

**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.

- I. Introduction
- II. Borchard's Life, Character, and Ideology
- III. Borchard's Career: Progressive Legal Scholar and Advisor
- IV. Borchard's Agenda: Compensating the Wrongfully Convicted
- V. Conclusion: Borchard's Innocence Project and Its Legacy

I Introduction

Edwin M. Borchard was the first American scholar to catalogue wrongful convictions and advocate wrongful conviction compensation. *Convicting the Innocent*¹ 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 I*]; a popular version was also printed.

² See e.g., Russell Covey, "Police Misconduct as a Cause of Wrongful Convictions" (2013) 90 Wash UL Rev 1133 at 1143; Jon B Gould and Richard A Leo "The Path to Exoneration" (2016) 79 Alb Rev 325 (2016); Stephanie Roberts Hartung, "Habeas Corpus for the Innocent" (2016) 19 U PA JL & Soc Change 1 at 19; Jessica S Henry, "Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened" (2018) 55 Am Crim L Rev 665 at 689.

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

³ Edwin M Borchard, "European Systems of State Indemnity for Errors of Criminal Justice" (1912) 3 J Am Inst Crim L & Criminol 684 [*Borchard 2*]; Edwin M Borchard, "State Indemnity for Errors of Criminal Justice" (1941) 21 BU L Rev 201 [*Borchard 3*]. See e.g., Rachel Dioso-Villa, "Out of Grace: Inequity in Post-Exoneration Remedies for Wrongful Conviction" (2014) 37 UNSWLJ 349; Chelsea N Evans, "A Dime for Your Time: Case for Compensating the Wrongfully Convicted in South Carolina" (2017) 68 S Car L Rev 539 at 545; Jeffrey S Gutman, "An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted" (2017) 82 Mo L Rev 369 at 370; Michael Leo Owens & Elizabeth Griffiths, "Uneven Reparations for Wrongful Convictions: Examining the State Politics of Statutory Compensation Schemes" (2011) 75 Alb L Rev 1283.

⁴ Marvin Zalman, "Edwin Borchard and the Limits of Innocence Reform" in C Ronald Huff & Martin Killias, eds, *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (New York: Routledge, 2013) at 329 [*Zalman, Borchard*] (arguing that Borchard's work could not lead to an innocence movement without social and institutional change).

⁵ Herbert W Briggs, *In Memoriam: Edwin M. Borchard, 1884-1951* (1951) 45 Am J Int'l L 708 at 709; *Edwin Borchard, Law Expert, Dead*, NY Times (23 July 1951) (mentioning wrongful conviction work) [*NY Times Obituary*].

⁶ Lara Abigail Bazelon, "Ending Innocence Denying" (2019) 47 Hofstra L Rev. Available at SSRN, online: <<https://ssrn.com/abstract=3235834> or <http://dx.doi.org/10.2139/ssrn.3235834>>.

⁷ Justus D Doenecke, "Edwin Montefiore Borchard 1884-1951", *Dictionary of American Biography, Supplement 5: 1951-1955* (New York, American Council of Learned Societies, 1977) [*Doenecke 1*], online: <http://ic.galegroup.com.proxy.lib.wayne.edu/ic/bic1/ReferenceDetailsPage/ReferenceDetailsWindow?displayGroupName=Reference&disableHighlighting=false&prodId=BIC1&action=e&windowstate=normal&catId=&documentId=GALE%7CBT2310017447&mode=view&userGroupName=lom_waynesu&jsid=3d6c47306ec30eb72aca5c0b9aed27ca>.

⁸ This arbitration settled decades of dispute between Great Britain and the United States, see Robert Lansing, "North Atlantic Coast Fisheries Arbitration" (1910-1911) 59 U Pa L Rev 119; Edwin M. Borchardt (*sic*), "The North Atlantic Coast Fisheries Arbitration" (1911) 11 Colum L Rev 1.

collect comparative and international law materials for the Library of Congress.⁹ 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.¹⁰ In the midst of his government service, getting married, and completing his monumental dissertation,¹¹ all before 1915, he found the time to publish his exoneree compensation article, which¹² was the foundation for his subsequent wrongful conviction work.¹³

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.¹⁴ 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 LL.B., cum laude, from New York Law School (1905), a B.A. from Columbia College (1908), and a Ph.D. from Columbia University (1913)."¹⁵ 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.¹⁶ 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).¹⁷

⁹ Herbert Putnam, "Report of the Library of Congress" *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, *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.

