

APOLOGY IN THE CONTEXT OF WRONGFUL CONVICTION: WHY THE SYSTEM SHOULD SAY IT'S SORRY

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I. INTRODUCTION

Since 1989, there have been 198 post-conviction DNA exonerations in the United States.¹ Out of that number, fourteen DNA exonerees were at one time sentenced to death or served time on death row. The 198 exonerees spent an average of twelve years in prison each, meaning that since 1989, those exonerated by DNA testing served approximately 2,376 years in prison for crimes that they did not commit.² While it is impossible to calculate how many innocents are currently serving sentences, these limited statistics highlight the fallibility of the United States judicial system. But what is perhaps more shocking than the number of exonerations over the last eighteen years is the frequent failure of the system to acknowledge the mistake and to apologize to its innocent victims.

Apology plays a critical role in helping victims of wrongful conviction reintegrate into society, heal, and restore their faith in the judicial system. Although an apology cannot compensate for what may have been more than a decade of their lives, it can help victims to begin the healing process. Having spent nearly twenty years in prison after being wrongfully convicted of aggravated rape, Larry Fuller was finally released on October 31, 2006 and was officially pardoned in January of 2007. The prosecutor told Mr. Fuller that she was truly sorry for what happened to him. Mr. Fuller commented that the apology provided an “acknowledge-

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¹ The Innocence Project – About Us: Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Apr. 17, 2007).

² At the National Innocence Project Conference in 2004, David Dow, the Texas Innocence Network Director commented, “If there is an error rate of [one percent] that’s still 2,000 people. If there is an error rate of [six percent] which is the error rate we have been talking about at this conference it means that there are 12-15,000 people in Texas alone who are wrongfully convicted.” *AFTER INNOCENCE* (Showtime Networks Inc. 2005).

ment that they cannot deny you.”³ Once he received the apology from the district attorney and pardon from the judge, he commented that he felt as though “the stigma [was] gone” and highlighted the importance of the fact that the apology was given in public with witnesses present.⁴ Mr. Fuller’s case shows that when an apology is offered in the context of a wrongful conviction it can be a powerful first step in reconciling exonerees with the injustice they have endured.

Unfortunately Mr. Fuller’s case is not the norm. Many times prosecutors, police, and judges are reluctant to apologize to the victims of wrongful conviction, refusing to believe or acknowledge that someone they convicted or helped convict is actually innocent. After spending twelve and a half years in prison for a crime he did not commit, Scott Hornoff, a Rhode Island police officer, was released with no apology from the judge, District Attorney or the Attorney General. Instead, he commented, “I actually think they were upset at me for being innocent.”⁵

The first section of this Note will discuss apology as a psychological tool to heal victims, offenders, and the community. The second section will examine the use of apology in analogous contexts to that of wrongful conviction. The third section will explore the potential or perceived disadvantages of offering an apology in the criminal context. The fourth section will detail the desire for apology among the wrongfully convicted as well as give examples of situations – like Mr. Fuller’s – in which an apology has been tendered and has helped victims reintegrate into society. Finally, I will conclude that the state has a moral obligation to offer an apology to the wrongfully convicted. Whether the apology be public or private, an apology can be an integral part of exonerees’ reintegration into society. Moreover, it can help the members of a highly stigmatized group to reconcile themselves with their communities - communities that have made them feel unsafe, alienated and afraid.

³ Telephone interview with Larry Fuller, Innocence Project Exoneree, in Texas (Feb. 19, 2007).

⁴ *Id.*

⁵ *AFTER INNOCENCE*, *supra* note 2.

II. APOLOGY AS PSYCHOLOGICAL TOOL: CAPACITY TO HEAL AND RESTORE COMMUNITY

Apology is defined as “[a]n explanation offered to a person affected by one’s action that no offense was intended, coupled with the expression of regret for any that may have been given; or, a frank acknowledgement of the offense with expression of regret for it, by way of reparation.”⁶ Sociologist Nicholas Tavuchis suggests that, at a minimum, an apology must incorporate “acknowledgement of the legitimacy of the violated rule, admission of fault and responsibility for its violation and the expression of genuine regret and remorse for the harm done.”⁷ Apologies can take many forms. They can be private or public, written or verbal, or even nonverbal in certain contexts.⁸ Whatever form apologies take, they have the capacity to affect the lives of both the recipient and the giver of the apology.

For victims, apology has the capacity to heal psychological wounds in a variety of ways. Apology can help victims regain a sense of power, restore dignity, and assure them that the wrong that they experienced will not reoccur.⁹ Moreover, apology forces offenders to acknowledge their offense thereby minimizing the chance that they will re-offend or not recognize the magnitude of the harm they have caused.¹⁰ Ultimately both of these functions of apology combine to help the community at large.

