WRONGLY INCARCERATED, RANDOMLY COMPENSATED—HOW TO FUND WRONGFUL-CONVICTION COMPENSATION STATUTES

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INTRODUCTION

It is sadly true that there are people in this country who are sentenced to prison, and even death, for crimes they did not commit. Some have been exonerated and released, largely as the result of innocence projects that have helped prisoners assemble DNA evidence that shows they were not the perpetrators.[1] Some have been exonerated years after they died in prison. Many others are no doubt never exonerated.[2] For a wrongfully convicted person, exoneration is the end of one road but only the beginning of another. Unbelievably, exonerees starting out on the road back to society find that they get little to no help from the justice system. Offenders on parole and convicts who complete their sentences may receive more services than released persons who committed no crime at all.[3] This Article is based on the premise that states must pay compensation to innocent persons who have suffered wrongful imprisonment. The Article explains why exoneration is not enough. It then discusses theoretical justifications that support the payment of compensation and refutes objections to making such payments. Finally, it lays out concrete ways in which states may budget for wrongful-conviction compensation statutes. Although monetary compensation can hardly make up for years of wrongful imprisonment, providing compensation is the least a state can do after an

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1. For example, Gary Dotson's 1979 conviction for rape was vacated and the charges dismissed on August 14, 1989. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005). This was the "first exoneration by DNA evidence . . . [to take] place in the United States." Lauren C. Boucher, Comment, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069, 1069 (2007). One hundred ninety-eight post-conviction exonerations based on DNA evidence occurred between 1989 and 2007. Abigail Penzell, *Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry*, 9 CARDOZO J. CONFLICT RESOL. 145, 145 (2007) (citing *About Us: Mission Statement*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/about/Mission-Statement.php (last visited Feb. 12, 2011)).

2. Unknown numbers of prisoners whose innocence was never established have died in prison. Looking at exonerations beginning in 1989, "[i]n four cases, states posthumously acknowledged the innocence of defendants who had already died in prison: Frank Lee Smith, exonerated in Florida in 2000; Louis Greco and Henry Tameleo, exonerated in Massachusetts in 2002; and John Jeffers, exonerated in Indiana in 2002." Gross et al., *supra* note 1, at 524.

3. Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 429 (2009).

innocent person is exonerated.

Part I of this Article explains wrongful conviction terminology. Part II explains how the very same reasons that make it easy for innocent people to be convicted also make it difficult for them to be exonerated. Part III explains why governments must compensate the wrongfully incarcerated when they win their freedom. It discusses the reasons for and against government compensation, rejecting the argument that imprisoning and even executing innocent persons is a harsh but necessary cost of doing business. Part IV deals with the hard question of how to pay for wrongful-conviction compensation statutes. To ensure that wrongfully imprisoned persons actually obtain compensation, the Article makes concrete suggestions for funding compensation statutes. Wrongfully convicted persons who win their freedom deserve compensation statutes, and states can afford them.

I. TERMINOLOGY

Innocent people convicted and sentenced to prison are described as the "wrongly convicted,"[4] the "wrongfully convicted,"[5] the "erroneously convicted,"[6] the "unjustly convicted,"[7] and the "unjustly imprisoned,"[8] among other terms.[9] The prison sentence is also variably described as "wrongful imprisonment,"[10] "wrongful conviction,"[11] or "unjust conviction."[12] I make the stylistic choice of

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4. Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665 (2002).

5. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477 (2008); Shawn Armbrust, Note, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157 (2004).

6. Boucher, *supra* note 1; Christine L. Zaremski, Comment, *The Compensation of Erroneously Convicted Individuals in Pennsylvania*, 43 DUQ. L. REV. 429 (2005).

7. Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703 (2004) [hereinafter Bernhard, *Justice Still Fails*]; Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999) [hereinafter Bernhard, *When Justice Fails*]; Erin Ann O'Hara, *Victims and Prision [sic] Release: A Modest Proposal*, 19 FED. SENT'G REP. 130, 133 (2006) (using the term "innocent convicts").

8. Shelley Fite, *Compensation for the Unjustly Imprisoned: A Model for Reform in Wisconsin*, 2005 WIS. L. REV. 1181.

9. Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. C.R. L.J. 233 (2002); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

10. Jonathan L. Entin, *Being the Government Means (Almost) Never Having to Say You're Sorry: The Sam Sheppard Case and the Meaning of Wrongful Imprisonment*, 38 AKRON L. REV. 139 (2005).

11. Penzell, *supra* note 1; *see also* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291; Brandon L. Garrett,

the Anglo-Saxon "wrong/wrongful/wrongfully" over the Latinate "error/erroneous/erroneously" and the philosophical choice of "wrongful/wrongfully" over "unjust/unjustly." "Wrongfully" describes how the convicting was done, whereas "unjustly" focuses on the result of the conviction. The injustice flows from the wrongfulness of the conviction.[13] Those who win their freedom are commonly called "exonerees."

II. BACKGROUND: WHY IT IS EASY TO BE CONVICTED AND DIFFICULT TO BE EXONERATED

From mythology to the Bible to Shakespeare to children's tales, popular culture is replete with stories in which no one believes a speaker's claim to be telling the truth.[14] Modern American criminal law has its share of such stories. Fifty years ago a murder took place that resulted in one of the best known stories: the tale of "The Fugitive." Told and retold on television and in the movies, the story focuses on Sam Sheppard, who was wrongfully accused of murdering his wife, convicted, and imprisoned for twelve years before being found not guilty.[15] More recent examples include the teens accused of raping the "Central Park Jogger"[16] and members of the Duke University lacrosse team accused of raping

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Innocence, Harmless Error, and Federal Wrongful Conviction Law, 2005 WIS. L. REV. 35.

12. Bernhard, *Justice Still Fails*, *supra* note 7, at 715; Bernhard, *When Justice Fails*, *supra* note 7, at 73.

13. It is noteworthy that commentators do not use the word "mistakenly" to describe the convicting of innocent persons. The unspoken assumption seems to be that a mistake can be innocent, but a decision reached wrongfully is more blameworthy.

14. *E.g.*, Greek mythological figures Laocoon (he warned the Trojans not to accept the Greeks' gift of the Trojan Horse, but no one listened to him) and Cassandra (she could prophesy the future, but it was fated that no one believe her); Biblical figure Susanna (the elders who tried to seduce her knew no one would take her word over theirs); Shakespeare's Othello (he refused to believe that Desdemona was faithful to him); the Little Red Hen (she warned the barnyard animals that she would not share her homemade bread if they did not help plant, harvest, and grind the wheat—they did not; she did not).

15. *See* Entin, *supra* note 10, at 139-41. Entin begins this article by reviewing a book written by the *Sheppard* prosecutor about the retrial of the *Sheppard* case twenty-five years after the original wrongful conviction. In Entin's review, he highlights all the ways that the *Sheppard* decision was and remains troubling. He uses that starting point as a springboard to discuss new approaches to wrongful imprisonment.

16. A young female jogger was attacked, beaten, assaulted and left for dead in Central Park in April 1989, presumably by a group of teenage boys "wilding" (participating in a violent spree) in the park. Five teens were convicted of the rape and other attacks that occurred in the park that night. In December 2002, as a result of a confession by the real attacker, the boys' convictions were set aside. Lynnell Hancock, *The Press and the Central Park Jogger*, COLUM. JOURNALISM REV. 1, 1-2, Jan. 1, 2003, *available at* http://www.4efren.com/resources/The+Press+and+the+Central+Park+Jogger.pdf.

a woman hired to dance at a party.[17] What makes us believe in a person's guilt when that person is not guilty?

A. Easy to Be Convicted

Innocent defendants are wrongfully convicted and imprisoned for a variety of reasons generally traceable to facets of the criminal justice system. These include "fallible eyewitness identification evidence and flawed eyewitness identification procedures, false confessions, jailhouse snitch testimony, police and prosecutorial misconduct, forensic science error or fraud, and inadequate defense counsel."[18] Mistaken eyewitness testimony[19] may result in a wrongful accusation. Crime lab error[20] or ineffective assistance of counsel[21] may turn the wrongful accusation into a wrongful conviction. Even though innocent, an accused person may confess.[22]

Moreover, incentives within the prosecutorial system may influence prosecutors to obtain convictions.[23] Individually, prosecutors with high conviction rates are more likely to advance on the job[24] and so may overzealously pursue easy targets. Institutionally, district attorneys who show high conviction rates may be able to garner more resources than those who seem to be less successful.[25]

B. Difficult to Be Exonerated

The same circumstances that allow wrongful convictions, and the same incentives that promote them, make it as hard to be exonerated as it is easy to be convicted. For example, prosecutors may oppose post-conviction DNA testing sought by a convicted person.[26] Prosecutors may also oppose post-conviction

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17. "Duke University and its men's lacrosse team came under national scrutiny after a Durham woman alleged she was assaulted at a March 2006 team party off-campus. On April 11, 2007, the North Carolina Attorney General's Office dropped all charges against three indicted team members, saying they are innocent . . . ." *News & Communications*, DUKE UNIV., http://www.dukenews.duke.edu/mmedia/features/lacrosse_incident/ (last visited Feb. 13, 2011).

18. Findley & Scott, *supra* note 11, at 292.

19. Boucher, *supra* note 1, at 1074; Lopez, *supra* note 4, at 675.

20. Boucher, *supra* note 1, at 1078; Lopez, *supra* note 4, at 677 (identifying eyewitness error and creating a mega-category of "police, prosecutor, and scientific (mis)conduct"); *see also* Garrett, *supra* note 11, at 95 n.302, 98 n.311, 99 n.312.

21. Boucher, *supra* note 1, at 1080.

22. Liliana Segura, *Why Would Someone Confess to a Crime He Did Not Do?*, CHI. SUN-TIMES, Oct. 7, 2007, at B1.

23. Medwed, *supra* note 9, at 134-37. For further discussion, see Findley & Scott, *supra* note 11, at 374. For discussion in terms of fair trial rights, see Garrett, *supra* note 11, at 69-110.

24. Medwed, *supra* note 9, at 135.

25. *Id.* at 134-37.

26. *Id.* at 127 n.10. Charles Lugosi also describes the case of *Godschalk v. Montgomery County District Attorney's Office*, 177 F. Supp. 2d 366 (E.D. Pa. 2001), in which defendant

evidentiary hearings sought by the defense to present new evidence such as confessions from actual perpetrators.[27] Even after a wrongfully convicted person is released, prosecutors strive to uphold convictions, often in spite of evidence that shows a defendant is innocent.

Various aspects of the institutional culture of prosecutors' offices contribute to the drive to uphold convictions.[28] Professionally, once a conviction has been attained, "both the individual prosecutor and the office may become vested in maintaining the integrity of the conviction."[29] Psychologically, neither individuals nor organizations want to admit mistakes.[30] Prosecutors, though, may develop some sort of personal stake in the outcome.[31] Even prosecutors who realize that innocent people might sometimes be convicted may have an "'ends justifies the means' outlook" that keeps them from "acknowledging the worthiness of a post-conviction innocence claim."[32]

Further, prosecutors view post-conviction innocence claims skeptically because there are so many of them.[33] In addition to the professional and psychological motivations, political incentives may influence prosecutors to

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Godschalk was finally able to win post-conviction DNA testing. Even though the test results exonerated Godschalk, the district attorney claimed the test results were flawed instead of releasing Godschalk. When further DNA testing still exonerated Godschalk, the district attorney reluctantly recommended to the court of common pleas that he be released. The district attorney still, however, refused to believe that Godschalk was innocent. Lugosi, *supra* note 9, at 235 n.10 (citing Sara Rimer, *Convict's DNA Sways Labs, Not a Determined Prosecutor*, N.Y. TIMES, Feb. 6, 2002, at A14).

27. Medwed, *supra* note 9, at 128.

28. *Id.* at 132. The *Sheppard* case presents a prime example. Sam Sheppard was convicted of second degree murder of his wife in 1954 and was sentenced to life in prison. Entin, *supra* note 10, at 139. Twelve years later, in 1966, the Supreme Court granted habeas corpus review and set aside the conviction after holding that pretrial publicity had tainted the original trial. *Id.* Later that year, Sheppard was acquitted in a retrial. *Id*. He died in 1970, and in 1995, his estate sought a declaration of innocence against the state so that the estate could seek compensation for Sheppard's wrongful imprisonment. *Id.* at 139-40. In the civil trial to establish innocence, the jury ruled against the estate even though Sheppard's conviction had been set aside and he had been acquitted. *Id*. at 140. The prosecutor in the civil trial, William Mason, set out to prove that Sam Sheppard was guilty in spite of the evidence that led to acquittal in his retrial. Entin explains that Mason, in his 2003 book about the civil trial, "sought to vindicate the honor and reputation of his office and of the other law enforcement agencies that had handled the Sheppard case from the beginning." *Id*. at 149.

29. Medwed, *supra* note 9, at 136.

30. *Id.* at 138.

31. This seems to have been the case with the prosecutor in the 1995 civil trial at which Sam Sheppard's son sought to have Sam Sheppard declared innocent. *See* Entin, *supra* note 10, at 139.

32. Medwed, *supra* note 9, at 147.

33. *Id.* at 148. Under the "'needle in a haystack' view of innocence claims, efficiency considerations militate against prosecutors thoroughly reviewing all post-conviction motions." *Id.* at 149.

strive to uphold convictions in post-conviction innocence cases, just as these same incentives may have led them to prosecute the cases in the first place.[34] First, prosecutors who need to win elections may emphasize a tough-on-crime stance.[35] Once in office, they need a record of successful convictions to substantiate such claims. Second, and ironically, state legislation to compensate wrongly convicted individuals may actually motivate prosecutors to resist post-conviction innocence claims[36] because prosecutors may fear that they or their departments will end up paying for these claims.

