HOW TO ALLEVIATE THE REPERCUSSIONS OF WRONGFUL CONVICTIONS: HOLISTICALLY RIGHTING THE WRONGS OF INADEQUATE COMPENSATION STATUTES

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† Senior Articles Editor (Volume 44), *Cardozo Law Review*; J.D. Candidate (June 2023), Benjamin N. Cardozo School of Law; M. Acct. (2018), Tulane University; B.S.M. (2018), Tulane University. I would like to thank Professor Ekow Yankah for serving as my faculty advisor and providing invaluable guidance throughout the research and writing process. Thank you to the editors of *Cardozo Law Review* for their scrupulous editing, and to the Innocence Project for its strides in zealously advocating for the needs of exonerees. Finally, my deepest gratitude goes out to my friends and family who have provided insurmountable support throughout the Note-writing process and never stopped listening to my tirades about the detriment of wrongful convictions and the deficiencies in wrongful conviction compensation statutes.

INTRODUCTION

For over two centuries, the United States has been knowingly plagued with innocent people being wrongfully convicted of crimes.[1] At the heart of America's first wrongful murder conviction case[2] laid issues that are still present in modern-day wrongful convictions. In 1819, seven years after Russell Colvin disappeared from town, brothers Jesse and Stephen Boorn were arrested for his murder.[3] Prior to trial, their uncle claimed Colvin appeared to him in a dream, confirming he was slain and directing the uncle to the area of his remains.[4] Near that area, a dog found several bones, which a few local doctors pronounced as human.[5] Subsequently, an arrest warrant was issued for Stephen, who had recently moved to another state; however, since Jesse was living locally, he was taken into custody and placed in a cell with a forger named Silas Merrill.[6] Merrill quickly told authorities that Jesse confessed to him about both brothers' involvement in the crime, and he agreed to testify against the brothers in exchange for his release—which he did and was thus granted immediate release.[7]

Hearing of Jesse's confession, Stephen panicked and claimed self-defense in a written confession to the murder.[8] Around the same time, doctors reexamined the earlier-discovered bones and determined that

1 *See* Rob Warden, *First Wrongful Conviction: Jesse Boorn and Stephen Boorn*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/vt/boorn-brothers.html [https://perma.cc/C7VT-TCS8].

2 Paul S. Gillies, *The Trials of Jesse and Stephen Boorn*, VT. BAR J., Summer 2012, at 8, 9.

3 *Id.*

4 *Id.*

5 *Id.*; Warden, *supra* note 1.

6 Warden, *supra* note 1.

7 *Id.*; Gillies, *supra* note 2, at 9–10.

8 Warden, *supra* note 1.

they were actually of animal nature—not human.[9] With a deep-rooted belief in the strength of the brothers' confessions and Merrill's testimony, the prosecution still moved the case forward to trial.[10] Consequently, the brothers were both convicted of Colvin's murder and sentenced to death.[11] The brothers were only later exonerated when Colvin himself returned to town, alive and well.[12] Though it has been over two hundred years since the Boorns' exonerations, the criminal legal system has yet to rectify the very problems that led to their wrongful convictions.[13]

As of December 2022, over 3,000 individuals have been exonerated of their wrongful convictions after having lost a combined total of almost 30,000 years of freedom.[14] These erroneous convictions are ordinarily caused by little to no fault of the exonerees, yet their lives are still irreparably harmed because of them. For instance, exoneree Luke Wirkkala recalled that for him, part of the traumatic outcome of being wrongfully convicted included having eight years of freedom taken from

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9 Notably, Jesse likely would not have been arrested and put in a prison cell with Merrill—who testified to Jesse's alleged confession, leading to Stephen's frantic written confession—had it not been for the misapplied forensic analysis regarding the bones. *Id.*

10 *Id.*

11 *Id.*; Gillies, *supra* note 2, at 9–10.

12 Warden, *supra* note 1; Gillies, *supra* note 2, at 9–10. Akin to the controversies surrounding exonerations today, people still do not believe in the Boorns' innocence, despite the brothers being widely recognized as the first wrongfully convicted individuals in America. *See, e.g.*, GERALD W. MCFARLAND, THE "COUNTERFEIT" MAN: THE TRUE STORY OF THE BOORN-COLVIN MURDER CASE (Univ. of Mass. Press 1993) (1990) (conveying that the Boorns may have hired an imposter to act as Colvin so they could be exonerated for his murder).

13 *See, e.g.*, Maurice Possley, *Ronald Keith Williamson*, NAT'L REGISTRY OF EXONERATIONS (July 10, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3752 [https://perma.cc/QUY2-VJ46] (discussing the case of Ronald Keith Williamson and Dennis Fritz, who were wrongfully convicted of a murder based on a false confession, suspicious jailhouse snitch testimony, and false forensic evidence); Suzie Schottelkotte, *Polk Judge Denies New Trial for Convicted Murderer Leo Schofield in Fatal Stabbing of Wife, 18*, LEDGER (May 11, 2018, 3:15 PM), https://www.theledger.com/story/news/crime/2018/05/10/polk-judge-denies-new-trial-for-convicted-murderer-leo-schofield-in-fatal-stabbing-of-wife-18/12260454007 [https://perma.cc/85W8-LE9H] (recounting how part of the still-open case against Leo Schofield includes his own father's "vision" in a dream of where Leo's deceased wife was buried).

14 *See generally* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [https://perma.cc/J927-E8LK] (detailing every known exoneration in the United States). The total number of actual *wrongful convictions*—as opposed to actual *exonerations*, which are reported by the National Registry of Exonerations—is, of course, unreported and nearly impossible to determine. As there is no precise metric to perfectly determine how many innocent individuals have been convicted, the next best gauge for determining at least the minimum number of wrongful convictions is through officially reported exonerations. Marvin Zalman & Robert J. Norris, *Measuring Innocence: How to Think About the Rate of Wrongful Conviction*, 24 NEW CRIM. L. REV. 601, 603 (2021).

him, losing his home, and getting a divorce.[15] Considering the systemic flaws that have wreaked havoc on the legal system,[16] leading to an overwhelming amount—neither randomized, nor unavoidably accidental—of wrongful incarcerations, it is clear that states should compensate for the cruel loss of life, years, and experience that could have been prevented. Regardless of the reasonableness of the state's initial prosecution of an exoneree, innocent people unequivocally deserve reparations for their unwarranted time spent imprisoned.

Although nothing could thoroughly counteract or "make up for the time and opportunities [arrogated] from exonerees,"[17] several state and federal legislatures have enacted laws to begin effecting positive change in exonerees' lives by providing them some relief.[18] Though various states continue to pass new compensation laws,[19] as of February 2023, there are

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15 Christina Carrega, *More Than 2,800 Have Been Wrongly Convicted in the US. Lawmakers and Advocates Want to Make Sure They're Paid Their Dues.*, CNN POL. (July 7, 2021, 4:28 PM), https://www.cnn.com/2021/07/07/politics/wrongful-conviction-compensation-bill/index.html [https://perma.cc/G98S-65BN].

16 Throughout this Note, the phrase "criminal *legal* system" is used, as opposed to the outdated phrase "criminal *justice* system," to highlight the inaccuracies portrayed by using the term "justice" to refer to outcomes that result pursuant to American criminal law. *See* Erica Bryant, *Why We Say "Criminal Legal System," Not "Criminal Justice System*," VERA (Dec. 1, 2021), https://www.vera.org/news/why-we-say-criminal-legal-system-not-criminal-justice-system [https://perma.cc/TMX8-RTVM].

17 *See* Press Release, Maxine Waters, Congresswoman, Chairwoman of the House Comm. on Fin. Servs., Waters Introduces Justice for Exonerees Act (June 25, 2021), https://waters.house.gov/media-center/press-releases/waters-introduces-justice-exonerees-act [https://perma.cc/3LKS-LGPM].

18 *See, e.g.*, 12 R.I. GEN. LAWS §§ 12-33-1 to 12-33-7 (2023); 735 ILL. COMP. STAT. 5/2-702(a) (2022) ("[I]nnocent persons who have been wrongly convicted of crimes in Illinois and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and . . . such persons should have an available avenue to obtain a finding of innocence so that they may obtain relief through a petition in the Court of Claims."); NEB. REV. STAT. § 29-4602 (2022) ("The Legislature finds that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been uniquely victimized, have distinct problems reentering society, and have difficulty achieving legal redress due to a variety of substantive and technical obstacles in the law. The Legislature also finds that such persons should have an available avenue of redress. . . . [Thus,] persons who can demonstrate that they were wrongfully convicted shall have a claim against the state as provided in the act."). In June 2021, Congresswoman Waters also announced the Justice for Exonerees Act, which would increase the amount of money exonerees in the federal system could receive per year of wrongful incarceration, accounting for inflation. Press Release, Maxine Waters, *supra* note 17.

19 Daniele Selby, *20 Recent Justice Reform Measures to Celebrate*, INNOCENCE PROJECT (Oct. 6, 2021), https://innocenceproject.org/20-recent-justice-reform-measures-to-celebrate [https://perma.cc/JC2Y-YLND] (touting Idaho and Rhode Island as among the newest states to pass compensation laws for exonerees in 2021). As of the publication of this Note, Oregon is the most recent state to approve legislation that provides compensation for individuals who were "wrongly imprisoned, on parole, in post-prison supervision, or on the sex offender registry." Press

still twelve states, including Georgia, Pennsylvania, and South Carolina, without legislative compensatory measures.[20]

Among the exonerees stranded in a state without any compensation statute in place was John Jerome White, who wrongfully spent more than twenty-two years incarcerated for a home invasion and rape of an older woman.[21] Once exonerated based on DNA evidence, White was thrust back into freedom in Georgia without any official avenue for recourse.[22] Thus, after almost three decades of incarceration, White still had to spend another two years lobbying the Georgia legislature to introduce a private bill on his behalf so that he could receive compensation.[23] Eventually, he succeeded and was paid—though less money than he originally asked for—through the private bill.[24]

As it is, exonerees face an arduous path to receive compensation for their wrongful imprisonment. Unfortunately, this path usually does not even end in ample reparations,[25] given that both the process to receive compensation and the actual compensation itself set a low bar for exonerees to fail post-release. Accordingly, given the numerous injustices that play a significant role in wrongfully convicting individuals and the toll a wrongful conviction takes on an exoneree, the urgency for enacting ample compensation statutes is evident.

This Note will proceed in three Parts, arguing the case for adequately compensating wrongfully convicted individuals. Concurrently, relevant features of the thirty-eight states' existing compensation statutes will be analogized and distinguished to determine which characteristics to include as part of the proposed improvements legislatures should

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Release, Kayse Jama, Or. State Sen., Oregon Senate Approves Compensation for Wrongfully Convicted Oregonians (Mar. 1, 2022), https://www.oregonlegislature.gov/Jama/Documents/[SB%201584]%20PRESS%20RELEASE_%20Oregon%20Senate%20Approves%20Compensation%20for%20Wrongfully%20Convicted%20Oregonians.pdf [https://perma.cc/Q4MY-ZLCW]; *see* S.B. 1584, 81st Legis. Assemb., 2022 Reg. Sess. (Or. 2022).

20 *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, https://innocenceproject.org/compensating-wrongly-convicted [https://perma.cc/HAL9-BLA3].

21 *John Jerome White*, NAT'L REGISTRY OF EXONERATIONS (Nov. 22, 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3735 [https://perma.cc/USA7-9Y8H].

22 *Id.*; *see* Carrega, *supra* note 15.

23 Carrega, *supra* note 15.

24 *Id.*

25 *See, e.g.*, IOWA CODE § 663A.1(6)(b) (2023) ("Damages recoverable from the state by a wrongfully imprisoned person under this section are limited to . . . . [a]n amount of liquidated damages in an amount equal to *fifty dollars per day of wrongful imprisonment*." (emphasis added)); Erin Jordan, *Wrongful Imprisonment Compensation Rare in Iowa*, GAZETTE (June 1, 2014, 8:00 AM), https://www.thegazette.com/news/wrongful-imprisonment-compensation-rare-in-iowa [https://perma.cc/C3W6-9CNX] (expressing defense attorneys' view that Iowa's compensation rate of fifty dollars per day of incarceration is "paltry").

consider. Part I will first address the habitually present causes of wrongful convictions.[26] This Part will then discuss the struggle wrongfully convicted individuals face to gain release from prison due to prosecutors' tenacity and tactics to keep individuals who they convict incarcerated.[27] Subsequently, Part I will outline the advancements made within the wrongful conviction compensation realm.[28] Part II will then highlight the typical issues present within existing wrongful conviction compensation statutes.[29] This Part juxtaposes the efficacy of adjudication processes executed through administrative boards versus within the court system,[30] illuminates how certain statutory eligibility requirements are limiting,[31] and emphasizes the importance of providing exonerees with ample monetary and nonmonetary awards.[32] Hence, Part III proposes that adjudication processes must be streamlined by utilizing the best aspects of both state claims boards and the court system, eligibility requirements must be less restrictive and more inclusive, and awards must be provided to exonerees through more holistic, individualized arrangements.[33]

I. BACKGROUND: FROM CONVICTION TO COMPENSATION

"The path to receiving compensation for a wrongful imprisonment is generally three steps: a wrongful conviction, an exoneration, and then ultimately compensation for wrongful imprisonment."[34] The following Sections will discuss each of these steps in turn.