¹⁰ 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" *American National Biography*, [Mayer I], online: <<https://doi.org/10.1093/anb/9780198606697.article.1100081>>; Doenecke 1, *supra* note 7.

¹¹ Edwin M Borchard, *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>>.

¹² Borchard 2, *supra* note 3.

¹³ Borchard 1, *supra* note 1.

¹⁴ My thesis draws on biographical sketches, Doenecke 1, *supra* note 7; Mayer 1, *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.

¹⁵ Mayer 1, *supra* note 10.

¹⁶ *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+America+n+Revolution+Corinne+Brackett&source=bl&ots=0CzoWCtnOV&sig=SA8WcDO_BTzrmRTTqRrROI1zY7s&hl=en&sa=X&ei=1XTKT4uaOaT00gGHwoWpAQ&ved=0CEIQ6AEwAg#v=onepage&q&f=false>.

¹⁷ Doenecke 1, *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.¹⁸ With his marriage to DAR member Corrine Elizabeth Brackett, Borchard achieved "Anglo-conformity" assimilation.¹⁹ 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.²⁰

An accomplished student,²¹ Borchard put his long educational gestation period to good use.²² 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,

¹⁸ See generally, Lucy S Dawidowicz, *On Equal Terms: Jews in American, 1881-1881* (New York: Holt, Rinehart and Winston, 1982); Henry L Feingold, *Zion in America: The Jewish Experience from Colonial Times to the Present* (New York: Hippocrene Books, 1974); Milton M Gordon, "Assimilation in America: Theory and Reality" (1961) 90:2 *Daedalus* 263; Arthur A Goren, *The American Jews* (Cambridge: Belknap Press/Harvard University Press, 1982); Susanne Klingenstein, *Jews in the American Academy, 1900-1940; The Dynamics of Intellectual Assimilation* (Syracuse: Syracuse University Press, 1998); Michael A Mayer, "German-Jewish Identity in Nineteenth Century America" in Jacob Katz, ed, *Toward Modernity: The European Jewish Model* (New Brunswick: Transaction Books, 1987); Annie Polland & Daniel Soyer, *Emerging Metropolis: New York Jews in the Age of Immigration, 1840-1920* (New York: NYU Press, 2012); Howard B Radest, *Toward Common Ground: The Story of the Ethical Societies in the United States* (New York: Frederick Ungar Publishing Co., 1969).

¹⁹ The announcement of Edwin and Corrine's engagement in the *NY Times* (18 October 1914) was a mark of elite status; they lived a cultured life in New Haven as indicated by society page citations: *NY Times* (30 April 1931, 21 May 1931, 31 October 1931); they were involved with classical music, see *NY Times* Obituary, *supra* note 5.

²⁰ Briggs, *supra* note 5 at 709; See Part III, *infra*.

²¹ Elected to Phi Beta Kappa while at Columbia, *NY Times* Obituary, *supra* note 5.

²² He probably grew up in a German-speaking or bilingual household and studied languages during his undergraduate years as indicated by his dealings with European legal experts in 1911 and by his fluency with French, German, Italian and Spanish sources in his dissertation, Borchard 4, *supra* note 11 at xxvi-xxxvi (bibliography).

undoubtedly assisted Borchard's entrée into Washington's legal community.²³ 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 1913.²⁴

The Progressive Era during which Borchard came of age likely made the greatest imprint on his scholarship.²⁵ He remained an avowed Progressive throughout his life.²⁶ His early teen years, the 1890s, saw America in crisis, as its 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.²⁷ 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,²⁸ muckraking journalism,²⁹ 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.³⁰ Progressives fought against monopolies and income inequality, favored an inheritance tax,³¹ and ratified constitutional amendments in the first decade of Borchard's professional life.³² Although ambiguous in some respects, the

²³ Moore served as a judge on the Permanent Court of International Justice (i.e., the World Court) and was acknowledged as the dean of the international law profession, Edwin Borchard, "John Bassett Moore" (1946) 32 ABA J 575 [*Borchard* 5]. "Moore's *Digest of International Law* (1906) was undoubtedly the most important American work on international law in the early twentieth century," Doenecke 2 *supra* note 14 at 1.