Statistical studies support the observation that it is difficult to obtain an exoneration. In a study of exonerations in the United States between 1989 and 2003, Gross and colleagues found 340 documented exonerations.[37] This may sound like a large number; it is not. According to the authors,

> We can't come close to estimating the number of false convictions that occur in the United States, but the accumulating mass of exonerations gives us a glimpse of what we're missing. . . . Almost all the individual exonerations that we know about are clustered in two crimes, rape and murder. They are surrounded by widening circles of categories of cases with false convictions that have not been detected: rape convictions that have not been reexamined with DNA evidence; robberies, for which DNA identification is useless; murder cases that are ignored because the defendants were not sentenced to death; assault and drug convictions that are forgotten entirely. Any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands.[38]

Exonerations can be said to demonstrate a failure of our justice system.[39]

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34. *See id.* at 149. This is not always the case. For example, Nancy E. Ryan, trial division chief in the Manhattan district attorney's office, led the reinvestigation of the Central Park Jogger case. The report that she authored in 2002, concluding that the five young men in prison for the attack had been wrongfully convicted, generated controversy and criticism. "The report, which ruled that Matias Reyes was the lone attacker, was criticized by the police and by some in Ms. Ryan's office." John Eligon, *Turning Off the Phone After 20 Years on Call*, CITY ROOM BLOG-NYTIMES.COM (Mar. 12, 201,0 7:38 AM), http://cityroom.blogs.nytimes.com/2010/03/12/turning-off-the-phone-after-20-years-on-call/.

35. Medwed, *supra* note 9, at 127, 154.

36. *Id.* at 154.

37. Gross et al., *supra* note 1, at 524. Gross points out that his team looked only at exonerations that resulted from case-by-case investigations into the particular circumstances of exonerated persons. *Id.* at 523-24. Their study did not include mass exonerations or people wrongly convicted of crimes such as misdemeanor assault or routine felonies. *Id*. at 533-35.

38. *Id.* at 551; *see also* Lopez, *supra* note 4, at 671 (noting that "the extent of factually incorrect convictions in our system must be much greater than anyone wants to believe").

39. *See* Lopez, *supra* note 4, at 674. *But see* Justice Scalia's concurrence in *Kansas v. Marsh*, 548 U.S. 163 (2006), a case analyzing the constitutionality of a state statute that required the death penalty if the jury found beyond a reasonable doubt that certain conditions existed. The defense

Recently, there does seem to be a trend toward more exonerations,[40] yet the number of exonerations still remains relatively low. When, against the odds, a wrongfully convicted person is exonerated, the last thing he should have to contend with is a battle to obtain meaningful compensation. This is a further punishment that adds to the existing failures of our justice system.

III. GOVERNMENTS MUST COMPENSATE THE WRONGLY CONVICTED

A. Exoneration Is Not Enough

A wrongfully convicted and incarcerated person pins his hopes on being exonerated. But exoneration is not enough. Exonerating a convicted person does not mean that he or she is restored to the status quo ante. Convicted persons whose innocence is established may be able to walk out of prison, but it is not so easy to walk back into society. More often than not, they have been harmed in countless ways. They may have lost years of their lives, their families, the opportunity to go to school, or the chance to gain or keep employment.

In our rapidly changing world, employment skills exonerees possessed upon entering prison may be out of date by the time of their release. They probably face discrimination in future employment despite their exoneration. They have probably lost any savings they once had. They have probably lost confidence in their ability to direct and manage their lives. They may have gained a host of physical and psychological problems due to prison conditions; in fact, they may even have lower life expectancies as a result of their incarceration. Further, they have arguably lost their status and respectability in the eyes of society.

Yet upon being set free from prison, at the time when they are the most helpless, exonerated prisoners are released into the world with virtually nothing in hand. Exonerees may receive such token assistance as fifty dollars[41] or "ten dollars and a denim jacket."[42] Beyond so-called "gate money,"[43] some states

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had contended that the statute violated the Eighth Amendment. The majority rejected the argument. *Id.* at 172. The dissent argued that the Eighth Amendment's application to a death penalty statute after 1989 should be assessed in light of the "repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests." *Id*. at 208 (Souter, J., dissenting). In a separate concurring opinion, Justice Scalia found fault with statistical studies referred to by the dissent. He said that the exonerations included in the statistics were not limited to cases of factual innocence. Further, he opined that it "it is utterly impossible to regard 'exoneration'—however casually defined—as a failure of the capital justice system, rather than as a vindication of its effectiveness." *Id.* at 194 (Scalia, J., concurring).

40. *See* Gross et al., *supra* note 1, at 523, 527-28.

41. Armbrust, *supra* note 5, at 158.

42. Lopez, *supra* note 4, at 669.

43. The Arizona "gate money" program is typical: discharged prisoners receive up to fifty dollars that they have accumulated through deductions from their wages in a prison work program or through gifts from families and friends. Prisoners who have not worked will be "gifted" fifty dollars. Inmates also receive a set of clothes and possibly a bus or train ticket "to the closest stop

provide no help at all to exonerees.[44] In all states, exonerees must enter the legal system again if they wish to gain anything beyond token assistance. It is a difficult fight that exonerees lose more often than not. Even in states that do provide compensation through statute, the trigger for compensation is still for the exoneree to file a lawsuit against the state.[45] Although exonerees in states with compensation statutes may seem to be better positioned to receive compensation, applying for compensation under these statutes is a difficult and expensive undertaking that may still leave exonerees empty-handed.

1. Three Avenues of Legal Redress Offer Little Hope to Exonerees.—Four avenues of legal redress exist, but all four are not available in all states. In states without compensation statutes, only three avenues may be available. First, an exoneree may try to get the state legislature to pass a private bill awarding compensation in his or her particular case. Second, an exoneree may be able to bring a federal civil rights lawsuit against the government. Third, the exoneree may be able to bring a state tort lawsuit against prosecutors, police, or defense lawyers. Very few exonerees succeed under these approaches.

a. Private bills.—The first avenue—the private bill—requires that "a wrongly convicted person must lobby his state legislature to pass a private bill that dispenses money from the state treasury directly to the lobbying individual as a remedy for the injustice of being wrongly convicted."[46] Lobbying the state legislature means finding a state legislator who will sponsor the bill and enlist support for it "in both houses so that the bill will pass when it comes up for a vote. This can be a long and arduous process . . . ."[47]

Assuming a private bill passes, some awards are significant;[48] some are not. In *O'Neil v. State*, defendant Leonard O'Neil was convicted and sentenced to a term of ten to twenty-five years for armed robbery.[49] When the actual perpetrator confessed, O'Neil had already served three and a half years of his wrongful sentence. He sued for compensation, but the court of claims dismissed the suit

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outside state lines." KATE J. WILSON, CTR. FOR PUB. POLICY RESEARCH, STATE POLICIES AND PROCEDURES REGARDING "GATE MONEY" 1-2 (Oct. 2007), *available at* http://www.cdcr.ca.gov/adult_research_branch/research_documents/gate_money_oct_2007.pdf.

44. States without wrongful imprisonment compensation statutes are Alaska, Arizona, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Michigan, Minnesota, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington, and Wyoming. *State Compensation*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/content/index.php?option=com_content&view=article&id=52&itemid=55 (last visited Feb. 13, 2011).

45. *See* Boucher, *supra* note 1, at 1083, 1099.

46. Lopez, *supra* note 4, at 698.

47. Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why*, 18 B.U. PUB. INT. L.J. 403, 408 (2009) (giving a full account of the procedure and discussing some of the awards made in various states via this route).

48. *Id.* (discussing Georgia exoneree Clarence Harrison and Alabama exoneree Freddie Lee Gaines, who were each awarded $1 million).

49. O'Neil v. State, 469 N.E.2d 1010, 1012 (Ohio Ct. App. 1984).

for failure to state a claim. At this point, the Ohio General Assembly enacted special legislation authorizing him to file a claim for "loss of education and employment and general damages . . . from the erroneous imprisonment."[50] It would seem that O'Neil could now be compensated, and he was; the court of claims awarded him $6,967. O'Neil appealed this paltry amount. In reversing the judgment, the Ohio Supreme Court said that when a person is wrongfully convicted,

> the legislature and legal system have a responsibility to admit the mistake and diligently attempt to make the person as whole as is possible where the person has been deprived of his freedom and forced to live with criminals. Indeed the legal system is capable of creating few errors that have a greater impact upon an individual than to incarcerate him when he has committed no crime.[51]

Viewed in that context, "[the court's] award of $6,967 for O'Neil's three-and-one-half years of erroneous imprisonment is grossly inadequate, is against the manifest weight of the evidence, and shocks the conscience."[52] Although the Ohio Court of Appeals gave the court of claims the opportunity to rethink its shockingly low award in this case, in general, few private bills ever get passed.[53] Even when one does pass, it may not go very far toward curing the harm.

b. Federal civil rights lawsuits under § 1983.—The second possible avenue of redress is to bring a federal civil rights lawsuit against the municipality and the police. Such a suit is brought under 42 U.S.C. § 1983.[54] Section 1983 offers the plaintiff a chance to overcome the immunity of state actors. The theory is that the municipality or police deprived the plaintiff of a constitutional right while "acting under color of state law."[55] The deprivation of a constitutional right removes the barrier of government immunity, allowing the plaintiff to sue units of government—such as municipalities and police departments—that are normally immune from suit. Section 1983 is the vehicle for "interpos[ing] the federal courts between the States and the people, as guardians of the people's

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50. *Id.*

51. *Id.* at 1013.

52. *Id.*

53. Lopez, *supra* note 4, at 699 ("Unfortunately, legislative compensation remains a longshot for most wrongly convicted individuals . . . .").

54. Section 1983 provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2006).

55. *See* Lopez, *supra* note 4, at 690-98.

federal rights."[56]

Before invoking these protections by filing a § 1983 lawsuit, the plaintiff must satisfy the requirements of 28 U.S.C. § 2513, the Unjust Conviction and Imprisonment Act. This is the federal government's wrongful conviction statute,[57] and it contains two basic categories of requirements. First, subsection (a)(1) requires the plaintiff to use the court record or a court certificate to show that: the conviction was set aside or reversed; he was found not guilty in a new trial; or he was pardoned on the ground of innocence.[58] Next, under subsection (a)(2), the plaintiff must not have committed any of the acts with which he was charged, and his own misconduct must not have brought about the prosecution.[59]

Once the requirements of 28 U.S.C. § 2513 are satisfied, the exoneree may continue his quest under § 1983. Since § 1983 claims center on problems in the criminal justice system that may lead to a deprivation of civil rights, § 1983 seems the ideal path for exonerees to redress civil rights violations that may have occurred in their state cases. Focusing narrowly on what plaintiffs must do to initiate § 1983 lawsuits suggests that these suits will be very difficult for many plaintiffs to bring. Often, a potential § 1983 plaintiff may not be able to satisfy the threshold requirements.

Brandon Garrett, who has represented exonerees in multiple wrongful conviction cases,[60] points out that a federal wrongful conviction suit may only be brought if the exoneree can show that his case terminated with "[v]acatur of the conviction" and that the cause of the wrongful conviction was official misconduct.[61] The vacatur requirement that "a plaintiff can file a federal case challenging unconstitutional conduct resulting in a conviction only after that

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56. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

57. The Unjust Conviction and Imprisonment Act was passed in 1938. Although it may seem that the federal government was aware of wrongful conviction issues rather early, the first attempt at wrongful conviction compensation actually dates from a bill introduced in the Senate in 1912. S. DOC. NO. 974, 62ND CONG. 3D SESS. (1912).

58. 28 U.S.C. § 2513(a)(1) (2006) provides that

> [a]ny person suing under section 1495 of this title must allege and prove that: (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction . . . .

"Section 1495" refers to 28 U.S.C. § 1495—damages for unjust conviction and imprisonment—the text of which is, "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned."

59. *Id.* § 2513(a)(2). These are basically the same requirements for bringing a claim under state compensation statutes.

60. *See generally* Garrett, *supra* note 11. For reference to cases Garrett handled, see *id.* at 43 n.30.

61. *Id.* at 53-54.

conviction is either vacated or pardoned"[62] affects potential § 1983 plaintiffs in one of two ways. First, a wrongfully incarcerated prisoner cannot bring a § 1983 lawsuit while he pursues a state remedy. Instead, he must wait until his state causes of action have concluded. This adds years to the time he spends seeking redress. Second, and much more damaging, the wrongfully incarcerated prisoner who is not able to bring a state suit has no other recourse. If he cannot succeed in bringing and winning a state wrongful conviction claim, the state court will not set aside the conviction, and the door to a federal civil rights lawsuit will remain shut.

Assuming, however, that the § 1983 plaintiff can establish vacatur, he must next show that his injury resulted from official misconduct on the part of police or prosecutors.[63] Official misconduct may result from official acts, such as suppression of exculpatory evidence, suggestive eyewitness identification procedures, coerced confessions, or fabrication of evidence.[64] Misconduct may be at the root of such civil rights causes of action as malicious prosecution and retaliatory prosecution.[65] Whatever the source, it may be difficult to establish that misconduct occurred. For example, police behavior can be justified under a probable cause standard. According to Michael Avery, "probable cause[] is a low standard, ordinarily not difficult for law enforcement to meet."[66] The difficulties in establishing vacatur and official misconduct, from the narrow point of view of the wrongfully incarcerated individual, suggest that a § 1983 remedy may be remote.

A broader focus, however, indicates a greater significance for § 1983 lawsuits; these suits are important more as vehicles for exposing and addressing systemic deficiencies that led to the wrongful conviction rather than as means of redressing injuries to particular exonerees caused by the wrongful conviction. According to Garrett, although the two threshold requirements of vacatur and official misconduct result in the bringing of fewer wrongful conviction suits than "run-of-the-mill civil rights actions, the lawsuits that can be maintained involve the most egregious miscarriages of justice in which a conviction was vacated. Thus, through that filter, the cases brought may disproportionately involve misconduct implicating systemic failures."[67] In discussing criminal justice reforms being both considered and adopted, Garrett seems to be saying that § 1983 suits are useful in a societal sense because they bring attention to the problems in criminal procedure that set defendants up for wrongful convictions.[68]

The usual result of a criminal appeal is for the court to respond in favor of

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62. *Id.*; *see also* Heck v. Humphrey, 512 U.S. 477, 486-87 (1994).

