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Restorative Justice for Wrongful Convictions: A Quasi-Institutional Approach

Andrei Poama, Jennifer M. Page

Ronald Cotton had been out of jail for two years when he received word that Jennifer Thompson wanted to meet him. He had already told the world that he wanted to speak to her. Cotton and Thompson had recently been featured in a PBS *Frontline* story about a series of events that was life-altering for them both. Thompson, a White woman living in Burlington, North Carolina, had been raped by an African American man who broke into her home thirteen years prior. Thompson wrongly identified Cotton as her rapist. Cotton was convicted, spending over a decade in prison before DNA testing led to his exoneration. As Cotton said on *Frontline*, he was still searching for answers. Thompson had never contacted him and he wondered why. He wanted to know what she would say.

Thompson was already inundated by remorse and a sense of responsibility for what Cotton suffered. After watching the *Frontline* story, she immediately took steps to arrange a meeting. On April 4, 1997, Cotton and Thompson met at a church, accompanied by their spouses. Thompson sorrowfully conveyed her guilt and offered an apology; Cotton forgave her. Their first meeting led to phone calls, visits, and a lifelong friendship.

At the time, Cotton and Thompson were not familiar with the term, but they eventually came to see their story through the lens of restorative justice. Explains Thompson, “What Ron and I did that day in the church was restorative justice in its purest form” (Bazelon 2018: 136). After a string of successes advocating with Cotton for criminal justice reform in North Carolina and beyond, Thompson began thinking about restorative justice more seriously. Though she and Cotton stumbled into it by accident, she saw restorative justice as something that could help facilitate healing in the aftermath of other wrongful conviction cases. She became a founder of *Healing Justice*, a non-profit dedicated to bringing together exonerees, crime victims, and family members at healing retreats modelled on a restorative justice framework (Bazelon 2018, Ch. 11).¹

There is something revealing about Thompson’s description of what happened as “restorative justice in its purest form”. It gives the sense that there is something especially authentic and meaningful about a restorative justice process that takes place when the parties involved do not even know what restorative justice is. However, if left only to be discovered

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¹ For a link to the Healing Justice project, see <https://healingjusticeproject.org>.

by accident, this would block the possibility of restorative justice for many individuals in need of healing and closure. The vast majority of the time, spontaneous restorative justice processes do not take place; Thompson and Cotton are the rare exception. Yet it is worth asking: Are important aspects of restorative justice lost when restorative justice is institutionalized and becomes part of the state-run criminal justice system?

In this chapter, we discuss the institutionalisation of restorative justice in the wrongful conviction context. Granted, the aftermath of a criminal exoneration is not the typical context for restorative justice. Healing Justice's work is recent and innovative. There is reason to think, however, that in the future, there is a place for institutionalised restorative justice following exonerations in the United States and elsewhere.² As we ultimately argue, the state can and should be involved in restorative justice practices that address wrongful convictions, but that such involvement can only be justified if it is limited to a strictly administrative role whereby state officials serve restorative justice processes directly controlled by the relevant parties—most notably, the wrongly convicted defendant, the victim of the offence, and, whenever possible and desirable, their families and friends. We call this limited state involvement a quasi-institutional one.

The chapter is structured as follows: Section 1 explains why the aftermath of wrongful convictions is a unique context for restorative justice. Section 2 provides a discussion of the concept of wrongful convictions, as well as its causes and correlates. Section 3 weighs the case in favour and against state-managed restorative justice as a distinctive set of practices for tackling wrongful convictions, and offers grounds for our quasi-institutional restorative approach. Section 4 draws on these grounds and outlines some of the ways in which the quasi-institutional approach might be put into practice.

Two notes on terminology before beginning. First, the concept of “institutionalisation” is not inherently about *state* institutionalisation (Aertsen 2006: 75-77). However, we are interested in questions concerning the state institutionalisation of restorative justice in the aftermath of a criminal exoneration, as there seems to be a tension between the claim that the state owes it to exonerees and crime victims to robustly secure the possibility of restorative justice, and another claim that we will consider, namely, that the state's involvement in restorative justice might undermine the process and its outcome. This tension is worth exploring. For simplicity's sake, then, we treat “institutionalised restorative justice” as

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² Note, more generally, that the ideal of restorative justice is capacious in its application to various types of conflicts, including war — see, for instance, Braithwaite (2006).

synonymous with “state institutionalised restorative justice.” “Formal restorative justice processes” is a conceptually broader term referring to any process conducted by a trained restorative justice facilitator. “Informal restorative justice” is the kind of healing process that Ronald Cotton and Jennifer Thompson had, without the involvement of restorative justice professionals. “Quasi-institutional restorative justice” refers to the set-up where the state’s only role is to serve, not manage, the relevant restorative justice practices.³

Second, we construe wrongful convictions as guilty verdicts imparted by legally competent authorities—in particular, judges or juries—to defendants who are later found factually innocent of the offences for which they have been convicted. Importantly, our understanding of factual innocence is evidential, viz., we take innocence to be established when the guilty verdict is not adequately supported by the evidence presented at trial.⁴

1. Restorative Justice in the Wrongful Conviction Context

Societies have not yet found a satisfactory justice-based response to wrongful convictions. As McCold and Wachtel (2003: 1) put it in their influential account, “justice requires the healing of the harm as much as possible.” For this context, restorative justice—which provides “an opportunity for those who have been most affected by an incident to come together to share their feelings, describe how they were affected and develop a plan to repair the harm done or prevent a reoccurrence” (McCold and Wachtel 2003: 2)—holds promise.

