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$10 and a Denim Jacket--A Model Statute for Compensating the Wrongly Convicted

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$10 AND A DENIM JACKET? A MODEL STATUTE FOR COMPENSATING THE WRONGLY CONVICTED

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I. INTRODUCTION

With confidence in the rarity of erroneous convictions, Judge Learned Hand wrote:

> Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[1]

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[1] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). The preceding sentences state "[u]nder our criminal procedure the accused has every advantage. . . . He is immune

Contrary to the eminent jurist's statement, cases involving ghosts like Michael Ray Graham, Jr. not only haunt the criminal justice system, but also shake the lofty pedestal upon which the reliability of criminal procedure unsteadily rests. In 1986, the Louisiana police found themselves under pressure to solve a case involving the murder and robbery of an elderly couple. The police subsequently uncovered ample evidence seemingly inculpating Graham for the murder.[2] During the investigation, the ex-wife of Albert Ronnie Burrell told police that she saw blood on her ex-husband's boots, one of the victims' Social Security cards in his wallet, and $2700 in his possession on the night of the crime.[3] Graham was linked to Burrell when Kenneth St. Clair, with whom Graham had been staying in Louisiana, told investigators that Graham had blood on him when he returned from a late-night trip with Burrell on the evening of the crime.[4] Furthermore, a fourteen-year old girl staying at the same home as Graham informed police that she saw Graham and Burrell counting money in a suitcase on the night of the double murder.[5]

Since he was already in a Louisiana jail for forgery, police investigators did not have to travel far to locate Graham.[6] There they unwittingly stumbled upon the prize piece of evidence that cemented the case against him. Graham's cellmate, Olan Wayne Brantley, notified police that Graham had confessed to his role in the murder of the elderly couple, while awaiting trial on the forgery

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from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. . . ." *Id.*

[2] Christopher Baughman & Tom Guarisco, *Justice for None: The State Sent Albert Ronnie Burrell and Michael Graham to Death Row for 13 Years, Only Later There Wasn't Enough Evidence to Convict Them. How Could This Happen?*, BATON ROUGE ADVOCATE, Mar. 18, 2001, at 1-A. The victims, Delton and Callie Frost of Downsville, Louisiana, were murdered by someone who fired a rifle through a window in their home, killing the couple where they sat. *Id.* Mr. Frost, distrusting banks, kept cash in a suitcase that police were unable to find after searching the crime scene. *Id.* As a result, police believed robbery to be the motive for the crime. *Id.*

[3] *Id.* The two met twice on the night of the crime to discuss issues related to their son. Burrell's ex-wife told police that the evidence of the crime appeared during their second meeting and was not present during their first encounter on that night. *Id.*

[4] *Id.* Graham met the St. Clair family in his home state of Virginia and traveled to Louisiana for a visit while staying with the family. *Id.*

[5] *Id.*

[6] *Id.* Graham and Kenneth St. Clair, the man who told police about Graham and Burrell's unexplained late-night journey, were both in jail for forgery and cashing $300 worth of stolen checks. *Id.*

charges.[7] In 1987, a jury convicted Graham of the murder and robbery and sentenced him to death.[8]

As Graham languished on death row in the Louisiana State Penitentiary at Angola,[9] the prosecution's tight knit case against him unraveled. In 1988, Albert Burrell's ex-wife, who testified at the trials of both Graham and Burrell, changed her testimony, claiming she had fabricated the entire story in an effort to regain custody of her son from her ex-husband.[10] Similarly, the fourteen-year old girl, who testified only against Graham, recanted her testimony in 1998.[11] She claimed that the family with whom she had been staying at the time of the murders pressured her to give false testimony to deflect suspicion away from a family member.[12] In addition to the reversal of these two key witnesses, Graham's attorneys unearthed new facts on appeal to paint Brantley, the jailhouse informant, in a light unknown to the jury during the trial. Brantley, also known as "Lyin' Wayne," had been found not guilty of a crime by reason of insanity in 1981. In another case, a judge found Brantley mentally incompetent to stand trial.[13] Furthermore, the jurors in Graham's trial did not know that, before "Lyin' Wayne" took the stand, he had cut a deal with prosecutors to reduce his own

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[7] *Id.*

[8] Lawrence Hammack, *2nd Man Gains Release from Louisiana's Death Row*, ROANOKE TIMES & WORLD NEWS, Jan. 21, 2001, at A9. Both Graham and Burrell received death sentences. Baughman & Guarisco, *supra* note 2.

[9] Christopher Baughman & Tom Guarisco, *Justice for None*, THE BATON ROUGE ADVOCATE, Mar. 20, 2001, at 1-A.

[10] *Id.* Burrell's attorney asked Burrell's ex-wife, "None of this testimony was true?" with her responding "Right." *Id.* The attorney then asked "And the reason you gave it was because [your grandmother and another woman] told you to make that up to help you get custody of the minor child, is that correct?" To which ex-wife replied, "That's right." *Id.* Based upon the ex-wife's change of testimony, the state Supreme Court sent the case back to the trial court to determine if the new evidence warranted a new trial for Burrell. *Id. See also* Baughman & Guarisco, *supra* note 2 (noting state social workers had given custody of the couple's son to Albert Burrell).

[11] Baughman & Guarisco, *supra* note 9. The girl claimed in her recantation that Kenneth St. Clair was the one with blood on him. *Id.*

[12] *Id.*

[13] *Id.* Brantley turned out to be a career criminal with a 35-page criminal record. For example, one of Brantley's schemes involved posing as an heir to the Opryland estate fortune. *See also* Baughman & Guarisco, *supra* note 2 (documenting comment of retired local jailer familiar with Brantley, "[i]f his lips moved, he was lying."). Defense attorneys questioned Brantley about his mental health during the trial, but he claimed the medicine he had been taking for 10 months merely helped to control hyperactivity. *Id.*

sentence in exchange for his testimony in Graham's trial.[14] Graham's attorneys also learned that Brantley manufactured confessions in two other murder cases while in Florida jails during 1994 and 1996.[15] In sum, the retractions by the ex-wife and the fourteen-year old impugning the credibility of "Lyin' Wayne" eviscerated the evidence used at trial to convict Graham.

Armed with the new information, Graham's defense attorneys sought a new trial for their client.[16] A Louisiana District Judge granted Graham's request for a new trial in March 2000 based upon the failure of the prosecution to disclose facts that might have helped Graham's defense.[17] In her ruling, the judge not only faulted the prosecution for its failure to tell the jury about the plea agreement for Brantley's testimony, but also charged that it had glossed over Brantley's history of concocting jailhouse confessions and "misled" jurors as to his true mental state.[18] Moreover, the judge noted that the prosecution failed to inform defense attorneys that they possessed information linking the murder weapon to Burrell, rather than Graham, which could have helped Graham's murder defense.[19] The judge reasoned that withholding this type of evidence intruded upon the jury's right "to make its decision based on complete, correct facts and the correct law."[20] Based on the misconduct of the prosecutors and the reversals of the witnesses of Graham's trial, the judge concluded that she had "no confidence in

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[14] Baughman & Guarisco, *supra* note 9.

[15] *Id.* One of Brantley's stories involved someone who allegedly confessed to stabbing an attorney 56 times, decapitating the attorney, and then driving over the body twice. Another fabrication involved an individual who allegedly confessed to stabbing an elderly man for his ATM card and then burying him in a shallow grave. *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* The allegations of misleading the jury arose from exchanges between the prosecution and Brantley in front of the jury. Although the prosecution revealed that Brantley had spent time in mental hospitals to the jury, the prosecution also told the jury that the medicine Brantley was taking at the time of the trial merely controlled hyperactivity. Moreover, the prosecution asked, "[b]ut you were never found to be mentally incompetent or legally insane, were you?" Brantley responded, "I don't guess." The judge wrote that if the prosecution did not know about Brantley's history of mental illness, that "[i]t would have been very easy for the state to verify Brantley's true mental condition." *Id.*

[19] *Id.*

[20] *Id.*

the outcome of this trial" and accordingly ordered a new trial for Graham.[21]

After the judge issued her order for a new trial in March 2000, the Attorney General's Office, which had taken over Graham's prosecution, began a new investigation into the 1986 murder of the elderly Louisiana couple.[22] Given the retracted testimony of the witnesses and the absence of physical evidence linking Graham to the crime, the Attorney General's Office decided to dismiss the case against Graham in December 2000, stating that "a total lack of credible evidence" existed to connect Graham to the murders.[23] After spending 13 years and 129 days in prison, Michael Ray Graham, Jr. walked off of death row and into a very different world from the one which he had previously known. As Graham walked into strange world filled with cell phones and the Internet, he carried all of his worldly possessions in two manila envelopes.[24] For Graham's time and trouble in prison, the State of Louisiana gave him what every inmate receives upon being released from prison, whether guilty of the crime charged or not—ten dollars and a denim jacket.[25]

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[21] *Id.* The judge put little faith in the recantation of Burrell's ex-wife, because she recanted her testimony a total of three times during Graham's ordeal. After the first retraction of her testimony at trial (where she told defense attorneys that she lied on the stand in 1987 to get custody of her son) she changed her story again in 1988 saying she had testified truthfully at both Graham and Burrell's trials. She claimed a friend forced her to go to the defense attorney's office and take back her testimony in 1987 and used a gun as a means of compulsion. Later in 1995, the ex-wife again changed her story and saying she had indeed lied on the stand at the trials of both men. The judge did, on the other hand, give weight to the retraction of the fourteen-year old girl because the judge found no ulterior motive for her recantation and called her new testimony "reliable and trustworthy." *Id.*

[22] *Id.*

[23] *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Michael Graham).

[24] Sara Rimer, *Two Death-Row Inmates Exonerated in Louisiana*, N.Y. TIMES, Jan. 6, 2001, at A8 (noting Louisiana also released Burrell for same reasons shortly after releasing Graham).

[25] *Id.* The $10 check from Louisiana was not enough for Graham to get a bus ticket home to Virginia. As a result, one of his lawyers purchased the $127 Greyhound bus ticket that allowed Graham to get home. *Id.* Although the $10 check is supposed to be for transportation home, it is all but useless unless the released inmate lives in the nearby area. Nevertheless, a prison spokeswoman stated "We can't afford to send them out of state. We're not responsible for getting them home. They could ask to go to Africa or Australia." *Id.* Furthermore, Graham did not even keep the check. The bus carrying Graham stopped in Atlanta the day following his release on its way to Virginia. As he got off the bus, Graham

Graham's experience is one of a long and growing list of wrongful convictions that disprove the idealistic notion that "[i]nnocent men are never convicted. . . . It is a physical impossibility."[26] To the contrary, abundant evidence demonstrates that wrongful convictions have maligned our criminal justice system in the past and continue to do so today. Edwin Borchard's 1932 work, *Convicting the Innocent*, chronicles the cases of sixty-five individuals whom the author argued were "completely innocent" of the crime for which they were convicted.[27] More recently, a 1992 study documented 416 unjust convictions in capital and potential capital cases from 1900 to 1991, including twenty-three cases of wrongful execution.[28]

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spotted a homeless man sitting in the cold weather. Graham found a place to cash the check and gave his $10 to the homeless man. *Id. See also* Statement of Michael Graham, *supra* note 23 (noting denim jacket was five sizes too large).

[26] EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE vii (1932) (attributing quote to Massachusetts prosecutor). *See also, e.g.*, Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965–1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807, 807 (1990/1991) (noting New York State Defenders Association Wrongful Conviction Study Project found "a significant number of wrongful convictions"); Charles Anzalone, *J.L. Ivey Spent More Than Five Years in Jail for a Murder He Didn't Commit. Can Any Amount of Money Repay What He Lost?*, BUFFALO NEWS, June 27, 1993, Buffalo Magazine (describing conviction and subsequent exoneration of J.L. Ivey); Barton Gellman, *DNA Test Clears Man Convicted of SE Rape: Move Keeps Findings Out of D.C. Court*, WASH. POST, Mar. 20, 1990, at A12 (reporting dropping of rape charges against Edward Green after DNA testing); Denis Hamil, *For an Innocent Man Time Means Money*, NEWSDAY, Oct. 20, 1989, at 18 (reporting on unjust conviction and compensation of Bobby McLaughlin); J. Michael Kennedy, *DNA Test Clears Man Convicted of Rape*, L.A. TIMES, Jan. 16, 1994, at B1 (documenting facts surrounding arrest and exoneration of Mark Bravo); Larry King, *Salvaged by Science: DNA Helps Set the Innocent Free*, NEW ORLEANS TIMES-PICAYUNE, May 14, 1995, at A22 (reporting releases of Garrett Davis and David Shepherd after DNA evidence exonerated them); Daniel J. Lehman, *DNA Results Free Man on Bond in 1990 Rape Case*, CHI. SUN-TIMES, Dec. 6, 1995, at 8 (documenting DNA exoneration of Richard Johnson); James F. McCarty, *DNA Test Lets Prisoner Go Home*, PLAIN DEALER, Sept. 17, 1994, at A1 (recounting release of Brian Piszczek after DNA tests proved innocence); James Thorner, *DNA Test Frees Innocent Man*, GREENSBORO NEWS & REC., July 1, 1995, at A1 (documenting arrest and exoneration because of DNA testing of Ronald Cotton following rape conviction).

[27] BORCHARD, *supra* note 26, at viii.

[28] MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 270-73 (1992). *See generally* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (detailing study upon which book is based). *But see* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 126-44 (1988) (disputing findings of Bedau-Radelet study contending study fails to show individuals were innocent); Michael L. Radelet & Hugo Adam Bedau, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988) (presenting authors' response to their critics).