A. *Common Miscarriages of Justice That Lead to Wrongful Convictions*

Wrongful convictions stem from an amalgam of factors in a perfect storm—part human errors, part willful mistakes. Among the most prevalent causes of wrongful convictions are prosecutorial misconduct, eyewitness misidentifications, false confessions, jailhouse snitch testimony, faulty forensic evidence, and ineffective assistance of

26 *See infra* Section I.A.

27 *See infra* Section I.B.

28 *See infra* Section I.C.

29 *See infra* Part II.

30 *See infra* Section II.A.

31 *See infra* Section II.B.

32 *See infra* Sections II.C–II.D.

33 *See infra* Part III.

34 Meridith J. Heneage, Comment, *Rightful Compensation for a Wrongful Conviction: In Defense of a Compensation Statute in the State of Wyoming*, 19 WYO. L. REV. 305, 308 (2019).

counsel.[35] In fact, while the circumstances leading to each wrongful conviction case are unique, they consistently comprise some permutation of these elements.[36] Comprehending these numerous systemic failures will help demonstrate the necessity for each state to restitute exonerees who have been aggrieved by its failures.[37]

1. Prosecutorial Misconduct

Since prosecutors themselves are vital to the interworking of the criminal legal system, a discussion of prosecutorial misconduct should be prefaced with a caveat: not all prosecutors are unscrupulous, perhaps even most are not, but those who are commit harms with egregious consequences.[38] This Section focuses on the latter type of prosecutor. As another leading cause of wrongful convictions, prosecutorial—or official—misconduct is detrimental to the criminal legal system. This type of misconduct refers to prosecutors' overt actions to ensure a defendant is convicted regardless of evidence contradictory to their guilt.[39] It primarily occurs through the use of false testimony—in the form of

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35 *See, e.g.*, Chelsea N. Evans, Note, *A Dime for Your Time: A Case for Compensating the Wrongfully Convicted in South Carolina*, 68 S.C. L. REV. 539, 546 n.56 (2017); Ryanne Berube, Miko M. Wilford, Allison D. Redlich & Yan Wang, *Identifying Patterns Across the Six Canonical Factors Underlying Wrongful Convictions*, 3 WRONGFUL CONVICTION L. REV. 166, 170 (2022).

36 Michael P. O'Connor, Book Review, 42 JURIMETRICS J. 221, 226 (2002) (reviewing BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000)).

37 *See* Dru Selden, Comment, *The Debt Paradox: In Debt but Society Owes You a Debt*, 37 EMORY BANKR. DEVS. J. 95, 99 (2020).

38 *Compare* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxii (2015) (recalling that a large portion of prosecutors the author interacted with were "fair-minded, forthright and highly conscientious"), *and* John Shaw, Comment, *Exoneration and the Road to Compensation: The Tim Cole Act and Comprehensive Compensation for Persons Wrongfully Imprisoned*, 17 TEX. WESLEYAN L. REV. 593, 599 (2011) (mentioning that most prosecutors are, in fact, honest and not untrustworthy), *with* Alisha L. McKay, Comment, *Let the Master Answer: Why the Doctrine of Respondeat Superior Should Be Used to Address Egregious Prosecutorial Misconduct Resulting in Wrongful Convictions*, 2012 WIS. L. REV. 1215, 1243 (2012) (arguing that, though "[t]here are a limited number of prosecutors who [commit intentional] misconduct to obtain convictions," those who do should be held liable).

39 Shaw, *supra* note 38, at 599; *see Official Misconduct*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/issues/misconduct [https://perma.cc/R9Q6-YYJ9] (defining official misconduct as instances when "officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree's conviction"). Though official misconduct often encompasses misconduct committed by police officers as well, this type of misconduct goes beyond the scope of this Note. *But see infra* note 54.

inaccurate eyewitnesses[40] or perjured jailhouse snitches[41]—or through improper summations and exculpatory evidence suppression.[42]

In fact, a common theme of misconduct relates to necessary evidence being withheld from the defense.[43] Though *Brady v. Maryland* requires prosecutors to provide the defense with exculpatory evidence,[44] prosecutors still have complete control over what evidence is shared with the defense, leading to numerous issues regarding their discretionary powers.[45] For instance, consider the case of Dennis Allen and Stanley Mozee, two men convicted of a murder they did not commit and incarcerated for fifteen years, all while Rick Jackson, the assistant district attorney assigned to their case, held and hid the very evidence that could have proven their innocence.[46]

Prosecutors are meant to be defenders of the people, protecting society from the guilty while upholding the law.[47] However, the criminal legal system functions to motivate some prosecutors with reasons—e.g., societal pressure to convict a criminal quickly,[48] institutional incentives

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40 *See* discussion *infra* Section I.A.2.

41 *See* discussion *infra* Section I.A.4.

42 Shaw, *supra* note 38, at 599; Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 69–70 (2005).

43 *See, e.g.*, *How Brady Material Can Help Your NYC Criminal Defense*, D'EMILIA L., https://www.demilialaw.com/casestudies/how-brady-material-can-help-your-nyc-criminal-defense [https://perma.cc/G6YE-VKV5] ("The National Registry of Exonerations reported that at least *88 of the 234 exonerations* in New York State involved withholding *Brady* material." (emphasis added)).

44 *See generally* Brady v. Maryland, 373 U.S. 83 (1963); Emily Jane Dodds, Note, *I'll Make You a Deal: How Repeat Informants Are Corrupting the Criminal Justice System and What to Do About It*, 50 WM. & MARY L. REV. 1063, 1064 (2008) ("[T]he *Brady* Court's directive seems clear: If the prosecution has evidence that is material to the defendant's innocence, the prosecution . . . must give it to the defendant.").

45 Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 420–21 (2006); United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) ("*Brady* [disclosure] violations have reached epidemic proportions in recent years . . . ."); *see, e.g.*, State v. Jackson, 444 S.W.3d 554, 593–98 (Tenn. 2014).

46 Daniele Selby, *This Prosecutor's Misconduct Sent Two Innocent People to Jail. Now He's Been Disbarred.*, INNOCENCE PROJECT (May 19, 2021), https://innocenceproject.org/richard-jackson-texas-prosecutor-disbarred-misconduct-wrongful-conviction [https://perma.cc/C385-S8AA]. Note that while Jackson was disbarred, only four percent of prosecutors who have committed prosecutorial misconduct that led to a wrongful conviction have faced any kind of personal or professional discipline. SAMUEL R. GROSS, MAURICE J. POSSLEY, KAITLIN JACKSON ROLL & KLARA HUBER STEPHENS, NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT 115 (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [https://perma.cc/XK9E-QUB9].

47 Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999, 2:00 AM), https://www.chicagotribune.com/investigations/chi-020103trial1-story.html [https://perma.cc/8E3J-PHA8].

48 Joy, *supra* note 45, at 405.

based on high conviction rates,[49] or absolute immunity[50] coupled with a general lack of punishment for committing misconduct[51]—to forgo their moral and legal obligations and commit misconduct by manipulating the system when beneficial to them. Relatedly, prosecutors' conscious and subconscious tunnel vision to pursue specific individuals is often seen when they do not have a clear—or any—suspect, zeroing in on a likely candidate and building a case around them instead of taking the necessary time to follow the evidence and reach a proper conclusion.[52]

For example, the Exonerated Five case, in which five young boys were incorrectly convicted for attacking and raping a woman in Central Park, demonstrated prosecutors' desire for a speedy conviction and determination as a result of tunnel vision.[53] Because the brutal attack was extensively publicized, prosecutors were desperate to put anyone away for

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49 Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 506 (2011); *see* McKay, *supra* note 38, at 1222–23, 1223 n.44 (relaying that one of the numerous causes of prosecutorial misconduct includes "an extreme desire to convict the accused," perhaps due to overzealousness resulting from an upcoming reelection); Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1010 (2009).

50 *See generally* Imbler v. Pachtman, 424 U.S. 409, 424–29 (1976) (granting prosecutors absolute immunity for misconduct—accidental or otherwise—committed within the performance of their duties).

51 KATIE MCCARTHY & KIAH DUGGINS, NAT'L POLICE ACCOUNTABILITY PROJECT, ABSOLUTE IMMUNITY FOR PROSECUTORS 1–2 (2020), https://www.nlg-npap.org/wp-content/uploads/2020/07/Absolute-Immunity-Fact-Sheet-vF.pdf [https://perma.cc/ZPT4-RPKK]; Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 293 (2001) ("Promotions for subordinate prosecutors depend on their 'scores' for convictions. Winning gets rewarded while misconduct goes unpunished." (footnote omitted)); Bennett L. Gershman, *Prosecutorial Misconduct* § 14:1 (2d ed. 2022) ("[E]xisting sanctions are either too infrequently employed or mostly ineffective to punish or prevent misconduct.").

52 *See* McKay, *supra* note 38, at 1223; Wrongful Conviction, *#042 Jason Flom with Noura Jackson*, LAVA FOR GOOD, at 10:40, 21:06 (Nov. 20, 2017), https://lavaforgood.com/podcast/042-jason-flom-with-noura-jackson (last visited Feb. 21, 2023) ("[The prosecutor's strategy] comes down to seeing every fact through the prism of Noura's guilt and once these investigators decide who they think did it, they make everything fall in line. And when they do that, they miss the obvious evidence that shows that there was somebody else there."). *See generally* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006) ("By tunnel vision, we mean that 'compendium of common heuristics and logical fallacies' . . . that lead actors in the criminal justice system to 'focus on a suspect, select and filter the evidence that will "build a case" for conviction, while ignoring or suppressing evidence that points away from guilt.'" (quoting Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002))).

53 Erin Schapiro, Comment, *Wrongful Convictions: Not Just an American Phenomenon?: An Investigation into the Causes of Wrongful Convictions in the United States, Germany, Italy, and Japan*, 34 EMORY INT'L L. REV. 897, 903 (2020).

the crime, leading them to encourage police officers to obtain a confession at any cost and subsequently rely heavily on these false confessions over circumstantial DNA evidence.[54] Prosecutors were certain their initial arrests were accurate—based on the boys' false confessions—confident that they had caught merely some of the right perpetrators, just not all of them.[55] Though the boys were excluded as DNA matches from the start, the prosecutors continued forward with the case as they were pressured to convict.[56] Unsurprisingly, the boys were wrongfully convicted and consequently incarcerated for decades.[57] Years later, when the actual perpetrator confessed, and the DNA evidence matched him, the boys—now men—were exonerated, and their confessions proved to be false.[58] Though the men have been unequivocally exonerated, their former prosecutors still steadfastly believe they are guilty.[59]

2. Eyewitness Misidentification

The reasonable person—namely, a trial juror—inherently wants to trust witnesses who are confident of a perpetrator's identity.[60] However, eyewitness misidentification—especially in the face of a confident identification[61]—is a leading cause of wrongful convictions, uncovered in

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54 *Id.*; *see infra* note 86. Not only is it problematic that prosecutors are infinitesimally punished for committing official misconduct, but also that it is not uncommon to see this type of behavior encouraged in an interdepartmental capacity, such as between police departments and district attorneys' offices, as seen in the Exonerated Five case. *See* Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1145, 1171 (2013) (examining how "investigators discovered a culture of corruption that fostered official misconduct" within police departments in two wrongful convictions, and that, as "prosecutors are reluctant to doubt the credibility of the police officers," they are indirectly a part of encouraging this system of misconduct).

55 *See* Schapiro, *supra* note 53, at 903; *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 899–900 (2004) (referring to the negative backlash from former prosecutors and police officers on the case after the existing district attorney joined the motion to vacate the Exonerated Five defendants' convictions).

56 *See* Schapiro, *supra* note 53, at 903.

57 *See* Drizin & Leo, *supra* note 55, at 897–900.

58 *Id.* at 898–99.

59 Findley & Scott, *supra* note 52, at 307–08 (noting how innate cognitive distortions, including confirmation bias, typically cause this type of myopic focus).

60 *See* O'Connor, *supra* note 36, at 225; Schapiro, *supra* note 53, at 902.

61 State v. Guilbert, 49 A.3d 705, 725 (Conn. 2012) ("[A]lthough there is little if any correlation between confidence and accuracy, an eyewitness' confidence 'is the most powerful single determinant of whether . . . observers . . . will believe that the eyewitness made an accurate identification . . . .'" (quoting Gary L. Wells et al., *Eyewitness Identification Procedures:*

a majority of exonerations.[62] For example, in *State v. Guilbert*, the Supreme Court of Connecticut recognized that extensive scientific research, as evidenced in hundreds of studies, exposed the "fallibility of eyewitness identification testimony."[63] Not only are people frequently unreliable in times of high stress—like when someone witnesses a crime—as one's memories may skew or misremember facts,[64] but also the subsequent methods of obtaining eyewitness identifications significantly influence the reliability of that identification.[65]

Specifically, researchers identified two types of variables, system and estimator, that affect eyewitness accuracy.[66] System variables, which can be controlled by the criminal legal system, include circumstances such as the use of photo lineups or positive reinforcement from officers after the witness identifies an individual.[67] Estimator variables, on the other hand, cannot be controlled by the criminal legal system, and include lighting conditions at the crime scene and whether the perpetrator used a mask.[68] The *Guilbert* court supplemented the variables with an illustrative list of

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Recommendations for Lineups and Photospreads, 22 LAW & HUM. BEHAV. 603, 620 (1998))); Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'").

