

House Study Committee on Compensating Wrongfully Convicted Persons

House of Representatives, Georgia Assembly

Testimony of Michael Leo Owens, Ph.D.

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I thank the House Study Committee on Compensating Wrongfully Convicted Persons, especially its chairperson, Representative Carolyn Hugley, for allowing me to testify today.

I'm Dr. Michael Leo Owens. I'm Associate Professor of Political Science at Emory University. I'm also a member of the board of directors of Prison Policy Initiative, a nonprofit, nonpartisan think tank that works to improve criminal justice through research.

I come before the Study Committee as a scholar of ex-prisoner reentry and the politics of punishment in the United States. I've a particular interest in and focus on wrongful convictions.

You may not know it but our nation recently celebrated an important anniversary – the 100th anniversary of the first enactment of statutory compensation by states. In 1913, California and Wisconsin became the first states to enact statutes for compensating citizens for wrongful convictions.¹ They were the first to decide to create systematic financial restitution for the wrongly convicted. One hundred and one years later Georgia still has not made that decision. That's odd.

Georgia is a leader among the states in reforming criminal justice, particularly punishment. Think of the last two years. The state made amazing, even surprising, reforms to the adult correctional system in 2012 and the juvenile correctional system in 2013. Georgia, however, has been slow to reform its approach to compensating those the courts have ruled wrongly convicted and unjustly imprisoned.

Nonetheless, it's heartening that the Georgia legislature created this Study Committee. It's also heartening that the legislature, as the General Assembly stated in its resolution creating this Study Committee, "is sympathetic to the tremendous burden a wrongfully convicted person faces; and... finds that there is a need to create a uniform method of fairly and reasonably compensating wrongfully convicted persons...."

In many states, including ours, the unjustly convicted, as judged by the courts, have a hard time distinguishing themselves from those who were justly convicted.² Like the rightly convicted, the wrongfully convicted bear the mark of a felony conviction and the stigma of imprisonment. Furthermore, government agencies, nonprofit organizations, and neighbors often view and treat the wrongfully convicted as discredited and scorned citizens, unworthy of assistance and empathy.³

Therefore, “An exoneree faces the stigma of being an ex-prisoner and re-entering society as an ex-offender, but does not qualify for [compassion] and services offered ex-offenders.”⁴

Consequently, and strangely, in an age when state governments like Georgia’s willingly spend tens and hundreds of millions of dollars on institutions to try to positively reintegrate the justly convicted back into society, it sparingly spends on individuals wrongfully convicted of crimes. Such individuals must scrape, toil, and fight for arguably paltry portions of state dollars to positively reintegrate them. They must do so despite “the special sacrifice [they have] been compelled to make in the interest of the [public]”—loss of their liberty.⁵

Problems with Georgia’s Current Method for Compensation

As one legal scholar contended in 1932, “the least that the State can do to vindicate itself and make restitution to the innocent victim is to grant him an indemnity, not as a matter of grace and favor but as a matter of right.”⁶

Private legislation, however, which is what Georgia relies upon to assist the wrongfully convicted, trades in “grace and favor.” Georgia requires lobbying by or on behalf of the wrongly convicted to obtain a legislative sponsor and broad legislative support for a bill that will provide them with restitution. “But such action,” as legal scholars observe, “is spasmodic only, and not all persons have the necessary influence to bring about legislation in their behalf.”⁷

Beyond the unpredictable nature and outcomes of private legislation, legislative access, influence, and success vary among the wrongly convicted. Policymakers and the public may view some of the wrongly convicted more positively than others. Also, some of the wrongly convicted may have considerably more public support than others, which they can covert to political capital and leverage in the legislature. That’s unfair.

Furthermore, legislative discretion in granting compensation is problematic. Although scholars and advocates focus attention on legislative influence over amounts of compensation, private legislation may also manifest paternalism towards and regulate the wrongly convicted.

