State Killing, the Stage of Innocence, and The Exonerated

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Jessica Blank and Erik Jensen’s documentary play, *The Exonerated*, brings to the stage the experiences of six people who spent between two and twenty-two years on death row for crimes they did not commit. Drawn from interviews and developed with Allan Buchman, director of the Culture Project, *The Exonerated* was first performed by the Actor’s Gang in Los Angeles on 19 April 2002. The play moved to Off-Broadway six months later, directed by Bob Balaban, and has been performed across the country, in Europe, and at the United Nations. Often staged as readers’ theater with a minimal set and high-profile actors, *The Exonerated* has won numerous awards, including the Outer Critics Circle Award for Best Off-Broadway Play. It appeared on lists of the top ten plays for 2002 in the *New York Times* and *Time* magazine and was made into a movie by Court TV in 2005. Writing for the London *Telegraph*, Charles Spencer “approached *The Exonerated* with a certain degree of dread”—“There are few spectacles more ridiculous than Hollywood stars in one of their periodic fits of morality”—but he found the play moving and important. Ben Brantley in the *New York Times* called it “intense and deeply affecting.”¹

Through a popular merger of documentary, star power, and sentimental address, *The Exonerated* provokes, through firsthand testimony, sympathy for former death-row prisoners. The hallmark signs of sentimentality are abundant: human connectedness, shared pain, broken ties, compassion in brutalized contexts, and redemptive suffering. Brantley writes that the clear goal of *The Exonerated* is “to edify.” In their memoir *Living Justice*, Blank and Jensen recall that they set out to recreate the “emotional immediacy” they had experienced at a
conference on the death penalty when they heard over speakerphone the voice of a man on death row. They decided to write a play to bring the reality of wrongful convictions to a wider audience. By focusing on innocence, Blank and Jensen hoped to “sidestep much of the polarized ethical debate that so often bogs down conversations about the death penalty and get right to the human issues involved.”

Balaban describes the work as less polemical than pedagogical. As a celebrated example of political theater, *The Exonerated* provides a forum for thinking through the contemporary terms and framework of conversations about state killing. The script may not sidestep a debate as much as inscribe key cultural dynamics. *The Exonerated* promotes reform and elicits sympathy by substituting a false rhetoric of universal vulnerability for a more accurate assessment of imprisonment and judicial murder. Although hardly uncontroversial, the play does generate a deceptive sense of shared agreement—after all, few people argue that innocent people should be poisoned or electrocuted. (Justices William Rehnquist and Antonin Scalia have come close.) In its steady tone and narrow focus, the play cedes to sentimentalism’s “generic wish for an unconflicted world, one where structural inequities, not emotions and intimacies, are epiphenomenal.” Beneath the veil of the play’s sentimental structure lie the murderous realities of the justice system.

A few years ago at an orientation session for teachers at a federal prison in West Virginia, I was given a handout of things not to do with inmates. Top on the list of don’ts was this requirement: “Don’t overidentify.” We were warned about the cunning of prisoners, their capacity to play on visitors’ sympathy. We were given detailed instructions on what to do in a hostage situation. The warden made clear that in the case of an attempted escape, he is trained to kill—and it doesn’t matter if he’s aiming at a man or a woman, or if the woman is a mother, as most women in prison are. To sympathize with people held captive under such conditions is a needed, ethical response, and *The Exonerated* moves in this direction, fashioning an intense exchange among actors, released prisoners, and audience members.

Sentimentalism is under particular pressure in the prison context. Analysis of the composition, performance, and reception of *The Exonerated* reveals the challenges of creating art that is aimed at social reform and confirms the difficulty in assessing the political function or, in Fredric Jameson’s sense, the political unconscious of American
literature. The literature of imprisonment and resistance testifies to a history of struggle against structural violence and racism. Dylan Rodriguez describes such writing as activating from a “site of political death” and focuses on instances when a “deeply politicized impatience with the pace of resistance” overtakes other concerns, disturbing “the ritualized coherence and contrived rationality of political discourse altogether.” In The Exonerated, Sunny Jacobs conveys this kind of break:

They tell you exactly how they’re gonna do it. They’re gonna send twenty-two hundred volts of electricity through your body until you’re dead. And then they ask you if have anything to say to that, and really it’s kind of dumb-founding. So after the judge read the sentence, I just said, “Are you finished?” I didn’t have anything to say. What do you say? How can you say anything to that?

Other stage figures articulate as well the ways that state violence forecloses meaningful exchange, but the form of the play moves steadily away from this epistemological key to accentuate dramatic and political coherence. Although my analysis may seem wearily skeptical (What are the bad consequences of this good literary work?), the need to reflect on what we talk about when we talk about the U.S. prison system is especially urgent.

Starting the Conversation

Blank and Jensen interviewed on the phone forty people who had been wrongfully convicted of capital crimes and selected twenty to meet in person. For the play, they whittled the twenty down to twelve, and the twelve down to the following six cases. In the early 1970s, Delbert Tibbs was convicted of the murder of a white man and the rape of a sixteen-year-old white woman in Florida. The evidence against him consisted of the eyewitness account of the rape victim. “Now, initially,” Tibbs explains, “the girl who survived the thing described the murderer as a black man about five six, very dark complexion, with pockmarked skin and a bush Afro. [beat] Now that don’t fit me no matter how you draw it—except racially. . . . We’re both black men” (E, 23). On appeal, the original conviction was overturned, and Tibbs was released in January 1977. In 1991 in Mississippi, Robert Hayes was convicted of the rape and murder of a white woman. Hayes recalls,
“[I]n my first trial, I knew I was going to prison—I had eleven whites and one black on that jury” (E, 12). The Florida Supreme Court overturned his conviction in 1995, and he was acquitted in a retrial in 1997. David Keaton, a black teenager, confessed under torture to the murder of a white police officer in 1971. “I didn’t know the rules,” Keaton says, “and they were threatenin’ me, and all that. And I was afraid. I mean they could go in there and beat you up, mess you up, hang you up, nobody’d ever hear nothin’ else about you. And so I say, okay, to prevent that, I’m gonna go ahead and confess to the crime” (E, 20). He trusted that witnesses would verify that he was not at the scene of the murder. Keaton was convicted and sentenced to death in Florida. In 1973, the state supreme court reversed the conviction and ordered a new trial. Keaton was released after another man was tried and convicted for the murder.