62 Garrett, *supra* note 42, at 79; O'Connor, *supra* note 36, at 225; *see* United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

63 *Guilbert*, 49 A.3d at 721.

64 Wayne T. Westling, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93, 101–02 (1992) ("Environmental conditions, the observer's state of stress, the mental set of the observer, race, age, sex, and suggestion by the questioner are all recognized as elements affecting the ability to accurately relate what was observed." (footnotes omitted)); Aaron J. Lyttle, *Return of the Repressed: Coping with Post-Conviction Innocence Claims in Wyoming*, 14 WYO. L. REV. 555, 563–65 (2014); *see* Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 548 n.56 (2005) (discussing the case of exoneree Ronald Cotton and the frailties of even the most seemingly perfect eyewitness—a sober college student who spent a considerable amount of time observing and studying her rapist in order to identify him to authorities later).

65 Schapiro, *supra* note 53, at 901–02; *see* Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCH. PUB. POL'Y & L. 765, 765–66 (1995) (discussing the dispositive effect of variables that can be controlled by the legal system on the reliability of eyewitness identification); *see also* Jason Paul Bailey, *Paying the Price for Injustice: The Case for Enacting a Wrongful Conviction Compensation Statute in Arkansas*, 2015 ARK. L. NOTES 1814 (2015).

66 Gary L. Wells, Amina Memon & Steven D. Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCH. SCI. PUB. INT. 45, 45 (2006).

67 Shaw, *supra* note 38, at 597; *see* Schapiro, *supra* note 53, at 901–02.

68 Shaw, *supra* note 38, at 597; *see* Schapiro, *supra* note 53, at 901.

other shortcomings that disturb the accuracy of eyewitness identification.[69]

While also recognizing the frailty of eyewitness testimony in *Manson v. Brathwaite*, the United States Supreme Court set forth a two-part test to determine whether an identification is reliable: first, judges must determine whether the identification procedures were unnecessarily suggestive; and, second, if they were, judges must examine five factors to determine whether the identification was still reliable.[70] After the *Manson* decision, state supreme courts followed and enhanced the two-part test to assess the reliability of eyewitness identifications.[71]

3. False Confessions

It is not abnormal for people to disbelieve and question how or why a person who is alleging their innocence would initially submit a false confession to a crime they did not commit.[72] However, modern case law and studies uncover a consortium of reasons why individuals provide false confessions.[73] Namely, internal dispositional risk factors—including

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69 State v. Guilbert, 49 A.3d 705, 721–23 (Conn. 2012) ("Courts across the country now accept that (1) there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy, (2) the reliability of an identification can be diminished by a witness' focus on a weapon, (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events, (4) cross-racial identifications are considerably less accurate than same race identifications, (5) a person's memory diminishes rapidly over a period of hours rather than days or weeks, (6) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure, (7) witnesses are prone to develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification, and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." (footnotes omitted)).

70 Manson v. Brathwaite, 432 U.S. 98, 114 (1977) ("The factors to be considered . . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.").

71 For example, in *State v. Henderson*, the New Jersey Supreme Court first revised the *Manson* test to help jurors evaluate eyewitness identification evidence. State v. Henderson, 27 A.3d 872 (N.J. 2011). The court subsequently expanded the jury instructions to consider "estimator variables," such as weapon focus and lighting conditions, and "system variables," such as lineup composition and use of multiple viewings. NAT'L RSCH. COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 35 (2014); *see also* Shaw, *supra* note 38, at 597.

72 Schapiro, *supra* note 53, at 903; *see* Deborah Davis & Richard A. Leo, *To Walk in Their Shoes: The Problem of Missing, Misunderstood, and Misrepresented Context in Judging Criminal Confessions*, 46 NEW ENG. L. REV. 737, 743 (2012).

73 *See, e.g.*, United States v. Hall, 93 F.3d 1337, 1341 (7th Cir. 1996) (identifying defendant's personality disorder as the sort that could cause individuals to falsely confess); Schapiro, *supra* note

a suspect's age, gender, level of education, and mental impairment—impact an individual's susceptibility to falsely confess.[74] The police's ability to manipulate these personal characteristics with ease is then reflected in the external situational risk factors associated with false and coerced confessions.[75] Among other problems,[76] these situational attributes can relate to the suspect's confinement time and conditions, such as denial of access to the bathroom, human contact, sleep, or food;[77] physical parameters of the interrogation room, such as whether it is

53, at 904 (listing circumstances leading to false confessions, including "[d]uress, coercion, intoxication, diminished capacity, mental impairment, a misunderstanding of the law, fear of violence by the police, actual harm by the police, the threat of a harsh sentence if a confession is not given, and a misunderstanding of the situation" (alteration in original)); Davis & Leo, *supra* note 72, at 744. Additionally, suspects may purposely and consciously put forth a false confession for their own personal reasons. *See, e.g.*, Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 519 (1998) (noting that some suspects may confess to protect a loved one); Lyttle, *supra* note 64, at 618 (listing further reasons an innocent person may confess and plead guilty, including "fear of the death penalty, ineffective assistance of counsel, incompetence, coercion, and economics"). In fact, a particular type of plea bargain—an *Alford* plea—is premised on the notion that a person can maintain their innocence while, in theory, falsely pleading guilty. *Id.* at 617 n.451; *see* discussion *infra* Section I.B.

74 Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 19–22 (2010).

75 *See* Drizin & Leo, *supra* note 55, at 911–20. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (recognizing that custodial interrogation—without proper safeguards in place to protect the suspect—is inherently coercive to the extent that it relies on sustained pressure, manipulation, trickery, and deceit, which may lead to false confessions). Although an increasing number of studies are dissecting the use and effects of coercive techniques, jurors, as laypeople, still may neither understand how nor believe that these sneaky tactics result in false confessions. Schapiro, *supra* note 53, at 904–05; *see, e.g.*, Saul M. Kassin, Christian A. Meissner & Rebecca J. Norwick, *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211 (2005); Charles R. Honts, Saul M. Kassin & Ronald A. Craig, *'I'd Know a False Confession if I Saw One': A Constructive Replication with Juveniles*, 20 PSYCH. CRIME & L. 695 (2014).

76 For example, coerced confessions can occur due to "poor police practice, overzealousness, criminal misconduct and/or misdirected training." Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 440 (1998).

77 Kassin et al., *supra* note 74, at 16; Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 112, 114 (2014).

windowless or has a clock;[78] and interrogatory procedures, such as the two-step interrogation,[79] minimization,[80] or maximization techniques.[81]

These situational factors played out in the 1944 United States Supreme Court case *Ashcraft v. Tennessee*, in which police officers took the defendant to the county jail to interrogate him regarding his involvement in the murder of his wife.[82] His interrogation lasted *thirty-six hours straight*, with no breaks for the defendant despite the fact that the police continued to switch in and out of their shifts.[83] Eventually, the interrogation ended in the defendant's alleged confession, in which he confirmed that he hired a man to kill his wife.[84] Justice Black concluded that the environment surrounding the defendant's interrogation was "so inherently coercive" that it would be "inconceivable" to allow prosecutors to use this strategy and assert that the alleged confession was voluntary.[85] Nevertheless, although *Ashcraft* occurred almost eight decades ago, this type of coercive strategy is still harnessed today to elicit false confessions, which courts continue to deem admissible at trials.[86]

4. Jailhouse Snitch Testimony

As arguably the most unreliable form of testimony, jailhouse snitch testimony entrusts convicted individuals with nothing to lose—but

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78 Kassin, *supra* note 77, at 114.

79 *See, e.g.*, Missouri v. Seibert, 542 U.S. 600 (2004).

80 Through minimization, interrogators sympathize with the suspect by pretending to minimize the extent of the wrongfulness of the crime and "provid[e] moral justification or face-saving excuses, making confession seem like an expedient means of escape." Kassin et al., *supra* note 74, at 18–19; KINGS CNTY. DIST. ATT'Y'S OFF., 426 YEARS: AN EXAMINATION OF 25 WRONGFUL CONVICTIONS IN BROOKLYN, NEW YORK 20 (2020).

81 Kassin et al., *supra* note 74, at 12 (defining maximization as a combination of techniques to portray the belief that the suspect is guilty, including citing nonexistent evidence); KINGS CNTY. DIST. ATT'Y'S OFF., *supra* note 80, at 20.

82 Ashcraft v. Tennessee, 322 U.S. 143, 148 (1944).

83 *Id.* at 149.

84 *Id.* at 151.

85 *Id.* at 154.

86 For example, in the early stages of the "investigation" into the now-dubbed Exonerated Five, prosecutors spent hours interrogating minor children without their parents about a violent attack that occurred in Central Park. Drizin & Leo, *supra* note 55, at 894–96. Though the disturbing circumstances of the interrogation were disputed, it is conceded that it culminated with the boys producing false confessions, which were later admitted at trial. *Id.* at 896–97. See also Alysia Lo, Note, *Expert Testimony on False Confessions: An Old Psychological Problem with New Challenges in New York Courts*, 50 FORDHAM URB. L.J. 105, 106–08 (2022), for a discussion about the coerced confession of Melissa Lucio—a Texas woman who was wrongfully convicted of murdering her two-year-old daughter—which the prosecution used as an integral part of their case at her trial.

plenty to gain[87]—to testify to alleged confessions made by their peers in jail or prison.[88] The convention of using this type of "witness" is highly controversial and not well regulated.[89] From a high-level perspective, federal and state laws generally bar witness bribery in both civil and criminal matters.[90] Paradoxically, jailhouse snitch testimony would not exist without allowing an elusive form of witness bribing.[91] Under this regime, prosecutors are permitted to offer varying agreements—ranging from sentence reduction to case dismissal[92]—to an informant so long as the informant provides some testimony—even if capricious—incriminating the defendant.[93]

Though this type of deal is seemingly a prohibited form of bribery, the Supreme Court has perpetually approved using jailhouse informant testimony.[94] In *Hoffa v. United States*, Justice Stewart conceded that the government's jailhouse informant was "compensated . . . for his services" and explicitly acknowledged that he may have even had more motive to distort the facts than most informants.[95] Nevertheless, Justice Stewart still legitimized the use of the informant's testimony, subjecting this and

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87 *See infra* text accompanying note 92.

88 *See, e.g.*, Garrett, *supra* note 42, at 97; Wrongful Conviction, *#053 Jason Flom with Blaise Lobato*, LAVA FOR GOOD, at 26:46–27:10 (Apr. 16, 2018), https://lavaforgood.com/podcast/053-jason-flom-with-blaise-lobato (last visited Feb. 21, 2023) (discussing the "pernicious" nature of jailhouse snitch testimony and how "they don't have morals or ethics, they'll do whatever it takes not to go to prison or to be there for less time"); ROB WARDEN, NW. UNIV. SCH. OF L.: CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 2 (2004), https://www.aclu.org/wp-content/uploads/legal-documents/asset_upload_file119_30624.pdf [https://perma.cc/8EEA-PTK6] (identifying different examples of famous snitches).

89 *See generally* Dave Collins, *Lying Prisoners: New Laws Crack Down on Jailhouse Informants*, AP NEWS (Sept. 14, 2019), https://apnews.com/article/9f8858ef3fbf4965874d314ce41ec69c [https://perma.cc/Y8S3-T5CC] (juxtaposing defense attorneys' desires to restrict informant testimony with prosecutors' admiration of the "crucial, truthful information" provided by jailhouse informants).

90 *See* 18 U.S.C. §§ 201(b)(3), 1510(a); *e.g.*, N.Y. PENAL LAW § 215.00 (McKinney 2023); UTAH CODE ANN. § 76-8-508 (West 2023).

91 *See* Wrongful Conviction, *supra* note 88, at 27:10–27:40. The United States Court of Appeals for the Tenth Circuit eloquently encapsulated this conundrum: "If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so." United States v. Singleton, 144 F.3d 1343, 1346 (10th Cir. 1998).

92 *See* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 664–65 (2004).

93 *See Informing Injustice: The Disturbing Use of Jailhouse Informants*, INNOCENCE PROJECT (Mar. 6, 2019), https://innocenceproject.org/informing-injustice [https://perma.cc/S3PF-XGUH] ("The promise or expectation of possible benefits from prosecutors creates a strong incentive to lie, and the secretive nature of the jailhouse informant system makes cross-examination and other legal safeguards against unreliable testimony ineffective.").

94 *See generally* Hoffa v. United States, 385 U.S. 293 (1966).

95 *Id.* at 299, 311.

future types of informer and testimonial evidence to only be tested pursuant to the "established safeguards of the Anglo-American legal system" at trial.[96] After this disappointing holding, legal scholars are left to wonder the following: why and at what point does well-established federal and state law fall to the wayside if the judiciary and legal system protect the admissibility of bribery-induced jailhouse informant testimony?

