

**Wrongful Convictions in Illinois: What's Being Done?**

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## **Wrongful Convictions in Illinois: What's Being Done?**

In criminal justice circles, the problems surrounding wrongful convictions have been discussed for many years. According to Northwestern School of Law, in the 25 years since the death penalty has been reenacted, 298 people were sentenced to death in Illinois, of those 298 people, 18 have been exonerated. "Since 1989 more than 150 people have been exonerated nationally, solely on the basis of DNA evidence" (National Innocence Project, September 2005).

In Illinois on January 31, 2000, then Illinois Governor, George Ryan began a moratorium on all executions in Illinois, and then on January 10, 2003, Governor Ryan commuted all of the sentences for inmates who were sitting on death row in Illinois. The commutation of Illinois death row inmates' sentences and moratorium of the death penalty in Illinois occurred after 14 people on Illinois death row were exonerated. George Ryan also created a death penalty reform commission to look at why wrongful convictions occurred in Illinois and recommend changes for how death penalty cases would be dealt with in the future. This is in large part due to the case of Anthony Porter and the 1999 Chicago Tribune investigative series that looked at the death penalty in Illinois. The death penalty reform commission was created to allow time to assess the criminal justice system in Illinois and figure out how to avoid wrongful convictions in the future.

This paper will examine the effort to create an innocence commission in the state of Illinois, utilizing Cobb and Elder's (1983) agenda setting theory. Cobb and Elder (1983) argue that the agenda setting process involves two agendas, the policy agenda and

the institutional agenda. The issue must survive multiple policy agendas, not just one.

This theory emphasizes the two agendas and illustrates the difficulty a policy faces just to be considered for policy action. Next, a discussion of the Cobb and Elder (1983) agenda setting theory will be presented. The paper will then look at the ways that Cobb and Elder (1983) agenda setting theory applies to the legislation.

### **Creation of an Innocence Commission in Illinois**

Out of the many wrongful convictions all across the nation, the idea of an innocence commission was born. North Carolina and Connecticut have established Innocence Commissions, and many more states are considering doing the same, including this effort in the State of Illinois. Since its inception in 2002, the North Carolina Actual Innocence Commission has held hearings on the role of mistaken eyewitness identifications and false confessions in wrongful convictions. In 2003, they issued a recommendation that all law enforcement officials follow specific eyewitness identification procedures meant to reduce mistakes. An innocence commission would be a way to intervene in cases where there is strong suspicion of factual innocence.

As with any bill, there is politics behind these commissions, however, the supporters of this legislation have their hearts in the right place. They don't want to see an innocent person sit in jail, or even worse be executed for a crime they did not commit. Many of the provisions in these bills allow for early intervention into a case where the convicted has not yet exhausted all of his or her appeals. Two innocence commission bills have been discussed in Illinois, both aims to accomplish the same thing, preventing incarceration of innocent people and preventing wrongful convictions in the future.

The first, which will be called the intervention bill, allows for earlier intervention in a case before all appeals have been exhausted. The key features of the intervention bill are: subpoena power, access to investigative resources, and political independence. The commission must also produce a report of its findings and any recommendations the commission deems appropriate after they have fully investigated the case.

The second bill, based on the National Traffic Safety Board (NTSB), operates the way the NTSB does when an airplane crashes or a train derails. The NTSB bills commission would immediately conduct an investigation into the causes of the wrongful conviction and make recommendations to prevent further harm from occurring. The key features of the NTSB bills commission are: subpoena power, expertise, and independence. This type of commission is able to ask and find answers to the important questions: What went wrong? Was it systemic error or an individual's mistake? Was there any official misconduct? What can be done to correct the problem and prevent it from happening again? (National Innocence Project)

Key to the discussion in this paper are several definitions, wrongful conviction, wrongful detention, and factual innocence. A wrongful detention indicates that a person is detained by the authorities without proper procedure being followed to ensure the person really is the main suspect, such as DNA testing, interviewing of witnesses, and following up on leads that may point to another suspect. Wrongful conviction is where a person is convicted of a crime he or she did not commit. Factual innocence is used interchangeably with actual innocence and both mean the person really didn't commit the crime he or she is either charged with or detained for. This is not where there is neglect

on the side of the authorities and a technicality makes the person innocent, but where the person really didn't do the crime.

