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Executing the Innocent: How to Remedy a State's Wrong

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INTRODUCTION

Carlos DeLuna, executed in the State of Texas in 1989, at the age of 27, left behind nine siblings.[1] His mother became extremely ill after hearing that DeLuna was arrested for murder and died two weeks after DeLuna's trial.[2] DeLuna's whole family was shocked by the news that he was a murderer and believed it was impossible.[3] According to them, DeLuna was just not that type of guy.[4] Yes, he had a criminal record, but something as extreme as murder was not possible for DeLuna.[5] DeLuna's younger sister, Rose, said that DeLuna was afraid of the dark and of Chihuahuas; he could not kill someone.[6] The evidence against DeLuna, however, seemed compelling.

Carlos DeLuna was sentenced to death for murdering Wanda Lopez during a supposed gas station robbery that occurred on February 4, 1983.[7] Police found DeLuna hiding under a pickup truck a few blocks from the crime scene.[8] In his pocket was a rolled up wad of $149.[9] This was not

1 *See* James S. Liebman et al., *Los Tocayos Carlos: Part I: The Death of Wanda Lopez*, 43 COLUM. HUM. RTS. L. REV. 724, 790 (2012) [hereinafter Liebman, *Carlos Part I*].

2 *See id.*

3 *See id.* at 796.

4 *See id.*

5 *See id.*

6 *See id.*

7 *See* Michael McLoughlin, *Carlos DeLuna Execution: Texas Put to Death an Innocent Man, Columbia University Team Says*, HUFFINGTON POST (May 15, 2012, 12:00 AM), http://www.huffingtonpost.com/2012/05/15/carlos-de-luna-execution-_n_1507003.html [hereinafter McLoughlin, *Carlos DeLuna Execution*]. Robert Stange, the gas station store's manager, said he had his doubts that the robbery was in fact a robbery. *See* Liebman, *Carlos Part I*, *supra* note 1, at 759, 782. To him, it seemed as though Lopez tried to give her murderer the money while or after being stabbed. *See id.* at 776-77, 782. Additionally, Stange said Lopez was aware of the store's protocol and would have given up the money in the cash register immediately. *See id.* at 774. Therefore, he believed this murder was about more than a mere gas station robbery. *Id.* at 782. In fact, Stange recalled there being rumors about someone having it out for Lopez, but the police never looked into these rumors. *See id.* at 782.

8 *See* Liebman, *Carlos Part I*, *supra* note 1, at 747-48.

9 McLaughlin, *Carlos DeLuna Execution*, *supra* note 7.

DeLuna's first run in with the law;[10] in fact, DeLuna was paroled just thirty-six days prior to the murder, after having been in jail for violating parole.[11]

Multiple eyewitnesses identified DeLuna as the murderer.[12] One eyewitness, Kevan Baker, was asked by police to do a show-up identification at the crime scene.[13] Normally, witnesses are asked to identify a suspect through a line-up of different people; a show-up identification, however, occurs when a witness is asked to identify a suspect face-to-face.[14] After some hesitation, Baker agreed to participate in the show-up identification and identified DeLuna as the man he saw run out of the store after murdering Lopez.[15] The police were convinced that DeLuna was the man they were looking for.

A more thorough analysis of the evidence, however, shows that DeLuna's family was right: DeLuna was not Lopez's murderer. The majority of the evidence against DeLuna was actually quite weak. First, the key evidence in convicting DeLuna—the eyewitness statements—actually conflicted with one another.[16] For example, Baker described the murderer as having a moustache and beard growth, while another eyewitness, Julie Arsuaga, described the murderer as clean shaven.[17] Second, the makeup of the crime scene suggested that the murderer would likely have blood on his shoes and pants, but DeLuna did not have any blood on him, nor was there any blood on the money in his pocket.[18] The bills found left in the store, though, did have blood on them.[19] Third, the store's manager, Robert Stange, said that the cash register would never have more than $75 in it.[20] In fact, bills worth $20 or more were not even

10 *See* Liebman, *Carlos Part I*, *supra* note 1, at 804 (noting that none of DeLuna's previous crimes involved the use of a weapon).

11 *Id.* at 806.

12 *See* McLaughlin, *Carlos DeLuna Execution*, *supra* note 7.

13 Liebman, *Carlos Part I*, *supra* note 1, at 757.

14 *See id.*

15 *See id.* When later interviewed, Baker said he was unsure whether DeLuna had actually been the man he saw running out of the store, specifically noting the difficulty he has with identifying cross cultures. *See id.* at 765. Baker said he was only seventy percent sure DeLuna was the man he saw. *Id.* Additionally, he noted that cops told Baker that DeLuna was found under the truck and that, because of this information, Baker thought DeLuna must be the guy, but without this information, he would have only been fifty percent sure that DeLuna was the man he saw. *Id.*

16 *See* McLaughlin, *Carlos DeLuna Execution*, *supra* note 7.

17 *See* Liebman, *Carlos Part I*, *supra* note 1, at 739.

18 *See* McLoughlin, *Carlos DeLuna Execution*, *supra* note 7.

19 *See* Liebman, *Carlos Part I*, *supra* note 1, at 776.

20 *See id.* at 774; *see also* James S. Liebman, et al., *Los Tocayos Carlos: Part III: The Prosecution of Carlos DeLuna*, 43 COLUM. HUM. RTS. L. REV. 908, 951 (2012) [hereinafter Liebman, *Carlos: Part III*] (noting that DeLuna's lawyers never received any of the information regarding the store's cash

put into the cash register; they were deposited directly into a safe.[21] After the incident, the key and the drop slot safes were found locked and untouched.[22] Thus, Stange said that Lopez tried to give the murderer money from the register[23] and that the murderer could not have left with more than $20.[24] DeLuna, however, was found with $149, which included some $20 bills.[25]

The weaknesses of the above evidence are enhanced by the fact that there was actually another suspect that the police should have had on their radar. There were tips that Carlos Hernandez had actually murdered Lopez, but the police failed to thoroughly look into these tips.[26] In fact, Hernandez and DeLuna bore a similar resemblance to one another, which could explain the misidentifications by eyewitnesses.[27] Additionally, Hernandez always carried a knife on him; people close to Hernandez later identified a picture of Lopez's murder weapon as Hernandez's knife.[28] Hernandez actually admitted to the crime on a couple of occasions and numerous people confessed to knowing that Hernandez had actually murdered Lopez.[29]

This compelling evidence illustrates that DeLuna was likely innocent.[30] In fact, the executive director of the Death Penalty Information Center (DPIC), Richard Dieter, stated that, "if a new trial was somehow able to be conducted today, a jury would acquit DeLuna."[31]

DeLuna is not the first probably innocent person to be executed. Cameron Todd Willingham was executed in 2004 in Texas for killing his

register policies).

21 *See* Liebman, *Carlos Part I*, *supra* note 1, at 774.

22 *Id.* at 782.

23 *Id.* at 776.

24 *Id.* at 784. There was $55 of loose cash in the store, so the most the murderer could have taken was $20, rather than $75. *See id.*

25 *See* Liebman, *Carlos: Part III*, *supra* note 20, at 914.

26 *See* McLaughlin, *Carlos DeLuna Execution*, *supra* note 7.

27 *See* James S. Liebman et al., *Los Tocayos Carlos: Part II: The Lives of Carlos Hernandez*, 43 COLUM. HUM. RTS. L. REV. 816, 898 (2012) [hereinafter Liebman, *Carlos Part II*] ("A number of friends and family members of the two men mistakenly identified photographs of one Carlos, whom they'd never met, as the other.").