5. Faulty Forensics

Though, in its nature, science is a dependable tool for testing evidence, false or misleading forensic evidence—also known as junk science—has contributed to almost a quarter of wrongful conviction cases nationally.[97] Relying on scientific testimony that is unverified or that exists without a national standard has led to heaping issues within the criminal legal system, both for wrongfully convicted individuals and for those who contribute to the application of junk science.[98] Without a generally accepted benchmark for a scientific standard, scientific procedures are needlessly discretionary, and the interpretation of forensics that follows is susceptible to fraud.[99]

A prime example of the dilemma accompanying unmerited discretion is the controversy over evidence provided by forensic odontologists.[100] These "experts" in bite-mark analysis, who are board certified and publish their own professional journals, purportedly match

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96 *Id.* at 311 ("[T]he veracity of a witness [will] be tested by cross-examination, and the credibility of [their] testimony [will] be determined by a properly instructed jury.").

97 *Overturning Wrongful Convictions Involving Misapplied Forensics*, INNOCENCE PROJECT (citing NAT'L REGISTRY OF EXONERATIONS, *supra* note 14), https://innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics [https://perma.cc/R93M-LQHP]. This prevalence of junk science in wrongful convictions possibly manifests from the fact that prosecutors are in charge of analyzing forensic evidence, and they are often looking to meet their trial burden of proof by looking for incriminating, rather than exculpatory, evidence of their intended suspect. Schapiro, *supra* note 53, at 906; *see supra* note 52 and accompanying text.

98 *See* Garrett, *supra* note 42, at 95 n.301. *See generally* O'Connor, *supra* note 36, at 226 (defining junk science as "any scientific testimony or evidence based upon unreliable methodology").

99 *See* Garrett, *supra* note 42, at 95 n.302.

100 *See generally* Hannah Thompson, *Forensic Odontology: An Overview and Bite Mark Controversy*, UNIV. OF MD. SCH. OF DENTISTRY, https://www.dental.umaryland.edu/museum/exhibits/online-exhibits/forensic-odontology [https://perma.cc/9P9U-3JVK] ("While forensic odontological evidence can be helpful in both criminal and civil law cases, it is not a conclusive form of evidence unless coupled with other sufficient evidence.").

an apparent bite mark on a victim with the dentition of its perpetrator.[101] Based on the alleged reliability and qualifications of these scientists and the importance of the forensic analyses, it follows—at least theoretically—that courts have upheld the admissibility of this type of evidence.[102] However, no matter how frequently it is admitted to courts, bite-mark testimony does not actually meet the *Daubert* admissibility standard required of scientific evidence.[103] Reasonably skepticized for its "murky" nature,[104] forensic odontology is unreliable due to the lack of an industry-wide standard supported by legitimate data.[105] That unreliability is evidenced by numerous wrongful conviction cases in which the defendant was convicted based heavily on bite-mark testimony only to be later exonerated due to DNA tests.[106]

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101 *See* Erica Beecher-Monas, *Reality Bites: The Illusion of Science in Bite-Mark Evidence*, 30 CARDOZO L. REV. 1369, 1371–72 (2009); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 67–68 (2009).

102 *See, e.g.*, State v. Sager, 600 S.W.2d 541, 569 (Mo. Ct. App. 1980) ("[F]orensic odontology, inclusive of bite mark identification, is an exact science. . . . [A]n expert can form an opinion useful to the courts . . . .").

103 PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 83–87 (2016) (finding that forensic odontology is "far from meeting" the generally accepted scientific standards for validity); *see* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593 (1993) (noting that determinators of whether scientific testimony is admissible include the testability of the theory and whether the theory has been published and subject to peer review).

104 Beecher-Monas, *supra* note 101, at 1371; *see also* Joe Palazzolo, *Texas Commission Recommends Ban on Bite-Mark Evidence*, WALL ST. J. (Feb. 12, 2016, 2:42 PM), https://www.wsj.com/articles/BL-LB-53123 [https://perma.cc/QZ74-CNN2] (discussing the Texas Forensic Science Commission's moratorium on using bite-mark evidence in criminal cases).

105 Stephanie L. Damon-Moore, Note, *Trial Judges and the Forensic Science Problem*, 92 N.Y.U. L. REV. 1532, 1538 (2017). In 2015, the Organization of Scientific Area Committees determined that forensic odontology as a practice required an overall critical review to assess its scientific validity. *See* ORG. OF SCI. AREA COMMS., NAT'L INST. OF STANDARDS & TECH., OSAC RESEARCH NEEDS ASSESSMENT FORM: RELIABILITY OF BITEMARK ANALYSIS METHODOLOGY (2016), https://www.nist.gov/system/files/documents/2016/08/29/osac_odontology_-_research_needs_assessment_form_-_reliability_of_bitemark_analysis_methodology.pdf [https://perma.cc/DT6S-W69P] ("A foundational and critical need in the bitemark analysis discipline is validation of reliability of the methods used in current practice. A number of such studies have been done in the past, but several of these have been criticized as poorly designed and/or poorly executed. . . . Further research is needed in order to assess the reliability and validity of the methods currently used in the field, and to help identify new methods that might be used in the future."). And in 2023, the National Institute of Standards and Technology released a report detailing the "lack of [standardized scientific] support" and numerous "specific shortcomings" throughout the discipline of bitemark analysis as it exists today. *See generally* KELLY SAUERWEIN, JOHN M. BUTLER, KAREN K. RECZEK & CHRISTINA REED, NAT'L INST. OF STANDARDS & TECH., BITEMARK ANALYSIS: A NIST SCIENTIFIC FOUNDATION REVIEW (2023), https://nvlpubs.nist.gov/nistpubs/ir/2023/NIST.IR.8352.pdf [https://perma.cc/x89QY-RPN2].

106 Beecher-Monas, *supra* note 101, at 1373–74.

Another side of faulty forensics is based in conscious deceit or misapplication of science. For example, laboratory technicians' independence should be analyzed under a microscope since technicians and law enforcement officials often work closely together.[107] This was the case with Annie Dookhan, a once-praised lab chemist for the government who was later exposed as an epic fraud.[108] In 2009, Dookhan was working at the Massachusetts state drug lab, and while other chemists averaged 1,981 tests that year, she had contemporaneously run 6,321.[109] This incredulous efficiency made Dookhan a star chemist for prosecutors, who went directly to her to ensure quick—and favorable—results.[110] As one could anticipate, thrilled with the speedy and triumphant results, prosecutors ignored the impossibility of Dookhan's work.[111] Dookhan reaped the praise,[112] and consequently, thousands of defendants were wrongfully imprisoned.[113] Investigators eventually uncovered the truth about Dookhan's tests: she would report that masses of samples tested positive for drugs, even though she only tested a few, or if the samples that she tested came back negative, she would add cocaine into them from another sample.[114] Though Dookhan never confirmed why she falsified a considerable number of reports, it seems like it may have been because she felt as though she was a part of the prosecutorial team and was motivated by recognition for her achievements.[115] Thus, her desire for esteem led to purposeful fraudulent forensic conclusions.

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107 *See* Garrett, *supra* note 42, at 95.

108 Katie Mettler, *How a Lab Chemist Went from 'Superwoman' to Disgraced Saboteur of More Than 20,000 Drug Cases*, WASH. POST (Apr. 21, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/04/21/how-a-lab-chemist-went-from-superwoman-to-disgraced-saboteur-of-more-than-20000-drug-cases [https://perma.cc/TKJ7-9UCK]. For a deep dive into Dookhan's story as well as the story of another disgraced Massachusetts drug lab chemist, see *How to Fix a Drug Scandal* (Netflix Apr. 1, 2020), and Erin Sheley, *The Dignitary Confrontation Clause*, 97 WASH. L. REV. 207, 238–42 (2022).

109 Mettler, *supra* note 108 (citing Sally Jacobs, *Annie Dookhan Pursued Renown Along a Path of Lies*, BOS. GLOBE (Feb. 3, 2013, 12:00 AM), https://www.bostonglobe.com/metro/2013/02/03/chasing-renown-path-paved-with-lies/Axw3AxwmD33lRwXatSvMCL/story.html [https://perma.cc/ZZ63-J46V]).

110 Mettler, *supra* note 108.

111 *See generally supra* note 54 (noting the existing issue of collusion between governmental departments).

112 Mettler, *supra* note 108 ("My colleagues call me 'superwoman' and say that I do too much for the lab . . . .").

113 *How to Fix a Drug Scandal: Episode 4* (Netflix Apr. 1, 2020); *see* Paul C. Giannelli, *The Massachusetts Drug Lab Scandal*, CRIM. JUST., Spring 2015, at 42, 42.

114 Giannelli, *supra* note 113, at 42.

115 *See* Sheley, *supra* note 108, at 239–40 (criticizing "how tightly [Dookhan's] personal identity was bound up with being, rather than a neutral scientist, *an arm of the prosecution*" (emphasis added)); Andrea Estes & Scott Allen, *Indicted Drug Analyst Annie Dookhan's E-Mails Reveal Her*

6. Ineffective Assistance of Counsel

Unconstitutionally poor defense counsel is perhaps the most tragic cause of wrongful convictions from the perspective of a defendant and serves as a serious cause assessed in almost a quarter of DNA exoneration cases.[116] The right to a fair trial is of utmost importance in the American legal system, and there is a general consensus that central to this right is effective defense counsel.[117] Criminal defendants are guaranteed assistance of counsel under both federal and state constitutions,[118] which courts have interpreted to translate to and encapsulate this "effective" assistance of defense counsel.[119] This generalized right does not equate to defense attorneys always providing effective assistance of counsel; public and private attorneys alike are obliged to be their clients' most zealous advocate; but, in fact, there are a variety of cases in which both types of defense counsel reprehensibly err and do not act as such.[120] In fact, Clayton B. Drummond and Mai Naito Mills conducted a study that revealed the most common forms of inadequate legal defense, including numerous pre- and mid-trial offenses.[121] Nonetheless, public and private attorneys face different obstacles due to the nature of their positions. For instance, indigent defendants, specifically, desperately rely on public defenders, who are typically underfunded and overburdened with their

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Close Personal Ties to Prosecutors, BOSTON.COM (Dec. 20, 2012), https://www.boston.com/news/local-news/2012/12/20/indicted-drug-analyst-annie-dookhans-e-mails-reveal-her-close-personal-ties-to-prosecutors [https://perma.cc/S8EJ-RSVX]; Jon Schuppe, *Epic Drug Lab Scandal Results in More Than 20,000 Convictions Dropped*, NBC NEWS (Apr. 18, 2017, 10:50 PM), https://www.nbcnews.com/news/us-news/epic-drug-lab-scandal-results-more-20-000-convictions-dropped-n747891 [https://perma.cc/5AU4-V9MK].

116 EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 3 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf [https://perma.cc/BJ3L-2QD8].

117 Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 261 (1997).

118 *See* U.S. CONST. amend. VI; *e.g.*, N.Y. CONST. art. I, § 6.

119 *See* Strickland v. Washington, 466 U.S. 668, 686 (1984); *e.g.*, People v. Baldi, 429 N.E.2d 400, 405 (N.Y. 1981) ("So long as . . . the attorney provided *meaningful* representation, the constitutional requirement will have been met." (emphasis added)).

120 *See, e.g.*, State v. Hicks, 536 N.W.2d 487, 491–92 (Wis. Ct. App. 1995) (holding that *private* defense counsel was ineffective when he did not conduct DNA testing before trial, though it would have supplemented his trial strategy); Moore v. United States, 432 F.2d 730, 739–40 (3d Cir. 1970) (stating that there was enough evidence for an evidentiary hearing to determine whether the *public* defense attorney was ineffective based on inadequate trial preparation and actual trial performance).

121 Clayton B. Drummond & Mai Naito Mills, *Addressing Official Misconduct: Increasing Accountability in Reducing Wrongful Convictions*, 1 WRONGFUL CONVICTION L. REV. 270, 284–85 (2020).

caseloads and do not have time to invest in each of their clients personally, whereas this is not typically a problem that private defense attorneys face.[122] Aside from a lack of funding, subpar defense counsel may also result from poor case management, lack of quality control, low motivation, or a presumption that the defendant is guilty.[123]

The consequences of ineffective counsel do not stop at trial either. For instance, inadequate defense work can have catastrophic impacts on defendants' future appeals and habeas claims. Take Sonny Bharadia, a defendant whose motion for a new trial was denied because gloves worn by the attacker—which implicated his co-defendant—were originally presented at trial before they were tested for DNA, thus disqualifying them from being considered "newly discovered evidence," which would have warranted him a new trial.[124]

Additionally, serving prison time unnecessarily is another consequence of ineffective-attorney–caused wrongful convictions[125]—or any other type of wrongful conviction, for that matter. The problem is that despite how dire the consequences of inadequate legal defense are, the two-prong test from *Strickland v. Washington* sets quite a high bar for defendants to qualify for a Sixth Amendment claim.[126] Thus, defendants are rarely granted appellate relief on ineffectiveness grounds.[127] Even under various flagrant circumstances—such as cases where the attorney slept through a portion of trial,[128] was drunk during trial,[129] used illegal

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122 Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 482–83 (1982); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1974 (1992); Schapiro, *supra* note 53, at 911.

