Edwin Borchard’s Innocence Project:  
The Origin and Legacy of His Wrongful Conviction Scholarship

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The article recognizes the life and work of Edwin Montefiore Borchard, the founder of US innocence scholarship, as fitting for the Wrongful Conviction Law Review’s inaugural issue. The sources of his scholarship are located in his life and times in the early twentieth century US Progressive movement. The links between Borchard’s other legal scholarship and his wrongful conviction writings are explained. Borchard’s writings and advocacy leading to his main work, Convicting the Innocent, and passage of the federal exoneree compensation law are described. The article concludes that Borchard’s lasting legacy is to refute innocence denial, a deeply held belief that wrongful convictions never occur or are vanishingly rare.

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I Introduction

Edwin M. Borchard was the first American scholar to catalogue wrongful convictions and advocate wrongful conviction compensation. Convicting the Innocent¹ is cited frequently by innocence scholars, who may ascribe more to it than was intended.² His exoneree compensation

¹ Edwin M Borchard, Convicting the Innocent: Errors of Criminal Justice (New Haven: Yale University Press, 1932) [Borchard 1]; a popular version was also printed.
articles are cited in like studies.³ This article extends earlier work⁴ that explored the impact of Borchard’s innocence scholarship and advocacy.

Part II reviews Borchard’s Ethical Culture credo and progressive ideology as bases for his wrongful conviction reform interest. Part III examines his career as a preeminent legal scholar who made substantial contributions to international law, the declaratory judgment, and tort law. Although his wrongful conviction scholarship constituted a small portion of his academic output, it had significant policy impact⁵ and sprang from a coherent, progressive, view of the individual’s relationship to the state. Part IV, regarding Borchard’s “agenda,” describes his advocacy for laws to indemnify the innocent. Part V traces what I call Borchard’s “innocence project” his desire to eradicate “innocence denial.”⁶ His work is evaluated in the context of his era but I conclude with reflecting on its significance for today’s innocence movement.

II Borchard’s Life, Character, And Ideology

“Borchard's rise in his chosen profession—international law—was almost meteoric.”⁷ At the age of twenty-six in 1910, while a legal specialist at the Library of Congress, he advised the American international arbitration delegation at The Hague, while studying for a Ph.D. in international law at Columbia University.⁸ He then toured Europe to interview “lawyers, judges, professors, and law librarians as to the important legal literature of their respective countries” and

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collect comparative and international law materials for the Library of Congress.\footnote{Herbert Putnam, “Report of the Library of Congress” \textit{House of Representatives, 62d Congress, 2d Sess.}, Doc. No. 147 at 36 (Washington: Government Printing Office, 1911), listing 47 people visited. Borchard wrote or supervised review essays based on the materials collected, e.g., Edwin M Borchard, \textit{The Bibliography of International Law and Continental Law} (Washington: Government Printing Office: 1913) and additional volumes on the law and legal literature of several European countries.} In 1911, Borchard was appointed Law Librarian of Congress. He served as assistant solicitor for the State Department for a year and another practising law for a New York bank, before his appointment to Yale University’s Law School faculty in 1917, where his distinguished career lasted until his retirement in 1950 shortly before his death.\footnote{In 1927 Borchard was named the Justus H Hotchkiss Professor of Law, a position he held until retirement in 1950, Michael S Mayer, “Edwin Montefiore Borchard” \textit{American National Biography}, [Mayer 1], online: <https://doi.org/10.1093/anb/9780198606697.article.1100081>; Doenecke 1, \textit{supra} note 7.} In the midst of his government service, getting married, and completing his monumental dissertation,\footnote{Edwin M Borchard, \textit{The Diplomatic Protection of Citizens Abroad or the Law of International Claims} (New York: Banks Law Publishing Co., 1915) [Borchard 4] began as his 1914 doctoral dissertation at Columbia University, see online: <https://wild.worldcat.org/title/diplomatic-protection-of-citizens-abroad-or-the-law-of-internationalclaims/oclc/566404>.} all before 1915, he found the time to publish his exoneree compensation article, which\footnote{Borchard 2, \textit{supra} note 3.} was the foundation for his subsequent wrongful conviction work.\footnote{Borchard 1, \textit{supra} note 1.}

The sources of his achievements and his interest in miscarriages of justice lay in Borchard's family’s circumstances and Jewish roots, extensive education, assimilation into high Anglo-American culture, and the remarkable era during which he grew to maturity.\footnote{My thesis draws on biographical sketches, Doenecke 1, \textit{supra} note 7; Mayer 1, \textit{supra} note 10 and materials on Borchard's wrongful conviction work at Yale University’s archives but not on personal letters or other intimate sources. Insights from Justus D Doenecke, “Edwin M Borchard, John Bassett Moore, and Opposition to American Intervention in World War II” (Winter 1982) 6 J Libertarian Stud 1 [Doenecke 2] were helpful.} He was born in 1884 in New York City into “a prosperous Jewish merchant family, and … enjoyed the benefits of a highly cultured upbringing. He attended City College of New York from 1898 to 1902, after which he earned an L.L.B., cum laude, from New York Law School (1905), a B.A. from Columbia College (1908), and a Ph.D. from Columbia University (1913).”\footnote{Mayer 1, \textit{supra} note 10.} By 1914 he was the Law Librarian of Congress and that year married Corinne Elizabeth Brackett, a recent graduate of George Washington University and a Daughters of the American Revolution (DAR) member.\footnote{Directory of the National Society of the Daughters of the American Revolution (Washington, D.C.: Memorial Continental Hall, 1911) at 179, online: <http://books.google.com/books?id=_AktAAAAMAAJ&pg=PA179&lpg=PA179&dq=Daughters+of+the+American+Revolution+-+Corinne+Brackett&source=bl&ots=0CzoWCtmOV&sig=SA8WcDO_BTzmRTTqRrRO11zY7s&hl=en&sa=X&ei=1XTKT4uaOaT00gGHwoWpAQ&ved=0CEIQ6AEwAg#v=onepage&q=&f=false>.} Later in life Borchard “was on the advisory board of the First Humanist Society of New York” and the national board of the American Civil Liberties Union (ACLU).\footnote{Doenecke 1, \textit{supra} note 7.}
Borchard’s family milieu was that of assimilated German-American Jews, who by the time of his birth numbered 250,000 in the United States and constituted a respected part of the commercial class, thanks to their emigrating at a time of mild anti-Semitism and the extraordinary expansion of American industry and commerce following the Civil War. This group practiced Reform Judaism which broke away from traditional rites and emphasized communal charitable action. From the assimilationist and social reform strains of Reform Judaism arose Ethical Culture. The Ethical Culture Society was founded in 1876 by Felix Adler, the son of a leading Reform Judaism rabbi. Adler was educated at Columbia University and studied in Germany for the rabbinate but, moved by German neo-Kantianism and funded by members of his father’s synagogue, founded a sect that eschewed ritual and dogma and was based on the ethical and humanistic core of world religions. A central element of Ethical Culture was “deed” over “creed,” expressed by social reform activities. Although Ethical Culture grew out of Reform Judaism it divorced spirituality from belief in a deity and severed ties with group identity. By joining Ethical Culture, Borchard was freed from a Jewish identity that was a barrier to many professional or academic posts, especially as Anti-Semitism turned more toxic in the late nineteenth century, and probably smoothed the way to marrying into white Anglo-Saxon Protestant (WASP) society, albeit to a well-educated, cultured, and companionate wife. With his marriage to DAR member Corrine Elizabeth Brackett, Borchard achieved “Anglo-conformity” assimilation. Borchard’s cultured German-Reform-Jewish environment and the “good deed” ethos of Ethical Culture likely supported his altruistic inclinations and shaped the “zealous humanitarian interest in legal reform” that animated his scholarship and advocacy.