²⁴ Part IV *infra*.

²⁵ "The Progressive Era...marks the collective response to the newly emerging industrial world, which presented challenges to every aspect of traditional American life...." Francis J Sicius, *The Progressive Era: A Reference Guide XV* (Santa Barbara: ABC-CLIO, LLC, 2015) at XV [*Sicius*]; See Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York: Knopf, 1955) [*Hofstadter*]; Jill Lepore, *These Truths: A History of the United States* (New York: Norton, 2018) 330 [*Lepore*]; Samuel Elliot Morrison, *The Oxford History of the American People* (New York: Oxford University Press, 1965) [*Morrison*].

²⁶ "For your personal information, I may add that I am an old-line Progressive and was happy to be considered a friend of Senator La Follette, Sr." Letter from Borchard to Sen Gerald Nye, 12 November 1929, Yale University Archives, Borchard Papers, MSS Group # 670, Box 111, Folder 1065 (requesting that Sen Nye introduce compensation legislation) [*Yale Archives*].

²⁷ Hofstadter, *supra* note 25 at 166.

²⁸ Julius W Pratt, *America and World Leadership, 1900-1921* (London: Collier Books, 1967). Borchard's international law mentor at Columbia University was intimately involved in the creation of the American empire, John Bassett Moore, *Dictionary of American Biography* (New York: Charles Scribner's Sons, 1974).

²⁹ Hofstadter, *supra* note 25 at 185-196.

³⁰ Morrison, *supra* note 25 at 815, generally at 799-834; Sicius, *supra* note 25.

³¹ Robert M LaFollette, "The Battle for Progressive Government in Wisconsin" in H Landon Warner, ed, *Reforming American Life in the Progressive Era* (New York: Ozer Books, 1971) 116-132.

³² Amdt XVI (income tax, 1913); Amdt XVII (direct election of senators, 1913); Amdt XVIII (Prohibition, 1919); Amdt XIX (women's vote, 1920).

Progressive Era on balance was a significant period of government reform.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.³⁴ The major political parties had dominant Progressive wings as Republican President Theodore Roosevelt and Democratic President Woodrow Wilson were exemplary Progressives.³⁵ The movement was complex, and while encompassing various strains, included many common goals.³⁶

Historians describe the flavor of progressivism as a kind of liberal conservatism,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; Progressives read pamphlets. ... Populists believed that the system was broken; Progressives believed that the government could fix it.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,”³⁹ we can imagine his formidable presence in the legal policy arenas he entered.

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, *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.⁴⁰ Although foremost an international law scholar,⁴¹ he contributed significantly to the declaratory judgment and

³³ Thomas McCraw, “The Progressive Legacy” in Lewis M Gould, ed, *The Progressive Era* (Syracuse: Syracuse University Press, 1974) 181-201, citing, e.g., workmen’s compensation laws, Pure Food and Drugs Act, state minimum wage laws, Federal Reserve Act.

³⁴ Hofstadter, *supra* note 25 at 213.

³⁵ Hofstadter, *ibid* at 132.

³⁶ Sicius, *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.

³⁷ “Theodore Roosevelt, and after him Presidents Taft and Wilson, were liberal conservatives,” Morrison, *supra* note 25 at 811.

³⁸ Lepore, *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.”

³⁹ Doenecke 1, *supra* note 7.

⁴⁰ Borchard 1, *supra* note 1; Borchard 2, *supra* note 3; Borchard 3, *supra* note 3; see Part IV *infra*.