63. *See* Garrett, *supra* note 11, at 54.

64. *Id.* (citing Brady v. Maryland, 373 U.S. 83 (1963)). *Brady* will be discussed further in the rest of this section.

65. Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439, 439 (2009).

66. *Id.* at 442.

67. Garrett, *supra* note 11, at 54.

68. *See id.* at 99-102.

the criminal justice system rather than in favor of a criminal defendant, who may have been the victim of a suggestive lineup or coerced into confessing.[69] For example, in *Arizona v. Youngblood*, the Supreme Court held that potentially exculpatory evidence could be destroyed if it was not destroyed in bad faith.[70] But critics of the courts' tendency to favor law enforcement seem less concerned with the § 1983 plaintiffs—the exonerees—than with what § 1983 suits may accomplish. Civil suits under § 1983 generally focus on such "systemic deficiencies" as municipalities' failures to train or supervise police, for example.[71] Bringing attention to system-wide problems should lead to reform; indeed, "[t]he advance deterrent effect of such systemic claims will place the focus on what institutions can do to prevent wrongful convictions."[72] Commentators point out a connection between the growing numbers of § 1983 lawsuits and changes in police techniques that seem to signal institutional reform.[73]

Certainly some exonerees do win § 1983 lawsuits,[74] and exonerees should continue to bring § 1983 suits. But they should be aware that their overall chance of recovery is slight.

c. Common law tort suits.—The third avenue of redress is common law tort suits. These may be brought in state court or in federal court, depending on the specific cause of action. Such suits are also difficult to win. A plaintiff may bring a state court tort suit against police or prosecutors based on malicious prosecution, but it is generally difficult to prove malice.[75] Relying on *Brady* requirements designed to guarantee a fair trial, a plaintiff may make a *Brady* due process claim alleging that the prosecutor's failure to disclose material evidence prejudiced the plaintiff's ability to mount an effective defense.[76] The difficulty here, according to Michael Avery, is that

> [t]he Supreme Court has never resolved whether a criminal defendant's due process right to obtain exculpatory evidence in the hands of the state, protected by *Brady v. Maryland* and its progeny, is bottomed on substantive or procedural due process. As a consequence, the lower

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69. *See id.* at 58-62.

70. Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988). This seems to be an example of moral hazard, discussed *infra* Part III.C.3.

71. Garrett, *supra* note 11, at 106-07.

72. *Id.* at 107.

73. *See, e.g.*, *id.* at 45-46.

74. *E.g.*, Pierce v. Gilchrist, 359 F.3d 1279 (10th Cir. 2004); Newsome v. McCabe, 319 F.3d 301 (7th Cir. 2003); Jones v. City of Chi., 856 F.2d 985 (7th Cir. 1988) (suppressing exculpatory evidence); People v. LeGrand, 867 N.E.2d 374 (N.Y. 2007) (denying defense request to call an expert on causes of mistaken identification).

75. Garrett, *supra* note 11, at 50-51.

76. Anderson v. State, 196 S.W.3d 28, 36-37 (Mo. 2006). For a very clear explanation of how *Brady* violations may be established and used as the basis for a civil rights lawsuit, see Bernhard, *Justice Still Fails*, *supra* note 7, at 726-28.

federal courts are in disagreement on the issue.[77]

Predicting outcomes of these cases is difficult.

A plaintiff may also bring a tort suit against his own defense attorney for ineffective assistance of counsel.[78] However, plaintiffs have lost these suits even when their defense counsel slept through the trial,[79] presented no evidence during the sentencing phase of the trial,[80] or was intoxicated during the trial.[81]

Finally, plaintiffs may bring common law tort suits against the United States in federal court under the Federal Tort Claims Act (FTCA).[82] The FTCA "evinces a waiver of sovereign immunity with respect to certain categories of torts committed by federal employees in the scope of their employment."[83] These "certain categories" are all negligence-based causes of action because the Federal Tort Claims Act specifically excludes the intentional torts of "assault, battery, false imprisonment, false arrest, malicious process, abuse of process, libel, slander, misrepresentation, deceit, [and] interference with contract rights."[84] The FTCA provides that the United States may only be found liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[85] This means that even though the plaintiff is suing the federal government in federal court, the law governing the cause of action will be that of the state "in which the allegedly tortious acts or omissions occurred."[86] This law-of-the-state requirement is how the federal government establishes jurisdiction over the cause of action. A federal court will not have jurisdiction to hear an FTCA case unless a state court would have had jurisdiction if the tortfeasor had been a private actor. Claims under the FTCA can only be brought

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77. Avery, *supra* note 65, at 446 (internal citation omitted).

78. Bernhard, *Justice Still Fails*, *supra* note 7, at 736-37.

79. United States v. Petersen, 777 F.2d 482, 484 (9th Cir. 1985). The plaintiff was unable to establish ineffectiveness of counsel because defense counsel had not slept through "a substantial portion of the trial." *Id.* By comparison, in *Burdine v. Johnson*, the Fifth Circuit Court of Appeals affirmed the district court's conclusion that "sleeping counsel is equivalent to no counsel" when defense counsel "repeatedly dozed or slept as the State questioned witnesses" during Burdine's murder trial. Burdine v. Johnson, 262 F.3d 336, 339 (5th Cir. 2001); *see also* McFarland v. Texas, 928 S.W.2d 482, 505 (Tex. Crim. App. 1996) (en banc), *abrogated by* Mosley v. State, 983 S.W.2d 249 (Tex. Crim. App. 1998).

80. Mitchell v. Kemp, 762 F.2d 886, 888 (11th Cir. 1985).

81. Haney v. State, 603 So. 2d 368, 377-78 (Ala. Crim. App. 1991).

82. The FTCA is codified at 28 U.S.C. §§ 1346(b), 2671-80 (2006). 28 U.S.C. § 1346(b) is recognized as preempted by *Moore v. Potter*, 605 F. Supp. 2d 731, 734 (E.D. Va. 2009) (preempted for postal workers by the Postal Reorganization Act).

83. Bolduc v. United States, 402 F.3d 50, 55 (1st Cir. 2005).

84. 28 U.S.C. § 2680(h).

85. *Id.* § 1346(b)(1).

86. *Bolduc*, 402 F.3d at 56.

if the "challenged government conduct" has a "parallel in the private sector."[87] Further, the behavior must not fall under the discretionary exception to the FTCA,[88] which allows some government conduct to be sheltered from tort liability.[89] This exception creates difficulty for wrongful-conviction plaintiffs because even though a federal official's actions may have been negligent, the official will be protected from suit when the negligent acts resulted from policy decisions the official was required to make in his official role.

The case of *Bolduc v. United States* illustrates both of these concepts.[90] In *Bolduc*, two men were wrongly convicted and incarcerated for a robbery in Wisconsin.[91] They spent eight years in prison before the actual perpetrator was identified.[92] After their release, they sued the United States for the negligence of an agent who withheld evidence that would have exculpated them and for the negligent supervision of the agent by the agent's supervisor.[93] In a bench trial, the court denied the claim, and the claimants appealed.[94] In affirming the district court opinion, the First Circuit Court of Appeals first analyzed the negligence claim.[95] The court applied Wisconsin negligence law[96] and concluded that the claim failed under Wisconsin law "[b]ecause Wisconsin's recognition of a governmental duty to disclose exculpatory evidence does not ground private liability under that state's law."[97] That is, Wisconsin could recognize a governmental duty to disclose exculpatory information. But to prevail, the plaintiffs needed to show—and could not—that Wisconsin

> imposed *private* liability on a prosecutor or other state agent for a failure to disclose exculpatory evidence. That is a fatal flaw, for the federal government does not yield its immunity with respect to obligations that

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87. *See id.* (citing Sea Air Shuttle Corp. v. United States, 112 F.3d 532, 536-37 (1st Cir. 1997)).

88. The FTCA's discretionary exception section, codified at 28 U.S.C. § 2680(a), states that

> [t]he provisions of this chapter and section 1346(b) of this title shall not apply to . . . [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

There are other exceptions, but this one is commonly encountered by wrongful-conviction plaintiffs.

89. *Bolduc*, 402 F.3d at 60.

90. *See id.* at 55-56.

91. *Id.* at 53.

92. *Id.* at 54.

93. *Id.*

94. *Id.*

95. *Id.* at 56.

96. *Id.*

97. *Id.* at 57.

> are peculiar to governments or official-capacity state actors and which have no private counterpart in state law.[98]

Next, the court analyzed the claim of negligent supervision, which failed because the FBI's supervision of the agent fell under the discretionary function exception to the FTCA.[99] The court reasoned that government agencies need to be able to carry out certain activities without constant threat of suit.[100] A court reviews "whether the conduct itself is discretionary, that is, 'a matter of choice for the acting employee.'"[101] If so, the court then looks to see if that exercise of discretion involves policymaking because "[o]nly if the conduct is both discretionary and policy-driven will section 2680(a) strip the court of subject matter jurisdiction."[102] The agent's supervisors' actions in this case were both discretionary and policy-related. Thus, they were protected because "this court has recognized, in the context of supervision, that in the absence of a statutory or regulatory regime that sets out particulars as to how an agency must fulfill its mandate, the development and management of a supervisory model is a matter of agency discretion."[103] As a result, the United States could not be liable.

As *Bolduc* illustrates, it is very difficult for wrongful-conviction plaintiffs to show that an official's actions would subject the official to liability if he were a private person. If plaintiffs succeed in making this link, more likely than not, the official's actions will be protected under the discretionary function exception.

In sum, private bills afford relief to few. Litigation is slow, costly, and uncertain. Adele Bernhard, who has championed compensation for the wrongfully convicted since 1999,[104] notes that "litigation has yielded mixed results. Few exonerated individuals have been compensated. And . . . others, no more deserving, have received enormous awards."[105] But until all states have fair and easily accessible compensation statutes, litigation—whether § 1983 federal suits or state common law tort suits—remains an essential tool for exonerees.[106]

2. The Fourth Avenue, State Compensation Statutes, Holds the Most Promise, But Overly Restrictive Requirements Create Hardships for Exonerees.—The fourth avenue of redress for the wrongly incarcerated is to sue for compensation under a state wrongful-conviction compensation statute. State compensation statutes offer the promise of speedier and more equitable damage awards. It is the premise of this Article that states without compensation statutes should pass them. This section comments on two features of some existing

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98. *Id.*

99. *Id.* at 62.

100. *Id.* at 60 (citing United States v. Varig Airlines, 467 U.S. 797, 808 (1984)).

101. *Id.* (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

102. *Id.*

103. *Id.* at 61.

104. *See generally* Bernhard, *When Justice Fails*, *supra* note 7.

105. Bernhard, *Justice Still Fails*, *supra* note 7, at 707 (citations omitted).

106. Indeed, one of Bernhard's goals is to "encourage more litigation" using new theories based on creative strategies. *Id.* at 726-27.

statutes that are challenging for exonerees: (1) actual innocence; and (2) possible reductions in awards under compensation statutes should the exoneree also win a § 1983 suit.

a. Actual innocence.—Compensation statutes, also called enabling statutes,[107] enable the exoneree to sue the state itself on the ground that the exoneree was wrongfully incarcerated and should be compensated. Twenty-five states, the District of Columbia, and the federal government have passed enabling statutes.[108] The exoneree must meet various requirements, depending on the state.[109] Under all the statutes, an exoneree must demonstrate his innocence of the crime for which he was convicted.

Wrongful-conviction compensation statutes generally have four requirements. First, the exoneree must have been convicted of a crime—typically, a felony.[110] Second, under most statutes, the claimant must not have pleaded guilty to the charged offense.[111] Third, the claimant must have been sentenced to incarceration and have actually served time as a result of the conviction.[112] Fourth, the claimant must establish actual—also called factual—innocence.

The goal of the fourth requirement is to ensure that the claimant is actually innocent. Establishing factual innocence calls for "an official act declaring a defendant not guilty of a crime for which he or she had previously been

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107. *See* Zaremski, *supra* note 6, at 436.

108. Bernhard, *supra* note 47, at 409 n.49 (citing *Compensating the Wrongly Convicted Fact Sheet*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Compensating_The_Wrongly_Convicted.php (last visited Feb. 13, 2011)).

109. New Hampshire is one state whose statute does not provide the elements of a prima facie case. The exoneree may choose an administrative remedy or a judicial remedy, under which the exoneree brings an action against the state "for time unjustly served in the state prison when a person is found to be innocent of the crime for which he was convicted." N.H. REV. STAT. ANN. § 541-B:14 (2007 & Supp. 2009). Maryland requires that an exoneree receive a full pardon. The pardon must state that the conviction was conclusively demonstrated to have been in error. MD. CODE ANN., STATE FIN. & PROC. § 10-501(b) (West, Westlaw through 2010 Reg. Sess.).

110. *E.g.*, ALA. CODE § 29-2-156 (2003); CAL. PENAL CODE § 4900 (2010). However, New York permits claims based on misdemeanor convictions. N.Y. CT. CL. ACT § 8-b.2 (McKinney 2003 & Supp. 2011). An Illinois court has interpreted the "crime" requirement of 705 ILL. COMP. STAT. ANN. 505/8(c) (West, Westlaw through 2010 Reg. Sess.) to be satisfied by any offense for which an exoneree suffered wrongful imprisonment. Smith v. State, 26 Ill. Ct. Cl. 290, 298 (West 1969).

111. For example, the Iowa statute defines a "wrongfully imprisoned person" as one who "did not plead guilty to the public offense charged, or to any lesser included offense, but was convicted by the court or by a jury of an offense classified as an aggravated misdemeanor or felony." IOWA CODE ANN. § 663A.1(1)(b) (West, Westlaw through 2010 Reg. Sess.). An Oklahoma statute requires that the exoneree be charged with the commission of a felony and that he not have pleaded guilty. OKLA. STAT. ANN. tit. 51, § 154(B)(1) (West, Westlaw through 2010 2d Reg. Sess.).