For instance, during the 2009 legislative session in Georgia the General Assembly passed a resolution to award \$500,000 over twenty years to John Jerome White. Mr. White was wrongfully convicted of the burglary, rape, beating, and robbery of an elderly woman. The state chose to compensate him for “loss of liberty, personal injury, lost wages, injury to reputation, emotional distress, and other damages as a result of his 28 years of incarceration and expenses in trying to prove his innocence totaling \$3 million.”

Compensation of Mr. White, however, also came with post-exoneration scrutiny and regulation: The General Assembly mandated that Mr. White submit to random drug tests and remain in the labor force (i.e., employed or seeking employment) and/or volunteer with a nonprofit organization during his twenty years of compensation.⁸ In short, the legislature placed an exonerated man on quasi-parole.

Beyond the possibility of private legislation being a tool of paternalism and wrongful regulation of personal liberty, private legislation is often among the slowest forms of legislation to pass. For example, it took twenty years, and the introduction of four bills (1979, 1980, 1990, and 1998), for the Florida legislature to pass legislation acknowledging the “entitlement to equitable relief” of two wrongly convicted men, Freddie Lee Pitts and Wilbert Lee.⁹ In Georgia, compensation is sometimes quicker but still slow, if it happens at all. Calvin Johnson, for instance, waited five years for compensation from Georgia, stemming from a wrongful conviction that imprisoned him for 16 years.

Ultimately, moving from the scheme of private legislation to a system of statutory compensation in Georgia would remove “grace and favor” from the calculus of compensation. Such a reform would privilege right, entitlement, and reason. In other words, statutory compensation would allow the General Assembly and governor to manifest the state’s motto on behalf of the exonerated – wisdom, justice, and moderation.

Enactment of Compensation Statutes by States

The federal government encourages the states to “provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State.”¹⁰ Today, a majority of states (60 percent) have statutes that permit and provide for compensating the wrongly convicted or have revisited their statutes to strengthen them.¹¹ That’s in addition to the District of Columbia and the federal government having compensation laws on their books.

I have a graph to share with the Study Committee (see appendix). It’s from my some of research.¹² It shows the enactment of wrongful conviction compensation statutes across the states from 1900 through September 2014.

As you can see, there was the long period of stability – approximately 70 years – when almost no states enacted statutory compensation. Then, beginning in the early 1980s, states began to enact statutory compensation, and since then we have witnessed a spate of enactments – and not a single abolition – of wrongful compensation statutes, especially over the last decade.

Between 2000 and today, 26 states adopted some form of compensation law. Twenty of those states did it since 2006, bringing the total number of states with any statutory compensation for wrongful conviction to 30 states.¹³ The last three states to enact statutory compensation were Colorado (2013), Washington (2013), and Minnesota (2014).

Interestingly, most states in the South have enacted wrongful conviction compensation statutes. Eleven of the 16 southern states have compensation statutes.¹⁴ This set includes states known to have the toughest correctional systems: Texas, Alabama, Florida, and Mississippi. Moreover, seven of the eleven southern states enacted their compensations statutes in the last decade, with 2005 being the mean year in which all southern states with statutory compensation adopted their systems.

Furthermore, most states governed by Republicans (i.e., having Republican governors and majority-Republican legislatures) have wrongful conviction compensation statutes. Clearly, other state governments have been able to forge GOP-led reforms or bipartisan coalitions for reform. Georgia, however, is behind the curve.

What Predicts States Having a Compensation Statute?

So, there has been a cascade of compensation statutes across the states. Generally, this is because of spikes in exonerations, particularly DNA-based exonerations, across the states over the last two decades.

My own published research with criminologist Elizabeth Griffith, Ph.D. at Rutgers University suggests that the number of exonerations in a state best predicts whether it has a compensation statute.¹⁵ Correlational analysis suggests that states with more exonerations occurring in them are more likely to have a significantly higher probability of having a compensation statute.

An obvious interpretation of this finding is that states are increasingly likely to enact compensation legislation to remedy wrongful convictions as these miscarriages of justice are identified and corrected.

