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# An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted

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# An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted

Jeffrey S. Gutman\*

## I. INTRODUCTION

An appropriate measure of a just society is how it treats those whom the government harms most severely. As frequent and well-publicized exonerations have been etched into the public consciousness over the last several years, a number of scholars have engaged in the study of compensation for such a group – those wrongly convicted.<sup>1</sup> The general tenor of the resulting articles is one of disappointment.<sup>2</sup>

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\* © Jeffrey S. Gutman 2016. Jeffrey S. Gutman is a Professor of Clinical Law at the George Washington University Law School. I thank Dean Blake Morant for providing me a summer research grant to write this Article. I further thank Adele Bernhard of New York Law School and Professor Stacy Brustin of the Catholic University Law School for their constructive comments. Professor Samuel Gross of the University of Michigan Law School provided permission to use the data assembled by the National Registry of Exonerations. Maurice Possley of the Registry is the source of a great deal of my compensation data. I owe a debt of gratitude to research assistants Garrett Fitzgerald, Nicole Giles, Benjamin Gutman, William Pauley, and Natasha Sim. With great admiration and respect, I acknowledge my clients Donald Gates, Kirk Odom, Santae Tribble, and Cleveland Wright, whose wrongful convictions serve as the guiding narrative of this Article.

1. A word is in order on vocabulary. Throughout this Article, I use the term “wrongly convicted” or “unjustly convicted” interchangeably. I use these terms to describe persons whose criminal convictions have been vacated or reversed, either because of a determination that the individual was factually innocent of the crime for which he or she was convicted, or because of the disclosure of evidence consistent with innocence. In this sense, these terms overlap with the definition of “exoneration” developed by the National Registry of Exonerations described *infra* note 128.

2. See Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703 (2004) [hereinafter Bernhard, *Justice Still Fails*]; Justin Brooks & Alexander Simpson, *Find the Cost of Freedom: The State of Wrongful Conviction Compensation Statutes Across the Country and the Strange Legal Odyssey of Timothy Atkins*, 49 SAN DIEGO L. REV. 627 (2012); Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665 (2002); Howard S. Master, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 102 (2004). See also Michael Leo Owens & Elizabeth Griffiths, *Uneven Reparations for Wrongful Convictions: Examining the State Politics of Statutory Compensation Legislation*, 75 ALB. L. REV. 1283, 1298 (2012) (“We must recognize, however, that the statutory victories in some states to compensate the wrongly convicted are more hollow than they are solid, given

The notion of compensating the wrongly convicted is hardly new; it was pioneered by Professor Edwin Borchard over a century ago.<sup>3</sup> In 1913, Wisconsin became the first state to enact a no-fault wrongful conviction compensation statute.<sup>4</sup> There is a long-standing and near-universal understanding that, with respect to the wrongly convicted, “[e]xcept when an innocent defendant is executed, we hardly can conceive of a worse miscarriage of justice.”<sup>5</sup> There can be little dispute that the government has a corresponding moral responsibility to provide appropriate remedies to those individuals.<sup>6</sup> Yet, 18 states still lack no-fault compensation laws, and most of the remarkably dissimilar existing state laws share two characteristics in tension with that moral duty.

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that the laws include weak provisions for the amount and quality of compensation.”). Press and opinion pieces similarly criticize the inadequacy of state wrongful conviction compensation statutes. *See, e.g.*, Opinion, *Paying for Years Lost Behind Bars*, N.Y. TIMES, May 18, 2016, at A20; Karen Brown, Opinion, *Life After Wrongful Conviction*, N.Y. TIMES, May 28, 2016, at SR10; Jessica Pishko, *Tim Atkins Was Wrongfully Imprisoned for 23 Years – Why Is California Denying Him Compensation?*, NATION (Mar. 9, 2016), <https://www.thenation.com/article/tim-atkins-was-wrongfully-imprisoned-for-31-years-why-is-california-denying-him-compensation/> (discussing the claim of Timothy Atkins, a 2007 exoneree, featured in Brooks & Simpson, *supra*).

3. *See* Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. CRIM. L. & CRIMINOLOGY 684, 706 (1912); Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 110 (1914); EDWIN BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932) [hereinafter BORCHARD, *CONVICTING THE INNOCENT*]; Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 208 (1941). *See also* John H. Wigmore, *The Bill to Make Compensation to Persons Erroneously Convicted of Crime*, 3 J. CRIM. L. & CRIMINOLOGY 665, 665–67 (1912).

4. *See* WIS. STAT. ANN. § 775.05 (West 2017).

5. *Halsey v. Pfeiffer*, 750 F.3d 273, 278 (3d Cir. 2014).

6. For some, that moral duty is supported by the utilitarian notion that society as a whole, which benefits from the operation of the criminal justice system, should bear the cost when the operation of that system causes harm to the wrongly convicted. As Professor Borchard put it, “Where the common interest is joined for a common end, with each individual subject to the same danger [i.e., erroneous conviction], the loss, when it occurs, should be borne by the community and not alone by the injured individual.” BORCHARD, *CONVICTING THE INNOCENT*, *supra* note 3, at 390. Professor Bernhard makes the same point:

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

Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 93 (1999) [hereinafter Bernhard, *When Justice Fails*]. *See also* John Martinez, *Wrongful Convictions as Rightful Takings: Protecting “Liberty-Property,”* 59 HASTINGS L.J. 515, 537 (2008); Master, *supra* note 2, at 110–17.

First, there is a hypervigilant worry of compensating those who are viewed as potentially undeserving. Many statutes, for instance, place on the claimant the formidable burden of showing by clear and convincing evidence that he or she is factually innocent<sup>7</sup> and/or require the claimant to demonstrate that he or she had engaged in no misconduct that caused his or her prosecution or conviction.<sup>8</sup> Second, and the issue addressed in this Article, most prescribe astonishingly modest awards and/or impose caps on monetary compensation that are far below those awarded by most juries and judges in recent federal civil rights cases arising from wrongful convictions and in cases brought under state compensation statutes without caps.<sup>9</sup> Such statutes largely ignore the nature, severity, and variation of injuries suffered while incarcerated; fail to account for post-release damages, such as ongoing psychological and medical harms; and overlook the pressing needs many exonerees have for social, vocational, medical, and educational services following what is often years of wrongful incarceration. In sum, most of these statutes reflect a begrudging

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7. See COLO. REV. STAT. ANN. § 13-65-101(1)(a) (West 2017); D.C. CODE ANN. § 2-422(2) (West 2017); IOWA CODE ANN. § 663A.1(2) (West 2017); LA. STAT. ANN. § 15:572.8(A)(2) (West 2017); ME. REV. STAT. ANN. tit. 14, § 8241(2) (2017); MASS. GEN. LAWS ANN. ch. 258D, § 1(C) (West 2017); MICH. COMP. LAWS ANN. § 691.1755(1) (West 2017); NEB. REV. STAT. ANN. § 29-4603 (West 2017); N.J. STAT. ANN. § 52:4C-3 (West 2017); N.Y. CT. CL. ACT § 8-b(5)(c) (McKinney 2017); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(e)(2) (West 2017); WIS. STAT. ANN. § 775.05(3) (West 2017). Colorado's statute, for example, permits payment only when the conviction is set aside for "reasons other than legal insufficiency of evidence or legal error unrelated to the petitioner's actual innocence," COLO. REV. STAT. ANN. § 13-65-102(2)(a)(I), and when the claimant shows actual innocence by clear and convincing evidence. *Id.* §§ 13-16-101(1), 13-65-102(1). In *Nelson v. Colorado*, 2017 WL 1390727 (U.S. Apr. 19, 2017), a case dealing with Colorado's procedures to obtain a refund of fines and penalties through its Compensation for Certain Exonerated Persons statute when a conviction has been overturned, Justice Alito described the statute (which similarly governs the process for obtaining compensation for wrongful conviction) as "harsh, inflexible, and prevents most defendants whose convictions are reversed from demonstrating entitlement to a refund." *Id.* at \*11 (Alito, J., concurring).

8. See D.C. CODE ANN. § 2-422(2) (requiring that the petitioner show that he did not engage in misconduct causing his prosecution); 735 ILL. COMP. STAT. ANN. 5/2-702(d) (West 2017) (same); N.J. STAT. ANN. § 52:4C-3(d); N.Y. CT. CL. ACT § 8-b(5)(d); VA. CODE ANN. § 8.01-195.10B (West 2017). *But see* HAW. REV. STAT. ANN. § 661B-3(b) (West 2017) (assigning certain cause or contribute disqualifying conditions as affirmative defenses requiring proof by government by a preponderance of the evidence). Particular states have other similarly intended disqualifying quirks, such as a requirement that the claimant receive a pardon from the governor (Maine, Maryland, North Carolina, and Tennessee), that only DNA exonerees are eligible for compensation (Missouri and Montana), and that those convicted of a felony prior to the wrongful conviction are ineligible (Florida).

9. By "prescribed award," I mean a statute requiring a particular daily or annual compensatory award, regardless of facts or circumstances. By a "cap," I mean a ceiling on a possible award, usually expressed as the maximum annual and/or total payout.

rather than a restorative approach to remedying the harm done to the wrongly convicted.

Despite all this, state compensation statutes are rightly viewed as the best of even less appealing alternative methods of redress for the wrongly convicted.<sup>10</sup> While federal civil rights and some common law tort suits can be extremely successful in particularly egregious cases in which government misconduct caused the wrongful conviction, such misconduct is not present in some cases and difficult to prove in others.<sup>11</sup> Private legislative bills to compensate the unjustly convicted require political muscle and fortitude, if the state permits such private bills at all,<sup>12</sup> and, therefore, promise to help very few of the wrongfully convicted.<sup>13</sup>

To be sure, the decades since Professor Borchard's initial proposal have seen progress. The number of states with compensation statutes has increased steadily. Some of the more recent statutes, or amendments to older statutes, are more sensitive to evolving societal perceptions of the horrors of wrongful incarceration. Caps are being raised and more statutes offer elements of restorative reentry services that many exonerees need. But the balance between state

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10. Bernhard, *Justice Still Fails*, *supra* note 2, at 706–08; Lopez, *supra* note 2, at 704; Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated – How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 510–17 (2011).

11. Other scholars have canvassed the range of difficulties in obtaining compensation for wrongful convictions through civil rights and tort theories. Shawn Armbrust, Note, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 161–66 (2004); Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439 (2009); Bernhard, *Justice Still Fails*, *supra* note 2, at 722–38; Bernhard, *When Justice Fails*, *supra* note 6, at 87–92; 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, 131–34 (2010); Lopez, *supra* note 2, at 690–98; Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 136–52 (2010).

12. Some state constitutions bar private bills. See, e.g., *Twp. of Mahwah v. Bergen Cty. Bd. of Taxation*, 486 A.2d 818, 831–83 (N.J. 1985); *Rector v. State*, 495 P.2d 826, 827 (Okla. 1972); *Adams v. Harris Cty.*, 530 S.W.2d 606, 608 (Tex. Civ. App. 1975).

13. As of 2009, only 9% of the 240 people exonerated by DNA evidence obtained compensation through a private bill. *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, INNOCENCE PROJECT 13 (2009), [https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence\\_project\\_compensation\\_report-6.pdf](https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf) [hereinafter INNOCENCE PROJECT, *Making Up for Lost Time*]. See also Armbrust, *supra* note 11, at 167–68; Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why*, 18 B.U. PUB. INT. L.J. 403, 408–09 (2009); Kahn, *supra* note 12, at 134–35; Lopez, *supra* note 2, at 698–700. As Professor Bernhard points out, the fact that some wrongly convicted individuals receive compensation through a private legislative bill supports the notion that there is a moral obligation to compensate such people. Bernhard, *When Justice Fails*, *supra* note 6, at 96.

fiscal concerns and just redress remains askew. This imbalance palpably harms a category of claimants to state compensation and support that are among those least deserving of parsimony and least equipped to surmount it.

States, though, have reason to worry. Tort-based full compensation in these cases can be enormous. Fear of episodic, unplanned, and potentially large payouts in wrongful conviction cases leads to tough prerequisites to recovery and ungenerous prescribed awards and caps.<sup>14</sup> The uncertainty and worry of fiscal exposure that drives caps is real and understandable. As discussed further below, following several substantial judgments in favor of wrongly convicted individuals, Connecticut replaced its progressive uncapped statute with one that imposes damage caps. A proposal to do the same was made in the District of Columbia.<sup>15</sup> It is not enough, then, to view state compensation statutes only from the perspective of the claimants, deserving as they are for compensatory relief. We must consider the interests of the state as well.

A reassessment of these statutes should begin by understanding that the exonerated have different characteristics and needs. Some of the wrongly convicted are exonerated and released from custody at the same time; others are exonerated well after release. The former are very likely to have immediate needs for financial, medical, and social service support, while the needs of the latter may be less pressing. For some, unjust imprisonment was relatively brief. For others, it spanned decades. Some experienced devastating injuries while incarcerated, such as assaults, solitary confinement, psychiatric harm, and contraction of infectious diseases like HIV and hepatitis C, while others managed to avoid these kinds of harms. Some lost opportunities to parent children born prior to incarceration and to care for aging parents; others did not. Some were educated and employed when convicted and thus clearly suffered lost wages, while others had different educational and employment profiles. Some may be eager, or at least willing, to devote the time, resources, and emotional energy to litigating such claims and exposing their harms – and potential government misconduct – to the public, while others may be reluctant to wage a second battle – often painful, expensive, and lengthy – against the government that wrongfully imprisoned them.

Instead of accounting for the varying characteristics, needs, and inclinations of the exonerated, most state statutes mechanically set unyielding, but widely variant, per-year awards and damage caps. There is a better way. The approach I recommend here is based in large part on my empirical research, which has gathered compensation claims data for each of the 1900 persons

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14. Lopez, *supra* note 2, at 705. The most absurdly low are those of New Hampshire and Wisconsin, which cap damages at \$20,000 and \$25,000, respectively, regardless of the duration of the wrongful incarceration. WIS. STAT. ANN. § 775.05(4) (West 2017); N.H. REV. STAT. ANN. § 541-B:14 (2017). The Wisconsin State Assembly unanimously passed a bill in February 2016, increasing the cap to \$1 million. Assemb. 460, 102d Reg. Sess. (Wis. 2016). The bill, however, died in the state Senate. *Senate Puts Off Vote on Conviction Compensation*, WIS. L.J. (Feb. 16, 2016), <http://wislawjournal.com/2016/02/16/senate-set-to-approve-conviction-compensation/>.

15. See *infra* Part II.C.

listed in the National Registry of Exonerations as wrongly convicted in a state court since 1989. The results of that study are summarized, state by state, in Table 1. They show that a surprisingly small percentage of exonerees seek and obtain state compensation and that the average amounts paid per year of wrongful incarceration are disappointingly low.

The reassessment of state compensation statutes presented here considers five elements: (1) the funding mechanism, (2) compensatory adequacy, (3) the provision of non-monetary social and other services, (4) claimant choice, and (5) an opportunity for expedited resolution. These design elements are drawn and adapted from two different federal approaches to remedying harms to large numbers of people – the National Vaccine Injury Compensation Program and the September 11th Victim Compensation Fund – regarded as among the more successful mass tort compensation schemes developed to substitute for, in whole or in part, traditional tort-based litigation. Together, a redesign involving certain elements of these programs can both relieve some state fiscal concerns and allow the exonerated to select a remedial approach that better suits his or her individual needs.

Before venturing too far, I should reveal the source of my perspective. I represented four men in their claims for damages – Donald Gates, Kirk Odom, Santae Tribble, and Cleveland Wright – who were wrongfully convicted of serious crimes in the District of Columbia.<sup>16</sup> Each of these men spent over 20 years in prison for crimes they did not commit.<sup>17</sup> Donald Gates was in prison when DNA analysis exonerated him, after which he was immediately released.<sup>18</sup> Our remaining three clients, in contrast, spent long periods on post-release parole prior to exoneration.<sup>19</sup> For each client, my co-counsel and I

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16. I have served as co-counsel in these cases with the New York law firm of Neufeld, Scheck & Brustin. *See* *Gates v. District of Columbia*, Civ. No. 11-0040 (D.D.C.); *Odom v. District of Columbia*, No. 2013-CA-3239 (D.C. Super. Ct.); *Tribble v. District of Columbia*, No. 2013-CA-003237-B (D.C. Super. Ct.); *Tribble v. Greene*, Civ. No. 15-710 (D.D.C.); *Wright v. Greene*, Civ. No. 15-1067 (D.D.C.). Peter Neufeld and Barry Scheck of that firm are the co-founders and co-directors of the Innocence Project. *About*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about> (last visited Mar. 15, 2017).

17. *Gates v. District of Columbia*, 66 F. Supp. 3d 1, 8 (D.D.C. 2014); *Odom v. District of Columbia*, No. 2013-CA-3239, 2015 D.C. Super. LEXIS 2, at \*1–3 (D.C. Super. Ct. Feb. 27, 2015); *Tribble v. District of Columbia*, No. 2013-CA-003237-B, 2016 D.C. Super. LEXIS 4, at \*1 (D.C. Super. Ct. Feb. 26, 2016); *United States v. Wright*, No. 1978 FEL 4060 (D.C. Super. Ct. Sept. 28, 2015) (Amended Certificate of Actual Innocence).

18. *See Gates*, 66 F. Supp. 3d at 1; *see also Donald Eugene Gates*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3233> (last updated Nov. 20, 2015) [hereinafter *Gates*, NAT'L REGISTRY].

19. *See generally Kirk Odom*, NAT'L REGISTRY EXONERATIONS (Aug. 30, 2012), <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3943> (last updated Mar. 2, 2015) [hereinafter *Odom*, NAT'L REGISTRY]; *Santae Tribble*,

sought damages under the uncapped D.C. Unjust Imprisonment Act (“D.C. Act”).<sup>20</sup> In *Gates*, *Tribble*, and *Wright*, we also filed federal civil rights claims, asserting that police misconduct caused the wrongful conviction.<sup>21</sup>

The pain of failure does not warp my perspective. As explained further below, D.C. Superior Court judges awarded Kirk Odom \$9,654,500 and Santae Tribble \$13,236,527 in damages under the D.C. Act.<sup>22</sup> Following a federal jury trial in which two former D.C. homicide detectives were found liable for federal civil rights violations, the case brought by Donald Gates settled for \$16,650,000 – the largest single-person settlement in D.C. history.<sup>23</sup> Each of the cases, and the one brought by Cleveland Wright, has now settled.<sup>24</sup> These cases have taught me that litigation success is both possible and of enormous benefit to those who unquestionably deserve it, but it is also painful, protracted, and potentially fleeting.

In Part II, I discuss the cases of Kirk Odom and Santae Tribble brought under the D.C. Act. Those recent cases offer insight into how two different judges approached the difficult remedial questions presented. They also demonstrate how dramatically most statutes undercompensate claimants. In Part III, I describe how I drew data provided by the National Registry of Exonerations, and many other sources, to document which exonerees filed state compensation claims and how those claims were decided. The resulting data show the percentages of exonerees who filed claims and were awarded compensation and the costs of such awards. In Part IV, I analyze aspects of existing state compensation statutes. In Part V, I explore the National Vaccine Injury Compensation Program and the September 11th Victim Compensation Fund. In Part VI, I extract design elements of those statutes and draw lessons from

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NAT’L REGISTRY EXONERATIONS (July 3, 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3926> (last updated July 19, 2016) [hereinafter *Tribble*, NAT’L REGISTRY]; *Cleveland Wright*, NAT’L REGISTRY EXONERATIONS (Feb. 3, 2014), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4365> (last updated July 19, 2016) [hereinafter *Wright*, NAT’L REGISTRY].

20. D.C. CODE ANN. §§ 2-421–425 (West 2017).

21. See *supra* notes 18–19.

22. Spencer S. Hsu, *Judge Orders D.C. to Pay \$13.2 Million in Wrongful FBI Hair Conviction Case*, WASH. POST (Feb. 28, 2016), [https://www.washingtonpost.com/local/public-safety/judge-orders-dc-to-pay-132-million-in-wrongful-fbi-hair-conviction-case/2016/02/28/da82e178-dcde-11e5-81ae-7491b9b9e7df\\_story.html?utm\\_term=.8e969d83e73c](https://www.washingtonpost.com/local/public-safety/judge-orders-dc-to-pay-132-million-in-wrongful-fbi-hair-conviction-case/2016/02/28/da82e178-dcde-11e5-81ae-7491b9b9e7df_story.html?utm_term=.8e969d83e73c); Spencer S. Hsu, *D.C. to Pay \$9.2 Million in Wrongful Conviction*, WASH. POST (Feb. 28, 2015), [https://www.washingtonpost.com/local/crime/judge-orders-dc-to-pay-record-91-million-in-wrongful-conviction-case/2015/02/27/f54edaa6-beea-11e4-8668-4e7ba8439ca6\\_story.html](https://www.washingtonpost.com/local/crime/judge-orders-dc-to-pay-record-91-million-in-wrongful-conviction-case/2015/02/27/f54edaa6-beea-11e4-8668-4e7ba8439ca6_story.html).

23. Spencer S. Hsu, *District to Pay \$16.65 Million to Wrongfully Imprisoned Man, Attorneys Say*, WASH. POST (Nov. 19, 2015), [https://www.washingtonpost.com/local/public-safety/district-to-pay-1665-million-to-wrongly-imprisoned-man-attorneys-say/2015/11/19/2f62fd58-8ecf-11e5-baf4-bdf37355da0c\\_story.html](https://www.washingtonpost.com/local/public-safety/district-to-pay-1665-million-to-wrongly-imprisoned-man-attorneys-say/2015/11/19/2f62fd58-8ecf-11e5-baf4-bdf37355da0c_story.html).

24. See *supra* notes 18–19.



the empirical research to propose statutory reforms that are both mindful of state interests and more just for exonerees.

## II. WHAT IS THE VALUE OF A LOST YEAR?

### A. *Kirk Odom*

On February 24, 1981, not far from the U.S. Capitol in Washington, D.C., the lives of two young people were changed forever. At about six in the morning, S.Y., a white woman, was asleep in her house.<sup>25</sup> At the same time, Kirk Odom, an 18-year-old African American man, was asleep in the house he shared with his mother, step-father, and several siblings, a couple of miles away.<sup>26</sup> A man entered S.Y.'s dark home, bound and blindfolded her, and then sexually assaulted her.<sup>27</sup> He stole items from her house but left behind semen on her nightgown and pillow, as well as a pubic hair.<sup>28</sup>

Despite a very brief opportunity to view the assailant in the dark and under extreme stress, S.Y. assisted a sketch artist in drawing the face of her rapist.<sup>29</sup> The resulting drawing was circulated among D.C. Metropolitan Police Department officers, one of whom saw Mr. Odom walking down the street and thought that he might resemble the man depicted in the drawing.<sup>30</sup> Ultimately, S.Y. made a positive, but incorrect, cross-racial identification of him in a photo array, a police lineup, and at trial.<sup>31</sup> That, along with the scientifically invalid testimony of an FBI hair examiner who stated that Mr. Odom's hair and the pubic hair left at the scene were microscopically similar, was enough to convict Mr. Odom.<sup>32</sup> The man who actually committed this heinous crime was a convicted sex offender, not Kirk Odom.<sup>33</sup> Over twenty-two years later, at age forty, Mr. Odom was released on parole.<sup>34</sup> Subsequent DNA testing exonerated Mr. Odom, who received his certificate of actual innocence from a D.C. Superior Court judge ten years later, on his fiftieth birthday.<sup>35</sup>

Mr. Odom experienced an unspeakable ordeal in the many prisons to which he was transferred during his incarceration. Physical brutality, severe emotional suffering, serious illness, and a toxic combination of intense fear and unrelieved boredom marked his days, each of which began with the thoughts

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25. *Odom v. District of Columbia*, No. 2013-CA-3239, 2015 D.C. Super. LEXIS 2, at \*4–5 (D.C. Super. Ct. Feb. 27, 2015).

26. *Id.* at \*4.

27. *Id.* at \*3.

28. *Id.* at \*3, \*13.

29. *Id.* at \*3.

30. *Id.* at \*4.

31. *Id.* at \*4–5.

32. *Id.* at \*4.

33. *Id.* at \*1.

34. *Id.* at \*5.

35. *Id.* at \*13.

that he should not be where he was, that his life was slipping away from him, and that there was nothing he could do about it.<sup>36</sup> While incarcerated, he lost contact with his daughter who was born two weeks before he was convicted, lost his younger brother to a senseless murder, and briefly lost his grip on reality.<sup>37</sup>

### B. *Santae Tribble*

Early on the morning of July 26, 1978, a taxi driver named John McCormick returned from his shift to his home in a gritty southeast D.C. neighborhood.<sup>38</sup> He parked near his home, put his earnings in the trunk of his cab, and trudged to the front door of his house. Before he could get inside, a man wearing a stocking mask fatally shot him in the chest and rifled through his pockets.<sup>39</sup> At the same time, 17-year-old Santae Tribble was asleep at his mother's Maryland apartment with relatives and family friends.<sup>40</sup> Hours later, a canine officer found the mask.<sup>41</sup> At Mr. Tribble's 1980 trial, an FBI hair examiner testified that a hair found on that mask matched Mr. Tribble's.<sup>42</sup> A police informant also testified that Mr. Tribble and his co-defendant, Cleveland Wright, sold her roommate a .32 caliber handgun – the same type of “Saturday night special” gun used in the McCormick shooting – a few days after the murder.<sup>43</sup> She also testified that Mr. Tribble made incriminating statements to her.<sup>44</sup>

That evidence was sufficient to convict Mr. Tribble, who was sentenced to concurrent terms of twenty years to life in prison.<sup>45</sup> He was ultimately paroled in 2003, after serving precisely 25 years.<sup>46</sup> The police kept the hairs found in the stocking mask.<sup>47</sup> Using DNA analysis, it was determined that one belonged to a dog, and the others did not belong to Mr. Tribble or Mr. Wright.<sup>48</sup>

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36. *Id.* at \*5–6.

