

A MODEL STATE COMPENSATION LAW FOR THE WRONGFULLY CONVICTED[†]

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[†] This Note is dedicated to my friend, Iris Seabolt. Iris's friendship has inspired the changes proposed in this law. It is my hope that her twenty years spent wrongfully incarcerated will not have been in vain. In my heart, this law is known as "Iris's Law." Love you, girl. I would like to thank Natalie Huffman of the CJI for her polite, professional, and passionate dedication to not only her job, but to helping me with this note—which would not exist without her. The state of Indiana needs more people like Natalie Huffman. Thank you to Kristine Bunch for taking my last-minute call to open up her wounds—not just for this Note—but so to help others. Kristine, you are a wonderful mother to *both* Trent and Tony.

^{*} J.D. Notre Dame Law, 2024. It is my hope with this degree I can help people like my friends; Marvin Cotton Jr., Krissy Bunch, Roosevelt Glenn, Obie Anthony, & Ken Nixon on their quests for proper exoneree legislation in the United States.

CONTENTS

INTRODUCTION	181
I. COLLATERAL CONSEQUENCES & THE COST TO SOCIETY	183
<i>A. The Causes and the Cures of Collateral Consequences</i>	185
<i>B. The Consequential Costs</i>	186
1. Employment	186
2. Homelessness	188
3. Health Issues	190
4. Social Welfare	192
II. CURRENT COMPENSATION LEGISLATION	197
<i>A. Nation-Wide</i>	197
<i>B. Indiana's Law Specifically</i>	200
1. The State's Perspective	201
2. The Exoneree's Perspective	202
III. THE GOVERNMENT'S BURDEN	204
<i>A. Civic & Constitutional Duties</i>	205
<i>B. Moral Duties</i>	209
IV. A MODEL COMPENSATION LAW: RESTITUTION FOR WRONGFULLY INCARCERATED PERSONS	211
<i>A. Who Can Apply, To Whom They Apply, & The Process</i>	211
<i>B. The Relief</i>	214
<i>C. Funding</i>	219
<i>D. Expungement</i>	219
<i>E. Civil Suit</i>	221
CONCLUSION	222

INTRODUCTION

I could spend the majority of this Note explaining to you how radically unjust wrongful convictions are. I could express to you how permanent the suffering and how perpetual the frustration is for those among us who have been the ultimate victims of our flawed justice system. There are people more fitted to do this. What I do hope to discuss, is that aside from the utter cruelty, wrongful convictions are *expensive*. And further, without appropriate compensation to those who are lucky enough to be exonerated, not only is the injustice continued, but it spreads, infecting us all, socially and economically. And the very people in government who use fiscal reasons to prevent a proper remedy are either unaware of the true injury it requires, or do not realize this is a situation where to save, one must spend. Regardless of which ignorance plagues your state government, this Note hopes to be enlightening.

Each year, well over half a million Americans are released from state and federal prisons. At any given time, nearly seven million people are either incarcerated, on probation, or on parole.¹ Two-thirds of the people released will end up back in prison within three years.² Is this their failure or the system's inability to accurately focus on the needs reentry requires? The social and economic cost of these failures is widespread; one in twenty-eight children grow up with an incarcerated parent.³ The intersection between health issues, poverty, and reentry is more or less a roundabout.

Broadly, there are two types of people released from prison: those who are truly guilty, and those who are truly innocent. This Note is meant to focus on the latter.⁴ While both groups experience similar struggles, exonerees need a different level of assistance for an equitable outcome. That outcome can only be achieved by *both* expungement and compensation.

Expungement, the wiping of a criminal record—which is needed for housing and most jobs—is too long of a process considering its importance.⁵ Because exonerees cannot enjoy the freedoms of non-criminals until their records are expunged, their lives become frozen in time.⁶ Since exonerees are not technically

¹ Office of the Assistant Secretary for Planning & Evaluation, *Incarceration & Reentry*, ASPE, <https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0> [<https://perma.cc/TRG2-4ZYK>] (last visited Oct. 26, 2022).

² *Id.*

³ *Id.*

⁴ For clarification, a “parolee” is someone who is released from prison but is still serving the remainder of a court-ordered sentence. The term “exoneree” can refer to two groups: it can be someone whose sentence has been officially pardoned by a governor, or overturned by a court because of actual innocence, vacated, meaning it could have been retried, but the prosecutor declined to do so, both of which release them from the status of a prisoner or parolee, or it can be someone who further—because of their adjudicated innocence—had their record expunged, releasing them from the status of a criminal or ex-felon. This Note focuses on the struggles faced by both exoneree groups.

⁵ *Expungement FAQs*, PAPILLON FOUND., <https://www.papillonfoundation.org/information/expungement-faqs> [<https://perma.cc/L4LE-2ANP>] (last visited Aug. 9, 2023).

⁶ Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403 (2015); CARDOZO SCHOOL OF LAW, AN INNOCENCE PROJECT REPORT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR

parolees, they are not entitled to reentry services at all. Exonerees have insufficient notice of release, no reentry benefits, and lack guidance for accessing assistance.⁷ In attempting to vindicate a person by voiding parolee status, the unintended effect is punishing them further with more complications.

Compensation, which includes money and an apology,⁸ is not prioritized. There is a common assumption that exonerees get their money back ten-fold. They can either profit from selling their stories as the subject of a documentary or podcast or become rich from multi-million-dollar civil verdicts. But those instances are rare and paint a false narrative.⁹ Many times, exonerees are not compensated appropriately or even at all to tell their stories, which can become sensationalized by documentaries that reap the proceeds.¹⁰ What endures is the exoneree's distrust not only in their entire government, but in their social circle that comes to celebrate those fifteen minutes of fame. Successful civil lawsuits are rare, retraumatizing, and risky. Exonerees dedicate more of their lives to the worst thing that's ever happened to them just to be made whole again.

Compensation and expungement are the two necessary actions for the reentry exonerees need to avoid these collateral issues. These must be brought by uniform legislation, which this Note hopes to propose for enactment across the United States.

Part I of this Note describes the collateral consequences and financial burdens that a poorly functioning reentry for exonerees and lack of proper compensation has on not only them, but on society. These are the issues the proposed legislation aims to fix. Part II compares the varying state laws in existence and explains why they are ineffective. Because of its recent adoption into law, and because of its commonality with many other state statutes, I closely examine the current Indiana statute to show how compensation law actually works from both the state's perspective and an exoneree's experience. Part III describes the government's economic and constitutional burdens to exonerees and to society which underlies the importance of new legislation. Part IV presents in its full form a proposed model compensation law tailored to fulfill the burden and satisfy

COMPENSATION 10 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf [https://perma.cc/KP5A-2TBM].

⁷ Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105, 109 (2008).

⁸ Tyler G. Okimoto, *Outcomes as Affirmation of Membership Value: Material Compensation as an Administrative Response to Procedural Injustice*, 44 J. EXPERIMENTAL SOC. PSYCH. 1270, 1271 (2008) (discussing the psychological impact compensation has on reaffirming a victim's identity and value in society and how it's only effective when given as an apologetic gesture). *Hoffner v. State*, 142 N.Y.S.2d 630, 631 (Ct. Cl. 1955) ("The state . . . suggests that more compensatory than money is the apologetic gesture of a penitent society. It seems to the Court that such an apology accompanied by a token payment would add a highhanded insult to an almost inconceivable injury.").

⁹ Tony Kennedy, *Wrongfully Convicted Man Wins \$1.9 Million Judgment, But Normal Life May Elude Him*, L.A. TIMES (Nov. 5, 1989, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-11-05-mn-1352-story.html> [https://perma.cc/R5M3-GAA9] ("People think I'm winning the lottery or something. . . . [w]ell, they owe me. If they had given me a choice, I wouldn't have gone through all this for \$50 million.").

¹⁰ Telephone interview with Kristine Bunch, Indiana exoneree, released in 2012 after seventeen years of wrongful incarceration (Jan. 20, 2023) [hereinafter Bunch interview].

the presented needs in a practical and practicable way. In crafting this legislation, I have studied all thirty-eight state compensation statutes to assemble a single statute to fix the problems identified. This Frankensteinian proposal is inspired not only by research, but by my relationships working with exonerees, seeing and listening to their needs.

There is no way to right such a massive wrong.¹¹ There is, however, a beneficial way to be held accountable. And if anyone deserves greater accountability from others, it's the wrongfully convicted.

I. COLLATERAL CONSEQUENCES & THE COST TO SOCIETY

Collateral consequences are the consequences that a conviction has on an individual's ability to live as a citizen upon reentry.¹² Anyone susceptible to collateral consequences will likely be unable to escape the criminal justice system by design. The damage caused by these consequences thus becomes a cycle—never-ending for the exoneree and perpetuating through our society.¹³ Reentry programs are often either misguided or underfunded, and if reentry is not done correctly, the effects could be worse than not having reentry at all.

Parole became increasingly popular in the mid-twentieth century as a utilitarian measure for those who showed rehabilitative growth.¹⁴ During the “war on drugs” years of the 1980s, there were several legislative strongholds enacted to get “tough on crime” by punishing not only the incarcerated, but anyone who had ever been incarcerated.¹⁵ Inconsistent and untimely expungement-

¹¹ *Hoffner*, 142 N.Y.S.2d at 631–32 (“[A]ll the wealth in the State of New York could not compensate the claimant for the mental anguish suffered through . . . false imprisonment, under the impression that he would be there the rest of his life.”).

¹² See generally Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10 (1986) (analyzing the consequences restrictions of civil rights have among released offenders).

¹³ Amy Sholsberg et al., *The Expungement Myth*, 75 ALB. L. REV. 1229, 1237 (2011); *Criminal Justice Involvement and Homelessness*, CONN. COAL. END HOMELESSNESS, <https://cceh.org/criminal-justice-involvement-and-homelessness/> [https://perma.cc/6DD4-ABCR] (last visited Jan. 20, 2022).

¹⁴ Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 116 (2000) (“Utilitarian penology treats punishment as . . . permissible only when its benefits in reducing future crime outweigh the pain, fear, and public expense it imposes.”).

¹⁵ *Id.* at 118 (“[P]unishment became a medium for expressing hatred of criminals. . . . [I]t was unnecessary . . . to ask whether punishment would reduce crime or enhance social welfare. It sufficed that an offender deserved it.”); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C.); Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 11–12 (2011) (demonstrating that since the war on drugs, the rate of crime is at an all-time low, while the amount of incarcerated individuals has gone from 300,000 to over two million); Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment> [https://perma.cc/3C8G-8CSG] (“In the 1970s, roughly 1,950 separate laws limited job opportunities for people with a criminal record. Today, more than 27,000 rules bar formerly justice-involved people from holding professional licenses. (This includes a New York State law that bars anyone with a criminal conviction from obtaining a bingo operator’s license!).”); see also Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C.). Truth-In-Sentencing Laws were created to make sure that

ent of public criminal records rendered even minor crimes to carry, effectively, a life sentence.¹⁶ Naturally, parole was naturally attacked and diminished during the “tough on crime” years by abolitionists who preferred the caging of purported undesirables over the rehabilitation of people.¹⁷ The result was a 700% increase in prison inmates in America; costs of prison maintenance ballooned from \$6 billion to \$67 billion.¹⁸

A parolee’s first year outside prison is considered their “high-risk period” for reoffending.¹⁹ Parole has an immediate system in place upon release to help parolees during this period by providing job assistance, counseling, and addiction services.²⁰ Yet, exonerees are not considered to be parolees, therefore, they are not given access to any of these resources.²¹ Regardless, the collateral consequences of reentry affect exonerees just the same, and in other ways, more so.²² They are receiving all of the cost, and none of the benefit, and they *never even committed the crime*.

Without a full understanding of these consequences, it is impossible to accurately calculate the most equitable solution to criminal justice funding, be it reentry programs, wrongful conviction compensation, or prison spending. Some examples of these consequences are, homelessness, healthcare issues, welfare dependency, crime, unemployment, an imbalance in the workforce, and a breakdown of the family unit.²³

prisons no longer allowed incarcerated prisoners parole based on a case-by-case basis of rehabilitation, but to imprison them for as much time as possible as punishment. Paula M. Ditton et al., *Truth in Sentencing in State Prisons Special Report*, U.S. DEP’T OF JUST., (Jan. 1999), <https://bjs.ojp.gov/content/pub/pdf/tssp.pdf> [https://perma.cc/F5H6-WJ5K].

¹⁶ Mandatory minimums force judges to give sentences to those convicted of crimes regardless of mitigating circumstances. *The History Behind Mandatory Minimums*, REHAB. ENABLES DREAMS, <https://stoprecidivism.org/blog/the-history-behind-mandatory-minimums/> [https://perma.cc/AE9G-WKSD] (last visited Oct. 31, 2022); CAL. PENAL CODE § 667 (West 2023) (known as the infamous Three Strikes law that imposes a life sentence on those who commit their third felony). For how that worked out, see *Rummel v. Estelle*, 445 U.S. 263 (1980) (giving a life sentence to a man convicted of cashing three forged checks all under \$130); *Ewing v. California*, 538 U.S. 11 (2003) (giving a life sentence to a man who stole three golf balls because he had prior burglaries on his record).

¹⁷ Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 490–95 (1999) (describing that parole used to be a rehabilitative period, but then became seen as useless, an idea perpetuated by retributivist scholars). See, e.g., JAMES Q. WILSON, *THINKING ABOUT CRIME* (Vintage Books rev. ed. 1985) (arguing that more incarceration, not rehabilitation should be the chief aim to combat crime).

¹⁸ Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [https://perma.cc/XB38-GA86].

¹⁹ Petersilia, *supra* note 17, at 483 (“A study by the Bureau of Justice Statistics found that twenty-five percent of released prisoners are rearrested in the first six months [of release] and forty percent within the first year.”).

²⁰ *Id.*

²¹ Kelly Shea Delvac, *Liberty and Just [Compensation] for All: Wrongful Conviction as a Fifth Amendment Taking*, 53 CONN. L. REV. 981, 989 (2022).

²² Chunias & Aufgang, *supra* note 7, at 109.

²³ For an extensive description and examples of collateral consequences, see Kessler, *supra* note 6.

A. The Causes and the Cures of Collateral Consequences

The two causes of collateral consequences are laws and stigma towards people in reentry.²⁴ The two cures to these consequences are expungement and compensation. Letting an exoneree out of prison without an expunged record is akin to throwing someone off the deep end with cement shoes and a snorkel. Laws meant to imprison offenders forever still apply to exonerees because expungement is not automatic. Statutes that create “civil disabilities”—or barriers—between those with criminal records and those without take away freedoms such as voting, government employment, parental rights, jury duty, or the right to own a firearm.²⁵ Exonerees are barred from employment, housing, welfare benefits, and retaining their identity as both an individual and a citizen, especially if the crime they were convicted of is particularly perverse in nature.

Stigma is just as, if not more, powerful than restrictive laws.²⁶ The information age coupled with “right to know” laws allow the public to access and exploit people with criminal records. In fact, an entire market exists to disseminate those records.²⁷ The privacy of one’s criminal record is not regulated, nor is it protected by the Constitution.²⁸ After expungement occurs, many states “seal” instead of “destroy” these records, allowing them to still be used by law enforcement.²⁹ The legitimate public interest in accessing the records of former offenders is sensible—but not for those who are innocent. Until the exoneree’s record is expunged, they suffer the same collateral consequences as former offenders, and are subjected to the same outcomes of ostracism, poverty, and post-offending.³⁰ Expungement is not immediate for exonerees, but recidivism is. It is worth clarifying that even if an exoneree has never committed a crime in their life, they are still equally subject to recidivism—or reoffending—due to the design of collat-

²⁴ Kessler, *supra* note 6, at 405–06.

²⁵ Petersilia, *supra* note 17, at 509–11.

²⁶ Douglas N. Evans et al., *Education in Prison and the Self-Stigma: Empowerment Continuum*, 64 CRIME & DELINQ. 255 (2018).

²⁷ Kessler, *supra* note 6, at 411–12; *Expungement FAQs*, *supra* note 5.

²⁸ Kessler, *supra* note 6, at 410; *see also* Dickerson v. New Banner Inst. Inc., 460 U.S. 103, 115 (1983) (“[E]xpunction under state law does not alter the historical fact of the conviction.”).