However, we can imagine that some states also have such statutes because they reason, probably correctly, that the budgetary consequences of enacting statutory compensation are limited because of (a) low demand for recompense as a consequence of few exonerations, generally, or (b) they retain the discretion to high bars for compensation, reducing the pool of exonerees eligible for compensation.

Compensation Quality Varies Across the States

We must recognize that not all compensation statutes are the same. The result is statutory compensation may yield inequities in terms of access to compensation (i.e., eligibility and restrictions) and amount of compensation.

Some state laws include weak provisions for the amount and quality of compensation. The compensation statute in Montana, for example, makes no provision for direct financial compensation while offering indirect financial assistance in the forms of fee waivers, educational scholarships, and tuition payments for secondary education. In some states, compensation awards may be taxable as income.

Overall, 81 percent of those exonerated by the courts that have received compensation due to a wrongful conviction compensation statute received less than the federal standard of a maximum of \$50,000 for each year of unjust imprisonment.¹⁶ Some states do and some states don't allow for cost of living adjustments to compensation.

No state in the union provides a suite of compensation assistance that accord with the model proposed by the Innocence Project. Analyzing statutory compensation in the 27 states that had enacted it by 2011, criminologist Robert Norris at the State University of New York at Albany concludes that monetary compensation is near universal, with Montana being an outlier.

However, approximately 50 percent of states with statutory compensation cap total recompense for wrongful convictions; these range from a low of \$20,000 to a high of \$2,000,000, with a median of \$400,000.¹⁷ Additionally, only 57 percent of states with statutory compensation supplement monetary restitution with non-monetary compensation like subsidized medical care, job training, and tuition waivers.

Additionally, most statutory compensation systems ignore the importance of expunging wrongful convictions—clearing or sealing the records of the exonerated. To date, 39 states do not have “expungement statutes that are specifically tailored to the wrongfully convicted.” Georgia is among those 39 states. That seems unfair given that Georgia enacted a law in 2012 that strengthens restricted access to nonconviction records for people charged with crimes. Many expect the state to consider reforming the First Offender Act in 2014 to allow certain classes of offenders to receive record expungement for “good behavior.”

According to one well-regarded research study, “almost one-third of exonerees do not have their records purged.” Moreover, “failure to expunge was a significant predictor of post-exoneration offending. This relationship was strongest for offenders who had not committed an offense prior to the one for which they were wrongfully convicted.”¹⁸

What Influences the Quality of State Compensation?

Although statutory compensation may come closest to an ideal means of fulfilling the societal obligations to the wrongfully convicted, it yields grossly uneven compensation for exonerees across the states that provide for it. In other words, the quality of compensation is higher in some states than other states. Why?

To start to answer the question, criminologist Elizabeth Griffiths and I, in another published study,¹⁹ employ Norris's Quality of Statutory Compensation Index to identify factors that may influence the comprehensiveness and value of statutory compensation.²⁰

The index measures, as of 2011, various dimensions of statutory compensation for wrongful convictions: amounts of monetary compensation; categories of social assistance such as employment assistance, mental health services, attorney fees, and the like; criminal record expungement; eligibility criteria; disqualifications for assistance; statutes of limitations; tax provisions; availability of civil redress; and upon-death provisions. The index also scores the quality of statutory compensation by states against the model compensation legislation proposed by the national Innocence Project.

A state with statutory compensation meeting the standard of the model legislation would receive a score of 60. Of the 27 states covered by the index, which is a relatively and normally distributed scale, the highest score is 43, earned by Texas.

Based on our earlier research findings, we were keenly interested in whether the number of exonerations in a state influenced compensation quality. We included data on the 275 DNA-based exonerations facilitated by the Innocence Project from the late 1980s through November 30, 2011.