An accomplished student, Borchard put his long educational gestation period to good use. His privileged upbringing and his studies provided the self-confidence and ability to deal with men of power and accomplishment on an equal basis at an early age. His international law mentor at Columbia, John Bassett Moore, who was nationally prominent in international law,
undoubtedly assisted Borchard’s entrée into Washington’s legal community. Borchard’s intelligence, assuredness, persuasiveness, and facility in advising power brokers, characteristic of his mature career, was seen early as he advanced his draft of an exoneree compensation bill through Congress in 1913.

The Progressive Era during which Borchard came of age likely made the greatest imprint on his scholarship. He remained an avowed Progressive throughout his life. His early teen years, the 1890s, saw America in crisis, as it’s enormous industrial expansion collapsed into a depression and generated unparalleled income inequality, violent labor confrontations, and agrarian grievances that exploded into the Populist movement, which called for economic reforms. Many of the failed Populist movement’s economic and political goals were ultimately adopted by the Progressive Movement in the early twentieth century.

Borchard’s college and law school years (1898 to 1908) coinciding with the Progressive Movement’s heyday, included Theodore Roosevelt’s dynamic presidency, the Spanish-American War and the creation of an American empire, muckraking journalism, and a wave of progressive laws and programs like environmental conservation and anti-trust enforcement. The role of government in the lives of people expanded, including state-passed political reforms like primaries, the recall, and the initiative and referendum. Progressives fought against monopolies and income inequality, favored an inheritance tax, and ratified constitutional amendments in the first decade of Borchard’s professional life. Although ambiguous in some respects, the
Progressive Era on balance was a significant period of government reform.\textsuperscript{33}

The Progressive Movement positioned an expanding and educated middle class between fears of radical populism, socialism and excessive union power on the left and fears of organized corporate power on the right.\textsuperscript{34} The major political parties had dominant Progressive wings as Republican President Theodore Roosevelt and Democratic President Woodrow Wilson were exemplary Progressives.\textsuperscript{35} The movement was complex, and while encompassing various strains, included many common goals.\textsuperscript{36}

Historians describe the flavor of progressivism as a kind of liberal conservatism,\textsuperscript{37} driven to reform conditions only after concluding that huge economic changes required government action to balance the power of the corporations and trusts.

Progressivism had roots in late nineteenth-century populism; Progressivism was the middle-class version: indoors, quiet, passionless. Populists raised hell; Progressive read pamphlets. ... Populists believed that the system was broken; Progressives believed that the government could fix it.\textsuperscript{38}

In this vein, the quintessentially urban, urbane, hyper-educated, articulate, reform-minded, government-involved Edwin Borchard fit the Progressive mold. When combined with a driven work-ethic and a personality described by his biographer as “affable among friends, provocative and rigorous in the classroom, and tenacious in debate,”\textsuperscript{39} we can imagine his formidable presence in the legal policy arenas he entered.

\section*{III Borchard’s Career: Progressive Legal Scholar and Advisor}

Borchard's innocence scholarship was slight in relation to his other work, consisting of one book, \textit{Convicting the Innocent}, published mid-career, and two exoneree compensation articles written at the beginning and toward the end of his four decades of scholarship.\textsuperscript{40} Although foremost an international law scholar,\textsuperscript{41} he contributed significantly to the declaratory judgment and

\begin{itemize}
\item \textsuperscript{34} Hofstadter, \textit{supra} note 25 at 213.
\item \textsuperscript{35} Hofstadter, \textit{ibid} at 132.
\item \textsuperscript{36} Sicius, \textit{supra} note 25 at 6, e.g., controlling monopolies, universal primary education, local government reform, anti-vice laws, worker’s compensation, labor protection (especially for women & children), housing standards, clean water, sewage control, mass inoculations, open space in cities, and national parks.
\item \textsuperscript{37} “Theodore Roosevelt, and after him Presidents Taft and Wilson, were liberal conservatives,” Morrison, \textit{supra} note 25 at 811.
\item \textsuperscript{38} Lepore, \textit{supra} note 25 at 364. Hofstadter saw progressivism as “a rather widespread and remarkably good-natured effort of the greater part of society to achieve some not very clearly specified self-reformation.”
\item \textsuperscript{39} Doenecke 1, \textit{supra} note 7.
\item \textsuperscript{40} Borchard 1, \textit{supra} note 1; Borchard 2, \textit{supra} note 3; Borchard 3, \textit{supra} note 3; see Part IV \textit{infra}.
\item \textsuperscript{41} “Borchard was an authority on diplomatic protection for alien citizens and property.” Doenecke 1, \textit{supra} note 7.
\end{itemize}
sovereign immunity in tort law, and wrote on constitutional law and jurisprudence. Borchard published at least one-hundred and seventeen law journal articles in his thirty-nine year career, with about fifty on international and comparative law, including diplomatic protection, war, peace, belligerency, and aliens’ claims; thirty-three articles related to the declaratory judgment; and twenty on sovereign immunity or government liability in tort. He also wrote several consequential books, including his treatise on diplomatic protection of citizens abroad, a declaratory judgments treatise, and a co-authored brief for neutrality written before the U.S. entered World War II. Legal scholars continue to cite him. In this Part I do not examine his scholarship in depth but relate it to his wrongful conviction writings.

Borchard developed each area of scholarship in his first decade of academic writing and for the rest of his career doggedly pursued each with accomplished scholarship that supported law-reform activism. The civil law issues he pursued arose from his deep study of comparative and international law. Each reform program introduced European legal concepts into American jurisprudence. His flagship article advocating the curtailment of sovereign immunity challenged a Supreme Court justice who “overlooked the fact that practically every country of western Europe has long admitted [state] liability [for the torts of government officers or agents].” He traced the declaratory judgment from Roman and medieval Germanic and Italian law to modern European and Asian civil procedure. His method—an encyclopedic review of comparative law sources—marks his foundational exoneree indemnification article, appropriately titled “European Systems of State Indemnity for Errors of Criminal Justice.”

