

UNEVEN REPARATIONS FOR WRONGFUL CONVICTIONS:  
EXAMINING THE STATE POLITICS OF STATUTORY  
COMPENSATION LEGISLATION

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*The whole matter of compensation for unjust convictions for felonies and lesser crimes is well worth further study, to the end that within measurable time remedial legislation may cure this defect in our social institutions.<sup>1</sup>*

I. INTRODUCTION

One of the fascinating findings from interviews with the wrongly convicted is that they harbor little or no anger—or more accurately, that “joy overrides the anger”—towards the State following their release from imprisonment.<sup>2</sup> At the same time, they imagine and wish for compensation for their wrongful convictions, especially when it resulted in their incarceration and particularly when they faced the death penalty.<sup>3</sup> Too often, however, recompense remains a

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<sup>1</sup> Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684, 706 (1913).

<sup>2</sup> Mallory Simon, *Innocent Man Jailed in Texas Since 1979 Now Free*, CNN BLOG (Jan. 4, 2011), <http://news.blogs.cnn.com/2011/01/04/innocent-man-jailed-since-1979-likely-to-be-freed/>; SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED 12 (Lola Vollen & Dave Eggers eds., 3d ed. 2008) [hereinafter SURVIVING JUSTICE].

<sup>3</sup> They also desire and expect public apologies and accountability by state governments for the miscarriages of justice. See SURVIVING JUSTICE, *supra* note 2, at 12. Apologies, however, are perhaps harder to come by for the wrongly convicted than compensation. See *id.*; Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful Imprisonment*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 139, 139–41, 155–56 (2004). See generally Abigail Penzell, *Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry*, 9 CARDOZO J. CONFLICT RESOL. 145 (2007) (discussing the desire of the wrongly convicted for an apology and the reasons for why one should be given); Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 391 (2009) (proposing the use of declaratory judgments declaring innocence to

mirage. In an age when state governments willingly spend tens and hundreds of millions of dollars to try to positively reintegrate the justly convicted back into society, the unjustly convicted must scrape, toil, and fight for arguably paltry portions of state dollars to positively reintegrate them.<sup>4</sup> As Alan Northrop put it after he served seventeen years in a Washington state prison for a rape he did not commit, “I got no apology, no nothing, no offer of any kind of financial aid.”<sup>5</sup> He is not alone.

In the United States, financial compensation for wrongful convictions eludes many of its victims, including those exonerated of crimes.<sup>6</sup> The best empirical evidence of the difficulty the wrongly convicted face in accessing compensation comes from the Innocence Project and its national database of individuals exonerated through DNA testing. As of 2009, forty percent of them were awaiting compensation by their states.<sup>7</sup> Some of the wrongfully convicted reside in states where financial compensation is only possible (but

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restore the reputations of the wrongly accused or convicted). Additionally, the wrongfully convicted “want their standing as innocent people recognized and the trauma of their conviction acknowledged.” Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 432 (2009).

<sup>4</sup> This is generally true when the wrongly convicted seek any form of assistance after their exoneration. “An exoneree faces the stigma of being an ex-prisoner and re-entering society as an ex-offender, but does not qualify for services offered to ex-offenders.” Weigand, *supra* note 3, at 432. Vincent Moto, who served approximately nine years in prison for a rape he did not commit, put the inequality in perspective during an interview with the *New York Times*. “It’s ridiculous . . . They have programs for drug dealers who get out of prison. They have programs for people who really do commit crimes. People get out and go in halfway houses and have all kinds of support. There are housing programs for them, job placement for them. But for the innocent, they have nothing.” Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice is Slow to Make Amends*, N.Y. TIMES, Nov. 25, 2007, at 138.

<sup>5</sup> Wendy Brundige, *Washington State Proposes Compensation for Wrongly Convicted*, ABC NEWS (Jan. 29, 2011), <http://abcnews.go.com/US/alan-northrop-rape-bill-compensate-wrongly-convicted/story?id=12792640#.TvOdAvLfV8E>.

<sup>6</sup> See SURVIVING JUSTICE, *supra* note 2, at 11, 430–32.

<sup>7</sup> INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 15 (2009) [hereinafter INNOCENCE PROJECT: MAKING UP FOR LOST TIME]. Of those who received compensation, twenty-eight percent received money because they filed and won civil litigation; nine percent received it because of the passage of private legislation; and thirty-three percent received money because they made successful claims under state compensation statutes. *Id.* at 7. Nevertheless, even when they receive financial compensation, the wrongly convicted may remain burdened by the miscarriages of justice. See generally Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105 (2008) (noting that the wrongfully convicted are burdened in their physical and psychological health, as well as in their employment and housing prospects); Jessica R. Lonergan, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 405 (2008) (exploring the the remedies available to the wrongfully convicting, characterizing them as “woeful”).

unlikely) through civil litigation and private legislation.<sup>8</sup> Others live in states with statutes permitting compensation, but barriers to it may remain, resulting in few of the wrongly convicted receiving compensation.<sup>9</sup> A study by California Watch, for example, found that of the 132 claims submitted between 2000 and 2011 for compensation by persons determined to have been wrongly convicted by California, eleven claimants (approximately eight percent) received compensation from the state's Victim Compensation and Government Claims Board.<sup>10</sup>

Nonetheless, many states have chosen restorative policy designs for the wrongly convicted, including compensation statutes.<sup>11</sup> This is a cause for hope. For a long time, however, it seemed that states were unlikely to make much progress in compensating those whose lives had been irrevocably damaged by wrongful conviction and incarceration. Almost a decade ago, for instance, Adele Bernhard expressed the exasperation of reformers in light of limited success at spreading innovations in wrongful conviction compensation throughout the states:

I anticipated that the continuing parade of exonerations, in state after state across the country, would prompt local legislatures to enact new statutes benefiting the unjustly convicted and later exonerated in states that lacked such mechanisms and to modernize imperfect statutes in states where compensation statutes had not been revisited in years.

I was wrong.<sup>12</sup>

Upon reflection, Professor Bernhard and others were not wrong;

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<sup>8</sup> INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 12. For instance, only 39 of the 289 (13.5%) persons exonerated with the assistance of the Innocence Project between January 1989 and February 2012 reside in states without a compensation law at present and eleven of the twenty-three states without compensation laws have no exonerates. See *Know the Cases: Browse the Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Feb. 14, 2012); see *Reforms by State*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawView1.php> (last visited Feb. 14, 2012) [hereinafter INNOCENCE PROJECT, *Reforms by State*]. However, even in states where such statutes have been enacted, the courts exonerated many of their wrongly convicted persons before compensation laws took effect. See *Know the Cases: Browse the Profiles*, INNOCENCE PROJECT, *supra*; INNOCENCE PROJECT, *Reforms by State*, *supra*.

<sup>9</sup> INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 15–19.

<sup>10</sup> Marie C. Baca, *Wrongly Convicted Face Uphill Battle to Obtain Compensation*, CALIFORNIA WATCH (Mar. 5, 2011), <http://californiawatch.org/public-safety/wrongly-convicted-face-uphill-battle-obtain-compensation-9014>.

<sup>11</sup> See INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 21–24.

<sup>12</sup> Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 705 (2004).

they were righteously and justly impatient. Even now, a decade later, many states have yet to enact such statutes.<sup>13</sup> Yet that truth need not foster hopelessness among reformers and those who would benefit from reforms.

Policy change is possible. In fact, “large scale change is not an anomaly. There is no iron law of equilibrium that restricts policy making to incremental changes once a policy is established.”<sup>14</sup> While it is correct that “[f]ailure is the norm” for criminal justice policies,<sup>15</sup> and the speed of policy change in the United States can be glacial, the consensus among scholars of American politics and public policy is that policy change “is not gradual and incremental, but rather is disjoint[ed] and episodic,” with “bursts of frenetic policy activity” disturbing “[l]ong periods of stability.”<sup>16</sup> These fits of stops and starts aptly reflect the history of states enacting statutory compensation in the United States.

Figure 1 illustrates the “punctuated equilibrium”<sup>17</sup> of wrongful conviction compensation statutes between 1900 and 2011. There was the long period of stability—approximately seventy years—when almost no states enacted statutory compensation.<sup>18</sup> Then, beginning in the early 1980s, states began to enact statutory compensation, and since then we have witnessed a spate of enactments—and lack of abolition—of wrongful conviction statutes, especially over the last decade.<sup>19</sup> Between 2000 and 2011,

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<sup>13</sup> INNOCENCE PROJECT, *MAKING UP FOR LOST TIME*, *supra* note 7, at 3.

<sup>14</sup> FRANK R. BAUMGARTNER, JEFFREY M. BERRY, MARIE HOJNACKI, DAVID C. KIMBALL & BETH L. LEECH, *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 36 (2009).

<sup>15</sup> See VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 33 (2009). See generally Darryl K. Brown, *Democracy and Decriminalization*, 86 TEXAS L. REV. 223 (2007) (analyzing democratic dysfunction in criminal law).

<sup>16</sup> FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* xvii (2d ed. 2009); BRYAN D. JONES & FRANK R. BAUMGARTNER, *THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS* 24–27 (2005). See generally HANK C. JENKINS-SMITH & PAUL SABATIER, *POLICY CHANGE AND LEARNING: AN ADVOCACY COALITION APPROACH* (1993) (discussing errors of justice and approaches to analysis).

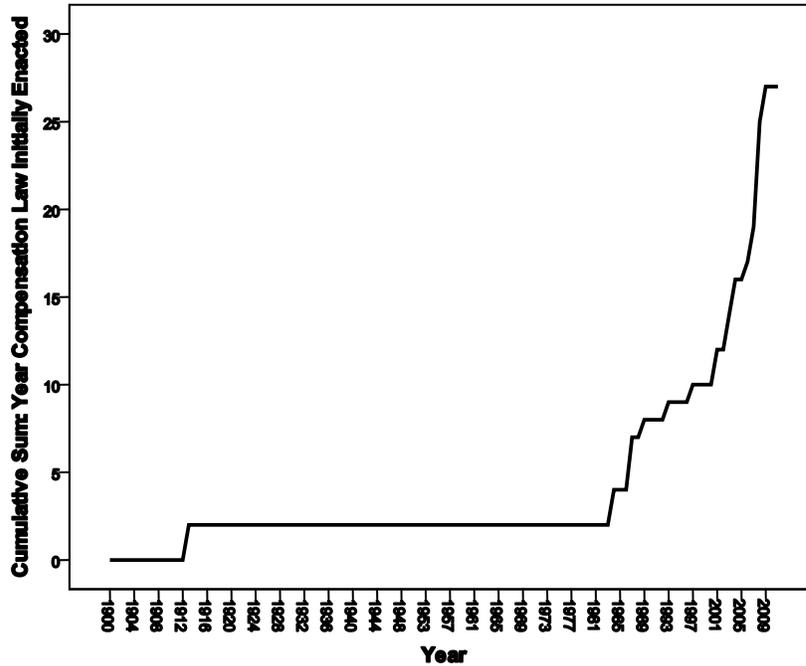
<sup>17</sup> Political scientists have adopted the term “punctuated equilibrium” from paleontologists to describe or visualize “stability interrupted by major alterations to a system,” which is akin to evolutionary development, while recognizing that not all stability denotes equilibrium. BAUMGARTNER & JONES, *supra* note 16, at 18 n.1.

<sup>18</sup> See INNOCENCE PROJECT, *Reforms by State*, *supra* note 8 (illustrating this seventy-year period of relative stability with regard to wrongful conviction compensation statutes with the examples of Wisconsin (1913), California (1941), North Carolina (1947), New Hampshire (1977), Oklahoma (1978)).

<sup>19</sup> See Devin Dwyer, *States Grapple with Compensation Laws for Boom in Exonerated Convicts*, ABC NEWS (Apr. 26, 2011) <http://abcnews.go.com/Politics/wrongful-conviction-states-grapple-compensation-felons-exonerated-dna/story?id=13459536#TyMTuBxzO1Y> (noting that twenty-seven states currently have wrongful conviction statutes); INNOCENCE PROJECT,

twenty-three states adopted some form of compensation law, with seventeen of those doing so since 2006, bringing the total number of states with any statutory compensation upon wrongful conviction to twenty-seven.<sup>20</sup>

TABLE 1.



While far from universal in coverage and displaying dramatic differences in quality,<sup>21</sup> a majority of states (albeit a small majority) have statutes that permit and provide for compensating the wrongly convicted or have revisited their statutes to strengthen them.<sup>22</sup>

*Reforms by State*, *supra* note 8 (illustrating the relatively few statutes passed prior to the 1980s).

<sup>20</sup> See Robert J. Norris, *Assessing Compensation Statutes for the Wrongly Convicted*, 23 CRIM. JUST. POL'Y REV. 1, 15 (Forthcoming 2012, Published Online 2011). Twelve states have modified their compensation statutes since initial enactment. See INNOCENCE PROJECT, *Reforms by State*, *supra* note 8 (indicating that Wisconsin, California, North Carolina, New Hampshire, Oklahoma, Tennessee, New York, Ohio, Maryland, Texas, Virginia, and Louisiana have each amended their statutes since originally enacted). 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 *id.*

<sup>21</sup> Norris, *supra* note 20, at 19.