Lamenting the ability of the criminal justice system to prevent unjust convictions, the authors of the 1992 study asserted that "most errors caught in time are corrected not thanks to the system but in spite of the system."[29]

Even more recently, the National Institute of Justice published a report in 1996 (the "NIJ report") describing twenty-eight wrongful convictions for sexual assault and murder for which the unjustly convicted individuals served an average of seven years in prison.[30] Beyond these twenty-eight wrongful convictions, a portion of the NIJ report observed that "[e]very year since 1989, in about 25 percent of the sexual assault cases referred to the FBI . . . where results could be obtained . . . the primary suspect has been excluded by forensic DNA testing."[31] Given that DNA tests excluded one in four of the FBI's primary suspects, "[e]ven if one assumes half the normal conviction rate . . . one would expect that hundreds of people who have been exonerated by FBI DNA testing . . . would have otherwise been convicted."[32] In short, the study found that "the extent of factually incorrect convictions in our system must be much greater than anyone wants to believe."[33]

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[29] RADELET ET AL., *supra* note 28, at 279.

[30] EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE iii (1996) [hereinafter NIJ REPORT].

[31] *Id.* at xxviii (*commentary* by Peter Neufeld, Esq. & Barry C. Scheck). *See also id.* at 20 (describing lab results that form basis for 25% exclusion rate). In short, 19 labs offered data regarding the total number of cases they handled with the accompanying number of exclusions or inconclusive results. The labs reported that they received 21,621 cases for DNA analysis, and the primary suspect was excluded based on the results in 23% of those cases. The FBI reported that it received 10,600 cases with a 20% exclusion rate. *Id.* However, if cases where the FBI results proved inconclusive are omitted, the exclusion rate rises to 25%. *Id.*

[32] *Id.* at xxix (noting "state conviction rates for felony sexual assaults average about 62 percent").

[33] PETER J. NEUFELD & BARRY C. SCHECK, DNA: UNDERSTANDING, CHALLENGING AND CONTROLLING THE NEW EVIDENCE OF THE 90'S xxix (1990). *See also* C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 10-11, 55-62 (1996) (containing study of Ohio's criminal justice system as method to calculate error rates in convictions). The study defined innocent as not committing a crime or not committing the crime for which one was convicted and excluded those acquitted after a second trial or appeal because of violations of a defendant's rights. This led the authors to an error rate of .5%, which when applied to the 1.9 million convictions for FBI index crimes, suggests approximately 10,000 unjust convictions occur in the United States per year. *Id.*

Following wrongful incarceration and fortuitous exoneration "in spite of the system," many newly freed individuals faithfully return to the justice system seeking redress for the harms resulting from their wrongful convictions.[34] Traditional tort law causes of action, such as cases based on the theory of malicious prosecution, provide a legal basis for the suits of those trying to obtain compensation for their wrongful convictions.[35] In addition to tort law remedies, the statutory codes of sixteen jurisdictions contain explicit provisions providing for compensation of individuals wrongfully convicted and incarcerated.[36] As a general matter, these statutory provisions not only contain eligibility requirements, but also specify the amount of damages recoverable. To be eligible to receive compensation under the federal statute, for example, a claimant must demonstrate that:

> 1. His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction[37]

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[34] *See, e.g.*, Marc Lacey & Shawn Hubler, *2 Ex-Inmates Get $7 Million for 17 Lost Years*, L.A. TIMES, Jan. 27, 1993, at A1 (recounting compensation of two inmates unjustly convicted of murder); Andrew Smith, *Freed Man Sues State/Seeks $40 Million for Eight Years in Prison*, NEWSDAY, Jan. 23, 1998, at A32 (discussing Clarence Braunskill's attempt to obtain compensation for being wrongfully convicted of selling cocaine); Paul W. Valentine & Richard Tapscott, *Md. to Give Cleared Man $300,000*, WASH. POST, June 23, 1994, at B1 (reporting on rape conviction, exoneration, and compensation of Kirk Bloodsworth).

[35] *See infra* notes 162-70; 180-87 and accompanying text.

[36] 28 U.S.C. §§ 1495, 2513 (1994); CAL. PENAL CODE §§ 4900-06 (West 2000 & Supp. 2001); D.C. CODE ANN. § 2-421 (2001); 705 ILL. COMP. STAT. ANN. 505/8(c) (West 1999); IOWA CODE ANN. § 663A.1 (West 1998); ME. REV. STAT. ANN. tit. 14, §§ 8241-44 (West Supp. 1999); MD. CODE ANN. STATE FIN. & PROC. § 10-501 (2001); N.H. REV. STAT. ANN. § 541-B:14 (1957); N.J. STAT. ANN. §§ 52:4C-1 to -6 (West 2001); N.Y. CT. CL. ACT § 8-b (McKinney 1989); N.C. GEN. STAT. §§ 148-82 to -84 (West 1999); OHIO REV. CODE ANN. §§ 2305.02, 2743.48 (West 1994); TENN. CODE ANN. § 9-8-108(a)(7) (1999); TEX. CIV. PRAC. REM. CODE ANN. §§ 103.001-007 (Vernon 1997); W. VA. CODE ANN. § 14-2-13a (Michie 2000); WIS. STAT. ANN. § 775.05 (West 2001).

[37] 28 U.S.C. § 2513(a)(1) (1994).

and

> 2. He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.[38]

If a claimant clears these hurdles, then he may receive up to $5000 for his unjust conviction and imprisonment under the federal statute. The five-thousand dollar cap applies whether the claimant spent 1 year or 20 years behind bars.[39]

Regardless of the avenue by which compensation is sought, statistics indicate that only 37% of wrongfully convicted persons actually receive compensation.[40] To play on the words of Learned Hand, the failure to compensate wrongly convicted persons should be the "unreal dream," but instead it is the nightmarish reality in cases where "archaic formalism" and "watery sentiment" did not protect innocent citizens from wrongful convictions.[41]

The purpose of this Article is to examine the various methods of compensating wrongly convicted individuals and propose an alternative to existing methods. Part II describes various mistakes and abuses that may occur during criminal investigations and trials that allow people to be convicted of crimes they did not commit. Part III presents an overview of the legal and legislative approaches unjustly convicted persons use to seek redress for their wrongful conviction. While this Article argues that statutory compensation is the most equitable avenue of redress for the wrongly convicted, it also asserts that current statutory schemes grossly undercompensate the wrongly convicted. As a result, Part IV proposes a revised statutory remedy based upon a capped formula that examines both the economic and noneconomic injuries suffered

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[38] *Id.* § 2513(a)(2).

[39] *Id.* § 2513(e).

[40] BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 230 (2000).

[41] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

by the wrongly convicted individual. In light of modern political realities, this revised statutory proposal achieves a better balance between the interests of state legislators and the wrongly convicted than do the current compensatory statutory remedies.

II. CAUSES OF WRONGFUL CONVICTIONS

According to the Supreme Court, "the central purpose of any system of criminal justice is to convict the guilty and free the innocent."[42] Nonetheless, cases of wrongful conviction expose the failure of our system and its process to attain this "central purpose" without levying a substantial penalty on a significant number of innocent people. Errors that occur during the administration of criminal justice, from the initial police investigation up to and including the criminal trial, threaten the integrity of the entire criminal justice system and the validity of its resulting convictions. Whether in good faith or not, mistakes involving eyewitness misidentification, police or prosecutorial misconduct, ineffective representation and dubious scientific evidence are frequently cited as the leading causes of wrongful convictions.[43] Most cases of wrongful conviction contain a number of errors that function in concert to bring about an unjust result.[44] In sum, the criminal justice system's search for truth runs the ever-present risk of convicting the innocent.

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[42] Herrera v. Collins, 506 U.S. 390, 398 (1993).

[43] NIJ REPORT, *supra* note 30, at xxx. *See also* BORCHARD, *supra* note 26, at xiii-xxiv (including other factors such as perjury and damaging effect of existing criminal record); Michael Higgins, *Tough Luck for the Innocent Man*, 85 A.B.A. J. 46 (Mar. 1999) (describing how honest mistakes can be responsible for wrongful convictions as in case of David Shephard). A New Jersey jury convicted Shephard based on the honest yet mistaken identification of him by the rape victim. After spending eleven years of his life in prison, a DNA test proved his innocence and Shephard obtained his freedom. *Id.* In Shephard's case, the witness made an honest mistake, understandable given the heinous nature of the crime she suffered, and the police and prosecutors relied upon her mistaken identification. Moreover, it was within the realm of jury discretion to convict Shephard based upon the evidence presented by the prosecution. Nevertheless, the jury convicted an innocent man. *Id.*

[44] NIJ REPORT, *supra* note 30, at xxx (noting mistakes function "singly and often in combination."). *See also* HUFF ET AL., *supra* note 33, at 145 (stating "in most cases of wrongful conviction the system breaks down in more than one way").

A. EYEWITNESS TESTIMONY

In comparison to other types of evidence prosecutors use to convict alleged criminals, eyewitness testimony is among the most persuasive. As one commentator has noted, "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!' "[45] However, studies consistently find that "the single most important factor leading to wrongful conviction in the United States and England is eyewitness misidentification . . . [made] in good faith."[46] According to Justice Brennan, "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[47] Moreover, experience suggests that "convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence."[48] Thus, eyewitness misidentification is a well-documented evidentiary phenomenon arising in part from police pressure to provide key evidence in solving a crime and also from the mistaken witness' internal pressure to see justice done.[49]

The ordeal of Kevin Green is one of many examples of how mistaken eyewitness identification has lead to unjust conviction and incarceration in the aftermath of a horrible crime. In September 1979, Green left his home to get some hamburgers at a nearby fast food restaurant late one night after a fight with his wife.[50] Green,

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[45] ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979).

[46] HUFF ET AL., *supra* note 33, at 66. *See also* NIJ REPORT, *supra* note 20, at 24 (stating "[i]n a majority of the cases, given the absence of DNA evidence at the trial, eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong.") *See also* SCHECK ET AL., *supra* note 40, at 263 (graphing types of errors in proportion to one another).

[47] United States v. Wade, 388 U.S. 218, 228 (1967).

[48] Jackson v. Fogg, 589 F.2d 108, 112 (2d Cir. 1978).

[49] See NIJ REPORT, *supra* note 30, at 24 (quoting Dr. Loftus from an October 15, 1995 article). Dr. Loftus stated there is "pressure that comes from the police [who] want to see the crime solved, but there is also psychological pressure that is understandable on the part of the victim who want to see the bad guy caught and wants to feel that justice is done." *Id.*

[50] SCHECK ET AL., *supra* note 40, at 240; Daniel Yi, *Wrongly Convicted Man Settles Lawsuit Brought by Ex-Wife*, L.A. TIMES (Orange County Ed.), Dec. 8, 1999, at B1.

a 22-year old Marine corporal, returned home to find his pregnant wife, Dianna, unconscious and lying in a pool of blood following an attack that left the young woman in a coma for a month.[51] The beating robbed Dianna of her memory, her senses of hearing and smell, and required doctors to perform an emergency cesarean section to save her life at the expense of her unborn child.[52] When Dianna regained her memory, she informed her mother that it was Green who attacked her on the night of the crime.[53] This revelation changed the direction of the police investigation. The police arrested Green for the crime, shattering the lives of both Green and his wife.[54] At trial, Dianna testified that her husband hit her with a key caddy and then proceeded to rape her.[55] Based largely upon the strength of her testimony, a jury convicted Green of the rape of his wife and the second-degree murder of his unborn child.[56] Green was sentenced to fifteen years to life and shipped to prison.[57] Despite his conviction, Green maintained his innocence throughout the first sixteen years of his sentence.

In 1996, a detective investigating an unsolved crime from 1980 stumbled upon evidence that buttressed Green's claim of innocence.[58] The detective's investigation turned up a man already in prison on a parole violation named Gerald Parker, who confessed to the crime for which Green had been convicted.[59] Seeking to

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[51] SCHECK ET AL., *supra* note 40, at 239-40.

[52] Higgins, *supra* note 43, at 49; Yi, *supra* note 50.

[53] SCHECK ET AL., *supra* note 40, at 240. Prior to Dianna's revelation, police thought the crime had been committed by a prowler in the area known for crimes of the type endured by Dianna, a suspicion that would later be proven correct. *Id.*

[54] Higgins, *supra* note 43, at 49. *See also* SCHECK ET AL., *supra* note 40, at 240-41 (describing suspicion of police following Dianna's recovery). While police began to more closely scrutinize Green's alibi involving the late night restaurant trip, they also overlooked exculpatory evidence. For example, Dianna claimed to have been hit by a bottle or can of beer, but police found no beer at the house after conducting a search. *Id.*

[55] *See* SCHECK ET AL., *supra* note 40, at 241. The key caddy was not mentioned in any of the police reports nor dusted for fingerprints. *Id.*

[56] *Id.*; Yi, *supra* note 50.