37. *Id.* at \*5–7.

38. *Tribble v. District of Columbia*, No. 2013-CA-003237-B, 2016 D.C. Super. LEXIS 4, at \*5 (D.C. Super. Ct. Feb. 26, 2016). The published opinion in *Tribble* was subsequently modified to correct small factual errors and an arithmetical mistake in the calculation of damages. *Tribble v. District of Columbia*, Civ. No. 2013-CA-003237-B, slip op. at 3 (D.C. Super. Ct. Mar. 25, 2016). See also *Tribble*, NAT'L REGISTRY, *supra* note 19.

39. See *Tribble*, 2016 D.C. Super. LEXIS 4, at \*15; *Tribble*, NAT'L REGISTRY, *supra* note 19.

40. See generally *Tribble*, NAT'L REGISTRY, *supra* note 19.

41. *Id.*

42. *Tribble*, 2016 D.C. Super. LEXIS 4, at \*15; *Tribble*, NAT'L REGISTRY, *supra* note 19.

43. *Tribble*, NAT'L REGISTRY, *supra* note 19.

44. *Id.*

45. *Tribble*, 2016 D.C. Super. LEXIS 4, at \*1.

46. *Id.* at \*11.

47. *Id.* at \*15.

48. *Tribble*, NAT'L REGISTRY, *supra* note 19.

The police informant later testified under oath that the gun was sold to her roommate *prior to* the murder, that officers instructed her to change the exculpatory date of sale in her diary, and that, contrary to trial testimony that the gun was lost, she actually provided it to the police.<sup>49</sup>

Incarcerated at age 17, prison was harrowing for Mr. Tribble. He spent long periods in solitary confinement, once in restraints for days.<sup>50</sup> He found temporary relief from boredom, fear, and despair in heroin, but he contracted serious diseases as a result.<sup>51</sup> Following his release, Mr. Tribble returned to the District of Columbia to rebuild his life.<sup>52</sup> He found two jobs he enjoyed, only to lose both when a vindictive parole officer sabotaged them.<sup>53</sup> Depressed and discouraged, several parole violations followed before a D.C. Superior Court judge exonerated him in 2012, 34 years after Mr. McCormick's slaying.<sup>54</sup>

One can read the psychological literature about the effects of wrongful conviction<sup>55</sup> and prepare a client for trial testimony over and over again, but there is something about hearing a man testify about the horrors of incarceration in the same courthouse in which he was wrongly convicted that can, and should, shudder the souls of even the most stoic. Far worse, to have to testify and withstand cross-examination about intensely personal details of prison and post-prison life, to hear family members eulogize you in the courtroom, and to

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49. *Id.*

50. *Tribble*, 2016 D.C. Super. LEXIS 4, at \*10.

51. *Id.* at \*46–47.

52. *Id.* at \*10–11.

53. *Id.* at \*12–13.

54. *Id.* at \*15–16.

55. Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 139, 139–64 (2004); Kathryn Campbell & Myriam Denov, *Miscarriages of Justice: The Impact of Wrongful Imprisonment*, 13 JUST. RES. 5 (2005); Jeffrey Chinn & Ashley Ratliff, “*I Was Put out the Door with Nothing*” – *Addressing the Needs of the Exonerated Under A Refugee Model*, 45 CAL. W. L. REV. 405, 405–44 (2009); Mary C. Delaney, Keith A. Findley & Sheila Sullivan, *Exonerees’ Hardships After Freedom*, WIS. LAW., Feb. 2010, at 18, <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=83&Issue=2&ArticleID=1925#bio>; Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 165 (2004); Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUST. 1 (2005); Adina M. Thompson, Oscar R. Molina & Lora M. Levett, *After Exoneration: An Investigation of Stigma and Wrongfully Convicted Persons*, 75 ALB. L. REV. 1373 (2012); Leslie Scott, “*It Never, Ever Ends*”: *The Psychological Impact of Wrongful Incarceration*, 5 AM. U. CRIM. L. BRIEF 10 (2010); Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427 (2009); Sandra D. Westervelt & Kimberly J. Cook, *Coping with Innocence after Death Row*, CONTEXTS, Fall 2008, at 32; Sandra D. Westervelt & Kimberly J. Cook, *Framing Innocents: The Wrongfully Convicted as Victims of State Harm*, 53 CRIME, L., & SOC. CHANGE 259 (2010).

hear expert witnesses discuss your mental and emotional health and your diminished life expectancy in public and with reporters watching, is grueling and tortuous. It takes a particularly strong person to endure this kind of litigation. If nothing else, exonerees like Mr. Odom and Mr. Tribble deserve compassion, and litigation is not a very compassionate exercise. But, the D.C. Act, like those of several other states, requires essentially a relitigation of the post-conviction proceedings, an exercise made necessary when the government is disinclined to consider settlement.

### C. The D.C. Act

The D.C. Act<sup>56</sup> is, comparatively, a very progressive statute. Following the exoneration of Bradford Brown in 1979 for a murder he did not commit, the D.C. City Council exercised its authority under the District of Columbia Home Rule Act<sup>57</sup> to supplement the pre-existing federal wrongful conviction remedy.<sup>58</sup> Its aim was “to create a civil cause of action against the District of Columbia on behalf of persons who are convicted and subsequently imprisoned for offenses which they did not commit.”<sup>59</sup>

The Council’s heart was in the right place; it viewed compensation as a moral imperative of government. The Judiciary Committee explained that the bill was “[g]rounded upon the principle of fundamental fairness.”<sup>60</sup> Because unjust imprisonment can occur only because of “governmental error,” the Committee stated that “a remedy should be made available by the District of

56. D.C. CODE ANN. § 2-421 (West 2017).

57. *Id.* § 1-201.02.

58. In the District of Columbia, the D.C. Metropolitan Police Department investigates violations of the D.C. criminal code. *See id.* § 5-133.17. Criminal defendants are tried in the D.C. Superior Court before a superior court judge and jury. *See id.* § 16-705. Congress, however, determined that prosecutions for most violations of the D.C. Code would be conducted “in the name of the United States by the United States attorney for the District of Columbia.” *Id.* § 23-101(c); *see also In re Crawley*, 978 A.2d 608, 620 (D.C. 2009). As a result, those wrongly convicted in District of Columbia had (before passage of the D.C. Act) and still have an additional remedy against the United States pursuant to 28 U.S.C. §§ 1495, 2513 (2012). Since 2004, the federal wrongful conviction compensation statute has awarded the wrongfully convicted up to \$50,000 per year of incarceration, or up to \$100,000 of incarceration per year on death row. *See* Stephanie Slifer, *How the Wrongfully Convicted Are Compensated for Years Lost*, CBS NEWS (Mar. 27, 2014, 6:33AM), <http://www.cbsnews.com/news/how-the-wrongfully-convicted-are-compensated/>. From 1938 to 2004, the federal statute permitted the award of only \$5000 in total for unjust convictions. 28 U.S.C. § 2513(e) (amended 2004); *see also* Alan Vinegrad & Douglas Bloom, *Compensating the Wrongly Convicted*, 238 N.Y. L.J. 1 (Oct. 2007).

59. COUNCIL OF D.C., COMM. ON JUDICIARY, REPORT 1 (July 9, 1980) [hereinafter D.C. COMM. REPORT]; *see also* Odom v. District of Columbia, No. 2013-CA-3239, 2015 D.C. Super. LEXIS 2, at \*3 (D.C. Super. Ct. Feb. 27, 2015).

60. D.C. COMM. REPORT, *supra* note 59, at 2; Odom, 2015 D.C. Super. LEXIS 2, at \*16.

Columbia to compensate the tragic consequences of such errors when they do occur.”<sup>61</sup>

The cause of action against the District is codified in section 2-421 of the D.C. Code, which provides simply that “[a]ny person unjustly convicted of and subsequently imprisoned for a criminal offense contained in the District of Columbia Official Code may present a claim for damages against the District of Columbia.”<sup>62</sup> The compensation provision is plain: if a judge finds that the plaintiff has met the statutory prerequisites, “the judge may award damages.”<sup>63</sup>

Rare among compensation schemes, the District of Columbia’s no-fault statute is uncapped, and damages are not restricted to post-conviction years served in prison. Indeed, proposals to place limitations on the amount of damages available under the Act were repeatedly rejected.<sup>64</sup> The Council expressly wished to avoid “arbitrary” caps that may restrict a claimant from recovering an amount warranted for actual suffering under “traditional legal methods of assessing damages.”<sup>65</sup> Thus, common law tort principles of full compensation for loss govern the award of damages under the Act.<sup>66</sup> The Council viewed the prohibition on punitive damages and the requirement that cases be heard by a judge rather than a jury as the devices needed to limit excessive fiscal exposure.<sup>67</sup>

From a remedial perspective, the District of Columbia’s full, tort-based compensation approach is one of the best in the country. But, like many older statutes, it is not perfect. It requires separate civil litigation following post-conviction relief. There is no provision for prompt interim financial support and social services. There is no attorneys’ fees provision. There is no specific provision for the expungement of the wrongful conviction. There is no deadline for the resolution of these cases. Nor does it incorporate provisions that can ease the financial burden of statutory compensation on the District of Columbia.

#### D. *Odom v. District of Columbia and Tribble v. District of Columbia*

In *Odom*, the District of Columbia stipulated to liability under the D.C. Act.<sup>68</sup> After a 6-day trial on damages, Judge Neal Kravitz of the D.C. Superior Court awarded Mr. Odom \$9,154,500.<sup>69</sup> Judge Kravitz recounted Mr. Odom’s life story and his experiences in prison and after release, and he considered

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61. D.C. COMM. REPORT, *supra* note 59, at 2.

62. D.C. CODE ANN. § 2-421.

63. *Id.* § 2-423.

64. D.C. COMM. REPORT, *supra* note 59, at 9.

65. *Id.*

66. *Odom v. District of Columbia*, No. 2013-CA-3239, 2015 D.C. Super. LEXIS 2, at \*25 (D.C. Super. Ct. Feb. 27, 2015).

67. D.C. CODE ANN. § 2-423; D.C. COMM. REPORT, *supra* note 59, at 4.

68. *Odom*, 2015 D.C. Super. LEXIS 2, at \*2.

69. *Id.* at \*57.

expert testimony on his psychological and medical harm.<sup>70</sup> He detailed Mr. Odom's 30 prison transfers, separation from his friends and family, and the particular fear of violence (subsequently realized) as a person convicted of rape.<sup>71</sup> Judge Kravitz did what the legislative history of the Act said he should do – assess damages based on traditional tort principles.

Judge Kravitz awarded Mr. Odom \$1000 per day for each day of imprisonment, \$250 per day for each day on parole, and \$200 per day for each day between his exoneration and the trial.<sup>72</sup> The court initially denied Mr. Odom's request for future damages experienced after the date of trial, but following a motion for reconsideration, the court decided to award Mr. Odom an additional \$500,000 for post-trial damages.<sup>73</sup> Judge Kravitz denied Mr. Odom's request for lost wages on the ground that the wages were speculative.<sup>74</sup> The District of Columbia filed an appeal and the case later settled, nearly three years after it was filed.<sup>75</sup>

In *Tribble*, the District of Columbia belatedly conceded liability at trial.<sup>76</sup> D.C. Superior Court Judge John M. Mott heard testimony from Mr. Tribble, his son, his friends, and expert witnesses.<sup>77</sup> Without contradiction, those witnesses testified at length about the medical and psychological harm caused by his wrongful imprisonment.<sup>78</sup> Judge Mott followed Judge Kravitz's interpretation of the Act and held that it required the award of full compensatory relief.<sup>79</sup> He further rejected the testimony of the District of Columbia's only witness, an economist, who testified that Mr. Tribble suffered no economic loss because, had he not been imprisoned, his consumption would have exceeded his income.<sup>80</sup> Judge Mott awarded Mr. Tribble \$400,000 per year in damages for post-conviction time in prison, \$100,000 per year in post-release damages, future medical expenses, and lost wages.<sup>81</sup>

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70. See generally *id.*

71. *Id.* at \*8–16.

72. *Id.* at \*56–57. The opinion does not explain how the court arrived at those numbers.

73. *Odom v. District of Columbia*, No. 2013 CA 3239, slip op. at 8, 9 (D.C. Super. Ct. July 22, 2015).

74. *Odom*, 2015 D.C. Super. LEXIS 2, at \*48–51.

75. *Id.* at \*26.

76. *Tribble v. District of Columbia*, No. 2013-CA-003237-B, 2016 D.C. Super. LEXIS 4, at \*17 (D.C. Super. Ct. Feb. 26, 2016).

77. *Id.* at \*7, \*18.

78. *Id.* at \*12.

79. *Id.* at \*13–15. The courts in *Odom* and *Tribble* held that the compensable period begins on the date of conviction, not the date of pre-trial detention or the date of sentencing. *Odom*, 2015 D.C. Super. LEXIS 2, at \*44–46; *Tribble*, 2016 D.C. Super. LEXIS 4, at \*20–21.

80. *Tribble*, 2016 D.C. Super. LEXIS 4, at \*19.

81. *Id.* at \*66. As with *Odom*, the court did not explain the basis for its choice of those numbers.

*Odom* and *Tribble* were triumphs of a progressive compensation statute. The damage awards in *Odom* and *Tribble* were significantly higher, even accounting for inflation, than that of the court's only other decision under the Act – the 1985 judgment in *Brown v. District of Columbia*.<sup>82</sup> It is beyond the scope of this Article to determine whether awards in these types of cases have increased over time. But, the very small D.C. sample accords with an intuition that, as American society has become more familiar with wrongful convictions and the stories of those who have experienced it, greater value may be placed on their pain and suffering. The evolving social understanding of just compensation in this context warrants the reexamination of state statutes with caps, particularly those that have been in place for some time and that are increasingly out of step with this understanding.

### E. *Odom and Tribble and the Connecticut Epilogue*

Not long after the ink on the judgment in *Odom* was dry, the D.C. Attorney General proposed legislation which would have had the effects of nullifying that verdict and of precluding the claims under the Act made by Santae Tribble and Cleveland Wright.<sup>83</sup> That legislation is bottled up in the Council's Judiciary Committee,<sup>84</sup> but it offers a cautionary tale to those who view compensation statutes as the best way to ensure that the wrongfully convicted may seek relief for the terrible injuries they suffer. These statutes could be victims of their success. The wrongfully convicted might be unjustly punished twice – once by the criminal jury and again by the legislature, which repeals or limits the civil remedies they have.

So far, that has not happened in the District of Columbia,<sup>85</sup> but it did happen in Connecticut, which was 1 of just 6 states without compensation caps.

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82. The wrongful conviction of Bradford Brown prompted passage of the D.C. Act. *See* *Brown v. District of Columbia*, No. 11595-81 (D.C. Super. Ct. July 12, 1985). The Superior Court awarded Mr. Brown \$325,000 for an unjust imprisonment lasting over 3 years. *Id.* at 30. The judges in *Odom* and *Tribble* awarded post-release damages, while Judge Urbina did not in *Brown*. *Id.*; *Tribble*, 2016 D.C. Super. LEXIS 4, at \*68–70; *Odom*, 2015 D.C. Super. LEXIS 2, at \*43, \*51–57.

83. In the District of Columbia, the Attorney General has the authority to propose legislation through the City Council. B21-0150 – Unjust Imprisonment Amendment Act of 2015, COUNCIL OF THE D.C. (2015), <http://lims.dccouncil.us/Legislation/B21-0150?FromSearchResults=true>. His proposal, B21-0150, which is expressly retroactive, would impose an annual cap of \$50,000 per year of incarceration, unless the plaintiff has received a settlement or obtained a judgment against the United States, in which case the D.C. remedy is offset dollar by dollar. *Id.*

84. *Id.* *See* Irvin B. Nathan, Opinion, *D.C. Needs to Revise Its Wrongful-Conviction Law*, WASH. POST (Sept. 23, 2016), [https://www.washingtonpost.com/opinions/dc-needs-to-revise-its-wrongful-conviction-law/2016/09/23/37faa1e4-7f94-11e6-8d0c-fb6c00c90481\\_story.html?utm\\_term=.a2e36fb23708](https://www.washingtonpost.com/opinions/dc-needs-to-revise-its-wrongful-conviction-law/2016/09/23/37faa1e4-7f94-11e6-8d0c-fb6c00c90481_story.html?utm_term=.a2e36fb23708) (former D.C. Attorney General argues for substantial limitations on D.C. Unjust Imprisonment Law).

85. On April 10, 2017, the Mayor of the District of Columbia proposed the FY 2018 Budget Support Act of 2017, B22-244, which included amendments to the Act

In Connecticut, claimants were eligible to receive compensation if their convictions were vacated “on grounds of innocence, or the complaint or information [was] dismissed on a ground consistent with innocence.”<sup>86</sup> Hearings before the Claims Commissioner, the person empowered under Connecticut law to determine eligibility and award damages, permitted the claimant to offer evidence of categories of damages that reflected the legislature’s intention that the award be fully compensatory.<sup>87</sup>

On January 15, 2016, the Connecticut Claims Commissioner awarded \$4.2 million each to 4 men whose convictions of a gang-related murder were vacated on the ground that the prosecutor sponsored false testimony of a key government witness.<sup>88</sup> Each was imprisoned for about 17 years; the Commissioner awarded each \$2.4 million for loss of liberty and enjoyment of life, \$1.1 million for lost wages, \$200,000 for loss of reputation, \$100,000 for physical and mental injury, and \$200,000 for attorneys’ fees and costs.<sup>89</sup> The award was further enhanced by \$200,000 for governmental “misconduct.”<sup>90</sup> Considerable controversy surrounded this award for two reasons.<sup>91</sup>

First, the convictions of the 4 men were vacated on grounds of prosecutorial misconduct, not factual innocence.<sup>92</sup> Second, the amount of the awards to men described in the press as gang members generated concern.<sup>93</sup> The resulting legislation addresses both issues but in an unusual way. The amended statute widens the eligibility criteria by explicitly permitting recovery to those whose criminal complaint or indictment was dismissed on the grounds of an act or omission “that constitutes malfeasance or other serious misconduct” of

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that would set compensation at \$200,000 per year of unjust imprisonment and \$40,000 per year for each year served on parole, on probation, or as a registered sex offender. FY 2018 Budget Support Act of 2017, B22-244, Subtit. C, § 1022.

86. CONN. GEN. STAT. ANN. § 54-102uu(a)(2) (amended 2016).

87. *Id.*

88. Mark Pazniokas, *Claims Commissioner Resigns Amid Controversy*, CT MIRROR (Feb. 19, 2016), <http://ctmirror.org/2016/02/19/claims-commissioner-resigns-amid-controversy>.

89. Memorandum of Decision: Wrongful Incarceration at 7–8, Claims of Carlos Ashe et al. (Conn. Claims Comm’r Jan. 15, 2016) (on file with author) [hereinafter Claim of Carlos Ashe]. The award for loss of liberty, reputation, and physical and mental injury, totaling \$2.7 million, comes to nearly \$160,000 per year of incarceration, a metric less than half of that awarded in *Odom* and *Tribble*. *Id.*

90. *Id.* at 8.

91. *CT Needs New Rules, Oversight of Wrongful Conviction Awards*, HARTFORD COURANT (Feb. 24, 2016, 5:00 AM), <http://www.courant.com/opinion/editorials/hc-ed-claims-commish-needs-review-20160223-story.html>; Pazniokas, *supra* note 88; Max Reiss, *Change Urged After Controversial Wrongful Conviction Payments*, NBC CONN. (Feb. 19, 2016), <http://www.nbcconnecticut.com/news/local/Change-Urged-After-Controversial-Wrongful-Conviction-Payments-369507052.html>.

92. *See* Claim of Carlos Ashe, *supra* note 89. Each of the 4 is listed in the Registry.

93. *See* sources cited *supra* note 91.



a state officer or employee.<sup>94</sup> It narrows the scope of compensation by limiting awards to between one and two times the median state household income<sup>95</sup> and permitting the Claims Commissioner to increase or decrease that award by 25% based on relevant factors.<sup>96</sup> If that amount exceeds \$20,000, or if the claimant seeks review, the Connecticut General Assembly has 45 days to deny, confirm, or modify the award.<sup>97</sup> The new Connecticut statute also makes one additional, worrisome change. Previously, acceptance of state compensation did not preclude other claims, like federal civil rights claims against other state actors. Now, award of compensation under the statute requires the claimant to release such claims.<sup>98</sup>

Table 1 shows that Connecticut's overall payments and average payment per exoneree were among the highest in the nation.<sup>99</sup> Connecticut paid exonerees significantly more than California and Illinois combined, which together had almost 18 times as many exonerees who experienced time in prison. That underscores California's and Illinois's parsimony, not Connecticut's generosity. But more troubling is that Connecticut's retrenchment appears to be the first of its kind. Since 1913, states have slowly adopted more compensation statutes and even more slowly increased the compensation permitted by them.<sup>100</sup>

Perhaps Connecticut is a one-off reversal of that progressive trend explained by an idiosyncratic reaction to an unpopular Claims Commissioner and awards to apparently disliked exonerees. But one wonders whether other progressive states hit by large damages verdicts, or states with more exonerees than Connecticut, might similarly seek to limit those statutes.<sup>101</sup> The argument for such limitation must necessarily turn on concerns about cost. It is worth, then, examining how costly these statutes have actually been.

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94. CONN. GEN. STAT. ANN. § 54-102uu(a)(2) (West 2017).

95. The median state household annual income in 2014 was \$70,112. Kirby G. Posey, *Household Income: 2015*, U.S. CENSUS BUREAU (Sept. 2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/acsbr15-02.pdf>.

96. CONN. GEN. STAT. ANN. § 54-102uu(d)(2).

97. *Id.* § 54-102uu(d)(1) (stating the Assembly can modify the award to any amount it "deems just and reasonable").

98. *Id.* § 54-102uu(g). Whether a state, by statute, can preclude state compensation recipients from the filing of federal civil rights claims is beyond the scope of this Article.

99. Robert J. Norris, *Exoneree Compensation: Current Policies and Future Outlook*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 289, 294–95 (Marvin Zalman & Julia Carrano eds., 2014).

100. *Id.*

101. See generally *supra* note 85 and accompanying text.

### III. THE BIG PICTURE

#### A. Coverage of State Compensation Statutes

Over time, the number of states adopting compensation statutes for wrongful imprisonment has grown and, with the District of Columbia, has now reached 33.<sup>102</sup> The adoption of such statutes has accelerated since the first DNA exoneration in 1989.<sup>103</sup> Nevertheless, the absence of universal national coverage of such statutes is troubling. Eighteen states (and Guam and Puerto Rico) fail to offer statutory redress for wrongful convictions. How many exonerates fall within that gap?

The National Registry of Exonerations, a project of the University of California, Irvine, Newkirk Center for Science & Society, the University of Michigan Law School, and the Michigan State University College of Law, maintains a database of individuals convicted of crimes but later exonerated based on new evidence of innocence since 1989.<sup>104</sup> As of March 1, 2017, the cut-off date for this analysis, there were 2000 listed exonerations.<sup>105</sup> That averages about 71 per year for the 28 years covered by the Registry.<sup>106</sup> The Registry identifies each exoneree by state of conviction.<sup>107</sup>

For purposes of determining the current breadth of coverage of state compensation statutes, I make an important counterfactual assumption. I assume that all 1900 individuals wrongly convicted in a state court since 1989 were actually exonerated on March 1, 2017, rather than on the actual date of exoneration. How many were unjustly convicted in a state that now has a compensation statute?

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102. *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <http://www.innocenceproject.org/compensating-wrongly-convicted/> (last visited Mar. 20, 2017).

103. Norris, *supra* note 99, at 294–95; Owens & Griffiths, *supra* note 2, at 1286–87.

104. *About the Registry*, NAT'L REGISTRY EXONERATIONS (last visited Mar. 20, 2017), <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

105. *Id.*

106. The number of exonerations, however, has steadily increased over time. *Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY EXONERATIONS (last visited Mar. 20, 2017), <http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx>. The year 2016 saw a record number of exonerations: 166. *Exonerations in 2016*, NAT'L REGISTRY EXONERATIONS 1 (Mar. 7, 2017), [https://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2016.pdf](https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf).

107. *Detailed View*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Mar. 1, 2017) [hereinafter COMPLETE NAT'L REGISTRY]. Of the 2000 exonerated individuals, 100 were convicted in a federal or military court. *Id.* These individuals may be entitled to compensation under the federal wrongful conviction statute. 28 U.S.C. §§ 1495, 2513 (2012). Thus, the Registry shows that 1900 persons were wrongly convicted in a state or territorial court. COMPLETE NAT'L REGISTRY, *supra*.

The results are reflected in Table 1. Column B of the Table indicates whether the state now has a compensation statute and the year of its enactment.<sup>108</sup> Column C is the number of exonerated individuals wrongly convicted in a state court of that state since 1989. In total, 1674 of 1900 exonerees, or 88.1%, were convicted in states or territories that now have a statute. The Registry lists 226 of 1900 exonerees convicted in the 18 states and 2 territories (Guam and Puerto Rico) without statutes.<sup>109</sup> Put differently, while only about 60% of the states and territories have statutes, those states were home, at the time of conviction, to nearly 90% of the listed exonerees on the Registry.<sup>110</sup>

That result accords with a reasonable intuition that states with more wrongful convictions are more likely, perhaps because of that experience, to have a compensation statute.<sup>111</sup> Indeed, this intuition is confirmed by recent analysis. In 2012, political scientists Michael Leo Owens and Elizabeth Griffiths examined the 289 DNA exonerations identified at that point by the Innocence Project.<sup>112</sup> They found that “the mean number of exonerations in states with compensation laws is significantly larger . . . than the mean number of exonerations in states that have failed to enact a compensation statute.”<sup>113</sup> Owens and Griffiths then hypothesized why this might be and ran a series of statistical analyses to test the influence of interest group pressure, punitive regimes, and government ideology.<sup>114</sup> They found that only interest group pressure, which they measured to include the number of exonerations and the presence of an Innocence Project in the state, was positively associated with the presence of a state compensation statute.<sup>115</sup>

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108. I included Michigan, even though its new statute took effect after March 1, 2017.

