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# Legislative responses to wrongful conviction: Do partisan principals and advocacy efforts influence state-level criminal justice policy?

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## ABSTRACT

The number of discovered wrongful criminal convictions (and resulting exonerations) has increased over the past decade. These cases erode public confidence in the criminal justice system and trust in the rule of law. Many states have adopted laws that aim to reduce system errors but no study has examined why some states appear more willing to provide due process protections against wrongful convictions than others. Findings from regression estimates suggest that states with a Republican controlled legislature or more Republican voters are less likely to pass these laws while the presence of advocacy organizations that are part of the ‘innocence movement’ make legislative change more likely. We thus identify important differences in the political and social context between U.S. states that influence the adoption of criminal justice policies.

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Why do states differ in their commitment to identifying, preventing, and ameliorating wrongful criminal convictions? Over the last several decades there has been a growing public concern over the possibility that individuals could be convicted and sanctioned for crimes they did not commit (Zalman et al., 2012) and scholarly attention has followed (c.f. Garrett, 2011; Martin, 2001; Huff et al., 1996). This heightened concern has led to the identification of specific public policies and practices that appear to significantly contribute to system fallibility (Free and Ruesink, 2012). In response, advocates for change and legal scholars have advanced a series of legislative changes that can substantially reduce the likelihood of convicting individuals for crimes they did not commit. With these available guidelines, individual states have the ability to institute statutory changes that can begin to reduce wrongful convictions, and also compensate those who are victims of such miscarriages of justice. Such legislative changes are necessary because it is increasingly clear that wrongful convictions do not simply result from chance error by individuals in particular courtrooms, but instead reflect systemic errors (Zalman et al., 2012).

Punishing the innocent clearly violates the conscience of an advanced society. But if these errors are inherently part of our system of justice, there are profound legal implications as well. Indications of flaws in our courts not only erode public trust in the legal system but also reveal, as Martin (2001) so aptly points out, that “a double failure” has occurred such that “not only is an innocent person wronged by the conviction but the guilty person is thereby allowed to go free” (pg. 847). Given such serious consequences, it is not surprising that the media, scholars, advocacy groups and policymakers have been working for many years to expose such cases and to promote criminal justice reforms that make wrongful conviction less likely. Despite such widespread efforts, there are still important aspects of this process that remain understudied. In particular, Leo

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(2005), in his review and commentary on the state of the study of wrongful convictions notes that while lawyers have often written on the topic, social scientists have only just begun to empirically study miscarriages of justice and must continue to focus on organizational, macro-level factors that affect criminal justice practices. He concludes: “Criminologists need to better understand sociologically how the various legal actors promote certain perspectives and ideologies about justice and how, in fact, they deliver justice.” (2016). Leading scholars of wrongful convictions agree that altering policy is a useful avenue for reform (Forst, 2004; Garrett, 2011; Gould, 2008) but it is clear that states vary widely in their willingness to effect legislative change aimed at reducing wrongful convictions. Why is it that some states readily adopt the policy reforms while others appear reluctant to do so? To date, no study has attempted to systematically identify structural conditions within states that make the adoption of public policy designed to reduce the risk of wrongful convictions more or less likely. We begin to fill the need for such research by borrowing theoretically derived explanations taken from previous scholarship on legislative change to isolate the contextual factors that influence the adoption of criminal justice policies related to wrongful convictions across U.S. states. Before we develop these theoretical accounts we first provide a brief overview of wrongful convictions in the U.S. criminal justice system.

## 1. Brief overview of wrongful convictions in the United States

Though Borchard (1932) qualitatively studied the incidence of system errors that led to wrongful convictions as early as the 1930s, the development of DNA technology in the 1980s and the mistakes revealed by testing convicted criminals' DNA evidence to prove their innocence was partly responsible for renewed scholarly interest in wrongful convictions. Dozens of studies have since been published on this issue, many of which attempt to document the frequency of wrongful conviction (e.g. Risinger, 2007 reports that up to 5% of criminal cases have factual errors in them) or the reasons for these mistakes such as eyewitness error (e.g. Wells and Olson, 2003), false confessions (Kassin et al., 2010; Garrett, 2011) or professional errors by members of the criminal justice workgroup (McMahon, 1995). Many of these studies, however, focus on system errors in capital punishment cases even though nearly two thirds of wrongful convictions stem from noncapital violent crimes such as rape or assault (Ramsey and Frank, 2007).

Revelations of criminal justice errors reported in the media increased public awareness about the possibility of convicting an innocent person (Baumgartner et al., 2008). Consider for example, Anthony Porter, a man whose lawyer fell asleep during trial, who was convicted and sentenced to death due to faulty eyewitness testimony obtained through police coercion, who was luckily exonerated just days before his execution due to a pro-bono investigation that revealed the actual perpetrator. Stories like this one made news headlines and were the subject of documentaries that increase public awareness of these miscarriages of justice.

The fallout from these types of mistakes is immeasurable. The immediate actors in the criminal incident, (the offenders, victims, and their families) are burdened with the enormous personal and financial costs of a wrongful conviction; however, there is also an unbearable social price of these mistakes. The public's confidence in the criminal justice system is shaken as they grapple with both the public safety concern that the actual perpetrator is among them, as well as the disappointment in the system's concern with individual justice.

### 1.1. Incidence of wrongful convictions

While it is virtually impossible to know precisely how many innocent people are behind bars, a number of studies have attempted to gauge the frequency of wrongful conviction with estimates ranging rather widely depending on the methodology employed to produce the estimate. Risinger (2007), for instance, examined capital rape-murder cases between 1982 and 1989 and, using DNA evidence, concluded that the innocence rate was at least 3.3% and could be as high as 5%. If we extrapolate Risinger's findings to all felony convictions, there could be as many as 100,000 of the over 2 million currently behind bars that are innocent of the crime. Another study conducted by Ramsey and Frank (2007), used a survey to gauge how frequently police, prosecutors, defense attorneys and judges believe wrongful felony convictions occur in their own jurisdictions. They found that these criminal justice practitioners estimated that between .5% to 1% of all felony cases convicted the wrong person (Ramsey and Frank, 2007), which translates into about 20,000 innocent individuals among the over 2,000,000 serving time behind bars. Beyond pointing to an estimate of the incidence of wrongful conviction, the survey also revealed that these professionals believe that even these rather low figures represent unacceptable error rates and predict that policies intended to reduce them would be helpful and accepted among their peers. Thus it appears that criminal justice professionals are aware of the problem of wrongful convictions and recognize the importance of addressing and reducing them through changes in public policy. Action on this front, however, requires legislative change to remedy the system errors that make wrongful conviction more frequent.

### 1.2. Changes in public policy

In an effort to make wrongful convictions less likely, the U.S. Congress took a stand on the issue by passing the Innocence Protection Act as part of the Justice for All Act (2004). This act granted *federal* inmates the right to petition to use modern DNA testing to fight their conviction, but also provided financial incentives for states that adopt similar legislation. Because

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