28 *See id.* at 824-25.

29 *See* McLaughlin, *Carlos DeLuna Execution*, *supra* note 7; *see also* Liebman, *Carlos Part II*, *supra* note 27, at 878-79 (stating how one person, Janie, overheard Hernandez saying that he hurt Lopez and that DeLuna took the fall for him).

30 James Liebman, a professor at Columbia University School of Law, uncovered the above evidence and the full story about DeLuna. *See* McLaughlin, *Carlos DeLuna Execution*, *supra* note 7. The full story, along with audiotapes, photographs, and other materials, can be found on the Columbia Human Rights Law Review website. *See The Wrong Carlos*, http://thewrongcarlos.net/ (last visited Mar. 16, 2015).

31 McLaughlin, *Carlos DeLuna Execution*, *supra* note 7.

three daughters in a house fire.[32] However, evidence later showed that the fire was actually accidental.[33] In 2010, District Court Judge Charlie Baird wrote an order to posthumously exonerate Willingham; however, the order was never filed because a higher court questioned whether Judge Baird had the authority to examine the case.[34] The DPIC lists thirteen executions, since the death penalty was reinstated in 1976, in which there exists compelling evidence that those executed were actually innocent; the list includes both DeLuna and Willingham.[35] According to the DPIC, besides wrongful executions, 156 death row inmates have been exonerated while on death row since 1973.[36] Kwame Ajamu, the 150th death row inmate exonerated, was released from death row in Ohio on December 9, 2014, after spending thirty-nine years on death row.[37]

The execution of an innocent individual, therefore, is not out of the realm of possibility and has likely occurred on at least thirteeen occasions. Despite the permanency of an execution and the cruelty of executing an innocent individual, there is currently no remedy for a wrongful execution. Twenty-seven states and the District of Columbia have imposed statutes providing compensation for wrongfully convicted and incarcerated persons.[38] However, these compensation statutes do not explicitly account for those who are wrongfully executed;[39] some of the statutes even deny compensation after death.[40] While it is true that the deceased do not have a

32 *See* Michael McLaughlin, *Cameron Todd Willingham Exoneration was Written but never Filed by Texas Judge*, HUFFINGTON POST (May 19, 2012, 8:01 AM), http://www.huffingtonpost.com/2012/05/19/cameron-todd-willingham-exoneration_n_1524868.html [hereinafter McLaughlin, *Cameron Todd Willingham*].

33 *See id.*

34 *See id.*

35 *See Executed but Possibly Innocent*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/executed-possibly-innocent (last visited Mar. 2, 2016). The other eight names on the list are Ruben Cantu, Larry Griffin, Joseph O'Dell, David Spence, Leo Jones, Gary Graham, Claude Jones, Troy Davis, Lester Bower, Brian Terrell, and Richard Masterson. *Id.*

36 *See The Innocence List*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last updated Oct. 12, 2015). To be included on the DPIC's Innocence List, a defendant must have been convicted, sentenced to death, and subsequently either: (a) been acquitted of all charges related to the crime that placed [the defendant] on death row, or (b) had all charges related to the crime that placed [the defendant] on death row dismissed by the prosecution, or (c) been granted a complete pardon based on evidence of innocence. *Id.*

37 *See id.*

38 *See* Meghan J. Ryan, Article, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 296 (2012); *see, e.g.*, 28 U.S.C. § 2513 (2012) (permitting recovery of up to $100,000 per year for those wrongly placed on death row and up to $50,000 per year for other wrongful incarcerations); N.J. STAT. ANN. § 52:4C-5 (West 2012) (awarding up to $50,000 for each year of wrongful incarceration, or two times the claimant's income in the year prior to incarceration).

39 Ryan, *supra* note 38, at 301-02.

40 *Id.* at 304; *see, e.g.*, NEB. REV. STAT. § 29-4604(5) (2012) (stating that a claimant's cause of action for wrongful conviction and incarceration will not survive the claimant's death).

pressing need for monetary compensation, it is shocking that a punishment of such permanent proportions does not have some sort of remedy to at least attempt to reconcile the harm caused to those innocents executed and their families.

Typically, when harm is caused to an individual by another, tort law attempts to remedy the situation by providing some form of compensation to the injured individual. This applies even in cases where the injured individual is deceased, through the use of both survival claims and wrongful death claims.[41] When the state government, however, is the cause of an individual's injury, the government is protected from tort liability through sovereign immunity.[42] Therefore, in the case of Carlos DeLuna, or any other wrongfully executed individual, neither DeLuna's estate nor DeLuna's family could sue under a survival claim or wrongful death claim, respectively, because those responsible for DeLuna's execution are protected under sovereign immunity.

This Note explores states' sovereign immunity and suggests the abrogation of sovereign immunity in instances of wrongful execution. Part I discusses the Eighth Amendment and examines how the execution of an innocent individual constitutes a violation of one's Eighth Amendment rights. Part II examines states' sovereign immunity and how such immunity can be waived or abrogated. It also looks at instances where Congress has previously abrogated states' sovereign immunity. Part III suggests that, when an innocent individual is executed, Congress utilizes its Fourteenth Amendment Section 5 power to abrogate sovereign immunity via clear legislation and suggests a potential framework for the legislation. Part IV addresses any potential counterarguments to this legislation. This Note concludes with a reexamination of the DeLuna case and attempts to determine its outcome under the suggested legislation.

I. THE EIGHTH AMENDMENT AND THE DEATH PENALTY

The Eighth Amendment of the United States Constitution protects

41 *See* Runyun v. Dist. of Columbia, 463 F.2d 1319, 1321 (D.C. Cir. 1972) (explaining that survival actions are brought by the estate of the deceased on behalf of the deceased to recover for the deceased's personal injury and that wrongful death actions are brought in the interest of the deceased's spouse and next of kin); *see, e.g.*, 42 Pa. Cons. Stat. § 8302 (Pennsylvania's survival statute); 42 Pa. Cons. Stat. § 8301 (Pennsylvania's wrongful death statute).

42 U.S. CONST. amend. XI; *see infra* Part II. This Note takes the viewpoint that the State would be the appropriate defendant in a lawsuit defending the constitutional rights of a wrongfully executed individual. Therefore, Section 1983 of the Civil Rights Act would not be applicable in these lawsuits since it subjects actual persons to liability rather than the State itself. *See* 42 U.S.C. § 1983 (2012).

against the infliction of cruel and unusual punishment.[43] In *Furman v. Georgia*, the Supreme Court ruled that the death penalty violated the Eighth Amendment's protection against the infliction of cruel and unusual punishment.[44] *Furman* was overruled four years later by *Gregg v. Georgia*.[45] The Supreme Court stated that its main concern in *Furman* was that the state death penalty statutes allowed for juries to arbitrarily impose the death penalty, thus, making it cruel and unusual.[46] Since *Furman*, the State of Georgia revised its death penalty statute and imposed guidelines for when a death penalty sentence could be applied.[47] These guidelines took away the arbitrariness of the prior system and helped to "assure that the death penalty [would] not be imposed on a capriciously selected group of convicted defendants."[48] Therefore, under *Gregg*, as long as a state imposes proper guidelines in its death penalty statute to ensure that the death penalty is not applied arbitrarily, imposition of the death penalty upon a convicted defendant does not violate the cruel and unusual punishment provision of the Eighth Amendment.[49]

Since the establishment of the legality of the death penalty in *Gregg*, states have chosen for themselves whether to maintain the death penalty as a sentence for certain crimes. Currently, the death penalty is legal in thirty-two states, the United States government, and the United States military.[50]

A. Herrera v. Collins: A Look at Executing Innocents and the Constitution

Arbitrary imposition of the death penalty should not be the only red flag when it comes to the constitutionality of the death penalty. The execution of innocent individuals also has major constitutional consequences. In fact, the Supreme Court dealt with such an issue in *Herrera v. Collins*, in which the petitioner, Herrera, claimed that "he was 'actually innocent' of the murder for which he was sentenced to death, and that the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law therefore forbid

43 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

44 Furman v. Ga., 408 U.S. 238, 239-40 (1972).

45 *See* Gregg v. Ga., 428 U.S. 153 (1976).

