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# When Society Becomes the Criminal: An Exploration of Society's Responsibilities to the Wrongfully Convicted

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When Society Becomes the Criminal: An  
Exploration of Society's Responsibilities to the  
Wrongfully Convicted

Thesis by  
Amelia Haselkorn

In Partial Fulfillment of the Requirements for the Degree  
of  
Bachelor of Arts



PITZER COLLEGE  
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## DEDICATION

There are so many people whose support throughout this yearlong endeavor I am inexpressibly grateful for. First and foremost, I would like to thank my parents for their unconditional love and support throughout the process. The constant stream of words of affirmation and encouragement to keep going along with your patience in letting me try out ideas with you were integral to my motivation to keep going and finish. However, this thesis was actually enjoyable to write thanks to two of my best friends and ultimate frisbee teammates, Tiana “T” Wu and Sarah “Joey” Laws. Each late night that we (“#TeamThesis”) spent together was a unique adventure, which shaped the culmination of my college experience. I would do anything as crazy as to write another thesis just knowing that the two of you are by my side, good thing I don’t have to though.



## PREFACE

The prevalent issue of wrongful conviction in our nation is one that requires both Politics and Philosophy in order to wade through and decide how we should tackle it. Having been fortunate enough to come into contact with people both in prison and out on parole these past four years, I have spoken face to face with those who the US criminal justice system fails the most. However, people who have committed crimes are not the only people who are harmed by the criminal justice system because as it turns out, many innocent people have been and currently are being punished for crimes that they had no participation in. These people who have been proven innocent after having served a mistaken punishment deserve just compensation for the wrong that they suffered. This thesis seeks to explore how society can and should compensate those who have been wrongfully convicted after they are exonerated and how we can prevent these mistakes from happening to others in the future. I hope that my reader will consider the odd phenomenon of wrongful conviction in conjunction with how it plays into the broken justice system as a whole.



## ACKNOWLEDGEMENTS

I would like to acknowledge my Professors, Dr. Rachel VanSickle-Ward and Dr. Michael J. Green for their support and guidance throughout this process. Dr. Green ignited my interest in this topic over the summer and I have been fascinated by it ever since. His excitement regarding the philosophical questions that arise from wrongful conviction have immensely inspired this thesis. The political side of my thesis would not have come together without the help of Dr. VanSickle-Ward as she helped me think thoughtfully about the data that serve as a backbone to my philosophical inquiry. Thank you both for the time that you invested in my project and me. I would also like to acknowledge Bryan Stevenson who I had the pleasure to briefly meet. His book, "Just Mercy," and talk that I attended inspired me to think about wrongful incarceration from new angles and could not have come at a better time.



## Introduction

There is growing evidence that the dramatic rise in the number of people being sent to prison has also resulted in an extraordinary increase in the number of wrongful convictions, illegal sentences, and unjust imprisonments. Rather than expand and facilitate increased review of larger numbers of prisoner appeals, lawmakers and state and federal courts have sought to dismantle collateral appeal mechanisms, bar substantive remedies for constitutional violations, and restrict review of federal habeas corpus applications.<sup>1</sup>

While numerous authors like Bryan Stevenson have pointed out the growing danger of wrongful convictions, I have been drawn to study this issue through personal experiences such as working with and getting to know female parolees in the Crossroads Inc. halfway program and sharing education with prisoners as fellow students at the California Rehabilitation Center in Norco. Experiences like these have led me to explore the justice system, and while I know that many of the people I have met committed desperate acts (I will never forget my feelings the first time one of the parolees told me she had killed her husband), I have also come to know that the possibility of them being innocent yet imprisoned is far greater than I imagined. This thesis focuses on issues associated with wrongful conviction and compensation for those who, despite their innocence, have been wrongly incarcerated. I explore the topic of exonerees in both a philosophical and political context in order to address longstanding debates that have arisen from the fact that the U.S. criminal justice system, like any other, is imperfect.

Two years ago when I started this work with Professor Green, we were baffled by the lack of discussion surrounding such clear miscarriages of justice. Since then, as I have learned more about these cases, so too, it seems, has the country. Erroneous convictions have become a topic in multiple outlets, from stories on National Public Radio and articles in the New York Times, to pop-culture shows such as the “This American Life” podcast, *Serial*: Season One, the Netflix original series, *Making a Murderer*, and HBO’s *The Jinx*. This phenomenon is not completely new with shows in the past featuring innocent convictions, including TV shows such as “In

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<sup>1</sup> Bryan Stevenson, “Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases,” *Harvard Civil Rights-Civil Liberties Law Review*, 41 (2006): 1.

Justice” and “Perry Mason,” the novels of Scott Turow, and the hit play “The Exonerated”.<sup>2</sup> Nevertheless, the awareness of this issue seems to have greatly risen, culminating in current Presidential candidates Hillary Clinton and Bernie Sanders making reform of the criminal justice system a major campaign issue.

This attention has helped the American people see how arbitrary, inequitable, and at times, flat out wrong our criminal justice system can be, however, while locking innocent people up appears to be a clear-cut case of injustice, like most issues there are multiple sides, especially when it comes to (1) improving the criminal system to reduce the likelihood of these wrongs and (2) providing compensation when these wrongs are uncovered. Conservative politicians, judges, and scholars have openly stated that they do not see wrongful conviction as an urgent problem that needs solving. No one desires the wrongful conviction of innocent Americans; however, tough-on-crime policies can lead people to oppose solutions that might otherwise seem to be a simple case of addressing wrongs. And there are deeper questions of political philosophy concerning the obligations between citizen and state in the context of imperfect governmental systems.

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<sup>2</sup> Joshua Marquis, “The Innocent and the Shammed,” *The New York Times*, January 26, 2006.

## Overview

This thesis focuses on three questions: (1) How sizable is the problem of innocent individuals being convicted of and imprisoned for crimes they did not commit? (2) What can be changed within the criminal justice system to minimize the risk of this occurring? (3) When it does occur, what is the appropriate compensation for those who have been wrongly imprisoned?

I begin by addressing the question of the size and nature of these issues. Multiple estimations have been made and I seek to weigh the best ones. I base this analysis on reputable data, looking at estimates that have been publicly used within the legal, judicial and criminal justice communities to quantify wrongful conviction in the United States. I include the reactions of experts in the innocence field to these data and analyze how plausible the numbers themselves are and the methodologies that derived them. By almost any measure, the problem is huge.

In addition, I explore whether the risk of being mistaken as guilty is an equal burden that every American citizen shares or if the risk is disproportionate by race and other factors. And if this is so, what are the implications for improving the criminal justice system and for determining appropriate compensation?

Next, I take a philosophical look at how the relationship between the American people and the criminal justice system affects our perspectives on this issue. In short: Is compensating the wrongfully convicted a tax that society should pay for having an imperfect criminal justice system or is the possibility of being wrongfully convicted a risk that each member must take to be a part of society? There are arguments on both sides, and the answer to these questions is not simply one side or the other. Ultimately I argue that while we all run a risk of being punished for not having done anything wrong (whether this risk is equal or not), when this occurs society owes us compensation, just as the government comes to the aid of people who are harmed through no cause of their own by providing assistance that includes disaster relief, social safety net payments and victim's compensation.

Having argued that society is responsible for providing some form of compensation to those who it wrongly punishes, I discuss the intricacies of compensation in order to decide what an appropriate level of compensation would look like for innocent exonerees. I also address issues such as the lack of uniformity in the amounts and policies associated with compensation by both Federal policies and state-by-state ones. Should there be a single compensation solution

or does it require localized variations? In this section I also explore which policies, currently practiced by various states, actually serve individuals and society best by making amends for the mistake. In order to keep this exploration realistic, I include an examination of the costs and benefits of compensation to society.

The final section discusses the way forward and how everything that I have discussed can be applied towards taking appropriate action in the future. I review the action and implementation that has already been taken, and explore the considerable work that remains. Many of these issues are extremely difficult and there are competing goals that need to be resolved, but in the end it is critical to address the needs of those who, for no fault of their own, have suffered at the hands of the criminal justice system.

## **I. The Size and Significance of the Problem**

Before analyzing previous work on the size and significance of wrongful conviction within the U.S. criminal justice system, it is first necessary to clarify the key concepts and scope of the issue.

### ***Definitions and Scope of the Problem***

The population of interest for this thesis is generally called *exonerees*. The term exoneree refers to a person who was convicted of a crime that she or he did not commit and was later proven to be innocent and, thus, exonerated. These individuals are known to be ‘factually innocent,’ distinguishing them from others who might be deemed innocent for other reasons such as a mistrial or other legal misconduct. An exoneree is also distinct from someone who was pardoned by the President or a governor for a crime that he or she committed (although sometimes innocent people are pardoned) because an exoneree had no part in the crime that they were accused, convicted and charged for. In other words, this thesis does not address cases where the individual convicted a crime, but arguably should not have been held guilty for reasons such as personal defense cases where a wife killed an abusive husband. Even though these cases are also important to consider, they are outside my scope.

Given this precise scope, recent advances in technology are especially important for defining true innocence. Technology such as DNA testing, which began to be used in the 1980s, allows us to know for almost certain whether an innocent person was mistaken for the actual perpetrator. These innocent people or exonerees have been incarcerated for any number of years and subsequently found to be innocent through post-conviction DNA testing or other additional evidence such as outside confessions or proof of alibi for example.

### ***Size – How many innocents are still behind bars?***

What is the best estimate of the number of people in U.S. prisons who should be exonerated? What is the nature of the system’s mistakes that have put them there? Unfortunately, these are not simple questions. The hardest evidence of innocence that we have, DNA analysis, is only available in cases where there is DNA evidence, such as rape. There are problems with

trying to generalize the percentage of wrongful convictions in this subset of crimes to the entire criminal justice system.

The first problem is that most rape cases include eye witness testimony or identification through lineups which are a main cause of wrongful conviction due to their inaccuracies. Scholars have shown that eyewitness testimony is one of the most unreliable sources of evidence (Garrett 2015; Gould 2010). If a rape case defendant is more likely to be wrongfully convicted than a defendant in another type of case, projecting the data that we have on DNA exonerations would overestimate the total error rate.

However, rape cases are not the only cases that use eye witness testimony and identification, nor is eye witness testimony the only source of error. In fact, all types of cases can involve proven inaccuracies that come in many forms such as: overly aggressive interrogations, false informants, false confessions due to threats of the death penalty or for other reasons, prosecutorial misconduct and racial bias among others.<sup>3</sup> Given all these sources of error, it is possible that using the data that we currently have from DNA exonerations would underestimate the total error rate in the US. This is because despite the proven unreliability of eyewitness testimony, these numerous other sources of wrongful conviction are likely to impact non-rape cases without the DNA evidence to exonerate those wrongly convicted.