The remaining three cases involve white defendants. In 1993, Gary Gauger was convicted of killing his parents in Illinois. During an all-night interrogation, Gauger was encouraged to provide police with a “vision statement,” describing how, hypothetically, he would have committed the crime. This statement, full of factual errors, was used to convict Gauger. His death sentence was overturned in 1996, and the prosecution dropped charges. Soon after, the FBI secured information on the perpetrators, and in 2002, former governor George Ryan extended a full pardon to Gauger. Neither of the two final cases resulted in a legal exoneration, a factual discrepancy that has not been lost on pro–death penalty reviewers of the play. In 1976, Sonia Jacobs was convicted, along with her life partner Jesse Tafero, of killing a white police officer and a Canadian constable. From prison a few years later, Walter Rhodes claimed that he had been the actual shooter. In 1981, the Supreme Court commuted Jacobs’s sentence to life. Tafero was executed in 1990; Jacobs later took the Alford plea and was released in 1992. (An Alford plea is a curious guilty plea in which the defendant registers with the court a claim of innocence but admits that the prosecution has convincing evidence to the contrary.) Last, Kerry Max Cook was arrested in 1977 for the murder of a white woman in Texas. Cook was working at a gay bar at the time of his arrest and was assumed to be gay. In closing remarks, the prosecution urged the jury not “to give this pervert his butcher knife back” and to “let all the freaks and perverts and murderous homosexuals of the world know what we do with them in a court of justice” (E, 42).
During his twenty-two years in prison, Cook saw 141 people go to the death chamber. After four separate trials, he also took the Alford plea and was released.

The playwrights wove these experiences into a compelling narrative of arrest, prosecution, imprisonment, and release. The result has had clear impacts. Montel Williams, who played Tibbs, continues to support the death penalty but was challenged by the performance: “‘[T]he more I keep working with this issue I’m in support of, I keep arguing myself out of it, because a system that is operated by people is not infallible. People make mistakes.’”12 Brian Dennehy, who played Gauger, said in a postperformance talk: “‘Before acting in this play I philosophically didn’t have a problem with the death penalty. What I’ve learned is that the problems lie in implementation.’”13 The script contains a conversion story as well. Sandra Cook, who met and married Kerry Max Cook after his release, admits that she initially assumed he must have been guilty of something: “I’m ashamed to have had this thought—What did he do to get himself in that situation? That’s how I looked at it . . . ‘cause you know, I was very conservative . . . [beat] and also very stupid” (E, 69, ellipses in original).

Directors and actors have tried to enlist a diverse audience in terms of attitudes about executions. Richard Dreyfuss urged audience members to invite others to the performance “whose thinking might be changed,”14 and Vanessa Redgrave assured potential audience members that the play does not preach.15 In New York, the playwrights left tickets at will-call for George W. and Laura Bush. The play has been seen by magistrates from London and district attorneys from New Jersey as well as attorneys general and Supreme Court justices.16 Former attorney general Janet Reno argued that it would “‘do more to promote justice than any literary effort I have seen.’” A production for the American Bar Association in Texas raised $100,000 for DNA testing and resulted in a lead prosecutor publicly apologizing to Cook.17 Judges and prosecutors have complimented Balaban on the play, and Mary Jo White, a federal prosecutor from Manhattan, acknowledged its accuracy, noting that the “degree to which [the zealfulness of cops] permeates the American justice system, I fear, is not insignificant.”18

One of the most dramatic performances took place on 17 December 2002 at the Chicago Center for the Performing Arts. Then-governor Ryan, his top staff, and members of the general assembly were in attendance. The evening had been arranged by a coalition of groups—
the Center on Wrongful Convictions, the Illinois Coalition against the Death Penalty, and Murder Victims’ Families for Reconciliation—as part of a strategy to compel the governor to grant commutations to Illinois death-row prisoners. A Republican and longtime supporter of the death penalty, Ryan had been prompted by the state’s record of wrongful capital convictions to issue a moratorium on the death penalty two years earlier: twelve people had been executed and thirteen people exonerated since 1976. As Ryan explained, “I’m a pharmacist. If I got 50 percent of my prescriptions back because they were filled wrong I wouldn’t be in business.”¹⁹ (As of this writing, eighteen people have been exonerated from death row in Illinois.) The coalition’s campaign included a national gathering of forty exonerated men and women, meetings between the governor and prisoners’ families, a thirty-seven-mile awareness walk, and the Chicago premiere of The Exonerated. The playwrights were delighted: “We’d also been trying,” they noted, “to figure out how to start a conversation with those who had more decision-making power than ourselves, who were perhaps more conservative, who controlled the system in more direct, immediate ways. We could imagine no more perfect venue for the play, no situation in which it would fulfill its purpose more directly, than this” (L, 291–92).²⁰ Also at the performance were the individuals portrayed in the play. Cook described it as “‘the most important night of my life . . . . This honestly transcends the day I was freed. Through Richard Dreyfuss, I was getting the chance to talk to Governor Ryan.’”²¹

Approximately three weeks later, and three days before leaving office, Ryan granted a mass commutation, and Balaban was told that the play had influenced his decision.²² Louise Kennedy began her article in the Boston Globe with this observation: “Before outgoing Illinois Governor George Ryan decided to commute the sentences of all the prisoners on that state’s death row last weekend, he watched a play.”²³ The playwrights’ hopes had been exceeded: “The power of these people and their stories translated—we hadn’t gotten in the way. We’d done our job” (L, 275).

