

WRONGFUL CONVICTIONS: LIFE, LIBERTY, AND THE PURSUIT OF COMPENSATION

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INTRODUCTION

How much money is spending a year in prison worth? Is it worth \$5,000?¹ \$50,000?² Free tuition?³ If someone is wrongfully convicted of a crime in the United States, the compensation for time unjustly served can vary greatly⁴—assuming, however, that the state even provides specific statutory compensation for wrongful convictions.

Currently, thirty-two states,⁵ the District of Columbia,⁶ and the federal government⁷ provide specific statutory means for

¹ See WIS. STAT. ANN. § 775.05 (West 2017).

² 28 U.S.C. § 2513 (2012); ALA. CODE § 29-2-150 (2017); FLA. STAT. ANN. § 961.06 (West 2017); HAW. REV. STAT. § 661B-3(c) (2017); MICH. COMP. LAWS ANN. § 691.1755 (West 2017); MINN. STAT. ANN. § 611.365 (West 2005); MISS. CODE ANN. § 11-44-7 (West 2009); N.J. STAT. ANN. § 52:4C-5 (West 2013); N.C. GEN. STAT. ANN. § 148-84 (West 1997) (between \$20,000-500,000 per year); VT. STAT. ANN. tit. 13, § 5574 (2016) (between \$30,000-60,000 per year).

³ See, e.g., MONT. CODE ANN. § 53-1-214 (2003).

⁴ See WIS. STAT. ANN. § 775.05 (West 2017) (permitting recovery of up to \$5,000 per year of incarceration, capped at \$25,000); see also TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West 2011) (permitting a recovery of \$80,000 per year of incarceration).

⁵ Alabama, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North

compensating those who are wrongfully convicted and subsequently incarcerated. Most of these state statutes have been enacted since 2000, leading to the conclusion that the idea of compensating those who are wrongfully convicted is a growing idea rather than a diminishing one. Yet, eighteen states have not adopted a statutory scheme to compensate victims of wrongful convictions.⁸ These states are not divided on political lines,⁹ or even geographic lines;¹⁰ rather, they are grouped together as a collection of states who are depriving citizens of their life and liberty without recourse.

There are alternate paths by which a victim of wrongful conviction can make a claim against the state for indemnification. One way is to seek restitution by filing a section 1983 civil rights claim against state actors and municipalities who are believed to have created the injustice.¹¹ A section 1983 claim could allow a claimant to bring a lawsuit against a government individual or municipality for deprivation of a constitutional right.¹² However, since the section itself only provides a method for protecting constitutional rights and does not create substantive rights, it is difficult for a claimant to prevail on these claims.¹³ Additionally,

Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. The individual statute citations will be provided intermittently throughout this Comment.

⁶ See D.C. CODE § 2-421 (1981).

⁷ 28 U.S.C. § 2513.

⁸ Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming.

⁹ *State Partisan Composition*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 2, 2018), <http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx#2017> [<https://perma.cc/8VX5-LCRU>].

¹⁰ *Map of the United States of America*, NATIONSONLINE.ORG http://www.nationsonline.org/oneworld/usa_map.htm [<https://perma.cc/A27C-JNN7>] (last visited Mar. 19, 2018).

¹¹ 42 U.S.C. § 1983 (2012); Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 690-91 (2002); Chelsea N. Evans, *A Dime for Your Time: A Case for Compensating the Wrongfully Convicted in South Carolina*, 68 S.C. L. REV. 539 (2017).

¹² Lopez, *supra* note 11, at 691.

¹³ Evans, *supra* note 11, at 557; C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* 156 (1996) ("The other option for these individuals seeking compensation, of course, is through civil litigation, but this can be impractical.").

there is a significant financial burden placed on the claimant in a civil case where the right to an attorney is not present.¹⁴

Second, the victim of the conviction can seek legislative remedies.¹⁵ This requires a claimant to lobby the state legislature to pass a private bill that would pay money to the claimant directly from the state treasury.¹⁶ Although this option seldom results in the payment of damages, it has worked out for some.¹⁷ For instance, a man who spent ten years wrongfully incarcerated lobbied the Virginia General Assembly for damages with success in the amount of \$500,000.¹⁸ However, some state courts have declared that these bills are unconstitutional.¹⁹

Ultimately, these options are available, but not realistic for providing a consistent and reliable path to indemnification from the state. To even further complicate matters, some states that have compensation statutes use language that makes the compensation statute the exclusive remedy for victims of wrongful conviction.²⁰ While this is not an inequitable principle in itself, it becomes questioned when an individual spends twenty years in prison for a crime they didn't commit, only to receive \$20,000.²¹

This Comment is a complete collection of states' wrongful conviction compensation statutes. For each subsection, a critique of jurisdictional statutes will be provided. Finally, for states that

¹⁴ Newton N. Knowles, *Exonerated, But Not Free: The Prolonged Struggle for a Second Chance at a Stolen Life*, 12 HASTINGS RACE & POVERTY L.J. 235, 245 (2015); see also U.S. CONST. amend. VI. In addition, claimants have to face the problem of sovereign immunity where the state must waive its immunity and subject itself to the suit.

¹⁵ Lopez, *supra* note 11, at 698.

¹⁶ *Id.*

¹⁷ Knowles, *supra* note 14, at 249-50 (where a claimant in Connecticut was awarded \$5,000,000 in 2007). *But see* Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 510-11 (2011) (where an Ohio man served three and a half years unjustly and was compensated \$6,967).

¹⁸ Ruth S. Inness, *Assembly Acts as VA.'s Court of Last Resort*, RICHMOND TIMES DISPATCH, Feb. 25, 1996, at A-1.

¹⁹ See, e.g., *Kalisek v. Abramson*, 599 N.W.2d 834, 837-39 (Neb. 1999); see also *Rector v. State*, 495 P.2d 826, 826-27 (Okla. 1972).

²⁰ See, e.g., MISS. CODE ANN. § 11-44-7(4) (West 2009) ("Any claimant who obtains an award under this chapter may not obtain an award by reason of the same subject against the State of Mississippi or a political subdivision thereof under the provisions of the Mississippi Tort Claims Act . . .").

²¹ N.H. REV. STAT. ANN. § 541-B:14 (2017).

have yet to adopt similar legislation, there will be a suggestion of how to implement the statute effectively, while providing ideal statutory schemes for guidance.

The Comment will begin with a short historical background of current compensation statutes in Part I.²² The background section is brief due to Part II serving as a fifty-state survey for compensation statutes. The background section will provide statistics that can be referenced for various arguments throughout the remaining sections.

Part II contains a complete survey of compensation statutes in the United States. Each subheading will address a theme commonly found in the different compensation statutes based on jurisdiction. Within this section, there is a discussion of *Nelson v. Colorado*, decided in 2017 by the Supreme Court, followed by potential outcomes that could result from Justice Ginsburg's opinion.

Part III lays out broad guidelines for how a state can implement a compensation statute and fund it properly. While the intragovernmental mechanisms are not detailed, the general concept of creating a self-sustaining fund is ushered forth.

Part IV provides an ideal statutory framework for states to use when creating or amending its compensation statute. The same subheadings to appear in Part II's survey will be located in Part IV, where new ideas will be presented. Some of the recommendations are modeled after current statutory provisions, but for certain provisions, if there is not an acceptable provision, the proposal will frame the ideal theme that states should adopt.

I. BACKGROUND

Devising a statutory scheme to provide a method for compensation for those wrongfully incarcerated is hardly a new idea. In fact, the earliest compensation statutes were enacted by Wisconsin and California in 1913.²³ To illustrate the growing

²² The term "compensation statutes" will be used throughout instead of the elongated "wrongful conviction compensation statutes."

²³ See WIS. STAT. ANN. § 775.05 (West 2017); Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 370 (2017); *id.* at 439. These statutes were adopted shortly after Edwin Borchard brought light to these issues by lobbying the Senate in 1912. WRONGFUL

trend in adopting specific statutory relief for wrongful convictions, eighteen of these statutes have been adopted since 2000.²⁴ Additionally, the jurisdictions implementing statutes most recently have devised schemes that give higher compensation and caps than their antiquated counterparts.²⁵

Based on a 2015 record of current incarceration statistics by the BJS, there are over 1.3 million prisoners incarcerated in state institutions.²⁶ Of these 1.3 million, over 300,000 of them are incarcerated in states that do not provide specific statutory compensation for wrongful convictions.²⁷ As of 2017, the Innocence Project recognizes 353 successful exonerations through its work alone.²⁸ Collectively, the 353 exonerees spent a total of 4,942 years

CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICA AND EUROPEAN CRIMINAL JUSTICE SYSTEMS 330 (C. Ronald Huff & Martin Killias eds., 2013).

