

California Western Law Review

Volume 38 | Number 2

Article 2

2002

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Recommended Citation

Findley, Keith A. (2002) "Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions," *California Western Law Review*. Vol. 38 : No. 2 , Article 2.

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CALIFORNIA WESTERN LAW REVIEW

VOLUME 38

SPRING 2002

NUMBER 2

LEARNING FROM OUR MISTAKES: A CRIMINAL JUSTICE COMMISSION TO STUDY WRONGFUL CONVICTIONS

KEITH A. FINDLEY*

INTRODUCTION

For hundreds of years the criminal justice system has developed, relied upon, and incrementally refined a body of rules and procedures ostensibly designed to ensure that at the end of the day, the guilty are convicted and the innocent are acquitted. The rules have developed through custom and common law, and then through legislation and formal rule-making, through a process of trial and error and logical argument about what might be effective in ascertaining the truth. The criminal justice system has developed largely through faith in the adversarial process, faith in the rules of evidence, faith in the standard of proof beyond a reasonable doubt, and faith in the common sense of police, lawyers, judges, and politicians to create an effective truth-finding process. Recent empirical evidence, however, especially DNA evidence, has opened a window through which we can examine this faith in the system. That window both reveals the errors in the system and suggests means to remedy them.

Rarely has the system relied upon real study to determine what actually produces fair and accurate results. Sporadically, courts have relied upon empirical evidence from the social or psychological sciences. Just as frequently, however, courts have created rules or followed procedures that ignore or even contradict what the empirical evidence shows. The psychological literature, for example, is replete with studies showing that, in the area of eyewitness identification, the confidence of a witness bears almost no relation to

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the likely accuracy of the identification.¹ Yet in the established constitutional law governing admissibility of eyewitness identifications, a witness's confidence is one of the factors the Supreme Court has said courts must consider in determining whether an eyewitness identification obtained through a suggestive procedure is nonetheless sufficiently reliable to be admissible.² Similarly, hard evidence shows that jurors do not understand the psychological processes at work in an eyewitness identification and tend to rely an unwarranted extent on such identifications,³ and that expert testimony can help correct such juror misunderstandings.⁴ Nonetheless, courts in many jurisdictions routinely continue to exclude expert testimony designed to educate jurors on these matters, often on the ground that such information is within the common knowledge of jurors or would usurp the role of the jury.⁵

Part of the reason why the judicial system relies so infrequently on real study of what works and what doesn't is that it is so very hard to know which outcomes are accurate and which are not. The jury verdict is our almost sacred test for whether one is guilty or innocent. With the jury verdict itself as the end-all measure of guilt or innocence, there is no ready mechanism for determining whether the jury verdict in any given case is itself a reflection of truth or a terrible mistake.⁶ And the guilty or no contest plea,

1. See, e.g., Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCH. PUB. POL. & LAW 817, 825 (1995) (marshalling numerous studies and concluding that "under the conditions that typically prevail in short criminal encounters . . . witness confidence . . . is largely unrelated to accuracy, and confidence in having made a correct identification is, at best, only modestly associated with identification accuracy").

2. See *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). Indeed, research has shown that the factors these cases mandate to evaluate the reliability of a suggestive eyewitness identification procedure—including a witness's perception of her opportunity to observe the suspect and the confidence with which she makes her identification—are themselves affected by the suggestiveness of the lineup procedure. Because they are so affected by suggestiveness, they provide a poor basis upon which to evaluate whether an identification is sufficiently reliable to overcome that very suggestiveness. See Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCH. PUB. POL. & LAW 765, 785 (1995).

3. See ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 171-77 (1979); ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL 14-30 (1991); Cindy J. O'Hagan, Note: *When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 747-51 (1993).

4. See Harmon M. Hosch et al., *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 L. & HUM. BEHAV. 287, 294 (1980).

5. See, e.g., *United States v. Hall*, 165 F.3d 1095, 1104-07 (7th Cir. 1999); *United States v. Benitez*, 741 F.2d 1312, 1315 (11th Cir. 1984); *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973); *United States v. Purham*, 725 F.2d 450, 454 (8th Cir. 1984); *State v. Butterfield*, 27 P.3d 1133, 1146 (Utah 2001); O'Hagan, *supra* note 3, at 757-62.

6. See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1322 (1997) ("[W]hile any serious evaluation of the quality of criminal justice rendered requires an inquiry into whether the innocent are convicted, an explicit answer cannot be found in the results of the adjudicatory process itself.").

which accounts for a far greater percentage of criminal convictions than jury verdicts,⁷ is even more intuitively understood to be the measure of truth, and accordingly even less susceptible to evaluation for the possibility that an innocent person might have pled guilty.⁸ Without an external measuring stick, there has been no real way to gauge the accuracy of guilt and innocence determinations. That is, until recently.

I. THE OPPORTUNITY TO LEARN

In recent years a body of cases has developed in which we know that the verdict (or in some cases the guilty plea) was wrong. Especially with the advent of postconviction DNA testing, but also in non-DNA cases, we now have a body of cases in which we know that an injustice was done, that an innocent person was convicted and often sent to prison for many years or to death row.

For years scholars have sought to identify wrongful convictions.⁹ Edward Borchard, in his classic work in 1932, identified sixty-five wrongful convictions.¹⁰ Judge Jerome Frank and his daughter, Barbara, followed in 1957 with an analysis of another set of wrongly convicted individuals.¹¹ More recently, Hugo Bedeau and Michael Radelet in 1987 identified 350 wrongful convictions in cases potentially subject to capital punishment.¹² In 1992, joined by Constance Putnam, Bedeau and Radelet expanded their work to include over 400 such cases in the twentieth century.¹³ False confession scholars Richard Leo and Richard Ofshe have identified another sixty

7. Over ninety percent of convictions in the United States are the product of a guilty or no contest plea. *See id.* at 1337.

8. Intuitively, it is hard to imagine that anyone would plead guilty or no contest to a crime he or she did not commit. This intuitive assessment, however, like the jury verdict itself, is not uniformly true. The spate of recent exonerations based on postconviction DNA testing includes cases in which the defendant pled guilty to a crime he did not commit. *See, e.g.,* EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 12 (Dep't Justice, National Institute of Justice 1996) (reporting that David Vasquez pled guilty in Virginia to a crime DNA later proved he did not commit); Keith A. Findley & John Pray, *Lessons from the Innocent*, 47 WIS. ACADEMY REV. 33, 34 (Fall 2001) (describing the case of Christopher Ochoa, who pled guilty in Texas to a rape and murder that DNA later proved he did not commit).

9. For a good summary of the scholarly works identifying wrongful convictions, *see* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 75-80 (1999).