123 Schapiro, *supra* note 53, at 911.

124 Bharadia v. State, 774 S.E.2d 90, 95 & n.9 (Ga. 2015); *see also* Schapiro, *supra* note 53, at 911–12; Jeremy Campbell, Matt Livingston, Erin Peterson & Blis Savidge, *Prisoner Serving Life Even Though DNA Evidence Points to the Man Who Testified Against Him*, 11ALIVE (May 23, 2018, 11:36 PM), https://www.11alive.com/article/news/local/investigations/georgia-man-has-spent-17-years-in-prison-dna-evidence-points-to-someone-else/85-553107525 [https://perma.cc/2CC7-PUWR].

125 *See, e.g.*, Elmore v. Ozmint, 661 F.3d 783, 785–86, 869–70 (4th Cir. 2011) (noting that "there is a reasonable probability . . . that, but for his lawyers' failure to investigate the State's forensic evidence, Elmore would have been acquitted in the 1984 trial" instead of serving nearly thirty years in prison).

126 The type of Sixth Amendment claims referred to in this Note stem from a breach of defendants' right to counsel. *See supra* notes 118–19 and accompanying text.

127 Findley & Scott, *supra* note 52, at 350–51. See also *infra* Sections II.C–II.D for a discussion of the lack of civil remedies defendants could seek outside of the appeals process.

128 *See, e.g.*, Ortiz v. Artuz, 113 F. Supp. 2d 327, 341–42 (E.D.N.Y. 2000); *see also* Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 576–77 (1996) (describing a judge as contending, in response to a defendant's ineffective assistance of counsel claim, that while the Constitution may guarantee a lawyer, "it 'doesn't say the lawyer has to be awake'" (quoting John Makeig, *Asleep on the Job? Slaying Trial Boring, Lawyer Says*, HOUS. CHRON., Aug. 14, 1992, at 35)).

129 *See, e.g.*, Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993).

drugs during trial,[130] or did not call potential witnesses at trial[131]—courts still uphold defendants' convictions.

B. *Strategic Maneuvers on the Path to Exoneration*

After all the horrors that lead to a wrongful conviction, the fight for exoneration is a laborious battle. As discussed in Section I.A.1, in line with their tenacity to convict a specific person,[132] prosecutors are not often willing to yield a "loss," as that would reflect poorly on their legal skills in their community.[133] Thus, instead of, for example, being forthcoming with helpful *Brady* evidence, dismissing a case outright, or even relitigating a case, prosecutors will offer pleas—such as an *Alford* plea[134]—to desperate, innocent incarcerated persons.[135] Professor Michal Buchhandler-Raphael delves into the power imbalance inherent in plea deals:

> The problems associated with plea agreements have been thoroughly documented. The prevalent practice results in convicting over 90% of criminal defendants without trial. . . . [O]ne of the key problems with plea agreements is the tremendous leverage they provide prosecutors in pressuring defendants to plead guilty to lesser included crimes.
>
> . . . [Defendants could be] placed in an untenable position of choosing between pleading guilty to manslaughter to avoid the possibility of a murder conviction, accompanied by a harsh term of imprisonment, or taking the risk of going to trial and trying to persuade the jury [of their innocence] . . . and be acquitted altogether of any crime.[136]

For example, in *North Carolina v. Alford*, acknowledging the strength of the case against him, the defendant pleaded guilty to second-

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130 *See, e.g.*, Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985).

131 *See, e.g.*, State v. Talton, 497 A.2d 35, 44–46 (Conn. 1985).

132 *See supra* note 52 and accompanying text.

133 *See supra* note 49 and accompanying text.

134 An *Alford* plea is a "guilty plea that a defendant enters as part of a plea bargain without admitting guilt," after, for example, said defendant "realiz[es] the strength of the prosecution's evidence and [does] not want[] to risk the death penalty." Alford *Plea*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* North Carolina v. Alford, 400 U.S. 25, 37, 39 (1970); *New DNA Testing May Exonerate Tennessee Woman of Mother's Murder*, INNOCENCE PROJECT (Aug. 2, 2017), https://innocenceproject.org/new-dna-testing-may-exonerate-tennessee-woman [https://perma.cc/SF4K-5WSR].

135 *See* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 5 (2021) ("[I]nnocent people are pressured into pleading guilty because *everyone* is pressured into pleading guilty. Ours is a system of pressure and pleas, not truth and trials.").

136 Michal Buchhandler-Raphael, *Survival Homicide*, 44 CARDOZO L. REV. 1673, 1693–94 (2023) (footnotes omitted) (citing HESSICK, *supra* note 135).

degree murder to avoid standing trial for first-degree murder with a possible death penalty sentence, though he avidly proclaimed that he did not commit the murder.[137] The Supreme Court upheld the defendant's plea on appeal, reasoning that it is constitutional for judges to accept a defendant's guilty plea even if the defendant still maintains their innocence.[138]

Alford had drastic effects on prosecutors' strategy to keep their suspects incarcerated.[139] After serving years or decades in prison, some individuals may not want to relitigate their case and instead will take a plea deal to minimize their sentence.[140] Though legally *Alford* pleaders are not considered exonerees, they may have their own personal reasons for taking a guilty plea despite attesting to being truly and wholly innocent.[141] Under an *Alford* plea, if a convicted person pleads to a lower charge on appeal and has already served enough time to suffice the sentence for that charge, they will be released from prison.[142] However, this type of guilty plea is inherently flawed as it concedes that officials are "at least partially acknowledging a legitimate claim of actual innocence."[143] Moreover, the consequence of this verdict is that instead of leaving prison with a clean or more forgiving slate, individuals are left with a guilty plea on their

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137 *Alford*, 400 U.S. at 26–29.

138 *Id.* at 37–38.

139 Schapiro, *supra* note 53, at 913 (revealing how prosecutors may take advantage of *Alford* pleas, using them when the prosecutor knows that an individual may be wrongfully convicted but the prosecutor still wants to avoid placing an obligation on the state).

140 Wrongful Conviction, *supra* note 52, at 47:59–54:13 (discussing Noura's ultimate decision to take an *Alford* plea after being exhausted from continuous trials and mentioning the implications of taking such a plea).

141 *See, e.g.*, HESSICK, *supra* note 135, at 5 (articulating the thought process behind innocent people pleading guilty, including the fact that "the risk of being convicted after trial can't be ignored" as "anyone who goes to trial and is convicted will [likely] get a much longer punishment than someone who pleads guilty" before trial).

142 *See, e.g.*, Kaytee Vota, Comment, *The Truth Behind* Echols v. State*: How an* Alford *Guilty Plea Saved the West Memphis Three*, 45 LOY. L.A. L. REV. 1003, 1004–06, 1008 (2012) (documenting the West Memphis Three's conviction for the vicious murder of three young boys). Two of the West Memphis Three were sentenced to life in prison and the third received the death penalty, all while maintaining their innocence. The men served just over eighteen years in prison, took an *Alford* plea to be resentenced for the exact amount of time they had served, and finally were released from prison on the exact day of their resentencing. *Id.*

143 Schapiro, *supra* note 53, at 933. Professor John H. Blume highlights this quandary: "[F]actually innocent defendants do plead guilty. And, more disturbingly, in many of the cases, the defendant's innocence is known, or at least highly suspected, at the time the plea is entered." John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 157 (2014).

record, which affects their entire future post-incarceration, including their eligibility for compensation in certain states.[144]

C. *Evolution of Compensating the Wrongfully Convicted*

Over a century ago, Professor Edwin Borchard was the first to establish the concept of compensating the wrongfully convicted.[145] Soon after Borchard breached the topic, Wisconsin followed suit, creating a no-fault wrongful conviction compensation statute.[146] Since then, over half the states in America have enacted their own wrongful conviction compensation laws.[147] The legislatures incorporate different elements into the statutes, including the avenue for adjudication,[148] eligibility for a compensation claim,[149] the standard of proof to prove such eligibility requirements,[150] monetary awards,[151] and reintegration services.[152] For instance, California has one all-encompassing statute that lays out the groundwork for a multitude of compensatory measures, including transitional services and monetary offerings,[153] and a separate statute that

144 *See* Audrey D. Koehler, Note, *Exonerated, Free, and Forgotten: How States Continue to Punish the Wrongfully Convicted Through Procedural Hoops and Inadequate Compensation*, 58 WASHBURN L.J. 493, 499 n.41 (2019); *infra* Section II.B.1; *e.g.*, OHIO REV. CODE ANN. § 2743.48(A)(2) (West 2023) ("[A] 'wrongfully imprisoned individual' means an individual who . . . . was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court . . . .").

145 *See generally* Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 108 (1914) (publicizing the idea of exoneree compensation).

146 *See* Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 370 (2017); WIS. STAT. § 775.05 (2023).

147 *See supra* notes 18–20 and accompanying text; *e.g.*, N.Y. CT. CL. ACT § 8-b(2) (McKinney 2023) ("Any person convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit may, under the conditions hereinafter provided, present a claim for damages against the state."); CONN. GEN. STAT. § 54-102uu(d)(1) (2023) ("If the Claims Commissioner determines that such person has established such person's eligibility . . . , the Claims Commissioner shall order the immediate payment to such person of compensation for such wrongful incarceration . . . ."). However, many states still have no such statute. *See supra* text accompanying note 20.

148 *See infra* Section II.A.

149 *See infra* Section II.B.1.

150 *See infra* Section II.B.2.

151 *See infra* Section II.C.

152 *See infra* Section II.D.

153 California's compensation statute for persons exonerated from a conviction includes the following:

> (h) The Department of Corrections and Rehabilitation shall assist a person who is exonerated as to a conviction . . . with all of the following:

sets the standard for eligibility of a claim, the designated factfinder, and the calculation for the monetary appropriation based on the exoneree's time served.[154] However, as scrutinized throughout Part II, though much progress has been made since Borchard started the conversation long ago, over a quarter of U.S. states still have no compensation statute in place,[155] and none of the states that do have laws in place have thoroughly sufficient statutes to reach the apex of relief that can be imparted to exonerees.

II. SHORTFALLS WITHIN EXISTING STATUTES

Post-incarceration, exonerees face arduous challenges in securing "housing, healthcare, employment and training, access to financial resources," and legal assistance to help mitigate the consequences of their wrongful incarceration.[156] These struggles stem from spending vital years behind bars without access to a rapidly modernizing society and a "stigma-by-association" that accompanies being incarcerated—regardless of innocence.[157] Though many states have passed measures

> (1) Transitional services, including *housing assistance, job training, and mental health services*, as applicable. . . . Services shall be provided for a period of not less than six months and not more than one year from the date of release . . . .
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> . . . .
>
> (i)(1) In addition to any other payment to which the person is entitled to by law, a person who is exonerated shall be paid the sum of one thousand dollars ($1,000) upon release, from funds to be made available upon appropriation by the Legislature for this purpose.
>
> (2) In addition to any other payment to which the person is entitled to by law, a person who is exonerated shall be paid the sum of five thousand dollars ($5,000) upon release, *to be used for housing* . . . . The exonerated person shall also be entitled to receive direct payment or reimbursement for reasonable housing costs for a period of not more than four years following release from custody.

CAL. PENAL CODE § 3007.05 (West 2023) (emphasis added).

154 *Id.* § 4904(a) ("The amount of the payment shall be a sum equivalent to one hundred forty dollars ($140) per day of incarceration served, and shall include any time spent in custody, including in a county jail, that is considered to be part of the term of incarceration."). In 2022, the California State Legislature passed a bill that, among other changes, supplements California's existing compensation statute by adding remedial payments for *nonjail* time served—i.e., parole and supervised release—as a result of an exoneree's former erroneous conviction. Act of Sept. 29, 2022, ch. 771, § 21, 2022 Cal. Legis. Serv. 771 (West) (codified at CAL. PENAL CODE § 4904).

155 *See supra* note 20 and accompanying text.

156 Evans, *supra* note 35, at 552.

157 *See* Jeff Kukucka, Kimberley A. Clow, Ashley M. Horodyski, Kelly Deegan & Nina M. Gayleard, *Do Exonerees Face Housing Discrimination? An Email-Based Field Experiment and Content Analysis*, 27 PSYCH. PUB. POL'Y & L. 570, 570–71 (2021) ("[I]t is now abundantly clear that

through varying compensation statutes to ameliorate the strains that exonerees face,[158] most of the adopted laws are wholly deficient due to ineffective adjudication routes, extreme standards, sparse monetary compensation, and a dearth of reintegration services provided.[159]

A. *Adjudication Process*

Presently, statutes handle compensation claims through an administrative process or civil suit.[160] Administrative hearings, which are meant to streamline and ease an exoneree's path to remedy,[161] designate claims to state commissioners or claims boards.[162] While those entities may be perceived as "less daunting" than appearing in front of the court, members of these nonjudicial boards will not have the same extensive knowledge and experience weighing evidence and assessing claims as do distinguished members of the court,[163] which could lead to misunderstandings of the facts and how to interpret the law.

For example, Texas's statute—which is well known as one of the most comprehensive and generous compensation statutes[164]—requires a petitioner to file their claim with the comptroller's judiciary section to apply for compensation.[165] The comptroller will then assess the exoneree's eligibility and amount of compensation owed, and if denied compensation, the exoneree may bring action for mandamus relief.[166] Though this process is relatively straightforward, a comptroller is well versed in monetary matters,[167] thereby, they are likely not as proficient in

exonerees—despite their innocence—are negatively stereotyped and stigmatized in ways that may prompt discrimination.").