46 *Id.* at 206.

47 *See id.*

48 *Id.* at 204.

49 *See id.* at 206-07.

50 *States with and without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar. 9, 2015) (listing states with and without the death penalty).

his execution."[51]

The Court ruled against Herrera; however, this ruling was not made on the grounds that executing an innocent individual does not violate the Eighth Amendment. Rather, the Court ruled against Herrera because Herrera's new evidence did not reach the Court's high threshold for demonstrating "actual innocence," warranting federal habeas relief.[52] This is because, as both the majority and concurring opinions stated, when Herrera was found guilty of murder, he lost the presumption of innocence that exists for criminal defendants, thus Herrera was no longer considered innocent in the eyes of the law.[53] Therefore, the question the Court answered in this case was not whether an innocent person can be executed, but rather, the question was "whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding . . . notwithstanding his failure to demonstrate that constitutional error infected his trial."[54]

Even though the Court did not have to answer any questions regarding the constitutionality of executing an innocent individual, the Court's opinion does contain some dicta on the topic. In the beginning of its opinion, the Court noted that Herrera's proposition that wrongfully executing someone violates the Eighth and Fourteenth Amendments "has an elemental appeal," especially since the purpose of the criminal justice system is "to convict the guilty and free the innocent."[55] The concurring justices agreed that "executing the innocent is inconsistent with the Constitution" and would be a "constitutionally intolerable event."[56]

The dissenting opinion in *Herrera*, written by Justice Blackmun, also discussed the legality of executing an innocent individual.[57] Justice Blackmun noted that executing an innocent person would violate all standards of decency.[58] He also said that it is "violative of the Eighth Amendment to execute a person who is actually innocent. Executing an innocent person epitomizes the "'purposeless and needless imposition of

51 Herrera v. Collins, 506 U.S. 390, 393 (1993).

52 *See id.* at 417.

53 *See id.* at 399-400. Since Herrera already had a trial and was found guilty beyond a reasonable doubt, he "does not appear before [the Court] as an innocent man on the verge of execution. He is instead a legally guilty one who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again." *Id.* at 419-20 (O'Connor, J., concurring).

54 *Id.* at 420.

55 *Id.* at 398 (majority opinion).

56 *Id.* at 419 (O'Connor, J., concurring).

57 *See id.* at 430-46 (Blackmun, J., dissenting).

58 *Id.* at 431.

pain and suffering.'"[59]

B. Has Herrera Affected Wrongful Executions?

While no decision was made on the legality of executing an innocent individual, the dicta and dissenting opinion in *Herrera* reflect the view that if an innocent person was executed, it would be unconstitutional under the Eighth Amendment.[60] Based on the Eighth Amendment, a person has the right to protection against the infliction of cruel and unusual punishment.[61] However, if nothing is in place to enforce this right or deter others, including the government, from violating this right, it basically becomes null.[62]

The Court recognized that a right without a correlative remedy is, in essence, useless in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, in which the Court allowed the petitioner to recover monetary damages from federal agents in the agents' personal capacities for violating the petitioner's constitutional rights.[63] In *Bivens*, the Court quoted *Marbury v. Madison* in coming to its ruling and stated that, "'[t]he very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'"[64] If this statement from *Marbury* refers to *all* laws, then something must be done with regards to the Eighth Amendment and the execution of innocent persons. With sovereign immunity and the current state of the majority of state laws, an innocent person executed on death row has no available remedy to cure the violation of his or her Eighth Amendment right. If, however, Congress were to abrogate state sovereign immunity in instances where an individual is wrongfully executed, a remedy would then be available to the deceased via survival actions.

59 *Id.* at 431-32 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

60 *See supra* notes 55-59 and accompanying text.

61 U.S. CONST. amend. VIII.

62 *See* Lawrence Rosenthal, Article, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 861 (2007) ("[A] constitutional right without a correlative remedy is no right at all.").

63 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (permitting private suit against federal agents when those agents violated the plaintiff's Fourth Amendment right protecting against unreasonable search and seizure).

64 *Id.* (quoting Marbury v. Madison, 1 Cranch 137, 163 (1803)).

II. A LOOK AT SOVEREIGN IMMUNITY

The basis of sovereign immunity is the Eleventh Amendment: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[65]

The Supreme Court has verified the extent of states' sovereign immunity in multiple cases. In *Hans v. Louisiana*, the Court ruled that a citizen is barred from suing his own state in federal court, unless the state consents to such a suit.[66] In *Alden*, the Court ruled that non-consenting states cannot be subjected to private suits in state courts.[67] In coming to this conclusion, the Court not only looked at the legislative history of sovereign immunity, but also looked at the numerous state statutory provisions waiving sovereign immunity.[68] The fact that states can, and have, used these statutory waivers show that the states are well protected by sovereign immunity in basically all contexts because otherwise these waivers would not exist.[69]

Based on these rulings and the long standing protection of sovereign immunity, at first glance it would seem as though those innocently executed are left in the dark when it comes to their Eighth Amendment rights. Due to states' sovereign immunity, those innocent persons executed do not have a means of obtaining some remedy for the wrong done to them, thus rendering their Eighth Amendment protection ineffective and pointless. However, a state's sovereign immunity can be removed in certain instances in one of two ways: a state's explicit waiver of immunity or Congress's explicit abrogation of immunity.[70] If one of these avenues of removing sovereign immunity is taken, a proper remedy through a survival suit becomes available to those wrongfully executed.

65 U.S. CONST. amend. XI. In *Alden v. Maine*, the Supreme Court, however, made clear that states' sovereign immunity, while typically referred to as coming from the Eleventh Amendment, was actually enjoyed by the states prior to the ratification of the Constitution and has continued to be recognized by the courts since then. 527 U.S. 706, 713 (1999).

66 *See* Hans v. Louisiana, 134 U.S. 1, 17 (1890); *see also Alden*, 527 U.S. at 727.

67 *See Alden* 527 U.S. at 712 (implying that a "non-consenting state" is a state that has not waived its sovereign immunity).

68 *See id.* at 724.

69 *See id.*

70 *See* Beers v. Arkansas, 61 U.S. 527, 529 (1858) (stating that a state may not be sued without its consent unless it waives sovereign immunity); Kimel v. Florida Board of Regents, 528 U.S. 62, 73 (2000) (stating that Congress may abrogate states' sovereign immunity); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 185 (4th ed. 2011).

