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## WHY AND HOW TO COMPENSATE EXONEREES

*Erik Encarnacion\**

Brothers Henry McCollum and Leon Brown were tried and convicted for the rape and murder of an 11-year-old girl. McCollum faced the death penalty, Brown life incarceration. Roughly thirty years later they were exonerated by DNA evidence and freed from prison.<sup>1</sup>

North Carolina awarded each brother \$750,000.<sup>2</sup> A statute guaranteed the payments upon receipt of a full pardon from the state's governor. This kind of statute, which allows exonerees to obtain compensation without filing lawsuits or otherwise establishing that official misconduct caused the incarceration, is called a compensation statute.<sup>3</sup> North Carolina's statute awards exonerees \$50,000 per year but caps the total amount of compensation at \$750,000.<sup>4</sup> In this case, the cap effectively reduced each brother's award to \$25,000 for each year of incarceration.

Many agree that exonerees ought to be compensated somehow. It is also increasingly well accepted that the best mechanism for ensuring compensation, if compensation is to be awarded at all, is through compensation statutes. Compensation statutes represent the gold standard for compensating exonerees because these statutes do not require exonerees to

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1. *North Carolina Brothers to Receive \$750,000 Each for Wrongful Convictions*, GUARDIAN (Sept. 2, 2015), <http://www.theguardian.com/us-news/2015/sep/02/north-carolina-brothers-wrongful-convictions> [<https://perma.cc/UF9T-3TBX>].

2. *Id.*

3. 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.").

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

establish official wrongdoing or to file lawsuits, and they furnish faster compensation than the process of litigation allows.<sup>5</sup>

But jurisdictions still disagree about whether to adopt these statutes and how much compensation they should award. For example, North Carolina's compensation looks paltry compared to the \$80,000 per year offered by Texas<sup>6</sup> and even the \$50,000 guaranteed by Alabama,<sup>7</sup> neither of which (unlike North Carolina) caps total compensation. Still, McCollum and Brown are comparatively lucky. Louisiana has an even lower compensation cap than North Carolina.<sup>8</sup> Other states, like Kentucky and Pennsylvania, lack compensation statutes altogether. In such states, it is in principle possible to recover compensation, provided that the victim sues the state and shows improper conduct by law enforcement officials. But these cases are very difficult to win.<sup>9</sup> And some innocents end up in prison even if each official in the criminal process acted in good faith in prosecuting them.<sup>10</sup> These cases offer virtually no hope for exoneree compensation in states lacking compensation statutes.

## I

How can we bring greater uniformity to exoneree compensation in a principled and just way? This paper argues that answering this question becomes easier once we identify the principles of justice that best justify and explain compensation statutes. In particular, commentators have assumed incorrectly that the goal of compensating exonerees should be understood primarily in terms of corrective justice, which posits a duty to undo or repair

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5. See sources cited *supra* note 3; see also 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.”). Exonerees are typically unsuccessful in bringing civil claims due to the “inflexibility” of tort and civil rights law. Bernhard, *supra* note 3, at 404.

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

7. ALA. CODE § 29-2-159(a) (LexisNexis 2015).

8. See LA. STAT. ANN. § 15:572.8(H)(2) (West 2016) (allocating \$25,000 per year of incarceration for a maximum of \$250,000).

9. See, e.g., Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439 (2009).

10. It happens. See, e.g., Lara Bazelon, *Justice After Injustice*, SLATE (Sept. 30, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/09/restorative\\_justice\\_for\\_false\\_convictions\\_crime\\_victims\\_and\\_exonerated\\_convicts.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/09/restorative_justice_for_false_convictions_crime_victims_and_exonerated_convicts.single.html) [<https://perma.cc/J2RE-EY9U>] (describing good faith but mistaken accusations against exoneree Thomas Haynesworth).

wrongfully inflicted harms. This paper argues, by contrast, that restitutionary justice, which forces parties to relinquish unjust gains, better justifies and explains compensation statutes. The unjust gains at issue are fair wages withheld from those performing crime-deterrence services. That is, this paper claims that prisoners, like law enforcement officials, perform crime-deterrence services simply by virtue of their incarceration. The state might fairly withhold compensation from the guilty for their crime-deterrence role, on the grounds that we should avoid rewarding individuals for their wrongdoings. But this rationale for withholding payment does not apply to innocent prisoners; innocent prisoners are in effect pressed into service as instruments of criminal deterrence without being compensated for this task. Fair compensation cannot be justly withheld from the innocent, any more than the state may justly withhold compensation from conscripts unwillingly pressed into military service.

