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# Backpay for Exonerees

**Erik Encarnacion\***

## INTRODUCTION

Kristie Mayhugh, Elizabeth Ramirez, Cassandra Rivera, and Anna Vasquez were convicted for sexually assaulting a child. The prosecution's evidence included testimony from children and an expert witness who testified that objective signs of abuse existed. But years later one of the witnesses—now an adult—admitted to having fabricated the story with her sister. Another witness came forward and testified that the child witnesses had been forced to testify against the defendants. Even the expert witness retracted her testimony, acknowledging that she had relied upon an unreliable methodology. After reviewing this newly discovered evidence, the Texas Court of Criminal Appeals—Texas's highest criminal appellate court—concluded that the so-called “San Antonio Four” were in fact actually innocent and entitled to exoneration. They had already served nearly 18 years in prison.<sup>1</sup>

The number of innocent prisoners currently serving time is unknown.<sup>2</sup> But the ranks of exonerees continue to swell. According to the National Registry of Exonerations, there have been 2,042 total exonerations.<sup>3</sup> The questions of whether and how to compensate exonerees become more pressing every time a new person is added to the list. But jurisdictions answer this question in wildly different ways. Under one “compensation statute,”<sup>4</sup> Texas guarantees exonerees \$80,000 per year of incarceration,

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\* Climenko Fellow and Lecturer on Law, Harvard Law School. The author would like to thank Renee Jorgenson Bolinger, Arthur Lau, Victor Tadros, and Kevin Tobia, as well as audience members in attendance at the Yale Law and Philosophy Symposium.

1. *Ex Parte Mayhugh*, No. WR-84, 700-01, 2016 WL 8605257 (Tex. Crim. App. Nov. 23, 2016).

2. For an attempt to estimate a wrongful conviction rate for rape in the 1980s, see Michael D. Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. OF CRIM. L. & CRIMINOLOGY 761 (2007).

3. THE NATIONAL REGISTRY OF EXONERATIONS, available at <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited June 6, 2017).

4. 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, 409 (2009) (“Compensation statutes provide money and services to exonerated individuals without regard to fault or blame. Generally, claimants need only establish innocence and prove that they served time in prison as a result of the wrongful conviction.”); Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 704 (2002) (“[A] compensatory statute allows an unjustly convicted individual to seek redress for her injuries without having to show malice, negligence, or some other transgression by the state actors involved in the case.”).

plus medical and other benefits.<sup>5</sup> Exonerees in other states others are not so “lucky.” Alaska, unlike Texas, has no compensation statute and guarantees no compensation upon release. So, for example, the “Fairbanks Four”—unlike the San Antonio Four—must struggle to get by.<sup>6</sup> Other jurisdictions fall somewhere in between.<sup>7</sup>

This inconsistent treatment of exonerees, coupled with their growing numbers, raises urgent questions. Do states owe compensation to exonerees as a matter of justice or is compensating them merely supererogatory? If the latter, compensating exonerees may be a decent thing to do but not morally required, and so any funds given to exonerees exceeds justice’s demands. In turn, the disarray among jurisdictions would reflect no fundamental injustice. On the other hand, if justice requires compensation, what exactly do governments owe? Focusing on financial compensation, how much money if any should governments pay exonerees? And how should we figure out what justice requires?

Thinking clearly about why punishing innocent people is wrong, and what the aims of compensation should be, helps answer the question of the minimum level of financial compensation owed to exonerees as a matter of justice. To extend, clarify, and to some extent revise points I have sketched elsewhere, this Essay argues that prisoners perform crime-deterrence services simply in virtue of being incarcerated, and thus are entitled to compensation for those services.<sup>8</sup> Although withholding payment is morally permissible when the prisoner is guilty (because wrongdoers should not profit from their wrongdoings), failing to compensate the innocent wrongfully withholds wages from them.<sup>9</sup> This simultaneously answers the question of whether we ought to compensate exonerees (yes), while providing a principled answer to the question of what the minimum amount of compensation should be (fair wages). To determine “fair wages” this Essay uses analogical reasoning of the kind familiar in practical ethics and legal practice: We can use prevailing wages for analogous occupations to determine what governments should pay exonerees per year of incarceration. In particular, this Essay argues that

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5. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a) (West 2015).

6. Josh Saul, *The Fairbanks Four’s Brutal Fight for Freedom*, NEWSWEEK (Jan. 12, 2016 5:39 AM), available at <http://www.newsweek.com/2016/01/22/alaska-fairbanks-four-and-how-murder-convictions-end-414201.html>.

7. See generally Erik Encarnacion, *Why and How to Compensate Exonerees*, 114 MICH. L. REV. FIRST IMPRESSIONS 139 (2016), available at <http://michiganlawreview.org/why-and-how-to-compensate-exonerees>; see also Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 429 (2009) (“It is a patchwork quilt of laws where an exoneree might fare better in one state than another.”); Louise Radnofsky, *Compensating the Wrongly Convicted*, AMERICAN PROSPECT (July 24, 2007), available at [http://www.prospect.org/cs/articles?Article=compensating\\_the\\_wrongly\\_convicted](http://www.prospect.org/cs/articles?Article=compensating_the_wrongly_convicted).

8. See generally Encarnacion, *supra* note 7.

9. *Id.* An alternative or supplementary explanation is that withholding payment is justified because the guilty have forfeited the right not to be used for criminal deterrence. See generally VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF THE CRIMINAL LAW* (2011).

exonerees should be paid based on the hourly wages that corrections officers receive. Assuming that exonerees earn this wage 24 hours a day, seven days a week, all year, this amount comes out to roughly \$180,000 per year of incarceration, based on a median hourly wage of \$20.59.

Disagreement about which analogy best fits may persist. But because the range of disagreement focuses on ordinary, fact-based analogical reasoning, a form of reasoning perfectly familiar in common law adjudication and among lawyers, the debates become far more tractable. For the purposes of this Symposium, this Essay thus shows by example how philosophical reflection can sometimes expose overlooked paths to concrete, principled, and just solutions to otherwise seemingly intractable problems of legal design.

The Essay unfolds as follows. Part I briefly rehearses well-known reasons why traditional methods of securing compensation, including filing lawsuits, fail to reliably compensate exonerees. These reasons motivate some jurisdictions to adopt so-called compensation statutes, which aim in part to overcome this unreliability. Part II broaches the question of what justifies compensation statutes by focusing on corrective justice. Because corrective justice presupposes a wrong that the wrongdoer must rectify, Part III.A explains why punishing the innocent is wrong even if everyone who causally contributed to that punishment acted completely “innocently”—i.e., in good faith and non-negligently. The fundamental wrong involves, roughly, the state’s infringing an innocent person’s right to control what to do with his body, consistent with others’ rights to do the same. Thus, one goal of Part III.A is to rebut the view that “innocently” infringing this right involves no compensable wrongdoing.

Indeed, as Part III.B argues, there are two ways to rectify that wrongdoing consistent with the demands of corrective justice. The first attempts to undo, to the extent possible, the harms suffered by the exoneree as a result of this rights infringement. This harm-centric way of thinking about exoneree compensation dominates most writing on the topic.<sup>10</sup> But I defend an alternative, which I have already previewed: that we can understand compensation as backpay for criminal deterrence services rendered by exonerees. This view not only provides a principled and just rationale for compensating exonerees in a way that fits the lock-step payouts that compensation statutes typically guarantee, the wage-disgorgement perspective also generates further principles capable of helping legislators design and reform compensation statutes. Payments calculated per year of incarceration should not *prima facie* be lower than a

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10. See, e.g., Robert J. Norris, *Assessing Compensation Statutes for the Wrongly Convicted*, 23 CRIM. J. POL. REV. 352, 356 (2010) (emphasizing that “exonerees often desire an acknowledgement of error on the part of the government and compensation for harms suffered”); Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 112 (2004) (“Wrongfully convicted individuals also ought to be able to mount moral arguments that they are personally deserving of compensation for the harms that they suffered.”).

reasonably comparable wage earned by a similar profession. A wage-based approach to compensation also disfavors caps on total compensation, which some states impose. Part III.C discusses these and other principles of statutory design.

Although room for reasonable disagreement about the minimum amount of compensation owed to exonerees may persist, thinking in terms of disgorging wages makes that disagreement more tractable, and holds the promise of reducing the disarray among payout schemes currently in effect.

