THE BOSTON PHOENIX

Let us now praise framed-up men:

Innocence commissions are being established all over the country. It's high time the Bay State followed suit.

BY HARVEY A. SILVERGLATE
April 9, 2004

THOSE WHO'VE spent time examining our criminal-justice system know how easy it is for an innocent person to be erroneously convicted. They can also identify the systemic defects that account for the majority of false convictions — namely, flawed eyewitness identification procedures, overly aggressive police interrogations, and questionable deals with suspects and witnesses. Yet people in a position to change the system — our leading politicians, law-enforcement officials, prosecutors, and judges — refuse to do anything about it. Many want to protect their people, their turf, and, in some cases, themselves. Others labor under the misguided notion that if the public learns what's wrong with how criminal law is enforced, confidence in the system will be shaken. So innocent people continue to be convicted, and when a small portion of false convictions is exposed, prosecutors and judges claim that "the system works."

But we seem to be reaching a tipping point for reform. Two years ago, North Carolina Supreme Court chief justice I. Beverly Lake established the North Carolina Actual Innocence Commission. The commission, the first of its kind in the country, examines investigations and prosecutions resulting in wrongful convictions — just as the National Transportation and Safety Board does after an airline crash. It then makes recommendations for change to prevent such mistakes from happening again. Last year, Connecticut became the first state to create such a commission by legislative statute. Also last year, Judith Kaye, chief justice of the New York State Court of Appeals, informed some members of the bar of her intention to create an innocence commission. The state of Wisconsin has established a study group to examine the logistics of setting up an innocence commission. Proposals to do the same are under active consideration in Minnesota and Arizona, according to Barry Scheck, co-director of the New York–based Innocence Project, a nonprofit legal clinic at Cardozo School of Law that takes on prisoner appeals in which post-conviction DNA or other scientific tests can prove innocence.

Locally, the Massachusetts Association of Criminal Defense Lawyers (MACDL) plans to petition the Massachusetts Supreme Judicial Court to create an innocence commission if Governor Mitt Romney, Attorney General Tom Reilly, and our legislature fail to do it on their own. Given the recent spate of exonerations of wrongfully imprisoned innocents around the state — which have received unprecedented coverage in Boston's two local dailies — there seems no better time than now to set up a statewide system to examine where police and prosecutors have gone wrong in individual cases. And to make recommendations for real systemic change.

BOSTON UNIVERSITY law professor Stanley Z. Fisher published an article two years ago in that school's *Public Interest Law Journal* examining all the "known cases of wrongful convictions in Massachusetts courts" since 1800. He demonstrated that wrongful convictions occur just as frequently in Massachusetts as they do in other states. He summed up his findings thusly: "A rising tide of prisoner exonerations, a significant number of which have relied upon DNA testing, has revealed how miscarriages of justice can result from deficient practices of police interrogation and eyewitness identification, inadequate disclosure of exculpatory evidence, acceptance of unreliable 'junk science' and 'snitch' testimony, and ineffective assistance of counsel."

Fisher's conclusions were presaged two years earlier by the groundbreaking book *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted*(Doubleday, 2000), authored by Scheck and Peter Neufeld, who co-directs the Innocence Project, and Pulitzer Prize–winning journalist Jim Dwyer. The book recounts some of the exonerations resulting from the Innocence Project's work (to date the project has freed 143 wrongfully convicted prisoners) and draws the same general conclusion as Fisher: our system of criminal justice is deeply flawed, and the time has come to reform it.

The most recent Massachusetts exonerations, as determined by court proceedings in each case, illustrate this need:

Anthony Powell: wrongly convicted in 1992 of rape because of a faulty eyewitness identification. Exonerated in 2004 on the basis of DNA evidence after 13 years of incarceration.

Stephan Cowans: wrongly convicted in 1998 of shooting a police officer because of an erroneously matched fingerprint. Exonerated in 2004 after DNA testing proved that the fingerprint analysis was wrong (for reasons not yet fully determined). Cowans spent six years in prison.