Organizations active on the exoneree issue are overloaded and underfunded, focusing more on finding and exonerating innocent people than on research to pin down the size of the problem. Even so, the number of exonerees is informative with more and more individuals exonerated each week. 2015 was a record year of exonerations with 149 in total compared to 139 in 2014<sup>4</sup> and 87 in 2013<sup>5</sup>, according to the National Registry of Exonerations, a registry put together by the University of Michigan Law School. This increase probably shows that DNA evidence has become an increasingly effective mechanism for diagnosing our country's erroneous conviction "disease;" yet, the data is unable to tell us whether the prevalence of the disease is increasing or decreasing. We only know that we are better at diagnosing it. Given the complex nature of wrongful conviction and exoneration, we may never have a definitive count of the cases and

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<sup>3</sup> Jon B. Gould & Richard A. Leo, "One Hundred Years Later: Wrongful Convictions after a Century of Research," *Journal of Criminal Law & Criminology* 100.3 (2010): 841.

<sup>4</sup> "Exonerations in 2015," University of Michigan, last modified February 3, 2016, [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2015.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf)

<sup>5</sup> "Exonerations in 2015."

thus, we will not know whether we are doing a better job of preventing it from happening in the first place or whether the problem is getting worse.

Another issue with projecting the limited data we have available onto the entire criminal justice system surrounds death penalty cases. Much of the data on exonerations is acquired from capital punishment cases since these cases undergo the appeals process more than any other type of case. Given this high degree of scrutiny, capital punishment cases might seem like a good sample dataset to model what the total rate of false conviction would be if all cases were to undergo a similarly extensive appeals process. However, the death penalty is also a contentious and highly debated topic in our nation. Defendants pursuing habeas corpus relief, generally based on procedural rather than evidential grounds, often make their way up to the Supreme Court. The Court has acknowledged that wrongful convictions happen; however, in 2015 former Justice Antonin Scalia concurred with the Court in *Glossip v. Gross* writing that:

The reality is that any innocent defendant is infinitely better off appealing a death sentence than a sentence of life imprisonment. (Which, again, Justice Breyer acknowledges: “[C]ourts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue,” post, at 5.) The capital convict will obtain endless legal assistance from the abolition lobby (and legal favoritism from abolitionist judges), while the lifer languishes unnoticed behind bars.<sup>6</sup>

This is to say that there exists an inherent bias in capital punishment cases because we would prefer to incarcerate a person for life over putting them to death (a final, irreversible act) if there is an inkling of doubt in their case. This is an odd argument however because it turns out that putting someone in life for prison is also nearly irreversible given our criminal justice system. Even so, Justice Scalia was right—there are obviously strong reasons to appeal the death penalty and therefore using capital punishment cases as a sample size brings many exonerations into the equation that go beyond our initial definition of exoneree, and therefore could over predict the total number of wrongful convictions in the country.

It is clear that there are many challenges to estimating the rate at which wrongful convictions occur in the US criminal justice system. The total number of unknown innocents who are currently behind bars will continue to remain unknown. Perhaps unsurprisingly, this has not deterred many scholars from trying to make estimations. These estimations are valuable

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<sup>6</sup> *Glossip v. Gross*, 576 U.S. (2015)

because while they are not certain, they are backed by immense research and statistical analysis and can help us to measure future progress. Additionally, many of these estimations are shockingly high and thus, should influence more action to be taken to stop future false convictions from happening. As Gould and Leo wrote in their 2010 article which analyzed 100 years of research on wrongful conviction research, “whatever the correct figure, wrong convictions are far from rare in the criminal justice system.”<sup>7</sup> Zalman, Smith and Kiger (2008) call this an issue of “intrinsic importance—as a matter of justice and as a gateway to exposing overlooked deficiencies in the criminal justice process—makes knowledge about the scope of the problem desirable.”<sup>8</sup>

The following section reviews historical efforts to estimate the scope of this issue of “intrinsic importance.”

### ***Historical Efforts to Estimate the Scope of the Problem***

#### **i. Borchard**

Before DNA was a developed technology that could be used to prove or disprove a person’s innocence, there was still recognition that the criminal justice system could be wrong from time to time as well as discussion about what should be done. One of the first major works written about the philosophical and political problem of wrongful conviction was published in 1932 by a Law Professor at Yale University named Edwin M. Borchard.<sup>9</sup> While Borchard does not discuss or even estimate how many people might be wrongly convicted, he does question whether there are people who have been or who were currently being punished for a crime that they did not commit. Borchard’s piece titled *Convicting the Innocent* analyzes how other, primarily European, countries respond when they realize that their legal system has allowed the wrong person to face punishment. Despite the non-existence of DNA evidence, countries around the world including certain US states possessed statutes that outlined details such as protocol, eligibility and compensation requirements for exonerees. This shows that it was well known,

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<sup>7</sup> Gould & Leo, "One Hundred Years Later: Wrongful Convictions after a Century of Research," 827.

<sup>8</sup> Marvin Zalman, Brad Smith & Angie Kiger, “Officials’ Estimates of the Incidence of ‘Actual Innocence’ Convictions,” *Justice Quarterly*, 25 (2008): 73.

<sup>9</sup> Edwin Borchard, *Convicting the Innocent* (New Haven: Yale University Press, 1932), 375-414.

long before DNA technology sprung up, that the legal system is imperfect—that there are people in every prison system around the world who are innocent.

Most relevant here is Borchard's discussion of the philosophy behind why the State should aim to balance their system's imperfections by indemnifying those who have been mistakenly punished. He presents three theories that people who oppose creating legislation and allocating resources toward finding and compensating the wrongly convicted still use to ground their argument today. In short, these arguments are: (1) that the State cannot be held accountable for the hardships that particular individuals have to suffer when it is exercising its "sovereign right,"<sup>10</sup> (2) if the State is acting lawfully it cannot injure anyone,<sup>11</sup> and perhaps the strongest of the three, that (3) there can be no liability if there is not fault.<sup>12</sup> Borchard countered these arguments to verify the importance of rectifying a criminal justice system as thoroughly as possible. I return to Borchard and these arguments in section five on the issue of compensation.

Following Borchard, many other scholars have delved into this problem. In 1992, Radelet, Bedau and Putnam published *In Spite of Innocence*, a book that consolidated stories from 416 cases they had accumulated over their 30 years of research. These researchers identified that in all 416 cases "the wrong person was convicted."<sup>13</sup> These cases took place in all but the last decade of the 20<sup>th</sup> Century.<sup>14</sup> Like Borchard, the cases that these authors examined did not have the luxury of DNA technology.<sup>15</sup> However, they correctly recognized that, "[t]he errors, blunders, and tragedies recounted in the pages of this book barely scratch the surface of this vast output of the nation's criminal justice system."<sup>16</sup>

## ii. The Innocence Project

The same year that Radelet, Bedau and Putnam published their book, Barry C. Scheck and Peter J. Neufeld founded the Innocence Project, an NGO created as an external overseer of the

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<sup>10</sup> Borchard, *Convicting the Innocent*, 388.

<sup>11</sup> Borchard, *Convicting the Innocent*, 389.

<sup>12</sup> *Ibid.*

<sup>13</sup> Michael L. Radelet, Hugo Adam Bedau and Constance E. Putman, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (Boston: Northeastern University Press, 1994), 17.

<sup>14</sup> Radelet, Bedau and Putnam, *In Spite of Innocence: Erroneous Convictions in Capital Cases*, ix-x.

<sup>15</sup> The first person convicted by DNA evidence was Tommie Lee Andrews in 1987. (Randy James, "A Brief History of DNA Testing," *Time Magazine*, June 19 2009.)

<sup>16</sup> Radelet, Bedau and Putnam, *In Spite of Innocence: Erroneous Convictions in Capital Cases*, 17.

innocent. Working primarily with DNA technology, this organization has worked to combat the errors that occur beneath the criminal justice system's surface. Given this effort, the Innocence Project is generally seen as the most reliable estimate of proven U.S. exonerees. According to the Innocence Project, as of February 2016, 337 innocent people who served time in prison have been exonerated.

The Innocence Project works to exonerate wrongfully convicted individuals through DNA testing and reforming the criminal justice system in order to prevent these injustices from happening in the first place. It achieves this through litigation and public policy work across the nation. The Innocence Project has positively impacted the political conversations surrounding prison reform and wrongful conviction, but they feel that they are unable to leave this work in the government's hands. As they state: "These DNA exoneration cases have provided irrefutable proof that wrongful convictions are not isolated or rare events, but arise from *systematic defects* that can be precisely identified and addressed. For more than 15 years, the Innocence Project has worked to pinpoint these trends [emphasis added]."<sup>17</sup>

While the Innocence Project is an important player, they are not the only ones who have recognized and made a concerted effort to understand and mitigate this problem.

### iii. Considering the Data – Our Best Guess

There are considerable data describing various aspects of the U.S. criminal justice system. We have statistics on incarceration rates by race (at the end of 2014 black males made up 37% and Hispanic made make up 22% of the prison population<sup>18</sup>), location (as of 2014, Texas and California had the highest prison populations in the country<sup>19</sup>), and offense (at the end of 2014, 53.2% of all people in prison sentenced under state jurisdiction were convicted of violent crimes<sup>20</sup>) as well as rates of recidivism (at the beginning of 2014, 61% of people who had been released within three years had returned to prison in California<sup>21</sup>) and length of sentence (the nationwide average incarceration sentence length from October 2011 to September 2012 was

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<sup>17</sup> "DNA Exonerations Nationwide," The Innocence Project, accessed February 10, 2016, <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>.

<sup>18</sup> Ann Carson, "Prisoners in 2014," *Bureau of Justice Statistics* (September 2015): 15.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> California Department of Corrections and Rehabilitation, "2013 Outcome Evaluation Report," (January 2014): 12.

54.9 months<sup>22</sup>). However, we do not have solid data on incorrect convictions despite our knowledge that mistakes happen on a seemingly systematic basis. We know that in total between 1989 and March 2<sup>nd</sup>, 2016, 1,746 people had been exonerated total<sup>23</sup> and that from 1992 to present, 337 people have been exonerated with DNA,<sup>24</sup> but we can't help but ask: Are there more? What is the rate of wrongful convictions in the U.S.?

The numbers just cited do not tell us how many people are currently serving time for a crime that they did not commit. The fact that we cannot definitively know this figure has added a factor of mystery and fear to the exoneree issue. This fear, combined with limited data and personal stories from exonerees, has already led to some state and federal government action (e.g. the National Summit on Wrongful Convictions in 2013<sup>25</sup>). Nevertheless, having better data and estimates as to the extent of the problem is important to future political and judicial action.

The current data (and personal accounts) confirm that the error rate of wrongful conviction in the U.S. is meaningful, but where do we go from there? The biggest cliché used in innocence literature is the tip of the iceberg because the confirmed number of exonerated individuals is likely only a small fraction of the actual number. In 2015, 149 innocent people were exonerated, or more than two per week.<sup>26</sup> Yet, there is no way to know what is under the surface or how many innocent people are behind bars right now. Lara Bazelon, attorney and director of Loyola Law School's Project for the Innocent, writes that the most conservative estimate is between 10,000 and 20,000 people who are currently locked up in the U.S.<sup>27</sup>

#### **iv. Rape and Capital Crime**

In 2007, Michael D. Risinger published the first ever empirically justified wrongful conviction rate. Focusing on capital rape-murders in the 1980s, he developed the conclusion that

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<sup>22</sup> California Department of Corrections and Rehabilitation, "2013 Outcome Evaluation Report," (January 2014): 24.

<sup>23</sup> "The National Registry of Exonerations," University of Michigan Law School, last updated March 2, 2016.