[57] Higgins, *supra* note 43, at 46. Green served his time at San Quentin State Prison in California until transferred for his safety. *Id.*

[58] SCHECK ET AL., *supra* note 40, at 241-43. Green had been denied parole several times because he steadfastly maintained his innocence instead of accepting responsibility for crime. *Id.*

[59] *Id.* at 241-42 (noting Parker said "you better go get that Marine off death row for killing his wife. I did that one.").

validate his confession, Parker suggested that police test the DNA evidence used in Green's case, and using new DNA technology, police found that the DNA evidence matched Gerald Parker and not Kevin Green.[60] In light of the new scientific evidence, a judge declared Kevin Green innocent of the rape and attempted murder of his wife after almost seventeen years in prison based upon a mistaken eyewitness identification.[61]

B. POLICE, PROSECUTOR, AND SCIENTIFIC (MIS)CONDUCT

Errors committed by police and prosecutors also contribute to the failure of the criminal justice system to protect the innocent from wrongful conviction.[62] When a heinous crime occurs, the public puts pressure on police officials to solve the crime and prosecutors to convict because of its desire for justice and need to feel safe. In response to public pressure to solve a crime, "the police may be tempted to cut corners, to jump to conclusions, and . . . to manufacture evidence to clinch the case."[63] Once police officers arrest a

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[60] *Id.* at 243. To Green's good fortune, one of the detectives had decided to keep the old rape kit. *Id.*

[61] Higgins, *supra* note 43, at 46. *See also* Nancy Hill-Holtzman, *Bill Tries to Right 16-Year Wrong*, L.A. TIMES (Orange County Ed.), Apr. 25, 1999, at B1 (reporting on "unprecedented bill" to compensate Kevin Green for wrongful imprisonment); Daniel Yi, *Serial Murderer Receives Death Penalty for 70's Rapes, Killings*, L.A. TIMES (Orange County Ed.), Jan. 22, 1999, at B1 (noting Parker earned nickname "Bedroom Basher" for spree of killings in late 1970's in which he knocked victims unconscious, then raped or attempted to rape them). During the sentencing, the judge described Parker's conduct as "inhuman behavior beyond belief" and rejected Parker's argument that the death penalty should not be imposed due to his drug habit and troubled childhood. *Id.* Notably, Dianna still maintains that her ex-husband was responsible for her baby's death. Shortly after his conviction, Dianna filed a wrongful death lawsuit against Green saying in court papers that she had been "beaten and raped by two men". *Id. See also* Yi, *supra* note 50 (reporting Dianna won multi-million dollar judgment against Green by default because of his imprisonment). Dianna asserts Green beat her and left her unconscious prior to Parker's entrance into the home and her subsequent rape; therefore, Green is partially responsible for the death of the unborn daughter. *Id.*

[62] *See* SCHECK ET AL., *supra* note 40, at 175 (stating "[f]or 63 percent of the DNA exonerations analyzed by the Innocence Project study, misconduct by police or prosecutors played an important role in the convictions"). *See also* NIJ REPORT, *supra* note 30, at 15 (reporting 8 of 28 cases in study involved governmental misconduct); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 tbl. 6 (1987).

[63] Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 135 (Autumn 1998).

suspect and present the prosecutor with inculpating evidence, the prosecutor faces public pressure to convict the suspect that is heightened by the political nature of her office.[64] A prosecutor with political ambition beyond her current office must appear to be tough on crime or her chances for political advancement diminish.[65] As a result, prosecutors may be tempted to bring cases based on scant evidence to both quell the public's clamor for justice and improve their own political future.

The case of Rolando Cruz vividly demonstrates how police and prosecutorial sins of omission and commission place innocent individuals at risk for lengthy stays in prison. In February 1983, ten-year-old Jeanine Nicarico was abducted from her home, raped, and murdered in Naperville, Illinois.[66] Given the horrific nature of the crime and public outrage over the slow progress of the investigation, police developed a task force comprised of local law officials and offered a sizable award for information leading to the arrest of the perpetrator.[67] Police thought they had gotten a break when Rolando Cruz contacted them to provide information about a crime after the alleged perpetrator attempted to take Cruz's life.[68] While riding with a single sheriff's officer, Cruz relayed a "vision" he had involving a girl who had been dragged from her home, dumped in a field, hit so hard in the back of her head that it left an impression in the mud, then sodomized and left for dead.[69] After hearing this story and recognizing its resemblance to the facts of the Nicarico case, the lone officer suggested that Cruz tell another officer about his "vision," and Cruz complied.[70] Although the two officers allegedly called a sheriff's sergeant in the same department to

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[64] *See* Interview with Bennett Gershman, *Frontline: The Case for Innocence, available at* www.pbs.org/wgbh/pages/frontline/shows/case/interviews/gershman.html (last visited Jan. 8, 2002) (stating "[Prosecutors] are political officials").

[65] *Id. See also* SCHECK ET AL., *supra* note 40, at 181 (recounting 1988 presidential campaign where George Bush damaged Michael Dukakis with television ad describing Willie Horton's rape of woman while on release from prison).

[66] Maurice Possley, *The Nicarico Nightmare: Admitted Lie Sinks Cruz Case*, CHI. TRIB., Nov. 5, 1995, at A1.

[67] *Id.* In fact, the award had been set at $5000 but was increased to $10,000 because of public outcry over the crime. *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

inform him about Cruz's tale, the two officers never documented the story on paper believing the story would be obtained under oath during a grand jury hearing.[71] As a result, no written record existed of Cruz's "vision," and, notably, prosecutors did not ask him about it during the grand jury proceeding.[72] Nevertheless, the grand jury indicted Cruz for the heinous crimes committed against Jeanine Nicarico,[73] and he proceeded to trial in 1983 on a course that would twice repeat itself.[74]

Prosecutors planned to introduce testimony regarding Cruz's "vision" but did not inform the defense until the eve of trial.[75] Nevertheless, over defense objections, the two officers convincingly testified about Cruz's dream at trial.[76] Without any physical evidence to link Cruz to the murder, a jury convicted Cruz and a co-defendant and sentenced them to death in 1984.[77] The Illinois Supreme Court overturned Cruz's conviction in January 1988, reasoning that Cruz was denied a fair trial by reason of the introduction of admissions of codefendants.[78] While Cruz's conviction was pending on appeal another man, Brian Dugan, came forward to police and confessed to the Nicarico murder.[79] Despite Dugan's confession, prosecutors ignored his story and concentrated on Cruz's retrial.[80] Upon retrial, Cruz was again convicted of the

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[71] *Id. See* Eric Zorn, *Vision of Murder Blind to Truth in Rolando Cruz Case*, CHI. TRIB., Nov. 1, 1995, § 2, at 1 (noting police created no record of story during 4 follow-up interviews). Moreover, the *Tribune* article suggests Cruz created his story out of thin air in an attempt to get the $10,000 reward. *Id.* However, the details of the dream and the facts of the case do not match up as well as police alleged at the time of the crime. *Id. See also* Maurice Possley & Jeffrey Bils, *'Braggart' Cruz Raised Some Doubts Ex-Prosecutor Says Not All Was Believed*, CHI. TRIB., Nov. 2, 1995, § 2, at 1 (reporting former prosecutor advised sheriff's officers against write-up in favor of waiting for grand jury proceeding).

[72] Possley, *supra* note 66.

[73] *Id.*

[74] Ted Gregory, *Prosecutors Offer Details of Alleged Cruz Conspiracy*, CHI. TRIB., Dec. 3, 1997, § 2, at 1.

[75] Maurice Possley, *Nightmare Follows Dream for Cruz Prosecutors: Inconsistencies Rise from Transcripts*, CHI. TRIB., Dec. 17, 1996, § 2, at 1.

[76] *Id.*

[77] Possley, supra note 66. Alejandro Hernandez and Stephen Buckley were tried along with Cruz. Hernandez was also convicted and sentenced to death while the jury could not agree on a verdict for Buckley. *Id.*

[78] People v. Cruz, 521 N.E.2d 18, 22-24 (Ill. 1988).

[79] Possley, *supra* note 66.

[80] William Rentschler, *For Mishandling of Cruz Case, Ryan Must Resign*, CHI. SUN-

Nicarico murder with the help of the two sheriff's officers testimony regarding Cruz's vision, and he was again sentenced to death.[81] On appeal, the Illinois Supreme Court again overturned Cruz's conviction in 1994—this time based upon Dugan's statements to police suggesting that he alone committed the murder.[82] Moreover, DNA testing performed after the second Illinois Supreme Court argument linked Dugan, not Cruz, to evidence left at the scene of the crime.[83]

Following the second reversal of Cruz's conviction, determined prosecutors began preparations to try Cruz for the Nicarico murder for a third time. However, before they got the opportunity to re-try Cruz their case against him rapidly disintegrated. Discovering his conscience, the sergeant who had allegedly been called by the two sheriff's officers searched his own records and discovered that he could not have spoken to them because he was in Florida at the time of the alleged phone call.[84] The sergeant impeached his prior testimony regarding the truthfulness of the officers' story during a hearing to suppress the "vision" evidence before Cruz's third trial, testifying that the phone call about Cruz's dream could not have occurred.[85] In the aftermath of the sergeant's revelation, a cloud of suspicion and doubt engulfed the testimony of the two officers regarding the "vision," particularly because they had conveniently failed to document any evidence of it in written form.[86] Given the absence of physical evidence linking Cruz to the crime, DNA test results excluding Cruz as the donor of crime scene evidence, and the likelihood that the sheriff's officers had manufactured testimony,

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TIMES, Dec. 30, 1995, at 17 (asserting prosecutors ignored evidence against Dugan because of "obsession" with Cruz); *see also* Eric Zorn, *Cruz Prosecutors Trip Themselves Trying to Shuffle*, CHICAGO TRIB., Oct. 29, 1995, § 4, at 1. The prosecutors minimized similarities between Dugan's story and facts of case to bolster their case against Cruz. For example, Dugan said that he murdered the little girl on a certain path upon which a prior prosecutor had said substantial amounts of blood had been found. To minimize the similarity with Dugan's story, the substantial amount of blood now became "thumb-sized". *Id.*

[81] Possley, *supra* note 66.

[82] People v. Cruz, 643 N.E.2d 636 (Ill. 1994).

[83] *See* NIJ REPORT, *supra* note 30, at 46 (noting DNA tests excluded Cruz and Hernandez as donors of semen found at scene of crime but prosecutors argued evidence only showed they were not the rapists, not that they were absent from crime scene).

[84] Possley, *supra* note 66.

[85] *Id.*

[86] *Id.*

the presiding judge found the defendant not guilty and dismissed the case against Rolando Cruz in November 1995.[87] Cruz left death row after spending approximately twelve years there for a crime he did not commit.[88]

Further investigation into Cruz's unjust conviction revealed that in addition to manufacturing evidence, prosecutors strategically withheld evidence to secure a conviction in this high-profile case. For example, the trial judge ordered the prosecution to turn over any evidence it planned to use in its case to the defense, which clearly should have included revealing the "vision" evidence to the defense team.[89] The prosecutors, however, did not reveal their knowledge of Cruz's dream to the defense until four days before the beginning of jury selection, a full 290 days after the court order.[90] Furthermore, the prosecution withheld other information tending to exonerate Cruz until 1989, five years after the judge's order.[91] While interviewing Brian Dugan, the man who confessed to the murder in 1985, police officers recorded notes in which he described fifty facts about the murder to demonstrate his culpability.[92] Instead of investigating Dugan's assertions, prosecutors brushed Dugan's claim aside by claiming that a police investigator coached Dugan as to the facts described in his confession.[93] However, the investigator could not have fed Dugan any information about the case because prosecutors obtained Dugan's story a full three days prior to his interview with police.[94] In their zeal to convict Cruz, both police and prosecutors consistently acted to "conceal evidence favorable to Cruz and to cook up evidence that would convict him."[95]

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[87] *Id.*

[88] *Id.*; *see also* Eric Zorn, *Freedom Smells Sweet After Life on Death Row*, CHI. TRIB., Nov. 5, 1995, at 1 (calculating time of Cruz's incarceration at 12 years, 3 months, and 3 days).

[89] POSSLEY, *supra* note 75.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] Ken Armstrong, *Indictments Tear at Prosecutorial Teflon*, CHI. TRIB., Dec. 13, 1996, at 1; *see also* Possley, *supra* note 75 (reporting prosecutor issued 79 page indictment against three prosecutors and four sheriff's officers for their part in Cruz's wrongful conviction including charges of perjury, obstruction of justice, and official misconduct); Maurice Possley & Ted Gregory, *DuPage 5 Win Acquittal: Jurors Join Courtroom Celebrations After Verdict*, CHI. TRIB., June 5, 1999, at 1. A jury acquitted all of the individuals of their alleged crimes

In addition to fabricating or withholding evidence, police may also use coercion to obtain false confessions to be used at trial. Indeed, "false confessions have played a major role in the conviction of innocent people."[96] Like eyewitness identification, a confession can be a very persuasive piece of evidence and is "probably the most probative and damaging evidence that can be admitted" because it comes from the mouth of the accused.[97] Although police are forbidden to use physical torture to procure a confession,[98] the persuasive value of confessions creates an incentive for police to use a variety of manipulative techniques. Police officers might, for example, pretend to have a case solved but offer to give the suspect an opportunity to tell her side of the story, lie to a suspect about the evidence against her, or pretend to be sympathetic to a suspect in an effort to get her to utter an incriminating statement.[99] Any inconsistency unearthed during interrogation, regardless of the tactics involved, is a dangerous weapon in the hands of a prosecutor and threatens to place innocent individuals in prison.

Although many people cannot conceive of innocent people admitting to crimes they did not commit, the cases demonstrate that the innocent will frequently submit to police coercion if placed under enough pressure.[100] In one example, Gary Gauger called police and

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in the Cruz case. In a bizarre twist, the cleared police officers and prosecutors hugged and shook hands with the jurors following the verdict. *See also* SCHECK ET AL., *supra* note 40, at 180 (providing explanation for acquittal). The defense lawyers reminded the grand jury that Cruz had filed a civil rights lawsuit against the state as a result of his wrongful conviction. By so doing, defense attorneys gave grand jurors the impression that convicting the officials (now numbering five because two had been previously acquitted) would cost taxpayers a large sum of money to fund Cruz's award of damages. *Id.*

[96] *See* HUFF ET AL., *supra* note 33, at 65; see also SCHECK ET AL., *supra* note 40, at 78-106 (documenting cases involving false confessions in wrongful convictions and pointing to Innocence Project study finding 23% of wrongful convictions resulted from false confessions).

[97] Arizona v. Fulminante, 499 U.S. 279, 280 (1991) (White, J., dissenting); *see also* SCHECK ET AL., *supra* note 40, at 92 (noting "73 percent of jurors will vote to convict even when admissions have been repudiated by the defendant and contradicted by the physical evidence").