⁴¹ “Borchard was an authority on diplomatic protection for alien citizens and property.” Doenecke 1, *supra* note 7.

sovereign immunity in tort law, and wrote on constitutional law and jurisprudence.⁴² Borchard published at least one-hundred and seventeen law journal articles in his thirty-nine year career,⁴³ 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.⁴⁴ He also wrote several consequential books, including his treatise on diplomatic protection of citizens abroad,⁴⁵ a declaratory judgments treatise,⁴⁶ and a co-authored brief for neutrality written before the U.S. entered World War II.⁴⁷ Legal scholars continue to cite him.⁴⁸ 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.⁴⁹ 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].”⁵⁰ He traced the declaratory judgment from Roman and medieval Germanic and Italian law to modern European and Asian civil procedure.⁵¹ 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”.⁵²

⁴² E.g., Edwin Borchard, “Justiciability” (1936) 4 Chicago L Rev 1.

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.

⁴⁶ Edwin Borchard, *Declaratory Judgments* (Cleveland: Banks-Baldwin Law Publishing Co., 1934) [Borchard 6] (2nd ed, 1941).

⁴⁷ Edwin Borchard & William Potter Lage, 2nd ed, *Neutrality for the United States* (New Haven: Yale University Press, 1937).

⁴⁸ HeinOnline >Databases>Law Journal Library> Text>Search term (Edwin w/2 Borchard) produced 3,576 hits on 7 November 2019: 278 hits in 1991-2000; 383 hits in 2001-2010; 334 hits in 2011-2019. Titles of the first 100 hits in 2010-2019 indicated that 47 were related to wrongful convictions and 53 to other subjects.

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.

⁵⁰ Edwin M Borchard, “Government Liability in Tort” (1924) 34 Yale LJ 1 at 2.

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. Barring 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 *US Fidelity & Guaranty Co v Koch*, (1939) 102 F2d 288 at 290.

⁵⁶ William O Douglas, *Go East, Young Man: Early Years – The Autobiography of William O Douglas* (New York: Vintage Books, 1974) at 167. “He lobbied strenuously and successfully for passage in 1934 of the Declaratory Judgments Act” Mayer 1, *supra* note 10.

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, *ibid* (1924) 34 Yale LJ 1.

⁶⁰ *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

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.

⁶⁵ Sarah H Ludington, "The Dogs That Did Not Bark: The Silence of the Legal Academy during World War II" (2010) 60 *J Legal Educ* 397 at 419-20.

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

⁶⁸ See Innocence Project, *Compensating The Wrongly Convicted* (35 states have enacted compensation laws) <https://www.innocenceproject.org/compensating-wrongly-convicted/> (accessed 21 December 2019); Robert J Norris, “Exoneree Compensation: Current Policies and Future Outlook” [Norris] in Marvin Zalman & Julia Carrano, eds, *Wrongful Conviction and Criminal Justice Reform: Making Justice*, (New York: Routledge, 2014) [Zalman & Carrano].

⁶⁹ Borchard 2, *supra* note 3.

⁷⁰ Zalman, Borchard, *supra* note 4 at 331, citing Borchard 2, *ibid* at 684. Common law jurisdictions seem retrograde on this issue, see Myles Frederick McLellan, “Innocence Compensation: The Private, Public and Prerogative Remedies” (2013-2014) 45 *Ottawa L Rev* 59.

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.”⁷⁶ 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.”⁷⁷ 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,⁷⁸ 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.”⁷⁹ 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.⁸⁰ Finally, the “relief is limited to five thousand dollars. This provision is to limit any exorbitant claims which may be brought.”⁸¹

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.”⁸²

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

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*.

⁸² John H Wigmore, Editorial “The Bill to Make Compensation to Persons Erroneously Convicted of Crime” (1912) 3 *J Am Inst Crim L & Criminol* 665 at 667 [*Wigmore*].