109. COMPLETE NAT’L REGISTRY, *supra* note 107.

110. The Registry further identifies exonerated individuals who were not incarcerated in prison – including those remanded to a mental hospital, sentenced to community service, fined, with suspended licenses, not sentenced at all, who received probation, or whose sentences were unknown. *Id.* Column D of Table 1 identifies the number of incarcerated exonerees per state. *See infra* Table 1. Of the 1900 state or territorial exonerees, 1719 were incarcerated in a jail or prison. *See infra* Table 1. Of those, 1509, or 87.8%, were convicted in a state that, as of March 1, 2017, has a state compensation statute. *See infra* Table 1.

111. Norris, *supra* note 99, at 297 (finding correlation between the number of exonerations and the existence of a state compensation statute). However, Professor Norris believes that “the sociocultural and political environments in which reform efforts take place,” particularly the intensity of innocence advocacy and media attention on particular cases, better explains the diffusion of compensation statutes. *Id.* at 295–99.

112. Owens & Griffiths, *supra* note 2, at 1283. Exonerations following DNA analysis are among the exonerations listed in the Registry. COMPLETE NAT’L REGISTRY, *supra* note 107.

113. Owens & Griffiths, *supra* note 2, at 1308, 1310 fig.2B.

114. *Id.* at 1289.

115. *Id.* at 1321. The authors were careful not to infer causation from this relationship.

A look generally at all exonerations, rather than just DNA exonerations, seems consistent with this conclusion. The 4 states with the largest number of exonerees as of March 1, 2017 – Texas (309), New York (224), Illinois (184), and California (173) – have statutes.<sup>116</sup> Eleven of the 18 states without statutes have 8 or fewer exonerees.<sup>117</sup> There are, to be sure, exceptions to this general finding. As explained, the District of Columbia enacted its compensation statute after only 1 wrongful conviction. Several states with a compensation statute have few exonerees: Colorado (7), Hawaii (3), Maine (2), Montana (9), New Hampshire (1), and Vermont (1).<sup>118</sup> At the same time, Pennsylvania (60), Georgia (29), and Indiana (24) are the states with the largest number of exonerees without compensation statutes.<sup>119</sup>

That is not to say that universal coverage is an unworthy goal. Every state should have a no-fault compensation statute. The failure of the 18 states to have one has left scores of wrongly convicted persons without the possibility of state statutory redress. However, it does suggest how pro-compensation advocates might prioritize their resources. Assuming that the relative numbers of exonerations among states remain stable over time, seeking reform of existing weak statutes, particularly in states with large numbers of exonerees, could help more people than expanding the number of states with a compensation statute, especially states with low numbers of exonerees.<sup>120</sup>

### B. Use and Costs of State Compensation Statutes

To be sure, the wrongfully incarcerated suffer grievously, and those profound injuries have prompted most states to impose compensation caps for fear that awards based on a D.C.-like tort damage statute would be unpredictably higher. It is worth testing the source of that worry by asking how much these statutes actually cost. The answer is far less than one might reasonably think, amounting to a tiny percentage of state corrections budgets.

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116. COMPLETE NAT'L REGISTRY, *supra* note 107.

117. Alaska (8), Arkansas (6), Delaware (2), Idaho (2), Kansas (7), New Mexico (6), North Dakota (2), Rhode Island (5), South Carolina (7), South Dakota (4), and Wyoming (3). *Id.* Of the 10 states with the largest per capita numbers of exonerations from 1989 to 2013, only Wyoming lacks a compensation statute. See *Exonerations in 2013*, NAT'L REGISTRY EXONERATIONS 20 (Feb. 4, 2014), [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2013\\_Report.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf).

118. COMPLETE NAT'L REGISTRY, *supra* note 107.

119. *Id.*

120. Of course, advocates should seize on well-publicized wrongful convictions, which sometimes get more state-wide press coverage when they are rare, to press for state compensation statutes; this recently happened in Alaska. See, e.g., Megan Edge, *New Bill Would Give Payouts to Wrongfully Convicted Alaskans*, ALASKA DISPATCH NEWS (Feb. 5, 2016), <https://www.adn.com/crime-justice/article/exonerated-alaskans-could-reap-financial-benefits/2016/02/06/> (last updated Sept. 30, 2016) (sponsor of Alaska proposal inspired by wrongful convictions in the Fairbanks Four case).

## 1. The Data Collection Process

To calculate these costs, I again relied on the data provided in the National Registry of Exonerations. As noted in Table 1, as of March 1, 2017, the Registry shows that 1674 individuals were convicted of crimes in state courts in states that today have compensation statutes. Of those, 165 were not incarcerated and would not be eligible for compensation under any state statute.<sup>121</sup> The resulting total, 1509, listed by state, is found in Column D of Table 1. The task has been to record who among this group has been awarded compensation and how much was received.

Academic studies and some detailed press reports have documented the amounts paid to exonerees under particular state compensation statutes.<sup>122</sup> A number of states publish state compensation awards, decisions, and denials online. The Registry has researched state statutory and other forms of compensation for a substantial number of exonerees.<sup>123</sup> It has summarized that information within the public narrative descriptions associated with each exoneree.<sup>124</sup> The Innocence Project has documented compensation awards in some cases involving DNA exonerations and provided that data to me. Witness to Innocence, which focuses on death penalty cases, has done the same.

In addition, I received data from a number of states following FOIA or other records requests. Government personnel in those states have been exceptionally helpful in gathering and providing me that information and generous with their time in responding to follow-up inquiries. I have also reviewed press reporting, obtained information on public databases, court records, and judicial opinions, and have received data from practicing attorneys. In sum, I have reasonably precise data from all of the 33 jurisdictions with state compensation statutes.

While I am confident that I obtained substantially complete data on awards<sup>125</sup> and denials, determining precisely which exonerees did not file

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121. COMPLETE NAT'L REGISTRY, *supra* note 107. These individuals are recorded as having zero time lost in the Registry. *Id.*

122. *See, e.g.*, THE CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, BERKELEY SCH. OF LAW, CRIMINAL (IN)JUSTICE: A COST ANALYSIS OF WRONGFUL CONVICTIONS, ERRORS, AND FAILED PROSECUTIONS IN CALIFORNIA'S CRIMINAL JUSTICE SYSTEM (2015); Dan Glaun, *Massachusetts Has Paid \$8.34 Million Under Wrongful Conviction Compensation Law*, MASSLIVE (Aug. 31, 2016, 6:30 AM), [http://www.masslive.com/news/index.ssf/2016/08/massachusetts\\_has\\_paid\\_834\\_mil.html](http://www.masslive.com/news/index.ssf/2016/08/massachusetts_has_paid_834_mil.html) (last updated Aug. 31, 2016, 7:31 AM); Johnathan Silver & Lindsay Carbonell, *Wrongful Convictions Have Cost Texans More Than \$93 Million*, TEX. TRIB. (June 24, 2016, 6:00 AM), <https://www.texastribune.org/2016/06/24/wrongful-convictions-cost-texans-over-93-million/>.

123. COMPLETE NAT'L REGISTRY, *supra* note 107.

124. *Id.*

125. I very seldom encountered a state award of compensation in an undisclosed amount. I coded those as a grant but did not speculate on the amount. At least 2 states that lack a statute, Arkansas and Georgia, had made modest awards legislatively or

claims at all is clearer in some states than others. However, as noted, wrongful conviction compensation has been the subject of detailed academic study and press reporting, based on analysis of government documents, in several states, including California, Massachusetts, and Texas. Other states, such as Alabama, Connecticut, Florida, Illinois, Louisiana, New York, Ohio, and Wisconsin, maintain comprehensive databases or reports of claims. The absence of a claim made by an exoneree in those materials raises a very strong inference that no claim was made. For many other states, conversations with government officials and reviews of press reporting allowed similarly strong inferences to be made. At bottom, while the number of non-filers may be overstated, any variation is likely to be modest.

At the same time, this is not a static process. Additions are made to the Registry frequently – both newly exonerated individuals and recently discovered exonerees of the past. New administrative claims or lawsuits are filed, and existing claims are decided. As a result, I tagged people whose relatively recent exoneration dates lie within the applicable statute of limitations as “premature” when I found no evidence of a claim being filed. For those individuals, filing remains possible as of the time of this writing. When I had definitive information or a strong suspicion that a claim was filed, but undecided, I labeled the individual as “pending.”

## 2. Data Analysis

The result of this research is shown in Table 1. Column B indicates whether the state listed in Column A has a compensation statute and, if so, when it was originally adopted. Starting with the number of exonerees listed in the National Registry of Exonerations for each state with a statute (Column C), I set aside those the Registry showed as serving no time in prison, leaving the number of individuals I call “incarcerated exonerees” in Column D. Because each statute requires individuals to have been imprisoned to award compensation, I presumed that those who did not serve time did not file a claim.

Non-filing incarcerated exonerees fall into 2 categories. Column E lists the number of relatively new “premature” exonerees, which total 236, who have not filed but still have time to file claims.<sup>126</sup> Column F states the number

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through state claims processes. I excluded those awards because the state did not have a statute.

126. Over half of those “premature” claims are in Michigan and Texas. Michigan very recently passed a compensation law. MICH. COMP. LAWS ANN. §§ 691.1751–691.1757 (West 2017). Because it does not explicitly preclude those exonerated prior to the effective date of the statute from filing a claim, I coded each previously incarcerated Michigan exoneree as “premature.” In addition, Texas has a large number of exonerees in this category because many people in Harris County were recently determined to be wrongly convicted on drug offenses based on inaccurate field tests of suspicious substances. See Lise Olsen & Anita Hassan, *298 Wrongful Drug Convictions Identified in Ongoing Audit*, HOUSTON CHRON. (July 16, 2016), <http://www.houstonchronicle.com/news/houston-texas/houston/article/298-wrongful->

of incarcerated exonerees (576) who appear not to have filed a claim and who cannot do so due to the statute of limitations. As shown at the bottom of Column G, and discussed below, 38.17% of the exonerated persons in states with compensation statutes did not file a claim. That number will rise when any person coded as “premature” does not file within the applicable statute of limitations. When considering all exonerees, including those convicted in states without statutes, the percentage of non-filing increases to over 45%.

Incarcerated exonerees who did file a claim for compensation under the state statute (listed by state in Column H) fall into three categories. Column I lists the number of persons who filed claims and were awarded compensation.<sup>127</sup> That total is 523 and will rise if premature cases are filed and paid and when claimants prevail in pending cases. Column K states the number of persons who filed claims and were denied compensation.<sup>128</sup> The total is 109 and

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drug-convictions-identified-in-8382474.php. Because most of these exonerees were incarcerated rather briefly, I would expect that few will file for compensation. In addition, for some states, it is difficult to determine whether claims are filed before they are decided. It is possible that a number of claims coded as “premature” are actually “pending.”

127. Some exonerees have received compensation by act of the state legislature, typically in the absence of an existing state statute. I have included those, nevertheless, in the count of claims granted in states now with statutes so as not to understate state costs. In addition, there are exonerees who are awarded damages but have not received payment, frequently because of state budgetary issues. This is particularly true in Illinois. *See infra* note 237. Nonetheless, I counted a claim as granted even if not paid.

128. Table 1 shows that 109 claims, or 15.6%, were denied. *See infra* Table 1. It is beyond the scope of this Article to analyze why a state would deny a claim for compensation by someone listed on the Registry as an exoneree, but a substantial number were denied because the claimant failed to show by a preponderance or clear and convincing evidence that he or she was actually innocent of the crime for which he or she was wrongly convicted. This happens with some frequency. For example, in California, the claimant must prove that “the crime with which he or she was charged was either not committed at all, or, if committed, was not committed by him or her.” CAL. PENAL CODE § 4903(a) (West 2017). Of 23 claims denied in California, my research found that 19 were denied, at least in part, on the ground that the claimant failed to satisfy the statutory innocence standard. It is more difficult to make a similar assessment for New York, the state with the highest number of denied claims (39) because of the lack of availability of orders denying some of those claims.

The reason why a person may be listed in the National Registry of Exonerations but fails to show innocence for compensation lies in differences between state statutory requirements, the burden on the claimant to establish them, and the definition of “exoneration” used by the National Registry:

A person has been exonerated if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually

will rise as well. Column L notes the number of persons, now 65, who filed claims that remain pending for decision.

Additional columns set forth data that provide a basis for cross-state comparison. Column G calculates the percentage of incarcerated exonerees listed in the Registry who did not file for compensation.<sup>129</sup> For states with more than 5 exonerees, Mississippi had the lowest percentage of non-filers (12.5%), while Montana had the highest (100%). Large percentages of non-filers within a state suggest a structural or statutory barrier that must be addressed, as discussed below.

Column J identifies the percentage of filing incarcerated exonerees who received an award.<sup>130</sup> In theory, any exoneree listed on the Registry who seeks state compensation should be awarded it. In reality, the percentage of granted claims is just over 75%. That number, however, would increase as pending claims are decided in the exoneree's favor. States with relatively low grant rates with few pending claims, such as California and Iowa, raise obvious questions.<sup>131</sup> As noted, the California Crime Victim Compensation Board has applied the state statute's showing of innocence requirement to deny the claims of nineteen exonerees. Iowa has a much smaller sample size, but one claim

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related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant and the defense attorney, and to the court, at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person.

*Glossary*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Apr. 26, 2017). Depending on how a state statute like California's is applied in practice, the more forgiving language of the Registry, along with the statute's placement of the burden of proof on the exoneree rather than the government, can lead to disqualified exonerees. See Kahn, *supra* note 11, at 125–26 (noting that statutes should place burden on the government to prove guilt rather than on the exoneree to again prove innocence or present evidence consistent with innocence).

129. Column G is the result of dividing the number of non-filing incarcerated exonerees (Column F) by the total number of incarcerated exonerees in the state. See *infra* Table 1.

130. Column J is the result of dividing the number of claims granted to incarcerated exonerees (Column I) by the number of claims made (Column H). See *infra* Table 1. The number of claims made includes pending claims which, when decided, will change the results.

131. Washington, for example, has a low award rate, but a number of pending claims, approval of which would increase that rate.



was denied by court on the same ground,<sup>132</sup> and another was denied on the ground that the state statute precludes those who pled guilty from compensation.<sup>133</sup>

Column M shows the percentage of incarcerated exonerees in each state with a compensation statute who received an award.<sup>134</sup> A low percentage could have, in part, a worrisome explanation, like substantial non-filings and denials. Or, it could be explained by innocent factors, such as high numbers of premature or pending claims. However, at the time of this writing, only just over one-third – 34.7% – of incarcerated exonerees from states with statutes received compensation. That number drops to 30.4% when accounting for incarcerated exonerees from all states and territories.<sup>135</sup>

As described above, I have collected state statutory compensation data for each individual wrongly convicted in a state court who is listed on the Registry. Adding those awards together is reflected in Column N. Column N lists the amounts paid by each state that currently has a compensation statute.<sup>136</sup> The total amount paid was \$408.4 million, which, over the 28 years covered by the Registry, amounts to an average of just \$14.6 million per year nationally.<sup>137</sup>

Column O lists the average amount paid pursuant to state compensation statutes to each incarcerated exoneree (whether or not the exoneree sought compensation). That average ranges dramatically, from under \$8000 per exoneree in Wisconsin, to over \$2 million per exoneree in Connecticut and the District of Columbia. The national average is \$270,669. Including exonerees in states without statutes, that average amount drops to \$237,741.46 per exoneree.

Column P states the number of years lost to wrongful conviction in each state as calculated by the Registry. Column Q divides the total amount paid by

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132. *Smith v. State*, 845 N.W.2d 51, 59 (Iowa 2014). *See also* *State v. DeSimone*, 839 N.W.2d 660, 673 (Iowa 2013) (reversing and remanding finding of innocence for review of broader record, including prior trial testimony).

133. *Rhoades v. State*, 880 N.W.2d 431, 450–51 (Iowa 2016).

134. Column M is the result of dividing the number of claims awarded (Column I) by the number of incarcerated exonerees (Column D). *See infra* Table 1.

135. That number omits a very small number of exonerees who received a legislative award or compensation through a general state claims program in states without a wrongful conviction compensation statute.

136. The total in Texas includes annuity payments made through June, 2016. I have also included in the Illinois costs all awards made, even though, as a result of budgetary deadlock, many recent exonerees have yet to be paid.

137. On rare occasions, I have found state wrongful conviction compensation payments for persons not on the Registry. I have excluded those from the cost total. A small number of states reported amounts of attorneys' fees or costs awarded. Because that money is not paid to the claimant, and because the data are not uniformly available, I have omitted including it in the cost figures. Doing so undercounts the costs of these statutes to the states.

those number of years to obtain a per-year amount for each state with a statute.<sup>138</sup> The average amount paid per year lost to wrongful incarceration ranges enormously from \$1112.36 in Wisconsin to \$183,584.91 in Connecticut. Put differently, the value the state assigns to a year of lost liberty is 165 times higher in Connecticut than in Wisconsin. The overall average amount received per incarcerated exoneree per year (whether he or she filed or not) in states that now have statutes is \$26,846.31; nationally (counting states without statutes), the annual average is \$23,701.03. That figure is lower than the 2017 poverty rate for a family of four and significantly less than half of the 2015 national median household income.<sup>139</sup>

I do make an important assumption that understates the cost of these statutes. I do not consider the costs of non-monetary relief, such as social services, tuition assistance, and attorneys' fees. I generally have no basis for monetizing most of those forms of relief, but those costs are likely to be reasonably modest. The marginal cost of providing an exoneree vocational training in a state-operated program or free or reduced cost education at a state college, valuable as they are, is likely to be relatively small. Nor do I account for reimbursements for court costs, fees, and other expenses incurred during the wrongful conviction, or for the governmental costs in processing, deciding, or administering these claims.

States are understandably concerned about the potential costs of progressive wrongful conviction compensation statutes. But, when the historical record is viewed nationally and over time, the gravity of these concerns fades. Of course, payments will trend upward as currently pending or premature cases are resolved in the future. The reality, however, is that the amount paid nationally to a surprisingly small percentage of exonerees over the last 28 years is remarkably modest. And, the average amount paid per year per exoneree is roughly tantamount to a low-wage job, effectively awarding little or nothing for loss of liberty. Just as striking is the unfairness inherent in the extraordinary

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138. This figure will in large part be driven by the statutory metric for compensation discussed *infra* Part IV.A. Admittedly, there is a bit of an apples-to-oranges element in this analysis. As will be discussed below, some states explicitly include in their calculations proven lost wages, while others do not. And some include post-release damages, while most do not. I have included the total of each award, regardless of remedial category, in my cost figures. Those costs do not, then, reflect compensation only for the loss of liberty while incarcerated. This means that the average paid per lost year amount in Column Q is overstated in those states. *See infra* Table 1.

139. *Poverty Guidelines: U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. ASSISTANT SECRETARY FOR PLAN. & EVALUATION, <https://aspe.hhs.gov/poverty-guidelines> (last visited Apr. 5, 2017) (\$24,600 is the poverty line for a family of four); *Real Median Household Income in the United States*, FRED ECON. DATA, <https://fred.stlouisfed.org/series/MEHOUNUSA672N> (last updated Sept. 13, 2016) (\$56,516 is the median household income for 2015). Do note that these figures concern only state statutory compensation and do not consider any additional judgments or settlements in federal civil rights or tort claims.

variations among states; the fortuity of one's state of wrongful conviction makes an enormous difference.

Further, comparing the costs of these statutes with state corrections budgets is illuminating. Determining the cost of incarcerating individuals in the United States is an extremely difficult exercise and requires an analysis of more than just each state's published corrections budget. The Vera Institute of Justice attempted to do that in 2012.<sup>140</sup> In its study, researchers obtained data from forty participating states and found that the actual price to taxpayers in those states of incarceration was \$39 billion in fiscal year 2010.<sup>141</sup>

Similarly, in July 2014, the Department of Justice's Bureau of Justice Statistics published its Justice Expenditure and Employment Extracts for 2010.<sup>142</sup> Looking only at state direct and capital outlay expenditures, thereby excluding the very substantial expenditures by local and municipal governments and the costs found by the Vera Institute to be excluded from budgets, the total expenditures by states on corrections in 2010 was just over \$46 billion.<sup>143</sup> Taking my annual cost estimate and dividing it by the most recent 2010 corrections statistics, the cost of compensating the wrongly convicted under state statutes is between 0.03% and 0.035% of corrections expenditures.

This is true on a state level as well. Let's take as an example Ohio, a reasonably generous state with a relatively low number of non-filers, few premature claims, few pending claims, and a high percentage of claims awarded. Ohio's statute conveniently dates to 1989, and the state maintains comprehensive claims data. I have high confidence in my cost calculation of \$21.3 million spent on Ohio statutory compensation, or an average of \$760,986 per year. By comparison, the budget for the Ohio Department of Rehabilitation and Correction for fiscal year 2016 is \$1,666,729,709.<sup>144</sup> The annual cost of compensating Ohio's wrongly convicted is 0.0457% of its corrections budget.

Naturally, in time, some claimants with premature claims will file and be awarded compensation, and some pending claims will be granted as well. It is also true that, if nothing were to change, the annual costs of these statutes would likely increase over time. One can reasonably project into the future

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140. Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, VERA INST. JUST. (Jan. 2012), <http://archive.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf> (last updated July 20, 2012).

141. *Id.* at 6.

142. Tracey Kyckelhahn, *Justice Expenditure and Employment Extracts, 2010 – Final*, BUREAU JUST. STATS. (July 1, 2014), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5049>.

143. It is true that the costs of exoneration statutes apply only to those states that have them. It is fair to compare total state corrections expenditures of all states because the costs to states without compensation statutes was \$0. Henrichson & Delaney, *supra* note 140.

144. OHIO DEP'T REHABILITATION & CORRECTION (July 2016), [http://www.drc.ohio.gov/LinkClick.aspx?fileticket=MX\\_xCeS-dYE%3D&portalid=0](http://www.drc.ohio.gov/LinkClick.aspx?fileticket=MX_xCeS-dYE%3D&portalid=0).

that a higher percentage of claims will be filed in states that have adopted statutes since 1989. The number of exonerees each year has also generally risen over time.<sup>145</sup> But, these statistics make it very difficult to take seriously any argument that, viewed as a whole, these statutes are as good as we can do.

The disappointment expressed in academic and popular literature about these statutes is typically that too few states have them, that some exonerees in states with statutes are denied compensation, and that, for some, the award takes too long to receive. These are legitimate concerns, but the data also show that the vast majority of exonerees were convicted in states that today have a statute and that over 75% of applicants receive an award. Instead, perhaps more telling is the finding that only about one-third of incarcerated exonerees were compensated, and they received, on average, less than \$27,000 per year of incarceration.<sup>146</sup> Those figures should be the source of greater dissatisfaction with state wrongful compensation statutes. They should also provide the basis for a belief that there is room to make considerable progress.

### C. *The Efficiency of State Compensation Statutes*

By efficiency, I do not mean the amount of time required between exoneration and compensation, although that would be an important measure of evaluation. Instead, I refer to percentage of incarcerated exonerees who received a state statutory award. As noted, that figure is astonishingly low, only 34.66%. Two calculations form the basis of that finding – the percentage of incarcerated exonerees who seek compensation (state statutes generally require claimants to either file complaints in court or claims with a designated administrative entity to obtain compensation) and the percentage of filers who are denied compensation.<sup>147</sup>

Why about 38% of exonerees in states with statutes do not file likely depends on a number of factors, some of which are unique to the state in question. First, some states impose statutory barriers that preclude claims; removal of them may yield more awards. Florida and Missouri, for example, have high non-filing rates. Florida's high non-filing percentage is likely due in large part to a unique statutory bar on compensation for persons who committed a felony prior their wrongful conviction.<sup>148</sup> Missouri permits compensation only for those exonerated by DNA evidence.<sup>149</sup> Maryland and Tennessee also have

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145. COMPLETE NAT'L REGISTRY, *supra* note 107. The number of DNA exonerations, however, has generally leveled off. *Id.* State claims arising from DNA exoneration are quite possibly the most likely claims granted because the showing of factual innocence is generally quite clear.

146. This figure is obtained by dividing the total cost by the years lost by exonerees convicted in states with statutes today.

147. For a brief discussion of the latter point, see *supra* note 128.

148. See *supra* note 8.

149. Of 37 Missouri exonerations, only 13 involved DNA and, of those, only 9 are on the Innocence Project's list of DNA exonerees. See INNOCENCE PROJECT, <https://www.innocenceproject.org/all-cases/#missouri,exonerated-by-dna> (last visited

high non-filing rates. In those states, as in Maine, compensation is permitted only if the governor issues a pardon.<sup>150</sup> Iowa, New Jersey, Oklahoma, Ohio, and, in certain cases, Virginia, preclude those who pled guilty from receiving compensation, even if that plea was coerced.<sup>151</sup>

Second, at least some non-filing could be related to ungenerous statutes. Montana grants qualifying exonerees only tuition remission, and no Montana exoneree has sought it.<sup>152</sup> Wisconsin awards a maximum of \$25,000, regardless of the length of incarceration.<sup>153</sup> Both have high non-filing rates. In contrast, those states that have or had uncapped statutes (except Maryland), and thus relatively high awards (Connecticut, District of Columbia, New York, and West Virginia), have comparatively low non-filing rates.<sup>154</sup>

Third, 22 states have adopted statutes since 1989.<sup>155</sup> Half explicitly permit those exonerated prior to the passage of the statute to file for compensation, but the statutes of the other half are silent on the point. Of those, most appeared nevertheless to approve claims for persons exonerated before the adoption of the statute. There were no retroactive claims filed in Minnesota and Utah. That might explain some non-filing in those states. But, non-filing by those exonerated prior to the adoption of a state statute may more realistically be explained for other reasons: they did not learn about these statutes, had passed away, were in prison for other crimes (which can be disqualifying), or simply chose not to pursue compensation. As a result, it may not be surprising that states with quite recent and comparatively progressive statutes, like Colorado, Minnesota, and Washington, have high non-filing rates. One would reasonably expect those to drop over time.