### I. A PROBLEM AND ITS “SOLUTION”

The problems that exonerees<sup>11</sup> face upon release are well documented.<sup>12</sup> Many have lost years of their life in jail with little to show for it.<sup>13</sup> They often lack money, education, or even robust social networks to help them adjust to life outside of prison. They face, in other words, many of the same problems that *all* prisoners face upon their release.<sup>14</sup> But the innocent sometimes have even fewer resources than parolees available to help them re-enter society, adding insult to injury.<sup>15</sup> The innocent have done nothing to deserve this burden.

One thought is that exonerees should sue someone—the state, individuals who causally contributed the incarceration, and so on—to obtain compensation. But successfully suing the state to recover damages is extremely difficult.<sup>16</sup> Immunity doctrines sometimes prevent recovery.<sup>17</sup>

11. For the sake of this article, “exonerees” will refer to individuals released from prison because they were actually innocent of the crimes for which they were imprisoned. In reality, the class of exonerees may include individuals who have been incarcerated due to, say, grossly improper official misconduct, such as falsifying evidence. But this more expansive set of exonerees may include those who are actually guilty but who should still not have been imprisoned given that official misconduct. Still, even those whose convictions are overturned for “merely” procedural or technical reasons must be presumed innocent. *See e.g.*, *Nelson v. Colorado*, 137 S.Ct. 1249, 1255 (2017) (explaining that once “[defendants’] convictions were erased, the presumption of their innocence was restored”). In any event, to simplify the inquiry this Essay focuses on the actually innocent.

12. *See, e.g.*, Weigand, *supra* note 7.

13. *See generally id.*; Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007) (“Few of those who were interviewed received any government services after their release.”), available at <http://www.nytimes.com/2007/11/25/us/25dna.html>.

14. Weigand, *supra* note 7, at 428 (“The re-entry experience for the exonerated across most domains mirrors the struggle and debilitating challenges faced by parolees.”).

15. Tina Simms, *Statutory Compensation for the Wrongly Imprisoned*, 61 SOC. WORK 155, 156 (2016) (“Those who are able to prove their innocence and are exonerated typically receive less support and fewer services than prisoners on parole.”); Weigand, *supra* note 7; Roberts & Stanton, *supra* note 13 (“[D]espite being imprisoned for an average of 12 years, [exonerees] typically left prison with less help — prerelease counseling, job training, substance-abuse treatment, housing assistance and other services — than some states offer to paroled prisoners.”).

16. Many have observed this point. *See generally* Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439 (2009); Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999); Joseph H. King, Jr., *Compensation of Persons Erroneously Confined by the State*, 118 U. PENN. L. REV. 1091, 1096 (1970) (observing that lawsuits by exonerees face almost “insuperable obstacles”).

17. *See, e.g.*, Avery, *supra* note 16, at 442-51 (“Although they are generally shielded by absolute immunity, prosecutors may be liable for the fabrication of evidence for actions taken prior to filing of

The substantive tort doctrines on which exonerees may try to rely also pose obstacles, since they sometimes require plaintiffs to establish that officials acted purposefully or otherwise with fault.<sup>18</sup> Innocent people sometimes end up in jail, however, despite good faith efforts of police, jurors, and prosecutors. Indeed, the Innocence Project observes that “[i]n most cases, there is no intentional misconduct that caused the wrongful conviction, or at least, none that can be proven.”<sup>19</sup> Other mechanisms for recovery also prove unreliable.<sup>20</sup>

Many jurisdictions have codified “compensation statutes” in response.<sup>21</sup> These statutes share at least two apparent goals. First, they aim to provide relatively quick compensation for exonerees—at least as compared to the process of litigation would allow.<sup>22</sup> Second, they try to guarantee this compensation without requiring proof of official misconduct.<sup>23</sup> This reflects the view (as I argue below) that incarcerating the innocent constitutes a wrong that must be corrected, even if no official acted

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charges.”); INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 12 (2009); King, Jr., *supra* note 21, at 1099.

18. See, e.g., Avery, *supra* note 16, at 446.

19. INNOCENCE PROJECT, *supra* note 17; see also Lara Bazelon, *Justice After Injustice*, SLATE (Sept. 30, 2015), available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/09/restorative\\_justice\\_for\\_false\\_convictions\\_crime\\_vic\\_tims\\_and\\_exonerated\\_convicts.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/09/restorative_justice_for_false_convictions_crime_vic_tims_and_exonerated_convicts.single.html) (describing good faith but mistaken accusations against exoneree Thomas Haynesworth); Bernhard, *supra* note 16, at 86 (“In many—if not most—of the cases where an innocent person was convicted no single person can be described as having been negligent or at fault.”); King, Jr., *supra* note 16, at 1104 (observing that no one might be at fault for and that official liability is fault-based).

20. Exonerees sometimes win compensation by convincing legislatures to pass private bills. But this too proves an unreliable route to recovery. See INNOCENCE PROJECT, *supra* note 17, at 13 (“Only 9% of the more than 240 people who have been exonerated through DNA testing received compensation through private bills, making it the least likely remedy for the wrongfully convicted.”); see also Bernhard, *supra* note 4, at 408 (describing private bills); King, Jr., *supra* note 16, at 1008. One of the more creative theories of recovery holds that governments owe “just compensation” under the Fifth Amendment for having exercised eminent domain over the “liberty” of innocents who are wrongfully incarcerated. The eminent domain analogy has proven popular over the years among commentators. See, e.g., John Martinez, *Wrongful Convictions as Rightful Takings: Protecting “Liberty-Property”*, 59 HASTINGS L.J. 515 (2008); Master, *supra* note 10; Ilya Somin, *The Case for Compensating People Who Serve Time in Prison for Crimes They Did Not Commit*, WASH. POST: THE VOLOKH CONSPIRACY (Jan. 29, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/29/the-case-for-compensating-people-who-serve-time-in-prison-for-crimes-they-did-not-commit/>; Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 207 (1941). The appeal of this approach makes some sense because imprisonment indeed involves taking a person’s body, which is “used” for the public’s benefit (as I argue below). To my knowledge no court has evaluated the merits of this proposed extension of takings jurisprudence. But the analogy’s persistence is puzzling, however, given that the government’s compensating the property owner licenses the government to take property for public use *without having to return it*. The prima facie implication here is that, once the state takes someone’s body for public use, it need not return it—whether guilty or innocent. For other doubts about the comparison, see Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 132-33 (2010).

21. See, e.g., Simms, *supra* note 15, at 157 (noting that 30 states and the District of Columbia had compensation statutes by 2015).

22. Evan J. Mandery et al., *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553, 559 (2013) (“The best bet for an exoneree seeking compensation is through a preexisting statute, though the picture here is also grim. Only twenty-seven states and the District of Columbia have enacted statutes to compensate the wrongfully convicted.”).

23. Bernhard, *supra* note 4, at 409; Lopez, *supra* note 4, at 704.

maliciously, purposefully, or recklessly in incarcerating that innocent person. To date, thirty states and the federal government have compensation statutes.<sup>24</sup>

But problems remain. Many states lack compensation statutes.<sup>25</sup> Among the remaining jurisdictions, the amount of compensation and the conditions under which exonerees may obtain compensation vary greatly.<sup>26</sup> Montana, for example, provides only limited educational funds.<sup>27</sup> North Carolina offers \$50,000 per year of incarceration, but caps the total recovery at \$750,000.<sup>28</sup> This (in effect) means that someone serving a long-term prison sentence may end up receiving *less on average* per year of incarceration than someone serving a short-term sentence.<sup>29</sup> Other states are more generous. As already noted, Texas provides \$80,000 per year of incarceration, does not cap total recovery, and provides various other benefits.<sup>30</sup>

Most commentators agree that governments owe *some* form of compensation to exonerees, and indeed, some amount of *financial* compensation.<sup>31</sup> But how much is necessary to avoid injustice to exonerees? Answering this question requires that we take a detour into fundamental questions that are at home in legal philosophy—questions about the functions of criminal law and the relation between justice and compensation more generally. I turn to the latter question below.

## II. WHY COMPENSATE?

So how much financial compensation, if any, do states owe exonerees to avoid serious injustice? To answer this question, the first step involves asking a foundational question about the point or purpose of compensating people financially for wrongs that befall them, and in particular, by those who committed those wrongs. Philosophers of private law have an answer to this question, one that is already implicit and explicit in legal practice:

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24. See Simms, *supra* note 15, at 157.

25. See *id.*

26. See sources collected *supra* note 7.

27. MONT. STAT. § 53-1-214 (2015).

28. N.C. GEN. STAT. § 148-84(a) (2015).

29. See Encarnacion, *supra* note 7, at 139 (explaining that North Carolina's compensation cap "effectively reduced" the annual compensation of two brothers from \$50,000 per year to \$25,000).

30. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a) (West 2015).

31. Despite noting the "widespread support" for compensating exonerees, a contrarian view can be found in Rosenthal, *supra* note 20, at 127. Rosenthal assumes that the sole purpose of compensating exonerees is to achieve some form of deterrence or other instrumental goal, while largely ignoring the demands of justice. Surprisingly, he confines his entire discussion of corrective justice to a single footnote that assumes that corrective justice requires fault-based liability. See *id.* at 157 n.122. Although some writers agree with this assessment, this Essay shows that there is a capacious sense of corrective justice that Rosenthal's argument ignores, and which captures our intuitions about why the state owes compensation to exonerees. To the extent that Rosenthal is correct that instrumentalist justifications for compensating exonerees are difficult to come by, so much the worse for purely instrumentalist justifications for compensation statutes.

remedies represent a vehicle for achieving corrective justice.<sup>32</sup> A few words about corrective justice will help lay the groundwork for the question of how to design compensation statutes.

The imperative for corrective justice arises when, roughly, person A wrongs B by violating B's rights. More completely, if A is responsible for wronging B, then A thereby acquires a moral duty to B to rectify that wrong to the extent possible. The caveat "to the extent possible" reflects the fact that it is literally impossible to undo injuries once they occur. One cannot turn back time. The best we can do is to mitigate the wrongdoing's aftermath.

Corrective justice helps us understand that the point of certain remedies—and financial compensation in the form of "damages" more specifically—is to force wrongdoers to rectify their wrongdoings, primarily by mitigating the injuries caused by those wrongdoings. The *duty of repair* that some corrective justice theorists emphasize focuses on corrective justice's call for mitigating damage done by wrongdoings.<sup>33</sup> Courts express this basic thought in the dictum that damages aim to make victims "whole" or to place them in the position they would have occupied but for the wrongdoing.<sup>34</sup> Money damages allow victims to offset the financial burdens they have suffered as a result of the injury—such as medical bills incurred to heal physical harms, lost wages, and so on—to make things "as if [the wrongdoing] never happened."<sup>35</sup>

All of this is well-trodden terrain. Debates about how best to interpret corrective justice and its relationship to remedies continue. Some theorists focusing instead on the more specific duty of injurers to undo or repair wrongfully imposed harms.<sup>36</sup> Still others focus on the right of victims to demand redress or that wrongdoers make amends—rights that do not imply any specific forms of relief.<sup>37</sup> Be that as it may, an abstractly stated and orthodox version of the view—one abstract enough to encompass various competing specifications—holds that corrective justice fundamentally involves rectifying wrongdoings, and moreover, that financial compensation is one important way of trying to achieve

32. The literature is voluminous. See, e.g., ERNEST WEINRIB, *CORRECTIVE JUSTICE* (2012); ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (rev. ed. 2012); JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 1-64 (2001) (defending a traditional conception of corrective justice as the best explanation for tort law's structure).

33. See COLEMAN, *supra* note 32, at 1-64.

34. See, e.g., *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994) ("Compensatory damages are intended to make the plaintiff 'whole' for any losses resulting from the defendant's interference with the plaintiff's rights."); *Becker v. Schwartz*, 46 N.Y.2d 401, 411 (N.Y. App. 1978) ("The remedy afforded an injured party in negligence is designed to place that party in the position he would have occupied but for the negligence of the defendant.")

35. ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2016) (Ch. 8).

36. See, e.g., COLEMAN, *supra* note 32, at 1-64.

37. See e.g., Erik Encarnacion, *Corrective Justice as Making Amends*, 62 BUFF. L. REV. 451 (2014); Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 126 (2011); Linda Radzik, *Tort Processes and Relational Repair*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* (John Oberdiek, ed., 2014).



corrective justice.

I assume this widely accepted view—that compensation strives to satisfy the demands of corrective justice—in what follows. But what does any of this have to do with justifying or explaining *compensation statutes*? I assume that compensation statutes aim to achieve corrective justice, broadly construed.<sup>38</sup> But this assumption still takes us only part of the way towards assigning a dollar figure on the amount of financial compensation owed to exonerees. The next step, proposed in the following Section, is more precisely identify the nature of the wrongdoing at issue and ways to try to rectify that wrong. This helps get us closer to the mark.

### III. RECTIFYING THE WRONG OF PUNISHING THE INNOCENT

Compensation statutes, as vehicles for corrective justice, empower exonerees to force governments to right wrongs that exonerees have endured. But beyond that little has been written to clarify the nature of the wrongdoing to be rectified. And perhaps this should come as no surprise. After all, there is already widespread agreement that exonerees should receive some compensation. This alleviates the pressure to take a close look at the nature of the underlying wrongdoing. What's more, asking foundational questions about the nature of the wrongdoing seems far removed from practical questions like whether to compensate exonerees and how to do so.

Both of these reactions are misguided. Widespread agreement sometimes obscures more than it helps, since we might agree on a goal while still disagreeing about how to achieve it or the rationale for doing so. As for the suspicion that philosophical reflection has little to contribute, this Essay aims to show that this is not the case. Accordingly, this Section begins by asking and answering some foundational questions about punishing the innocent. First, what makes it wrong to punish the innocent? Second, given that punishing the innocent is wrong and triggers duties of corrective justice, how do we rectify the wrongdoings? This inquiry will pave the way towards concrete recommendations for legislative reform.

#### *A. What Makes Punishing the Innocent Wrong?*

Distinguish two questions. First, under what circumstances is it wrong

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38. See, e.g., Deborah Mostaghel, *Wrongly Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 527 (2011) (“All of the current wrongful-conviction compensation statutes rest on the corrective justice theory of tort liability.”); Alanna Trivelli, Note, *Compensating the Wrongfully Convicted: A Proposal to Make Victims of Wrongful Incarceration Whole Again*, 19 RICH. J. OF L. AND THE PUB. INT. 257, 270-71 (2016). In previous work, I raised worries about a narrower interpretation of corrective justice, and whether it would suffice to justify compensation statutes, given that the narrower view focuses primarily on forcing wrongdoers to repair injuries they impose on others, rather than more generally rectifying wrongs. See Encarnacion, *supra* note 7, at 142-45 (contrasting corrective justice with a “restitutionary approach”). But everything I wrote about the so-called restitutionary model in that piece is compatible with the broader conception of corrective justice used in this Essay. See *id.* at 147-51.

to punish via the criminal justice system? Second, what makes punishing the innocent wrong? The answer to the first question is, at least in part, obvious: criminally punishing people is justified or morally permissible, if at all, only when they are guilty. But innocents are not guilty. Therefore, punishing innocents is not morally permissible and thus wrong.

This is all fair enough. But the key premise of the argument—that it is permissible to punish someone only if he or she is guilty—is not informative for our purposes. It does not explain much to say that punishing the innocent is wrong just because punishing people is right only when those people are guilty. The argument hovers near vicious circularity.

We want instead the answer to the second question: granting that punishing the innocent is wrong, what explains or justifies this judgment? What are the “wrong-making” features, in other words, of punishing the innocent? And what are the ways we can, in accordance with corrective justice, seek to undo the wrongdoing to the extent possible?

To preview my conclusions, I argue that: (1) it is possible to wrong someone by invading their rights to decide what to do with their body, consistent with the like right of everyone else to do the same, and (2) infringing these rights does not necessarily require negligence or ill will towards the person whose rights have been infringed (e.g., by knowingly, maliciously, intentionally, or recklessly impinging on those rights).<sup>39</sup> To bolster these claims, I mostly rely on cases to elicit moral judgments that I hope to be relatively uncontroversial.

Let us start with one such case. Suppose that an official successfully prosecutes Jim, who the state incarcerates as a result, despite knowing that Jim is innocent. The prosecutor has plainly wronged Jim on behalf of the state. After all, knowingly (intentionally, willingly, recklessly) harming someone without adequate justification is wrong. (Call this a *Culpable Harm* principle.) The prosecutor obviously lacked adequate justification given that he knew Jim was innocent. So the prosecutor wronged Jim—and egregiously so.

Some officials convict innocents by violating something like *Culpable Harm*. But that principle cannot explain what makes punishing the innocent wrong in all cases. Consider the following:

*Good Faith Prosecution.* A prosecutor successfully convicts an innocent person, E, who subsequently serves a lengthy prison term.