Perhaps the most important advantage of the restitutionary justification lies in its ability to give principled and relatively determinate guidance for legislators seeking to set a fair rate of compensation. If we understand round-the-clock incarceration as just one mode of crime deterrence in pursuit of public security interests, we can look around for analogous jobs and their level of compensation in order to find ballpark ranges within which compensation looks reasonably fair. We also learn from the restitutionary approach that caps on payments—like the ones restricting payouts to McCollum and Brown in North Carolina—are seriously unjust. In sum, this restitutionary perspective points toward a principled and just range of fair payment capable of bringing order to the disarray among payment regimes in various jurisdictions.

This restitutionary approach provides not only a new justification for compensation statutes and useful guidance for legislators, but it also provides a better justification for these statutes than corrective justice. Consider two problems with a corrective justice explanation that a restitutionary justification avoids. One is that corrective justice implies, arguably, that exonerees must establish that official wrongdoing—that is, negligent, reckless, knowing, or purposeful wrongdoing—caused the incarceration. If establishing this kind of wrongdoing is necessary, as some conceptions of corrective justice require, then compensation statutes are unjustified given that they characteristically do not require establishing official wrongdoing. A second problem lies in the inherently individualized nature of corrective justice, which traditionally allocates damages on a case-by-case basis. This implies that, when we seek to repair a person's life, we must take into account the trajectory of that person's life before incarceration and try to afford compensation in a way that attempts, as far as possible, to reconstruct that life. Apart from the fact that this reparative ideal is very difficult to implement practically (especially in cases of long-term incarceration), individually assessing compensation is wholly at odds with

compensation statutes, which provide periodic lump sum—indeed, wage-like—compensation to exonerees without regard to their individual needs. Corrective justice therefore does not fit the structure of compensation provided by compensation statutes—or at least not as well as a fair-wage-based restitutionary account would.

## II

Let us begin indirectly by raising a threshold objection to the very idea of automatic compensation for all exonerees. Specifically, the objection holds that—pursuant to corrective justice—exonerees are not entitled to compensation unless the state engaged in wrongdoing in securing their conviction. This entails, the argument goes, that states prosecuting individuals in good faith and without misconduct owe no compensation if those individuals are later exonerated. I will argue that the argument is ultimately unsuccessful. But the objection nevertheless raises enough of a worry to motivate a turn away from the reparative perspective presupposed by corrective justice and toward a restitutionary approach.

The argument goes like this: An exoneree's demand for compensation is a demand for reparative relief on account of having been wronged. Essentially, it is a demand for relief predicated on a principle of corrective justice. This principle holds, roughly, that one is entitled to reparative compensation by the wrongdoer only if one has suffered injuries as a result of the wrongdoing.<sup>11</sup> Hence, if there has been no official wrongdoing, officials are not required to pay compensation.

This argument initially appears to bolster the claim that exonerees must establish official misconduct. After all, if all officials who play some causal role in securing the innocent person's incarceration acted in good faith, the incarceration was an "innocent" mistake. And if it was innocent, then no wrongdoing occurred. Hence, corrective justice requires no compensation. So a prerequisite for compensation is a showing of wrongdoing by an official that caused the mistaken incarceration. Call this the *corrective justice argument*.

I suspect that something like this argument explains in part why some jurisdictions hesitate to enact compensation statutes, which characteristically offer relief without requiring that the exoneree establish official misconduct.

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11. This formulation reflects the traditional conception of corrective justice. See generally 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). But see Erik Encarnacion, *Corrective Justice as Making Amends*, 62 *BUFF. L. REV.* 451, 490–509 (2014) (articulating another, nontraditional conception of corrective justice grounded in moral norms of making amends).

Something like the corrective justice argument might also explain why some jurisdictions offer only a pittance by way of compensation: They are not motivated by the goal of repairing the often-considerable physical, social, and psychological injuries suffered on account of wrongful incarceration. Rather, the pittance might be motivated by a milquetoast sense of pity or a duty of beneficence, at best. Compensation statutes with low payouts are, from the perspective of the corrective justice argument just considered, supererogatory.