43 HeinOnLine >Databases>Law Journal Library>Author/Creator: Search term (Edwin w/2 Borchard); the 117 articles were published steadily from 1911 to 1949 (except for 1914). “In addition to writing a number of books, Borchard was the author of more than 200 articles and book reviews…. He also wrote for such popular periodicals as the Nation, New Republic, American Mercury, Current History, and Saturday Review of Literature” Doenecke 1, supra note 7.
44 These figures are my counts among the 117 titles listed in HeinOnLine; my categorization might not be precisely correct. I count six constitutional law articles, two on jurisprudence and a few others, including a review of his mentor’s work, Borchard 5, supra note 23.
45 Borchard 4, supra note 11.
49 He published the influential pamphlet “The Declaratory Judgment” in 1918, Doenecke 1, supra note 7. His first article on “Government Liability in Tort” was published in the Yale Law Journal in 1924, and his major international law treatise and his first article on exoneree compensation were completed before 1915.
51 Borchard 6, supra note 46 at 201-244.
52 Ibid, also see text at note 71, noting Borchard’s penchant for supporting his analysis with copious references from legal history, apparently drawn from his doctoral dissertation.
Each area had a Progressive reformist cast. The declaratory judgment, a procedural device that allows judicial resolution of contested issues “without the appendage of any coercive decree,”\(^{53}\) for example, fit the Progressive model of structural or legal-technocratic reform, making law more efficient and allowing dispute resolution before the monetary and psychic costs of litigation piled up. Conservative jurists resisting the declaratory judgment failed to recognize that “a judicial declaration of rights … becomes an instrument not merely of curative but also of preventive justice.”\(^{54}\) In addition to authoring the leading treatise, Borchard’s avid advocacy led to his sobriquet as the “father” of the declaratory judgment.\(^{55}\) Justice William O. Douglas, a law school colleague, wrote that Borchard acted “almost [as] a one-man lobby to push through the federal Declaratory Judgment Act,”\(^{56}\) a style of activism he would replicate with exoneree compensation.\(^{57}\)

Borchard’s indefatigable advocacy for allowing tort lawsuits against government agents was in the same mold.\(^{58}\) His introductory article raised a salient Progressive factor, namely that the substantial growth of government operations inevitably injured more people. Barrng lawsuits for government-inflicted harm “in Anglo-American law [left] the individual citizen … to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State’s functions.”\(^{59}\) There is “no sound reason” why the relations between government officers and agents should not be determined by “modern social and legal principles.”\(^{60}\) These well-meaning reforms, important to a well-functioning modern polity, fit the ambiguous Progressive Era “good government” frame rather than seeking sweeping solutions to deeper social and economic inequities.

The Progressive roots of Borchard’s innocence (and other) scholarship was eloquently stated in his dissertation, which emphasized a caring state’s obligation to individual well-being both at the diplomatic and local level:

> The state is not merely an end in itself, nor only a means to secure individual welfare…. National welfare and individual welfare are indeed intimately bound together. In an impairment of individual rights, the state, the social solidarity, is affected . . .

\(^{53}\) Borchard \(6\) supra note 46 at vii.

\(^{54}\) Borchard \(2\), supra at note 3.

\(^{55}\) \textit{US Fidelity & Guaranty Co v Koch}, (1939) 102 F2d 288 at 290.


\(^{57}\) Part IV, infra.

\(^{58}\) Borchard made his case for reforming sovereign immunity in a string of sequential law review articles with identical or very similar titles: Edwin M Borchard, “Government Liability in Tort” (1924) 34 Yale LJ 1; (1924) 34 Yale LJ 129; (1925) 34 Yale LJ 229; (1925) 59 Am L Rev 393; (1926) 36 Yale LJ 1; (1927) 36 Yale LJ 757; (1927) 36 Yale LJ 1039; (1928) 28 Colum L Rev 577; (1928) 28 Colum L Rev 734. He publicized the issue to the larger legal community: Edwin M Borchard, “State and Municipal Liability in Tort: Proposed Statutory Reform” (1934) 20 ABA J 747.

\(^{59}\) Borchard, \textit{ibid} (1924) 34 Yale LJ 1.

\(^{60}\) \textit{Ibid} at 2.
The assurance of the welfare of individuals, therefore, is a primary function of the state, accomplished internally by the agency of municipal public law, and externally through the instrumentalities of international law and diplomacy. The establishment of the machinery to insure this object constitutes an essential function of state activity – within, protecting every member of society from injustice or oppression by every other member; without, protecting its citizens from violence and oppression by other states.61

When Borchard wrote this, a central Progressive reform, workmen’s (now workers’) compensation, providing certain compensation for the scourge of industrial injuries, was sweeping through state legislatures.62 The theoretical support for workmen’s compensation as a substitute for uncertain lawsuits closely paralleled compensating wrongfully convicted defendants.

Borchard’s seemingly anomalous support of traditional neutrality and opposition to America’s entry into World Wars I and II, the position for which he was best known, and his alignment with the America First Committee before World War II, was consistent with many Progressives.63 He took unwavering liberal positions as demonstrated by his American Civil Liberties Union (ACLU) board membership, public support for easing immigration law restrictions to admit refugees fleeing Nazi Germany and public relief bills, and opposition to President Roosevelt’s “Court-packing” plan.64 Never shy of criticizing presidents, Borchard was one of very few academicians to openly criticize the government during World War II for interning Japanese-American civilians. He “signed on to the briefs” in the Korematsu and Endo cases.65 Despite his liberalism, isolationism was always latent in American life and the interwar period saw many prominent Progressive isolationists.66 While Borchard was by no means an isolationist, his staunch views on neutrality were intellectually defensible and fit a lifelong adherence to views of international law and international relations that he shared with his mentor.67

IV Borchard’s Agenda: Compensating the Wrongfully Convicted

Borchard’s main innocence agenda—to establish the intellectual basis for and to enact federal and state exoneree compensation laws—emerged fully formed in 1912 and remained firmly fixed to 1941, when widespread enactment of state compensation laws proved futile. Three states

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61 Borchard 4, supra note 11 at 31.
62 See Zalman, Borchard, supra note 4 at 334-335.
63 Doenecke 1, supra note 7; Doenecke 2, supra note 14; Mayer 1, supra note 10. Progressives had a mixed record on support for the imperial expansion of US power in the early twentieth century, William E Leuchtenburg, “Progressivism and Imperialism: The Progressive Movement and American Foreign Policy,1898-1916” (1952) 39:3 Miss Valley Hist Rev 483.
64 Correspondence between Roger Baldwin, ACLU Director, activist lawyer Osmond Fraenkel and Borchard, 2-6 February 1937 regarding committee to consider Franklin Delano Roosevelt’s “Court Packing” plan, Yale Archives, supra note 26 at 1/5.
66 Hofstadter, supra note 25 at 20.
67 Doenecke 2, supra note 14.
and the United States enacted compensation laws he drafted at a time when wrongful conviction was on no policy agenda; widespread passage took flight only after the contemporary innocence movement arose.68

His campaign began with a well-crafted article justifying exoneree compensation legislation69 and a restrictive legislative draft, which reflected a conservative side to his progressivism and a political calculation that narrow legislation would more likely be enacted. He enlisted the support of influential men and worked behind the scenes to ensure the law’s passage. This process stretched intermittently from 1912 to 1941.