The death penalty abolition movement has gained significant traction because of the number and visibility of cases of “actual innocence,” a phrase meant to distinguish exonerations based on factual innocence from those resulting from due-process or legal errors. The innocence argument maintains that because the criminal justice sys-
tem is fallible and mistakes will occur and because there are alternatives to death, a democratic state cannot justify this irreversible punishment. Since 1976, 139 people have been exonerated of capital crimes in the United States. Bryan Stevenson, director of the Equal Justice Initiative, often points out that a defendant in a capital case is better off being rich and guilty than poor and innocent. The Supreme Court’s decision in *Herrera v. Collins* (1993) provided little reassurance. Rehnquist argued that “errors of fact” discovered after a constitutionally fair trial do not require judicial remedy, citing *Patterson v. New York* (1977): “[D]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.” The petitioner, Leonel Herrera, was executed in Texas in 1993. Three years later, Bill Clinton introduced and Congress passed the Anti-terrorism and Effective Death Penalty Act, which reduced the federal appeals process and created what Amy Goldwasser calls “perhaps the most innocent-be-damned legislation on capital punishment.” More recently, in June 2009, Scalia wrote in a dissent in Troy Davis’s case that “this court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.”

The American Bar Association has called for a moratorium on the death penalty, and after more than a century of support for capital punishment, the *Chicago Tribune* reversed its editorial position. A moratorium has been in effect in Illinois since 2000, and as I write, a cost-saving abolition bill is making its way into law. In December 2007, New Jersey abolished the death penalty, followed by New Mexico in 2009, with both states citing the risk of executing an innocent person. Yet some abolitionists, including attorney David Dow, founder of the Texas Innocence Network, believe that the innocence argument is a tactical and moral mistake. Most people on death row are, Dow emphasizes, guilty. Having seen many of his clients put to death, he insists, “[I]t is the humanity of the inmates—of my clients—that is the critical moral fact. I remain convinced that the obsessive attention to innocence distracts from that fact.” Penal history is filled with theories and practices that promise reform and transformation but deliver more convictions and more prisons. This is, Michel Foucault argues, the point of prison/reform. If we do not confront the intentional aim of capital punishment, we open the door, Dow attests, to reform, not abolition. And
reform was the route taken by most state legislatures after *Furman v. Georgia* (1972). Four years after the court ruled in this case that capital punishment was applied in a capricious and discriminatory manner, new death penalty statutes were approved in *Gregg v. Georgia*. For Dow, concentrating on flaws in the administration of the death penalty only encourages governments to tinker and “design a better mousetrap.”

**Crafting and Limiting Reform**

Programs, reviews, and the Court TV version emphasize the fact-based character of *The Exonerated*. “With a few exceptions,” the playwrights stress, “each word spoken in this play comes from the public record—legal documents, court transcripts, letters—or from an interview with the exonerated person” (*E*, xiii). Blank and Jensen chose cases that they thought were “most representative” in terms of race, gender, geography, personality, and life experience (*L*, 225). They wanted to keep out their own politics and “not to tell people what to do, but just to present these stories and let them tell themselves.” Stories, the playwrights also realize, never tell themselves; presenting stories means choosing subjects, introducing terms, setting conceptual and historical parameters.

Carol Martin points out that contemporary documentary theater generally claims that “everything presented is part of the archive. But equally important is the fact that not everything in the archive is part of the documentary.” Once the playwrights had chosen the initial subjects and actors had begun reading the script, they “took a big Magic Marker and crossed out the boring parts, the awkward parts, the parts that didn’t translate. Our interviews were beginning—just beginning—to look a little bit like stories” (*L*, 186). Balaban recalls, “I immediately threw it on its feet with a bunch of movie stars. . . . In the course of five years we cut it down. I was the director at this point so I helped organize this and helped bring in more material so this could feel more like drama.” Blank and Jensen explain that had they “not been willing to chip away at [the manuscript] ruthlessly, we would have been left with rough edges, undefined lines, coarse masses of words” (*L*, 226). In this documentary paradox—between staying out of the way and ruthlessly cutting—*The Exonerated* was composed.

Among the people interviewed who did not become part of the performance was Darby Tillis, who was suspicious of the playwrights’
moters. The playwrights acknowledge in their memoir and interviews that Tillis educated them about the need to clarify their intentions and address compensation up front. He told them that plays make money—"'[T]hat’s what you’re doing this for; don’t tell me any different’”—and refused to be tape-recorded (L, 60). Tillis does not appear in the play because, according to Blank and Jensen, he did not want to be. Lost in the performance are his telling historical objections. “Transcription is not,” writes Dwight Conquergood, “a transparent or politically innocent model for conceptualizing or engaging the world.”36 Blank and Jensen also spoke with Henry Drake but knew ten minutes into the conversation that he could not be in the play. After indicating that his IQ might be below average, they recall, “As we sat talking with Henry [Drake], we knew there was no way his story could make it into the play. We were fashioning a play based on people’s own words, and Henry’s weren’t cohesive enough for an audience to understand” (L, 115).

People with mental disabilities confess far more often to crimes they did not commit than people with average IQ scores.37 Since 1976, more than forty people with IQs under seventy have been executed, and it was not until Atkins v. Georgia (2002) that the Supreme Court declared the execution of mentally retarded people unconstitutional. The death penalty extends, write Jensen and Blank in their memoir, to “the most defenseless, most vulnerable members of our society” (L, 116). Rather than grapple with the challenges Drake would present to the form of the play, they decided to cut his story, admitting that they “were unhappy with that” (L, 237). When asked about subsequent choices in an interview, Jensen said the question “weighs on him”: “When you are in the business of empathy,” he said, “which artists and I guess educators are, you have to make choices.”38 (I will turn to the “business of empathy” in the next section.)