<sup>24</sup> "Number of DNA Exonerations," Innocence Project, accessed March 2, 2016.

<sup>25</sup> International Association of Police Chiefs, "National Summit on Wrongful Convictions: Building a Systematic Approach to Prevent Wrongful Conviction." August 2013.

<sup>26</sup> Ari Melber and Marti Haus, "Jailed But Innocent: Record Number of People Exonerated in 2015," *NBC News*, February 3, 2016.

<sup>27</sup> Laura Bazelon, "Scalia's Embarrassing Question," *Slate*, March, 11<sup>th</sup>, 2015.

there is a 3.3% error rate for this specific subset of criminal convictions.<sup>28</sup> If we were to extrapolate this rate to the entire 2007 prison population,<sup>29</sup> his estimation would be that there were 52,744 people in the US were being erroneously punished. This is a much higher estimate than Bazelon's; however, Risinger does not suggest that the error rate he found for capital rape-murders applies to all crimes. Risinger describes how he got these results emphasizing that in order to derive a factual wrongful conviction rate, we must have a numerator and a denominator.<sup>30</sup> In his numerator, Risinger only included DNA exonerations to avoid any debates about factual innocence versus court misconduct. Of course, since not all overturned convictions involve DNA, his numerator is cautiously small at 10.5. This number represents eleven defendants of capital rape-murder trials who were found to be factually innocent between 1982 and 1989. Risinger subtracted one-half of an exoneration in order to make his figures even more conservative. As he states: "If we give an exceedingly generous probability of one in twenty to the factual guilt of an apparently exonerated defendant, then a statistical exclusion of one-half an exoneration covers it."<sup>31</sup>

Risinger recognized that in order to reach a defensible conclusion, the denominator should be solely made up of "capital convictions in which it is reasonable to believe that bodily sources of DNA might have been left in such a way as to provide the basis for including or excluding a defendant as the possible perpetrator."<sup>32</sup> Since there were 2235 capital sentences from 1982 to 1989 and since 21.45% of capital sentences between those years involved a rape-murder, 2235 multiplied by .2145 produced a denominator of 479. From these numbers, Risinger concludes that a factual innocence rate of rape-murders within this time frame must be a bare minimum of 2.2%. However, he then reduces the denominator to 319 because he estimates from Innocence Project data that 33.3% of rape-murder cases yield no usable DNA. With this subtraction made, he arrives at a minimum innocence rate of 3.3% among these certain cases and within this specific time period.

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<sup>28</sup> Michael D. Risinger, "Innocents Convicted: An Empirical Justified Factual Wrongful Conviction Rate," *Journal of Criminal Law and Criminology*, 96 (2006-2007): 761.

<sup>29</sup> The total prison population, both federal and state, in 2007 according to the BJS was 1,598,316 people.

<sup>30</sup> Risinger, "Innocents Convicted: An Empirical Justified Factual Wrongful Conviction Rate," 768.

<sup>31</sup> Risinger, "Innocents Convicted: An Empirical Justified Factual Wrongful Conviction Rate," 774.

<sup>32</sup> *Ibid*, 772.

In order to produce a range, Risinger then goes on to find a maximum innocence rate. He believes the maximum is less than double, which would make it 6.6% and so argues “it is fair to put a reasonable maximum under these circumstances at around 5%.”<sup>33</sup> His evidence for this maximum appears to be concluded rather quickly; however, his minimum estimate for capital-rape cases between 1982 to 1989 (inclusive) seems defensible due to his careful logic and data collection. It is also in line with the subsequent estimate of Samuel Gross (2014) who estimated a 4.1% error rate for capital convictions. Accepting this 3-5% error rate of factual innocence in capital cases is scary and certainly cannot be waved away as insignificant for those both inside and outside the criminal justice system.

More recently, Garrett (2015) showed that out of the pool of 250 DNA exonerees at the time, 68% of those were exonerated from rape cases. This is significant since only 12.5% of all sentenced prisoners in 2014 were convicted of rape or sexual assault.<sup>34</sup> As previously mentioned, this indicates that exonerees in rape cases are easier to find since the perpetrators are more likely to leave DNA evidence compared to other types of crimes. It seems likely that other crimes that do not leave DNA evidence as often could have this high rate as well, but we do not yet have a way of knowing for sure.

#### **v. Beyond DNA Testing**

Because death penalty cases are so unique it is also important to look at studies that have sought to estimate the total rate of false convictions using mechanisms other than DNA testing. Among peer-reviewed studies, there seems to be general consensus that the error rate is likely no lower than one percent and no higher than three to five percent. Thus, while we cannot extrapolate Risinger’s 3-5% or Gross’s 4.1% error rate estimate of wrongful rape and death sentences to the entire criminal justice system, many of the findings from studies that used other methodologies fit within this accepted total range of error.

One such mechanism that scholars use to model and estimate the error rate in our criminal justice system is through gauging professional perception—how often the people who work in the criminal justice system reasonably think that errors occur. Zalman, Smith and Kiger

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<sup>33</sup> Ibid, 780.

<sup>34</sup> Bureau of Justice Statistics, “National Crime Statistics,”(2015) 16.

“surveyed all sheriffs, a random sample of police chiefs, all trial and appellate judges (including Supreme Court justices), and all chief prosecutors in Michigan”<sup>35</sup> and from the 853 people who they surveyed they received 467 responses.<sup>36</sup> Respondents were asked to “estimate the percentage of wrongful conviction [meaning ‘actual innocence’] that occurs “in my jurisdiction” and “in the United States.”<sup>37</sup> For the estimates of wrongful conviction in their own districts:

Almost 25 percent of the defense attorneys gave an estimate of 4–5% wrongful convictions (the mode), and almost 30 percent put the proportion of wrongful convictions as 11% or higher... Police and prosecutors accounted for almost all of the respondents who believed that no wrongful convictions had occurred; defense attorneys estimated the largest percentage of wrongful convictions; and in judges’ opinions the frequency of wrongful convictions was higher than that estimated by police and prosecutors and lower than that estimated by defense attorneys.<sup>38</sup>

Given the aligned results from both DNA-based studies and professional assessment, it seems reasonable that the rate of wrongful convictions for all types of crime in the U.S. is somewhere between 1% and 5%.

If the U.S. currently detains 1.6 million people in prison,<sup>39</sup> a 1% error rate would mean that 15,615 of those people are wrongly incarcerated. Far worse, a 5% error rate would mean that 78,075 people are currently being punished for crimes that they did not commit. Given such a high number of innocent people being condemned to a punishment meant for someone else, it seems odd that, “Our judicial system does not normally conduct inquiries when miscarriages of justice occur.”<sup>40</sup>

Wrongly convicted prisoners are more than data; they are more than false positives (also known as type I errors in statistics when one asserts something that is not actually there) – they are living suffering human beings. It is appalling to both the individual and the community that our society has not done a better job of addressing the issue of wrongful conviction. It is unfortunate when a guilty person gets away with a crime, but far more unfortunate when we punish a blameless person. Before turning our attention to possible ways to prevent these terrible occurrences, it is helpful to look at the role of politics in this area.

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<sup>35</sup> Zalman, Smith and Kiger, “Officials’ Estimates of the Incidence of ‘Actual Innocence’ Convictions,” 81.

<sup>36</sup> *Ibid.*, 82.

<sup>37</sup> *Ibid.*, 85.

<sup>38</sup> *Ibid.*

<sup>39</sup> Carson, “Prisoners in 2014,” 15.

<sup>40</sup> Brandon L. Garrett, “The Banality of Wrongful Executions,” 112 *Mich. L. Rev.* 979 (2014): 992.

### *Political Aspects of the Issue*

The data on wrongful conviction are not just important for measuring human harm, but these numbers are also used to impact political positions and support judicial decisions. In fact, estimations of the number of wrongly convicted people have played a significant role in Supreme Court decisions on this subject.

One such famous estimation was made in a 2006 Op-Ed by Joshua Marquis, the District Attorney of Clatsop County in Oregon. Why is an estimate that was not peer-reviewed or published in an academic journal so significant? It is significant because the late Justice Scalia cited it in *Kansas v. Marsh (2006)*. In the Op-Ed, Marquis countered what he viewed as misconstrued “conventional wisdom: that our prisons are chock-full of doe-eyed innocents who have been framed by venal prosecutors and corrupt police officers with the help of grossly incompetent public defenders.”<sup>41</sup> In order to do this, he reached an estimate of the actual number of innocent people behind bars or on death row from an exhaustive study carried out by University of Michigan law professor Samuel Gross that was published in the Winter 2005 *Journal of Criminal Law and Criminology*. In this study, Gross documents 340 inmates who were exonerated between 1989 and 2003. Making what Marquis considers to be a wildly generous calculation, he states:

[L]et's assume that he understated the number of innocents by roughly a factor of 10, that instead of 340 there were 4,000 people in prison who weren't involved in the crime in any way. During that same 15 years, there were more than 15 million felony convictions across the country. That would make the error rate .027 percent — or, to put it another way, a success rate of 99.973 percent.<sup>42</sup>

These words and data were cited in Justice Scalia's concurring opinion where he agreed with the Court's decision that a death penalty statute that allows the defendant to be sentenced to death when “mitigating and aggravating factors” are found to be of equal weight does not violate the Eighth Amendment's prohibition on cruel and unusual punishment. Granted, 4,000 people is still a lot of people who are undeservingly in prison, yet both Marquis and Scalia claim that it is insignificant for the total number of individuals who are incarcerated in our country. Marquis

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<sup>41</sup> Marquis, “The Innocent and the Shammed.”

<sup>42</sup> Ibid.

even wryly notes that many industries would be ecstatic to have a 99.973 rate of success. The two do not see the system as broken, but instead as one that is doing its best.

Justice Scalia is happy with this high estimate of success as he points out that: “One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation.”<sup>43</sup> With this in mind, he indicates that a low rate of false conviction is something we should be proud of. Marquis and Justice Scalia believe that Americans (especially death penalty abolitionists) should become less concerned with innocent people being incarcerated and more concerned with guilty perpetrators being let off.

For me, Justice Scalia’s thinking in *Kansas v. Marsh* and his reliance on Marquis’ data is wishful. It’s true there will always be mistakes within any criminal justice system, but when these mistakes become consistent and systematic rather than anomalies, there is a societal problem. Scalia also argued more recently in *Glossip v. Gross* (2015) that innocent individuals facing the death penalty are better off than those sentenced to life in prison because they are more likely to be exonerated given the strong anti-death penalty lobbies, the strict scrutiny applied in these cases and the systematic appeals for which they are eligible.<sup>44</sup>

Following Scalia’s 2006 citation of Marquis’s 4,000 estimation that was based on Gross’s study, Gross came out with a new study in 2004. In it, he conservatively estimates that there is a 4.1% rate of false conviction among death-sentenced defendants.<sup>45</sup> After pointing out that the arithmetic that Justice Scalia relied on is “silly,”<sup>46</sup> he goes on to try to find a more logical estimate of the error rate. To do this, he explains that because individuals on death row are tried and retried so many times whereas individuals in the general prison population are rarely represented by a lawyer again after their initial conviction, we can use death penalty cases as a gage, yet they unfortunately cannot be used to generalize the wrongful conviction rate in all crime since murder is a unique type of crime in the way that it is treated.<sup>47</sup> Only 0.1 percent of people in prison are sentenced to death row so Gross is researching a very specific subset of

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<sup>43</sup> *Kansas v. Marsh*, 548 U.S. 113 (2006).