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39. One might resist the premise that there is a right to control what happens to one's body consistent with each person's right to do the same. But insofar as we have any moral rights at all, one of those rights quite plausibly includes a right to decide what to do with our own bodies, a right that every moral agent should likewise have—at least when formulated at this high level of generality. Of course one might follow Bentham and reject wholesale the idea of moral rights. But the questions of injustice that befall those who are wrongly imprisoned presuppose a framework of moral rights. Giving up this framework wholesale is thus quite costly from the perspective of articulating claims of injustice. I will simply set aside deeper normative and meta-ethical questions.

Nobody in the criminal process—the arresting officers, the prosecution, witnesses, the judge, jury, and so on—acts improperly. They perform their respective roles in good faith, non-negligently, and based on the evidence available. The key witness, though mistaken, was justified in believing that E committed the crime. E does not contribute to his own imprisonment, as some exonerees do, by confessing (falsely) to the crime. E has maintained his innocence throughout the entire process. Finally, had any of these actors *known* or even *suspected* E's innocence, he or she would have done everything in his or her power to prevent E's conviction.

In *Good Faith Prosecution*, officials, witnesses, and jurors all reasonably believe that an accused person is guilty despite his innocence. So no violation of the *Culpable Harm* principle occurs here. Nor will relaxing *Culpable Harm* to include negligence help to explain what is wrong. The case stipulates that no one behaved negligently. So unless we accept that no wrong occurs in cases like *Good Faith Prosecution* we need to consider the possibility of non-negligent, non-culpable wrongs.

Indeed, ordinary moral thought *does* allow for the possibility of non-negligent, non-culpable, but compensable wrongdoings. Consider the following three cases:

*Umbrella.* After dinner at a nice restaurant, you pick up a pricey umbrella that you reasonably believe is yours. It even has the same monogrammed handle. After taking it home, you realize that it belongs to someone else.

*Cabin.* “Suppose that you are on a backpacking trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly somebody else's private property. You smash in a window, enter, and huddle in a corner for three days until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture in the fireplace to keep warm.”<sup>40</sup>

*Kidnapping.* A prospect for a college fraternity agrees in advance to be kidnapped as part of a hazing ritual. Unbeknownst to the fraternity and the prospect, the prospect has a long-lost twin brother who happens to attend the same college—but who has obviously not consented to any hazing or kidnapping. The fraternity locates and kidnaps the twin brother believing, reasonably but incorrectly, that it is the prospect. They release him the moment he demands to be freed.

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40. Joel Feinberg, *Voluntary Euthanasia and the Right to Life*, 7 PHIL. & PUB. AFF. 93, 102 (1978).

The purpose of these cases is to illustrate, in the first instance, the *possibility* of non-negligent, non-culpable wrongdoings. Setting aside how the law would treat these cases, let me begin by reporting my moral judgments in the hopes that the reader would agree. In *Umbrella*, you owe something (morally speaking) to the umbrella's owner, *even though you have behaved perfectly reasonably under the circumstances*. You carry off someone else's umbrella. But you were epistemically justified: All the reasonably available evidence supported the belief that the umbrella was *yours*. You reasonably relied on reasonably available evidence. But you still owe the umbrella's owner something: the return of his umbrella. And if you cannot return it—say it gets destroyed while in your possession—then you must replace it.

Unlike *Umbrella*, *Cabin* involves no false belief. Further, you are justified in breaking into the cabin and destroying its contents in order to save your life. You did exactly what you should have done in the circumstances. But you still deprive the owner of her rightful control over the cabin, infringing the cabin owner's property rights in the process. You have therefore wronged the owner, albeit with justification. And just as in *Umbrella*, some form of rectifying act is called for. Joel Feinberg argues that due respect for the person whose rights you have infringed demands compensation.<sup>41</sup>

*Kidnapping* is like *Umbrella* and *Cabin* in some ways even though the rights infringed are not property rights. Set aside one's prior beliefs about whether hazing is ever permissible. After all, the prospect consented in advance to the kidnapping. Even if you think that under no circumstance is hazing or kidnapping permissible—even with consent—there appears an *additional* wrongdoing in *Kidnapping*. Despite the reasonable belief that the victim had consented, the fraternity wronged the victim by invading his rights to do with his own body what he pleased, consistent with the right of everyone to do the same. The fraternity invaded this right and hence wronged the victim. The fraternity should, at a minimum, release, apologize, and try to compensate the brother in some way.<sup>42</sup>

Common to these cases is that someone would have invaded the relevant rights even without inflicting harm. The umbrella's owner may have totally forgotten the umbrella even existed and may never have needed it again. Yet the owner's right to its possession remains transgressed as long as someone else remains in possession of it or until it is returned or replaced, at least for some reasonable amount of time. In

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41. *Id.*

42. Although I am presently interested in judgments about moral wrongs to others, it is worth noting that the twin might prevail against the fraternity on a legal theory of false imprisonment. *See, e.g., Forgie-Buccioni v. Hannaford Bros., Inc.* 413 F.3d 175, 181 (1st Cir. 2005) (“The essential elements of false imprisonment are: (1) defendant acted with the intent to restrain or confine plaintiff within boundaries fixed by the defendant; (2) defendant’s act directly or indirectly resulted in such restraint or confinement of plaintiff; and (3) plaintiff was conscious of and harmed by the restraint or confinement.”) (citing Restatement (Second) of Torts § 35).

*Cabin*, you have damaged the cabin's contents. But suppose you had merely entered the cabin for warmth and left the cabin better off than before (suppose you tidied it up). You still would have used the owner's property for your own purposes for which you had no permission to do so. So you still would have wronged the owner by invading her right to decide what to do with her own property. Finally, in *Kidnapping*, suppose the "victim" actually found the whole experience (strangely) exhilarating and was excited by the possibility of suing the fraternity into oblivion. Although far fetched, imagine that the victim was actually better off as a result of the kidnapping and better off than he would have been but for the kidnapping. Still, the fraternity did something wrong by invading a right to control what happens with one's own body consistent with everyone else's right to do the same. The fact that the object of the right is one's *body* rather than one's property makes little difference on this point.

These cases illustrate two important upshots: (1) it is possible to wrong people by transgressing their rights to decide what to do what they want to their body or property, consistent with the like right of everyone else to do the same, and (2) transgressing others' rights does not necessarily require having any negligence or ill will towards the person whose rights have been transgressed (e.g., by knowingly, maliciously, intentionally, or recklessly impinging on those rights).<sup>43</sup>

By now I have telegraphed the sense in which I think that the state wrongs innocent prisoners even in cases like *Good Faith Prosecution*. With respect to rights over our bodies and property, others' appropriating them for their own use constitutes an invasion of those rights, even if no damage occurs and even if the appropriation was reasonable given the reasonably available evidence (*Umbrella*, *Kidnapping*) or justified under the circumstances (*Cabin*). People might reasonably disagree about whether to characterize E's incarceration as justified or instead was wrong but merely reasonable given the evidence. But that makes no difference to the conclusion: that by imprisoning an innocent person, we thereby use their body for whatever governmental purpose punishment serves without their permission. This constitutes a wrong because it transgresses the innocent person's unforfeited right to control what happens to his body consistent with the right of others to do the same. Punishing the guilty, all else equal, does not count as wrong because they forfeit these very same moral rights.

### *B. Interlude: An Objection*

One might resist idea that "justified" or "reasonable" wrongdoings are conceptually possible. (Call this the Skeptical Position.) To illustrate with

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43. I hasten to add that I am not claiming that *all* rights infringements or violations operate this way. Again, my point is much narrower: that some infringements of rights to bodily control and property require no intentional, reckless, negligent, or otherwise faulty conduct.

*Cabin*, one might think that moral rights to exclude others from your property come with implicit limitations, such that a right to exclude does not entail the right to unreasonably exclude others from freezing to death outside. And so someone who breaks in to avoid freezing does not violate the Cabin owner's rights and has therefore done nothing wrong, and in turn, no compensation is owed under corrective justice. And perhaps the point may be generalized to other cases—including, we might worry, the case of *Good Faith Prosecution*.

