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COMMISSIONING INNOCENCE AND RESTORING CONFIDENCE: THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION AND THE MISSING DELIBERATIVE CITIZEN

Mary Kelly Tate

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COMMISSIONING INNOCENCE AND RESTORING CONFIDENCE: THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION AND THE MISSING DELIBERATIVE CITIZEN

Mary Kelly Tate*

"[T]he institution of the jury places the people themselves, or at least one class of citizens, on the judge's bench. The institution of the jury, therefore, really puts the direction of society into the hands of the people or of this class."¹

I. INTRODUCTION

Since 1989, the United States has witnessed 289 DNA exonerations, with exonerees serving an average of thirteen years in prison.² Although DNA and its unmatched power for conclusive results is what brought popular attention to wrongful convictions, the scope of the problem is vastly larger than the number of known DNA exonerations.³ The actual number of convicted individuals who are factually innocent is unknown. The state of North Carolina has recently responded to this national crisis via a newly created state agency. This essay applauds North Carolina's response, but urges that ordinary citizens, qua jurors, be active participants in its important work.

Long before the arrival of DNA technology, wrongful convictions have been the object of scholarly, judicial, philosophical and literary focus. Indeed the breadth of the attention shows that conviction of the innocent unsettles the collective psyche. Yale Law School Professor Edwin Borchard wrote a classic critique of sixty-five wrongful conviction cases in the 1930s.⁴ Judge Friendly authored an important work in the 1970s pressing the legal culture to face the fallibility of criminal trials.⁵ And few are unacquainted with the Blackstonian

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1. ALEX DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 260 (Francis Bowen trans., 3d ed. 1863).

2. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Apr. 9, 2012).

3. See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780-82 (2007) (focusing on capital rape-murder trials during the 1980s and asserting a three to five percent innocence rate).

4. EDWIN M. BORCHARD, *Preface to CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (Archon Books 1961) (1932) ("'Innocent men are never convicted. Don't worry about it, it never happens in the world. It is a physical impossibility.' The present collection of sixty-five cases, which have been selected from a much larger number, is a refutation of this supposition.")

5. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments* 38 U. CHI. L. REV. 142, 153 (1970) (discussing the American Bar Association Standards Relating to Post-

bromide that it is better to let ten guilty men go free than to imprison one innocent man.⁶ Within modern American literature, Harper Lee's *To Kill a Mockingbird* is the archetypal example of the innocent man who is convicted in a trial beset with racial and class animus.⁷ And, of course, wrongful convictions rightly capture the imagination of those engaged in philosophical and moral discourse.⁸ Notwithstanding the calls of judicial and academic luminaries or great works of literature, it required the revolution in DNA testing to ultimately pry loose the long-standing cultural pretension that the United States had a singularly high performing criminal justice system and that its adversarial system was well built for truth seeking.⁹

As a practical matter, state and federal courts are the province for post-conviction review, even though, theoretically, executive clemency is a pathway for relief. Yet, in general, the appellate review found in state and federal courts for all post-conviction cases, but also for innocence cases, is a form of review hobbled by extraordinary procedural and substantive limitations.¹⁰ Appellate courts' limited factual review and preference for finality are strong barriers to post-conviction

Conviction Remedies concluding that new constitutional developments "produce a growing pressure for post-conviction remedies.").

6. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358–59 (1996).

7. HARPER LEE, *TO KILL A MOCKINGBIRD* (Grand Cent. Publ'g 1982) (1960).

8. See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* 72 (1985) (providing a philosophical meditation on how society, the lawyer and the individual are to conceptualize the problem of the conviction of the innocent.). See also *id.* ("Nothing is of more immediate practical importance to a lawyer than the rules that govern his own strategies and maneuvers; and nothing is more productive of deep and philosophical puzzles than the question of what those rules should be. One such puzzle is quickly stated. People have a profound right not to be convicted of crimes of which they are innocent. If a prosecutor were to pursue a person he knew to be innocent, it would be no justification or defense that convicting that person would spare the community some expense or in some other way improve the general welfare. But in some cases it is uncertain whether someone is guilty or innocent of some crime. Does it follow, from the fact that each citizen has a right not be convicted if innocent, that he has a right to the most accurate procedures possible to test his guilt or innocence, no matter how expensive these procedures might be to the community as a whole?").

9. See BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 6 (2011) ("DNA exonerations have changed the face of criminal justice in the United States by revealing that wrongful convictions do occur and, in the process, altering how judges, lawyers, legislators, the public, and scholars perceive the system's accuracy."). See also REVIEW OF THE CRIMINAL AND CIVIL JUSTICE SYSTEM IN WESTERN AUSTRALIA 51 (1999), <http://www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/finalreport/ch7adverscrim.pdf>. ("In . . . the adversarial . . . criminal justice system[], the State monopoliz[es] the determination of whether or not an act is a criminal offen[s]e and the sentencing of offenders. The primary purpose is to prevent private justice by retribution. . . . [The goal of the adversarial system is] to ensure the procedural fairness by balancing the rights of the individual against the rights and interests of society as a whole.").

10. See GARRETT, *supra* note 9, at 211–12 (discussing the barriers in postconviction proceedings confronting those seeking exoneration from their sentences); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 399–400 (1995) ("the [Supreme] Court has imposed substantial barriers to all habeas petitioners."). But see Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 604, 621 (2009) (discussing unexpected strengths that appellate courts may have in reviewing innocence cases based on social science research. Studies show people can detect deception better through engagement with transcripts rather than testimony).

relief.¹¹ Fewer than 10% of criminal convictions are reversed; some estimates assert a percentage as low as 1.5%.¹² Furthermore, political realities dampen courts, legislatures and governors' willingness to afford relief to petitioners even when faced with compelling evidence in favor of innocence.

In addition to the incalculable injury to the individuals wrongfully convicted and incarcerated, exonerations have made their mark on the chief actors in the criminal justice system. Judges, jurors, prosecutors, defense counsel and law enforcement now perform their duties with knowledge that wrongful outcomes are not an abstract concern, but a concrete reality. The steady stream of DNA exonerations have also strongly impacted the public and its elected representatives. The public's confidence in the integrity of the courts does not compare favorably to the public's assessment of other public institutions. Moreover, DNA exonerations have also led to eroding support for the death penalty, and exposed the strained relationship between law enforcement and citizens living in heavily-policed neighborhoods.

Seventeen years after the United States heralded its first DNA exoneration, in 2006 North Carolina established the North Carolina Inquiry Innocence Commission ("Inquiry Commission"). The Inquiry Commission is the first-ever state agency in the United States with the power to review, investigate and refer claims of actual innocence for judicial review and relief.¹³ The Inquiry Commission's pioneering contribution to the problem of wrongful convictions is the much needed post-conviction flexibility afforded by its sophisticated screening, investigating, reviewing and remedial functions.¹⁴ Consequently, the Inquiry Commission is a public policy turning point in the modern wrongful conviction epoch.

Although the Inquiry Commission is most prominently recognized for its creative approach to the problem of post-conviction review of credible claims of innocence,¹⁵ its value does not solely rest with the innovative case-specific review process. It also lies in the Inquiry Commission's confrontation, although incomplete, with the institutional harm to the judicial branch, and by extension to our democratic society, caused by recurring wrongful convictions all across the

11. GARRETT, *supra* note 9, at 227 (discussing judges' denial of postconviction DNA testing requests by petitioners later exonerated, "[s]tates emphasized the 'finality' of convictions, for the understandable reason that except in unusual situations, as time passed after a trial, evidence would get stale, memories would fade, and it would be difficult to revisit the question of guilt or innocence.").

12. *Id.* at 197.