112. *E.g.*, N.C. GEN. STAT. § 148-82 (LEXIS through 2010 Reg. Sess.); N.Y. CT. CL. ACT § 8-b.3 (McKinney 2003 & Supp. 2011); IOWA CODE ANN. § 663A.1.

convicted."[113] In 2005, Samuel Gross and colleagues published results of a study of the 340 exonerations that took place in the United States between 1989 and 2003.[114] Gross identified four specific types of official acts by which the defendants in the study were exonerated. These official acts were gubernatorial pardons, court dismissal of charges, acquittal at retrial, and posthumous state acknowledgment of innocence.[115] However, not all state statutes recognize all four forms. In five states, the only acceptable official act to establish factual innocence is a pardon from the governor, regardless of any other proof of innocence that exists.[116] This stringent requirement can lead to harsh results. To illustrate, consider the 340 exonerations studied by Gross. In the exonerations of these 340 people, governors issued forty-two pardons.[117] Under all existing compensation statutes, those forty-two exonerees who were lucky enough to receive pardons would be eligible to sue or otherwise apply for compensation. But under the statutes of the five states requiring pardons, the remaining exonerees would not have been eligible for compensation because they were not pardoned by governors.[118] Courts dismissed criminal charges in the cases of 263 of the 340 exonerees.[119] Thirty-one exonerees were acquitted at retrials.[120] Four exonerees died in prison; their innocence was posthumously acknowledged.[121] What this means is that under the compensation statutes requiring pardons, 298 people out of the 340 who were exonerated—298 people officially declared not guilty of a crime—would receive no compensation because a governor did not give them a pardon. Such a stringent requirement makes it unnecessarily difficult for wrongfully incarcerated persons to establish innocence.

In addition to the four official acts establishing factual innocence that Gross

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113. Gross et al., *supra* note 1, at 524.

114. *Id.* at 523-24.

115. *Id.* Texas posthumously exonerated Timothy Cole in 2009, ten years after his death in prison. He received a posthumous pardon on March 1, 2010. Cole, a college student, was convicted in 1985 of raping a Texas Tech student and sentenced to twenty-five years in prison. He was cleared by DNA evidence in 2008, exonerated in 2009, and pardoned in 2010. Texas Governor Rick Perry granted him a full pardon on Monday, March 1, 2010, as soon as he received a legal opinion from the Texas attorney general saying that the governor had such authority. *See Timothy Cole: A Tragic Story Begets Hope for the Future*, INNOCENCE PROJECT OF TEX., http://www.ipoftexas.org/index.php?action=timothy-cole (last visited Feb. 14, 2011).

116. Boucher, *supra* note 1, at 1085 n.113 (listing the five states that require pardons: California, Illinois, Maine, Maryland, and North Carolina).

117. Gross et al., *supra* note 1, at 524.

118. CAL. PENAL CODE § 4900 (2010); 705 ILL. COMP. STAT. ANN. 505/8(c) (West, Westlaw through 2010 Reg. Sess.); ME. REV. STAT. ANN. tit. 14, § 8241(2) (West, Westlaw through 2009 2d Reg. Sess.); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West, Westlaw through 2010 Reg. Sess.); *see also* N.C. CONST. art. III, § 5(6); N.C. GEN. STAT. § 148-82 (LEXIS through 2010 Reg. Sess.); 88 Md. Op. Att'y Gen. 03-007 (2003).

119. Gross et al., *supra* note 1, at 524.

120. *Id.*

121. *Id.*

described in 2003, some statutes require yet another official act before the exoneree may be considered for compensation. Namely, the claimant must produce proof from the trial court that he was innocent of the crime.[122] Ohio does not require a gubernatorial pardon, but it does require an express finding of innocence. The claimant must secure a "determin[ation] by a court of common pleas that the offense of which the individual was found guilty . . . either was not committed by the individual or was not committed by any person."[123] Maine requires not only that the exoneree receive a full pardon,[124] but also that the exoneree be found innocent by a court.[125] However, not all states require such restrictive proof of innocence as Maine does. Alabama, for example, does not require an express finding of innocence. The claimant must demonstrate that the conviction was vacated or reversed and that the accusatory instrument was dismissed either on the ground of innocence or a ground "consistent with innocence."[126] By comparison, New Jersey requires that the claimant show that he "did not commit" the crime.[127]

Atypically, New York's scheme allows for a claim based not only on pardons and factual innocence, but also on legal innocence.[128] To succeed on a claim of legal innocence, a claimant must show that the alleged facts did not constitute a felony or misdemeanor against the state.[129] This is a less restrictive standard; most statutes require that the exoneree not have committed acts that constitute a felony.[130] Although committing acts that do not constitute a felony seems to correspond to not committing acts that do constitute a felony, it might be easier to demonstrate that actions did not equal a felony than to demonstrate that no actions were taken.

Inequalities exist in the kind and amount of compensation as well as in the standards for establishing innocence. Some statutes determine an exoneree's compensation on a case-by-case basis.[131] Some award a set amount regardless

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122. Haddad v. Dep't of Rehab. & Corr., No. 01AP-1130, 2002 WL 1163917, at *2-3 (Ohio Ct. App. June 4, 2002). Although unpublished, *Haddad* has been cited in a later—also unpublished—decision. *See* Mickey v. Ohio Dep't of Rehab. & Corr., No. 02AP-539, 2003 WL 116152, at *4 (Ohio Ct. App. Jan. 14, 2003).

123. OHIO REV. CODE ANN. § 2743.48(A)(5) (West, Westlaw through 2010 legislation).

124. ME. REV. STAT. ANN. tit. 14, § 8241(2)(c) (West, Westlaw through 2009 2d Reg. Sess.).

125. *Id.* § 8241(2)(d). At the time of the Gross study, Maine had not exonerated anyone.

126. ALA. CODE § 29-2-157(2) (2003).

127. N.J. STAT. ANN. § 52:4C-2 (2011).

128. N.Y. CT. CL. ACT § 8-b.3 (McKinney 2003 & Supp. 2011).

129. N.Y. CRIM. PROC. LAW § 440.10(1) (McKinney 2005) sets forth the grounds for setting aside convictions; *see also id.* § 470.20(1)-(3), (5) (McKinney 2009).

130. *E.g.*, ALA. CODE § 29-2-161(e); CAL. PENAL CODE § 4900 (2010); N.J. STAT. ANN. § 52:4C-3(b); OHIO REV. CODE ANN. § 2743.48(A)(5) (West, Westlaw through 2010 legislation); W. VA. CODE ANN. § 14-2-13a(f)(4) (West, Westlaw through 2011 Reg. Sess.).

131. *E.g.*, N.Y. CT. CL. ACT § 8-b.6; TENN. CODE ANN. § 9-8-108(a)(7)(A) (West, Westlaw through 2010 Reg. Sess.) (lifetime limit of $1 million); W. VA. CODE ANN. § 14-2-13a(g).

of the length of time the exoneree was in prison.[132] Others award a set amount based on the length of the wrongful incarceration.[133]

One consistent aspect of compensation statutes is that innocence will not be considered established if reversal occurred merely because of procedural or jurisdictional errors. In *Walden v. State*, the Ohio Supreme Court described a defendant's acquittal in a criminal trial as "a determination that the state has not met its burden of proof on the essential elements of the crime. It is not necessarily a finding that the accused is innocent."[134] Claimants are consistently required to establish that the conviction was reversed on relevant grounds.[135] Relevant grounds do not include the following: claims of double jeopardy;[136] "not guilty by reason of insanity;"[137] a court's failure to comply with provisions of the criminal statute;[138] the fact that the statute under which a claimant was convicted was later found unconstitutional;[139] or that the convicting court lacked jurisdiction.

Though focusing on the jurisdictional issue, the case of *Osborn v. United States*[140] illustrates the requirement that the claimant must demonstrate either that he did not commit the act or that the act he committed did not constitute a crime. In *Osborn*, four servicemen already court-martialed and in prison for other offenses were charged with premeditated murder of a fellow inmate under the 92nd Article of War. After being found guilty, one of the co-defendants filed a habeas corpus petition on the ground that under the 92nd Article of War, courts-martial did not have jurisdiction over trials for rape or murder during peacetime.[141] The court granted the petition because the nation had been at peace when the defendants were charged and court-martialed.[142] Co-defendant Osborn then filed his own habeas motion, the granting of which resulted in his discharge from prison.[143] Then Osborn sued the United States for wrongful

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132. *E.g.*, N.H. REV. STAT. § 541-B:14 (2007 & Supp. 2010).

133. *E.g.*, ALA. CODE § 29-2-159(a); CAL. PENAL CODE § 4904; 705 ILL. COMP. STAT. ANN. 505/8(c) (West, Westlaw through 2010 Reg. Sess.) (amount varies with length of time incarcerated); TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a)-(b) (West, Westlaw through 2009 Reg. Leg.).

134. Walden v. State, 547 N.E.2d 962, 966 (Ohio 1989).

135. *See, e.g.*, D.C. CODE § 2-422(1) (2011).

136. Fudger v. State, 520 N.Y.S.2d 950, 952-53 (N.Y. App. Div. 1987).

137. *See generally* Ebberts v. State Bd. of Control, 148 Cal. Rptr. 543 (Cal. Ct. App. 1978).

138. Mickey v. Ohio Dep't of Rehab. & Corr., No. 02AP-539, 2003 WL 116152, at *4 (Ohio Ct. App. Jan. 14, 2003) (holding that lower court failed to comply with § 2967.28(B)(3) of the Ohio Code).

139. Lambert v. State Claims Bd., No. 78-306, 1979 WL 30360, at *1-2 (Wis. Ct. App. 1979) (finding that the claimant had violated the statute when it was in effect).

140. 322 F.2d 835, 838 (5th Cir. 1963).

141. *Id.* at 837-38.

142. *Id.* at 838.

143. *Id.*

imprisonment.[144] The district court "found that the record showed that the plaintiff's conviction had not been reversed or set aside upon the stated ground of innocence and unjust conviction, and that Osborn had failed to show that he had not committed the acts with which he was charged."[145] The court of appeals affirmed.[146] At best, Osborn could demonstrate that he was discharged because the court-martial lacked jurisdiction. That showing would not satisfy the wrongful conviction statute; Osborn could not demonstrate that he did not commit the murder, and he also could not demonstrate that the act of murder did not constitute a crime.[147] In short, whether federal or state, wrongful-conviction compensation statutes are intended to "separate those who were wrongfully imprisoned from those who have merely avoided criminal liability."[148]

As important as it is for states to pass enabling legislation for exoneree compensation, it is equally important that they analyze the need for onerous requirements and widely varying calculation methods. Exonerees may be shut out of compensation because of needlessly strict requirements even in states that have passed compensation statutes. Relatively few exonerees succeed in establishing all the elements required under compensation statutes. Widely varying requirements for establishing innocence or determining compensation make recovery more difficult for some exonerees than for others merely based on where they live.[149] Thus, a goal of statutory revision should be to create consistency among statutes.

b. Possible reductions in compensation statute awards should the exoneree also win a § 1983 lawsuit.—State compensation statutes may require as a condition of compensation that the exoneree agree to give up the third avenue of legal redress,[150] which is to bring suit against the state on common law tort theories. This is a reasonable requirement because the point of the compensation statute is to streamline and make more certain the exoneree's route to compensation.[151]

A New York case suggests that courts may treat § 1983 suits the same way by offsetting one award against another should an exoneree win a § 1983 suit and

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144. *Id.*

145. *Id.*

146. *Id.* at 842-43.

147. *Id.* at 842.

148. Walden v. State, 547 N.E.2d 962, 967 (Ohio 1989).

149. An Iowa statute allows a claim to go forward after the exoneree obtains a district court order adjudging the exoneree to be a "wrongfully imprisoned person." IOWA CODE ANN. § 663A.1 (West, Westlaw through 2010 Reg. Sess.). Other statutes (those of California, Illinois, Maine, Maryland, and North Carolina, noted *supra* note 118) require pardons from the governor.

150. *See supra* Part III.A.1.

151. In at least once instance, however, a court ruled that separate causes of action for the same wrongful imprisonment could go forward (under the state compensation statute and the state tort claims act) if negligence by a state employee was responsible for the wrongful imprisonment "based on acts or omissions apart from the process responsible for the conviction and wrongful imprisonment." Cox v. State, 686 N.W.2d 209, 215 (Iowa 2004).

attempt to claim compensation under a state statute as well. In *Carter v. State*, an exoneree was compensated under § 1983 for wrongful conviction.[152] He also brought suit under New York's Unjust Conviction and Imprisonment Act, which is part of the state's Court of Claims Act. The appellate court ruled that the exoneree's recovery under § 1983 barred recovery under the state's statutory compensation remedy.[153] The court reasoned that the success of the claimant's suit under § 1983 showed that he was not a person "frustrated in seeking legal redress," which was the class of persons the Unjust Conviction and Imprisonment Act sought to protect.[154] Further, the claimant could not recover because he had already been compensated for the injuries resulting from his wrongful conviction.[155] Thus, exonerees with state statutory remedies may choose to file § 1983 lawsuits anyway, but they should be aware of the potential for offsets in their statutory damage awards.

B. Theoretical Justifications Support the Payment of Compensation

Once a wrongfully convicted person has been found innocent, the state should pay compensation. Two theoretical justifications—the instrumental and corrective justice theories—support the payment by a state to an exoneree.

Compensation statutes arose in the context of providing aid to crime victims.[156] The goal of compensation statutes for crime victims is to "give financial or other aid to victims or their survivors."[157] Such statutes grew out of a "rights theory[158] positing that a state that fails 'to protect its citizens from crime is obligated to provide compensation to those who become victims.'"[159] Funding these statutes, however, may complicate compensation for wrongly convicted persons. Statutes that provide compensation for crime victims do so through fines imposed on criminal wrongdoers.[160] In the case of wrongly convicted

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152. Carter v. State, 546 N.Y.S.2d 648, 650 (N.Y. App. Div. 1989).