The problem with the corrective justice argument just considered, however, is that it assumes an overly narrow conception of wrongdoing. It assumes, that is, that one must act negligently, recklessly, or maliciously—or otherwise with fault. But this need not be the case. Tort law, at least, recognizes a range of transgressions that count as wrongs despite involving no fault (i.e., strict liability wrongs).<sup>12</sup> One can wrong another person simply by transgressing certain boundaries, especially with respect to artificial boundaries established by property law and natural boundaries established by one's own body. If I trespass on your land, I potentially owe compensation for any injury on that land even if I reasonably believed that the land was mine.<sup>13</sup> And I might commit a battery against you simply by intentionally touching you without your consent, even if in good faith (though mistakenly) I thought you were my good friend.<sup>14</sup> Again, this is so even if I behaved perfectly innocently but mistakenly. The wrongdoing is a form of strict liability wrong, where the wrong consists in the doing of the transgression itself voluntarily though without fault.

There is another form of strict liability wrong that becomes plain in cases of necessity. These are cases in which someone acts justifiably in appropriating another person's property yet nevertheless wrongs them by not voluntarily compensating them. Initially, this class of cases seems incoherent, since one may not justifiably wrong another. But that is not the claim. One can act justifiably under the circumstances yet still wrong someone by not voluntarily offering up compensation. This is especially so in cases involving the use of another's person or property. In this vein, Gregory Keating has an illuminating analysis of certain strict liability torts that may involve justified conduct but that nevertheless give rise to valid

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12. For a sophisticated attempt to reconcile strict liability with corrective justice, see Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformation*, 15 HARV. J.L. & PUB. POL'Y 849, 867–881 (1992).

13. See, e.g., *S. Ctys. Ice Co. v. RKO Radio Pictures, Inc.*, 39 F. Supp. 157 (S.D. Cal. 1941).

14. See *White v. Univ. of Idaho*, 797 P.2d 108, 109 (Idaho 1990) (“‘A battery . . . requires intentional bodily conduct which is either harmful or offensive,’ that does not mean that the person has to intend that the contact be harmful or offensive.”) (quoting *Durtschi v. Durtschi*, 716 P.2d 1238, 1243 (Idaho 1986)).

claims for compensation.<sup>15</sup> Consider *Vincent v. Lake Erie Transportation Co.*<sup>16</sup> In that case, a ship was caught in a terrible storm, and rather than risk life and limb (and ship), the captain commandeered a dock, presumably saving everyone and everything in the process—except, that is, the dock, which suffered damage. The dock owners filed suit, arguing that the captain trespassed and that they were entitled to compensation. The ship owners argued that they were justified in commandeering the dock given the extreme circumstances and hence did nothing wrong. And if they did nothing wrong, they acted with due care, and thus did not have to pay compensation to repair the ship.<sup>17</sup>

The ship owners lost the argument.<sup>18</sup> But it is puzzling why, if there was no wrongdoing at issue. Keating's reinterpretation of the case is compelling: there *was* a wrongdoing—namely, the fact that the ship owner failed to voluntarily pay for the damaged dock.<sup>19</sup> This view recognizes that there are limits to property owners' rights to exclude others from their premises, which may be permissibly infringed in cases of necessity. We may permissibly use others' property without consent in such cases. That said, due respect for people and their property still requires voluntarily compensating for damage done even if that damage was all justified under the circumstances. The wrong is, in other words, the wrong of nonconsensual-using-without-compensating—not merely nonconsensual using.

Each of these kinds of “strict-liability wrongs,” using Keating's terminology, provides a way of resisting the idea that corrective justice requires exonerees to establish official misconduct. The wrongful injury to the exoneree is akin to the wrongful injury in a battery—an unconsented-to transgression of his bodily autonomy for which he must be compensated even if the transgression occurred in good faith. Alternatively, or additionally, the wrongful injury was the state's failure to voluntarily compensate him for using his body as an instrument of crime deterrence. That is, by imprisoning him, they used his body—just as Lake Erie Company used Vincent's docks—in a way that may have been justifiable

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15. Gregory C. Keating, *Strict Liability Wrongs*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 292 (John Oberdiek ed., 2014).

16. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

17. *Id.* at 221.

18. *Id.* at 222.