Fourth, although this is not a state-specific issue, a significant number of non-filers spent relatively little time in prison. The Registry calculates the number of years lost in incarceration by those exonerated in each state.<sup>156</sup> The national average is 8.7 years, but of the 576 non-filers, 155 were incarcerated

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Apr. 26, 2017). The other 4 are not because “post-conviction DNA evidence was not central to establishing innocence, and other non-DNA factors were essential to the exonerated.” COMPLETE NAT’L REGISTRY, *supra* note 107.

150. *See supra* note 8.

151. *See* IOWA CODE ANN. § 663A.1 (West 2017); *see also* Rhoades v. State, 880 N.W.2d 431, 450 (Iowa 2016); N.J. STAT. ANN. § 52:4C-3 (West 2017); OKLA. STAT. ANN. tit. 51, § 154(B)(2) (West 2017); OHIO REV. CODE ANN. § 2743.48(A)(2) (West 2017); VA. CODE ANN. § 8.01-195.10 (2017). Of 8 non-filers in Iowa, 5 entered guilty pleas. Four of 27 New Jersey exonerees pled guilty. No exoneree from Oklahoma pled guilty. COMPLETE NAT’L REGISTRY, *supra* note 107.

152. *See* MONT. CODE ANN. § 53-1-214 (West 2017).

153. *See* WIS. STAT. ANN. § 775.05 (West 2017).

154. *See* CONN. GEN. STAT. ANN. § 54-102uu (West 2017); D.C. CODE ANN. § 2-423 (West 2017); N.Y. CT. CL. ACT § 8-b (McKinney 2017); W. VA. CODE ANN. § 14-2-13a (West 2017).

155. *See* Norris, *supra* note 99, at 298 fig.16.2 (tracing growth statutes from 1989 to 2009).

156. COMPLETE NAT’L REGISTRY, *supra* note 107.

for less than 1 year.<sup>157</sup> The majority, 81, were wrongly convicted in Texas for minor drug violations. For this population, filing a claim may promise little benefit, particularly in relatively ungenerous states without attorneys' fees provisions and with a requirement to seek compensation judicially, rather than administratively.

While more research is required to isolate the causes of non-filing in other states lacking obviously plausible explanations, it is difficult to explain why the filing rate is quite high in other states. Louisiana and Mississippi, for example, have the two lowest non-filing rates. Indeed, the procedures to obtain compensation in those states are not particularly user friendly; nor are they especially generous. It is possible that the legal culture in certain states, supported by networks of criminal and civil attorneys experienced in wrongful conviction matters, and possibly aided by an active Innocence Project and robust media attention to wrongful convictions, can explain why the non-filing rate is lower in some states than others. The fact remains, though, that fewer than 35% of exonerees in states with statutes obtain compensation. In Part V, below, I offer several proposals that, if adopted, could increase that number.

#### IV. THE QUALITY OF STATE COMPENSATION RELIEF PROVISIONS

An exploration of the number of claims filers and how many receive compensation under state wrongful conviction compensation statutes says nothing about the quality of those statutes or whether they contain any of the four characteristics that should be used to evaluate that quality: (1) financial adequacy, (2) non-monetary social and other services, (3) choice, and (4) opportunity for expedited resolution. An examination of the approaches states have taken on these issues reveals that most fall far short of satisfying these features.

##### *A. Financial Adequacy*

###### 1. What is Fair?

Establishing an appropriate level of monetary compensation for the wrongly convicted is a profoundly difficult exercise. One federal judge resorted to a Broadway musical to pose the question:

The Court is reminded of the well-known lyrics from *Rent*:

Five hundred twenty-five thousand six hundred minutes

How do you measure, measure a year?

In daylight, in sunsets, in midnights, in cups of coffee

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157. *See id.*

In inches, in miles, in laughter, in strife

In five hundred twenty-five thousand six hundred minutes

How do you measure a year in the life?<sup>158</sup>

The exercise, however, is hardly unprecedented. Congress, for example, recently passed legislation authorizing \$10,000 of compensation per day for the former Iranian hostages, and that metric had been established in the District of Columbia in hostage litigation under the Foreign Sovereign Immunities Act.<sup>159</sup>

In this context, judges and juries throughout the country have been required to assess appropriate monetary damages in wrongful conviction cases brought under federal civil rights theories and in states with uncapped statutory compensation provisions. Recent jury verdicts in civil rights cases routinely approach or exceed \$1 million per year of incarceration.<sup>160</sup> *Newton v. City of*

158. *Singletary v. District of Columbia*, 876 F. Supp. 2d 106, 109 (D.D.C. 2012) (quoting JONATHAN LARSON, *Seasons of Love*, on RENT (Verve 1996)), *vacated and remanded on other grounds*, 766 F.3d 66 (D.C. Cir. 2014).

159. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015) (codified in scattered sections of 1 U.S.C.A., 2 U.S.C.A., 5 U.S.C.A., 7 U.S.C.A., 10 U.S.C.A., 15 U.S.C.A., 16 U.S.C.A., 20 U.S.C.A., 21 U.S.C.A., 33 U.S.C.A., 41 U.S.C.A., 42 U.S.C.A., 51 U.S.C.A.). See generally Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605 (West 2017). See, e.g., *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57, 69–70 (D.D.C. 2015) (using \$10,000 per day of confinement metric and citing prior cases using same metric).

160. The following is a fairly comprehensive listing of judgments issued after January 1, 2010, excluding those in the D.C. cases: *Spencer v. Peters*, 2017 U.S. App. LEXIS 8712, at \*3–4 (9th Cir. May 18, 2017) (reinstating \$9 million verdict for man incarcerated 19.6 years); *Patrick v. City of Chicago*, Civ. No. 14-cv-3658 (N.D. Ill.); Jason Meisner, *Jury Awards \$13.4 Million to Man Wrongly Imprisoned for Decades for Murder*, CHI. TRIB. (Apr. 12, 2017, 8:02 PM) (jury award of \$13,390,000 for 18.8 years of wrongful incarceration; \$712,000 per year); *Fields v. City of Chicago*, No. 10 C 1168, 2012 WL 6705419 (N.D. Ill. Dec. 26, 2012); Jason Meisner & Elyssa Cherney, *Jury Awards \$22 Million in Damages to Wrongly Convicted Ex-El Rukn*, CHI. TRIB. (Dec. 15, 2016, 8:27 PM) (\$22 million for 18 years of incarceration); *Dean v. Cty. of Gage*, 807 F.3d 931 (8th Cir. 2015), *cert. denied sub nom. Gage Cty. v. Dean*, 136 S. Ct. 2490 (2016); Chris Dunker, *Taxpayers, Not Insurance, to Pay for Gage County Mistake*, LINCOLN J. STAR (July 6, 2016), [http://journalstar.com/news/local/taxpayers-not-insurance-to-pay-for-gage-county-mistake/article\\_bcd4bfd1-245b-5cb9-a946-02a547a4c91a.html](http://journalstar.com/news/local/taxpayers-not-insurance-to-pay-for-gage-county-mistake/article_bcd4bfd1-245b-5cb9-a946-02a547a4c91a.html) (total award of \$28.1 million to 6 people, ranging from \$350,000 to \$456,000 per year); *Peacock v. City of Rochester*, No. 6:13-cv-6046-MAT, 2016 U.S. Dist. LEXIS 103544, at \*9–13 (W.D.N.Y. Aug. 5, 2016) (awarding \$5 million for a man unjustly incarcerated for rape for 5 years, 9 months, and 21 days, plus \$750,000 in post-release damages and lost wages); *Deskovic v. City of Peekskill*, Civ. No. 07-08150 (S.D.N.Y.); Albert Samaha, *Jury Awards Upstate Man \$41 Million for 16-Year Wrongful Imprisonment*, VILLAGE VOICE (Oct. 24, 2014, 11:48 AM), <http://www.villagevoice.com/2014/10/24/jury-awards-upstate-man-41-million-for-16-year-wrong->

*New York*<sup>161</sup> offers an interesting recent example. In 1985, Alan Newton was convicted of 2 rapes and sentenced to 2 consecutive terms of imprisonment; he served 10 years for the first and 12 years for the second rape.<sup>162</sup> After New York passed legislation entitling defendants to request DNA samples after conviction, Newton filed such a request for the second rape, but the rape kit associated with it could not be found.<sup>163</sup> Many years later, it was located, and the forensic testing exonerated Newton for the second crime.<sup>164</sup> He filed and won a federal civil rights claim based on the city's failure to timely locate the rape kit.<sup>165</sup>

With respect to damages, Newton testified that he had not suffered physical injuries while incarcerated, that he sought no psychological treatment for depression after release, and that the 12 years of wrongful incarceration were

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ful-imprisonment/ (2015 verdict of \$40 million for 16.5 years of wrongful incarceration, plus \$1.65 million lost wages, or approximately \$2.4 million per year); *Restivo v. Nassau Cty.*, No. 06-CV-6720(JS)(SIL), 2015 U.S. Dist. LEXIS 160336, at \*4 (E.D.N.Y. Nov. 30, 2015) (2014 verdict of \$36 million to 2 plaintiffs who each spent 18 years wrongly imprisoned, or \$1 million per year); *Ayers v. City of Cleveland*, No. 1:12-CV-00753, 2014 WL 2042254, at \*1 (N.D. Ohio May 6, 2014) (\$13.2 million jury verdict for 12 years' wrongful imprisonment), *aff'd*, 773 F.3d 161 (6th Cir. 2014); *Jimenez v. City of Chicago*, 732 F.3d 710, 712 (7th Cir. 2013) (affirming § 1983 jury verdict of \$25 million for 16 years of wrongful incarceration, or \$1.5 million per year); *Spadaro v. City of Miramar*, No. 11-61607-CIV, 2013 U.S. Dist. LEXIS 135646, at \*6 (S.D. Fla. Sept. 23, 2013), *aff'd*, 591 Fed. App'x 906 (11th Cir. 2015) (upholding \$7 million verdict for man incarcerated over 25 years); *Slevin v. Bd. of Comm'rs for Cty. of Doña Ana*, 934 F. Supp. 2d 1270, 1274–78 (D.N.M. 2012) (holding \$15.5 million compensatory damages verdict for 22 months in wrongful solitary confinement – \$500,000 per month of confinement plus \$1 million per year since release – was not excessive given evidence at trial); *Drumgold v. Callahan*, 806 F. Supp. 2d 405, 426–27 (D. Mass. 2011) (denying remittitur for \$14 million jury award for 14 years of wrongful imprisonment), *vacated on other grounds*, 707 F.3d 28 (1st Cir. 2013); *White v. McKinley*, 605 F.3d 525, 539 (8th Cir. 2010) (affirming § 1983 jury verdict of \$14 million compensatory damages for 5.5 years' wrongful incarceration, or \$2.5 million per year); *Newton v. City of New York*, 779 F.3d 140, 145, 159 (2d Cir. 2015) (reinstating 2010 jury verdict of \$18 million for 12 years' wrongful incarceration, about \$1.5 million per year), *cert. denied*, 136 S. Ct. 795 (2016), *remittitur granted*, 171 F. Supp. 3d 156, 177 (S.D.N.Y. 2016) (remitted to \$1 million per year). Of the pre-2010 cases, perhaps the most influential has been *Limone v. United States*, 579 F.3d 79, 103–07 (1st Cir. 2009), which affirmed as not excessive a \$96 million wrongful conviction judicial verdict split among 4 plaintiffs – based on \$1 million per year baseline. *See also* *Limone v. United States*, 497 F. Supp. 2d 143, 243–44 (D. Mass. 2007) (underlying district court opinion setting damage amount, discussing wrongful conviction awards).

161. *Newton*, 171 F. Supp. 3d 156.

162. *Id.* at 160–61.

163. *See id.* at 160.

164. *See id.*

165. *See id.* at 161.



similar to those of the first 10 in which he was properly incarcerated.<sup>166</sup> He did not seek economic damages.<sup>167</sup> The jury, not told of this lawful conviction, awarded him \$18 million, or \$1.5 million per year of wrongful imprisonment.<sup>168</sup> Ultimately, the city filed a motion for remittitur and was required to show that the verdict was “so high as to shock the judicial conscience and constitute a denial of justice.”<sup>169</sup>

That standard required comparing the outcome with other wrongful conviction cases.<sup>170</sup> To do that, the court held that it would not consider settlements because they “implicate compromise.”<sup>171</sup> After discussing the remaining competing cases cited by both parties, the court granted the remittitur.<sup>172</sup> The court’s rationale turned on distinguishing cases, in New York and elsewhere, cited by Newton that awarded more than \$1 million per year of incarceration.<sup>173</sup> Those cases involved the wrongful incarceration of youths, situations in which the incarceration was solely for crimes not committed, cases in which the plaintiff was physically abused, plaintiffs with ongoing mental health problems, and instances where post-release damages may have affected the jury’s valuation of harm.<sup>174</sup> The key point here is not that the court granted the motion, but that the court’s “survey of other similar cases provide[d] further indication that an award of one million dollars per year of incarceration constitutes the upper boundary for a reasonable award under the circumstances presented by this case.”<sup>175</sup> Put differently, \$1 million per year of incarceration is now the reasonable top “going rate,” subject to enhancement in particular circumstances.<sup>176</sup>

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166. *See id.*

167. *See id.* at 161 n.11.

168. *See id.* at 162.

169. *Id.* at 165 (quoting *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 165 (2d Cir. 1998)).

170. As a result of a prior appeal and other delays, the city’s motion was actually filed over 5 years prior to the court’s ruling on the motion, but the court held that it could consider post-briefing cases in deciding the motion. *See id.* at 172.

171. *Id.* at 172 n.98 (quoting *Limone v. United States*, 579 F.3d 79, 104 (1st Cir. 2009)).

172. *See id.* at 177.

173. *See id.* at 172–77.

174. *See id.*

175. *See id.* at 174.

176. The court compared the Newton verdict with the \$25 million verdict awarded to Jeffrey Deskovic, who was wrongly incarcerated for seventeen years for a rape-murder, distinguishing it on the ground that Deskovic was very young (convicted at age 16), as well as both the “level of governmental misconduct involved, and media attention it received.” *See id.* at 175 n.118. Factors relevant to the calculus are the nature of the crime for which the individual was unjustly convicted (sex offenses being the most stigmatizing and likely to result in prison violence), *Peacock v. City of Rochester*, No. 6:13-cv-6046, 2016 U.S. Dist. LEXIS 103544, at \*6–7 (W.D.N.Y. Aug. 5, 2016); *Odom v. District of Columbia*, No. 2013-CA-3239, 2015 D.C. Super. LEXIS 2, at \*10–11 (D.C. Super. Ct. Feb. 27, 2015), and whether the individual had previous experience

The substantially lower *Odom* and *Tribble* judgments, issued by two different D.C. Superior Court judges sitting without juries, offer additional insight into the valuation decision-making process. Neither judge explained how or why he arrived at the particular \$1000 per day or \$400,000 per year metric applied in *Odom* and *Tribble*, respectively. Neither compared the facts of these cases to others. Their lengthy and detailed findings were, however, issued months after trial and reflect the time, thought, and care they brought to perform their “solemn charge.”<sup>177</sup>

Most important, both were guided by the D.C. City Council’s intent to fully compensate the unjustly incarcerated. Their findings of fact make two things very clear: (1) assessment is highly individualized, and (2) assessment involves consideration of a wide range of damages and harms experienced in prison and afterwards. The findings in these cases view the loss of freedom not merely one-dimensionally in terms of years, but in a specific context that accounts for separation from family, friends, and children and the loss of personal promise. The judges found relevant the brutality, desperation, conditions, and fear inherent in prison life, the psychological impact of wrongful imprisonment, and the specific medical consequences of incarceration, as each was particularly experienced by the plaintiff.<sup>178</sup> Put differently, the judges in *Odom* and *Tribble* did not decide upon a universally appropriate value of a day or year lost. They instead assigned a value based for the actual harms, pain, and suffering experienced by the plaintiffs.

## 2. What Actually Happens

All but 5 state compensation statutes, however, take an entirely different approach. They either prescribe an unalterable daily or annual amount or impose modest compensation caps, or do both. I place these statutes in 3 basic categories.<sup>179</sup> Category 1 statutes prescribe a daily or annual amount of compensation during incarceration without an overall compensation cap.<sup>180</sup> Cate-

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in the criminal justice system, including prior incarcerations. *See Peacock*, 2016 U.S. Dist. LEXIS 10354, at \*6.

177. *Odom*, 2015 D.C. Super. LEXIS 2, at \*54.

178. *See id.* at \*54–56; *see also Tribble v. District of Columbia*, No. 2013-CA-003237-B, 2016 D.C. Super. LEXIS 4, at \*58–62 (D.C. Super. Ct. Feb. 26, 2016).

179. Montana is excluded because it offers only tuition benefits and no financial compensation. MONT. CODE ANN. § 53-1-214 (West 2017).

180. Missouri (\$50 per day of incarceration = \$18,250 per year), MO. ANN. STAT. § 650.058.1 (West 2017); Virginia (90% of per capita state income = \$46,922.40 per year), VA. CODE ANN. § 8.01-195.11 (West 2017); Michigan (\$50,000 per year of incarceration), MICH. COMP. LAWS ANN. § 691.1755(2)(a) (West 2017); Washington (\$50,000 per year; \$100,000 per year if sentenced to death), WASH. REV. CODE ANN. § 4.100.060(5)(a) (West 2017); New Jersey (two times prior income or \$50,000 per year, whichever is higher), N.J. STAT. ANN. § 52:4C-5 (West 2017); California (\$140 per day of incarceration = \$51,110 per year), CAL. PENAL CODE § 4904 (West 2017); Ohio

gory 2 statutes prescribe a daily or annual amount of compensation during incarceration with an overall compensation cap.<sup>181</sup> Category 3 statutes impose a general overall cap on damages.<sup>182</sup>

States with prescribed daily or annual non-economic damage amounts (Categories 1 and 2) depersonalize the compensation question by presuming that all wrongly incarcerated persons suffer equally. For these states, all that matters is the number of years of incarceration. Individual facts and circumstances are irrelevant, and the narratives of exonerees in these states go unheard. State statutes with both prescribed awards and caps additionally penalize those incarcerated the longest. Those incarcerated for lengthy terms are effectively given no compensation for the later years of prison, reducing their average annual awards.<sup>183</sup>

States with overall caps (Category 3) are similarly unfair to those incarcerated the longest. To the extent that the state awards at or near the cap, the rate of annual compensation for those incarcerated for very lengthy periods

(\$52,625.18 per year and lost wages, inflation adjusted), OHIO REV. CODE ANN. § 2743.49 (West 2017); Colorado (\$70,000 per year of incarceration; \$120,000 per year if sentenced to death), COLO. REV. STAT. ANN. § 13-65-103 (West 2017); Texas (\$80,000 per year of incarceration), TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West 2017). Vermont and Connecticut prescribe ranges: \$30-60,000 per year and lost wages, VT. STAT. ANN. tit. 13, § 5574 (West 2017), and \$71,346-\$142,692 per year, which is between one and two times Connecticut's gross household income, CONN. GEN. STAT. ANN. § 54-102uu (West 2017).

181. Wisconsin (\$5000 per year with \$25,000 total cap), WIS. STAT. ANN. § 775.05 (West 2017); Utah (\$42,180 (the Utah nonagricultural annual wage) per year; 15-year cap), UTAH CODE ANN. § 78B-9-405 (West 2017); Mississippi (\$50,000 per year; \$500,000 cap), MISS. CODE ANN. § 11-44-7 (West 2017); North Carolina (\$50,000 per year; \$750,000 cap), N.C. GEN. STAT. ANN. § 148-84 (West 2017); Florida (\$50,000 per year; \$2 million overall cap), FLA. STAT. ANN. § 961.06 (West 2017). Iowa varies slightly with a prescribed award of \$50 per day and a cap of \$25,000 per year in lost wages. IOWA CODE ANN. § 663A.1 (West 2017). Louisiana prescribes \$25,000 per year capped at \$250,000, plus up to \$80,000 for loss of life opportunities. LA. STAT. ANN. § 15:572.8 (West 2017).

182. New Hampshire (cap of \$20,000), N.H. REV. STAT. ANN. § 541-B:14 (2017); Illinois (0-5 years of incarceration cap is \$94,600; 5-14 years = \$188,423; 14+ years = \$230,732) (inflation adjusted 2016 figures), 705 ILL. COMP. STAT. ANN. 505/8 (West 2017); Oklahoma (cap of \$175,000), OKLA. STAT. ANN. tit. 51, § 154 (West 2017); Maine (cap of \$300,000), ME. REV. STAT. tit. 14, § 8242 (2017); Massachusetts (cap of \$500,000, including services and tuition), MASS. GEN. LAWS ANN. ch. 258D, § 5 (West 2017); Nebraska (cap of \$500,000), NEB. REV. STAT. ANN. § 29-4604 (West 2017); Tennessee (cap of \$1,000,000), TENN. CODE ANN. § 9-8-108 (West 2017).

183. For example, Mississippi, which awards \$50,000 per year and imposes a \$500,000 cap, effectively stops compensation at the end of 10 years. MISS. CODE ANN. § 11-44-7. Of 16 Mississippi exonerees, 9 were incarcerated for 10 years or longer. COMPLETE NAT'L REGISTRY, *supra* note 107. North Carolina awards \$50,000 per year of incarceration, capped at \$750,000. N.C. GEN. STAT. ANN. § 148-84. Of the 58 incarcerated exonerees in North Carolina, 20 served more than 15 years. COMPLETE NAT'L REGISTRY, *supra* note 107.

may be less than those incarcerated for less time.<sup>184</sup> Illinois, with the third-highest number of exonerees on the Registry, which oddly provides capped amounts for 0-5 years, 5-14 years, and over 14 years of incarceration, offers an excellent example.<sup>185</sup> One 2010 exoneree received \$85,350 for a 1.2-year wrongful incarceration, which exceeds \$70,000 per year.<sup>186</sup> Another man exonerated the same year after 23.1 years of wrongful imprisonment was awarded \$199,500, or just over \$8600 per year. Both received the maximum amount permitted for their durations of imprisonment.<sup>187</sup> States with compensation caps produce unjustifiable inequalities among exonerees within the state.

### 3. Promising Alternatives?

Only 3 states – Alabama, Connecticut, and Hawaii – provide for a specific damage floor and afford claimants an opportunity to seek additional monetary compensation based on particular individual circumstances.<sup>188</sup> In theory, these states would allow the claimant to demonstrate that particular harms they experienced justify an enhanced compensatory award. This would allow for an element of individualized decisionmaking similar to that offered in the September 11th Victim Compensation Fund, described below. So far, however, they are not promising.

Hawaii's statute, which imposes a floor of \$50,000 per year and an enhancement cap of \$100,000, was enacted in 2016 and remains untested.<sup>189</sup> There have been, moreover, only three exonerations in Hawaii since 1989.<sup>190</sup> Connecticut, which permits an award between one and two times the state median household income, allows the Claims Commissioner to award an additional 25% based on statutory factors.<sup>191</sup> That statute, amended in 2016 as described, retreats from Connecticut's previous uncapped provision and is also untested.

Alabama's statute merits closer attention because of its longer history and the greater number of exonerees in the state. It sets a \$50,000-per-year-of-

184. In Massachusetts, the overall cap is \$500,000, including the value of services and the tuition discount. MASS. GEN. LAWS ANN. ch. 258D, § 5. The average wrongful incarceration in Massachusetts is 10.9 years. See COMPLETE NAT'L REGISTRY, *supra* note 107. That caps the annual recovery for an average exoneree at less than \$50,000 per year. Twenty-two of 48 incarcerated exonerees in Massachusetts served more than 10 years. *Id.*

185. 705 ILL. COMP. STAT. ANN. 505/8.

186. COMPLETE NAT'L REGISTRY, *supra* note 107.

187. *Id.*

188. In Hawaii, the claimant may seek additional compensation in "extraordinary circumstances." HAW. REV. STAT. ANN. § 661B-3(c)(3) (West 2017). See ALA. CODE § 29-2-159 (2017); CONN. GEN. STAT. ANN. § 54-102uu (West 2017); HAW. REV. STAT. ANN. § 661B-3(c)(3).

189. HAW. REV. STAT. ANN. § 661B-3(c)(3).

190. COMPLETE NAT'L REGISTRY, *supra* note 107.

191. CONN. GEN. STAT. ANN. § 54-102uu.

imprisonment floor and an uncapped potential enhancement.<sup>192</sup> However, my review of each claim filed under Alabama's statute<sup>193</sup> reveals that in only one case was a claimant awarded more than the presumptive amount, and the increase was for litigation costs, not extraordinary non-economic damages. At the same time, it does not appear that the claimants in the other cases had ever actually requested an evidentiary hearing to support a petition for an enhanced award.

While it is premature to evaluate Connecticut and Hawaii, it is uncertain whether the adoption in other states of Alabama's intriguing floor-plus-uncapped-enhancement approach will work in practice. Perhaps a concern in Alabama is the potential delay in compensation inherent in proceeding before the Committee and, if it grants supplemental compensation, waiting for state legislative review. That cumbersome procedure would provide a disincentive to seeking enhanced compensation. Much better would be a process in which the base compensation amount is paid pending Committee and legislative review of a request for additional compensation.