<sup>22</sup> See INNOCENCE PROJECT, *MAKING UP FOR LOST TIME*, *supra* note 7, at 4.

Moreover, as of 2004 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,” albeit solely for those who were on death row and without incentives for states to enact statutory compensation systems.<sup>23</sup>

The move toward enacting wrongful compensation statutes is heartening. This is true even if the news and trend are far from clear signals of a new direction from the penal turn that criminologist David Garland has described.<sup>24</sup> Nevertheless, variation in the presence of compensation statutes across the fifty states remains the norm, as not all states have such statutes, much to the consternation of the wrongly convicted and their advocates.<sup>25</sup> Furthermore, merely noting the variation in presence and absence of wrongful conviction compensation statutes is neither adequate to comprehend the presence and absence of such statutes, nor sufficient to understand the diverse origins of these statutes. Identifying variation, as Robert J. Norris writes in a forthcoming evaluation of wrongful conviction compensation statutes in the United States, is “a first step toward building a theoretical understanding of wrongful conviction policy . . . [and] the next step is to understand the source of such variation.”<sup>26</sup> We take that next step in this article, exploring and testing explanations for the policy choices of the states regarding compensation for the wrongly convicted.

Like Marvin Zalman, who contends that scholars must place politics more squarely in the examination of the choices of states that affect the lives of the wrongly convicted, we seek to expand the study of (and advocacy for) compensation for wrongful convictions to attend much more to politics than extant scholarship does.<sup>27</sup> In line with that desire, we take up questions like those Norris posed to the field about the presence of wrongful conviction statutes across the states: “Are such policies simply reactions to large numbers of exonerations? Is the development of compensation statutes and

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<sup>23</sup> H.R. REP. NO. 108-711, at 121 (2004).

<sup>24</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8–11 (2001) (describing the evolution of thought in crime control).

<sup>25</sup> See Dwyer, *supra* note 19.

<sup>26</sup> Norris, *supra* note 20, at 19.

<sup>27</sup> See Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1510 (2010/2011) [hereinafter Zalman, *An Integrated Justice Model*]. To date, few law review articles directly address the politics of compensation for the wrongly convicted. See, e.g., Creighton C. Horton II, *Working Together for Justice: Utah's Exoneration and Innocence Assistance Bill*, 2008 UTAH L. REV. 107 (2008).

other wrongful conviction policies a partisan political issue? Do structural and cultural characteristics of jurisdictions affect the passage of such laws?"<sup>28</sup> Ultimately, we seek to begin a line of research on political explanations for why some states have wrongful conviction compensation statutes while others lack them.

With this article we aim to draw more attention to the possible social and political determinants affecting state enactment of statutory compensation for wrongful convictions. We draw from the political science literature to begin to develop a theory for the presence of wrongful compensation statutes and derive preliminary theoretical implications. This may seem strange. The social sciences, especially political science, have generally ignored the issue of wrongful convictions.<sup>29</sup> It is less strange when we recognize that the reform of wrongful conviction compensation schemes requires considerations of problem definition, agenda setting, interest group mobilization, and policy choice and change, all of which are topics central to and informed by American politics research. Subsequently, we test a set of political hypotheses on an original, cross-sectional data set, employing logistic regression.

Our results provide tentative evidence that a narrow set of factors influence whether states have and maintain wrongful compensation statutes. These findings, however, are suggestive, not conclusive. Still they may point scholars in fruitful directions that yield better empirical analyses of compensation for the unjustly convicted and provide advocates with more than anecdotes about the political factors that advance or hinder legislative campaigns for compensating the wrongly convicted. At a minimum, our study illustrates how inquiries rooted in the social sciences may inform the legal study of the enactment, maintenance, and diffusion of wrongful compensation statutes among the states.

We begin by offering a brief critique of the legal scholarship on compensating the wrongfully convicted, emphasizing its general neglect of politics. Next, we focus on the broader politics of reparation<sup>30</sup> and compensation, offering ideas about how the social

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<sup>28</sup> Norris, *supra* note 20.

<sup>29</sup> For a pivotal exception, see FRANK R BAUMGARTNER, SUZANNA L. DE BOEF & AMBER E. BOYDSTUN, *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* (2008).

<sup>30</sup> In this article, we do not use the term restoration. Guided by the conceptualization of others, we acknowledge that

Restoration requires the reinstatement of the *status quo ante*. A harm was caused, a wrong was done, and its memory might remain: but when restoration is achieved, it is now (apart from the memory) as if the harm or wrong had never occurred. Reparation and compensation, by contrast, seek to make up for the loss of what

construction and political resources of the wrongfully convicted may influence broad support for their recompense. From there we deduce from the social science literature a set of hypotheses about the presence of statutory compensation. We follow this with an original analysis of state-level data on the presence of wrongful conviction compensation statutes. Finally, we draw out implications from our analysis and suggest subsequent steps to improve upon our study and the broader scholarship on compensating the wrongfully convicted.

## II. THE LIMITS OF LEGAL SCHOLARSHIP ON COMPENSATING THE WRONGLY CONVICTED

Legal scholars, supplemented by psychologists, have cornered the market on the study of wrongful convictions, including scholarship on compensation for the unjustly convicted.<sup>31</sup> Interestingly and surprisingly, the study of compensation for the wrongfully convicted has not changed much since the classic studies by Edwin Borchard in the early twentieth century.<sup>32</sup> Typically, legal scholarship on compensation for the wrongfully convicted opens with and/or includes notable cases of miscarriages of justice.<sup>33</sup> From there they develop arguments for why states should compensate the wrongfully convicted.<sup>34</sup> Generally, the arguments stem from moral and/or

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cannot thus be restored.

R. A. Duff, *Restorative Punishment and Punitive Restoration*, in *WHY PUNISH? HOW MUCH?: A READER ON PUNISHMENT* 367, 369 (Michael Tonry ed., 2011). In the case of miscarriages of justice that result in wrongful convictions, reparation and compensation are possible and appropriate, but restoration of the loss of liberty and other losses are impossible.

<sup>31</sup> See Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 *J. CONTEMP. CRIM. JUST.* 201, 201 (2005). Others have noted that criminal justice scholars joined the field late. See Marvin Zalman, *Criminal Justice System Reform and Wrongful Conviction: A Research Agenda*, 17 *CRIM. JUST. POL'Y REV.* 468, 469 (2006) [hereinafter Zalman, *Criminal Justice System Reform*]. Furthermore, political science and public policy scholars have been among the least likely scholars to engage and contribute to the wrongful convictions literature. See Zalman, *An Integrated Justice Model*, *supra* note 27, at 1510.

<sup>32</sup> See generally Borchard, *supra* note 1 (discussing the state of wrongful conviction compensation statutes in Europe in the early 1900s); Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice*, 52 *ANNALS AM. ACAD. POL. & SOC. SCI.* 108 (1914) (discussing the state of wrongful conviction compensation statutes in the United States in the early 1900s); EDWIN M. BORCHARD, *CONVICING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932) [hereinafter BORCHARD, *CONVICING THE INNOCENT*] (discussing the state of wrongful conviction compensation statutes in the early 1900s).

<sup>33</sup> See BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 1–5 (2011).

<sup>34</sup> See, e.g., Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 *N.Y.U. ANN. SURV. AM. L.* 97, 110 (2004).

utilitarian reasoning.<sup>35</sup> In other words, the traditional legal study of compensation for the wrongly convicted is a normative study of it. From there it often identifies common barriers the wrongly convicted face as they seek compensation and considers inequities in compensation that flow from different types of compensation schemes.<sup>36</sup> Nearly all law review articles close with some form of model legislation or elements that could improve extant model legislation, coupled with conclusions that outline steps for implementation.<sup>37</sup> As Richard Leo and Jon Gould conclude, “Borchard, in effect, created the template that would be used to study wrongful convictions . . . identify wrongful conviction cases, describe their legal causes, and propose reforms to prevent future miscarriages.”<sup>38</sup>

The legal study of compensation for those wrongly convicted of crimes provides what anthropologist Clifford Geertz termed “thick description,”<sup>39</sup> explaining in careful detail the moral arguments and policy means available to the wrongly convicted to seek recompense, forceful critiques of the limits of those means, and thoughtful proposals for redesigning the means of compensation.<sup>40</sup> It ably describes practice (or possible practice) and rightly functions as a form of advocacy for compensation of the unjustly convicted.<sup>41</sup> However, the legal study of compensation for wrongful convictions, borrowing a line from Marvin Zalman, “even if analyzing problems brilliantly, typically propose[s] reform measures with little or no thought given to the political world and policy process by which reforms are implemented.”<sup>42</sup>

The legal study of (and its inherent advocacy for) compensation for the wrongly convicted at worst ignores the politics of compensation. At best, it minimizes politics. That is, when legal scholars suggest inferences about plausible determinants of states

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<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How To Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 510 (2011).

<sup>37</sup> See, e.g., *id.* at 504, 541–42, 544.

<sup>38</sup> Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 11 (2009).

<sup>39</sup> CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES 6, 9–10 (1973).

<sup>40</sup> Policy-oriented advocacy materials have the same characteristics. See, e.g., INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7 (providing a detailed and thorough analysis of obstacles, options, and shortcomings of remedies available to the wrongfully convicted).

<sup>41</sup> *Id.* at 5.

<sup>42</sup> Zalman, *An Integrated Justice Model*, *supra* note 27, at 1510.

enacting compensation laws, they do it unwittingly and in ways that privilege utilitarian and moral explanations for why states should adopt compensation statutes, relegating political explanations to the sidelines.<sup>43</sup> Moreover, when they in passing point at possible political determinants, they treat them as truths rather than as open to empirical examination. They may claim, for instance, that “popular support” is largely responsible for the few new statutes enacted by states.<sup>44</sup> Conjecture serves as conclusion. But legal scholars could go further in their analyses by identifying, considering, and including political determinants commonly associated with policy adoption, especially the enactment of criminal justice policies and redistributive policies (e.g., political ideology of citizens and elites, partisan control of political institutions, and election cycles). This would require legal scholars to mine the social sciences, especially political science, for theoretical and empirical insights into agenda setting, interest group mobilization, and policy choice and change.<sup>45</sup>

Additionally, the legal study of compensation for the wrongly convicted is limited by its case-by-case—actually, state-by-state—approach to understanding the process and products of reparation and compensation. While we learn a great deal about the particulars of reparation and compensation in specific states, which we can aggregate to comprehend the general contours of reparation and compensation across the nation, legal scholarship to date has been unable to offer general explanations for the enactment, maintenance, and diffusion of compensation laws across the states.<sup>46</sup> This is true of the wrongful convictions scholarship overall,<sup>47</sup> as well as legal scholarship in general, which tends to

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<sup>43</sup> For instance, when Professor Bernhard identifies “uniformity, practicality, popular support, and fairness” as possible reasons for states adopting and maintaining wrongful compensation statutes, she places far more emphasis on nonpolitical factors than she does political ones. Bernhard, *supra* note 12, at 707–08. Others do the same. See, e.g., Master, *supra* note 34, at 110. The neglect of political factors specifically and politics more broadly is true of the general legal and criminal justice research on wrongful convictions and scholarship-based proposals for reform. See Zalman, *Criminal Justice System Reform*, *supra* note 31, at 468; Zalman, *An Integrated Justice Model*, *supra* note 27, at 1510.

<sup>44</sup> See Bernhard, *supra* note 12, at 712.

<sup>45</sup> For a pivotal exception, see BAUMGARTNER, BOEF & BOYDSTUN, *supra* note 29.

<sup>46</sup> See, e.g., Mostaghel, *supra* note 36, at 504 (discussing only why states should adopt compensation statutes); INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 12–13 (discussing why states should adopt compensation statutes and offering proposed legislation); Bernhard, *supra* note 12, at 706–07 (discussing a possible explanation for enactment in certain states, but not across states).

<sup>47</sup> One review of the legal scholarship on wrongful convictions concludes: “Rarely does legal scholarship delve deeply or systematically into the multifactorial, interactive, and complex

ignore the potential of inferential studies to contribute to legal scholarship and advance legal advocacy.<sup>48</sup> Thus, “most scholarship on wrongful conviction . . . has been primarily descriptive and has relied almost exclusively on a narrative case-study method to illustrate the traditional legal causes of wrongful conviction and to propose policy reforms.”<sup>49</sup>

The limits of the conventional approach to the legal scholarship on wrongful convictions and policy reform are consequential. Case-driven narratives raise many empirical questions that are impossible to answer without getting beyond the legal analysis of compensation. For instance, why do some states enact and maintain compensation laws to distribute recompense while other states only permit compensation through civil litigation and/or private legislation?<sup>50</sup> What are the determinants of the diffusion of innovations in such laws? What factors influence state generosity regarding access to and benefits levels of compensation? What are the correlates of public support for compensating the wrongly convicted? What are the attributes of compensation advocacy campaigns that increase the likelihood of success? The extant literature cannot answer these questions. Also, with the legal scholarship focused primarily on the courts and legal cases,<sup>51</sup> our understanding of the defeats and victories for policy change on behalf of the wrongly convicted in the legislatures and through political bargaining remains stunted.<sup>52</sup>

By critiquing the legal scholarship our intent is not to be quarrelsome, not to pick a fight with its producers, and not to suggest that their products are of little value. Rather, we merely

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nature of human and institutional causation in wrongful conviction cases.” Leo & Gould, *supra* note 38, at 16.