Sutherland of Utah.⁸³ 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.⁸⁴ Yet he continued to publicize the idea in academic and popular outlets with an eye to stimulating reform in the states.⁸⁵

The issue stagnated and the project to compensate the wrongfully convicted seemed abandoned. For reasons discussed below,⁸⁶ in the late 1920s he once again took up the issue and wrote *Convicting the Innocent*.⁸⁷ Borchard clearly planned to use the book to “furnish the support necessary to demonstrate the necessity for state indemnification of errors of criminal justice.”⁸⁸ 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.⁸⁹ To defray costs Borchard requested funding from the Institute of Human Relations at Yale University.⁹⁰ 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

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”).

⁸⁵ Edwin M Borchard, “State Indemnity for Errors of Criminal Justice” (1914) 52:1 *Annals Am Acad Pol & Soc* 108 and Edwin M Borchard, “Errors of Criminal Justice” (1916) 8:99 *New Republic* 182 were parallel articles that advanced the theory for exoneree compensation developed in Borchard 2, *supra* note 3; both cited compensation laws passed by Wisconsin and California in 1913. North Dakota passed a Relief for Wrongful Imprisonment Law in 1917 (Sess Laws, ch 172, setting compensation at a maximum of \$2,000.00) but repealed it in 1965: NDCC Chap 12-57 (Sess Law 1965, ch 203, §86).

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 May 1929, Letters from the Alfred A Knopf/Borzoi Books Editorial Department, 23 April 1929, 1 May, *ibid*.

Library of Congress records.⁹¹ 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.”⁹² By late 1929 Lutz made headway in compiling wrongful conviction records.⁹³ After some strain requiring a letter from Borchard to President Herbert Hoover, Borchard and Lutz gained access to federal pardon records.⁹⁴

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.⁹⁵ Throughout 1930 Lutz steadily reported cases to Borchard as they collaborated on tracking down leads and put in for reimbursement for incidental expenses.⁹⁶ The grant from Yale’s Institute of Human Relations came through⁹⁷ and Lutz was allotted \$60 a month for expenses.⁹⁸ Yale University Press, in April 1931,⁹⁹ indicated an interest in publishing a book entitled “Not Guilty” by the autumn of that year.¹⁰⁰ The completed draft won approval from

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*.

⁹² Letter from Borchard to George W Wickersham, 12 November 1929, Yale Archives, *ibid*; Letter from W Barry, Secretary to Wickersham, 14 November 1929, acknowledging receipt of the Senate pamphlet, *ibid*. The Wickersham Commission never addressed the issue, see generally, Franklin E Zimring, “The Accidental Crime Commission: Its Legacies and Lessons” (2013) 96 Marq L Rev 995.

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).

⁹⁶ Lutz to Borchard, 19 July 1930, 5 September 1930, 11 September 1930, 14 September 1930, 30 September 1930, Yale Archives, *ibid* at 111/1067.

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."¹⁰¹

Convicting the Innocent, published by Yale University Press in April 1932,¹⁰² 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.¹⁰³ As Dean Clark noted, the book's unusual structure combined miscarriage of justice vignettes that appealed to average readers with scholarly material.¹⁰⁴ An "Introductory Chapter," most likely to appeal to contemporary innocence scholars,¹⁰⁵ invented the inductive method of drawing wrongful conviction "causes" from the narratives.¹⁰⁶ Each vignette included a bibliography of sources including court opinions, news articles, pardon statements, and attorney interviews.¹⁰⁷

The book, whilst generally well received,¹⁰⁸ 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*.

¹⁰⁶ See Richard A Leo, "Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction" (2005) 21 J Contemp Crim J 201 [Leo] (critique of narratives approach); Marvin Zalman, "An Integrated Justice Model of Wrongful Convictions" (2010) 74 Alb L Rev 1465 at 1500-1504 (coining label "innocence paradigm"); Marvin Zalman & Matthew Larson, "Elephants in the Station House: Serial Crimes, Wrongful Convictions, and Expanding Wrongful Conviction Analysis to Include Police Investigation" (2015) 79 Alb L Rev 941 at 945-952 [Zalman & Larson] (assessing nature and limits of Borchard's approach in relation to others).

¹⁰⁷ Borchard 1, *supra* note 1.