10. EDWARD M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (1932).

11. JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957).

12. Hugo Adam Bedeau & Michael L. Radelet, *Miscarriage of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

13. MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

modern-era cases of police-induced false confessions.¹⁴ The work of these scholars has made an important contribution to the study and critique of the criminal justice system. But the underlying premise—that the cases identified are cases of wrongful conviction of the innocent—has not gone unchallenged.¹⁵ And even where error is undisputed, the errors have typically been dismissed as anomalies rather than symptoms of systemic flaws.¹⁶ Without scientific proof of error, these cases have lacked the certainty necessary for undisputed and objective study of the failings of the criminal justice system.

That has changed with the emergence of DNA typing as a forensic tool. After an uncertain start in the late 1980s and early 1990s, DNA typing has matured into a scientific arbiter of truth, whose reliability and validity is now beyond dispute.¹⁷ Most significantly for purposes of this article, DNA typing has been used in the postconviction context during the past dozen years to exonerate more than one hundred wrongly convicted individuals in the United States.¹⁸ In most of these cases, the DNA evidence proved beyond any doubt that the convicted person could not have perpetrated the crime. These cases have not only confirmed that wrongful convictions exist, and at a higher rate than ever acknowledged previously, but have shown that innocent people are often convicted in cases where innocence is least suspected. Unlike the notorious cases of wrongful conviction studied previously, many of the DNA exonerations occurred in cases that otherwise looked airtight.¹⁹ Without the DNA, many never would have been noticed.

Additionally, an identifiable and alarming body of wrongful conviction cases has emerged in the death penalty context. Since 1973, one hundred

14. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

15. See, e.g., Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedeau-Radelet Study*, 41 STAN. L. REV. 121 (1988) (challenging Bedeau & Radelet's innocence assessments); Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999) (challenging Leo & Ofshe's innocence assessments); Givelber, *supra* note 6, at 1323 ("Because a claim of actual innocence requires a judgment which goes beyond that which official governmental bodies make, such claims are often disputed.").

16. See Givelber, *supra* note 6, at 1325 (because false convictions are largely hidden in the criminal justice system, they are viewed as "random events of popular interest, not a subject deserving systematic attention").

17. This is not to suggest that DNA evidence is always dispositive on the question of guilt or innocence. The value of DNA evidence depends on the quality of the testing results, and also on the significance of the biological evidence in the overall evidentiary picture in a given case. In some cases, biological evidence is relatively insignificant, such as where a suspect's biological evidence could be found at a crime scene for perfectly innocent reasons. In other cases, however, the DNA results—for example, the DNA profiles from a rape kit involving a single-perpetrator rape—can be virtually conclusive.

18. For an updated tally of DNA exonerations, see The Innocence Project, at <http://www.innocenceproject.org/> (last visited Apr. 5, 2002).

19. See Givelber, *supra* note 6, at 1347.

people have been exonerated and released from death row.²⁰ These are not just cases in which the claim of innocence rests upon the post hoc judgment of an academic. These are cases in which the government has officially judged the convictions or death sentences to be erroneous, through reversal, dismissal, or pardon. Twelve of the wrongly condemned men and women were exonerated by DNA evidence.²¹ In some of the non-DNA cases, the proof of innocence was strong, but lacked the scientific certainty of the DNA cases. Nonetheless, each of these cases represents a miscarriage of justice, at least in the sense that the condemned individuals were legally innocent and the government has officially acknowledged it. Moreover, in many of the cases, the evidence of actual innocence is so compelling as to be beyond dispute.

These cases, and particularly the DNA cases, open a new window of opportunity for applying real study and knowledge to the truth-finding mechanisms of our criminal justice system. As never before, we now have a body of cases in which we know that the process produced the wrong result, and we can therefore study those cases to determine what went wrong, what did not work. All those time-honored yet ultimately faith-based assumptions about how to conduct a fair investigation and trial can now be put to the test.

This is a window of opportunity, however, that will not remain open forever. As DNA is used increasingly before conviction, the body of wrongful convictions that can be exposed through postconviction DNA testing will diminish, and ultimately disappear.²² That is not to say that the ills that beset the criminal justice system will be cured, but rather only that we will lose the measuring stick for evaluating the system from the back end. DNA is no panacea. While DNA can and will prevent the mistaken conviction of some wrongly identified suspects, it will not prevent the errors that infect the system in the vast majority of cases where there is no biological evidence left behind by the perpetrator. Such biological evidence rarely exists in the ordinary robbery, shooting, drug transaction, or forgery. Moreover, biological evidence is useless where issues of consent or intent, rather than identity, are in dispute. Only in those relatively few cases with dispositive biological evidence will DNA prevent miscarriages of justice. DNA, therefore, presents not a solution, but an opportunity and a challenge.

The opportunity poses a double imperative—a justice imperative and a public safety imperative. Justice to the accused and victims alike demands

20. For a current count of the death row exonerations, and a description of the cases, see Death Penalty Information Center, *Innocence and the Death Penalty*, at <http://www.deathpenaltyinfo.org/innoc.html> (last visited Apr. 24, 2002).

21. *Id.*

22. See Michael J. Saks et al., *Toward a Model Act for the Prevention and Remedy of Erroneous Convictions*, 35 *NEW ENG. L. REV.* 669, 670 (2001) (“In cases where DNA typing can be performed it will routinely be performed, and the post-conviction DNA exoneration cases that today are almost commonplace will disappear. . . . However, the opportunity to see basic flaws in the criminal justice process will disappear, and the flaws themselves will remain.”).

that every reasonable measure be taken to ensure that no innocent person is wrongly convicted. By the same token, public safety demands such truth-finding accuracy, for when we convict an innocent person, the true perpetrator usually goes unpunished, free to commit other crimes that might have been prevented had the system not misfired. The cases are replete in which the wrongful conviction of an innocent person meant that the real guilty person remained free, continuing to commit other serious crimes that might have been avoided if the mistake had not been made. As Daniel Givelber has put it:

The costs of these erroneous convictions extend beyond the enormous price to defendants. Victims and their families also pay a significant price. Persuaded that the person convicted is the perpetrator, victims frequently experience a subsequent exoneration as a fresh injury, if not the reawakening of an old wound. Moreover, victims are confronted with the terrible realization that if the person who was convicted is not guilty, then the true perpetrator remains at large. In addition to these intense personal costs, there is a broader social cost: convicting the innocent person means that a guilty person remains free.²³

Correcting the criminal justice system is not a defense cause, but a system-wide, even community-wide cause. The goal is not just to acquit the innocent, but also to identify and convict the guilty. All have a stake in this enterprise.