Our statistical analysis suggests that the quantity of state-level exonerations strongly predicts the quality of state-level statutory compensation. Specifically, as the number of DNA-based exonerations increases beyond 15, the quality of statutory compensation for wrongful convictions rises. Indeed, Texas, the state with the largest number of exonerees has the highest score on the Quality of Statutory Compensation Index.

Texas truly is the state with the best statutory compensation system. It has no rival. In 2009 the Texas legislature increased the annual recompense available to its wrongly convicted citizens to \$80,000, which is \$30,000 above both the amount the federal government provides for wrongful convictions and the amount the Innocence Project lobbies for in state legislatures.²¹

Moreover, Texas provides the wrongfully convicted with \$25,000 for every year of parole and/or as a registered sex offender. Furthermore, Texas allows for monthly payments, following an initial lump sum. It even allows for leftover compensation to be distributed to the estates of deceased exonerees.

Additionally, the wrongfully convicted in Texas are entitled by statute to reentry and reintegration services that the justly convicted receive; awarded tuition scholarships for up to 120 hours of credit at a public university or college, which is enough to earn a bachelor's degree; have the option to purchase lower-cost health insurance from the state's employee health plan; and receive compensation for child support payments. However, and perhaps rightly, Texas prohibits compensation for the wrongfully convicted if concurrent with their wrongful conviction they were imprisoned for other crimes that they did commit.

Beneficiaries of Compensation

Despite inequities across the states with statutory compensation systems, advocates of the wrongly convicted still favor statutory compensation. This is mainly because it reduces the degree to which legislative discretion and politicking dominate the process of recompense for wrongful convictions.²²

Before I conclude, let's remind ourselves of the beneficiaries of compensation. The payment of the public debt to the wrongly convicted for the "taking of [their] liberty for public use"²³ is intended to repair and compensate for as much of the damage wrought by miscarriages of justice as possible. This reparation has three beneficiaries.

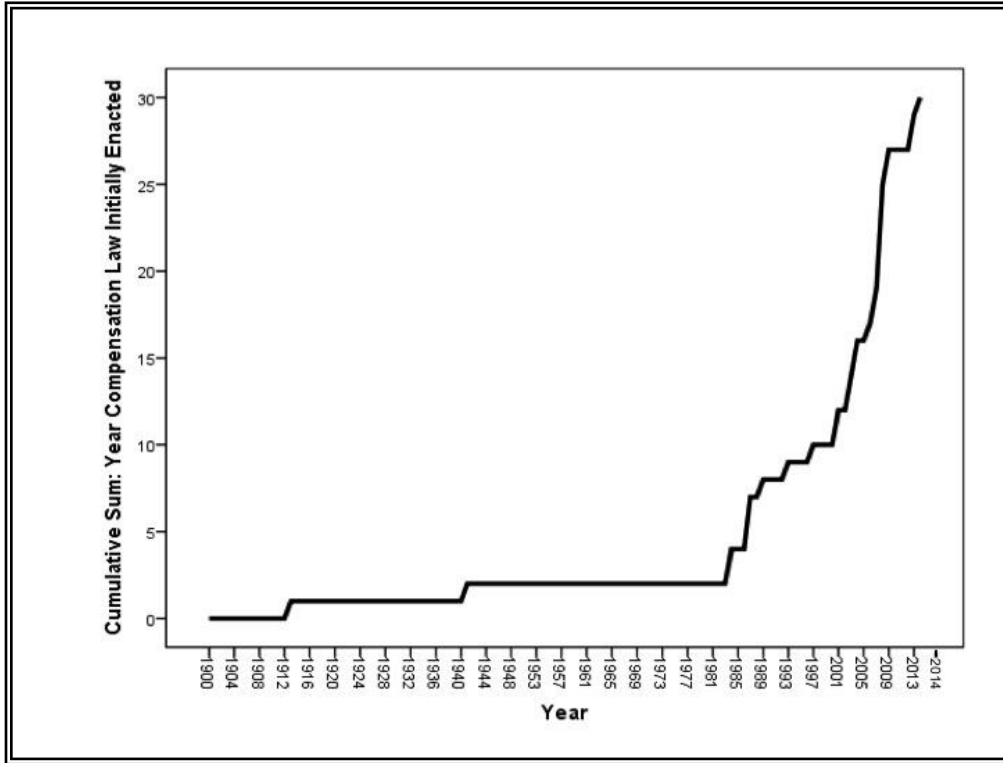
The first beneficiary of reparation is the wrongly convicted individual.²⁴ The intent of payment for their unjust conviction is to make amends for the miscarriage of justice, to allow the victims of it to recoup financial losses, to reduce the economic vulnerability of the victims, and to increase self-sufficiency after release from imprisonment, inclusive of parole and probation.