²⁴ ALA. CODE § 29-2-150 (2017); COLO. REV. STAT. § 13-65-101 (2013); CONN. GEN. STAT. § 54-102uu (2016); FLA. STAT. ANN. § 961.02 (West 2017); HAW. REV. STAT. ANN. § 661B-1 (2017); 735 ILL. COMP. STAT. 5/2-702 (2014); LA. STAT. ANN. § 15:572.8 (2012); MASS. GEN. LAWS ANN. ch. 258D, § 1 (West 2004); MICH. COMP. LAWS ANN. § 691.1752 (West 2017); MINN. STAT. ANN. § 590.01 (West 2005); MISS. CODE ANN. § 11-44-1 (West 2009); MO. REV. STAT. § 650.058 (2016); MONT. CODE ANN. § 53-1-214 (2003); NEB. REV. STAT. § 29-4602 (2009); UTAH CODE ANN. § 78B-9-405 (West 2012); VT. STAT. ANN. tit. 13, § 5572 (2016); VA. CODE ANN. § 8.01-195.10 (West 2010); WASH. REV. CODE § 4.100.010 (2013).

²⁵ Compare HAW. REV. STAT. ANN. § 661B-3(c) (2017) (passed in 2015, creating \$50,000 per year of wrongful incarceration, with a maximum of \$150,000 per year of incarceration, with no maximum stated) with WIS. STAT. ANN. § 775.05 (West 2017) (passed in 1913, created a \$5,000 per year of wrongful incarceration, with a maximum of \$25,000 for overall recovery).

²⁶ E. Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, U.S. DEP'T OF JUSTICE 5 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>. [<https://perma.cc/L8UP-86ED>].

²⁷ *Id.* Alaska (5,338); Arizona (42,719); Arkansas (17,707); Delaware (6,654); Georgia (52,193); Idaho (8,052); Indiana (27,355); Kansas (9,857); Kentucky (21,701); Nevada (13,071); New Mexico (7,169); North Dakota (1,795); Oregon (15,245); Pennsylvania (49,858); Rhode Island (3,248); South Carolina (20,929); South Dakota (3,564); Wyoming (2,424).

²⁸ *Exonerate the Innocent*, INNOCENCE PROJECT, <https://www.innocenceproject.org/exonerate> [<https://perma.cc/Q4GS-NFPQ0>] (last visited Apr. 4, 2018); see also Keith A. Findley, *Innocence Found: The New Revolution in American Criminal Justice*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 3, 5 (Sarah Lucy Cooper ed., 2014) ("As of July 2013, the National Registry counted a total of 1,175 known exonerations in America since 1989.").

in prison for crimes they did not commit.²⁹ The average exoneree spends fourteen years in prison before gaining their freedom.³⁰

II. SURVEY OF EXISTING STATUTES AND ANALYSIS OF SHORTCOMINGS

A. Statute of Limitations

The purpose of a statute of limitations is “to require diligent prosecution of known claims”³¹ so as to “promote justice by preventing surprises through the revival of claims that have been . . . lost”³² In the context of compensation statutes,

[t]he competing interests raised by the statute of limitations period are, on the one hand, to protect the state from unduly delayed claims—which both undermine the state’s ability to budget for its expected liabilities and increase the likelihood that relevant evidence is lost or discarded—and, on the other hand, the wrongfully convicted claimant’s need for sufficient time to file suit.³³

Typically, if a state imposes a longer statute of limitations, it is because the restrictions for eligibility requirements are greater.³⁴

1. Statutory Survey

Most of the states that have compensation statutes explicitly list a statute of limitations for the claim to be brought. The most common period of limitations is two years, having been adopted by

²⁹ *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states> [<https://perma.cc/8EN8-5NTH>] (last visited Apr. 4, 2018). The Innocence Project notes the average incarceration for an exoneree is fourteen years. This number was multiplied by the number of Innocence Project reported exonerees to produce this figure.

³⁰ *Id.*

³¹ *Statute of Limitations*, BLACK’S LAW DICTIONARY (10th ed. 2014).

³² *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

³³ 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, 144 (2010).

³⁴ *Id.*

fourteen states: Alabama, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Massachusetts, Minnesota,³⁵ New Jersey, and New York.³⁶ A three-year statute of limitations is also fairly common with six states providing the extra year of leniency: Michigan, Mississippi, New Hampshire, Texas, Vermont, and Washington.³⁷ A few outliers are: 120 days in Wisconsin,³⁸ one year in Tennessee,³⁹ Oklahoma,⁴⁰ the District of Columbia,⁴¹ five years in North Carolina,⁴² six years for claims against the federal government,⁴³ and ten years in Montana.⁴⁴ A few states do not specify a statute of limitations: Maryland, Missouri, Nebraska, Utah, Virginia, and West Virginia.⁴⁵

2. Critique of Existing Statutes

A statute of limitations serves as a procedural mechanism by which claims are prosecuted under time constraints in order to

³⁵ *But see* Reynolds v. State, 888 N.W.2d 125, 133 (Minn. 2016) (holding that the statute of limitations under the compensation statute was unconstitutional as presented in a motion under Minn. R. Crim. P. 27.03, subd. 9). Additionally, the court reasoned that the statute of limitations was unconstitutional as presented because it violated the separation of powers under MINN. CONST. art. III, § 1. *Id.* at 128.

³⁶ ALA. CODE § 29-2-162 (2017); CAL. PENAL CODE § 4901 (West 2016); COLO. REV. STAT. § 13-65-102(b)(1-2) (2013); CONN. GEN. STAT. § 54-102uu (2016); FLA. STAT. ANN. § 961.05 (West 2017); HAW. REV. STAT. ANN. § 661B-4 (2017); 735 ILL. COMP. STAT. 5/2-702 (2014); IOWA CODE § 663A.1 (1997); LA. STAT. ANN. § 15:572.8 (2012); ME. STAT. tit. 14, § 8244 (2017); MASS. GEN. LAWS ANN. ch. 258D, § 8 (West 2004); MINN. STAT. ANN. § 590.01 (West 2005); N.J. STAT. ANN. § 52:4C-4 (2013); N.Y. CT. CL. ACT § 8-B (Consol. 2007).

³⁷ MICH. COMP. LAWS ANN. § 691.1757 (West 2017); MISS. CODE ANN. § 11-44-9 (West 2009); N.H. REV. STAT. ANN. §541-B:14 (2017); TEX. CIV. PRAC. & REM. CODE ANN. §103.003 (West 2011); VT. STAT. ANN. tit. 13, §5576 (2016); WASH. REV. CODE §4.100.090 (2013).

³⁸ WIS. STAT. ANN. §893.80 (West 2009).

³⁹ TENN. CODE ANN. §40-27-108 (West 1982).

⁴⁰ OKLA. STAT. tit. 51, §156 (2003).

⁴¹ D.C. CODE § 12-309 (2001).

⁴² N.C. GEN. STAT. ANN. § 148-84 (West 1997).

⁴³ 28 U.S.C. § 2501 (2012).

⁴⁴ MONT. CODE ANN. § 53-1-214 (2003) (although the state will only provide the tuition assistance for five years within the ten-year period).

⁴⁵ MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis 2017); MO. REV. STAT. § 650.058 (2016); NEB. REV. STAT. ANN. § 29-4602 (LexisNexis 2009); UTAH CODE ANN. § 78B-9-405 (West 2012); VA. CODE ANN. § 8.01-195.10 (West 2010); W. VA. CODE § 14-2-13a (2014).

prevent surprises by reviving stale claims.⁴⁶ However, does justice allow for a one-year statute of limitations when a person has been wrongfully imprisoned by the government established to protect him or her? A one-year statute of limitations in Tennessee is reflective of the general one-year limitation of tort claims for the state,⁴⁷ but this amount of time is simply too short.⁴⁸

For a newly released inmate, there are many struggles that go along with adapting to life outside of prison. In addition to finding employment and housing, the person may want to spend time with the ones that he or she was unjustly kept from for years. Oftentimes filing for compensation under the wrongful conviction statute may not even be a thought until it is too late.

Even more egregious is Wisconsin's compensation statute which provides for a mere 120-day statute of limitations.⁴⁹ Wisconsin allows for three years to bring a claim in a personal injury negligence action.⁵⁰ Additionally, Wisconsin has a two-year statute of limitations for motor vehicle accidents resulting in death.⁵¹ Essentially, Wisconsin allows for a victim of wrongful incarceration only 11% of the time to file a claim, compared to a general negligence action.⁵² This cannot support a notion of fairness considering the state has purposely stripped an individual of their rights and continues to do so by implementing a harsh statute of limitations. Although Wisconsin was among the first states to enact a wrongful conviction compensation statute, it must update its 104-year-old statute. Permitting only a mere four

⁴⁶ See *Statute of Limitations*, BLACK'S LAW DICTIONARY (10th ed. 2014); see also *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

⁴⁷ *Duffer v. Keystops, LLC*, No. M2011-01484-COA-R3-CV, 2012 WL 3104903, at *10 (Tenn. Ct. App. July 31, 2012).