13. N.C. GEN. STAT. § 15A-1461 (2007). In light of criminal defendants' perennial outsider-status vis-à-vis accessing favor from the legislative branch, the creation of the Inquiry Commission marked enormous progress for this "discrete and insular" group. See generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (explaining democratic processes and analyzing groups chronically excluded from such processes).

14. See Jerome M. Maiatico, *All Eyes On Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1361 (2007) ("[t]he Criminal Cases Review Commission (CCRC) is the independent review commission in the United Kingdom that reviews suspected miscarriages of criminal justice . . . [M]any of the fundamental characteristics of the [Inquiry Commission] were based upon those of the CCRC.").

15. See, e.g., David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1027 (2010).

United States.¹⁶ Incorporating jurors into the Inquiry Commission's mission would bolster its ability to protect the judiciary's institutional capital.

Lest we forget the obvious, trial courts are the locus of errant outcomes in criminal matters. Therefore, any attempt at amelioration of this kind of confidence-reducing problem should be broadly conceived and directed there. Public confidence in adequately functioning trial courts¹⁷ is damaged by the ongoing problem of wrongful convictions.¹⁸ By employing the prestige and competencies of the judiciary in the form of special tribunals tasked to review criminal convictions in which signs and symptoms of outcome-based error are present, this ground-breaking agency recognizes that wrongful convictions damage the integrity of the courts and the societal sense of justice they are thought to reflect.¹⁹

Against this historical and legal background, North Carolina's decision to empower a state agency with remedial muscle of this non-traditional sort, and no less in the politically rife arena of criminal justice matters, marked a bold and innovative step. Such a step in a system of federalism will certainly be assessed by other states in their unavoidable and on-going response to wrongful convictions.²⁰

This essay argues that, in order for the Inquiry Commission to most adequately remedy the harms of wrongful convictions, its final review must include the deliberative voice of jurors selected from the community where the conviction occurred. The discussion proceeds as follows. Part II briefly addresses the origin and structure of innocence commissions in other states. Part III addresses the unique structure of North Carolina's Inquiry Commission. Part IV offers a proposal for enhancing the Inquiry Commission's effectiveness through inclusion of post-conviction jurors in the final stage of review now performed exclusively by a three-judge panel. Including jurors in the Inquiry Commission's final review of

16. See Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 413, 413 (2009) (“[b]ut the deeper, more systematic causes of wrongful conviction—causes imbedded in institutional structure and culture—are harder to isolate, and certainly harder to tackle.”). See also GARRETT, *supra* note 9, at 6 (discussing the proliferation of exonerations and the establishment of the “innocence network” while noting that “[p]ublic distrust of the criminal justice system has increased, and popular television shows, books, movies, and plays have dramatized the stories of the wrongfully convicted. We now know that the ‘ghost of the innocent man’ spoken of by Judge Learned Hand is no ‘unreal dream,’ but a nightmarish reality.”).

17. See generally Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 697-707 (2006) (discussing a lower-courts driven analysis of public confidence in the judiciary and how it affects democratic values); THE FEDERALIST NO. 78 (Alexander Hamilton) (explaining the relative weakness of the courts in relation to the executive and legislative branches. Absent the “purse” or “sword” belonging to the other branches, the judicial branch’s reliance on public trust and confidence is even more necessary).

18. GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 1–2* (2008) (maintaining that protection of the innocent is the essential, foremost goal of the criminal justice system and that the system has failed in reaching it).

19. See *Rules and Procedures, Preamble*, N.C. INQUIRY COMM’N 6 (2010), <http://www.innocencecommission-nc.gov/rules.html> (“Although the reasons for the original conviction of North Carolina’s exonerated vary, each exoneration can be characterized as delayed, lengthy, costly, and damaging to the public’s confidence in its justice system.”).

20. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting) (“[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

innocence cases deemed worthy of judicially-impaneled review will achieve three important “confidence-enhancing” goals: it would reinforce the jury’s central role in our criminal justice system, protect the review process from political pressures on elected officials, and honor the local jurisdiction’s natural and substantial interest in the ultimate resolution of the controversy. As it stands now, the Inquiry Commission is a good thing. But it could be even better.

II. ATTEMPTS AT RESTORING CONFIDENCE: A BRIEF LOOK AT INNOCENCE COMMISSIONS STATE BY STATE

At least eleven innocence commissions have been established since the DNA-driven modern awareness of wrongful convictions.²¹ Each state commission varies in structure, mission and origin.²² Some are the product of legislative action, while others were created by non-profit organizations, bar associations, the judiciary and law firms.²³ This multiplicity not only speaks to the mounting impact exonerations are having on stakeholders in the legal arena, but also signals a lack of consensus concerning how to properly respond to the problem of wrongful convictions.

Despite this mosaic in form and purpose, all the commissions share the absence of active and power-based citizen involvement and all, except the Inquiry Commission, lack any remedial authority over claims of innocence.²⁴ Accordingly, these commissions perform framing and studying functions belonging in the public policy domain, rather than functioning as a check on the criminal justice system’s fact-finding and assignment of culpability.²⁵

Below is a brief overview of commissions throughout the United States.²⁶ This review is intended to highlight, through contrast, the innovative nature of the

21. *Criminal Justice Reform Commissions: Case Studies*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Criminal_Justice_Reform_Commissions_Case_Studies.php (last visited April 10, 2012)

22. *Id.* In 2011, Senator Jim Webb (D-Va.) sponsored the *National Criminal Justice Commission Act of 2011*, S. 306, 112th Cong. (2011). This was the third year Senator Webb sponsored a bill such as this, which would create a bi-partisan national commission to review the nation’s criminal justice system over eighteen months. Wesley P. Hester, *Senate GOP Defeats Webb’s Criminal-Justice Reform Bill*, RICHMOND TIMES-DISPATCH, Oct. 21, 2011, <http://www2.timesdispatch.com/news/virginia-politics/2011/oct/21/tdmain04-senate-gop-defeats-webbs-criminal-justice-ar-1398378/>. Over 100 organizations, including The National Sheriff’s Association, the International Association of Chiefs of Police, the U.S. Conference of Mayors, and the Innocence Project, supported the Bill. Wesley P. Hester, *Mayors Back Webb’s Criminal Justice Reform Legislation*, RICHMOND TIMES-DISPATCH, June 23, 2011, <http://www2.timesdispatch.com/news/virginia-politics/2011/jun/23/tdmet03-mayors-back-webbs-criminal-justice-reform--ar-1127407/>. Regrettably, the Bill fell three votes shy of the votes it needed to advance even though it was supported by four Republicans. Hester, *Senate GOP Defeats Webb’s Criminal-Justice Reform Bill*, *supra*. Senator Webb has committed to continue fighting for a commission with the help of the organizations supporting the Bill. *Innocence Blog, Sen. Webb to Keep Fighting for a Commission*, INNOCENCE PROJECT (Oct. 24, 2011, 05:26PM), http://www.innocenceproject.org/Content/Sen_Webb_to_Keep_Fighting_for_a_Commission.php.

23. *Criminal Justice Reform Commissions: Case Studies*, *supra* note 21.

24. *Id.*

25. See generally THOMAS, *supra* note 18, at 1 (analyzing the difference in pursuit of “truth” in the American adversarial model and the European inquisitorial model).

26. The discussion of the innocence commissions found in Part II is not exhaustive and additional information can be found on each commission’s respective website.

Inquiry Commission's investigative and remedial reach and to demonstrate that the innocence commission movement in the United States has not created a vital place for citizen participation.