The selection process also resulted in hurt feelings among some whose stories were eliminated. Blank and Jensen apologize to these unnamed individuals in Living Justice and add, “If it’s any consolation, we learned something from our mistake and have tried to evolve from the experience” (L, 227). The performance joins a tradition of enfranchised people speaking for formerly captive people and benefiting from the publication or recording.39 Like oral histories of American Indians, slaves, and prisoners, contemporary documentary work often draws attention to patterns of privilege and public access. The
inevitably subjective criteria at work in the crafting of *The Exonerated*—With whom could the playwrights relate? Who wanted to work with them? Which cases were easier to convey?—resulted less in a representative group than a broadly familiar narrative. Prison reform efforts have similarly focused on the most “accessible” or “sympathetic” victim, often to avoid facing the antiblack engine of the criminal justice system.40

The second sentence of the introduction tells us that the people with whom Blank and Jensen spoke “were from vastly different ethnic, religious and educational backgrounds. . . . The only thing they held in common was that they had each been sentenced to die” (*E*, xi). This description, repeated in program notes, is perplexing. Most of the people exonerated from death row in the United States—and most of the people the playwrights chose to feature—have at least three things in common: poverty, a conviction in the South, and a case involving a white victim. The overwhelming number of defendants in capital trials cannot afford a private attorney, and in Alabama, more than 80 percent of those on death row were represented by defense attorneys whose costs were capped at $1,000 (“CD,” 94). Of post-1976 executions, 80 percent have occurred in the South, and cases in two states, Florida and Illinois, account for 43 of the total 139 exonerations. (Three of *The Exonerated*’s six cases were prosecuted in Florida.) Finally, the murder of white people more often results in capital convictions than the murder of black people. The majority (79 percent) of those on death row were convicted of killing a white person,41 even though, according to the U.S. Bureau of Justice Statistics, black Americans constitute more than half of all murder victims—52 percent from 1976 to 2005.42 And though you cannot learn this from the play, all the victims in these cases were white. Still, we are told the only common ground between the wrongfully convicted is the sentence of death.43

Of the people featured in *The Exonerated*, three are black and three are white. Unless contextualized by the racial makeup of the United States, this “balanced” presentation suggests an equivalency and risks obscuring the disproportionate impact of mass incarceration, wrongful convictions, and capital sentencing on African American, American Indian, and Latina/o individuals, families, and communities. Although anyone may wind up in prison for a crime he or she did not commit, the person most likely to be in this position has historically been, and continues to be, a black man with little or no money. Black
men and boys are more likely to be innocent, and more assumed to be guilty, than their white counterparts. Cook points out in *The Exonerated*, “I wasn’t trash, I came from a good family—if it happened to me, man, it can happen to anyone” (E, 48). Jacobs describes her shock at the indictment: “I’m one of those peace-and-love people. I’m a *vegetarian*. How could you possibly think I would kill someone?” (E, 43). These moments contrast sharply with Hayes’s response: “I *knew* I was going to prison.”

On the one hand, the decision to stress that even those with some class and race privilege are trapped in this system is understandable. Such a choice can coincide with a concern for those more routinely subjected to the aggression of the state—like Victor Saldano, whose Texas death sentence was vacated in 2000 because the prosecution had argued that his race predisposed him to future violence (“CD,” 87). Given racism, fear of violent crime, and dehumanizing accounts of prisoners, highlighting the exceptional (proportionally speaking) case, perhaps more easily empathetic to a middle-class white majority, might seem to make strategic sense. But “choice of subject matter,” as Raymond Williams observes, “contains real determinants.” This decision can mask one of the strongest legal arguments against the death penalty—unequal protection based on race—and foreclose reflection on the larger workings of the criminal justice system. As Saidiya Hartman’s history of slavery and emancipation illustrates, we need to be alert to “the savage encroachments of power that take place through notions of reform, consent, and protection.” U.S. reform movements have disappointed repeatedly, notably those that have grappled insufficiently with racial and economic injustice.

The extensive impact of white supremacy in the police force and the legal system has been analyzed by Marc Mauer, Angela Davis, Manning Marable, Jerome Miller, Stuart Banner, Bryan Stevenson, Loïc Wacquant, Douglas Blackmon, David Oshinsky, Christian Palenti, and Amnesty International, among others. Although the race of the victim is the most telling contemporary indicator of unequal sentencing, the race of the defendant remains salient. “Evidence of disparate treatment of racial minorities,” writes Stevenson, “becomes more pronounced at each juncture of the criminal justice process (arrest, filing of charges, pretrial detention, conviction, and incarceration).” These disparities persist, he argues, “even when offender rates are racially proportionate” (“CD,” 85). Almost 42 percent of people
on state death rows, and 59 percent of those of federal death rows, are black and overwhelmingly male. These percentages, higher at the time of *The Exonerated*’s composition, need to be contrasted with the percentage of the population who are black men—approximately 6 percent. The combined percentage of racial minorities on state death rows is over 55 percent; this number goes up to 75 percent on federal death row. Yet Blank and Jensen maintain that social inequity in the North and South is “not even exclusively a racial division; more than anything, the dividing line is based on class” (*L*, 55). This elision of the critical intersection of class and race in the United States has its corollary in the framing of the performance.

These numbers can be dismissed as precisely the kind of academic or “nonhuman” approach to the death penalty that the playwrights wanted to sidestep. Certainly the individual voices are the play’s great strength, and statistical studies can never convey the scope of suffering caused by the death penalty. And with Tony Kushner, I agree that there is not a “hierarchy of political efficaciousness” when it comes to socially committed theater. Still, I find it useful to contrast the interview-based form of much contemporary documentary theater with the form of the Federal Theater Project’s “Living Newspapers.” Stage directions for *The Exonerated* warn against “stapling newspaper headlines to the back wall or throwing electric chairs all over the stage” (*E*, 8). By using narrators and projections to convey statistics and factual information, Living Newspapers aimed to elicit a critical and emotional response; dramatizing psychological depth was not a priority. In Arthur Arent’s *One-Third of a Nation* (1938), the depression housing crisis is captured by rolling out a carpet to represent a plot of real estate in Manhattan. More and more people purchase lots and crowd onto the carpet until there is, literally, no remaining room. Meanwhile the owners get richer and richer.

A similar presentational style could serve in the case of death rows, allowing audiences to see the historical color of prisons and its effects on specific communities. Instead, *The Exonerated* confines white supremacy to overtly racist Southern sheriffs and zealous prosecutors, a few bad apples. The audience can feel sympathy for the wrongfully convicted and repulsion for those directly responsible without having to confront either the racist history of the death penalty or race-based support for executions. Sympathy for the wrongfully convicted is built on what John Ernest calls in another context “studied
avoidances” when it comes to race in the United States. Similarly unexplored are grassroots efforts that have galvanized legal interventions, like the Committee to Free Delbert Tibbs, a network of friends and allies who fought for Tibbs’s release.