⁴⁸ See *Graugnard v. Capital Area Transit Sys.*, 137 So. 3d 26, 30 (La. Ct. App. 2013); see also LA. CIV. CODE ANN. art. 3492 (1992). Louisiana specifies a general one-year statute of limitations for general negligence actions, but has implemented a two-year limitation for wrongful imprisonment actions under LA. STAT. ANN. § 15:572.8 (2012).

⁴⁹ WIS. STAT. ANN. § 893.82(3) (2016). *But see* 2017 WI A.B. 548, 2 (proposed legislation where the Wisconsin legislature has offered to extend the statute of limitations to three years).

⁵⁰ WIS. STAT. ANN. § 893.54(1m) (2016).

⁵¹ WIS. STAT. ANN. § 893.54(2m) (2016).

⁵² Compare WIS. STAT. ANN. § 893.54(1m) (2016) with WIS. STAT. ANN. § 775.05 (West 2017).

months to bring a compensation claim against the state is truly burdensome and unjust.

Additionally, jurisdictions that do not list a statute of limitations are leaving an unnecessary burden on the claimant and courts to determine how long the claimant has to file.

B. Burden of Proof

“The necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause.”⁵³ Simply put, the burden of proof is necessary because in a lawsuit, somebody has to prove that something happened. In terms of a compensation statute, the claimant always has the burden of proof to prove that they were innocent.⁵⁴

1. Statutory Survey

The two most common standards employed by states for burden of proof requirements are preponderance of the evidence and clear and convincing evidence. Accordingly, six states require the petitioner to prove innocence by a preponderance of the evidence: California, Connecticut, Hawaii, Illinois, Mississippi, and New Hampshire;⁵⁵ and, fifteen states require clear and convincing evidence: Colorado, the District of Columbia, Florida, Iowa, Maine, Massachusetts, Michigan, Nebraska, New Jersey, New York, Utah, Vermont, Washington, West Virginia, and Wisconsin.⁵⁶

⁵³ *Burden of Proof*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵⁴ States differ among the claimant's burden to prove “actual innocence” or “factual innocence” depending on the individual jurisdiction's compensation statute. *See, e.g.*, UTAH CODE ANN. § 78B-9-401.5(2)(a-c) (West 2012) (requiring the claimant to prove “factual innocence”, which means the person did not “engage in the conduct for which the person was [later] convicted; engage in conduct relating to any lesser included offenses of the crime for which the person was convicted; or commit any other felony arising out of or reasonably connected to the facts supporting the indictment or information upon which the person was convicted.”); *see also* WASH. REV. CODE § 4.100.020(2)(a) (2013) (requiring the claimant to prove “actual innocence” which is defined as “not engag[ing] in any illegal conduct alleged in the charging documents.”).

⁵⁵ CAL. PENAL CODE § 4903 (West 2016); CONN. GEN. STAT. § 54-102uu (2016); HAW. REV. STAT. ANN. § 661B-3(a) (2017); 735 ILL. COMP. STAT. 5/2-702 (2014); MISS. CODE ANN. § 11-44-7 (West 2009); N.H. REV. STAT. ANN. § 541-B:14 (2017).

⁵⁶ COLO. REV. STAT. § 13-65-101 (2013); D.C. CODE § 2-422 (1981); FLA. STAT. ANN. § 961.03 (West 2017); IOWA CODE § 663A.1 (1997); ME. STAT. tit. 14, § 8241 (2017);

The remaining twelve statutes do not specify a specific burden of proof requirement: Alabama, Louisiana, Maryland, Minnesota, Missouri, Montana, North Carolina, Ohio, Oklahoma, Tennessee, Texas, and Virginia.⁵⁷

2. Critique of Existing Statutes

The difference in preponderance of the evidence, and clear and convincing evidence is really just semantics. Preponderance of the evidence is somewhere just above 51% certainty, and clear and convincing evidence is between that and the beyond-a-reasonable-doubt standard implemented in criminal trials.⁵⁸

a. Nelson v. Colorado

The most groundbreaking case that analyzes a compensation statute was decided by the Supreme Court in April 2017.⁵⁹ In *Nelson v. Colorado*, the Supreme Court held § 113-65-101 of the Colorado Revised Statutes unconstitutional because it violates due process under the Fourteenth Amendment.⁶⁰ Colorado's statute is modeled like many others—the petitioner holds the burden of proof to show innocence.⁶¹ Specifically, Colorado requires that the petitioner demonstrate actual innocence by clear and convincing evidence.⁶² As Justice Ginsburg points out, “Absent conviction of a

MASS. GEN. LAWS ANN. ch. 258D, § 1 (West 2004); MICH. COMP. LAWS ANN. § 691.1755 (West 2017); NEB. REV. STAT. § 29-4603 (2009); N.J. STAT. ANN. § 52:4C-3 (2013); N.Y. CT. CL. ACT § 8-B (2007); UTAH CODE ANN. § 78B-9-404 (West 2012); VT. STAT. ANN. tit. 13, § 5574 (2016); WASH. REV. CODE § 4.100.060 (2013); W. VA. CODE § 14-2-13a (2014); WIS. STAT. ANN. § 775.05 (West 2017).

⁵⁷ ALA. CODE § 29-2-150 (2017); LA. STAT. ANN. § 15:572.8 (2012); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2017); MINN. STAT. ANN. § 590.01 (West 2005); MO. REV. STAT. § 650.058 (2016); MONT. CODE ANN. § 53-1-214 (2003); N.C. GEN. STAT. ANN. § 148-84 (West 1997); OHIO REV. CODE ANN. § 2743.48 (2013); OKLA. STAT. tit. 51, § 154 (2003); TENN. CODE ANN. § 40-27-109 (West 1982); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (West 2011); VA. CODE ANN. § 8.01-195.10 (West 2010).

⁵⁸ VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 590 (13th ed. 2015).

⁵⁹ *Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

⁶⁰ *Id.*

⁶¹ COLO. REV. STAT. § 13-65-101 (2013); *see, e.g.*, WIS. STAT. ANN. § 775.05(3) (West 2017) (“After hearing the evidence on the petition, the claims board shall find either that the evidence is clear and convincing that the petitioner was innocent of the crime . . . or that the evidence is not clear and convincing . . .”).

⁶² COLO. REV. STAT. § 13-65-101 (2013).

crime, one is presumed innocent. Under the Colorado law . . . the State retains conviction-related assessments unless and until the prevailing defendant . . . proves her innocence by clear and convincing evidence. This scheme, we hold, offends the *Fourteenth Amendment's* guarantee of due process."⁶³

In *Nelson*, two claimants, who were found guilty at trial and subsequently acquitted of all charges, filed a claim in Colorado state court for a repayment of court costs, fees, and restitution.⁶⁴ Both claimants were denied some portion of repayment at the trial court level.⁶⁵ The Colorado Court of Appeals reversed the trial court and acknowledged the claimants' right to seek a refund for all expenses.⁶⁶ The Colorado Supreme Court reversed the Colorado Court of Appeals and held that the Exoneration Act was the exclusive remedy for these claims, and that the Act was constitutionally valid.⁶⁷ The United States Supreme Court granted certiorari.⁶⁸

In its analysis, the Court applied the procedural due process test declared in *Mathews v. Eldridge*.⁶⁹ This balancing test requires the court to examine: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through the procedures used, and (3) the governmental interest at stake.⁷⁰ Essentially, the Court found that the claimants had an interest in recovering the money they paid as a result of their wrongful convictions, and that the government had no interest in keeping the money because it should not have been paid to the government in the first place.⁷¹ Although the Supreme Court focused primarily on the monetary figure that was sought by the petitioner, there may be deeper implications at play.⁷² For example, Justice Ginsburg in her introduction states,

⁶³ *Nelson*, 137 S. Ct. at 1252 (emphasis added).

⁶⁴ *Id.* at 1251 (noting that the claimants chose not to file under Colorado's Compensation for Certain Exonerated Persons statute).

⁶⁵ *Id.*

⁶⁶ *People v. Nelson*, 369 P.3d 625 (Colo. App. 2013).

⁶⁷ *People v. Nelson*, 362 P.3d 1070 (Colo. 2015).

⁶⁸ *Nelson v. Colorado*, 137 S. Ct. 30 (2016).

⁶⁹ *Nelson*, 137 S. Ct. 1249, 1255.

⁷⁰ 424 U.S. 319, 335 (1976).

⁷¹ David G. Post, *Nelson v. Colorado: New Life for an Old Idea?*, 2017 CATO SUP. CT. REV. 205, 210-11.

⁷² See generally *Nelson*, 137 S. Ct. 1249.