A. California

The California Legislature, through Senate Resolution 44 established the California Commission on the Fair Administration of Justice (the "CCFAJ") in 2004.²⁷ The CCFAJ had a tripartite mission: (1) to study the extent of criminal justice system failures in California's past, specifically instances of wrongful convictions or wrongful executions; (2) to examine possible methods for the improvement in the functioning of California's criminal justice system; and (3) to recommend and propose legislative action which could enhance the fair and accurate administration of justice in California.²⁸

Governor Schwarzenegger and the California Legislature received the CCFAJ's final report on June 30, 2008.²⁹ The report made several recommendations across a myriad of areas including, improving interrogation practices, diminishing reliance on jailhouse snitch testimony, and reforming exoneree compensation.³⁰ However, as a result of gubernatorial vetoes,³¹ the only successfully enacted reform concerned compensation for the exonerated.³² This reform extended the time period in which an exoneree can present a claim for compensation from six months to two years³³ and removed language from the code which prohibited compensation when the accused negligently contributed to his or her arrest or conviction.³⁴

27. S. Res. 44, 2003-04 Leg. (Cal. 2004). *See also* Membership, Gerald Uelman, CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, <http://www.ccfaj.org> (follow "Membership" hyperlink) (last visited April 10, 2012).

28. S. Res. 44, 2003-04 Leg. (Cal. 2004).

29. S. Res. 10, 2007-08 Leg. (Cal. 2007) (extending the commission's deadline to report its finding and recommendations from December 31, 2007 to June 2008).

30. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT (2008), *available at* <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

31. Robert J. Norris et al., "*Than That One Should Suffer*": *Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1356 (2010/2011) (noting that in "California . . . the legislature passed a number of bills based on the recommendations of the California Commission on the Fair Administration of Justice, only to have the governor veto them."); *Gov. Vetoes 3 Bills on Crime Case Procedures*, L.A. TIMES, Oct. 7, 2007, <http://articles.latimes.com/2007/oct/16/local/me-veto16>.

32. *See* CALIFORNIA COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT, *supra* note 30, at 109. Under existing federal law, a wrongfully imprisoned individual can receive a maximum of \$100,000 per year in compensation after exoneration. 28 U.S.C. § 2513 (2006). California's penal code section 4904 provides a maximum compensation of \$100 per day of incarceration. CAL. PEN. CODE § 4904 (West 2012).

33. 2009 Cal. Legis. Serv. ch. 432 (West) (amending CAL. PENAL CODE § 4901).

34. *Id.* (amending CAL. PENAL CODE §§ 4903-4904). *See also* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 30. The compensation statutes now prohibit compensation only where the accused intentionally contributed to bringing about his or her arrest or conviction and provide that the compensatory factfinder will not consider an involuntary false confession or involuntary plea as intentionally contributing to the arrest or conviction. 2009 Cal. Legis. Serv. ch. 432 (West) (amending CAL. PENAL CODE §§ 4903-4904).

B. Connecticut

The Connecticut legislature established the Connecticut Advisory Commission on Wrongful Convictions in 2003 as a body intended to review particular cases of wrongful conviction.³⁵ The Connecticut Commission is vested with the authority to investigate exonerations, determine the causes of the wrongful convictions, and devise recommendations meant to lessen the risk of convicting an innocent person in Connecticut courts.³⁶ Fourteen members comprise the Advisory Commission, drawn broadly from the criminal justice system.³⁷ In February 2009, the Commission issued a report describing its efforts, including implementing new protocols for eyewitness identifications with the Office of the Chief State's Attorney, evaluating a pilot program for recording interrogations of arrested persons, and monitoring the procedures for the compensation of wrongfully convicted persons.³⁸ Regrettably, as a result of funding shortfalls and perceived overlap with the Connecticut Innocence Project, the Commission became dormant after issuing its report in 2009.³⁹

C. Florida

The Florida Supreme Court ordered the creation of the Florida Innocence Commission on July 2, 2010.⁴⁰ Its mandate is to identify the causes of wrongful convictions, along with advancing proposals for reducing the risk of such convictions.⁴¹ The Commission submitted an interim report in 2011 to the Florida Supreme Court highlighting the five main causes of wrongful convictions found in the Florida court system.⁴² The Commission remains dedicated to working to eliminate the possibility of wrongful convictions and is working to produce a final report in June 2012.⁴³

D. Illinois

Former Governor Ryan of Illinois established the Governor's Commission on Capital Punishment in January of 2000, which is the most noted and publicized

35. H.R. 6700, 2003 Gen. Assemb., Reg. Sess. (Conn.).

36. *Id.*

37. STATE OF CONN. JUDICIAL BRANCH, ADVISORY COMMISSION ON WRONGFUL CONVICTIONS, <http://www.jud.ct.gov/committees/wrongfulconviction/#Member> (last visited Mar. 30, 2012).

38. CONN. ADVISORY COMM'N ON WRONGFUL CONVICTIONS, REPORT OF THE ADVISORY COMMISSION ON WRONGFUL CONVICTIONS 1 (2009), available at http://www.jud.ct.gov/committees/wrongfulconviction/WrongfulConvictionComm_Report.pdf.

39. Dave Collins, *Wrongful Convictions Panel Idle for 2 Years*, BOSTON GLOBE (Nov. 26, 2010), http://www.boston.com/news/local/connecticut/articles/2010/11/26/conn_wrongful_convictions_panel_idle_for_2_years/.

40. *In re* Florida Innocence Commission, No. AOSC10-39 (Fla. Jul. 2, 2010), available at <http://www.floridasupremecourt.org/clerk/adminorders/2010/AOSC10-39.pdf>.

41. *Id.*

42. FLA. INNOCENCE COMM'N, INTERIM REPORT 10 (Jun. 6, 2011) (providing the five main causes for wrongful convictions found in Florida: eyewitness misidentification, false confessions, informant/jailhouse snitches, invalidated or improper scientific evidence and professional responsibility and accountability).

43. *Id.* at 2.

commission of the last decade. The Commission's fifteen members, drawn from a predictable cross-section of criminal justice system stakeholders, completed a report in 2003 from which twenty of eighty-five recommendations formed the basis of legislatively enacted reform.⁴⁴ The recommendations were aimed at safeguarding the criminal justice system against the threat of wrongful convictions.⁴⁵ In response to the Commission's findings and recommendations, Governor Ryan commuted the sentences of all Illinois death row inmates to life imprisonment⁴⁶ and the state ultimately abolished the death penalty in 2011, citing concerns over executing the innocent.⁴⁷

E. Louisiana

The Louisiana Legislature ordered the pre-existing official state agency, the Louisiana State Law Institute, to broadly study problems in the criminal justice system and recommend revisions to the law of criminal procedure before January 1, 2013.⁴⁸ The Institute will work with other organizations across the criminal justice system in Louisiana, including the Louisiana District Attorney's Association, the Louisiana Public Defender Board, the Louisiana Sheriffs' Association, and others.⁴⁹ To date, the Institute has no tangible findings, but is expected to produce recommendations in 2013.

F. New York

New York has established two separate innocence commissions: one launched by the New York State Bar Association called the Task Force on Wrongful Convictions⁵⁰ and the other—the New York State Justice Task Force—was produced through action taken by Jonathan Lippman, the Chief Judge of the State of New York.⁵¹ Both commissions were charged with identifying the causes of

44. COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 36–38 (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf. See also Joseph L. Hoffmann, *Protecting the Innocent: The Massachusetts Governor's Council Report*, 95 J. CRIM. L. & CRIMINOLOGY 561, 564 (2005).

45. See COMM'N ON CAPITAL PUNISHMENT, *supra* note 44.

46. Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 325, 337 (James R. Acker et al. eds., 2d ed. 2003).

47. John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES (Mar. 9, 2011), <http://www.nytimes.com/2011/03/10/us/10illinois.html>, (quoting Governor Quinn as justifying his signature on the ban stating “it is impossible to create a perfect system”).

48. *Criminal Justice Reform Commissions: Case Studies*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Criminal_Justice_Reform_Commissions_Case_Studies.php (last visited Apr. 10, 2012) [hereinafter *Innocence Project Case Studies*]. See also *Purpose*, LOUISIANA STATE LAW INSTITUTE, <http://www.lslri.org> (last visited Apr. 10, 2012).