In their article on apology, Stephanos Bibas and Richard A. Bierschbach recognize that crime victims’ wounds are the greatest and therefore require the most healing.¹¹ An apology can prove to be an integral step in the healing process. As psychologist Aaron Lazare notes in *ON APOLOGY*, “Apologies have the power to heal humiliations and grudges, remove the desire for vengeance, and generate forgiveness on the part of the offended parties. . .”¹² When an injustice occurs, the victim may feel anything from

⁶ OXFORD ENGLISH DICTIONARY, 553 (2d ed. 1989).

⁷ Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 468–69 (2003).

⁸ AARON LAZARE, *ON APOLOGY* 21 (2004).

⁹ Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1274 (2006).

¹⁰ Erin Ann O’Hara, *Victims and Prison Release: A Modest Proposal*, 19 Fed. Sent. R. 130 No. 2, 4 (Dec. 2006).

¹¹ Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 87 (2004).

¹² Lazare, *supra* note 8, at 1.

slighted, insulted, and humiliated to devalued as a human being. Victimization may even make some individuals experience self-loathing if they perceive that they have somehow allowed themselves to become victims,¹³ that it is they who are in fact to blame. Apology offers a chance for victims to recognize the fact that they are not at fault for the wrongs that they suffered. This understanding can restore self-respect and dignity by validating the victim's experience.¹⁴

Apology also has the capacity to empower victims by shifting the power dynamic between the victim and the offender. Whenever a crime is committed, it results in an inequity in the relationship between the wrongdoer and the offended party.¹⁵ The apology process can thus be viewed as an exchange of humiliation and power.¹⁶ When an apology is offered, the offender admits a mistake placing him/herself in a vulnerable position.¹⁷ This shift in power can be humiliating for the offender, while at the same time bestowing the power on the victim to forgive the wrongdoing or, alternatively, not to do so.¹⁸ In this way, apology restores "dignity through a symbolic transfer of humiliation and power."¹⁹ In the medical malpractice context, this transference of power has been shown to provide a health benefit in the facilitation of emotional healing for victims.²⁰ Patients who have been given access to information and an apology have been able to regain a sense of control and empowerment.²¹

For victims, an apology can eliminate fear and take away the desire for revenge.²² When an apology is offered, it provides victims with the belief that the offender will not transgress against the victim or other victims again in the future.²³ In this way, apology re-establishes a sense of safety that was lost after the transgression took place. Furthermore, an apology can allow victims to release

¹³ White, *supra* note 9, at 1274.

¹⁴ *Id.*

¹⁵ Robbennolt, *supra* note 7, at 477.

¹⁶ White, *supra* note 9, at 1275.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1274.

²⁰ Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 *CONN. L. REV.* 667, 686 (2006).

²¹ *Id.*

²² O'Hara, *supra* note 10.

²³ *Id.*

their fear, anger, and bitterness towards the offender and thus move on with their lives.²⁴

For offenders or those who have committed an error, the acknowledgement of legal and/or moral wrong can provide an outlet to express remorse. Offering an apology can prevent an offender from denying or minimizing the harm that he or she has caused.²⁵ Apology also has the capacity to encourage the offender to engage in a good course of future behavior.²⁶ In this way, apology can reduce rates of recidivism more than formal criminal justice alone.²⁷ Although apology does not ensure that an offender will not re-offend, it increases the likelihood of reform. As Lazare notes, “For the offender, [apologies] can diminish the fear of retaliation and relieve the guilt and shame that can grip the mind with a persistence and tenacity that are hard to ignore.”²⁸

Lazare points out that “[t]he result of the apology process, ideally, is the reconciliation and restoration of broken relationships.”²⁹ This reconciliation takes place both between the victim and the offender and also between each of them and the community. When a person is victimized, the entire community suffers. Whenever an individual commits a crime, he or she is ostensibly putting himself or herself above the public mores and norms that define the community.³⁰ As a result, remorse and apology do not just involve individual healing, but also encompass social interactions and relationships.³¹ By apologizing, the victim and, by extension, the community are reassured that “important values are in fact shared and that the offender feels bound by the social contract.”³² In this way, apology can provide the restoration of a moral balance.³³ Archbishop Desmond Tutu describes a similar process in his explanation of the word *Ubuntu* as something that “speaks about the essence of being human.”³⁴ Archbishop Tutu explains:

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Lazare, *supra* note 8, at 1.

²⁹ *Id.*

³⁰ Bibas & Bierschbach, *supra* note 11, at 109.

³¹ *Id.* at 88.

³² Lazare, *supra* note 8, at 66.

³³ Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1138 (2002).

³⁴ *Id.* (citing Archbishop Desmond Tutu, *Without Forgiveness There Is No Future*, Foreword to EXPLORING FORGIVENESS xiii (Robert D. Enright & Joanna North eds., 1998)).