A second beneficiary of reparation is the government. Payment to the wrongly convicted is a down payment for repairing damage to the State. Compensation serves as acknowledgments of miscarriages of justice by government, or at least by juries on behalf of "the people." Reparation of the wrongly convicted burnishes the public legitimacy government. Reparation allows it to rightly retain (or regain) public respect for its criminal justice institutions and the rule of law.²⁵ The monetary costs to states compensating the wrongly convicted may also reduce the likelihood of further miscarriages of justice, improving the moral performance of the courts and other institutions of criminal justice.²⁶

The third beneficiary of reparation is the public. As the observer of miscarriages of justice performed in its name, reparation of the wrongly convicted likewise restores public confidence in the ability of judicial, correctional, and legislative institutions to exercise good judgment and fairness.

Thank you.

Appendix. Adoption of Statutory Compensation by the States, 1900-2014



Notes

¹ Wisconsin was the first state to enact statutory compensation, followed by California, both in 1913. This date contradicts the history of enactments presented by the Innocence Project on its website, which suggests that California adopted its statute in 1941 (See www.innocenceproject.org). However, Edwin M. Borchard, the leading scholar on wrongful convictions at the time and writing in the early twentieth century, identifies California as the second state in the nation to have enacted a compensation statute via “relief by general statute” in 1913. While this “relief” was not applied in California until the 1930s, the state had at least created an avenue to access compensation through statute. See Edwin M. Borchard, *Convicting the Innocent: Errors of Criminal Justice* (New Haven: Yale University Press, 1932).

² Allison Redlich, James Acker, Robert J. Norris, and Catherine Bonventre, eds., *Examining Wrongful Convictions: Stepping Back, Moving Forward* (Durham: Carolina Academic Press, 2014).

³ Kevin Johnson, “Those Cleared by DNA Tests Struggle to Be Free,” *USA Today*, January 27, 2009; Sandra D. Westervelt and Kimberly J. Cook, “Framing Innocents: The Wrongly Convicted as Victims of State Harm,” *Crime, Law, and Social Change* 53(2010): 259-275; Lola Vollen and Dave Eggers, *Surviving Justice: America’s Wrongfully Convicted and Exonerated* (San Francisco: McSweeney’s Books, 2008); Adina M. Thompson and Lora M. Levett, “Exoneree Stigma: An Investigation of Attitudes Toward Guilty and Wrongfully Convicted Persons,” unpublished paper presented at the 2011 American Society of Criminology Meetings, Washington, D.C.

⁴ Heather Weigand, “Rebuilding a Life: The Wrongfully Convicted and Exonerated,” 18 *Boston University Public Interest Law Journal* 432 (2009).

⁵ Edwin M. Borchard, “State Indemnity for Errors of Criminal Justice,” *Annals of the American Academy of Political and Social Science* 52 (1914): 108-114.

⁶ Edwin M. Borchard, *Convicting the Innocent: Errors of Criminal Justice* (New Haven: Yale University Press, 1932), p. xxiv.

⁷ Edwin M. Borchard, *Convicting the Innocent: Errors of Criminal Justice* (New Haven: Yale University Press, 1932), p. xxiv.