²⁹ Kessler, *supra* note 6, at 409. *See, e.g.*, KAN. STAT. ANN. § 60-5004(i) (West 2022) (“Upon entry of a certificate of innocence, the court shall order the expungement and destruction of the associated biological samples authorized by and given to the Kansas bureau of investigation . . .”).

³⁰ Kenny Lo, *Expunging and Sealing Criminal Records*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/article/expunging-clearing-criminal-records/> [https://perma.cc/P4F3-9WM5] (Apr. 23, 2020).

eral consequences.³¹ The first year being outside prison is when exonerees (and parolees) are at their most vulnerable, and most susceptible to arrest.³²

Factors that are known to decrease recidivism include access to social services, health insurance, a familial support system, housing, and full-time job opportunities.³³ Most affordable housing and minimum wage jobs require background checks, shying away from those with a felony record. If these needs are not addressed adequately and immediately it often leads to recidivism which perpetuates deep social, moral, and monetary harms onto all members of society.³⁴

B. *The Consequential Costs*

The effects and expenses on exonerees and society from a few of these consequences are discussed here. Important to remember, is that whenever crime is a secondary effect, it also comes with an implied cost.

1. Employment

Exonerees claim that their most dire, initial need is a job.³⁵ This makes sense considering that employment is most effective when recidivism is most likely.³⁶ Even if they have been pardoned, until their records are formally expunged, exonerees must disclose any previous conviction to potential emplo-

³¹ In some cases where the exoneree had a perfect record beforehand, the issues of reentry, such as homelessness, end up causing them to live a lifestyle that may cause them to go back to prison. This does not imply that every exoneree had lived as criminals beforehand. *See also* Chunias & Aufgang, *supra* note 7, at 115 (“According to exoneree Lawyer Johnson . . . living outside of prison was at times so difficult that he would commit minor offenses, like shoplifting, in order to spend the night in prison when he was feeling particularly overwhelmed with life on the outside.”).

³² *See, e.g.,* Megan C. Kurleychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*, 5 CRIMINOLOGY & PUB. POL’Y 483,498 (2006); Office of the Assistant Secretary for Planning & Evaluation, *Predictors of Reentry Success*, ASPE RSCH. BRIEF (Dec. 2016), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/173586/reentrysuccessbrief.pdf [<https://perma.cc/J22H-2VXH>].

³³ *Predictors of Reentry Success, supra* note 32.

³⁴ *See generally* All Things Considered, *As Court Fees Rise, The Poor Are Paying The Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/transcripts/312158516> [<https://perma.cc/M44H-K24D>] (“From the defense view, the sentence is meant to be the punishment for the crime. And to then say that we’re going to charge you for the privilege of being prosecuted and sentenced for the crime is somewhat a double penalty. . . . [S]tate legislators don’t want to raise taxes. So they fund popular programs by charging more and more fees to an unpopular group: defendants and the convicted.”).

³⁵ Leslie Scott, “*It Never, Ever Ends*”: *The Psychological Impact of Wrongful Conviction*, 5 CRIM. L. BRIEF 10, 10 (2009). Scott’s interviews with several exonerees are illuminating first accounts of the exact effects collateral consequences have on exonerees both mentally, socially, and physically.

³⁶ Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOCIO. REV. 529 (2000).

yers.³⁷ This cuts their access to employment nearly in half.³⁸ At least sixty percent of the post-release population is, at any given time, jobless.³⁹ Because of this, exonerees are often desperate for any job in order to stay out of prison. And as a consequence, the post-prison population loses its bargaining power with employers. In effect, industries that want to save money end up employing exonerees over those who have never been to prison.⁴⁰ This is just one example of how poor reentry negatively affects society as a whole.⁴¹ Additionally, the economic burden imposed due to the aforementioned collateral consequences is felt by all. The unemployment rate for formerly incarcerated people is five times higher than the unemployment rate for the entire United States population.⁴²

Though there are laws in place that discourage employment discrimination based on a criminal record, those laws are ineffective in practice; employers have a right to avoid the liabilities that may come from those who have a criminal past. And while in recent years, new anti-discrimination legislation for background checks has been effectuated throughout the United States, eighty percent of employers continue to perform background checks of potential employees, and the mere existence of a criminal record continues to substantially reduce the likelihood of a hiring callback.⁴³ Criminal records also prevent people from obtaining occupational licenses.⁴⁴ Even without a criminal record, the exonerated must explain any gaps in employment, a lack of recent references, and a lack of technical skills.⁴⁵ Economists estimate that about \$80 billion in lost gross domestic product is a result of barring criminals from the workforce.⁴⁶

Many exonerees have been imprisoned for so long that they have missed the opportunity to finish high school, get a degree, or even develop skills that would allow them to hold their own in a competitive job market. Therefore, exonerees are often forced to take low-level employment opportunities. Prison inmates are prevented from choosing their own calling, contracting, bargaining, or acquiring skills to monetize their labor.⁴⁷ Those who entered prison with jobs

³⁷ Sholsberg et al., *supra* note 13, at 1235.

³⁸ *Prison & Jail Reentry & Health Policy Brief*, HEALTH AFFAIRS POL'Y BRIEF (Oct. 28, 2021), <https://www.healthaffairs.org/doi/10.1377/hpb20210928.343531/full/health-affairs-brief-appendix-prison-community-reentry-russ.pdf> [<https://perma.cc/42HV-D8H6>].

³⁹ Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, PRISON POL'Y INITIATIVE (Feb. 8, 2022), <https://www.prisonpolicy.org/blog/2022/02/08/employment/> [<https://perma.cc/9DTT-GNE9>].

⁴⁰ *Id.*

⁴¹ *Id.* ("Without leveling the playing field for formerly incarcerated people, not only will their jobless rates remain high, but self-serving employers will continue to benefit from a disposable labor pool, with detrimental impacts on everyone.").

⁴² Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/EA4M-85NA>].

⁴³ Kimble & Grawert, *supra* note 15.

⁴⁴ For examples, see Kessler, *supra* note 6, at 404–08.

⁴⁵ Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 129 (2010).

⁴⁶ Lo, *supra* note 30.

⁴⁷ Delvac, *supra* note 21, at 1011; see also Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOCIO. REV.

and education find that the stigma upon release is insurmountable, in part due to public opinion of those who have been imprisoned.⁴⁸ Nearly half of the wrongfully convicted end up earning less after prison than they did before entering.⁴⁹ Moreover, many have incurred debt due to lawyer fees, criminal fines, and unpaid child support. Most never recover financially.⁵⁰ As a result, a third of exonerees are financially dependent on family and friends.⁵¹

Compensation can ease the desperation of needing employment to survive. But without a mechanism for expungement in the statute, there is no specific nor guaranteed recourse for exonerees looking to expunge their records. Those without expunged records cannot begin to rebuild their lives and are likely to wind up homeless or back in prison.

2. Homelessness

Formally incarcerated individuals are ten times more likely than others to end up homeless, thanks to poverty caused from unemployment, legal restrictions on public housing, discrimination due to their criminal record, and an inflated market.⁵² The law does little to help. The Fair Housing Act of 1968 does not protect people with criminal records.⁵³ They can be denied housing, as can anyone who lives with them.⁵⁴ This makes family unity difficult. Additionally, because wrongful convictions tend to occur more often in lower-income neighborhoods, the very neighborhoods that tend to have higher recidivism rates, it is unsurprising that exonerees are set up to fail.⁵⁵ Since these same neighborhoods are met with several reentries a year, the members of those communities deal with those same challenges as well.⁵⁶ Generally, former prisoners will have access to rehoming programs through the state, but no such programs exist for the wrongfully incarcerated who are unceremoniously released with nothing.⁵⁷ These individuals, who often do not have enduring, close familial relations can easily end up in a homeless shelter. It is common for those who have served longer sentences

539 (2000) (describing how workplace and age, both factors determined by reentry, can affect recidivism).

⁴⁸ Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), <https://www.nytimes.com/2007/11/25/us/25dna.html> [<https://perma.cc/3MKF-6CY7>].

⁴⁹ *Frontline: Burden of Innocence: Frequently Asked Questions*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/faqsreal.html#4> [<https://perma.cc/6GNA-4JFD>] (last visited Nov. 29, 2022).

⁵⁰ *Id.*

⁵¹ Scott, *supra* note 35, at 16.

⁵² *Prison & Jail Reentry & Health Policy Brief*, *supra* note 38.

⁵³ 42 U.S.C. §§ 3601–3631 (2018).

⁵⁴ Romina Ruiz-Goiriena, *Exclusive: HUD Unveils Plan to Help People with A Criminal Record Find A Place to Live*, USA TODAY (Apr. 12, 2022, 11:41 AM), <https://www.usatoday.com/story/news/nation/2022/04/12/can-get-housing-felony-hud-says-yes/9510564002/> [<https://perma.cc/GC6L-XU4K>].

⁵⁵ See Chariles E. Kubrin & Eric A. Stewart, *Predicting Who Reoffends: The Neglected Role of Neighborhood Context in Recidivism Studies*, 44 CRIMINOLOGY 165, 185 (2006).

⁵⁶ *Id.* at 166.

⁵⁷ Chunias & Aufgang, *supra* note 7, at 119–20.

to no longer have these connections, and without immediate means, will end up homeless.

To make matters worse, homelessness is a crime in almost every state in the United States.⁵⁸ Thus, the vicious cycle of post-offending begins.⁵⁹ Supportive services for a homeless person costs anywhere between \$30,000 to \$50,000 per year.⁶⁰ Twenty-five percent of homeless people report that they have been arrested simply for *being* without a home.⁶¹ Homeless people make up the largest population of emergency room visits, and also cost the taxpayers the expenses of frequent arrests, jail stays, ambulance rides, and other medical costs.⁶² Some cities have made strides to alleviate both the personal and societal consequences of homelessness through the adoption of novel initiatives. The evidence suggests they work. In San Diego, a two-year program that housed just thirty-six homeless people saved the taxpayers a total of \$3.5 million.⁶³ In Denver, offering supportive housing to the homeless resulted in a savings of \$15,733 per person in public costs.⁶⁴

Until their records are expunged, homeless exonerees will fail the requisite background checks for many housing opportunities. This only increases their shame and lack of independence.⁶⁵ Under Indiana law, it is permissible for apartment complexes to deny renters with criminal records a place to live.⁶⁶ People with records are advised to seek out housing opportunities from individual renters, often found on housing websites and in local advertisements, as opposed to complexes owned by management companies.⁶⁷ Nearly sixty percent of rental opportu-

⁵⁸ Cynthia Griffith, *Where in the United States is it Illegal to Be Homeless?*, INVISIBLE PEOPLE (Dec. 16, 2022), <https://invisiblepeople.tv/where-in-the-united-states-is-it-illegal-to-be-homeless> [https://perma.cc/DV77-J2C2].

⁵⁹ *Criminal Justice Involvement and Homelessness*, *supra* note 13.

⁶⁰ Belle Ren, *Ending Homelessness Would Cost Far Less Than Treating It*, STREET SENSE MEDIA (Aug. 10, 2022), <https://www.streetsensemedia.org/article/ending-homelessness-would-cost-far-less-than-treating-it> [https://perma.cc/AZD4-YCYD].

⁶¹ Griffith, *supra* note 58; *see also Homelessness—What We Know*, REENTRY AND HOUSING COALITION, <http://www.reentryandhousing.org/public-housing> [https://perma.cc/9R8Y-HX3X] (last visited Jan. 18, 2022).

⁶² *United Way's Homeless Initiative, Father Joe's Project 25, Saves Lives, \$3.5 Million*, FATHER JOE'S VILLAGES, <https://my.neighbor.org/homeless-initiative-project-25-saves-lives-3-5-million> [https://perma.cc/D2TD-HXEJ] (Mar. 12, 2020).

⁶³ *Id.*

⁶⁴ *What is the Cost of Homelessness?*, FATHER JOE'S VILLAGES, <https://my.neighbor.org/what-is-the-cost-of-homelessness/homeless-initiative-project-25-saves-lives-3-5-million/> [https://perma.cc/ZL3G-Y272] (Mar. 9, 2022).

⁶⁵ Alexander, *supra* note 15, at 23 ("It is not just the denial of public housing, but the shame of being a grown man having to ask your grandma to sleep in her basement at night.").

⁶⁶ Bente Bouthier, *Rising Rent, Pandemic Making it Hard For People with Criminal Records to Find Housing*, WFYI INDIANAPOLIS (Feb. 15, 2022), <https://www.wfyi.org/news/articles/rising-rent-pandemic-making-it-hard-for-people-with-criminal-records-to-find-housing> [https://perma.cc/RJZ2-AH9D] ("[T]he surge in rental prices makes landlords more selective . . . Criminal Records make it the hardest, criminal records and evictions. That's what makes it take the longest to find housing.").

⁶⁷ *Housing*, FELONY REC. HUB, <https://www.felonyrecordhub.com/housing-for-felons/> [https://perma.cc/98JJ-G8FQ] (last visited Jan. 20, 2022).

nities in Indiana, however, are acquired through rental companies.⁶⁸ Regardless, even if an exoneree can pass a background check, landlords can still ask for security deposits, first and last month's rent upfront, and proof of income—all of which are insurmountable hurdles for most people fresh out of prison.

3. Health Issues

Because exonerees have been isolated, interrogated, manipulated, wrongfully convicted, and incarcerated they thus, from a mental health standpoint, suffer from the symptoms of having been tortured.⁶⁹ While in prison, their mental health severely deteriorates. Studies show a causal link between procedural justice afforded and the mental health of the convict once behind bars.⁷⁰ The wrongfully convicted have received the ultimate miscarriage of justice and they know that. Beyond that, their false reputation as a criminal may precede them behind bars.⁷¹ It is common knowledge that child sex offenders are often tortured, if not killed, in prison. Eleven percent of wrongfully incarcerated people are convicted of child molestation.⁷² Those accused of other offenses are also at risk. For example, a New York man's erroneous conviction for killing a gang kingpin led incarcerated members of that gang to attack him inside prison.⁷³

Paddy Hill, one of the Birmingham Six exonerees⁷⁴ explains that “every day a rightfully convicted person spends in prison is one day closer to release. But every day a wrongfully convicted person is in prison is one more day he shouldn't

⁶⁸ *Comprehensive Housing Market Analysis For Indianapolis—Carmel—Anderson, Indiana*, U.S. DEPT OF HOUS. & URB. DEV. (May 2016), <https://www.huduser.gov/portal/publications/pdf/Indianapolis-comp-16.pdf> [https://perma.cc/X8D7-NADR].

⁶⁹ Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 430 (2009). In several cases out of Chicago, many had literally been tortured by disgraced former “detective,” Jon Burge. E.g., Dave Byrnes, *Brothers Sue Chicago After Enduring Police Torture and Decades of False Imprisonment*, COURTHOUSE SERV. NEWS (July 25, 2023), <https://www.courthousenews.com/brothers-sue-chicago-after-enduring-police-torture-and-decades-of-false-imprisonment/> [https://perma.cc/QG5J-QLPZ]; John Garcia, *Two Ex-Prosecutors on Trial After Man Wrongfully Convicted of Killing Two Chicago Police Officers*, ABC7 (Oct. 17, 2023), <https://abc7chicago.com/jackie-wilson-wrongful-conviction-nick-trutenko-andrew-horvat/13930102/> [https://perma.cc/P8AZ-LMJ4].

⁷⁰ See Karin A. Beijersbergen et al., *Procedural Justice and Prisoners' Mental Health Problems: A Longitudinal Study*, 24 CRIM. BEHAV. & MENTAL HEALTH 100, 109 (2014).

⁷¹ See, e.g., Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful Imprisonment*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 139, 151 (2004) (describing exonerees' experiences of being labeled as sex-offenders behind bars; they would be strip-searched, beaten, harassed, and singled out because of the stigma).

⁷² *Basic Patterns*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Basic-Patterns.aspx> [https://perma.cc/S6YE-2VCP] (Nov. 2016); see, e.g., *Baba-Ali v. State*, 878 N.Y.S.2d 555, 589–90 (N.Y. Ct. Cl. 2009), *aff'd in part, rev'd in part*, 907 N.Y.S.2d 432 (App. Div. 2010).