<sup>48</sup> See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (analyzing the methodological myopia of legal scholars).

<sup>49</sup> Leo & Gould, *supra* note 38, at 28.

<sup>50</sup> See INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 12.

<sup>51</sup> See Leo & Gould, *supra* note 38 (“Unlike the social and physical sciences, legal scholarship is premised on doctrinal, not empirical, research.”). *But see* Horton II, *supra* note 27, at 110–12 (discussing the passing of a wrongfully-convicted compensation statute in Utah); Deborah Mostaghel, *supra* note 36, at 523–28, 537–44 (discussing the reasons for passing such a statute and the methods for funding the compensation of wrongfully-convicted persons); John Shaw, Comment, *Exoneration and the Road to Compensation: The Tim Cole Act and Comprehensive Compensation for Persons Wrongfully Imprisoned*, 17 TEX. WESLEYAN L. REV. 593 (2011) (“[T]he Tim Cole Act, should serve as a model for other states to amend or create comprehensive compensation schemes.”).

<sup>52</sup> Reiterating a point, there is almost no legal scholarship that addresses from the legislative perspective the challenges and prospects of enacting wrongful conviction compensation statutes. *But see generally* Horton II, *supra* note 27 (discussing the legislative process of passing a compensation statute in Utah).

observe and suggest that the scholarship could grow and expand in the name of righting miscarriages of justice. Our contribution to its growth and expansion is to focus some of its attention on politics, employing findings about politics and policy change in the United States in order to better comprehend the challenges and potential for reforming the behavior of state governments towards the wrongly convicted.

*A. Legal Hodgepodge: The Means of Compensating the Wrongly Convicted*

For nearly a century advocates have called on states to enact compensation statutes.<sup>53</sup> They call for systematic provision of some degree of financial restitution to the wrongly convicted.<sup>54</sup> In 1913, California and Wisconsin became the first states to enact statutes for compensating citizens for wrongful convictions.<sup>55</sup> Two decades later legal scholars advocated for more states to adopt uniform institutions to compensate the wrongly convicted.<sup>56</sup> Their calls followed the recognition that state governments had discretion to compensate the wrongly convicted, that most states chose to not adopt any compensation statutes, and that the statutes that existed typically included provisions that erected barriers to compensation.<sup>57</sup> At the time, Borchard reasoned that state governments would recognize the debt owed to the wrongly convicted and act to reduce it.<sup>58</sup> “It may be hoped,” he averred, “that within measurable time remedial legislation may recognize the social obligation to compensate the innocent victims of an unjust

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<sup>53</sup> See BORCHARD, CONVICTING THE INNOCENT, *supra* note 32, at 387.

<sup>54</sup> See *id.* at 406–07.

<sup>55</sup> See *id.* at 387. Wisconsin was the first state to enact statutory compensation, followed by California, both in 1913. Shelley Fite, Comment, *Compensation for the Unjustly Imprisoned: A Model for Reform in Wisconsin*, 2005 WIS. L. REV. 1181, 1182 & n.4 (2005). This date contradicts the history of enactments presented by the Innocence Project on its website, which suggests that California adopted its statute in 1941. *California: State Compensation Laws*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawView/state1.php?state=CA> (last visited Feb. 14, 2012). 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. See BORCHARD, CONVICTING THE INNOCENT, *supra* note 32, at xxiv, 387 n.52. 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 *id.* at 387 n.52.

<sup>56</sup> See *id.* at 406–07.

<sup>57</sup> See *id.* at xxiv.

<sup>58</sup> See *id.* at 392.

conviction.”<sup>59</sup> Unfortunately, “over a half-century of exposés about wrongful convictions, from 1930 to 1990, stimulated very little policy activity.”<sup>60</sup> During that time and since then, the victims of unjust convictions have traveled hard policy roads through the states towards statutory compensation by their governments.

In many states, the roads toward justice the wrongfully convicted, including the exonerated, trod lead to nowhere. For example, in 2011 the Washington state legislature failed to pass a compensation law that would have established a system for providing wrongly convicted individuals with \$20,000 for each year of their imprisonment.<sup>61</sup> As one advocate recalled, “[w]e got lots of support philosophically, from both sides of the aisle. But then people said, ‘How are you going to pay for it?’”<sup>62</sup> In lieu of statutory compensation for the wrongfully convicted, civil litigation or private legislation are means by which the unjustly convicted may seek recompense from state governments.<sup>63</sup> Neither means guarantees them compensation.<sup>64</sup>

Civil litigation requires the wrongly convicted to bring suits against the state, as well as criminal justice institutions, such as prosecutors’ offices and police departments.<sup>65</sup> Allegations against the state may include false arrest or imprisonment, malicious and/or retaliatory prosecution, fabrication or suppression of evidence, and coercion of and ineffective assistance of counsel for defendants.<sup>66</sup> As many legal scholars note, however, suits against the state, when permissible under state law, may not result in compensation.<sup>67</sup> One reason is that compensation is impossible if the courts cannot attribute the conviction to identifiable wrongdoing by an agent of the criminal justice system.<sup>68</sup> Proving intentional wrongdoing by the state is nearly impossible. “It is hard to overstate,” as Michael Avery contends, “the legal and practical

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<sup>59</sup> *Id.* at 407.

<sup>60</sup> Zalman, *An Integrated Justice Model*, *supra* note 27, at 1478.

<sup>61</sup> Dwyer, *supra* note 19.

<sup>62</sup> *Id.*

<sup>63</sup> Lauren C. Boucher, Comment, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069, 1082–84 (2007).

<sup>64</sup> *Id.*

<sup>65</sup> See Shaw, *supra* note 51, at 602.

<sup>66</sup> Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439, 439–40 (2009).

<sup>67</sup> See *id.* at 451; Boucher, *supra* note 63, at 1082–84.

<sup>68</sup> Joseph H. King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1095–96 (1970).

difficulties of these cases.”<sup>69</sup> Furthermore, inequities influence the use and outcomes of civil litigation, ranging from the variation across the states in the right of the wrongly convicted to sue to differences in access to and competence of legal counsel.<sup>70</sup> One thing we know, however, about civil litigation as a means of recompense for the wrongly convicted: “Thus far, litigation has yielded mixed results.”<sup>71</sup>

Borchard argued in *Convicting the Innocent* that “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.”<sup>72</sup> Private legislation, however, trades in “grace and favor” as it 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 restitution.<sup>73</sup> “But such action is spasmodic only, and not all persons have the necessary influence to bring about legislation in their behalf.”<sup>74</sup> Beyond the unpredictable nature and outcomes of private legislation, there is variation in legislative access and success by the wrongly convicted. While the wrongly convicted often have ambivalent social constructions and low political resources, policymakers and the public may view some of the wrongly convicted more positively and some of the wrongly convicted have considerably more access to civic support than others, which they can covert to political capital and leverage in legislatures.<sup>75</sup>

Additionally, some states contain provisions in their state constitutions that may disallow private legislation.<sup>76</sup> According to the National Conference of State Legislatures, forty states have constitutional provisions against the introduction and passage of private bills.<sup>77</sup> Even when private legislation is permissible, it is

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<sup>69</sup> Avery, *supra* note 66, at 451.

<sup>70</sup> See Mostaghel, *supra* note 36, at 515; Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 86–87 (1999).

<sup>71</sup> Bernhard, *supra* note 12, at 707.

<sup>72</sup> BORCHARD, CONVICTING THE INNOCENT, *supra* note 32, at xxiv.

<sup>73</sup> *Id.*; Bernhard, *supra* note 70, at 94–96; INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 13.

<sup>74</sup> BORCHARD, CONVICTING THE INNOCENT, *supra* note 32, at xxiv.

<sup>75</sup> See INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 13; Bernhard, *supra* note 70, at 94–96.

<sup>76</sup> See John J. Johnston, *Reasonover v. Washington: Toward a Just Treatment of the Wrongly Convicted in Missouri*, 68 UMKC L. REV. 411, 415–16 (2000) (citing Charles B. Nutting, *Legislative Practice Regarding Tort Claims Against the State*, 4 MO. L. REV. 1, 13 (1939)).

<sup>77</sup> See NAT'L CONFERENCE OF STATE LEGISLATURES, EXAMPLES OF CONSTITUTIONAL PROVISIONS PROHIBITING SPECIAL OR PRIVATE BILLS (2011).

problematic because of legislative discretion. 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 legislature passed a resolution to award \$500,000 over twenty years to John Jerome White, who was wrongly convicted of the burglary, rape, beating, and robbery of an elderly woman.<sup>78</sup> 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 . . . .”<sup>79</sup> Compensation of Mr. White came with post-exoneration scrutiny and regulation: The legislation mandated that Mr. White submit to random drug tests, remain in the labor force (i.e., employed or seeking employment), and/or volunteer with a nonprofit organization during his twenty years of compensation.<sup>80</sup>

Beyond the possibility of private legislation being a tool of paternalism and regulation, it 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.<sup>81</sup>

Given the difficulties associated with accessing recompense through civil litigation and private legislation, legal scholars and advocates reason that state governments must enact statutory compensation for the wrongly convicted.<sup>82</sup> “Compensation statutes are necessary,” as Professor Bernhard argues, “because individuals convicted and incarcerated for crimes they did not commit are generally precluded from recovering damages by the inflexibility of tort law and civil rights doctrine, despite later exoneration.”<sup>83</sup> In a small majority of states such statutes exist, offering the wrongly

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<sup>78</sup> H.R. 161, 150th Gen. Assemb., Reg. Sess. (Ga. 2009), *available at* [http://www1.legis.ga.gov/legis/2009\\_10/pdf/hr161.pdf](http://www1.legis.ga.gov/legis/2009_10/pdf/hr161.pdf).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> H.B. 3035, 1998 Leg., Reg. Sess. (Fla. 1998), *available at* <http://laws.flrules.org/1998/431>.

<sup>82</sup> See Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why*, 18 B.U. PUB. INT. L.J. 403, 403, 408 (2009); see Johnston, *supra* note 76, at 415.

<sup>83</sup> Bernhard, *supra* note 82, at 403.

convicted degrees of triumph at the end of their roads to justice.<sup>84</sup> By the end of 2011, fifty-four percent of all states—twenty-seven of fifty (and the District of Columbia and the federal government)—had compensation laws (with some providing useful revisions to the laws) on their books.<sup>85</sup>

Statutory compensation removes “grace and favor” from the calculus of compensation, privileging right, entitlement, and reason.<sup>86</sup> “Generally, claimants need only establish innocence and prove that they served time in prison as a result of the wrongful conviction.”<sup>87</sup> Recently, for instance, after a two-year campaign by and for the wrongly convicted in Utah, the state legislature passed an “exoneration and innocence assistance” bill in 2008 to award approximately \$34,000 to those bearing “factual innocence” for each year of incarceration following their wrongful conviction, up to a maximum of fifteen years.<sup>88</sup> Even better, indeed the best, is Texas where in 2009 the 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.<sup>89</sup>

We must recognize, however, that the statutory victories in some states to compensate the wrongly convicted are more hollow than they are solid, given that the laws include weak provisions for the amount and quality of compensation.<sup>90</sup> 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

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<sup>84</sup> *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Compensating\\_The\\_Wrongly\\_Convicted.php](http://www.innocenceproject.org/Content/Compensating_The_Wrongly_Convicted.php) (last visited Feb. 14, 2012).

<sup>85</sup> *See id.*

<sup>86</sup> *See* BORCHARD, CONVICTING THE INNOCENT, *supra* note 32, at xxiv; Bernhard, *supra* note 82, at 409.

<sup>87</sup> Bernhard, *supra* note 82, at 409.

<sup>88</sup> Horton II, *supra* note 27, at 107–09. The establishment of “factual innocence” creates, however, a considerable burden of proof, even for those who have experienced exoneration. *See id.* at 109.

<sup>89</sup> INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 14, 30, app. B at 4. 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 (based on forty-four exonerations in Texas out of 289 nationwide, which is 15.2%). *Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Feb. 14, 2012).

<sup>90</sup> For instance, no state in the union provides a suite of compensation assistance that accords with the model proposed by the Innocence Project. Norris, *supra* note 20, at 13.

payments for higher education.<sup>91</sup> In some jurisdictions, compensation awards may be taxable as income.<sup>92</sup> Overall, eighty-one percent of those exonerated by the courts who 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.<sup>93</sup> Furthermore, statutory compensation yields inequities in terms of access to compensation (i.e., eligibility and restrictions) and the amount of compensation.<sup>94</sup> Nonetheless, for the advocates of the wrongly convicted, statutory compensation is the favored means of compensation because it reduces the degree to which discretion dominates the process of recompense for wrongful convictions.<sup>95</sup>

### III. THE POLITICS OF REPARATION AND COMPENSATION AFTER WRONGFUL CONVICTION

There is a longstanding norm among nations that the wrongly convicted warrant reparation and compensation.<sup>96</sup> International organizations and treaties establish and promote the norm, seeking full compliance by nation states. Key conventions include the International Covenant on Civil and Political Rights of the United Nations and the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe.<sup>97</sup> “Almost every

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<sup>91</sup> See INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 29.

