of NTSB investigations and the ability of the NTSB to effect regulatory changes from the FAA. See, Singer, Garvey v. National Transportation Safety Board: *The FAA Gets its Cake and Eats it Too*, 66 J. AIR L. & COMM. 875 (2001).

ful conviction²⁴ and to recommend any public policy reforms they deem necessary.

One problem with the Canadian Public Inquiry model is that its investigations must be triggered by a direction from the executive branch. Aside from the danger that the executive branch simply won't charter investigations it doesn't like, this approach also runs the risk that review of officially acknowledged wrongful convictions only occur as a response to public pressure. Hopefully, the opposite dynamic will be in play. By routinely examining wrongful convictions, including cases that are not "high profile," innocence commissions will be able to bring serious scrutiny and public attention to serious problems and misconduct that would have otherwise been ignored and forgotten;

(2) *Innocence commissions need the power to order reasonable and necessary investigative services, including forensic testing, autopsies, and other research services.*

It seems wise to keep the permanent innocence commission bureaucracy as small as possible, expanding on a contractual basis when a case demands it. Usually existing agencies, such as state or local crime laboratories, could provide adequate forensic services. In fact, this is the approach taken by the Morin and Sophonow Canadian Public Inquiries, who sent the forensic evidence pertaining to the case to provincial laboratories. And while the Morin inquiry cost the province around \$3 million, most of these costs were associated with the cost of providing every intervenor with their own counsel in addition to the investigative resources expenses accrued. It is conceivable that an effective innocence commission could operate on a far smaller budget. For example, a commission's initial inability to create civil or criminal liability to any of the participating parties may cut down on attorney's fees.

On the other hand, innocence commissions should not be stymied in their investigations by arbitrary budget cuts from the executive, the legislature, or even the administra-

tive office of the judiciary. One solution might be arbitration or court review of disputes over requests for investigative resources;

(3) *Innocence commissions must have the power to subpoena documents, compel testimony, and bring civil actions against any person or entity that obstructs its investigations.*

Such powers are simply indispensable. Without the ability to lift up flat rocks and see what's underneath, innocence commissions will revert to being weak, ineffectual "study" groups that can be disregarded with impunity by those who most need exposure. The incredible and indispensable revelatory power of depositions is exemplified by the "Ford Heights Four" case.²⁵ In 1978, three men and one woman were convicted of the abduction and murder of one woman and the murder and rape of another. The men were primarily convicted based on a tip from a man claiming to have seen them near the murder scene and the testimony of a co-defendant who was forced to confess to the crime and then offered a reduced sentence if she agreed to testify against her co-defendants. The convictions of all four were overturned in 1999 based on DNA testing that excluded them as the perpetrators. Only during depositions taken in preparation for the exonerees civil suit against Cook County was it revealed that the convictions rested on evidence and information never turned over to the defense, due to police and prosecutorial misconduct. It is clear from this egregious example that depositions are a necessary mechanism for any procedure dedicated to identifying the causes leading to wrongful convictions.

(4) *The findings and recommendations of innocence commissions should not be binding in any subsequent civil or criminal proceeding, although the factual record created by the commission can be made available to the public.*

Like the NTSB, this feature of an innocence commission will ultimately prove to be a source of strength, not weakness, a way to preserve independence and insulate the commission from political pressures.

Nor will it unfairly restrict civil or criminal cases.

As a practical matter, federal civil rights litigation for victims of wrongful convictions are very difficult and often prohibitively expensive undertakings. Prosecutors have absolute immunity from civil lawsuits for any actions they take while engaged in litigating a criminal case, even if it includes unlawful, even criminal suppression of exculpatory evidence, and qualified immunity (good faith is a defense) for their investigative activities.²⁶ Police officers have qualified immunity for their conduct outside the courtroom, and absolute immunity for in court testimony.²⁷

The legal issue of qualified immunity can be the subject of interlocutory appeal, thereby greatly protracting the time and expense civil rights plaintiffs must expend during litigation.²⁸ And quite frequently, the lawsuits would have to be filed against law enforcement officials with great power in the community. Lawyers are extremely reluctant to take on such matters unless a "slam dunk" constitutional violation is apparent from the record. It is highly unlikely

24. A wrongful conviction should be carefully defined. Ordinarily, it should embrace just those cases where a conviction has been vacated based, in part, on new evidence of innocence, and the indictment was subsequently dismissed, the defendant was acquitted, or the governor issued a pardon. The innocence commission should, however, have discretion to reach tougher cases, such as instances where new evidence of innocence leads to a conviction being vacated and a deal is struck permitting an *Alford* or *nolo contendere* plea to time served. Such arrangements are often impossible for an innocent defendant to turn down and invite abuse, especially if law enforcement officials insist on such an arrangement in order to avoid an innocence commission inquiry.