While lessons about how restorative justice has been institutionalised in other criminal justice areas can inform the wrongful conviction context, the latter has many unique features. When restorative justice is incorporated into the criminal justice system, it often brings together a person who has caused harm and a person who has been harmed, as well as family and community members who have felt the harm’s impact. As Stephen Garvey describes:

When the processes associated with restorative justice, such as victim-offender mediation, family group conferencing, and sentencing circles, work as intended, they bring an offender to realise the full extent of the damage he has done. Ideally, the offender experiences remorse and repentance, and thus shoulders willingly some burden or hardship in order to make amends (Garvey 2003: 303).

³ On the diversity of institutionalisation modes of restorative justice, see also Poama (2015).

⁴ As discussed in the following section, this might be prompted by a variety of factors, such as missing evidence, as well as collection of or reliance on faulty evidence.

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However, after a wrongful conviction, it is often overly simplistic to identify any single individual as the perpetrator of harm. Though Cotton and Thompson's case might seem to be little more than the age-old trope of a White woman accusing the wrong Black man of rape, various actions and inactions by police and state officials (some malicious, some merely neglectful, and some benign) created a perfect storm for her to mistake Cotton for the real rapist, Bobby Poole. Far from a restorative justice process being needed to make Thompson realise the harm she has done, she was already debilitated by guilt, which she shouldered single-handedly, not thinking about the other parties who shared some of the responsibility. Healing Justice's main focus is on exonerees, crime victims, and their families—not criminal justice officials, and not perpetrators of crimes. A passage from Laura Bazelon's *Rectify: The Power of Restorative Justice After Wrongful Conviction* describes the stakes of healing for exonerees and their families:

Many exonerees suffered horribly in prison. Separated from their families, they were assaulted, raped, and terrorised, and spent years in solitary confinement. Some are full of anger and fear while lacking the tools to express themselves because they had learned to stifle their emotions in order to survive. They have no ready access to services that can help them reacclimate to society: no parole officer or other legally guaranteed support system is in place to help them find work and a place to live. The road to obtaining compensation from the state, if that is even possible, can be long and arduous.

Many exonerees have been imprisoned for so long that their parents are dead, their families have scattered, and their close friends are now mere acquaintances. Even putting aside the immediate need for food and shelter—and the fact that many exonerees have serious physical health conditions—there is the daunting psychological task of finding the will to move forward after losing trust in the basic decency of other people. Some exonerees die within a few years of their release, from health problems that went untreated in prison, substance abuse, or suicide (Bazelon 2018: 94).

Bazelon goes on to describe how exonerees are not the only parties who suffer because of a wrongful conviction. She discusses grown-up children who struggle to have a normal relationship with a parent they got to know only during prison visits and partners for whom sharing “a physical and emotional space” with an exonerated person who has been absent for so many

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years is a major change. “Not surprisingly, many of these relationships collapse under the strain,” Bazelon (2018: 94) writes.

After a wrongful conviction comes to light, crime victims suffer as well. There is the guilt of having submitted mistaken eyewitness testimony, and sometimes the guilt of knowing that the real perpetrator went on to commit other heinous acts of violence. There is the horror that comes with the worst chapter of one’s life not being closed, and having to relive the past again and again (Bazelon 2018: 94-95). In this light, we can observe that part of Healing Justice’s effectiveness might have to do with *who* is brought to the table. There is the possibility of an exoneree and a crime victim finding solace in ideas about shared victimhood and common enemies who are not involved in the conversation.

With state-run restorative justice after a wrongful conviction, however, it would be all too conspicuous if state officials were absent. If state officials refused to take responsibility for their contributory actions, the state would seem to lack moral authority to be a part of exonerees’ and crime victims’ healing processes. But the introduction of state officials into a post-exoneration restorative justice process could bring with it its own negative dynamics: State officials could be defensive, emotionally unavailable, and/or hostile, taking part because they are “forced” to and not because they want to, and undermining the healing process for those who need it the most. Moreover, authorities could want to dictate *how* participating state officials engage in the restorative justice process due to civil liability-related considerations.⁵ This brings us to a dilemma about restorative justice that arises in the wrongful conviction context. Because of the actions by the state that contribute to the occurrence of a given wrongful conviction, the state’s involvement in a restorative justice process seems desirable, but at the same time, bringing in state officials could undercut restorative justice’s meaningfulness and healing power. We will return to this dilemma, but first, let us look at how actions by state officials and other factors contribute to wrongful convictions.

2. Factors Contributing to Wrongful Convictions

⁵ Page (2019a) discusses how considerations of civil liability impact state officials’ willingness to apologize after police shootings, for example.

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Criminal justice professionals have long minimised both the seriousness and scale of wrongful convictions. One indication of this is outright denial, illustrated by Judge Learned Hand's opinion a century ago in *United States v. Garsson* (1923):

No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. *It is an unreal dream.* What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime. (*emphasis added*)

Today, minimisation is less about disavowal than about disregarding the size and significance of wrongful convictions. [This is to say that government officials pay little attention to the number of innocent persons who get punished following a false conviction (Smith, Zalman & Kiger 2011). Estimates vary depending on the measures used. In the US, they range from a high 10% when using a disagreement rate on convictions between judges and jurors (Spencer 2007) to a low 1-3% when criminal justice professionals—in particular, police officers, prosecutors, defence lawyers and judges—are surveyed on the topic (Ramsay & Frank 2007; Zalman et al. 2008; Gross 2013).⁶ For other countries, estimates remain even more rare and imperfect. For Europe, they vary with the official procedures in place for requesting conviction revisions, with the Netherlands receiving a low of 20-30 applications/year, and the UK, a high 1,400-1,500 applications/year, and the percentage of successful applications varying between 3% and 10% (Nan, Holvast & Lestrade 2020).