But there is no mechanism at present in most jurisdictions for undertaking this analysis of the system, or even for taking a hard look at any particular wrongful conviction to determine what might have gone wrong. In this regard, the criminal justice system stands almost alone. As Barry Scheck, Peter Neufeld, and Jim Dwyer have written in their book, *Actual Innocence*,

In the United States, there are grave consequences when an airplane falls from the sky; an automobile has a defective part; a patient is the victim of malpractice, a bad drug, or an erroneous lab report. Serious inquiries are made: What went wrong? Was it systemic breakdown? An individual's

23. Givelber, *supra* note 6, at 1394 (footnote omitted). The Christopher Ochoa case is a point in case. Ochoa and his co-defendant, Richard Danziger, spent twelve years in prison for the rape and murder of a young woman, Nancy DePriest. In 2000, DNA proved that neither man had anything to do with the crime and that another man, Achim Josef Marino, was the actual perpetrator. Because police coerced a false confession from Ochoa, and accordingly failed to investigate adequately other suspects, the real suspect remained free in the community, where he committed other serious rapes and robberies that eventually landed him in prison for life. During the twelve years that Ochoa and Danziger sat in prison for this crime, the victim's mother, Jeanette Popp, suffered immeasurably and unnecessarily, both from the simple deception about who had killed her daughter and, even more profoundly, because part of that deception included painful exaggerations she was led to believe about brutality and suffering her daughter purportedly endured before she was killed that were written into the false confession that Ochoa was coerced to sign. Jeanette Popp, lecture at the University of Wisconsin Law School, March 1, 2001. See also Findley & Pray, *supra* note 8, at 334.

mistake? Was there official misconduct? Can anything be done to correct the problem and prevent it from happening again?²⁴

But not so for the criminal justice system. "Only the criminal justice system exempts itself from self-examination. Wrongful convictions are seen not as catastrophes but topics to be avoided."²⁵ Although a wrongful conviction and lengthy prison sentence, or worse, a death sentence, is a human catastrophe of almost unparalleled proportion, ordinarily no inquiry is made into the causes of the error. Often, the order setting aside the conviction is a one-line order entered in the trial court.²⁶ Occasionally, an appellate decision addresses the errors in the case.²⁷ But almost never is there a searching inquiry to determine what led to the errors, and how they can be prevented in the future.

The growing body of actual innocence cases presents an opportunity to change that. This article outlines a few of the models that are available for studying and reforming the criminal justice system, starting first with the Canadian inquiry commissions, then addressing the British Criminal Cases Review Commission, then turning to American models, including state blue-ribbon study panels and a law school study project, and finally proposing a hybrid approach. Each jurisdiction differs; no one model fits all. The important point is to find a way to learn from the wrongful conviction cases, and to do so in a manner that might realistically lead to reform of the criminal justice system, before the opportunity is lost.

II. SCOPE OF THE INQUIRY

Before proceeding to examine the various models that might be employed to study the errors in the system, a word is in order about the scope of the inquiry. Initial evaluation of the first DNA exoneration cases has identified recurring factors that have contributed to the wrongful convictions. The first study of the DNA exoneration cases, conducted by the National Institute of Justice, evaluated twenty-eight cases in which DNA proved that an innocent person had been convicted and found that eyewitness identification error played a role in almost all of the studied cases.²⁸ Other features of those twenty-eight wrongful convictions included reliance on apparently erroneous or misleading forensic evidence, and alleged government malfeasance or misconduct, including perjured testimony at trial, intentional withholding from the defense of exculpatory evidence, and intentionally erroneous labo-

24. BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 246 (2000).

25. *Id.*

26. Givelber, *supra* note 6, at 1323-24 n.19; Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 410 (1987).

27. *E.g.*, *State v. Hicks*, 549 N.W.2d 435 (Wis. 1996).

28. CONNORS ET AL., *supra* note 8, at 15.

ratory tests and expert testimony.²⁹ Scheck, Neufeld, and Dwyer subsequently analyzed sixty-two DNA-based exonerations in the United States and concluded that mistaken eyewitness identification was a factor in eighty-four percent of the cases; jailhouse snitches or informants played a role in twenty-one percent; false confessions were present in twenty-four percent; inadequate representation by defense counsel in twenty-seven percent; prosecutorial misconduct in forty-two percent; and police misconduct in fifty percent.³⁰ Professor Saks and his students thereafter updated that study to include eighty-one DNA exoneration cases.³¹ They concluded, again, that mistaken eyewitness identification was the leading contributing factor, present in sixty of the eighty-one cases.³² Additionally, they found that erroneous forensic science was present in fifty-three of the eighty-one cases; prosecutorial misconduct in thirty-two; police misconduct in twenty-six; fraudulent or tainted evidence in twenty-five; bad lawyering in twenty-three; false confessions in fifteen; reliance on snitch or informant testimony in fourteen; and false witness testimony in fourteen.³³ Other analysts have argued that in the capital cases perjury is the most common and direct cause of error.³⁴

The nature of these errors defines the necessary nature and scope of the inquiry into the flaws that produce wrongful convictions, and the possible remedies. The errors derive not just from what happens in the courtroom, but from every step in the process—from the initial gathering of evidence, interviewing of witnesses, and identification of suspects; to the decisions about whom to investigate, what science and experts to utilize, what evidence the state must or should disclose to the defense; to the rules governing admissibility of evidence, such as expert testimony on eyewitness identification and the testimony of jailhouse informants; to the instructions given to the jury on these matters; to the nature of and applicable standards for appellate review and the availability of postconviction remedies. The inquiry is, therefore, one that cannot be undertaken just by gathering lawyers together to think about the rules that govern trials; a holistic evaluation of the process from start to finish is required, with input from experts and stakeholders involved at every step in the process. And the inquiry of necessity requires evaluation not only of what contributes to wrongful convictions, but also how that problem leads in turn to the failure to identify and convict the guilty.

Much study has already begun into many of these problems. Notably, for example, the National Institute of Justice Technical Working Group for Eyewitness Evidence has drawn on the considerable body of psychological study on eyewitness identifications to produce an important report and set of

29. *Id.*

30. SCHECK ET AL., *supra* note 24, at 246.

31. Saks et al., *supra* note 22, at 671.

32. *Id.*

33. *Id.*

34. Steven Clark, *Procedural Reforms in Capital Cases Applied to Perjury*, 34 J. MARSHALL L. REV. 453, 453 (2001).

recommendations on procedures for minimizing the risks of eyewitness identification error.³⁵ New Jersey Attorney General John J. Farmer, Jr., taking the process a step further, has mandated those guides, plus additional safeguards recommended by experts in the field, for law enforcement in that state.³⁶ Study is also underway and recommendations for reform are being made to some degree in all of the other identified causes of wrongful convictions.³⁷ Learning and change are possible.