49. *Innocence Project Case Studies*, *supra* note 48.

50. N.Y. STATE BAR ASS'N, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS (Apr. 4, 2009), available at http://www.nysba.org/AM/Template.cfm?Section=News_Center&CONTENTID=31576&TEMPLATE=/CM/ContentDisplay.cfm.

51. N.Y. STATE JUSTICE TASK FORCE, <http://www.nyjusticetaskforce.com/> (last visited Apr. 9, 2012).

wrongful convictions and fashioning potential remedies. The Task Force on Wrongful Convictions produced a final report in April 2009 and continues working to advocate its legislative proposals and supports legal education for wrongful conviction issues.⁵² The New York Justice Task Force created two reports recommending changes to prevent wrongful convictions—one on improving eyewitness recommendations and the other on expanding the New York DNA bank.⁵³

G. Oklahoma

The Oklahoma Bar Association established the Oklahoma Justice Commission in 2010. It has an expansive research mission aimed at gathering wide-spread information at the state and national level on the causes of wrongful conviction.⁵⁴ The Commission's membership is determined by the Commission's Chairman, former Oklahoma Attorney General Drew Edmondson.⁵⁵ Currently, the Commission is creating remedial strategies designed to reduce the possibility of conviction of the innocent by examining procedural and educational remedies determined to be the cause of wrongful convictions in Oklahoma.

H. Pennsylvania

Pennsylvania Senator Stewart J. Greenleaf, Chairman of the Senate Judiciary Committee, sponsored a resolution calling for an advisory committee on wrongful convictions in 2006. The Pennsylvania Senate passed the resolution, creating a commission to study the causes of wrongful convictions and to propose remedial steps to prevent their occurrence.⁵⁶ The commission published its report, which provides best practice recommendations, in September 2011.⁵⁷

I. Texas

Judge Barbara Hervey of the Texas Court of Criminal Appeals established an ad hoc committee, the Texas Criminal Justice Integrity Unit, in June 2008 for the purpose of studying the strengths and weaknesses of the criminal justice system in Texas.⁵⁸ The body is intended to achieve reform through education, training and

52. NEW YORK STATE BAR ASS'N, *supra* note 50.

53. N.Y. STATE JUSTICE TASK FORCE, RECOMMENDATIONS FOR IMPROVING EYEWITNESS IDENTIFICATIONS (2011), *available at* http://www.nyjusticetaskforce.com/2011_02_01_Report_ID_Reform.pdf; N.Y. STATE JUSTICE TASK FORCE, RECOMMENDATIONS REGARDING FORENSICS AND EXPANSION OF THE NEW YORK STATE DNA DATABANK (2011), *available at* http://www.nyjusticetaskforce.com/2011_02_01ForensicsAndDNADatabankReport.pdf.

54. *Oklahoma Bar Association Resolution Establishing the Oklahoma Justice Comm'n*, OKLA. STATE BAR ASS'N (Sept. 24, 2010), <http://www.okbar.org/members/justice-commission>.

55. Press Release, Okla. Bar Ass'n, Edmonson to Chair Justice Commission (Jan. 28, 2011), <http://www.okbar.org/news/2011/01-28-edmondson-to-chair-justice-commission.htm>.

56. S. Res. 381, 2006 Gen. Assemb., Reg. Sess. (Pa. 2006).

57. JOINT STATE GOV'T COMM'N, REPORT OF THE ADVISORY COMMITTEE ON WRONGFUL CONVICTIONS(2011), *available at* <http://jsg.legis.state.pa.us/resources/documents/ftp/documents/9-15-11%20rpt%20%20Wrongful%20Convictions.pdf>.

58. TEX. CRIM. JUSTICE INTEGRITY UNIT, 2009 ANNUAL REPORT OF ACTIVITIES 3 (2009), *available at* <http://www.cca.courts.state.tx.us/tcju/reports/TCJIU-2009-report.pdf>.

legislative recommendations.⁵⁹

The Texas Legislature passed House Bill 498 establishing the second innocence commission for the state.⁶⁰ That commission, the Timothy Cole Advisory Panel on Wrongful Convictions was established on September 1, 2009.⁶¹ It is named after the first Texan to be exonerated posthumously through DNA. Its final report was completed in 2011 and offers recommendations for the prevention of wrongful convictions.⁶² The panel also addressed the feasibility of replicating a North Carolina-style case review commission.⁶³

J. Virginia

A joint project between the Mid-Atlantic Innocence Project, the Administration of Justice Program at George Mason University and the Constitution Project at Georgetown University Law Center established the Innocence Commission of Virginia (the "ICVA") in 2004.⁶⁴ The ICVA had significant assistance from several major law firms in Virginia and the District of Columbia. The ICVA identified cases of wrongful convictions in Virginia, proposed specific reforms linked to problems in Virginia law and practices, and surveyed police and prosecutors on a variety of issues.⁶⁵ As a nongovernmental commission and one of the first bodies to pursue a broad-based commission approach, the ICVA was a trail-blazing body.

K. Wisconsin

The Wisconsin Republican Chairman of the Assembly Judiciary Committee, Representative Mark Gundrum, led the effort to establish a commission to study the causes of wrongful convictions in Wisconsin in 2003.⁶⁶ The task force was named the Avery Task Force after Wisconsin exoneree Steven Avery.⁶⁷ The work of the task force resulted in numerous legislative reforms, including ones aimed at improving eyewitness identification, related to the preservation of biological evidence and mandatory recordings of interrogations.⁶⁸

After the Task Force's final report in 2005, a group of criminal justice system leaders from Marquette University School of Law, the Wisconsin Attorney

59. *Id.*

60. Act of Sept. 1, 2009, Tex. H.B. 498, 81st Leg., Reg. Sess. (2009).

61. TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 1 (2010), available at <http://www.txcourts.gov/tidc/pdf/FINALTCAPrepor.pdf>.

62. *Id.*

63. *Id.* at 32-33.

64. See Jon B. Gould, *After Further Review: A New Wave of Innocence Commissions*, 88 JUDICATURE 126, 128-29 (2004).

65. *Id.*

66. Wis. Legis. Reference Bureau, *Criminal Justice Reforms: 2005 Wisconsin Act 60*, LEGISLATIVE BRIEFS, Oct. 2006, available at <http://legis.wisconsin.gov/lrb/pubs/Lb/06Lb18.pdf>.

67. The group was originally known as the "Avery Task Force," but in 2005 the committee's recommendations were renamed the Criminal Justice Reforms Package. *Id.* See also Tom Kertscher Tkertscher, *Man Linked to Rape Had Long Criminal History: Crime Persisted After Avery Wrongly Convicted*, MILWAUKEE J. SENTINEL, Dec. 10, 2003, at 1B.