<sup>92</sup> Fernanda Santos, *Bill Would Give Tax Break to Exonerated Prisoners*, N.Y. TIMES, Dec. 7, 2007, at B4.

<sup>93</sup> INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 15.

<sup>94</sup> See *id.* at 15–19 (citing examples of the differences between states’ compensation statutes and exceptions).

<sup>95</sup> See *id.* at 4.

<sup>96</sup> See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A(XXI), at art. 14(6) (Dec. 16, 1966); Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105, 107 (2008).

<sup>97</sup> See International Covenant on Civil and Political Rights, *supra* note 96; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, C.E.T.S. 117. Article 14(6) of the International Covenant on Civil and Political Rights reads:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

International Covenant on Civil and Political Rights, *supra* note 96. Protocol 7 states:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage

country,” according to Jason Costa, “recognizes the right to compensation in the case of wrongful conviction as a matter of domestic or international human rights law.”<sup>98</sup> However, despite being a party to the convention, the United States “recognizes no national right to compensation for wrongful conviction.”<sup>99</sup> Moreover, the absence of statutory compensation in twenty-three states suggests that intra-national disagreements exist over the right to compensation for wrongful conviction.<sup>100</sup> This is puzzling.

As early as 1914, Borchard argued that governments of the United States should compensate those burdened by “errors of justice.”<sup>101</sup> In his advocacy for a federal compensation law, Professor Borchard posed an enduring rhetorical question, “when the facts subsequently show that [government] has convicted and imprisoned an innocent man, does not the state owe that man compensation for the special sacrifice he has been compelled to make in the interest of the community?”<sup>102</sup> Two decades later, he answered his own question, asserting, “when it is discovered after conviction that the wrong man was condemned, the least the State can do to right this essentially irreparable injury is to reimburse the innocent victim, by an appropriate indemnity, for the loss and damage suffered.”<sup>103</sup> Approximately seventy years later Bernhard reprised Borchard’s assertion: “The state whose actions have put individuals in prison for crimes they did not commit owes a debt to those who through no fault of their own have lost years and opportunity. The debt should be recognized and paid.”<sup>104</sup> This is the consensus of the legal scholarship, and it generally concludes that states should repair the lives of the unjustly convicted as much as possible and do it in part by adopting statutory compensation. Yet this consensus is echoed neither in state legislatures nor the

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of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra*, at art. 3.

<sup>98</sup> Jason Costa, Comment, *Alone in the World: The United States’ Failure to Observe the International Human Right to Compensation for Wrongful Conviction*, 19 EMORY INT’L L. REV. 1615, 1618 (2005).

<sup>99</sup> *Id.* at 1632.

<sup>100</sup> See INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 3.

<sup>101</sup> Borchard, *State Indemnity*, *supra* note 32, at 108.

<sup>102</sup> *Id.* at 108–09.

<sup>103</sup> BORCHARD, CONVICTING THE INNOCENT, *supra* note 32, at vii.

<sup>104</sup> Bernhard, *supra* note 70, at 74.

federal legislature.<sup>105</sup>

Nevertheless, the payment of a civic debt to the wrongly convicted for the “taking of [their] liberty for the public use,”<sup>106</sup> either automatically or after judicial and bureaucratic processes, is intended to repair and compensate for as much of the damage wrought by miscarriages of justice as possible.<sup>107</sup> This reparation has three beneficiaries. The first beneficiary of reparation is the wrongly convicted individual.<sup>108</sup> 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 upon release.<sup>109</sup> A second beneficiary of reparation is government. Payment to the wrongly convicted is a down payment for repairing damage to the State.<sup>110</sup> By pairing subsequent acknowledgments of miscarriages of justice by government with reparation of the wrongly convicted, governments burnish their public legitimacy and retain (or regain) public respect for its criminal justice institutions and the rule of law.<sup>111</sup> 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.<sup>112</sup> The third beneficiary of reparation is the public. As the

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<sup>105</sup> The federal government amended its compensation statute for wrongful convictions under federal criminal law, 28 U.S.C. § 2513, which permits an award of damages in the amount of no more than \$100,000 for each twelve-month period of imprisonment for unjust sentences to death and a maximum of \$50,000 for each twelve-month period of imprisonment for all other unjust sentences. 28 U.S.C. § 2513 (2011). Additionally, 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” for which they served time on death row. Justice for All Act, Pub. L. No. 108–405, §§ 431, 118 Stat. 2293 (2011) (codified at 28 U.S.C. § 2513(e) (2011)).

<sup>106</sup> Borchard, *supra* note 1, at 685.

<sup>107</sup> *See id.*

<sup>108</sup> 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 R. CLEAR, HARM IN AMERICAN PENOLOGY: OFFENDERS, VICTIMS AND THEIR COMMUNITIES 6 n.1 (1994).

<sup>109</sup> INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 14, 20.

<sup>110</sup> *Id.* at 21.

<sup>111</sup> MICHAEL NAUGHTON, RETHINKING MISCARRIAGES OF JUSTICE: BEYOND THE TIP OF THE ICEBERG 85 (2007). *See generally* BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES (2004) (discussing the management of errors in the criminal justice system).

<sup>112</sup> *But see* Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 128 (2010) (arguing that political accountability is the best method of deterrence).

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.<sup>113</sup>

Given the diversity of beneficiaries of reparation, one might assume that it—at least as it is possible through forms of financial compensation—would be automatic, generous, and speedy. It is not and it perhaps never will be because the adoption of a wrongful conviction reparation system and the mechanisms for its implementation involve policy design, and politics will influence it. Policy design is the political craft of establishing the sets of institutions (i.e., the formal and informal rules) that bound and bestow the benefits and burdens, credits and costs, and prizes and penalties of distributive politics.<sup>114</sup> Policy design determines “who gets what, when, how.”<sup>115</sup> Group conflicts and power dynamics influence the targets, benefits, timing, and process for allocating values—positive and negative—to groups via policy design, often irrespective of the merits of justice, morality, ethics, science, or rationality.<sup>116</sup> Accordingly, we should always anticipate reparation to involve a political process, one that does not necessarily follow a linear path from “good” argument to “good” choices to “good” results. Democratic institutions, buffeted by cross-pressures of equity and efficiency, will influence the breadth, degree, and duration of governmental assistance and benefits for the wrongly convicted, even the extent to which governments take responsibility and/or accept blame for wrongful convictions.<sup>117</sup> Decisions of legislatures, bureaucracies, courts, and voting booths ultimately shape the forms and set the lengths of reparation and compensation for the wrongly convicted.<sup>118</sup> Consequently, democratic politics affects the scale and

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<sup>113</sup> See INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 21.

<sup>114</sup> See ANNE LARASON SCHNEIDER & HELEN INGRAM, POLICY DESIGN FOR DEMOCRACY 2–3 (1997) [hereinafter SCHNEIDER & INGRAM, POLICY DESIGN]. See generally Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334 (1993) [hereinafter Schneider & Ingram, *Social Construction*] (arguing that social constructions influence policy design).

<sup>115</sup> See generally HAROLD D. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (1958) (stating the conditions of politics in relation to influence).

<sup>116</sup> See generally GIANDOMENICO MAJONE, EVIDENCE, ARGUMENT AND PERSUASION IN THE POLICY PROCESS (1989) (arguing that policy is based on the use of value judgments by policy makers); DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING (2d ed. 2002) (discussing the inclusion of basic societal goals in policy); JOHN KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 2011) (examining how issues come before the legislature and become part of the government agenda).

<sup>117</sup> See INNOCENCE PROJECT, MAKING UP FOR LOST TIME, *supra* note 7, at 13.

<sup>118</sup> See *id.*

character of reparation as much as it does the scale and character of punishment in America.

Generally, democratic politics involves conflicts and contests over public respect and regard, representation, and/or the allocation of public resources.<sup>119</sup> If governments are to respond to the preferences, values, and interests of the wrongly convicted, the wrongly convicted and their allies, like other interest groups, must navigate and influence elite and public perceptions of their civic worth for regard, representation, and resources; they must convince policymakers and voters that they are deserving of attention, benefits, and compassion.

In many states, however, the wrongly convicted have a hard time distinguishing themselves from the justly convicted. Like the latter, the former bear the mark of felony conviction and the stigma of imprisonment.<sup>120</sup> This is intentional. “Criminal stigma,” as Frederick Lawrence reminds us, “is not an accidental byproduct of the criminal justice system. It is precisely what the criminal justice system is supposed to provide.”<sup>121</sup> Consequently, in many instances, democratic institutions, civil society, and neighbors view and treat the wrongly convicted as discredited and scorned citizens.<sup>122</sup> This happens for at least four reasons. First, the initial branding of the innocent by the state as violent felons, often for alleged rape, robbery, and murder, coupled with negative media from their court cases, weakens (but does not preclude) the mutability of their status as “criminal” within a polity.<sup>123</sup> This results in negative

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<sup>119</sup> *See id.*

<sup>120</sup> Whether stigma must be a performance and product of criminal punishment is debatable. *See generally* JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 8–9 (2003) (comparing the treatment of convicts in America with convicts of France and Germany, where offenders are not stigmatized, for example, offenders are rarely imprisoned, prison uniforms are abolished, convicts work real jobs, and are encouraged to exercise their right to vote); JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 102 (1989) (theorizing that stigmatizing results in higher crime rates because shaming that is stigmatizing encourages participation in criminal subcultures, whereas shaming produced by interdependency that is followed by reintegration results in low crime rates because disapproval is dispensed without eliciting a rejection of the disapprovers so that a possibility of future disapproval remains).

<sup>121</sup> Lawrence, *supra* note 3, at 396.

<sup>122</sup> *See* Kevin Johnson, *Cleared by DNA Tests, but Still Struggling to be Free; Stigma of Conviction is Difficult to Overcome*, USA TODAY, Jan. 28, 2009, at A1; Saundra D. Westervelt & Kimberly J. Cook, *Framing Innocents: The Wrongly Convicted as Victims of State Harm*, 53 *CRIME, LAW & SOC. CHANGE* 259, 270–71 (2010); SURVIVING JUSTICE, *supra* note 2, at 432–33; Adina M. Thompson, Oscar R. Molina & Lora M. Levett, *After Exoneration: An Investigation of Stigma and Wrongfully Convicted Persons* 5–11 (2011) (unpublished manuscript) (on file with Albany Law Review).

<sup>123</sup> *See* Westervelt & Cook, *supra* note 122, at 270–71.

consequences for the wrongly convicted, ranging from depression to unemployment.<sup>124</sup> Second, public faith in the judicial system is relatively high, driven at the individual-level by personal experience with the courts, perceptions of procedural justice (e.g., judicial fairness), general trust in governmental institutions, and race.<sup>125</sup> Moreover, public knowledge and acceptance of the causes and biases in wrongfully convicting the innocent is relatively low.<sup>126</sup> Third, the legalities and science of innocence, which are complex and contested,<sup>127</sup> may hinder the general public from forming sure opinions and sustain certain support for the convicted who claim unjust conviction and imprisonment.<sup>128</sup> Fourth, even in the face of “structural injustice,” members of the public, including families and friends of the unjustly convicted, may apply what political theorist Iris Marion Young called the “liability model of responsibility,” whereby blame for the errors of justice shift from the courts to the convicted person.<sup>129</sup> When that happens, as Saundra Westervelt and Kimberly Cook explain, the unjustly convicted are judged to have contributed to the error of justice, either through their surreptitious involvement in the crime or their failure to adequately defend themselves against the criminal charges.<sup>130</sup> Taken together, these factors begin to suggest why the “mobilization of bias” on behalf of the wrongly convicted is difficult.<sup>131</sup>

At the same time, the wrongly convicted may lack positive social constructions (or possess ambivalent or unsympathetic ones) as

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<sup>124</sup> See *id.* at 263; SURVIVING JUSTICE, *supra* note 2, at 432–33.

<sup>125</sup> See James P. Wenzel, Shaun Bowler & David J. Lanoue, *The Sources of Public Confidence in State Courts: Experience and Institutions*, 31 AM. POL. RES. 191, 200–02 (2003); Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 704 (2006).

<sup>126</sup> See Marvin Zalman, Matthew J. Larson & Brad Smith, *Citizens' Attitudes Toward Wrongful Convictions*, 37 CRIM. JUST. REV. (forthcoming 2012). At the same time, many may affirm that the frequency of errors of justice makes the criminal justice system worthy of policy changes. *Id.* According to one study of public opinion, a modest majority of respondents in one state (Michigan) thought that unjust convictions occurred at a rate worthy of criminal justice reform. *Id.*

<sup>127</sup> See Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 508 (2005); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 588–89 (2005); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1552–53 (2008).

<sup>128</sup> See SCHNEIDER & INGRAM, POLICY DESIGN, *supra* note 114, at 167. This is the case of science-based policy-making generally and it limits for full engagement of the public with important policy issues. *Id.*

<sup>129</sup> See IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 97–104 (2011).

<sup>130</sup> Westervelt & Cook, *supra* note 122, at 262.