A. Waiver of State Sovereign Immunity

A state may choose to waive its sovereign immunity through statute. Most states have chosen to waive their sovereign immunity via statute in select instances.[71] Washington is the only state whose waiver statute provides for governmental liability in a basically unlimited capacity when the government's conduct is tortious.[72] Most waivers also limit the amount of damages that one can receive from a suit against the unprotected entity.[73]

While having a state willingly waive its immunity for wrongful executions would be ideal, there is no way to guarantee that all death penalty states would be willing to do so. The compensation statutes provided by some states for any wrongful convictions and incarcerations are certainly a start in the right direction. However, as stated earlier, many of these statutes do not provide for compensation after death and none explicitly take into account wrongful executions.[74] Due to the uncertainty of states choosing to waive their immunity or invoke such compensation provisions with regards to wrongful execution, this Note focuses instead on a more guaranteed way of providing some form of relief for this violation of Eighth Amendment rights: the abrogation of states' sovereign immunity via Congress's Fourteenth Amendment power.

B. Fourteenth Amendment Section 5 Power

Section 5 of the Fourteenth Amendment gives Congress the power to enforce the provisions of the Fourteenth Amendment.[75] Section 1 of the Fourteenth Amendment protects United States citizens from any injustices done by the states to United States citizens by making the Bill of Rights applicable to the states.[76] Therefore, via Congress's Section 5 power,

71 *See* Michael Tardif & Rob McKenna, *Washington State's 45-Year Experiment in Government Liability*, 29 SEATTLE U.L. REV. 1 app. at 53-60 (2005) (listing state sovereign immunity waiver statutes); *see, e.g.*, ME. REV. STAT. tit. 14, § 8104-A (2012) (waiving sovereign immunity in Maine when a government entity is liable for property damage, bodily injury, or death in certain instances).

72 *See* WASH. REV. CODE § 4.92.090 (2012) ("The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."); *see also* Tardif & McKenna, *supra* note 71 (explaining the history, consequences, and extent of Washington's sovereign liability waiver).

73 *See* Tardif & McKenna, *supra* note 71, app. at 53-60 (2005) (listing any damage limitations); *see, e.g.*, MD. CODE ANN., STATE GOV'T § 12-104 (LexisNexis 2012) (limiting recovery to $200,000).

74 *See supra* notes 38-40 and accompanying text.

75 U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by the appropriate legislation, the provisions of this article.").

76 U.S. CONST. amend XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

Congress can pass laws to enforce a person's, in this case a wrongfully executed person's, Eighth Amendment right to be free from the infliction of cruel and unusual punishment by the state. As the Supreme Court ruled in *Fitzpatrick v. Bitzer*, this includes the power to authorize damage actions against states, despite states' sovereign immunity, since Section 5 of the Fourteenth Amendment allows Congress to limit state sovereign immunity by permitting private suits against states.[77]

While Congress has the power to limit state sovereign immunity via the Fourteenth Amendment, this power is restricted and, thus, only applies in a narrow array of circumstances. In *City of Boerne v. Flores*, the Supreme Court made clear that Congress does not have the power to determine what constitutes a constitutional violation, just the power to enforce a constitutional right.[78] This power to enforce a constitutional right "includes the authority both to remedy and to deter violations of rights guaranteed [under the Fourteenth Amendment]."[79] It is up to the Court to determine whether a law passed by Congress abrogating sovereign immunity is a valid use of Congress's Section 5 power.[80]

1. A Look at Congress's Utilization of its Abrogation Power

The Supreme Court has faced the question of whether Congress's use of its Section 5 power was constitutional in five cases.[81] For there to be a constitutional abrogation of sovereign immunity, two questions must be answered: "(1) whether Congress unequivocally expressed its intent to abrogate; and (2), if so, whether it acted pursuant to a valid grant of constitutional authority."[82] The first question is easy to determine by just looking at the language of the statute and seeing if Congress provided for abrogation in the statute. The second question raises more concerns. There are three cases in which the Supreme Court ruled that Congress's use of its Section 5 power was invalid: *Florida Prepaid Postsecondary Education*

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

77 *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); *see also* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 816-17 (2007).

78 *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Congress [does not have] the power to decree the substance of the Fourteenth Amendment's restrictions on the States. [For example,] [l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

79 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) (citing *City of Boerne*, 521 U.S. at 518).

80 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 309 (4th ed. 2011).

81 *Id.*

82 Tennessee v. Lane, 541 U.S. 509, 509-10 (2004) (citing *Kimel*, 528 U.S. at 73).

Expense Board v. College Savings Bank,[83] *Kimel v. Florida Board of Regents*,[84] and *Board of Trustees of the University of Alabama v. Garrett*.[85] While Congress did unequivocally express its intent to abrogate in these instances, they were not valid uses of Congress's power to abrogate. The Court looked at the history of violations by the state, using a rational basis test in *Kimel* and *Garrett*, to determine the validity of Congress's abrogation of states' sovereign immunity.[86] Since none of these cases involved a protected class of people, nor did any of the cases have a clear showing of a violation of due process by the state, Congress's use of its abrogation power was invalid.[87]

In two other cases, *Nevada Department of Human Resources v. Hibbs*[88] and *Tennessee v. Lane*,[89] the Court ruled that Congress validly used its abrogation power. Unlike in *Florida Prepaid*, *Kimel*, and *Garrett*, in these two cases, the Court applied a heightened scrutiny when determining the validity of abrogation.[90] In *Hibbs*, there was a gender-based issue, which is subject to intermediate scrutiny; in *Tennessee*, the right involved was a fundamental right, which is subject to heightened scrutiny.[91] A valid use of the abrogation power, therefore, occurs when Congress is trying to enforce a fundamental right or the rights of a protected class of people. Therefore,

83 527 U.S. 627 (1999) (holding that Congress's law abrogating states' sovereign immunity in patent infringement claims was an invalid use of Congress's Section 5 power because there was no pattern of patent infringement, or constitutional violations with regards to patents, by the states).

84 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act exceeds Congress's Section 5 power to validly abrogate states' sovereign immunity because, under the rational basis test, states may discriminate based on age if it is rationally related to a legitimate state interest).

85 531 U.S. 356 (2001) (holding that Congress could not abrogate states' sovereign immunity under Title I of Americans with Disabilities Act when it did not show an irrational pattern of state discrimination against the disabled in employment).

86 *See id.* at 366, 374 (explaining that disability discrimination by the state must only meet the rational basis test to be permissible, so there did not really exist a pattern of discrimination that violated the Fourteenth Amendment that Congress was trying to prevent or remedy through abrogation); *Kimel*, 528 U.S. at 83, 86 ("States may discriminate based on age without offending the Fourteenth Amendment if the age classification is rationally related to a legitimate state interest.") (explaining that, since states may discriminate based on age, Congress's abrogation of states' sovereign immunity where there is age discrimination is not designed to prevent or respond to unconstitutional behavior); *Florida Prepaid*, 527 U.S. at 639-40 (explaining that the abrogation statute was not congruent or proportional to any constitutional violation it was trying to remedy since there was no pattern of patent infringement or a constitutional violation by the state); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 309-13 (4th ed. 2011).

87 *See supra* note 86; CHEMERINSKY, *supra* note 86, at 315.

88 538 U.S. 721 (2003) (holding that Congress validly abrogated states' sovereign immunity under the Family and Medical Leave Act because the law was meant to protect against gender discrimination, which is subject to a heightened level of scrutiny).

89 541 U.S. 509 (2004) (holding that Congress validly abrogated states' sovereign immunity under Title II of the Americans with Disabilities Act because there exists a fundamental right to access the courts and fundamental rights are subject to heightened scrutiny).