⁷³ *Jones v. State*, No. 2009-014-051 (N.Y. Ct. Cl. Aug. 19, 2009).

⁷⁴ The Birmingham Six refers to six men in Ireland who were tortured into confessing for a bombing they did not commit and served fifteen years while the real culprits were known by journalists. Rowan Moore, *Why The Birmingham Six's Story Must Not Be Forgotten*, THE GUARDIAN, <https://www.theguardian.com/uk-news/2022/mar/26/why-the-birmingham-six-story-must-not-be-forgotten> [https://perma.cc/GQH5-GMM8], (last visited Jan. 19, 2022).

have been there”; the psycho–emotional difference in that realization is dramatic.⁷⁵ Post-traumatic stress disorder (PTSD) is a common consequence of spending years in prison and a result of incarcerated individuals’ segregation and fear for their lives. Depression and anxiety are the other common disorders suffered by exonerees.⁷⁶ Prisonization materializes from necessary adaptation. Survival methods include becoming emotionally vacant and aggressive, conforming to cruelty, staying alert at night, and distrusting surroundings due to the constant threat of harm or even death.⁷⁷ This often leaves permanent psychological damage and irreversible personality defects. Submitting to physical intimidation by inmates and guards and crumbling under the emotional confusion and disillusionment can showcase weakness, and, thus, the exoneree becomes more punished.⁷⁸ Not having a release date in sight, separation from loved ones, a lack of control over their reputation, and the loss of all of their assets are often the only things the wrongfully convicted can think about. If they are lucky enough to be released, their biggest hurdle is recovery, and they live in constant fear that wrongful conviction will somehow happen again.

Once the wrongfully convicted fight their way out, they are not met with immediate and constructive apologies from the government, but even worse, a society that still considers them ex-convicts.⁷⁹ Under these conditions, exonerees often feel paranoid, isolated, and revictimized.⁸⁰ After years of living in a restricted survival mode and collecting uncontrollable debt, they enter a world where they may not recognize: a world with advanced technology, cultural changes, and an unrecognizable family.⁸¹ Moreover, they are robbed of an education, destined to a life they never wanted, shortened by prolonged exposure to prison conditions.

⁷⁵ Jennifer Wildeman et al., *Experiencing Wrongful and Unlawful Conviction*, 50 J. OF OFFENDER REHAB. 411, 412–13 (2011).

⁷⁶ Lauren Legner, *The Psychological Consequences of a Wrongful Conviction and How Compensation Statutes Can Mitigate the Harms*, MICH. ST. L. REV. F. (Apr. 26, 2022), <https://www.michiganstatelawreview.org/vol-2021-2022/2022/4/25/the-psychological-consequences-of-a-wrongful-conviction-and-how-compensation-statutes-can-mitigate-the-harms> [https://perma.cc/Q45N-KTSF] (“Many studies have found that wrongfully convicted people suffer from additional psychological symptoms in addition to specific disorders. Some individuals have reported feeling ‘worn down’ after being wrongfully accused and often worry that others do not believe in their innocence. Wrongfully convicted people also often experience feelings of ‘bitterness, feelings of loss, hopelessness, emptiness, anger and aggression, helplessness, [and] chronic feelings of threat and fear when out in public.’”).

⁷⁷ Chunias & Aufgang, *supra* note 7, at 113–19.

⁷⁸ MARVIN COTTON JR., BETTER, NOT BROKEN: AN OPTIMISTIC GUIDE TO OVERCOMING PAIN AND LEVERAGING LIFE’S OPPORTUNITIES 91–96 (2022). Michigan exoneree, Marvin Cotton Jr. describes a Christmas Eve he spent in prison wrongfully incarcerated. The guards left the doors open until every inmate was so cold, they would scream for heat, only to turn the heat on so hot they felt trapped inside a furnace unable to breathe. This continued back and forth all night as the guards laughed. Marvin was not only tortured by guards on the inside, but he was inside for something he did not do. Now a free man, he no longer wears a jacket because he refuses to be cold.

⁷⁹ Evans et al., *supra* note 26.

⁸⁰ Weigand, *supra* note 69, at 429–30.

⁸¹ Legner, *supra* note 76 (explaining studies of exonerees upon reentry where every participant felt “psychologically the age they had been upon entering prison, as if time stopped in their head at that point”).

They are left with mental trauma, addiction, broken relationships, lack of closure from deaths they missed, children they never saw grow up, and continuous anxiety-inducing interactions with the state.⁸²

The severe difficulty finding unemployment and rebuilding or starting new family relationships have the most profound impact on exonerees' mental health once exonerated.⁸³ Many exonerees lost touch with their families due to their incarceration.⁸⁴ Additionally, trying to build relationships with those they meet after release can be difficult, because exonerees are different people than they were before these traumatic events unfolded.⁸⁵ It is difficult to readjust to normalcy, because in prison, their wrongful conviction consumed their thoughts and lives. After adapting to strict day-to-day living, exonerees find it both difficult and embarrassing to reenter a society that has moved on culturally or that contains simple mundane tasks people take for granted daily.⁸⁶ Worse, this whole experience turns historically "normal" people with no mental issues or addictions into completely different people now dependent on mental and physical assistance to survive.⁸⁷

4. Social Welfare⁸⁸

Crime costs money. This is not an unfamiliar concept. And those with criminal records must pay. Forever. Take child support for example—"rising imprisonment contribut[es] to rising child support debt and rising child support debt contribut[es] to rising imprisonment."⁸⁹ With heavy wage garnishes, if an exonerate can get a job, sixty percent of their income can go to child support they were unable to pay while in prison. These debts also come with fees and interest.⁹⁰

⁸² AN INNOCENCE PROJECT REP., *supra* note 6, at 7–11; *see, e.g.*, Aaron Montes, "You'll Never be the Same," *Daniel Villegas Opens Up on Life After 2018 Trial*, KTSM, <https://www.ksm.com/local/youll-never-be-the-same-daniel-villegas-opens-up-on-life-after-2018-trial/> [https://perma.cc/C5UM-BYUN] (Dec. 3, 2021, 10:09 PM).

⁸³ Scott, *supra* note 35, at 11.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Legner, *supra* note 76 ("[S]everal exonerees reported feeling 'embarrassed by the practical difficulties of mundane tasks like crossing the street, using a microwave, or handling money.' They categorized this experience as humiliating and shameful. In addition, many reported feeling 'unsettled'—that they 'could not find a sense of direction' and that they 'struggled to reintegrate back into their families.'").

⁸⁷ *Id.*

⁸⁸ "When evidence is not excluded, indictments are not quashed, and convictions are not overturned, we eviscerate the deterrent effect of these and other similar measures, and, consequently, infect the entire criminal process with an ambivalence toward our most fundamental liberties." Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1195 (1995).

⁸⁹ Lynne Haney & Marie Mercier, *Child Support and Reentry: Executive Summary*, NAT'L INST. JUST. (Sept. 20, 2021), <https://nij.ojp.gov/topics/articles/child-support-and-reentry> [https://perma.cc/M6GE-9BSZ]; *see also* Eli Hager, *For Men in Prison, Child Support Becomes a Crushing Debt*, MARSHALL PROJECT (Oct. 18, 2015, 5:00PM), <https://www.themarshallproject.org/2015/10/18/for-men-in-prison-child-support-becomes-a-crushing-debt> [https://perma.cc/2F6C-RB37];

⁹⁰ Alexander, *supra* note 15, at 22.

Not paying can also send them back. Further, this has negative effects on the family of that parent. In fact, most exonerees are imprisoned around twenty-six—the prime of their working lives.⁹¹ Leaving behind families and children typically ensures poverty among the household.⁹² It also hinders the concept of a family unit which strengthens community and welfare.

In 1996, a federal welfare reform banned drug felons from collecting food stamps.⁹³ Indiana banned Supplemental Nutrition Assistance Program (SNAP) benefits for people with criminal records until 2020.⁹⁴ It was one of the last states to recognize that it costs more money and social harm to do so.⁹⁵ In Florida, the state modified SNAP ban reform to include those committing financially motivated crimes. Most people leaving prison need access to food stamps within the first two months.⁹⁶ Florida's modified SNAP ban caused recidivism rates to go up because those who were precluded from accessing bare necessities were left to make money the only other way they knew how: crime.⁹⁷ In trying to save money, Florida spent over \$70 million.⁹⁸

In fact, Florida's compensation statute forbids those with a prior felony from collecting compensation. Further, compensation is capped at \$50,000 annually.⁹⁹ Compare that with New York, where there is no prior felony restriction nor a cap on compensation.¹⁰⁰ In Florida, there is an almost sixty percent reoffending rate amongst exonerees, and in New York, eight percent.¹⁰¹

⁹¹ *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://innocenceproject.org/g/dna-exonerations-in-the-united-states/> [<https://perma.cc/E37T-CTEG>] (last visited Jan. 20, 2022).

⁹² Rebecca Silbert et al., *Criminal Injustice: A Cost Analysis of Wrongful Convictions, Errors, and Failed Prosecutions in California's Criminal Justice System*, CHIEF JUST. EARL WARREN INST. L. & SOC. POL'Y, 16 (2015).

⁹³ Cody Tuttle, *Snapping Back: Food Stamp Bans and Criminal Recidivism*, 11 AM. ECON. J.: ECON. POL'Y 301, 302 (2019).

⁹⁴ Mark Peterson, *Indiana Food Stamp Ban For Drug Felons Nears Its End*, WNDU (Dec. 17, 2019, 4:14 PM), <https://www.wndu.com/content/news/Indiana-food-stamp-ban-for-drug-felons-nears-its-end-566284431.html> [<https://perma.cc/YD9D-AS9Z>] (“When they suddenly started finding out that their constituents in the rural areas who were now being convicted of meth, who had opiate issues, they were finding out what it was like for when those people came out of prison or when those people came out of rehab.”).

⁹⁵ Elizabeth Wolkomir, *How SNAP Can Better Serve the Formerly Incarcerated*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/food-assistance/how-snap-can-better-serve-the-formerly-incarcerated> [<https://perma.cc/XZG5-QLTX>] (Mar. 18, 2018); *No More Double Punishments: Lifting the Ban On SNAP and TANF for People with Prior Felony Drug Convictions*, CLASP, <https://www.clasp.org/publications/report/brief/no-more-double-punishments> [<https://perma.cc/9QES-57QL>] (Apr. 2022).

⁹⁶ Tuttle, *supra* note 93, at 315–16.

⁹⁷ *Id.* at 324 (“For every offender who recidivates because of the SNAP ban, Florida pays the cost to incarcerate that offender and the citizens of Florida suffer costs of victimization.”).

⁹⁸ *Id.*

⁹⁹ FLA. STAT. ANN. § 961-06(1)(a) (West 2023); FLA. STAT. ANN. § 961-06(2) (West 2023).

¹⁰⁰ N.Y. JUD. CT. ACTS LAW § 8-b(6) (McKinney 2023).

¹⁰¹ See Evan J. Mandery et al., *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553 (2013).

Noted factors in determining recidivism rates include the offender's age, race, neighborhood into which they return, gender,¹⁰² prison experience,¹⁰³ and poverty level.¹⁰⁴ This is why, because they are experiencing all of these collateral consequences, exonerees with no criminal past are still subject to returning to prison. This constant fear can lead to a severe distrust of the criminal justice system. Not only stemming from the exoneree, but from those they know, and those who hear their stories.

Additionally, when compensation laws are not satisfactory—or non-existent—the exoneree may file a civil rights lawsuit. As of 2022, a total of \$2.65 billion has been paid to exonerees nationally through civil rights suits.¹⁰⁵ The average payout is \$318,000 per year spent incarcerated.¹⁰⁶ This, of course, is only after years of waiting for a payout.

The reason civil suits are so attractive is because they often award far more than the state's compensation package. Still, civil suits are not as glamorous as they appear; there is an extremely heavy burden on the exoneree to spend several years relitigating either extreme police corruption or malicious prosecution—both are uphill battles.¹⁰⁷ The solution, thus far, has been to accept offers from predatory loan companies that make themselves immediately available to exonerees who appear to have promising claims and reliable representation. These companies come calling with six-figure offers, skirting interest caps by claiming the “all-or-nothing risk.”¹⁰⁸ If the exoneree loses in court, their loan is forgiven, but if they win, a hefty chunk of that settlement goes back to the company. This is why exonerees backed by reputable civil rights attorneys are the ones eligible to borrow these loans, which on average have a thirty-three percent interest rate.¹⁰⁹ Why would anyone borrow money with this kind of rate? As one exoneree put it, “I needed a service and they provided it...[m]ost people aren't willing to take a chance on any of us.”¹¹⁰

¹⁰² Kubrin & Stewart, *supra* note 55, at 187–89.

¹⁰³ *Id.* at 168.

¹⁰⁴ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [https://perma.cc/89G7-N8QG].

¹⁰⁵ Specifically, claims made under 42 U.S.C. § 1983; Corey Kilgannon, *They Were Unjustly Imprisoned. Now, They're Profit Centers*, N.Y. TIMES (Nov. 27, 2022), <https://www.nytimes.com/2022/11/27/nyregion/high-interest-loans-exonerated-prisoners.html> [https://perma.cc/PTY9-SHAD].

¹⁰⁶ *Id.*

¹⁰⁷ Alberto B. Lopez, *\$10 and a Denim Jacket—A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 690–98 (2002) (explaining the elements the exoneree must prove and the immunities of each defendant).

¹⁰⁸ Roy Strom, *Out of Prison and Broke, Wrongfully Convicted Sell Their Case*, BLOOMBERG L., <https://news.bloomberglaw.com/business-and-practice/out-of-prison-and-broke-wrongly-convicted-turn-lawsuits-to-cash>, [https://perma.cc/RYSR-JYB2] (Feb. 2, 2022, 12:38 PM).

¹⁰⁹ Kilgannon, *supra* note 105.

¹¹⁰ *Id.* “I had no choice. I just wanted . . . normalcy, but that normalcy comes at a high price.” A New York exoneree, Fernando Bermudez “acknowledges the lawsuit loans were his ‘best option’ but wasn’t happy about the terms: ‘I felt taken advantage of. I just felt exploited.’” Strom, *supra* note 108.

Civil rights suits are not always a practical choice for exonerees. Many cannot prove misconduct either because of immunity defenses, loss of original evidence, or a statutory bar. Many also do not have the resources to wait that long. Therefore, much of the money is going to only a small amount of those wrongfully convicted. And who pays for these verdicts? The taxpaying public.

If the exoneree sues an individual officer, the city typically indemnifies that officer, that is, it pays on their behalf.¹¹¹ In fact, a 2014 study concluded that officers personally paid .02% of the dollars recovered by plaintiffs in civil rights lawsuits against them.¹¹² Many times, the exoneree will sue the city itself. Cities usually have varying forms of liability insurance for this reason, as a way to protect themselves from the actions of its police officers.¹¹³ The cities pay with their insurance usually through general funds or pools depending on the jurisdiction. The data varies, but ultimately, it is still the taxpayer who funds at least a portion of the insurance.¹¹⁴ Some cities, however, do not have insurance, and therefore the money comes directly from municipal taxes.¹¹⁵ Either way, the people pay.

Even after awards are given, issues continue to manifest. The exoneree may have to experience additional legal battles with insurance companies that try to avoid liability.¹¹⁶ The city may appeal the award because it cannot afford to

¹¹¹ See generally Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (conducting a study of civil rights lawsuits and who pays on the officer's individual behalf).

¹¹² *Id.* at 913.

¹¹³ See generally Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 U.C.L.A. L. REV. 1144, 1161–63 (2016) (discussing the different methods of municipal insurance, and how civil rights lawsuits affect each kind); see also John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1579–81 (2017) (describing different ways private insurance companies audit and regulate police departments to prevent them from incurring excessive liability, particularly, by interpreting constitutional rights).

¹¹⁴ Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 781–82 (2004) (“Civil judgments come out of the city or county funds, or perhaps from insurance policies that the local government purchases—i.e., from taxpayers.”).

¹¹⁵ See Schwartz, *supra* note 113, at 1161.