Wrongful conviction and factual innocence seem to be buzz words today, thrown around in the media without much attention paid to the people and events that have brought them to the fore front of the public's attention. As noted earlier, The Center on Wrongful Convictions at Northwestern School of Law has focused the light on the shortcomings of the Illinois criminal justice system. The Center on Wrongful Convictions at Northwestern University is dedicated to identifying and rectifying wrongful convictions and other serious miscarriages of justice. Legal Clinic students at Northwestern University investigate possible wrongful convictions and represent imprisoned clients with claims of actual innocence. Illinois's exoneration rate is the highest exoneration rate of the 38 states with death penalties on their books. According to the Innocence Commission for Virginia, there are nine issues that lead to wrongful conviction: mistaken identification, suggestive identification procedures, tunnel vision by authorities, junk science, ineffective defense council, failure to disclose all evidence to the defense, high pressure interrogations, inconsistent statements by defendants, and the unavailability of post-conviction remedies (Innocence Commission for Virginia, March 2005).

The intervention bill deals most directly with the last issue, the unavailability of post-conviction remedies. It allows for intervention in a case before a clemency determination is made by the governor. It addresses the other eight issues through a report that is required by the commission after a determination of factual innocence. The intervention bill allows for the commission to send a case back to the courts for further review if it is believed that the defendant may be factually innocent of the crime. The

commission is also authorized to report any misconduct uncovered through the course of its investigations. This holds the police, prosecutors, judges, and defense attorneys accountable for their actions.

The NTSB bill, on the other hand, focuses on cases that have completed the journey through the judicial system and tries to determine what went wrong so that it can be corrected in the future. The commission in this bill must submit reports to the Governor, the Speaker of the House of Representatives for the State of Illinois, the President of the Senate for the State of Illinois, the Chief Justice of the Illinois Supreme Court, the legislative information service, and the victim or victim's family. This bill addresses all nine issues evenly; through the commission's authority to select and investigate cases, as well as, draw conclusions from the cases that it selects. It also allows the commission to look at the big picture and identify any reoccurring problems that may emerge.

The motivation behind these bills is clear. The obvious reason is that no one wants to see an innocent person in jail, or even worse executed. Underlying the obvious reason are motives ranging from moral disagreement with the death penalty to political gain from preventing possible wrongful executions and detentions. Each of these beliefs has a large part to do with the support the bills are getting from various members of the community. The support for these bills is coming from some unexpected places. Beyond justice for the wrongly convicted, there are additional motivations behind these bills. Built into each is more accountability for prosecutors, police, judges, and defense attorneys, as well as having a more effective way to uncover misconduct by these groups. The sponsors of the bill, as well as the defense associations that have been working on

the legislation, believe that there needs to be a better way of dealing with both non-death and death cases in Illinois. The creation of an independent body in Illinois with the authority to investigate factual rather than procedural issues, this will hopefully address Illinois problems with wrongful convictions. This is not intended to be a hunt for one or two bad apples, but instead a sweeping review of how the system can break down and convict people who have committed no crime.

Both bills attempt to solve the problem through innocence commissions; however, they differ in the details. The intervention bill has an eleven member commission that conducts inquiries into claims of factual innocence in felony cases. The commission gives priority to people who are incarcerated solely for a crime which they claim factual innocence. Anyone can refer a case to the commission, but it is up to the members to decide what cases they will investigate (Wilson 2005).