<sup>44</sup> *Glossip v. Gross*, 576 U.S. (2015).

<sup>45</sup> Samuel R. Gross, et al. "Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death," *Proceedings of the National Academy of Sciences* 111, no. 20 (2014): 7234.

<sup>46</sup> *Ibid*, 7230.

<sup>47</sup> *Ibid*.

people within the criminal justice system; however, he has a good reason for sticking to this group as he explains:

The vast majority of criminal convictions are not candidates for exoneration because no one makes any effort to reconsider the guilt of the defendants. Approximately 95% of felony convictions in the United States are based on negotiated pleas of guilt (plea bargains) that are entered in routine proceeding; at which no evidence is presented. Few are ever subject to any review whatsoever.<sup>48</sup>

Death penalty cases can, however, serve as a natural experiment to decide how many cases would be overturned if they received the same scrutiny. These are a small population of cases where the system checks and double checks its work, allowing us to get a taste of what the results would be if the entire system were to continuously question itself until it was sure that it made the correct verdict. It's important to note that here, Gross also speculates why there are so many false convictions. Scalia's fixation with the accuracy of the court system does not hold up because most felony convictions do not see a courtroom.

At some point, we must set aside what our judicial system does and does not do and ask: Do we want to accept this? This is the question that I will develop in my next section by looking through the lens of society and asking what we want to do about this issue. Before I do, I will address one final piece of the data on wrongful incarceration that I view is an important primer for the theoretical discussion of this topic – the inequality of the risk.

### *Is the Risk Shared Equally?*

A final significant aspect of the size and impact of the exoneree issue is determining whether or not the risk of wrongful conviction is equally shared among U.S. citizens. This is important not only to characterize the problem but also in considering the argument against compensation that wrongful conviction is a risk that each citizen must accept as part of having a necessarily imperfect criminal justice system.

At least once a month there seems to be a front-page story in the New York Times about erroneous conviction. Just recently, an article told of the death of a twelve-year old boy that was unexpectedly strangled in his mother's apartment in a small town in upstate New York. Within a few hours of his discovery the police arrived at Mr. Hillary's door. Soon after they dropped

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<sup>48</sup> Ibid, 7230.

white suspects who could have been equally as likely to have committed the crime in turn for Mr. Hillary, their only black suspect:

The prominent civil rights lawyer Norman Siegel has consulted with the defense on the case, believing Mr. Hillary to be innocent.

In Mr. Hillary's view, the prosecution's zeal — as well as the way he has been treated since Garrett's death — may revolve on one other salient detail.

"It goes to show the color of my skin," Mr. Hillary said in a soft Caribbean cadence.<sup>49</sup>

Despite making the front page, this is not a unique story. Out of the 337 post-conviction DNA exonerations made in the U.S. by February 2016, 206 of those were African-American exonerees.<sup>50</sup>

There is little doubt that the rate of incarceration in the U.S. is racially skewed. At the end of 2013, a total of 36.2% of the prison population was African-American, 21.9% was Hispanic and 33.3% was white.<sup>51</sup> This compares to 2014 census data showing that the general population contains 13.2% African-American, 17.4% Hispanic, and 77.4% White. In other words, the African-American population in prison was significantly higher than the population, the Hispanic prison population was slightly higher, and the White prison population was significantly lower.

The issues of false conviction rates and exoneration rates by race in the US is less clear, as is the larger question of whether or not every member of our society takes the same chance of becoming wrongly incarcerated than others. If one of the goals of our criminal justice system is to protect the innocent, yet a segment of our population is disproportionately subject to false convictions with less likelihood of exoneration, than there is a serious systemic problem.

The exoneration data by race is a challenge to interpret. Out of the 337 Innocence Project exonerees as of May 2016, 206 are African Americans, 104 are Caucasian, 25 are Hispanic and 2 are Asian-American.<sup>52</sup> This means that African-Americans make up 61.1% of all DNA exonerations done by the Innocence Project compared to 36.2% of the prison population and 13.2% of the general population. Does this mean that the Innocence Project disproportionately seeks African-American cases? Or that African-Americans are more likely to be involved in cases with DNA evidence? Or that African-Americans are more likely to be wrongly convicted?

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<sup>49</sup> Jesse Mckinley, "Tensions Simmer as a Small Town Seeks Answers in a Boy's Killing," *The New York Times*, 2016.

<sup>50</sup> The Innocence Project, "DNA Exonerations Nationwide."

<sup>51</sup> Carson, "Prisoners in 2014," 13.

<sup>52</sup> The Innocence Project, "DNA Exonerations Nationwide."

The Caucasian exoneration rate is slightly lower than the Caucasian incarceration rate with 30.9% of the DNA exonerations compared to a 33.3% incarceration population. Hispanics, on the other hand, appear to be underrepresented in DNA exonerations making up only 7.4% of the Innocence Project's exonerations compared to making up 21.9% of the total US prison population. Does this mean that the Innocence Project does not seek Hispanic cases? Or that Hispanics are less likely to be involved in cases with DNA evidence? Or that Hispanics are less likely to be wrongly incarcerated?

The data is a bit confusing since it seems plausible that African-Americans are more likely to be wrongly convicted due to racial bias, however, it does not seem plausible that Hispanics are less likely. Perhaps the Innocence Project needs to do a better job of seeking out Hispanic cases. At the same time the data does suggest that African-Americans are more likely to be convicted of a crime that they did not commit than other racial groups.

Seeing as only two people out of the 337 DNA exonerees were female, men appear to have a much higher chance of being wrongly convicted than women. It's true that men make up more of the total US prison population and women only make up 6.7% of it; however, two female exonerees out of the 337 give us a percentage of only .6%, which is notably lower.



### III. Addressing the System—Minimizing the Risk of Wrongful Conviction

In the previous section I discussed the social science data and analysis that surrounds the size and scope of wrongful conviction within the U.S. criminal justice system. This analysis indicates that wrongful conviction is not a matter of anomaly; it is a systematic problem that we need to address through concrete solutions. While there are already many organizations in the Innocence Network that seek to find people who are currently being wrongly incarcerated, this information also causes us to ask: What could be done to reduce the risk of defendants being falsely convicted now and in the future? Use greater scrutiny? Conduct more DNA testing? Stop using lineups? Scholars have suggested a plethora of mechanisms for modifying the criminal justice system in order to make the process more fair and less prone to error, yet it is difficult to know which ones to focus on.

According to Chief Justice Roger Traynor of the Supreme Court of California, “Errors are the insects in the world of law, traveling through it in swarms, often unnoticed in their endless procession. Many are plainly harmless; some appear ominously harmful. Some, for all the benign appearance of their spindly traces, mark the way for a plague of followers that deplete trials of fairness.”<sup>53</sup> Given that these errors have added up to putting innocent people in prison for 14 years on average and for a total of 4,606 years,<sup>54</sup> something needs to be done. This section seeks to address the most harmful and systemic errors in our criminal justice system. The following section will address how we should deal with the consequences of these errors through compensation, as well as what our priorities should be in moving forward.

Scholars have come to some agreement on the many sources of error that lead to wrongful convictions. Moreover, this base of knowledge is not particularly new. In their 1973 paper “One Hundred Years Later: Wrongful Convictions After a Century of Research,” Jon B. Gould and Richard A. Leo state that we are in no way “unaware of the sources of these errors.”<sup>55</sup> Gould and Leo outline seven categories of conviction error: (1) mistaken eyewitness identification; (2) false

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<sup>53</sup> Garrett, “Convicting the Innocent: Where Criminal Prosecutions Go Wrong,” 183.

<sup>54</sup> This is the combined number of years and the average number of years that the 337 DNA exonerees from the Innocence Project spent wrongly incarcerated. (The Innocence Project, “DNA Exonerations Nationwide.”)

<sup>55</sup> Gould and Leo, “One Hundred Years Later: Wrongful Convictions After a Century of Research,” 838.

confessions; (3) tunnel vision; (4) informant testimony; (5) imperfect forensic sciences; (6) prosecutorial misconduct; and (7) the role of race, media and failure of post-conviction remedies.<sup>56</sup> The authors conclude that it is crucial that researchers take action in contributing to policy and systematic changes in the criminal justice system so that research on wrongful conviction does not become a purely “academic exercise.” They are troubled to find that the criminology field, unlike the medical and transportation safety fields for example, does not yet have a culture or a system of incentives established to learn from its mistakes.<sup>57</sup> Even 43 years later, it appears that the criminal justice system has yet to develop this type of internal learning culture, possibly due to its often partisan instead of professional nature. Instead, NGOs are the ones who put external pressure on the justice system.

However, I do not think that we can solely blame the partisan nature of criminal justice for the system’s lack of change and growth. As a profession, the criminal justice system does its job—it works to find those who are guilty and convict them. Perhaps the problem is that it is not part of the industry’s job description to find the innocent and exonerate them. Brandon L. Garrett points out in his book *Convicting the Innocent*, that appellate judges view their responsibility to be correcting legal errors, not factual errors. Unfortunately, many of the errors in exonerees’ cases are factual errors with evidence, testimony or false confessions.

Making matters worse, in an attempt to make judge’s jobs easier the U.S. Supreme Court has designed multiple “tests” to determine the potential harm of trial errors. This makes sense because judges face the task of having to decide which errors made in the trial process merit throwing out the trial and which are “harmless.” Thus, the “harmless error test” was developed in *Chapman v. California (1967)*, and it serves to determine if errors made at criminal trial, even of a Constitutional magnitude, are bad enough that the judge should grant a new trial. The Court held that all types of errors (including Constitutional ones) can be deemed as “harmless error” so long as no reasonable doubt exists that the error could have led to the verdict of the case in question.<sup>58</sup> In Garrett’s study he found that the “harmless error test” can actually be quite harmful. Of the 250 DNA exonerations that he studied, 165 exoneree cases had a written

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<sup>56</sup> Ibid, 841.

<sup>57</sup> Ibid, 866.

<sup>58</sup> Jeffrey O. Cooper, "Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine," *University of Kansas Law Review* 50.2 (2001-2002): 311.

decision. Of these 165 cases, in 39 or 30% of them the court had used the “harmless error test” to refuse a reversal of the conviction. These were people pleading a reversal who we now know to be innocent.

*Brady claims* (*Brady v. Maryland, 1963*) are another example of a possible claim that a petitioner might make; yet that in practice do not generally provide relief to the defendant. Even if a defendant successfully shows that “the prosecutor failed to disclose evidence of innocence to the defense, and this evidence was significant [...] enough that there is a reasonable probability that concealing the evidence affected the outcome of the trial,”<sup>59</sup> they are still unlikely to receive a reversal (only four out of the forty-two in exoneree cases were successful). It appears that one strategy for making the criminal justice system more responsive to potential wrongful convictions would be to strengthen the impact of challenges such as *Brady* claims, and reduce the impact of mechanisms that make the court less flexible, such as “harmless error tests.”