90 *See* CHEMERINSKY, *supra* note 86, at 313-15.

91 *See id.* at 313-14; *supra* notes 88-89.

if Congress were to abrogate sovereign immunity for a wrongfully executed individual, it must ensure that any statute exercising the abrogation power falls within the powers of Section 5, as expressed in these cases, by being eligible for a heightened scrutiny test.

2. *United States v. Georgia: A Quick Look at the Eighth Amendment and Abrogation*

In *United States v. Georgia*, the Court specifically looked at an Eighth Amendment issue involving Title II of the Americans with Disabilities Act (ADA) and considered whether a disabled inmate could sue the state.[92] This case distinguishes itself from the previous five cases because the state's conduct independently violated the due process clause of the Fourteenth Amendment.[93] The Court found an independent violation of the Fourteenth Amendment because, while the state's conduct violated Title II of the ADA, the conduct also directly violated the Eighth Amendment by inflicting cruel and unusual punishment upon the plaintiff.[94] Since the Fourteenth Amendment incorporates the Eighth Amendment's guarantee against cruel and unusual punishment, any violation of the Eighth Amendment also directly violates the Fourteenth Amendment.[95] Since Section 5 of the Fourteenth Amendment "grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions, 'Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendments rights.'"[96]

Thus, with regards to a wrongful execution, there are no readily apparent constitutional issues with abrogating states' sovereign immunity if a state executes an innocent person. As evident in the dicta and dissent of *Herrera*, executing an innocent individual would violate a person's Eighth Amendment right to be free from cruel and unusual punishment.[97] In turn, a violation of a person's Eighth Amendment right is also a violation of a person's Fourteenth Amendment right to due process which, under

92 *See* United States v. Georgia, 546 U.S. 151, 153 (2006).

93 *See id.* at 157. This distinguishes *Georgia* from *Hibbs* and *Lane* because "*Hibbs* and *Lane* hold that for rights or types of discrimination that receive heightened scrutiny, Congress has much greater authority to permit suits against state governments than for claims that receive only rational basis review," while Georgia is looking at a state action that actually violates the Fourteenth Amendment. CHEMERINSKY, *supra* note 86, at 315.

94 *See Georgia*, 546 U.S. at 157.

95 *See id.* (citing *Louisiana ex rel.* Francis v. Resweber, 329 U.S. 459, 463).

96 *Id.* at 158.

97 *See supra* Part I.A.

Congress's Section 5 power, Congress has a right to enforce and remedy via statute, including by abrogating states' sovereign immunity.[98] Therefore, since a statute abrogating states' sovereign immunity when a state wrongfully executes an innocent is constitutional, the next step is to determine whether such a statute would even be logical and what effects it would have.

III. The Abrogation of Sovereign Immunity in the Case of a Wrongful Execution

A. Logistics Behind an Abrogation Statute

A statute abrogating states' sovereign immunity where an innocent individual is executed needs to take into account multiple factors. Such factors include what type of suit could be brought against the state and how damages would be calculated in such a suit. Additionally, the statute should address the evidentiary requirements for imposing the death penalty in the first place and what affect these requirements should have on the amount of damages recoverable in a lawsuit resulting from an innocent person being executed.

1. Survival Suits

Under a survival statute, a decedent's estate may recover for the tortious act that caused the decedent's death.[99] Therefore, in the case of a wrongful execution, a decedent's estate could bring a suit under a survival statute for the violation of the decedent's Eighth Amendment rights.[100] Without state liability, however, there is no conceivable defendant for such a suit; the state is ultimately responsible for the wrongful execution, thus, the state would be the rightful defendant in such a suit.

While wrongfully executed individuals do not have a dire need for monetary compensation, valid reasons still exist to hold a state liable for executing an innocent. Compensation statutes were imposed by states "to

98 *See supra* text accompanying notes 75-77, 94-96.

99 *See* Runyun v. District of Columbia, 463 F.2d 1319, 1321 (D.C. 1972); *see also* Meghan J. Ryan, Article, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 284 (2012); *see, e.g.*, 42 PA. CONS. STAT. § 8302 (2012) (Pennsylvania's survival statute).

100 This Note does not address wrongful death actions, which are brought on behalf of a deceased's spouse and next of kin. Congress can only abrogate sovereign immunity in certain instances, specifically when dealing with a protected group of people or a clear violation of the Fourteenth Amendment. Since the deceased's spouse and next of kin are not the people who actually had their Fourteenth Amendment rights violated, abrogating states' sovereign immunity to allow for a wrongful death action is likely an invalid use of Congress's abrogation power.

compensate an individual for a wrong perpetrated by the government[; a] goal which does not become obsolete once an individual has been wrongfully executed."[101] The same is true in the case of a liability suit against the government: the goal of making a state take responsibility for violating an individual's Eighth Amendment right does not become obsolete once the individual can no longer physically accept compensation.

As stated earlier, without some correlative remedy, a violation of a person's constitutional rights is irrelevant because the right is basically non-existent.[102] The Supreme Court has made clear that the execution of an innocent individual would violate that individual's Eighth Amendment right to be free from the infliction of cruel and unusual punishment; with no other available remedy, allowing the decedent's estate to sue a state under a survival statute for this violation would make the state both take responsibility for its action and compensate the decedent's estate for its wrongdoing.

2. Statutory Damages Caps

Any liability imposed upon the state, however, cannot be without some sort of cap. Statutory damages caps "preserve political pressure on government to conform its conduct to the law but mitigate the anomalies associated with governmental damages liability."[103] Unlimited liability damages on a state's government could have a drastically negative effect on the state's budget and could take money away from other pressing state needs. Additionally, constitutional tort damages should not be based on the presumed intrinsic value of the violated constitutional rights; rather, they are based on the actual and compensable loss.[104] Thus, where there is a wrongful execution, damages should not be based on the perceived value of Eighth Amendment rights. The actual loss in these cases would, instead, be the loss of one's life. This again, though, is not really compensable since it is difficult to calculate and cannot be used by the decedent. The type and amount of damages recoverable by the decedent's estate should really just be those usually recoverable in survival actions: decedent's pain and

101 Ryan, *supra* note 99, at 305.

102 *See supra* text accompanying note 62.

103 Lawrence Rosenthal, Article, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 863 (2007).

104 *See id.* at 815-16. In *Memphis Community School District v. Stachura*, the Court explained that even if constitutional rights are denied, in order to recover compensatory damages, there must be an actual injury. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307-08 (1986). Therefore, the intrinsic value of a constitutional right is not the basis for compensatory damages; rather, it is the actual injury that results from the violation of those rights that is the basis for compensatory damages.

suffering, funeral expenses, and punitive damages.[105]

Under such a compensatory scheme, punitive damages should be based on the extent of the measures taken by the state to ensure an innocent person is not executed. The more measures taken by a state, the less a state should have to pay in punitive damages. Factors that could be taken into account in determining damages include the strength of the evidence and the value of any evidence not taken into account. In determining strength of evidence, one could differentiate between eyewitness evidence; biological evidence, such as DNA evidence or fingerprints; video evidence; and any other forms of evidence.