¹¹⁶ For example, Missouri exoneree, Ryan Ferguson was exonerated in 2013 after ten years of wrongful imprisonment. In 2017, he was awarded \$5.3 million against the City of Columbia. The city paid \$500,000, but its insurer refused to indemnify because it wasn't the insurer at the time of the conviction, so Ferguson had to relitigate to get his damages award. In 2019, a court affirmed his award against the insurers. *Ferguson v. St. Paul Fire & Marine Ins. Co.*, 597 S.W.3d. 249 (Mo. Ct. App. 2019); Marcelle Peters, *Former City Insurer Ordered to Pay \$5.35 Million for Ferguson Wrongful Conviction*, COLUMBIA MISSOURIAN (Aug. 14, 2018), https://www.columbiamissourian.com/news/local/former-city-insurer-ordered-to-pay-5-35-million-for-ferguson-wrongful-conviction/article_18bc6de2-a000-11e8-830b-07831aaa482d.html [https://perma.cc/BAR9-7RML].

pay.¹¹⁷ The general public suffers from raised taxes,¹¹⁸ or cutbacks in social services.¹¹⁹ Some jurisdictions do not allow for insurance to financially impact their law enforcement budgets.¹²⁰ This fact, along with constant indemnification, gives no deterrence for city officials to take steps to prevent misconduct.¹²¹ This means that the cause of these suits will continue in perpetuity and thus the consequences never cease. The more lawsuits a city experiences, the higher the premiums, and the taxpayers continue to pay more.

Aside from judgment awards are litigation fees. From 2004 to 2018, Chicago spent \$213 million on private lawyers to represent officers in civil rights suits.¹²² Civil rights attorneys say the city wants to “appease cops who want to see their conduct justified in court.”¹²³ Advocates of that approach argue good defense lessens the plaintiff’s expectations. This would be persuasive if the City did not spend so much to lose even more.¹²⁴

¹¹⁷ See, e.g., *Hill v. City of Hammond*, No. 2:10-CV-393-TLS, 2023 WL 4683311 (N.D. Ind. July 21, 2023) (granting the parties’ Motion to vacate the \$25 million a jury awarded exoneree James Hill against the City of Hammond in favor of a \$9 million dollar settlement). The City claimed “the settlement will better allow” it “to meet the demands it owes its citizens” and that the “risks implicat[ing] the financial costs of continued provision of police and fire services, proper roads, sidewalks, bridges, and other vital community services” was a “burden” to ask its “present-day citizens to bear” considering the conviction happened forty years prior. *Id.* at *5. Hill agreed to sacrifice \$14 million because he had waited long enough to see his money, needed it because he could not rebuild his life without it, and the City could not pay him. If he accepted \$9 million, he would be paid right away. *Id.* at *6. How? Because the city sold its debt. For this, Hammond homeowners will pay an additional \$3.44 in taxes per year over ten years. Molly DeVore, *Hammond Moves Forward with \$155M Budget*, TIMES OF NW. IND. (Oct. 12, 2023), https://www.nwtimes.com/news/local/lake/hammond/hammond-city-budget/article_a01581e8-6904-11ee-b3bb-bbe68e1f6a05.html [https://perma.cc/NW4W-E6HF]. This is not the first time Hammond has done this to the wrongfully convicted for the same reason. See *Mayes v. City of Hammond*, 631 F. Supp. 2d 1082, 1096–98 (N.D. Ind. 2008). One wonders what Hammond will do at the conclusion of another pending lawsuit by two exonerees. Note, all of these claims stem from the *same officer*, Mike Solan. *Glenn v. City of Hammond*, No. 2:18-CV-150-TLS-JEM, 2021 WL 4078063 (N.D. Ind. June 22, 2023).

¹¹⁸ Inkster, MI is self-insured for claims above \$2 million. A \$1.4 million settlement due to police misconduct caused the entire city to raise its property taxes \$178 per household. Schwartz, *supra* note 113, at 1174–75, n.96.

¹¹⁹ “When you had to budget for [police] tort liability you had less to do lead poisoning screening for the poor children of Chicago. We had a terrible lead poisoning problem and there was a direct relationship between the two. Those kids were paying the tort judgments, not the police officers.” *Id.* at 1178 (quoting former Chicago attorney Lawrence Rosenthal).

¹²⁰ Schwartz, *supra* note 113, at 1166, 1188.

¹²¹ For arguments both supporting and weakening this argument, see *id.* at 1155–56. For a fuller analysis, see Rappaport, *supra* note 113 at 1595–1607.

¹²² Dan Hinkel, *A Hidden Cost of Chicago Police Misconduct: \$213 Million to Private Lawyers Since 2004*, CHICAGO TRIB. (Sept. 12, 2019 5:00 AM), <https://www.chicagotribune.com/investigations/ct-met-chicago-legal-spending-20190912-sky5euto4jbcdenjfi4datpnki-story.html> [https://perma.cc/FR3R-27T5].

¹²³ *Id.*

¹²⁴ *Id.* For example, exoneree Jacques Rivera was awarded \$17 million despite Chicago spending nearly \$6 million on attorneys. *Id.* The “Englewood Four” (four men falsely accused of rape and murder) settled for \$31 million after Chicago spent \$4.4 million on attorneys. *Id.* After twenty-five years wrongfully convicted of arson, James Kuppelberg spent five years awaiting his

These funds should not be sacrificed by innocent taxpayers. If there were more consistent and equitable compensation laws in place, civil suits may not be as necessary for exonerees. Ultimately, all of the social and literal cost that society endures from lackluster, or nonexistent expungement and compensation laws specifically tailored to the needs of exonerees are costing more money than lawmakers think they are saving by not enacting them correctly. Worse, what does it say about a society that prioritizes laws for punishment over remedies?

II. CURRENT COMPENSATION LEGISLATION

Currently, only thirty-eight states plus D.C. have mandatory exoneration compensation laws.¹²⁵ All vary in their eligibility requirements, obstacles, compensation amounts, and contributory provisions.¹²⁶ In reality, exonerees often must relitigate their own case, to get compensation and expungement. During this process, they often must depend on their family to seek shelter and the luck of their jurisdiction to determine if relief is even possible because eligibility requirements and processes vary between states.

A. Nation-Wide¹²⁷

Wrongful convictions are inconsistent nationally because they tend to happen in state courts where judicial practices vary.¹²⁸ Nationally, seventy-two percent of exonerees who file state claims are given compensation, but it varies by

civil trial when the City's private lawyers offered to settle for \$9.3 million after billing over \$6 million. "We would have taken that number more or less earlier." *Id.*

¹²⁵ Alejandra Marquez Janse & Ari Shapiro, *For the Exonerated, Compensation is a Battle for Stability and Dignity*, NPR (Jan. 11, 2023, 5:00 AM), <https://www.npr.org/2023/01/11/1147443227/for-the-exonerated-compensation-is-a-battle-for-stability-and-dignity#:~:text=Currently%2C%2038%20states%20plus%20the,the%20states%20have%20been%20paid> [https://perma.cc/K9HV-ED3N].

¹²⁶ *Id.*

¹²⁷ For the most informative state comparison charts up to 2019, see *Compensation Statutes: A National Overview*, NAT'L REGISTRY OF EXONERATIONS (May 21, 2018), https://www.law.umich.edu/special/exoneration/Documents/CompensationByState_InnocenceProject.pdf [https://perma.cc/44LK-S7VJ]; *Key Provisions in Wrongful Conviction Compensation Laws*, INNOCENCE PROJECT, <https://www.law.umich.edu/special/exoneration/Documents/Key-Provisions-in-Wrongful-Conviction-Compensation-Laws.pdf> [https://perma.cc/5PBR-NC84] (last visited Oct. 27, 2022); and *National Landscape of Compensation*, MONT. DISTRICTING & APPORTIONMENT COMM'N, <https://leg.mt.gov/content/Committees/Interim/2019-2020/Law-and-Justice/Meetings/June-2019/LJIC-June28-2019-Ex19.pdf> [https://perma.cc/8YSH-YBXN] (last visited Oct. 27, 2022).

¹²⁸ On a federal level, the 2004 Justice For All Act urged states to "provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death." Eleven years later, it made compensation tax-exempt. That is the only consistency that exists. Justice For All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended at 42 U.S.C. § 3797j); Keith. A. Findley, *The Federal Role in the Innocence Movement in America*, 33 J. CONTEMP. CRIM. JUST. 61, 64, 75 (2017).

state.¹²⁹ Some states pay the exoneree by the day.¹³⁰ Most pay them by the year. Some pay them based on an arbitrary calculation guided by a cap.¹³¹ Some states' maximums are lower than other states' minimums.¹³² Some states compensate time in pre-trial custody,¹³³ others do not. Some base the amount off of how many years were served,¹³⁴ some add more if a death sentence was given.¹³⁵ Some states will allow the exoneree to collect a lump sum or specific installments on a case-by-case basis,¹³⁶ while others are stringent on how much is given per year.¹³⁷ Some states do not explain how much they will award, nor how it is calculated.¹³⁸

The likelihood of getting compensation is also inconsistent because the burdens of proof vary, as does the deciding authority. For example, in fifteen states, the burden of proof is clear and convincing.¹³⁹ In eleven states, the burden is preponderance of evidence.¹⁴⁰ Other states are silent on the matter. Some states

¹²⁹ Celina Tebor, *What's the Value of Decades Lost in Prison? Adnan Syed Could Get Millions, But Exonerated People Often Face a Legal Maze in US*, USA TODAY (Oct. 23, 2022, 5:00 AM), <https://www.usatoday.com/story/news/nation/2022/10/23/adnan-syed-exoneration-compensation/10528473002/> [https://perma.cc/F5XT-KJCU].

¹³⁰ See, e.g., California—\$140 per day, CAL. PENAL CODE § 4904(a) (West 2023); Iowa—\$50 per day, IOWA CODE ANN. § 663A-1(6)(b) (West 2023); Maryland—unknown amount, MD. CODE ANN., STATE FIN. & PROC. § 10-501(b) (West 2022); Missouri—\$100 per day, MO. ANN. STAT. § 650.058(1) (West 2023).

¹³¹ In Massachusetts, it's \$1 million, MASS. GEN. LAWS ANN. ch. 258D § 5 (West 2023); in New Hampshire, it's \$20,000, N.H. REV. STAT. ANN. § 541-B:14(II) (2022); in Mississippi, it's anywhere from 50k to 500k a year, MISS. CODE ANN. § 11-44-7(2)(a) (2022). Some states give a few determination factors, others do not.

¹³² See Wisconsin (caps at \$25,000 per year), WIS. STAT. ANN. § 775.05(4) (West 2022) compared to Louisiana (minimum per year starts at \$40k), LA. STAT. ANN. § 572:8(H)(2)(b) (2023).

¹³³ See, e.g., ALA. CODE § 29-2-160(d) (2022), CAL. PENAL CODE § 4902 (West 2023); COLO. REV. STAT. ANN. § 13-65-103-3(b)(I) (2022); HAW. REV. STAT. ANN. § 661B-3(a)(3) (West 2022); IDAHO CODE § 6-3503(1)(a)(ii) (2022); WASH. REV. CODE ANN. § 4.100.060(5)(a) (West 2023).

¹³⁴ See, e.g., 705 ILL. COMP. STAT. ANN. 505/8 (West 2023); NEV. REV. STAT. ANN. § 41.950 (West 2022).

¹³⁵ See, e.g., COLO. REV. STAT. ANN. § 13-65-103-(3)(a)(I) (2022); IDAHO CODE § 6-3503-1(a)(ii) (2022); WASH. REV. CODE ANN. § 4.100.060(5)(a) (West 2023).

¹³⁶ See, e.g., ALA. CODE § 29-2-160 (2022); KAN. STAT. ANN. § 60-5004(e)(3)(B) (West 2022); LA. STAT. ANN. § 572:8(H)(2)(c) (2023); MONT. CODE ANN. § 53-1-214 (West 2022); TENN. CODE ANN. § 9-8-108(a)(7)(D) (2022); TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West 2022); UTAH CODE ANN. § 78B-9-405(4)(c) (West 2022); WASH. REV. CODE ANN. § 4.100.060(12) (West 2023).

¹³⁷ See, e.g., while Missouri pays \$100 per day, they cap yearly disbursements to \$36,500. MO. ANN. STAT. § 650.058 (West 2023); Indiana distributes its installments evenly over five years with no exceptions. IND. CODE ANN. § 5-2-23-3(c) (West 2022).

¹³⁸ See, e.g., MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2022); N.Y. CT. CL. ACT LAW § 8-b (McKinney 2023); W. VA. CODE ANN. § 14-2-13a(d) (West 2022) ("If the court finds that the claimant is entitled to a judgment, the court shall award damages in a sum of money as the court determines will fairly and reasonably compensate the claimant based upon the sufficiency of the claimant's proof at trial. The damages shall depend upon the unique facts and circumstances of each claim. The claimant shall bear the ultimate burden of proving all damages associated with the claimant's claim.").

¹³⁹ *National Landscape of Compensation*, *supra* note 127.

¹⁴⁰ *Id.*; IDAHO CODE § 6-3502 (2022); S.B. 1584 § 1(9)(a), 81st Leg. Assemb., Reg. Sess. (Or. 2022).

form committees to decide,¹⁴¹ others delegate the matter to various courts.¹⁴² Some states require re-litigation for the exoneree,¹⁴³ others, simply a certificate of innocence given by a judge or committee.¹⁴⁴ Montana leaves it up to its department of corrections.¹⁴⁵

State statutes create barriers for their citizens and remain tone-deaf in the severity and case-by-case variations of wrongful conviction. For example, in New Jersey, an innocent person cannot get compensated if they took a plea deal even though over eleven percent of exonerees are coerced into pleading guilty.¹⁴⁶ Relatedly, states bar recovery for those who have perjured,¹⁴⁷ but false confessions are one of the leading causes of wrongful convictions.¹⁴⁸ Rhode Island will not allow a claim for compensation if the exoneration was based off of ineffective assistance of counsel.¹⁴⁹ In Missouri and Montana, compensation is only eligible for those exonerated through DNA, but just under eighteen percent of exoneration are through DNA.¹⁵⁰ A large problem is that many crimes either did not involve the collection of viable DNA samples, or the samples were either lost or destroyed.¹⁵¹

¹⁴¹ ALA. CODE § 29-2-151 (2022); LA. STAT. ANN. § 572:1 (2023); N.C. GEN. STAT. § 15A-1462 (2022).

¹⁴² *National Landscape of Compensation*, *supra* note 127.

¹⁴³ MASS. GEN. LAWS ANN. ch. 258D, § 4 (West 2023); VT. STAT. ANN. tit. 13, § 5569 (2022); WASH. REV. CODE ANN. § 4.100.040 (West 2023).

¹⁴⁴ IDAHO CODE § 6-3504 (2022); 705 ILL. COMP. STAT. ANN. 505/8(c) (West 2023); KAN. STAT. ANN. § 60-5004(g) (West 2022); NEV. REV. STAT. ANN. § 41.910 (West 2022).

¹⁴⁵ Montana doesn't even give monetary compensation, just tuition at a Montana school. Montana is the worst—unequivocally so. MONT. CODE ANN. § 53-1-214 (West 2022).

¹⁴⁶ See N.J. STAT. ANN. § 52:4C-3(d) (West 2023); see also, e.g., IOWA CODE ANN. § 663.A.1(1)(b) (West 2023); MASS. GEN. LAWS ANN. ch. 258D, § 1(C)(iii) (West 2023); OHIO REV. CODE ANN. § 2743.48(A)(2) (West 2023); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(b) (West 2023); 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/XC3H-M2EQ].

¹⁴⁷ See, e.g., HAW. REV. STAT. ANN. § 661B-3(b)(2)-(3) (West 2022); VT. STAT. ANN. tit. 13, § 5574(4) (2022).

¹⁴⁸ *Facts and Figures*, FALSECONFESSIONS.ORG, <https://falseconfessions.org/fact-sheet/> [https://perma.cc/DBC9-YESV] (last visited Jan. 2, 2022).

¹⁴⁹ 12 R.I. GEN. LAWS § 12-33-2 (2022). But see EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 225 DNA EXONERATION CASES (2010) (detailing cases where exonerees' judgments were solely vacated due to ineffective assistance of counsel claims).