<sup>131</sup> E.E. SCHATTSCHEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 30 (1960).

citizens<sup>132</sup> and they tend to have a low degree of political resources to influence positive governmental and nongovernmental action, as well as civic regard, on their behalf.<sup>133</sup> That is to say, the quantity and quality of their human, economic, and social capital is inadequate to trouble policymakers and the public, for the “wrongfully convicted are a small and unsympathetic constituency.”<sup>134</sup> They are few in number across the United States. As of 2011, for instance, the ranks of the wrongfully convicted cleared through DNA evidence remains fewer than 300.<sup>135</sup> Additionally, “those affected by wrongful arrest or conviction are a weak social group, whose voice is almost unheard,”<sup>136</sup> reducing the political incentives of elected policymakers (i.e., legislators, governors, and prosecutors) to respond to the interests and preferences of the unjustly convicted.

In the end, the intersection of their negative social construction and low political resources relegates the wrongly convicted to a “deviant” category of polity membership,<sup>137</sup> one where members are “undeserving” of assistance, benefits, and compassion in the absence of clearing high standards of innocence.<sup>138</sup> Yet even when innocence is established, political institutions may remain unresponsive because of the limited political resources of the wrongly convicted.<sup>139</sup> The membership of the wrongly convicted in the “deviant” category allows other categories of polity members to relegate them to a lower plane of group position, categorizing their claims as illegitimate, neglecting their needs, and signaling that the polity perceives them to be of low civic and political worth.<sup>140</sup>

Nevertheless, in many states’ political institutions, especially state legislatures, politicians have recognized the claims of the wrongly convicted for compensation, despite their status as a “weak social group.”<sup>141</sup> Why? How is it “that the weak *can* sometimes do

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<sup>132</sup> See Westervelt & Cook, *supra* note 122, at 262. Here *social constructions* are the collective “images, stereotypes, and beliefs that confer identities on people and connect them with others as a social group who are possible candidates for receiving beneficial or burdensome policy.” SCHNEIDER & INGRAM, *POLICY DESIGN*, *supra* note 114, at 75.

<sup>133</sup> See Westervelt & Cook, *supra* note 122, at 261–63.

<sup>134</sup> BAUMGARTNER ET AL., *supra* note 29, at 53.

<sup>135</sup> *Know the Cases*, INNOCENCEPROJECT, <http://www.innocenceproject.org/know/> (last visited Feb. 14, 2012).

<sup>136</sup> BORCHARD, *CONVICTING THE INNOCENT*, *supra* note 32, at 390.

<sup>137</sup> See Schneider & Ingram, *Social Construction*, *supra* note 114, at 339; SCHNEIDER & INGRAM, *POLICY DESIGN*, *supra* note 114, at 6.

<sup>138</sup> See SCHNEIDER & INGRAM, *POLICY DESIGN*, *supra* note 114, at 6.

<sup>139</sup> See BORCHARD, *CONVICTING THE INNOCENT*, *supra* note 32, at 390.

<sup>140</sup> See SCHNEIDER & INGRAM, *POLICY DESIGN*, *supra* note 114, at 6.

<sup>141</sup> See RICHARD A. STACK, *DEAD WRONG: VIOLENCE, VENGEANCE, AND THE VICTIMS OF*

well in politics”?<sup>142</sup> Turning to our explanation for the presence of statutory compensation across the states, we begin with the assumption that compensation for the wrongly convicted is a political act. We theorize that a set of factors may influence the presence (and maintenance) of statutory compensation. These include interest group pressure by “innocence movement” activists, the influence of punitive penal regimes, and the dominant political ideology of state governments.<sup>143</sup>

### A. Interest Group Pressure

For close to a century, legal professors and journalists, coupled with a growing set of intellectual and organizational resources from some of the nation’s most prestigious universities and law firms, have spoken on behalf of the wrongly convicted,<sup>144</sup> advocating for criminal justice reforms aimed at preventing unjust convictions and making reparations after they happen.<sup>145</sup> In the last three decades, the “innocence movement”—the national network of regional and state-based advocates and advocacy organizations and coalitions pursuing the correction and prevention of criminal justice errors, and recompense and reintegration of the victims of error—has matured.<sup>146</sup> It employs to increasingly good effect the classic approach of interest groups: it combines an “inside strategy” focused

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CAPITAL PUNISHMENT 209 (2006) (quoting BORCHARD, CONVICTING THE INNOCENT, *supra* note 32, at 390); see *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, *supra* note 84.

<sup>142</sup> BAUMGARTNER ET AL., *supra* note 29, at 224.

<sup>143</sup> See discussion *infra*.

<sup>144</sup> When scholars focus on the role of organized interest in criminal justice policy-making, they prefer national policy venues. See, e.g., Barbara Ann Stolz, *The Roles of Interest Groups in U.S. Criminal Justice Policy Making: Who, When, and How*, 2 CRIM. JUST. 51, 52 (2002); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 265 (2007). That preference has stunted our theoretical and empirical understanding of the influence of interest groups on criminal policy-making among the states. See Erika S. Fairchild, *Interest Groups in the Criminal Justice Process*, 9 J. CRIM. JUST. 181, 181 (1981). State-level criminal policy subsystems, nonetheless, provide fertile fields for empirical studies of interest group formation and mobilization vis-à-vis criminal justice agenda setting, policy choice, implementation, and evaluation. See, e.g., LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* (2008); S. Laurel Weldon, *Women’s Movements, Identity Politics, and Policy Impacts: A Study of Policies on Violence Against Women in the 50 United States*, 59 POL. RES. Q. 111, 111 (2006); Mahalley D. Allen, *Laying Down the Law? Interest Group Influence on State Adoption of Animal Cruelty Felony Laws*, 33 POLY STUD. J. 443, 443–44 (2005); JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* (2011).

<sup>145</sup> See BAUMGARTNER ET AL., *supra* note 29, at 216.

<sup>146</sup> See *Additional Information on the Innocence Movement and the Death Penalty in the United States*, MUSEUM OF CONTEMPORARY PHOTOGRAPHY, 7, [http://mocp.org/uploads/MoCP\\_Simon\\_PacketC.pdf](http://mocp.org/uploads/MoCP_Simon_PacketC.pdf) (last visited Feb. 14, 2012).

on direct policy appeals and political pressure on policymakers, especially judges and legislators, with an “outside strategy” focused on expanding the scope of conflict<sup>147</sup> via the media and the leveraging of social capital to mobilize latent indirect pressure on policymakers from a widening cast of supporters and patrons.<sup>148</sup>

*The Decline of the Death Penalty and the Discovery of Innocence* succinctly describes the innocence movement and its greatest contribution in the cause of reducing, perhaps ending, unjust convictions:

A small group of students and activists defending the rights of a reviled population in the face of active hostility from large segments of the population and the political leadership set in motion a positive-feedback system. The social cascade reverberated through the system not on the basis of money and power, but simply by bringing attention to an aspect of the criminal justice system that has been known for hundreds of years: It is not perfect.<sup>149</sup>

While the innocence movement may not have all the attributes of a social movement,<sup>150</sup> it fits with a conventional definition of an interest group—“an association of individuals or organizations or a public or private institution that, on the basis of one or more shared concerns, attempts to influence public policy in its favor.”<sup>151</sup> Moreover, the innocence movement expresses what Richard Berk and Peter Rossi termed *reform interests*,<sup>152</sup> its activists pursue purposive benefits and rewards from crime policymaking.<sup>153</sup> According to Professor Zalman:

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<sup>147</sup> See generally JACK L. WALKER, JR., MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS 103 (1991) (explaining how inside activities directly appeal to politicians while outside activities are aimed at building support with the general public). For the general use of the dual strategies by interest groups in American politics, see *id.*; BAUMGARTNER ET AL., *supra* note 14, at 149–65. For more on the mobilization of bias via expansion of the “scope of conflict,” see SCHATTSCHEIDER, *supra* note 131, at 12.

<sup>148</sup> See Zalman, *An Integrated Justice Model*, *supra* note 31, at 1491.

<sup>149</sup> BAUMGARTNER ET AL., *supra* note 29, at 216. Additionally, Chapter 3 provides a fascinating “[c]hronology [of] [i]nnocence” as a frame for political debate, organizational development, and policy change. *Id.* at 49.

<sup>150</sup> Zalman, *Criminal Justice System Reform*, *supra* note 31, at 478.

<sup>151</sup> Clive S. Thomas & Ronald J. Hrebener, *Interest Groups in the States*, in POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 102 (Virginia Gray & Russell L. Hanson eds., 8th ed. 2004).

<sup>152</sup> Jennifer J. Hora & Margaret R. Ferguson, *The Politics of the Executive Branch*, in THE EXECUTIVE BRANCH OF STATE GOVERNMENT: PEOPLE, PROCESS, AND POLITICS 187, 201 (Margaret Robertson Ferguson ed., 2006).

<sup>153</sup> See RICHARD A. BERK & PETER H. ROSSI, PRISON REFORM AND STATE ELITES 5, 12 (1977).

It may be more accurate to describe the [innocence movement] as an association type of interest group because of its organizational membership. The lawyer leaders of the innocence movement seem to fit the model of interest group participants in that they are highly educated and well positioned to get results in various policy venues. They can marshal arguments before legislative committees, newspaper editorial boards, and a host of places where public opinion is shaped and policy decisions made.<sup>154</sup>

Aside from lawyers, journalists, and graduate and undergraduate students, activists in the innocence movement include exonerated persons; they “put a human face on the otherwise theoretical idea of innocent people being convicted.”<sup>155</sup>

The legal research, journalistic coverage, and judicial advocacy work of the innocence movement has resulted in the exoneration of 289 wrongly convicted persons that the courts deemed innocent through analysis of DNA between 1989 and January, 2012.<sup>156</sup> Such judicial victories may have positive political consequences. Norris suggests, for instance, “there is reason to believe that as more wrongful convictions are discovered, and research on the post-release experiences of exonerees continues to grow, states may begin to develop improved policies to provide meaningful reentry assistance for wrongly convicted individuals.”<sup>157</sup> If so, we would expect that as exonerations increase, states should be increasingly willing to adopt statutory compensation. There is some evidence of this occurring, illustrated in Figures 2a, 2b, and 2c. For example, the vast majority (twenty-three of the twenty-seven; 85.2%) of states that have enacted compensation laws have had at least one wrongly convicted person exonerated in state courts.<sup>158</sup> Moreover, the mean number of exonerations in states with compensation laws is significantly larger (mean=8.70; n=27) than the mean number of exonerations in states that have failed to enact a compensation statute (mean=1.74; n=23).<sup>159</sup> And, finally, Figure 2c illustrates

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<sup>154</sup> Zalman, *Criminal Justice System Reform*, *supra* note 31, at 478; see JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 5 (2008).

<sup>155</sup> Horton II, *supra* note 27, at 110.

<sup>156</sup> *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php#](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php#) (last visited Feb. 14, 2012).

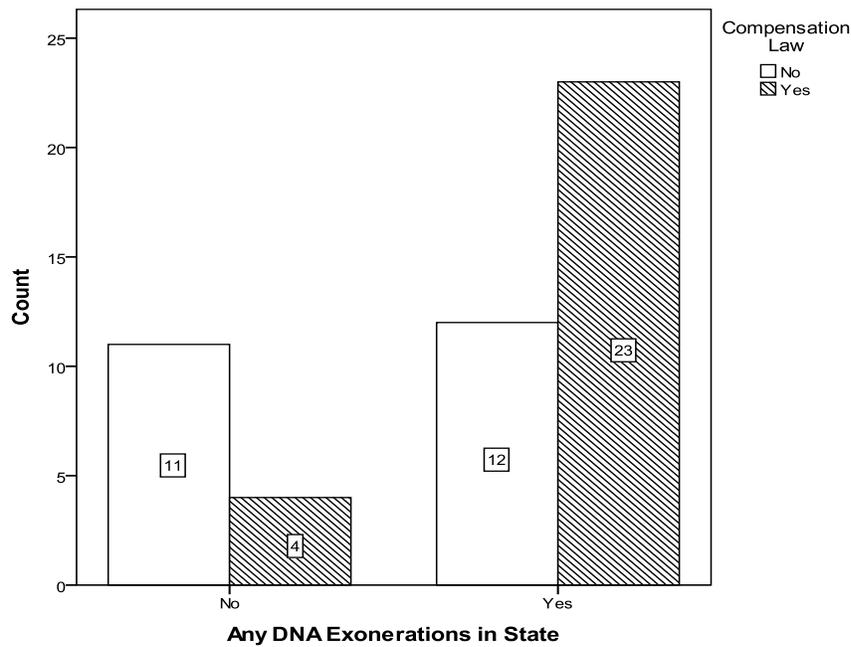
<sup>157</sup> Norris, *supra* note 20, at 18.

<sup>158</sup> See *infra* Figure 2a.

<sup>159</sup> See *infra* Figure 2b.

that the rapid introduction of state compensation statutes after 2006 followed closely on the heels of spikes in the national number of exonerations occurring in the first few years of the twenty first century.<sup>160</sup>

FIGURE 2A. PRESENCE OF ANY DNA EXONERATIONS IN STATE BY PRESENCE OF COMPENSATION LAW (N=50)



<sup>160</sup> See *infra* Figure 2c.