That is not to say, however, that the need to study the wrongful convictions is already being met. Such study is producing and will continue to produce a significant volume of information in the legal and scientific literature. But it will not by itself apply that knowledge to local circumstances, identify all of the error points in a given criminal justice system, translate neatly into reforms applicable in a particular jurisdiction, or respond to local political realities in a way that is likely to lead to reform. More systematic, localized inquiries, by respected and authoritative bodies, are necessary to create the possibility of real, meaningful reform based on the lessons of the false convictions. Fortunately, several models for such inquiry exist.

35. NATIONAL INSTITUTE OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (1999). See also Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231 (2000).

36. See John J. Farmer, Jr., Attorney General of New Jersey, *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (Apr. 18, 2001) (on file with the author); *Witnesses, Victims Get New Way to ID Suspects*, BERGEN COUNTY RECORD (July 22, 2001), available at 2001 WL 5261060. Among other things, the new regulations require that photographs or suspects be presented to witnesses sequentially, rather than simultaneously, because research shows that this simple change in procedure reduces eyewitness error rates from somewhere between twenty and forty percent to about ten percent. *Id.*

37. See, e.g., Leo & Ofshe, *supra* note 14; Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, forthcoming in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* (Saundra D. Westervelt & John A. Humphrey, eds., Rutgers University Press 2001); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719 (1997); Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337 (2001); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999); Sharone Levy, *Righting Illinois' Wrongs: Suggestions for Reform and a Call for Abolition*, 34 J. MARSHALL L. REV. 469 (2001); Clark, *supra* note 34; Michael J. Saks, *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 HASTINGS L.J. 1069 (1998); Michael J. Saks & Jonathan J. Koehler, *What DNA "Fingerprinting" Can Teach the Law About the Rest of Forensic Science*, 13 CARDOZO L. REV. 361 (1991); George Castelle, *Lab Fraud: Lessons Learned*, THE CHAMPION 12 (May 1999); Scott Bales, *Turning the Microscope Back on Forensic Scientists*, 26 NO. 2 LITIG. 51 (2000); U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE A REPORT FROM THE NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (1999), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/177626.htm>.

III. THE MODELS

A. *Canadian Wrongful Conviction Inquiries*

Canada has not avoided the problem of wrongful convictions. But Canada's response has been far different than the response in the United States. In Canada, significant exonerations have not been followed by the official silence that has greeted most American exonerations. In Canada, the government has taken the mistakes seriously, viewed them as necessarily the product of a flawed system rather than insignificant aberrations, and has made a serious effort to remedy the problems.

One of the more notable of these cases arose from the wrongful conviction of Guy Paul Morin for the 1984 murder of nine-year-old Christine Jessop.³⁸ Morin was first acquitted, the judgment was reversed on appeal and he was then convicted following the second trial (double jeopardy does not bar appeal and retrial after an acquittal in Canada³⁹), and ultimately in 1995 he was exonerated when DNA proved he could not have committed the crime.⁴⁰ Following the exoneration, the Province of Ontario ordered "an unprecedented top-to-bottom examination of its criminal justice system."⁴¹ The Lieutenant Governor in Council in 1996 directed that a public inquiry be held, and appointed a Commission on the Proceedings Involving Guy Paul Morin. The Commission, headed by a former judge of the Quebec Court of Appeal, was charged to (a) determine why the case resulted in conviction of an innocent person; (b) make recommendations for change intended to prevent future miscarriages of justice; and (c) educate the community about the administration of justice generally and the criminal proceedings against Guy Paul Morin in particular.⁴²

The Commission held 146 days of hearings, heard testimony from 120 witnesses, reviewed transcripts, exhibits, and other documents, and produced a two-volume, 1400-page report, complete with 119 specific recommendations for improving the criminal justice system.⁴³ Those recommendations addressed problems with forensic science, the use of informant testimony, police investigation procedures, the performance and training of prosecutors and defense counsel, the instructions given the jury at trial, and the rules governing postconviction and appellate review.⁴⁴ The conclusions were di-

38. See Jack King, *The Ordeal of Guy Paul Morin: Canada Copes with Systemic Injustice*, THE CHAMPION (Aug. 1998), available at <http://www.criminaljustice.org/CHAMPION/ARTICLES/98aug01.htm>.

39. *Id.* at *6.

40. *Id.* at *1.

41. *Id.* at *1.

42. FRED KAUFMAN, EXECUTIVE SUMMARY: COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998), available at http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/exesumrec/morin_esumm.pdf.

43. *Id.*

44. *Id.*, Recommendations at 1-40.

rect and damning. Regarding the use of jailhouse informants, for example, the Commission concluded:

[The informants'] claim that Guy Paul Morin confessed to [them] was easy to make and difficult to disprove. These facts, taken together, were a ready recipe for disaster. The systemic evidence emanating from Canada, Great Britain, Australia and the United States demonstrated that the dangers associated with the jailhouse informants were not unique to the Morin case. Indeed, a number of miscarriages of justice throughout the world are likely explained, at least in part, by the false, self-serving evidence given by such informants.⁴⁵

Specific recommendations followed for limiting the use of informants, including requirements for screening and obtaining authorization by superiors before a prosecutor can use an informant, limiting the types of inducements that can be offered to informants, ensuring openness and full disclosure to the defense of the informant's background and the nature of any deals, and instructing juries on the unreliability of informant testimony.⁴⁶ The Commission made similar specific recommendations for each of the other problem areas identified in the inquiry.

In the process, the Commission noted the imperative for reform both for the wrongly convicted, and for the victims of crimes and the community. The Commission observed:

The criminal proceedings against Guy Paul Morin represent a tragedy not only for Mr. Morin and his family, but also for the community at large: the system failed him—a system for which we, the community, must bear responsibility. An innocent man was arrested, stigmatized, imprisoned and convicted. The real killer has never been found. The trail grows colder with each passing year. For Christine Jessop's family there is no closure.⁴⁷

Judge Kaufman concluded the report, writing: "The challenge for all participants in the administration of justice in Ontario will be to draw upon this experience and learn from it."⁴⁸

The inquiry into the case of Guy Paul Morin does not stand in isolation in Canada. In 1998, the Manitoba government ordered a similar inquiry into the wrongful conviction of Thomas Sophonow.⁴⁹ After three trials, Sophonow was convicted of the 1981 strangulation murder in Winnipeg of a sixteen-year-old girl, Barbara Stoppel. In 1985, the Manitoba Court of Ap-

45. *Id.*, Executive at 14.