[a]bsent conviction of a crime, one is presumed innocent . . . [but] [u]nder the Colorado law . . . the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. This scheme, we hold, offends the Fourteenth Amendment's guarantee of due process.⁷³

Could Ginsburg's acknowledgment of the entitlement to a presumption of innocence mean that the State should afford the civil claimant the presumption of innocence in the petitioning process?

b. Implications of Decision

The immediate result of this decision is clear on its face: the government must automatically relinquish fees, costs, and restitution extracted from an exoneree, since it no longer bears any interest in them under the *Mathews* test.⁷⁴ But for the Supreme Court to obligate state governments to return these monies without any hearing, is the Supreme Court also tipping its hand in future litigation over the burden of proof? This could potentially mean that the claimant must be presumed innocent in the civil claim resulting from the criminal trial. Although courts have relied on the *Nelson* decision,⁷⁵ none have interpreted the decision to extend the reach of a presumption of innocence to the resulting civil claims.

C. Gubernatorial Pardons

The power to eliminate a criminal record with the stroke of a pen is perhaps one of the most powerful tools at a governor's disposal.⁷⁶ In fact, pardons are such a powerful tool that many

⁷³ *Id.* at 1252.

⁷⁴ *Id.*

⁷⁵ See generally, *United States v. Brooks*, 872 F.3d 78 (2d Cir. 2017); *United States v. Libous*, 858 F.3d 64 (2d Cir. 2017).

⁷⁶ Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 *NEW. ENG. J. CRIM. & CIV. CONFINEMENT* 413, 417 (1999); see also Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 *IND. L.J.* 1651, 1652 (2008).

states did not want the right to pardon in the early years of statehood.⁷⁷

In terms of compensation statutes, some states allow a claimant to prove innocence through multiple means; however, other states require the claimant to obtain a governor's pardon or DNA exoneration as the sole proof of innocence.⁷⁸

1. Statutory Survey

Six states have adopted wrongful conviction compensation statutes with the sole method of exoneration being a gubernatorial pardon: California, Illinois, Maine, Maryland, North Carolina, and Tennessee.⁷⁹ The remaining twenty-six states allow for a judicial finding or governor's pardon to suffice as a means for establishing innocence.

2. Critique of Existing Statutes

"Limiting the manner of proof to pardons will severely limit the reach of a compensation statute because the granting of pardons is often dictated by the political climate of the state and typically hinges on the advocacy efforts of local public figures such

⁷⁷ *Id.* at 1654-55.

⁷⁸ Donna McKneelen, "Oh Lord Won't You Buy Me a Mercedes Benz?: A Comparison of State Wrongful Conviction Compensation Statutes, 15 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 185, 198 (2013).

⁷⁹ See CAL. PENAL CODE § 4900 (West 2016) (requiring that the claimant "is granted a pardon by the Governor" before bringing a claim against the state to the California Victim Compensation Board); 735 ILL. COMP. STAT. 5/2-702 (2014); ME. STAT. tit. 14, § 8241(2)(C) (2017) (the claimant must have "received a full and free pardon . . . which is accompanied by a written finding by the Governor who grants the pardon that the person is innocent"); MD. CODE ANN., STATE FIN. & PROC. § 10-501(b) (West 2017) (a claimant is eligible "if the individual has received from the Governor a full pardon stating that the individual's conviction has been shown conclusively to be in error."); N.C. GEN. STAT. ANN. § 148-82 (West 1997) ("Any person who, having been convicted of a felony and having been imprisoned therefor in a State prison of this State, and who was thereafter or who shall hereafter be granted a pardon of innocence by the Governor . . . may as hereinafter provided present by petition a claim against the State for the pecuniary loss sustained . . ."); TENN. CODE ANN. § 40-27-109(a) (West 1982) ("After consideration of the facts, circumstances and any newly discovered evidence in a particular case, the governor may grant exoneration to any person whom the governor finds did not commit the crime for which the person was convicted.").

as state legislators.”⁸⁰ Additionally, a claimant should be entitled to petition the same court that wrongfully incarcerated him or her for redress. If a court has the power to take an action, it should bear the ability to provide redress for its actions.

D. Expiration of Action Upon Death

1. Statutory Survey

Four states have provisions in their wrongful conviction statute that directly prevent the survival of a claim upon the death of the wrongfully incarcerated.⁸¹ However, four jurisdictions explicitly permit the survival of the claim upon death of the victim of the wrongful incarceration.⁸² The remaining jurisdictions make no mention as to the claim’s survivability or have ambiguities within the statute.

2. Critique of Existing Statutes

Many of the jurisdictions deny or fail to address the survivability of wrongful incarceration claims. These states do not acknowledge that a wrongful incarceration effects those other than just the person physically confined without justification.

E. Legislature Approval of Funding

1. Statutory Survey

Some states require that the state legislature must approve funding for claims against the state under the wrongful conviction

⁸⁰ Muhammad U. Faridi, Hillel Hoffman & Paul A. Montuori, *Undoing Time: A Proposal for Compensation for Wrongful Imprisonment of Innocent Individuals*, 34 W. NEW ENG. L. REV. 1, 19-20 (2012).

⁸¹ ALA. CODE § 29-2-160 (2017); FLA. STAT. ANN. § 961.05(2) (West 2017); NEB. REV. STAT. § 29-4604 (2009); VA. CODE ANN. § 8.01-195.10 (West 2010).

⁸² MINN. STAT. ANN. § 611.365(7) (West 2005) (a wrongful conviction claim “survives the death of the petitioner or claimant and the personal representative of the person may be substituted as the claimant or bring a claim”); MISS. CODE ANN. § 11-44-13 (West 2009) (“If any potential claimant dies prior to the filing of a claim, the claim may be filed by and on behalf of his or her estate or heirs.”); UTAH CODE ANN. § 78B-9-402(14)(b) (West 2012) (“A claim for determination of factual innocence under this part is not extinguished upon the death of the petitioner”); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(c) (West 2011).

compensation statute.⁸³ Many others make no mention of legislative approval for compensation amounts.⁸⁴

2. Critique of Existing Statutes

The jurisdictions that jeopardize the claimant's recovery by making it subject to legislature approval are creating another injustice for the wrongfully convicted. After serving unjust time in prison and having innocence established, states can still deny the right to compensation through a pseudo-legislative veto. Alabama, for instance, states that the claimant is not entitled to any compensation unless the legislature approves the funding.⁸⁵ This provision essentially gives the Alabama state legislature positive publicity by establishing a compensation statute, while also giving them absolute authority in denying claims under the statute.

However, this issue is not limited to Alabama. California also jeopardizes recovery by creating a scheme where the California Victims Compensation Board recommends an amount to the Legislature, "with a recommendation that the Legislature make an appropriation for the purpose of indemnifying the claimant for the injury."⁸⁶

Connecticut requires that the Claims Commissioner submit his or her recommendation to the General Assembly, who then "may deny such claim or confirm or modify such compensation award."⁸⁷ This scheme allows for the legislature to deny or even modify the award without stating any statutory factors or standard.⁸⁸

Minnesota provides that the claimants are "*entitled to . . . damages of not less than \$50,000 for each year of imprisonment . . .*,"⁸⁹ but also that "[t]he commissioner shall

⁸³ See ALA. CODE § 29-2-165 (2017) ("[P]ayment and receipt of any base or supplemental compensation . . . is contingent upon the Legislature appropriating funds for that purpose"). *But see id.* ("This article does not provide for an entitlement to compensation to persons determined to have been wrongfully incarcerated, does not require that the Legislature appropriate funds for payment . . .").

⁸⁴ See generally COLO. REV. STAT. § 13-65-101 (2013).

⁸⁵ ALA. CODE § 29-2-165 (2017).

⁸⁶ CAL. PENAL CODE § 4904 (West 2016).

⁸⁷ CONN. GEN. STAT. § 54-102uu(d)(1) (2016).

⁸⁸ See generally *id.*

⁸⁹ MINN. STAT. ANN. § 611.365(a) (West 2005) (emphasis added).

submit the amount of the award to the legislature for consideration as an appropriation during the next session of the legislature.”⁹⁰ In essence, Minnesota has created an entitlement with conditions.⁹¹ The result is a legislature holding a veto-power over any compensation award that it deems inappropriate. Additionally, the legislature is not required to state a reason for not appropriating the funds.⁹² This promotes the ability of legislators to make arbitrary decisions without needing to explain themselves.

F. Damage Caps

Many jurisdictions have statutory damage caps in place. However, some states’ supreme courts have declared the caps unconstitutional. Wrongful incarceration claims are often capped because of the inability to accurately determine the extent of the non-economic damage that one has suffered.

1. Statutory Survey

Twelve states have implemented caps on damages for their respective wrongful conviction compensation statutes: Florida, Illinois, Louisiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, North Carolina, Oklahoma, Tennessee, and Wisconsin.⁹³ The remaining jurisdictions choose one of two paths:

⁹⁰ *Id.* § 611.367.