19. Keating, *supra* note 15, at 302 (“The wrong in *Vincent* lay not in the defendant's doing damage to the dock, but in the defendant's wrongful (or unreasonable) failure to step forward and volunteer in the aftermath of the storm to make good the damage done the dock.”).

under the circumstances. Still, compensation is owed to repair the damage done to his life.

The upshot is this: Despite the superficial appeal of the corrective justice argument against no-fault compensation, corrective justice does not necessarily require a showing that negligence or other kind of official misconduct caused an exoneree's incarceration. The mere fact that he was innocently imprisoned suffices to show that reparative compensation is owed, assuming that two forms of strict liability wrongs count as genuine wrongs. And if this analysis goes through, the amount of compensation should be fixed by reference to the amount that each exoneree lost as a result of the incarceration.

### III

The preceding section argued that strict liability justifications for exoneree compensation are consistent with a corrective-justice-based, reparative approach. But we should also worry about these justifications. First, even granting that tort law recognizes strict liability wrongs as genuine legal wrongs, it is not obvious that they are genuine moral wrongs according to principles of justice. Some corrective justice theorists try to explain away strict liability wrongs as cases of negligence in disguise or as simply incompatible with corrective justice.<sup>20</sup> These writers argue that tort law, to the extent that it really does impose faultless liability, is itself *prima facie* defective. The strict liability justification therefore looks like quite a controversial foundation on which to place demands for exoneree compensation.

There is another worry. This one relates to the mode of recovery prescribed for corrective justice: reparative compensation. How do we measure this compensation? Again, corrective justice holds that we should try to make things as if the incarceration had never had occurred, just as the appellant in *Vincent* had to pay reparative relief to the dock owners to repair the dock.

Of course this goal is often near impossible, especially for innocents who have been incarcerated for long terms. It is not obvious what paths people would have taken—which careers they would have taken up, for example—had they not been imprisoned. And suppose we could figure out what has been lost. Many—most, I hazard—of those innocents who wind up in prison are not well off enough to afford good lawyers. So even if we could identify their projected lost earnings, chances are they would not be very high. But it seems perverse, to me at least, to suggest that those who are

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20. *E.g.*, ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 171 (rev. ed. 2012) (arguing, in Chapter 7, that corrective justice is incompatible with strict liability).

wrongly imprisoned should have their compensation fixed to their preincarceration earnings potential.

There is a further difficulty. Even if we can identify a wrong that ought to be remedied with reparative compensation, this approach cannot justify the fixed compensation schemes offered by compensation statutes—the gold-standard mode of relief for exonerees. Corrective justice’s reparative ideal inherently demands that assessments be individualized. Negligently bumping into you might not cause any injury whatsoever. But negligently bumping into a highly fragile person might lead to some catastrophic consequences, for which you might be on the hook, at least pursuant to the eggshell skull rule.<sup>21</sup> Yet compensation statutes, at their core anyway, provide no individualized treatment of victims. (You will recall, for example, that North Carolina provides \$50,000 per year of incarceration, with a \$750,000 total cap, no matter your prior earnings potential or any “eggshell skull” you might have.) Corrective justice therefore does not do a very good job of justifying the way that compensation statutes actually compensate. We would have to understand these lock-step payouts as, at best, very rough proxies for harms to individual exonerees, which may be wildly over- or under-compensatory as measured by reference to actual harms needing remediation.

This is not to say that corrective justice’s reparative ideal lacks merit. Innocent people who are incarcerated face numerous medical obstacles upon release, including psychological and physical trauma. Here the reparative ideal seems most apt and forceful. Compensation should include compensation for this kind of medical care, aimed at restoring bodily and mental integrity to the extent possible.<sup>22</sup> Indeed, some states include this kind of relief in their compensation statutes.<sup>23</sup> Other states provide educational grants or tuition reimbursements, presumably (though not necessarily) on the assumption that the exoneree would have obtained an education but for his incarceration.<sup>24</sup> These are all good and important things. And nothing in this paper should be taken as an argument against providing reparative relief. Instead, I want to argue that even more is owed

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21. See, e.g., *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891).

22. See Bernhard, *supra* note 3, at 404 (“Ideally, compensation statutes should provide generous, rapid, and certain damage awards, *accompanied by education and social services*, for all those who have been wrongly convicted and later exonerated.”) (emphasis added).