¹⁰⁸ Anthony Burnett, "Circumstantial Evidence is Often Wrong" *Washington Post* (27 November 1932) (descriptive review of *Convicting the Innocent*); James P Gifford, "Convicting the Innocent" (1933) 48:1 Pol Sci Q 127; Max Radin, "Review: Convicting the Innocent" (July 1932) 34 U Cal Chronicles 362; William G Thompson, "Convicting the Innocent. Errors of Criminal Justice" (1932) 32 Colum L Rev 1460. Two cases were republished in the *American Bar Association Journal*, with case bibliographies intact, "Convicting the Innocent" (1932) 18 ABA J 404.

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

¹⁰⁹ Taft, *supra* note 104.

¹¹⁰ Borchard 1, *supra* note 1 at 375-421.

¹¹¹ Borchard letter to Cummings, 8 March 1938, Yale Archives, *supra* note 26 at 109/1050 (alluding to Cummings' famous action as Connecticut prosecutor moving to dismiss murder charges against man for murder of a priest); see Homer S Cummings, “State vs Harold Israel” (1925) 15 J Crim L & Criminol 406; case basis of Hollywood feature picture, “Boomerang” (Feature Film: Twentieth Century Fox, 1947). See Ken Armstrong, “The Suspect, the Prosecutor, and the Unlikely Bond They Forged” *Smithsonian Magazine* (January 2017), online: <https://www.smithsonianmag.com/history/charming-story-homer-cummings-harold-israel-180961429/>.

¹¹² Holzoff letter to Borchard, 7 December 1934, Yale Archives, *ibid* at 109/1050 (Borchard sent copy of book to Holzoff; 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 Sen 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 1938.¹¹⁸ Rep. William Citron of Connecticut, who became a House sponsor of the compensation bill, referred concerns of recalcitrant House members to Borchard.¹¹⁹ Additional letters found Borchard receiving intelligence about the progress of the bill and offering advice on various points,¹²⁰ culminating in a telegram to Sen. Maloney advising on last minute changes.¹²¹

The Act “to grant relief to persons erroneously convicted in courts of the United States” was signed into law on May 24, 1938.¹²² 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.”¹²³ This hope, however, would not take off until the twenty-first century. Borchard's overture to the American Law Institute was never pursued.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.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.

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

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

¹¹⁹ Rep Citron letter to Borchard, 17 February 1938, Yale Archives, *ibid*; Rep Creal letter to Rep Citron, 10 March 1938, *ibid*; Borchard letter to Rep Citron, 15 March 1938, *ibid* (responding to Rep Creal's pardon concerns).

¹²⁰ Holtzoff letters to Borchard, 24 March & 6 May 1938, Yale Archives, *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, *ibid*.

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

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

¹²³ Borchard letter to Sen Maloney, 30 May 1938, Yale Archives, *supra* note 26 at 109/151.

¹²⁴ See *supra* note 113.

¹²⁵ Roger Baldwin, ACLU Director, letter to Borchard, 9 January 1941, Yale Archives, *ibid* at 109/1053; Memorandum, State Indemnity for Errors of Criminal Justice, 26 July 1940, *ibid* at 109/1052; “Outline of Campaign: Restitution to Prisoners Wrongfully Convicted” 1 April 1941,” *ibid* at 109/1053.

V Conclusion: Borchard's Innocence Project and Its Legacy

Borchard did not live to see compensation laws sweep the country,¹²⁶ but his work inspired future innocence scholars and activists. *Convicting the Innocent* set the model for “big picture” books,¹²⁷ an *idea* that motivated the jurist Jerome Frank.¹²⁸ Scholars cited Borchard for decades but their scattershot works did not produce a coherent or evolving body of knowledge.¹²⁹ 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.¹³⁰ Borchard did influence Neufeld and Scheck’s “innocence manifesto”—a preface in *Convicted by Juries*¹³¹—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*....”¹³²

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.¹³³ His causal analysis, from a social science perspective, was

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*].