After an inquiry is completed by the Intervention Bill Commission, the commission must make a report on their findings. The defendant does not have the right to counsel during the investigation; however, they may consult with their counsel before and after the inquiry. The investigation may be terminated at anytime if the defendant refuses to cooperate. The commission has the authority to issue process and proscribe its own rules of procedure. After hearing all the evidence, the commission votes, if eight of the eleven members believe there is factual innocence, the case is then referred to the appellate court in the district of original jurisdiction. If less than eight members of the commission think that there is factual innocence, then the actual innocence claim does not merit judicial review, however the defendant is still allowed to appeal other issues in

the case. In either outcome, the commission will document the findings and file with the clerk of the appellate court of original jurisdiction (Wilson 2005).

If the Intervention Bill commission decides there is enough evidence for judicial review of the actual innocence claim, a three-judge panel is called; this panel cannot include any judge who has had significant contact with the case. The panel will conduct an evidentiary hearing where the defendant has the right to be represented by counsel. The three-judge panel will determine whether there is clear and convincing evidence of factual innocence, it must be a unanimous vote in order for the charges to be dismissed. If the panel is not unanimous, relief shall be denied. Denial of relief does not limit any other form of appeal for a defendant (Wilson 2005).

The NTSB bill follows more of a study commission form, although it still has the ability to investigate wrongful convictions. This model creates a board called the Illinois Independent Criminal Case Review Board. As drafted The Board has the authority to look into: wrongful convictions, wrongful arrest or detention, and cases in which relief has been denied by the courts, but present evidence of factual innocence. The Board will have eleven members and no current prosecutors or judges may sit on the Board (Colfax, Saltmarsh, and Wilson, September 2005).

“The case is referred to The Board by an attorney, judge, police officer, or licensed investigator who is directly involved in the investigation, prosecution, or defense of the case, or a person or group that undertook independent review of the case after all judicial proceedings were concluded” (Colfax, Saltmarsh, and Wilson 2005). The Board has a full range of investigative power, including subpoena power. Once the Board has completed its investigation of a case, The Board must write a report that states its

findings. The Board may at its discretion: refer the case back to the circuit court for appointment of council to pursue appropriate remedies; recommend corrective action that will prevent similar issues in the future; develop a solution to correct the problem; or identify programs and procedures to prevent future wrongful convictions. The report the Board produces will be given to the Governor, the Speaker of the House or Representatives for the State of Illinois, the President of the Senate for the State of Illinois, the Chief Justice of the Illinois Supreme Court, the victim or victim's family, and the Legislative Information Service.

Which ever bill the legislators decide to go forward with will be a drastic improvement in the criminal justice system in Illinois. Both bills allow for intervention on some level into cases where there is an indication of factual innocence. One of the most important parts of these two bills is that they deal not only with death penalty cases, but also serious felonies where wrongful convictions also can occur. It does us no good as a society to acknowledge that a problem exists without putting in place a system to fix the problem. A wrongful conviction case implicates some of the fundamental rights that are set out in the United States constitution, the right to life and the right to liberty.

### **Cobb & Elder Agenda Setting Model**

In a 1971 article in the *Journal of Politics*, Cobb and Elder spell out their theory about agenda setting in a democratic society. The theory was continued and expanded on in their 1983 book titled "*Participation in American Politics: The Dynamics of Agenda-Building*". Cobb and Elder's Theory (1983) focuses on two agendas, the institutional agenda and the systemic agenda. It emphasizes the difficulties a policy faces when

moving through the two agendas and how in the end a policy is formed. The theory also explains the barriers to entry that exist for segments of society who wish to place an issue on the agenda. Cobb and Elder's Theory (1983) seeks to explain what happens before a policy actually becomes a policy and why it happens the way it does. This theory is particularly useful when dealing with proposed policies that have not actually made it to the institutional agenda yet.

Cobb and Elder (1983), lay out four stages for their agenda setting model: identification of a potential problem; systemic agenda setting; institutional agenda setting; and policy formation (Cobb & Elder 1983). Their definition of agenda is "a general set of political controversies that will be viewed at any point in time as falling within the range of legitimate concerns meriting the attention of the policy cycle." (Cobb & Elder 1983) Policy is created and maintained by the public, if the public deems something must be done, it most likely will be dealt with rather expeditiously.