Another such mechanism stems from *Strickland v. Washington*, which decided that adequate defense representation must only fall “within a wide range of reasonable professional assistance.”<sup>60</sup> This wording makes it nearly impossible to prove a violation of the *Strickland* standard. *Strickland* is also known as the “foggy mirror test” because it more or less states that “if a mirror held under the defense lawyer’s nose during trial would fog up, indicating the lawyer is alive and breathing, the lawyer has provided adequate assistance” to the defendant.<sup>61</sup> Judges are unlikely to site prosecutorial misconducts and even if they do, judges can still claim that the defendant was not “prejudiced” by it and deny a reversal. Thus while under the Sixth Amendment everyone has the right to a trial, the right to a specific quality of trial is less clear.

Another disconcerting decision that set a precedent that is tolerant of potential trial errors was developed in the Supreme Court case, *Manson v. Brathwaite (1977)*. Here, the Court held “that even if the police engage in suggestive procedures so potentially misleading that their conduct violates due process, the identification may still be admitted at trial if it was otherwise ‘reliabl[e].’”<sup>62</sup> We now know that one out of four people who were erroneously convicted and

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<sup>59</sup> Garrett, “Convicting the Innocent: Where Criminal Prosecutions Go Wrong,” 203.

<sup>60</sup> Ibid, 205.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid, 188.

later exonerated by DNA made a false confession or incriminating statement,<sup>63</sup> often under pressure from police interrogators. Thus this 1977 ruling seems to be an important ingredient in the recipe for erroneous conviction.

If we add to the pot another innocence standard articulated in *Herrera v. Collins* (1993), we see that habeas corpus rules make it nearly impossible for anyone to ever be exonerated without clear DNA evidence to prove their innocence. In *Herrera v. Collins* the question was posed to the Court: Is the Eighth Amendment violated if an innocent person is put to death? Here, the majority decision failed to answer this question; only the concurrence of Justice O’Conner and the dissent affirmatively responded that yes, it is cruel and unusual punishment for the State to end the life of an innocent person. Garrett points out that, “[w]hile this may come as a surprise, since a right to be freed if one is innocent seems fundamental, the Supreme Court to this day has not decided whether a claim of innocence can in fact be made under the U.S. Constitution.”<sup>64</sup> Worse, the Opinion of the Court delivered by Justice Rehnquist, disallowed future habeas reviews from making a plea of actual innocence by the defendant stating that: “Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.”<sup>65</sup> Rehnquist’s main concern appears to be that of society’s resources, yet he and the majority do not address society’s moral obligation.

Together, these systematic procedures and precedents seem to have been decided in the name of efficiency, yet together, they also seem to undermine the quality and flexibility of the system as a whole, especially its ability to prevent wrongful conviction. Unfortunately, the difficulty of being exonerated has only increased with the 1996 enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA). The AEDPA imposed strict rules that limit “federal habeas corpus review, strict time limits, limits on filing more than one habeas corpus,…”<sup>66</sup> etc. Given these multiple roadblocks to exoneration, it’s inconceivable that anyone is ever successful. In order to increase the chances for innocent individuals to be exonerated, Brandon Garrett argues that if we are going to provide more resources in the process, they should be focused during “the appeals, when less time has passed, when convicts have lawyers and when

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<sup>63</sup> Innocence Project, “False Confessions or Admissions,” accessed February 2016.

<sup>64</sup> Garrett, “Convicting the Innocent: Where Criminal Prosecutions Go Wrong,” 203.

<sup>65</sup> *Herrera v. Collins*, 506 U.S. 390 (1993).

<sup>66</sup> Garrett, “Convicting the Innocent: Where Criminal Prosecutions Go Wrong,” 205.

sufficiency of evidence claims can be raised.”<sup>67</sup> He adds that we “should also examine ways to enhance factual review during post-conviction proceedings.”<sup>68</sup> In short, the sooner we can exonerate an innocently convicted person the better both for the ease of the procedural system and to minimize their personal lost time.

Because this does not always work in practice, the issue of compensation is the focus of the next section. It is worth pointing out here that one of the best forms of “compensation” is actually for society to invest in systematic reform of the criminal justice system. Presently there is no mechanism within the system to consistently do this. However, given the number of barriers currently in place that hinder factual review of post-conviction innocence claims, it is time the State to provide those mechanisms. Below I present strategies for fixing these and other procedural mistakes that are made in the criminal justice system, inevitably leading to false conviction and retention.

There are numerous potential models for effective reform of the criminal justice system that would increase the likelihood of catching and reversing false convictions. Brandon Garrett has applauded North Carolina for the reforms that they have implemented. After having at least seven DNA exonerations in 1995, the chief justice of the North Carolina Supreme Court decided that it was his duty to prevent further wrongful convictions. Thus, North Carolina adopted the Actual Innocence Commission in 2002. First, this commission drastically changed the lineup procedure. It then pressured officials to enact laws to reduce false confessions including interrogation recording in homicide cases, better preservation of evidence, access to DNA testing, and more post-exoneration support for the wrongfully convicted.<sup>69</sup> The commission also looked at measures to improve factual review of post-conviction innocence claims and used elements from Canada and the UK’s justice systems to create an Innocence Commission whose sole goal is to examine whether a person is innocent and should be exonerated. More than ten states have taken up similar reforms to North Carolina, but none have been quite as effective.

Another more costly yet highly effective way to ensure that the system finds wrongly convicted individuals is to offer post-conviction state and federal review for all prisoners serving

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<sup>67</sup> Ibid, 206.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid, 242.

life without parole sentences. This makes sense because, as Scalia has rightly pointed out (and as strange as it may seem), it is more difficult to be exonerated when serving a life sentence than when on death row.

Both innocent commissions and automatic post-conviction review would be big steps towards making it easier for innocents to be exonerated from prison. If the goal is to prevent the incarceration of innocent people in the first place, however, there are more steps that need to be taken. Many of these are not as labor intensive or as costly as creating an entire commission devoted to wrongly incarcerated individuals or providing every individual serving a life sentence post-conviction review. Scholars recommend that police departments implement mandatory videotaping in interrogations. This is an inexpensive mechanism that could help protect officers and witnesses alike. This would also make judges jobs easier because instead of having to decide the credibility of what was said during an interview that they were not present at, they could see what went on during the interrogation for themselves.<sup>70</sup>

The police, however, are just one element of the system that produces wrongful convictions; prosecutors have also been pointed to as another culprit who enhances the rate of conviction error. There is an unfortunate belief that prosecutors want to prosecute the defendant regardless of their perceived innocence. While there have been some cases of prosecutorial misconduct to achieve conviction, most prosecutors want to do a good job and convict the right person. Even so, there is a strong argument to be made for “open-file” policies that give the defense access to the prosecution’s file. This would be a positive systematic reform to stop incarcerating innocent people because there have been many cases where the prosecution has hidden evidence that the defendant was innocent. One recent example where this policy could have spared 25 years of an innocent man’s life is the case of Andre Hatchett who was exonerated by the Innocence Project on March 10<sup>th</sup>, 2016. The Innocence Project reported that:

The state’s case against Andre Hatchett was based entirely on one eyewitness, but records reveal this **witness identified another person as the assailant** on the night of the crime. That information was never disclosed to Mr. Hatchett’s defense attorneys. In addition, at the time of the crime, Mr. Hatchett was in a leg cast and on crutches, which would have made it virtually physically impossible for him to

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<sup>70</sup> Ibid, 203.

commit the murder. **His defense lawyers never presented these medical records at trial.**<sup>71</sup>

Cases like these are unnerving, and could be prevented using the knowledge that we have and the solutions that have been proposed.

It is baffling that so many states have not sought out reform. Noting that wrongful conviction is a “double failure”—not only does the wrong person get punished, but the perpetrator is still among us, — Stephanie Kent and Jason Carmichael asked the question: Why have some states instituted laws aimed at reducing wrongful conviction errors while others have largely avoided the issue?<sup>72</sup> Kent and Carmichael hypothesized two major explanatory reasons: (1) political climate and (2) extent of interest group advocacy.

Kent and Carmichael found empirical evidence that disputed claims that wrongful conviction was a bipartisan issue and not subject to politics or special interest advocacy. “These findings counter claims among innocence movement leaders and others that wrongful conviction is a valence issue that is supported by both liberals and conservatives.”<sup>73</sup> However, a Republican governor is not enough to cause a state to lack policies that work to minimize and compensate wrongful convictions. The authors found that the legislature (not the governor) has more impact on whether or not these laws get passed.<sup>74</sup>

All in all, Kent and Carmichael found that political climate plays an important role in the passage of laws that criminal justice scholars, including the Innocence Project itself, support. “Our findings here thus support the idea that changes to social control apparatuses in the U.S., including legal change, are more responsive to the social and political climate than actual levels of crime.”<sup>75</sup> Nevertheless, only looking at the “redness” or “blueness” of a state does not tell the whole story about the work that needs to be done in the innocence realm.

Even more important than political climate are advocacy groups working to lobby and pressure legislatures to pass laws that favor innocent defendants. “We found that states with more Innocence Network organizations are nearly two-and-a-half times more likely to have laws

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<sup>71</sup> Jennifer Peltz, “Judge Reverses Conviction, Freeing Man Who Served 25 Years In 1991 Brooklyn Murder,” *ABC News*, March 10, 2016.

<sup>72</sup> Stephanie L. Kent and Jason T. Carmichael, “Legislative responses to wrongful conviction: Do partisan principals and advocacy efforts influence state-level criminal justice policy?” *Social Science Research* 52 (2015): 147.

<sup>73</sup> Kent and Carmichael, “Legislative responses to wrongful conviction: Do partisan principals and advocacy efforts influence state-level criminal justice policy?,” 158.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

requiring the preservation of DNA evidence after a criminal trial than those without an office in the state.”<sup>76</sup> It is surprising that advocacy groups were seen as more likely to create legislation than the awareness of wrongful convictions in a State. Texas is known for its positive legislation that was developed after a man died in prison who was later found to be innocent. However, Kent and Carmichael state, “perhaps our most important and unexpected finding is that the frequency of discovered wrongful convictions in a state does not affect its likelihood of implementing legislative changes aimed at preventing wrongful convictions.”<sup>77</sup> It’s really advocacy groups that affect change and are able to do the most work, even where there is “a majority Republican voting public.”<sup>78</sup> This has implications for further solutions, especially in many of the blue states that have yet to adopt these kinds of laws. This also suggests that NGOs such as innocence projects, which have cropped up all across the country, are doing effective work.

It is evident that both State and Federal legislative action is needed to fix the problems with our criminal justice system. There has been some effort on this front, for example, the U.S. Congress passed the Innocence Protection Act as part of the Justice for All Act (2004).<sup>79</sup> This piece of legislation granted federal inmates the right to petition for modern DNA testing and incentivized states to do the same. Kent and Carmichael establish a coding scheme to assess how well state legislatures were doing in this area. They focused on three leading factors that lead to wrongful convictions and the legal solutions that coincide with them. They also added a fourth legal method of assistance to their coding, monetary compensation, to help exonerees once they are released. The three laws that they focused on were: prohibiting “show-ups,” a procedure where the victim is brought directly before the perpetrator and asked if he or she is the person (77-84% of wrongful convictions included this practice), recorded interrogations to limit or more easily find false confessions (16% of the first 250 DNA exonerees confessed to crimes they did not commit), and mandatory preservation of DNA to limit the mishandling of scientific evidence (the Innocence Project claims that over 50% of the cases they handle are involved with this<sup>80</sup>).