153. *Id.*

154. *Id.* (quoting N.Y. CT. CL. ACT § 8-b(1) (McKinney 1989)).

155. *Id.* However, in at least one case, an exoneree did have the right to pursue both a § 1983 remedy and a state statutory remedy. *See, e.g.*, State v. Oakley, 181 S.W.3d 855, 857 (Tex. Crim. App. 2005) (granting rule 53.7(f) motion), *aff'd in part and rev'd on other grounds*, 227 S.W.3d 58 (Tex. 2007).

156. Federal crime victim compensation statutes have been in place in this country since the 1980s; similar state statutes have been in place since the 1990s. Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 BRANDEIS L.J. 83, 87 n.17 (2001).

157. *Id.* at 87. Compensation statutes provide aid to the victim; by contrast, under restitution statutes, victims or their survivors can seek restitution from the perpetrator.

158. This "rights theory" is the same as the corrective justice theory (*see infra* Part III.B.2); it supports compensation for victims of the criminal justice system no less than for victims of crime.

159. Mostaghel, *supra* note 156, at 87 (quoting Charlene L. Smith, *Victim Compensation: Hard Questions and Suggested Remedies*, 17 RUTGERS L.J. 51, 62 (1985)).

160. *Id.* at 87.

persons, there is no easily targeted actor to fine, as there is when the harm is done by a criminal wrongdoer. But if the state should make amends to those it fails to protect from crime, it should equally make amends to those it fails to protect from its own processes when they go awry.[161]

"[S]tates have no legal obligation to remedy the injuries of the wrongly convicted."[162] For example, New York's Unjust Conviction and Imprisonment Act, providing compensation under the state's Court of Claims Act, "discharge[s] a moral obligation of the State."[163] Alberto Lopez suggests that the motivation that underlies crime victim compensation statutes could form a basis for improved state compensation for wrongly convicted persons.[164] If the state feels morally compelled to pass crime victim compensation statutes to "spread out the cost of hardship" on victims harmed by private individuals, it should feel an even stronger moral compulsion "to indemnify the unjustly convicted person and spread out the cost of the harm inflicted" when "it is the failure of the state itself that damaged the victim."[165]

The rights theory that underlies crime victim compensation statutes and carries over to wrongful-conviction compensation statutes "can be based in tort or contract."[166] Under the contract theory, "citizens have actions for breach of contract if society fails to protect them because they have given up the individual right to exact retribution from a wrongdoer in return for society's protection."[167] Under tort theory, "if the State breaches its duty to protect citizens, the injured citizens would have actions against the State for damages in tort."[168] The rights theory as expressed in wrongful-conviction compensation statutes takes the form of tort, rather than contract, actions.

1. The Instrumental Theory of Tort Liability.—The instrumental theory is one of the two main theories underlying tort liability.[169] In the very broadest terms, under the instrumental theory, the threat of liability is a lever to make an actor act in a way that avoids liability. Under this theory, holding a private tortfeasor liable creates in the tortfeasor "an incentive to make cost-justified investments in safety."[170] Holding a government liable creates "an economic

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161. "The reparation of damages caused by erroneous criminal accusations, irrespective of how well founded they seemed, is properly a cost of the operation of the criminal justice system. It is difficult to see why the innocent victims should be forced to absorb this cost." Boucher, *supra* note 1, at 1101 n.235 (quoting Keith S. Rosenn, *Compensating the Innocent Accused*, 37 OHIO ST. L.J. 705, 716 (1976)).

162. Lopez, *supra* note 4, at 709.

163. Carter v. State, 546 N.Y.S.2d 648, 650 (N.Y. App. Div. 1989).

164. *See* Lopez, *supra* note 4, at 710-11.

165. *Id.*

166. Mostaghel, *supra* note 156, at 87.

167. *Id.* at 88 (citing Smith, *supra* note 159, at 63).

168. *Id.* (citing Smith, *supra* note 159, at 62).

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

170. *Id.* at 823.

incentive for the government and its officials to make cost-justified investments in preventing constitutional violations."[171] This theory is based on the view that behavior is affected by the existence of economic consequences.

Nevertheless, according to Lawrence Rosenthal, governments are rarely motivated by economic consequences. Rosenthal summarizes the arguments of Professor Daryl Levinson to make this point.[172] Levinson does not believe that the instrumental theory of tort liability applies to governments. He believes that governments respond to political—not financial—incentives, caring more about votes than dollars.[173] Governments may therefore tolerate behavior that violates the Constitution because that behavior garners political advantage.[174] Levinson gives the example of randomly searching young men in high crime areas—a policy which, despite the likelihood of Fourth Amendment violations, "could also pay such handsome political dividends that liability would have no deterrent effect on elected officials."[175] Myriad examples spring to mind, including racial profiling to look for drug dealers or ethnic profiling to search airline passengers. Thus, in Levinson's view, as long as there is a political payoff, governments would rather continue unconstitutional behavior and pay tort damages to plaintiffs injured by those violations.[176]

According to Rosenthal, Levinson's views have generated some negative reactions among academics,[177] but apparently much more approbation.[178] In Rosenthal's words, "[m]ost academics have been persuaded by Levinson; it has now become fashionable to warn that the consequences of imposing damages liability on government are uncertain at best."[179] Rosenthal himself disagrees with this conclusion.[180] Based on an examination of the political significance of liability to elected officials, he posits a theory of political behavior that elected officials primarily use the public resources over which they have control in their attempts to gain re-election.[181] In attempting to be re-elected, "elected officials

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171. *Id.*

172. *Id.* at 824.

173. *Id.* (citing Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 420 (2000)).

174. *Id.* (citing Levinson, *supra* note 173, at 367-68).

175. *Id.* (quoting Levinson, *supra* note 173, at 369-70).

176. *Id.* at 825. Levinson believes that tort liability for constitutional torts could not be imposed on governments under the corrective justice theory either (*see* discussion *infra* Part III.B.2), since payment would ultimately come from taxpayers. *Id.* He seems to be saying that the moral responsibility would be the government's, but the government would not deem this responsibility a reason to change behavior because the burden of payment would fall on taxpayers. This is indeed a problem in the funding of current compensation statutes, and I suggest a remedy in Part IV.

177. *Id.* at 827-29.

178. *Id.* at 830.

179. *Id.*

180. *See id.* at 831.

181. *See id.* at 832.

will be highly sensitive to tort liability"[182] because defending against and paying for tort liability takes away resources from other projects.[183] As a result, elected officials will be "willing to make investments in loss prevention in order to reduce governmental liability costs."[184]

The stumbling block in the path of Rosenthal's theory could be that governments protect themselves through immunity legislation.[185] Rosenthal addresses this problem. Analyzing a litany of objections to the theory, he ultimately concludes that the ubiquity of immunity legislation[186] shows that government officials are very aware of the liability costs of unconstitutional behavior and want to limit those costs.[187] Thus, he argues, the instrumental justification theory supports tort liability for governments.[188] Even though the desire to minimize costs is primarily accomplished through immunity statutes,

> governmental tort liability has an instrumental justification; it creates an incentive on the part of officeholders to allocate resources to loss prevention. There should be a clear political incentive to invest in loss prevention at least when the cost of avoiding an injury is small, the likelihood of injury is great, and the impact on the government's budget is likely to be large.[189]

If there is such an incentive to prevent loss, another question arises: why do states still continue to shield themselves behind immunity laws? Rosenthal's answer to this question is that it is a matter of costs versus benefits.[190] The political cost of spending money on loss prevention may be greater than the actual "dollars and cents" cost. Thus, the instrumental theory supports tort liability for governments; it is just not a very efficient means of getting governments to take liability for their torts. Indeed, according to Rosenthal, "Professor Levinson was right to claim that governmental tort liability has no efficiency justification comparable to the role of tort liability in the private sector."[191]

How does the instrumental theory of tort liability apply to wrongful-conviction compensation statutes? On the one hand, the instrumental theory supports the creation of compensation statutes and a concomitant chinking of the armor of government immunity. Compensation statutes do not seem to carry a high political cost, and they provide several advantages to states: states with compensation statutes can predict costs; they will not be surprised by large

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182. *Id.*
183. *Id.*
184. *Id.*
185. *See supra* Part III.A.1 (discussing the Federal Tort Claims Act).
186. *See* Rosenthal, *supra* note 169, at 838.
187. *See id.* at 841.
188. *Id.* at 842.
189. *Id.*
190. *Id.* at 799.
191. *Id.* at 842.

awards in lawsuits; and there should be fewer wrongful convictions. On the other hand, the instrumental theory of liability does not seem to be a very strong underpinning for current compensation statutes. If it were—that is, if a compensation statute really acted like a lever to make a government actor behave a certain way—then we would see the implementation within these statutes of suggestions designed to change behavior. This is not the case. For example, states have not implemented the suggestion that funding for compensation statutes should come from the prosecutor's budget[192] as a way of curbing overzealous prosecutors. The reason typically given—that the prosecutor in office at the time of a wrongful conviction may no longer be there when the fine is imposed[193]—shows that changing officials' behavior is not a goal of compensation statutes. Because states seem to ignore rather than harness a compensation statute's behavior-changing ability, it appears that most states' compensation statutes are not based on the instrumental theory of tort liability.

2. The Corrective Justice Theory of Tort Liability.—Moral rather than economic concerns animate the second major theory of tort liability: that of corrective justice. Under the corrective justice theory, imposing tort damages on individuals "embodies a widely accepted moral obligation on the part of a wrongdoer to make the injured party whole."[194] Imposing tort damages on the government is "based on an asserted moral entitlement to compensation when one has been the victim of a constitutional wrong."[195] All of the current wrongful-conviction compensation statutes rest on the corrective justice theory of tort liability.

Corrective justice is the theoretical justification for finding a moral obligation. The vehicle for achieving corrective justice is strict liability—perhaps "the most philosophically and procedurally sound [theory] for imposing

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192. *See, e.g.*, Evan J. Mandery, *Efficiency Considerations of Compensating the Wrongfully Convicted*, 41 NO. 3 CRIM. L. BULL., ART. 4, at 1 (2005). Mandery's article opens with a bang: "Here is a simple, seemingly obvious response to the mounting evidence that innocents are being convicted at an intolerable rate: make prosecutors pay for their mistakes regardless of fault." *Id.*

193. Rosenthal, *supra* note 169, at 835 & 835 nn.152-53.

> For example, it is reasonable to believe that the time frame of concern to politicians is the next electoral cycle and that their political judgments are therefore made with only that time frame in mind. For that reason, elected officials might ignore litigation costs or liability exposure, believing that they have no real ability to reduce them quickly enough to affect the current electoral cycle.

Id. (citing James M. Buchanan & Dwight R. Lee, *Tax Rates and Tax Revenues in Political Equilibrium: Some Simple Analytics*, 20 ECON. INQUIRY 344, 345-50 (1982)). On the other hand, Rosenthal continues that "there is reason for skepticism about this view of the time horizons of public officials—most politicians likely plan long careers in public service and will pay a political price if they are still in office when tort judgments must be paid." *Id.*

194. *Id.* at 823.

195. *Id.* For a discussion of what constitutes constitutional error in wrongful conviction cases, see Garrett, *supra* note 11.

liability on a state."[196] As explained by Lauren Boucher, "[t]he strict liability theory assumes that in 'any great undertaking . . . there are bound to be a number of accidents.'"[197] Further,

> [b]ecause all citizens benefit from the operation of the criminal justice system (in the form of increased public safety), it is unfair that only one person should bear the cost of an error such as wrongful incarceration simply because he was the unlucky victim of the mistake. Instead, everyone should bear the burden equally.[198]

Arguing for the passage of compensation statutes in 1999, Adele Bernhard discussed cases showing "that innocent people have been, and will continue to be, unjustly convicted, as an unfortunate but inevitable consequence of the routine operation of the criminal justice system."[199] In her view, "neither traditional fault-based tort actions nor civil rights statutes provide a remedy"[200] for unjust conviction. Under strict liability, however, there is no need to determine fault. Strict liability works well because

> it is the state, through operation of one of its most essential services—the criminal justice system—that has inflicted the harm. Although it may be impossible to hold any individual law enforcement officer, or any particular municipality, liable, the state's responsibility for the injury is sufficient to generate a moral obligation.[201]

The current wrongful-conviction compensation statutes, all based on strict liability, "do not require claimants to discover why the prosecution was erroneous, or who made mistakes which 'caused' the investigation to go awry, or even what those mistakes might have been."[202]

C. Pragmatic Objections to Payment of Compensation Do Not Hold Up

Although theoretical bases support the government's payment of compensation to the wrongly convicted, those who do not believe that the government must provide such compensation generally present a pragmatic argument to support their view. However, the primary justification offered does not hold up under scrutiny, and strong pragmatic reasons exist to support the payment of compensation. The justification offered for inadequate compensation statutes or for none at all derives from the view that the state cannot right every

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196. John J. Johnston, Note, Reasonover v. Washington*: Toward a Just Treatment of the Wrongly Convicted in Missouri*, 68 UMKC L. REV. 411, 414 (2000).

197. Boucher, *supra* note 1, at 1101 (quoting Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 208 (1941)).

198. *Id.* (citing Borchard, *supra* note 197, at 208).

199. Bernhard, *When Justice Fails*, *supra* note 7, at 92.

200. *Id.*

201. *Id.* at 93.

202. Bernhard, *supra* note 47, at 409.

wrong. "The state cannot be expected to compensate every citizen forced to bear an unjust burden within its boundaries: '[c]ertain harms are simply accepted as part of life.'"[203] This is the cost-of-doing-business argument, an argument that accepts that innocent people can and will be imprisoned as an unavoidable aspect of the justice system. The cost-of-doing-business argument should be repudiated for four reasons: (1) it does not save the state money; (2) it leads to treatment that is unfair; (3) it creates incentives to continue the unfair treatment; and (4) it leads states to violate the Constitution.