[M]y humanity is caught up in your humanity because we say a person is a person through other persons. . . [W]e set great store by communal peace and harmony. Anything that subverts this harmony is injurious, not just to the community, but to all of us, and therefore forgiveness is an absolute necessity for continued human existence.³⁵

The apology process thus has the capacity to reconcile the victim, offender, and the community.

III. THE USE OF APOLOGY IN ANALOGOUS CONTEXTS

In a variety of contexts, the offering of an apology to victims for past wrongdoings has been critical to their healing. Like the wrongfully convicted, many groups have suffered wrongful detention, abuse, or other offenses at the hands of a large group whether it is a government, a religious or medical institution, or some other organization. In cases where an apology has been denied, victims continue to suffer and may be less likely to consider settlement.³⁶ In other cases, either individual actors or some other third party on behalf of the institution has issued an apology to victims. This apology has the potential to restore dignity through a recognition of the harm that they have suffered which in turn allows victims to regain a sense of power. From a financial perspective, apology has also been shown to encourage settlement over litigation.³⁷ In fact, in some contexts, apology is more important to victims than monetary compensation.³⁸

Recently, Japan's Prime Minister Shinzo Abe refused to acknowledge the role that the Japanese military played in coercing women into sexual slavery during the 1930s and 1940s. Prime Minister Abe's denial prompted criticism worldwide. Historians estimate that at least 200,000 women,³⁹ mostly Chinese and Korean, served as "comfort women" for the Japanese soldiers.⁴⁰ In the fall of 2006, the United States House of Representatives issued a non-binding resolution calling on Japan to "formally acknowledge, apologize and accept historical responsibility in a clear and un-

³⁵ *Id.*

³⁶ Robbennolt, *supra* note 7, at 463.

³⁷ *Id.* at 464.

³⁸ Examples to follow.

³⁹ Norimitsu Onishi, *Denial Reopens Wounds of Japan's Ex-Sex Slaves*, N.Y. TIMES, Mar. 8, 2007, at A1.

⁴⁰ *Japan's Prime Minister: Scarcely an Abe-rration*, ECONOMIST, Mar. 10, 2007, at 37.

quivocal manner for its Imperial Armed Forces' coercion of young women into sexual slavery."⁴¹ In 1993, the Japanese government had issued a public statement acknowledging that the military played a role in coercing women into sexual slavery, but Prime Minister Abe amended the statement in March of this year, stating that there had been no "coercion, like the authorities breaking into houses and kidnapping [women]."⁴² By saying that there was "no historical proof" of coercion, Prime Minister Abe was essentially calling the women liars.⁴³ Despite Prime Minister Abe's declaration that no crime was committed, a private fund was set up to compensate the women in 1995. Although 285 women have accepted money, many others have refused, viewing it as a way for the government to "avoid taking direct responsibility."⁴⁴ One victim, Jan Ruff O'Hern, testified to a Congressional panel in February that "[a]n apology is the most important thing we want – an apology that comes from the government, not only a personal one – because this would give us back our dignity."⁴⁵ Another victim, Lee Yong Soo, said, "The Japanese government must not run from their responsibilities. . . I want them to apologize. To admit that they took me away, when I was a little girl, to be a sex slave. To admit that history."⁴⁶ Besides the personal testimony of the victims, Prime Minister Abe's denial has spawned official protests in China, Taiwan, South Korea and the Philippines, some of the countries from which the sex slaves were taken.⁴⁷ Prime Minister Abe's refusal to acknowledge the wrongs that the women suffered has produced anguish among victims and upheaval in their communities.

Similarly, victims of sexual abuse by Catholic priests have demanded apologies rather than just monetary settlements. Benjamin N. Cardozo School of Law Professor Marci Hamilton commented, "The most valuable benefit from these lawsuits for victims [of sexual abuse] is that the world validates what happened, and it wasn't their fault. That's usually more important to them than money, and they're becoming more innovative about getting

⁴¹ Onisihi, *supra* note 39.

⁴² *Id.*

⁴³ *Japan's Prime Minister: Scarcely an Abe-rration*, *supra* note 40, at 37.

⁴⁴ Onisihi, *supra* note 39.

⁴⁵ *Id.*

⁴⁶ Hiroko Tabuchi, *Prime Minister Denies Women Were Forced Into WWII Brothels*, *WASH. POST*, Mar. 2, 2007, at A09.

⁴⁷ *Id.*

it.”⁴⁸ However, in some cases, based on the advice of their attorneys, Church officials have been reluctant to give an apology. Even when the allegations of sexual abuse had been substantiated, attorneys advised their clients not to apologize to the victims fearing that the apologies could be used in court.⁴⁹ One bishop commented, “We made terrible mistakes. . . attorneys said over and over, ‘Don’t talk to the victims, don’t go near them,’ . . . I heard victims say, ‘We would not have taken it to [plaintiffs’ attorneys] had someone just come to us and said ‘I’m sorry.’”⁵⁰ In the end, by discouraging their clients from apologizing for fear of liability, the attorneys placed the abusers at a greater risk of liability.