Just four states (Maryland, Minnesota, New York, and West Virginia) and the District of Columbia<sup>194</sup> permit the exonerated claimant to seek full, tort-based compensatory relief. The results are widely variant and summarized in Table 1. In Maryland, for example,<sup>195</sup> the Board of Public Works makes compensation awards, and state law requires claimants to have been pardoned by the governor. Only 3 of 23 incarcerated Maryland exonerees on the Registry have been awarded compensation; the present value of those awards is \$91 or \$92 per day, less than one-tenth of that awarded by judges in the neighboring District of Columbia.<sup>196</sup> As Table 1 shows, awards in the remaining uncapped states are considerably higher, but none except Minnesota offer reentry support and services.

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192. ALA. CODE §§ 29-2-159(a)–(b).

193. Alabama has created a 9-person Committee on Compensation for Wrongful Incarceration, which consists primarily of high-ranking members of the state legislature or their designees. *Id.* §§ 29-2-151, 152. A claimant asserting eligibility for compensation submits an application to the state's Division of Risk Management. *Id.* § 29-2-158(a). If the Division finds the claimant eligible, the Committee has 90 days to certify an award. *Id.* § 29-2-158(b). The presumptive amount is \$50,000 per year of incarceration. *Id.* § 29-2-159(a). However, a claimant may request additional compensation. *Id.* § 29-2-159(b). If so, the Committee will convene a hearing and invite the attorney general and appropriate district attorney to attend and refute the claimant's evidence. *Id.* § 29-2-159(c). If the committee makes a presumptive or supplemental award, it does so in the form of a recommended bill presented to the state legislature. *Id.*

194. D.C. CODE ANN. § 2-423 (West 2017); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2017); N.Y. CT. CL. ACT § 8-b (McKinney 2017); W. VA. CODE ANN. § 14-2-13a (West 2017).

195. MD. CODE ANN., STATE FIN. & PROC. § 10-501. Information from the Maryland Board of Public Works is on file with the author.

196. COMPLETE NAT'L REGISTRY, *supra* note 107.

Minnesota's statute, enacted in 2014, deserves close attention because it adopts an innovative approach that rebalances state exposure and fair compensation by capping certain forms of damages but not others. Claims are decided by a 3-person compensation panel appointed by the Chief Justice of the Minnesota Supreme Court.<sup>197</sup> The panel is required to consider the following elements of damages: (1) economic damages, including attorneys' fees, lost wages, and costs of criminal defense; (2) reimbursement for medical and dental expenses already incurred and future unpaid expenses causally related to the wrongful imprisonment; (3) non-economic damages; (4) tuition benefits; (5) reimbursement for paid or unpaid child support payments; and (6) reimbursement for paid or unpaid reintegrative expenses.<sup>198</sup> Elements 2 and 3 are uncapped, while elements 1 and 4 through 6 are capped at \$100,000 per year of incarceration.<sup>199</sup> The statute sets a floor: \$50,000 per year of incarceration and \$25,000 for each year on supervised release or as a registered predatory offender.<sup>200</sup> The Minnesota statute requires the legislature to approve awards made by the compensation panel.<sup>201</sup>

So far, the results in Minnesota are encouraging. A legislative subcommittee has approved awards to 3 exonerated Minnesota men who were wrongfully imprisoned for 2, 3.1, and 5.5 years.<sup>202</sup> They sought and are expected to receive a total of \$1,787,000, or an average of nearly \$170,000 per year. However, Minnesota's novel statute has not been replicated beyond that state, where only 11 people have been exonerated since 1989.

#### 4. The Reality: Partial Compensation

It is clear that all of the states with prescribed limits or overall caps compensate far less than recent jury awards in civil rights cases or judgments in uncapped states.<sup>203</sup> This is not an accident. Many of the more recent state caps are keyed to the \$50,000 per-year metric contained in the 2004 amendment to the federal wrongful conviction compensation statute.<sup>204</sup> That \$50,000 annual cap did not, however, reflect Congress's judgment that such an amount fully compensates those wrongfully convicted. Indeed, the Senate report specifically noted that the \$50,000 cap was less than initially proposed and less than many members wished.<sup>205</sup> It was a compromise reflecting a realization that it did not

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197. MINN. STAT. ANN. § 611.363 (West 2017).

198. *Id.* § 611.365, subdvs. 2(1)–(6).

199. *Id.* § 611.365, subd. 3.

200. *Id.* § 611.365, subd. 2.

201. *Id.* § 611.367.

202. Matt Sepic, *Minn. Panel Approves Payment of \$1.8M to Three Freed After Wrongful Convictions*, MPR NEWS (Apr. 13, 2016), <http://www.mprnews.org/story/2016/04/13/payments-to-wrongfully-convicted>.

203. *Newton v. City of New York*, 171 F. Supp. 3d 156, 174 (S.D.N.Y. 2016).

204. 28 U.S.C. § 2513(e) (2012).

205. PATRICK LEAHY, THE INNOCENCE PROTECTION ACT OF 2002, S. REP. NO. 107-315, at 37 (2002).

represent full compensation for damages but instead was “the “very least that the Congress should do.”<sup>206</sup>

Some states with caps similarly acknowledge that the limit does not reflect a legislative judgment that it is fully compensatory. California, for example, made this quite clear. In its legislative findings, the California legislature expressed its intent to “remedy *some* of the harm caused to . . . factually innocent people.”<sup>207</sup> Moreover, in challenging as excessive an award of \$1 million per year of unjust imprisonment in a Federal Tort Claims Act case,<sup>208</sup> the United States pointed to § 2513 and state statutes with much smaller annual caps as evidence of more appropriate benchmarks for damages. The U.S. Court of Appeals for the First Circuit rejected that challenge and upheld the judgment, holding that the state and federal caps “do not purport to measure the harm actually inflicted by wrongful incarceration; rather, each reflects a legislative choice to limit the sovereign’s liability.”<sup>209</sup> These caps are simply a partial waiver of sovereign immunity.<sup>210</sup>

It is plain, then, that the vast majority of state statutes are not fully compensatory and are not intended to be. By pegging compensation at a particular rate, multiplied by years of incarceration, or by imposing very low caps, they have no place for the careful and detailed individualized inquiries made in *Odom* and *Tribble*. It is not simply that these statutes are insufficiently compensatory; most have no mechanism to account for the particular damages and harms experienced by individual exonerees.

Moreover, those state statutes that center on per-day and per-year incarceration metrics are temporally limited. On the front end, only 4 states permit

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206. *Id.*

207. 2009 Cal. Stat. ch. 432, § 1 (emphasis added).

208. *Limone v. United States*, 579 F.3d 79 (1st Cir. 2009).

209. *Id.* at 105.

210. In *Singletary v. District of Columbia*, the plaintiff filed a § 1983 suit against the District of Columbia, claiming that the D.C. Parole Board violated his right to due process when, without evidentiary support, it revoked his parole, resulting in Mr. Singletary’s incarceration for an additional ten years. 876 F. Supp. 2d 106, 107 (D.D.C. 2012), *vacated and remanded on other grounds*, 766 F.3d 66 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1565 (2015). The jury awarded him \$2.3 million, and the District of Columbia argued that the verdict was excessive, pointing to 28 U.S.C. § 2513(e), arguing, in effect, that \$50,000 per year is adequate and anything more is excessive. *Id.* at 108–10. The court pointed out the false comparison:

But what the legislature has determined that the government would be willing to pay to resolve a wrongful incarceration claim does not impose any sort of ceiling on what a jury can fairly decide. Here, the jury – which heard all the evidence in the case and assessed the credibility of the witnesses, including the plaintiff – determined that an amount of money greater than what was contemplated in that statute was necessary to compensate plaintiff for the particular harm he experienced.

*Id.* at 110.

compensation for pre-trial incarceration.<sup>211</sup> On the back end, only 4 states explicitly recognize that the harms suffered by exonerees do not end on the day of release.<sup>212</sup> The statutes in those states authorize compensation for post-release time spent on parole, probation, or a sex offender list.<sup>213</sup> No capped state statute provides for post-parole or post-probation damages or for post-release damages experienced by those never placed on parole, placed on probation, or required to register as a sex offender.

In addition, most state statutes overlook the significant economic costs associated with wrongful conviction. The most significant of these is lost wages. Only Connecticut, Iowa, Minnesota, Ohio, and Vermont have explicit lost wage provisions.<sup>214</sup> New Jersey keys its cap to twice the annual lost wages or \$50,000 per year, whichever is higher.<sup>215</sup> Only 4 states contemplate the award of unpaid child support accrued during the wrongful incarceration.<sup>216</sup> Six states permit the reimbursement of court costs, penalties, fees, expenses, or attorneys' fees arising from the underlying criminal case and/or post-conviction litigation.<sup>217</sup>

Yet, there are signs of progress. The relatively new statutes in states like Washington, Colorado, Texas, and Minnesota, while adopting aspects of prescribed awards and caps keyed to incarceration time, break free of the traditional mold that adheres only to those metrics. These statutes reflect a more thoughtful approach to compensation, which more comprehensively accounts

211. ALA. CODE § 29-2-156(2) (2017) (pre-trial detainees on state felony charges for at least 2 years are eligible); HAW. REV. STAT. ANN. § 611B-3(a)(3) (West 2017) (permits compensation for pre-trial detention in cases of conviction); N.C. GEN. STAT. ANN. § 148-84(a) (West 2017) (compensation includes time spent awaiting trial); WASH. REV. CODE ANN. § 4.100.060(5)(a) (West 2017) (compensation includes time waiting for trial if convicted). These cases explicitly provide for compensation for pre-trial detention under certain circumstances. *Cf.* MISS. CODE ANN. § 11-44-7(2)(a) (West 2017) (no compensation for pre-indictment detention).

212. Colorado, Minnesota, Texas, and Washington.

213. COLO. REV. STAT. ANN. § 13-65-103(3)(a)(II) (West 2017); MINN. STAT. ANN. § 590.11 (West 2017); TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(b) (West 2017); WASH. REV. CODE ANN. § 4.100.060(5)(a). No state statute explicitly provides for post-parole or post-probation damages.

214. CONN. GEN. STAT. ANN. § 54-102uu(a)(2) (West 2017); IOWA CODE ANN. § 663A.1(6)(c) (West 2017); MINN. STAT. ANN. § 590.11 subdiv. 2(1); OHIO REV. CODE ANN. § 2743.48(E)(2)(c) (West 2017); VT. STAT. ANN. tit. 13, § 5574(b)(1) (West 2017).

215. N.J. STAT. ANN. § 52:4C-5(b) (West 2017).

216. Only Colorado, Minnesota, Texas, and Washington do so at present. COLO. REV. STAT. ANN. § 13-65-103(2)(e)(II); MINN. STAT. ANN. § 590.11; TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a)(2); WASH. REV. CODE ANN. § 4.100.060(5)(c).

217. Only Colorado, Florida, Iowa, Ohio, Vermont, and Washington generally do so. COLO. REV. STAT. ANN. §§ 13-65-103(2)(e)(iv), (v); FLA. STAT. ANN. §§ 961.06(1)(c), (d) (West 2017); IOWA CODE ANN. § 663A.6(a); VT. STAT. ANN. tit. 13, § 5574(b)(1). Nebraska will extinguish liens imposed to recover costs of state-provided criminal defense. NEB. REV. STAT. ANN. § 29-4605 (West 2017).



for the duration of damages and the types of economic harms that the wrongfully exonerated have experienced. As will be discussed in Part V, aspects of these statutes serve as useful models for a reconceived approach to the compensation of the wrongfully convicted.

### B. *The Needs of the Exonerated*

There can be no doubt that many of the exonerated have significant health care, social service, job training and employment, and other needs.<sup>218</sup> But, there is no reason to think that those needs are the same or equally pressing for all. While many, like our client Donald Gates, were exonerated while in prison and thus released, many others, like our remaining clients, were exonerated post-release. This is not to say that they had no need for services, but rather, that their needs for certain services were less pressing than those who, often without significant warning, suddenly find themselves released after a lengthy incarceration.

A fair number of states<sup>219</sup> recognize the social service needs of the exonerated and thus offer elements of this form of restorative justice in their statutes,<sup>220</sup> although few offer a comprehensive set of them. Several states, with some limitations, offer the following services: (1) educational benefits, such as

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218. See generally INNOCENCE PROJECT, *Making Up for Lost Time*, *supra* note 13; Robert J. Norris, *Assessing Compensation Statutes for the Wrongly Convicted*, 23 CRIM. JUST. POL'Y REV. 352, 355–57 (2012). See also Armbrust, *supra* note 11, at 170–82 (advocating for “holistic” state compensation statutes that provide services and medical insurance in addition to money); Jennifer L. Chunias & Yael Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105 (2008) (same). Relying on psychological literature, Chinn and Ratliff detail the profound trauma experienced following release of those wrongfully convicted and argue that the exonerated should be offered transitional services. Chinn & Ratliff, *supra* note 55, at 415–18, 422–39, 442–43.

219. Of the 33 states (including the District of Columbia), with compensation statutes, 15 offer no services at all (Alabama, California, District of Columbia, Hawaii, Iowa, Maine, Michigan, Mississippi, Missouri, New Hampshire, New York, Oklahoma, Utah, and West Virginia). The Nebraska statute oddly provides that it does not preclude the provision of services but does not require them. NEB. REV. STAT. ANN. § 29-4606. Costs of such services are deducted from the award. *Id.*

220. For a discussion of restorative justice in this context, see Cathleen Burnett, *Restorative Justice and Wrongful Capital Convictions: A Simple Proposal*, 21 J. CONTEMP. CRIM. JUST. 272, 280–86 (2005).

free or reduced cost tuition at state public educational institutions;<sup>221</sup> (2) employment training;<sup>222</sup> (3) job search and placement;<sup>223</sup> (4) medical and counseling services;<sup>224</sup> and (5) reentry or reintegration services.<sup>225</sup> Whether they are actually sought and provided is much more difficult to determine.

Here again, Minnesota's statute is particularly thoughtful and comprehensive. It requires the panel awarding compensation to consider: (1) reimbursement of medical and dental expenses and future unpaid expenses expected to be incurred as a result of the wrongful imprisonment; (2) reimbursement for tuition and fees for educational programs or employment skills and development training and future costs for education and training, up to the cost of a 4-year public university; and (3) paid or unpaid reintegrative expenses "for immediate services secured by the claimant upon exoneration and release, including housing, transportation and subsistence, reintegrative services, and medical and dental health care costs."<sup>226</sup>

The Texas statute is also comparatively progressive and, as shown below, can serve as a model for reform. It requires that the same programs available for parolees be available to the wrongfully convicted.<sup>227</sup> It also requires the development of a comprehensive plan to ensure the "successful reentry and

221. COLO. REV. STAT. ANN. § 13-65-103(2)(e)(II) (Colorado awards tuition waivers at state colleges for the exonerated person and for his or her children conceived or adopted prior to incarceration if the claimant was unjustly incarcerated for more than 3 years); CONN. GEN. STAT. ANN. § 54-102uu(2)(c) (West 2017); FLA. STAT. ANN. § 961.06(1)(b); LA. STAT. ANN. § 15:572.8(H)(2)(c)(i) (West 2017); MASS. GEN. LAWS ANN. ch. 258D, § 5(A) (West 2017); MINN. STAT. ANN. § 611.362, subdiv. 2(4); MONT. CODE ANN. § 53-1-214 (West 2017); N.C. GEN. STAT. ANN. § 148-84(c)(2) (West 2017); VA. CODE ANN. § 8.01-195.11(C) (West 2017) (\$10,000 community college career or technical training reimbursement).

222. CONN. GEN. STAT. ANN. § 54-102uu(e); N.C. GEN. STAT. ANN. § 148-84(c)(1).

223. 20 ILL. COMP. STAT. ANN. 1015/2 (West 2017); LA. STAT. ANN. § 15:572.8(H)(2)(a) (job skills training for 3 years); N.C. GEN. STAT. ANN. § 148-84(c)(1) (for at least 1 year).

224. LA. STAT. ANN. § 15:572.8(H)(2)(b) (for 6 years); MD. CODE ANN., STATE FIN. & PROC. § 10-501(a)(1) (West 2017) (Board of Public Works may "grant a reasonable amount for any financial or other appropriate counseling"); MASS. GEN. LAWS ANN. ch. 258D, § 5(A); MINN. STAT. ANN. § 611.365, subdivs. 2(2), (6) (West 2017) (allows for reimbursement for medical and reintegrative services); VT. STAT. ANN. tit. 13, § 5574(b)(2) (West 2017) (up to 10 years of health coverage equivalent to Medicaid).

225. CONN. GEN. STAT. ANN. § 54-102uu(e); 20 ILL. COMP. STAT. ANN. 1710/125 (reentry services limited to assistance in obtaining mental health services); MINN. STAT. ANN. § 611.365, subdiv. 2(6); N.J. STAT. ANN. § 52:4C-5(b) (West 2017) (claimant may be awarded other non-monetary relief, including vocational training, tuition assistance, counseling, housing assistance, and health insurance coverage); TEX. GOV'T CODE ANN. § 501.101(b) (West 2017); VT. STAT. ANN. tit. 13, § 5574(b)(3); WASH. REV. CODE ANN. § 4.100.060(10) (West 2017) (claimant may seek referral to reentry services; statute silent on who pays for services).

226. MINN. STAT. ANN. § 611.365, subdiv. 2(6).

227. TEX. GOV'T CODE ANN. § 501.101(b).

reintegration” of wrongfully imprisoned persons.<sup>228</sup> That plan must include life skills, job, and vocational training for as long as they are needed, assistance in identifying needed documents, and financial assistance of up to \$10,000 for living expenses following the release from prison.<sup>229</sup>

These statutes reflect efforts to proactively identify and provide the assistance particular exonerees specifically require. They view the exonerated as individuals with unique and personal needs that government programs can address, rather than as a depersonalized multiplication problem. The inclusion of social services and other reentry support in new state compensation statutes is the most significant improvement in these statutes over the last decade.

### C. Expedited Consideration and Choice

The process that results in a state compensation award involves two steps: (1) the post-conviction process aimed at obtaining a *vacatur* of the conviction, dismissal of the indictment, and/or a certificate of actual innocence and (2) a compensatory process in which a civil remedy is sought. Outside the scope of this Article is the length of post-conviction relief procedures.<sup>230</sup> Compensatory delay can be devastating, particularly for those freed from prison with nothing following post-conviction relief.<sup>231</sup>

The first potential cause of compensatory delay is essentially factual and raises the question of whether the findings and conclusions made during the post-conviction proceedings are given preclusive effect in the civil claim for compensation. Our D.C. cases, for instance, involved unique questions about the preclusive effect of facts recited in the certificates of innocence awarded at

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228. *Id.* § 501.102(b).

229. *Id.*

230. A terrible practice, but one in which counsel in post-conviction relief proceedings and compensation cases may face and manage jointly, are offers by the State to concede post-conviction relief in exchange for an agreement to waive rights to civil damages. Josh Saul, *The Fairbanks Four's Brutal Fight for Freedom*, NEWSWEEK (Jan. 12, 2016, 5:39 AM), <http://www.newsweek.com/2016/01/22/alaska-fairbanks-four-and-how-murder-convictions-end-414201.html>. Such was the case in for “Fairbanks Four” in Alaska whose convictions were reversed in exchange for a waiver. *Id.*

231. *See, e.g.*, Marie C. Baca, *Wrongly Convicted Face Uphill Battle to Obtain Compensation*, CAL. WATCH (Mar. 5, 2011), <http://californiawatch.org/public-safety/wrongly-convicted-face-uphill-battle-obtain-compensation-9014> (California process can take 2 years from filing to hearing); Glaun, *supra* note 122 (2 years is allowed for discovery in compensation cases); Ziva Branstetter, *Few Exonerees Receive Payment for Wrongful Convictions*, TULSA WORLD (Nov. 23, 2014, 12:00 AM), [http://www.tulsaworld.com/newshomepage1/few-exonerees-receive-payment-for-wrongful-convictions/article\\_0f8f4e61-ca52-57bf-a8c5-ad3014fe4003.html](http://www.tulsaworld.com/newshomepage1/few-exonerees-receive-payment-for-wrongful-convictions/article_0f8f4e61-ca52-57bf-a8c5-ad3014fe4003.html) (last updated Apr. 23, 2016) (describing Nebraska man’s 10-year effort to receive compensation).

the conclusion of post-conviction proceedings, during which federal prosecutors represented the interests of the District of Columbia.<sup>232</sup> The second often-litigated issue concerns whether the exonerated claimant satisfies the statutory prerequisites of the state compensation statute.<sup>233</sup> As shown in Table 1, this litigation or administrative adjudication is not uncommon – 109 claims by claimants on the Registry were denied, and an unknown number surmounted challenges to compensability.<sup>234</sup> The third potential source of delay arises in the process by which the amount of compensation for qualified exonerees is set and ultimately awarded.<sup>235</sup> Delay can follow when the statute fails to impose deadlines for the administrative processing of the award,<sup>236</sup> when the administrative adjudication amounts to a recommendation to the state legislature

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232. In the absence of statutory direction, this can involve some potentially tricky issues. For instance, a county district attorney may agree that the former defendant is factually innocent, but a stipulated order to that effect may not be binding on the separate governmental entity, the State, litigating the claim for compensation. This may raise the questions whether the issue of factual innocence was “actually litigated” and whether the State is in privity with the county, such that the State is deemed to have had a full and fair opportunity to litigate the issue. *See* *Tennison v. Cal. Victim Comp. & Gov’t Claims Bd.*, 62 Cal. Rptr. 3d 88, 95–101 (Cal. Ct. App. 2007) (discussing preclusion question prior to statutory amendment). California, Illinois, and Ohio, for example, resolve that issue by deeming declarations or certificates of factual innocence binding on subsequent claims for damages. CAL. PENAL CODE § 851.865 (West 2017); 735 ILL. COMP. STAT. ANN. 5/2-702(j) (West 2017); OHIO REV. CODE ANN. § 2743.48(E)(1) (West 2017).

233. *See supra* note 128.

234. *See infra* Table 1.

235. The Minnesota statute offers a clear example of a bifurcated process. MINN. STAT. ANN. § 590.11 (West 2017), *held unconstitutional on other grounds*, *Back v. State*, 883 N.W.2d 614 (Minn. Ct. App. 2016). In Minnesota, a claimant must first file an action in court for an order declaring him or her eligible for compensation, to which the prosecutor responds. *Id.* If granted, the claimant files a separate claim for compensation with the state supreme court. *Id.* § 611.362.

236. Twenty-five of the state statutes have no deadlines for the resolution of the claim for compensation and subsequent award, if granted. Several contain tepid exhortations that the matter be resolved as soon as practical. *See, e.g.*, COLO. REV. STAT. ANN. § 13-65-02(6) (West 2017); LA. STAT. ANN. § 15:572.8(H)(1) (West 2017). In New York, the matter must be given docket priority. N.Y. CT. CL. ACT § 8-b(2) (McKinney 2017). Those with some specific deadlines generally do not impose time frames covering each step of the process. In California, for example, the Victim Compensation and Government Claims Board is required to calculate the amount of compensation within 30 days of presentation, and the attorney general may respond within 60 days to claims that were not based on a certificate of innocence or writ of habeas corpus. CAL. PENAL CODE § 4902(a). However, the following hearing is scheduled at the “earliest date convenient,” and no deadline is set for a decision or for legislative review of any recommended payments. *Id.* § 4902(b). *See also* Pishko, *supra* note 2 (noting that the California Claims Board process “takes no less than [a] year, and often much more than that”).

to make a future payment,<sup>237</sup> or when a civil lawsuit is required to obtain compensation.<sup>238</sup> It took Kirk Odom 3 years from the filing of his complaint to receive his compensation, and Santae Tribble waited even longer.

Given the state interest in ensuring that an exonerated individual meets the requirements of the state compensation statute, devoting the time necessary to make that determination is inevitable, particularly in cases raising real questions of qualification. The delay inherent in resolving questions of qualification, real or imagined, however, gives the state bargaining leverage in cases that may be subject to settlement. That leverage can be very effective with exonerees desperate for support.

Some states address this issue by requiring the state, represented by the attorney general's office or district attorney, to announce whether it will oppose the claim on qualification grounds by a certain date.<sup>239</sup> Opposed claims are litigated judicially or administratively. Unopposed claims move on to a determination of compensation. Once that stage is reached, however, no state offers the exoneree the choice to either receive a set of services and prescribed monetary award or to pursue litigation seeking more than that prescribed award.

As described below, that election of remedies concept would give the qualifying exoneree a choice to trade compensation for speed. They should be permitted to select a package of compensation and services to be provided quickly or proceed to litigate the compensation question. For our clients, only the latter option was available. But, as explored in the next section, the remedial frameworks of the National Vaccine Injury Compensation Program and the September 11th Victim Compensation Fund offer design features that might fit in a more flexible state compensation scheme in a manner that can benefit both the states and exonerees.

## V. ALTERNATIVE CLAIMS PROCESSING MODELS

### A. *The National Childhood Vaccine Injury Act of 1986*

A small percentage of individuals who are administered a vaccine experience an adverse reaction to it. In the early 1980s, the number of lawsuits

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237. ALA. CODE § 29-2-165(a) (2017); CAL. PENAL CODE § 4904; MINN. STAT. ANN. § 611.368; VA. CODE ANN. § 8.01-195.10(A) (West 2017). This problem has been particularly acute recently in Illinois. See Lolly Bowean, *Freed from Prison, but Waiting Compensation as State Budget Fight Drags On*, CHI. TRIB. (Oct. 9, 2015, 5:00 PM), <http://www.chicagotribune.com/news/ct-exonerated-payouts-held-met-20151009-story.html>.

238. A 2007 *New York Times* analysis of claims that individuals filed on the Innocent Project's listing of persons exonerated through DNA analysis found that over half of those awarded compensation received it 2 or more years after exoneration. Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), <http://www.nytimes.com/2007/11/25/us/25dna.html>.