Shawn Drumgold: wrongly convicted in 1989 of killing a 12-year-old girl in a gangland shooting gone awry. He was freed from prison in 2003 after a hard-hitting investigative report by then–

Boston Globe reporter Dick Lehr spurred a court hearing examining new evidence. Although prosecutors maintain, against the overwhelming weight of the evidence, that Drumgold may still be guilty (but not so demonstrably guilty that they're going to retry him), the hearing forced them to admit that the original investigation in the shooting had been rife with police and prosecutorial error (which they deftly avoided labeling misconduct). Drumgold spent 15 years in prison.

Some other (but hardly all) notable cases of wrongful convictions over the past two decades include the following:

Christopher Harding: wrongly convicted in 1990 of murdering a police officer. Exonerated in 1998 when police testimony in another defendant's trial produced discrepancies with previous police testimony at Harding's trial.

Donnell Johnson: wrongly convicted in 1996, on the basis of "mistaken" eyewitness testimony, of killing a nine-year-old boy; released in 2000. His conviction was re-examined when a gang member involved in the shooting, then facing separate drug charges, told prosecutors that Johnson had nothing to do with the shooting of the boy. Johnson spent five years in prison.

Kenneth Waters: wrongly convicted in 1983 of murder based on false testimony and exonerated by DNA evidence in 2001. He served 18 years in prison.

Henry Tameleo, Louis Greco, Peter Limone, and Joseph Salvati: wrongly convicted in 1965 of a mob-related murder. Although FBI agents knew the four men were innocent, they refused to intervene in the prosecution. Tameleo and Greco died in prison. Salvati was released in 1997 when then-governor William Weld commuted his sentence; Limone was released in 2001 after a federal investigation into FBI misconduct in the handling of South Boston crime boss James "Whitey" Bulger rendered the conviction untenable.

In all these cases, highly questionable police and prosecutorial work, tactics, or testimony came to light that merit further investigation, and perhaps action beyond mere exoneration of the wrongly convicted. It does not appear, however, that prosecutors and judges are particularly willing to do this. If those who do not remember history are doomed to repeat it, surely the same can be said of those who don't want to delve too deeply into that history in the first place.

IT WOULD TAKE three modest reforms to prevent the overwhelming number of wrongful convictions that take place in the Commonwealth. And it wouldn't be hard to enact the appropriate legislation and implement new procedures. Indeed, attorney Carol Donovan of the

state's Committee for Public Counsel Services (CPCS), which provides free legal representation to indigent criminal defendants, has already done the work of drafting the necessary bills. The proposed statutes would reform eyewitness identification procedures by mandating basic steps to ensure that a victim or witness makes his or her own identification without hints from police and prosecutors; require that police electronically record interrogations of suspects in order to have a reliable record of what the person says and to detect suggestive or coercive questioning techniques (indeed, it would be wise to record *all* station-house and many other interrogations, including those of witnesses); and provide prisoners with post-conviction access to evidence in police and prosecutors' custody. (This last measure would protect convicts from the Catch-22 of having to provide evidence of innocence in order to win access to the very files containing evidence of innocence that prosecutors improperly withheld from the defendant prior to trial.)

At a November press conference after last year's exoneration of Shawn Drumgold, CPCS head William Leahy urged Governor Romney to establish an official commission of inquiry into the causes of wrongful state convictions, a step supported by Fisher, the national Innocence Project, and the Boston-based New England Innocence Project. The governor, unfortunately, favors a different kind of blue-ribbon investigative body. Just two months earlier, in September of 2003, he appointed members to the Governor's Council on Capital Punishment. Their task? To determine whether procedures for implementing a Bay State death-penalty statute could ensure "scientific accuracy." (See "Stopping Government's Culture of Death," Editorial, September 26, 2003.) Thus, instead of using his prestige and resources to reduce wrongful convictions throughout the system, the governor is frittering away time, resources, and attention in a futile search for perfection in a death-penalty system that would apply to only a small number of cases. (In any event, it is unlikely that the legislature will adopt the death penalty, making Romney's death-penalty obsession even less relevant to the overall goal of avoiding error.)

Unlike Romney, at least one prosecutor has finally felt the need to say something other than "see, the system works" every time a convict — often against fierce prosecutorial (and sometimes judicial) resistance — is finally exonerated after years of wrongful imprisonment. Suffolk County district attorney Daniel F. Conley announced last month that he and newly appointed Boston Police commissioner Kathleen O'Toole would create a task force made up of police, prosecutors, and defense attorneys to examine the recent cases of wrongful convictions and make recommendations for change, particularly in the area of eyewitness identification.