⁹¹ Entitlement is defined as “a right to benefits specified especially by law or contract,” but the statute allows the government to deprive its citizens of this clearly stated entitlement. *Entitlement*, MERRIAM-WEBSTER. Does this mean that the legislature could have a tort action brought against it should it not approve the appropriation for compensation? *But see* VA. CODE ANN. § 8.01-195.10(A) (West 2010) (“This article *shall not provide an entitlement* to compensation for persons wrongfully incarcerated or require the General Assembly to appropriate funds for the payment of such compensation.” (emphasis added)).

⁹² *See generally*, MINN. STAT. ANN. § 590.01 (West 2005).

⁹³ *See* FLA. STAT. ANN. § 961.06 (West 2017) (\$2,000,000); 705 ILL. COMP. STAT. 505/8 (2014) (for imprisonment lasting 1-5 years, \$85,350; for imprisonment lasting 6-14 years, \$170,000; and for imprisonment lasting over 14 years, \$199,150); LA. STAT. ANN. § 15:572.8 (2012) (\$250,000); ME. STAT. tit. 14, § 8242 (2017) (\$300,000); MASS. GEN. LAWS ANN. ch. 258D, § 5 (West 2004) (\$500,000); MISS. CODE ANN. § 11-44-7(2) (a) (West 2009) (\$500,000, this is the same statutory damage cap that Mississippi abides by for non-economic damages in civil litigation under MISS. CODE ANN. § 11-1-60 (West 2009)); NEB. REV. STAT. § 29-4604 (2009) (\$500,000); N.H. REV. STAT. ANN. § 541-B:14 (2017) (\$20,000); N.C. GEN. STAT. ANN. § 148-84 (West 1997) (\$750,000); OKLA. STAT.

(1) no mention of statutory caps on damages,⁹⁴ or (2) explicitly state that no damage caps will apply to the award amount.⁹⁵

2. Critique of Existing Statutes

In Illinois, compensation is capped based on the amount of years spent wrongfully incarcerated. However, Illinois caps negligence actions at over two times the amount that a wrongful conviction claimant may receive.⁹⁶ This difference suggests that the Illinois legislature finds more value in an ordinary negligence action than it does in depriving a citizen of the right to freedom and liberty.

Perhaps the most egregious statutory cap is found in New Hampshire, which limits the recovery a claimant can receive to \$20,000.⁹⁷ New Hampshire previously capped non-economic damages at \$875,000 in ordinary negligence actions.⁹⁸ However, that statute has been held unconstitutional by the New Hampshire Supreme Court because it violated equal protection guarantees under the New Hampshire Constitution.⁹⁹ The statutory cap of \$20,000 on damages for a wrongful conviction should be brought to the New Hampshire Supreme Court's attention who said, "the right to recover for personal injuries is . . . an important substantive right."¹⁰⁰

tit. 51, § 154 (2003) (\$175,000); TENN. CODE ANN. § 9-8-108 (West 1982) (\$1,000,000); WIS. STAT. ANN. § 775.05 (West 2017) (\$25,000).

⁹⁴ See generally ALA. CODE § 29-2-150 (2017); see also CAL. PENAL CODE § 4900 (West 2016).

⁹⁶ See MINN. STAT. ANN. § 611.365 (West 2005) ("There is no limit on the aggregate amount of damages that may be awarded under this section."); see also COLO. REV. STAT. § 13-65-103(6) (2013) ("The amount of monetary compensation awarded to an exonerated person pursuant to this section shall not be subject to: (a) [a]ny cap applicable to private parties in civil lawsuits . . .").

⁹⁷ 735 ILL. COMP. STAT. 5/2-1115.1 (2014) (damages in a negligence action are capped at \$500,000 per plaintiff); 705 ILL. COMP. STAT. 505/8 (2009) (limiting an award to \$199,150 if the claimant spent more than 14 years in wrongful incarceration).

⁹⁸ N.H. REV. STAT. ANN. § 541-B:14 (2007).

⁹⁹ N.H. REV. STAT. ANN. § 508:4-d(I).

⁹⁹ *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991) (where a plaintiff suing for medical malpractice was limited by a non-economic damage cap of \$875,000, the New Hampshire Supreme Court declared the cap unconstitutional due to equal protection guarantees).

¹⁰⁰ *Id.* at 1236.

Another state with an eye-catchingly low statutory cap on wrongful incarceration damages is Wisconsin.¹⁰¹ According to the Wisconsin legislature, \$25,000 is a sufficient amount to equitably compensate someone who has served an indefinite amount of time in incarceration for a crime they did not commit.¹⁰² However, Wisconsin's Supreme Court has struck down a cap on non-economic damages before.¹⁰³ Accordingly, the statutory cap placed on the damages that a claimant can receive violates the equal protection clause of Wisconsin's Constitution.¹⁰⁴ It is worth noting that Wisconsin has legislation currently pending to modernize its compensation statute.¹⁰⁵

G. Calculation of Damages

Attempting to establish an adequate amount of compensation for a victim of wrongful conviction is almost an impossible task.¹⁰⁶ "No one can really understand the loss of freedom, liberty so unjustly taken from another."¹⁰⁷ The truth of this statement flows directly into the debate about recovering damages under state compensation statutes. As one New York court put it,

We are asked to determine the value of the very things we take for granted; the very things we hold dear; the longings, hopes and aspirations. In short, the very essence for this

¹⁰¹ WIS. STAT. ANN. § 775.05 (West 2017) (allowing up to \$25,000 for recovery). *But see* WIS. STAT. ANN. § 893.82(6) (West 2017) (where the Wisconsin Tort Claims Act permits recovery up to \$250,000).

¹⁰² WIS. STAT. ANN. § 775.05 (West 2017) ("[T]he amount which will equitably compensate the petitioner, not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment.").

¹⁰³ *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 446 (Wis. 2005) (where the Wisconsin Supreme Court held that the medical malpractice damage cap of \$350,000 was unconstitutional because of Wisconsin's equal protection clause).

¹⁰⁴ WIS. CONST. art. I, § 1.

¹⁰⁵ 2017 WI A.B. 548. The Wisconsin legislature has proposed legislation that is a great improvement to its current statute, and it should be applauded. The new legislation would provide a minimum compensation of \$50,000 per year while instituting a \$1,000,000 damage cap, which is reviewed every five years to determine if it should be adjusted.

¹⁰⁶ Gutman, *supra* note 23, at 397.

¹⁰⁷ *See generally* SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTION CASES 37 (2004) (quoting Judge Adolph C. Orlando, in a case where after six and a half years of incarceration, Gregory Reed was freed based on innocence; subsequently, Reed was awarded \$495,000 by the Court of Claims in Kings County). *Id.*

individual's existence. 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.¹⁰⁸

1. Statutory Survey

Seventeen states base compensation on a per year basis.¹⁰⁹ These amounts can vary from \$5,000,¹¹⁰ up to \$143,000.¹¹¹ Additionally, three states explicitly set forth amounts for recovery

¹⁰⁸ *Baba-Ali v. State*, 878 N.Y.S.2d 555, 565 (N.Y. Ct. Cl. 2009) (citing *Ferrer v. State of New York*, Claim No. 74308, 1990).

¹⁰⁹ ALA. CODE § 29-2-159 (2017) (\$50,000 per year of wrongful imprisonment, plus any discretionary amount that the court decides is necessary); COLO. REV. STAT. § 13-65-103 (2013) (\$70,000 per year of wrongful imprisonment, plus an additional \$50,000 per year served on death row, and/or \$25,000 per year on parole, probation, or a sex offender registry); CONN. GEN. STAT. § 54-102uu (2016) (Up to 200% median household income per year of wrongful incarceration) (In 2005, this amount would be almost \$143,000 per year of incarceration, <http://www.deptofnumbers.com/income/connecticut/>); FLA. STAT. ANN. § 961.06 (West 2017) (\$50,000 per year of wrongful incarceration); HAW. REV. STAT. ANN. § 661B-3 (2016) (\$50,000 per year, and up to \$150,000 per year if extraordinary circumstances exist); LA. STAT. ANN. § 15:572.8 (2012) (\$25,000 per year, plus up to \$55,000 in additional compensation if the court finds the request "reasonable and appropriate"); MICH. COMP. LAWS ANN. § 691.1755 (West 2017) (\$50,000 per year of wrongful incarceration); MINN. STAT. ANN. § 611.365 (West 2014) (\$50,000 per year of wrongful incarceration, plus an additional \$25,000 per year while on probation, parole, or a sex offender registry); MISS. CODE ANN. § 11-44-7(2)(a) (West 2009) (\$50,000 per year); N.J. STAT. ANN. § 52:4C-5 (2013) (\$50,000 per year or double the claimant's income before the imprisonment, whichever is greater); N.C. GEN. STAT. ANN. § 148-84 (West 1997) (\$50,000 per year); UTAH CODE ANN. § 78B-9-405 (West 2012) ("[T]he monetary equivalent of the average annual nonagricultural payroll wage in Utah.") (this amount as of 2016 is \$45,490, https://www.bls.gov/oes/current/oes_ut.htm); VT. STAT. ANN. tit. 13, § 5574 (2015) (authorizing awards to be between \$30,000 and \$60,000 per year of wrongful imprisonment); VA. CODE ANN. § 8.01-195.11 (West 2017) (90% of Virginia's per capita income per year of wrongful incarceration) (as of 2016, this amount would be \$47,661 per year, <https://www.bea.gov/regional/bearfacts/pdf.cfm?fips=51000&areatype=STATE&geotype=3> [<https://perma.cc/3RMY-K5DF>]); WASH. REV. CODE § 4.100.060 (2013) (\$50,000 per year, plus an additional \$50,000 per year while on death row); WIS. STAT. ANN. § 775.05 (West 2017) (\$5,000 per year of wrongful incarceration).