¹⁵⁰ MO. ANN. STAT. § 650.058 (West 2023); MONT. CODE ANN. § 53-1-214 (West 2022); see *Exonerations by Year: DNA vs. Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> [https://perma.cc/D54T-5B EZ] (current as of Sept. 25, 2023). Note: in 2023, both states admitted they needed to improve their wrongful conviction laws. Missouri proposed increasing its daily amount and annual cap and removing the DNA-only requirement. Montana proposed actual compensation. Both bills passed house and senate, but both governors, Gianforte (R-MT) and Parson (R-MO) vetoed them.

¹⁵¹ Clare Gilbert, *When the State Loses or Destroys Key Evidence...*, GA INNOCENCE PROJECT (Aug. 22, 2010), <https://www.georgiainnocenceproject.org/general/when-the-state-loses-or-destroys-key-evidence-2/#:~:text=The%20loss%20or%20destruction%20of,incentivized%20witnesses%2C%20and%20circumstantial%20evidence> [https://perma.cc/3QFU-J39F].

Some states put pressure on officials to make a speedy decision.¹⁵² Some give input on expungement.¹⁵³ Most do not seem to acknowledge speed or expungement at all. Some states give social benefits, acknowledging the due hardships faced by exonerees.¹⁵⁴ Many states provide nothing. Most states allow civil suits. Only a few do not.¹⁵⁵ Many allow for the family to benefit, even fewer allowing for the estate to make a claim of innocence after death.¹⁵⁶

Of course, there are also 275 exonerees so far who could not receive compensation at all because they were convicted in: Alaska, Arkansas, Arizona, Delaware,¹⁵⁷ Georgia,¹⁵⁸ Kentucky,¹⁵⁹ New Mexico, North Dakota, Pennsylvania,¹⁶⁰ South Carolina,¹⁶¹ South Dakota, and Wyoming—all states that do not have compensation laws.¹⁶²

B. Indiana's Law Specifically

This section illustrates the reality of a compensation law from both the perspective of the state and the exoneree. Indiana became the thirty-fifth state to enact a compensation law in 2019.¹⁶³ Indiana, being a recent law, is written simply

¹⁵² See, e.g., ALA. CODE §§ 29-2-158 to 29-2-159 (2022); CAL. PENAL CODE § 4902 (West 2023); CONN. GEN. STAT. ANN. § 54-102uu(d) (West 2022); D.C. CODE § 2-423.02 (2022); FLA. STAT. ANN. § 961-06(3) (West 2023); HAW. REV. STAT. ANN. § 661B-2(b) (West 2022); LA. STAT. ANN. § 572:8(e) (2023); MASS. GEN. LAWS ANN. ch. 258D §§ 2-3 (West 2023); UTAH CODE ANN. § 78B-9-405(3) (West 2022).

¹⁵³ COLO. REV. STAT. ANN. § 13-65-103(7) (2022); KAN. STAT. ANN. § 60-5004(h) (West 2022); 20 ILL. COMP. STAT. ANN. 2630/5.2(b)(8) (West 2023); MICH. COMP. LAWS ANN. § 691.1755(14) (West 2023); MO. ANN. STAT. § 650.058(4) (West 2023); TENN. CODE ANN. § 40-27-109(b) (2022); VT. STAT. ANN. tit. 13, § 5569(d) (2022) (but only for DNA exonerations); WASH. REV. CODE ANN. § 4.100.060(9)(b) (West 2023).

¹⁵⁴ California has bridge housing funding, job training, and provides a license, CAL. PENAL CODE § 3007.05 (West 2023); Colorado gives tuition, finance course, health care, COLO. REV. STAT. ANN. § 13-65-103 (2022); Idaho gives reentry services, IDAHO CODE § 6-3503 (2022); Nevada provides health care, restitution, and housing subsidies; NEV. REV. STAT. ANN. § 41.950 (West 2022).

¹⁵⁵ See, e.g., CONN. GEN. STAT. ANN. § 54-102uu(g) (West 2022); FLA. STAT. ANN. § 961.06(01) (West 2023); HAW. REV. STAT. ANN. § 661B-6 (West 2022); IND. CODE ANN. § 5-2-23-4 (West 2022).

¹⁵⁶ ALA. CODE §§ 29-2-160 (2022); IDAHO CODE § 6-3502 (2022); MD. CODE ANN., STATE FIN. & PROC. § 10-501(c)(4) (West 2022); MISS. CODE ANN. § 11-44-13 (2022); MO. ANN. STAT. § 650.058 (West 2023); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(c) (West 2022); VT. STAT. ANN. tit. 13, § 5574 (2022); WASH. REV. CODE ANN. § 4.20.046 (West 2023).

¹⁵⁷ But see S.B. 169, 152d Gen. Assemb., Reg. Sess. (Del. 2023) (introduced in June 2023).

¹⁵⁸ S.B. 35, 158th Gen. Assemb., Reg. Sess. (Ga. 2023) (rejected by the Ga. Senate).

¹⁵⁹ But see H.B. 571, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023) (introduced in Feb. 2023).

¹⁶⁰ But see H.B. 1470, 2023-2024 Gen. Assemb., Reg. Sess. (Pa. 2023) (introduced in June 2023).

¹⁶¹ But see H.B. 3546, 125th Gen. Assemb., Reg. Sess. (S.C. 2023) (introduced in Jan. 2023).

¹⁶² That number was calculated referencing NAT'L. REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=ST&SortDir=Asc> [https://perma.cc/N2W4-ZASW] (last visited Dec. 27, 2023) [hereinafter THE REGISTRY].

¹⁶³ Act of July 1, 2019, P.L. 165-2019, 2019 Ind. Acts 1941 (codified as amended at IND. CODE ANN. §§ 5-2-23-1 to 5-2-23-10 (West 2022) (IND. CODE ANN. § 5-2-23-7 has been repealed));

and reads quite basic. It offers no benefits other than the \$50,000 per year incarcerated, which is the national average.¹⁶⁴ Originally, its statute was narrower. In 2017, the debate was between \$25,000 versus \$35,000 a year, and it relied solely on DNA exoneration.¹⁶⁵ Fortunately, Indiana's law became less narrow, but compared to the two statutes passed within the same year,¹⁶⁶ Indiana's offers much less, while the state itself has more exonerees.¹⁶⁷

The law describes itself as follows: if a judge vacates a conviction, that person has two years to apply for compensation.¹⁶⁸ They must be deemed "actually innocent" to get approval.¹⁶⁹ This determination is made by the Criminal Justice Institute (CJI).¹⁷⁰ If approved, they are allotted \$50,000 per year of compensation.¹⁷¹ If compensation is sought, the right to a civil action must be waived.¹⁷² No one can collect it on their behalf or that of their estate.¹⁷³ If the applicant is in prison for another crime, they are ineligible to collect.¹⁷⁴ They are not precluded from receiving services, but services are not offered whatsoever.¹⁷⁵

1. The State's Perspective

There have been thirty-three applications for compensation as of the time of this Note, and only ten have been approved for compensation.¹⁷⁶ The average

Indiana is Now One of 35 States to Pay Exonerees For Wrongful Incarceration, INNOCENCE PROJECT (June 24, 2019), <https://innocenceproject.org/new-law-to-provide-wrongfully-convicted-hoosiers-with-compensation/> [https://perma.cc/E5PT-NPUM].

¹⁶⁴ Jamiles Lartey, *"It's Crushing": The Lasting Trauma of the Exonerated*, THE MARSHALL PROJECT (July 30, 2022 12:00 PM), <https://www.themarshallproject.org/2022/07/30/its-crushing-the-lasting-trauma-of-the-exonerated> [https://perma.cc/6KX2-XAKC].

¹⁶⁵ Scott Rodd, *What Do States Owe People Who Are Wrongfully Convicted?*, STATELINE (Mar. 14, 2017, 12:00 AM), <https://stateline.org/2017/03/14/what-do-states-owe-people-who-are-wrongfully-convicted/> [https://perma.cc/JN7L-FVW6].

¹⁶⁶ KAN. STAT. ANN. § 60-5004(e) (West 2022) (offering \$65,000 per incarcerated year plus \$25,000 a year on parole); NEV. REV. STAT. ANN. § 41.950(2)(a) (West 2022) (offering \$50,000 per year for 1–10 years in prison, \$75,000 per year for 11–20 years in prison, and \$100,000 per year for over 20 years in prison, plus \$25,000 for every year on parole).

¹⁶⁷ As of this Note's publication, Indiana has forty-seven exonerees, whereas Kansas has twenty, and Nevada has twenty-two. Numbers calculated using THE REGISTRY, *supra* note 162.

¹⁶⁸ IND. CODE ANN. §§ 5-2-23-8(a)(2) (West 2022).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* § 5-2-23-8(b).

¹⁷¹ *Id.* § 5-2-23-3.

¹⁷² *Id.* § 5-2-23-4.

¹⁷³ *Id.* § 5-23-2-8(f)(1)–(4).

¹⁷⁴ *Id.* § 5-2-23-8(e)(4).

¹⁷⁵ *Id.* § 5-2-23-6.

¹⁷⁶ Leslie Bonilla Muñiz, *Indiana Has Paid Out \$1 Million in Restitution to Eight Wrongfully Incarcerated People*, IN. CAP. CHRON. (Aug. 16, 2023, 6:31 AM), <https://indianacapitalchronicle.com/2023/08/16/indiana-has-paid-out-1-million-in-restitution-to-eight-wrongfully-incarcerated-people/> [https://perma.cc/5RTR-AGKA]. The highest payout was given to Kristine Bunch. *Id.* See also *infra* section II.B.2.

amount of time an exoneree must wait to get a decision is anywhere from six to eighteen months. It can sometimes be longer. There are a few reasons for this.¹⁷⁷

First, “actual innocence” according to the statute, is not the only reason a court may render a “vacated judgment.” Judgments can be vacated for several reasons that are not necessarily because the accused is actually innocent. For this assessment of “actual innocence,” the applicant must go through a review process akin to that of applying to be represented by an exoneration clinic. This is done through a first-come-first-serve basis. A group of three people, with several other unrelated tasks, must sift through court transcripts, exhibits, motions for post-conviction relief, appellate briefs, judgments, sentencing records, police reports, and any other document related to the entire case. If they leave this process believing the person is innocent by a preponderance of the evidence and the case meets all statutory requirements, they submit a memorandum to a subcommittee of CJI board members for review.¹⁷⁸

The subcommittee consists of five board members: three state judges, the representative of public defenders, and the representative of prosecutors. If they agree with the finding of innocence, it then goes to the entire board.¹⁷⁹

The CJI board consists of sixteen members. Eight are statutorily appointed by the positions they hold, the other eight are specially appointed by the governor.¹⁸⁰ These positions are that of either law enforcement or the legal profession. The board meets quarterly, and the applications are reviewed by a first-come-first-serve basis out of fairness. There must be a majority vote for the applicant to become approved, at which point it can take up to six weeks for the first installment to go into their bank account.¹⁸¹ This means, assuming everything goes at its fastest pace, an exoneree will be out in the world for almost eight months before they see a dime of compensation. Once that occurs, the check comes every year in exactly twenty-percent increments for five years. The largest delay is that people have a hard time getting every single document the committee asks for.¹⁸² These documents include court dockets, evidence, letters from witnesses or lawyers, certificates, and paperwork showing sentencing and time served. Pro se applicants take the most amount of time.¹⁸³ They often do not appreciate exactly what the committee needs.

2. The Exoneree’s Perspective¹⁸⁴

¹⁷⁷ Zoom interview with Natalie Huffman, General Counsel, Indiana Criminal Justice Institute (Oct. 28, 2022) [hereinafter Huffman interview].

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ At the time of this Note, the governor is Eric Holcomb. The board of trustees is assigned via IND. CODE ANN. § 5-2-6-4 (West 2022); for a list of board members, see also *Board of Trustees*, IND. CRIM. JUST. INST., <https://secure.in.gov/cji/about-icji/> [https://perma.cc/GJ4S-9PY5] (last visited Dec. 27, 2023).

¹⁸¹ Huffman interview, *supra* note 177.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Bunch interview, *supra* note 10 (describing her experience applying for compensation).

Though she was not asked to appear, Kristine Bunch, an Indiana exoneree who had been wrongfully incarcerated for seventeen years for allegations that she started the fire that led to the death of her three-year-old son, was not going to allow another body of strangers make decisions about her life without her present. She scrambled to figure out the hearing date, as the board did not communicate it to her. Bunch is lucky. Unlike many other exonerees, she had the strength and energy to fight fiercely, the resources for an effective lawyer, her younger brother to give her housing and shelter, a gas station that employed her without checking her background, and the knowledge of computer technology. Without those things, which most exonerees do not have, she would not have been able to apply as immediately and effectively. Regardless, she applied in November of 2020, and did not get a hearing until October of 2021.

“They say the petitioner does not have to pay for the application process, but what they don’t say is you have to send those documents in as certified copies. That requires time and money to go to the county clerk’s office and request those dockets.”¹⁸⁵ Another aspect Bunch was unprepared for was relitigating her case.

The original prosecutor’s office was sent notice that Bunch had applied for compensation; they wanted his opinion. He was given ninety days to submit a letter. Eventually, Bunch was given thirty days to submit her materials. She scrambled for everyone who could testify on her behalf. “I felt like I was gathering up my own witnesses. I was preparing, yet again, for a trial.”¹⁸⁶

At the hearing, three dissenters, whose identities and qualifications unknown to Bunch, tirelessly expressed that she was probably guilty despite the evidence establishing—for almost a decade—that the ATF chemist at her trial falsified her report. She was not allowed to speak, nor could her lawyer. Bunch and her lawyer held hands as she wept—it reminded Bunch of the day a jury stole seventeen years of her life. Chris Naylor, of the Indiana Prosecuting Attorney’s Counsel, and chief dissenter, had mainly this to say: “The evidence of guilt, *albeit circumstantial*, was strong.”¹⁸⁷

The majority, led by a superior court judge, agreed with the previous panels, and the dozens of attorneys who had worked on Bunch’s case for a decade—there was no evidence of guilt.

Bunch was exonerated in 2012, seven years before Indiana’s statute came into effect. Winning compensation was a relief to her. She felt seen as an innocent person for the first time. Clearly, compensation statutes can do so much good, not just for the economy, but for morale as well. She attempted to file a civil suit and was first offered one thousand dollars in mediation. She did not progress with the suit because she would have had the burden of proving that the man who purposely imprisoned her had acted with malice. A tough thing considering he had already died. She decided to give up on the advice of her attorneys. Had she

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Sandra Chapman, *Legal Panel Approves Payouts for Wrongfully Convicted*, WTHR, <https://www.wthr.com/article/news/local/legal-panel-approves-payouts-for-wrongfully-convicted/531-7887849e-b852-48c8-ad4e-dea715521ea8> [<https://perma.cc/9GF2-VNXN>] (Oct. 19, 2020 2:43 AM) (emphasis added).

gone forward and failed, she would have been liable to the state for \$200,000. This will never sit right with her.¹⁸⁸

This shows two things: civil suits and compensation statutes serve different purposes, each with varying levels of restitution, and vindication. Both are needed to help make the exoneree feel whole. The choice of which to pursue should be theirs; the government has dictated enough.¹⁸⁹

Bunch used her first check to repay debts incurred in prison and to get check-ups she desperately needed, as she was not given any medical attention while incarcerated. The next three checks, she says, will go towards her retirement, as she had never been able to save. This means that she must keep working to maintain her life at present, which she is fortunate enough to be able to do. Because her case is well known, and she is a fighter by nature, Bunch has been able to find work. At the time of this Note, she is unaware if her record has ever been expunged.¹⁹⁰

When I asked Bunch what her dreams were before prison, she said that at the time, she was close to getting her welder's certificate so she could make good money and take care of her sons. She loves being a mother. She missed out on raising her children. Not only was one son stolen from her in a fire that she did not start, but upon reentry, she realized her fertile years were also stolen from her.¹⁹¹

The three dissenters, who sat in the same room as Bunch—acting as if she was not there—elected not to compensate her for that.

III. THE GOVERNMENT'S BURDEN

Though it seems reasonable to assume, regardless of religious or political belief, that anyone would support reparations for the wrongfully convicted, the (in)actions of many state governments are telling. When seeking compensation, the burden is on the exoneree to show they were wronged. The burden is on the exoneree to show employers they are not criminals. The burden is on the exoneree to live their lives making up for a mistake made by the very authority chosen to protect them. The burden is on the exoneree to overcome the obstacles of stigma, sovereign immunity, qualified immunity, mental and physical ailments, poverty, and all else. Burden shifting seems to be both the cause *and* the effect of wrongful conviction.