158 *See supra* note 18; *supra* Section I.C.

159 Shawn Armbrust, Note, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 167–68 (2004).

160 Justin Brooks & Alexander Simpson, *Find the Cost of Freedom: The State of Wrongful Conviction Compensation Statutes Across the Country and the Strange Legal Odyssey of Timothy Atkins*, 49 SAN DIEGO L. REV. 627, 637–40 (2012).

161 *Id.* at 637.

162 *See, e.g.*, CAL. PENAL CODE § 4904(a) (West 2022) (utilizing the California Victim Compensation Board to ascertain whether the claimant was injured through a wrongful conviction); N.C. GEN. STAT. § 148-83 (2023) (requiring claimants to present their petition for compensation based on a wrongful conviction to an Industrial Commission).

163 *See* Koehler, *supra* note 144, at 520 & n.203 ("Notably, board members . . . may lack legal training.").

164 *See id.* at 504, 524–27.

165 TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(a) (West 2021).

166 *Id.* § 103.051(b), (e).

167 *See Comptroller*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a comptroller as a state officer whose duties usually "relat[e] to fiscal affairs, including auditing and examining accounts and reporting the financial status periodically").

weighing and assessing evidence to determine whether an exoneree has met their requisite burden of proof. Accordingly, state commissioners and other similar claims boards may be more prone to making errors by misinterpreting evidence and misconstruing evidentiary requirements.

Conversely, other states allot for adjudication within the court system.[168] The issues with filing a lawsuit against the state include a lengthy, more drawn-out proceeding and a potential directly opposing adversary.[169] Though perhaps "more onerous" on the petitioner to file directly with the court,[170] the judiciary has the essential experience to gauge a claimant's eligibility on these consequential claims.[171]

B. *Eligibility to Receive Compensation*

1. Exclusive Applicability

Naivete must be eschewed when understanding the legal and ethical need to compensate innocent exonerees. The criminal legal system exists to impart justice upon those who commit crimes and to protect those who are genuinely innocent.[172] However, as it is, not all people who are wrongfully convicted are factually innocent.[173] Thus, while procedurally wrongfully convicted individuals have a legal right to not be imprisoned, factually innocent yet wrongfully convicted individuals have a deeper, moral right to be recompensed. Accordingly, to avoid frivolous claims and ensure support is provided to those worthy, eligibility requirements within compensation statutes usually include at least four significant factors: First, the individual did not commit, or take any part in, the crime

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168 *See, e.g.*, IDAHO CODE § 6-3502(2) (2023) ("[A] claimant may bring a civil action against the state of Idaho for wrongful conviction."); VT. STAT. ANN. tit. 13, § 5572(b) (2023) ("An action brought under this subchapter shall be filed in Washington County Superior Court.").

169 Koehler, *supra* note 144, at 518–20.

170 Brooks & Simpson, *supra* note 160, at 638.

171 *See* Innocence Project, *Key Provisions in Wrongful Conviction Compensation Laws*, NAT'L REGISTRY OF EXONERATIONS (May 27, 2022), https://www.law.umich.edu/special/exoneration/Documents/IP%20-%20Key%20Provisions.pdf [https://perma.cc/336U-PVPX].

172 *See* State v. Gonzalez, 25 A.3d 648, 661 (Conn. 2011) ("[T]he fundamental purpose of the criminal justice system . . . [is] to convict the guilty and acquit the innocent.").

173 Wrongful convictions may also occur and be overturned due to procedural errors that violated the convicted person's rights. Halle Ostoyich, *Wrongful Convictions: The Facts*, WV INNOCENCE PROJECT (Oct. 2, 2020), https://wvinnocenceproject.law.wvu.edu/innocence-project-blog/our-voices/2020/10/02/wrongful-convictions-the-facts [https://perma.cc/392Z-D557] ("Examples of [procedural errors] include, among others, cases in which the police failed to properly obtain warrants, or the defendant was coerced to confess under duress (like physical or psychological abuse) from police officers.").

for which they were convicted.[174] Second, the individual's conviction was reversed or vacated.[175] Third, either the case against the individual was dismissed and they were not retried, or they were retried and found not guilty.[176] Fourth, the individual's suit concluded on the basis of their innocence.[177]

Alternatively, specific stricter statutes disregard the first three factors, establishing that the only available path for an individual to be considered for compensatory eligibility is by being pardoned, and in those situations, the only remaining factor that applies is that the pardon

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174 *See, e.g.*, NEV. REV. STAT. § 41.900(2)(b)(1)–(3) (2021) ("The court shall award damages for wrongful conviction in accordance with NRS 41.950 if . . . [h]e or she did not commit the felony for which he or she was convicted and the person: (1) Was not an accessory or accomplice to the acts that were the basis of the conviction; (2) Did not commit the acts that were the basis of the conviction; and (3) Did not aid, abet or act as an accomplice or accessory to a person who committed the acts that were the basis of the conviction . . . ."); VA. CODE ANN. § 8.01-195.10(B) (2023) ("'Wrongful incarceration' or 'wrongfully incarcerated' means incarceration for a felony conviction for which . . . the person incarcerated did not by any act or omission on his part intentionally contribute to his conviction for the felony for which he was incarcerated.").

175 *See, e.g.*, LA. STAT. ANN. § 15:572.8(A)(1) (2023) ("A petitioner is entitled to compensation in accordance with this Section if . . . [t]he conviction of the petitioner has been reversed or vacated."); W. VA. CODE § 14-2-13a(c)(2)(B) (2023) ("A claimant shall demonstrate by clear and convincing evidence that they were unjustly arrested and imprisoned or unjustly convicted and imprisoned . . . . Specifically, the following shall be proven by clear and convincing evidence: . . . [t]he claimant's judgment of conviction was reversed or vacated . . . .").

176 *See, e.g.*, IDAHO CODE § 6-3502(2)(f) (2023) ("The claimant shall prevail if . . . [t]he claimant establishes that his conviction was reversed or vacated and either: (i) The claimant was not retried and the charges were dismissed; or (ii) The claimant was retried and was found not guilty."); WASH. REV. CODE § 4.100.040(1)(c)(ii) (2022) ("In order to file an actionable claim for compensation under this chapter, the claimant must establish by documentary evidence that . . . [t]he claimant's judgment of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information or, if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the claimant was not retried and the charging document dismissed.").

177 *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(a)(2)(A)–(B) (West 2021) ("A person is entitled to compensation if . . . the person: (A) has received a full pardon on the basis of innocence for the crime for which the person was sentenced; [or] (B) has been granted relief . . . based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced . . . ."), *and* FLA. STAT. § 961.03(1)(a)(1) (2022) ("In order to meet the definition of a 'wrongfully incarcerated person' and 'eligible for compensation,' . . . a person must set forth the claim of wrongful incarceration under oath and with particularity by filing a petition . . . . At a minimum, the petition must . . . [s]tate that verifiable and substantial evidence of actual innocence exists and state with particularity the nature and significance of the verifiable and substantial evidence of actual innocence . . . ."), *with* MO. REV. STAT. § 650.058(1) (2022) ("[A]ny individual who was found guilty of a felony in a Missouri court and was later determined to be actually innocent of such crime *solely as a result of DNA profiling analysis* may be paid restitution." (emphasis added)).

is granted on the basis of the individual's innocence.[178] These states that solely permit eligibility pursuant to a gubernatorial pardon—a full pardon from a governor—severely restrict a claimant's possibility of obtaining relief.[179] Forcing a claimant to perform the nearly impossible task of procuring a politician's backing leaves their entire fate in the hands of an individual person, likely driven by external influences other than just assuring an innocent person is granted their freedom.[180] Furthermore, requiring pardons at all as the basis to establish an exoneree's innocence is problematic as pardons are meant to block an individual from receiving punishment for a crime they have committed, whereas exonerees have explicitly not committed the misdeed for which they are imprisoned.[181]

The amalgamation of these requirements poses an intricate concern for many wrongfully convicted people. Notably, not all people who are factually innocent yet wrongfully convicted are among those exonerated; in fact, exonerees constitute merely a small percentage of the whole amount of truly innocent imprisoned individuals.[182] Consequently, for those wrongfully convicted individuals who are not officially exonerated and instead decide to plead guilty, as with an *Alford* plea, the prohibitive statutory requirements bar them from eligibility for compensation.[183] *Alford* pleaders are not officially recognized as innocent or having been wrongfully convicted—as they did, plainly, plead guilty—but it is still

178 *Compare* ME. STAT. tit. 14, § 8241(2)(C) (2023) ("The State is liable for damages for wrongful imprisonment of a person if that person alleges and proves . . . [that] the person received a full and free pardon . . . , which is accompanied by a written finding by the Governor who grants the pardon that the person is innocent of the crime for which that person was convicted . . . ."), *with* HAW. REV. STAT. § 661B-1(b) (2022) ("To present an actionable claim against the State for wrongful conviction and imprisonment, the petitioner shall allege . . . either that: (1) The judgment of conviction was reversed or vacated because the petitioner was actually innocent of the crimes for which the petitioner was convicted . . . ; or (2) The petitioner was pardoned because the petitioner was actually innocent of the crimes for which the petitioner was convicted . . . ."), *and* MASS. GEN. LAWS ch. 258D, § 1(B) (2022) ("The class of persons eligible to obtain relief under this chapter shall be limited to the following:—(i) those that have been granted a full pardon . . . if the governor expressly states in writing his belief in the individual's innocence, or (ii) those who have been granted judicial relief by a state court of competent jurisdiction, on grounds which tend to establish the innocence of the individual . . . .").

179 *See* Brooks & Simpson, *supra* note 160, at 639–40.

180 *See* Armbrust, *supra* note 159, at 168.

181 *Id.* at 169.

182 *See supra* note 14. For example, wrongful plea bargains are major contributors to the staggering number of innocent people who either remain in prison or get released with a conviction on their record. This issue further exacerbates the dilemma of grasping the true extent of how many innocent individuals there are in prison, leaving an unknown, yet presumably substantial, number of people without the possible recourse of exoneration through the set established innocence requirements. *See* Zalman & Norris, *supra* note 14, at 643–48.

183 *See generally supra* notes 134, 137–43 and accompanying text.

impracticable that every one of those individuals claiming their innocence under these pleas is actually guilty.[184] Regardless, as the compensation statutes do not permit investigating the pleader's intent, compensatory measures will not be allotted if an individual cannot satisfy all of the statutory requirements.[185]

Aside from the issues presented with guilty pleaders, other statutory eligibility criteria within different states also outright prevent exonerees from collecting any measures set out for them.[186] Florida's wrongful conviction compensation laws are dispositive of this issue. Though Florida provides the typical $50,000 for each year of wrongful incarceration,[187] its statutory eligibility criteria prevent the statutes from achieving their primary purpose and working for the very people for whom they were created.[188] The statute's "clean hands" criteria disqualify an individual from receiving compensation if they have a violent felony conviction—or more than one nonviolent felony conviction—on their record, regardless of whether it is entirely disconnected from the one for which they were wrongfully serving time.[189]

Exoneree Clifford Williams was one of the many deemed ineligible for compensation under Florida's statute.[190] In 1976, Williams and his nephew, Hubert Nathan Myers, were wrongfully convicted of murder before serving forty-two years in prison.[191] Upon being one of the first exonerees freed as a result of investigatory work by a Conviction Integrity

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184 Zalman & Norris, *supra* note 14, at 647 & n.233.

185 For instance, though still claiming their innocence, *Alford* pleaders end their cases without legally proving their innocence, making them fail the fourth prong of the main eligibility requirements. *See generally supra* note 177 and accompanying text.

186 *See, e.g.*, N.J. STAT. ANN. § 52:4C-6(a) (West 2023) ("A person serving a term of imprisonment for a crime other than a crime of which the person was mistakenly convicted shall not be eligible to file a claim for damages pursuant to the provisions of this act."); Seth Miller, *Guest Column: Exonerees Need to Be Fairly Compensated*, JACKSONVILLE.COM: FLA. TIMES-UNION (Apr. 23, 2021, 12:00 AM), https://www.jacksonville.com/story/opinion/2021/04/23/guest-column-exonerees-need-fairly-compensated/7333228002 [https://perma.cc/L5V7-ZNE5] ("Florida's wrongful conviction compensation law . . . . contains exclusionary eligibility criteria, which ultimately bar most exonerees from claiming the compensation they rightfully deserve.").

187 FLA. STAT. § 961.06(1)(a) (2022).

188 *See id.* § 961.04 (barring eligibility for compensation if, before or during the exoneree's conviction and incarceration, they were convicted of, or pled guilty or nolo contendere to, any violent felony or more than one nonviolent felony, or if during their wrongful incarceration, the exoneree was also serving time for another felony for which they were not wrongfully convicted). This "clean hands" law is so restrictive that only five of the state's almost eighty exonerees have been paid under the statute since it was passed in 2008. Miller, *supra* note 186.

189 § 961.04.

190 Miller, *supra* note 186; *see* Ken Otterbourg, *Clifford Williams, Jr.*, NAT'L REGISTRY OF EXONERATIONS (June 10, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5533 [https://perma.cc/545X-V4TA].