While many attorneys in the Catholic Church sex abuse scandal cases discouraged their clients from apologizing, thereby impeding settlement, many legal scholars have argued that apologizing has the capacity to increase the possibility of settlement in lawsuits.⁵¹ Jennifer Robbennolt cites that in the resolution of health care disputes, patients report that they wanted apologies and may have been less likely to litigate if they had received them.⁵² Consistent with this finding, many state legislatures have

⁴⁸ Alan Cooperman, *Abuse Victims Demand More Than a Check From the Church*, WASH. POST, Feb. 24, 2007 at A01.

⁴⁹ Robert K. Vischer, *Legal Advice As Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 249 (Winter 2006).

⁵⁰ *Id.* (citing The National Review Board for the Protection of Children and Young People, *A Report on the Crisis in the Catholic Church in the United States* 121, Feb. 27, 2004, <http://www.usccb.org/nrb/nrbstudy/nrbreport.pdf>).

⁵¹ Robbennolt, *supra* note 7, at 463.

⁵² Jennifer K. Robbennolt, *What We Know and Don’t Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009 at 1019–23 (2005) (citing Kathleen M. Mazor et al., *Health Plan Members’ Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409, 409–15 (2004)). Kathleen Mazor and her colleagues conducted an experimental study of health care plan members’ responses to medication errors. *See id.* The study measured patient’s responses to physician’s making errors in the administration of medication by reading stories that offered a number of different reactions that physicians could make in response to the error. *See id.* The study split the physician’s responses into two categories: “non-disclosure” and “full disclosure.” *Id.* at 1019. In the former, physicians only provided limited information about the error and did not acknowledge any responsibility for it. *See id.* In the latter, physicians explained the error in detail, took responsibility and apologized for the error, and listed what would be done in the future to make sure that it didn’t happen again. *See id.* Those that read the “full disclosure” vignettes stated that they would be less likely to seek legal advice or change physicians and commented that they were more satisfied by the process and both trusted and had fewer negative emotions about the physicians than those who read the “nondisclosure” vignettes. *Id.* In addition, eighty-eight percent of respondents agreed with the statement, “I would want the doctor to tell me that he or she was sincerely sorry” when asked about physician strategy in the event of a medication error, and ninety-nine percent agreed with the statement, “I would want to know something was being done to make sure it didn’t happen to someone else.” *Id.* at 1019–1020.

enacted statutes that protect the admissibility of apologies in court in order to protect and encourage them.⁵³ If apologies are protected, proponents of these statutes suggest that defendants will be more likely to offer them in health care and other disputes.⁵⁴ Apart from legal benefits, supporters of these statutes highlight the role of apologies in repairing relationships, offering emotional and psychological benefits, fulfilling the need to make reparations and restore equity, and facilitating forgiveness and psychological growth.⁵⁵

IV. THE PERCEIVED DISADVANTAGES OF APOLOGY: FEAR OF LIABILITY AND OTHER FACTORS

An apology is often not offered when an injustice or mistake has occurred because of a fear of liability. Catholic Church officials,⁵⁶ health care providers,⁵⁷ and even some state legislators⁵⁸ have either not offered an apology or been counseled not to offer an apology in order to insulate themselves from an admission of guilt that would subject them to liability. Though liability concerns

⁵³ Robbennolt, *supra* note 7, at 462 ((for example, as Robbennolt explains, a Massachusetts statute provides that “Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.”) (quoting MASS. GEN. LAWS ch. 233 § 23D (2002))). Robbennolt explains that “[t]his provision renders inadmissible apologies that are expressions of sympathy (e.g., ‘I am sorry that you are hurt’), but does not clearly address the admissibility of more fully apologetic expressions that also take responsibility for the injury-causing incident (e.g., ‘I am sorry that I hurt you’).” Robbennolt, *supra* note 7, at 471. Massachusetts (1986), Texas (1999), California (2000), Florida (2001), and Washington (2002), passed legislation protecting apologies as expressions of sympathy from being admissible at trial. *See* CAL. EVID. CODE § 1160 (West Supp. 1995); FLA. STAT. § 90.4026 (Supp. 2004); MASS. GEN. LAWS ch. 233, § 23D (2002); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 2004); WASH. REV. CODE § 5.66.010(1) (1995)).

⁵⁴ Robbennolt, *supra* note 52, at 1014.

⁵⁵ *Id.* at 1015.

⁵⁶ *See* Vischer, *supra* note 49, at 249–51 (discussing the Catholic Church’s failure to apologize to victims for fear of liability).