The Skeptical Position raises a controversial point about the scope of rights that cannot be resolved here. By the same token I want to gesture towards a conciliatory response, one that invokes the possibility that some wrongful acts are wrongful not in virtue of harming or appropriating in themselves, which may involve no rights violations, but rather in the “conditional wrong” of harming-or-appropriating-without-compensating.<sup>44</sup> For example, suppose that you violate no one's moral rights, or otherwise wrong them, in accidentally taking someone's umbrella or breaking into her home to survive a blizzard (because in either case you behave reasonably). But reasons of fairness and due respect for others' status as holders of rights dictate that you *stili* must offer up something for having exercised unilaterally a privilege over others' belongings or person. The thought is that harming others or appropriating others' belongings does not in itself represent wrongdoing (in at least some perhaps rare cases where doing so is reasonable); doing so without voluntarily offering up redress or compensation does constitute a wrongdoing, however. As Gregory Keating puts the point, failing to voluntarily compensate sometimes shows “insufficient regard for the rights of the person harmed, even though the conduct responsible for inflicting that harm is beyond reproach.”<sup>45</sup>

Keating's approach of course raises its own questions, including how one might simultaneously show “insufficient regard” for others' rights while at the same time acting “beyond reproach.” We might meaningfully ask whether a recipe exists for identifying cases of reasonable or justifiable harm or appropriation. (Keating himself draws inspiration from well-established tort law, including strict liability that governs injuries caused by socially useful but abnormally hazardous activities—a natural analogue for the criminal justice system if there were ever was one.<sup>46</sup>)

Although questions remain about Keating's approach, it nevertheless represents a promising strategy for reconciling the Skeptical Position about moral rights—i.e., that one can never transgress rights when one behaves reasonably—with the core claims that I will eventually make—

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44. Here I rely on the recent work of Greg Keating. Gregory C. Keating, *Strict Liability Wrongs*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 292 (John Oberdiek ed., 2014). Keating articulates his point in terms of harming, but I will take the liberty of generalizing to include unauthorized uses of others' or their property.

45. *Id.* at 301.

46. *Id.* at 300.

namely, that cases of so-called *Good Faith Prosecution* do not necessarily absolve the state of a duty to compensate exonerees. The wrongdoing is simply re-located to another site: the point at which the state unfairly refuses to compensate an exoneree for certain unilateral harms or appropriations, especially where rights holders would normally expect their interests against such harms or appropriations to be protected by a right against them. But the rest of this paper is nevertheless articulated in terms of the stronger view that recognizes the possibility that reasonable or justified conduct might nevertheless be wrongful in the sense of transgressing rights to persons or their property, and hence give rise to demands for redress.

### *C. Two Ways to Rectify the Wrong*

Recall our goal: to justify compensation statutes in a way capable of governing their design in a principled and relatively determinate way. A particularly pressing question of design involves affixing a fair dollar figure on the amount the government owes to exonerees. Although I have assumed that corrective justice motivates these statutes, corrective justice presupposes a wrong that the wrongdoer must rectify. Section A identified the nature of the wrong: the invasion of the right to decide what one does with one's body consistent with everyone else's same right (let us call this the right of "bodily sovereignty"). The state infringes this right when they incarcerate the innocent, even if the mistake was innocent. Compensation statutes thus should be designed with the aim of rectifying this wrong. I consider two ways to do so below.

#### *1. Repairing Harms*

So how do we rectify the infringement of innocent prisoners' rights to bodily sovereignty? Most obviously, to the extent it has not been done already, is to release the prisoner. But this is not enough. Letting an innocent person free no more satisfies the state's moral duties to right wrongs under corrective justice than merely ceasing to savagely beat someone suffices to satisfy corrective justice. Rectifying wrongs also normally requires curing the harms that the wrongdoing caused.

In tort law the wrongdoer accomplishes this by paying money damages: roughly, the amount required to offset the losses suffered by the victim, insofar as money can accomplish this goal.<sup>47</sup> Money damages aspire to place the victim in the position he would have occupied had the wrongdoing never occurred.<sup>48</sup>

In the case of exonerees, financial compensation would likewise have to place them in a position they had occupied had they never been convicted or imprisoned. The money needed to offset harms associated with

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47. JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 1–64 (2001).

48. RIPSTEIN, *supra* note 35, at ch. 8.

imprisonment would have to include money necessary to cure the extreme harm—emotional and physical—that prisoners suffer. At a minimum, the state must pay for any medical attention or therapy the exoneree needs as a result of the incarceration. Others have documented these harms and attended needs, so I will not belabor the point. Exonerees may also suffer from lost opportunities, education, careers—and so on. Compensation should aim to restore these too, to the extent possible, at least if we understand the goal of rectification as trying to place someone in the position they would have occupied but for the wrongdoing.

In principle, I have no quarrel with seeking to undo the damage done by incarceration. But let me raise three worries about thinking of exoneree compensation *exclusively* in these terms. First, it is very difficult to figure out the amount of damages owed to exonerees as a result of lost opportunities and the like. Now to some extent this practical worry does not raise any concern unique to compensating exonerees. This is a puzzle for damages in tort law more generally. Courts are frequently asked to grapple with the question of how to compensate for incapacitating injuries or lives lost as a result of tortious conduct. And even to the extent that this jurisprudence is not determinate or otherwise provide much in the way of practical guidance, at least the worry does not present a unique one; attempting to compensate exonerees is difficult in just the same way compensating decedents in wrongful death suits is difficult.

But this response of course does not make the difficulty go away. Rather, it just shows that the problem is a familiar one.

A second worry more uniquely concerns compensating exonerees under compensation statutes. Statutory payouts that compensation statutes provide do not vary on an individualized, case-by-case basis. To see the problem, notice how compensation statutes structure payouts: typically as a lump sum, calculated based on a fixed amount multiplied per year of incarceration. As discussed earlier, Texas guarantees \$80,000 per year of incarceration.<sup>49</sup> Because compensation calculated this way is not individualized, payouts may be radically over- or under-compensatory, at least if that annual compensation measure aims to compensate the exoneree for the harms they have suffered.<sup>50</sup> Some may have suffered more serious injuries than others. To be sure, this method of calculating harm may represent some kind of average or some rough proxy for damages. But this is just to concede that there may very well be a poor fit between payouts and what justice requires if we think in terms of mitigating harms.

A third concern comes from the natural tendency to focus too much on physical or emotional harms exonerees have suffered, at least for purposes of setting the appropriate amount of financial compensation. The worry

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49. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a) (West 2015).

50. Encarnacion, *supra* note 7, at 146.



will ultimately force us to consider alternative rationales for compensation statutes—one that I argue will better fit the compensatory structure of compensation statutes, as well as provide some relatively determinate way of setting the amount of financial compensation owed. To set the stage, consider the following hypothetical:

*Beneficial Incarceration.* Sam is not incarcerated. But he lives a life of abject suffering. One day he is arrested for a crime he did not commit. He is convicted and sentenced to jail for 30 years. Life in prison, from Sam's perspective, is terrific. He secures basic nutrition, a minimal education, and exercises daily. He finds purpose through a newfound faith. Sam actually enjoys prison a great deal and does not suffer a day. One day he is released after compelling evidence of his innocence surfaces. Sam worries that his life will revert to the horrors of daily living that he encountered before incarceration.

*Beneficial Incarceration* is implausible. But the case illustrates a principle already discussed in the previous Section as applied to a case of wrongful incarceration: how, in principle, someone can be wronged without being harmed. Sam leaves in much better shape than when he entered, and better off than he would have been had he not been incarcerated. But the state has still wronged him. The wrongdoing is by now familiar: If someone uses your body without your authorization for her own purposes, then normally she has wronged you. This is so even if that use ends up *benefitting* you. As Arthur Ripstein puts the point, you rather than anyone else has the right to use your means—your body, your property—for the ends that you choose, consistent with everyone else's having the same right.<sup>51</sup> In other words, nobody but you is in charge of your body or property, consistent with everyone else's right to be in charge of her own body or property.<sup>52</sup> This right is infringed even if no harm occurs as a result, and even if the person makes a good faith mistake when using your body as a means to an end they did not authorize.

This brings us, finally, to the third worry about thinking of compensation exclusively in terms of curing harms. If compensation statutes aim solely to undo harms, then in principle someone like Sam who suffers no harm during their incarceration obtains an unjust windfall rather than a payout required by justice. But intuitively, paying Sam is not unjust. Indeed, justice *requires* paying him significant financial

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51. RIPSTEIN, *supra* note 35, at 48.

52. *Id.* at 39-40. My argument does not depend on the very capacious sense of "use" employed by Ripstein, according to which even inoffensive touchings—e.g., tapping someone on his shoulder to get his attention—appear to involve rights violations. See Scott Hershovitz, Book Review, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 949 (2017) (criticizing Ripstein's capacious understanding of "use" as too broad to explain the tort of battery). I will not articulate a precise alternative conception here. Suffice it to say that even on a very narrow construal, the state's taking possession of another person's body for the purpose of criminal deterrence easily qualifies as a "use" of that body in the relevant sense.

compensation even if he happens to be better off as a result of his incarceration. Explaining why puts us on track towards some concrete principles for designing compensation statutes that avoid serious injustice, and reforming compensation statutes that fail to abide by these principles. Once we recognize how the state ordinarily uses prisoners' bodies, we are well on our way towards an alternative, non-harm-based justification for substantial payouts under compensation statutes.