*European Systems* laid out his rationale for exoneree compensation and criticized American jurisdictions for failing to indemnify “these unfortunate victims of mistakes in the administration of the criminal law, although cases of shocking injustice are of not infrequent occurrence.”70 This foundation for his activism was never revised. It reviewed medieval and Enlightenment era laws on the subject, analyzed the compensation statutes of seventeen other countries, and included them in an appendix. Compensation was grounded in a Lockean vision of the “ultimate end and object of government” being an “absolute … right to personal security, to liberty and to property.”71 The European compensation statutes were traversed in detail.72

The article’s theoretical core demolished three arguments against compensation.73 The first was strict sovereign immunity and the assumption of risk of injury by private citizens, a major area of Borchard’s tort scholarship.74 Allied to this were the doctrines that “the state acting legally can injure no one” and that there is no fault without liability.75 Drawing on the justification for workers’ compensation laws, Borchard argued that only “general burdens borne by all the citizens as a whole” are not to be compensated. In contrast, “special sacrifices asked from the individual in the interests of the entire community,” such as the burden on a “juryman” or one whose “property is

69 Borchard 2, supra note 3.
71 Borchard 2 supra note 3 at 685; as this theme is applied in tort law, Borchard's work serves as a reference point, see Steven J Heyman, “The First Duty of Government: Protection, Liberty and the Fourteenth Amendment” (1991) 41 Duke LJ 507 at 539.
72 Borchard 2, ibid at 685-87; these laws were passed in a wave of late nineteenth century reform, ibid at 688-94.
73 Borchard also raised the practical concerns of budget stringency and debates over “the proper limitations of the right” of compensation in European parliaments, Borchard 2, ibid at 694.
74 See Part III supra.
75 Borchard 2, supra note 3 at 695-696. As for the principle of fault, Borchard noted that “Modern social and economic conditions, however, have brought about an important modification in the rigidity of the doctrine, so that for large classes of cases liability is predicated on the mere causal relation between the act and the injury, whether inflicted with or without fault” Borchard 2, ibid at 696.
taken by eminent domain for public use,” require public compensation. The wrongfully convicted defendant has made “special sacrifices … for the general benefit of society” and deserves compensation. A counter-argument was that the public gains when property is taken by eminent domain but does not gain when a person is wrongfully convicted. The flaw in this argument, according to Borchard, was that because the advantage to society gained by taking private property exceeds the property-owner’s loss, the “price paid represents not the gain of the state, but the loss to the individual. It is a special sacrifice that is asked of the individual, for which society compensates him.”

In short, the wrongfully convicted person was injured in losing his or her liberty for the protection of public safety and should be compensated for that loss.

“European Systems” then explored features of the European laws: “(a) who may be indemnified; (b) the limitations on the right; (c) the extent of the indemnity; and (d) the procedure for making the right effective.” Without examining these points in detail we note that Borchard’s immersion in the statutory minutiae was a necessary prelude to his campaign’s next step: drafting a model compensation law. His federal compensation statute and comments, printed in the same issue as his article, is quite conservative. Compensation is withheld if the wrongfully convicted person was “guilty of any other offense against the United States.” Compensation applied only to those who had been incarcerated, and required a legal exoneration or pardon, after which the person can “apply by petition for indemnification for the pecuniary injury he has sustained.” Borchard commented that the “right to the relief is discretionary only.” The bill’s six-month statute of limitations was very short. Worse, the bill required the claimant to prove his innocence and barred compensation if the claimant had willfully or negligently “contributed to bring about his arrest or conviction,” likely barring relief to defendants who confessed or pleaded guilty. Finally, the “relief is limited to five thousand dollars. This provision is to limit any exorbitant claims which may be brought.”

To complement his article and bolster the draft statute, Borchard obtained an editorial endorsement from John Wigmore, the most prominent evidence law scholar in America, dean of the Northwestern University Law School, and editor of the Journal of the American Institute of Criminal Law and Criminology: “Mr. Borchard's article in this number of the Journal,” wrote Wigmore, “ought to appeal to every citizen of the land and particularly to every legislator. He sets forth what has been done on the continent and points out the entire feasibility of the measure. We ask for its earnest consideration.”

Beyond this impressive achievement, the article, statute, and editorial ratification were simultaneously published as a U. S. Senate Report, to accompany a bill sponsored by Sen. George

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76 Ibid at 695.
77 Ibid at 697, 697-705.
78 Edwin M Borchard, “Notes on Current and Recent Events, For Relief to Persons Erroneously Convicted” (1912) 3 J Am Crim L & Criminol 792.
79 Ibid §1 at 792.
80 Ibid §§ 2, 4, 5 at 793.
81 Ibid at 794; for comment on the scope of this draft bill, see Part V infra.
Sutherland of Utah. Borchard leveraged his position as Law Librarian of Congress to persuade a senator to place his draft bill into the legislative hopper. Borchard later chalked up the failure of passage of exoneree compensation to concerns about World War I. Yet he continued to publicize the idea in academic and popular outlets with an eye to stimulating reform in the states.

The issue stagnated and the project to compensate the wrongfully convicted seemed abandoned. For reasons discussed below, in the late 1920s he once again took up the issue and wrote Convicting the Innocent. Borchard clearly planned to use the book to “furnish the support necessary to demonstrate the necessity for state indemnification of errors of criminal justice.” To that end he began collecting information about ironclad wrongful conviction cases. By 1929 he had data on about 35 cases when he enlisted the assistance of E. Russell Lutz, a former student who worked in Washington, D.C. and had access to the Library of Congress. To defray costs Borchard requested funding from the Institute of Human Relations at Yale University. He expanded the number of cases for the book by sending a research assistant to state pardon boards to review their unpublished records; meanwhile, Lutz scanned newspaper records and trolled

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83 “Together with the editorial and Mr Borchard’s article in this number of the Journal, ibid has been reprinted in Senate Document 974, 62d Congress, 3rd Session, and may be obtained from Senator Sutherland or any other member of Congress. The bill was introduced in the House on 5 December by Mr Evans and in the Senate on December 10 by Senator HR Sutherland, 26748; S 7675,” Wigmore, ibid at 792.

84 Letter to Harry Elmer Barnes, 14 July 1930, Yale Archives, supra note 26 at 111/1066. After describing “how I got into this channel of investigation” Borchard wrote: “in fact California now has such a statute, which arose directly out of the articles written in 1912 on this subject. Wisconsin and North Dakota are the only other states which fell into line, the movement having stopped on the outbreak of the European War, when people became interested in other things.” Letter to George Soule, 20 June 1938, Yale Archives, ibid at 109/1051 (this humanitarian effort “was stifled by the outbreak of the European War”).


86 Part V, infra.

87 Borchard 1, supra note 1.

88 E M Borchard, letter to E Russell Lutz, Esq, 15 April 1929, Yale Archives, supra note 26 at 111/1065; Borchard laid out two less substantial reasons for the project: to deter prosecutors and juries from convicting on the basis of circumstantial evidence and “spasmodic identifications” alone and “to furnish the most fascinating reading, better than any detective stories that I know....” See Zalman, Borchard, supra note 4 at 337. Lutz eagerly accepted by return post, E Russell Lutz letter, 17 April 1929, Yale Archives, ibid at 111/1066.

89 Lutz letter, 17 April 1929, Yale Archives, ibid. Lutz was acknowledged on Convicting the Innocent’s title page; his obituary mentioned his assistance to Borchard, Russell Lutz, “Shipping Expert”, NY Times (15 January 1970) 42. Lutz spent part of his 1929 vacation tracking down cases, Lutz letter 10 September 1929, ibid at 111/1065. Borchard invited him to lunch at the Cosmos Club to discuss his findings, Borchard letter, 14 September 1929, ibid.