⁵⁷ Robbennolt comments that “[h]ealth care providers cite fear of litigation as a major barrier to disclosing and apologizing for medical error.” Robbennolt, *supra* note 52, at 1026. Furthermore, although apology may be viewed as an acknowledgement of guilt, in the medical context, studies have shown that “absence of an apology can be taken as an insult or humiliation and may, in fact, spurn the victim to file a lawsuit.” Lazare, *supra* note 8, at 173.

⁵⁸ In writing about the recent movement for states to apologize for slavery, Stanley Fish comments that, “There is a fear that because an apology is an admission of responsibility for a prior bad act, apologizing might establish a legal or quasi-legal basis for reparations.” Stanley Fish, *But I Didn’t Do It!*, N.Y. TIMES, Mar. 21, 2007, at A21.

may be very real in contexts such as these where statutes have not been passed to protect apologies, liability of state actors is very difficult—if not impossible—to prove in the context of wrongful conviction.

It is very difficult for exonerees to bring action against those who may have contributed to their wrongful conviction due to the procedural safeguards that exist in our current system. Even in cases where victims can clearly attribute the wrongful conviction to law enforcement behavior, substantial legal barriers, namely the doctrines of absolute and qualified immunity, protect law enforcement from liability for damages.⁵⁹ Prosecutors are insulated from liability “for decisions made and actions taken ‘initiating a prosecution and . . . presenting the State’s case,’”⁶⁰ and judges are given absolute immunity for any work that they do in their official capacity.⁶¹ While police officers only possess “qualified immunity”, their mistakes may be immunized if they can show that it was “objectively reasonable for the officers to have believed, even incorrectly, that their behavior was lawful.”⁶² While some wrongfully convicted individuals have been successful in suing state actors for

⁵⁹ Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 164 (2004).

⁶⁰ Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 723–24 (2004) (citing *Imbler v. Pachtman*, 424 U.S. 429, 431 (1978)). In addition, Bernhard notes that states are insulated from suits for damages under 42 U.S.C. § 1983 in both state and federal court unless they waive their immunity and subject themselves to suit. *See id.* As a result, if employees of the state are responsible for a wrongful conviction, the state itself cannot be sued. *See id.* Instead, plaintiffs would only be able to sue individual actors. *See id.* Cities and other municipal entities, on the other hand, can be sued under § 1983 for their employees’ activities, but “only if those activities were both unconstitutional and performed in accordance with the ‘custom’ or policy of the municipality.” *Id.*

⁶¹ *Id.* at 724–25. Bernhard further notes that

[a] prosecutor acting within the scope of his duties as an advocate ‘in initiating and pursuing a criminal prosecution’ is not amenable to suit. The Supreme Court extends absolute immunity to prosecutors acting in the exercise of their discretion in order to protect the prosecutor “from harassing litigation that would divert his time and attention from his official duties” and in order to enable “him to exercise independent judgment when deciding which suit to bring and in conducting them in court.”

Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 90 (1999).

⁶² Bernhard, *supra* note 60, at 725 (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). Bernhard writes that police have no responsibility to investigate alternate evidence that could potentially prove the accused’s innocence or that might point to another suspect as long as the police have probable cause in making the arrest. *See id.* Moreover, since it is often difficult to make a probable cause determination and the courts generally agree that the police should only be held liable when their conduct is clearly proscribed, the courts have concluded that the doctrine of qualified immunity protects the police from suit even when there is only arguable proba-

their wrongful convictions under § 1983 actions,⁶³ the legal barriers described above make damages difficult to recover for many.⁶⁴ As a result, it appears as though indemnification statutes are the only predictable way that a wrongfully convicted inmate would be able to recover.⁶⁵

A number of factors besides the fear of liability may contribute to a prosecutors' reluctance to apologize or to admit the innocence of the wrongfully convicted.⁶⁶ In many cases, prosecutors may not apologize for both professional and psychological reasons.⁶⁷ On a professional level, prosecutors may be loath to apologize for fear of losing their jobs or not being reelected.⁶⁸ Chief prosecutors at the municipal and county levels are elected offi-

ble cause. See Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, *supra* note 61, at 92. In that article, Bernhard explains:

[I]n the typical wrongful conviction case, the existence of probable cause for an arrest, the various immunity doctrines, the time between the errors leading to conviction and eventual release, and the difficulty of establishing ineffective assistance of counsel present insurmountable barriers to a civil lawsuit for damages. On a practical level, lawsuits can be expensive - prohibitively so for plaintiffs who have just been released from prison - and deadly slow.

Id.

⁶³ The "Ford Heights Four" received a \$36 million settlement from Cook County, Illinois after serving a collective sixty-five years in prison for a rape and double murder that they did not commit. Armbrust, *supra* note 59 at 184 (citing Ken Armstrong & Robert Becker, *Record Ford Heights 4 Payout May Not be End*, CHI. TRIB., Mar. 6, 1999, at A1). Rolando Cruz, Alejandro Hernandez, and Stephen Buckley received \$3.5 million from DuPage County, Illinois after being convicted of kidnapping and murder based on alleged police and prosecutorial misconduct. See *id.* (citing John Chase, *Angry DuPage Settles Cruz Suits: 3 Former Defendants to Split \$3.5 Million*, CHI TRIB., Sept. 27, 2000, at A1.).