Despite scarce official information about the magnitude of the phenomenon, researchers tend to agree on the kind of factors that contribute to false guilty verdicts (Huff & Killias 2013). Eight factors are typically singled out as important correlates of wrongful convictions. The first, and arguably most substantial one, is faulty eyewitness identification of the defendant, usually by the victim of the offense or a nearby witness. In the US, more than 70% of exoneration cases identified through DNA evidence feature some form of incorrect identification (Turow & Scheck 2017). Inaccurate testimonies by victims or witnesses are all

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⁶ For a comparative discussion of DNA and non-DNA estimates of wrongful convictions, see West & Meterko 2015.

the more problematic in serious felony cases, where juries give them higher credence (Turow & Scheck 2017: 46).

The second factor covers different kinds of false confessions. This category is heterogenous, as it includes voluntary crime confessions by individuals who spontaneously yet falsely identify themselves as offenders without any pressure from police officers or other criminal justice officials (e.g., the case of 200 such confessions for the kidnapping of the Lindbergh baby in 1932⁷); internalised crime confessions by people who somewhat pathologically come to believe they have committed the crime in question, and compliant, yet coerced crime confessions typically prompted by stressful or deceiving police interrogation techniques (Kassin et al. 2010).

The third and related factor is misconduct by criminal justice officials, most typically by police officers and/or prosecutors. Coercing false confessions is one commonly-cited category of misconduct; others are witness tampering, evidence fabrication, evidence concealment, and trial-related misconduct (Gross et al. 2020, 29; Foley 2000). A 2020 report using data from the National Registry of Exonerations—a catalog of all known U.S. exonerations since 1989, viz., 2,663 cases at the time of the report’s publication—found that forms of government misconduct contributed to a wrongful conviction 54% of the time (Gross et al. 2020; see also Naughton 2007: 63).⁸

The fourth factor refers to perjury by other witnesses and individuals typically associated with the defendant. This comprises of cases where prison informants provide false information in exchange for a sentence reduction or other benefits, but also cases where defendants are maliciously accused for sexual offenses. The first kind of cases are arguably better covered by the third type of wrongful convictions factor, while the latter kind forms a substantively distinct set of cases (Naughton 2007: 63).

The fifth factor covers a wide range of questionable forensics, which include both pseudoscientific practices (e.g., hair analysis or bloodstain pattern analysis) or questionable science practices (e.g., bad fingerprinting or over-testifying to the probative character of

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‘Task-related rule-breaking’ is ‘for the purpose of acting in a manner that contributes to the lawful police task’ (van Halderen, 2019: 299)

<https://www.ou.nl/-/promotie-taakgerelateerd-ongoorloofd-handelen-door-de-politie>

Foley, 2000 – 77% of police officers indicated perjury would likely be committed in response to vignettes

<https://www.ojp.gov/ncjrs/virtual-library/abstracts/police-perjury-factorial-survey>

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⁷ For an analysis of the Lindbergh case, see Kennedy 1986.

⁸ Note that construing this category in terms of a faulty and sometimes outright wrongful collection and/or abuse of evidence would imply that the compliant and coerced confessions included in the second (official misconduct) category would have to be moved to this third category. Importantly, official misconduct is not always ill-willed, as van Halderen & Koltoff 2018 show in their study of police officers who break or circumvent the law because of otherwise morally commendable aims.

evidence, as well as misinterpreting or misrepresenting it during trial proceedings) (Leo & Gould 2009; Gould & Firman 2013).⁹

The sixth factor points to various inadequate lawyering and defective legal representation practices. As described by Turow & Scheck (2017), such practices include “defense lawyers who failed to present defense witnesses (often to establish/confirm alibi), failed to seek DNA testing or have serology testing done to try to exclude the client, failed to object to prosecutor arguments or to evidence introduced by the state and failed to interview witnesses in preparation for trial or to cross-examine state witnesses” (207-208).¹⁰

The seventh factor is what Firman and Gould (2013) call tunnel vision – viz., a combination of biases (e.g., confirmation bias) and attachment to a theory of the case early on in the investigative process that ultimately leads to an inaccurate adjudicative decision. Upon closer examination, this factor seems to be a combination of the third and fifth factor rather than a sui-generis one.¹¹

An increasingly recognised final factor is implicit and explicit forms of racial bias, as well as more institutionalised forms of racism. A 2017 report found that 47% of the exonerees whose cases appeared in the National Registry of Exonerations were Black, despite Black people comprising only 13% of the U.S. population (Gross, Possley, and Stephens 2017). While the relationship between race and wrongful conviction is complex, and there are overlaps with other categories—e.g., the tendency to make an error recognising the face of a person of a different race can contribute to mistaken eyewitness identification—this factor needs to be examined and addressed in its own right, and its weight assessed across the relevant jurisdictions.¹²

When deciding how to tackle wrongful convictions, it is important to note that the factors listed above are, strictly speaking, correlates, not causes of wrongful convictions. Here, Firman and Gould (2013) compare what distinguishes “near misses” (i.e., cases where wrongful convictions were almost, but not actually issued) from wrongful convictions. Based on US data, they conclude that a weak or otherwise inadequate defence, an evidentially weak

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⁹ Estimates of the magnitude of this factor vary, but a rough indication is that 52% of wrongful convictions dealt with through Innocence Projects are caused by faulty applications or interpretations of forensic science (here, see <https://innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics/>, accessed December 2022).

¹⁰ Note that, on a capacious understanding of officialdom, criminal lawyers are criminal justice officials, and so this factor collapses into the third (official misconduct) one. For an analysis of the prevalence of inadequate defense as a factor contributing to wrongful convictions, see West 2010.

¹¹ Another factor not included in this standard list is the type of legal system (i.e., adversarial vs. inquisitorial, as discussed by Vidmar & Coleman 2014).

¹² On racial bias and stereotype threat(s), see also Najdowski 2011, 2014.

indictment case, as well as misconduct by prosecutors (e.g., their failure to hand in the required evidence to defense lawyers) are the three most important causes why wrongful convictions happen.