"Policy problems are socially constructed. They arise not so much from events and circumstances, as from the meanings that people attribute to those events and circumstances. Whether or not a situation is considered a public problem and what the problem is, if there is one, depends not just on facts, but upon beliefs and values- beliefs and values that determine what is taken to be fact, what facts are considered relevant, and how those fact are interpreted." (Cobb & Elder 1983)

Along with the four stages of the model, a triggering event is also required for the issue to have enough weight for decision makers to notice it. It is also worth noting that Cobb and Elder (1983) place considerable emphasis on how different groups and people gain access to the decision makers, as well as, how that access affects an issue's ability to make it though the agenda setting process.

Step one of Cobb and Elder's theory involves two parts, issue creation and the occurrence of a triggering event. There are four ways that issues are created and an issue may fall into more than one of the categories (Cobb & Elder 1983). First, is economics, when a group believes that there is a bias in the distribution of positions or resources they create an issue to address their perceived injustice. Second, a person or group can create an issue for their own personal gain. Third, an unexpected event can create an issue. Last, a group or person can create an issue if they believe there is an injustice in the distribution of resources even if it doesn't benefit them. Once an issue is created, to make it any further in agenda setting, normally, a triggering event must occur which helps the issue further in the process (Cobb & Elder 1983).

A triggering event is something dramatic that happens which forces the public to demand a policy change. There are two types of triggering events, internal or domestic triggers and external or foreign triggers (Cobb & Elder 1983). An internal trigger would be a natural disaster, unanticipated human event, a technological change in society, an imbalance in resource distribution, or an ecological change in society. An external trigger is something that happens to a country such as an act of war, innovations in weapons technology, an international conflict that a country is not directly involved in, or changing world allegiances. For an issue to make it to the next stage of agenda setting there must be a connection between issue creation and triggering event. An issue or triggering event by itself doesn't necessarily create a policy initiative that will make it onto one of the agendas. (Cobb & Elder 1983)

The second stage of Cobb and Elder's Theory involves moving an issue from problem identification to the systemic agenda. The systemic agenda consists of all the

issues that merit public attention and have some outlet in the political arena for change. (Cobb & Elder 1983) There are three things that must happen for an issue to be placed on the systemic agenda: an issue must gain wide spread public attention or awareness; a large portion of the public must believe that action is required on the issue; and the public must believe that the government can do something about the issue (Cobb & Elder 1983).

For an item to make it onto the systemic agenda it must be able to gain and sustain public support. To do this, the group who created the issue needs to have either access to the media or the resources to mobilize and reach people who will be sympathetic to the issue. Once the public has been made aware of the issue, the public must then believe that the government should take some kind of action to resolve the issue. Finally, the fate of the issue will lie in whether the group that created the issue can control the issue sufficiently to make the public believe that the government has the ability to do something about it. If the public disagrees and thinks that there is nothing that can be done, then the issue will die. This is the step in the process where it is easiest to kill an issue. To accomplish this all one must do is convince the public that the issue is just a part of life and that the government can do nothing to resolve it (Cobb & Elder 1983).

It is possible for an item to make it onto the third stage institutional agenda without ever having been on the second stage systemic agenda. This is possible because of how politics is played. Decision makers often trade support for issues to make sure that their priority items are put onto the institutional agenda. The institutional agenda is the group of items which are “explicitly up for formal consideration by decision makers” (Cobb & Elder 1983). The institutional agenda is much smaller and limited in the number

of issues on it. Only issues that are going to be seriously considered by decision makers will make it to the institutional agenda (Cobb & Elder 1983).