⁶⁴ Armbrust, *supra* note 59, at 167.

⁶⁵ Evan J. Mandery, *Commentary: Efficiency Considerations of Compensating the Wrongfully Convicted*, 41 No. 3 Crim. Law Bulletin 4, June 2005. According to the Innocence Project website, the following twenty-one states, in addition to the District of Columbia, have compensation statutes of some form: Alabama, California, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Virginia, West Virginia and Wisconsin. See TheInnocenceProject.org, <http://www.innocenceproject.org/Content/309.php> (last visited Apr. 20, 2007).

⁶⁶ See Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. CIV. RTS. L.J. 233, 235 (2002) (explaining that even after DNA testing has proven the innocence of a prisoner, prosecutors refuse to accept the results and rely upon other evidence that supports guilt, or they create a new theory of how the crime occurred (never before put to the judge and jury) to justify the continued punishment of an innocent person.).

Id.

⁶⁷ Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U.L. REV. 125, 130 (suggesting that psychological and professional reasons contribute to prosecutorial resistance to post-conviction innocence claims).

⁶⁸ *Id.* at 151.

cials.⁶⁹ Although assistant district attorneys are not directly elected, they do serve at the pleasure of the district attorney who is an elected official.⁷⁰ Furthermore, some offices may have professional incentives to obtain and maintain convictions.⁷¹ Under these systems, prosecutors may believe that the prosecutors with the highest conviction rates are the most likely to be promoted.⁷² Prosecutors may fear that a mistaken conviction, therefore, would reflect poorly upon them and potentially affect their conviction rate or undermine the credibility of their office.⁷³

On a psychological level, it is difficult for anyone to admit a mistake, particularly when that mistake was so grave that it has cost an individual many years of his or her life.⁷⁴ Furthermore, since prosecutors need to display confidence in themselves and their presentation of a case to be successful before the judge and the jury, admitting fallibility might undermine their internal sense of confidence.⁷⁵

V. THE POWER OF APOLOGY FOR THE WRONGFULLY CONVICTED

Apology can positively affect exonerees' reintegration into society after their release from prison. Exonerees who were offered an apology frequently noted its contribution to their ability to heal, restore their dignity, and reconcile themselves with society and the state.⁷⁶

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 134.

⁷² *Id.* at 134–135.

⁷³ *Id.* at 136 (noting that “[a] prosecutor’s superiors may measure his individual success or failure by the ‘number of convictions’ he obtains.” (quoting Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 409–10 (2002))).

⁷⁴ John Tierney, *The Big City; Prosecutors Never Need to Apologize*, N.Y. TIMES, Jul. 21, 2001 at B1.

⁷⁵ Medwed, *supra* note 67, at 138.

⁷⁶ It is important to note that apology is one of many factors including financial compensation, validation by the media, and fewer years served that may all positively affect an exonerees' ability to transition from prison life. Lawyer Johnson, Exoneree, and Howard Friedman, P.C., National Police Accountability Project of the National Lawyers Guild, Remarks at the Innocence Network Conference at Harvard Law School (Mar. 24, 2007) [hereinafter Johnson Remarks]. Not all of the wrongfully convicted who failed to receive an apology had more trouble reintegrating into society than those who did. See interview with Walter D. Smith, Exoneree, in Cambridge, Mass. (Mar. 23, 2007). For example, Walter D. Smith, an exoneree, commented that

After serving fifteen years and eight months in prison, Samuel Scott was released with \$25, a pair of pants, and a white shirt.⁷⁷ When interviewed after Mr. Scott's release, the original prosecutor in his case said, "I don't exactly know what exoneration means, but I feel that Samuel Scott is guilty."⁷⁸ Mr. Scott explained that the prosecutor's comments coupled with the fact that "no one said we made a mistake. . . makes you feel like you kinda don't exist."⁷⁹ He observed, that just as he felt dead in prison, "being in society is the same."⁸⁰ In society, Mr. Scott felt devalued as a human being just as he did in prison. When discussing how he would feel if he were to receive a public or private apology, Mr. Scott said, "I would prefer a public apology, but even behind closed doors it would have felt good."⁸¹ According to Mr. Scott, an apology would have made him feel empowered and vindicated. In other words, he would have felt that his exoneration had actually changed his place in society.