191 Miller, *supra* note 186.

Unit in Florida,[192] Myers was promptly compensated with a two million dollar payout.[193] Sadly, Florida's law did not also allow Williams to recover—despite the fact that he was wrongfully imprisoned for this crime for decades—because he had a preexisting criminal record for crimes unrelated to the murder from when he was eighteen and twenty-three, a true lifetime ago for the man.[194] In short, the State took over forty years of Williams's life, an unfathomable wrong, yet because he also committed some other separate legal wrongs, Florida's compensation law rejected his request for justice.[195] After decades of misfortune, Williams was lucky enough to obtain support from a compassionate legislature,[196] though tragically, endings like his—receiving personalized compensation after being denied relief from the state wrongful conviction compensation statute—are few and far between.

2. Harrowing Standard of Proof

Compensation statutes also set out a specific standard of proof to meet the aforementioned eligibility requirements. The burden to prove one's innocence in order to be eligible to obtain compensation varies through different statutes, mainly vacillating between requiring claimants to show by clear and convincing evidence[197] or by a preponderance of the evidence[198] that they did not commit the crime of which they were

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192 *Hubert Nathan Myers and Clifford Williams*, INNOCENCE PROJECT OF FLA., https://www.floridainnocence.org/myers-williams [https://perma.cc/5X4V-HL7D].

193 Miller, *supra* note 186; *Florida Governor Signs Bill Authorizing $2.15 Million Compensation for Death-Row Exoneree Imprisoned 43 Years*, DEATH PENALTY INFO. CTR. (June 11, 2020) [hereinafter *Florida Governor Signs Bill*], https://deathpenaltyinfo.org/news/florida-governor-signs-bill-authorizing-2-15-million-compensation-for-death-row-exoneree-imprisoned-43-years [https://perma.cc/W74Q-AUNE].

194 *See* Miller, *supra* note 186.

195 *Id.*

196 Remarkably, since Williams was not eligible for compensation under Florida's rigid law, the Florida legislature took it upon themselves to remedy him for the injustice he faced through a private bill directly enacted to compensate him and acknowledge his tragedy. *Florida Governor Signs Bill*, *supra* note 193; S. 28, 2020 Leg., Reg. Sess. (Fla. 2020).

197 *See, e.g.*, COLO. REV. STAT. § 13-65-101(1)(a) (2023) ("'Actual innocence' means a finding by clear and convincing evidence . . . that a person is actually innocent of a crime . . . ."); LA. STAT. ANN. § 15:572.8(A)(2) (2023) ("A petitioner is entitled to compensation in accordance with this Section if . . . [t]he petitioner has proven by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted.").

198 *See, e.g.*, IDAHO CODE § 6-3502(2) (2023) ("[A] claimant may bring a civil action against the state of Idaho for wrongful conviction. The claimant shall prevail if he establishes each . . . requirement[] by a preponderance of the evidence . . . ."); MISS. CODE ANN. § 11-44-7(1) (2023) ("In order to obtain a judgment under this [Compensation to Victims of Wrongful

convicted. The clear and convincing evidence standard seemingly addresses legislatures' desire to ensure that state funds are not misused to compensate those unworthy and instead only aids those who are genuinely deserving and were wronged and imprisoned despite their innocence.[199] At the same time, this more stringent standard places a loftier burden on the claimant to prove their case.[200]

Meanwhile, the preponderance of the evidence standard assesses and balances the evidence from both sides, ultimately leaning on the side with greater weight or the most convincing evidence.[201] One benefit of this standard is that it sets a lower burden of proof—merely requiring the claimant to demonstrate that it is "more likely than not that [they] did not commit the crime"[202]—consistent with the burden used for standard civil cases.[203] This burden also allows the claimant to focus on major issues without having to contest every insignificant inculpatory fact[204]—as opposed to proving that it is highly probable or reasonably certain that they did not commit the crime.[205] Although, the preponderance standard does lend itself to "room thinking" ideology[206] and skepticism from legislatures.[207]

Conviction and Imprisonment] chapter, a claimant must prove [the enumerated elements] by a preponderance of the evidence . . . .").

199 *See* Gutman, *supra* note 146, at 371.

200 *Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[Clear and convincing evidence] is a *greater burden* than preponderance of the evidence . . . ." (emphasis added)). *But see* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 108 (1999) (supporting the clear and convincing evidence standard and commenting how she has not seen a case where the burden of proof impacted the court's determination of innocence).

201 *Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

202 Jeffrey S. Gutman, *Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes*, 69 CLEV. ST. L. REV. 219, 257 (2021).

203 *Id.* at 248.

204 *Id.* at 257.

205 *See Evidence*, *supra* note 200.

206 Professor Jeffrey Gutman explores how, even under the preponderance standard, some courts ask whether there is any "room" to conclude that claimants are guilty based on small pieces of inculpatory evidence to preemptively seize on an opportunity to deny claimants a certificate of innocence, and consequently, compensation. Gutman, *supra* note 202, at 223, 254–57 (asserting that a "room thinking" mentality is "inconsistent with the preponderance of evidence standard").

207 Legislatures may be less forthcoming with instituting a burden of proof that they believe may allow for cases in which courts will incorrectly denote a convicted person as innocent. *See* Armbrust, *supra* note 159, at 172.

C. *Monetary Disbursements*

At the bare minimum, wrongful conviction compensation statutes provide just that—monetary compensation. Professor Jeffrey Gutman assigned existing statutory compensation structures into three categories,[208] under which the statute either prescribes: a specific salary per day or year of incarceration without an overall compensation cap (Category 1);[209] a finite payout with a compensation cap (Category 3);[210] or a combination of both (Category 2).[211] While compensation is justifiably owed to exonerees, many of the rates currently enumerated within the statutes do not provide enough compensation to begin adequately remedying the injustice of a wrongful conviction.[212] Hence, reintegration programs are integral to supplement and rectify this gap.

D. *Noneconomic Reintegration Services*

Similar to the purposes of the wrongful conviction statutes,[213] a goal of tort law—aptly labeled under the moniker of compensatory damages—is to remedy the victim in an attempt to restore them to their position, at

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208 Gutman, *supra* note 146, at 401–02.

209 *See, e.g.*, MO. REV. STAT. § 650.058(1) (2022) ("The individual may receive an amount of one hundred dollars per day for each day of postconviction incarceration for the crime for which the individual is determined to be actually innocent."); KAN. STAT. ANN. § 60-5004(e)(1) (2022) ("Damages awarded under this section shall be . . . $65,000 for each year of imprisonment . . . .").

210 *See, e.g.*, ME. STAT. tit. 14, § 8242(1) (2023) ("[T]he claim for and award of damages, including costs, against the State may not exceed $300,000 for all claims arising as a result of a single conviction."); TENN. CODE ANN. § 9-8-108(a)(7)(A) (2023) ("[T]he maximum aggregate total of [the] compensation [to exonerees] shall not exceed one million dollars ($1,000,000) . . . .").

211 *See, e.g.*, WIS. STAT. § 775.05(4) (2023) ("[T]he claims board shall find the amount which will equitably compensate the petitioner, not to exceed $25,000 and at a rate of compensation not greater than $5,000 per year for the imprisonment.").

212 Considering the federal compensation law distributes $50,000 per year of wrongful incarceration, this rate has become the standard baseline for adequate monetary compensation. 28 U.S.C. § 2513(e). *Compare* N.C. GEN. STAT. § 148-84(a) (2023) ("[T]he Industrial Commission shall award to the claimant an amount equal to fifty thousand dollars ($50,000) for each year or the pro rata amount for the portion of each year of the imprisonment actually served . . . ."), *and* ALA. CODE § 29-2-159(a) (2022) ("[T]he committee shall certify to the applicant an amount equal to fifty thousand dollars ($50,000) for each year or the pro rata amount for the portion of each year of incarceration."), *with* N.H. REV. STAT. ANN. § 541-B:14(II) (2023) ("If a claim is filed 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, such a claim shall be limited to an award not to exceed $20,000.").

213 *See, e.g.*, N.Y. CT. CL. ACT § 8-b(1) (McKinney 2023) ("The legislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages.").

least economically, making them whole again as if the wrong never occurred.[214] However, applying the concept of compensatory damages under wrongful conviction claims is problematic because exonerees need help reacclimating to society, and purely economic damages routinely do not succeed alone in making them, the injured victim, whole again.[215]

In attempting to ease the transition between prison life and freedom, legislatures have formed reintegration services for convicts post-release.[216] The issue with these programs is that they are only available to parolees,[217] *convicted* criminals who have been permitted to serve a portion of their sentence outside of prison.[218] Due to the fact that exonerees neither committed a crime nor were meant to be imprisoned from the outset, they are no longer under state supervision upon release.[219] Ironically, then, after leaving prison, exonerees do not qualify for support through the official reentry services and are thus forced to look to their state-designated compensation schemes to receive remedial aid.[220] However, only about half of the existing compensation statutes provide services to exonerees to help them reacclimate back into society,[221] and none of them currently account for every reintegration challenge exonerees face.[222]

The statutes do not account for unique compensation for each exoneree, even though every individual has different characteristics and legal needs depending on their circumstances.[223] For instance, some wrongfully convicted individuals are simultaneously exonerated and released, whereas others are released and then subsequently exonerated some undetermined time later.[224] As the individuals within the latter

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214 Alanna Trivelli, Comment, *Compensating the Wrongfully Convicted: A Proposal to Make Victims of Wrongful Incarceration Whole Again*, 19 RICH. J.L. & PUB. INT. 257, 266–68 (2016).

215 *Id.* at 270.

216 Selden, *supra* note 37, at 102.

217 *Id.* at 102–03.

218 *See* United States v. Polito, 583 F.2d 48, 54 (2d Cir. 1978).

219 *Lack of Post-Release Social Services Leaves Exonerees High and Dry*, INNOCENCE PROJECT (Nov. 9, 2015), https://innocenceproject.org/lack-of-post-release-social-services-leaves-exonerees-high-and-dry [https://perma.cc/7FWZ-DBZG].

220 *Id.*; Selden, *supra* note 37, at 103.

221 *See* Trivelli, *supra* note 214, at 261–62. *But cf.* MONT. CODE ANN. § 53-1-214 (2021) (gifting specific eligible exonerees aid only related to educational expenses).

222 Selden, *supra* note 37, at 97.

223 *Id.* at 103.

224 *Compare* Ken Otterbourg, *Termaine Hicks*, NAT'L REGISTRY OF EXONERATIONS (Jan. 12, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5885 [https://perma.cc/Y7ML-7DUL] (stating that Mr. Hicks was released on the same day that his conviction was vacated and charges against him were dismissed), *with* Innocence Project, *Michael Morton*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/

group are classified as parolees upon release, they would have access to state-sanctioned reentry programs, requiring less immediate resources.[225] On the other hand, the former group is more likely to immediately need a range of support that is not accessible to them through reentry programs.[226]

Varying expungement processes—the means of removing a conviction from one's criminal record[227]—also exacerbate the need for official state-sponsored programs. Not all states automatically expunge one's record upon exoneration.[228] As such, depending on their state of exoneration, exonerees may still be left with a criminal record, which is challenging to purge without the expertise of an attorney, whom many exonerees do not have the financial resources to engage.[229] Since many employers are staunchly against hiring people with any criminal record—even those proven innocent—earning gainful employment is among the hardships that exonerees must overcome.[230] Similarly, private landlords and public housing authorities also legally deny housing on the basis of an existing criminal record.[231] Lastly, either through natural medical problems or medical problems resulting from incarceration—such as psychological trauma or infectious diseases like asthma—exonerees have a greater necessity for healthcare access.[232] Unsurprisingly, however, they do not have access to treatment often because of its cost or because of healthcare's connection to employment.[233]

Some existing statutes currently lack extraneous compensation beyond monetary considerations.[234] Contrarily, the Innocence Network has a framework to help address exonerees' individualized needs—including assessing their social support and living situation, acquiring valid official identification documents, evaluating their health needs pre-

Pages/casedetail.aspx?caseid=3834 [https://perma.cc/SSC3-QK7S] (stating that Mr. Morton was first released from prison in October 2011 before being officially exonerated in December 2011).

225 Gutman, *supra* note 146, at 373.

226 *Id.*

227 *See Expungement of Record*, BLACK'S LAW DICTIONARY (11th ed. 2019); *e.g.*, MICH. COMP. LAWS § 691.1755(14) (2023) ("If a court determines that a plaintiff was wrongfully convicted and imprisoned, the court shall enter an order that provides that any record of the arrest, fingerprints, conviction, and sentence of the plaintiff related to the wrongful conviction be expunged from the criminal history record.").

228 Kukucka, Clow, Horodyski, Deegan & Gayleard, *supra* note 157, at 576.

229 Evans, *supra* note 35, at 553–54.

230 *See supra* notes 156–57 and accompanying text.

231 Evans, *supra* note 35, at 556.

232 *Id.*

233 *Id.* at 557.

234 *See, e.g.*, OKLA. STAT. tit. 51, § 154 (2023) (awarding solely monetary remedies for claims related to wrongful convictions); FLA. STAT. § 961.06(a)–(d) (2022) (providing direct monetary compensation, tuition assistance, and reasonable legal fees as the extent of its offerings).

release, getting local support, and determining the necessity for legal assistance post-release.[235] Without a personalized experience—as exhibited by the Innocence Network's exoneration checklist—state compensation statutes are not equitably compensating exonerees.