90 Memorandum to Mr Schlesinger, 5 June 1929; Memorandum from School of Law, signed by D Schlesinger, 13 June 1929; Yale Archives, ibid. Borchard also tried to interest the publisher Alfred Knopf, but apparently the publisher was not prepared to advance royalties on a project that was far from publication, Letters from Borchard to Alfred A. Knopf, 18 April 1929, 24 April 1929, 2 May1929, Letters from the Alfred A Knopf/Borzoi Books Editorial Department, 23 April 1929, 1 May, ibid.
Library of Congress records. Borchard even reached out to former Attorney General Wickersham proposing that the presidential commission on prohibition, crime, and criminal justice he was then chairing take up the issue of “state indemnity for errors of criminal justice.” By late 1929 Lutz made headway in compiling wrongful conviction records. After some strain requiring a letter from Borchard to President Herbert Hoover, Borchard and Lutz gained access to federal pardon records.

As work on the book accelerated, Borchard, who was routinely in contact with many prominent men in politics, public opinion and international law, corresponded with several regarding errors of justice. Throughout 1930 Lutz steadily reported cases to Borchard as they collaborated on tracking down leads and put in for reimbursement for incidental expenses. The grant from Yale’s Institute of Human Relations came through and Lutz was allotted $60 a month for expenses. Yale University Press, in April 1931, indicated an interest in publishing a book entitled “Not Guilty” by the autumn of that year. The completed draft won approval from

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91 Letter from Lutz to Borchard, 5 October 1929, Yale Archives ibid. Borchard wrote to various personages requesting information. Letter from Borchard to Norris G Osborn, Editor, The (New Haven) Journal Courier (7 October 1929), ibid; Letter from Borchard to James A. Finch, the chief federal pardon attorney, 7 October 1929, ibid. His files include a prototype letter “To the Governor of The State” requesting assistance, 8 October 1929, ibid.


93 Letter from Russell Lutz to Borchard, 13 December 1929, Yale Archives, ibid, detailing information received on cases.

94 Letters: Lutz, 12 November 1929; Borchard, 15 November 1929; Finch, Pardon Attorney, 20 November 1929; Borchard, 22 November 1929; Borchard, 22 November 1929; Lutz, 25 November 1929; Walter H Newton, President’s Secretary, 14 December 1929 (noting that Borchard’s request was being submitted to the attorney general for consideration); Letter from Lutz to Borchard, 19 December 1929, Yale Archives, ibid.

95 Henry Spindler letter (Minnesota State Senator), 3 April 1929, Yale Archives, ibid; Borchard letter to Sen Gerald Nye, 12 November 1929, Nye to Borchard, 14 November 1929, discussing the Tom Mooney case and including Borchard’s inquiry as to whether Sen Nye “would be disposed to reintroduce this bill [i.e., the bill introduced by Sen Sutherland in 1913] in the present Congress” ibid. Borchard to Harry Elmer Barnes, 14 July 1930, ibid at 111/1066. Mooney was a wrongfully convicted labor leader whose case became a cause célèbre, see Richard H Frost, The Mooney Case (Stanford: Stanford University Press, 1968). See Mooney v Holohan, (1935) 294 US 103 (prosecutor’s knowing use of perjured testimony violates due process).


97 Borchard Memorandum to Executive Committee of Human Relations Institute, 21 October 1930, requesting $1500.00; Institute of Human Relations letter, 18 November 1930 appropriating $1,200.00, Yale Archives, ibid.

98 Borchard offer to pay Mrs. Lutz for typing, Borchard to Lutz, 15 November 1930, Yale Archives, ibid.

99 Malcolm W Davis letter, Yale University Press to Borchard, 1 August 1930, Yale Archives, ibid; Borchard letter to Alfred A Knopf, 31 January 1931, indicating Institute of Human Relations advanced funds and Yale University Press expressed interest, requesting to withdraw earlier request for publication; letter from AW Barmby, Editorial Department, Alfred A Knopf/Borzoi Books, 22 January 1931, agreeably withdrawing from project, indicating interest in future works, ibid at 111/1068.

100 Malcolm W Davis letter, Yale University Press to Borchard, 3 April 1931, Yale Archives, ibid at 111/1069. Felix Frankfurter letter referred to title of “Unjust Convictions,” 30 October 1931, ibid at 112/1071. The book’s title was
Charles E. Clark, dean of the Law School, who reviewed the manuscript for the Institute for Human Relations and the University Council’s publication committee. “It seems to me it combined very well indeed scholarly research with matter of considerable human interest, and it focused upon a desirable reform. The combination is unusual and therefore the manuscript has some unique values.”

*Convicting the Innocent*, published by Yale University Press in April 1932, lists Borchard as the sole author but prominently identifies E. Russell Lutz as collaborator and research assistant on the title page. The book was dedicated to Felix Frankfurter, then a prominent Harvard Law School professor and public intellectual, and to John H. Wigmore, the legendary dean of Northwestern University Law School. As Dean Clark noted, the book’s unusual structure combined miscarriage of justice vignettes that appealed to average readers with scholarly material. An “Introductory Chapter,” most likely to appeal to contemporary innocence scholars, invented the inductive method of drawing wrongful conviction “causes” from the narratives. Each vignette included a bibliography of sources including court opinions, news articles, pardon statements, and attorney interviews.

The book, whilst generally well received, was perceived by reviewers not so much as a foundation for criminal justice reform but aimed at inspiring compensation legislation.

It is not the main purpose of Professor Borchard in writing this book to advocate reforms in criminal judicial procedure. Indeed, in an introductory chapter he says that “There is not much that the prosecuting or judicial machinery can do to prevent unsettled; correspondence with Frankfurter bandied about several possible titles: “The Law’s Errors”, “Innocent Victims of the Law”, and “The Innocent Convicted,” letters from Felix Frankfurter to Borchard, 20 October 1931, 24 October 1931; letter from Borchard to Frankfurter, 22 October 1931, *ibid*.

101 Charles E Clark (CEC) letter to Carl Lohmann, 16 November 1931, Yale Archives, *ibid*.

102 Books and Authors, *NY Times*, 3 April 1932, BR 15; Letter from Felix Frankfurter to Borchard, 8 January 1932, Yale Archives, *ibid* at 112/1072.

103 The dual dedication was problematic, as explained in Part V, *infra*.

104 A reviewer noted that “The facts of these cases are narrated with precision, clarity, and brevity. Technical phraseology is avoided….The stories of these cases as told by the author are highly interesting and often thrilling.” Henry W Taft, “Miscarriages of Justice” (1932) 8:42 Saturday Rev Lit 712 [*Taft*].