Lawyer Johnson described returning to society after his release after ten years like being "one atom by itself bouncing back and forth."⁸² Outside of prison, Mr. Johnson felt alone and detached. He lived in constant fear that he would be targeted by law enforcement. He commented, "I have flashbacks, I see police coming after me again."⁸³ While he said that he "tried to cope with the various ups and downs," he felt as if he were "condemned by society. . . [his] belief system was gone. . . [he] had no faith in the system."⁸⁴ According to Johnson, as a result of these feelings, he consciously committed crimes to have a "vacation and go back

although the prosecutor doubted his innocence, the media supported him. *See id.* In addition, Mr. Smith received compensation for the time he was wrongfully imprisoned. *See id.* He commented that both of these factors had a positive impact on his ability to reenter society. *See id.* Since his release in 1996, Mr. Smith has served as a motivational speaker and body builder with his own business and website. *See id.*

⁷⁷ Interview with Samuel Scott, Exoneree, in Cambridge, Mass. (Mar. 23, 2007).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Johnson Remarks, *supra* note 76. Mr. Johnson was convicted of first-degree murder by an all white jury in 1972. *See id.* Three years later, his conviction was overturned, but a second all white jury convicted him of second-degree murder with a life sentence that was confirmed upon appeal. *See id.* After serving ten years in prison for a crime that he did not commit, he was finally released in 1982. *See id.*

⁸³ *Id.* Mr. Johnson also noted that he suffered from post-traumatic stress disorder after his release.

⁸⁴ *Id.*

in.”⁸⁵ For Mr. Johnson, reintegration was not just difficult it was impossible. Johnson recognized that “if they had gone half way,” by offering an apology, “I would have been willing to go the other half way. . . then I would have been able to truly get my life back in order.”⁸⁶ Had Mr. Johnson received an apology, he may have been able to regain his faith in the system and reconcile himself with his freedom.

When offered, an apology can make a positive difference in exonerees’ healing and the restoration of their faith in the system. When commenting on the district attorney’s offering of an apology at a press conference after his release, exoneree Alan Newton said, “It means somebody actually cares on the other side.”⁸⁷ He commented further that after serving twenty years for a crime that he did not commit, “anger will eat you up inside, but apology restores my faith in individuals.”⁸⁸ In Mr. Newton’s case, the apology provided what Lazare termed “the reconciliation and restoration of broken relationships.”⁸⁹ Once the prosecutor apologized, Mr. Newton’s severed faith in the system was at least partially restored.

After being wrongfully imprisoned for nineteen years, Dennis Maher reported that the original prosecutor in his case “apologized and asked forgiveness.”⁹⁰ He further commented that “I found out what kind of a person he was . . . genuine. . . . [I]t was a true heartfelt apology. To me that was the best there was. I couldn’t have asked for a better apology.”⁹¹ Like Mr. Newton, Mr. Maher was able to reconcile and restore his relationship with the prosecutor in his case. In fact, after he received an apology, Mr. Maher, his wife, and his son went out to dinner with the prosecutor, his wife, and his children. Mr. Maher explained, “It made me feel good because he admitted he was wrong. It made me feel better that someone acknowledged they were wrong.”⁹² However, Mr. Maher did not re-

⁸⁵ *Id.* After his initial release, Mr. Johnson commented that he did not feel safe in society and committed petty crimes in order to be returned to prison. *See id.* Mr. Johnson said that the environment he encountered in prison “supports death and decay.” *Id.* He further commented that prison broke him down as he had to live in constant fear of being attacked. *See id.*

⁸⁶ *Id.* Mr. Johnson reported that “the cornerstone of his recovery was compensation.” *Id.* Before he received financial recognition from the state, he was “constantly going down in a spiral. . . condemned by society.” *Id.*

⁸⁷ Interview with Alan Newton, Exoneree, in Cambridge, Mass. (Mar. 23, 2007) [hereinafter Newton Interview].

⁸⁸ *Id.*

⁸⁹ Lazare, *supra* note 8, at 1.

⁹⁰ Telephone Interview with Dennis Maher, Exoneree, in Massachusetts (Apr. 15, 2007).

⁹¹ *Id.*

⁹² *Id.*

ceive an apology from the judge or police officer that handled his case and said that as a result, "I don't trust cops and judges."⁹³

When exoneree Christopher Ochoa was released after serving twelve years, he commented that the judge offered an apology for the "great mistake and miscarriage of justice."⁹⁴ However, neither the District Attorney nor the police apologized.⁹⁵ Mr. Ochoa's wrongful conviction was based on a false confession that he offered after the police questioned him for three days and asked leading questions providing him with nonpublic details of the crime that they then used to convict him. Mr. Ochoa commented that an apology from the police "would have gone a long way" and "would have made me feel that I wasn't the one at fault."⁹⁶ "Money can help you get your life on track, but I still have nightmares. The police officer doesn't have the decency to say 'I messed up.'"⁹⁷ After his exoneration, Mr. Ochoa moved from Texas to Wisconsin and attended law school. When asked how he currently feels after being out for over five years he said, "I am feeling more at peace now, but I don't know if I will ever have closure."⁹⁸ He commented, "If I would have stayed in Texas, the police would have set me up again."⁹⁹ However, he highlighted that the judge's apology was significant to him, "Public vindication was important for me to trust the system, the judiciary and to become a lawyer. If not, I don't know if I would've come into the profession. I have trust in the system because of the judge. I don't have faith in the police."¹⁰⁰ The judge's apology restored Mr. Ochoa's faith in the legal system and allowed him to pursue a career in the law.