¹¹⁰ See WIS. STAT. ANN. § 775.05 (West 2017).

¹¹¹ See CONN. GEN. STAT. § 54-102uu (2016);

<http://www.deptofnumbers.com/income/connecticut> [<https://perma.cc/5MHR-MATL>].

on a per-day basis.¹¹² These amounts range from \$50 to \$140 per day.¹¹³ However, six states have ambiguous language that do not specify an exact amount.¹¹⁴

2. Critique of Existing Statutes

How can you place a value on someone's life? Lawyers place a value on their time based on the billable hour standard. But for those who do not live in six-minute increments of time, how do you determine the value placed on their time? This is the question that haunts victim compensation statutes.

The states that have ambiguous language and do not provide a clear baseline compensation amount have placed another potential obstacle in the face of the wrongfully convicted. By not even providing a base amount of compensation, states are not setting a floor on compensation amounts.¹¹⁵ Therefore, a jury or judge is forced to discern what another's life is worth. States that use pure discretionary criteria are doing very little to protect the recovery of a claimant.

Additionally, states that provide an exact amount without discretionary factors are doing more to protect the state from having to pay large sums, rather than fully compensate a victim for the loss of liberty and life.¹¹⁶ This is counterintuitive because exonerees who are compensated above \$500,000 are far less likely to commit crimes in comparison to those who are not compensated or compensated below \$500,000.¹¹⁷ This evidence suggests that

¹¹² CAL. PENAL CODE § 4904 (West 2016) (\$140/day); IOWA CODE § 663A.1 (1997) (\$50/day and up to an additional \$25,000/year for lost wages); MO. REV. STAT. § 650.058 (2016) (\$50/day).

¹¹³ See IOWA CODE § 663A.1 (1997); see also CAL. PENAL CODE § 4904 (West 2016).

¹¹⁴ See D.C. CODE § 2-421 (1981); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2017) ("amount commensurate with the actual damages sustained"); MASS. GEN. LAWS ANN. ch. 258D, § 1 (West 2004) (providing enough compensation so award "fairly and reasonably compensate[s]" the victim of wrongful incarceration); NEB. REV. STAT. § 29-4604 (2009) (awarding "damages found to proximately result from wrongful conviction"); N.Y. CT. CL. ACT § 8-b (2007) (providing compensation that "fairly and reasonably compensate[s]" the victim of wrongful imprisonment).

¹¹⁵ See, e.g., MASS. GEN. LAWS ANN. ch. 258D, § 5 (West 2004).

¹¹⁶ See WIS. STAT. ANN. § 775.05 (West 2017) (providing \$5,000 per year).

¹¹⁷ Evan J. Mandery, Amy Schlosberg, Valerie West & Bennett Callaghan, *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553, 556 (2013).

providing higher compensation amounts is essential to keep exonerees out of prison after they are released.¹¹⁸

H. Eligibility Requirements: Type of Offense and Length of Incarceration

Almost all jurisdictions include language to limit redress to a particular class of offender.¹¹⁹ Claimants must meet these eligibility requirements set forth by the legislature, or they will lack standing to sue and the claim will be dismissed.¹²⁰

1. Statutory Survey

One type of limitation that jurisdictions place on potential claimants is the requirement that they were convicted of a felony.¹²¹ Just over half of the jurisdictions require that the claimant was convicted of a felonious offense.¹²² However, three jurisdictions specifically allow for claimants to bring a claim if they were wrongfully incarcerated for a misdemeanor or a felony.¹²³ Additionally, the remaining jurisdictions allow for any claimant who was wrongfully convicted of any crime to bring a claim.¹²⁴

¹¹⁸ Knowles, *supra* note 14, at 253.

¹¹⁹ Kahn, *supra* note 33, at 137.

¹²⁰ *Id.*

¹²¹ See, e.g., ALA. CODE § 29-2-156(1) (2017) (“convicted by the state of one or more felony offenses”) (emphasis added); Evans, *supra* note 11, at 564.

¹²² ALA. CODE § 29-2-156 (2017); CAL. PENAL CODE § 4900 (West 2016); COLO. REV. STAT. § 13-65-101 (2013); FLA. STAT. ANN. § 961.02 (West 2017); 735 ILL. COMP. STAT. 5/2-702 (2014); MASS. GEN. LAWS ANN. ch. 258D, § 1 (West 2004); MINN. STAT. ANN. § 590.01 (West 2005); MISS. CODE ANN. § 11-44-7(1)(a) (West 2009); MO. REV. STAT. § 650.058 (2016); MONT. CODE ANN. § 53-1-214 (2003); NEB. REV. STAT. § 29-4602 (2009); N.C. GEN. STAT. ANN. § 148-84 (West 1997); OKLA. STAT. tit. 51, § 154 (2003); UTAH CODE ANN. § 78B-9-405 (West 2012); VT. STAT. ANN. tit. 13, § 5572 (2016); VA. CODE ANN. § 8.01-195.10 (West 2010); WASH. REV. CODE § 4.100.010 (2013).

¹²³ IOWA CODE § 663A.1 (1997); N.Y. CT. CL. ACT § 8-b (2007); W. VA. CODE § 14-2-13a (2014).

¹²⁴ See, e.g., HAW. REV. STAT. § 661B-1(a) (2017) (“Any person convicted in a court of the State and imprisoned for one or more crimes of which the person was actually innocent may file a petition for relief . . .”).

2. Critique of Existing Statutes

By limiting compensation to only those who were wrongfully convicted of felonies, the state is providing unequal protection for the same injustice—wrongful incarcerations. The reasoning for providing compensation to those wrongfully convicted is the idea that the government cannot take individual rights unjustly without some form of repercussion. The premise for this idea should not change because of a technical difference between a felony and a misdemeanor. The unjust deprivation of an individual's right still occurs—no matter the crime wrongfully imprisoned for.

III. IMPLEMENTATION PROCEDURES

A victim of wrongful incarceration is just that—a victim. Therefore, as a victim of the state, the compensation recovered by the victim should come out of a crime victims' fund. Additionally, by paying the claimant through a partial lump-sum payment, to be followed by annuities, the state does not have to bear the entire cost of its mistake at once.¹²⁵

Unfortunately, many states that provide specific statutory compensation for those wrongfully convicted neglect to mention a precise source of funding.¹²⁶ The most successful compensation statute must have a source of funding—that also has a source of funding for itself. Otherwise, a state is left with an idea of where the money comes from, but if there is no legislation enacted to put the money where it needs to go, then the funding is inadequate.

¹²⁵ *But see* Gutman, *supra* note 23, at 421-22 (advocating for a national fund to be established through contributions from the individual states). A national compensation system is not proper because these are purely state issues and do not involve the national government.

¹²⁶ *See* ALA. CODE § 29-2-159(d) (2017) (“The Comptroller upon proper certification from the committee shall pay the amount of the base award to the applicant out of any available state funds appropriated by the Legislature for such purposes.”). However, this requires that the Alabama Legislature specifically designate the funds from somewhere rather than have it written into the statute. *See also* CONN. GEN. STAT. § 54-102uu (2016) (Where the statute requires the Claims Commissioner to order the immediate payment to the claimant, without mentioning from where the money is to be drawn). *But see* MICH. COMP. LAWS ANN. § 691.1756(1)-(8) (West 2017) (providing that a wrongful imprisonment compensation fund be created and placing a duty on the state treasurer to pay the claims if there is insufficient money in the compensation fund).

A model crime victims' fund would work as follows. First, the state creates a separate fund that is distinct from the general funds of the state. Second, the state initially puts a sum of money into the fund. Then, those found guilty of crimes in state criminal proceedings would have to contribute to this fund as part of their sentencing. The contribution would be commensurate with the severity of the crime.¹²⁷ The fund could be invested with a money managing firm and could begin the path to self-sufficiency.¹²⁸ For states looking to create a compensation statute, it would be necessary to contribute a greater amount initially because of the expected back-log of claimants who will seek compensation.