FIGURE 2B. MEAN NUMBER OF EXONERATIONS IN STATE BY PRESENCE OF COMPENSATION LAW (N=50)

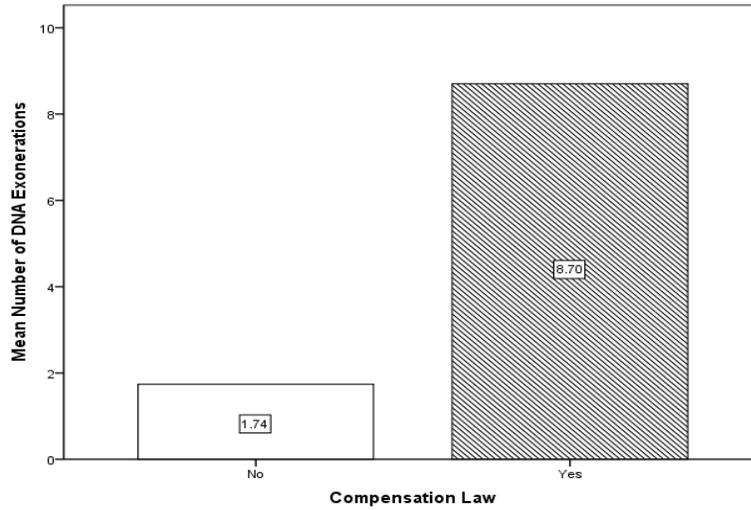
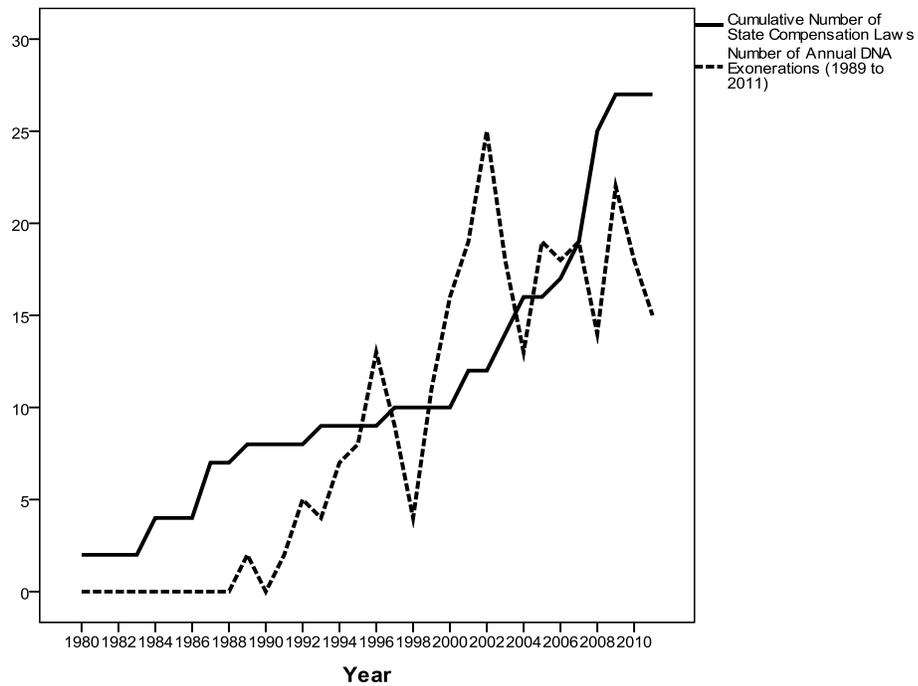


FIGURE 2C. TOTAL NUMBER OF STATES WITH COMPENSATION STATUTES AND THE ANNUAL NUMBER OF EXONERATIONS, 1989–2011



In light of the development and activities of the innocence movement and the rise in exonerations, we hypothesize that *the presence of statutory compensation is more likely in states with greater interest group pressure on behalf of and by the wrongly convicted.*

### B. Penal Regimes: Retribution vs. Rehabilitation

Wrongful convictions and their consequences constitute forms of what criminologist Todd Clear calls “penal harm”; they result from and manifest “government’s organized infliction of harm upon [an innocent] citizen.”<sup>161</sup> Given “the battery of harms” that the wrongly convicted endure during and after their imprisonment, even exoneration, ranging from unemployment to family dissolution to stigma, Saundra D. Westervelt and Kimberly J. Cook propose the classification of “victims of wrongful convictions as victims of state-produced harms.”<sup>162</sup> If so, the choice by a state to not enact statutory compensation for wrongful convictions or supplemental reforms is a choice by a state to lengthen the suffering of the unjustly convicted, perpetuating penal harm. It is a choice by states to be punitive, engaging in and extending what legal historian James Whitman describes as “harsh justice” that degrades its targets, exercising the “power to make the person punished feel diminished, lessened, lowered.”<sup>163</sup> Because states have discretion, there is variation in punitiveness across the states towards those under correctional influence, as recent catalogs and analyses of the punitiveness of states suggest.<sup>164</sup>

One theory of state-level punitiveness is that the type of penal regime (i.e., the dominant consensus on the causes and consequences of crime, dominant understandings of what constitutes just acts, the set of explanations for punishment, and the collections of punishment) a state has, influences its policies towards those under, or who have been under, correctional

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<sup>161</sup> CLEAR, *supra* note 108, at 2, 4.

<sup>162</sup> Westervelt & Cook, *supra* note 122, at 261, 265. Some advocates and scholars go as far as to imply that the harms felt by the wrongly convicted, during and after imprisonment, may constitute torture. Weigand, *supra* note 3, at 429–30; Jennifer J. Curtiss, Reentry Challenges Faced by the Wrongly Convicted 6, 19 (Sept. 2007) (unpublished manuscript), available at [http://www.jjay.cuny.edu/Wrongly\\_Convicted\\_Thesis\\_10.5.07.pdf](http://www.jjay.cuny.edu/Wrongly_Convicted_Thesis_10.5.07.pdf).

<sup>163</sup> WHITMAN, *supra* note 120, at 8.

<sup>164</sup> BESI KI KUTATELADZE, IS AMERICA REALLY SO PUNITIVE? EXPLORING A CONTINUUM OF U.S. STATE CRIMINAL JUSTICE POLICIES 245, 247–48 (2009); BARKER, *supra* note 15, at 4, 10.

control.<sup>165</sup> Retributive regimes, according to sociologists Katherine Beckett and Bruce Western, “emphasize the undeserving and unreformable nature of deviants, tend to stigmatize and separate the socially marginal, and are hence more likely to feature less generous welfare benefits and more punitive anti-crime policies.”<sup>166</sup> States with rehabilitative regimes, on the other hand, attempt to restore those who have been under correctional control to their full status as citizens vis-à-vis rights, obligations, and expectations, or at least work to positively reintegrate them into society, after imprisonment.<sup>167</sup> Furthermore, states with retributive regimes may be more likely to assert, invest in, and defend an ideology of the rightness of the criminal justice process, even in the face of errors of justice such as wrongful convictions.<sup>168</sup> Surveys of criminal justice professionals suggest that this ideology is common among judges, police officers, and prosecutors.<sup>169</sup> In the case of prosecutors, for instance, this ideology, along with political and professional incentives (e.g., burnishing “tough on crime” bona fides for reelection, increased prosecutorial budgets, retention of public legitimacy, decreased public scrutiny of their competence, fairness, and effectiveness) and their “personal morality and self-righteousness,” may influence their “zeal” to uphold convictions by

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<sup>165</sup> See BARKER, *supra* note 15, at 13; Michael Leo Owens & Adrienne R. Smith, “*Deviants and Democracy: Punitive Policy Designs and the Social Rights of Felons as Citizens*,” 40 AM. POL. RES. (forthcoming 2012).

<sup>166</sup> Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT AND SOC’Y 43, 44 (2001); see also Willem de Koster, Jeroen van der Waal, Peter Achterberg & Dick Houtman, *The Rise of the Penal State: Neo-Liberalization or New Political Culture?*, 48 BRIT. J. CRIMINOLOGY 720, 730 (2008) (arguing that increased incarceration rates in Western countries are the result of a new rightist political culture that emphasizes social order). The development of such penal regimes may stem from state “cultures of inequality” that accept and foster social and economic inequality among their citizens. Robert D. Crutchfield & David Pettinicchio, “*Cultures of Inequality: Ethnicity, Immigration, Social Welfare, and Imprisonment*,” 623 ANNALS AM. ACAD. POL. & SOC. SCI. 134, 135 (2009). Polities with cultures of inequality, for instance, are more likely than those with culture of equality to adopt public policies that exacerbate socioeconomic cleavages between the “deserving” and “undeserving” poor, emphasizing social assistance for the former group and self-sufficiency for the latter group. *Id.* at 136; Beckett & Western, *supra*, at 44.

<sup>167</sup> Owens & Smith, *supra* note 165.

<sup>168</sup> See generally Brad Smith, Marvin Zalman & Angie Kiger, *How Justice System Officials View Wrongful Convictions*, 57 CRIME & DELINQ. 663, 679 (2011) (describing data showing that prosecutors and police are less likely to acknowledge the frequency of wrongful convictions).

<sup>169</sup> *Id.* at 668, 679; Robert J. Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors*, 53 CRIME & DELINQ. 436, 443, 461 (2007); see C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 54 (1996).

refuting and fighting in the judicial courts and courts of public opinion claims of unjust convictions.<sup>170</sup> Thus, the ideology primes their support for penal punitiveness more broadly. It is consequential politically. Given their unchecked discretion to bring charges for criminal offenses and to reduce or dismiss them,<sup>171</sup> along with their “virtually sole access to the politically potent symbols of ‘law and order’ politics,”<sup>172</sup> prosecutors are perhaps the most influential policy entrepreneurs when it comes to criminal justice agenda setting and policymaking.<sup>173</sup>

Therefore, we hypothesize that states with rehabilitative penal regimes are more likely than states with retributive penal regimes to favor recompense for the wrongfully convicted and thereby have statutory compensation for unjust convictions.

### C. Ideological Composition of Government

While the continued reluctance of some states to compensate the wrongly convicted through a statute is “surprising,”<sup>174</sup> the political environment within a state may account for the absence or presence of statutory compensation for wrongful convictions. In particular, the ideological composition of governmental elites, which to a degree reflects public sentiments and the ideology of the electorate, should influence whether states have wrongful compensation statutes. The intuition for this comes from the consistent empirical finding that liberal governments are positively correlated with wider social welfare access and greater social welfare generosity and negatively correlated with higher rates of punishment (e.g., incarceration rates).<sup>175</sup> Furthermore, there is recent public opinion evidence to

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<sup>170</sup> Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–35, 139, 156, 182 (2004).

<sup>171</sup> Ramsey & Frank, *supra* note 169, at 446.

<sup>172</sup> Roy B. Flemming, *The Political Styles and Organizational Strategies of American Prosecutors: Examples from Nine Courthouse Communities*, 12 LAW & POLY 25, 25 (1990).

<sup>173</sup> See *id.* For more on the political influence of prosecutors in state legislative policymaking, see John P. Heinz, Robert W. Gettleman & Morris A. Seeskin, *Legislative Politics and the Criminal Law*, 64 NW. U. L. REV. 277, 288–89, 339 (1969); MILLER, *supra* note 144, at 88.

<sup>174</sup> Bernhard, *supra* note 12, at 708.

<sup>175</sup> See Beckett & Western, *supra* note 166, at 55. See generally Matthew C. Fellowes & Gretchen Rowe, *Politics and the New American Welfare States*, 48 AM. J. POL. SCI. 362, 369 (2004) (describing results that the more liberal a state government was, the more generous the welfare benefits are); Joe Soss, Sanford F. Schram, Thomas P. Vartanian & Erin O'Brien, *Setting the Terms of Relief: Explaining State Policy Choices in the Devolution Revolution*, 45 AM. J. POL. SCI. 378, 390–91 (2001) (concluding that less generous welfare benefits are the result of more conservative governments in power and racism); John R. Sutton, *The Political Economy of Imprisonment in Affluent Western Democracies, 1960–1990*, 69 AM. SOC. REV. 170

suggest that “wrongful conviction will have a liberal ideological valence” among adults.<sup>176</sup> Accordingly, if governmental elites have more liberal policy attitudes, the criminal justice policies of their states should be more restorative.

Expressed as a hypothesis, *the presence of wrongful conviction compensation statutes is more likely in states with greater degrees of liberalism as expressed in the policy attitudes and ideology of governmental elites.* That is, more progressive political environments within states should increase the likelihood of a state having a wrongful conviction compensation statute.

#### IV. DATA

The analyses presented below are based on our comprehensive cross-sectional dataset capturing an array of state-level demographic and socioeconomic conditions, crime rates, criminal justice and correctional statistics, legislative configuration and governmental partisanship, and sentencing policies, among other factors. In creating this dataset, data limitations forced us in some cases to include measures that reflect different time periods. For example, while the National Prosecutors Survey is available in later years, the 2001 survey was the most recent census of all chief prosecutors in each state.<sup>177</sup> In order to develop state-level measures of prosecutorial strength, we believed it necessary to aggregate data that reflect all offices rather than rely on a random sample of chief prosecutors across the various states. Nevertheless, all of the variables included in our model are measures collected at or after 2008, with the exception of our indicator of prosecutorial strength.