[98] Brown v. Mississippi, 297 U.S. 278, 285-87 (1936) (prohibiting physical torture after three African-American men were tied to tree and whipped until interrogators obtained confession).

[99] YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 1-80 (1980) (discussing other tactics, such as playing on suspect's fears or attempting to wear suspect down via repetitive questioning).

[100] *See* SCHECK ET AL., *supra* note 40, at 92 (stating "[m]ost jurors can't swallow the idea

asked them to come to his home after discovering a crime that "rankled the psyche" of a small community: the murder of his two elderly parents.[101] Once on the scene, police became suspicious of Gauger because of his unemotional response to the brutal slaying.[102] As a result, police took Gauger into custody and brought him to the local sheriff's office for questioning.[103] During the course of the interrogation, investigators continually peppered him with emotionally charged questions.[104] In addition, investigators threw pictures of his parents' dead bodies in front of him and told him that they had discovered the murder weapon.[105] For good measure, Gauger's interrogators told him that he failed a polygraph test regarding his role in the crime and that they possessed a "stack of evidence against him."[106]

Despite Gauger's denial of any involvement in the crime and his claim that he had no memory of committing the murders, police knew about Gauger's continuing struggle with alcohol and suggested that he might have committed the murders during an alcoholic "blackout."[107] Police then asked Gauger a hypothetical question about how he would kill his parents if he had chosen to do so.[108] Tired from the interrogation, Gauger answered by telling investigators that he would sneak up behind each of his parents and slash their throats, a story that appeared to resemble the facts of the case.[109] Equating Gauger's hypothetical killing to a confession,

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that people would admit to crimes they had not committed").

[101] Andrew Martin & Robert Becker, *Was Prodigal Son a Killer?: Sister Fights for Twin Held in Parents' Deaths*, CHI. TRIB., Apr. 17, 1995, § 2, at 1. Gauger found the bodies of his parents, whose throats had been slashed, while taking some customers through his parents' motorcycle shop after not seeing them for almost two days. *Id.*

[102] *Id.* Upon finding his father, Gauger knelt beside him and said "[o]h Jeez, dad." *Id.* at 14. He then went to call police and returned to the customers. In addition, Gauger allegedly smoked marijuana while police searched the crime scene for evidence. *Id.*

[103] *Id.*

[104] Charles Mount, *'Confession' Was Forced, Gauger Says*, CHI. TRIB., Oct. 20, 1993, § 2, at 1.

[105] *Id.*

[106] Charles Mount, *Murder Confession Story Derided: Cops Say Gauger Was Asked No Hypothetical Questions*, CHIC. TRIB., Oct. 21, 1993, § 2, at 7.

[107] Mount, *supra* note 104.

[108] *Id.*

[109] *Id.* Gauger claimed to have said

> I told them I had a knife on me all day because I had been working and that I would have gone to my mother's [oriental rug sales] office. She

police decided that Gauger had murdered his parents and turned the case over to local prosecutors.[110]

Based upon the strength of Gauger's statements, a jury took only three hours to convict Gauger of the murder of his parents and sentenced him to death in 1993.[111] However, Gauger's supporters discovered facts to cast doubt on the validity of his statements and pointed to several aspects of the questioning that suggested undue coercion on the part of police investigators. In total, the interrogation lasted approximately twenty-two hours, during which time, Gauger had fifteen cups of coffee, one sandwich, and no sleep.[112] Gauger also had no attorney present during any of the questioning.[113] Although interrogators stressed that they possessed a large amount of incriminating evidence against Gauger, police actually had no physical evidence whatsoever linking him to the crime.[114] Investigators also misrepresented the outcome of the polygraph test. The results did not show that Gauger had failed as investigators told him, but instead proved to be inconclusive.[115] Furthermore, investigators failed to record any of the questioning on tape or in written form, which constituted a departure from standard procedure and created uncertainty about the reliability of investigator accounts of the inquisition.[116]

> trusts me. I would have grabbed her by the hair from behind and cut her throat.
>
> Then I would have kept her from falling. . . . Then . . . I would have gone into my father's [motorcycle] shop and killed him the same way.

Id.

[110] *Id.*

[111] Martin & Becker, *supra* note 101; *see also* Charles Mount, *Doubt Told in Murder Conviction: Confession Coerced, Gauger Lawyer Says*, CHIC. TRIB., Feb. 7, 1996, § 2 at 2 (noting Gauger's death sentence was reduced to life in prison based upon mitigating circumstances such as his lack of criminal record).

[112] Charles Mount, *Jury Told of Murder Confession*, CHIC. TRIB., Oct. 9, 1993, § 2, at 5 (reporting duration of interrogation); *see also* Mount, *supra* note 104 (reporting on lack of food and sleep).

[113] Ray Quintilla & Charles Mount, *Court Throws Out Son's Murder Conviction*, CHIC. TRIB., Mar. 12, 1996, § 2, at 1.

[114] Robert Becker & Andrew Martin, *Vicious Killer or Gentle Farmer?: 2 Portraits Emerge of Gary Gauger*, CHIC. TRIB., Apr. 18, 1995, § 2 at 1 (reporting search of Gauger land lasted twelve days); *see also* Charles Mount, *supra* note 111 (noting police confiscated 163 items over two-week period, but failed to link any to Gauger or the crime).

[115] *See* Becker & Martin, *supra* note 114.

[116] *Id.*

Given the circumstances surrounding Gauger's alleged confession, an Illinois appellate court overturned Gauger's conviction in 1996.[117] The court reasoned that police improperly obtained Gauger's statements during their interrogation and decided that the trial court should not have allowed the statements to be introduced before the jury.[118] According to the court, " '[t]he defendant's inculpatory statements were the fruits of an illegal arrest,' . . . 'we find that the trial court erred in denying defendant's motion to suppress [the] statements.' "[119] With that, the State of Illinois released Gauger after he spent three and a half years of his life in prison, including eight months on death row.[120]

Along with coerced false confessions, the scientific evidence embraced by prosecutors is often subject to questions of reliability. Scientific analysis of hair, blood, semen, or DNA can be powerful evidence from which "prosecutors are often able to conclusively establish the guilt of a defendant."[121] The seeming immunity from error and conclusive nature of scientific evidence in conjunction with testimony from scientific experts sporting innumerable, esoteric academic and professional credentials entices jurors into giving scientific results dispositive weight. However, scientific testing is not immune from error, as revealed by cases of wrongful convictions resulting from fraudulent scientific results.

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[117] *See* Quintilla & Mount, *supra* note 113.

[118] *Id.*

[119] *Id.*

[120] Dave Daley, *Gang Informant Admits to Lying in Court Before: But He Defends Account of Slayings of Gaugers*, CHIC. TRIB., Apr. 27, 2000, § 2 at 1. A member of a motorcycle gang confessed to killing the elderly couple along with another member of the same gang. Carolyn Starks, *'93 Slaying of Couple is Detailed*, CHI. TRIB., Mar. 9, 1999, § 2, at 1. According to the gang member, the two killed the couple for money and had previously staked out the Gauger home because they knew the couple had money in it. *Id.* Upon committing the crime, however, the killers only obtained a total of $15. *Id.* Nevertheless, they laughed about the crime and said they could "write a book about how to do the perfect murder and not get caught because the son had admitted to it." *Id.* The gang member came forward with his statements about the Gauger murder after making a plea deal for a reduced sentence in exchange for testimony against 16 other gang members who had been indicted for a variety of crimes. *Id. See also* Dave Daley, *Biker Given 45 Years in 1993 Slaying in Richmond: Ex-Outlaw Sentenced in Slaying on Farm*, CHIC. TRIB., Mar. 10, 2001, § 2, at 5 (reporting biker who confessed to killing Mrs. Gauger received forty-five year sentence).

[121] NIJ REPORT, *supra* note 30, at iii.

. Contrary to the seeming independence of scientific results, one survey found that "[s]eventy-nine percent of all laboratories . . . are located within law enforcement/public safety agencies."[122] In fact, the majority of crime labs only perform scientific testing on evidence submitted to them by the prosecution.[123] In other words, these labs earn their money from tests performed at the behest of prosecutors. As a result,

> [t]he "independence" of forensic science is often largely mythical. A series of case records suggests that scientific testimony is frequently distorted or molded to fit preconceived misassumptions about the nature of the crime or the guilt or innocence of the accused.[124]

One of the most glaring examples of scientific fraud in criminal justice history emerged after a five-month long investigation of Fred Zain, a former serologist with the West Virginia State Police Crime Laboratory.[125] The investigation revealed Zain had a "long history of falsifying evidence in criminal prosecutions" by providing evidence against defendants that, for example, "overstat[ed] the strength of results" or "report[ed] scientifically impossible or improbable results."[126] Moreover, the investigation found that the

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[122] Joseph L. Patterson et al., *The Capabilities, Uses, and Effects of the Nation's Criminalistics Laboratories*, 30 J. FORENSIC SCI. 10, 11 (1985).

[123] *Id.* at 13.

[124] Paul Wilson, *Lessons from the Antipodes: Successes and Failures of Forensic Science*, 67 FORENSIC SCI. INT'L 79, 82 (1994).

[125] *In re* Investigation of the W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501, 502 (W. Va. 1993).

[126] *Id.* at 503. The full list of Zain's acts of misconduct included:

> (1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches on multiple pieces of evidence; (4) reporting that multiple items had been tested, when only a single item had been tested; (5) reporting inconclusive results as conclusive; (6) repeatedly altering laboratory records; (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested; (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a suspect when testing supported only a match with the victim; and (11) reporting scientifically impossible or improbable

irregularities in Zain's scientific work resulted from "systematic practice rather than an occasional inadvertent error."[127] Zain's investigators cast doubt on the validity of up to 134 cases in which his "pattern and practice of misconduct" produced pro-prosecution evidence from 1986 to 1989.[128] Even more troubling, "Zain's supervisors may have ignored or concealed complaints of his misconduct" thereby contributing to "an environment within which Zain's misconduct escaped detection."[129] In fact, Zain's patent misconduct, and the laboratory environment that allowed it, pierced "the heart of the State's case in every prosecution in which Zain was involved."[130] As a result, the investigation concluded that "as a matter of law, any testimonial or documentary evidence offered by Zain at any time in any criminal prosecution should be deemed invalid, unreliable, and inadmissible."[131]

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results.

Id.

[127] *Id.*

[128] *Id.* at 503-04, 510-11. The investigation only reviewed records from 1986-1989 although Zain's tenure of employment lasted from 1979-1989. *Id.* at 510 n.4. The case that shed light on Zain's conduct involved the conviction of Glen Dale Woodall for multiple felonies resulting in a prison sentence of 203-305 years. *Id.* at 509 (citing State v. Woodall, 385 S.E.2d 253 (W. Va. 1989)). Zain testified this analysis indicated that Woodall's blood types were "identical" to the assailant, and that the blood traits would "statistically occur in only 6 of every 10,000 males in West Virginia." *Id.* Later DNA testing proved Woodall innocent of the crime and he recovered one million dollars from West Virginia as a result of his wrongful conviction. *Id.*

[129] *Id.* at 504. The report had previously noted that Zain appeared to be "quite skillful in using his experience and position of authority to deflect criticism of his work by subordinates." *Id.* at 503. In addition, the report found a variety of procedural deficiencies that operated in conjunction with Zain's superiors to mask his misconduct. The procedural difficulties enumerated in the report included:

> (1) no written documentation of testing methodology; (2) no written quality assurance program; (3) no written internal or external auditing procedures; (4) no routine proficiency testing of laboratory technicians; (5) no technical review of work product; (6) no written documentation of instrument maintenance and calibration; (7) no written testing procedures manual; (8) failure to follow generally-accepted scientific testing standards with respect to certain tests; (9) inadequate record-keeping; and (10) failure to conduct collateral testing.

Id. at 504.

[130] *Id.* at 519.

[131] *Id.* at 506; *see also* Laura Frank & John Hanchette, *Convicted on False Evidence?: False Science Often Sways Juries*, USA TODAY, July 19, 1994, at 1A (reporting on Zain's move to Texas following his misconduct in West Virginia); Mark Hansen, *Lab Evidence Questioned*, A.B.A.J., July 1994, at 16 (reporting Zain's work in Texas came under fire for similar reasons

C. INEFFECTIVE DEFENSE COUNSEL

Although police and prosecutors serve as the most ready targets for allegations of wrongdoing leading to an unjust conviction, defense attorneys may be equally responsible for wrongful convictions in some cases. A recent study found that "27 percent of the wrongfully convicted had subpar or outright incompetent legal help."[132] Predictably, a lack of monetary resources lies at the root of the problem of inadequate representation for wrongfully convicted defendants. Because many defendants are indigent,[133] statutes commonly endow judges with the power to appoint attorneys at the expense of the state.[134] However, court-appointed defense attorneys are often overworked and grossly underpaid,[135] a combination that jeopardizes the adequacy of representation in any case. In fact, the American Bar Association called for a moratorium on capital punishment in 1997 because of "overwhelming evidence that some defense lawyers lack the basic tools for defending a death penalty case—they are underfunded, untrained and, frankly, all too often incompetent."[136]

Despite the Court's commendable mandate in *Gideon v. Wainright*[137] that provides indigent defendants with lawyers to ensure a fair trial,[138] courts frequently review records "where the incompetence of counsel is patent and the attendant consequences

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as in West Virginia and that Zain was indicted for his misconduct in Texas).

[132] *See* SCHECK ET AL., *supra* note 40, at 92 (reporting on study by Innocence Project); *see also* BORCHARD, *supra* note 26, at xx (citing inadequate defense counsel as one factor in wrongful convictions).