1. The Cost-of-Doing-Business Argument to Avoid Passing Compensation Statutes Does Not Save the State Money.—Accepting a cost-of-doing-business rationale does not save the state money. The most common justification for the cost-of-doing-business rationale is that it will strain state budgets to provide compensation to wrongly incarcerated persons who win their freedom.[204] Perhaps this fear stems from occasional highly publicized lawsuits that garner million dollar settlements for wrongfully incarcerated individuals.[205] It has similarly been feared that compensation schemes for crime victims will create high award and management costs.[206] That has not turned out to be the case with crime victim compensation statutes,[207] and neither will it be the case with compensation statutes for the wrongfully convicted.

A look at compensation statistics demonstrates that the fiscal argument fails. Gross's study of exonerations between 1989 and 2003 found that four states—Illinois, New York, Texas, and California—accounted for more than forty percent of the total of 340 exonerations.[208] Illinois had fifty-four exonerations, New York had thirty-five, Texas had twenty-eight, and California had twenty-seven.[209] Considering just these four states, this is an average of thirty-six exonerations per state over a fourteen year period, which in turn is between two and three per state per year, a number that cannot reasonably be claimed will break the bank.

A look at DNA statistics also bears out that compensation awards will not bankrupt states.[210] The number of people imprisoned without DNA analysis to

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203. Boucher, *supra* note 1, at 1100 n.226 (quoting Bernhard, *When Justice Fails*, *supra* note 7, at 92-93).

204. Fite, *supra* note 8, at 1191 (citing Bernhard, *When Justice Fails*, *supra* note 7, at 105-06).

205. See cases set out in Garrett, *supra* note 11, at 44 n.32 (including some awards of up to $8.26 million).

206. Bernhard, *When Justice Fails*, *supra* note 7, at 100. Bernhard specifically mentions the opinion of former New York State Assistant District Attorney Richard Kuh, expressed at legislative hearings in New York on crime victim legislation. *Id.*

207. *See id.* at 101. However, this may be because "[r]estitution has been recognized as one of the 'most underenforced victim rights' available through the criminal justice system." Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167, 179 (2004).

208. Gross et al., *supra* note 1, at 541.

209. *Id.* at 541 tbl.2.

210. DNA evidence was used to establish innocence in nearly half of the exonerations from 1989 to 2003. Boucher, *supra* note 1, at 1070 (citing Gross et al., *supra* note 1, at 524).

establish their innocence is dwindling—either those cases have now had DNA analysis, or those prisoners are dying. As it becomes more common to do DNA testing on physical evidence at the investigatory stage, according to Bernhard, "the rate of DNA exonerations will inevitably slow. The number of convicted inmates who can locate material, relevant, and untested forensic material will dwindle, as will the number of individuals claiming compensation for unjust conviction."[211]

Along with fearing the cost of implementation, another motivation for states to pass grudging statutes—or none at all—is the fear that a state will compensate people who do not deserve to be compensated.[212] This fear is also unfounded because "[l]egislatures can carefully draft a statute to prevent unwarranted claims from being considered."[213] Under all compensation statutes, procedural requirements are rigorously enforced.[214] And "[w]hile statutory provisions are designed to compensate the wrongfully incarcerated, they still require the plaintiff to meet a high burden of proof before compensation will be granted."[215] Claimants therefore may not simply restate trial evidence.[216] The claim of innocence "shall be verified by the claimant;"[217] this cannot be done with "conclusory and self-serving testimony."[218] Rather, claimants must fulfill statutory requirements to establish actual innocence, requirements that function to keep those whose convictions were overturned on procedural grounds from recovering.[219]

A further safeguard for states is the role of trial courts. According to the Iowa Supreme Court, the district court's "predicate review and assessment of the

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211. Bernhard, *Justice Still Fails*, *supra* note 7, at 715.

212. Boucher, *supra* note 1, at 1098.

213. *Id.* at 1099. Boucher also points out that compensation statutes do not result in immediate and unquestioned state compensation, but rather, they create a cause of action. *Id.* She quotes a provision of the Ohio Code to illustrate:

> Notwithstanding any provisions of this chapter to the contrary, a wrongfully imprisoned individual has and may file a civil action against the state, in the court of claims, to recover a sum of money as described in this section, because of the individual's wrongful imprisonment. The court of claims shall have exclusive, original jurisdiction over such a civil action.

Id. at 1099 n.221 (quoting OHIO REV. CODE ANN. § 2743.48(D) (West, Westlaw through 2010 legislation)).

214. *E.g.*, Dvorak v. Pickaway Corr. Inst., No. 02AP-452, 2002 WL 31656236, at *3 (Ohio Ct. App. Nov. 26, 2002).

215. Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 391, 394-95 (2009).

216. *See, e.g.*, Fudger v. State, 520 N.Y.S.2d 950, 953 (N.Y. App. Div. 1987).

217. *E.g.*, N.Y. CT. CL. ACT § 8-b(4) (McKinney 2003 & Supp. 2011).

218. Vasquez v. State, 693 N.Y.S.2d 220, 220 (N.Y. App. Div. 1999).

219. *See* Michael J. Saks et al., *Toward a Model Act for the Prevention and Remedy of Erroneous Convictions*, 35 NEW ENG. L. REV. 669, 682 (2001); *see also* discussion *supra* Part III.A.2.a.

claim . . . permits the district court to serve as a gatekeeper."[220] A claimant may not deprive the court of its gatekeeper role. In an Ohio case, a defendant found to have acted in self-defense was acquitted of a murder charge.[221] She argued that under collateral estoppel, she could sue for compensation without establishing actual innocence. The court rejected this argument because acquittal is an essential step that allows a claimant to get to the gate. Only with the acquittal does the court of claims open the gate and give the claimant the opportunity to demonstrate actual innocence.[222]

States whose requirements are very restrictive, as well as states just implementing compensation statutes, should look to states like New York for assurance that less restrictive statutes do not result in floods of claims.[223] It does not appear that states with well-planned compensation statutes will suffer inordinate strains on their budgets. Similarly, it is unlikely that such states will compensate those who are not entitled to compensation.

2. The Cost-of-Doing-Business Argument for Refusing to Pass Compensation Statutes Leads to Treatment That Is Unfair.—It is unfair for the state to treat wrongful conviction and undeserved time in prison as harms that should be "simply accepted as part of life."[224] It is also unfair to expect people subjected to months or years of undeserved incarceration to return to their lives as if nothing has happened. Moreover, it is wrong for the state to compound the harm of wrongful incarceration by adding another harm—namely, release from incarceration without any provision for a meaningful return to society. Making provision for the wrongfully incarcerated is "[t]he least the community can do."[225] Indeed, making such provision should be an integral part of criminal justice; "[t]he reparation of damages caused by erroneous criminal accusations . . . is properly a cost of the operation of the criminal justice system. It is difficult to see why the innocent victims should be forced to absorb this cost."[226] In clarifying the parameters of New York's compensation statute for the wrongly imprisoned, a New York court said that "the evil sought to be remedied was the likelihood of no recovery."[227] No state should tolerate the likelihood that a wrongfully convicted person might have no remedy.

3. The Cost-of-Doing-Business Argument for Wrongful Incarceration Leads to Moral Hazard.—Accepting the cost-of-doing-business rationale provides no incentive for the justice system to stop practices that lead to unfair treatment. Thus, this rationale leads to moral hazard. Moral hazard is created when there

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220. State v. McCoy, 742 N.W.2d 593, 596 (Iowa 2007).

221. Walden v. State, 547 N.E.2d 962, 963 (Ohio 1989).

222. *See id.* at 966-67.

223. *See* Boucher, *supra* note 1, at 1098-99 nn.215-16.

224. *Id.* at 1100 n.226.

225. Bernhard, *When Justice Fails*, *supra* note 7, at 112 (quoting EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE 392 (1932)).

226. Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 241 n.86 (quoting Rosenn, *supra* note 161, at 716).

227. Carter v. State, 546 N.Y.S.2d 648, 650 (N.Y. App. Div. 1989).

are no consequences for bad behavior. As columnist David Sirota puts it, "without consequences—or worse, with rewards—for wrongdoing, there is an incentive to do wrong."[228] When the state makes no provision, or only minor provision, for released individuals, the state excuses itself from responsibility for errors and misconduct in criminal investigations, trials, and sentences. No consequences flow from the bad behavior. This lack of consequences effectively tells the criminal justice community that errors and misconduct will be overlooked. Thus, the state's disinterest creates a moral hazard: an incentive for the criminal justice system to continue doing business as usual. When the state creates the moral hazard of "business-as-usual," the state will continue to tolerate preventable wrongs. Setting free a wrongfully convicted person is the ultimate expression that preventable wrongs indeed occurred. Under a cost-of-doing-business rationale, there is no incentive to eliminate preventable wrongs.

Courts have a role to play in rejecting the cost-of-doing-business rationale. One way to do so is to ensure that there are consequences for wrongdoing. A number of trial courts have admonished jurors to ignore prosecutors' improper suggestions to the jury.[229] Appellate courts have reversed and remanded cases because of prosecutors' misconduct[230] or improper methods.[231] Another way courts play such a role is through interpretations of burden-of-proof language in their states' enabling statutes. Under many statutes, exonerees trying to establish factual innocence must do so by presenting "clear and convincing evidence."[232] The clear and convincing evidence standard is an elevated standard.[233] Three statutes, however, direct courts to make allowance for the difficulty of producing clear and convincing evidence when claims are brought years after the original trials.[234] When the statute couples strict requirements with flexibility, courts

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228. David Sirota, *Moral Hazards—and Consequences*, S.F. CHRON., Dec. 11, 2009, at A24, *available at* http://articles.sfgate.com/2009-12-11/opinion/17220728_1_moral-hazard-senate-democrats-bernanke.

229. *E.g.*, Baker v. State, 906 A.2d 139, 148-49 (Del. 2006); Phelps v. State, 360 N.E.2d 191, 192-93 (Ind. 1977). In *Helleson v. State*, 5 S.W.3d 393, 397 (Tex. Crim. App. 1999), the prosecutor was told he could mention parole law but could not discuss it in regard to the sentence to be determined. When he did, the court told the jury to disregard the prosecutor's remarks. Courts do this routinely, but if not carefully worded, the court's warning to the jury might actually make the problem worse by highlighting the improper remarks. People v. Bolden, 589 P.2d 396, 400 n.5 (Cal. 1979).

230. *E.g.*, DeFreitas v. State, 701 So. 2d 593 (Fla. Dist. Ct. App. 1997).

231. Schoels v. State, 966 P.2d 735, 743 (Nev. 1998) (Springer, C.J., dissenting).

232. *E.g.*, ME. REV. STAT., tit. 14, § 8241(2) (West, Westlaw through 2009 2d Reg. Sess.); N.J. STAT. ANN. § 52:4C-3 (2011); W. VA. CODE ANN. § 14-2-13a(f)(1) (West, Westlaw through 2011 Reg. Sess.).

233. "The clear and convincing evidence standard is somewhere between the preponderance standard of civil cases and the reasonable doubt standard of criminal cases." *In re* G.B.R., 953 S.W.2d 391, 396 (Tex Crim. App. 1997).

234. N.Y. CT. CL. ACT § 8-b(1) (McKinney 2003 & Supp. 2011); N.J. STAT. ANN. § 52:4C-1; W. VA. CODE ANN. § 14-2-13a(f).

have the tools to issue decisions that whittle away at the cost-of-doing-business rationale.[235] When statutes are not explicit, a court's understanding of legislative intent may be similarly important. For example, a Louisiana court's interpretation was influenced by its understanding that legislative intent did not limit "the introduction of evidence related *in any way* to the conviction and the proof of factual innocence."[236] When statutes are not explicit, courts may facilitate consequences for wrongdoing by adopting a preponderance of the evidence standard instead of a clear and convincing evidence standard.[237]

4. The Cost-of-Doing Business Argument for Wrongful Incarceration Leads States to Violate the Constitution.—Finally, accepting the argument that wrongful incarceration is a cost of doing business leads to the ultimate moral hazard: the continued acceptance of constitutional violations. In a criminal appeal based on constitutional error, the court's focus is "on whether evidence of guilt could excuse constitutional error."[238] In effect, such a focus means that the court is balancing the possibility that the accused is guilty against the certainty that a constitutional error was committed. Rather than aiming for the elimination of constitutional errors from criminal trials, this focus invites the routine repetition of constitutional errors.

Whenever an exoneree succeeds in winning release after years of wrongful confinement, sympathy grows among the public for the payment of compensation. Tort-based compensation statutes not only respond to this sympathy, but also may lead to criminal justice reforms in such areas as mistaken

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235. The New Jersey statute, in discussing the burden of proof that exonerees bear in establishing factual innocence, states that

> it is the intent of the Legislature that the court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, may, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence, or other factors not caused by such persons or those acting on their behalf.

N.J. STAT. ANN. § 52:4C-1.

236. *In re* Williams, 984 So. 2d 789, 793 (La. Ct. App. 2008) (emphasis added). Although the result—vacatur of the trial court's award of compensation—was bad for the exoneree, the case clarifies the burden of proof and the steps in establishing proof of innocence.

237. Walden v. State, 547 N.E.2d 962 (Ohio 1989) (applying OHIO REV. CODE ANN. § 2305.02 (West, Westlaw through 2010 legislation)); Duncan v. State, No. 5625, 1972 WL 16790 (Ill. Ct. Cl. Apr. 12, 1972) (applying 37 ILL. COMP. STAT. ANN. § 439.8(c) (1967) and interpreting how to prove innocence of the fact of a crime). A claimant seeking to prove an unjust conviction claim carries a heavy burden of "evidence that is neither equivocal nor open to opposing presumptions." Solomon v. State, 541 N.Y.S.2d 384, 385 (N.Y. App. Div. 1989).