How we understand, conceptualize, and dramatize the workings of the criminal justice system will impact the scope and timeliness of change. By isolating Gauger, Tibbs, Jacobs, Cook, Hayes, and Keaton from the cultural context of prisons and from each other (Tibbs is the only one who can respond to others onstage), *The Exonerated* risks leaving in place the “easy intelligibility” of crime policy. Martin suggests that one of the purposes of fact-based theater is to “construct the past in service of a future the authors would like to create.” The difficulty is that we always live in the present and, as Ernest argues, the most useful literary map is “not the kind that charts a course to the future, but rather the kind that enables us to determine our present orientation in the currents of history.” *The Exonerated* neglects this orientation, failing to stress that the devastation caused by the justice system is unexceptional. Robert Meeropol, one of Julius and Ethel Rosenberg’s sons, knows that personal testimony about innocence can be powerful, but he insists it is never sufficient: “Isolating capital punishment from [other human rights abuses] may maximize the chances of producing a ‘liberal’ single-issue mass movement with a significant chance of achieving one important, but very limited, victory for humanity—the elimination of capital punishment. Yet placing this effort in the context of these other issues seems essential in dealing with a problem that is rapidly assuming holocaust proportions.” In an essay that begins, but does not end, with the electrocution of his parents when he was six years old, Meeropol argues that it is a mistake to elevate personal testimony over demands for social change.

**Directing Empathy**

Toward the end of *The Exonerated*, Jacobs asks audience members to imagine their lives during her captivity: “1976 to 1992, just remove that entire chunk from your life, and that’s what happened. [long pause, the length of a count to six]” (*E*, 66). In this silence, audience members are encouraged to step into Jacobs’s experience and consider, then erase, sixteen years of their lives. This dramatic invitation goes to the heart of empathic operations: Can you, will you, imagine my pain? Lauren
Berlant observes that sentimentality requires you to “imagine yourself with someone else’s stress, pain, or humiliated identity. The possibility that through the identification with alterity you will never be the same remains the radical threat and the great promise of this affective aesthetic.” She recognizes that this threat has rarely been realized in the U.S. history of sentimental writing.

*The Exonerated* puts personal losses on center stage and presses into consciousness the particular tragedy of convictions based on legal error or malfeasance. Jacobs’s mother and father died during her imprisonment, her children grew up without her, and her partner was killed in a botched execution in Florida. Jacobs recalls in the play, “It took *thirteen and a half* minutes for Jesse to die. Three jolts of electricity that lasted fifty-five seconds each. Almost a minute. *Each.* Until finally flames shot out from his head, and smoke came from his ears, and the people that came to see the execution, on behalf of the press, are still writing about it. *Ten years afterward*” (*E*, 74). Gauger mourned his parents while being prosecuted and imprisoned for their murder. Keaton lost a spiritual connection that he had felt with God since he was a child. While in prison, three men raped Cook and carved an epithet into his buttocks. His older brother began to drink, lost a good job, and separated from his wife and children: “He put himself right on death row with me,” Cook explains. One night outside a bar, his brother was shot and killed. Cook says, “I know it’s going to sound corny there, but—and I mean it—every day that goes by I wish I could tell him how much I love him” (*E*, 60).

Blank and Jensen advise actors against “over-emotionalizing” and emphasize that the events described happened a long time ago (*E*, xvi). They explain in their memoir: “Whenever emotion runs the show, whether it’s in the form of a desire for vengeance, a deeply felt need for a quick resolution or ‘closure,’ a real fear of further violence, or a prosecutor’s personal desire to get ahead at all costs, it inevitably obscures the truth and leads to wrong decisions—often with tragic consequences” (*L*, 283). Yet *The Exonerated* is an emotional play and many reviewers describe audience members crying. At the conclusion of an early version of the play in Los Angeles, attorney Larry Marshall introduced the people whose stories had been staged. The playwrights describe the moment:

The audience jumped to their feet and roared. The actors—totally shocked to find out that their alter-egos were in the audience—
started weeping. The exonerated folks joined the actors onstage; the audience went on applauding at top volume for what seemed like five minutes.

Neither of us expected how that moment would feel. We knew it would be powerful, but we had no idea how intense it would be to see everything come together like that: art and life, the play we’d put together and the real people it was based on. We clenched each other’s hands as chills ripped through us. We both had goose bumps; tears streamed down our faces. It was the highest moment of either of our lives. (L, 217) ^57

This emotional and bodily response—chills, goose bumps, tears—suggests the sentimental energy of the play, its capacity to evoke a feeling, to compel identification, and perhaps to elicit action.

The disruptive potential of tears is implied by their management at executions. In California witnesses are told, “No loud, open sobbing will be tolerated. You will be removed immediately and without discussion.” ^58 If unruly tears threaten the legitimacy of the state’s performance, cued tears threaten nothing, as Langston Hughes suggests in a poem from 1938. Spoken from the perspective of Clarence Norris, the only Scottsboro defendant still sentenced to be killed at that time, the poem announces:

**August 19th is the date.**
Put it in your book.
The date that I must keep with death.
Would you like to come and look?
You will see a black boy die.
Would you like to come and cry?
Maybe tears politely shed
Help the dead.
Or better still, they may help you—
For if you let the “law” kill me,
Are you free? ^59

Hughes names the ongoing spectacle of closed executions (“Would you like to come and look?”) and exposes the empty sentimentalism of “tears politely shed” unless they yield a critique of unfreedom. The quotations around “law” make clear that lethal actions, and actors, are hidden behind abstractions.

Scholars continue to debate the character and import of empathy’s
tears, a conversation rooted in aesthetics and ethics. Joanne Dobson affirms the political power of sentimental values, insisting on the relevance of “a body of literature giving primacy to affectional connections and responsibilities.” Unfavorable critiques of sentimentalism emphasize its suggestion that feeling deeply constitutes moral character, its preference for personal remedies over structural ones, and its aversion to complexity. Glenn Hendler sees sentimental politics summarized in a moment from *Uncle Tom’s Cabin* when Harriet Beecher Stowe answers her own inquiry, “‘But, what can any individual do?’ with her most famous injunction: ‘they can see to it that they feel right.’” Hendler asks the necessary follow-up, “What does it mean to ‘feel right’ about slavery in particular, or about other forms of physical and emotional suffering . . . ?” and continues:

Did the act of empathizing with a suffering slave lead the novel’s readers to any concrete action aimed at the relief of that suffering? Did it absolve the predominantly white and Northern readers of *Uncle Tom’s Cabin* from responsibility for their actions, leaving them “feeling good” about themselves for their imaginative extension of sympathy to subjects previously excluded from both citizenship and humanity itself? Did the spectacle of suffering provide a kind of self-affirmation—even a sadistic pleasure—to its viewers, one that paradoxically reinscribed the hegemony of the readers’ subject position and the subordinate position of the object of sympathy? These questions pertain to a study of prison literature as well, to the ways prisoners are “excluded from both citizenship and humanity,” their bodies marked by violence.