239. HAW. REV. STAT. ANN. §661B-2(b) (West 2017).

seeking compensation for such injuries grew, causing 2 of the 3 domestic vaccine manufacturers to exit the market.<sup>240</sup> The supply of vaccines was threatened, rates of vaccinations dropped, and compensation for injury was slow and difficult.<sup>241</sup> Congress passed the National Childhood Vaccine Injury Act of 1986<sup>242</sup> to replace the traditional tort system for this category of injury with the intent to resolve this serious dilemma.

The Act created an adjudicatory process that largely preempted state tort suits against vaccine manufacturers and healthcare providers.<sup>243</sup> Petitioners are required to file claims for damages in the U.S. Court of Federal Claims.<sup>244</sup> They are not required to demonstrate fault but must show causation. To facilitate the showing of causation in certain cases, a Vaccine Injury Table (“Table”) was developed.<sup>245</sup> If a listed side effect is experienced within the time periods following administration of particular vaccines set forth in the Table, causation is presumed; it then becomes incumbent on the government to rebut that presumption.<sup>246</sup> A Special Master of the Court of Federal Claims decides the claim within 240 days of filing,<sup>247</sup> subject to time-restricted review by the Court of Federal Claims.<sup>248</sup>

The statute compensates the injured petitioner fully for causally related medical, social service, and other expenses, as well as lost wages.<sup>249</sup> Injured petitioners who prove causation are also entitled to compensation for pain and suffering, but this category of damages is capped at \$250,000.<sup>250</sup> Damages are

240. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 227 (2011). For a detailed description of the history leading to the National Childhood Vaccine Injury Act, see Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1655–58 (2015).

241. *Wyeth*, 562 U.S. at 227.

242. *See* Act of Nov. 14, 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C. §§ 300aa-1–300aa-34). The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act. *Id.*

243. Unless the petitioner seeks less than \$1000, he or she may not sue a vaccine administrator or manufacturer without first proceeding in the U.S. Court of Federal Claims. 42 U.S.C.A. § 300aa-11(a)(2) (West 2017). For a description of the history of the Act, and its provisions, see Engstrom, *supra* note 240; Peter H. Meyers, *Fixing the Flaws in the Federal Vaccine Injury Compensation Program*, 63 ADMIN. L. REV. 785, 792–96 (2011).

244. 42 U.S.C.A. § 300aa-11(a)(1).

245. *Id.* § 300aa-14(a); 42 C.F.R. § 100.3 (2017).

246. 42 U.S.C.A. §§ 300aa-11(c)(1), 300aa-13(a)(1)(A). The petitioner must prove causation through conventional means in cases not covered by the Table. Meyers, *supra* note 243, at 790–91, 798, 801. The substantial majority of vaccine injury cases no longer involve use of the Table. As a result, this litigation-shortening mechanism is now largely inoperative.

247. 42 U.S.C.A. § 300aa-12(d)(3)(ii).

248. *Id.* § 300aa-12(e)(2) (the court has 120 days from the date of filing of the response brief to complete its review).

249. *Id.* §§ 300aa-15(a)(1), (3).

250. *Id.* § 300aa-15(a)(4).

also capped at \$250,000 in cases of death.<sup>251</sup> Attorneys' fees are awarded in cases in which the petitioner prevails and in cases in which he or she does not, so long as the "petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought."<sup>252</sup> Attorneys' fees are paid by the Vaccine Injury Compensation Trust Fund.

The government or patient, rather than the vaccine manufacturer, pays an excise tax on each vaccine to fund the Trust Fund, from which money is drawn to pay damages, costs, and fees under the Act.<sup>253</sup> The current excise tax is 75 cents per vaccine recommended by the Centers for Disease Control and Prevention.<sup>254</sup> To provide a sense of the scope of the program, from October 1, 1988, to March 1, 2017, 17,935 claims for compensation have been filed, of which 5,269 were granted.<sup>255</sup> Total outlays have been \$3,619,323,678.<sup>256</sup> Of this total, \$3,363,282,409 went to petitioners, and the balance of \$256,041,269 was paid to attorneys.<sup>257</sup>

Under the Act, if claimants are dissatisfied with the results of their petitions before the Court of Federal Claims, they may elect to file a civil action within 90 days.<sup>258</sup> The scope of permissible civil actions against manufacturers or health care providers is, however, quite narrow.<sup>259</sup> The Act preempts certain claims against providers and manufacturers, including those for design defect.<sup>260</sup> Before the *Bruesewitz* decision in 2011, which further narrowed the scope of available remedies for petitioners who opt out, 99.8% of petitioners who received an award chose not to reject it in favor of a civil action.<sup>261</sup>

The National Vaccine Injury Compensation Program has been subject to substantial criticism.<sup>262</sup> Of greatest concern in this context is the failure of petitions to be decided within the 240-day deadline set in the Act. In fact, fewer than 5% of claims are decided timely, with an average resolution length of more than 5 years.<sup>263</sup> As time has passed, far fewer cases have been guided

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251. *Id.* § 300aa-15(a)(2).

252. *Id.* § 300aa-15(e).

253. *See id.* § 300aa-15(i)(2); *see also* Meyers, *supra* note 243, at 793.

254. 26 U.S.C. § 4131(b)(1) (2012).

255. HEALTH RES. & SERVS. ADM'R, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL VACCINE INJURY COMPENSATION PROGRAM: MONTHLY STATISTICS REPORT 5 (updated Mar. 1, 2017), [https://www.hrsa.gov/vaccinecompensation/data/vicpmonthlyreporttemplate3\\_1\\_17.pdf](https://www.hrsa.gov/vaccinecompensation/data/vicpmonthlyreporttemplate3_1_17.pdf).

256. *Id.* at 8–9.

257. *Id.*

258. 42 U.S.C.A. § 300aa-21(a).

259. *Id.* §§ 300aa-22(b), (c).

260. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011). *See also* Engstrom, *supra* note 240, at 1664.

261. Engstrom, *supra* note 240, at 1664 n.186.

262. *See generally id.*; Meyers, *supra* note 243, at 792–809.

263. Engstrom, *supra* note 240, at 1685.

toward resolution by reference to the Table, requiring causation to be litigated.<sup>264</sup> In addition, part of that delay is attributable to complexities in assessing damages, even though certain elements of damages are prescribed by statute.<sup>265</sup> The hope that such damage determinations could be made more cooperatively has collided with the default position in American litigation – adversarialism.<sup>266</sup>

### B. The September 11th Victim Compensation Fund

After the September 11th terrorist attacks, Congress passed the Air Transportation Safety and System Stabilization Act.<sup>267</sup> That Act created the September 11th Victim Compensation Fund, which was intended to provide monetary compensation to those physically injured in the attacks and to the families of those killed.<sup>268</sup> Congress intended that potential claimants either elect to pursue no-fault compensation from the Fund, administered by a Special Master,<sup>269</sup> or to pursue litigation through an exclusive federal remedy created in the U.S. District Court for the Southern District of New York.<sup>270</sup> The Special Master was tasked with determining eligibility for compensation and the amount of compensation awarded to those found eligible.<sup>271</sup> The statute authorized the Special Master to make individualized determinations of compensation, accounting for economic and noneconomic harm and deducting collateral source

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264. Meyers, *supra* note 243, at 799–805.

265. Engstrom, *supra* note 240, at 1691–92.

266. *Id.* at 1664 n.186.

267. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended in scattered sections of 49 U.S.C.). A key purpose of the Act was to ensure the continued operation of the airlines in light of concern that their insurance carriers might terminate coverage and insufficient funds would be available in the capital markets to fund a potentially enormous liability. 147 CONG. REC. H5894–5902 (Sept. 21, 2001). Compensation for any suit filed against an airline was capped at the amount of the airline’s insurance coverage. § 408(a), 115 Stat. at 240. That limitation was later extended to other potential defendants in litigation, such as airline security, the owners of the World Trade Center, and airport owners and operators. Aviation Transportation and Security Act, Pub. L. No. 107-71, § 201, 115 Stat. 646 (2001) (codified at 49 U.S.C. § 40101 (2012)).

268. § 403, 115 Stat. at 237–41.

269. *Id.* § 404. Filing a claim with the Special Master effects a waiver of rights to pursue a judicial remedy. *Id.* § 405(c)(3)(B)(i). The Attorney General selected Kenneth Feinberg to serve as the Special Master. KENNETH R. FEINBERG, DEP’T OF JUST., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 6 (2004), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/September-11-Victim-Compensation-Fund-Final-Report-Volume-I-I.pdf>.

270. § 408(b), 115 Stat. at 2401–41.

271. *Id.* § 405(b)(1).



payments.<sup>272</sup> The Special Master had 120 days after a claim was filed to make such determinations, and those determinations were final.<sup>273</sup>

The statute therefore required the Special Master to make case-by-case determinations based on traditional no-fault tort principles. At the same time, pursuant to the statute's directive that he also consider "the individual circumstances of the claimant,"<sup>274</sup> the Special Master, Kenneth Feinberg, included in his consideration of individual circumstances "the financial needs or financial resources of the claimant or the victim's dependents and beneficiaries."<sup>275</sup> Nonetheless, Special Master Feinberg viewed his charge as not making "widely disparate" awards to claimants.<sup>276</sup> And the statute required those difficult determinations, and the resulting payments, to be made very quickly, which dampened any inclination to make time consuming, highly individualized determinations.

For those killed in the attacks, Special Master Feinberg crafted "presumed" economic loss metrics for the calculation of lost future earnings intended to be both generous and easy to administer.<sup>277</sup> The presumed noneconomic loss for those killed was set at a uniform \$250,000, plus \$100,000 for the spouse and each dependent.<sup>278</sup> The claimant could, however, attempt to persuade the Special Master to depart from the presumed awards in cases of "extraordinary circumstance."<sup>279</sup>

With respect to economic loss in death cases, such extraordinary circumstances included an income exceeding the ninety-eighth percentile or a demonstration of greater-than-expected potential for job advancement.<sup>280</sup> The regulations also permitted the Fund to enhance awards when the victim or victim's family "would suffer significant out-of-pocket expenses in order to maintain daily care and household services."<sup>281</sup> The Fund's final report stated that over

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272. *Id.* §§ 405(b)(1)(B), (b)(6). The Act, then, contained provisions reflecting a collective needs-based model (fault and contributory fault were irrelevant, with set-offs for collateral sources) and a competing individual entitlements model (awarding compensation for economic and subjective noneconomic losses). Robert L. Rabin, *September 11 Through the Prism of Victim Compensation*, 106 COLUM. L. REV. 464, 469–71 (2006) (reviewing KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE VICTIMS OF 9/11* (2005)).

273. § 405(b)(3), 115 Stat. at 239.

274. *Id.* § 405(b)(1)(B)(ii).

275. 28 C.F.R. § 104.41 (2017).

276. FEINBERG, *supra* note 269, at 5.

277. *Id.* at 7–9, 30–31; *see* 28 C.F.R. § 104.43. Additional economic losses included medical expenses, loss of services, and burial costs. *Id.* Special Master Feinberg described the methodology in a statement. DEP'T OF JUST., EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS (2002), [www.justice.gov/archive/victimcompensation/vc\\_matrices.pdf](http://www.justice.gov/archive/victimcompensation/vc_matrices.pdf).

278. 28 C.F.R. § 104.44.

279. *Id.* § 104.33(e)(2).

280. FEINBERG, *supra* note 269, at 37–38.

281. *Id.* at 38.

300 families demonstrated “extraordinary special needs, such as children suffering from serious medical conditions or developmentally disabled family members who had depended on the victim’s assistance for daily care,”<sup>282</sup> as well as the loss of unborn children.

The presumed noneconomic loss award was also adjusted upward in extraordinary cases. Such cases included the loss of multiple family members in the attacks, the death of other close family members shortly before or after September 11, 2001, situations in which children lost both parents, circumstances in which an individual was severely injured and later died, cases of pregnant victims, and instances when surviving spouses of deceased victims miscarried due to trauma.<sup>283</sup> Such increased awards were made in 75 cases.<sup>284</sup>

With respect to those injured in the attacks, Special Master Feinberg determined economic loss on a case-by-case basis, depending on the severity and permanency of the injury.<sup>285</sup> Given the wide variations in physical injuries, Special Master Feinberg did not adopt a set non-economic injury award. Instead, he used the \$250,000 figure in death cases as a guide and adjusted it based on “the nature, severity and duration of the injury and the individual circumstances of the claimant.”<sup>286</sup> In sum, one observer stated, “[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.”<sup>287</sup>

Special Master Feinberg created 2 claims processing tracks once it was determined that the written claim was substantially complete. Under Track A, Fund evaluators issued decisions of eligibility and made a presumed eligibility award.<sup>288</sup> The claimant then had a right to appeal that award at an in-person hearing, during which he or she could argue that “extraordinary circumstances” warranted an upward adjustment to the presumed award.<sup>289</sup> Under Track B, a hearing before the Special Master or his designee was held after the claim was found substantially complete.<sup>290</sup> The award determination (if any) was made

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282. *Id.*

283. *Id.* at 42–43.

284. *Id.* at 43.

285. 28 C.F.R. § 104.45 (2017).

286. FEINBERG, *supra* note 269, at 43. *See* 28 C.F.R. § 104.46. The highest noneconomic award in an injury case was \$6 million. FEINBERG, *supra* note 269, at 43. Four percent were greater than \$250,000. *Id.* The Report identified those with catastrophic burns as those warranting high noneconomic compensation. *Id.*

287. Rabin, *supra* note 272, at 478.

288. *Id.* at 477 n.59.

289. FEINBERG, *supra* note 269, at 15. *See* 28 C.F.R. § 104.31(b)(2). The “extraordinary circumstances” standard for a departure from the presumed award is found at 28 C.F.R. § 104.33(f)(2).

290. FEINBERG, *supra* note 269, at 15.

thereafter without a right of appeal.<sup>291</sup> In total, just over 3000 hearings were held regarding award amounts for injury and death cases combined.<sup>292</sup>

Ninety-seven percent of eligible families of deceased and injured victims obtained compensation through the Fund.<sup>293</sup> Ninety-five lawsuits were filed on behalf of 96 claimants in the Southern District of New York.<sup>294</sup> Thirteen of the cases (principally against airline carriers) settled quickly.<sup>295</sup> Subsequent delays and complications in discovery prompted Judge Alvin K. Hellerstein, who oversaw the lawsuits, to assign a mediator to attempt to settle the remaining cases.<sup>296</sup> Ultimately, all settled.<sup>297</sup>

Prior to the issuance of Judge Hellerstein's Order and the Mediator's Report, Professor Gillian K. Hadfield conducted an empirical study in which she surveyed and interviewed claimants about their choice between seeking compensation from the Fund or pursuing federal litigation.<sup>298</sup> Professor Hadfield concluded that "the choice between accepting a payment from the Fund and going to court was not exclusively, or even primarily, framed as a financial calculation."<sup>299</sup> Although those who settled after pursuing litigation appeared

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291. *Id.* According to the Report, claimants for deceased persons split fairly evenly between choosing Track A or Track B. *Id.* at 16. Eighty-nine percent of injured claimants chose Track A. *Id.*

292. *Id.* at 18, 111. To put that in context, 2968 claims were filed for deceased victims for which there were 2880 awards. *Id.* Nearly \$6 billion, after offsets, were awarded. *Id.* at 110. The average award was \$2,082,035.07. *Id.* Further, 4435 claims were filed for injured victims. *Id.* The Fund made 2680 awards, totaling just over \$1 billion. *Id.* The average award was \$392,968.11. *Id.*

293. *Id.* at 1.

294. *In re* September 11 Litigation, No. 21 MC 101, slip op. at 4 (S.D.N.Y. Mar. 4, 2009) (order accepting mediator's report and providing that it be filed).

295. *Id.* at 5.

296. *Id.* at 6–8.

297. *Id.* at 8 (at the time the report was issued, 3 cases remained unsettled). A number of cases settled after damages-only discovery and jury trials in a sample of 6 cases. *Id.* at 7–8. See also Benjamin Weiser, *Value of Suing over 9/11 Deaths Is Still Unsettled*, N.Y. TIMES (Mar. 12, 2009), [http://www.nytimes.com/2009/03/13/nyregion/13lawsuits.html?\\_r=0](http://www.nytimes.com/2009/03/13/nyregion/13lawsuits.html?_r=0). The last case settled in 2011. Benjamin Weiser, *Family and United Airlines Settle Last 9/11 Wrongful-Death Lawsuit*, N.Y. TIMES (Sept. 19, 2011), <http://www.nytimes.com/2011/09/20/nyregion/last-911-wrongful-death-suit-is-settled.html>. The mediator assigned by Judge Hellerstein reported that the total amount of settlements in the 93 cases was approximately \$500 million, or roughly \$5 million per case. See *In re* September 11 Litigation, No. 21 MC 101, slip op. at 13 (S.D.N.Y. Mar. 3, 2009) (report of the mediator on the mediation and settlement efforts of the parties in the cases previously docketed under 21 MC 97). That compares to an average award of just over \$2 million in death cases made by the Fund. FEINBERG, *supra* note 269, at 1. The Mediator's Report, however, cautions that such a comparison may be misleading because some of the cases involved those with extremely high earnings or other extraordinary circumstances. *September 11 Litigation*, slip op. at 13.

298. Gillian K. Hadfield, *Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC'Y REV. 645 (2008).

299. *Id.* at 647.

to have recovered more than the average Fund recipient, obtaining that higher amount was not, she concluded, an important reason for making that choice.<sup>300</sup>

Professor Hadfield's surveys and interviews revealed that a substantial number of respondents believed that parties other than the hijackers (such as airline security firms, the Federal Aviation Administration, and the Immigration and Naturalization Service) deserved a measure of blame for the resulting deaths and injuries.<sup>301</sup> Ten of Professor Hadfield's interviewees went the litigation route, and, she found, none did so for financial reasons.<sup>302</sup> Instead, they were motivated by a desire to punish, to achieve a public attribution of responsibility, to learn about what happened, to prevent a recurrence, or to avoid being perceived as taking "hush money."<sup>303</sup> Some felt that litigation was part of responsible citizenship in which they acted "as an agent of the community to gain information about what happened, to hold people accountable, and to play a role in prompting responsive change."<sup>304</sup>

Professor Hadfield found that 57% of the claimants who sought compensation through the Fund regarded that decision as "'somewhat' or 'very' hard."<sup>305</sup> Ten percent regretted their choice, and 25% were unsure about whether they were right in choosing the Fund.<sup>306</sup> Of those who found the decision difficult, non-monetary concerns substantially outweighed monetary considerations in their thinking.<sup>307</sup> Of those who did not, non-monetary considerations, such as financial pressure to obtain an award quickly and concerns about the emotional stress of litigation, significantly outweighed monetary factors.<sup>308</sup> Some did not believe that litigation would achieve the non-monetary goals that litigants believed could be furthered.<sup>309</sup>

### C. *Transferrable Elements*

Although done in different ways and with varying degrees of success, the National Vaccine Injury Compensation Program and the September 11th Victim Compensation Fund both attempted to deal with the problem of compensating substantial numbers of persons for tragic injury in ways that strongly steered claimants away from the traditional litigation model. They attempted to tackle very different kinds of problems. The September 11th Victim Compensation Fund was occasioned by a single horrendous event that summoned a national will to compensate the victims of those attacks quickly, sensitively,

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300. *Id.*

301. *Id.* at 653–59.

302. *Id.* at 660–61.

303. *Id.* at 659–62.

304. *Id.* at 673.

305. *Id.* at 663.

306. *Id.*

307. *Id.*

308. *Id.* at 664–70.

309. *Id.* at 666. In retrospect, that belief seems to have been borne out. All but 3 litigants settled without obtaining substantial discovery on liability. *Id.* at 675.

and with meaningful, but not unbounded, generosity. The National Vaccine Injury Compensation Program, in contrast, more closely resembles wrongful conviction compensation, in the sense that it deals with the resolution of ongoing claims that will arise indefinitely.

The question of qualification for compensation was, in the vast majority of cases, a non-issue in the September 11th Victim Compensation Fund context. Use of the Vaccine Table was initially expected to make qualification straightforward in vaccine injury cases as well, but it has not turned out that way. Qualification decisions in the National Vaccine Injury Compensation Program follow a far more adversarial process as the Table has applied to fewer and fewer cases. This has created significant delay in the resolution of vaccine compensation qualification decisions.

On the compensation side, both programs incorporated varying concepts of floors and caps, but they also created mechanisms for determining whether appropriate compensation should exceed the floors or fall below those caps. For the September 11th Victim Compensation Fund, those mechanisms and hard deadlines promised claimants a more efficient and shorter claims resolution process, with the Special Master as the ultimate decider. The Fund's success was largely attributable to the Special Master's efforts to create a non-adversarial process, administered by sensitive and empathetic staff, guided by a claimant-centered mission. Compensation through the National Vaccine Injury Compensation Program, however, continues to be subject to the delay inherent in an adversarial process.

This brief comparison highlights the age-old conflicts in any claims resolution process. When qualification for compensation can be uncertain or debatable, individualized determinations are necessary. Those determinations can follow from claimant-driven advocacy or an adversarial process. The time required to make those decisions depends on the nature of that advocacy, the volume of the claims, the complexity of the decision, and the number of decision-makers available. In the wrongful conviction compensation context, that decision-making process ranges from an administrative claims process, in which risk managers quickly decide written applications, to traditional adversarial litigation that, on occasion, reaches state supreme courts.

Uniform compensation may be efficiently and fairly determined when claimants suffer identical injuries. However, when the compensatory determination may depend on individualized characteristics, a fact-finder informed through an advocacy process must determine what characteristics are relevant, whether they are present, and what weight they should be given; then, the fact-finder must apply those determinations to the established compensatory metric. The result may be comparatively fairer outcomes for claimants but ones that may be obtained at some cost in time and money.

For at least some exonerees in certain states, the statutory process for receiving compensation for wrongful conviction combines the worst aspects of the National Vaccine Injury Compensation Program and the September 11th Victim Compensation Program. For some listed on the Registry, the circum-

stances of their exonerations nevertheless raise questions about their qualifications under state statutes. Those qualification determinations are often adversarial and delayed, particularly when the decision-maker is a busy judge rather than a specialized administrative decision-maker. For those found qualified, the resulting compensation decisions are, in most states, non-individualized but nevertheless subject to delay. And, they are often both comparatively and normatively unjust due to prescribed awards and caps and the lack of an opportunity to seek exceptions for special individual circumstances. The task next, then, is to draw upon the best features of these programs to craft a better compensation system for exonerees that is also mindful of the concerns of the states.

## VI. A PROPOSAL

As explained, there are three pieces to this puzzle. The first involves the often lengthy and complex post-conviction procedure aimed at exoneration. The second concerns the determination of whether the exoneree satisfies the requirements of the state compensation statute. The third piece deals with the award of state compensation to those qualified to receive it. At steps two and three, an opportunity exists to construct a compensatory regime less adversarial, less time consuming, and more even-handed than most state statutes currently in place. That reconstruction should thoughtfully borrow from certain statutory design elements of the National Vaccine Injury Compensation Program and the September 11th Victim Compensation Fund, as well as sound elements of certain existing state wrongful conviction compensation statutes.

### *A. A New Funding Mechanism*

Paralleling the funding mechanism of the National Vaccine Injury Compensation Program, states should create Wrongful Conviction Trust Funds.<sup>310</sup> They should be funded with an initial lump sum deposit sufficient to cover potential awards of current premature and pending claims. Going forward, each state should make per-capita contributions based on the number of individuals committed to state incarceration each year, and they should account the expected number of future eligible claimants and anticipated pay-outs, including the costs of social and other services awarded to the exoneree.

As described above, existing state data on annual incarcerations and data from the National Registry of Exonerations offer state budgetary officials a solid quantitative basis for determining an appropriate per-incarceration trust fund deposit amount given the contours of the state compensation statute. That amount can be adjusted over time if the number of qualified exonerees, number

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310. Louisiana appears to be the only state with an explicit, statutorily created Innocence Compensation Fund dedicated to making awards under its state statute. The Fund consists of appropriated funds, donations, grants, and “other monies which may become available.” LA. STAT. ANN. § 15:572.8.N(1) (West 2017).

of state incarcerated, or the returns on the money in the trust deviate from expectation.<sup>311</sup>

This sort of pay-as-you-go approach to financing wrongful conviction compensation trust funds may relieve states of the budgetary worry of rare but unexpected and large payouts, which make low prescribed awards and caps fiscally prudent but inadequately compensatory. On the expense side, as discussed below, states should be permitted (as many now are) to pay exonerees in installments.<sup>312</sup> A reasonably constant and predictable annual deposit to the Trust Fund, and installment payments to exonerees from the Trust Fund, are better and fairer ways of controlling the financial risks states now face than prescribed awards and caps. That reduction of risk and uncertainty provides states the breathing room necessary to increase the generosity of compensation payments to qualified exonerees.

Moreover, a Trust Fund could also avoid delays inherent in states, like California and Illinois, that require cumbersome legislative appropriation of recommended awards.<sup>313</sup> In those states, qualified exonerees risk being caught in political budget battles. A particularly bitter one in Illinois has caused substantial delays in making payments authorized by the Illinois Court of Claims.<sup>314</sup> Of course, the annual appropriation to a state Trust Fund could suffer a similar fate, but the possibility of such difficulty could be factored into earlier appropriation metrics to permit a cash cushion or partial payments. The

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311. Taking Ohio again as an example, the average annual payout from 1989 to 2016 under existing law was just over \$760,986 per year. In calendar year 2016, 19,895 persons were committed to Ohio prisons. CRAIG BERNIE, BUREAU OF RESEARCH & EVALUATION, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION: CALENDAR YEAR 2016 COMMITMENT REPORT 2 (2017), <http://www.drc.ohio.gov/Portals/0/Reentry/Reports/Commitment%20Reports/CY2016%20COMMITMENT%20REPORT.pdf?ver=2017-03-10-103733-650>. A deposit in the trust fund of \$38.25 per prisoner would approximate the amount required. In Ohio, as elsewhere, the numbers of persons imprisoned per year is dropping, suggesting that increased deposits would be needed.