The focus on both causes and correlates is important for guiding how government institutions deal with wrongful convictions. Causes matter for reducing the likelihood that similar cases occur in the future, which can be best done *via* various reforms of the criminal justice system, most importantly at investigative and adjudicative stages.¹³ Correlates count for the design of general policies whereby governments deal with wrongful convictions. Given their *legal* relevance, they inform what governments need to systematically address when justifying exoneration decisions, as well as the considerations that determine the compensation schemes to which wrongfully convicted defendants are entitled, and for mapping the considerations that need to be included in the apology statements these defendants are owed.¹⁴

However, the institutional responses driven by general causal or correlative accounts are inadequate when it comes to dealing with cases of wrongful conviction. This is because, while to some extent similar, the injustices incurred by wrongly convicted offenders, the victims of the offenders gone unpunished, as well as by their families and friends, need to be recognised in their own terms, and arguably warrant a duly *individualised* response from the state. Given basic rule of law requirements (e.g., equal treatment, legal certainty), as well as more mundane practical limitations (e.g., budgetary constraints), it seems that the standard instruments whereby states respond to wrongful convictions—namely, exoneration decisions, compensation packages and formal apology letters or declarations—are either largely insufficient or inappropriate for providing each wrongful conviction case with the individualised response it deserves.

What is missing, in other words, is the morally felicitous situation displayed in the Cotton-Thompson case—namely, a response that is adequately adapted to the particulars of the case at hand. In the two following sections, we analyse whether and, if so, how a more systematic state-led restorative justice approach can offer the resources for fostering such situations without subverting them.

3. Institutionalised Restorative Justice For Wrongful Convictions?

¹³ Firman & Gould (2013) outline some reform proposals, such as establishing clear checklists at the and introducing forensic testing (most notably, DNA tests) early on during the investigative stage, and establishing open file discovery practices, whereby *all* the evidence is simultaneously available to both prosecutors and defense lawyers.

¹⁴ For benchmark state treatments of wrongful convictions as a matter of general policy, see Huff & Killias (2013).

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In his essay, “Conflicts as Property,” Nils Christie (1977) scathingly describes the state control of criminal justice processes as a sort of theft: The state steals conflicts whose rightful owners are victims and offenders. When the concept of restorative justice began its skyrocketing rise in the 1990s and early 2000s, Christie’s essay was often considered one of the intellectual bases of the movement. As Christie suggests, restorative justice is the kind of justice that victims and offenders would **want** as an alternative to state-controlled criminal justice, a form of justice more therapeutic and humane than traditional prosecutor-driven processes. It is thus not without some irony that restorative justice has easily found a home as a branch of state criminal justice systems; “the *idea* of restorative justice has proved enormously popular with governments,” Daly (2002: 57, original italics) observes. Authors such as Pali and Maglione (2021) have urged restorative justice advocates and practitioners to “reflect more critically on the long-term effects of handing over an originally community-based, informal and radical justice practice to the Leviathan” (see also Maglione 2020).

In the wrongful conviction context, restorative justice has not been institutionalised by the state in the way it has been in other contexts. Again, restorative justice after a criminal exoneration is extremely rare, and the state is not at the helm of current restorative justice initiatives. Therefore, this is a context where there is a choice: To institutionalise or not to institutionalise? In this section, we consider the arguments on both sides of this question. After that, we offer some tentative suggestions about how restorative justice should be institutionalised in the wrongful conviction context.

Why would the state’s institutionalisation of restorative justice following wrongful convictions be desirable from a justice standpoint? First, there is **much** residual suffering that a criminal exoneration, even when accompanied by **proper** compensation and apology, does not eliminate.¹⁵ For a crime victim, it can be shocking to receive news that DNA testing has cleared the name of the person believed to be the perpetrator of horrific personal violence, or that there have been new revelations about the fabrication of past **evidence**.¹⁶ If one has additionally identified the wrong person as an eyewitness, there is the guilt of being both

¹⁵ For a good overview of the practice of paying compensation to wrongfully convicted persons, see Campbell (2019). In practice, though many countries recognize the international human rights law provision to pay redress to exonerees, many exonerees are never paid; when they are, this is only after extremely long wait periods and amounts are often insufficient. In his memoir, exoneree Ronald Kitchen (2018) describes the lengthy and oftentimes demoralizing process of seeking compensation from Chicago for his experience of police torture and wrongful conviction. For the argument that holistic services, and not just monetary compensation, are owed to exonerees, see Ambrust (2004) and Chunias and Aufgang (2008).

¹⁶ For an in-depth qualitative analysis of the experiences crime victims undergo in wrongful conviction cases, see Cook 2022.

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complicit in the wrongful punishment of an innocent person and of making a mistake that has perhaps enabled a violent offender to harm others. The act of formally exonerating the wrongfully convicted person does not necessarily bring closure to any of these experiences. For an exoneree, it is natural to want answers beyond the state's formal recognition that one was convicted wrongfully. It is difficult for anyone to reenter the "free world" after a long prison stay (O'Brien 2001), but there are unique emotions and experiences that attend serving a long prison sentence for a crime one did not commit (Thompson-Cannino, Cotton, and Torneo 2009; Kitchen 2018; Bazelon 2018). It is natural to experience an extreme loss of trust in a society that long denied one's protest of innocence. Crime victims and exonerees, as well as their families and other supporters, are parties who can help each other make progress in their healing processes. With the state institutionalisation of restorative justice after a wrongful conviction, there is the ability to cast a wider net and bring more parties affected by a wrongful conviction to the table. If a team of state-funded restorative justice practitioners were routinely involved after every criminal exoneration, this would greatly expand access to restorative justice services.