¹²⁹ Bernard Botein, Review of Frank & Frank, *Not Guilty*, *ibid* (1958) 58 Colum L Rev 284; Richard C Donnelly, “Unconvicting the Innocent” (1952) 6 Vand L Rev 20; Joseph D Grano, “Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?” (1973-74) 72 Mich L Rev 717; Max Hirschberg, “Wrongful Convictions” (1940-1941) 13 Rocky Mtn L Rev 20; Max Hirschberg, “Pathology of Criminal Justice: Innocent Convicted in Three Murder Cases” (1941) 31 Am Crim L & Criminol 536; Joseph H King Jr, “Compensation of Persons Erroneously Confined by the State” (1970) 111 U Pa L Rev 1091; Donal EJ MacNamara, “Convicting the Innocent” (1969) 15:1 Crime & Delinq 57; John T Noonan Jr, “Inferences from the Invocation of the Privilege against Self-Incrimination” (1955) 41 VA L Rev 311; Note “Lawyers and Lineups” (1977) 77 Yale LJ 390; Otto Pollak, “The Errors of Justice” (1952) 284 Annals Am Acad Pol & Soc 115. See generally, Leo, *supra* note 106.

¹³⁰ Michael Meltsner, “Innocence Before DNA” [*Meltsner*] in Daniel S Medwed, *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (Cambridge: Cambridge University Press, 2017) [*Medwed*] at 14-35. (Meltsner is a leading anti-death penalty litigator).

¹³¹ Edward Connors et al, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial* (Washington, DC: NIJ, 1996) [Connors et al]; the report “became an event rather than one more list” that helped stimulate innocence movement, James M Doyle, *True Witness: Cops, Courts, Science, and the Battle Against Misidentification* (New York: Palgrave Macmillan, 2005) at 129.

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.¹³⁴ 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.¹³⁵

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.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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,"¹³⁹ a criticism of innocence

¹³⁴ See Jon B Gould et al, "Predicting Erroneous Convictions" (2014) 99 Iowa L Rev 471.

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 zealotry; suppressing evidence by police and prosecutors; and allowing appellate courts to review facts of felony convictions).

¹³⁶ 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 Psychological research refutes Wigmore's widely cited quotation: "Cross-examination is the greatest legal engine ever invented for the discovery of truth," available by Internet search, see Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process* (Cambridge: Harvard University Press, 2012) 180-205.

¹³⁸ 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 in equipoise; Justice Scalia also argued that number of wrongful convictions is minuscule, *Kansas v Marsh*, 185-199).

¹³⁹ 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.¹⁴⁰ 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."¹⁴¹

The decision to write *Convicting the Innocent*, urged by Felix Frankfurter,¹⁴² 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.¹⁴³

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.¹⁴⁴ 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.¹⁴⁵

¹⁴⁰ See Ronald J Allen and Larry Laudan, "Deadly Dilemmas" (2008) 41 Tex Tech L Rev 65.

¹⁴¹ Letters between Borchard and Edmund L. Pearson, 22 November 1932, 5 December 1932, 10 December 1932, 2 January 1933, 13 January 1933, Yale Archives, *supra* note 26 at 112/1076. See Edmund Pearson, "A Reporter at Large, Hauptmann and Circumstantial Evidence" (9 March 1935) *New Yorker* 37 (commenting that *Convicting the Innocent* did not record an execution of an innocent person).

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.¹⁴⁶ 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.¹⁴⁷

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,¹⁴⁸ followed with a popular book.¹⁴⁹ 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."¹⁵⁰ Frankfurter'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."¹⁵¹ Frankfurter's position was quickly and publicly attacked by none other than Dean John Henry Wigmore, who supported Borchard's efforts in 1912.¹⁵² 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.

¹⁴⁶ On political trials and wrongful convictions, see C Ronald Huff et al, *Convicted but Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks: Sage, 1996) 21-27; Ron Christenson, *Political Trials: Gordian Knots in the Law*, 2nd ed (New Brunswick: Transaction Books, 1999); Paul Averich, *The Haymarket Tragedy* (Princeton: Princeton University Press, 1984); Michael R Belknap, *Cold War Political Justice: The Smith Act, The Communist Party, and American Civil Liberties* (Westport: Greenwood Press, 1977); Christina E Wells, "Fear and Loathing in Constitutional Decision-Making" (2005) 2005 Wis L Rev 115.