III. HOLISTIC PROPOSAL

In order to elevate the legal compensation process to be efficient yet fair, statutory changes or implementations should include a comprehensive adjudicatory process of handling claims, inclusive eligibility benchmarks, and a reasonable standard to prove one's claims. Furthermore, when adopting a compensation plan, statutes should employ a holistic approach—providing money and societal assistance—consistent with recommendations from criminal legal scholars[236] and the Innocence Project's model legislation.[237]

A. *Legal Procedure*

The overhaul of the current set up of the adjudicatory process of wrongful conviction compensation claims proposes a multi-venue adjudicatory process to rightly handle claims, an addition and slight modification to typical existing eligibility requirements, and a justifiably fair burden of proof. First, wrongful conviction compensation claims should initially be filed as part of an administrative process to a state-sanctioned board. Successively, the most pragmatic adjudicatory process is for the claim to be sent to the courts, which can appoint a panel experienced in settling tort damages—as seen in Minnesota's compensation statute[238]—to then review the evidence presented to determine the claimant's eligibility and make a recommendation for

235 *Exoneration Checklist*, INNOCENCE NETWORK, https://innocencenetwork.org/category/resources (last visited Jan. 6, 2022) (scroll down to "Guides and How-To's"; then click "Read More" under "Exoneration checklist").

236 *See, e.g.*, Bailey, *supra* note 65; Armbrust, *supra* note 159, at 171.

237 *See Compensating the Wrongly Convicted*, *supra* note 20. The Innocence Project is a leader in the wrongful convictions movement, as an all-encompassing organization working to represent and protect the wrongfully convicted and advance the legal system to create an equitable environment for all. *See About*, INNOCENCE PROJECT, https://innocenceproject.org/about [https://perma.cc/75LZ-YGCR].

238 MINN. STAT. § 611.363(1) (2022) ("[T]he chief justice of the supreme court shall appoint a compensation panel of three attorneys or judges who are responsible for determining the amount of damages to be awarded. Members of the panel must have experience in legal issues involving the settlement of tort claims and the determination of damages.").

compensation back to the state board.[239] In conjunction with this standard procedure, gubernatorial pardons should be permitted to demonstrate one's innocence, in contrast to being the requisite sole path to proving one's innocence.[240] Conclusively, the original board can utilize the court's recommendation to then calculate and parse out an adequate remedy for the exoneree, as seen in Texas's compensation statute.[241]

Second, the demarcation of innocence—at least as it pertains to the statutory requirements to determine one's eligibility for compensation—should be expanded. Currently, eligibility standards require the criminal case against an individual to end on the basis of some legal display of innocence.[242] Nonetheless, there should be three avenues for an individual to pursue in order to establish their innocence: First, the individual's case was reversed or vacated, then the case was dismissed, and the individual was not retried. Second, the individual's case was similarly reversed or vacated, but the individual was retried, and then conclusively found not guilty.[243] Third, under circumstances in which the individual's case was not reversed or vacated, but rather the individual took a plea deal yet is still pronouncing their innocence, the adjudicating body should balance a list of mitigating circumstances against aggravating factors to determine if the individual is innocent for the purposes of compensation under the statute.

Although mitigating factors are more frequently considered in conjunction with sentencing hearings,[244] prosecutors' efforts to take advantage of these pleaders at their lowest point should amount to a sufficient enough reason to circumvent the habitual eligibility practices within compensation statutes for how to prove one's innocence. Accordingly, an illustrative list of mitigating circumstances that could lead to compensation eligibility should at least include whether the

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239 The evaluation process and reward provided to Kirk Bloodsworth under Maryland's new law, MD. CODE ANN., STATE FIN. & PROC. § 10-501(b)(1) (West 2022) ("An administrative law judge shall issue an order that an individual is eligible for compensation and benefits . . . ."), is a chief example of the efficacy of primary judicial review and recommendation and secondary board approval. *See* Ovetta Wiggins, *Former Maryland Death Row Inmate Receives $400,000 for His Wrongful Imprisonment*, WASH. POST (Oct. 6, 2021, 3:11 PM), https://www.washingtonpost.com/local/md-politics/exonoree-receives-compensation-wrongful-conviction-/2021/10/06/ee4b765c-26b6-11ec-8831-a31e7b3de188_story.html [https://perma.cc/5TU9-AM72].

240 *See supra* text accompanying notes 179–80.

241 TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(b)(2) (West 2021).

242 *See supra* text accompanying notes 174–77.

243 These first two fact patterns are already commonly included in existing compensation statutes. *See supra* notes 175–76 and accompanying text.

244 *See, e.g.*, ALA. CODE § 13A-5-45(c) (2022) ("At the sentence hearing evidence may be presented as to any matter . . . and shall include any matters relating to the aggravating and mitigating circumstances [enumerated thereafter] . . . .").

petitioner maintained their innocence throughout their case;[245] whether the petitioner took a plea bargain, such as an *Alford* plea, for a lowered charge or sentence reduction; and whether there was any type of misconduct from someone other than the petitioner that played into their conviction. Importantly, for conservative legislatures that would like to maintain or incorporate a "clean hands" qualifier within their statutes,[246] when weighing the aggravating factors juxtaposed against the mitigating circumstances, legislatures can make a felonious criminal record a circumstance to *consider*, instead of forcing it to be an immediate, absolute bar to recovery for all exonerees. Though some opponents to this aspect of the proposal may contest that expanding eligibility in this way will open the floodgates for more claims, states can bypass this worry by implementing safeguards in their statutes. These safeguards could include stating that if a claim is found to be frivolous—i.e., the individual who pleaded guilty was truly guilty—then they will face some form of a legal or fiscal repercussion. Alternatively, and more conservatively, opponents who are weary of implementing this aspect can contemplate heightening the standard of proof for this avenue of proving one's innocence, as the individual would still have a guilty plea on their record.[247]

Third, in hearings related to the wrongful conviction compensation statutes, petitioners should only have to establish their claims by a preponderance of the evidence, with courts ensuring that their eligibility considerations are void of any "room thinking"—which essentially equates to a determination by the clear and convincing evidence standard.[248] This burden and assurance will aid the quest to compensate innocent people and avoid perpetuating the tragedy of said innocent people being left in the dust, unremedied in the face of shreds of inculpatory evidence.[249] While it may, in fact, be less complicated for legislatures to publicly support a statute utilizing the higher clear and convincing evidence standard,[250] that burden is unreasonable and nearly impossible to meet.[251] As exonerees, whom the criminal legal system has

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245 *Cf.* Johnson v. Sawyer, 47 F.3d 716, 722 n.13 (5th Cir. 1995) (refusing to categorize the defendant's plea as an *Alford* plea because he explicitly swore in open court that "he was 'entering this plea of guilty . . . because [he was] guilty'" (emphasis omitted)).

246 *See supra* notes 187–89 and accompanying text.

247 *See supra* note 144 and accompanying text.

248 *See supra* note 206.

249 *See* Gutman, *supra* note 202, at 223.

250 *See supra* note 207 and accompanying text.

251 Eric Williamson, *Innocence Project Helps Wrongfully Convicted Virginians Have Better Shot at Writ of Innocence*, UNIV. OF VA. SCH. OF L. (Apr. 14, 2020), https://www.law.virginia.edu/news/202004/innocence-project-helps-wrongfully-convicted-virginians-have-better-shot-writ-innocence [https://perma.cc/LU7X-ECUS].

already jettisoned, face off in adversarial battles against parties who do not believe in their innocence,[252] an unnecessarily elevated burden of proof need not add to their troubles.

B. *Compensation Provided*

In terms of what is provided under the statute after the exoneree has proven their case, a holistic approach is needed to enact an altogether apropos compensation scheme, encompassing both sufficient monetary payments and personalized noneconomic services. First, the best financial compensation plan would stipulate a baseline remuneration per year of incarceration without any cap on compensation and then supplementally provide for actual, readily calculable expenses. This way, those who were unjustly imprisoned receive at least some amount of money, and then the aggregate reward individualizes the compensation experience, as it should, instead of basing compensation solely on how much time one spent in prison.[253] Per the corrective justice theory of tort liability, a wrongdoer is morally obligated to make the injured party whole.[254] Whole is not just measured by years spent in prison; when calculating damages, the combination of expenses they have incurred and will incur—including paying for DNA tests to prove their innocence, legal fees, in- and out-of-prison medical bills, and housing costs, among others[255]—should be taken into account.

Furthermore, the money should be distributed in equal portions over a defined number of years, as seen in Indiana's compensation statute.[256] An advantage of this payment plan is that it would help parse out compensation payments over time while avoiding potentially bankrupting state wrongful conviction appropriation funds.[257] Though

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252 *See* Koehler, *supra* note 144, at 518 n.184.

253 *Compare* NEV. REV. STAT. § 41.950(1)–(2) (2021) (awarding compensation based on integral costs and expenses incurred in tandem with compensation based on time of imprisonment), *and* ALA. CODE § 29-2-159(a)–(b) (2022) (awarding compensation based on time of imprisonment while allowing the committee to approve a supplemental discretionary payment based on the claimant's circumstances), *with* CAL. PENAL CODE § 4904 (West 2023) (awarding compensation exclusively based on the claimant's term of incarceration).

254 *See* Mostaghel, *supra* note 49, at 527.

255 Heneage, *supra* note 34, at 317–18.

256 IND. CODE § 5-2-23-3(c) (2022) ("The criminal justice institute shall pay compensation owed under this chapter in equal sums distributed over five (5) years.").

257 *See* Meghan Keneally, *Growing List of Exonerated Prisoners Stretching Compensation Funds to the Limit*, ABC NEWS (May 23, 2019, 4:06 PM), https://abcnews.go.com/US/states-create-exonoration-compensation-laws-run-funding-problems/story?id=63172650 [https://perma.cc/DY5P-FD7M] (highlighting how only two years after implementing Michigan's Wrongful

complete, immediate payment to the exoneree may grant instant gratification that the state's comeuppance has come to fruition, a long-term payment can provide greater assurance that they and their exonerated peers will not be robbed of any owed compensation in the future. Additionally, this fixed period advances the exoneree's interests by not dragging out the payments indefinitely.

Second, continuing in line with the corrective justice theory,[258] every state should be obligated to institute programs and afford noneconomic services to help reassimilate exonerees back into society after the state wrongfully incarcerated them for years or decades.[259] A multitude of problems accompanies being thrust back into society after years locked away—including a considerable gap in their resume, lack of technical skills, mental health issues, and potentially nonexistent home life—that could drastically impact exonerees' post-release life.[260] Not everyone will encounter the same problems upon release, so the presence of different aggravating circumstances in an exoneree's life require tailored programs to address their unique needs.[261]

States should analyze the matters discussed in the Innocence Network's exoneration checklist[262] and integrate them into the support provided within their compensation statutes. They can offer, among other services, tuition assistance for college, vocational classes, job search assistance, housing assistance, mental-health assessment, and counseling services.[263] These reintegration services are imperative to wrongfully convicted individuals' proper reentry into society.[264]

CONCLUSION

Regardless of one's background, anyone can end up facing a combination of the wrongful conviction causation factors and become a casualty of the criminal legal system.[265] After being wrongfully

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Imprisonment Compensation Act, the state spent almost the entirety of its recourse fund, leaving remaining ailing exonerees with no access to any monetary compensation).

258 *See supra* notes 254–55 and accompanying text.

259 *See* Trivelli, *supra* note 214, at 269.

260 Armbrust, *supra* note 159, at 175–79.

261 ADIAH PRICE-TUCKER ET AL., HARV. UNIV. INST. OF POL., SUCCESSFUL REENTRY: A COMMUNITY-LEVEL ANALYSIS 3 (2019), https://iop.harvard.edu/sites/default/files/sources/program/IOP_Policy_Program_2019_Reentry_Policy.pdf [https://perma.cc/URR4-NLEX].

262 *See supra* note 235 and accompanying text.

263 *See generally Compensating the Wrongly Convicted*, *supra* note 20.

264 *See supra* Section II.D.

265 *See* Zieva Dauber Konvisser, *"What Happened to Me Can Happen to Anybody"—Women Exonerees Speak Out*, 3 TEX. A&M L. REV. 303, 317 (2015).

imprisoned, innocent people work tirelessly to legally prove their innocence and clear their name.[266] Despite what they have overcome, exonerees are continuously revictimized because of the catastrophes embedded within the criminal legal system and the government's failure to give exonerees meaningful assistance.[267] Whether with or without existing statutes, no state currently has an all-encompassing breadth of satisfactory compensatory accommodations or measures.[268]

Exonerees deserve just compensation for the collective thousands of years that have been taken from them, and it is in the hands of the states to enact reasonable statutes and provide corrective treatment to make up for the fact that innocent people were subjected to their unjust legal system.[269] Reparations must be implemented to aid exonerees' rightful reentry into society and assist them in returning some semblance of normalcy to their lives.

266 *See generally supra* Sections I.B, II.B.

267 Trivelli, *supra* note 214, at 281.

268 *See supra* Part II.

269 Trivelli, *supra* note 214, at 282.