Marianne Noble suggests that masochistic sentimentalism mobilizes a shared comprehension of bodily pain: “[T]he observer knows what the sufferer feels and becomes intertwined with the other.” Readers of *Uncle Tom’s Cabin* are invited to figure their own suffering as equivalent to that dramatized on the page. Hartman in turn warns against “the dangers of a too-easy intimacy” and “the violence of identification.” Abolitionists often urged white people to sympathize with the enslaved, but given the insensitivity of the white majority to black suffering this effort was variously strained. Hartman maintains that the white body had to “be positioned in the place of the black body in order to make this suffering visible and intelligible.” She cites a letter John Rankin wrote to his proslavery brother. To portray the cruelty
of slavery, Rankin imagines himself, his wife, and his child as slaves, sketching the degradation and horror. Scrutinizing the implications of this strategy of replacing black bodies with white ones, Hartman argues that it erased reality; such empathy “fails to expand the space of the other but merely places the self in its stead.” Rankin’s substitution arguably reinforced the heightened regard for white life that is supposedly critiqued by his imaginative act. Empathy can be, in Augusto Boal’s words, a “terrible weapon.”64

The overt dynamic in *The Exonerated* is not white bodies replacing black ones—though this replacement does obtain in subtle ways, as I’ve suggested—but rather the free and the famous replacing the exonerated and the unknown. The performance relies on a rotation of Hollywood stars: Danny Glover, Susan Sarandon, Vanessa Redgrave, Brian Dennehy, Marlo Thomas, Tim Robbins, Robert Vaughn, Mia Farrow, Kathleen Turner, Parker Posey, Blair Brown, Stockard Channing, Aidan Quinn, Robin Williams, Brooke Shields, Steve Earle, and Debra Winger, among many others. Jensen sees in this strategy a Brechtian effect: the audience is made aware that the actors are not playing characters but reading actual people’s words (“PE”). For Terry Stoller as well, the use of celebrities “creates a distance between performer and character, so that the audience is always aware that the actor is giving voice to the testimony of real people.” But Brantley praises Dreyfuss precisely for effacing his stardom: “The actor, for the moment, has vanished.”65 And for Esther Kaplan, the big names distort reality, especially “an issue as defined by racism as the American death penalty.”66 She suggests that better-known white actors, such as Dreyfuss and Thomas, capture more of the audience’s attention than lesser-known black actors like Charles Brown.

The activation of empathy for a character in sentimental literature is often achieved through another character or narrator. Tibbs functions as a choral figure in the play, creating a second order of mediation and transitioning between stories while telling his own. He speaks the opening lines:

This is not the place for thought that does not end in concreteness; it is not easy to be open or too curious.
It is dangerous to dwell too much on things:
to wonder who or why or when, to wonder how, is dangerous.
How do we, the people, get outta this hole, what’s the way to fight,
might I do what Richard and Ralph and Langston’n them did?
It is not easy to be a poet here. Yet I sing.
I sing. (E, 8)

Situating himself within a tradition of black writers, Tibbs revises these lines in the play’s conclusion, suggesting that this is the place (the prison, the theater, the poem) “for thoughts that do not end in concreteness.” Wondering “why / and how and when” is exactly, his writing affirms, how we get out of the hole (E, 76).

The performance text does not wonder about the murders that led to these convictions. Based on individual accounts—and only Jacobs was present at the scene of the crime—the play does not include information that would demand more than the single direction of empathy. In trials and the media, murders are accounted in gruesome detail, and the prosecution frequently argues that it is seeking death on behalf of murder victims and their families. Judge Alex Kozinski explains that his support for capital punishment was solidified when he worked as a law clerk: “Whatever qualms I had about the efficacy or the morality of the death penalty were drowned out by the pitiful cries of the victims screaming from between the lines of dry legal prose.” While struggling with the capital system and recognizing its “creepy” contradictions, Kozinski affirms his position, ending his argument with “the tortured voices of the victims crying out to me for vindication.” The script of The Exonerated changes the person in the position of victim, leaving unchallenged rehearsed understandings of guilt and innocence.

The faces we know and the sentimental appeal we expect bring in the larger audience but also lessen the imaginative ethical work required for the abolition of the death penalty. Empathy, which Blank describes as the “main mechanism of all narrative, but especially of theatre,” is overmanaged and contained (“PE”). In her excellent review, Kaplan asks “whether one can offer an effective critique of either the death penalty or the criminal justice system writ large by telling only the stories of the innocent.” And in an essay composed before The Exonerated premiered, Alisa Solomon wonders where the American playwrights are who engage in “deep, defiant political thinking” (she gives the exceptions of Kushner and Naomi Wallace). On plays like The Laramie Project, Solomon comments, “We are glutted on sentimental empathy for the proper victims, while relieved of mustering any shred of empathy for the criminal and despised.” Gay men
and death-row prisoners cannot easily or accurately be assumed to be "proper victims" in the national imagination, but telling their stories does not require a disinterest in understanding and stopping violence. James Baldwin feared exactly this: that sentimental renderings of injustices shield an audience from the most difficult and needed reflections on personal and social responsibility.