3. Faulty Eyewitness Identifications, Evidentiary Requirements, and Aggravating and Mitigating Factors

In Carlos DeLuna's case, eyewitness identifications were really the only substantial evidence linking DeLuna to the murder of Lopez, but those identifications were actually quite faulty.[106] In fact, eyewitness misidentification is the leading cause of wrongful convictions.[107] For example, in Texas in 2008, 84% of wrongful convictions were due to eyewitness misidentification.[108] There are a number of different reasons behind why eyewitness misidentifications are so common, including the distance of the eyewitness from the crime, the lighting in the area, the race of the perpetrator, any trauma to the witness, and the method used by the police to obtain identifications.[109] With so many variables affecting the validity of eyewitness identifications and the high percentage of wrongful convictions based on these identifications, a death penalty sentence should not be allowed to hinge on an eyewitness identification alone. While eyewitness identification can be important, it should by no means be the determining factor in a life or death case. Had this rule been established when DeLuna was on trial, the likelihood of DeLuna being sentenced to death probably would have decreased dramatically.[110]

105 Ryan, *supra* note 99, at 285.

106 *See supra* Introduction.

107 *See Eyewitness Misidentification*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Oct. 7, 2014) (stating that eyewitness misidentification played a role in nearly 75% of convictions that were overturned through DNA testing).

108 Joshua M. Lott, Note & Comment, *The End of Innocence? Federal Habeas Corpus Law After* In Re Davis, 27 GA. ST. U.L. REV. 443, 475 (2011).

109 *Eyewitness Misidentification*, *supra* note 107.

110 *See infra* Conclusion. *See generally* Michael McLoughlin, *Carlos DeLuna Execution: Texas Put to Death an Innocent Man, Columbia University Team Says*, HUFFINGTON POST (May 15, 2012, 12:00 AM), http://www.huffingtonpost.com/2012/05/15/carlos-de-luna-execution-_n_1507003.html

In 2009, Maryland actually changed its death penalty statute to include a provision about eyewitness evidence, which provided that the death penalty is not applicable to a defendant "if the state relies solely on evidence provided by eyewitnesses."[111] Maryland's revised death penalty statute also provided that a death penalty sentence may not be given unless the court or jury is presented with biological or DNA evidence, a videotaped confession, or a video recording conclusively linking the defendant to the crime.[112] Some critics of the revised statute stated that it basically rendered the death penalty obsolete in Maryland because of the difficulty of satisfying this high standard.[113]

While Maryland's statute may have been too extreme, the state had the right idea in requiring substantive evidence for a death penalty sentence. State death penalty statutes have aggravating and mitigating factors to help decide whether a death penalty sentence should be applied.[114] Most states' aggravating factors look at the context of the crime and, thus, include factors such as whether the victim was a police officer, whether the defendant committed the murder during another felony, and whether the defendant committed the murder in an extremely cruel manner.[115] Mitigating factors typically include the defendant's age, whether the defendant was incapacitated at the time of the crime, and whether the defendant was under extreme duress.[116] No current state statute provides for substantive evidentiary requirements, like Maryland's previous statute did, or includes the type of evidence needed for a death penalty sentence in either their aggravating or mitigating factors or other parts of their death

(stating that "eyewitness testimony formed the bedrock of the case.").

111 MD. CODE ANN., CRIM. LAW § 2-202(c) (repealed 2013) (LexisNexis 2012). Maryland has since repealed the death penalty, doing so in May 2013. While Maryland's 2009 revised death penalty statute is no longer in existence, the standards it employed for giving a death penalty sentence are still relevant and should be considered by those states that still have the death penalty.

112 See id. § 2-202(a)(3).

113 See Michael Drost, House Vote Limits Capital Punishment; Bid to Include Hit men on Shortlist Rebuffed, THE WASHINGTON TIMES, March 27, 2009, at A13; see also Steve Lash, Maryland House of Delegates Passes Death Penalty Measure, 87-52, THE DAILY RECORD (Baltimore, MD), March 27, 2009.

114 See State Death Penalty Laws, PROCON.ORG, http://deathpenalty.procon.org/view.resource.php?resourceID=001172 (last updated Feb. 12, 2014) (providing links to each state's death penalty statute); see, e.g., N.C. GEN. STAT. § 14-17 (LexisNexis 2012) (North Carolina's death penalty statute).

115 See State Death Penalty Laws, supra note 113; see, e.g., DEL. CODE ANN. tit. 11, § 4209(e) (LexisNexis 2012) (requiring at least one of twenty-two aggravating circumstances for a death penalty sentence to be available in Delaware).

116 See Terence Lenamon, Terry Lenamon's List of State Death Penalty Mitigation Statutes, JD SUPRA (Mar. 10, 2010), http://www.jdsupra.com/legalnews/terry-lenamons-list-of-state-death-pena-78641/; see, e.g., DEL. CODE ANN. tit. 11, § 4209(d) (LexisNexis 2012) (stating mitigating factors to be considered when determining a death penalty sentence in Delaware).

penalty statutes.[117] Having such heightened evidentiary requirements, however, could help to ensure that faulty evidence, such as eyewitness identifications, does not end up causing an innocent person to be executed. While no form of evidence is foolproof, heightened requirements could at least weed out some of the more error prone forms of evidence, thus bringing states further away from the possibility of executing an innocent.

B. A Proposed Model for Statutory Abrogation in the Context of a Wrongful Execution: Combining Survival Suits, Damages Caps, and Evidentiary Materials

A statute passed by Congress abrogating states' sovereign immunity in the context of a wrongful execution would help to both protect against and remedy a violation of Eighth Amendment rights. Such a statute could allow for the decedent's estate to sue via a survival suit. In doing so, the statute would have to take into account how a wrongful execution could be established. Proving innocence after death is by no means an easy feat, but it can be done. For example, Tim Cole was imprisoned for rape and ended up dying in prison due to an asthma attack.[118] Cole was later exonerated through DNA evidence, making him the first person in the United States to be posthumously exonerated through DNA evidence.[119] DNA evidence would certainly be the key in establishing innocence posthumously; however, prosecutors and courts are often reluctant to allow posthumous DNA testing.[120] Other forms of evidence, such as witness recantation, another's confession, etc., can also be helpful, but, again, it is not easy to establish these posthumously because of preferences to keep a case closed.

Besides the difficulty of establishing evidence of innocence posthumously, the courts and the states would not want an abrogation statute to result in a wrongful execution lawsuit for every person executed. Therefore, the statute should also include some limitations on when a

117 This is not to say that the states do not provide for a specific burden of proof to be met by the parties. Typically, once guilt has been established, the State must prove, beyond a reasonable doubt, that an aggravating factor is met for the defendant to receive the death penalty. See, e.g., DEL. CODE ANN. tit. 11, § 4209(e)(1) (LexisNexis 2012) ("In order for a sentence of death to be imposed, the jury, unanimously, or the judge where applicable, must find that the evidence established beyond a reasonable doubt the existence of at least one of the following aggravating circumstances . . . .").

118 *See* Marice Richter, *Tim Cole, Convict Exonerated After Death, Gets Texas Historical Marker*, HUFFINGTON POST (Feb. 12, 2012, 6:49 PM), http://www.huffingtonpost.com/2012/02/12/convict-exonerated-after-death_n_1272061.html.