⁸ House Resolution 161, George General Assembly. Text of the law is available from http://www1.legis.ga.gov/legis/2009_10/sum/hr161.htm

⁹ House Bill 3035, Florida State Legislature, enacted May 1, 1998. Text of the law is available from <http://laws.flrules.org/1998/431>.

¹⁰ Justice for All Act, Public Law 108–405, 42 USC 13701, Section 432.

¹¹ States without statutory compensation include: Alaska, Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Michigan, Minnesota, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming.

¹² Michael Leo Owens, and Elizabeth Griffiths. 2011/2012. “Uneven Reparations for Wrongful Convictions: Examining the State Politics of Statutory Compensation Legislation.” *Albany Law Review* 75 (3): 1283-1327.

¹³ Nine states have modified their compensation statutes since initial enactment. With the exception of Wisconsin, which in 1987 became the first state to strengthen its statute, the remaining eight states that have moved to strengthen their compensation statutes did so during the first decade of the twenty-first century. See Robert J. Norris, “Assessing Compensation Statutes for the Wrongly Convicted,” *Criminal Justice Policy Review* 23 (2012): 352-374.

¹⁴ Generally, the classic set of southern states includes: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

¹⁵ Michael Leo Owens, and Elizabeth Griffiths. 2011/2012. “Uneven Reparations for Wrongful Convictions: Examining the State Politics of Statutory Compensation Legislation.” *Albany Law Review* 75 (3): 1283-1327.

¹⁶ See The Innocence Project, *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (New York: Benjamin Cardozo School of Law, Yeshiva University, 2009).

¹⁷ Robert J. Norris, “Assessing Compensation Statutes for the Wrongly Convicted,” *Criminal Justice Policy Review* 23 (2012): 352-374.

¹⁸ Amy Shlosberg, Evan J. Mandery, Valerie West, and Bennett Callahan, “Expungement and Post-Exoneration Offending,” *The Journal of Law and Criminology* 104 (2014): 353-388.

¹⁹ Elizabeth Griffiths and Michael Leo Owens, “Remedying Wrongful Convictions: Societal Obligations to Exonerees,” in *Examining Wrongful Convictions: Stepping Back, Moving Forward*, edited by Allison Redlich, James Acker, Robert J. Norris, and Catherine Bonventre (Durham: Carolina Academic Press, 2014).

²⁰ Robert J. Norris, “Assessing Compensation Statutes for the Wrongly Convicted,” *Criminal Justice Policy Review* 23 (2012): 352-374.

²¹ It is perhaps fitting that Texas provides the most generous compensation scheme to those who have been victimized by wrongful convictions as Texas has the unfortunate honor of initially convicting and then exonerating the greatest number of persons on the basis of DNA evidence (N = 43 of 275; 15.6% of all DNA exonerations) (<http://www.innocenceproject.org/> - accessed November 2011).

²² See The Innocence Project, *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* (New York: Benjamin Cardozo School of Law, Yeshiva University, 2009)

²³ Edwin M. Borchard, “European Systems of State Indemnity for Errors of Criminal Justice,” 3 *Journal of Criminal Law and Criminology* 685 (1912-1913).

²⁴ We include the families of the wrongly convicted in this first group of beneficiaries. This makes sense, especially if one understands wrongful conviction to be a form of “penal harm,” whereby policies that produce it “scatters more widely than its intended target: spouses, partners, children and other family members—all innocent of the [alleged] conduct leading to the harm—suffer not only shame and disappointment, but real losses in well-being as a result of an [alleged] offender’s conviction and punishment.” Todd Clear, *Harm in American Penology: Offenders, Victims, and Their Communities* (State University Press of New York, 1994), note 1.

²⁵ Brian Forst, *Errors of Justice: Nature, Sources, and Remedies* (Cambridge University Press, 2004); Michael Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (Palgrave Macmillan, 2007).

²⁶ For counter arguments, see Lawrence Rosenthal, “Second Thoughts on Damages for Wrongful Convictions,” 85 *Chicago-Kent Law Review* 1 (2010).