238. Garrett, *supra* note 11, at 38. In the introduction to this article, Garrett explains how the development of harmless error rules in criminal cases makes it hard for an accused to establish innocence. *Id.* He says that wrongful conviction lawsuits based on tort liability may have a dramatic reformative effect because they may change the "truth-defeating nature" of aspects of criminal procedure. *Id.* at 36.

eyewitness identification,[239] crime lab error,[240] and ineffective assistance of counsel.[241] Reforms in these areas cut down on the potential for constitutional violations. When constitutional violations are perceived to carry a cost, justification for the cost of doing business evaporates.

A wrongful-conviction compensation statute creates incentives that make it worthwhile for state actors to conform their conduct to the Constitution. Assuming that a compensation statute makes a department of government responsible for its constitutional violations, the motivation of that department to overlook such violations may diminish. Unconstitutional practices that a department might previously have ignored may no longer seem justifiable when violations leading to wrongful convictions have consequences for those who committed them.

An argument can be made that imposing consequences on government actors for unconstitutional behavior will tie the government's hands. However, consequences need not be unlimited. Rosenthal explains this in political terms. According to Rosenthal, a constitutional right should not depend on whether the right is politically acceptable:

> Inherent in the concept of a constitutional right is that its protection does not depend on the political acceptance of the right at stake. Thus, political accountability is an unacceptable method for securing constitutional rights; the Constitution protects even the unpopular or politically inexpedient. . . . [A] law of constitutional torts must place pressure on the government to conform all of its conduct to the Constitution. That does not imply, however, that damages are always properly awarded for a constitutional violation. Once one understands that the primary virtue of damages awards against the government is to create a political incentive to undertake loss prevention, there is ample room for damages-limiting doctrines that protect the interests of the taxpayers and avoid unwarranted reallocation of scarce public resources.[242]

This means that passing wrongful-conviction compensation statutes in no way ties a government's hands.

Passing wrongful-conviction compensation statutes will create political incentives for loss prevention, i.e., improving criminal justice practices, if part of the funding for the damage awards comes from the departments or offices that have the most ability to prevent constitutional violations. Some part of the damage award must come from police and prosecutor budgets because their actions directly create or prevent these violations. But statutory damage caps are acceptable because they "preserve political pressure on government to conform

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239. One among many articles dealing with criminal justice reform is Boucher, *supra* note 1, at 1074-78.

240. *Id.* at 1078-79.

241. *Id.* at 1080-82.

242. Rosenthal, *supra* note 169, at 856 (internal citation omitted).

its conduct to the law but mitigate the anomalies associated with governmental damages liability."[243] The aim of damage statutes should be "[a] regime of limited liability that nevertheless imposes a sufficient political price to minimize the likelihood of constitutional violations."[244] Translated to the compensation issue, this means that the government that created the harm then passes a statute to give damages for the harm. Because the government must continue to fulfill its other roles, the remedy will be limited. But a primary goal of the statute is to minimize the likelihood that the government will convict and imprison innocent persons. Therefore, the remedy should inflict some pain that matters on the "bad" actors. Suggestions such as fining or charging the prosecutor who brought the case will not work because that prosecutor may be gone, and no other prosecutor will see the remedy as cautionary.[245] But taking some portion of the compensation money from the budget of prosecutors would exact "a sufficient political price"[246] because any prosecutor could expect to lose funding whenever damages are awarded.

D. Pragmatic Reasons Support the Payment of Compensation

Refusing to pass generous wrongful-conviction compensation statutes has no practical justification. Looked at pragmatically, a refusal to pay compensation based on the cost-of-doing-business rationale cannot be justified. Paying compensation does not strain state budgets—and not only is refusing to pay compensation unfair, it also creates disincentives to improve bad practices and leads to constitutional violations. Further, pragmatic reasons exist for putting fair and generous compensation statutes into place.

First, passage of statutes contributes to a rebalancing of priorities. If the state does not take adequate steps to compensate the individual harmed by its processes, it demonstrates that it lacks responsibility for the errors. The state's demonstration that it lacks responsibility allows and even encourages further

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243. *Id.* at 863. Rosenthal does not illustrate anomalies. A possible example is seen in *Rooney v. United States*, 634 F.2d 1238 (9th Cir. 1980). Plaintiff Rooney was injured working for a contractor hired by the federal government. All three parties were negligent, but the government argued it could not be liable for damages "apportionable to its joint tortfeasor, the contractor." *Id.* at 1245. The court said that "[u]nder California law, each concurrent tortfeasor in a . . . comparative negligence case is jointly liable with the others. This rule applies regardless of the apportionability of negligence . . . . Since each defendant's negligence was a proximate cause of Rooney's indivisible injuries, each defendant is liable for the full amount of damages." *Id.* (internal citations omitted). Thus, the court found the government responsible for all damages except the thirty percent attributable to the comparative negligence of the plaintiff. The result, according to the court, is that "[w]e are faced with an anomaly which we must accept: the [g]overnment, which is the least culpable of the three of the negligent parties, will bear the greatest burden in damages." *Id.* The court affirmed judgment for the plaintiff.

244. Rosenthal, *supra* note 169, at 863.

245. *See generally* Medwed, *supra* note 9.

246. Rosenthal, *supra* note 169, at 863.

wrongdoing. Putting wrongful conviction statutes into place signals that the state is aware it may make mistakes and that those mistakes may be grave. It also signals that those who either commit or do not prevent mistakes in criminal process shall bear some responsibility for wrongful convictions. Making it easier for an exoneree to receive compensation through statute should result in fewer false convictions since prosecutors' offices may be motivated to pay more attention to fair trial techniques.[247] In fact, compensation statutes should be designed to make it easier, not harder, for exonerees to receive compensation.[248] Draconian compensation statutes rest on the argument that a restrictive statute will lead to few awards because it is so hard for exonerees to qualify. That rationale does not comport with our fundamental understanding of a justice system that protects the innocent from the ultimate deprivations: those of life and liberty.

Second, compensation statutes allow governments to forecast costs. Errors will occur, which explains the cost-of-doing-business argument. But tolerating errors in the criminal justice system under a cost-of-doing-business rationale may turn out to be costly for the state as well as unfair to the exoneree whose harm is justified under this rationale. Implementing compensation statutes allows the state to estimate its costs and not leave itself open to unexpected and potentially high damage awards. Passing compensation statutes that streamline the process of applying for compensation may lead to lower costs since the state will presumably be defending against fewer exoneree common law tort suits against prosecutors and § 1983 suits against municipalities and the police. Passing compensation statutes that make it easier for exonerees to receive compensation will enable the state to set up a predictable cost structure. Refusing to compensate exonerees as a cost-containing measure may backfire since sympathetic juries are likely to give large damage awards to the wrongfully convicted. For instance, the City of Chicago paid $1.5 million to a man wrongly convicted of murder after a city crime lab analyst was found to have falsified reports.[249] In another Chicago case, the city agreed to pay $9 million to settle a wrongful rape conviction lawsuit.[250] Similarly, New York City paid $5 million when it came to light that the prosecution had suppressed exculpatory evidence in a rape case.[251]

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247. *See* Garrett, *supra* note 11, at 53-56, 71-99.

248. For exonerees, the process should be more like submitting an application than filing a lawsuit. Making the process an administrative rather than adversarial proceeding will reduce the toll on exonerees and the costs to government.

249. *See* Steve Mills et al., *When Labs Falter, Defendants Pay*, CHI. TRIB., Oct. 20, 2004, *available at* http://truthinjustice.org/labs-falter.htm.

250. Maurice Possley & Gary Washburn, *City Will Pay $9 Million in False Jailing*, CHI. TRIB., Jan. 28, 2006, at 1, *available at* http://articles.chicagotribune.com/2006-01-28/news/0601280288_1_dna-testing-chicago-police-supt-false-confessions.

251. Andrea Elliott, *City Gives $5 Million to Man Wrongly Imprisoned in Child's Rape*, N.Y. TIMES, Dec. 16, 2003, at B3, *available at* http://nytimes.com/2003/12/16/nyregion/city-gives-5-million-to-man-wrongfully-imprisoned-in-child-s-rape.html.

If, instead of reacting to lawsuits, states develop plans for paying compensation under wrongful-conviction compensation statutes, they can encourage procedural changes that will lead to fewer instances of wrongful arrest and conviction. At the same time, they can prepare for the predictable costs of the scheme.

IV. FUNDING COMPENSATION STATUTES

A state may refuse to pass a compensation statute for the wrongfully convicted. The state does not, however, escape paying for the harm it has tolerated, if not actually caused. As difficult as it is for exonerees to sue on wrongful imprisonment grounds, exonerees do win lawsuits, and when they do, their damage awards are often significant.[252] Some entity of government pays when an exoneree wins a judgment against a prosecutor or a municipality. States should therefore accept their responsibility for wrongful convictions and implement fair and fairly administered compensation schemes. Recognizing that exonerations will occur means that the state can prepare for the inevitable payment of compensation instead of trying to find ways to deny recovery to wrongfully imprisoned persons.

Rosenthal points out that many proposals calling for governments to pay tort damages require the government

> to assume costs in order to avoid losses experienced by others; consequently, they all have a negative impact on government budgets, regardless of the externalized benefits they may produce—unless one can make the rather implausible claim that these proposals would be so popular that the voters would tolerate an increase in taxes to fund the new expenditures that they necessitate. Yet one cannot find in any of the proposals for new governmental liability any consideration of the consequences that new liabilities will have on government budgeting, or on those who depend on government budgets for the variety of social goods allocated through that process.[253]

By consequences, Rosenthal means that increased government spending in one area will result in less money for government spending in other areas. It is not enough for states to pass compensation statutes; they must also determine how these statutes will be funded.

Current wrongful-conviction compensation statutes do not pay much attention to the sources of funding. In California, for example, exonerees are not discussed explicitly in budget information on the state's website.[254] California

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252. *See* Robert T. Garrett, *Texas House Votes to Boost Compensation for Wrongly Imprisoned*, DALL. MORNING NEWS, Apr. 25, 2009, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/dnacases/stories/DN-innocent_25tex.ART.State.Edition1.4a9c71a.html.

253. Rosenthal, *supra* note 169, at 845.

254. *See generally* Letter from Dep't of Finance to Dep't of Budget Officers, Dep't Accounting Officers, & Dep't of Finance Budget Staff (Sept. 28, 2010), *available at*

funds its wrongful-conviction compensation statute from the state's general fund[255] pursuant to the California Penal Code.[256] A specific source within the general fund is not designated. The state's department of corrections receives its funding from the general fund.[257] Perhaps funding comes from the corrections budget, perhaps not. The general fund is a fairly haphazard source, as the provision of funds for DNA testing illustrates. In 2001,

> California mandated that all costs associated with representing inmates pursuant to Penal Code section 1405 to investigate and, if appropriate, file motions for DNA testing of biological evidence where such testing could prove innocence, *be borne by the State*. In that same year, California allocated $1.6 million dollars over two years to provide counsel to assist inmates with innocence claims. For 2002 and 2003, the NCIP [Northern California Innocence Project] and CIP [California Innocence Project] received state funding. That funding *was discontinued as a result of state budget cuts* in 2003.[258]

Other states have equally vague sources of funding. Alabama pays awards out of any available state funds.[259] New Hampshire pays claims from any money in the treasury not otherwise appropriated.[260] North Carolina provides awards from its contingency and emergency fund or other available state funds.[261] These states' statutes at least mention some funding source. Most, however, are silent. The most completely thought out statute seems to be Maryland's, which specifies that the board of public works should make payments to exonerees using money in the general emergency fund or money provided by the governor in the annual budget.[262] If governments must "assume costs" in an attempt to avoid losses that others experience at their hands, they need to pass compensation statutes whose funding sources will be secure.

Assuming a state is revisiting its statute or creating a new one, how can it fund the statute? One way to pay for harm is through insurance. In an insurance scheme, the insured protects against a risk by paying premiums to an insurer to

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http://www.dof.ca.gov/ budgeting/budget_letters/documents/BL10-26.pdf.

255. CAL. PENAL CODE §§ 4900-06 (2010).

256. *Id.* § 2713.1.

257. KAISER FAMILY FOUND., CALIFORNIA: DISTRIBUTION OF STATE GENERAL FUND EXPENDITURES (IN MILLIONS), SFY2008, http://www.statehealthfacts.org/profileind.jsp?rgn=6&ind=33&cat=1 (last visited Feb. 16, 2011). In fiscal year 2008, the department of corrections received 9.4% of the general fund. *Id.*

258. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 107 (Feb. 22, 2008), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf (emphases added).

259. ALA. CODE § 29-2-160(a) (2003).

260. N.H. REV. STAT. § 541-B:13 (2007).

261. N.C. GEN. STAT. § 148-84 (LEXIS through 2010 Reg. Sess.).

262. MD. CODE ANN. STATE FIN. & PROC. § 10-501(a)(2) (West, Westlaw through 2010 Reg. Sess.).

cover that risk.[263] Employers provide insurance "to account for the risk of liability that employees face."[264] Governments offer insurance to public employees through statutes, policies, or collective bargaining agreements.[265] Consumers buy insurance to extend product warranties. They buy trip insurance to minimize losses from having to cancel a trip. Self-employed workers buy medical insurance. Fathers and mothers buy life insurance to safeguard their children if the parents die.[266] In all of these contexts, the purchaser of the insurance buys the insurance because he understands that a danger of harm exists generally and that the harm may befall him specifically.[267] Yet even with sensational news stories about people being set free after years and years of wrongful imprisonment, there is no wrongful conviction insurance. Discussing ways in which requiring compensation for the wrongly convicted should lead to improvement in the criminal justice system, Evan Mandery says that

> [i]nsurance theory suggests that in the open market consumers would not choose to purchase "constitutional tort insurance." Generally speaking, people choose to buy insurance against losses that reduce wealth, but do not insure against intangible harms, such as emotional distress or affronts to . . . [dignity], that have no direct or indirect effect on wealth. Since most constitutional torts cause intangible damages, insurance theory argues that requiring citizens to purchase insurance against these kinds of injuries reduces their net welfare.[268]

Arguably, wrongful incarceration is a constitutional tort that reduces net wealth and inflicts an array of intangible damages. But the point is that people will most likely not voluntarily spend money, and thereby reduce their net worth, to insure themselves against an event that seems so remote from the average person's experience.