## 2. *Backpay: Disgorging Unjustly Withheld Wages*

Once we reflect on the reasons why the state incarcerates people, another useful way of characterizing the wrongdoing emerges: When the state incarcerates a person, it uses that person's body to try to deter others from committing crime.<sup>53</sup> As I observe elsewhere, the state in effect *conscripts* that person into criminal deterrence services.<sup>54</sup>

This thought might initially provoke pushback. If we take up the participant's perspective—the perspective of officials and prisoners in the criminal justice system—it is not obvious that any of them would accept my characterization. But historically officials have characterized prisoners and their relationship with the state in even starker terms, with the Supreme Court of Appeals of Virginia once infamously calling prisoners “slaves of the state.”<sup>55</sup> And even assuming that officials today deny this characterization and further insist they do not *intend* to use individuals' bodies to deter crime, there is no denying that prisoners' bodies *are* being used and controlled for some purpose, with many jurisdictions expressly

53. This view is developed at length in *See* TADROS, *supra* note 9, 265–92, 312–30 (2011). The basic idea that the government uses inmates' bodies to deter crime seems hard to dispute, especially when jurisdictions routinely and expressly tout criminal deterrence as a purpose of punishment and sentencing. *See, e.g.*, 18 U.S.C. § 3553(a)(2)(B) (2012) (describing “deterrence to criminal conduct” as a factor judges must consider in sentencing).

54. *See generally* Encarnacion, *supra* note 7.

55. *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871). This language from *Ruffin* continues to frame discussions by scholars drawing connections between slavery and prison labor. *See, e.g.*, DENNIS CHILDS, *SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY 3* (2015); Robert T. Chase, *We Are Not Slaves: Rethinking the Rise of Carceral States through the Lens of the Prisoners' Rights Movement*, 102 J. OF AM. HIST. 73, 74 (2015). And a well-established and growing body of scholarship has shown the continuity between the end of the Civil War and the use of the criminal justice system to maintain a system of racial subordination, including by using convict leasing and other forms of forced labor as a de facto alternative to chattel slavery. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010) (Ch. 1); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WAR WAR II* (2008); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 27 (2003) (noting the “significant similarities between slavery and the penitentiary prison”); ANGELA Y. DAVIS, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglas and the Convict Leasing System*, in *THE ANGELA Y. DAVIS READER* 74–95 (Joy James, ed., 1998) (explaining the role of convict leasing and discriminatory enforcement of criminal laws as a means of re-enslaving African Americans); ADAM JAY HIRSH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 71 (1992). These commentators focus primarily on actually existing involuntary servitude by prisoners over and above incarceration. But my point is that *punitive incarceration itself*, regardless of whether coupled with labor practices more traditionally recognized as “work,” constitutes a form of forcible and uncompensated use of another person's labor, for the ostensive purpose of criminal deterrence.

accepting criminal deterrence as an important part of punishment's aim.<sup>56</sup> So whatever individual officials may believe they are doing, the mission statement of the criminal justice system in many jurisdictions purports to use prisoners' bodies to deter others from committing crime.<sup>57</sup>

As for the prisoners' perspective, they may not understand their own roles as serving, simply in virtue of incarceration, any criminal deterrence purpose. Indeed, from their point of view, incarceration may actually *facilitate* crime by providing a training ground and ample opportunity to commit it. If so, then prisoners might deny that they perform any criminal-deterrence services, and might actually seek to thwart those objectives.

But prisoners do compare their situation to that of forced labor on par with slavery. One historian observes that “[i]ntegral to the southern prisoners' rights campaigns was a language of resistance that claimed that southern prisons, in particular, were explicit examples of twentieth-century slavery.”<sup>58</sup> Another describes “a long history of prisoners, particularly African-American prisoners, who have used the language and narrative of slavery to describe the conditions of their imprisonment.”<sup>59</sup> John Eduardo Smith, an activist and prisoner in the 1970s, could not be more explicit:

Arise, arise, Strike! For your lives and liberties. . . . Let every SLAVE on the . . . SLAVE CAMP do this and the days of the Slave Holder are numbered. . . . You cannot be more oppressed than you are. You cannot suffer greater cruelties than you have already. Let OUR motto be: Resistance! Resistance! Resistance!<sup>60</sup>

But even if prisoners like Smith view themselves as slaves, it does not follow that they view themselves as performing *criminal deterrence services in particular*. Prison labor today “ha[s] been involved with mining, agriculture, and all manner of manufacturing from making military weapons to sewing garments for Victoria's Secret.”<sup>61</sup> But there are few if any accounts, to my knowledge, of prisoners characterizing

56. See, e.g., 18 U.S.C. § 3553(a)(2)(B) (2012) (describing deterrence as a sentencing factor).

57. One might argue that we must distinguish between *threats* of punishment, which truly aim to deter crime, and punishment itself, which might not have that as a constitutive aim. See, e.g., Zachary Hoskins, *Deterrent Punishment and Respect for Persons*, 8 OHIO ST. CRIM. L. REV. 369, 372 (2011). But it is unclear what good a threat would be without further showing the capacity to make good on that threat by punishing people. So even if this distinction articulates a material difference, the view that punishment aims to deter has a ready reply: *threats* deter crime, but only if those threats are taken seriously, which punishment accomplishes.

58. Chase, *supra* note 55, at 76.

59. Kim Gilmore, *Slavery and Prison—Understanding the Connections*, 27 SOC. JUSTICE 195, 195 (2000).

60. Chase, *supra* note 55, at 79 (quoting John Eduardo Smith, Inmate Correspondence and Writings 1973–1974 folder, box 2004/016-55, General Counsel's Office Ruiz Litigation Case Files, Texas Department of Criminal Justice Records).

61. Whitney Bennis, *American Slavery, Reinvented*, THE ATLANTIC (Sept. 21, 2015), available at <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/>.

imprisonment, in and of itself, as a form of labor for the purposes of criminal deterrence.

Still, I doubt the prisoner's perspective is decisive here. Workers may be entirely alienated from the services they provide. But they may still end up serving the purposes set by their employers. If so, they still must be compensated by the employer to avoid involuntary servitude—to avoid the employer's using the employee's body to serve his own ends while unjustly withholding compensation.

To bolster the idea that prisoners provide deterrence services simply in virtue of being in jail, regardless of whether they *want* to deter, *understand* their role as deterring, or *actually* deter, consider the following case:

*Security Guard.* A company hires Tim as a private nighttime security guard for its office building. For obscure reasons relating to the regulation of private security guards in this jurisdiction, he is permitted only to press an emergency button should an emergency arise. The button contacts the local authorities. But the primary reason he is hired is simply to be a visible presence in the office building during the evenings. This visible presence—which requires him to stay in one place for extended periods of time—serves as the primary and sufficient reason for his employment. So Tim mostly reads books and watches movies on his smart phone while on the job. Tim thinks he does no good deterring anybody given his friendly demeanor. In fact, he thinks his demeanor will likely *encourage* burglary. Because Tim craves excitement, he actually *wants* someone to burglarize. But no one ever does.

Just as when a person's body is confined to deter crime, *Security Guard* shows how being hired to *merely be physically present* at some designated location at another person's direction can constitute performing criminal-deterrence service. Private security guards like Tim do this all the time, though the harm they typically face probably is quite minimal (depending on the assignment). In the case of incarceration, of course, no one hires prisoners to deter crime. Instead, governments appropriate and control prisoners' bodies for that same purpose. Incarcerated bodies "send a message" that aims to deter crime. It does not matter whether the prisoner himself intends to perform any discrete crime-deterrence tasks (like patrolling the streets). Nor does it matter if the prisoner succeeds in deterring. *Conscripting their bodies for that purpose suffices*, just as if the security guard had been forced at gun point to do show up at the designated location to deter trespass and the like.

If this characterization of the state's use of prisoners' bodies is fair, the fact that prisoners perform crime-deterrence services motivates a new way of thinking about how much to compensate exonerees. Again, the method is analogical reasoning: find some analogous criminal-deterrence tasks and determine how much they are paid on an annual basis. If we assume that

that level of compensation is reasonably fair and reasonably analogous, then innocent prisoners are owed a similar amount. The *guilty* are not owed this amount either because the government should not reward people for the wrong they do or because it is part of the set of entitlements that they forfeit once they engage in criminal wrongdoing. But paying the innocent is imperative to undo the wrong of involuntary servitude: the state's having secured criminal deterrence services at the expense of the innocent. Failing to compensate, or compensating grossly inadequately, is morally on par with enslavement or other forms of involuntarily uncompensated labor. Just as the security guard must be paid for the labor of putting his body to use as a crime-detering object, so must the innocent prisoner. Putting a price tag on the amount owed becomes easier once we start thinking in terms of analogous wages rather than offsetting harms. Let us turn to this and other practical questions in the next Section.