**Activating the Audience**

The final lines of *The Exonerated* are forceful and quite beautiful. Gauger speculates about light beams and wonders if DNA may well be a miraculous presence in our lives. Jacobs says that she harbors no bitterness about her imprisonment and wants to be a living monument to Tafero. She has never been to his grave because she does not believe that is where he is: “My life is my monument,” she explains (*E*, 76). Tibbs cites Gandhi’s belief that the discovery of God relieves human beings of fear, and he expresses the need to work for justice. In the final gesture of the play, Keaton is able, in contrast to an earlier moment, to stop the rain with his faith.72

While the play acknowledges the severe impediments to a free life postrelease—the difficulty of getting work, the accusations that persist in everyday life, the assault on the spirit and permanent scars on the body (in interviews Blank and Jensen rightly compare the exonerated to returning veterans73)—the play yields to substantial uplift in its concluding lines and staging choices. In this move, suffering may become, to borrow from Toni Morrison, domesticated. Morrison argues that slaves in nineteenth-century white-authored literature serve as “surrogate selves,” a way to reflect on questions of liberty and freedom, “to contemplate limitation, suffering, rebellion, and to speculate on fate and destiny.”74 The imprisoned play a related role in contemporary U.S. movies, plays, and film—a subject of fascination, contempt, horror, and occasional sympathy. After a post-9/11 crisis of faith in the play (Blank and Jensen live in New York City), the playwrights discovered a new relevance to the work: “[T]he exonerated people had something to teach us about facing darkness—even death—and coming out the other side. . . . [T]he exonerated people had something to teach us about survival, endurance, and hope. That was the heart of the play” (*L*, 254). The applicability of the script to other lives revives meaning, and abstractions become its “heart,” not murders in homes, on streets, in execution chambers.
In contrast to the ending of *The Exonerated*, Gauger describes in *Surviving Justice* his ongoing stress and anxiety: “I have very vivid memories of the injustice that I went through. Sometimes I’m out in the fields driving the tractor where nobody can hear me, and all of a sudden I’ll get a memory and I’ll just scream.”75 The play’s accent on freedom is especially pronounced when the wrongfully convicted people are invited onstage at the end of performances. Spencer reveals that “the most emotional moment of a deeply affecting show” occurred when Jacobs—“tiny and indomitable Sunny herself”—came onstage after the play was over. Retta Blaney had a similar response: “Then in what was possibly the most dramatic moment in an afternoon filled with them . . . . in walked several of the real-life exonerated, Kerry Max Cook among them. He held a toddler with curly blond hair and rosy cheeks who smiled and waved at someone in the audience.”76

A reviewer identified as C.J. writes, “For me, it is one of those transcendent moments. Before us are people who had the courage to stand strong and unbroken through unspeakable horrors.”77

The audience has been prepared for this moment in which the exonerated step into the role reserved for them. The subjects of political documentary theater are often dead or missing and so must be represented through “stage acting, film clips, photographs, and other ‘documents’ that attest to the veracity of both the story and the people being enacted.”78 In *The Exonerated*, the actual people become their own verifying documents, proving the truth of the performance and heightening the emotional force.

For the playwrights at that early performance, the applause was intensified by “our knowledge that some of the exonerated folks onstage were shunned by their communities, unable to shake the stigma that clung to them like shadows. Not here, though. Tonight, in this theater, they were getting a standing ovation from movie stars” (L, 218). Blank and Jensen realized that this moment could not achieve justice, but it was, they believed, “a start.” At the cathartic conclusion of each show—Blank and Jensen speak favorably of its basis in Greek theater—the audience welcomes back into the fold its innocent brothers and sisters. Stoller describes this conclusion to a performance at 45 Bleecker Theater:

Richard Dreyfuss made a financial appeal for the six ex-prisoners, who were not compensated by the state upon their release. The deeply affecting material had roused the audience’s emotions, and
as people exited the auditorium they acted upon their empathy, dropping five- and one-dollar bills into a collection basket. Perhaps upon reflection of the issues of injustice that the play had addressed, they will also be roused to take political action.79

Stoller makes a direct connection between the “deeply affecting material” and the impulse to give money. In fact, *The Exonerated* has raised more than $800,000 for the people whose stories it tells (“PE”). The people featured were not extended copyright protection, but financial contributions from audience members have, according to the playwrights, “transformed the lives of the individuals . . . , while providing a way for audiences to make a real difference in a direct and satisfying way.”80

The script may point the audience more toward a personal and financial action than a structural and political response, but these do not have to be discrete operations.81 As with sentimental aesthetics, the rhetorical impact of *The Exonerated* is neither uncomplicated nor predictable. Stoller’s closing optimism that the audience members may be “roused to take political action” does not seem misplaced. At some performances, there have been talkbacks, panel discussions, and abolitionist and other social justice organizations in the lobby inviting audience members to become more involved.

Of greater concern for me is the positioning of the audience with regard to the violent content. Jensen explained in an interview, “I see our roles as being a conduit. People think actors are kind of self-involved, and it’s kind of nice to do something that doesn’t really have anything to do with us.”82 While Jensen may have simply been referring to the fact that he has not been sentenced to die and therefore the play is not about him, the form of the performance reinforces this notion that the caging and killing of human beings “doesn’t really have anything to do” with the audience. The conclusion of the play defers to fate and destiny, and to financial donations, not to organized resistance, political action, or the “dialectical thinking” Solomon hoped for.

By deploying certain sentimental conventions, including a carefully mediated, empathetic subject, an intense focus on private experience, and a movement toward redemption, the play crafts and directs sympathy while averting our gaze from the still-imprisoned and the dead. The conclusion can, as Boal suggests of catharsis in general, work against revolutionary sentiment and action: Aristotelian theater, Boal writes, is “designed to bridle the individual, to adjust him to what
The Court TV version of *The Exonerated* ends with Lyle Lovett singing “Amazing Grace” as a shot of each actor fades into his or her real-life counterpart who addresses the audience. Their comments, under thirty seconds each, are positive and uplifting—except in the case of Hayes, who does not say anything. With the sixth actor, we are segued to a photograph of Hayes, and a subtitle explains that he is in jail on an unrelated charge and again has an innocence claim. No voice attends this still photograph, and the documentary lens moves on quickly. In 2004, Hayes pleaded guilty to arson and manslaughter that occurred in 1987 and is now serving 15–45 years. With the photograph, the line dividing the free and innocent from the trapped and guilty dissolves, and nothing in the script has prepared us to understand or sympathize with the twenty-year-old Hayes, who may have, with drugs raging through him, killed another person.