312. The Louisiana Commission on Law Enforcement and Administration of Justice, for example, prepares annual reports of disbursements from the Fund. See *Innocence Compensation Program*, LA. COMM'N ON L. ENFORCEMENT & ADMIN. CRIM. JUST., [http://lcle.la.gov/programs/innocence\\_compensation.asp](http://lcle.la.gov/programs/innocence_compensation.asp) (last visited Mar. 14, 2017). It reports that, in nearly all cases, successful claimants are paid \$25,000 per year, rendering total annual payments relatively constant. LA. COMM'N ON LAW ENFORCEMENT & ADMIN. OF CRIMINAL JUSTICE, INNOCENCE COMPENSATION FUND REPORT: FISCAL YEAR 2016 (2016), [http://www.lcle.la.gov/programs/uploads/2016\\_Innocence\\_Compensation\\_Fund\\_Report.pdf](http://www.lcle.la.gov/programs/uploads/2016_Innocence_Compensation_Fund_Report.pdf).

313. Similarly, in Alabama and Virginia, there is no entitlement to compensation. Payment is contingent on legislative approval, which can be denied. ALA. CODE § 29-2-165 (2017); VA. CODE ANN. § 8.01-195.10(A) (West 2017). Even if the particular awards do not require individual legislative approval, payments can be delayed by general state budgetary impasses. See Bowean, *supra* note 237.

314. Bowean, *supra* note 237.

result, while perhaps not ideal, would be substantially better than the months of delay experienced by qualified exonerees in Illinois.

### *B. Efficient Transition Between Exoneration and Compensation*

It is striking, as Table 1 shows, that 576, or 38.17%, of exonerees in states now with compensation statutes did not file a claim for state compensation. In Part III.C, I offered a number of explanations for why a substantial number of exonerees do not file state claims for compensation. The easiest fixes are to eliminate unnecessary substantive disqualifiers, such as barring from compensation those exonerated on grounds other than DNA, those exonerated but not receiving a pardon from the governor, those who pled guilty to the crime, or those exonerees with prior felony convictions.

Procedure may explain other non-filings. The prototypical compensation statute fundamentally involves two pieces of litigation: the post-conviction criminal proceeding, resulting in relief under circumstances that may qualify one for entry on the Registry, and a separate civil case in which the factual basis for the exoneration must be reproved. A similar battle is fought twice, and a state that concedes criminal relief may fight civil compensation.<sup>315</sup> A more seamless process would be one in which the court granting post-conviction relief on grounds of innocence, or grounds consistent with innocence, would render findings of fact in a certificate of innocence that includes certain recitals necessary for civil compensation. Such findings would automatically be forwarded to and/or would be binding on the appropriate state civil compensation authority.

California, which historically has had a high non-filing rate, amended its statute in 2014 along these lines for some cases.<sup>316</sup> Generally, the award of a declaration of factual innocence by a court or through the stipulation of a prosecutor obviates the need for a compensation hearing and is sufficient grounds to recommend payment (which is statutorily prescribed in California) of a compensation claim.<sup>317</sup> At least as to the category of California claims covered by

315. Jenifer McKim, *Moral Debt: What Happens When the State Overturns a Conviction, but Fights the Payout*, HUFFINGTON POST (Dec. 12, 2016, 2:32 PM), [http://www.huffingtonpost.com/entry/moral-debt-what-happens-when-the-state-overturns-a-conviction-but-fights-the-payout\\_us\\_584edeb2e4b0e05aded4d371](http://www.huffingtonpost.com/entry/moral-debt-what-happens-when-the-state-overturns-a-conviction-but-fights-the-payout_us_584edeb2e4b0e05aded4d371) (describing the case of Kevin O'Loughlin).

316. *California Improves Compensation Process for Wrongfully Convicted Prisoners*, PRISON LEGAL NEWS (May 19, 2014), <https://www.prisonlegalnews.org/news/2014/may/19/california-improves-compensation-process-wrongfully-convicted-prisoners/>.

317. CAL. PENAL CODE § 851.865 (West 2017). Similarly, if a court grants a writ of habeas corpus, vacates a judgment of conviction, and finds that the petition unquestionably points to innocence, that finding is binding on the California Victim Compensation Board, the administrative body that adjudicates claims for compensation for wrongful conviction. *Id.* § 1485.55(a). *See also id.* § 4902(a) (in such cases, the Board will calculate the award within 30 days and recommend that the legislature pay it).



this provision, one should expect 100% filing and, so long as the legislature approves and appropriates the award, 100% grant rates.

In Illinois, those convicted of crimes they did not commit may file a state court action in which they seek a certificate of innocence.<sup>318</sup> If granted (there appears to be only 2 of 107 claims denied in Illinois), the certificate is automatically transferred to the Illinois Court of Claims.<sup>319</sup> As a matter of practice after the Illinois statute was amended in 2008, those claims supported by a certificate of innocence are docketed and quickly approved for payment by the court, without the need for further evidentiary presentation.<sup>320</sup>

Ohio takes a similarly proactive approach. When the trial court determines that an individual is wrongfully imprisoned, it notifies the clerk of the Ohio Court of Claims within 7 days.<sup>321</sup> Within 60 days of the trial court's determination, the Clerk of the Ohio Court of Claims requests that one-half of the statutory amount be paid to the exoneree.<sup>322</sup> If the individual fails to file a claim for the balance with the Ohio Court of Claims within 6 months, the clerk is directed to send periodic reminder letters thereafter.<sup>323</sup>

States without an automatic notification to the entity that awards claims should provide exonerees with notice of the opportunity to file a claim with the state. Texas's notice statute is the best in the country in this regard. It requires the Texas Department of Criminal Justice to notify individuals determined to be wrongfully imprisoned, both in writing and orally, of the right to make a claim, with guidance on how to do it, and it recommends non-profit advocacy groups that might provide assistance.<sup>324</sup> The goal of these statutes is laudable and should be replicated – to simplify and accelerate the procedural requirements of making claims and to reduce the incidence of procedural default.

Another way to reduce the rate of non-filing, particularly in states that require claimants to seek compensation judicially rather than administratively,

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Claims for compensation that do not rely on a declaration of factual innocence or such a writ are decided by the Board following an evidentiary hearing. *Id.* § 4903(a). The D.C. Mayor's proposed amendment to the D.C. Act similarly requires a certificate of innocence to be filed with an executive branch officer, the Chief Risk Officer, and implies that compensation would be paid upon receipt of additional documents required in the proposed statute or by the Chief Risk Officer. FY 2018 Budget Support Act of 2017, B22-244, Subtit. C, § 1022.

318. 735 ILL. COMP. STAT. ANN. 5/2-702(a) (West 2017).

319. *Id.* 5/2-702(h).

320. E-mail from Karen Daniel, Dir., Northwestern Law Sch. Ctr. on Wrongful Convictions, to author (Dec. 7, 2016) (on file with author).

321. OHIO REV. CODE ANN. § 2743.48(B)(3) (West 2017).

322. *Id.* § 2743.48(B)(4).

323. *Id.* § 2743.48(C)(2). Despite this statute, Ohio's non-filing rate remains above the national average.

324. TEX. CIV. PRAC. & REM. CODE ANN. § 103.102 (West 2017). Over half of Texas's non-filers were exonerated before the overhaul of the Texas compensation statute in 2009, which included this notice provision. See also IOWA CODE ANN. §§ 663A.3, 663A.4 (West 2017); VT. STAT. ANN. tit. 13, § 5577 (West 2017) (providing notice).

is to include an attorneys' fees provision in the statute. From a compensatory perspective, exonerees should be made whole to the extent possible, as the several states with fees provisions recognize. There is no need to go as far as the National Childhood Vaccine Injury Act goes in awarding the losing claimant attorneys' fees. But, an attorneys' fees provision may encourage attorneys to represent claimants, especially those with potentially modest claims because they were incarcerated relatively briefly. Florida has, as noted, an extremely high non-filing rate, and its explicit bar on state payment of attorneys' fees and criminalization of private fee arrangements in these cases make a highly restrictive statute even worse.<sup>325</sup>

As suggested earlier, it is possible that other non-filers who were convicted in states that adopted compensation statutes after their exonerations either did not become aware of or were disqualified due to subsequent convictions or death. Additional states adopting compensation statutes should, as many of the newer statutes do, provide prior state exonerees an opportunity to seek compensation retroactively. The state should be able to identify such individuals, and most, or all, should be listed in the Registry. The state should affirmatively notify the exoneree and his or her criminal defense attorney of the right to seek compensation under the new statute.

In sum, states with high numbers of non-filers, particularly non-filers who were incarcerated for a significant period of time, should revisit their statutes. Table 1 helps identify such states, many of which appear not to have analyzed their statutes from this perspective. That reexamination should assess whether non-filing might be attributed to substantive statutory barriers and/or procedural issues. A number of states have, in contrast, taken steps to more seamlessly bridge the transition from exoneration to compensation. Those efforts can fairly easily be replicated to reduce other states' non-filing rates.

### *C. Permission to Pursue Other Claims*

Recall that the September 11th Victim Compensation Fund offered an election of remedies on two levels. First, claimants could choose a remedy through the Fund or proceed to litigation against private defendants in the Southern District of New York, with a cap on damages corresponding to insurance coverage. Second, having chosen the Fund, the claimant could accept the presumed award or seek to enhance it by showing "extraordinary circumstances," thereby permitting an element of individualized determination.

Adapted to this context, that election of remedy should be modified in one respect. Claimants who proceed under the state compensation statute should not be precluded from seeking damages under tort or civil rights theories against other defendants, such as police officers, counties, or other municipalities.<sup>326</sup> Of course, many exonerees will not file such suits because of the

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325. FLA. STAT. ANN. § 961.056(5)(b) (West 2017); *id.* § 961.06(e).

326. Such is the case in several states. *See, e.g.*, COLO. REV. STAT. ANN. § 13-65-103(9)(b) (West 2017); LA. STAT. ANN. § 15:572.8(k) (West 2017); MICH. COMP. LAWS

lack of evidence of misconduct, the presence of immunity defenses, the inability to find an attorney or to fund a lawsuit, or a preference to devote the time and energy needed for litigation on other pursuits.

But for those with viable civil rights and tort claims, and the means and inclination to pursue them, a non-preclusive statute would help relieve the evident anguish Professor Hadfield uncovered when September 11th claimants were forced to elect between seeking compensation through the Fund or through traditional litigation. Many struggled between accepting compensation and pursuing claims through litigation, as litigation might uncover facts that could possibly assign blame or responsibility on accountable third parties.<sup>327</sup> A majority resented that the Fund required a waiver of such claims in exchange for compensation.<sup>328</sup>

In this context, preclusion could tend to drive most claimants to less generous, but more certain, no-fault state compensation and away from potentially more generous, but less certain, civil rights and torts cases. That choice imposes real social costs. Civil rights and other suits can serve to identify rogue officers, dishonest forensic examiners, or suspect investigative practices that have led to wrongful convictions. Such lawsuits have led to additional exonerations and advances in investigative procedure, which will reduce wrongful convictions in the future. Other than governmental repose, the only real justification supporting preclusion is to avoid duplicative recovery, and that problem can, as discussed below, be dealt with through offsetting.

#### D. Election of State Remedies

Similar to the September 11th Victim Compensation Fund, but absent from all current state compensation statutes, the statute itself should offer a choice. In Option A, states should create generous, but fiscally measurable,<sup>329</sup>

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ANN. § 691.1755(8) (West 2017); NEB. REV. STAT. ANN. § 29-4608 (West 2017) (may make other claims against parties other than the state). A number of states, however, explicitly preclude, in whole or in part, those seeking or receiving state statutory awards from seeking alternative remedies for wrongful conviction. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-102uu(g) (West 2017); FLA. STAT. ANN. §§ 961.06(5), (6)(a) (application for compensation under state statute requires a release of all claims arising from wrongful conviction; claimant may not apply for compensation if there is a pending lawsuit); IOWA CODE ANN. § 669.10; MISS. CODE ANN. § 11-44-7(4) (West 2017) (claimant receiving award under statute may not obtain award under Mississippi Tort Claims Act); VA. CODE ANN. § 8.01-195.12(B) (West 2017) (same); WASH. REV. CODE ANN. § 4.100.080(1) (West 2017) (claimant waives relief against state, subdivision, or employees under any legal theory arising from wrongful conviction).

327. *See* Hadfield, *supra* note 298, at 646–49.

328. *Id.* at 668.

329. In Massachusetts, the total package of services and monetary compensation cannot exceed \$500,000, demonstrating that the monetary value of non-monetary redress is ascertainable. MASS. GEN. LAWS ANN. ch. 258D, § 5(a) (West 2017). The potential costs of these items can be factored into the state's calculation of an appropriate per-capita deposit into the state's Wrongful Conviction Compensation Trust Fund.

compensation packages, from which claimants can select elements that are suited to their needs. The remedial packages should permit an exonerated person, after consultation with a state-designated reentry specialist or a professional of his or her own choosing, to select among an *a la carte* menu of remedial options. Alternatively, in Option B, exonerated claimants should be permitted to sue the state. That option would look much like the D.C. Act, in which liability is no-fault and compensation is uncapped and tort-based.

Recall the respective backgrounds of Kirk Odom and Donald Gates. Mr. Odom was exonerated nearly a decade after his release from prison; he had married, started a small business, qualified for medical insurance, and rented an affordable apartment with his family. Mr. Gates was exonerated and released simultaneously after being incarcerated for over 27 years; he had no resources for housing, transportation, or a host of other urgent personal needs. Based on their personal circumstances, preferences, and inclinations, exonerates like them should be permitted to choose between a prescribed basket of compensation and support options and a traditional uncapped litigation option. The former should include:

1. Transitional housing for an appropriate period of time and assistance accessing mortgage financing for a home thereafter;
2. State-provided medical and dental insurance to cover treatment and therapy for conditions causally connected to their incarceration for an appropriate period of time;
3. Vocational and employment training services;
4. Time-limited transportation vouchers;
5. Expedited provision of state-issued identification cards;
6. Tuition benefits at public universities or state educational institutions;
7. Tuition benefits for children born prior to or during the wrongful incarceration at public universities or other state educational institutions;<sup>330</sup>

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330. Only Colorado currently provides tuition benefits for the children of the exonerated, provided the children were conceived or adopted prior to the incarceration and the exonerated parent was incarcerated for at least 3 years. COLO. REV. STAT. ANN. § 13-65-103(2)(E)(II).

8. State payment of child support arrearages accrued during the period of incarceration;<sup>331</sup>
9. Low-interest state loans through existing state programs to begin a small business or a non-profit organization;<sup>332</sup>
10. Other services demonstrated by the claimant to be necessary to facilitate his or her particular reentry into the community;<sup>333</sup>
11. Reimbursement for costs, reasonable attorneys' fees, and expenses associated with criminal defense and post-conviction relief;
12. Reasonable attorneys' fees incurred in advancing the civil claim;
13. Recovery of lost wages and other economic losses;
14. Expungement of the wrongful conviction;<sup>334</sup>
15. An immediate bridge payment to reentering exonerees for adequate living expenses until the full package is received;
16. A non-taxable,<sup>335</sup> pro-rata presumed, non-economic damage award of \$200,000 per year of incarceration, doubled for time served on death row, and adjusted for inflation; and

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331. Only Colorado and Texas provide for payment of child support arrearages. *Id.* § 13-65-103(2)(E)(III); TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(a)(6) (West 2017).

332. No state presently offers such loans. The exonerated, however, are, either because of their record (if not expunged), or because of a period of unemployment, frozen out of the credit market. *See INNOCENCE PROJECT, Making Up for Lost Time, supra* note 13, at 17. States paying claimants on an installment basis might consider periodic loan repayments coming out of those installments.

333. *See* CONN. GEN. STAT. ANN. § 54-102uu(e) (West 2017).

334. The statutes of several states – Colorado, Florida, Hawaii, Illinois, Massachusetts, Michigan, Missouri, and Washington – provide for expungement or sealing. *See* Jack Healy, *Wrongfully Convicted Often Find Their Record, Unexpunged, Haunts Them*, N.Y. TIMES (May 5, 2013), <http://www.nytimes.com/2013/05/06/us/wrongfully-convicted-find-their-record-haunts-them.html>.

335. The statutes of California, Colorado, Hawaii, Massachusetts, Mississippi, New Jersey, Vermont, and Washington explicitly state that the award to the plaintiff (except, for some, any award of attorneys' fees) is not taxable. *See, e.g.*, COLO. REV. STAT. ANN. § 13-65-103(6)(b); HAW. REV. STAT. ANN. § 661B-3(g) (West 2017); MASS. GEN. LAWS ANN. ch. 258D, § 5(d) (West 2017); MISS. CODE ANN. § 11-44-7(3)(b) (West 2017). Wrongful conviction awards are not taxable by the federal government. 26 U.S.C.A. 139F (West 2017).

17. A presumed non-economic damage award of \$75,000 per year for time served post-release on probation, on parole, and/or as a registered sex offender.<sup>336</sup>

Most of these items are already part of at least one state's statute, but no state offers such a comprehensive set of services and remedies. Moreover, many states make some of this support available to reentering citizens on parole or probation but disqualify the exonerated from receiving them because they are no longer supervised by the state.<sup>337</sup> A number of states have recognized what should be obvious – that for some exonerees, the successful reintegration into society will require the prompt and efficient provision of the kinds of social services commonly viewed as part of a humane social safety net.<sup>338</sup>

Particularly for those exonerated and released from incarceration at the same time, transitional housing, access to public transportation, and state-issued identification are immediately essential. There is very commonly a need for prompt and ongoing medical, dental, and psychological treatment for conditions caused by the wrongful conviction. Less urgent, but crucial in the short-term, are vocational training, job placement, and educational support to assist the exonerated in reentering the workforce. Entry into the job market is often made more difficult with a criminal record, making expungement of the wrongful conviction necessary.

It makes no sense for states to provide reentry support and services to those who were correctly convicted and released from custody but to deny them to the wrongly convicted. States owe the innocent more, not less, than the guilty. That obligation should extend to those forms of relief which, in the view of the exoneree and reentry specialist, will best put that person on the path to restoring the life he or she might have had. Depending on the length of the incarceration and the nature of the harm experienced while in custody, the cost of doing so will be greater for some exonerees than others.

States can, however, be creative in controlling those costs in a manner that is both fiscally responsible and mindful of the restorative purpose of these efforts. For example, states might reasonably require individuals to be incarcerated for a certain period of time before they are eligible for certain forms of

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336. To prevent the premature depletion of this money, state law should require at least half of these damage awards to be invested in annuities offered by safe and established life insurance companies.

337. Evan J. Mandery et al., *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553, 578 (2013).

338. Surveys of the exonerated show that significant numbers suffer from mental health conditions, such as post-traumatic stress disorder, anxiety, and depression and are financially dependent on others. Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 PUB. INT. L.J. 427, 428 (2009) (summarizing results of a survey of 60 exonerees by The Life After Exoneration Program).

relief.<sup>339</sup> Of the 1900 individuals convicted in state courts on the Registry of Exonerations as of March 1, 2017, 474 served 2 or fewer years in prison.<sup>340</sup> States might determine that persons who were wrongfully incarcerated comparatively briefly do not merit, for example, tuition benefits and housing assistance. In addition, so long as the caps are adequate to provide meaningful support and services, and an opportunity exists to petition for additional assistance in cases of demonstrated need, states could consider capping the costs of particular services or particular combinations of services, as Minnesota has done.<sup>341</sup>

At the same time, wrongful conviction can be financially costly. Some of the exonerated have paid court costs, criminal penalties, and attorneys' fees associated with their wrongful conviction and post-conviction proceedings. Those should be reimbursed. Some may leave prison with substantial unpaid child support arrearages. And, as is the case with the National Vaccine Injury Compensation Program, make-whole relief requires that the state pay the attorneys' fees for reasonable time devoted to representing the exonerated in seeking that civil redress.<sup>342</sup>

Last, those exonerees who were incarcerated long-term, in particular, have been deprived of the opportunity to make a legacy. For many families, that involves assisting a child in going college. For others, it may be the purchase of a home or creation of a small business. The opportunity for a legacy should be restored to the exonerated. Offering children of the exonerated an opportunity to go to state colleges or universities has little marginal cost for the state and potentially high benefit for the children and their families. If a viable business plan is presented, states should provide the exonerated with low-income loans, in connection with existing small business development programs. The lack of a credit history may similarly require the state to assist the exoneree in obtaining a mortgage to purchase a home, perhaps payable from annual compensation payments.

In short, should the exoneree elect Option A, the determination of what combination of support and services would best serve his or her needs should be the product of a collaborative and ongoing relationship between the state and the exoneree and counsel. That relationship will, it is hoped, increase the likelihood of a successful reentry and meaningfully satisfy the state's moral obligation to help those it has so grievously harmed.

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339. Colorado's tuition waiver for the exonerated and custodial children, for example, applies only if the wrongful incarceration was for at least 3 years. COLO. REV. STAT. ANN. § 13-65-103(2)(E)(II)(B).

340. COMPLETE NAT'L REGISTRY, *supra* note 107.

341. MINN. STAT. ANN. § 611.365 subdiv. 3 (West 2017).

342. Although the provisions vary, Colorado, Hawaii, Illinois, Iowa, Michigan, Minnesota, Mississippi, New Jersey, Ohio, Vermont, Washington, and Wisconsin permit the recovery of attorneys' fees to some degree from the state.

### *E. The Annual Award*

Of these proposals, the one likely to be the most controversial is the \$200,000 per-year award.<sup>343</sup> It should not be. Table 1 shows that the current average annual payment per incarcerated exoneree in states with statutes is just under \$27,000 per year of incarceration and just over \$23,700 nationally.<sup>344</sup> To be sure, that number will creep upwards if currently pending cases are decided in the exoneree's favor. There are, however, only 65 pending cases. And, that number will increase as cases now coded as "premature" are filed and awards are made. However, a substantial number of those are brief incarcerations for Texas drug possession convictions. Even if those numbers increase, they will not likely exceed lost wages for a fairly low wage worker. That means, on average, there is effectively *no* compensation for the extraordinary non-economic harms suffered by the wrongly convicted. No fair-minded person would argue that the wrongly convicted are entitled to no damages for their loss of liberty.

Not only are these figures discouragingly low, but they stand in striking contrast to awards in recent judgments in state compensation cases without caps and federal civil rights cases arising from wrongful conviction. Placed in that context, \$200,000 per year is half of that awarded to Mr. Tribble and one-fifth of that provided to Mr. Newton, whose \$1 million per year of incarceration now stands at the higher range of such awards.<sup>345</sup>

Let's put this proposal in broader context. If the next 2000 exonerees placed on the Registry also average 8.7 years lost to wrongful conviction (as the last 2000 have), the total cost, at \$200,000 per year, would be \$3,480,000,000. That figure is slightly less than the \$3,619,000,000 paid by the National Vaccine Injury Compensation Fund since 1989<sup>346</sup> and less than half of the approximately \$7 billion paid by the September 11th Victim Compensation Fund.<sup>347</sup> Even if it took 20 years to arrive at the next 2000 exonerees, rather than the 28 years it took for first 2000, the cost would be \$174,000,000 annually, or about \$3.5 million per year for each of the 50 states.<sup>348</sup>

343. After I developed this proposal, the D.C. Mayor's budget bill proposed a \$200,000 per-year compensation metric. FY 2018 Budget Support Act of 2017, B22-244, Subtit. C, § 1022. *See also supra* note 85 and accompanying text.

344. *See infra* Table 1.

345. *Tribble v. District of Columbia*, No. 2013-CA-003237-B, 2016 D.C. Super. LEXIS 4, at \*81 (D.C. Super. Ct. Feb. 26, 2016); *Newton v. City of New York*, No. 07 Civ. 6211, 2016 U.S. Dist. LEXIS 34594, \*177 (S.D.N.Y. Mar. 17, 2016).

346. *See supra* Part V.A.

347. FEINBERG, *supra* note 269, at 98–99 (nearly \$6 billion paid in claims for deceased victims and \$1.05 billion paid for physical injury victims).

348. According to the Registry, the average number of years lost to wrongful incarceration by the first 2000 exonerees wrongly convicted in both state and federal court is 8.7 years. COMPLETE NAT'L REGISTRY, *supra* note 107. Admittedly, I have excluded the additional compensation for post-release time or parole, probation, or as a registered sex offender and for reimbursements and services provided by the states.



In reality, the actual amount is likely to be considerably less. Some states will continue not to have compensation statutes. There will continue to be some, but hopefully less, non-filing. Some claims will continue to be denied. If additional states require the exonerated to repay compensation received from the state from amounts received in federal civil rights settlements or judgments, the price tag is further reduced. All told, when viewed from this broader perspective, the need for enhanced awards is clearer, and the costs of them are surprisingly modest.

My case-by-case review of awards in state statutory compensation cases reveals another profoundly unsettling aspect of these awards. There is extraordinary variation in compensation, with many exonerees receiving nothing, while others receive sizeable awards. To be sure, variation is not uncommon in tort law, but unlike tort law, the primary compensatory metric used by most states is a standard multiplication problem – dollars per years served. The considerable differences among states in assigning a dollar-per-year value results, as shown earlier, in vastly different values placed on a year of lost liberty depending on the state of conviction. Connecticut values that year 165 times greater than Wisconsin. No fair compensatory system would have such a result. While a purpose of this Article is to encourage individual states to reexamine their statutes, this extraordinary variation suggests that a national review is in order and should have as a primary goal reducing this unsettling inequality.