46. *Id.*, Recommendations at 11-23.

47. FRED KAUFMAN, EXECUTIVE SUMMARY: COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998), available at http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/Kaufmanrpt/morin_ch1.pdf at 1.

48. *Id.* at <http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/exesumrec/morinconcl.pdf> at 2.

49. See The Inquiry Regarding Thomas Sophonow, available at <http://www.gov.mb.ca/justice/sophonow/index.html> (last visited Apr. 5, 2002).

peal acquitted him.⁵⁰ For the next thirteen years he continued to seek full exoneration. Finally, in 1998, the Winnipeg Police Service reopened the case. On June 8, 2000, the Police Service announced that Sophonow was in fact innocent, and that another suspect had been identified.⁵¹ The Manitoba government publicly apologized to Sophonow and announced that there would be a Commission of Inquiry “to review the police investigations and full court proceedings to determine if mistakes were made” and “to determine whether compensation should be provided.”⁵² As in the Morin case, the Sophonow Commission undertook a searching inquiry, and produced an exhaustive written report, detailing the errors that led to the wrongful conviction, and making recommendations for reform of the system. The Commission’s report included recommendations for rules requiring the videotaping of all police interrogations of suspects to guard against coerced or disputed confessions,⁵³ recommendations for improved eyewitness identification procedures along with jury instructions on the frailty of eyewitness identification evidence,⁵⁴ and severe restrictions on the use of jailhouse informants.⁵⁵ Another such inquiry was also held in the case of David Marshall, Jr., who was wrongfully convicted of a 1971 murder,⁵⁶ and another is presently under way in the case of Greg Parsons, a Newfoundland bodybuilder who was exonerated by DNA evidence after being wrongfully convicted of killing his mother.⁵⁷

B. *The British Criminal Cases Review Commission*

Great Britain offers an alternate approach to wrongful conviction—a formal governmental body charged with investigating potential miscarriages of justice *before* innocence is otherwise established. In 1997, Great Britain created the Criminal Cases Review Commission (CCRC), an independent body responsible for investigating suspected miscarriages of criminal justice in England, Wales and Northern Ireland.⁵⁸ The CCRC has authority to review and independently investigate claims and then to refer the cases to the

50. *Id.*

51. *Id.*

52. *Id.* at <http://www.gov.mb.ca/justice/sophonow/intro/thefacts.html>.

53. *Id.* at <http://www.gov.mb.ca/justice/sophonow/police/recommend.html>.

54. *Id.* at <http://www.gov.mb.ca/justice/sophonow/eyewitness/recommend.html>.

55. *Id.* at <http://www.gov.mb.ca/justice/sophonow/jailhouse/recommend.html>.

56. See <http://www.indigenousbar.ca/cases/marshallinq.htm> (last visited Apr. 5, 2002).

57. Allison Lawlor, *Newfoundland Gives \$650,000 to Wrongfully Convicted Man*, THE GLOBE AND MAIL, (Feb. 28, 2002), available at http://www.globeandmail.com/servlet/RTGAMArticleHTMLTemplate/C/20020228/wconv2802?hub=homeBN&tf=tgam%252Frealtime%252Ffullstory.html&cf=tgam/realtime/configneutral&vg=BigAdVariableGenerator&slug=wconv2802&date=20020228&archive=RTGAM&site=Front&ad_page_name=brea kingnews.

58. Criminal Appeal Act, 1995, ch. 35 §§ 8-25 (Eng.). See also David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U.L. REV. 91 (2000).

appropriate court of appeal or to the Home Secretary with a recommendation for a Royal Pardon. The CCRC is mandated to refer cases for appellate review where there is a “real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.”⁵⁹ The court of appeal has described this “real possibility” test as requiring a referral when there is “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.’”⁶⁰

In its first three years, from 1997 through the Fall of 2000, the CCRC received 3,680 applications for review from convicted persons. As of October 31, 2000, the CCRC had reviewed 2,381 of those applications. Of those cases, 203, or 4.3 percent, were referred for appellate review. As of that date, forty-nine of those appeals had been heard, and the court had quashed the conviction in thirty-eight of the reviewed cases.⁶¹ The CCRC now receives approximately 860 cases each year, 500 of which it deems eligible for review.⁶² Of those, approximately thirty-five are referred to the Court of Appeal. In sixty-eight percent of the referred cases, the convictions are quashed; in eighty percent, the sentences are quashed.⁶³

The British and American criminal justice systems are of course not identical,⁶⁴ which raises questions about whether a commission of this type is necessary or workable in the United States.⁶⁵ Among the more notable differences is that, unlike the U.S. system, the British system provides only limited direct appellate review of criminal convictions, and no mechanism for collateral attack.⁶⁶ The Criminal Cases Review Commission is especially important in Great Britain to provide a mechanism for postconviction review that otherwise is largely nonexistent.

But in most relevant respects the British and American criminal justice systems are quite similar.⁶⁷ Accordingly, commentators including Norval Morris, Barry Scheck, David Horan, and Lissa Griffin, among others, have called for creating similar Inspector General-type bodies, or ombudsmen, or Innocence Commissions, to review potential cases of wrongful conviction in

59. Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241, 1276 (2001) (quoting Criminal Appeal Act, 1995, § 13(1)(a) (Eng.)).

60. Griffin, *supra* note 59, at 1277 (quoting *R. v. CCRC, ex p. Pearson*, 3 All E.R. 498 (1999)). Under British law, a conviction is deemed “unsafe,” and hence reversible, if there is a “lurking doubt” or if the jury would “necessarily have reached the same result in light of the evidence.” Griffin, *supra* note 59, at 1305.

61. Griffin, *supra* note 59, at 1277.

62. Leonard Leigh, Commissioner, Criminal Cases Review Commission, “Innocence Projects and Commissions: Who Will Free the Wrongfully Convicted?”, presentation at Harvard Law School Conference, *Wrongful Convictions: A Call to Action* (Apr. 20, 2002).