23. E.g., TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(d) (West, Westlaw through end of the 2015 Reg. Sess. of the 84th Leg.) (“[An exoneree] entitled to compensation . . . is also eligible to obtain group health benefit plan coverage through the Texas Department of Criminal Justice as if the person were an employee of the department.”).

24. E.g., N.C. GEN. STAT. § 148-84(c) (2015) (providing for job skills training and payment for, inter alia, tuition and fees).

at a *minimum* to exonerees as a matter of restitutionary justice, and that this restitution-based approach best justifies and explains compensation statutes.<sup>25</sup> I turn to that issue in the Section that immediately follows.

#### IV

Corrective justice focuses exclusively, and hence problematically, on compensating victims for their wrongfully suffered injuries. The injuries suffered by exonerees are often quite salient, so it is not surprising that commentators tend to focus on reparative relief rather than other kinds.<sup>26</sup>

Given these problems, I think that we should focus on a *restitutionary model* for exoneree compensation. In general, restitution looks at what one party has unjustly gained and seeks to undo that transaction by removing that which has been gained and returning it to the victim.<sup>27</sup> So what does the government unjustly retain by incarcerating an innocent person, albeit

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25. It has been suggested that we should turn to constitutional law for a better analogy. The Takings Clause of the U.S. Constitution allows the government to take people's property provided that the state uses that property for the public *and* gives "just compensation" for the appropriation—usually fair market value. *See* U.S. CONST. amend. V. In other words, from the Constitution's point of view, taking a person's property for public purposes may be all-things-considered justified. Still, a wrong has been committed if the state fails to voluntarily offer up just compensation. Some have suggested that a wrongful conviction and imprisonment should be analogized to or understood as a taking under the Fifth Amendment. *See, e.g.*, John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property"*, 59 HASTINGS L.J. 515 (2008); Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97 (2004); Ilya Somin, *The Case for Compensating People Who Serve Time in Prison for Crimes They Did Not Commit*, WASH. POST (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/> [<https://perma.cc/EY57-Q8M6>]. Problematically, this analogy leads us astray, suggesting (in accordance with Takings Clause doctrine) that the proper measure of "just compensation" is reparative rather than restitutionary relief. *See, e.g.*, Master, *supra*, at 143 ("The Supreme Court recently affirmed that the measure of damages under the federal Takings Clause is *harm to the individual* rather than use to the government, definitively rejecting the principle that the government must obtain a benefit in order for its compensation obligation to be invoked.") (emphasis added). This is problematic for reasons already given in Section III. But my goal is not merely to highlight legal doctrines that seem to serve purposes similar to compensation statutes, but rather to identify deeper principles of justice that would justify and explain those statutes. The Takings Clause, while a clever analogy in some respects, is inadequate until we identify the principles of justice underpinning it.

26. *See* sources cited *supra* note 25.

27. WARD FARNSWORTH, *RESTITUTION: CIVIL LIABILITY FOR UNJUST ENRICHMENT* 1 (2014) (commenting that restitution involves "the rights that arise not when one person has caused an unjustifiable loss to another, but when the defendant has unjustifiably *gained* at the plaintiff's expense."). The talk of plaintiff and defendant here makes plain that the author discusses legal claims brought in private lawsuits. I intend to speak more generally in terms of principles of justice presupposed by such private rights of action.

unintentionally? The answer: money to pay fair compensation for criminal-deterrence services. To elaborate, prisoners function as instruments of criminal deterrence and law enforcement: We incarcerate people in order to deter other criminal wrongdoings. Those who are guilty give up their right not to be used as criminal-deterrence devices in this way.<sup>28</sup>

But the innocent do not. Principles of restitution therefore demand that we should, at a minimum, compensate exonerees for each year they have served in prison, since failing to do so allows the state to unjustly extract without payment an important public service from exonerees. They must be paid accordingly, for each year of the dangerous, 24/7 crime-deterrence job they are forced to perform. Exonerees are owed compensation just like any other person employed by the state to fulfill its criminal law enforcement responsibilities.