It is true that these preliminary calculations exclude the costs of the proposed social and other services. Costs will also increase to the extent that exonerees select the unbounded litigation option, Option B, and win more than the \$200,000-per-year threshold. However, if states adopt this proposed election of remedy framework, they will have some interest in steering claimants into Option A. The judge overseeing and the Special Master administering the September 11th Victim Compensation Fund applied some pressure on applicants to seek compensation through the Fund.<sup>349</sup> They were very successful in achieving that goal, with 97% doing so.<sup>350</sup> That task was made easier because Special Master Feinberg and his team made the Fund an appealing option by using flexible and informal procedures, an expedited resolution process, and reasonably generous and administratively efficient compensation metrics.<sup>351</sup> States would be well-advised to pursue the same approach and make Option A substantively and procedurally attractive.

#### *F. Avoidance of Lump Sum Payments and Offset*

Implicit in many state compensation statutes is the worry that newly freed, wrongfully convicted individuals may spend a large amount of money un-

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349. FEINBERG, *supra* note 269, at 1.

350. *Id.* at 75.

351. *Id.* at 1, 81.

wisely. Only Colorado requires the awardee to take a personal financial management course,<sup>352</sup> but many other states permit or require the compensation to be paid to an annuity company or directly to the exoneree in installments.<sup>353</sup>

Acceptance of installment payments is a reasonable exchange for enhanced generosity. Such payments enforce, albeit paternalistically, a measure of spending discipline while regularizing state payments from their Trust Funds. Provisions, however, should be made for an opportunity to request and receive a lump sum or larger installment payments in compelling situations.<sup>354</sup>

Offsets are another reasonable price to be paid to encourage states to enact more progressive compensation statutes. In the District of Columbia, courts have ruled that the state compensation award is not offset by any settlement reached in claims against the federal government.<sup>355</sup> In New York, two recent federal courts have similarly ruled that civil rights awards should not be offset

352. COLO. REV. STAT. ANN. § 13-65-103(2)(F) (West 2017) (exoneree must complete a financial management course to receive more than one annual payment).

353. ALA. CODE § 29-2-160(a) (2017) (may pay in installments); COLO. REV. STAT. ANN. § 13-3-114(1)(a) (annual payments of \$100,000 adjusted for inflation); FLA. STAT. ANN. § 961.06(4) (West 2017) (annuity for entire amount awarded); LA. STAT. ANN. §§ 15-572.8(H)(2), (O) (West 2017); MD. CODE ANN., STATE FIN. & PROC. § 10-501(c) (West 2017) (lump sum or installments); MASS. GEN. LAWS ANN. ch. 258D, § 5(A) (West 2017) (lump sum or annuity installments); MICH. COMP. LAWS ANN. § 691.1755(6) (West 2017) (lump sum or installment); MISS. CODE ANN. § 11-44-7(2)(a) (West 2017); MO. ANN. STAT. § 650.058.1(4) (West 2017) (no award of more than \$36,500 per year); N.J. STAT. ANN. § 52:4C-5(a)(2) (West 2017) (court may order annuity if damages exceed \$1 million); TENN. CODE ANN. § 9-8-108(a)(7) (West 2017) (monthly installments unless lump sum award is warranted; lump sum may be funded by annuity); TEX. CIV. PRAC. & REM. CODE ANN. § 103.053(a) (West 2017) (claimant entitled to annuity); UTAH CODE ANN. § 78B-9-405(2)(d) (West 2017) (allocations made so that the amount is paid within 10 years); VA. CODE ANN. § 8.01-195.11(B) (West 2017) (lump sum of 20%; remainder by annuity); WASH. REV. CODE ANN. § 4.100.060(11) (West 2017) (claimant or attorney general may initiate and agree to a structured settlement).

354. *Cf.* TENN. CODE ANN. § 9-8-108(a)(7)(D) (claimant can seek lump sum payment upon showing of special needs; Board will consider if lump sum is in the best interests of the person and whether he or she can wisely manage and control the payment). Motivated by a desire to help an exoneree purchase a home, the Colorado legislature recently passed Senate Bill 17-125, which permits exonerees to elect to receive the balance of the award in a lump sum if certain conditions are met. S. 17-125, 71st Gen Assemb., 1st Reg. Sess. (Colo. 2017) (allowing certain persons who have been exonerated of crimes to receive in lump sum payments compensation that is owed to them by the state).

355. The D.C. Superior Court in both *Odom* and *Tribble* held that prior settlements with the federal government could not be offset against state awards because the City Council expressed in the legislative history that the remedies be cumulative. *Tribble v. District of Columbia*, No. 2013-CA-003237-B, 2016 D.C. Super. LEXIS 4, at \*24–25 (D.C. Super. Ct. Feb. 26, 2016); *Odom v. District of Columbia*, No. 2013-CA-3239, 2015 D.C. Super. LEXIS 2, at \*57–58 (D.C. Super. Ct. Feb. 27, 2015).

by earlier state compensation settlements.<sup>356</sup> Other states, however, make the offset requirement explicit. Colorado, for example, requires state compensation recipients to repay the state amounts received in subsequent cases arising from the wrongful conviction.<sup>357</sup>

If, as I propose, exonerees are permitted to pursue both state compensation and other remedies, then it is not unfair to impose an offset, whereby the state compensation is repaid in whole or in part by a subsequent civil rights or tort award. The latter sort of offset could significantly reduce state payouts in these kinds of cases.

### G. Procedural Efficiency and Expedition

Should the qualified exonerated claimant<sup>358</sup> wish to select Option A, he or she would apply to the director of the state Trust Fund for that remedial package. Selected remedial items should be promptly provided by a date set by statute. If the state imposes a prescribed amount or if the claimant selects one, there is no reason why such an administrative entity cannot quickly award it. Texas offers a sound approach to expediency. There, a claimant files an application with the judiciary section of the Texas Comptroller of Public Accounts.<sup>359</sup> The Comptroller is required to make a determination of eligibility and compensation within 45 days.<sup>360</sup> If granted, the compensation is paid

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356. Federal courts in New York have held that, under New York law, New York state compensation settlements should not be offset from subsequent civil rights awards. *Peacock v. City of Rochester*, No. 6:13-cv-6046-MAT, 2016 U.S. Dist. LEXIS 103544, at \*16–19 (W.D.N.Y. Aug. 5, 2016); *Restivo v. Nassau Co.*, Civ. No. 06-cv-6720, 2014 U.S. Dist. LEXIS 188474, at \*23–29 (E.D.N.Y. Nov. 12, 2014). The rationale of those decisions was that the state and county actors were not joint tortfeasors and that the state share of liability in § 1983 actions was zero. *Restivo*, 2014 U.S. Dist. LEXIS 188474, at \*28–29; *Peacock*, 2016 U.S. Dist. LEXIS 103544, at \*19. Nor was there a double recovery because the rule against double recovery applies only to judgment, not settlements. *Restivo*, 2014 U.S. Dist. LEXIS 188474, at \*10; *Peacock*, 2016 U.S. Dist. LEXIS 103544, at \*19.

357. *See, e.g.*, COLO. REV. STAT. ANN. §§ 13-1-114(6), (7); 13-65-103(8)(a) (offsets award under statute by recovery in another civil action against the state or other governmental entity arising from the wrongful conviction); MINN. STAT. ANN. § 611.365, subdiv. 5 (West 2017) (future damages resulting from action by claimant against state or political subdivision are offset by award under state statute); N.J. STAT. ANN. § 52:4C-2(b) (award of damages against state, subdivision, or employee are offset by award under Act).

358. Those in receipt of a certificate of innocence or similar document with statutorily required recitals should be deemed automatically qualified. *See* ALA. CODE § 29-2-165(a); CAL. PENAL CODE § 4904 (West 2017); MINN. STAT. ANN. § 611.368; VA. CODE ANN. § 8.01-195.10(A).

359. TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(a) (West 2017).

360. *Id.* § 103.051(c).

within 30 days.<sup>361</sup> Unlike some state statutes with deadlines, Texas wisely imposes deadlines on an Executive Branch administrator to decide the merits of the claim and to make the award.<sup>362</sup> For those selecting the remedial package, remedies selected should be provided separately. A calculation of lost wages, for example, may require a presentation by an economic expert and may take some time. That showing should not delay the provision of other needed financial support and social services.<sup>363</sup>

That is not to say, however, that the award package can escape all controversy. It is easy to foresee disputes over the appropriate lost wage calculation. One can also imagine situations in which there is dispute as to whether the exoneree needs or would benefit from particular services. Is transitional housing needed if the exoneree is living with family members? Is a college tuition voucher useful for someone with significant educational or cognitive issues? When is a proposal for a low-interest state loan sufficiently viable to warrant the loan? There is evidence of even low-level compensatory disputes in the National Vaccine Injury Compensation Program that have introduced delay and adversarialism in that process.<sup>364</sup> Why would this be any different when, for instance, a state reentry specialist and a social worker of the exoneree's choosing disagree on the elements of the basket of supports and services appropriate for a qualified exoneree?

There is no reason to create a mechanism for solving a problem that may not exist. A number of states offer particular supports and services. It is not at all clear that these kinds of disputes have in fact materialized in these cases. If they do, however, it should be possible to appoint a judge to promptly adjudicate them without the possibility of appeal and without delaying receipt of the services about which there is no dispute.<sup>365</sup>

Critics might point to the National Vaccine Injury Compensation Program as an example of one program in which statutory deadlines are routinely missed, casting doubt on whether they could be met here. One important difference is that the National Vaccine Injury Compensation Program is a national

361. *Id.* § 103.051(a).

362. *Id.* §§ 103.051(a), (c).

363. Ohio and Utah take unusually proactive approaches to the issue of prompt payment. In Ohio, within 60 days of a judicial determination of wrongful imprisonment, the court of claims will request payment of a preliminary judgment of half of the amount expected to be paid. OHIO REV. CODE ANN. § 2743.48B(B)(3) (West 2017). Utah will pay 20% of the payment owed or 2 years' worth of incarceration, whichever is higher, within 45 days of a court determination of actual innocence. UTAH CODE ANN. § 78B-9-405(2)(a) (West 2017). Texas and Virginia offer interim awards, but there is no deadline for their payment. TEX. GOV'T CODE ANN. § 501.102(b)(3) (West 2017); VA. CODE ANN. § 8.01-195.11(C).

364. Engstrom, *supra* note 240, at 1692.

365. *Cf.* COLO. REV. STAT. ANN. § 13-65-101(7) (West 2017) (if the claimant appeals a jury award, the court may direct the state administrator to pay the petitioner pending appeal).

program with a single point of entry. In fiscal year 2016, 1120 claims for compensation were filed.<sup>366</sup> In this context, claims would be filed in states with statutes, and the volume per state would be dramatically less. That reduces the possibility of delay due to high volume. That lower state volume may make easier enforcement of tight statutory deadlines.

#### *H. The Unbounded Litigation Option*

The qualified exoneree should not, however, be required to select the remedial package. Some claimants may not regard the package of services and reimbursements to be particularly useful and, like some applicants seeking compensation through the September 11th Victim Compensation Fund, may believe that their particular circumstances warrant a departure upward from the presumptive \$200,000-per-year value. They may believe, for example, that a serious illness or injury and a resulting diminished life expectancy are causally related to their wrongful incarceration and seek additional compensation for that particular loss.

For compensatory or other reasons, they may wish for an opportunity to express publicly the depth of their suffering or, if regarded as relevant by the state,<sup>367</sup> to use this litigation to expose evidence of misconduct. They should be permitted to do so in an expedited procedure before a state judge, sitting with or without a jury, selected by the chief justice of the state supreme court.<sup>368</sup> That process will be lengthier, involving traditional civil discovery and expert witnesses. There should be no cap, and reasonable attorneys' fees at prevailing market rates in the state should be awarded to prevailing claimants.

No state currently offers this kind of election of remedy. The wrongly convicted were, during their incarceration, largely denied the freedom to choose. There is something particularly appropriate about permitting qualified exonerees an opportunity, with counsel, to consider their individual circumstances and to choose the remedial option that best suits their needs and preferences. Choice, even if necessarily limited, navigates a path between a prescribed and capped award, which ignores individual circumstances, and the sort of adversarial litigation Kirk Odom and Santae Tribble experienced. Choice, which allows for the collaboration between reentry specialists, attorneys as counselors, and other professionals to assist in the decision-making, may help at least some of the exonerated obtain what they need to rebuild their lives.

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366. HEALTH RES. & SERVS. ADM'R, *supra* note 255, at 6.

367. Connecticut appears to be the only state that explicitly accounts for the negligence or misconduct of governmental agents in assessing the amount of compensation. CONN. GEN. STAT. ANN. § 54-102uu(d) (West 2017). Claims Commissioner decisions in 4 cases supplemented the award based on this factor. *See* MASS. GEN. LAWS ANN. ch. 258D, § 5 (West 2017) (court may consider "particular circumstances of . . . trial and other proceedings").

368. In Minnesota, the chief justice appoints a compensation panel of 3 attorneys or judges to determine the amount of damages to be awarded. MINN. STAT. ANN. § 611.363 subd. 1 (West 2017).

And, choice helps states better discharge their moral obligations which underscore these statutes. To be sure, states may, like Special Master Feinberg, ease that choice by making the collaborative option extremely attractive to exonerees through generosity, flexibility, and efficiency. That would not be a bad outcome.

## VII. CONCLUSION

Most fair-minded people would be outraged if the September 11th Victim Compensation Fund precluded certain victims who resided in certain states from seeking compensation; if 38% of the potentially eligible did not apply at all; if only 44% of the victims were compensated; if those compensated for similar injuries were awarded widely varying amounts based on random fortuity like state residence; if the average compensatory amount were many times smaller than that typically awarded in similar cases; or if it sometimes took years to receive an award. We would regard such a compensatory regime as grossly unfair. Yet that is precisely the state of statutory wrongful conviction compensation in the United States today.

The problem is not the lack of public recognition of wrongful convictions. They are widely reported in the press, on social media, and by advocacy groups; podcasts are now devoted to the subject. Nor is the problem a lack of understanding of the horror of wrongful conviction. The New York State Law Revision Commission, which recommended New York's wrongful conviction compensation statute, claimed that wrongful incarceration is "the most serious deprivation of individual liberty that a society may impose."<sup>369</sup> Many states, however, simply have not caught up with Professor Borchard's vision of decades ago, much less today's understanding that grievous errors occur in the criminal justice system, and that innocent people are profoundly harmed as a result. While it is difficult to view Kirk Odom and Santae Tribble as men blessed by good fortune, they were lucky to have been wrongly convicted in the District of Columbia and fairly compensated as a result. The vast majority of exonerees are not so fortunate.

Appealing to the moral sensibilities of state legislatures has, to a very real degree, helped make progress in several states. The empirical research presented here may, it is hoped, provide the basis for an economic argument that most states can compensate exonerees more generously and more equitably. Highlighting those states with creative approaches to serving the very real medical, vocational, and social service needs of exonerees may encourage states that have not revisited their statutes in many years to incorporate similar concepts.

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369. *Baba-Ali v. State*, 878 N.Y.S.2d 555, 587–88 (N.Y. Ct. Cl. 2009) (quoting REPORT OF THE NEW YORK LAW REVISION COMMISSION TO THE GOVERNOR ON REDRESS FOR INNOCENT PERSONS UNJUSTLY CONVICTED AND SUBSEQUENTLY IMPRISONED, 1984 McKinney's Laws of New York 2899, 2903)).

Recent scholarship focuses on another benefit. A recent study of 118 exonerates from Florida, Illinois, Texas, and New York, 71 of whom received some compensation, examined the amounts received and the rates at which exonerates committed post-exoneration offenses.<sup>370</sup> The authors found that “[t]he mean amount of compensation for those with no post-exoneration offense was \$1.7 million, as compared to \$720,000 for those who had at least one post-exoneration offense.”<sup>371</sup> In addition, the researchers concluded that those who received more than \$500,000, including those with a previous history of criminal behavior, were significantly less likely to offend post-release.<sup>372</sup> The researchers believed that the need for a threshold level of support to surmount known barriers to reentry and the fostering of positive feelings toward a justice system that once failed them may explain the link between more generous compensation and lower recidivism.<sup>373</sup> Perhaps additional scholarship will focus on the benefits of social services to reduce recidivism as well.

The path forward requires recognition of the progress made, particularly by a few states, such as Minnesota, Colorado, Washington, Texas, and Alabama, that have at least in part broken the mold of the standard state compensation statute. But, it also requires a forthright acknowledgement that, with the exception of Texas, the states with these better compensation statutes have, ironically, relatively few potential beneficiaries of them. That is why it is important to candidly recognize state fiscal concerns and to develop concrete ideas to respond to them, such as the creation of Wrongful Conviction Trust Funds, installment payments, offsets, and sensible limits on certain services for those wrongly incarcerated for relatively brief periods.

As important, the exonerated are better served by moving from a depersonalized compensation regime to one that offers an election of remedy that permits them, to some degree, to select a remedial path better suited for their personal needs and circumstances. I cannot say that I know which path my clients might have taken if offered that choice in the D.C. Act. But, I can say that it could be appealing to forego litigation and a potentially sizeable recovery in exchange for an expedited, less adversarial, and more holistic approach that, at least for some of the exonerated, may better remedy the profound harm they have suffered.

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370. Mandery et al., *supra* note 337, at 571.

371. *Id.* at 572.

372. *Id.* at 556.

373. *Id.* at 576.

TABLE 1

State/Territory	Compensation Statute?	Exonerated Exonerated	Incarcerated Exonerated	Premature Claims	Unfiled Claims	Incarcerated Non-Filers	Filed Claims	Claims Awarded	Filed Claims Awarded	Claims Denied	Claims Pending	Incarcerated Exonerated Paid	Total Paid to Exonerated	Average Paid per Incarcerated Exonerate	Total Years Lost	Amount Paid Per Year Lost by All Exonerated
Alabama	YES (2001)	26	23	0	15	65.22%	8	3	37.50%	2	3	13.04%	\$ 1,342,331.18	\$ 58,362.23	183	\$ 7,335.14
Alaska	NO	8	6												70	
Arizona	NO	18	17													
Arkansas	NO	6	4													
California	YES (1913)	173	160	7	94	58.75%	59	29	49.15%	23	7	18.13%	\$ 14,279,320.00	\$ 89,245.75	1435	\$ 9,950.75
Colorado	YES (2013)	7	6	1	4	66.67%	1	1	100.00%	0	0	16.67%	\$ 1,200,000.00	\$ 200,000.00	74	\$ 16,216.22
Connecticut	YES (2008)	20	18	2	4	22.22%	12	10	83.33%	0	2	55.56%	\$ 38,920,000.00	\$ 2,162,222.22	212	\$ 183,584.91
Delaware	NO	2	2													
D.C.	YES (1981)	16	16	3	6	37.50%	7	4	57.14%	3	0	25.00%	\$ 38,214,027.00	\$ 2,388,376.69	279	\$ 136,967.84
Florida	YES (2008)	61	53	2	43	81.13%	8	7	87.50%	1	0	13.21%	\$ 8,876,901.24	\$ 167,488.70	585	\$ 15,174.19
Georgia	NO	29	29												269	
Guam	NO	1	1												1	
Hawaii	YES (2016)	3	2	2	0	0.00%	0	0		0	0	0.00%			28	
Idaho	NO	2	2												37	
Illinois	YES (2008)	184	171	21	43	25.15%	107	97	90.65%	2	8	56.73%	\$ 15,131,022.76	\$ 88,485.51	1986	\$ 7,618.84
Indiana	NO	24	24												268	
Iowa	YES (1997)	14	14	2	8	57.14%	4	1	25.00%	3	0	7.14%	\$ 197,812.00	\$ 14,129.43	79	\$ 2,503.95
Kansas	NO	7	5												46	
Kentucky	NO	11	11												93	
Louisiana	YES (2005)	47	46	2	10	21.74%	34	29	85.29%	3	2	63.04%	\$ 7,294,725.04	\$ 158,580.98	738	\$ 9,894.45
Maine	YES (1993)	2	0	0	0	0.00%	0	0		0	0				0	
Maryland	YES (1999)	24	23	1	18	78.26%	4	3	75.00%	1	0	13.04%	\$ 2,605,000.00	\$ 113,260.87	261	\$ 9,980.84
Massachusetts	YES (2004)	51	48	3	15	31.25%	30	22	73.33%	4	4	45.83%	\$ 9,335,000.00	\$ 194,479.17	522	\$ 17,883.14
Michigan	YES (2017)	68	59	59	0	0	0	0		0	0				528	
Minnesota	YES (2014)	11	10	0	7	70.00%	3	3	100.00%	0	0	30.00%	\$ 1,740,436.89	\$ 174,043.69	24	\$ 72,518.20
Mississippi	YES (2009)	16	16	0	2	12.50%	14	13	92.86%	0	1	81.25%	\$ 4,962,333.00	\$ 310,145.81	206	\$ 24,089.00
Missouri	YES (2006)	39	38	0	30	78.95%	8	8	100.00%	0	0	21.05%	\$ 1,923,900.00	\$ 50,628.95	449	\$ 4,284.86
Montana	YES (2003)	9	8	0	8	100.00%	0	0		0	0				83	



State/Territory	Compensation Statute?	Exonerated Exonerates	Incarcerated Exonerates	Premature Claims	Unfiled Claims	Incarcerated Non-Fileers	Claims Filed	Claims Awarded	Filed Claims Awarded	Claims Denied	Claims Pending	Incarcerated Exonerates Paid	Total Paid to Exonerates	Average Paid per Incarcerated Exonerate	Total Years Lost	Amount Paid Per Year Lost by All Exonerates
Nebraska	YES (2009)	9	9	0	2	22.22%	7	7	100.00%	0	0	77.78%	\$ 2,630,000.00	\$ 292,222.22	101	\$ 26,039.60
Nevada	NO	9	9	0	1	100.00%	0	0	0	0	0	28.00%	\$ 1,802,775.00	\$ 72,111.00	279	\$ 6,461.56
New Hampshire	YES (1977)	1	1	0	1	100.00%	0	0	0	0	0	28.00%	\$ 1,802,775.00	\$ 72,111.00	279	\$ 6,461.56
New Jersey	YES (1997)	27	25	3	14	56.00%	8	7	87.50%	1	0	28.00%	\$ 1,802,775.00	\$ 72,111.00	279	\$ 6,461.56
New Mexico	NO	6	6	0	0	0	0	0	0	0	0	0	0	0	0	0
New York	YES (1984)	224	211	17	41	19.43%	153	91	59.48%	39	23	43.13%	\$ 120,247,849.43	\$ 569,895.02	2226	\$ 54,019.70
North Carolina	YES (1947)	59	58	10	21	36.21%	27	22	81.48%	4	1	37.93%	\$ 10,516,470.27	\$ 181,318.45	736	\$ 14,288.68
North Dakota	NO	2	1	0	0	0	0	0	0	0	0	0	0	0	0	0
Ohio	YES (1989)	59	58	3	22	37.93%	33	28	84.85%	4	1	48.28%	\$ 21,307,601.45	\$ 367,372.44	733	\$ 29,069.03
Oklahoma	YES (1978)	34	34	5	22	64.71%	7	5	71.43%	0	2	14.71%	\$ 760,000.00	\$ 22,352.94	314	\$ 2,420.38
Oregon	NO	16	10	0	0	0	0	0	0	0	0	0	0	0	0	0
Pennsylvania	NO	60	59	0	0	0	0	0	0	0	0	0	0	0	0	0
Puerto Rico	NO	6	6	0	0	0	0	0	0	0	0	0	0	0	0	0
Rhode Island	NO	5	4	0	0	0	0	0	0	0	0	0	0	0	0	0
South Carolina	NO	7	7	0	0	0	0	0	0	0	0	0	0	0	0	0
South Dakota	NO	4	3	0	0	0	0	0	0	0	0	0	0	0	0	0
Tennessee	YES (1984)	18	18	0	16	88.89%	2	2	100.00%	0	0	11.11%	\$ 936,036.36	\$ 52,002.02	197	\$ 4,751.45
Texas	YES (1985)	309	227	79	57	25.11%	91	82	90.11%	8	1	36.12%	\$ 83,668,717.76	\$ 368,584.66	1,772	\$ 47,217.11
Utah	YES (2008)	14	13	1	8	61.54%	4	4	100.00%	0	0	30.77%	\$ 843,933.00	\$ 64,917.92	83	\$ 10,167.87
Vermont	YES (2007)	1	1	0	0	0	1	1	100.00%	0	0	100.00%	\$ 1,550,000.00	\$ 1,550,000.00	17	\$ 91,176.47
Virginia	YES (2004)	46	46	4	17	36.96%	25	19	76.00%	5	1	41.30%	\$ 9,602,519.00	\$ 208,750.41	418	\$ 22,972.53
Washington	YES (2013)	44	40	2	23	57.50%	15	6	40.00%	1	8	15.00%	\$ 1,980,701.00	\$ 49,517.53	228	\$ 8,687.29
West Virginia	YES (1987)	10	10	1	2	20.00%	7	6	85.71%	0	1	60.00%	\$ 6,200,000.00	\$ 620,000.00	102	\$ 60,784.31
Wisconsin	YES (1913)	48	47	6	23	48.94%	18	13	72.22%	5	0	27.66%	\$ 370,416.76	\$ 7,881.21	333	\$ 1,112.36
Wyoming	NO	3	3	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL		1900	1718	236	576	45.69%	697	523	75.04%	109	65	30.44%	\$ 237,741.46	\$ 17,233	29	\$ 23,701.03
TOTAL IN STATES WITH STATUTE		1674	1509	236	576	38.17%	697	523	75.04%	109	65	34.66%	\$ 408,439,829.14	\$ 270,669.20	15,214	\$ 26,846.31
TOTAL IN STATES W/O STATUTE		226	209	0	0	0	0	0	0	0	0	0	\$ 0	\$ 0	2,019	\$ 0
		88.11%	87.83%												88.28%	