[133] YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES COMMENTS AND QUESTIONS 27 (8th ed. 1994).

[134] *See, e.g.*, Miss. Code Ann. § 99-15-17 (Michie 2000); VA. CODE ANN. § 19.2-163 (1999).

[135] *See* SCHECK ET AL., *supra* note 40, at 191 (calling caseload of public defender "overwhelming"); Lis Wiehl, *A Program for Death-Row Appeals is Facing Elimination*, N.Y. TIMES, Aug. 11, 1995, at B16 (discussing 1995 cut in federal monies for attorneys serving death row inmates). *See also generally* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 377-97 (1995) (discussing inadequate funding of poor defendants);

[136] Phillip S. Anderson, Letter, *Executions Must Be Put on Hold*, CHI. TRIB., Mar. 23, 1999, § 1 at 14.

[137] 372 U.S. 335 (1963).

[138] *Id.* at 343-45.

to the particular case and the justice system are disastrous."[139] In Illinois, for example, an attorney attempted to represent a defendant charged with murder, kidnapping, and rape while under investigation related to his handling of another client's estate.[140] During a disciplinary hearing to investigate his administration of the estate, the attorney admitted that "he was so stressed out he couldn't think straight" because of the intersection of the criminal trial and his professional collapse.[141] In light of his attorney's inability to "think straight" during the trial the criminal defendant, Dennis Williams, received a new trial and eventually won his freedom, after serving eighteen years in prison, based upon exonerating DNA evidence.[142] Similarly, a court-appointed attorney for Federico Martinez-Macias in a capital murder case failed to present an alibi witness to challenge his client's culpability, failed to interview witnesses to rebut prosecutorial evidence at trial, and declined to investigate evidence pertaining to good character to reduce his client's criminal sentence.[143] Commenting on the compensation provided by Texas for Martinez-Macias' counsel, $11.84 per hour, the Fifth Circuit Court of Appeals observed that "the justice system got only what it paid for."[144] Thus, the conduct of police, prosecutors, and pro-prosecution scientists is only one side of the wrongful conviction equation; a significant part of the danger comes from those charged with defending the innocent.

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[139] *In re* Amendment to the Fla. Rules of Judicial Admin., 688 So.2d 320, 321 (Fla. 1997) (Anstead, J., specially concurring).

[140] People v. Williams, 444 N.E.2d 136, 142-43 (Ill. 1982). Williams' attorney also represented two of Williams's co-defendants for the same crime, each of whom had simultaneous trials. *Id.* at 137.

[141] Dirk Johnson, *Shoddy Defense By Lawyers Puts Innocents on Death Row*, N.Y. TIMES, Feb. 5, 2000, at A1.

[142] *Id.*; *see also Williams*, 444 N.E.2d at 138 (recounting that defendant's attorney, later disbarred, had $23,000 judgment against him for his handling of unrelated matter); *In re* Weston, 242 N.E.2d 236, 236-37 (1982) (discussing allegations against Williams attorney).

[143] Martinez-Macias v. Collins, 810 F. Supp. 782, 786-87 (W.D. Tex. 1991); *see also* Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533 (1999) (observing "erroneous convictions after trials and false pleas of guilty frequently result from defendants' inability to adequately investigate the facts").

[144] Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992) (granting writ of habeas corpus because defendant was "denied his constitutional right to adequate counsel").

III. REMEDIES FOR THE WRONGLY CONVICTED

After enduring wrongful incarceration, newly freed, unjustly convicted individuals traverse a number of legal avenues in their attempts to obtain compensation for their time behind bars. The wrongly convicted typically place the blame at the feet of those involved in the flawed process that placed them in prison using either legal or legislative remedies. The blame-fixing aspect of compensatory claims is reflected in both the variety of claims brought by the wrongly convicted and those against whom such claims are made, including police officers, prosecutors, and defense attorneys.[145] Wrongly convicted individuals who have suffered an infringement on their Fourth and Fourteenth Amendment rights may bring claims against police or prosecutors under the umbrella of section 1983. More commonly, however, wrongly convicted individuals initiate traditional tort law claims against prosecutors and defense attorneys, seeking to establish that either prosecutorial misconduct or ineffective representation by defense counsel led to their incarcerations. In addition to claims based on the Constitution or the common law, some wrongly convicted individuals rely on legislation, either in the form of special compensatory legislation or statutory remedies already on the books, to furnish compensation for the injustice resulting from their prison time. Regardless of the legal theory used to pursue compensation, the underlying claim to compensation is that "liberty is absolute and the loss of it is the greatest of all human injustices."[146]

A. LEGAL REMEDIES

Section 1983 provides a statutory foundation for wrongly convicted individuals to seek redress from police officers and

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[145] Mistaken witnesses are generally immune from lawsuits resulting from their mistakes unless the mistake is made out of malice and the prosecution of the individual was groundless. Anthony v. Baker, 955 F.2d 1395, 1400-01 (10th Cir. 1992); White v. Frank, 855 F.2d 956, 962 (2d Cir. 1988).

[146] Mary Ann Giordano, *Rulings on Wrongful Imprisonment Due; How Much is Freedom Worth to the Innocent?*, MANHATTAN LAW., June 13, 1989, at 1 (quoting judge in New York wrongful conviction case).

municipalities who are, in the eyes of the wrongly convicted, the initiators of the series of events that led to their plight.[147] In short, section 1983 allows individuals to bring a lawsuit for damages against any official acting under color of state law, who deprives that individual of a constitutional right.[148] One common section 1983 claim brought by the wrongfully convicted against police alleges that the evidence or incriminating statements used in their prosecutions were obtained in violation of the constitutional protection against illegal searches and seizures.[149] Police officers acting in their official capacities are "acting under color of state law" for purposes of a section 1983 claim.[150] According to the Supreme Court in *United States v. Classic*,[151] the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of state law.' "[152] Thus, actions of police officers that result in the wrongful conviction of innocent individuals based upon evidence obtained in violation of the Fourth and Fourteenth Amendments appear to place compensatory claims squarely within the ambit of section 1983.

While section 1983 claims look amenable to providing compensation for the wrongly convicted, the complainant must overcome the hurdle of showing that a constitutional violation occurred. To prove such a violation by a police officer, for example, the wrongfully accused may show the police lacked probable cause to conduct a search or make an arrest in violation of the Fourth or Fourteenth Amendment. Unfortunately, the probable cause standard is so low

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[147] 42 U.S.C. § 1983, entitled "Civil action for deprivation of rights," states

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

Id.

[148] St. Louis v. Praprotnik, 485 U.S. 112, 121-31 (1988).

[149] Elkins v. United States, 364 U.S. 206 (1960).

[150] Screws v. United States, 325 U.S. 91, 101-08 (1945). Acts complained of in that case, held to be acts under color of state law, included effecting arrest. *Id.* at 107.

[151] 313 U.S. 299 (1941).

[152] *Id.* at 326.

that proving its absence is nearly impossible.[153] Moreover, if the police did have probable cause, they will be protected from liability under section 1983 in all but the most egregious cases.[154] Beginning with a request for a warrant, police officers possess qualified immunity from liability in that "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . will the shield of immunity be lost."[155]

The U.S. Supreme Court declared in *Pierson v. Ray*[156] that "a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved" as long as the officer acted in good faith and with probable cause.[157] Any negligence on the part of police officers during a criminal investigation is brushed aside because police officers are only obliged "to conduct criminal investigations in a manner that does not violate the constitutionally protected rights of the person under investigation."[158] Moreover, the presence of probable cause releases police officers from any duty to conduct further investigation that might uncover evidence of a suspect's innocence.[159] As extensive as the protection is prior to trial, the shield of immunity from liability for section 1983 violations even attaches to police officers who offer perjured testimony at a criminal trial that leads to an unjust outcome.[160] Despite its promise, making a section 1983

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[153] Illinois v. Gates, 462 U.S. 213, 238 (1983) (defining probable cause as determination based upon "totality of circumstances" where there is "fair probability that contraband or evidence of a crime will be found in a particular place").

[154] Hunter v. Bryant, 502 U.S. 224, 227 (1991). Police officers may still be found liable for knowing violations of the law. *See, e.g.*, Goodwin v. Metts, 885 F.2d 157, 163 (4th Cir. 1989), *overruled on other grounds by* Osborne v. Rose, 133 F.3d 916 (4th Cir. 1998).

[155] Malley v. Briggs, 475 U.S. 335, 344-345 (1986).

[156] 386 U.S. 547 (1967).

[157] *Id.* at 555 (reiterating qualified nature of immunity for police).

[158] Orsatti v. N.J. State Police, 71 F.3d 480, 484 (3d Cir. 1995).

[159] Schertz v. Waupaca County, 875 F.2d 578, 583 (7th Cir. 1998); *see also* Romero v. Fay, 45 F.3d 1472, 1476-78 (10th Cir. 1995) (finding presence of probable cause waived any requirement that police investigate any alibi suspect may have at time of arrest).

[160] Briscoe v. LaHue, 460 U.S. 325, 341-46 (1983). The Court reasoned that police officers have two ways to obtain immunity. One lies in the immunity given any lay witness, while the other lies in the immunity of officials, such as judges or prosecutors, who play an important role in the criminal process. *Id.* at 335. To hold otherwise would be to undermine the contribution of the police to the judicial process and thwart the performance of their other public duties. *Id.* at 343.

claim against police officers based upon a wrongful conviction is a daunting task with little chance of success given the low threshold of probable cause and that police officers need only to act in "good faith" to escape liability.

As an alternative to bringing suit against police officers, the wrongly convicted often hold prosecutors responsible for their unjust sentences and bring suit against them to obtain compensation for the resulting injuries. In an attempt to make prosecutors liable for a wrongful conviction, an unjustly convicted individual has the option of asserting either a civil rights claim under section 1983 or a traditional common law tort claim of malicious prosecution. An exonerated person filing a section 1983 action charges that the prosecutor, "acting under color of state law," unlawfully prosecuted a criminal case against her that resulted in the loss of the fundamental right to liberty as protected by the Constitution and applied to the states under the Fourteenth Amendment.[161]

Using the common law, on the other hand, a wrongly convicted person initiating a malicious prosecution claim against a prosecutor must show that (1) the prosecutor initiated a proceeding against the individual; (2) the proceeding terminated in favor of the wrongly convicted person; (3) the prosecutor initiated the case without probable cause; (4) the primary purpose of the prosecution involved malice or something other than bringing the individual to justice; and (5) damage resulting from the prosecution.[162] To apply these elements to prosecutors in cases of wrongful conviction, an exonerated claimant essentially alleges that a prosecutor maliciously brought criminal charges against her without probable cause and obtained a conviction that resulted in her wrongful incarceration as shown by her later exoneration.

Regardless of whether the claimant files a state claim based upon the common law or a federal section 1983 claim, the doctrine of absolute immunity stands as a significant barrier to recovery for the

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[161] Imbler v. Pachtman, 424 U.S. 409, 420-29 (1976).

[162] Dickey v. Kaiser Aluminum & Chem. Sales, Inc., 286 F.2d 137, 139 (5th Cir. 1960); Pratt v. Kilborn Motors, Inc., 363 N.E.2d 452, 453 (Ill. App. 1977); Schmidt v. Richman Gordman, Inc., 215 N.W.2d 105, 109 (Neb. 1974); Rose v. Whitbeck, 562 P.2d 188, 190 (Or. 1977).

claimant. In *Imbler v. Pachtman*,[163] the Supreme Court examined the issue of prosecutorial liability under section 1983 by referring first to the rule governing prosecutorial liability under the common law.[164] In short, the Court found that a "well settled" common law rule endowed prosecutors with absolute immunity from suits arising out of their prosecutorial duties.[165] According to the Court, the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies . . . and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust" justifies the prosecutor's absolute immunity at common law.[166] Moreover, the mere risk of prosecutorial liability hampers the functioning of the criminal justice system itself in that prosecutors might decline to use some evidence for fear of subsequent lawsuits, which prevents the trier of fact from assessing all admissible evidence when making a determination regarding guilt or innocence.[167] The Court held that the same justification for absolute prosecutorial immunity at common law applied with equal force in the context of section 1983 causes of action.[168] Although the Court recognized that prosecutorial immunity from section 1983 damages left a claimant without a civil remedy against a prosecutor "whose malicious or dishonest action deprive[d] him of liberty," the Court believed its rule served the greater public interest when weighed against the harm threatened by imposing liability on prosecutors.[169] To hold otherwise would

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[163] 424 U.S. 404 (1976).

[164] *Id.* at 421-24.

[165] *Id.* at 424 (citations omitted).

[166] *Id.* at 423. "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences . . . of his own potential liability in a suit for damages." *Id.* at 424-25. *See also* Yaselli v. Goff, 12 F.2d 396, 406 (2d Cir. 1926) ("The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions.").

[167] *Imbler*, 424 U.S. at 426. Furthermore, post-trial procedures and their outcomes could be colored by the knowledge that the decision could serve as the basis for a lawsuit against the prosecutor. *Id.* at 427.

[168] *Id.* at 431 ("[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.").

[169] *Id.* at 427. The court noted the absence of liability under § 1983 did not prevent the possibility of criminal penalties for willful deprivation of constitutional rights or professional discipline from a prosecutor's peers. *Id.* at 429.

"prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[170]

Shifting their focus away from the prosecutors, but using similar legal bases, exonerated individuals expand the scope of potentially responsible parties by filing claims grounded in either section 1983 or traditional tort law to scrutinize the performance of their own defense attorneys during the trials that resulted in their wrongful incarcerations. For purposes of a section 1983 claim, a wrongly convicted individual alleges that the deficient performance of a public defender, if one was used, prevented him from having effective assistance of counsel and ultimately a fair trial as required by the Sixth Amendment and the Due Process Clause.[171] Alternatively, a wrongly convicted individual has the option to pursue a common-law legal malpractice suit against a defense attorney whose negligent work ostensibly resulted in his unjust incarceration. To bring a successful malpractice lawsuit, a claimant must show the existence of an attorney-client relationship, the attorney's duty to act according to the facts of a case, breach of the duty owed by the attorney, and damage as a result of the attorney's breach.[172] To satisfy the elements of a legal malpractice claim, wrongly convicted individuals allege that some error or miscalculation committed by their defense attorneys, such as the failure to present evidence at trial deemed crucial by the claimant, resulted in the unjust verdict that cost them their freedom. By asserting a section 1983 or a legal malpractice claim, then, the exonerated individual possesses the

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[170] *Id.* at 427-28.

[171] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 684 (1984) (finding defendant's counsel's conduct before and during sentencing proceeding was not unreasonable under appropriate standards).

[172] For various permutations of these elements, see, for example, Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989) ("[W]e note the requirements to establish a cause of action for legal malpractice relating to civil matters. These are (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breath."); Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.L., 813 S.W.2d 400, 403 (Tenn. 1991) (stating elements as duty owed by attorney to client, breach, damages, and proximate cause); Pierce v. Colwell, 563 N.W.2d 166, 169 (Wis. Ct. App. 1997) (listing elements as presence of attorney-client relationship, acts constituting negligence, negligence as proximate cause of alleged injury, and actual damage); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 30 at 164-65 (5th ed. 1984) (outlining traditional elements of cause of action).

ability to turn the tables on allegedly negligent public defenders or private defense attorneys by making them the defendants in trials to assess their performances.

Much like the doctrine of immunity associated with the lawsuits against prosecutors, significant obstacles block the road to recovery against defense attorneys. For example, in *Polk County v. Dodson*[173] a claimant sought compensation from a public defender under section 1983 alleging that the attorney's negligence deprived him of his Sixth Amendment right to effective assistance of counsel.[174] Prior to analyzing any argument involving the effectiveness of the representation, the Court looked to the functional nature of the public defender in the criminal justice system to determine whether a public defender acts under "color of state law" for purposes of recovery under section 1983.[175] The Court reasoned that, rather than serving the state, the public defender opposes the state both in the best interests of her client and in the interest of a justice system that relies on an adversarial setting to promote truth and fairness.[176] According to the Court, the state had a constitutional obligation to refrain from attempting to influence the independent judgment of the public defenders that it employs to represent criminal defendants.[177] In the view of the Court, the obligations and duties of the public defender were the same as those of a private attorney and were "in no way dependent on state authority."[178] As a result, the Court held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."[179] This equivalence of a public defender to a private attorney, who clearly does not act under color of state law, bars wrongfully convicted

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[173] 454 U.S. 312 (1981).

[174] *Id.* at 314. The attorney had been assigned to represent the claimant before the Iowa Supreme Court, but sought to withdraw from the case because she deemed the claimant's assertions to be frivolous. *Id.*

[175] *Id.* at 317-19.

[176] *Id.* at 318.

[177] *Id.* at 321-22 (stating "[t]here can be no fair trial unless the accused receives the services of an effective and independent advocate").

[178] *Id.* at 318.

[179] *Id.* at 325 (stating holding did not necessarily preclude recovery for certain administrative or investigative functions under specific circumstances not before Court).

persons from recovering against public defenders under section 1983.

Wrongfully accused persons who seek to bring malpractice actions against public defenders and private defense attorneys face a similarly inhospitable environment. While defense attorneys do not possess immunity from civil malpractice suits in state courts as a general matter,[180] courts in two states, New Mexico and Minnesota, grant absolute immunity to public defense attorneys.[181] Courts in four other states grant qualified immunity to public defense lawyers barring suits for "malpractice arising out of discretionary decisions that [were] made pursuant to their duties as public defenders."[182] In addition to these legislative grants of immunity, state procedural rules provide yet another obstacle to recovery from defense attorneys. For example, the running of the statute of limitations period threatens to bar any lawsuit against a defense attorney whose poor performance contributed to the ordeal of the wrongly convicted.[183]

Even in the absence of immunity for defense attorneys, satisfying the elements of a legal malpractice claim is a difficult task, because states routinely apply the same minimal standard of care used to examine claims of ineffective assistance of counsel to claims involving civil legal malpractice.[184] The Supreme Court delineated the minimal standard used to analyze claims of ineffective assistance of counsel in *Strickland v. Washington.*[185] In *Strickland,* the court concluded that the appropriate test for evaluating such claims

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[180] Ferri v. Ackerman, 444 U.S. 193, 205 (1979).

[181] Harold H. Chen, Note, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis,* 45 DUKE L.J. 783, 799-802 (1996).

[182] *Id.* at 796 (quoting Ramirez v. Harris, 773 P.2d 343, 344-45 (Nev. 1989)). States providing qualified immunity include Delaware, Nevada, New York, and Vermont. *Id.* at 795-96.

[183] *Compare* Halliwell v. Brown, No. CV-366172 2000, WL 1867398, at *6-*8 (Ohio Ct. App. Dec. 14, 2000) (dismissing claim of malpractice because limitations period had expired, reasoning limitations period began to run when individual discovered or should have discovered injury related to attorney's performance, which could be measured from when individual first consulted attorney about matter or first filed grievance), *with* Britt v. Legal Aid Soc'y, 741 N.E.2d 109, 113 (N.Y. 2000) (finding limitations period does not begin to run until day criminal action is terminated without conviction against claimant).

[184] *E.g.,* Rowe v. Shreiber, 725 So. 2d 1245, 1250 (Fla. Dist. Ct. App. 1999); Barner v. Leeds, 13 P.3d 704, 712 (Cal. 2000).

[185] 466 U.S. 668 (1984).

involved examining whether the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment" and whether the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[186] As described in *Strickland,* the elements of a legal malpractice claim are very difficult to satisfy because the standard of care required of defense attorneys is extremely low. In most cases, "[i]f a mirror fogs up when placed beneath the lawyer's nostrils, he or she is not ineffective, as a matter of law."[187] Thus, the odds of winning a legal malpractice lawsuit against a defense attorney do not favor the wrongly convicted claimant.

B. LEGISLATIVE REMEDIES

Given the low odds of winning compensation in the courts against police, prosecutors, or defense attorneys, well-connected wrongly convicted individuals possess the option of turning to their state legislatures to obtain compensation for their injuries. To obtain redress in this manner, a wrongly convicted person must lobby his state legislature to pass a private bill that dispenses money from the state treasury directly to the lobbying individual as a remedy for the injustice of being wrongly convicted.[188] For example, an exonerated Edward Honaker persuaded the Virginia General Assembly to pay him $500,000 as redress for the ten years that he spent in prison for a rape he did not commit.[189] Similarly, the Ohio Legislature paid William Jackson $720,000 as compensation for spending five years behind bars for a series of frightening Columbus-area rapes he did not commit.[190] Thus, a few wrongly convicted persons are able to

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[186] *Id.* at 687. This encompasses the two elements of a claim of ineffective assistance of counsel—deficient performance and prejudice to the defendant. The Court defines "prejudice" as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

[187] *See* SCHECK ET AL., *supra* note 40, at 183 (calling standard "breath test").

[188] Bernard B. Bell, *In Defense of Retroactive Laws*, 78 TEX. L. REV. 235, 263 n.167 (Nov. 1999) (reviewing Daniel G. Troy, RETROACTIVE LEGISLATION (1998)) (defining private bill as piece of "special legislation," as opposed to general legislation, enacted by state legislature concerning individual or small group of individuals).

[189] Ruth Intress, *Assembly Acts as VA's Court of Last Resort*, RICHMOND TIMES DISPATCH, Feb. 25, 1996, at A-1.

[190] *See* Higgins, *supra* note 43, at 50 (noting police eventually discovered real rapist, "a

successfully utilize state legislatures as courts of last resort in their efforts to obtain compensation for their unjust convictions and incarcerations.

Unfortunately, legislative compensation remains a longshot for most wrongly convicted individuals for several reasons. First, the courts of some states construe their state constitutions as forbidding the passage of private compensatory bills.[191] Seeking compensation for approximately twelve years unjustly spent in prison for a 1994 rape he did not commit,[192] David Shepard consulted an attorney who initially thought that the state legislature could pass a private bill that would set aside money for Shepard's benefit.[193] Unfortunately, for Shepard the New Jersey Constitution declares that "[n]o general law shall embrace any provision of a private, special or local character,"[194] and New Jersey courts construe this provision as banning private bills.[195] The underlying reasons for such interpretations rests with the Fourteenth Amendment of the U.S. Constitution, which provides that a legislature cannot pass bills for the benefit of one person without passing legislation for all similarly situated people.[196] As a result, Shepard found himself barred from obtaining special compensatory legislation because such legislation confers "some special right, privilege, or immunity or impose[s] some particular burden upon some portion of the people of the State less than all."[197]

Beyond the problem of statutory construction, the availability of legislative compensation through private bills is limited by the realities of politics and influence. Indeed, special legislation from a state legislature is likely only available to wronged individuals with the support of those influential in the political world of the

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man with a similar name and appearance").

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

[192] Robert E. Misseck, *DNA Evidence Exonerates Man of Kidnap-Rape: 32-Year Old Free After Serving 11 Years*, STAR-LEDGER (NEWARK), Apr. 29, 1995, *available at* 1995 WL 5220867 (reporting Shepard worked near area of crime, and victim said one of her two assailants referred to other as "Dave").

[193] *See* SCHECK ET AL., *supra* note 40, at 231.

[194] N.J. CONST. art. IV, § 7, ¶ 7.

[195] *See* SCHECK ET AL., *supra* note 40, at 231.

[196] *Id.*

[197] People v. Wilcox, 86 N.E. 672, 673 (Ill. 1908).

state. Commenting upon the propriety of private bills, the New York Law Review Commission stated:

> The enactment of such legislation is simply an ad hoc approach which is not in the best interests of the State, not only because it can fail to compensate the truly aggrieved, but also because it can lead to charges of influence, political power, etc., that create an appearance of impropriety and undermine the integrity of the legislative process.[198]

Needless to say, most unjustly convicted individuals neither possess nor are fortunate enough to acquire supporters with sufficient political savvy to obtain compensation in this manner.

Furthermore, even with sufficient political clout, the ebb and flow of state politics may affect the ability of the wrongly convicted to receive compensation from state legislatures. For example, a 1963 Florida jury convicted Freddie Pitts and Wilbert Lee of murder and sentenced each of them to death.[199] After being exonerated in 1975, the pair of men lobbied the legislature year after year in an attempt to receive a remedy from the state for their injuries.[200] Despite their attempts, Democratic legislators who controlled the state legislature at the time, repeatedly denied their requests for compensation, claiming their constituents believed that the two were guilty of the crimes and so would never support any award of legislative compensation.[201] However, the political tide turned when Republicans gained control of the legislature in 1998. Republican leaders in Florida backed the compensatory legislation as "a symbol of their interest in building relations with black voters and African-Amer-

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[198] NEW YORK LAW REVIEW COMM'N, REPORT TO THE GOVERNOR ON REDRESS FOR INNOCENT PERSONS UNJUSTLY CONVICTED AND SUBSEQUENTLY IMPRISONED, 1984 N.Y. LAWS 2915.

[199] Mike Williams, *Florida Moves to Make Peace with Wrongly Convicted Men; Payments of $500,000 Approved by Lawmakers for Two Who Spent 12 Years on Death Row*, ATLANTA J.-CONST., May 1, 1998, at C11.

[200] *Id.*

[201] *Id.*; *see also* Mark Hollis, *Wrongly Convicted Pair Win Legislative Victory*, SARASOTA HERALD-TRIB., May 1, 1998, at 1A (stating legislators doubted support from their constituencies for compensation).

ican legislators."[202] With the political winds in their favor, the Republican legislature granted each man $500,000 as compensation for his wrongful conviction.[203] Thus, the adage that "timing is everything" may apply with exceptional force to the lobbying efforts of the wrongly convicted to obtain special legislative compensation.

Recognizing the shortcomings of litigation against attorneys and private bills as a means of compensation for the wrongly convicted, the statutory codes of sixteen jurisdictions contain provisions allowing the wrongly convicted to bring suit directly against the state.[204] For example, the New York statute establishing a claim of unjust conviction proclaims that:

> The legislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages.[205]

To circumvent the problems with existing tort remedies, the statutes utilize a two-tiered investigation to evaluate the compensatory claim of a wrongfully convicted individual. The first tier examines a claimant's eligibility for compensation as a result of her wrongful conviction and generally requires proof of a claimant's innocence of the crime for which she was convicted.[206] In Maine, for example, a claimant must obtain "a written finding by the Governor

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[202] Williams, *supra* note 199.

[203] *Id.*

[204] *See supra* note 36 (listing jurisdictions where statutory remedy is available).

[205] N.Y. CT. CL. ACT § 8-b(1) (McKinney 1989).

[206] As an initial matter, a claimant must also show that she was convicted of a crime and spent time in prison as a result of that conviction. *E.g.*, WIS. STAT. § 775.05(1)(2) (2001). In addition, states differ as to what class of crime results in an injury compensable by the state. Some provide compensation as a result of "a criminal offense." *E.g.*, D.C. CODE ANN. § 2-421 (2001). Other states provide compensation only for felonies. *E.g.*, CAL. PENAL CODE § 4900 (West 2000). Some states provide compensation for wrongful convictions for misdemeanors or felonies. *E.g.*, IOWA CODE § 663A.1(1)(a) (1988).

who grants [a] pardon [stating] that the person is innocent of the crime for which that person was convicted."[207] In addition to the stringent requirement of obtaining a gubernatorial pardon as proof of innocence, some states allow a claimant to prove eligibility by showing that a court dismissed, reversed, or vacated the conviction or accusatory instrument on grounds consistent with actual innocence.[208] On the other end of the spectrum, New Hampshire law states that a claimant "found to be innocent of the crime for which he was convicted" is eligible for compensation without specifying the type of proof required to show innocence.[209] Furthermore, many of the statutes require that a claimant demonstrate that he "did not, by any act or omission on his part, either intentionally or negligently, contribute to bringing about his arrest or conviction."[210] In sum, the statutes uniformly require that a claimant show that he is innocent of the crime for which a jury convicted him before dipping into the state treasury to provide compensation for her injuries.