105 Borchard 1, *supra* note 1 at xiii-xxix. For the book’s impact on later scholars, see Part V, *infra*.


107 Borchard 1, *supra* note 1.

some of these particular miscarriages of justice.” But the author seeks to attach public attention to the fact that … innocent persons are occasionally convicted of crime, and to arouse public opinion in favor of legislation authorizing monetary indemnification of the victims of such miscarriages of justice. 109

To that purpose the book reprinted Borchard’s 1912 European Systems article, the California and Wisconsin compensation statutes, and his draft federal bill,110 providing ammunition for a re-opened campaign to pass a federal compensation law. Borchard wrote to Attorney General Homer Cummings in March 1934 seeking administration support for a compensation law.111 Special Assistant Attorney General Alexander Holtzoff sent an encouraging letter attesting to administration support.112 The Attorney General, however, while not opposed to a compensation law, preferred that a bill not emanate from the Roosevelt Administration. As a result, Borchard asked U. S. Senator Francis Maloney of Connecticut to sponsor a bill and he agreed.113 Later that year he asked Borchard to revise the draft bill to exclude claimants with no other pending federal charges in response to concerns raised in sub-committee that “as it is now drawn the bill would bring about suits against the government in altogether too many cases.”114 Borchard agreed to the change, although expressing concerns that federal prosecutors could stymie relief to the innocent by bringing charges after innocence was established.115

From 1936 to 1938 Borchard participated in the tedious legislative drafting process. The Senate Judiciary Committee approved a bill in 1936116 but progress stalled in 1937.117 The pace

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109 Taft, supra note 104.
110 Borchard 1, supra note 1 at 375-421.
112 Holtzoff letter to Borchard, 7 December 1934, Yale Archives, ibid at 109/1050 (Borchard sent copy of book to Holtzoff; discussed payment of federal judgments; reviewed Court of Claims procedures; expressed view that compensation limited to defendants who testified on their own behalf).
113 Borchard letter to Maloney, 18 February 18, Yale Archives, ibid. Borchard was busy on another front seeking the approval of the American Law Institute for a model compensation law. W Draper Lewis, Director, American Law Institute letter to Borchard, 5 February 1935, ibid at 113/1079.
114 Sen Maloney letter, 14 August 1935, Yale Archives, ibid at 109/1050.
115 Borchard letter to Maloney, 18 August 1935, Yale Archives, ibid.
116 Sen Edward R Burcke letter to Sen Maloney, 9 June 1936, Yale Archives, ibid indicating that Judiciary Committee draft bill will be printed, noting committee report not needed “as the whole subject is so clearly dealt with by Professor Borchard and Dean Wigmore that we content ourselves with brief excerpts from their written statements.” Borchard letter to Sen Maloney, 18 June 1936, ibid (thanking him for June 16 letter, enclosing Sen Burke’s letter, and forwarding a copy of Convicting the Innocent). Borchard letter to Holtzoff, 18 June 1936, ibid (indicating receipt of Judiciary Committee report; expressing hope that bill enacted in the next session; discussing support for Federal Tort Claims Act, which significantly set aside sovereign immunity, a major focus of Borchard’s research, supra Part III).
117 Borchard letter to George Soule, 1 October 1937, Yale Archives, ibid at 109/1051 (proposing The New Republic editorial to advance compensation law, noting objections raised in House of Representatives Judiciary Committee). Borchard letter to Max Lerner, 1 October 1937, ibid (proposing The Nation editorial, same as Soule letter). Borchard
picked up as the bill headed toward passage in May 1938.\footnote{118} Rep. William Citron of Connecticut, who became a House sponsor of the compensation bill, referred concerns of recalcitrant House members to Borchard.\footnote{119} Additional letters found Borchard receiving intelligence about the progress of the bill and offering advice on various points,\footnote{120} culminating in a telegram to Sen. Maloney advising on last minute changes.\footnote{121}

The Act “to grant relief to persons erroneously convicted in courts of the United States” was signed into law on May 24, 1938.\footnote{122} In a letter thanking Senator Maloney for “transmitting the pen with which President Roosevelt signed S. 750,” Borchard expressed the expectation that “the example of the federal government is likely to be followed by the states, where cases do unfortunately occur not infrequently.”\footnote{123} This hope, however, would not take off until the twenty-first century. Borchard's overture to the American Law Institute was never pursued.\footnote{124} His papers reveal some interest by the American Civil Liberties Union to start a campaign in 1940 or 1941 to advance state compensation legislation.\footnote{125} His second, and last law review article on the matter in 1941, reprising the theoretical arguments first raised in 1912, reported the existence of the federal law, provided a few examples of wrongful convictions, made a brief argument for passage of such laws in the states, and appended a model statute. As the article cut no new ground, it was designed to provide material for a state legislative campaign. Perhaps, just as the “European War” deflected interest in Borchard's original legislative campaign in 1914, concerns with a looming World War overwhelmed the states’ capacities to consider compensation laws.

\footnote{letter to Felix Frankfurter, 27 December 1937, \textit{ibid} at 113/1081 (noting The New Republic editorial supporting compensation bill, complaining about House Judiciary Committee delay).}

\footnote{118} Holtzoff letter to Borchard, 14 February 1938, Yale Archives, \textit{ibid} at 109/1051 (enclosing bill revisions made in response to Respresentatives’ concerns); Borchard letter to Holtzoff, 17 February 1938, \textit{ibid} (noting Rep Citron informed him of concerns, arguing compensation should allow cause of action for pecuniary damages resulting from conviction and imprisonment).


\footnote{120} Holtzoff letters to Borchard, 24 March & 6 May 1938, Yale Archives, \textit{ibid}; Borchard letter to Rep Citron letter to Borchard, 10 May 1938 (House version superior to Senate Bill, praising Borchard’s report); 11 May 1938 (promising to get bill Consent Calendar); 16 May 1938, \textit{ibid}.

\footnote{121} Sen Maloney Letter to Borchard, 16 May 1938, Yale Archives, \textit{ibid}; Borchard telegram to Sen Maloney, 17 May 1938, \textit{ibid} (advising that “Senate 750 in the Form in Which it Passed the House is Preferable to Senate Version Writing” (sic)).

\footnote{122} (1938) Public Law 75-539 / Chp 266, 75 Congress, 52 Stat 438.

\footnote{123} Borchard letter to Sen Maloney, 30 May 1938, Yale Archives, \textit{supra} note 26 at 109/151.

\footnote{124} See \textit{supra} note 113.

\footnote{125} Roger Baldwin, ACLU Director, letter to Borchard, 9 January 1941, Yale Archives, \textit{ibid} at 109/1053; Memorandum, State Indemnity for Errors of Criminal Justice, 26 July 1940, \textit{ibid} at 109/1052; “Outline of Campaign: Restitution to Prisoners Wrongfully Convicted” 1 April 1941,” \textit{ibid} at 109/1053.
V Conclusion: Borchard's Innocence Project and Its Legacy

Borchard did not live to see compensation laws sweep the country, but his work inspired future innocence scholars and activists. Convicting the Innocent set the model for “big picture” books, an idea that motivated the jurist Jerome Frank. Scholars cited Borchard for decades but their scattershot works did not produce a coherent or evolving body of knowledge. Borchard inspired anti-capital punishment litigator Michael Meltsner as a law student in the 1950s, who nevertheless wrote that innocence was ignored before DNA profiling. Borchard did influence Neufeld and Scheck’s “innocence manifesto”—a preface in Convicted by Juries—in which the Innocence Project’s co-founders commented: “Interestingly, in many respects the reasons for the conviction of the innocent in the DNA cases do not seem strikingly different from those cited by Professor Edwin Borchard in his seminal work, Convicting the Innocent….”