No single theatrical production can bear the burden of resolving, rhetorically or politically, a calamity like the U.S. prison industrial complex. To start a conversation about the moral implications of capital punishment in this country is not easy, even—and this is stunning—when the singular focus is on people who were sentenced to be killed for crimes they did not commit. It is, in Kaplan’s words, “no shabby feat” for *The Exonerated* to have done the cultural work it has. The abolition of the death penalty and the existing prison system will result from a range of strategies and struggles, including efforts to raise consciousness about wrongful capital convictions—yet even this phrasing seems to posit rightful ones. Abolitionists continue to hope that the next case of innocence (Cameron Todd Willingham, convicted on the basis of junk science of the arson murder of his children and executed) or the next botched execution (Romell Broom, poked with needles eighteen times over the course of two hours before the lethal injection was called off) or the next scandal (Charles Hood—the prosecutor and judge were in a relationship at the time of his capital trial) will end the death penalty. *The Exonerated* reminds me that nothing short of a direct confrontation with the violence of the social order will get us fully out of this hole, will uproot the antipathies and allegiances that build death houses, isolation chambers, innumerable cells.

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Notes

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5 I cite William Rehnquist further in the essay. According to Antonin Scalia, “One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation” (“Consensus on Counting the Innocent: We Can’t,” New
York Times, 25 March 2008). Ernest van den Haag also accepts wrongful capital convictions as a necessary outcome: “Despite precautions, nearly all human activities, such as trucking, lighting, or construction, cost the lives of some innocent bystanders. We do not give up these activities, because the advantages, moral or material, outweigh the unintended losses” (“The Ultimate Punishment: A Defense,” Harvard Law Review 99 [May 1986]: 1662–69). For a Missouri assistant state attorney who argued before the state supreme court that innocence was irrelevant in a capital case, see Surviving Justice: America’s Wrongfully Convicted and Exonerated, ed. Lola Vollen and Dave Eggers (San Francisco, Calif.: McSweeney’s, 2005), 352.

Lauren Berlant, “Poor Eliza,” American Literature 70 (September 1998): 646.


Jessica Blank and Erik Jensen, The Exonerated (New York: Faber and Faber, 2004), 45. Further references are to this edition and will be cited parenthetically in the text as E.


State Killing, Innocence, and *The Exonerated* 145


22 See Mead, “A Star.”


24 See the Innocence List at the Death Penalty Information Center, www.deathpenaltyinfo.org. Michael L. Radelet, Hugo Adam Bedau, and Constance E. Putnam document over four hundred wrongful convictions in homicide cases in the twentieth century, including those of twenty-three people who were executed (*In Spite of Innocence: Erroneous Convictions in Capital Cases* [Boston: Northeastern Univ. Press, 1992]).


29 See National Coalition to Abolish the Death Penalty, “Chicago Paper


31 Hugo Adam Bedau examines six major “improvements” to capital punishment since the late eighteenth century (the institution of degrees of murder; the abolition of public executions; the declaration that juries, not judges, should have discretion over death; the move toward “more humane” modes of killing; and the implementation of the federal appeals process) and concludes, “Each of these reforms has entrenched ever deeper what remains of the death penalty, which makes what remains of it more resistant to complete repeal” (“An Abolitionist’s Survey of the Death Penalty in America Today,” in *Debating the Death Penalty*, ed. Bedau and Cassell, 25).


33 Kennedy, “Enter Policy.”


39 Kate Taylor reports that *The Exonerated* “turned [Blank and Jensen], seemingly overnight, into playwrights of national stature as well as experts on the death penalty, wrongful convictions, and documentary theater.” The pair received funding from the Ford Foundation for their next documentary play, *Aftermath* (“Wedded to Docudrama, and Each Other,” *New York Times*, 26 August 2009, www.nytimes.com/2009/08/30/theater/30tayl


See Parker, DeWees, and Radelet, “Race.” Barry Scheck, Peter Neufeld, and Jim Dwyer report that the most common factors that lead to wrongful convictions “are more pronounced in the conviction of innocent black men” (Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted [New York: Doubleday, 2000], 246).


See “CD” and Lee Bernstein, “. . . Give Me Death”: Capital Punishment


53 Ernest, Chaotic Justice, 35.
54 Garland, Culture of Control, 1; Martin, “Bodies of Evidence,” 10; Ernest, Chaotic Justice, 7.
56 Berlant, “Poor Eliza,” 648.
57 For a similar account, listen to “PE.”
Observer, 12 February 2006, www.guardian.co.uk/stage/2006/feb/12/theatre; and “PE.”

67 For family members of murder victims who do not seek or support the death penalty, see Rachel King, Don’t Kill in Our Names: Families of Murder Victims Speak Out against the Death Penalty (New Brunswick, N.J.: Rutgers Univ. Press, 2003); Brian MacQuarrie, The Ride (Cambridge, Mass.: Da Capo, 2009); Bill Pelke, Journey of Hope . . . from Violence to Healing (Bill Pelke, 2003); Murder Victims’ Families for Reconciliation, www.mvfr.org/; and Murder Victims Families for Human Rights, murdervictimsfamilies.org/.

68 Alex Kozinski, “Tinkering with Death,” Debating the Death Penalty, 2.

69 Jayne M. Blanchard charged the play with avoiding difficult questions: “Capital punishment is a knotty moral problem. Unless, that is, you’re talking about a hand-picked group of people tragically convicted and definitively exonerated. Then, the answer is easy” (“Compelling Stories Drive ‘Exonerated,’” Washington Post, 18 January 2003).

70 This sympathy will not, obviously, be felt by all viewers. Blank recalls a difficult conversation she had with a rape survivor in attendance at The Exonerated in “PE” and L, 279–83.


75 Vollen and Eggers, Surviving Justice, 111.

76 Spencer, “Real Life”; Blaney, “Listening.”


79 Stoller, review of The Exonerated, 347.


82 Hart, “Life after Death Row.”
83 Boal, Theater of the Oppressed, 47.
84 The Exonerated, directed by Bob Balaban, aired 27 January 2005 (Court TV, 2005).