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<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid, 148.

<sup>80</sup> Innocence Project, "Getting It Right: Forensics," YouTube, 2011. Accessed April 13, 2016.

Given how commonly our system produces false convictions and how difficult it is to prove one's innocence, another practical way to reduce the size and inequity of the problem is to reduce the severity of punishment. The Supreme Court ruling that the death penalty is constitutional raises the stakes for wrongfully convicted individuals, since those who are sentenced and put to death can never receive individual compensation for the mistake. DNA testing is not cheap—the Innocence Project pays over \$1,000 per test and some cases involve multiple rounds of testing on several different items of evidence.<sup>81</sup> While this seems expensive, consider how much it costs for a trial, especially a capital one, to proceed, and how much more it costs the victim of false conviction, including family and friends.

### ***Capital Punishment Reform***

In 1972 the Supreme Court decided in *Furman v Georgia* (1972) that in specific cases the death penalty constitutes cruel and unusual punishment, thus violating the Eighth Amendment. They decided that, “states and the national legislature [should] rethink their statutes for capital offenses to assure that the death penalty would not be administered in a capricious or discriminatory manner.”<sup>82</sup> Apart from Justice White, the ruling majority was left leaning, while the dissents came from the justices on the right. Over thirty years later, this same ideological split was seen in *Herrera v Collins* (1993) when this time, the right majority, including Justice White, refused to grant that sentencing an innocent person to death is a violation of the Eighth Amendment and ruled against the petitioner. They decided that there is no “constitutional claim for relief based upon his newly discovered evidence of innocence.”<sup>83</sup> Justice Scalia concurred with the Court. So as not to be mistaken he wrote: “There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.”<sup>84</sup> However, Scalia's logic had unfortunate consequences because there was no

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<sup>81</sup> Innocence Project RSS, "FAQs," Accessed April 15, 2016.

<sup>82</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>83</sup> *Herrera v Collins* 506 U.S. 390 (1993).

<sup>84</sup> *Herrera v Collins* 506 U.S. 390 (1993).

“text”, “tradition” or “contemporary practice” to address the wrongs done to innocent citizens, incarcerated through no fault of their own.

Given authentic concerns of wrongful conviction, innocence advocates call for the removal of the death penalty as a mechanism to decrease the severity of punishment. This seems desirable given the uncertainty surrounding conviction in capital cases. Garrett cites a famous study, done by Liebman, Fagan and West, which found that all capital punishment cases from 1973 through 1995 both in state and federal post-conviction review had an extremely high reversal rate of 68%. The reversal rate for noncapital cases, Garrett found, is around 9 or 10%. He states “... the incidence of reversals on factual claims in appeals of serious convictions provides cause for concern regarding the accuracy of such criminal trials. Because DNA evidence is not available in most cases, we can never know how many post-conviction petitioners are really innocent.”<sup>85</sup> All of this information combined with the fact that, as previously mentioned, the Supreme Court still has not responded as to whether putting a factually innocent person to death is a violation of the Eighth Amendment, suggest we still have a long way to go.<sup>86</sup>

So far, I have shed light on the surprising number of factually innocent people who have been or currently are being wrongly incarcerated and how difficult the system makes their exoneration. In the next section, I discuss whether exonerees should be compensated and, if so, what this compensation should be.

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<sup>85</sup> Garrett, “Convicting the Innocent: Where Criminal Prosecutions Go Wrong,” 198.

<sup>86</sup> *Ibid*, 203.

## IV. Compensation

### i. Should Society Compensate Exonerees?

Is society responsible for compensating those who we find to have been wrongfully convicted in our justice system and are factually innocent? Where is the fault and who is responsible? Some argue that the US criminal justice system is not at fault. They argue, for example, that we view DNA and other types of innocent exoneration as a success of the system, not a failure.<sup>87</sup> But as Brandon L. Garrett, Justice Thurgood Marshall Distinguished Professor of Law at University of Virginia points out, DNA technology is typically introduced into a case from the outside, and thus, should be thought of as a failure of the system rather than a success.<sup>88</sup> If the justice system has fundamental flaws and if erroneous convictions occur at the remarkable rate that many scholars suggest—that is, around one in twenty—then it seems reasonable to conclude that we as a society have a generic problem on our hands. This problem raises some important philosophical questions, many of which touch on the fundamental relationship between those who govern and those who are being governed.

The question of whether or not society should compensate exonerees is both important and controversial. There are arguments for both sides and this question does not call for a simple yes or no binary decision. On one hand, we can see compensation as a tax that society should pay for having a criminal justice system that makes mistakes. I will call this view, the “Social Safety Tax” viewpoint. On the other, we can look at the possibility of a person being convicted of a crime that they did not commit as a small risk that each citizen accepts as being a part of a society with a justice system that benefits all, but is necessary imperfect. I will refer to this position as the “Play at Your Own Risk” viewpoint.

I see three distinct, primary reasons why society should support and create laws that advocate for the “Social Safety Tax” perspective and against individuals having to “Play At

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<sup>87</sup> “Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success,” Antonin Scalia, *Kansas v Marsh* 548 U.S. 163 (2006): 12-13.

<sup>88</sup> Garrett, “Convicting the Innocent: Where Criminal Prosecutions Go Wrong,” 241-274.

Their Own Risk.” Society should compensate individuals who are wronged by the criminal justice system because:

- Our society believes in and has set precedents for compensating citizens when events occur that are beyond their control,
- our society values equal opportunity and justice and we are not upholding this value if we do not compensate those who have been wrongly set back (Some might go so far as to call this a right under the Privileges and Immunities Clause of the Fourteenth Amendment, which prohibits a State from curtailing “the privileges or immunities of citizens”), and
- the risk of being erroneously convicted is not equally shared (i.e. it is not 1 in 318.9 million for each citizen) and thus some people face an unfairly higher probability of wrongful conviction than others.

Together, these points argue that it is unjust for the majority of us to benefit from a system if we do not provide compensation to those people who it unfairly harms. Private industry such as oil companies benefit from our business, yet when they cause negative externalities such as oil spills, we expect and demand for them to clean it up. Compensation to innocent exonerees is no different, except that society is the one responsible for cleaning up a mess that is caused by a system we all benefit from.

In Part II of this section I take the position that society is responsible for compensation and tackle some of the difficult questions regarding the appropriate ways to provide this compensation. First, however, I address some of the counterarguments that have been made to this position that exonerees should be compensated by society.

### ***The Counterarguments***

In *Convicting the Innocent*, Borchard raises three arguments that have been made against compensation: (1) the State cannot be held accountable for the hardships that particular individuals have to suffer when it is exercising its “sovereign right,”<sup>89</sup> (2) if the State is acting lawfully it cannot injure anyone,<sup>90</sup> and, perhaps the strongest of the three, (3) there can be no

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<sup>89</sup> Borchard, *Convicting the Innocent*, 388.

<sup>90</sup> *Ibid*, 389.

liability if there is not fault. Addressing these arguments sheds additional light on the philosophical and political aspects of the exoneree compensation issue.

(1) The State cannot be held accountable for the hardships that particular individuals have to suffer when it is exercising its “sovereign right.”<sup>91</sup>

This first argument asserts that the State cannot be held accountable for harm to individuals in the course of carrying out its lawful duties. The State is doing the best job it can, and it cannot be perfect. Therefore, it is not responsible for “incidental harm” in the process of doing its job. But in the case of systemic wrongful conviction, there is another way to look at this.

The key distinction here is that States are not simply doing their jobs and being surprised by the rare outlier case where individuals suffer harm; they are fully aware that harm is being done on a regular basis, but are choosing not to address that harm out of convenience. In the U.S. the principle that government rules under the consent of the governed goes all the way back to the Declaration of Independence. Under the influence of Locke, Jefferson wrote:

... governments are instituted among men, deriving their just powers from the consent of the governed... Whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.<sup>92</sup>

Paired here with the assertion that governments derive their powers from the consent of the governed is the follow-on assertion that when the government becomes destructive of the safety and happiness of its citizens, they have the right to alter or abolish it.

Given the approximately 5% rate of wrongful conviction and the use of DNA testing to provide concrete evidence of innocence, a State’s refusal to provide compensation for wrongful punishment can be seen as an intentional act that is destructive to its citizens, not, as this argument asserts, just the State doing its job.

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<sup>91</sup> Ibid, 388.

<sup>92</sup> "The Declaration of Independence: A Transcription," National Archives and Records Administration, accessed April 20, 2016.

(2) If the State is acting lawfully it cannot injure anyone.

This second argument asserts that so long as the State is not breaking any law, it cannot harm anyone. This appears to be untrue simply on the face of it. There is no requiring States to compensate exonerees (although it is recommended in the Federal law), yet exonerees have suffered catastrophic harm. There is no law broken when a hurricane destroys a coastline, yet we compensate people for their losses. In addition, society is deriving benefits from the criminal justice system that could not currently be derived without the systemic occurrence of false conviction. In that sense, society owes these victims.

We already compensate individuals who face harms that are brought onto them for the greater good of society. For example, if the State needs to seize an individual's property in order to complete a public project such as demolishing a person's waterfront property in order to build a bridge, the State has to pay the owner of the waterfront property compensation. It is unjust for the State to claim that the owner benefits from the bridge just as much as everyone else does and that having their property seized was simply a risk that each member of society faces.

Being wrongly convicted of a crime is similar. In order to have a criminal justice system the State must subject everyone to the risk of being wrongly incarcerated (even if this risk is unequal). So, while everyone benefits from this establishment, when one person pays an unusual price for the shared public good (such as being mistakenly convicted) that person is owed compensation, parallel to property owners who pay an unusual price for public goods (such as losing their house) are compensated.

While compensation is and mostly should be for the purpose of serving the individual who has faced unimaginably unfair treatment, it also has a positive externality on society. This phenomenon can be witnessed when there is an outcry for the US government to come to the aid of people harmed by natural disaster. It is expected that the State provide disaster relief, which is merely assistance provided to people who are harmed through no cause of their own. Social safety net payments and victim's compensation are other examples of kinds of compensations that are allocating to individuals and families who have suffered through no fault of their own. If we didn't believe in compensating harms faced due to a sacrifice for the public good or for unpreventable incidents that an individual suffers, both of which wrongful conviction are, why would we already be doing it?

There is an existing belief that we should lift up those in our society who are doing the worst off, particularly when they are not at fault. Some might argue that this ideal stems from Christianity and others might argue that it stems from a founding principle of opportunity, which we recognize as impossible with unfair setbacks and inadequate means. Wherever it comes from, there are many existing governmental programs that serve as prime examples that our nation holds this ethical foundation to help those in need such as: State Crime Victims Compensation, Disaster Unemployment Assistance, and the International Terrorism Victim Expense Program.<sup>93</sup> We currently take part in all of these programs and more because we do not think that people should have to suffer consequences for which they are not responsible. Moreover, we think that compensation is a moral practice.