#### IV. OPERATIONALIZING BACKPAY

I have suggested that governments owe exonerees fair wages, at a minimum, for the uncompensated criminal-deterrence services that they have performed simply in virtue of their incarceration. I have also suggested that one way to calculate a fair wage is by paying them what analogous occupations pay. The task becomes ordinary analogical reasoning—a task lawyers are well familiar with. Acknowledging that no analogy will be perfect, my own view is that, all things considered, exonerees are owed—at a minimum—no less than the hourly wage paid to corrections officers. To see why, Section A describes several occupations, their compensation rates, and compares and contrasts them with incarceration (albeit incompletely). Section B provides additional commentary, explaining why I prefer the corrections-officer analogy to other, superficially more similar occupations and services.

##### *A. Comparing Occupations with Incarceration*

No analogy to incarceration is perfect, and there is a risk that the very act of comparing any occupation with incarceration makes light of it in a way insulting to those who suffer through it. This might be unavoidable. But to avoid this (at least somewhat), plausible analogies must share several conditions in common with incarceration:

Incarceration is: (a) involuntarily imposed, (b) limits bodily movement for the purpose of (c) criminal deterrence, under conditions of (d) high stress, (e) high danger or likely harm, (f) separation from friends, family, and society more generally, without (g) the option of quitting. Finally, these conditions are in place (h) around the clock.

This is not a definition of incarceration so much as a brief accounting of some of the conditions that incarceration in the United States currently

involves. A number of analogies come to mind.

### 1. *Private Security Guards*

Take our original *Security Guard*. Let us assume that, as in that hypothetical, being a private security guard involves (b) (limits on bodily movement) and (c) (criminal deterrence). The kind of assignment I had in mind in *Security Guard* itself did not involve (d) (high stress), (e) (high danger or likely harm), or (h) (around-the-clock assignments). And one signs up for the job voluntarily and may quit at any time, so (a) and (f) do not obtain, either.

The median salary for security guards in 2016 was \$25,840 per year or \$12.43 per hour.<sup>62</sup> At this hourly rate, prisoners would earn \$108,886.80 per year, assuming compensation for 24 hours a day, 365 days a year.

### 2. *Correctional Officers*

The analogy between correctional officers and inmates is closer in some respects. Both operate within the physical confines of a prison, though obviously being on one side of the bars makes all the difference. Correctional officers in prisons, like private security guards, implicate (b) (restrictions on movement) and, to some extent, (c) (at least in part to deter crime that might occur within a prison), and more likely involve (d) (high stress) and (e) (danger/likely harm). Correctional officers obviously are not conscripted against their will to perform their job functions or lack the option of quitting. Nor do they necessarily have to spend extended time away from close social ties or be “on the job” around the clock. So (a), (f), (g), and (h) do not obtain. The median pay for correctional officers is greater than that of private security guards presumably because they face on average more hazardous working conditions than a standard private security guard.

The median salary for correctional officers is \$42,820 per year, or \$20.59 per hour.<sup>63</sup> At this hourly rate, prisoners would earn \$180,368.40 a year, assuming payment for 24-hour-a-day incarceration, 365 days a year.

### 3. *Undercover Police Officers*

Three further occupations share certain characteristics: undercover police officers, jurors, and military conscripts. Being an undercover police officer potentially involves features (b) through (f) and (h). One’s movements are limited while under cover (satisfying (b)). The ultimate aim of these officers is to enforce the law, and in an attenuated sense, to deter crime. This satisfies (c). The job may be highly stressful and involve

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62. Bureau of Labor Statistics, U.S. Dep’t of Labor, *Security Guards and Gaming Surveillance Officers*, Occupational Outlook Handbook, available at <https://www.bls.gov/ooh/protective-service/security-guards.htm> (last visited June 6, 2017).

63. Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Outlook Handbook, available at <https://www.bls.gov/ooh/protective-service/correctional-officers.htm> (last visited June 7, 2017).

danger (the risk of being discovered inopportunistically), thereby satisfying (d) and (e), respectively. Depending on how “deep” one’s undercover assignment, one may have to leave behind one’s friends, family, and ordinary society (f) while one works around the clock (h). This condition is not involuntarily imposed, however, and quitting may be an option. So (a) and (g) do not obtain.

Salaries for undercover officers vary. In Dallas, Texas they earn upwards of \$89,000 per year.<sup>64</sup> Other large cities pay them upwards of \$100,000.<sup>65</sup>

#### 4. Jurors

Unlike the previous occupations, being a juror captures (a) and (g). That is, one may be conscripted into jury duty involuntarily (satisfying (a)), and you may be barred from leaving (satisfying (g)). Jury service also involves the criminal justice process, which may be enough to satisfy: (c) (though arguably the goal of jury service is to not directly to *deter* crime rather than to make sure only the guilty are punished). *Sequestered* jurors also satisfy (b) (sequestered jurors are restricted in where they can go, who they can speak to, and what sources of information they have access to), (d) (sequestration is stressful), (f) (contact to friends and family is limited), (g) (one may not simply quit on demand), and (h) (sequestered jurors find themselves operating under these conditions around the clock for long as trial lasts).<sup>66</sup> Of the above-listed factors, only the danger/harm element is lacking.

One important difficulty in using juror compensation as an analogy is that jury duty is traditionally understood to be, in some sense, a civic *duty* that one must perform regardless of pay. Although governments usually pay jurors, the view that jury duty is a civic duty probably depresses the amount of compensation paid. Federal jurors receive \$40 a day, and \$50 a day for every day after 10 days have elapsed.<sup>67</sup> That comes to \$18,150 per year.

#### 5. Military Conscripts and Volunteer Service Members

Conscription into the military during wartime satisfies (a) (conscripts do not have a choice), (b) (they are told where to be when and told what to do), (d) (war is stressful), (e) (war is dangerous), (f) (soldiers spend time away from loved ones), (g) (soldiers are prohibited from being away without leave), and (h) (they live under these conditions until their

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64. Dana Severson, *How Much Does an Undercover Cop Make?*, HOUSTON CHRONICLE, available at <http://work.chron.com/much-undercover-cop-make-15934.html> (last visited June 6, 2017); Economic Research Institute, *Undercover Cop Salary Survey in Dallas, Texas*, available at <http://www.eri.com/research/city=dallas-tx/job=undercover-cop/salary> (last visited June 6, 2017).

65. Severson, *supra* note 64.

66. Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63 (1996).

67. See 28 U.S.C. § 1871(b).

services is no longer required). Although the aim of the armed forces and its members is not to deter *crime*, it still involves protecting the security interests of the public.

Still, just as jury duty, performing one's obligations under (at least justified) military conscription is traditionally understood as performing a civic duty as well, suggesting that the salary and benefits afforded to conscripts will also be depressed. So relying on military pay for conscripts, while perhaps instructive, cannot provide a reliable measure of what exonerees are owed, given that exonerees unjust conviction and confinement are *not* civic duties.

But perhaps the pay grades for members of the *volunteer* armed services provide a reasonable analogy. Currently the lowest earning pay grade in the U.S. armed forces earns \$1,449.00 per month for the first three months and \$1,566.90 per month for four months or more served, equaling \$18,359.10 for the first year.<sup>68</sup> Pay increases depending on years of service and rank, and does not include other benefits and allowances, such as \$225 per month for hostile fire/imminent danger pay.<sup>69</sup> As I argued elsewhere, adding this amount would make the analogy with prison tighter, assuming prison also involves imminent danger.<sup>70</sup> Adding this bonus to the lowest annual pay grade would bring the total to \$21,059.10 for that low-pay-grade soldier's first year of service. But military salaries vary widely depending on rank and years of experience, with some officers earning over \$100,000.00.

### B. Evaluating the List

We have just seen a range of occupations in search of more or less plausible analogies with incarceration. If minimum annual compensation per year of incarceration for exonerees ought to roughly track the occupations listed above, then the fair range of compensation should be somewhere between \$18,000 to \$170,000 per year of incarceration.