¹⁴⁷ Arthur M Schlesinger, Introduction to Louis Joughin & Edmund M Morgan, *The Legacy of Sacco & Vanzetti*, rev 1976 (Princeton, Princeton University Press, 1948).

¹⁴⁸ Felix Frankfurter, "The Case of Sacco and Vanzetti" *Atlantic Monthly* (March 1927), online:

<https://www.theatlantic.com/magazine/archive/1927/03/the-case-of-sacco-and-vanzetti/306625/>; Melvin I

Urofsky, Felix Frankfurter, *Judicial Restraint and Individual Liberties* (Boston: Twayne Publishers, 1991) [Urofsky].

¹⁴⁹ Felix Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen* (Boson: Little, Brown, 1927).

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 the to 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

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*.

¹⁵⁴ See Keith A Findley, "Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process" (2008) 41 Tex Tech L Rev 133 (innocence movement espouses neutral "reliability model" situated between control and due process models); Daniel Kroepsch, "Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs are Fulfilling the Prosecutor's Duty to Serve Justice" (2016) 29 Geo J Leg Ethics 1095 (line between prosecution and defense orientations blurring with conviction integrity units).

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.

¹⁵⁶ Edwin M Borchard, "For Relief to Persons Erroneously Convicted" (1912) 3 J Am Inst Crim L & Criminol 792 (emphasis in original).

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

¹⁵⁸ See Robert J Norris, (2012) "Assessing Compensation Statutes for the Wrongly Convicted" 23:3 Crim Just Pol'y Rev 352.

innocence reforms,¹⁵⁹ the greater number of innocence movement pioneers are defense-oriented liberals who were inspired by the movement for racial equality.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.¹⁶¹ I would update my previous argument that structural justice system features foreclosed an innocence movement in Borchard's day,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,¹⁶³ suggesting that resistance to see errors of justice reflects ideology.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.”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.¹⁶⁶ In this light an essential function of the innocence movement is to press the case,¹⁶⁷ – to paraphrase Borchard's Preface and to stress

¹⁵⁹ See Jon B Gould, *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System* (New York: New York University Press, 2008); Christine C Mumma, “The North Carolina Innocence Inquiry Commission: Catching Cases that Fall Through the Cracks”, in Zalman & Carrano, *supra* note 68 (referring to the innocence advocacy of North Carolina Justice I Beverly Lake).

¹⁶⁰ See Harry Kreisler, “A Passion for Justice: Conversation with Peter Neufeld” (Interview, 2001), online: <<http://globetrotter.berkeley.edu/people/Neufeld/neufeld-con0.html>>; Harry Kreisler, “DNA and the Criminal Justice System: Conversation with Barry Scheck” (Interview, 2003), online: <<http://globetrotter.berkeley.edu/people3/Scheck/>>; University of Michigan Faculty Biography, Samuel R Gross, online: <<https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=srgross>>. See Robert J. Norris, *Exonerated: A History of the Innocence Movement* (New York; NYU Press, 2017) 167-180 (debate among innocence movement pioneers regarding whether innocence is a civil-rights movement).

¹⁶¹ See Zieva Dauber Konvisser and Ashley Werry, “Exoneree Engagement in Policy Reform Work: An Exploratory Study of the Innocence Movement Policy Reform Process” (2017) 33:1 J Contemp Crim Just 43; Jennifer Wildeman et al, “Experiencing Wrongful Convictions” (2011) 50 J Offender Rehabilitation 411.

¹⁶² Zalman, Borchard, *supra* note 4.

¹⁶³ Meltsner, *supra* note 130; see Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, rev ed (New York: The New Press, 2012).

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

¹⁶⁵ Keith A Findley, “Defining Innocence” (2010) 74 Alb L Rev 1157 at 1157-1158.

¹⁶⁶ Risinger, *supra* note 164.

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.