(3) There can be no liability if there is not fault.

This third argument asserts that the State is not liable for compensation because it was not at fault in the wrongful conviction. The State didn't want to get it wrong and it didn't do anything intentional to produce the wrong outcome, therefore it is not liable. But given the numerous systemic problems such as unequal risk, the predictable error rate of around 5%, and the clear DNA evidence that disproves guilt, this argument seems unreasonable.

The State can be seen as in a similar position as a surgeon. Surgeons work hard to get positive outcomes, but there are a predictable number of errors. According to a 2012 article in *Surgery*, "events that should never occur in surgery... happen at least 4,000 times a year in the U.S. according to research from Johns Hopkins University." This includes "at least 39 times a week a surgeon leaves foreign objects inside their patients."<sup>94</sup> Surgeons, despite being well trained and well intentioned, are required to carry malpractice insurance to compensate the victims of these predictable surgical errors. Why isn't the State required to carry insurance to compensate the victims of predictable errors in their criminal justice system?

The State's position of denying liability is made even worse by the unequal risk of error faced by those who enter the criminal justice system. Unlike surgery, certain members of society have a very small chance of being erroneously convicted, while others, specifically Blacks and

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<sup>93</sup> Disaster Relief Benefits, "Disaster Relief | Benefits.gov."

<sup>94</sup> Joseph Nordqvist, "Surgical Errors Occur More Than 4,000 Times A Year In The U.S.," *Medical News Today*, December 22, 2012.

Latinos, have a much higher chance of being victimized by error in the courts, Where there is consistent predictable error that targets specific groups, it seems difficult to claim there is no fault. The State may argue that by being part of society, we take part in an imaginary social contract that signs away any insurance that society owes us if they happen to convict us of something that we did not do. However, no one would sign such a contract if they knew that they were more likelihood to be victimized than their neighbor.

Moreover, society should *want* to compensate individuals who are put in this situation. Americans are uneasy knowing that their justice system is not only letting off guilty people, but perhaps worse, convicting innocent ones. Compensation is a price that the State should pay for allowing this to happen—a disincentive to allowing miscarriages of justice. Exoneree compensation serves society as a whole in addition to serving the individual who receives it, and the more fairly the individual is compensated, the better society can feel about the justice system acting—well—just.

A discussion of compensation would not be complete without considering the ethical theory known as *equality of opportunity*. Individuals who are mistakenly put into our criminal justice system are dealt a major, unfair setback in their life by being punished for a crime that they did not commit. If we take an Equality of Opportunity approach (EO) to their situation we would likely agree that these innocent individuals deserve some form of compensation in order to get them remotely back to where they might have been had this mistake not occurred. Of course, we can never truly pay them back completely.

In “Justice as Fairness,”<sup>95</sup> John Rawls introduces the concept of Independent Rationale—a sort of litmus test for determining which justice principles would actually be fair in a society. We can use this concept to rationally compare whether we should compensate exonerees or not. The Independent Rationale starts off with moral premises that Rawls argues we all already accept to be true. First, that the right principles of justice are always binding, in other words moral rules do

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<sup>95</sup> John Rawls, "Justice as Fairness," *The Philosophical Review*, 67 (1958): 164.

not suddenly disappear because they are inconvenient,<sup>96</sup> and second, that the right principles are not those that one party forces on another.<sup>97</sup>

Rawls acknowledges that not everyone in our society believes the same thing—why else would we have politics? So, in order to find a fair balance among a lot of people who do not agree, he introduces a mechanism for coming up with a social contract, a thought experiment known as “The Original Position.” He imagines the Original Position (OP) as a hypothetical convention where a group of people, “contractors,” must come up with the rules that will govern their society. The hypothetical people in the OP are rational, but they are not perfect. Like most people, they are self-interested, however, because an individual cannot force others to agree to anything that they do not want to agree to, there is going to have to be unanimous agreement among the contractors. The final catch is that each individual in the OP is under the “veil of ignorance”—they do not know what status they have once the convention is over and they return to their lives in the society that they have created. Thus, knowing that they could possibly end up with low social status, Rawls argues that the only unanimous decision that the contractors in the OP will come to will be to protect those who are worse off in society as much as possible.

Without getting into a full-blown discussion of equality of opportunity in the US, I can use this model to explain why the right principle of justice is to compensate those who are wrongly incarcerated. If we look at the OP as a convention to decide how we should treat exonerees we, knowing that we could very well enter back into society as a person who is more likely to be wrongly convicted than others, would want to provide exonerees with as much support as possible, which would likely mean giving them just compensation once they are exonerated. In other words, under the constraints of the OP, we would never embrace a society that did not treat exonerees well and just because it may sometimes be inconvenient for us to do so, does not mean that it is any less moral.

This argument does not rest on an unequal risk of being wrongful incarcerated. Even if the risk were shared equally, the contractors would still not want to be an uncompensated exoneree. However, since we know that there is a disparate risk in our society, compensating exonerees is arguably even more important.

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<sup>96</sup> Rawls, “Justice as Fairness,” 188.

<sup>97</sup> Ibid, 190.

So, if we accept the affirmative answer that that we owe compensation to exonerees, many other questions follow: How do we know what we owe an exoneree? What is fair and sufficient compensation? What are the options for providing compensation? What are the goals of compensation? What are the costs to society? These are the types of questions that I address in the next section.

## **ii. What is Appropriate Compensation?**

Since we are unable to give an exoneree the years of their life that they wrongly spent in prison back, the best we can do is compensate them with money, services and systematic reforms. I have already addressed some of the systematic reforms that should be adopted in order to prevent others from suffering the same unjust mistakes that they did, which is why I now focus on compensation that is related to money and services. The goals are for society to apologize for the wrong that was done and try to make the exoneree's life as right reasonably possible. It's true that we can probably never offer an individual enough money and services to make up for 14 years of their life that we have taken away (not to mention the trauma we have caused them), but this does not mean that we should not try to settle on a fair and satisfactory compensation..

There are currently three ways for exonerees to gain access to post-release compensation: private bills, lawsuits, and statutory compensational parameters. The first of these three options is unreliable (they are "dangerously prone to becoming 'popularity contests'"<sup>98</sup>) and the second is untimely and costly. The third option, built-in state laws that assure compensation, is widely accepted by NGOs and scholars alike as the best mechanism to insure that exonerees receive an acceptable level of compensation in a reliable and timely manner. Compensation statutes for exonerees are also beneficial for states because they create a uniform and predictable policy for action.

Not every State has established compensation parameters for exonerees. In fact, 20 States are still without wrongful conviction compensatory statutes, meaning that exonerees in these

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<sup>98</sup> Gregory P. Scholand, "Re-Punishing the Innocent: False Confession as an Unjust Obstacle to Compensation for the Wrongfully Convicted," *Case Western Reserve Law Review* 63.4 (2012-2013): 1396.

States are not afforded the right that exonerees in states with these statutes are promised.<sup>99</sup> Furthermore, of the states that have established compensation parameters, the packages that their statutes guarantee are extremely variable amongst one another. Thus, in order to decide what appropriate compensation is, I will first provide a factual look at the current state of compensation in the US. Following this, I will discuss my own proposals which are based on achieving three goals: (1) admit there was a wrong done to the exoneree, (2) try to remedy that wrong by providing financial resources for an exoneree to establish a new life, and (3) provide other services that an exoneree may need upon release.

While money is a huge part of a compensation package, it is not the only or even the most important piece. Instead, it is important that statutes aim to meet these three goals in conjunction with one another and that large sums of money are not given out without including assistance in handing it.<sup>100</sup>

### ***Existing Compensation Frameworks in the US***

The federal government has recently updated their compensation framework and have encouraged states to do the same. Since 2004, H.R. 5107: The Federal Justice for All Act, grants exonerees up to \$50,000 per year that they were wrongly incarcerated and \$100,000 per year that they were on death row.<sup>101</sup> This statute has been praised for distinguishing between the negative psychological effects that being wrongly sentenced to death has on a person. Previously, Section 2513(e) of title 28, United States Code had read that the amount of compensation could not “exceed the sum of \$5,000” period.<sup>102</sup>

It is notable that Congress included a statement in The Federal Justice for All Act to encourage the States to create just compensation provisions for those wrongfully sentenced to death. Section 432 reads: “It is the sense of Congress that States should provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State

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<sup>99</sup> "Taxing the Wrongfully Convicted": What Fiscal Relief Means for Exoneree Compensation - Innocence Project, Innocence Project RSS, May 24, 2016.

<sup>100</sup> Sandra Davis Westervelt and Kimberly J. Cook, “Critical Issues in Crime and Society: Life After Death Row: Exonerees’ Search for Community and Identity,” *Rutgers University Press* (October 2012): 213.

<sup>101</sup> Justice for All Act of 2014, Public Law 108–405 108th Congress, October 30, 2004.

<sup>102</sup> Justice for All Act of 2014, Public Law 108–405 108th Congress, October 30, 2004.

and sentenced to death.”<sup>103</sup> While the federal government cannot mandate states to provide compensation packages to exonerees, some States have taken up the call.

30 states plus Washington D.C. have adopted compensation statutes for those who have been exonerated<sup>104</sup> and I will highlight some of the distinct elements that these statutes contain so as to better understand the options that states have before them. Perhaps the leading State in terms of compensation statutes for wrongfully convicted individuals is Texas, which has been commended by the Innocence Project as having the “most generous” compensation statute in the country.<sup>105</sup> Texas exceeds the federal recommendation. Wrongfully convicted persons are entitled to \$80,000 per year of wrongful incarceration as an annuity and \$25,000 per year that they spent on parole or as a registered sex offender.<sup>106</sup> Other States offer different less generous amounts of monetary compensation to their exonerees.

California offers a maximum of \$140 per day for wrongful incarceration, which includes any time spent in custody prior to incarceration,<sup>107</sup> while an exoneree from Missouri is only eligible for \$50 a day for wrongful incarceration.<sup>108</sup> If awarded the maximum amount, \$50 a day would come to \$51,100 for a year wrongly spent in prison and thus is at about the Federal recommendation. In Maine, “any person with a pardon of innocence is eligible for up to \$300,000”<sup>109</sup> whereas in Tennessee, “any exonerated or pardoned person is entitled to a total of \$1,000,000 for the entirety of a wrongful incarceration.”<sup>110</sup> Thus, we see that states place a wide range of “values” on the time that an innocent endured punishment. Some states compensate by day and others by year. Some states place maximums while other states have imposed minimums. However, what makes Texas’s compensation statute so generous is not only the monetary compensation that it awards to exonerees, but the services that it secures.

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<sup>103</sup> Ibid.

<sup>104</sup> Innocence Project, “Exoneree Compensation,” accessed February 2016.

<sup>105</sup> Innocence Project, “Making up for Lost Time,” *Benjamin N. Cardozo School of Law, Yeshiva University* (2009): 20.