63. *Id.*

64. See Horan, *supra* note 58, at 100-05; Griffin, *supra* note 59, at 1243-46.

65. Horan, *supra* note 58, at 100-25.

66. Griffin, *supra* note 59, at 1246.

67. Horan, *supra* note 58, at 100; Griffin, *supra* note 59, at 1244.

the U.S.⁶⁸ These commentators reason that the basic criminal procedural systems in the Great Britain and the United States are substantially the same.⁶⁹ And while there are notable differences, particularly in appellate and post-conviction procedures, those differences are not as significant as they first appear. Although the U.S. system generally provides a right to direct review and collateral attack, the scope of such review is limited to correcting legal and procedural errors, not re-evaluating guilt or innocence.⁷⁰ Appellate courts cannot hear new evidence, and frequently invoke doctrines such as waiver and harmless error to avoid reversals even where procedural error exists. As one commentator has noted, “[f]actual claims of innocence tend to get little hearing in American appellate courts, particularly in post-conviction proceedings following direct appeals where courts have set very high thresholds for the consideration of such claims.”⁷¹ By contrast, in Great Britain, while there is a more limited opportunity for direct appellate review and no avenue for collateral attack, the appellate court “has broad jurisdiction to hear new evidence and employs a relatively relaxed standard for overturning a wrongful conviction.”⁷²

Moreover, strict time limitations and high burdens of proof in the American postconviction system are designed to make it difficult to obtain postconviction relief. Most states impose onerous time limitations on post-conviction motions, even when they are based on newly discovered evidence, often barring such motions unless brought within a year or two, or even as little as twenty-one days, after conviction.⁷³ Under the Antiterrorism and Effective Death Penalty Act of 1996, most federal habeas corpus petitions now face a strict one-year statute of limitations,⁷⁴ and the substantive standards for relief have tightened so strictly as to make habeas relief unavailable in all but the most egregious cases of constitutional error.⁷⁵ Com-

68. Horan, *supra* note 58, at 97-98; Griffin, *supra* note 59, at 1243-46; *see also* MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED 221 (1991).

69. Horan, *supra* note 58, at 102.

70. *See* Griffin, *supra* note 59, at 1246; *Herrera v. Collins*, 506 U.S. 390 (1993) (innocence is not a free-standing basis upon which a federal court generally may grant habeas corpus relief).

71. Horan, *supra* note 58, at 106.

72. Griffin, *supra* note 59, at 1246. Among other grounds, British appellate courts may reverse when they determine a conviction is “unsafe,” which can turn on whether there exists a “lurking doubt” or whether the jury would “necessarily have reached the same result in light of the evidence.” *Id.* at 1305.

73. *See* Patrick Leahy, *The Innocence Protection Act of 2001*, 29 HOFSTRA L. REV. 1113, 1124 (2001). Virginia has the most restrictive time limitation—21 days after trial. VA. SUP. CT. R. 3A:15(c) (2001). In light of significant recent criticism, the Virginia legislature has created a new writ of actual innocence, effective November 15, 2002, that is not subject to that rule, and that is available in felony cases. 2001 Va. Acts ch. 873, S.B. 1366 (codified as amended at § 19.2-327.2 (Cum. Supp. 2001)).

74. 28 U.S.C. § 2244(d)(1) (2002)

75. *See* 28 U.S.C. § 2254(d) (2001). For criticism of the Antiterrorism and Effective Death Penalty Act, particularly as applied to claims of innocence, *see* Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong With It and How To Fix It*, 33

pounding these difficulties, there is generally no right to counsel in postconviction proceedings and collateral attacks, so simply accessing the system to make a claim of innocence can be an insurmountable hurdle to many indigent and untrained defendants.⁷⁶

Recently, many American jurisdictions have relaxed some of the restrictions on innocence claims, at least in cases when DNA testing is available. Twenty-seven states and the District of Columbia now have statutes that authorize postconviction DNA testing and provide a right to relief upon favorable testing; most eliminate or expand the statute of limitations in DNA cases that otherwise applies to new trial motions.⁷⁷ Similar federal legislation is also pending.⁷⁸ But these new laws almost uniformly apply only to that rare species of case in which DNA evidence that was not available previously can be used to prove innocence. For the vast majority of cases in which new evidence might point toward innocence, all of the otherwise increasingly onerous barriers to postconviction relief remain. American appellate and postconviction remedies hardly substitute fully for a commission, such as the CCRC, with full funding and power to make the necessary inquiries into potential wrongful convictions.

As Lissa Griffin has proposed, the United States could remedy the deficiencies in the appellate and postconviction systems by creating

an independent governmental entity modeled after the English CCRC. 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.⁷⁹

As is obvious from this discussion, a commission of this type does not directly address the need identified in this article to study and learn from the wrongful conviction cases to prevent future miscarriages of justice. A commission like the CCRC more directly seeks to identify and remedy individual injustices than recommend systemic reforms. But, beyond patching a

CONN. L. REV. 919 (2001).

76. Even on direct appeal, where there generally is a right to counsel, appointed appellate counsel is often woefully inadequate. See Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1832 n.136 (2000) (collecting cases in which heavy caseloads among counsel for indigent appellants resulted in ineffective assistance of counsel); Douglas E. Cressler, *Mandated Briefing: A Judicial Mechanism for Enforcing Quality Control in Criminal Appeals*, 44 RES GESTAE 20 (July 2000) (identifying inadequacies in appellate representation in criminal cases in Indiana); 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, 1843 (1994).

77. See generally Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355 (2002).

78. See Leahy, *supra* note 73.

79. Griffin, *supra* note 59, at 1302 (footnotes omitted).

hole in the innocence safety net, the nature of such a commission's work, and the high-profile and credibility of such a commission, no doubt would also help in the systemic reform enterprise, as it would continue to highlight patterns in wrongful conviction cases, draw attention to those issues, and perhaps create a climate of enhanced receptiveness to reform. Indeed, such a commission could also be specifically charged to monitor the errors it detects in the system, and to issue reports with recommendations for reform.

But such a commission is indeed a tall order in the existing political and legal culture in the United States. It may just be that such a shift from the pure adversarial process that defines the American system, to something like the CCRC, with its inquisitorial powers, is too much to expect. It may be that, "[i]n the end, we prefer the autonomy, discretion, and theater which characterizes the adversarial process to the regulation and bureaucracy inherent in any effort to make the search for truth the principle goal of the criminal process."⁸⁰ But if it can work in Great Britain, it might also work here. We need not wait for that day, however, to start learning from the wrongful convictions. Other options are more immediately available in the interim.

C. American Study Commissions

Studying the flaws in the criminal justice system is hardly a radical notion. Indeed, although the United States has not yet seen fit to make expansive inquiries into individual cases of wrongful conviction, as in Canada, or to more systematically scour the landscape for individual injustices as does the CCRC in Great Britain, there are emerging efforts here to study the apparent flaws in the system. That effort has begun in capital cases, which certainly can serve as a model for the more expansive analysis proposed here.

1. Capital Punishment Study Commissions

The alarming number of wrongful convictions in capital cases in the United States has led to the formation of study committees or commissions in a number of states, whose assignment is to study the effectiveness of the criminal justice system in capital cases, and make recommendations for reforms. The capital cases have received considerable attention, obviously because the consequences of a wrongful conviction are so horrifying, but also because they form an identifiable body of cases that upon examination have produced many verifiable wrongful convictions. But there is no reason to believe that the problem of wrongful convictions is limited to capital cases, and no reason to limit study of wrongful convictions to such cases.