Second, obtaining answers and, insofar as possible, closure in the wake of a wrongful conviction experience is costly when it comes to finances, time, as well as cognitive and emotional labor, in ways that are practically prohibitive and/or morally inappropriate when considered from the standpoint of the wrongfully convicted defendant or the crime victim in the erroneously decided case.¹⁷ The state could step in to prevent or cover all or some of these costs.

Third, there is a certain sense in which the state institutionalisation of restorative justice after a wrongful conviction fits in with broader ideas about moral responsibility. In Section 1, we identified a number of causal factors prevalent in wrongful conviction cases, including false confessions, questionable forensics, police and prosecutorial misconduct, and inadequate legal representation. With each of these factors, the state itself is the party who is ultimately responsible in many cases. When individual officials acted negligently or intentionally committed acts of misconduct, there is sometimes a tendency to place all the blame on the officials as "bad apples." However, institutional culture can also play a role in official misconduct; from a victim's perspective, it can also be significant that the state is the party in whose name the officials were acting and the source of the authority wielded by the officials

¹⁷ Bazelon (2018) underlines that restorative justice initiatives are often sustained at the expense of exonerees, and that raising awareness about specific wrongful convictions risk exposing the exonerees to media exploitation, which further argues for the state's assuming some of the burdens associated with the restorative justice process.

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Commented [JP48R47]: Thanks!

(Page 2019a; 2022). Moreover, when the causes are systemic and result from how the actions of individual officials intersect and compound, as theorists of corporate agency argue, the state bears moral responsibility as the locus of the structural processes at work. This is “many-handed” wrongdoing, in Dennis Thompson’s phrase, that navigates the state’s decision structures (Thompson 1980; Pettit 2007; Page 2019b). Accordingly, there’s an important sense in which we might think of a wrongful conviction as the state’s moral “mess.” A just response is owed to the parties affected by a wrongful conviction, and because of the state’s moral responsibility, it is the entity that owes a just response to these parties. If we think that restorative justice should be part of a just response from the state—imperfect though restorative justice processes can be—then it falls on the state to institutionalise it. More aspirationally, we might think of institutionalised restorative justice following a wrongful conviction as part of a broader project of fostering accountable practices within the criminal justice system.¹⁸

However, there are also a number of downsides to institutionalised restorative justice in the wrongful conviction context. First, comparing the idea of a state post-wrongful conviction restorative justice process to the kind of restorative justice processes facilitated by Healing Justice, one might wonder about the moral standing of the state to get involved in exonerees’ and crime victims’ healing journeys. The state may have created the moral mess that exonerees and crime victims find themselves in, but one might worry that ideas about the state’s responsibility provide cover for restorative justice’s being controlled by the state—à la Christie (1977), the state could be stealing from the victims yet again. On this view, perhaps the state should provide funding to make sure that organisations like Healing Justice are well-financed, and exonerees should also be adequately compensated, but the state may lack legitimacy to try to lead the response for the parties harmed by a wrongful conviction. Some messes are best left to someone else to clean up besides the party most responsible.¹⁹

Second, one of the major critiques of restorative justice is its inattention to power dynamics that can undermine restorative justice’s aims (e.g., Delgado 2000: 760; Johnstone 2002: 28-29; Cunneen and Hoyle 2010: 150-156; Lyubansky and Shpungin 2016). This critique would seem especially important in the wrongful conviction context, since the state provides both the forum for a restorative justice process to take place and state representatives are among

Commented [49]: Could you expand on this? It is not self-explanatory (I see Jennifer wrote on the subject)

Commented [JP50R49]: Sure, good idea! I’ve expanded the text and added a few additional citations.

Commented [51]: bit informal

Commented [JP52R51]: “Moral mess” is idiomatic and used by other authors, but if it sounds funny, happy to put it in quotes!

Commented [53]: Interesting - I wonder if you could expand slightly on this important point

Commented [JP54R53]: Great - we decided it was best to cite other work on this topic because it is a huge subject and we don’t want to commit to any one view of what accountability looks like in criminal justice systems.

Commented [55]: please do not use straight apostrophes

Commented [JP56R55]: A result of writing in Google Docs then switching to Word! We used find + replace to fix... hopefully all instances were caught.

¹⁸ Many of the essays collected in Stenning (1995) revolve around the theme of creating and maintaining accountable criminal justice institutions. Prenzler’s (2021) monograph is devoted to the theme of democratic accountability in criminal justice systems.

¹⁹ For discussions about the state’s standing and/or legitimacy to correct or sanction the wrongs that it committed or contributed to, see, for instance, Duff (2001) and Shelby (2017). For a critique of legitimacy-based views, see Poama (2021).

the parties whose neglectful or blameworthy actions contributed to the wrongful conviction. An important institutional design feature of post-wrongful conviction restorative justice should thus be making restorative justice facilitators as independent from the state as possible, putting institutional safeguards in place so that state representatives are unable to skew the process in the state's favour. Here there is much to learn from the institutional design of independent agencies that oversee police misconduct, which are typically seen as more satisfactory than internal oversight mechanisms which allow the police to shape a self-favouring narrative (Walker 2000; Katz 2015). However, it is worth pointing out here that in restorative justice processes, an offender may be motivated to participate in restorative justice because the court sentencing alternative is highly unappealing. An offender may therefore have incentives to say what the mediator and victim want to hear. At the same time, they also have important personal stakes in the process. This arguably creates an opening for restorative justice to reach them in an emotionally meaningful way, even if this was not their original motivation for participation. By contrast, if state representatives who contributed to a wrongful conviction are brought into a restorative justice process and aren't at the same time facing sanctions as a possibility, it cannot be assumed that a personal sense of remorse will produce the kind of response that helps exonerees and crime victims heal. If state representatives deny responsibility and are uninterested in playing a role in repair, this could be worse than a scenario where there was no restorative justice process, particularly if exonerees and crime victims went into the process expecting a healing outcome.