68. Wis. Legis. Reference Bureau, *supra* note 66.

General's Office and the University of Wisconsin School of Law created the Wisconsin Criminal Justice Study Commission, which expanded the work of the Task Force. It examined DNA backlogs, false confessions and electronic recording of interrogations.⁶⁹

Although the "think-tank" style innocence commissions discussed above were significant successes in showcasing the reality of wrongful convictions, their findings on an aggregate level were marred by duplicative findings. Even though the states differ markedly in criminal procedure landscapes, which naturally impact the particulars of wrongful conviction study and reform, much work is left to be done in studying these causes more in-depth. The vast majority of the commissions were charged with identifying causes of wrongful convictions despite the fact that these causes have been set forth again and again by a multi-disciplinary array of scholars and researchers and are known as the "canonical list."⁷⁰ Countless sources have proven that eyewitness misidentification, poor lawyering, questionable interrogation practices, shoddy forensics and other widely-recognized inputs are the risk factors and causal links for errant outcomes in criminal trials.⁷¹

Absent breaking new ground in terms of our *understanding* of these causes or dedicating these precious resources to advancing specific state-based reforms, redundant summaries bulleting causes of wrongful convictions are hard to justify in an era of public resource scarcity. The designers of these commissions appear willing to overlook the efficiencies that could be leveraged by embracing the well-developed scholarship and reports that abound in the study of what causes wrongful convictions.⁷²

On a unitary level, the various innocence commissions were flawed by the absence of any capacity to review active claims of innocence and to afford relief where such relief was warranted.⁷³ In this sense, the commissions simply were not structured to provide relief even though our current system has shown traditional appellate and post-conviction review are not well-suited to correct wrongful outcomes.⁷⁴

The foregoing summary of the innocence commissions nationwide illustrates a recurring propensity for the creation of innocence commissions constricted in composition and constricted in function. These bodies are populated by criminal justice insiders who are tasked, for the most part, with studying and identifying already well-known causes of inaccurate outcomes in criminal trials. Future

69. Wis. Criminal Justice Study Comm'n, Charter Statement 2 (2005), available at http://www.law.wisc.edu/webshare/02i0/commission_charter_statement.pdf.

70. Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186 (2008).

71. *Id.*

72. See Innocence Protection Act of 2004, Pub. L. No. 108-405, title IV, 118 Stat. 2260 (codified at 18 U.S.C. § 3600).

73. See, e.g., OKLA. BAR ASS'N, *Resolution Establishing the Oklahoma Justice Commission* (Sept. 24, 2010), <http://www.okbar.org/members/justice-commission> (describing the responsibilities of the Oklahoma Justice Commission as limited to "research and identify[ing] the common causes of conviction of the innocent"); S. Res. 381, 2006 Gen. Assemb., Reg. Sess. (Pa. 2006) (establishing a commission for the limited purpose of studying "the underlying causes of wrongful convictions and to make findings and recommendations").

74. See GARRETT, *supra* note 9, at 179-212. Garrett addresses the many factors that result in post-conviction review difficulties in isolating and correcting wrongful convictions. *Id.*

commissions should direct limited resources exclusively to state-law specific reform proposals and review of actual cases, rather than any general study of the causes of wrongful convictions.⁷⁵ The perpetuation of the current model will achieve little in repairing the harm done to public confidence in courts. As discussed below, the Inquiry Commission takes positive, although incomplete, measures toward restoring such confidence.

III. A CLOSER LOOK AT THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION

The North Carolina Inquiry Commission was not the first reform-minded, officially-sanctioned action in North Carolina directed at examining the problem of wrongful convictions. On November 22, 2002, North Carolina Chief Justice I. Beverly Lake spearheaded the gathering of important representatives from the criminal justice system and the legal academic community for the purpose of confronting the problem of wrongful convictions in the state.⁷⁶ This preliminary judicial effort led to the formal creation of the North Carolina Actual Innocence Commission (the “Actual Innocence Commission”), which, in its broad mission of studying the problem of wrongful convictions and proposing reforms, strongly resembled the other innocence commission.⁷⁷

Moving past the study/reform paradigm of other commissions and the Actual Innocence Commission itself, North Carolina General Statute Article 92 established the Inquiry Commission in 2006.⁷⁸ In delineating the purpose of the legislation, the statute stated, “[t]his Article establishes an extraordinary procedure to investigate and determine credible claims of factual innocence that shall require an individual to voluntarily waive rights and privileges as described in this

75. Of course, causation studies linked strictly to the particular criminal procedure and post-conviction landscape of any given state are needed. See Statement of Stephen B. Bright Regarding the Innocence Protection Act 18 (Sept. 2009), available at <http://judiciary.house.gov/hearings/pdf/Bright090922.pdf>.

76. 2006 N.C. Sess. Laws 184. See generally Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 *DRAKE L. REV.* 647, 648-49 (2004) (providing a history of Chief Justice Lake’s request for a round-table discussion with leaders in the criminal justice system which ultimately led to the Actual Innocence Commission).

77. See Mumma, *supra* note 76, at 649-50. The 2009 Actual Innocence Commission Report furnished to the North Carolina legislature culminated in the passage of legislation reforming eyewitness identification practices. See THE N.C. INNOCENCE INQUIRY COMM’N, REPORT TO THE 2009-2010 SHORT SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA (2010) [hereinafter SHORT SESSION REPORT], available at <http://www.innocencecommission-nc.gov/gar.html>. After issuing its report, the North Carolina Actual Innocence Commission recommended the creation of the North Carolina Innocence Inquiry Commission to “provide an ‘independent and balanced truth-seeking forum for credible claims of innocence.’” *Criminal Justice Reform Commissions: Case Studies*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Criminal_Justice_Reform_Commissions_Case_Studies.php (last visited Apr. 9, 2011). In response, the legislature created the Inquiry Commission in 2006. *Id.*

78. N.C. GEN. STAT. § 15A-1461 (2011); see also Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 *CHI.-KENT L. REV.* 89, 90-92, 124 (2010). The Inquiry Commission is an independent commission that falls under the state’s Judicial Department for administrative purposes and funding is received from the Administrative Office of the Courts. N.C. GEN. STAT. § 15A-1462 (2011).

Article.”⁷⁹

Charged with implementing the Inquiry Commission’s “extraordinary procedure” is an Executive Director, her staff and, voting members of the Inquiry Commission.⁸⁰ The members are eight in number and are required to include a superior court judge, a prosecutor, a victim’s advocate, a criminal defense attorney, a non-attorney who is not an officer or employee of the judicial branch, a sheriff and two appointees from the public who serve at the discretion and selection of the Chief Justice of the North Carolina Supreme Court.⁸¹

The Inquiry Commission divides its review process into five distinct phases: (1) initiation of an innocence claim, (2) initial review and investigation of the innocence claim, (3) formal inquiry of an innocence claim, (4) hearing before the Inquiry Commission, and (5) judicial review by three-judge panel.⁸² Stages three through five are discretionary and are only granted after findings of sufficient evidence of innocence to support further, heightened scrutiny.⁸³

According to the Inquiry Commission, only two percent of innocence claims proceed to the third phase—the formal inquiry stage.⁸⁴ To proceed to judicial review upon a plea of not guilty at trial, five of the eight members must vote in support of such action.⁸⁵ In the case of a guilty plea at trial, the vote must be unanimous.⁸⁶ The standard of review is “sufficient evidence of factual innocence to merit judicial review.”⁸⁷ Once a case is transferred for judicial review, the Chief Justice of the Supreme Court of North Carolina appoints a panel of three judges who have not had substantial previous involvement in the case.⁸⁸ At the panel, relief is awarded when a unanimous court decides the petitioner has shown his factual innocence through “clear and convincing” evidence.⁸⁹

In terms of procedural and substantive rights, the Inquiry Commission is not a normative recapitulation of an American trial. A petitioner has the right to appointed counsel throughout the commission’s inquiry,⁹⁰ yet is required to forfeit various rights and procedural safeguards, including the Fifth Amendment privilege against self-incrimination and the attorney-client privilege with regard to the claim of innocence.⁹¹ The Inquiry Commission is required to notify the victim of the claim and the victim’s right to present his or her views throughout each phase of the proceedings.⁹² At any point during the proceedings, the Inquiry Commission

79. *Id.* § 15A-1461.

80. *Id.* § 15A-1465 (2011).

81. *Id.* § 15A-1463(a) (2011).

82. *Rules and Procedures*, N.C. INQUIRY COMM’N 7–18 (2010), available at <http://www.innocencecommission-nc.gov/rules.html>. See also N.C. GEN. STAT. § 15A-1461.

83. *Rules and Procedures*, N.C. INQUIRY COMM’N, *supra* note 82, at 10.

84. *Id.* at app. B.