Illinois has led the way in creating a death penalty study commission. After Governor George Ryan declared a moratorium on the death penalty on

80. Givelber, *supra* note 6, at 1396.

January 31, 2000,⁸¹ he appointed a blue-ribbon panel to study the death penalty and make recommendations to correct its failings. Frank McGarr, a former federal judge, chairs the Commission and its fourteen members include prosecutors, defense attorneys, former U.S. Senator Paul Simon, novelist Scott Turow, the chief of staff to the Chicago police superintendent, and the president of a janitorial firm.⁸² The Governor set no specific mandates as to how the Commission is to do its work, or when it was to complete the job.⁸³ The Commission reviewed all Illinois death penalty cases in the twenty-four years since the Illinois General Assembly reinstated capital punishment, paying particular attention to the thirteen cases in which individuals sentenced to death in Illinois were exonerated.⁸⁴ The Commission took testimony from experts and held a series of public hearings.⁸⁵

In April 2002, the Illinois Commission issued its report, after two years of study. The lengthy report makes eighty-five specific recommendations for reforms, including recommendations to require videotaping of interrogations in capital cases; to review police procedures for obtaining eyewitness identifications; to reduce the number of circumstances under which the death penalty may be imposed; to increase the funding and training for lawyers and judges involved in capital cases; to intensify the scrutiny of the testimony of in-custody informants; and to implement new procedures for review of capital sentences.⁸⁶

Other states are making similar inquiries. In Indiana, Governor Frank O'Bannon asked the Criminal Law Study Commission to take a comprehensive look at how that state's death penalty law is applied and whether there are adequate safeguards to protect the innocent.⁸⁷ In Arizona, at the request of the Governor, Attorney General Janet Napolitano in July 2000 named more than twenty people to a commission to study whether the death penalty is fairly applied in that state.⁸⁸ Among its tasks, the Capital Case Commis-

81. Governor Ryan, a death penalty proponent, declared the moratorium in reaction to the significant number of wrongful convictions in capital cases in his state. Thirteen death row inmates were exonerated and released during the same time period in which the state had carried out twelve executions. See Levy, *supra* note 37, at 471; Clark, *supra* note 34, at 453.

82. Steve Mills & Ken Armstrong, *Ryan Sets up Panel to Study Death Penalty*, CHI. TRIB., Mar. 9, 2000, available at 2000 WL 3643904.

83. Paul Krawzak, *Panel to Look at Flaws in Execution System*, SPRINGFIELD ST. J.-REG., Mar. 10, 2000, available at 2000 WL 22767056.

84. Report of the Governor's Commission on Capital Punishment, George H. Ryan, Governor, at i (Apr. 2002), available at <http://justice.policy.net/cjreform/studies/ilryan-com/indexilrpt.vtm> [hereinafter Governor's Commission].

85. Editorial, *Time Running out for Reform*, CHI. TRIB., Oct. 21, 2001, available at 2001 WL 4127710.

86. Governor's Commission, *supra* note 84, at i-ii.

87. Lesley Stedman, *State Study Won't Look at Ending Executions, Indiana Committee to Review Fairness of Death Penalty*, THE LOUISVILLE COURIER-JOURNAL, June 18, 2000, available at 2000 WL 7033670.

88. Mike McCloy, *Death Penalty to get "Fresh Look" by Panel*, ARIZ. REPUBLIC, July 22, 2000, available at 2000 WL 8051727.

sion is to examine how thoroughly claims of innocence are investigated. The Commission is comprised of judges, prosecution and defense attorneys, a mental health advocate, victims' rights representatives, and state legislators.⁸⁹ Nebraska, Virginia and North Carolina, among others, are also studying their death penalty systems.⁹⁰

2. Academic Study Projects

Those interested in seizing the learning opportunity presented by the DNA cases need not await official government action to begin the process. The Constitution Project at Georgetown University, for example, has assembled a committee of thirty former judges, prosecutors, defense attorneys, journalists, scholars, and others to study and recommend reforms to the death penalty system.⁹¹ In its initial draft report, the Project proposed eighteen reforms of the capital punishment system, addressing issues such as the provision of adequate counsel, the scope of the death penalty, reducing racial disparity, protecting against wrongful conviction and sentencing, and increasing discovery in capital cases.⁹²

Another such effort, more broadly addressing itself to reforming the criminal justice system, has been initiated by a group of law students at Arizona State University.⁹³ Those students, participating in a seminar taught by Professor Michael Saks, have set out to use the DNA exonerations "to identify the systemic flaws in the criminal justice system that produce errors and work to cure those flaws."⁹⁴ Their goal is to produce a "Model Act embodying a comprehensive set of criminal justice system reforms," all aimed at reducing "the probability of an erroneous conviction, without reducing the probability of a correct conviction."⁹⁵ Their Model Act will address eyewitness identification procedures (both interviewing of witnesses and conducting lineups and photo spreads); interrogation of suspects; forensic science; indigent legal representation; prosecutorial misconduct; postconviction procedures; and post-release rights.⁹⁶ Unlike the death penalty study commissions, their mission is not limited to examining the capital punishment system, but more broadly extends to examining the criminal justice system as a whole, in light of the wrongful conviction cases.

89. Office of the Attorney General, State of Arizona, *Capital Case Commission Interim Report*, available at <http://justice.policy.net/relatives/19100.pdf> at 1.

90. Governor's Commission, *supra* note 84, at 15.

91. The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* (Pre-Publication Draft, July 27, 2001), available at <http://justice.policy.net/relatives/18680.pdf>.

92. *Id.*

93. *See generally* Saks et al., *supra* note 22.

94. *Id.* at 670.

95. *Id.*

96. *Id.* at 672-82.

While such efforts can be important parts of the reform effort, and can provide useful material for other study and reform commissions, alone they cannot carry the weight of the reform movement. They can generate information and ideas, but without official sanction or involvement of players with a direct stake in the system, or without specific application to a particular jurisdiction, they are unlikely alone to translate directly into reform.

3. Expanding the Inquiry: State and Federal Criminal Justice Study Commissions

State and federal study commissions are needed to ensure that the reform opportunity is not lost. The commissions can, as in Canada, be appointed after significant exonerations to scrutinize the failings that produced each particular miscarriage of justice. But states need not await such a high-profile exoneration within their borders to begin the study. Nor need they muster the fortitude to engage in the type of painful (and expensive) individual-case self-scrutiny the Canadians have undertaken in the Morin and Sophonow inquiries. Every jurisdiction can and should now form study commissions, like the death penalty study commissions in Illinois and elsewhere that are studying on a more limited basis the flaws in the capital punishment system. Like the Arizona law students drafting a Model Act, they can take as their charge to study the entire criminal justice system, from top to bottom, drawing on the lessons from wrongful conviction cases within and outside their borders, and then to apply the lessons learned to the specific circumstances and conditions within their jurisdiction.