After satisfying the burden of proof on the element of innocence in the first tier of statutory analysis, which varies from a "clear and convincing" standard in Wisconsin to a "preponderance" standard in Texas,[211] the second tier requires calculating the amount of compensation a state owes the wrongly convicted person. Like the various types of evidence used to demonstrate innocence and the burden of proof standard that must be satisfied, the state statutes differ sharply in the amount of compensation an unjustly convicted individual may recover. Neither New York nor West Virginia set limits on the amount grant a wrongly convicted person can recover.

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[207] ME. REV. STAT. ANN. tit. 14 § 8241(2)(C) (West Supp. 1999). *See also* 705 ILL. COMP. STAT. 505/8(c) (1999) (requiring pardon from governor to be eligible for compensation); MD. CODE ANN., STATE FIN. & PROC. § 10-501(b) (2001) (requiring governor's pardon); N.C. GEN. STAT. § 148-82 (1999) (same); TEX. CIV. PRAC. & REM. CODE. ANN. § 103.001(4) (Vernon 1997) (same).

[208] *E.g.*, D.C. CODE ANN. § 2-422 (2001); N.Y. CT. CL. ACT § 8-b(3)(b) (McKinney 1989); OHIO REV. CODE ANN. § 2743.48(A)(4) (West 1994); TENN. CODE ANN. § 9-8-108(a)(7) (1999); *see also* 28 U.S.C. § 2513(a)(1) (1994) (requiring same under federal statute).

[209] N.H. REV. STAT. ANN. § 541-B:14(II) (1997).

[210] CAL. PENAL CODE § 4903 (West 2000); *see also, e.g.*, N.J. STAT. ANN. § 52:4C-3(c) (West 2001) (requiring conduct not bring about conviction); W.VA. CODE ANN. § 14-2-13a(e)(3) (Michie 2000) (same); WIS. STAT. § 775.05(4) (2001) (same); *see also* 28 U.S.C. § 2513(a)(2) (1994) (requiring conduct or neglect not bring about conviction).

[211] TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(4) (Vernon 1997); WIS. STAT. § 775.05(3) (2001).

In both states, he can receive a "sum of money as the court determines will fairly and reasonably compensate him."[212] However, a majority of the statutes are less generous and place a cap on the amount of money recoverable by the wrongly convicted. For example, Ohio limits a claimant's recovery to $25,000 per year of incarceration along with any lost wages that directly resulted from the imprisonment.[213] In contrast, Maine allows unjustly convicted individuals to recover up to $300,000 for injuries resulting from their incarcerations regardless of the amount of time spent in prison.[214] On the conservative end of the spectrum in terms of compensatory amount, California limits recovery to no more than $10,000 for any and all injuries arising from a wrongful conviction and incarceration of any length.[215] Similarly, New Hampshire and Wisconsin limit recovery to $20,000 and $25,000 respectively.[216] Joining these states, the Federal Government enacted a miserly compensatory provision, allotting only a pittance of $5,000 for all damages arising from an unjust conviction.[217]

The vast disparities in the amount of statutory compensation available to a wrongly convicted person reveal the most glaring flaw in many of the statutory schemes: the statutory caps on compensation contained in all but two of the statutes. Capping compensation at some arbitrarily low dollar amount all but mandates that a wrongly convicted person be undercompensated for his injuries. For example, the exonerated Kevin Green received the maximum ten-thousand-dollar compensatory sum from the State of California

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[212] N.Y. CT. CL. ACT § 8-b(6) (McKinney 1989); W.VA. CODE ANN. § 14-2-13a(g) (Michie 2000); *see also* D.C. CODE ANN. § 1-1223 (2001) (stating "the judge may award damages").

[213] OHIO REV. CODE ANN. § 2743.48(E)(2) (West 1994) (including attorney fees and court costs); *see also* IOWA CODE § 663A.1(6) (1998) (providing for court costs, attorney fees, $50 per day of imprisonment as liquidated damages, and value of lost wages up to $25,000 per year).

[214] ME. REV. STAT. ANN. tit. 14 § 8242(1) (West Supp. 1999) ; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 103.006 (Vernon 1997) (allowing for total of $50,000 in compensation).

[215] CAL. PENAL CODE § 4904 (West 2001); *see also* § 705 ILL. COMP. STAT. 505/8(c) (1999) (providing award of up to $35,000 that varies with amount of time in prison); MD. CODE ANN., STATE FIN. & PROC. § 10-501(a)(1) (2001) (limiting awards to actual damages); N.J. STAT. ANN. § 52:4C-5 (West 2001) (awarding reasonable attorney's fees plus greater of twice amount of income during year prior to incarceration or $20,000 per year of incarceration).

[216] N.H. REV. STAT. ANN. § 541-B:14(II) (1997) (stating total compensation limited to twenty thousand dollars); WIS. STAT. § 775.05(4) (2001) (providing award total of $25,000 not to exceed $5,000 per year of incarceration plus attorney fees).

[217] 28 U.S.C. § 2513(e) (1994).

under its fifty-eight-year old compensation statute after spending more than sixteen years in its prison system for a rape and attempted murder that he did not commit.[218] Even more liberal statutory schemes utilizing a cap, like that in Ohio which pays an individual $25,000 per year for pain and suffering, threaten to grossly undercompensate the wrongly convicted individual.[219] The $25,000 per year cap, which ostensibly limits recovery for pain and suffering, discriminates against those who experience tremendous noneconomic injuries. One who is only slightly injured will be eligible for the same compensation as the individual who endures extensive pain and suffering, such as an inmate on death row. As a result, the statutory damage caps create an inherent risk that significant injuries will fail to be compensated adequately.

IV. IMPROVING COMPENSATION FOR THE WRONGLY CONVICTED

Despite the risk of undercompensation, statutory compensation provides the most equitable and readily available remedy in comparison to those based upon special legislation or litigation. In contrast to special private bills, a compensatory statute provides all wrongly convicted individuals with an opportunity to obtain redress for their injuries regardless of political connections or the happenstance of political interest. Furthermore, a compensatory statute allows an unjustly convicted individual to seek redress for her injuries without having to show malice, negligence, or some other transgression by the state actors involved in the case. Because malice or negligence cannot be shown in every case of wrongful conviction, a statutory remedy recognizes that honest mistakes, such as those involved in eyewitness misidentifications, occur and penalize innocent people in our criminal justice system. In this light, a compensatory statute preserves the justifiable immunity of

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[218] *See* Hill-Holtzman, *supra* note 61 (noting Green's case caught attention of state legislator who proposed private bill to pay Green $770,000 for his injuries); *see also* Yi, *supra* note 50 (reporting private bill passed California legislature and eventually gave $620,000 to Green in October 1999).

[219] OHIO REV. CODE ANN. § 2743.48(E)(2) (West 1994). The statute lists compensatory sums for attorney's fees, court costs, and salaries without specific reference to pain and suffering. *Id.* However, the additional $25,000 sum may be deemed compensation for pain and suffering since it is the one injury that is not expressly compensated. *Id.*

police and prosecutors from lawsuits based upon the performance of their jobs by providing an avenue of relief independent of their conduct or decision-making. Compensation for the wrongly convicted person under a statute is based upon the ability of the claimant to show his innocence and not on a scouring of the record in search of questionable police techniques or of faulty or malicious prosecutorial inferences that led to conviction. As a result, statutory compensation allows police and prosecutors to "speak and act freely and fearlessly in the discharge of their important official functions."[220]

Moving from the everyday world of police and prosecutors into the legislative arena, a statutory damages cap reflects a political balance between the diverging interests of state legislators and the wrongly convicted. State legislators fear that allowing the wrongfully convicted to recover large sums of money, whether a product of an uncapped lawsuit or one with a high cap, would be too substantial a drain on their state treasuries.[221] As political beings, state legislators predictably hesitate to compensate fully the injuries of the wrongly convicted at the expense of more politically attractive projects. Weighed against the interest of state legislators and their defense of state treasuries is the remedy required to redress the manifest injustice experienced by the wrongly convicted individual at the hands of the state's criminal justice system. If the appropriate amount of the remedy is measured by the amount an individual would demand to exchange places with a wrongfully convicted person, then the compensatory sum would likely be remarkably high. Thus, the statutory damage caps represent the clash between scarce public funds and the remedy for the harm suffered by the wrongly convicted where "any award is bound to be a mere token."[222]

The minimal statutory sums available to the unjustly convicted stand in sharp contrast with the amounts potentially available to victims of the similar common law tort of false imprisonment.[223] A

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[220] Yaselli v. Goff, 12 F.2d 396, 406 (2d Cir. 1926).

[221] *See* Higgins, *supra* note 43, at 51 (noting such spending disrupts legislatures because they cannot budget for it).

[222] Hoffner v. State, 142 N.Y.S.2d 630, 632 (N.Y. Ct. Cl. 1955).

[223] *See, e.g.*, CAL. PENAL CODE § 236 (West 1999) (defining false imprisonment as "the unlawful violation of the liberty of another").

federal court in Maryland awarded $850,000 to a young man who had been unjustly held for ten minutes in an Eddie Bauer store while a store security officer falsely accused him of shoplifting.[224] If this young man had been wrongfully convicted of a federal crime and imprisoned, he would have been entitled to a maximum award of $5,000.[225] In Texas, which provides a maximum of $50,000 for the wrongly convicted regardless of the length of incarceration,[226] a jury awarded a woman approximately $150,000 for mental pain, humiliation, embarrassment and similar claims after being falsely imprisoned in a jail cell for nine to eleven hours.[227] Similarly, a California jury awarded $10,000 to a man falsely arrested by police for car theft and forced to spend four hours in a jail cell.[228] Ironically, the falsely imprisoned victim would have received the same amount in California had he been falsely convicted and sent to death row for ten years. In short, the statutory sums allotted to the wrongly convicted generally pale in comparison to the awards given to victims of false imprisonment. While victims of false imprisonment may suffer significant harm as a result of their traumatic experiences, the wrongly convicted clearly endure at least equivalent injuries. Compensation schemes must diminish this glaring disparity.

Notably, the statutory caps on monetary recovery for erroneously convicted persons mirror damage caps in other areas of the law that

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[224] David Stout, *3 Blacks Win $1 Million in Bauer Store Incident*, N.Y. TIMES, Oct. 10, 1997, at A16. The incident involved a total of three young men. A security guard became suspicious of a young man whose shirt looked new in the eyes of the security guard. *Id.* Indeed, the shirt was new because the young man had purchased the shirt the previous day in the same store and a cashier remembered him. Nonetheless, the security guard approached the young men and actually confiscated the shirt from the young man who had aroused his suspicion. *Id.*

[225] 28 U.S.C. § 2513(e) (1994).

[226] TEX. CIV. PROC. & REM. CODE ANN. § 103.006 (Vernon 1997).

[227] Dayton Hudson v. Altus, 715 S.W.2d 670, 672 (1986). The young woman was a shopper at Target whom security officers suspected of stealing three pens with a value of ten dollars. Police searched the woman upon her arrival at the jail and then put her into a cell with people whom she believed were on drugs. The young woman claimed that the jail cell was noisy, dirty, and contained a filthy toilet with no seat cover. *Id.* at 672-74. Although the woman did not seek medical help after her ordeal, she did speak with her priest. *Id.* As evidence of the emotional distress caused by the experience, the victim quit teaching Sunday school and lost time from work. *Id.* Furthermore, children teased the victim's children about the affair. *Id.*.

[228] Washington v. Farlice, 2 Cal. Rptr. 2d 607 (Ct. App. 1991).

emerged following the tort reform movement that began in the 1970s.[229] During this period, Congress added damages recovery caps to an array of statutes, ranging from the well-known Civil Rights Act of 1991[230] to the obscure Longshore & Harbor Workers' Compensation Act.[231] Similar statutory caps were added to state codes.[232] In sum, statutory damage caps have become a pervasive feature of tort litigation in this country.

One feature of the tort reform movement that spurred its advance was the creation of statutory damages caps for noneconomic injuries. When the Illinois General Assembly enacted its Civil Justice Reform Amendments in 1995, it enacted a $500,000 statutory cap on the recovery of noneconomic damages in claims of medical malpractice.[233] The statute defined "noneconomic" damages as "damages which are intangible, including but not limited to damages for pain and suffering, disability, disfigurement, loss of consortium, and loss of society."[234] To justify its imposition of the noneconomic damages cap, the legislature claimed that such damages were difficult to quantify, that the cost of the tort system increased taxes and medical expenses in general, and rejected the

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[229] David Fink, Best v. Taylor Machine Works, *The Remittitur Doctrine, and the Implications for Tort Reform*, 94 NW. U. L. REV. 227, 228 (1999) (observing tort reform movement in general began during 1970's with perceived explosion of tort litigation which allegedly threatened availability of medical aid).

[230] 42 U.S.C. § 1981a(b)(2)-(3) (1994) (containing sliding cap on damages for intentional employment discrimination under Title VII depending upon size of employer).

[231] 33 U.S.C. § 906(b)(1)-(2) (1994) (fixing compensation at percentage of national average weekly wage).