85. *Id.* § 15A-1468(c) (2011).

86. *Id.*

87. *Id.*

88. *Id.* § 15A-1469(a) (2011).

89. *Id.* § 15A-1469(h).

90. *Id.* § 15A-1467(b) (2011).

91. *Id.* See also *id.* §§ 15A-1468(a1), 15A-1469(d).

92. *Id.* § 1467(c).

can determine that the claim is without merit.⁹³ The power of subpoena, as well as other, broader powers are also available to the body.⁹⁴

Since its inception, the Inquiry Commission has performed case reviews, substantive hearings, and pursued and obtained a federal grant through the National Institute of Justice.⁹⁵ As of January 2012, the Inquiry Commission had received and reviewed 1100 innocence claims, closing 953 of them by early 2012.⁹⁶ It has averaged roughly 225 claims yearly.⁹⁷ This initial period for the Inquiry Commission has resulted in four cases receiving a Commission Hearing and three exonerations.⁹⁸

The first Inquiry Commission exoneration came sixteen years after the conviction of Gregory Flynt Taylor based on faulty science and a jailhouse snitch.⁹⁹ Taylor was convicted of the murder of Jacquetta Thomas, whose body was found on the pavement of a cul-de-sac about 150 yards from Taylor's vehicle which was stuck in mud and gravel on a service road.¹⁰⁰ The Inquiry Commission reviewed Taylor's murder conviction and presented evidence of his innocence at a Commission Hearing in 2009.¹⁰¹ Specifically, the Inquiry Commission presented evidence that the preliminary blood test relied on at trial, indicating the victim's blood was found on Taylor's car, was not conclusive and that further testing revealed that none of the victim's blood was on Taylor's vehicle.¹⁰² The Inquiry Commission also presented testimony of the jailhouse snitch who testified at Taylor's initial trial, calling his credibility into serious question.¹⁰³ After a two-day hearing, the panel unanimously found that there was sufficient evidence of innocence to merit judicial review and recommended Taylor's case to proceed to a

93. *Id.* § 15A-1467(a).

94. *Id.* § 15A-1467(d). Included in the Inquiry Commission's broader powers are "[a]ll proceedings of the Commission shall be recorded and transcribed as part of the record. All Commission member votes shall be recorded in the record. All records and proceedings of the Commission are confidential and are exempt from public record and public meeting laws except that the supporting records for the Commission's conclusion that there is sufficient evidence of factual innocence to merit judicial review, including all files and materials considered by the Commission and a full transcript of the hearing before the Commission, shall become public at the time of referral to the superior court. Commission records for conclusions of insufficient evidence of factual innocence to merit judicial review shall remain confidential, except as provided in subsection (d) of this section." *Id.* § 15A-1468(e).

95. SHORT SESSION REPORT, *supra* note 77, at 2.

96. *NC Innocence Inquiry Commission Case Statistics*, NORTH CAROLINA INNOCENCE INQUIRY COMMISSION (Jan. 2012), <http://www.innocencecommission-nc.gov/stats.html> [hereinafter *NC Innocence Inquiry Commission Statistics*]

97. SHORT SESSION REPORT, *supra* note 77, at 4.

98. *NC Innocence Inquiry Commission Statistics*, *supra* note 96.

99. Brief for North Carolina Innocence Inquiry Commission at 2, *State v. Taylor*, No. 91CRS71728 (N.C. Super. Ct. Wake Cty.), *available at* <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/Redacted%20Taylor%20Brief.pdf>.

100. *Id.* at 1.

101. *Id.*

102. *Id.* at 321.

103. Transcript of Innocence Inquiry Commission Hearing Day 1 at 74, *State v. Taylor*, No. 91CRS71728 (N.C. Super. Ct. Wake Cty.), *available at* <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/TaylorHearingDay1.pdf>.

three-judge panel.¹⁰⁴ In early 2010, the three-judge panel held a hearing in Taylor's case, unanimously finding him innocent and making Taylor the first person in United States history to be exonerated by a state-mandated commission.¹⁰⁵ North Carolina Governor Bev Perdue subsequently pardoned Taylor on May 21, 2010.¹⁰⁶

The Inquiry Commission's most recent exonerations were a product of its review of the murder convictions of two men and a hearing held in April of 2011.¹⁰⁷ The two exonerees were among a group of six men charged with the murder of Walter Bowman in the course of what the police thought was a drug-related robbery.¹⁰⁸ To avoid charges of first-degree murder and the possibility of the death penalty, and after numerous, intense police interrogations, Kenneth Kagonyera and Robert Wilcoxson pleaded guilty to second-degree murder in 2002.¹⁰⁹ The Inquiry Commission investigated the cases jointly because they arose out of the same crime and discovered inadequate police investigation in the case.¹¹⁰ The police initially received a tip saying a group of three men (Group A) committed the crime, but chose instead to focus on a second group of men (Group B), which included Kagonyera and Wilcoxson.¹¹¹ Through its investigation, the Inquiry Commission discovered a member of Group A confessed to the crime, that DNA at the scene matched another member of Group A, and that police relied on a compromised surveillance video during the initial investigation.¹¹² After considering the evidence, the commissioners unanimously concluded there was sufficient evidence of factual innocence to forward the case to a three-judge panel.¹¹³ The three-judge panel heard the case in September 2011, unanimously ruling that Kagonyera and Wilcoxson had proven their innocence by clear and convincing evidence.¹¹⁴

The success stories of the Inquiry Commission indicate the value of a state mandated innocence commission. Through the Inquiry Commission's subpoena and other investigative powers, it was able to find evidence of wrongful

104. Transcript of Innocence Inquiry Commission Hearing Day 2 at 244, *State v. Taylor*, No. 91CRS71728 (N.C. Super. Ct. Wake Cty.), available at <http://www.innocencecommission-nc.gov/Forms/pdf/Taylor/TaylorHearingDay2.pdf>.

105. David Zuchino, *Man Freed, '93 Murder Conviction Struck Down*, CHICAGO TRIBUNE, Feb. 19, 2010, at 13.

106. Mandy Locke, *Greg Taylor Pardoned by Governor*, NEWS AND OBSERVER, May 21, 2010, <http://www.newsobserver.com/2010/05/21/494087/greg-taylor-pardoned-by-governor.html>.

107. Brief of North Carolina Innocence Inquiry Commission at 1, *State v. Kagonyera*, Nos. 00CRS065086 & 00CRS65088 (N.C. Super. Ct. Buncombe Cty.), available at <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/Kagonyera%20Brief%20Final%20PDF.pdf>.

108. *Id.* at 3–7.

109. *See id.* at 4.

110. *Id.* at 3–5.

111. *Id.* at 4.

112. *Id.*

113. Transcript of Inquiry Commission Hearing Day 2 at 265, *State v. Kagonyera*, Nos. 00CRS065086 & 00CRS65088 (N.C. Super. Ct. Buncombe Cty.), available at <http://www.innocencecommission-nc.gov/Forms/pdf/Kagonyera%20Hearing/TranscriptDay2.pdf>.

114. Fred Clasen-Kelly, *Judges Exonerate Two Men in 2000 Killing*, CHARLOTTE OBSERVER, Sept. 23, 2011, <http://www.charlotteobserver.com/2011/09/23/2631120/judges-exonerate-two-men-in-2000.html>.

convictions and have the sentences overturned, even without DNA evidence in one case.

The Inquiry Commission, however, cannot reach its full potential as currently enabled by statute. The Inquiry Commission's review process lacks a voice necessary for providing its full community and justice restoration potential—the voice of the deliberative citizen.