As is apparent in Figure 1, states enact compensation laws over time and may look to the actions of other states in passing these kinds of statutes.<sup>178</sup> The dramatic rise in enactment since the mid-1980s, but especially over the past decade, reflects this possibility.<sup>179</sup> Consequently, developing a longitudinal data set to better estimate the likelihood and pace of enactment, as well as

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(2004) (concluding that incarceration rates decrease when left parties and unions have greater political power).

<sup>176</sup> Zalman et al., *supra* note 126 (manuscript at 12).

<sup>177</sup> *National Prosecutors Survey [Census], 2001*, DATA.GOV, <http://explore.data.gov/Law-Enforcement-Courts-and-Prisons/National-Prosecutors-Survey-Census-2001/udrs-96du> (last visited Feb. 14, 2012).

<sup>178</sup> *See supra* Figure 1.

<sup>179</sup> *Id.*

innovation in the nature and quality of compensation provided to the wrongly convicted, is a worthwhile goal. A massive data collection effort of this sort should include longitudinal measures of state-based demographic, socioeconomic, political, and criminal justice statistics, as well as year of enactment among states that enact legislation, spatial measures capturing neighboring states years of enactment to investigate the potential diffusion of policy across place, years of modifications to compensation laws among those jurisdictions electing to strengthen their statutes, and more comprehensive qualitative assessments of the breadth and quality of compensation laws as they exist on the books. This database would also require constant updating, as the number of wrongly convicted persons released from prison grows monthly. While the analysis we present in this study is cross-sectional in nature, we view it as an important next step in understanding the state-level contributors to the enactment of legislation intended to formally rectify and recompense victims of known wrongful convictions.

#### A. *Dependent Variable*

To begin to examine the factors that encourage state enactment of statutes aimed at compensating the wrongly convicted, we distinguish between the twenty-seven states (fifty-four percent) that have enacted any such legislation from the twenty-three (forty-six percent) that have not.<sup>180</sup> Thus, our dependent variable captures *presence of compensation law*, without considering the breadth or quality of the recompense provided for in states that have enacted such statutes. Although both Washington, D.C. and the federal government have enacted legislation to compensate wrongly convicted persons, we exclude those two territorial units from these analyses; we limit the scope of the current investigation to specifically examine the presence of compensation legislation among the fifty American states. We culled the data on the presence and absence of compensation laws by state from the Innocence Project website.<sup>181</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> See INNOCENCE PROJECT, <http://www.innocenceproject.org/> (last visited Feb. 14, 2012).

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TABLE 1. DESCRIPTIVE VARIABLES ACROSS STATES (N=50)

	Total N (%)	Mean	Standard Deviation	Range
<b>Dependent Variable</b>				
Compensation law exists	27 (54 %)			
<b>Interest Group Pressure</b>				
Number of DNA exonerations		5.50	8.55	0–43
Presence of Innocence and/or Justice Project	42 (84 %)			
<b>Penal Regimes</b>				
State punitiveness score (2009)		1.92	.76	0–3.60
Budget (dollars) of prosecutor offices per capita (2000)		\$12.86	\$6.46	\$2.38–\$41.33
<b>Ideological Composition</b>				
Government ideology (2008)		63.58	28.25	7.88–98.13
<b>Control</b>				
Violent crime rate per 100,000 (2009)		382.03	158.57	119.80–702.20

### B. *Independent Variables*

#### 1. Interest Group Pressure

Two variables, intended to broadly capture interest group pressure, are included in the model. The first is a continuous measure of the *number of DNA exonerations* occurring in the state between 1989 and 2011. As the number of known wrongful convictions increases, we expect greater direct and indirect pressures to be exerted on state legislatures to compensate those victims of criminal justice error. The exonerated and/or their allies (e.g., families, friends, and interest groups acting on their behalf) might apply direct pressure on state legislatures for compensation. Media coverage of exonerations could likewise produce indirect pressure on state legislatures. By the end of November 2011, the Innocence Project listed 278 wrongly convicted persons on its website who were exonerated by the courts on the basis of DNA evidence, with the assistance of the Innocence Project.<sup>182</sup> Of these 278 exonerations, two (the exonerations of Donald Eugene Gates and Edward Green) occurred in Washington, D.C. and one (the exonerations of David Ayers) had no jurisdiction listed in his profile.<sup>183</sup> Excluding these three cases, the courts exonerated 275 persons on the basis of DNA evidence between January 4, 1989<sup>184</sup> and November 30, 2011.<sup>185</sup> The number of exonerations varies widely across states. Table 1 indicates that the mean number of exonerations in states is 5.50 (standard deviation=8.55) with a range of zero exonerations in fifteen states over this period to forty-three in Texas.<sup>186</sup>

A second variable, the *presence of an Innocence Project, Justice Project, or both*, operating in the state provides a measure of organizational advocacy in the interests of correcting criminal justice errors, preventing errors in the future, and fighting for recompense and reintegration of victims of known wrongful convictions. As shown in Table 1, forty-two states (eighty-four percent) are associated with an active Innocence Project and/or

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<sup>182</sup> *Know the Cases: Browse Profiles*, INNOCENCE PROJECT, *supra* note 8.

<sup>183</sup> *Id.*

<sup>184</sup> January 4, 1989, marked the date of the first exoneration, with the assistance of the Innocence Project, of David Vasquez in Virginia. *David Vasquez*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/David\\_Vasquez.php](http://www.innocenceproject.org/Content/David_Vasquez.php) (last visited Feb. 14, 2012).

<sup>185</sup> *Know the Cases: Browse Profiles*, INNOCENCE PROJECT, *supra* note 8.

<sup>186</sup> *See supra* Table 1.

Justice Project.<sup>187</sup> In total, thirty-five states host a specific regional Innocence Project,<sup>188</sup> fourteen states are home to a Justice Project or Center,<sup>189</sup> seven states have both,<sup>190</sup> and eight states are specifically associated with neither an Innocence Project nor a Justice Project.<sup>191</sup> While wrongly convicted persons in states not boasting a regional Innocence Project may receive assistance from the National Innocence Project or some other project or center in the national network, we distinguish those states hosting these kinds of advocacy organizations from those that do not. Arguably, advocacy organizations aimed at identifying and correcting local wrongful convictions are likely to apply pressure on state legislatures to enact statutory compensation or strengthen existing compensation statutes through legislation.

## 2. Penal Regime Type

To estimate punitiveness, or punitive penal regimes, we incorporate two state-level measures. The first is a 2009 *state punitiveness score* borrowed from Besiki Kutateladze.<sup>192</sup> Kutateladze sorted each of the fifty states according to their degree of punitiveness using forty-four criminal justice policy and practices indicators representative of punitive penal regimes.<sup>193</sup> He first rated each state on a scale of zero (minimum punitiveness) to four (maximum punitiveness) based on, (a) the state incarceration rate, (b) the death penalty; (c) three strikes laws; (d) the provision of life without the possibility of parole; and (e) sentence severity captured in the average time served for all offenses.<sup>194</sup> The average of the state's scores across these five indicators generates a continuous measure of the state's penal punitiveness. Table 1 shows that states average 1.92 on this scale (standard deviation=.76), ranging from zero (in Minnesota) through 3.6 (in Montana).<sup>195</sup>

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<sup>187</sup> *Id.*

<sup>188</sup> *Facts on Post-conviction DNA Exonerations*, *supra* note 156 (exonerations won in thirty-five states).

<sup>189</sup> *CSG's Justice Center Helps States Improve Criminal Justice Policy, Reduce Corrections Spending*, CSG MIDWEST (Dec. 2010), <http://www.csgmidwest.org/policyresearch/Dec10JusticeCenter.aspx> (noting that the Justice Center has assisted policymakers from fourteen states).

<sup>190</sup> *Innocence Projects*, FOREJUSTICE, [http://forejustice.org/wc/wrongful\\_conviction\\_websites.htm](http://forejustice.org/wc/wrongful_conviction_websites.htm) (last visited Feb. 14, 2012).

<sup>191</sup> *Id.*

<sup>192</sup> *See* KUTATELADZE, *supra* note 164, at 14–17.

<sup>193</sup> *Id.* at 14–15.

<sup>194</sup> *See id.* at 12–17.

<sup>195</sup> *See supra* Table 1.

Our second indicator of punitive penal regimes is based on the premise that states high in prosecutorial strength may evince a greater retributive emphasis in criminal justice processing. One of the best indicators of prosecutorial strength is the *combined per capita budget of all prosecutors' offices in the state*. In essence, we reason that states that spend more per capita on the prosecution of criminal offenses are more likely to have retributive penal regimes than rehabilitative penal regimes. We derive our measure from the 2001 National Prosecutors Survey, a census of the 2,341 chief prosecutors who handled felony cases in state courts of general jurisdiction across the United States.<sup>196</sup> To create the state-level budget measure, we combined the total budget of all offices within each state and divided by the Census population of the state in 2000.<sup>197</sup> The mean per capita spending on prosecutorial functions was \$12.86 per citizen in 2001 (standard deviation=\$6.46).<sup>198</sup> Prosecutorial strength as a function of total operating budget varied considerably across states. For example, California spent \$41.33 per capita on prosecutorial budgets that year while Mississippi offered the fewest financial resources per capita to prosecutors' offices at \$2.38 per citizen.<sup>199</sup>

### 3. Ideological Composition of Government

To assess the effect of the ideological composition of state government on the presence of statutory compensation, we include a conventional composite measure of *government ideology* that incorporates the collective policy attitudes of state political elites based on gubernatorial and legislative partisanship, congressional election outcomes, and the interest group ratings of Congressional Representatives. This measure is comprised of, (a) the Democratic and Republican shares of power within both the lower and upper chambers of the state legislature; (b) the estimated mean ideology scores of Democrats and Republicans within the lower and upper chambers of the state legislature, based on the average ideology scores of Congressional Democrats and Republicans representing the states; and (c) the ideology score of the governor, measured by

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<sup>196</sup> CAROL J. DEFRANCES, PROSECUTORS IN STATE COURTS, 2001, U.S. DEPT OF JUSTICE, 1 (2002), <http://www.bjs.gov/content/pub/pdf/psc01.pdf>.

<sup>197</sup> *Id.* at 4; U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING, SUMMARY POPULATION AND HOUSING CHARACTERISTICS, PART 1, at 2 (May 2002), <http://www.census.gov/prod/cen2000/phc-1-1-pt1.pdf>.

<sup>198</sup> *See supra* Table 1.

<sup>199</sup> *See id.*

the mean ideology score of all state legislators sharing the governor's partisan affiliation in 2008.<sup>200</sup> Higher values on this scale correspond with greater policy liberalism among political elites, which may in turn foster a greater willingness to enact compensation statutes. The state scores on this scale range from 7.88 (in Utah) to 98.13 (in Maryland) with an average score of 63.58 across the fifty states (standard deviation=28.25).<sup>201</sup>

### C. Control Variable

We include the 2009 *violent crime rate* of states as a control variable in the models.<sup>202</sup> To the extent that states with higher average rates of violent crime may be more likely to endorse a stricter position on issues of crime and punishment and have fewer resources that can be directed at remedying errors in criminal justice processing, controlling the violent crime rate isolates the effects of interest group pressure, punitive penal regimes, and government ideology from the size of the violent crime problem faced by the state. According to the descriptive statistics provided in Table 1, the average violent crime rate was 382.03 per 100,000 persons across the fifty states in 2009 (standard deviation=158.57).<sup>203</sup> Maine boasted the lowest rate at 119.80 per 100,000 persons while Nevada fielded the highest rate in the nation at 702.20 violent crimes per 100,000 persons.<sup>204</sup>

## V. METHODS

We model the presence of a compensation statute for the wrongly

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<sup>200</sup> See generally William D. Berry, Richard C. Fording, Evan J. Ringquist, Russell L. Hanson & Carl E. Klarner, *Measuring Citizen and Government Ideology in the U.S. States: A Re-appraisal*, 10 ST. POL. & POL'Y Q. 117 (2010) (assessing the validity of various measures of citizen and legislator ideology); William D. Berry, Evan J. Ringquist, Richard C. Fording & Russell L. Hanson, *Measuring Citizen and Government Ideology in the American States, 1960-93*, 42 AM. J. POL. SCI. 327 (1998) (constructing dynamic measures of a state's citizen's and political leaders).

<sup>201</sup> See *infra* Table 1.

<sup>202</sup> UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2009, U.S. DEP'T OF JUSTICE, 1 (2010), [hereinafter UNIFORM CRIME REPORT], <http://www2.fbi.gov/ucr/cius2009/documents/violentcrimemain.pdf>. The FBI's Uniform Crime Reporting ("UCR") Program combines four offenses—murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault—to generate a count of all violent crimes in the state. *Id.* The UCR also provides an estimated annual state population count to enable the conversion of violent crime counts into rates. *Id.*

<sup>203</sup> See *supra* Table 1. *But see* UNIFORM CRIME REPORT, *supra* note 202.