An alternative path for funding compensation statutes is to take money directly from the general funds of the state. In this model, there is no worry about exceeding an allotment within a separate fund. However, the consideration that arises is that the money is not specifically ear-marked for this purpose, and thus, some portion of the budget will be impacted by the deficit. Although the state's focus should be on compensating the victim of the wrongful conviction, other recipients of government funding should not bear the deficiency for the inadequacy of the statute.¹²⁹

Instead, the government could draw money from special sources to fund a wrongful compensation fund that is separate and distinct as previously mentioned. An easy avenue for additional revenue is increasing the fines on a speeding ticket with the

¹²⁷ For example, a drug-related misdemeanor conviction may carry a fine of \$150-\$500 of contribution, whereas a conviction for domestic violence would carry a fine of \$1,000-\$2,500. The individual states would have the discretion to determine proper amounts.

¹²⁸ See, e.g., MICH. COMP. LAWS ANN. § 691.1756(3) (West 2017) ("The state treasurer shall direct the investment of the wrongful imprisonment compensation fund. The state treasurer shall credit to the fund interest and earnings from fund investments."). It is not merely a coincidence that Michigan has the most recent version of a compensation statute and uses techniques as forward-thinking as investment of the fund to become self-sufficient.

¹²⁹ See Mostaghel, *supra* note 17, at 541-42 (proposing that funding for compensation statutes be gathered from the corrections budget). However, this idea is inadequate because the corrections budget of many states is already razor thin. Additionally, the corrections budget has already had to use its funding to keep the victim incarcerated, and to impose an additional penalty that has a detrimental effect on its budget is to punish it twice for an injustice beyond its control.

additional increased portion directly funding the wrongful conviction fund.¹³⁰

IV. PROPOSAL FOR STATUTORY ADOPTION

This proposal, while focusing on states without compensation statutes, also should give guidance to states with inadequate statutes. The proposal itself does not include model statutory language to be adopted, rather it will suggest the overall schemes to adopt while leaving the exact language to legislative experts, of which I am not.

A. Abolish the Statute of Limitations for Compensation Claims

Jurisdictions should not have a statute of limitations for wrongful imprisonment compensation claims. A statute of limitations is meant to protect an individual from being unfairly prejudiced by a delayed claim that could reappear once evidence is lost.¹³¹ However, the government, as a protector of individual human rights, cannot claim to be at the same disadvantage from a delayed claim compared to an individual. The government has taken two of the most fundamental rights from a claimant and should not deny a substantive claim based on a procedural injustice. One injustice by the government is enough.

Contrary to popular belief, a state does not have to create a statute of limitations. This is exemplified best when discussing the crime of murder.¹³² There is no statute of limitations for some of the most heinous crimes.¹³³ Wrongful imprisonment of an

¹³⁰ *Id.* at 540 (“Governments are unlikely to see raising taxes as a solution because raising taxes imposes a political cost on elected government officials.”). Therefore, a direct tax increase will be unfavorable, but an indirect tax increase, such as increased fines for speeding tickets, may not bear the same political cost.

¹³¹ *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

¹³² *See, e.g.*, 42 PA. CONS. STAT. § 5551 (2007).

¹³³ *See, e.g.*, MISS. CODE ANN. § 99-1-5 (West 2013) (specifically providing that “[t]he passage of time shall never bar prosecution against any person for the offenses of murder, manslaughter, aggravated assault, aggravated domestic violence, kidnapping, arson, burglary, forgery, counterfeiting, robbery, larceny, rape, embezzlement, obtaining money or property under false pretenses or by fraud, felonious abuse or battery of a child . . .”); *see also* WASH. REV. CODE ANN. § 9A.04.080 (2013) (declaring that no statute of limitations shall exist for murder, vehicular homicide, arson, child sexual abuse, etc.).

individual should be considered among the most heinous of crimes.¹³⁴ Unfortunately, with the state risking additional liability by not imposing a statute of limitations, it is unlikely that justice will be served to those who have suffered at the hands of reckless prosecutions and jailhouse snitches.

B. Burden of Proof

The State is required to show guilt beyond a reasonable doubt in criminal proceedings because of a great presumption of innocence afforded to a criminal defendant.¹³⁵ However, no state retains the presumption of innocence of an exoneree in a resulting civil proceeding against the state.¹³⁶ This logic is flawed because the state has failed to meet its burden in showing that a person was guilty of a crime during a criminal trial; but, it is afforded the presumption at a civil trial. The claim would not exist but-for the criminal trial where the State failed to meet its burden in proving that a person was guilty. The civil trial that ensues should reflect the derivative nature of the claim sought.

The claimant should be afforded the presumption of innocence in a claim for compensation. The State should retain a burden to prove that the claimant was “actually” or “factually” guilty, depending on the state’s verbiage, by a preponderance of the evidence. By instituting a lower burden of proof than a criminal trial, a prosecution that lacks evidence to meet the beyond-a-reasonable-doubt standard can still defend itself in civil claims resulting from a wrongful imprisonment. Additionally, instituting a lower burden on the State for compensation claims will deter costly and burdensome criminal re-trial where the State would have to meet the BARD standard in both criminal and civil cases.¹³⁷

¹³⁴ Gutman, *supra* note 23, at 370.

¹³⁵ *In re Winship*, 397 U.S. 358, 361 (1970).

¹³⁶ *See, e.g.*, FLA. STAT. ANN. § 961.03(5) (West 2017) (“the petitioner’s eligibility for compensation under this act must be established by clear and convincing evidence by the petitioner . . .”).

¹³⁷ Because the proposal suggests preponderance of the evidence as the burden of proof on the State for the compensation claims, the State may forego a criminal trial but still fight the civil liability. Thus, the exoneree would not have to suffer through another trial at the very least.

C. No Gubernatorial Pardons

States should not limit a determination of innocence only to a pardon issued by a governor. Jurisdictions looking to adopt or modify their compensation statute should allow for innocence to be determined either by a court, or by a pardon. By limiting the means of demonstrating innocence to a gubernatorial pardon, states are limiting the possibility of compensation to a political actor who can make decisions based on personal ideology rather than facts.

There has been great controversy surrounding the pardon power.¹³⁸ The principal problem with allowing for a governor's pardon as the sole declaration of innocence is that the separation of powers is breached.¹³⁹ Courts are meant to be the forum for which a person is determined to be guilty or innocent—not the executive branch.¹⁴⁰ There is something inequitable about allowing a court to provide a forum for a criminal conviction, but closing those same doors once it is discovered that the injustice occurred. The states that remove the ability to provide redress from the judiciary are violating their constitution and are demonstrating the inequity in the criminal justice system.

D. No Expiration of Action Upon Death

The states that limit actions to a living claimant are taking a narrow-minded approach by assuming that the victim of the incarceration is no longer entitled to just compensation for the state's miscarriage of justice. However, this logic does not apply to wrongful death actions. A wrongful death action, in many states, is instituted by those who are affected by the untimely deprivation of life of another that they relied on.¹⁴¹ This aligns perfectly with

¹³⁸ Vivian Kuo, *Outgoing Mississippi Governor Issues Nearly 200 Pardons*, CNN (Jan. 10, 2012), <https://www.cnn.com/2012/01/10/justice/mississippi-pardons/index.html> [<https://perma.cc/LS8J-3V3H>]; *Colorado governor pardons felon to stave off deportation to Cuba*, FOX NEWS (May 20, 2017), <http://www.foxnews.com/us/2017/05/20/colorado-governor-pardons-felon-to-stave-off-deportation.html> [<https://perma.cc/765G-3RJU>].

¹³⁹ See generally U.S. CONST. art. III, § 1. Although the example provided is a federal one, states adopt very similar language in their constitutions when providing for the judicial power of the state.

¹⁴⁰ Compare U.S. CONST. art. III, § 1, with U.S. CONST. art. II, § 1.

¹⁴¹ See, e.g., OKLA. STAT. tit. 12, § 1053 (2003).

the claim of wrongful conviction—the deprivation of life that has a direct harm upon others.

The question then becomes: what makes this different? It is not that wrongful imprisonment is somehow not as serious as the above examples, or even that the harm created is minute. Instead, the difference is that the state is creating the injustice. Nonetheless, this is not an excuse for a state to wrongfully deprive a person of life and liberty, only to deny them any recovery because of death. The estate left by the decedent should at the very least benefit from the action. A claim against the state should survive because of the equitable principles of a civilized society that will not allow the government to take an individual's rights without justification.