119 *See id.*

120 *See* Meghan J. Ryan, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 274-75 (2012) (explaining that courts and prosecutors would prefer to keep a case closed, rather than reopening it).

decedent's estate can sue for wrongful execution. Significant evidence should be required for such a lawsuit, and such evidence should result in the decedent's innocence being proven beyond a reasonable doubt. If the evidence would not meet this standard, then a lawsuit should not be allowed. Where there is a great likelihood that the evidence, if proven in the decedent's favor, would establish innocence beyond a reasonable doubt, the courts should be required to allow for posthumous DNA testing and the admittance of other evidence, so that a viable survival suit can be brought on behalf of the decedent. This may likely require some sort of pretrial to help determine the strength of the evidence in question. The exact means of going about bringing a viable survival suit and proving innocence after death, however, are beyond the scope of this Note.[121]

Additionally, the statute should have a cap on recoverable damages that takes into account the evidentiary material needed to sentence an individual to death in the first place. The cap on recoverable damages could be reduced for states depending upon the type of evidence required by the state for a death penalty sentence. For example, if state *A* requires DNA evidence for a death penalty sentence while in state *B* any form of evidence is sufficient so long as the state meets its burden of proof, then the damages cap for state *A* should be lower than the cap for state *B* because *A* is taking further precautions to reduce the likelihood of executing an innocent individual. By undertaking such measures, Congress would be taking steps to remedy a wrongful execution while also increasing the willingness of the states to take more precautionary measures when it comes to the death penalty in order to further protect against the possibility of a wrongful execution and liability.

Combining all of these components should result in a viable abrogation statute. However, even if the statute is viable, there are multiple reasons why people may be wary about abrogating states' sovereign immunity in the context of a wrongful execution. Tort theories, monetary concerns, and morality all play a part in determining whether an abrogation statute is a truly efficient way to deal with a wrongful execution.

[121] Using the beyond a reasonable doubt standard and an evidentiary hearing to prove innocence after death is the suggestion of this Note; although, it may be determined that there are other methods of proving innocence after death that are more viable. Utilizing habeas corpus litigation instead was considered when writing this Note; however, the holding of *Herrera v. Collins* weighs against habeas corpus litigation being a suitable method. *See supra* notes 51-54 and accompanying text.

IV. POTENTIAL COUNTERARGUMENTS TO ABROGATION

A. Tort Theories behind Abrogating Sovereign Immunity

There are two fundamental theories behind tort liability: the instrumentalist theory and the corrective justice theory.[122] Those who support the instrumentalist theory believe that individuals should be held liable for tort law violations because "liability promotes efficient investments in safety by [imposing] financial consequences on those who underinvest in safety."[123] Those who support the corrective justice theory believe that liability forces wrongdoers to provide compensation for harms caused by their wrongdoings and, therefore, liability embodies wrongdoers' moral obligations to make up for their wrongs.[124]

These two general theories are clearly applicable to private tortfeasors, but questions arise as to whether either theory has the same applicability when it comes to government tortfeasors. The instrumentalist theory is applicable to private tortfeasors because of profit maximization incentives: private individuals want to maximize their profits and minimize their costs, thus if the benefits of taking safety precautions outweigh the costs of paying liability, private individuals will take those extra measures in order to avoid the costs of liability.[125] The government, on the other hand, does not really have any profit maximization objectives; rather, the government responds to political incentives.[126] Therefore, even if the costs are high to the government, as long as the political benefits, such as gaining voter support, outweigh those costs, the government will take actions that could increase the likelihood of constitutional tort liability.[127] The constructive justice theory is applicable to private tortfeasors because any damages that the private tortfeasor has to pay to the victim come straight out of the private tortfeasor's pockets. Any damages a government tortfeasor would have to pay, however, would come straight out of the taxpayers' pockets.[128] Therefore, while private tortfeasors feel the burden of compensating their wrongs, government tortfeasors would not directly feel the burden of such

122 Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 798 (2007).

123 *Id.*

124 *Id.*

125 *See id.*

126 *See id.*

127 *See id.* at 824-25.

128 *See id.* at 798.

compensation.[129]

If the theories behind tort liability are not really applicable when it comes to government tortfeasors, then why would holding the state liable for a wrongful execution be appropriate, or even effective? While the theories on their face might not seem as applicable to government tortfeasors, liability would still have compelling affects. Even if the state cannot reach Pareto efficiency as a private tortfeasor could, the state still has a loss prevention incentive.[130] While profit maximization is not at the forefront of a government entity's concerns, state budgets are important. To pay for liabilities, states could raise taxes, but this would displease the taxpayers and possibly prevent state government officials from being reelected.[131] Therefore, if Congress were to impose liability for wrongful executions, states would have to reconsider the budget spending for corrections to ensure that the budget is allocated efficiently, without having to raise taxes too drastically (or at all).

Taxpayers, however, are not the ones who committed the constitutional tort of executing an innocent individual, so why should they be held accountable via taxes to pay for a state's wrongdoing? The truth, however, is that, while the taxpayers are not the ones who execute an individual or choose to ask for a death penalty sentence for a defendant, the taxpayers are the ones who ultimately give the death penalty sentence in the majority of states.[132] Therefore, while one certainly would not blame the average taxpayer for a wrongful execution, taxpayers are by no means just bystanders either. Additionally, from a moral standpoint, taxpayers may support state liability for wrongful execution because "of the widely held belief that people who are wrongfully injured should be entitled to recover fair compensation from the wrongdoer."[133] This belief that those wrongfully injured should be properly compensated was acknowledged by the Supreme Court in *Heck v. Humphrey*.[134]

129 *See id.*

130 *See id.* at 843, "[G]overnmental liability . . . will lead to greater investment in loss prevention than will a nonliability regime." Pareto efficiency occurs at the point when profit maximization and cost minimization are at equilibrium; additional profits cannot be made without increasing the costs to the producer beyond the profits.

131 *See id.* at 832.

132 *See Only Juries Can Impose Death Penalty, Supreme Court Rules*, CNN JUSTICE (June 24, 2002), http://articles.cnn.com/2002-06-24/justice/scotus.executions_1_timothy-ring-death-sentences-death-row-inmates?_s=PM:LAW, stating that a jury must make the findings of fact that result in a death penalty sentence. States may leave the ultimate life or death decision to a judge, rather than the jury, by either "requiring a prior jury finding of an aggravating factor in the sentencing phase or . . . placing the aggravating factor determination . . . in the guilt phase." *Id.*

133 *See* Rosenthal, *supra* note 122, at 838.

134 *See* Heck v. Humphrey, 512 U.S. 477, 483 (1994) ("[A] person should be compensated fairly

Even if there are reasons behind having taxpayers pay for the government's wrong, there is a chance that taxpayers would not even see a tax raise in the wake of government liability. As discussed *infra*, imposing liability in these wrongful death instances may actually have the effect of reducing costs to the states, thus leaving more money open in state budgets to pay for any possible liability without having to raise taxes.[135]

Should taxes have to be increased, though, the government may find that any contempt harbored by the taxpayers due to the tax raise is balanced or outweighed by the taxpayers' growing trust in the state and the criminal justice system. Imposing liability on the state for a wrongful execution shows the taxpayers that the state is willing to take responsibility for its wrongs. The state is acknowledging any flaws it may have, and by imposing liability, the state will want to reduce these flaws to prevent liability. Therefore, the state is building trust, within its citizens, of itself and of its criminal justice system by assuming the responsibility of paying damages for any wrongful execution.[136]

B. Monetary Considerations

As with all things, money is a major concern when it comes to any actions taken individually or by a government entity. Clearly, an imposition of liability will have some effect on a state's budget.[137] The state only has so much money to spend towards corrections without either taking money away from other parts of the budget, such as education or public transportation, or raising taxes. Currently, however, the imposition of the death penalty is more costly to states than life without parole.[138] The higher death penalty costs are not because of the actual execution, but rather are because of the long trial and appeals processes, which are necessary in death penalty cases in order to help assure that an innocent person does not get executed.[139] In California, for example, approximately $4.6 billion has been spent on the death penalty since 1978.[140] These costs

for injuries caused by the violation of his legal rights.").