Borchard did express other aims in addition to indemnifying exonerees. Convicting the Innocent’s “Introductory Chapter,” which summarized lessons drawn from the error-of-justice vignettes, was a crude but effective inductive empiricism that prefigured the innocence movement’s reform template. His causal analysis, from a social science perspective, was

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126 See Norris, supra note 68.
127 Leo, supra note 106. Borchard was disinclined to produce a follow-up book: Borchard letter to Felix Frankfurter, 27 December 1937, Yale Archives, supra note 26 at 13/1081 (“Whether I shall ever get to a new edition is doubtful, although I have a collection I think of nearly 100 additional cases.”)
128 Jerome Frank letter to Borchard, 29 December 1946; Borchard's secretary’s letter to Frank, 2 January 1947 (forwarding copy of Convicting the Innocence, requesting return “when it has served its purpose”), Yale Archives, ibid at 113/1082; inquiry resulted in Jerome Frank & Barbara Frank, Not Guilty (Garden City: Doubleday & Co, 1957) [Frank & Frank].
132 Peter Neufeld and Barry C Scheck, Commentary, in Connors et al, ibid at xxx.
133 Some causes perceived by Borchard in his jumbled and overlapping list, like mistaken identification and perjury, are familiar to innocence scholars, but he also saw “circumstantial evidence” as a causal factor, a category that upon reflection is too broad and amorphous to be seen as a source of wrongful convictions, see Zalman and Larson, supra note 106 at 949-950.
limited. His application for funding listed a few additional goals beyond compensation laws but they seem more like grant-proposal padding than a motivating reason to write the book.

Borchard's motivation for returning to the study of justice errors in the late 1920s and to again advocate exoneree compensation was, however, a desire to end, once and for all, *innocence denial*: the idea that miscarriages of justice never occur or are vanishingly rare. Innocence denial bolsters the common-law-belief-system, ingrained in American lawyers, that the adversary trial is the best method of wringing truth from contested facts, joined by a concomitant belief that defendants rarely lie when pleading guilty. This belief is chiseled into the pages of American law reports by such eminent judges as Learned Hand, Sandra Day O'Connor, and Antonin Scalia who could not believe that a criminal process offering defendants so many paper guarantees, enshrined in a constitution no less, can fail the innocent. After *Convicting the Innocent* was published Borchard received critical correspondence as well as plaudits. Albert S. Osborn, a noted questioned-documents examiner, argued that Borchard was one-sided: “A book with the title ‘6500 Cases Where Guilty Men Escaped’ could easily have been prepared,” a criticism of innocence denial.

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135 “Memorandum for the Executive Committee of the Institute of Human Relations,” 21 October 1930, Yale Archives, *supra* note 26 at 111/1067 (other goals included abolishing death penalty where based on circumstantial evidence; highlighting unreliable identifications “in time of emotional excitement,” frequency of perjured testimony, and undue zeal; suppressing evidence by police and prosecutors; and allowing appellate courts to review facts of felony convictions).

Borchard's "empirical agenda was to refute assertions that the innocent were never convicted," Richard A Leo, “Has the Innocence Movement Become an Exoneration Movement? The Risks and Rewards of Redefining Innocence” in Medwed, *supra* note 130 at 57.


137 Judge Hand, “Under our criminal procedure the accused has every advantage,” (SDNY 1923) *US v Garsson*, 291 F 646, 649; Justice O’Connor “[Herrera] was tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants. … Consequently, the issue before us is not whether a State can execute the innocent. It is, as the Court notes, whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial” (1993) *Herrera v Collins*, 506 US 390, 419-420 (O'Connor, J, concurring). Justice O’Connor later became more skeptical about capital-sentence accuracy, “Congressional Research Service, Report: Capital Punishment: Selected Opinions of Justice O'Connor (17 August 2005), online:

<https://www.everycrsreport.com/files/20050817_RS22224_42545280189972758dd1a725d1008db35987e407.pdf>. Justice Scalia: “Our solemn responsibility is … to ensure that when courts speak in the name of the Federal Constitution, they disregard none of its guarantees—[including] those that ensure the rights of criminal defendants…” (2006) *Kansas v Marsh*, 548 US 163, 185 [*Kansas v Marsh*] (Scalia, J concurring) (reversing state supreme court ruling which struck down statute requiring imposition of death sentence when aggravating and mitigating circumstances are in equipoise; Justice Scalia also argued that number of wrongful convictions is minuscule, *Kansas v Marsh*, 185-199).

138 Albert S. Osborn letter to Borchard, 14 April 1932, Yale Archives, *supra* note 26 at 112/1073, quoting from letter he wrote to third party; Osborn noted he had not read *Convicting the Innocent* but explained that gullible people “do not understand the difficulty of proving criminals to be guilty” *ibid*. 
that is alive today. In a lengthy and testy exchange, critic Edmund L. Pearson asserted that Borchard’s 65 cases were a minuscule fraction of convictions while Borchard asserted that his research merely “scratched the surface.”

The decision to write *Convicting the Innocent*, urged by Felix Frankfurter, was set off by the Sacco-Vanzetti case. In the book’s Preface, Borchard wrote:

A district attorney in Worcester County, Massachusetts, a few years ago is reported to have said: “Innocent men are never convicted. Don’t worry about it, it never happens in the world. It is a physical impossibility.” The present collection of sixty-five cases, which have been selected from a much larger number, is a refutation of this supposition.

Astute readers could infer a veiled allusion to Frederick G. Katzmann, who prosecuted Sacco and Vanzetti, and see the book as an attack on both of their unfair trials. Yet, Borchard strategically decided to veil Katzmann’s identity and avoid any reference to the trials. In a few letters, however, he wrote that his “innocence project” was a reaction to the Sacco-Vanzetti case. After enactment of the federal compensation law he wrote to George Soule, editor of the *New Republic*:

The effort [to pass compensation legislation] received a new lease of life through the statement made by the District Attorney in the Sacco-Vanzetti case, who remarked that “Innocence Men (sic) are never convicted….”

That dogmatic statement led me to undertake the research which resulted in the book “Convicting the Innocent”. A very cursory examination of cases in our state and federal courts disclosed about 200 which seemed airtight. Of these I published some 65 from various jurisdictions presenting various types of cases so as to let the public judge of the accuracy of the statement of the District Attorney.