VI. CONCLUSION

These examples illustrate the important role apology plays in the lives of the wrongfully convicted. It would be difficult to legislate what kind of apology is appropriate in the context of wrongful

⁹³ *Id.*

⁹⁴ Interview with Christopher Ochoa, Exoneree, in Cambridge, Mass. (Mar. 24, 2007) [hereinafter Ochoa Interview].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

conviction.¹⁰¹ However, public or private, apology has the capacity to promote healing and reintegration for the victims of wrongful conviction, victims who are owed some sort of recognition for the pain and suffering that they endured as a result of their confinement by the state. As Adele Bernhard notes, “Although it may be impossible to hold any individual law enforcement officer, or any particular municipality, liable, the state’s responsibility for the injury is sufficient to generate a moral obligation.”¹⁰² Whether or not an individual state actor has actually participated in the wrongful conviction should not preclude him/her from offering an apology; someone needs to apologize on behalf of the state. As Lazare points out,

[P]eople are not guilty for actions in which they did not participate. But just as people take pride in things for which they had no responsibility (such as famous ancestors, national championships of their sports teams, and great accomplishments of their nation), so, too, must these people accept the shame (but not guilt) of their family, their athletic teams, and their nations.¹⁰³

Prosecutors, judges, and police officers take pride in convicting the guilty and ensuring that justice prevails. So too should they accept responsibility when that justice has suffered a miscarriage. Not only is an apology the right thing to do, but the comments of the exonerees show that it makes a positive difference in their lives.

Beyond its capacity to heal victims, apology can have a profound affect on the community as well, a community that relies on the criminal justice system for its safety. An apology is, in essence, an admission and acceptance of a mistake. Once state actors have accepted that mistakes are being made in the criminal justice system, they will be more likely to investigate the causes and find solutions to correct those mistakes.¹⁰⁴ Exposure to the fallible elements of the system will galvanize state actors to implement safeguards to prevent future error.¹⁰⁵ Furthermore, if no one acknowledges that individuals are innocent after they have scientif-

¹⁰¹ Some exonerees reported that they would value either a public or private apology. Johnson Remarks, *supra* note 76; *see also* Ochoa Interview, *supra* note 94. Others said that it was important to receive a public apology in order for them to feel vindicated. Newton Interview, *supra* note 87.

¹⁰² Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, *supra* note 61, at 93.

¹⁰³ Lazare, *supra* note 8, at 41.

¹⁰⁴ TheInnocenceProject.org, Stopping Wrongful Convictions Before They Happen, <http://www.innocenceproject.org/fix/> (last visited June 13, 2007).

¹⁰⁵ *Id.*

ically proven so, the true perpetrator of the crime is less likely to be found.¹⁰⁶ Only by acknowledging their mistakes can state actors be properly motivated to achieve justice.

In a campaign address, John Fitzgerald Kennedy described how the Chinese use two characters to represent the word “crisis,” one character for danger and the other signifying opportunity.¹⁰⁷ This idea has been used numerous times to illustrate how adversity provides the opportunity for positive change. Similarly, whenever a wrongful conviction occurs, it presents an opportunity for the state to repair the harm that has been done. This crisis not only allows the state to give back to the victim, but also provides the criminal justice system with an opportunity to investigate the error, to improve the system going forward, and to hopefully find the real perpetrator. As Innocence Project Co-Director Barry Scheck commented, “The exonerees. . .they’re the greatest human resource our criminal justice system has had, ever. Because what we can learn from them and their cases can help us create a more just society and fix this system and move it forward in a way that it hasn’t been within memory.”¹⁰⁸

By exploring error and apologizing for it, the criminal justice system can promote awareness thereby reducing the likelihood of future injustice. When evidence proves that a wrongfully convicted individual is actually innocent, state actors have a choice of whether to apologize or not. An apology has the capacity to aid victims as well as the state actors themselves, to improve the system through a recognition of its flaws, and to give the community the security of knowing that the state’s commitment to justice will ensure that the right people are imprisoned and that the innocent are free.

¹⁰⁶ *Id.*

¹⁰⁷ President John F. Kennedy, Speech in Indianapolis, (Apr. 12, 1959); President John F. Kennedy, Campaign Address in Valley Forge, PA (Oct. 29, 1960).

¹⁰⁸ *AFTER INNOCENCE*, *supra* note 2.