But Conley's tepid move toward reform is too little, too late. Improving eyewitness identification procedures is not rocket science. It's been known for decades which identification procedures truly *test* a witness's actual recollection of the crime and which ones *suggest* to the witness that a particular suspect was present. When police present witnesses with a photo

array or a line-up and include the suspect along with others who have vastly different appearances, or when police subtly suggest who in the line-up is "our suspect," the resulting eyewitness identification can be more often wrong than right. When witnesses are asked to describe the person they claim to have seen committing a crime when the crime scene was dark and the suspect is of a different race than the witness (interracial identifications are notoriously unreliable), the ID isn't worth a damn. In fact, studies have shown eyewitness identifications to be error-prone even when viewing conditions are optimal. Federal guidelines have existed since 1999 for improving identification procedures; the state of New Jersey has already adopted them, and Massachusetts could do the same but hasn't, although Conley now says he is considering doing so.

WHAT WE CLEARLY need is a statewide innocence commission, with power to subpoena witnesses, probe cases, determine the causes of wrongful convictions, assign blame and responsibility, and recommend meaningful reforms, including procedures for holding police and prosecutors responsible for knowing misconduct. Right now, when courts exonerate a wrongly convicted defendant, the matter is usually allowed to stop there; the errors, and those who committed them inadvertently or intentionally, are almost never the subject of subsequent investigations (much less corrective measures). In only the rarest of cases is an exoneration followed by an investigation into the culpability of those responsible for the miscarriage of justice. After Albert Lewin was exonerated in 1989 for the murder of a police officer, for example, officers who perjured themselves were prosecuted. But that's only because Lewin's lawyers, unusually tenacious Boston defense attorney Max D. Stern and his associates, put together a compelling dossier demonstrating a long-standing pattern of police perjury in affidavits for securing search warrants. When, in light of this record, the Supreme Judicial Court excoriated the Boston police for "perjurious and fraudulent conduct," the district attorney had little choice but to take action, for the case was a page-one scandal day after day.

This shouldn't be. The failure to disclose certain facts that would affect a jury's view of the credibility of prosecution witnesses needs to be taken more seriously. Cops who provide witnesses with money, drugs, free room and board at hotels, dismissal of charges against them or loved ones, and other such amenities, *without disclosing it to the defendant and the court*, should be administratively or even criminally prosecuted, for at some point undisclosed witness incentives can readily turn into witness bribes or incentives to commit perjury. Prosecutors who intentionally fail to disclose this and other exculpatory evidence in their files — such evidence is required to be turned over to defendants, according to the US Supreme Court — should be punished for such legal and ethical infractions, including the loss of their licenses to practice law. It's time for accountability.

If the CPCS's proposed legislation is not enacted, a statewide group of criminal-defense lawyers plans to appeal directly to the Supreme Judicial Court. Andrew Good, president-elect of MACDL, has proposed a plan to file a petition with the SJC, asking the court to implement certain reforms on its own authority. (Disclosure: I work in the same law firm as Good.) The group would ask for a rule that interrogations of suspects in custody be electronically recorded. (Such a judicially imposed requirement is hardly revolutionary. The Supreme Court of Minnesota, for example, enacted the measure in 1994, and Alaska's court has done the same. In 2002, Illinois became the first state to require such procedures by statute. And individual police departments around the country have adopted a taping requirement as a matter of departmental procedure, including, for example, the departments of Broward County, Florida, and Santa Clara County, California.)

MACDL will also ask for court-imposed reforms in eyewitness identification procedures, as well as easy access to evidence in prosecutors' and police files. And it will seek the appointment of a judicially run innocence commission with real investigative power. At Suffolk Law School's graduation last year, SJC chief justice Margaret Marshall gave a commencement address in which she expressed support for the innocence agenda. Her words were perhaps prompted by the presence of Neufeld and Scheck on the dais to receive honorary degrees. Was that a fleeting moment, or will Marshall and her fellow justices eventually respond forcefully to the extraordinary embarrassment currently caused by our broken system?

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