“In giving an issue formal institutional agenda status the government conveys important messages about who and what are socially important, about what and what is not problematic, and about what and what is not in the authority of the government” (Cobb & Elder 1984). There are two types of issues found in the last stage of the formal institutional agenda, old issues and new issues. Old items are given priority over new issues and spontaneous issues take priority over channeled issues. The old issues come in two forms, habitual items that occur every year such as the budget and recurrent issues that do not necessarily come up every year, but make appearances on the agenda often such as government reorganization. The new issues also take two forms, automatic or spontaneous issues such as a strike or foreign crisis and channeled issues, where a group has created major public outcry for change, such as civil rights or gun control.

The last piece of the puzzle is how access to key decision makers affects an issue’s ability to maneuver its way through the agenda setting process. According to Cobb and Elder “for an issue to make it through to gain agenda status it must command the support of at least some of the key decision makers” (1983). There are four ways that people and groups gain access to key decision makers. One, a decision maker is either indebted to a group or identifies with that particular group. Two, some groups are blessed with better resources and are able to use their resources more efficiently. Three, some groups are strategically positioned in either economic arenas or political arenas and can not be ignored. Last, some groups and people are thought of in a more beneficial light

than others, for example, doctors and church clergy. As a consequence of this access, some groups end up being winners and some losers in the game of politics.

The fourth stage in Cobb and Elder's theory is actual creation of policy. Once an item makes it onto the institutional agenda it will either become policy or die. If a policy makes it out of the institutional agenda chances are it will become a part of society and the process will start again in determining what issues are problems. Cobb and Elder's Theory suggests that agenda setting is an ongoing process that continues after a policy has been put into action. The continuation of the process would then lead to new problems, perhaps with the policy that was just passed. From there, the theory would start again describing the process by which that issue was put on the agendas.

### **Analysis and Application of the Model**

Choosing the agenda setting model laid out by Cobb and Elder (1983) will hopefully provide a clear picture of what has and what is happening in Illinois regarding the formation of an innocence commission for the state. Their theory illustrates how a series of triggering events; the State of Illinois exonerating more people than it executed, the *Chicago Tribune's* investigative series that identified the recurring factors that lead to wrongful convictions, the moratorium on executions, the formation of the Governors commission on capitol punishment, and ultimately the mass commutation of death sentences in Illinois, that then Governor Ryan ordered, has put the issue of wrongful convictions squarely onto the institutional agenda. In the case of Illinois, the theory also explains how the issue flew through the systemic agenda and its current position on the institutional agenda.

In stage one of Cobb and Elder's (1983) agenda setting theory, a group must create an issue and a triggering event must occur. In the case of the innocence commission legislation, part one is issue creation. There are several ways to accomplish the task. The first is a person manufactures an issue for their own personal gain. Wrongfully convicted people are obviously going to be one of the largest beneficiaries of this legislation. The second is the occurrence of the series of unanticipated events which catapulted the issue into the minds of the public. The Northwestern journalism students who investigated and were able to exonerate five death row inmates gained enormous media attention and brought into focus the question about how wrongful convictions can occur (Center on Wrongful Convictions 2005). Northwestern University Legal Clinic students investigate possible wrongful convictions and represent imprisoned clients with claims of actual innocence. The focus has been on identifying systemic problems in the criminal justice system and, together with the community, developing initiatives designed to raise public awareness of the prevalence, causes, and social costs of wrongful convictions and promote reform of the criminal justice system (Center on Wrongful Convictions 2005). The previous reasons discussed in this paper lead to the former Governor of Illinois, George Ryan, clearing out death row by commuting all death row inmates' sentences to life, as well as, enacting a moratorium on the death penalty until further reforms could be enacted. This act of mass commutation by the Governor was the first of its kind in the nation and gained not only local, but national and international attention.

Last, a group creates an issue with out any benefits coming to them. This issue of wrongful conviction actually arose with out any particular group being its champion. The

system itself, more than a participant in the system, created the issue of wrongful convictions. This is one of the rare occurrences that no one will dispute that there is a problem, therefore involvement by interest groups is the middle step in the process, instead of the beginning step.