E. No Legislature Approval of Funding

States with the requirement that the legislature must approve of the compensation claim amount should immediately amend their statutes to dispose of these provisions. The victim of the wrongful incarceration should not be burdened by the state any longer for the injustice that they have suffered. Additionally, a politically-charged body should not be in control of rectifying the injustice carried out by the state—of which they are a functioning arm. Legislators could find many reasons to deny a claimant their relief, especially in times of economic hardships and budgetary deficits.¹⁴² However, these legislative concerns are not concerns of the claimant. The premise is simple: the state created an injustice, and when an injustice is created, somebody has to provide a remedy for it; therefore, the state has to remedy the injustice that it created. By placing discretionary power over the claimant with the legislature, states are allowing for the opportunity of another state-created injustice to occur. Effectively, legislatures can adopt

¹⁴² Scott Wong, *Chances for Government Shutdown Rising*, THE HILL (Nov. 28, 2017), <http://thehill.com/homenews/house/362256-chances-for-government-shutdown-rising> [<https://perma.cc/Y3G9-SWPD>]; Dylan Matthews, *Here is Every Previous Government Shutdown, Why They Happened and How They Ended*, WASH. POST (Sept. 25, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/09/25/here-is-every-previous-government-shutdown-why-they-happened-and-how-they-ended/?utm_term=.c159112b6c71 [<https://perma.cc/X3GA-TWLL>].

feel-good wrongful conviction statutes, all while knowing that they hold veto power over such claims.¹⁴³

To put the horror of a claimant into perspective, there would be outrage if the victim of a sexual assault was reliant on his or her assailant for the approval of an award.¹⁴⁴ That same outrage should be demonstrated when the state wrongfully prosecutes, sentences, and incarcerates an individual for any length of time. Then, shortly after release, the claimant is required to hedge his or her bet on the same government that provided the miscarriage of justice.

F. Damage Caps Should Remain Consistent with the State's Cap on Civil Damages

Although civil damage caps vary from jurisdiction to jurisdiction in both constitutionality and amount, the adopted compensation statute should follow the respective state's civil non-economic damage caps, if applicable. The reasoning is simple: the claimant should be treated like every other citizen of the state. There is no question about the hardship and unfairness of a wrongful incarceration, but if a state has a constitutionally valid non-economic damage cap, these claims should be resolved within that cap. By resolving the damages to an amount within the cap, the claimant can get their relief quicker without the aggravation of appeals. After all, the claimants, on average, have lost nearly fourteen years due to the wrongful incarceration;¹⁴⁵ there is no need to continue their suffering by withholding the entitled award.

¹⁴³ See ALA. CODE § 29-2-165 ("Notwithstanding any other provisions of this article, payment and receipt of any base or supplemental compensation . . . is contingent upon the Legislature appropriating funds for that purpose. This article does not provide for an entitlement to compensation to persons determined to have been wrongfully incarcerated, does not require that the Legislature appropriate funds for payment of either base or supplemental compensation . . .").

¹⁴⁴ Both sexual assault and wrongful imprisonment involve the deprivation of an individual's liberty by a perpetrator. The two should not be distinguished merely because one is a faceless perpetrator (government).

¹⁴⁵ *Exonerate the Innocent*, INNOCENCE PROJECT, <https://www.innocenceproject.org/exonerate> [<https://perma.cc/Q4GS-NFPQ0>] (last visited Apr. 4, 2018).

G. Compensation Should be Based on a Base Figure and Adjusted for Aggravating Factors

States should adopt or modify their compensation statutes to create a base amount of compensation at \$50,000 per year.¹⁴⁶ This amount aligns with many states and the federal compensation statute.¹⁴⁷ However, the state should also provide an additional \$25,000 per year in compensation for aggravating factors such as years spent on death row, the sex offender registry, probation, or parole.¹⁴⁸ Unfortunately, many horrific things take place within a prison and those unimaginable atrocities can be dealt with individually. States should have a discretionary amount to award up to \$25,000 per year in additional compensation for instances of extraordinary suffering.¹⁴⁹ These amounts apply only to non-economic damages.

However, for additional time that the incarcerated individual has added on while in prison, the state should not be liable. This would extend to situations where the individual has violated a rule or regulation in the prison and has the sentence extended. The state bears full responsibility for placing the individual in the prison, but the actions of the incarcerated person cannot be imputed on the state. Essentially, this point is supported by the general law of damages where the plaintiff must mitigate damages.¹⁵⁰

Additionally, claimants should be able to prove specific economic losses for consideration of damages. These losses could

¹⁴⁶ See, e.g., MISS. CODE ANN. § 11-44-7 (West 2009) ("If the court finds that the claimant was wrongfully convicted and incarcerated . . . the court shall award: (a) Fifty Thousand Dollars (\$50,000.00) for each year of incarceration . . ."); see also MINN. STAT. ANN. § 611.365 (West 2005) ("[T]he claimant is entitled to monetary damages of not less than \$50,000 for each year of imprisonment . . .").

¹⁴⁷ 28 U.S.C. § 2501 (2012).

¹⁴⁸ See, e.g., MINN. STAT. ANN. § 590.01 (West 2005).

¹⁴⁹ Although this would be at the state's discretion, it would be very difficult to find an instance where a human being was wrongfully convicted and incarcerated that did not result in extraordinary suffering.

¹⁵⁰ *Rockingham Cty v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929) (discussing the duty to mitigate damages in the context of contracts); see also RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (damages are not recoverable if they can be avoided without "undue risk, burden or humiliation"). There may potentially be an issue of the incarcerated individual getting an extended sentence for self-defense in prison, which begs the question of the action being necessary to prevent undue risk, etc.

include, but are not limited to, lost wages, future medical expenses, and lost property proximately caused from the incarceration.¹⁵¹ The claimant must be able to prove that the wrongful incarceration proximately caused these damages and were unavoidable.

Lastly, claimants should be awarded fifty percent of the total damages in a lump sum, with the remaining amount to be paid in installments.¹⁵² The consideration for this proposal is simple—the victim needs to be on an equal playing-field with the rest of the population. This will result in a windfall for some, but it should be considered more acceptable to over-compensate than to under-compensate. By allotting a substantial amount of the award upfront, the claimant can have access to what is legally theirs, without having to wait for a monthly payment. Although I advocate for annuities to follow, this is not because I believe in the lottery winner's curse.¹⁵³ Rather, I believe that the state should be able to spread out the financial hit that it will take over the years. By providing half of the money initially, there is a notion of fairness to the individual who has suffered tremendously, and to the state who does not bear the entire burden at once.

H. Eligibility for Wrongful Convictions of All Crimes: Misdemeanors and Felonies

The premise is simple: a year in prison, is a year in prison. Regardless of the crime being a misdemeanor or felony, the innocent individual is forced to spend time incarcerated instead of exercising his or her liberties as a free human being. States should model their statutory language after Hawaii's provision:

Any person convicted in a court of the State and imprisoned for one or more crimes of which the person was actually innocent may file a petition for relief pursuant to this chapter

¹⁵¹ This could include a car that was repossessed while the individual was wrongfully incarcerated and unable to earn enough money to pay the note.

¹⁵² *But see* Gutman, *supra* note 23, at 433 (advocating for installment payments as a bargaining chip to gain enhanced generosity from the state).

¹⁵³ Sandra Grauschopf, *Lottery Curse Victims: 7 People Who Won Big & Lost Bigger*, THE BALANCE (last updated May 6, 2018), <https://www.thebalance.com/lottery-curse-victims-896653> [<https://perma.cc/D9KV-ZK46>].

for an award of damages against the State; provided that the requirements of subsection (b) are met.¹⁵⁴

By including the word “crimes” instead of “felony”, a state is not sealing off the courthouse doors because of a poorly written statute. Furthermore, a state’s culpability in wrongfully incarcerating one of its citizens should not be diminished because of a technical difference. The state has an implied social contract with its citizens. The citizens surrender certain rights and liberties to the state in exchange for the state’s protection. However, in the situation of a wrongful conviction, the state has breached that social contract. The state must pay damages when it breaches the social contract by incarcerating innocent individuals.

CONCLUSION

One of the most difficult things to do in life is admit fault when you are wrong. In the year 2018, with eighteen states still not having enacted statutes to compensate those wrongfully convicted, the acceptance of fault remains an insurmountable task in some states. Although a majority of states have enacted legislation to compensate victims of wrongful convictions, the work is not yet complete. States are still writing unjust provisions into the statute as a loophole mechanism to avoid liability.¹⁵⁵ Moreover, states are requiring the claimant to prove his or her actual innocence without guaranteeing the right to an attorney in the process. These states enacted good-optics legislation that is sure to appease voters, but not those who are wrongfully convicted.

How many guilty people should go free in order to protect an innocent person? 10? 100? 1,000? What if you are the one innocent person? That number should not change. If it can happen to any, it can happen to all.

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¹⁵⁴ HAW. REV. STAT. ANN. § 661B-1(a) (2017).

¹⁵⁵ See, e.g., UTAH CODE ANN. § 78B-9-402 (14)(a).

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