Third, there's the related issue of just how diffuse individual responsibility can be in the wrongful conviction context. For example, if a factor in a wrongful conviction is bad forensic techniques, it is significant that these techniques were developed by a wide range of actors—some identifiable, some not—and used in a particular case because of this being normal at that particular place and time.²⁰ When responsibility is diffuse, it may be a genuine question—and ultimately, a judgment call—as to which parties are most appropriate to involve in a restorative justice conference. Relatedly, in the victim-offender mediation context, individuals are typically only seen as accountable for what they themselves did. But in the wrongful conviction context, it may be necessary and appropriate for state representatives to shoulder a broader responsibility than that rendered by their own individual actions. After all, they are representatives of the state, and when the reasons for a wrongful conviction are

Commented [57]: Are there any learnings from, for example, state-led responses to police misconduct and problems caused by the lack of independence of the agencies responsible?

Commented [JP58R57]: Yes, definitely a good connection to make here

Commented [PA(59): Replaced mediation with the more general restorative justice processes.

Commented [60]: slightly cumbersome wording

Commented [JP61R60]: Fixed

²⁰ Though we do recognize the possibility that a forensic technique widely considered to be dubious is used to provide evidence in favour of a preconceived outcome.

extremely structural in nature, someone needs to take responsibility on the state's behalf. However, it may be difficult to find state representatives who are willing to take responsibility in this way.

Fourth, we might question why states might want to institutionalise restorative justice after wrongful convictions. Is it because of the positive role restorative justice can play in exonerees' and victims' healing processes? Or is it a replacement for concrete measures that can help an exoneree rebuild their life after prison? Oftentimes exonerees have an extremely difficult time securing adequate financial compensation from the state. Ronald Cotton was originally offered a \$5,000 payment for the entire eleven-year period he spent behind bars. When Cotton and his advocates fought back, North Carolina relented and agreed to \$10,000 per year of lost freedom (Thompson-Cannino, Cotton, and Torneo 2009: 230, 257). Legal scholars, alas, have argued not only for monetary payments to wrongfully convicted persons, but also for more comprehensive post-release services (Armbrust 2004; Chunias and Aufgang 2008). As part of a restorative justice process, state representatives might agree to monetary payments and holistic reparative measures, and later on make good on what an exoneree was promised. However, if redress provisions were left solely to restorative justice processes to determine, one might imagine a pattern where emotionally vulnerable exonerees agreed to much less than a compensation statute might entitle them. Thus, a condition of institutionalised restorative justice should be a guarantee that exonerees receive adequate compensation and holistic redress measures—in keeping with international human rights law provision that signatories to the International Covenant on Civil and Political Rights (ICCPR) have agreed to, recognizing a state obligation to pay exonerees compensation (Campbell 2019).²¹ Restorative justice cannot be a substitute for reparations.²²

4. Restorative Justice: A Quasi-Institutional Approach

Given the potential worries raised by the idea of institutionalised restorative justice after wrongful convictions, one might be tempted to say that this is a context where there is a much stronger case for the involvement of organisations like Healing Justice rather than the state. However, in our view, the state should play a role in restorative justice after wrongful convictions, but only in a suitably limited way. The state should discharge its responsibility for

²¹ See also footnote 14.

²² See the report "Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalen Restorative Justice Scheme" for more on this point (Tyndall 2017). We thank Ian Marder for this reference.

Commented [62]: though, I may add, this is where RJ in the WCs context holds a radical promise - promoting bottom-up state accountability

Commented [JP63R62]: I see this point, but perhaps we are more pessimistic than you about the transformative possibilities of RJ when it comes to state misconduct. We left the text as is, but if there is something you'd like us to add, happy to make a change.

Commented [64]: interesting - I would specify what type of reparations are you thinking about: financial?

Commented [65R64]: Aren't compensation and reparations outcomes that belong to the restorative justice processes?

Commented [JP66R64]: In the text, we say "adequate compensation and holistic redress measures," so not just financial - I've added a footnote to reference our previous new footnote.

Leaving compensation and reparations to RJ processes to determine leaves too much to chance... I've added a line about the ICCPR in the text.

Commented [67]: There is learning here from recent efforts to take a 'restorative' (in name only?) response to the Magdalene Laundries and, separately, mother and baby homes in Ireland I think. See here on the former:

<https://www.ombudsman.ie/publications/reports/opportunity-lost/Magdalen-Scheme.pdf>

Commented [JP68R67]: Thank you for this reference!

a wrongful conviction²³ by facilitating the creation of and, if needed, serving the administration of a state-funded independent restorative justice body. The purpose of this body would be to systematically make contact with exonerees and crime victims after convictions are overturned, letting them know about what restorative justice is, and if there is interest, working with them as restorative justice facilitators (or if they prefer, referring them to a non-governmental organisation like Healing Justice). We call the idea behind a state-funded independent restorative justice body a “quasi-institutionalisation” approach. This approach posits that there is a role for the state to play in institutionalising this body, but also stresses the importance of strict constraints and regulations so that the state cannot influence or control its management and day-to-day operation. The concept of quasi-institutionalisation is thus in keeping with authors who worry about the gap between the theory and practice of restorative justice that arises from the way in which state actors institutionalize restorative justice processes (Marder 2020; Pali and Maglione 2021; Maglione 2020).²³ Importantly, we should note, a quasi-institutional restorative justice body would only be appropriate if there are already firm measures in place that ensure exonerees receive adequate compensation and holistic re-entry services.