The second part of stage one is the triggering event. In the case of the State of Illinois initiative to start an innocence commission, a series of different triggering events occurred. The passage of a first round of death penalty reform legislation in Illinois and the acknowledgement that these same problems can exist in non-death cases created an awareness of these problems. A bill that was introduced in North Carolina which proposed a similar commission for their state also created a great deal of interest in the idea of an innocence commission from different segments of society. The North Carolina bill is also the model for the intervention bill that is being proposed in the State of Illinois.

The next stage of Cobb and Elders agenda setting theory is moving the issue onto the systemic agenda (1983). The legislation this paper represents must build the support needed from the public before it will be able to move anywhere. The public has been outraged that it was possible for an innocent person to be wrongfully convicted and have to suffer like some of the cases that have occurred in Illinois. There was an outcry from the general public that something had to be done to prevent wrongful convictions after the original set of triggering events. Those first triggering events and the outcry by the public lead Governor Ryan to do several things that helped the recommendations the commission made fly through the legislative process (State of Illinois 2002). Recently, awareness by the general public that the same issues that death penalty cases had, can and

do occur in non-death cases, has helped the idea of creating an innocence commission in the State of Illinois. The proposed legislation is an extension of the earlier reforms that went through in the state of Illinois regarding death penalty cases. The public support waned a bit after the first set of reforms were made, but public support is once again growing and making progress moving the legislation to the third stage of the theory, the institutional agenda.

The various political actors involved with this proposed legislation are working on entering the proposed policy onto the systemic agenda and finally to the institutional agenda. Cobb and Elder (1983) explain that by necessity, agenda setting and the political processes involved are wide open and promote a great deal of participation in the process. (Cobb & Elder 1983) The effect this kind of system has is that “new demands, particularly those of the disadvantaged or deprived groups, are the least likely to receive attention on either the systemic agenda of controversy or the institutional agenda” (Cobb & Elder 1971). What this means for the proposed legislation is that the actors on both sides will play a large part in the formation of the legislation, as well as, how the legislation will move through the agenda setting process.

Because legislation like this, proposing major changes to the criminal justice system is often seen as being soft on crime, many players are thought to be unwilling to help legislation move which would create an innocence commission in the State of Illinois. The theory argues that this is a common occurrence and that often barriers such as this are effective in killing a proposed bill. (Cobb & Elder 1983) The recommendations that the Governor's death penalty reform commission made were a result of an automatic agenda placement. The second round of legislation which is

ongoing will be a recurring issue. This will help the issue since legislators are more willing to work with issues they find familiar (Cobb & Elder 1983). The legislation was originally to be placed on the institutional agenda in the spring 2006 legislative session, but due to a shortened legislative session and the election cycle, the legislation will be placed on the institutional agenda for the spring 2007 legislative session instead.

### **Conclusions**

Cobb and Elder's agenda setting theory, illustrates very efficiently what has happened through out the short life that this legislation has had. The process of applying the theory to the legislation has provided great insight into each piece of the puzzle. Not only did the application of the theory explain areas that needed to be focused on, coalition building, but it has also pointed out several strengths and weaknesses that the legislation must address before it can proceed to the institutional agenda.

The new legislation creating an innocence commission will most likely face an up hill battle in (?) the Illinois legislature. However, if it passes it will create one of the most progressive forms of review in the United States, affecting all levels of the criminal justice system. The prospects for change in Illinois are very real; it is very exciting to see support coming from both parties in the legislature. The public and the legislators in Illinois; as well as around the country, are beginning to warm to the idea that something must be done to prevent the atrocities that have plagued the criminal justice system. In Illinois specifically, there have been major miscarriages of justice. This legislation is a step in the right direction, however, it is not an end all solution to the problem. The public

and representatives of the people must continue to forge ahead in the pursuit of justice in order to head off potential problems; as well as swiftly address existing problems.

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