The military draft provides an analogy. Though they involve conscripting people into military service without their consent, drafts might be morally legitimate. But it is plainly illegitimate to press people into military service without compensating them for their work. This would be transparently wrong, essentially slavery. If we want to make explicit a moral principle that explains why this is wrong, consider this midlevel principle: refusing to provide fair compensation to people for the morally permissible services that they provide at your direction is *prima facie* unjust.<sup>29</sup> Call this a *principle of fair labor*. Something like this principle grounds the restitutionary principle preventing people from forcibly, even if justifiably, benefitting from another's labor without fair compensation. This principle strikes me as correct. But we might want to go deeper, seeking to ground this principle in a more basic one, such as the Kantian principle that one ought never treat persons solely as a means to one's own end.

Whatever the deeper foundations the restitutionary principle of fair labor, recognizing that compensating exonerees can be grounded in restitution has obvious advantages. First, a restitutionary perspective answers the corrective justice argument, which pressed the idea that "good faith" incarcerations were not compensable. Not so. Justice might require one to disgorge one's unjust gains, even if one is wholly innocent. We needn't engage in any debates about whether strict liability wrongs are truly wrongs in the sense needed to trigger a duty of repair pursuant to corrective justice. Accordingly, any jurisdiction that fails to provide near-immediate

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28. See VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF THE CRIMINAL LAW* 265–92, 312–30 (2011).

29. This might seem to imply that volunteer services are unjust. In response, we might characterize volunteers as those who voluntarily waive their right to compensation. I thank Steve Bero for the objection and suggested response thereto.

compensation for its exonerees or requires them to prove that they have been incarcerated as a result of misconduct perpetuates serious injustice from the perspective of restitution.

Restitution also gives guidance in answering the question of how much to compensate. For example, if we were to assume that exonerees were owed a federal minimum wage, supplemented by federal time-and-a-half overtime requirements, exonerees would be owed roughly \$87,500 per year of incarceration. This figure assumes that innocent prisoners are paid minimum wage for twenty-four hours a day, seven days a week, and fifty-two weeks a year. Under the Fair Labor Standards Act, qualified employees are entitled to 1.5 times the hourly salary for each hour worked over forty hours in a given week.<sup>30</sup> Anything below that figure would be presumptively unfair on this approach.

Another approach would try to link fair restitution to wages paid to workers performing labor analogous to full-time incarceration. Because innocent prisoners are essentially instruments of law enforcement, used for the purposes of deterring crime under dangerous and stressful prison conditions, perhaps exonerees must be paid on par with any other around-the-clock law enforcement official performing dangerous and taxing work. Undercover police officers provide one analogy. Why *undercover* officers? The thought, roughly, is that certain deep-cover police officers must, at times, operate in the field gathering evidence around the clock, in sometimes highly risky conditions, with the ultimate goal of criminal law enforcement. Incarceration shares this around-the-clock risk of danger. Conscripts into the armed forces provide another analogy of a potentially dangerous security job. Indeed, the conscript analogy might be stronger in some ways given that, like exonerees, conscripts are sometimes pressed into service involuntarily.

These analogies point us towards a principled approach to the how-much-to-compensate question: Compensation afforded to exonerees qua instruments of law enforcement, operating in dangerous environments, arguably should be on par with the salary and benefits paid to undercover police officers or military conscripts. Some jurisdictions pay undercover officers in excess of \$100,000 per year.<sup>31</sup> Under the conscript analogy, exonerees would obtain compensation comparable to military personnel, and in particular, personnel with particularly hazardous job descriptions. But military compensation and benefits vary depending on years of service,

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30. 29 U.S.C. § 207(a)(1) (2012).

31. Dana Severson, *How Much Does an Undercover Cop Make?*, HOUSTON CHRONICLE, <http://work.chron.com/much-undercover-cop-make-15934.html> [https://perma.cc/E23M-6KL4].

special allowances, and rank, so calculating the amount owed to exonerees might be a bit more complicated.<sup>32</sup>

These analogies are rough. For one thing, they assume that the rates paid to undercover officers and soldiers are just. But at least these analogies point toward a principled way to answer the question of how much to compensate exonerees in recognition of services that they have provided. Exonerees have been conscripted without their consent in the war against crime, as instruments of criminal law enforcement. They should be paid accordingly.