One way of conceiving of a quasi-institutional restorative justice body would be to draw on Christie’s (1977) claim that managing crime-related conflicts should be, as much as possible, in the hands of citizens and, in particular, of those directly affected by the said conflicts—in this case, the wrongly convicted defendant and the victim of the offence. The persons in charge of initiating, conducting and completing the restorative justice process would be trained restorative justice facilitators rather than state officials.²⁴ It would be particularly fitting for exonerees who have undergone restorative justice training and are interested in a career helping others in their position to fill these paid roles.²⁵ Besides providing the funding needed to facilitate restorative justice processes, the main role for the state would be to securely provide the facilitators with information about the wrongful conviction case and, whenever

²³ See Marder (2020: 521): “Unless we can mainstream restorative justice in a manner that disrupts the ultimate authority of the state, we must build the state and state actors into the framework that underpins its study and implementation, and into the benchmarks against which we set our expectations and measure its success.”

²⁴ For a discussion about political strategies for securing and promoting ordinary citizens’ participation in restorative justice practices, see Dzur (2010).

²⁵ One worry here might be that asking exonerees and offense victims to serve as facilitators—even though they are paid—is either supererogatory or wrong. This worry can be diluted if we accept the argument that victims of injustices are epistemically privileged with respect to the kind of injustices they incur, and that epistemic privilege generates special obligations to assist other similarly situated victims. This argument is developed by Vasanthakumar (2018). It is also important to point out that no exoneree or offense victim would be pressured into the facilitator role. Instead exonerees and offense victims would have the first priority for these roles should they want to take them.

Commented [69]: Not sure what you mean here - seems you're entailing responsibility for providing RJ in case of WCs, but what about the responsibility for the WC you discussed earlier on? I guess there is need of a clarification here

Commented [PA(70R69)]: See fn.

Commented [71]: What about e.g. prosecutors participating as offenders? What about the state providing compensation, monetary or otherwise, or otherwise being active in changing things so it doesn't happen again? What about a role for some sort of state-funded but accountability oriented body e.g. an ombudsman?

Commented [JP72R71]: These are interesting ideas but we are getting close to the word count limit and I think it would involve adding a lot to expand. So we (1) changed “the state’s role is limited to...” to “the main role for the state” to keep it open whether there are other ways in which the state could be involved, and (2) added the footnote “We leave it open as to whether there other ways for the state to be involved that fits in with a quasi-institutionalization approach.”

possible and desirable, with identifying other victims of wrongful convictions, as well as members of their families or friends who could help facilitate the restorative justice process.²⁶ The state thus discharges its responsibility for a wrongful conviction by [displacing](#) and reducing the various transactional costs—in particular, time and money—that restorative justice demands.²⁷

There are many precedents for state-funded bodies that operate independently of the state system, and whose role is to tackle state wrongs. One example is that of “Aboriginal patrols” in Australia. Aboriginal people in Australia had long experienced a range of inequalities within the criminal justice system, including an alarming number of deaths in [custody](#). A Royal Commission report on the matter recommended the formation of Aboriginal patrols, which would aim at reducing contact between Aboriginal individuals and the Australian criminal justice system (see Nagle and Summerrell 1996). Patrick Sharkey (2018: 175-179) spent time with members of the all-Aboriginal Nyoongar Outreach Services, which operates in Perth, Australia. Members of the patrol are trained in conflict resolution, and their mission is to walk the streets offering help to parties who need it. Sharkey describes the agency as operating “out of a beautiful office building, with updated conference rooms for team planning, whiteboards with schedules for the night, and a large garage holding a fleet of shiny white vans with the organisation’s logo on the sides.” It “does not have the feel of a struggling social service agency; it has the atmosphere of a startup, where every member of the team is energised and motivated by a common mission,” Sharkey writes.

Arguably, one reason why the Nyoongar Patrol is so [effective](#) is the model of the state financing an independent agency in an area where the state has little legitimacy—this seems to be Sharkey’s view, at least. When volunteer-based organisations and nonprofits arise to meet the needs of struggling members of a community, there is often the problem of wanting to do so much more than limited resources allow; frustration and burnout are common (Kanter and Sherman 2016, Ch. 1). This issue is largely avoided if an independent agency is well-resourced like the Nyoongar Patrol. One can similarly imagine an independent post-wrongful conviction restorative justice body or network that has the resources it needs to do meaningful work, while not triggering the same legitimacy worries as a one deeply embedded in the normal operations of the state criminal justice [system](#).

²⁶ We leave it open as to whether there are other ways for the state to be involved that fits in with a quasi-institutionalization approach.

²⁷ Secure provision of information about the wrongful conviction case and about the identity of other relevant actors means that sharing this information is strictly subject to the consent of the directly affected parties (i.e., wrongfully convicted offender, victim of the offense, and so on).

Commented [73]: interesting

Commented [74]: ref

Commented [JP75R74]: Added

Commented [76]: not sure you provided evidence of its effectiveness though

Commented [JP77R76]: You’re right; I clarified that Sharkey thinks this

Commented [78]: this section seems rather unreferenced

Commented [JP79R78]: It was intended as an expansion of Sharkey’s point about the patrol “having the atmosphere of a startup.”

However, added a reference about burnout!

One of the biggest questions concerning a quasi-institutional post-wrongful conviction restorative justice body is the role of individual state officials as bearers of responsibility. In his memoir—jointly-authored with Jennifer Thompson—Ronald Cotton describes the frustrating experience of encountering Luke Turner, one of the prosecutors who pursued Thompson’s rape case against him, around town. One time, noticing Cotton at a convenience store after the clerk made a remark, Turner “quickly turned around and put some money down on the counter before walking out. No apology, nothing. He simply got into his black Mercedes and sped off,” Cotton recounts (Thompson-Cannino, Cotton, and Torneo 2009: 261). What should be the role of individuals like Turner in a quasi-institutional restorative justice process?