Assuming individuals will not buy wrongful conviction insurance, but realizing that individuals are harmed by wrongful conviction (generally through no fault of their own), should states impose higher taxes on citizens to spread out the risk? In the case of strict products liability,

> consumers pay premiums to manufacturers—through higher product prices—in exchange for indemnification against injuries caused by the products. The thought is that manufacturers are better able to bear the costs of injuries than individual consumers. . . . [T]he premium . . . must be one that they [consumers] would choose to pay in a private market.[269]

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263. *See* Rosenthal, *supra* note 169, at 820-21.

264. *Id.* at 820.

265. *Id.* at 819.

266. Mandery, *supra* note 192, at 5.

267. I do not include automobile insurance in this discussion because its utility to the public is readily apparent, unlike insurance for something like wrongful convictions.

268. Mandery, *supra* note 192, at 7.

269. *Id.*

The analogy is between consumers paying premiums to manufacturers through higher prices and citizens paying premiums to the government through higher taxes. Governments are unlikely to see raising taxes as a solution because raising taxes imposes a political cost on elected government officials. Voters may not re-elect officials who raise taxes. A government will therefore avoid raising taxes if those taxes are to insure against a constitutional harm that is typically not the kind of harm people will insure against with their own money.

If states are not willing to pay for compensation statutes through direct taxation, is there some other way for states to assume this burden? A more useful analogy is to see states as manufacturers insuring themselves against injuries caused by their product, the criminal justice system. Manufacturers are thought to be better able to "to bear the costs of injuries than individual consumers."[270] But manufacturers can bear these costs because they get them back from consumers in the form of higher prices. Since the states do not want to raise taxes to pay for wrongful convictions, they need an insurance company of their own. So the analogy shifts again: now each individual state is a consumer, and the group of all the states becomes the insurer. Banding together, the states could create a wrongful convictions funding pool much larger than any single state's fund for damage awards. All the states would contribute,[271] but only a few states would likely need to use the funds in any particular year. In this manner, the funds will be able to grow.

A state could also create its own fund to cover the costs of compensating exonerees. Ideally, the fund would grow large enough that compensation could be paid from the interest it generates, and not from the principal. An argument can be made that there is no need to create a dedicated fund to cover the costs of exoneree compensation because specific awards "are a small percentage of any state's annual budget."[272] Looking just at numbers, this seems to be a valid point. For example, California's total budget expenditure for 2008 was about one hundred billion dollars.[273] An award of one or two million is nothing in the face of that number. Would this amount be more significant if it is targeted to come out of the corrections budget instead of the general fund? Even a small award makes up a larger percent of the corrections budget than the overall state budget. California's corrections budget for 2008 was 9.4% of the state's total budget.[274] This figure is certainly a small percentage of the whole state budget; however, it still amounted to about $9.6 billion. When corrections spends over $9 billion

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270. *Id.*

271. States could contribute based on the size of their felony prison populations, for example.

272. Karin D. Martin, *A Model State Policy for the Treatment of the Wrongfully Convicted*, LIFE AFTER EXONERATION PROGRAM 31 (2006), http://www.exonerated.org/content/images/articles/model%20state%20policy%20-%20karin%20martin.pdf. Martin conducted this study as part of the requirements for the Master of Public Policy degree of the Goldman School of Public Policy, Univ. of Cal., Berkeley. *Id.* at 1.

273. KAISER FAMILY FOUND., *supra* note 257.

274. *Id.*

a year, an award of $1 million or $2 million should be affordable. But this argument—that there is no need to create a dedicated fund because specific awards are relatively small—must be a spurious argument because some states do not provide compensation at all, and those that do have compensation statutes do not spontaneously make awards. Instead, they force the exoneree to sue the state to set the compensation machinery in motion. Therefore, the insignificance of the amount does not guarantee payment.

Assuming that a state decides to create a fund to pay for compensation claims, the question is how the state will make payments into the fund. Three sources can be tapped. The first source of funds is prosecutors' budgets. Whenever an exoneree is awarded compensation for wrongful incarceration, the attorney general's office should be required to contribute to the fund.[275] Even if the process for establishing factual innocence reveals that the state was without fault, the attorney general's office must still make the payment to the fund.[276] Also, in those few states that have implemented administrative procedures instead of adversarial ones,[277] the attorney general's office should still be required to pay into the fund.

The second source of funds is the corrections budget. The fund could be set up to require a yearly payment from the corrections budget, which could be a set amount or a fluctuating percentage. In either case, it can be calculated in various ways. The amount could be based on the size of the prison population. Alternatively, it could be based on the number of felons in prison or the average number of exonerations per year over a set period. In California, for example, twenty-seven claims for exoneration were approved between 1989 and 2003.[278] Taking the ratio to be twenty-seven exonerations per fifteen years, the average

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275. This proposal may raise the ire of prosecutors. *See* Medwed, *supra* note 9, at 157.

276. An example is "if the erroneous conviction were entirely the fault of a perjurious witness." Saks et al., *supra* note 219, at 682 n.35. Incidentally, the state may bring criminal charges against the perjurious witness. *Id*.

277. Alabama's remedy is exclusively administrative. *See* ALA. CODE § 29-2-151 to -165 (2003). California has an administrative scheme. *See* CAL. PENAL CODE § 4900 (2010). North Carolina and Wisconsin also have administrative schemes. *See* N.C. GEN. STAT. § 148-83 (LEXIS through 2010 Leg. Sess.); WIS. STAT. ANN. § 775.05 (West, Westlaw through 2009 Reg. Leg.). In Texas, an exoneree applies for administrative remedies. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.051 (West, Westlaw through 2009 Reg. Leg.). In New Hampshire, for a claim for less than $5000, the claimant follows administrative procedures. For a claim between $5000 and $50,000, there is concurrent jurisdiction between the administrative and judicial fora. Above $50,000, the claimant must follow the judicial route and sue in superior court. N.H. REV. STAT. ANN. § 541-B:9 (2007). In New Hampshire, then, most wrongful compensation claims would be brought as suits against the state in superior court. In Tennessee, the board of claims investigates and hears administrative claims for compensation. TENN. CODE ANN. § 9-8-108(a)(7) (West, Westlaw through 2010 Reg. Sess.).

278. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 258. In addition, twenty-five claims were denied and nineteen were dismissed as untimely, incomplete, or because the claimant was still in prison. *Id.*

yearly number of exonerations would be 1.8, or about two exonerations per year.

The third source of revenue comes from re-visioning how the department of corrections spends money to maintain inmates. The state's correctional authority must be seen as establishing a "line" in the budget for each prisoner. This line should not end with a prisoner's exoneration. Each year, the money that would have been spent on the (now-exonerated) prisoner would go into the exoneree's compensation fund. The exonerated prisoner would receive the set statutory amount annually until he has received payment for each of the years that he served in prison. If an exoneree dies before receiving his full payout, the remainder of the statutory amount would go to his heirs annually until the exoneree's years of prison service are compensated. Even after the exoneree or his estate has received the full payout to which he is entitled, however, the exoneree's budget line need not evaporate. In order to build up the fund, corrections could continue to make payments from the exoneree's prison budget line until the exoneree actually dies or until he was projected to die, whichever is longer. For a life sentence, payment should continue for the projected actuarial life span of the exonerated person.

All three of the proposed revenue sources for a state's own compensation fund are based on the two theories underlying tort liability: (1) the corrective justice theory that the state has a moral obligation to make victims whole[279] and (2) the instrumental theory that the threat of liability creates incentives to avoid behavior that triggers liability.[280] In corrective justice terms, it is appropriate to impose some of the moral obligation to make victims whole on prosecutors' offices since those offices bear some responsibility for the harm. Making the office strictly liable under the instrumental theory obviates the necessity to find any particular culprit, which is useful if specific prosecutors are no longer in office.[281] Even though the prosecutor who allowed a wrongful conviction to occur may have left the department, every prosecutor taking office after passage of this statute will know that a portion of the funding for exoneree awards comes from the prosecutor's budget.

As noted earlier in this Article, prosecutors will resist this requirement.[282] Describing existing statutes, Medwed writes that "[a]lthough these statutes do not expressly designate that funds used for this compensation should be drawn directly from prosecutors' budgets, the impact of these payouts on state coffers could conceivably have an indirect effect on the amount of money allocated to prosecutors partially dependent on state funding."[283] I suggest that the funding under revised statutes should have a direct effect on money allocated to

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279. *See supra* Part III.B.2.

280. *See supra* Part III.B.1.

281. *Cf.* Medwed, *supra* note 9, at 144 (assigning post-conviction motions based on whether lawyer who prosecuted case was still in office).

282. *See supra* note 275. I realize that this proposal implicates the very reason that prosecutors may resist post-conviction claims of innocence. However, all participants in wrongful convictions should participate in the remedy.

283. Medwed, *supra* note 9, at 157 (internal footnotes omitted).

prosecutors. Knowing that their budgets will be affected every time a wrongfully convicted person is exonerated should create a stronger incentive for prosecutors to avoid the practices that give rise to wrongful convictions.[284]

The second source of revenue—the automatic yearly payment from the corrections budget to the compensation fund—works similarly. It is not possible at the level of a huge department to blame specific individuals for the miscarriages of justice that result in wrongful convictions. But holding that department strictly liable for a significant portion of compensation funding is appropriate because that is the only department that could have condoned bad practices and can now stop them.

The third source of revenue—requiring corrections to continue carrying the expense of maintaining a prisoner by paying into the fund what it would have spent if the prisoner had not been exonerated—similarly satisfies both theories of tort liability. Continuing to "pay" for a prisoner who has left the system helps provide a viable fund that could make future victims whole. Requiring corrections to make these payments puts pressure on the department of government that is both most likely and most able to make changes, leading to fewer wrongful convictions.

There is a difference between the first two revenue streams and the department of corrections' budget "line." The first two revenue streams will yield reasonably predictable amounts because the amounts are based on averages. The method of calculation (and re-calculation, from time to time) of these averages must be established in the statute. By contrast, the third source, which is the amount the state pays to the fund under the budget line concept, is more fluid. That amount depends on several variables. One variable is how many exonerated individuals are receiving compensation at any one time. The more exonerees receiving compensation, the higher the amount coming from budget lines will be. The second variable is whether an exoneree was on death row when he was exonerated and released. The cost to the state to maintain a person on death row is higher than the cost to maintain a prisoner serving a life sentence.[285] When a death row inmate is exonerated, therefore, the state would put into the fund the difference between what it costs to maintain a death row inmate and an inmate serving a life sentence without the possibility of parole.[286]

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284. The creation of incentives to avoid bad practices is a third pragmatic reason in favor of wrongful-conviction compensation statutes. *See supra* Part III.D.

285. A New Jersey commission studying the death penalty found that the state would save $1.3 million per year in costs of incarceration if it switched just one death row inmate's sentence to a sentence of life without parole. Joe Bargmann, *Debating the Cost of Capital Punishment*, PARADE, Jan. 31, 2010, at 6, *available at* http://parade.com/news/intelligence-report/archive/100131-debating-the-cost-of-capital-punishment.html. Natasha Minsker, death penalty policy director of Northern California's ACLU affiliate, has said that changing death sentences to permanent imprisonment would save California $1 billion over five years. Scott Smith, *State Moves Closer to Resuming Executions*, STOCKTON REC., Jan. 6, 2010, *available at* http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100106/A_NEWS/1060309.

286. In a generous statute, the compensation for an exonerated death row inmate would be

But even allowing for a higher level of compensation because of the traumatic experience of facing execution, the annual cost of compensation for an exonerated death row inmate could be lower than the annual cost to maintain that person on death row.

Unpredictable results may also arise in the case of older prisoners. Thus, the age of the prisoner is the third variable. The cost to the state of paying into the fund for elderly exonerees is probably going to be less than the cost of maintaining them as older prisoners. Although it is true that "like other segments of the population, inmates are living longer,"[287] many criminology researchers consider offenders to be "elderly" at fifty-five.[288] According to Snyder, this is because of "the shorter life expectancy and lower health status of criminal offenders."[289] If inmates are elderly at fifty-five, with impaired health and shortened life expectancy, they can be expected to develop the illnesses of age sooner than those who are not inmates. Older prisoners need more medical care; as a result, they cost more to maintain.[290] If a prisoner is exonerated before developing the illnesses of age, it is possible that the budget line payment that the state continues to make into the fund every year on his behalf will be less than the actual cost to maintain the prisoner.

CONCLUSION

Wrongful convictions cost states money, resources, public goodwill, and moral authority. Well-planned wrongful-conviction compensation statutes help to mitigate all of these costs. But whether states contribute to a multi-state pool or create their own dedicated funds, state costs will certainly remain. Initially, states will need to spend money to get their funds operational. And states will have to commit continuing resources to maintaining the funds. Nevertheless, passing wrongful-conviction compensation statutes that include identified funding sources has important advantages over the haphazard systems generally in place now. The human cost to exonerees will be less; the financial cost to the states will be more predictable and more manageable.

Of course, it is better for exonerees not to have to fight yet again to receive compensation. It is better for states, too. Their criminal processes will improve. Their reputations will not be savaged in the press when juries make huge awards to exonerees. Presumably, it will be easier for states to fulfill their moral obligations to their citizens. And a citizenry often cynical about the justice system may begin to find renewed optimism that there actually is justice in the system.

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adjusted to reflect that the exoneree was on death row.

287. Cindy Snyder et al., *Older Adult Inmates: The Challenge for Social Work*, 54 SOC. WORK 117, 117 (2009).

288. *Id.*

289. *Id.*

290. *See* Jonathan Turley, *Older Prisoners and Overcrowding*, RES IPSA LOQUITUR BLOG (Dec. 6, 2007), http://jonathanturley.org/2007/12/06/older-prisoners-and-overcrowding/.