The two primary arguments against compensation statutes are: cost to the state and potentially letting criminals free. The latter is taken care of by the “actual innocence” standard adopted by states through statute. The former has

¹⁸⁸ Bunch interview, *supra* note 10.

¹⁸⁹ See generally Megan Fernandez, *When Will Kristine Bunch Be Free?*, INDIANAPOLIS MONTHLY (Dec. 23, 2015), <https://www.indianapolismonthly.com/longform/when-will-kristine-bunch-be-free> [<https://perma.cc/3ZYX-LR9M>] (for more information on Bunch's story).

¹⁹⁰ Bunch interview, *supra* note 10.

¹⁹¹ *Id.*

been proven to be a baseless argument.¹⁹² The majority argument is based in costs, which tends to be the motivation for change.¹⁹³

Considering the deference shown to the lower courts, and the questionable use of the harmless error doctrine, legislation may only be able to control the consequences of frivolous aspects of jurisprudence. The state has an interest in finality.¹⁹⁴ But until justice is served, finality is simply an illusion.

A. Civic & Constitutional Duties

*The claimant has been humiliated, degraded, shamed and suffered a loss of reputation and earnings. For this he must be paid . . . How can a man be repaid who has been branded a murderer and whose only hope is an early death to release him from the sentence erroneously passed on him? For this, any award is bound to be a mere token, but it should compensate as well as the medium allows.*¹⁹⁵

The government not only *should* pay because justice requires, but because it is beneficial. Though an argument could be made that the government did not viciously prosecute an innocent person on purpose, when both parties are innocent, the party that suffers the greater harm should benefit from the party that has the ability to prevent that harm.¹⁹⁶ The least-cost-avoider theory is not unknown to the law. It dates back to Judge Learned Hand's approach in *United States v. Carroll Towing*.¹⁹⁷ Liability must be assigned to the party best able to minimize costs.¹⁹⁸ A regular citizen is not in the situation to best prevent their wrongful conviction; however, the government is. The government has the ability to decide when and whom to prosecute. The government is in the best position to put preventative investigative measures into place.¹⁹⁹ The government has the authority to immediately expunge a record, admit when a mistake has been made, and pay for unconstitutional injustices.²⁰⁰ When they do not, the only reason the public can ascertain is that the government simply does not want to. If that were perceived as the case, it could also follow that the government is being frivolous with taxpayer money. The underlying goal of the theory is the application of future loss prevention.²⁰¹

¹⁹² Lauren C. Boucher, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069, 1098 (2007).

¹⁹³ Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 713–16 (2004).

¹⁹⁴ Edwards, *supra* note 88, at 1179.

¹⁹⁵ *Hoffner v. State*, 142 N.Y.S.2d 630, 631–32 (N.Y. Ct. Cl. 1955).

¹⁹⁶ Boucher, *supra* note 192, at 1087–88.

¹⁹⁷ 159 F.2d 169 (2d Cir. 1947).

¹⁹⁸ David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 ARIZ. L. REV. 357, 365 (1994).

¹⁹⁹ Boucher, *supra* note 192, at 1102–03 (explaining that since the government has control over lineup procedures, crime lab standards, and public defender reforms, it thus is in the best position to prevent erroneous convictions).

²⁰⁰ *Id.* at 1088 (illustrating least cost avoider theory in relation to wrongful convictions).

²⁰¹ *Id.* at 1089.

Americans have paid well over \$4 billion in keeping the wrongfully convicted behind bars.²⁰² With the average length of incarceration lasting around nine years, the lost salaries of those who have been incarcerated have been calculated to be over \$700 million.²⁰³ That's almost a billion dollars that could have been spent paying taxes, investing in stocks, contributing to social security, supporting families, and paying into consumer markets. America is hindering its own economic energy. Not only are people who end up in prison disproportionately poor, the median felony bail bond is the equivalent of eight months' rent for a typical defendant.²⁰⁴ What results is lengthy pretrial detention, for which exonerees are often not compensated.²⁰⁵ District attorney's offices may use county funds for prosecuting crimes, but they worry not about the resulting incarceration, as the taxpayer will pick up the tab.²⁰⁶ Social Security is affected, and those who did not get to pay into it will be working until they die, which ultimately means one way or another, the state is going to take care of them once they are unable to work.

Data has shown that anything less than \$500,000 in compensation has a much higher likelihood of leading to post-conviction offending because of the aforementioned reentry barriers and research supporting the premise that criminal conduct is affected by perceptions of systematic procedural fairness.²⁰⁷

Upon institutionalization, the incarcerated person is literally and figuratively stripped of their identity and forced to maintain the identity of the institution.²⁰⁸ Thinking in terms of consumerism, customer retention is more likely to occur in situations where the customer feels failed by a service they paid for when an apology and some sort of compensation is given. Likewise, when an exoneree's self-identity has been violated by the justice system, compensation can restore both their self-value and their community value.²⁰⁹

Even if those would cede that the government *should* pay, the premise would rely on if they *could* pay. A simple "yes" is easily inferable considering the federal revenues deposited into the Crime Victims Fund is over \$1.8 billion as of December 2022.²¹⁰ Exonerees are also typically paid in installments, and the rush

²⁰² Kristin Myers, *US Taxpayers Spent Almost \$1 Billion Incarcerating Innocent Black People*, YAHOO! FIN. (Nov. 20, 2019), <https://finance.yahoo.com/news/us-taxpayers-spent-over-4-billion-incarcerating-innocent-people-184439282.html> [https://perma.cc/CX6T-B9Z3].

²⁰³ *Id.*

²⁰⁴ Sawyer & Wagner, *supra* note 104 ("Poverty is not only a predictor of incarceration; it is also frequently the outcome, as a criminal record and time spent in prison destroys wealth, creates debt, and decimates job opportunities.").

²⁰⁵ See, e.g., IND. CODE ANN. § 5-2-23-3(b) (West 2022).

²⁰⁶ Daniel S. Medwed, *The Real Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 154 (2004).

²⁰⁷ Mandery et al., *supra* note 101, at 576.

²⁰⁸ Campbell & Denov, *supra* note 71; see also ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 46–48 (Anchor Books & Doubleday & Co. eds., 1961) (discussing this concept known as the "mortification process[es]").

²⁰⁹ Okimoto, *supra* note 8, at 1271.

²¹⁰ Exonerees are victims too. See also Office for Victims of Crime, *Crime Victims Fund*, (2020), <https://ovc.ojp.gov/about/crime-victims-fund> [https://perma.cc/MP9S-MEDE] (last visited Jan. 20, 2022); see, e.g., CAL. PENAL CODE § 4904(a) (West 2023); UTAH CODE ANN. § 78B-9-405(3) (West 2022) (states that utilize this fund for compensation).

to collect would likely not change if the barriers are not lowered. It has also been shown that the better the compensation, the less likely a civil suit would be filed.²¹¹

Because life expectancy decreases inside prison, the cost of providing state health care to a younger exoneree upon release, may be cheaper than paying for their incarceration down the line.²¹²

Immediate bridge funding would also save money because the amount given upon release is nominal in comparison to the collateral effects caused by an exoneree without instant resources. A recent study of people on the brink of homelessness in the Midwest showed that by immediately giving them one month's worth of living expenses (\$1000 in this case), the vast majority of them prevented the pitfalls of homelessness for at least two years.²¹³

Because of the uptick of incarcerated people in America over the last forty years, states have found ways to help pay incarceration expenses: by forcing them on those charged with crimes.²¹⁴ These debts need to be accounted for by legislation for true compensation to be effective.²¹⁵

Additionally, compensation statutes are still legislation. State legislation is a product of its voters. Compensation laws are popular, as is the notion that the wrongfully convicted have suffered a grave injustice.²¹⁶ In the last few decades, exposure to wrongful conviction has become popular in the media. The media as a whole has had a progressive effect on legislation.²¹⁷ This is unlikely to go away any time soon. Considering the state is in a better position to prevent erroneous convictions, it is their responsibility to do so. If the state accepts that responsibility, it saves money for the state and its people which, therefore, invites less scrutiny of its government actors.²¹⁸

States owe constitutional duties to their citizens. Forcing state governments to pay compensation prevents them from overusing their takings authority.²¹⁹ Depriving an individual of their right to income is a government taking, not only

²¹¹ See, e.g., Strom, *supra* note 108 (describing that Texas's law is satisfactory enough that exonerees have not chosen a civil suit in lieu of compensation).

²¹² Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 502, 544 (2011).

²¹³ David Shultz, *A Bit of Cash Can Keep Someone Off the Streets For 2 Years or More*, SCIENCE (Aug. 11, 2016), <https://www.science.org/content/article/bit-cash-can-keep-someone-streets-2-years-or-more> [<https://perma.cc/7B52-M4UW>].

²¹⁴ See Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNON CTR. FOR JUST. (July 31, 2014), <https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate> [<https://perma.cc/2L2R-MQTB>].

²¹⁵ See, e.g., COLO. REV. STAT. ANN. § 13-65-103 (2022); D.C. CODE § 2-423.02 (2022); TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West 2022); WASH. REV. CODE ANN. § 4.100.060(5)(c) (West 2023) (releasing exonerees from debt). But see also MICH. COMP. LAWS ANN. § 691.1755(11) (West 2023), and OHIO REV. CODE ANN. § 2743.48(F)(3) (West 2023) (deducting from an exoneree's compensation outstanding debts).

²¹⁶ Bernhard, *supra* note 193, at 711. But see also Delvac, *supra* note 21, at 984.

²¹⁷ Bernhard, *supra* note 193, at 711–12.

²¹⁸ Boucher, *supra* note 192, at 1104.

²¹⁹ Daryl J. Levinson, *Making the Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 349 (2000) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 58 (Little, Brown & Co. 4th ed. 1992)).

because of the lack of the individual's free choice in doing so, but because of the government's use of their imprisonment for a benefit.²²⁰ In support of the original 1939 federal bill acknowledging wrongful conviction compensation, one proponent analogized the duty of compensation to one of government necessity, for the same reasons offered for compensating in cases of eminent domain.²²¹ Even if one does not categorize labor as property, the vast majority of the wrongfully convicted lose their assets when they are imprisoned.²²²

The Thirteenth Amendment allows for servitude when incarcerated.²²³ If incarceration is not limited to those who actually commit a crime, does a constitutional ban on slavery truly have effect? "Slavery" may sound like hyperbole, but it was not so for Clyde Charles: a Black man, wrongfully convicted of rape, who picked who picked cotton in the fields of Angola, Louisiana for eighteen years.²²⁴

"Involuntary confinement is the most serious deprivation of liberty that a society" can impose on an individual.²²⁵ The psychological and physical effects of incarceration are, at face value, akin to a human experiment. A common coping mechanism, especially among those who have never committed a crime or been to prison, is withdrawal.²²⁶ The shock and horror of the prison environment causes them to segregate themselves. Often, by withdrawing or consistently maintaining their innocence, prison guards classify them as unrepentant, unwilling to adapt, and therefore hostile. This leads them to maintain maximum-security status, and denies them reentry eligibility, family visitation, or freedoms other prisoners may enjoy.²²⁷ This isolation can often lead to suicidal ideation.²²⁸ This could surely be classified as a violation of the Eighth Amendment.²²⁹

Any argument that the harm of sending the occasional innocent person to prison is an acceptable tradeoff for getting it right more often directly contradicts our constitutional scheme—one designed to put the burden and the error of risk on the government.²³⁰ There are several rights within that serve as safety nets

²²⁰ Howard S. Master, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 141–44 (2004).

²²¹ Act of May 24, 1938, ch. 266, 52 Stat. 438; Jeffery S. Gutman, *Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes*, 69 CLEV. ST. L. REV. 219, 229 (2021) (quoting Dean John H. Wigmore, "To deprive a man of liberty, put him to heavy expense in defending himself, and to cut off his power to earn a living, perhaps also to exact a money fine—these are sacrifices which the state imposes on him for the public purpose of punishing crime.").

²²² *Frontline: Burden of Innocence: Frequently Asked Questions*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/faqsreal.html> [https://perma.cc/2LAW-N5XN] (last visited Nov. 29, 2022).

²²³ U.S. CONST. amend. XIII; see also *United States v. Reynolds*, 235 U.S. 133 (1914); *Marchese v. United States*, 453 F.2d 1268 (Ct. Cl. 1972).

²²⁴ Master, *supra* note 220, at 103.

²²⁵ Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968).

²²⁶ Campbell & Denov, *supra* note 71, at 148–50.

²²⁷ *Id.* at 152–53.

²²⁸ *Id.* at 148–49.

²²⁹ U.S. CONST. amend. VIII.

²³⁰ Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 135 (2008); Alexander Volokh,

for criminal defendants: the right to counsel; the right not to testify or respond to questioning; speedy trials; confronting witnesses; and protections against interrogations, intrusions, and adversarial coercion all make it clear that the Framers found it imperative that the innocent not be convicted.²³¹ For these reasons, it is a greater violation of the Constitution to convict the innocent than fail to imprison the guilty.²³²

B. Moral Duties

*By imposing financial liability upon the State, recognition is given to a proposition that would seem to be self-evident, namely that it is the State's obligation, and no one else's, to do what justice and morality demand when an innocent person is convicted of a crime he did not commit.*²³³

The financial cost of compensation comes second to the political cost of having taxpayers bail out their representatives in these cases. And votes are more important to government actors than money.²³⁴ Almost everyone involved in a wrongful conviction is elected, and they are all protected by some form of immunity.²³⁵ Though as of 2020, prosecutorial misconduct has been the cause of fifty-four percent of wrongful convictions to date, only *two* prosecutors have ever received jail time for purposely rendering wrongful convictions; one spent four days in jail, the other spent one. Additionally, two prosecutors have been fired, five have been demoted, and three have been disbarred.²³⁶ In fact, the only actors to lose their jobs in malicious prosecution suits have been police officers—who were guilty of misconduct in thirty-four percent of cases.²³⁷ And even then, that's rare. We as a society, cannot turn a blind eye.

Guilty Men, 146 U. PA. L. REV. 173, 198 (1997) (describing the history of the constitutional scheme valuing presumption of innocence); *see also In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“[I]t is far worse to convict an innocent man than to let a guilty man go free.”). Even the common law upon which the Constitution is based imprisoned those guilty of wrongful prosecution. F. POLLOCK & F.W. MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 564 (2d ed. 1968).

²³¹ U.S. CONST. amends. IV–VI.

²³² Findley, *supra* note 230, at 135–36.

²³³ *Baba-Ali v. State*, 878 N.Y.S.2d 555, 567 (N.Y. Ct. Cl. 2009), *aff’d in part, rev’d in part*, 907 N.Y.S.2d 432 (App. Div. 2010).

²³⁴ Levinson, *supra* note 219, at 420.

²³⁵ Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 704 (1987) (“In 1976 . . . the Supreme Court extended to prosecutors similar immunity from suits brought against them under [42 U.S.C. § 1983] This decision has eliminated potential civil liability as a deterrent.”).

²³⁶ Samuel R. Gross et al., *Government Misconduct and Convicting the Innocent*, NAT’L REGISTRY OF EXONERATIONS 120 (Sept. 1, 2020), https://www.law.umich.edu/special/exonerations/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [https://perma.cc/QE9G-QP8G].

²³⁷ *Government Misconduct Cause of Most Wrongful Convictions*, UCI SCH. OF SOC. ECOLOGY (Sept. 30, 2020), <https://socialecology.uci.edu/news/government-misconduct-cause-most-wrongful-convictions> [https://perma.cc/VPK9-W7QS].

Official misconduct has occurred at every level and stage of a criminal investigation.²³⁸ Though the exclusionary rule acts as a deterrent for police officers to not act in bad faith, there is nothing to deter prosecutors from engaging in *Brady* violations; they are rarely punished for their actions.²³⁹ The Supreme Court has ruled that prosecutors get the same “good-faith deference” as policemen, yet punishing them—even for acts of misconduct—is still worse for our system.²⁴⁰ Prosecutors enjoy absolute immunity, are seldom sanctioned, and typically refuse to prosecute their colleagues.²⁴¹ If we continue to pretend that sanctions and model rules are actual deterrence (they are not), we must make up for a willing deprivation of citizens’ lives and liberties.