Generating the concern and political will to undertake such an in-depth inquiry is certainly made easier after a local high-profile DNA exoneration. But even without such a case, states can and should move forward with study of the wrongful conviction cases. After all, many of the factors that contribute to wrongful convictions cross all state borders. Eyewitnesses suffer the same weaknesses in every state. Police run the risk of tainting eyewitness identifications wherever they conduct lineups and photo spreads. Police interrogate suspects in largely the same way in most jurisdictions. Police and prosecutors everywhere work under the same pressures that lead to concealing exculpatory evidence. Providing adequate counsel for the indigent poses challenges in every jurisdiction. No matter where a DNA exoneration occurs, it provides useful material for study in virtually every jurisdiction.

No state is immune from the problem of wrongful convictions and its converse, failing to identify and convict the guilty. At least twenty-seven states and the District of Columbia presently have at least one case in which a wrongly convicted person has been exonerated by DNA testing.⁹⁷ Those

97. Those jurisdictions include Alabama, Arizona, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Missouri, Montana, New Jersey, New York, North Carolina, Oklahoma, Ohio, Pennsylvania, South Carolina, Texas, Virginia, Washington D.C., West Virginia, and Wisconsin. For a cur-

cases each present a powerful argument for examining the systems that produced those errors.

Even exonerations in nearby states, or exonerations merely with *connections* to a state, can generate the interest and concern necessary to motivate an examination of the criminal justice system. In Wisconsin, for example, interest in creating a study commission arose from a Texas exoneration—the case of Christopher Ochoa—because law students at the University of Wisconsin Law School’s Innocence Project worked to free Ochoa.⁹⁸ Ochoa served twelve years in prison after falsely confessing under police coercion to a rape and murder he did not commit. In 2001, Ochoa and his co-defendant were released from prison after DNA proved that they could not have committed the crime, and that another man, who had subsequently confessed, was indeed the perpetrator. The Wisconsin students’ involvement in the case generated considerable publicity in Wisconsin, and consequently, considerable attention to the problem of wrongful convictions.⁹⁹

With the attention focused on the problem by the DNA exonerations, other types of wrongful conviction take on new significance and can also serve as part of the impetus for self-examination. Every state has miscarriages of justice even apart from the DNA cases. Every state has wrongful convictions established by reversal and subsequent acquittal or dismissal, or by pardon. Finding and compiling such cases, especially in the shadow of the more than one hundred DNA exonerations nationwide, can add powerfully to the argument for self-study.¹⁰⁰

Commissions or inquiries can be formed in many ways. Governors and attorneys general can appoint panels. In some jurisdictions state supreme courts can establish commissions pursuant to their supervisory authority over criminal procedure. Legislative councils can also be charged to undertake the study. Barring the present willingness or inclination of such political entities to initiate the process, commissions can also be formed from the

rent listing of the DNA exonerations and their states, see http://www.innocenceproject.org/case/display_cases.php?sort=year_exoneration&start=1&end=20 (last visited Apr. 6, 2002).

98. See, e.g., Tom Kertscher, *UW Project on DNA Evidence Clears Austin Man*, MILWAUKEE JOURNAL-SENTINEL, Jan. 16, 2001, available at <http://www.jsonline.com/news/State/jan01/1ochoa011601.asp>; Tom Kertscher, *Texas Inmate Gets Freedom Back*, MILWAUKEE JOURNAL-SENTINEL, Jan. 16, 2001, available at <http://www.jsonline.com/news/Metro/jan01/ochoa17011601a.asp>; Alan Berlow, *Texas Justice*, SALON.COM, Oct. 31, 2000, at <http://www.salon.com/politics/feature/2000/10/31/ochoa/index.html>; Lisa Falkenberg, *Free Again: Law School Exonerates Man Convicted of Murder*, ABCNEWS.COM, Jan. 16, 2001, at <http://204.202.137.115/sections/us/DailyNews/dnaconvict010116.html>.

99. See sources cited in note 98, *supra*.

100. In Wisconsin, for example, law students searched published appellate decisions and surveyed public defenders and private attorneys to compile a list of apparent wrongful convictions beyond those involving DNA. The students were able to compile and analyze a preliminary list of 14 cases involving wrongful convictions, which added powerfully to the argument for a commission to study the system. Jessica A. Harry et al., *Guilty Until Proven Innocent: A Study of Wrongful Convictions in the Wisconsin Criminal Justice System*, unpublished manuscript (2001) (on file with the author).

ground up. In Wisconsin, for example, the State Bar has taken an interest in the issue, and is pursuing an effort to work with the deans of the state's two law schools to appoint a broad-based study commission, with the hope that the commission can then gain official sanction from the Supreme Court or the legislature.

However organized, any such commission must be one that is credible, respected, and above politics. The temptation is there to call these new commissions "Innocence Commissions," but this title is too narrow, too likely to marginalize the effort as a criminal defense movement when it really is much more. Truth and accuracy in the criminal justice system mean both acquitting the innocent and convicting the guilty. The reforms certainly protect the innocent, but also condemn the guilty. Accordingly, a more appropriate, if less inspiring moniker, might be simply a "Criminal Justice Study Commission."¹⁰¹

To fulfill the objectives of any such commission, it must have members that include prosecution and defense attorneys, members of the judiciary, representatives of police groups, victims rights groups, academics, and, importantly, non-lawyers and individuals outside the criminal justice system. Old problems require fresh ideas and perspectives. Individuals who work in the criminal justice system bring knowledge and expertise, but also inevitably biases and a certain unavoidable inability to see new ways of doing things. Those outside the criminal justice system can bring a fresh perspective and common sense to the problems that can contribute significantly to a serious and searching study of the system.

CONCLUSION

The scientific certainty of the DNA exonerations presents an opportunity for meaningful reform of the criminal justice system beyond anything we have known before. The opportunity is an important one—for the wrongly convicted or accused, for the victims who have a right to know the truth about their perpetrators, and for the safety of the community. But it is an opportunity that will not be fully present for long. It is an opportunity to learn that we must not waste.

101. Quibbling over the name may seem trivial, but it has important symbolic effect. Prosecutors and victims rights advocates, for example, are more likely to feel they have a stake in the enterprise if the language used does not carry implicit judgments hostile to their interest in punishing the guilty.