25. For a more detailed report, see Protes and Warden, *A Promise of Justice*, at: http://www.law.northwestern.edu/depts/clinic/wrongful/readings/warden_protes/TOC.htm. Lawrence Marshall and Thomas Sullivan also discuss this case in articles in this issue, see *Do exonerations prove that "the system works?"* (page 83) and *Preventing wrongful convictions* (page 106).

26. *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed.2d 209 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed.2d 128 (1976).

27. *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed.2d 272 (2001) (qualified immunity); *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed.2d 96 (1983) (absolute testimonial immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed.2d 396 (1982) (qualified immunity).

28. *Mitchell v. Forsyth*, 472 U.S. 511, 524-530, 105 S. Ct. 2806, 86 L. Ed.2d 411 (1985).

that an innocence commission investigation will get in the way of a plaintiff seeking civil relief; if anything, revelations from an innocence commission investigation might provide the stimulation lawyers need to pursue meritorious but costly lawsuits.

Similarly, criminal prosecutions arising out of law enforcement misconduct in wrongful conviction cases are very rare, and generally arise only when evidence is overwhelming or public pressure compels a serious investigation. It's hard to imagine innocence commission investigations unduly hampering criminal prosecutions;

(5) *Innocence commissions should be transparent, publicly accountable bodies, composed of diverse, respected members of the criminal justice community and the public.*

A major reason for the creation of innocence commissions is to bolster public confidence in the fairness of the criminal justice system. It goes without saying that its members must command respect, represent all sides of the criminal justice system, and reflect the diversity of the public it serves. Nor would the goal of enhancing public confidence be well served if innocence commissions operate with the secrecy of a grand jury, or if they conduct public hearings that are designed more for drama than gathering useful information.

A balance needs to be struck. There are plain advantages to the Canadian Public Inquiry method; it permits interested parties to call and cross-examine witnesses and it uses liberal rules of evidence. On the other hand, innocence commissions must be careful not to drag out their inquiries; they need clear authority to exercise sensible control over the length and breadth of their proceed-

ings. In terms of transparency, it should be noted that the CCRC's annual reports, website, and disclosure of budgetary information stands as an excellent template; and

(6) *Innocence commissions should be required to file public reports on their findings and recommendations, and the relevant branch of government to which these*

Innocence commissions should be seen as a capstone reform.

reports are submitted should issue a formal written response to the recommendations within a fixed period of time.

As noted at the outset, state criminal justice systems are sufficiently diverse in structure that one could anticipate innocence commissions to be created by the legislature, the executive, or the judiciary branches. In theory, it does not matter how such entities are formed as long as appropriate organizing principles are followed that permit the commissions independence and genuine capacity to investigate and make meaningful recommendations. As demonstrated by the NTSB, from whose charter this proposed element is drawn, the success of an innocence commission will not necessarily turn on whether its recommendations are immediately adopted. Ultimately, what matters most is that the findings and recommendations are clearly elucidated and made transparent to the public, and the relevant branch or branches of government to whom they are reported respond in writing within a fixed period of time. Such a procedure ensures that innocence commissions will over time become an increasingly valuable, independent public force for remedying the causes of wrongful convictions.

A capstone reform

Innocence commissions should be seen as a capstone reform because they have the capacity, through the recurring perusal of wrongful convictions, to provide a consistent, powerful impetus to remedy systemic defects that bring about wrongful convictions. While criminal justice politics will inevitably swing between "liberal" and "conservative" eras, the fundamental desire of citizens to make sure the system can reliably determine who is guilty and who is innocent should remain constant. That is why anchoring innocence commissions to actual cases where there have been undeniable miscarriages of justice is a sound long-term strategy.

It is encouraging to see leaders in the judiciary, the legislature, and the executive branches of government and members of the academy propose different kinds of innocence commissions. Soon, however, the process of experimentation must begin in the laboratory of the states; inventive judges, legislators, and governors should act before the "learning moment" occasioned by the exoneration of so many innocents begins to wane.

In 1927, Yale professor Edward Borchard, perhaps the father of modern "innocence" scholarship, made a memorable plea to Governor Lowell Fuller for a commission to investigate the convictions of Sacco and Vanzetti. "I write to you," Borchard stressed, "not as a radical sympathizer with the convicted men, but as a person interested in the preservation of our legal institutions. This depends on earning and retaining the respect of the public for those institutions. In a democracy, the confidence of the public in the fair and unbiased administration of justice lies close the roots of orderly government."²⁹ We couldn't agree more. ☞

29. Letter to Massachusetts Governor Alvin Fuller from Edwin Borchard, dated April 21, 1927. Borchard Papers, Yale University Archives.