Regardless, even in situations where it was an innocent mistake on behalf of the government, there should be a justifiable remedy.²⁴² Since a civil suit would not be applicable, there has to be a legislative alternative that would promise comparable relief. Though a government purposely putting away an innocent life seems more egregious than doing so by accident, the injustice is not so polarizing as to fairly make the rewards all that different.

In my work with exonerees, it often seems as if they are the ones doing most of the work to effect change. In the case of California exoneree, Obie Anthony, he used his civil rights award to start a campaign enacting laws for reentry benefits in California.²⁴³ It should not be on exonerees alone. Family

²³⁸ Mandery et al., *supra* note 101, at 581 n.113 (“Common forms of misconduct by law enforcement officials include: employing suggestion when conducting identification procedures, coercing false confessions, lying or intentionally misleading jurors about their observations, failing to turn over exculpatory evidence to prosecutors, and providing incentives to secure unreliable evidence from informants. Common forms of misconduct by prosecutors include: withholding exculpatory evidence from the defense; deliberately mishandling, mistreating or destroying evidence; allowing witnesses they know or should know are not truthful to testify; pressuring defense witnesses not to testify; relying on fraudulent forensic experts; and making misleading arguments that overstate the probative value of testimony.”).

²³⁹ Rosen, *supra* note 235, at 731–32 (“Effectively insulated from disciplinary punishment and immune from civil suit, a prosecutor contemplating *Brady*-type misconduct knows that the only possible legal consequence of presenting false evidence or suppressing exculpatory evidence is that the defendant may be fortunate enough to discover [it] and file for post-conviction relief. Even if this does occur, the defendant’s only hope, as this prosecutor knows, is for a court retrospectively to decide that the evidence is material enough to warrant a new trial. The prosecutor can take added comfort in the development of strict materiality standards and from the general trend towards restricting post-conviction relief in criminal cases.”).

²⁴⁰ *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (“The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to §1983 liability. . . . [T]his immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. *But the alternative of qualifying a prosecutor’s immunity would disserve the broader public interest.*”) (emphasis added). *But see* Mostaghel, *supra* note 212, at 531–33 (explaining that moral hazards are created specifically by overlooking wrongdoing because it incentivizes corruption and thus hurts the community it’s supposed to serve).

²⁴¹ Catherine Ferguson-Gilbert, *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 (2001).

²⁴² Lopez, *supra* note 107, at 704–05.

²⁴³ Douglas Oakley, *Healing the Trauma of Wrongful Conviction and Imprisonment*, KAISER PERMANENTE (Oct. 5, 2022), <https://lookinside.kaiserpermanente.org/healing-the-trauma-of->

members of both victims and exonerees, state officials that have done their jobs correctly, and other citizens who live in paranoia that this could one day happen to them, all deserve the comfort of a competent, just government. There is something terribly wrong with our justice system. Until those perpetrating a large portion of this issue are held liable, change will not truly exist. A law that helps squash the negative effects of collateral consequences, restores the injustices felt by all, and deters bad actors from repeating their malfeasance is a law worth having. A law that mends the best pieces from existing legislation to form a remedy that gives both expungement and compensation. A law that puts the exoneree first. A law that gives justice to all.

IV. A MODEL COMPENSATION LAW: RESTITUTION FOR WRONGFULLY INCARCERATED PERSONS²⁴⁴

A. Who Can Apply, To Whom They Apply, & The Process

To start, the *tone* of the statute should change. First, it should be remorseful. Acknowledging legislative intent and speediness is important. Acknowledging how and why the state must prioritize these cases shows that the state cares about righting a wrong and improving itself.²⁴⁵ The statute should also clearly describe the process. It must make sense to the exoneree, and it must be thorough. That way, they understand what they must do from when they petition

wrongful-conviction-and-imprisonment/ [https://perma.cc/57QC-R7K9] (describing some of the enacted benefits: a bridge fund, four years of housing costs, job training, mental health services, food program access, and free tuition); *Obie Anthony*, EXONERATED NATION, <https://exoneratednation.org/obie-anthony/#:~:text=Obie%20was%20instrumental%20in%20the,training%2C%20and%20mental%20health%20services> [https://perma.cc/CD77-S5RM] (last visited Aug. 15, 2023); AB 672, 2015-2016 Gen. Sess. (Ca. 2015) (codified as amended at CAL. PENAL CODE § 3007.05(i)(2) (West 2023)).

²⁴⁴ Before the statute begins, there should be a notice of legislative intent. This is done in Mississippi, Nebraska, New Jersey, New York, Rhode Island, Virginia, Washington, and West Virginia. Though seemingly insignificant, it adds to the statute a level of acknowledgment and concern that makes it appear as if the state *wants* to right a wrong, as opposed to simply legislating out of obligation; *see, e.g.*, MISS. CODE ANN. § 11-44-1 (2022); NEB. REV. STAT. ANN. § 29-4602 (West 2022); N.J. STAT. ANN. § 52:4C-1 (West 2023); N.Y. CT. CL. ACT LAW § 8-b (McKinney 2023); 12 R.I. GEN. LAWS § 12-33-1 (2022); VA. CODE ANN. § 8.01-195.10.20 (2022); WASH. REV. CODE ANN. § 4.100.010 (West 2023); and W. VA. CODE ANN. § 14-2-13a (West 2022).

²⁴⁵ *See, e.g.*, WASH. REV. CODE ANN. § 4.100.010 (West 2023) (“The legislature recognizes that persons convicted and imprisoned for crimes they did not commit have been uniquely victimized. Having suffered tremendous injustice by being stripped of their lives and liberty, they are forced to endure imprisonment and are later stigmatized as felons. A majority of those wrongly convicted in Washington state have no remedy available under the law for the destruction of their personal lives resulting from errors in our criminal justice system. The legislature intends to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives, and help to address the unique challenges faced by the wrongly convicted after exoneration.”); MISS. CODE ANN. § 11-44-1 (2022) (“The Legislature finds that innocent persons who have been wrongly convicted of felony crimes and subsequently imprisoned have been uniquely victimized, have distinct problems reentering society, and should be compensated. In light of the particular and substantial horror of being imprisoned for a crime one did not commit, the Legislature intends by enactment of the provisions of this chapter that innocent people who are wrongfully convicted be able to receive monetary compensation.”).

in prison to when they get their money. It should also clarify how long it will take. The exoneree should be able to read the statute, understand their rights, and feel as if the state is going to take care of them.

Additionally, the process an exoneree goes through to get compensation *must change*. Typically, the process includes a multi-level evaluation stage that can last years. The very people who put the exoneree in prison get a say in the process. This can be anxiety-inducing, triggering, and humiliating for the exoneree as they must relive their pain just to get compensation.²⁴⁶ Instead of government officials serving as the final arbiters, experts in the field of fair trials and wrongful convictions should be vested with the decision-making power. There should also be an immediacy in how often they meet, as opposed to simply quarterly, as it currently dictates. This immediacy will help the exoneree better integrate and save the state the social costs of failed reentry. Delay can occur when the statute does not force deadlines on the process.²⁴⁷ We need to make immediacy and mandatory provisions written into the statute.²⁴⁸

It also acknowledges the rights of co-defendants and victims. In many states, notifying the victim is a part of the process, however, in this case it would not be for permission, but for their safety as well as that of the exoneree. Additionally, recording the proceedings is important to preserve what occurs for a civil trial and for an appeal. An inquiry within thirty days and a decision in forty-five days sets for everyone an expectation that serves as a clear guideline so that immediacy is not only required but specified. I propose that instead of relitigating, upon the vacation of the sentence, they be issued a certificate of innocence. This certificate acts as an all-in-one ticket. Once this ticket is issued, it is considered binding on subsequent damage claims;²⁴⁹ it triggers the bridge fund, the compensation, the benefits, the expungement, the ending of a nightmare, and the beginning of a new life. It can be sent directly to those in charge of expungement, and those in charge of the money without any more litigation.²⁵⁰ Once a claim is filed, there should be assistance from either legal aid, an innocence clinic, or a department of justice to assist the petitioner in their case so the process can move along faster.²⁵¹

²⁴⁶ Bunch interview, *supra* note 10.

²⁴⁷ Jeffery S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongfully Convicted*, 82 MO. L. REV. 369, 411 (2017).

²⁴⁸ ALA. CODE §§ 29-2-158(b) (2022) (“The committee shall within 90 days of such notification meet to certify the award.”); CAL. PENAL CODE § 4902 (West 2023) (“[T]he Board shall, within 30 days of the presentation of the claim, calculate the compensation . . .”); D.C. CODE § 2-423.02(a) (2022) (“Within 60 days after a petition for compensation is approved, the Director shall compensate . . .”).

²⁴⁹ Gutman, *supra* note 247, at 411 n.232 (explaining the benefits of this binding certificate in helping expedite the process without relitigating and why without it, there are several tricky pitfalls resulting in delay).

²⁵⁰ See, e.g., *id.* at 424 (discussing Illinois process in the automatic transfer of the certificate to their court of claims).

²⁵¹ *Id.* (discussing how Texas does this).

Section 1—The Innocence Commission

- (a) There is established the Innocence Inquiry Commission which shall be an independent commission under the Administrative Office of the Courts for administrative purposes.²⁵² The Commission shall consist of nine voting members as follows:
 - (1) One shall be a superior court judge.
 - (2) One shall be a prosecuting attorney.
 - (3) One shall be a victim advocate
 - (4) One shall be engaged in the practice of criminal defense law.
 - (5) Two shall be public members not in the legal profession.
 - (6) One shall be a legal ethics trial expert.
 - (7) Two shall be the most senior lawyers of the two closest established exoneration clinics.

(1)–(5) may not be from the same county as the original trial.²⁵³ The superior court judge who is appointed shall serve as Chair of the Commission. The Commission shall meet a minimum of once every 6 months and shall also meet whenever necessary to carry out this chapter.²⁵⁴ A majority of the members shall constitute a quorum. All Commission votes shall be by majority vote.
- (b) Members may only serve as long as they hold their respective offices.²⁵⁵
- (c) The state shall apologize.

Section 2—To Whom This Applies

- (a) This chapter applies to a person:
 - (1) sentenced to prison and/or jail as the result of a criminal conviction;
 - (2) who is pardoned by the governor; or
 - (3) who receives a certificate of innocence.
- (b) As used in this chapter, "actually innocent" means, with respect to a particular offense, that a person did not:
 - (1) commit the offense;
 - (2) take part in the offense; or
 - (3) plan, prepare for, or participate in the planning or preparation of; any other criminal act in connection with that offense.
- (c) The state shall apologize.

²⁵² N.C. GEN. STAT. § 15A-1462(a) (2022).

²⁵³ N.C. GEN. STAT. § 15A-1463(a) (2022); (6) and (7) are not a part of the N.C. statute. They are an equitable and unbiased addition based on their specific occupations.

²⁵⁴ See ALA. CODE § 29-2-152(c) (2022). This helps with immediacy.

²⁵⁵ N.C. GEN. STAT. § 15A-1464 (2022); *id.* at § 15A-1466.

Section 3—The Process

- (a) The petitioner shall bring to the Commission a petition for an evidentiary hearing. There will be a formal inquiry within 30 days of the petition. If there is new evidence, the Commission shall hold an evidentiary hearing. Otherwise, an evidentiary hearing is at the discretion of the Commission. A denial of an evidentiary hearing can be appealed.
- (b) At the granting of an evidentiary hearing, the petitioner has the right to counsel. If they are indigent, they shall be appointed counsel.
- (c) Any possible co-defendants shall be notified and have 30 days to decide if they want to join the claim.
- (d) All proceedings of the Commission shall be recorded and transcribed as part of the record. All Commission member votes shall be recorded in the record. Commission records for conclusions of insufficient evidence of actual innocence to merit judicial review shall remain confidential.²⁵⁶
- (e) If a majority, by vote, agrees that the petitioner has shown by preponderance of the evidence they are actually innocent, they shall issue a certificate of innocence.
- (f) The Commission shall use all due diligence to notify immediately the victim of the Commission's conclusion in a case.²⁵⁷
- (g) There will be an automatic no contact order issued for both parties.
- (h) The decision of actual innocence shall be final.²⁵⁸
- (i) Decisions shall be made within 45 days of the submission of the petition.²⁵⁹
- (j) The state shall apologize.

B. The Relief

First, the statute needs to *ensure* an immediate and effective release for each exoneree, and that is done through an immediate bridge fund. Because the incarceration experience is so jarring—and the potential for negative social impact so great—legal advice, social services, expungement, and funds should be made accessible *immediately* so the exoneree can try to avoid the pitfalls of post-conviction offending and exploitation. In the model statute's proposed section 4, the issues of reentry are offset by offering a few immediate services. Virginia's

²⁵⁶ N.C. GEN. STAT. § 15A-1468(e) (2022).

²⁵⁷ N.C. GEN. STAT. § 15A-1468(c) (West 2022). Note: in 2023, Massachusetts proposed this as well as an immediate check for \$5,000 upon release. H.1752, 193d Gen. Ct. (Ma. 2023).

²⁵⁸ Though I believe the prosecution should get absolutely no say in the compensation decision, a tolerable compromise would be the California approach: if the Attorney General dissents to compensation, *they* have the burden to prove clearly and convincingly that the exoneree is not deserving. CAL. PENAL CODE ANN. § 4904(a) (West 2023).

²⁵⁹ D.C. CODE § 2-423.01 (2022).

compensation laws provide good inspiration here.²⁶⁰ If compensation is received, it will be taken from the final payment, and, if not, it is still a worthy investment on behalf of the state. Within five days, the exoneree is met with legal assistance and reentry guidance from an institution that is not law enforcement or the state government. This will help them separate themselves from the wrongdoer for a period of time, allowing them to begin the healing process. It will be given in writing and make things as easy as possible for the exoneree. They will also have access to receiving a birth certificate, a driver's license or state ID, and a housing stipend per Obie's law.²⁶¹

Next, the statute must also *guarantee* more than it currently does in terms of funding and services. The average annual compensation for an exoneree is \$50,000 per year of imprisonment after conviction. Very few statutes provide benefits, reimbursements, compensation for pretrial custody, parole, probation, or time spent as a sex offender—all of which are an inhibition on the freedoms of the individual brought by the conviction. Exonerees were also forced to spend money on their trial, including their exoneration proceedings, and were also likely ordered to give restitution to the victim. Because of the sheer multitude of incarcerated individuals in America, states have taken to charging offenders—regardless of crime severity—several fines and expenses both before and during imprisonment.²⁶² This contributes to the debt the exoneree is faced with upon release.²⁶³ These losses should be accounted for. The largest expense an exoneree typically has upon release is unpaid child support, along with its interest, which has defaulted because of their imprisonment.²⁶⁴ The exoneree has also not paid into Social Security, which means they have no retirement. They also likely do not have retirement savings, nor good credit. What little compensation is given by the state is used to pay off debts they would never have had and save for a future they did not ask for. A fixed amount can provide consistency, but the ability to get case-by-case related benefits dispenses justice.²⁶⁵ What of those who will

²⁶⁰ VA. CODE ANN. § 8.01-195.11(D) (2022) (“Any person who is . . . wrongfully incarcerated . . . shall receive a transition assistance grant of \$15,000 to be paid from the Criminal Fund, which amount shall be deducted from any award received . . . within 30 days of receipt of the written request for . . . disbursement.”).

²⁶¹ AB 672, 2015-2016 Gen. Sess. (Ca. 2015) (codified as amended at CAL. PENAL CODE § 3007.05(i)(2) (West 2023)); see *supra* note 243 and accompanying text.

²⁶² *Explainer: Do Prisoners Really Pay \$249 Per Day?*, HOW TO JUST., <https://howtojustice.org/i-am-getting-released-from-prison/explainer-do-prisoners-really-pay-249-per-day/> [<https://perma.cc/HD2S-AZGD>] (last visited Aug. 8, 2023).

²⁶³ See *Out of Prison and Deep in Debt*, N.Y. TIMES (Oct. 6, 2007), <https://www.nytimes.com/2007/10/06/opinion/06sat1.html> [<https://perma.cc/NZ2G-V2JT>].