My own view is that jury service, although superficially similar in several ways—especially with respect to its involuntary nature—should be cut from the list. Even though the lives of sequestered jurors is highly stressful, it seems fair to say that jury service pales in comparison to the potential horrors of incarceration. Another important moral difference already mentioned was that we have civic duties to serve on juries. We lack any such duty to serve time for crimes we have not committed. This difference matters. The government under-compensates individuals for

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68. DEF. FIN. & ACCOUNTING SERV., DEP'T OF DEF., BASIC PAY—EFFECTIVE JANUARY 1, 2016, available at <http://www.dfas.mil/dam/jcr:81e6bd2c-a106-461b-851d-c77c7066baa5/2016MilitaryPayChart.pdf> [<https://perma.cc/E6H4-HRLD>].

69. Hostile Fire/ Imminent Danger Pay, DEF. FIN. & ACCOUNTING SERV., DEP'T OF DEF. (Feb. 2, 2012), available at [http://www.dfas.mil/militarymembers/payentitlements/specialpay/hfp\\_idp.html](http://www.dfas.mil/militarymembers/payentitlements/specialpay/hfp_idp.html) [<https://perma.cc/4G2S-7Y7S>].

70. See Encarnacion, *supra* note 7, at 150 n.32.



their time—\$40 or \$50 *a day* in federal cases—at least in part on the grounds that individuals perform their civic duties when serving as jurors. (This same rationale probably explains juror employment protections.<sup>71</sup>) This justification for under-compensation simply does not apply to cases where there is no comparable civic duty—i.e., when the question is how much to compensate an exoneree.

Military conscription should likewise be cut. Again, there is a superficial similarity, given that the government conscripts people to serve. But what putatively justifies conscription, to the extent that it is ever justified, is that citizens have a duty to serve under certain conditions. Again, exonerees discharged no such duty to serve prison time because they had none.<sup>72</sup> So the same duty-based rationale for potentially under-compensating military conscripts makes conscription a rather unreliable analogy in assessing fair compensation for exonerees. To avoid the distorting influence of conscription, we might examine instead wages paid to members of the volunteer armed forces. But if conscription no longer seems so important in drawing the relevant analogy (given the nexus between conscription and civic duty), we would be better suited to find a closer fit between the environs experienced by prisoners and the relevant occupational analogue.

Of course the occupation that represents the closest analogue in terms of environs is a correctional officer, given that they work *in prisons*. The median rate of pay for a correctional officer, as already noted, is \$20.59 per hour, which amounts to \$180,368.40 per year. Some variety in payment is to be expected depending on jurisdiction.

This is a good ballpark figure to begin with in determining how much compensation governments owe exonerees per year. Legislatures that take the minimum demands of justice seriously need to take some figure in the vicinity as a starting point. And to the extent that legislatures choose to significantly deviate, they would be best served by justifying their deviation in terms of some other occupation, one that bears a more compelling and principled resemblance to incarceration.

#### V. THE ADVANTAGES OF THE WAGE-DISGORGEMENT APPROACH

Both the harm-repair and backpay-disgorgement approaches achieve corrective justice, broadly construed. I have no quarrel with efforts to do justice by repairing harm. But I think that the wage-disgorgement approach has particular advantages in justifying *compensation statutes in*

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71. See generally 28 U.S.C. § 1875.

72. Plausibly, all citizens bear *some* burden to reduce crime if not at significant personal cost, which still means we lack a duty to serve a prison term for a crime one has not committed. But suppose we could assign some monetary value, *d*, to this amount. In principle, we could deduct *d* from the total compensation, *c*, recommended by the best analogue. It is not clear how to calculate *d*, and if it is sufficiently small, we might as well ignore it. But I have no in-principle objection to the thought of subtracting *d* from *c* (again, provided that *d* is small). Thanks to Victor Tadros for noticing this wrinkle.

*particular*, given the way those statutes typically structure compensation payouts.

Recall that these statutes calculate total compensation by multiplying the total number of years of incarceration by a fixed dollar amount. Texas, recall, calculates the number of years by \$80,000.<sup>73</sup> This way of structuring payouts fits perfectly if we assume that the yearly payout figure corresponds to wages that the government plans to disgorge for services rendered by the exoneree. True, we can try to construe that figure as a proxy for costs associated with repairing injuries suffered—e.g., physical and mental harms, lost wages (from employers that the exoneree would have had but for incarceration), and so on. But this creates a new problem of potential over- or under-compensation. If the fixed dollar amount is tantamount to a yearly wage, however, this mitigates the risk of windfalls or under-compensation. Exonerees are just paid the fair salaries owed to them.

The wage-disgorgement approach also provides relatively determinate principles for legislatures trying to design compensation statutes properly:

(1) Financial compensation of exonerees is not merely supererogatory but morally required as a matter of corrective justice. So not just any amount of compensation will satisfy justice's demands.

(2) To determine the appropriate amount of compensation per year under the disgorgement approach, legislators should identify an occupation that most closely resembles the conditions of incarceration, taking into account that there is no civic duty to serve a prison term for a crime one has not committed. Per-year compensation should be, at a minimum, on par with the annual salary of the identified occupation.

(3) Arbitrary caps on total compensation are incompatible with wage-based compensation of the kind contemplated by (2), just like refusing to pay someone for the work they have done is ordinarily unjust.

Each of these principles follows from my preceding remarks. Start with (1). As I have argued, governments must compensate exonerees as a matter of corrective justice. Nor will a pittance do. If we take the disgorgement approach seriously, then governments owe exonerees the equivalent to backpay, which will not be a pittance. Jurisdictions that provide a pittance or fail to provide any financial compensation altogether thereby treat exonerees seriously unjustly. This is something many have suspected all along. Now we have a deeper understanding of why.

Once we determine that governments must disgorge wrongly withheld wages, principle (2) gives a strategy for figuring out a fair rate of backpay, given that the amount was not negotiated up front in a voluntary transaction. For reasons already discussed, correctional officers offer the best analogy in my view—although I acknowledge that there is some

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73. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a) (West 2015).

room left for reasonable disagreement. The point, however, is that thinking in terms of *wages owed* makes the disagreement more tractable, while underscoring that some non-trivial financial compensation will be required—whatever wage a legislature settles on. Although withholding this amount from the guilty is justified on the grounds that individuals should not profit from their wrongdoings, or because the guilty forfeit rights to payment, withholding this backpay from the innocent amounts to involuntary servitude.

Finally, thinking of compensating exonerees in terms of disgorging wages implies principle (3): that caps on compensation are *prima facie* unjustified. After all, the more time one serves in jail, caps entail—in effect—that exonerees earn less per year once they exceed that cap.<sup>74</sup> This by itself may not be perverse: salaried workers routinely and notoriously get paid “less” per additional hour they work (though maybe we should be more uncomfortable with this practice, too). But in the case of exonerees the result is unjust. After all, once the legislature identifies a fair amount of annual compensation, caps on compensation serve only to diminish the amount owed to the exoneree *below* that permissible range. Caps in effect license the state to stop paying wages for services rendered. This is seriously unjust.

#### CONCLUSION

Governments wrong innocent prisoners by infringing their rights to bodily sovereignty. But the state infringes that right in a particular way: it uses the prisoner for the purpose of deterring crime. Rectifying this wrong can come by way of either compensating with the aim of undoing the harms done or by paying for the criminal deterrence services rendered simply in virtue of incarceration. Calculating compensation under the former approach is difficult, as even proponents of that approach admit.<sup>75</sup> Compensating with the goal of repairing injuries also fits poorly the way compensation statutes calculate total financial compensation (i.e., using a fixed amount multiplied by the number of years of incarceration). If compensation statutes aim to repair harm, then this risks either compensatory windfalls or under-compensating exonerees, whose injuries may be more or less than the fixed-rate amount provides. Compensating wages owed for services rendered, but wrongfully withheld, better fits the compensation structure characteristic of employment, which is also typically paid out in lockstep, fixed rates.

Although nothing can compare to the nightmare of being in prison for a crime that one has not committed, some occupations bear a family resemblance to incarceration in several respects. It is worth thinking about

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74. See Encarnacion, *supra* note 7, at 139 (explaining that North Carolina’s compensation cap “effectively reduced” the annual compensation of two brothers from \$50,000 per year to \$25,000).

75. See, e.g., Trivelli, *supra* note 38, at 271.

analogous occupations as a way of making the how-much-to-pay debates more tractable. Legislatures ought to reconcile their payouts to exonerees with wages comparable to these occupations. To the extent that jurisdictions choose not to compensate or to compensate less than any comparable fair wage for the time that they have served, this demands a compelling justification. But it is unlikely that we will find one compatible with justice.