<sup>106</sup> “Improve the Law - Innocence Project,” Innocence Project RSS, Accessed April 15, 2016.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

Texas's statute entitles exonerees to compensation for child support payments, tuition, reentry and reintegration services, as well as the option to buy into the Texas State Employee Health Plan.<sup>111</sup> This serves as a recognition that individuals who are wrongly incarcerated are unable to pursue their education and thus, like those who are released after having committed an offense, are unprepared for the job market. Additionally, their families have suffered from not having them around. Exonerees are also likely to have many health problems upon being released as a result of spending so much time in prison living under inadequate health conditions. Last, but not least, reintegration is difficult for any person upon being released from prison, but exonerees face a specific kind of difficulty as they faced an immense amount of trauma having been convicted and punished for a crime they did not commit.

Texas is not the only state to recognize these important service needs in exonerees' lives once they are granted their freedom. North Carolina's statute also includes a provision of job skills training and education tuition waivers.<sup>112</sup> In Vermont, "The exoneree is also eligible for up to 10 years of state health care, [...], reimbursement for attorney fees, as well as reasonable reintegrative services and mental and physical health care costs incurred by the claimant..."<sup>113</sup> Montana does not provide any monetary compensation. Instead their statute only gives exonerees education aid.

While many of these compensation statutes sound good, there are usually limitations written into them. Some of these limitations are stricter than others. It is very common for states to include a clause in order to ensure that an individual did not play a role in causing their wrongful incarceration. New York's law specifies that the exoneree is only eligible for compensation if he or she "did not by his own conduct cause or bring about his conviction."<sup>114</sup> Likewise, in order for a claimant to receive compensation for a wrongful conviction they must first show that they did not plead "guilty with the specific intent to protect another from prosecution for the underlying conviction for which the claimant is seeking compensation."<sup>115</sup> While these limitations make sense at some level because states are worried that a person could

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<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid

intentionally seek out a wrongful conviction in order to receive these large compensation packages, this fear seems unfounded, especially when so many wrongfully incarcerated people were coerced to indicate themselves in the crime in the first place.

Another limitation that some states such as Florida include in their compensation statutes is that the exoneree must not have had a prior felony conviction.<sup>116</sup> This is an unfair limitation since someone who has been previously convicted of a crime are inherently more at risk of being wrongfully convicted.

### ***Uniform Compensation vs. Different Rules for Different States***

Clearly, compensation is extremely variable on a state-by-state level, yet the notion of receiving extremely different compensation for the same wrong suffered seems unjust. Yes, people should be compensated different amounts for different wrongs that they have suffered under different circumstances, but if two individuals suffer the same wrong (i.e. are erroneously punished in the same way for the same amount of time) and the only discrepancy is that they are from different states, this appears to be unequal justice.

On the other hand, the variability in current state compensation statutes and care packages can be seen as reflecting the variability in many State rights and laws, such as the ability to smoke marijuana, taxation of income, and the right to marry anyone you choose. Thus, while many in innocence projects advocate that all states should have exactly the same compensation statutes, I believe it is okay for these statutes to be unique in each state so long as each state meet a certain bar in their compensation statutes for exonerees. The legal system including the right to convict and punish is a state right unless it violates a federal law. However, where an issue is covered in the Constitution, the Federal government can mandate uniformity. This, I argue, is the case when a state's criminal justice system punishes an innocent individual in a way that is both cruel and unusual, violating the Bill of Rights. In this case there should be some minimum uniformity mandated by the Federal government to rectify the wrong. This should include a minimum level of healthcare needs, financial needs, and legal needs met.<sup>117</sup>

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<sup>116</sup> Ibid.

<sup>117</sup> Westervelt, "Critical Issues in Crime and Society: Life After Death Row: Exonerees' Search for Community and Identity," 209.

## *Impact*

Part of understanding appropriate compensation is understanding what the impact of wrongful incarceration is on the lives of exonerees. As many scholars, authors and NGOs point out, the reality of exonerees post-release is often worse than that of guilty parolees. The 2009 Innocence Project report *Making Up for Lost Time* points out that:

[s]ervices available to parolees in many states, including job placement and temporary housing, are not available to exonerees. Upon his release, David Shephard sought help from four agencies that provided services to ex-offenders. Each agency responded that he could not receive their services since he had not committed a crime.<sup>118</sup>

This is not to say that parolees are especially well treated, but it does seem strange that we would provide less support for those who are innocent than for those who are guilty. While this is not an intentional action on the part of states, it occurs in certain states because there has not yet been a system developed to specialize in helping exonerees. If trends continue and more and more innocent individuals are found in the near future, establishing a way to help them back on their feet will be crucial.

Another reason why our society has not done a great job helping exonerees upon their release is hypothesized by Kimberely Clow and Amy-May Leach in their 2012 psychological study titled, “After Innocence: Perceptions of Individuals Who Have Been Wrongly Convicted.”<sup>119</sup> Clow and Leach suggest that exonerated individuals face a significant stigma.<sup>120</sup> One might expect that, once their name is cleared, they would be viewed in the same manner as anyone else or even treated with more respect, however, they are not. Clow and Leach propose a Stereotype Content Model, which suggests that wrongly incarcerated individuals are highly stigmatized despite their innocence. The Stereotype Content Model is a model that determines perceived level of warmth and perceived level of competence and then places groups of people into four different categories based on these levels. Because exonerees are thought of as being both low in warmth and competence, society in general seeks to have as much social distance as possible from them, seeing them the same way that they would see offenders. This may be one

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<sup>118</sup> Innocence Project, “Making Up for Lost Time,” 10.

<sup>119</sup> Kimberely A. Clow and Amy-May Leach, “After Innocence: Perceptions of Individuals Who Have Been Wrongly Convicted,” *Legal and Criminological Psychology* (May, 17 2012).

<sup>120</sup> Ibid.

reason why exonerees face low employment opportunities, an important component of reintegration.

Once an individual has been publicly named as a suspect, the internet ensures that their reputation is ruined for life. An example is what happened to Mr. Hillary, a wrongfully convicted youth whose life was ruined. This led Debora Silberman, a Brooklyn public defender, to publish an Op-Ed on the “Brownsville Five.” In it she discussed the sad fate of five African-American teenagers who were immediately accused of raping a young woman in a Brooklyn park. The prosecutor dropped the charges when it became clear that these five boys, ages fourteen to eighteen, were innocent; however, their reputations were ruined. She concludes that: “Naming my client and the other boys during the initial public uproar may have been intended to create the appearance that the police and prosecutors were taking the case seriously. Their innocence should have a greater claim on our conscience.”<sup>121</sup>

Of course, feelings such as frustration, mistrust and anger are normal after having been illegitimately sentenced. This is especially true since exonerees serve an average of fourteen years behind bars.<sup>122</sup> Not only can this do psychological damage to a person, but it also takes a toll on a person’s physical health. While many see healthcare as a basic human right, prisoners tend to be neglected when it comes to medical services, leaving individuals with many lingering problems upon release.<sup>123</sup> Additionally, while many correctional facilities teach certain skills, exonerees, like offenders, come out of prison with a lower level of formal education than their peers who were not incarcerated.

Lastly, exonerees are not given the option to earn a normal (or high paying) salary or save money while they are incarcerated and thus are at a huge monetary disadvantage when they are released. Thus, we can conclude that satisfactory and fair compensation for exonerees, should cover livelihood, health and monetary setbacks. In addition, in order to truly mitigate all these unfair impacts on the lives that exonerees lead once they are found to be innocent, there is a need for psychological, medical and skills/job placement services for exonerees upon reentry.

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<sup>121</sup> Silberman, Debora. March 4<sup>th</sup>, 2016. NYTimes. <http://www.nytimes.com/2016/03/04/opinion/five-black-teenagers-innocent-face-a-lifetime-of-guilt.html?ref=todayspaper>

<sup>122</sup> "Exonerate - Innocence Project," Innocence Project RSS.

<sup>123</sup> Michael S. Vaughn, "Medical Malpractice in Correctional Facilities: State Tort Remedies for Inappropriate and Inadequate Health Care Administered to Prisoners," *The Prison Journal* 84, no. 4 (2004): 506.

Finally, who better to ask about effective and ineffective compensation packages than exonerees themselves? They know what they wish they would have had upon their release better than anyone else. Westervelt and Cook interviewed eighteen exonerated death row survivors and were able to compile meaningful recommendations for how to better the US compensation system for exonerees. 12 of these survivors were released in or before 2001, a time when there was a lot less in place for compensation than there is now. In interviews, these people pointed out that their lives had been destroyed “not once, but twice”<sup>124</sup> and that they are “angry over [the] state’s refusal to help them or... acknowledge them as people who have been wronged.”<sup>125</sup> The authors concluded that there should be additions to the Innocence Project’s recommendations to include using a restorative justice framework, community reintegration forums, abolition of the death penalty, and post-conviction state and federal review for all prisoners serving life without parole sentences.<sup>126</sup>

When one hears a wrongly convicted person speak, it reminds us of one more compensation—perhaps the most important piece of compensation there is—an apology from the people who were responsible for the wrongful conviction.<sup>127</sup> If made public, this apology not only serves to catalyze the victim’s healing process, but also to alleviate societal stigma. In order for an exoneree to recover on personal level, it is crucial to recognize that they have experienced trauma. Therefore, we need to help them establish their safety, reflect, and reconnect in daily life.

Yet perhaps surprisingly, what victims most want to see are systematic reforms so that they can be confident that others will not have to suffer the same hardships that they did.<sup>128</sup> They hope to see more funding of public defense offices, doing away with snitch testimony, rethinking the immunity of public officials, and abolishing the death penalty.<sup>129</sup> It is chilling to hear exonerees caring as much about future innocent victims as they care about themselves. Providing an apology and expunging an exoneree’s record are the least we can do and are virtually costless.

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<sup>124</sup> Westervelt and Cook, “Critical Issues in Crime and Society: Life After Death Row: Exonerees’ Search for Community and Identity,” 194.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Westervelt and Cook, “Critical Issues in Crime and Society: Life After Death Row: Exonerees’ Search for Community and Identity,” 217.

<sup>128</sup> Ibid, 223.

<sup>129</sup> Ibid, 227.

We live in a world with the technology to irrefutably exonerate an individual for a crime that they were thought to have committed. With technology like this, some may argue that wrongful conviction will soon be a problem of the past. But as Garrett points out, “[p]erhaps the cutting-edge science of DNA technology captivates the public. Or perhaps people find it surprising that innocence can sometimes, with the benefit of DNA, actually be indisputable, making people more suspicious than ever before that our criminal justice system can make terrible mistakes” (244). Technology has its limitations, and can even bring about unintended consequences.

Rather than rely on technology, this thesis has pointed out a wide array of issues and solution strategies to bring relief to the large number of people who have suffered wrongful conviction at the hands of our criminal justice system. Systematic reforms to be considered range from abolishing the death penalty to eliminating various types of evidence that are prevalent in wrongful conviction cases. More specific strategies would be to encourage the Innocence Project and NGOs like it to open their aid offices to cases that do not involve DNA evidence, yet are likely cases of wrongful incarceration just the same.

Currently NGOs, rather than the States, have taken it upon themselves to serve as the “exonerators” in wrongful conviction cases. It therefore seems appropriate that the government do its job to take on the role of “compensator.” Compensating exonerees in a timely manner and in satisfactory and fair ways is not only critical for the lives of the victims, but is also important for society itself. The United States cannot claim to value justice as a country that wrongly punishes innocent citizens and then turns its back on them when that wrong is irrefutably revealed.

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