135 *See infra* Part IV.B.

136 *See* Adam L. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 238 (2008); *see also* Meghan J. Ryan, Article, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 299 (2012).

137 *See* Rosenthal, *supra* note 122, at 845.

138 *See To Execute or Note: A Question of Cost?*, THE ASSOCIATED PRESS, http://www.nbcnews.com/id/29552692/ns/us_news-crime_and_courts/t/execute-or-not-question-cost/#.VDtVhCtdVRc (last updated Mar. 7, 2009, 4:35 AM).

139 *See id.*

140 *California Cost Study 2011*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/california-cost-study-2011 (last visited Oct. 13, 2014).

are broken down as follows: $1.94 billion for pre-trial and trial costs; $0.925 billion for automatic appeals and state habeas corpus petitions; $0.775 billion for federal habeas corpus appeals; and $1 billion for incarceration.[141] In California, the cost for a convict who receives life without parole is about $1.598 million in 34 years, without accounting for inflation; the cost for a convict who is put on death row is about $2.742 million in only 20 years.[142]

Since the death penalty is much more expensive than life without parole, imposing liability on the states for a wrongful execution could have a major cost effect. First, under the proposed abrogation statute, states have an incentive to increase the evidentiary requirements needed for a death penalty sentence to be an option. Increased evidentiary requirements would reduce the number of death penalty eligible defendants; therefore, some people who may have either received the death penalty, or been subjected to trials to try to impose a death penalty sentence, would only be capable of receiving a maximum sentence of life without parole. This would reduce the costs to the states in the initial trials of death penalty cases, mandatory appeals, and other procedural steps. Maryland's previous death penalty statute was the only working model with increased evidentiary requirements.[143] An article proposing reform of California's death penalty statute stated that if California were to impose legislation similar to that of Maryland's, the state would have "an immediate net savings of tens of millions of dollars per year."[144] Additionally, fewer death penalty trials, appeals, and post-conviction proceedings would save taxpayers millions of dollars per year over time.[145]

These great savings in death penalty costs would then be available to the states to be allocated elsewhere within their corrections budget. The millions saved could be allocated to any liability suits a state faces because of a wrongful execution. Therefore, taxes would not have to be increased because the "additional" money needed to pay for liability suits and resulting damages would be inherently created from the savings from less death penalty prosecutions. Additionally, since the proposed legislation

141 *Id.*

142 Glenn Barr, *The Cost of Life without Parole*, MOUNTAIN NEWS (Mar. 24, 2011, 9:03 AM), http://www.mountain-news.com/news/crime_log/article_4f1e45f8-5630-11e0-93da-001cc4c002e0.html.

143 See *supra* Part III.A.3. Unfortunately, the effects of these reforms are not readily available.

144 Arthur L. Alarcon & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L. REV. 41, 221 (2011).

145 *See id.*

would incentivize stricter evidentiary standards for a death penalty sentence, it would also have the hopeful effect of decreasing the possibility of executing an innocent individual. Thus, the possibility of a state even facing a suit due to wrongful execution decreases substantially. Therefore, while the money saved from the legislation is available to be used for any wrongful execution suits, the likelihood of these suits occurring is so minimal that states may be able to allocate funds elsewhere.

C. The Morality Issue

While the abrogation statute would have the benefit of reducing the likelihood of executing an innocent individual, it could also cause some guilty people to avoid execution. One of the stances taken by people in support of the death penalty is that these people deserve to die because of the horrific crime they committed.[146] Additionally, the criminal justice system takes the stance that some people may be convicted of crimes that they did not commit, but this wrong is necessary in order to prevent crimes and get retribution from those guilty of crimes.[147] In *Herrera*, the Court even said "'due process does not require that every conceivable step be taken, at whatever cost to eliminate the possibility of convicting an innocent person.' To conclude otherwise would all but paralyze our system for enforcement of the criminal law."[148] The chance of guilty murderers not being sentenced to death could be one that people are not willing to take.

The Court has also said, however, that "death is different in kind from any other punishment imposed under our system of criminal justice."[149] Since death is different, it should also be treated differently from other punishments and should have different standards. Executing an innocent person is not the same as putting an innocent person in prison. If a person is wrongfully imprisoned, he or she can be released; if a person is wrongfully executed, he or she cannot return from the dead. This

[146] *See* Thomas W. Clark, *Crime and Causality: Do Killers Deserve to Die?*, FREE INQUIRY MAGAZINE, *available at* http://secularhumanism.org/library/fi/clark_25_2.htm.

[147] *See* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Convictions Rate*, 97 J. Crim. L & Criminology 761, 764 (2007), "[T]he legal system is structured to operate as if it were controlled by Paleyites . . . ." Paleyites believe that "even though it is wrong to convict an innocent person, such convictions are not only inevitable in a human system, but represent the necessary social price of maintaining sufficient criminal law enforcement to provide an appropriate level of security for the public in general." *Id.* at 763.

[148] Herrera v. Collins, 506 U.S. 390, 399 (1993) (quoting Patterson v. New York, 432 U.S. 197, 208 (1977)).

[149] *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976); *see also* Joshua M. Lott, Note & Comment, *The End of Innocence? Federal Habeas Corpus Law After* In Re Davis, 27 GA. ST. U.L. REV. 443, 475 (2011) (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976)).

difference in permanency calls for a difference in standards and a difference in the ease with which the punishment is applied. Could actually guilty people manage to escape a "deserved" death row punishment? Yes, but that would not mean that the guilty, "deserving" person is now free to walk the streets. Assuming the State meets its burden of proof, these guilty individuals are still eligible for life without parole. Thus, saving an innocent person from the possibility of execution is well worth the consequence of possibly having to sentence a guilty person to life without parole rather than execution.

CONCLUSION

Under the proposed abrogation statute, DeLuna's estate would likely have a strong survival suit against the state and be able to recover for his execution. The evidence against DeLuna was extremely weak. There was no DNA evidence linking DeLuna to the murder of Lopez and faulty eyewitness evidence was the key argument in creating the link. This evidence or, rather, the lack thereof, combined with the new evidence uncovered regarding Hernandez, the money, and the state of the crime scene should pass a beyond a reasonable doubt burden of proof with regards to DeLuna's innocence. Since the State of Texas took minimal precautions, at least in DeLuna's case, in ensuring that an innocent was not executed, a survival suit brought by DeLuna's estate would likely result in Texas having to pay high monetary damages. However, one would hope that the potential for these high monetary damages would have prevented Texas from imposing the death penalty in the first place, or at least caused Texas to find stronger evidence against DeLuna.

As cases such as Carlos DeLuna's exhibit, executing an innocent individual is very possible and has likely even occurred. Executing an innocent is a violation of that person's Eighth Amendment rights. With every violation of someone's rights should come some remedy. By abrogating states' sovereign immunity in the case of a wrongful execution, Congress would be creating a remedy for the decedent and forcing the states to acknowledge the harm done in executing an innocent individual. Without abrogation, there is currently no remedy in place for the execution of an innocent; the states can execute an innocent with no consequences to them. The innocent, however, faces death and the innocent's family loses a loved one. While nothing can ever fully cure the pain caused by a wrongful execution, imposing liability upon the states is at least a step in the right direction to ensure that the states' wrongs are acknowledged and

that the states do something to reconcile this horrific wrong.