An important role for independent restorative justice facilitators would be to identify particular state officials involved in a wrongful conviction and formally discuss the concept of restorative justice with them. The facilitator would then have the weighty job of determining whether involving a given official would help produce a good restorative justice outcome or if it would be counterproductive. If an official is already remorseful and carries a sense of responsibility for what happened, then they would be an obvious candidate for restorative justice. Officials who exhibit indifference, or react arrogantly and defensively, require a restorative justice practitioner’s sensitivity to the dynamics of the situation. Perhaps spending time talking to this official over the course of multiple preliminary meetings would prove that they are a good candidate for restorative justice after all or other parties would upon preliminary consultation consent to involving such officials despite their problematic attitudes. Or perhaps the conclusion would be that it is best to leave this official out of the process entirely. Restorative justice is not for everyone.²⁸

Another function of independent restorative justice facilitators would be to find officials willing to take responsibility on the state’s behalf for broader structural factors leading to a wrongful conviction. Ideally, this should be someone very familiar with the details of an exoneree’s case—it would be unsatisfying for a mayor or government council member to pop in for a photo opportunity and not be able to give the exoneree and crime victim answers.²⁹ Perhaps the judge who overturned the conviction would be a fitting representative of the state

Commented [80]: Or the facilitator would ask the other parties if they wanted this person to participate given their attitudes - usually best practice is that one party's indifference would be communicated to the other party to inform if they still want to do RJ, rather than the facilitator making that call for the parties

Commented [PA(81R80): Incorporated the comment in text. Thanks!

Commented [82]: I agree that the PR photo idea is terrible, but are we sure that all the wrongfully convicted would reject such public or mediatic attention? And what about highly formalised rituals with state officials, mayors, or whoever is in a position to apologise officially?

Commented [PA(83R82): Yes, added this in fn. 28. Thanks!

²⁸ This might require a set-up that is structurally similar to restorative justice practices where offenders are absent and crime victims (in our case, wrongful convictions victims) engage only with facilitators and/or with other victims who have incurred similar offenses. For a discussion of this, see Walker (2004).

²⁹ Note that not all forms of media attention are undesirable – in particular, press conferences or other public appearances might play an important role in providing wrongfully convicted defendants with the recognition they are entitled to from the state *if* such public events are duly constrained by those defendants’ validly given consent.

in this context, or someone from the prosecutor's office who appreciated the weakness of the state's original case against the exoneree.

[There] might be situations where no criminal justice official directly involved in the wrongful conviction case is willing or able to participate in the restorative justice process. But even in such cases, it might still be possible for wrongfully convicted defendants and/or the victims of the offense to get into contact and come in dialogue with officials involved in comparable wrongful conviction cases. Such a proxy set-up has been successfully applied in so-called surrogate restorative justice circles that bring together actual offenders and surrogate victims or actual victims and surrogate offenders.³⁰

[Here], like in any other restorative justice process, it is important for a facilitator to manage the expectations of the participants before the process formally gets started.³¹ This is clearly important in the wrongful conviction context. It can be risky for exonerees and crime victims to presume that a transformative healing outcome always occurs, and in the wrongful conviction context, like any restorative justice context, it might not. The reason for quasi-institutional restorative justice is to provide an *opportunity* for participants to heal and obtain a sense of closure. After the traumatic injustice of a wrongful conviction, providing such an opportunity may be the best that a state aiming for a just response can do.³²

5. Conclusion

In this chapter, we argued that restorative justice can, if properly designed and implemented, provide an adequate platform for individually addressing the aftermath of wrongful convictions cases—in particular, by offering wrongfully convicted offenders, the victims of the offense, and other relevantly related parties (e.g., family members and/or friends) opportunities for jointly engaging their experiences, as well as for closure in the aftermath of the wrongs they incurred. Such opportunities are now largely absent from the state's institutional responses to wrongful convictions. We have further argued that there are good reasons for *not* putting the state in charge of the restorative justice process—in particular, because of the need to ensure a properly individualised treatment of each case considered in its own right in ways that might

Commented [84]: Yes, this is great and answers some of my previous questions!

Commented [85]: interesting - it looks like the vicarious victim set-up which is increasingly common in various RJ settings

Commented [86]: I am missing from this chapter some information on the needs of those wrongfully convicted - is there any research on e.g. their needs upon being reintegrated into society, the need for acknowledgments but also services and so on, and how RJ could help with this?

Commented [PA(87R86): Relevant ref. included in fn. 32.

³⁰ For a discussion of this, see Umbreit, Coates & Vos (2007)

³¹ On the importance of preparation for restorative justice, see Strang (2002).

³² On the empowering potential of restorative justice, see van Willigenburg (2018), and for a critique of the empowerment argument, see Richards (2011). For an analysis of the needs that wrongfully convicted citizens have following their return to society – in particular needs that are related to social reintegration – see Blackman 2021.

raise equal treatment concerns, and because it is important to keep the ownership of the case in the hands of those directly wronged by erroneous verdicts. Consequently, we proposed that restorative justice in the wrongful convictions context demands a quasi-institutional approach, whereby the state discharges its moral responsibility for a wrongful conviction by displacing and/or reducing some of the transactional costs associated with restorative justice processes, and trained facilitators manage the said processes.

Commented [88]: A very concise conclusion - I would consider reflecting on future opportunities/challenges/open questions related to the implementation of the quasi-institutional approach you have elegantly advocated for

Commented [89R88]: I agree, and I also wonder what parallels can be made here with cases of death of loved ones in prisons, of wrongful accusations (by tax authorities) of communities based on their ethnicity, of medical errors, all cases where the state wrongs someone, with big impacts on their lives.

Commented [PA(90R88): For word-count reasons, we decided to keep this conclusion concise.

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