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142 Borchard was in contact with Frankfurter by early 1929 about a planned book project, Borchard letter to Felix Frankfurter, 11 April 1929, Yale Archives, *ibid* at 111/1065. “You gave me the final impetus to start actually after the cases and get the work done” Borchard letter to Felix Frankfurter, 26 December 1930, *ibid* at 111/1067 (referring to support Borchard received from Wigmore and Frankfurter).
143 Borchard 1, *supra* note 1 at vii.
144 “The name Sacco-Vanzetti will not appear in the book, but this is my humble contribution to preventing another such case” Borchard letter to Felix Frankfurter, 26 December 1930, Yale Archives, *supra* note 26 at 111/1067. Borchard may have wished to avoid right-wing criticism, but thought that “by leaving that case entirely unmentioned, it will, I think, drive the lesson more vividly home” *ibid*.
145 Borchard letter to George Soule, 20 June 1938, Yale Archives, *ibid* at 109/1051. Borchard letter to Felix Frankfurter, 27 December 1937, *ibid* at 13/1081 (commenting: in *Convicting the Innocent* he focused on recent and
The impact of the Sacco-Vanzetti case on American opinion at the time was enormous. The convictions of two Italian immigrants and political anarchists for two robberies and two murders in suburban Boston in 1920 and 1921, and their executions after failed appeals and clemency requests in 1927, was the most celebrated U.S. political trial in the first half of the twentieth century. Writing about the case in 1948 the historian Arthur M. Schlesinger noted:

To duplicate its national repercussions one would have to go back to the trial of the Chicago anarchists for the Haymarket bombing in the 1880’s, and for its world effects to the Dreyfus case in France near the turn of the century. … Probably most Americans following the case at the time can remember where they were and what they were doing when the word first reached them that Sacco and Vanzetti had lost their last chance of escaping death.

Frankfurter’s deep involvement in the Sacco-Vanzetti case created a difficulty. He became a major actor in the case by strongly criticizing the trial’s fairness in the nationally respected Atlantic Monthly magazine, followed with a popular book. The article “offered proof after proof that Katzmann, with [judge] Thayer’s support, had undermined the integrity of the criminal justice system in this case.” Franklin’s dispassionate legal analysis “probably had more impact than any of the hundreds of pieces written on the case in the 1920’s” and forced Massachusetts’s governor to “appoint a committee to review all the evidence in the case.”

Frankfurter’s position was quickly and publicly attacked by none other than Dean John Henry Wigmore, who supported Borchard’s efforts in 1912. Their bitter exchange raised a cloud over American cases “to show that the District Attorney in the Sacco and Vanzetti case was quite wrong in his assumption that ‘it can’t happen here.’”). Borchard letter to Edmund Pearson, 13 January 1933, ibid at 112/1076.

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150 Urofsky, supra note 149 at 23.

151 Urofsky, ibid at 23-24. In fact, Borchard, apparently working in tandem with Frankfurter, called for a review commission in a letter to Governor Lowell Fuller in which he wrote “not as a radical sympathizer with the convicted men, but as a person interested in the preservation of our legal institutions. This depends on earning and retaining the respect of the public for those institutions. In a democracy, the confidence of the public in the fair and unbiased administration of justice lies close to the roots of orderly government” (21 April 1927) from the Yale Archives, Borchard papers as quoted in Barry C Scheck and Peter J Neufeld, “Toward the Formation of ‘Innocence Commissions’ in America” (2002) 86:2 Judicature 98 at 105.

152 Urofsky, ibid.
Borchard’s desire to dedicate the book both to Wigmore and Frankfurter, whose support meant so much. Borchard asked his friend Felix for permission and the book was indeed dedicated to these rivals, perhaps reinforcing the connection between the Sacco-Vanzetti miscarriage of justice and innocence denial.153

Innocence scholars who reflexively invoke Borchard’s mantra to link their studies to an established research genealogy may ignore the gulf between Borchard’s era and our own. But stopping to consider that distance helps us better understand the phenomenon we label the innocence movement.154 As Borchard’s ideas were shaped by the social and political cast of his times so too are ours. A close look at the young Progressive scholar’s compensation statute in 1912 shows a law with liberal and humane goals but with many constricted features.155 In his commentary, Borchard wrote:

The right to the relief is discretionary only. …The relief is limited to the pecuniary injury, thus excluding all compensation for moral injury, which, in case of conviction for crime, is generally the more serious element of injury. This limitation follows, in general, the European statutes and has as its object the restriction to its narrowest limits (while acknowledging the principle) of a demand on the State Treasury.156

Borchard’s law would indemnify for time spent in jail awaiting trial but would deny relief if the claimant “committed any offense against the United States.”157 Such a pinched statute is miserly compared to more generous exoneree compensation provisions in modern statutes.158

The difference between Borchard’s narrowly drawn bill and more expansive recent legislation marks the gulf between Progressive Era “liberal-conservative” concepts of social justice and an innocence movement created in the shadow of the civil rights movement. Whilst some conservatives, moved by the gross injustice of wrongful conviction have supported and initiated

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153 Wigmore, supra note 82. Wigmore “a friend of Judge Thayer’s, exploded in a bitter, racist, reactionary, and totally inaccurate attack on Frankfurter in the conservative ‘Boston Transcript’”, Urofsky, supra note 149 at 24. Frankfurter’s reply “‘pulverized’ Wigmore” according to Harvard Law School colleague, ibid.


155 For a review of the conservative nature of Borchard’s draft exoneree compensation bill in 1912, see text and notes, Part IV supra notes 77 - 81.


157 Ibid at 792-93 (emphasis in original).

innocence reforms,\textsuperscript{159} the greater number of innocence movement pioneers are defense-oriented liberals who were inspired by the movement for racial equality.\textsuperscript{160} However one parses the collective litigation, advocacy and scholarship concerning wrongful conviction as a movement, the complexity of present-day innocence activity far outstrips anything that Borchard could have conceived of, not due to personal failings, but because horizons are limited by the eras in which we live. Contemporary innocence concerns with the psychological effects of wrongful conviction or the policy activism of exonerees, for example, were inconceivable in Borchard’s time.\textsuperscript{161} I would update my previous argument that structural justice system features foreclosed an innocence movement in Borchard’s day,\textsuperscript{162} to suggest that his era’s social and political ethos also constrained innocence reforms in the early twentieth century.

The basic lesson – that errors of justice do occur – was forgotten during the decades of the U.S. tough-on-crime politics that produced mass incarceration,\textsuperscript{163} suggesting that resistance to see errors of justice reflects ideology.\textsuperscript{164} As Keith Findley explained, “[t]he innocence cases have exposed as self-deception our longstanding belief that the criminal justice system does all it can to guard against convicting the innocent, and that mistakes, rarely if ever made, are anomalous rather than systemic.”\textsuperscript{165} The greatest lasting effect of Borchard’s work, more meaningful than his causal analysis or perhaps even his advocacy for compensating the wrongfully convicted, is to refute the impulse of those who deny the existence or salience of wrongful convictions. Edwin Montefiore Borchard was a rationalistic, Progressive era legal scholar who may have believed that his proof, once offered, would eradicate belief in the justice system’s inerrancy. We should, however, be aware that innocence denial is a belief that arises in each era.\textsuperscript{166} In this light an essential function of the innocence movement is to press the case,\textsuperscript{167} – to paraphrase Borchard’s Preface and to stress


\textsuperscript{162} Zalman, Borchard, \textit{supra} note 4.


\textsuperscript{164} See for example, D Michael Risinger, “Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate” (2007) 97 J Crim L & Criminol 761 [\textit{Risinger}].


\textsuperscript{166} Risinger, \textit{supra} note 164.

\textsuperscript{167} As is done in the United States by the National Registry of Exonerations, online:
the goal of his “innocence project” – that “innocent men” *are* convicted, that it *is* a physical possibility, it *happens* in the world, and that it *is* something to worry about.