One last point. Whichever analogy is most apt—minimum-wage worker, undercover officer, conscript, or someone else—it is worth noting that the restitutionary approach, if correct, suggests that payout caps like the one imposed on McCollum and Brown in North Carolina are seriously unjust. The reason is simple. One may not, consistent with restitutionary justice, simply continue to withhold part of the money that one has unjustly withheld. One must disgorge all of it. Notice, by contrast, that corrective justice might rationalize compensatory caps found in some compensation statutes. Recall that these statutes provide lump-sum payouts based on a lock-step annual rate of compensation. Also recall that these payouts might be over- or under-compensatory with respect to the actual harms suffered as a result of incarceration, depending entirely on the harms suffered by the exoneree. One person might receive a windfall as a result of the compensation, and another might not obtain enough, depending (again) on the severity of the injuries suffered and the opportunities lost as a result of incarceration. But a cap might be easier to justify in light of a corrective-justice-based justification of compensation statutes. After all, trying to avoid the recovery of windfalls by exonerees seems a legitimate goal; compensatory caps might simply be blunt tools for realizing this goal. So to the extent that compensation caps appear intuitively mistaken or even unjust,

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32. As of January 2016, enlisted members of the armed forces on active duty earn, at the lowest-earning E-1 pay grade, \$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. DEF. FIN. & ACCOUNTING SERV., DEP'T OF DEF., BASIC PAY—EFFECTIVE JANUARY 1, 2016, <http://www.dfas.mil/dam/jcr:81e6bd2c-a106-461b-851d-c77c7066baa5/2016MilitaryPayChart.pdf> [<https://perma.cc/E6H4-HRLD>].

Importantly, military basic pay increases depending on years of service and rank, and does not include other benefits and allowances. For example, the military also awards \$225 per month for hostile fire/imminent danger pay. *Hostile Fire/Imminent Danger Pay*, DEFENSE FINANCE AND ACCOUNTING SERVICE (Feb. 2, 2012), [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>]. Adding this amount would make the analogy with prison more apt, assuming prison also involves imminent danger. Adding this hostile fire/imminent danger pay to the lowest annual pay grade would bring the total pay of an E-1 grade enlisted soldier to \$21,059.10 for that soldier's first year of service.

the restitutionary approach provides a tidy explanation for this thought—at least as compared to any attempt to ground compensation statutes in corrective justice.

## V

Now consider some objections. The first is a worry about perverse incentives. Suppose that the range of annual exoneree compensation is in the ballpark of \$100,000. Suppose further that no caps on compensation are permissible. One objection is that officials will be even less disposed to admit mistakes regarding incarceration and will be even more inclined to resist attempts to exonerate prisoners. So advocating a fairly high amount of money as the proper range of compensation might have unintended consequences that are counterproductive from the perspective of justice.<sup>33</sup>

Notice, first, that this objection does not deny that justice requires compensation on par with the amount advocated by this paper. Instead, the objection reflects a ubiquitous worry: pursuing justice always risks causing a backlash or creating counterproductive incentives. But this kind of worry can also be taken too far. Indeed, on the reasoning that the objection proposes, perhaps we should reduce the payout to *zero* to reduce the incentives for official obstinance. But this seems even more perverse. In addition, unintended consequences also potentially arise from inadequate compensation. Preliminary empirical work suggests that insufficient compensation, below a certain threshold, correlates with recidivism.<sup>34</sup> This too must be considered. So given that it is difficult to predict in advance how unscrupulous or overzealous officials will react to the demands of justice, and given that undercompensating also carries risks of inducing recidivism, it seems better to pursue justice's demands than accept status quo injustices.

Another objection goes to the heart of this paper's claim by denying that prisoners provide, in any intelligible sense, crime-deterrence "services."<sup>35</sup> For each individual prisoner, one might argue, it is highly unlikely that he or she deters others from committing a crime, and indeed, once we take into

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33. A version of this worry is expressed in Will Baude, *The Unintended Consequences of Compensating the Exonerated*, WASH. POST: THE VOLOKH CONSPIRACY (Jan. 30, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/30/the-unintended-consequences-of-compensating-the-exonerated/> [<https://perma.cc/J56A-8GQQ>] ("The bigger the compensation that the state has to pay, however, the more reluctant agents of the state might be to cooperate in an exoneration.").

34. Mandery et al., *supra* note 5, at 583 ("[I]t is clear that substantial compensation [in excess of \$500,000] may considerably reduce post-release offending.").