²⁶⁴ Hager, *supra* note 89 (“It is . . . up to the father to prove that he is incarcerated, and then to file for the reduction [which] involves navigating a maze of paperwork from prison, usually with no lawyer, irregular access to phones and, in many cases, an eighth-or ninth-grade education [T]he incarcerated dad has no idea his child support is piling up because he isn’t getting the notices. The debt keeps compounding—and federal law prohibits the reduction of child support bills retroactively.”).

²⁶⁵ Gutman, *supra* note 247, at 417 (quoting an observer of Kenneth Feinberg’s determination of 9/11 Compensation damages: “[T]he resultant mix of presumptive scheduling tempered by personal empathy and pecuniary adjustments at the margin was the touchstone to the success of the program.”).

not live for five years? What about those with multiple dependents? I propose lump sum as an option to be determined based on those needs with access to financial literacy courses.²⁶⁶

The statute must also help *reeducate* the exoneree, so they can regain some of their life back. Exonerees have also lost their standing in the working world. If they do not have a degree, they should have access to tuition. Significant time in prison is scientifically proven to lessen one's life expectancy and being wrongfully imprisoned takes a permanent and severe toll on mental health.²⁶⁷ The statute must compensate for this, and the state should provide tuition and permanent physical and mental health care to the exoneree not only because it is most just, but because it helps mitigate the social costs. Some statutes call these "loss of life" funds because, in essence, these detriments hinder the quality of the exoneree's life forever.²⁶⁸ It would be for the betterment of society, more economically sound over time, a more effective deterrence of judicial misconduct, and quite frankly, a nod to the retributivism that fuels the very need to punish someone in the first place.²⁶⁹

Section 4—Preliminary Relief

- (a) A claimant shall be entitled to preliminary relief under this section upon an initial showing that there is a substantial likelihood of success on the merits of the case.²⁷⁰
- (b) Within 5 business days after the release of a person from incarceration, the Superior Court shall provide information to the claimant, in writing, that includes guidance on how to obtain compensation and a list of nonprofit advocacy groups that assist individuals who have been wrongfully convicted and imprisoned.²⁷¹ It will also include information regarding social, health, financial, and legal services; transition programs; and substance abuse treatment.²⁷² The claimant shall receive a transition assistance grant of \$15,000 which amount shall be deducted from any award received within 30 days of receipt of the application for compensation.²⁷³

²⁶⁶ Scott, *supra* note 35, at 18 ("Exonerees often have very little experience managing money, and thus they are likely to mispend what they do receive."); *see, e.g.*, Conversation with Marvin Cotton Jr., Michigan exoneree, who was released in 2020 after twenty years of wrongful incarceration. (Oct. 30, 2022) ("I worry about the lump sum because I didn't know what money really was after so long in prison that I would spend it frivolously because I didn't understand its value or meaning.").

²⁶⁷ Chunias & Aufgang, *supra* note 7, at 113.

²⁶⁸ *See, e.g.*, LA. STAT. ANN. § 572:8(H)(2)(c)(3) (2023).

²⁶⁹ Binder & Smith, *supra* 14, at 118; Livermore et al., *supra* 225, at 75–76.

²⁷⁰ MASS. GEN. LAWS ANN. ch. 258D, § 1(G) (West 2023).

²⁷¹ D.C. CODE § 2-423.03 (2022). This helps with all aforementioned collateral consequences and serves as a recognition of them. A nonprofit group is also helpful because it keeps state and law enforcement interaction and control at a minimum.

²⁷² WASH. REV. CODE ANN. § 4.100.060(10) (West 2023).

²⁷³ VA. CODE ANN. § 8.01-195.11(D) (2022). This incentivizes immediate action on the state.

- (c) 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 \$5,000 upon release, to be used for housing, including, but not limited to, hotel costs, mortgage expenses, a down payment, security deposit, or any payment necessary to secure and maintain rental housing or other housing accommodations. The exonerated person shall also be entitled to receive direct payment or reimbursement for reasonable housing costs for a period of not more than 4 years following release from custody.²⁷⁴
- (d) The Department of Corrections shall facilitate the process required to obtain an identification card, a birth certificate, social security number, notary services, assistance with obtaining necessary forms, and correspondence.²⁷⁵
- (e) The state shall apologize.

Section 5—Compensation

- (a) An exonerated person shall receive prorated monetary compensation in an amount of \$85,000 for each year that they were wrongfully incarcerated both before and after trial. Additionally:
 - (1) \$30,000 for each year spent on death row; and
 - (2) \$25,000 for each year served on parole, on probation, or as a registered sex offender after a period of incarceration as a result of the felony of which they have been exonerated and not for any other criminal offense.²⁷⁶
- (b) The court may approve the agreement only if the judge finds that the agreement is in the best interest of the claimant and actuarially equivalent to the lump sum compensation award before taxation. When determining whether the agreement is in the best interest of the claimant, the court must consider the following factors:
 - (1) The age and life expectancy of the claimant;
 - (2) The marital or domestic partnership status of the claimant; and
 - (3) The number and age of the claimant's dependents.²⁷⁷
- (c) If a lump sum is given, the exonerated person is required to complete a personal financial management course.²⁷⁸

²⁷⁴ CAL. PENAL CODE § 3007.05(i)(2) (West 2023).

²⁷⁵ *Id.* at § 3007.05(a)2.

²⁷⁶ COLO. REV. STAT. ANN. § 13-65-103(3)(a) (2022) (amount adjusted).

²⁷⁷ WASH. REV. CODE ANN. § 4.100.060(12) (West 2023). This is important for those who do not have ten years to wait for all of their money.

²⁷⁸ COLO. REV. STAT. ANN. § 13-65-103(f) (2022). In my conversation with exoneree, Marvin Cotton Jr., he said his concern with a lump sum was that being in prison for so long made having a large amount of money dangerous.

- (d) Immediate payment of 20% and thereafter not to exceed 10 years.
- (e) Payments shall be reduced to the extent that the period of incarceration for which the petitioner seeks payment was attributable to a separate and lawful conviction.²⁷⁹
- (f) A person entitled to compensation under this chapter is entitled to standard annuity payments.²⁸⁰ This shall be applied retroactively to any current state exonerees who have received compensation.
- (g) The state shall apologize.

Section 6—Benefits

In addition, the court may award:

- (a) Reasonable attorney's fees, not to exceed \$25,000.²⁸¹
- (b) Medicare in perpetuity unless the claimant opts out. They are entitled to opt back in at any time.²⁸²
- (c) Programs for reentry into the community, counseling services and
 - (1) They may select a relative to receive counseling with the person.
 - (2) Housing assistance in an amount not greater than \$15,000 per year.²⁸³
 - (3) Programs for assistance for financial literacy.²⁸⁴
 - (4) Tuition waivers at state institutions of higher education for the exonerated person and for any children and custodial children of theirs.²⁸⁵
- (d) A court shall not award payment:
 - (1) In an amount greater than \$100,000 in a calendar year.
 - (2) For a length of time that exceeds the period the person was imprisoned or on parole.²⁸⁶

²⁷⁹ UTAH CODE ANN. § 78B-9-405(6)(a) (West 2022).

²⁸⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 103.053 (West 2022). This is to help recuperate from lack of retirement savings while incarcerated. This should be made retroactive to other compensated exonerees.

²⁸¹ NEV. REV. STAT. ANN. § 41.950(2)(a) (West 2022); this is in reference to attorney's fees for the postconviction relief process. This is the only money that can be taxed.

²⁸² I recommend Texas's health care provision giving exonerees the same healthcare as their state employees. TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(d) (West 2022).

²⁸³ This whole section to this point comes from Nevada. An alternative would be California's Obie's Law, CAL. PENAL CODE § 3007.05(i)(2) (West 2023); *see supra* note 243.

²⁸⁴ NEV. REV. STAT. ANN. § 41-950(2)(b)(2)–(6) (West 2022).

²⁸⁵ COLO. REV. STAT. ANN. § 13-65-103(2)(e)(ii)(A)–(B) (2022).

²⁸⁶ NEV. REV. STAT. ANN. § 41.950(6) (West 2022).

- (e) Reimbursement for the amount of any fine, penalty, court costs, or restitution imposed upon and paid by the exonerated person as a result of his or her wrongful conviction or adjudication.²⁸⁷
- (f) Compensation for child support payments owed by the exonerated person.²⁸⁸
- (g) Subsections (b)–(f) of this section shall be applied retroactively to any current state exonerees who have received compensation.
- (h) The state shall apologize.

C. Funding

Section 7—Funding

- (a) The exoneration fund is established for the purpose of carrying out this statute.
 - (1) The fund consists of appropriations from the general assembly with money from [the state’s allotted funds].²⁸⁹
 - (2) The aid will be disbursed within 15 calendar days.²⁹⁰
- (b) If the person dies without leaving a surviving spouse or surviving minor children, the payments shall cease. Upon the death of the claimant, any monthly installments left remaining shall be paid to the claimant’s surviving spouse and surviving minor children in equal portions.²⁹¹
- (c) The state shall apologize.

D. Expungement

The statute needs to address the exoneree’s release and specify the expungement process. Many statutes use the term “sealing,” but that is inadequate; sealed records can always be accessed by law enforcement.²⁹² Further, it is unjust to maintain record of biological samples of an innocent person. The term “destroy” needs to apply to both records and samples. A truly free exoneree should have the option to be restored to the position they were in before wrongful conviction. As already discussed, this needs to happen quickly. Immediate starter

²⁸⁷ COLO. REV. STAT. ANN. § 13-65-103(2)(e)(V) (2022) (“This . . . shall not be interpreted to require the reimbursement of restitution payments by any party to whom the exonerated person made restitution payments as a result of his or her wrongful conviction or adjudication.”).

²⁸⁸ *Id.* § 13-65-103(2)(e)(iii) (2022).

²⁸⁹ I could not dictate the source of the funds nor that they be the same throughout the states. For suggestions and discussions on possible sources, see Mostaghel, *supra* note 212, at 537–44; Schwartz, *supra* note 113.

²⁹⁰ FLA. STAT. ANN. § 961-06(3) (West 2023).

²⁹¹ TENN. CODE ANN. § 9-8-108(a)(7)(C) (West 2022). While it is not as progressive as some states that allow for suing on behalf of the estate, this is a great clause to help with the effects of collateral consequences.

²⁹² *Expungement FAQs*, *supra* note 5.

cash and swift, thorough, *clear* expungement is the only way society can prevent the social costs of reentry failure.

Section 8—Expungement

- (a) Upon entry of a certificate of innocence, the court shall order the associated convictions and arrest records be expunged and purged from all applicable state and federal systems pursuant to this subsection. The court shall enter the expungement order regardless of whether the claimant has prior criminal convictions.
- (b) The order of expungement shall state the:
 - (1) claimant's full name, or name at the time of arrest and conviction;
 - (2) claimant's sex, race, and date of birth;
 - (3) crime for which the claimant was arrested and convicted;
 - (4) date of the claimant's arrest and date of the claimant's conviction;
 - (5) identity of the arresting law enforcement authority and identity of the convicting court.
- (c) The order of expungement shall also direct the State Bureau of Investigation to purge the conviction and arrest information from all applicable state and federal databases. The clerk of the court shall send a certified copy of the order to the State Department of Corrections, Laboratory, and Bureau of Investigations and any other agency that may have a record all of whom should carry out the order after which, each agency shall send confirmation to the court.
- (d) If a certificate of innocence and an order of expungement are entered pursuant to this section, the claimant shall be treated as not having been arrested or convicted of the crime.²⁹³
- (e) Upon entry of a certificate of innocence, the court shall order the expungement and destruction of any associated biological samples submitted to authorities pursuant to this conviction. It shall destroy any profile record, or any lab notes taken in relation to the relevant investigation.
- (f) The expungement process shall take no more than 15 business days from the submission of the certificate of innocence.
- (g) The claimant may move to copy these records before destruction for use as evidence in a civil suit.
- (h) The state shall apologize.

²⁹³ KAN. STAT. ANN. § 60-5004(h) (West 2022); *see also* MINN. STAT. ANN. § 609A.03 subd. 6 (West 2023) (explaining that, in effect, the person is restored to the status they had before the crime occurred).

E. Civil Suit

Furthermore, I strongly propose we *omit* any and all clauses that force exonerees to waive their rights to civil trial. It should not be an either/or situation. This is especially so because civil suits occur in cases where the incarceration is a result of government malfeasance. Though statutes do not *forbid* a civil suit to apply, they do forbid a suit for compensation to be *received*. This means that the exoneree may apply for compensation while the civil suit is pending, but they will not be awarded compensation unless the suit is lost or dismissed. Because results of civil suits often take years, this forces the exoneree to wait even longer for compensation than they would have if they waived their rights, effectively stalling the process. Though the state may see this as a choice, in practice, it is not. I propose that exonerees are given compensation, *and* the right to sue through an offset provision that deducts awards from compensation. This prevents the exoneree from “eating from both sides of the apple,” a common argument from opponents of compensation statutes.²⁹⁴

Section 10—Suing the State

- (a) At the time of the decision of innocence, the Committee must orally inform the claimant and their attorney that, if the grounds exist to do so, they have the right to commence a civil action against the state should they choose.²⁹⁵ This shall not be construed as legal advice.
- (b) If at the time of the judgment the claimant has won a monetary award against the state, the amount of the award in the action or the amount received in the settlement agreement, less any sums paid to attorneys or for costs in litigating the other civil action or obtaining the settlement agreement, shall be deducted from the sum of money to which the claimant is entitled under this section.²⁹⁶
- (c) Though this affects and ceases compensation, it shall not bar the petitioner from their right to collect reimbursements and benefits described in this law.
- (d) Only the certificate of innocence, not the award of compensation can be brought into evidence in the civil suit.²⁹⁷
- (e) The state shall apologize.

²⁹⁴ In response to being told this, Kristine Bunch said she “deserves the whole fucking orchard.” Bunch interview, *supra* note 10.

²⁹⁵ IOWA CODE ANN. § 663A.1(3)(b) (West 2023). Iowa has taken the step in helping the exoneree make an informed choice, which is *exactly* what should be done.

²⁹⁶ KAN. STAT. ANN. § 60-5004(f)(1)–(2) (West 2022). Oregon does this as well. S.B. 1584 §1(9)(a), 81st Leg. Assemb., Reg. Sess. (Or. 2022).

²⁹⁷ The exoneree’s compensation reward should not be factored in when determining § 1983 damages; *see also* COLO. REV. STAT. ANN. §13-65-103(9)(b) (2022) (“A court’s finding that a person is actually innocent and eligible for compensation pursuant to this article shall not be interpreted to limit the person’s ability to pursue an action for damages against an entity that is not an employee, agent, or agency of the state government.”).

CONCLUSION

The variation across our country is unsettling. No fair compensatory system would have such inequality.²⁹⁸ It is my hope that every state adopts this model. It is more so my hope that these injustices stop altogether.

These changes are not only far fairer, but completely possible and realistic as exemplified by other states' legislatures. It could not only inspire states with inadequate or obsolete statutes to improve, but it would promote consistency among the states. Improvement would ultimately lead to less dependency on social welfare, less poverty, less crime, more accountability, increased liberty, a better relationship between the people and their government, and thus a better society in general. It would also be a cost benefit to the state. It could lessen the need for civil suits. It would eventually lead to taking affirmative steps to prosecute with more precision and less misconduct which improves democracy and the judicial system as a whole.

It is as if a man's life has been terminated at one point and then resurrected later; yet with all the intervening traumas, dangers and injuries that will endure, linger and become a permanent part of his life. It is within this set of circumstances that this Court must award damages; stating again that the liberty one so cherishes is absolute and the loss of it a tragedy of incalculable value.²⁹⁹

—Judge Adolph C. Orlando

²⁹⁸ Gutman, *supra* note 247, at 432.

²⁹⁹ *Baba-Ali v. State*, 878 N.Y.S.2d 555, 589–90 (N.Y. Ct. Cl. 2009), *aff'd in part, rev'd in part*, 907 N.Y.S.2d 432 (App. Div. 2010) (quoting *Ferrer v. State of New York*, No. 74308, (N.Y. Ct. Cl. June 13, 1990)).