<sup>204</sup> CRIME IN THE UNITED STATES, 2009, U.S. DEP'T OF JUSTICE, tbl.5 (2010), [http://www2.fbi.gov/ucr/cius2009/data/table\\_05.html](http://www2.fbi.gov/ucr/cius2009/data/table_05.html).

convicted across states, employing logistic regression as our method of statistical analysis. This maximum likelihood modeling strategy is appropriate when the outcome is dichotomous, as it is in this case (i.e., presence versus absence of a compensation law). Logistic regression models estimate model parameters that best reflect the pattern of observations in the data.<sup>205</sup> We restricted the model to include only the six independent variables described above, as degrees of freedom are limited in cross-sectional, state-level quantitative analyses (N=50). We performed all analyses using IBM SPSS Statistics 19 software.

## VI. RESULTS

A series of logistic regression models reveals the odds of interest group pressure, punitive regimes, and government ideology affecting the presence of compensation statutes, controlling for the state's violent crime rate. Model 1 illustrates the effects of interest group pressure, measured in the form of the number of exonerations in the state and the presence of an Innocence Project and/or Justice Project, on the presence of a compensation statute.<sup>206</sup> Measures capturing the punitiveness of the regime—specifically the state punitiveness score and prosecutorial strength—are incorporated into the equation shown in Model 2.<sup>207</sup> Finally, the political ideology of governmental elites is included in Model 3.<sup>208</sup>

The results of Model 1 suggest that states experiencing direct pressures on the legislature stemming from a greater number of local exonerations have a significantly higher probability of having a compensation statute to recompense the wrongly convicted when compared to states with fewer official exonerations. More specifically, each exoneration of a wrongly convicted person increases the odds 1.416 times ( $p=.003$ ) that the state will have a compensation statute on the books.<sup>209</sup> It is important to temper any strong causal inferences about the effect of exonerations on state enactment of compensation legislation because the temporal ordering is unclear. An obvious interpretation of this finding is that states are increasingly likely to enact compensation legislation to help remedy wrongful convictions as the miscarriages of justice are

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<sup>205</sup> FRED C. PAMPEL, LOGISTIC REGRESSION: A PRIMER 18 (2000).

<sup>206</sup> See *infra* Table 2.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

TABLE 2. LOGISTIC REGRESSION MODEL PREDICTING THE PRESENCE OF A COMPENSATION LAW FOR THE WRONGLY CONVICTED IN STATES (N=50)

	Model 1			Model 2			Model 3		
	B	S.E.	Odds	B	S.E.	Odds	B	S.E.	Odds
<b>Interest Group Pressure</b>									
Number of DNA Exonerations	.348**	.118	1.416	.381**	.128	1.464	.446**	.153	1.563
Presence of Innocence and/or Justice Project	-.151	.907	.860	-.113	.922	.893	-.334	.990	.716
<b>Penal Regimes</b>									
State punitiveness score (2009)				-.371	.512	.690	-.228	.535	.796
Budget (dollars) of prosecutor offices per capita (2000)				-.039	.053	.962	-.048	.055	.953
<b>Ideological Composition</b>									
Government ideology (2008)							.024	.015	1.025
<b>Control</b>									
Violent crime rate per 100,000 (2009)	-.003	.002	.997	-.003	.003	.997	-.003	.003	.997
Constant	.273	1.12		1.024	1.39		-.468	1.740	
Nagelkerke R <sup>2</sup>		.399			.416			.470	
Model $\chi^2$		17.760***			18.654**			21.675***	
Block $\chi^2$		17.760***			.894			3.021	

\*\* $p < .01$ ; \*\*\* $p < .001$

identified and corrected. An alternative interpretation, one that cannot be ruled out with our available data, is that states concerned about criminal justice error are more likely to formalize policies aimed at rectifying errors when they occur (via compensation statutes and the like) but they are also more likely to invest in identifying wrongful convictions (which potentially increases the number of exonerations that are identified in the state).

While we cannot completely arbitrate between these two interpretations, there is some evidence suggestive of the former; only four of the twenty-seven states that enacted compensation legislation for the wrongly convicted did so prior to a single exoneration.<sup>210</sup> The remaining twenty-three states that have existing compensation statutes enacted them either at the time of an initial exoneration or in the years that followed.<sup>211</sup> It is noteworthy that the presence of Innocence and/or Justice Projects—advocacy organizations committed to rectifying criminal justice error—does not affect the likelihood of a state having statutory compensation.<sup>212</sup>

Model 2 incorporates our two measures of state punitiveness, which capture the retributive nature of state penal regimes. The results of this model indicate that neither the state's score on the punitiveness scale, nor the resources available to prosecutors significantly affect the presence of compensation laws in states. Like Model 1, the effect of direct interest group pressure (or the number of DNA exonerations on record for the state) strongly and significantly increases the odds that a compensation statute is in place. The addition of the variables capturing punitive regimes in the model does not have an appreciable effect on the strength of the relationship between the number of exonerations and the presence of compensation legislation (odds ratio=1.464;  $p=.003$ ). Likewise, the inclusion of government ideology in Model 3 has no direct effect on the presence of compensation laws. In the final Model, each exoneration of a wrongly convicted person increases the odds that the state will have a compensation statute by 1.563 times ( $p=.004$ ). This effect is marginally stronger compared to the reduced equations shown in Models 1 and 2. Note, however, that the sets of variables included in Models 2 and 3 do not significantly increase model fit.

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<sup>210</sup> The four states are Iowa, Maine, New Hampshire, and Vermont. See *Know the Cases*, INNOCENCE PROJECT, *supra* note 135; *Reforms by State*, *supra* note 8.

<sup>211</sup> See *Know the Cases*, INNOCENCE PROJECT, *supra* note 135.

<sup>212</sup> See *supra* Table 1.

Taken together, the results of the logistic regression models suggest that the enactment of compensation statutes is a potentially rational reaction to the identification and rectification of wrongful convictions and, moreover, is less encumbered by overtly political factors that may be anticipated. None of the measures, capturing regime punitiveness and government ideology, had a statistically significant influence on the presence or absence of compensation statutes. In our subsequent analyses (not shown), various other social (age structure, racial composition, etc.), economic (percent in poverty, gross state product, etc.), and political (percent of Democrats in the House, etc.) measures also failed to distinguish those states that have enacted statutory compensation from those that have not.<sup>213</sup> If the presence of compensation statutes reflects a purely rational decision that the criminal justice system has erred not just once or twice but perhaps systematically, and the best way to restore victims of wrongful conviction and reduce future error is to ensure adequate recompense upon identification of the error, then state legislatures appear to be operating carefully and thoughtfully without regard for partisan political influences. A less gracious interpretation is that states enact compensation statutes less often as a means of guaranteeing compensation to those who have experienced a wrongful conviction and more as a means of limiting the state's liability by effectively capping the outlay of compensatory damages in the face of growing instances of error. The fact that a significant majority of wrongly convicted persons have either been disqualified for compensation or deemed eligible but unable to collect,<sup>214</sup> provides some very preliminary evidence suggesting this latter possibility.

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<sup>213</sup> Our data set includes a fuller set of independent and control variables. We used them to perform supplemental analyses of the effects of the political environments of states on the presence of statutory compensation for wrongful convictions. Some of these measures include the proportions of state legislative seats held by African Americans and women, the degree of professionalism in state legislatures (e.g., the numbers and proportions of full-time staffers and resources for research and deliberation), and the fiscal capacity of states (i.e., gross state product). Given the degrees of freedom challenge associated with an *N* of fifty, we exclude the additional variables from our models and present a more parsimonious model of the presence of statutory compensation across the states. The results of the supplemental analyses employing alternative model specifications did not differ from those presented in this article. These results are available from the authors upon request.

<sup>214</sup> See SURVIVING JUSTICE, *supra* note 2, at 431. For example, to be eligible for compensation under the statute, a number of states require that wrongfully convicted persons both prove their factual innocence, which is an incredible burden, and prove that he or she did not "contribute to [his or her own] arrest or conviction" by falsely confessing or contributing in other ways. *Id.*

## VII. CONCLUSION

In recent years scholars, journalists, citizen activists, and popular culture have devoted increasing attention to miscarriages of justice that resulted in wrongful convictions.<sup>215</sup> Much of their attention focused on two things, namely the causes of wrongful convictions and its consequences for its victims. The first emphasis is on identifying the factors that influence wrongful convictions. Here, the purpose is to reduce the influence of, or outright remove, these factors from criminal justice proceedings, thereby reducing the likelihood of wrongful convictions. The second emphasis is on the consequences and harms of wrongful convictions for its victims. In this case, the purpose is to minimize the harm and make amends to the wrongly convicted and other victims of the miscarriage of justice. A key and enduring harm that interests scholars is the lack of monetary (or even nonmonetary) compensation for the wrongly convicted. This is because a host of obstacles impede compensation for wrongful convictions that result in imprisonment.

In this article we have elaborated on some of the political obstacles the wrongly convicted face in seeking compensation. Additionally, we began an exploration of how political factors may influence the behavior of states regarding the enactment of statutory compensation for the unjustly convicted. The exclusion of politics by the legal scholarship on the compensation of the wrongfully convicted (and the neglect of wrongful convictions and its consequences by social scientists), along with the trend among the states to enact, and not to abolish, statutory compensation, prompted our elaboration and exploration of the politics of reparation after errors of justice.

From our perspective, politics by definition influence reparation and compensation of the wrongly convicted. Consequently, the introduction of politics to the analysis of life after miscarriages of

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<sup>215</sup> See, e.g., SCOTT CHRISTIANSON, INNOCENT: INSIDE THE WRONGFUL CONVICTION CASES (2004) (documenting forty-two criminal cases to find evidence of miscarriages of justice); GARRETT, *supra* note 33 (exploring two hundred and fifty wrongfully convicted people exonerated by DNA evidence); JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN (2006) (recounting the story of Ron Williamson wrongfully sentenced to death row for the rape and murder of Carter); SURVIVING JUSTICE, *supra* note 2 (discussing life after exoneration); WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE (Saundra D. Westervelt & John A. Humphrey eds., 2001) (considering the causes of wrongful convictions, coerced false confessions, unreliable informants, and the flaws within the criminal justice system); CONVICTION (Omega Entertainment 2010); *The Wronged Man* (Sony Pictures Television 2010); THE TRIALS OF DARRYL HUNT (Break Thru Films 2006); AFTER INNOCENCE (American Film Foundation 2005); AN INNOCENT MAN (Interscope Communications 1989).

justice is appropriate, indeed, essential. It also allows for at least four lines of inquiry into past products and future prospects of political engagement on behalf of and by the wrongly convicted. To begin, there remains much more to learn from empirical examinations of the enactment of statutory compensation schemes. Interestingly, our analysis of a set of political factors, thought to influence the choices of states regarding statutory compensation, supported only one of the three hypotheses driving this research. Apart from the direct political pressures associated with an increasing number of state exonerations, none of the remaining variables even marginally predicted the presence of compensation laws across the states. Our findings strongly suggest that the presence of statutory compensation is a function of interest group pressure on behalf of the wrongly convicted, at least as measured by the number of DNA exonerations. If politics matter as much as theory would suggest, why did the results not match more of our expectations? This is but one question for future scholarship to resolve. It is plausible that the cross-sectional nature of our data underestimates the effects of political factors on the enactment of statutory compensation. Building on this cross-sectional analysis, future longitudinal analysis, covering a span of years or even decades, may better clarify the recursive processes associated with the politics of reparation and compensation. A longitudinal dataset could also be used to better model the timing of the enactment of statutory compensation by the states vis-à-vis the overturning of wrongful convictions. For example, it may be important to distinguish the attributes of early adopters compared with late adopters. Additionally, spatial models could be utilized to examine the diffusion of statutory compensation across the states. Might some states that enact statutory compensation emulate their neighboring states? Is there a contagion effect of adoption of state compensation statutes and, if so, how is it patterned across space? Is it a result of policy learning by state legislators or is the mechanism primarily a product of internal state politics and circumstances?

Moving beyond the enactment of statutory compensation, future analysis could explore the variation in access to and generosity of statutory compensation schemes, adding to the broader analysis of social welfare access and generosity across the states. Insights into the constraints policymakers may feel when it comes to compensation for wrongful convictions could come from studies of public opinion. Does the public, for instance, have a jaundiced eye

towards the wrongly convicted, as theory and anecdotes suggest? To what degree does the presence (or absence) of statutory compensation accord with public opinion? What amounts of governmental compensation match the public sense of fairness? What factors influence public opinion on these issues? At present, however, we know little about public views on compensating the wrongly convicted specifically and wrongful convictions generally. Furthermore, there is room (and a need) for political analysis of the origins and outcomes of the mobilization efforts of the innocence movement, particularly its role and influence in shaping the environment for, and the enactment of, statutory compensation for the wrongly convicted.<sup>216</sup> If we are to better understand how the social and political climate affects the implementation of “remedial legislation [that] may cure this defect in our social institutions,” as Edwin M. Borchard advocated a century ago, we must begin to embrace the ways in which the social sciences and legal scholarship can coalesce to illuminate the nuanced, multifactorial, and complex drivers of the varied state responses to egregious criminal justice system errors.<sup>217</sup>

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<sup>216</sup> GOULD, *supra* note 154 (describing the history and origins of the Innocence Commission for Virginia).

<sup>217</sup> Borchard, *supra* note 1, at 706.