IV. INCLUDING JURORS IN JUDICIAL REVIEW OF ACTUAL INNOCENCE

As parts I and II of this essay show, ordinary citizens are not a significant part of modern America's innocence commissions. Rather, innocence commissions are often—even North Carolina's pioneering Inquiry Commission—the policy and bureaucratic province of criminal justice insiders and, occasionally, prominent elites drawn from other sectors of the political community. As discussed below, including jurors in the Inquiry Commission's final review procedures would serve important confidence-enhancing goals, reinforcing the jury's role in the criminal justice system and our democracy, reducing the effect of political pressures on elected officials, and remedying, at least partially, the injury caused to the local jurisdiction by the wrongful conviction.

A. Strengthening Democratic Values

The Inquiry Commission's remedial power strengthens democracy by innovatively responding to the harm to judicial legitimacy wrought by wrongful convictions. Nonetheless, further strengthening is possible. Juries have many attributes and features that are uniquely suited for supporting broad democratic values. Like other deliberative bodies in a democracy, juries convene to resolve important disputes and have the authority to reach binding results. However, the jury process is deliberative and citizen-based. It entails a cross-section of the citizenry and therefore reflects racial and economic diversity. It requires of ordinary people compromise, analysis, and persuasion. In essence, the jury experience distills the deployment of many of the skills, habits and attitudes necessary for a healthy democracy. Still further, it deploys the very habits of engagement that will be needed to uproot and reform the problems within the criminal justice system giving rise to the unrelenting stream of wrongful convictions.

1. The Jury System is in Our Civic DNA

The notion of the jury as democratic institution is strongly entrenched in American history.¹¹⁵ Our Framers felt it was an antidote against executive mischief or, worse, tyranny.¹¹⁶ In this sense, embracing juror participation for the Inquiry

115. The description of the jury as a democratic institution warrants succinct treatment in this essay as others fully develop this idea elsewhere. See, e.g., *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting in part and concurring in part) (describing the Sixth Amendment right of trial by jury as the “spinal column of American democracy”); TOCQUEVILLE, *supra* note 1, at 260–63.

116. See Susan Bandes, “*We the People*” and *Our Enduring Values*, 96 MICH. L. REV. 1376, 1386 (1998) (providing a compelling discussion of how the innocence problem does not conform to the

Commission is not near the leap that the creation of the body itself was. Rather, juries are in our civic DNA. They are foundational to our democratic design in that they are promised in our Constitution and the Bill of Rights.¹¹⁷

The Supreme Court has championed, at least rhetorically, the jury as an institution. The Court has embraced jury trials as “fundamental to the American scheme of justice”¹¹⁸ and Justice Kennedy noted that “[j]ury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life.”¹¹⁹ The fundamental character of jury trials means that inclusion of this historic artifact in the Inquiry Commission review process is not disruptive to our norms. Indeed, it is a natural return to norms long-honored at the trial level. Such norms, grounded in principles of democratic participation and civility, belong in the realm of adjudicating and rectifying cases of wrongful conviction, especially in the Inquiry Commission’s three-judge panel, which is structured more like a trial court than an appellate court.

2. *Educating Citizens in the Problems Surrounding Wrongful Conviction*

Apart from the threat of stolen liberty at the hands of the sovereign feared by our founders, Alex de Tocqueville, the great observer of the American democracy, lavished the jury system with utmost praise, almost cloaking it in a civic mysticism, a power to educate and uplift ordinary men, claiming it played a pivotal role in holding together the young democracy. In extolling its virtues and the stamp it left on the American character, he wrote

[The jury] vests each citizen with a sort of a magistracy; it makes all feel that they have duties toward society to fulfill and that they enter into its government. Enforcing men to occupy themselves with something other than their own affairs, it combats individual selfishness, which is like the blight of societies. The jury serves incredibly to form the judgment and to augment the natural enlightenment of the people. There, in my opinion, is its greatest advantage. One ought to consider it as a school, free of charge and always open, where each juror comes to be instructed in his rights, where he enters into daily communication with the most instructed and most enlightened members of the elevated classes, where the laws are taught to him in a practical manner and are put within reach of his intelligence by the efforts of the attorneys, the advice of the judge and the very passions of the parties.¹²⁰

In addition to raising democratic sensibilities in the citizenry,¹²¹ juror participation in the review of actual claims of innocence, side-by side, with the Inquiry Commission judges, would educate jurors about the complex problems

realities that made colonialists fearful of persecution at the hands of the sovereign). Arguably, however, the policy response across all branches has been inadequate to the point of “tyranny.” See THE FEDERALIST NO. 83 (Alexander Hamilton).

117. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. IV.

118. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

119. *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

120. TOCQUEVILLE, *supra* note 1, at 262.

121. See JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 5, 8, 28–30 (2010).

facing the criminal justice system. Police practices, prosecutorial discretion, funding problems, forensic weaknesses and all manner of issues would be made transparent during this deliberative undertaking. The lessons, exposure and data would lead to a virtuous cycle of greater community involvement and knowledge.¹²²

3. Returning “Local Democracy” to the Criminal Justice System

In overlooking citizen involvement and privileging judges in the final review of innocence claims, the Inquiry Commission further entrenches the professionalized insularity that already afflicts the modern criminal justice system. Such insularity, if not outright anti-democratic, is clearly dilutive of democracy. This is forcefully evidenced by the rate of guilty pleas. When nearly ninety-five percent of felony cases are resolved with a guilty plea,¹²³ by what fiction do we conclude that our criminal justice system is truly an adversarial model or one operated by citizens who make the Toquevillian decisions about the “direction of society”?

The late William Stuntz, one of the most prominent criminal law scholars in America over the past twenty-five years, describes the jury in late nineteenth and early twenty-first centuries in northern immigrant cities as part of “local” democracy.¹²⁴ In contrast to a sliver of felony cases having a jury trial today, nearly fifty percent of felony defendants received jury trials before and after the turn of the twentieth century in these northern and newly industrialized cities.¹²⁵ Mourning the loss of this local democracy, which he considered to arise from the complex web of political and civic ties that bound together police, victims, judges, prosecutors, and other citizens, Stuntz cautions against idealizing that era’s criminal justice system, while still unequivocally declaring it superior to the one in place today.¹²⁶ He observes “that system—at least the version that prevailed in the nation’s Northeast quarter—was more lenient, more locally democratic, less discriminatory, and more effective than today’s counterpart” and describes the modern system as “more centralized, more legalized and more bureaucratized.”¹²⁷

In light of the framers’ intent, the modern near-abandonment of juries and the public’s need for education about the criminal justice system in general and our wrongful conviction crisis in particular, it is clear that jury involvement in the Inquiry Commission’s final review stage would strengthen democratic values. Moreover, at the present pace of cases reaching this final stage, to provide Innocence Inquiry jurors would not be costly, but it would reinforce important democratic values—functionally through actual case-specific decision-making and symbolically through opening the process beyond criminal justice system insiders.

122. For example, individuals who complete jury service are more likely to vote in the next election than an individual not selected for jury service. *Id.* at 35–38.

123. Douglas D. Koski, *Introduction to The Declining Importance of the Jury Trial and the Plea Bargaining Problem*, *THE JURY TRIAL IN CRIMINAL JUSTICE* 3, 4 (Douglas D. Koski ed., 2003).

124. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 142 (2011).

125. *Id.* at 139.

126. *Id.* at 26–36.

127. *Id.* at 31.

B. Dampening Majoritarian Pressures and Leading to More Balanced Decision-Making

It is well-documented that political concerns can and do affect judicial actors.¹²⁸ Justice O'Connor opined, “[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.”¹²⁹ Legal scholars Stephen B. Bright and Patrick J. Keenan have established that judges who had the option to override a jury verdict and impose the death sentence were significantly more inclined to do so if facing reelection.¹³⁰ In the United States, the majority of judges are elected,¹³¹ including those in North Carolina.¹³² The presence of lay citizens, as jurors, in the deliberative process of innocence claim review at the Inquiry Commission could temper any active or latent politicization of the review process.