35. Thanks to Alex Sarch for raising this concern.

account recidivism, incarceration may actually increase crime rates.<sup>36</sup> And for all we know the likelihood that an innocent prisoner will succeed in deterring crime is even less likely. We should therefore conclude that prisoners perform no crime-deterrence services and, in turn, that restitutionary justice entitles them to no “back pay” for their services.

But this objection rests on a mistake. Distinguish between the services rendered and the effects of those services. An incompetent police officer or soldier may, on an individual level, fail to deter any criminals or protect anyone from enemy combatants. Indeed, they may be so incompetent that they do more harm than good. But they are still entitled to compensation for the tasks that they performed, or in the case of the conscript, that they are required to perform even against their will. That is, they are entitled to compensation for the services that they have rendered to the institutions that they serve or are forced to serve. Those institutions—the police force or the military—ideally have crime-deterrent or war-deterrent effects. But compensation, under something like the aforementioned fair labor principle, is not contingent on whether either those institutions or the particular individuals actually succeed in bringing about the desired effects.

One last objection.<sup>37</sup> This paper has asserted without argument that deterrence is one of the systemic goals of the criminal justice system. And this indeed is one of the official, stated goals in many jurisdictions in the United States.<sup>38</sup> But one of the dominant approaches to justifying criminal law in the philosophical literature—retributivism—insists that the sole goal of the criminal justice system is to punish the guilty, and that deterrence does not matter or matters much less.<sup>39</sup> So it might be objected that, if this view is correct, then inmates whether innocent or not are not being used as instruments of the state for crime deterrence since that simply ought not be the goal of the criminal justice system. Still, intuitively the innocent ought to be compensated anyway.

A full response cannot be offered here, at least not without wading into the well-developed scholarly literature on the question of whether retributivism suffices to justify criminal punishment. For what it is worth, I am inclined to think that punishing the guilty, even if doing so is good in and of itself, cannot suffice to justify a system of criminal law unless it also

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36. See Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 301 (2007).

37. I thank Steve Bero for articulating this objection.

38. *E.g.*, 18 U.S.C. § 3553(a)(2)(B) (2012) (listing “deterrence to criminal conduct” as one of the factors to be considered in sentencing).

39. A state-of-the-art defense of retributivism can be found in MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* (2010).

tends to deter crime.<sup>40</sup> But consider the following further responses. First, as already mentioned, jurisdictions already officially acknowledge that deterrence is a goal of punitive incarceration. So my argument goes through at least for these jurisdictions. Second, nothing in this paper denies that corrective justice still provides grounds for recovery (albeit weaker grounds). The paper just points out the advantages of justifying compensation statutes—the gold standard for compensating exonerees—on restitutionary grounds. So it is a mistake to conclude that if recovery on restitutionary grounds were not available, then justice requires no exoneree compensation. Corrective justice waits in the wings. Finally, and most importantly, the argument proposed in this paper can be refashioned in terms of this imagined punishment-only criminal justice system. Even if the sole justification for a given criminal justice system is to punish the guilty, then prisoners are still enlisted in the service of that goal. And although it might be justified to withhold compensation from guilty offenders for services rendered via incarceration, withholding compensation from the innocent remains unjust.

## VI

Exonerees are owed compensation. This paper began by rejecting the claim that this compensation ought to depend on whether the exoneree can establish that official misconduct caused their wrongful incarceration. It was argued that, even to the extent that corrective justice governs exoneree compensation, this does not necessarily require establishing official misconduct. This is because strict liability and corrective justice are reconcilable, and incarcerating the innocent can be construed as a form of strict liability wrong.

Given the controversial nature of this claim, this paper favors justifying exoneree compensation primarily in terms of restitution rather than corrective justice. It is even less controversial that restitution requires no showing of misconduct. And once we recognize that innocent inmates in prisons are performing unpaid crime-deterrence services, the natural and appropriate level of compensation comes quickly into view—the state should pay the fair wages that it is withholding from exonerees. As a ballpark estimate, \$100,000 is a fair annual payout, which roughly matches the amount paid to undercover police officers. The range, however, might vary depending on one's preferred analogy. A conscripted soldier during wartime might earn less. But in any event the range of fair annual

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40. Arguments against retributivism can be found, *inter alia*, in TADROS, *supra* note 28, at 44–87.

compensation will be relatively determinate, at least as compared to the compensatory disarray found among jurisdictions today.