Because judges are elected in North Carolina, the three-judge panel is composed of political creatures. Jurors, representative of the body politic, could counteract the self-interestedness that accompanies any elected office. After all, the jurors would be drawn from the very voters who, through elections, decide who populates the North Carolina bench. Presumably, if the decision-making did not rest solely on their “electoral” shoulders, elected judges would be more open to a broader array of cases, namely those without definitive forensic evidence.

Additionally, as the cases in the Inquiry Commission are inherently fact-bound, in contrast to the legal analysis found at the heart of appellate review, where is the rationale for excluding randomly selected community members whose common sense and everyday experience we claim to value?¹³³ As Professor Findley has noted, “One of the reasons we employ a jury system is that it serves as

128. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 785, 792, 796 (1995) (“Passions, as we all know, can run to the extreme when the State tries one accused of a barbaric act against society, or one accused of a crime that – for whatever reason – inflames the community. Pressures on the government to secure a conviction, to ‘do something,’ can overwhelm even those of good conscience. When prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous.”); Julian N. Eule, *Crocodiles in the Bath tub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994) (“A judge may hope that conscience will triumph over retention anxiety, but as Otto Kaus put it so well, ignoring the political consequences of visible decisions is ‘like ignoring a crocodile in your bathtub.’”).

129. *Republican Party of Minnesota v. White*, 536 U.S. 765, 788-89 (2002) (O’Connor, J., concurring) (“We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case.”).

130. See Bright & Keenan, *supra* note 128, at 785-89; see also Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 5 (2007) (“[T]he politics of death only exacerbate [defendants’] vulnerability, leaving little reason to trust other institutional actors to exercise self-restraint.”).

131. Bright & Keenan, *supra* note 128, at 777-78.

132. N.C. GEN. STAT. § 163-9 (2011).

133. HARVARD LAW REVIEW ASS’N, *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1423 (1997) (“a meaningful assessment of the [] jury as a judicial instrument must include a number of different systemic criteria: . . . factfinding competence (the ability to understand, recall, and draw logical conclusions from the evidence presented) . . .”). See also THOMAS, *supra* note 18, at 211 (“A jury that reflects the community should hear almost any evidence of innocence, assuming it is sufficiently probative of innocence.”).

an expression of community values and shared understandings. Juries bring to the justice system a kind of community common sense.”¹³⁴

This community values element¹³⁵ would cohere to create a more anti-majoritarian and balanced body. Wrongful convictions strike at the heart of the judicial system. Excluding citizens from a final review process intended to rectify grave harms of this sort is insular and shortsided.

C. Returning the Controversy to the Local Jurisdiction Who Was the Original Sovereign Victim of the Crime in Question

Although crime’s human face is the victim upon whom the unlawful act (or acts) was committed, the sovereign is also victimized as social order is upended.¹³⁶ For this reason, the criminal charge (or charges) is brought by the state to vindicate its rights. To make the community whole after being victimized, the Supreme Court notes the importance of community involvement in the criminal trial.¹³⁷ Selection of a jury from the victimized community is essential to remedy the crime against the greater society in addition to the individual victim of the crime.¹³⁸

134. Findley, *supra* note 10, at 624. *See also* Bandes, *supra* note 16, at 419 (“Another safeguard is the jury, which promotes the exchange of ideas among people with diverse perspectives. . . . Contrary to popular belief, judges are not exempt from the cognitive problems that beset other humans. They too make erroneous assumptions and, left to their own devices, fail to correct them. The best check against partiality and bias is debate with others.”).

135. *See supra* Part IV.A.3.

136. *See* Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 740 (2010) (“Restoring the offender to the community is an important theoretical foundation of the jury plea, because when an offender commits wrongdoing, he or she injures the community. By passing judgment on the offender—by determining both the offender’s crime and deciding on the punishment—the community can return itself to where it was before the crime was committed.”); Ndiva Kofele-Kale, *Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes*, 40 INT’L LAW. 909, 923 (2006) (“It is not only the individual accused who benefits from the presumption of innocence but the community as a whole. The latter has an interest to protect the system of criminal justice by maintaining the reasonable doubt standard since it serves to protect its members from activity which injures them without justifiable cause. It is in the community’s interest to ensure that conviction and punishment follow from evidence which leaves no reasonable doubt as to guilt, without which there is a reasonable possibility that an innocent person may end up being punished for a crime he did not commit. If conviction is allowed notwithstanding reasonable doubt, ‘[r]ight thinking members of th[e] community would then, justifiably, withdraw their trust and confidence in the criminal law,’ thus undermining the moral force of the criminal law.”). *See also* REVIEW OF THE CRIMINAL AND CIVIL JUSTICE SYSTEM IN WESTERN AUSTRALIA, *supra* note 9, at 51.

137. *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 508 (1984) (“Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done.”); *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 570 (1980) (“The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value.”)

138. Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1661 (2000) (“the vicinage presumption fulfills the jury’s democratic function by allowing the aggrieved community to participate through its representatives on the jury. Community participation injects a democratic component into the application of the laws and the outcome of the criminal trial. By stamping the community’s judgment on the verdict, the local jury legitimizes both the convictions and the acquittals of criminal defendants. This participation is essential to what the Supreme Court has described as the ‘community therapeutic value’ of the trial, whereby the criminal trial becomes a vehicle

Exoneration is evidence of double-harm to the state—first, where the crime occurred and then where the judicial process failed.¹³⁹ The local jurisdiction should be tightly woven into the potential review and redress of such process error. Citizens are entitled to be included in matters of singular importance to the well being of the community and are representative of the community harmed by the crime.¹⁴⁰ Indirect involvement via the election of judges is simply not enough.

V. CONCLUSION

As Professor Findley wrote “[s]earching inquiries into truth are, and likely will continue to be, increasingly important, not just as a matter of justice to the innocent, but also for protecting confidence in the process.”¹⁴¹ This “confidence in the system” is the concern of this essay. If system confidence is at stake, and it clearly is, then who decides when and how a person is proven wrongfully convicted is at least as important as fine, detailed decisions about doctrinal reform or appellate and trial innovations. The “who decides” part of the process needs to be expanded.

While the Inquiry Commission is a healthy step forward, altering the composition of the reviewing tribunals should further extend its reparative reach. Presently composed strictly of judges, including jurors would bolster important democratic values. Important questions regarding the number of jurors, voir dire, and other practical matters are beyond the scope of this short essay. Nonetheless, elevating the historical role both of the jury and local democracy, promoting citizen understanding of the phenomenon of wrongful convictions, assisting in restoring the public’s confidence and trust in its trial courts, and helping to ensure a more balanced review of the merits of each innocence case are some of the more obvious benefits.

Although embracing jurors in the Inquiry Commission’s final phase of review will not change our plea-based trial system nor will it alter the traditional limitations in the appellate process that make innocence identification so difficult in that arena, it will signal that citizens—ordinary men and women—have a right and a duty to face, assess, and weigh the claims of the innocent. The costs are low and the rewards, for democracy, the criminal justice system, citizens, and the local community, are substantial.

for healing the social rupture caused by the crime.”) (quoting *Richmond Newspapers, Inc.*, 448 U.S. at 570.).

139. Boaz Sangero, *Are All Forms of Crime Really “Organized Crime”?: On the New Israeli Combating Criminal Organizations Law and Parallel Legislation in the U.S. and Other Countries*, 29 LOY. L.A. INT’L & COMP. L. REV. 61, 97 (2007) (“There is no greater injustice than a wrongful conviction. It causes significant harm to society as a whole.”).

140. RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 72 (2003) (“the jury is generally a better representative of the community than a judge and is the more appropriate source for the normative assessments that the legislature has left to the trial decision maker.”).

141. Findley, *supra* note 10, at 608.