[232] *See, e.g.*, O.C.G.A. § 51-12-5.1(g) (2001) (limiting award of punitive damages to $250,000); KAN. STAT. ANN. § 60-3701 (1994) (applying complex scheme to limit exemplary damages); N.D. CENT. CODE § 32-03.2-11(4) (1996 & Supp. 2001) (capping exemplary damages at greater of $250,000 or two times amount of compensatory damages). One of the most common statutory caps contained in state codes is a limit on recovery for medical malpractice. Michigan limits medical malpractice compensation to only $280,000, with exceptions for grevious injuries increasing cap to $500,000. MICH. COMP. LAWS § 600.1483 (1996). *See also, e.g.*, COLO. REV. STAT. § 13-64-302 (1997) (limiting liability of hospital or physician for medical malpractice to $1,000,000 per patient); NEB. REV. STAT. § 44-2825 (1998) (capping medical malpractice recovery at $1,250,000); VA. CODE ANN. § 8.01-581.15 (Michie 2000) (allowing maximum recovery of $1,600,000).

[233] Fink, *supra* note 229, at 249.

[234] *Id.* at 250.

philosophy of "tort theorists who would use tort doctrine as a system of socialized compensation insurance."[235]

Prior to the passage of the Illinois act, only a judge possessed the power to reduce an award of noneconomic damages. As a result, the statute predictably came under state constitutional fire, arriving before the Illinois Supreme Court in *Best v. Taylor Machine Works, Inc.*[236] The court observed that the special legislation clause of the Illinois Constitution prohibited the legislature from "conferring a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated."[237] Construing the noneconomic damages cap in light of the ban on special legislation, the court found that the cap "discriminate[d] between slightly and severely injured plaintiffs, and also between tortfeasors who cause severe and moderate or minor injuries."[238] As a result, the court characterized the granting of compensation as nothing more than arbitrary, noting that the cap not only failed to cement the credibility of the tort system, but also thwarted the achievement of consistency and rationality in the justice system.[239] Furthermore, the court deemed the cap to be a "legislative remittitur" that "disregard[ed] the jury's careful deliberative process in determining damages that will fairly compensate plaintiffs who have proven their causes of action."[240] By so doing, the cap "encroach[ed] upon the fundamentally judicial prerogative of determining whether a jury's assessment is excessive within the meaning of the law."[241] Thus, the Illinois Supreme Court declared the noneconomic damages cap to be unconstitutional under both the ban on special legislation and separation of powers clauses of the Illinois Constitution.[242]

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[235] *Id.* (citing 1995 Ill. Laws 89-7).

[236] 689 N.E.2d 1057 (Ill. 1997).

[237] *Id.* at 1069.

[238] *Id.* at 1075.

[239] *Id.* at 1076 (noting legislative intent to achieve consistency and rationality in civil justice system as one goal of cap).

[240] *Id.* at 1079-80.

[241] *Id.* at 1080 (referring to court's power of remittitur). Furthermore, the court found that the cap forced a claimant to sacrifice that portion of a jury's award above the cap, violating the rule in Illinois that a court lacked the power to reduce an award if the claimant objects to the reduction. *Id.*

[242] *Id.* at 1081.

Applying the reasoning in *Best* to the damage caps on compensation for the wrongly convicted shows that they too are subject to constitutional attack in the courts of states where they have been enacted. Much like the noneconomic damages cap, wrongful conviction damage caps segregate the wrongly convicted into groups based upon the severity of the injury. The burden of the cap falls most heavily on those most severely injured because they are ineligible to receive an award above the statutory limit, which exposes them to gross undercompensation. On the other hand, individuals less injured, such as those only remaining behind bars for a short period, will likely receive full compensation for their injuries. Furthermore, the legislative cap eliminates the judicial power of remittitur by legislatively deciding the maximum amount of compensation allowable under any set of circumstances and also intrudes upon a jury's ability to determine the extent of damages a claimant should receive. Thus, the statutory damage caps on compensation for the wrongly convicted implicate the same special legislation and separation-of-powers concerns that other courts have used to strike down other damages recovery caps.

While damage caps are susceptible to constitutional attack, mounting assaults against them with an eye toward future enactment of unlimited recovery statutes could prove costly even if successful. States have no legal obligation to compensate victims of wrongful convictions.[243] If a court declares compensatory legislation unconstitutional, a state could react by simply refusing to enact a different remedial statute. Thus, rather than benefitting the wrongfully accused, overturning compensatory legislation on constitutional grounds could leave no avenue of redress other than a lawsuit against a state actor with all of its associated difficulty.[244]

Although states have no legal obligation to remedy the injuries of the wrongly convicted, legal precedent is not the only basis upon which states grant compensation to innocent individuals who suffer severe injuries. Between 1954 and 1992, many states enacted

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[243] Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 92 n.78 (1999) (asserting attempts to find legal basis for indemnification have been unsuccessful).

[244] *See supra* notes 147-87 and accompanying text (discussing inadequacy of statutory and common law remedies for unjust convictions).

legislation for "the protection and assistance of victims of crime and members of the immediate families of such victims in order to preserve the individual dignity of victims."[245] These statutes, generally referred to as Crime Victims' Compensation Statutes, financially aid innocent victims of crimes and their families because they may "suffer disabilities, incur financial hardships, or become dependent upon public assistance" as a result of the crime.[246] Despite having no legal obligation to provide monetary compensation for innocent victims of criminal acts, some state legislatures found a moral responsibility to assist innocent victims of crime.[247]

The moral compass articulated by state legislators in the legislative purpose of crime victims' compensation statutes suggests that there may exist at least an aspirational willingness to enact improved statutory compensation schemes for the wrongly convicted. Yet, in light of the awards to victims of false imprisonment, the moral and political balance of interests struck by state legislators and embodied in the statutory limits on payments to wrongly convicted persons cannot be considered anything but "a highhanded insult to an almost inconceivable injury."[248] If society benefits by the incarceration of guilty criminals, then society bears the burden of compensating a person unjustly incarcerated as a result of mistakes made by its criminal justice machine and its state actors. Moreover, many states spread out the cost of hardship on the private individual by recognizing a "moral" obligation, as opposed to a legal obligation, to compensate persons who suffered injuries at the hands of private individuals.[249] In comparison, the moral obligation of the

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[245] *E.g.*, COL. REV. STAT. ANN. § 24-4.1-101 (West 2001).

[246] FLA. STAT. ANN. ch. 960.02 (Harrison 1998).

[247] The crime victims' compensation statute in Wisconsin, for example, emphasizes that its legislature "finds and declares that the state has a moral responsibility to aid innocent victims of violent crime." WIS. STAT. § 949.001 (1996). Similarly, the Florida legislature found that "aid, care, and support be provided by the state, as a matter of moral responsibility, for such victims of adult and juvenile crime." FLA. STAT. ANN. ch. 960.02; *see also, e.g.*, MD. CODE ANN. CRIM. PROC. § 11-802(b) (2001) (terming justification moral responsibility); N.Y. EXEC. LAW § 620 (McKinney 1998) (terming justification "a matter of grace"); VA. CODE ANN. § 19.2-368.1 (Michie 2000) (same).

[248] Hoffner v. State, 142 N.Y.S. 2d 630, 631 (N.Y. Ct. Cl. 1955).

[249] See Bernhard, *supra* note 243, at 97-101 (comparing obligations of crime victim's compensation statutes to those of statutory compensation for wrongly convicted and arguing passage of former despite objections demonstrates objections to latter are generally unfounded).

state to indemnify the unjustly convicted person and spread out the cost of the harm inflicted is at least equivalent if not greater in cases of wrongful conviction because it is the failure of the state itself that damaged the victim. Even if state actors display no malice or negligence, it is still the state and its legislatively chosen procedures in lieu of others designed to prevent wrongful convictions, such as mandatory DNA testing, that injures the unjustly convicted. As a result, our collective sense of social and moral justice demands that the balance between political interest and compensation for the wrongly convicted be better weighed. In the end,

> compensation responds to an elementary demand for justice harbored in every human breast. Just as that demand is satisfied by the conviction of the guilty, so it required the acquittal of the innocent. When, then, by a misguided or mistaken operation of the governmental machine there is a miscarriage of justice and the helpless innocent is actually convicted, the public conscience is and ought to be revolted and dismayed. The least the community can do to repair the irreparable is to appease the public conscience by making such restitution as it can by indemnity.[250]

Given their similar underpinnings, the natural approach to compensating the wrongly convicted would be to apply the remedial standards associated with crime victims' compensation statutes. However, crime victims' compensatory schemes cannot be applied with precision to the wrongly convicted in part because they do not provide compensation for pain and suffering. For example, the crime victims' compensation statute in Kansas explicitly states that "noneconomic detriment is not loss" and defines "noneconomic detriment" to include pain and suffering.[251] The absence of a

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[250] *See* BORCHARD, *supra* note 26, at 392.

[251] KAN. STAT. ANN. § 74-7301(i),(j) (1992); *see also* COLO. REV. STAT. § 24-4.1-109(2)(a) (2001) (providing compensable losses do not include pain and suffering); ME. REV. STAT. ANN. tit. 5 § 3360(4) (West 1964, Supp. 2000) (requiring damages "must be expenses or losses actually and reasonably incurred"); TEX. CRIM. PROC. CODE ANN. § 56.34 (Vernon Supp. 2000) (referring only to "pecuniary loss"); WIS. STAT. § 949.06 (1996) (allowing recovery only for

compensatory sum for pain and suffering for the wrongly convicted would leave them without redress for one of their most severe injuries. As a result, compensation for the wrongly convicted requires alternative schemes that are capable of providing more equitable relief.

Recognizing the prevalence of statutory limitations provides a foundation from which to create a reformed statutory schedule of compensation that better balances the competing interests of legislators and the wrongly convicted. Rather than placing an upper limit upon total statutory compensation, a more equitable approach would be to compartmentalize the remedy according to the type of injury suffered and place a monetary damages limit on specific types of injuries in a manner similar to those applied to damages claims in other areas of law. As a general matter, the injuries suffered by the wrongly convicted because of their undeserved fate can be divided into economic and noneconomic damages, each of which must be accounted for in the remedy. Economic damages are those that remedy any monetary detriment to the individual as a result of the injury such as lost wages or medical expenses.[252] Noneconomic damages are those that remedy nonfinancial injuries such as pain and suffering, inconvenience, mental anguish, physical impairment, loss of capacity to enjoy life, loss of reputation, or loss of consortium, which may be substantial for the wrongfully accused.[253] By dividing the remedy into economic and noneconomic dimensions, a workable framework emerges from which to address compensation for the unjustly convicted that comprehensively redresses a victim's injuries and stands in stark contrast with the flat caps present in most current statutes.

The first prong, compensation for economic damages, is indispensable to the calculation because a wrongful conviction and

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economic loss).

[252] *E.g.*, ALA. CODE § 15-23-3(11) (1975); CONN. GEN. STAT. § 52-572h(a) (1991); FLA. STAT. ANN. ch. 766.202(3) (Harrison 1994); N.C. GEN. STAT. § 15B-2(10) (1999); OR. REV. STAT. § 18.560(2)(a) (1988); S.D. CODIFIED LAWS § 21-3A-1 (Michie 1987); WASH. REV. CODE § 4.56.250(1)(a) (1988).

[253] *E.g.*, ALA. CODE § 15-23-3(12) (1975); ALASKA STAT. § 9.17.010(a) (Michie 2000); CONN. GEN. STAT. § 52-572h(a) (1991); FLA. STAT. ANN. 766.202(7) (Harrison 1994); OR. REV. STAT. § 18.560(2)(b) (1988); S.D. CODIFIED LAWS § 21-3A-1 (Michie 19887); WASH. REV. CODE § 4.56.250(1)(b) (1988).

incarceration creates an undeniable financial detriment to the individual. In many cases, the most significant economic damage will be recovery for lost wages as a result of the wrongful conviction and incarceration. Allowing recovery for lost wages is reasonable because, but for an erroneous conviction, a wrongly convicted person who was employed prior to the injustice would have earned wages during the period of incarceration.[254] Michael Ray Graham Jr., to use but one example, worked in the construction business as a roofer in Virginia prior to his wrongful conviction in Louisiana.[255] If not for the fourteen years Graham unjustly spent in a Louisiana prison, Graham would have continued to earn his wages as a roofer.[256] In addition to the financial detriment occasioned by a loss of wages, a wrongful conviction and incarceration potentially creates medical expenses that should be recoverable as economic damages. For example, the trauma caused by an extended unjust imprisonment may result in psychological damage that requires counseling or treatment from a medical professional. In sum, the economic damages prong would compensate the wrongly convicted for all tangible injuries associated with the incarceration, whether prior to or following release from prison.

Considering the nature of economic damages, a monetary limit on recovery is unnecessary because a natural cap exists to preclude overcompensation. A claimant is limited to what she can factually prove as being the financial losses attributable to the unjust conviction and incarceration. In other words, one cannot obtain an award greater than what the evidence shows. Moreover, the limits of evidentiary proof bring an equitable quality to the economic damages inquiry because the claimant who suffers and proves greater injuries will receive greater compensation. If a claimant did not have a job prior to conviction, the evidence will demonstrate that fact, and the claimant will be unable to recover any money for lost wages. Any other result would be a windfall for the unemployed claimant in economic terms despite the gross injustice of a wrongful

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[254] Assuming that the wrongly convicted person would have labored at the same job for the duration of the incarceration. While one might have switched jobs if the wrongful incarceration is lengthy, such a change is far too speculative for remedial purposes.

[255] *See* Rimer, *supra* note 24.

[256] *Id.*

conviction. Thus, in the evidentiary world, monetary detriment as a result of lost wages or medical expenses is a finite and identifiable sum provable by reference to concrete evidence, and any cap on recovery would be arbitrary in every sense of the word.

In contrast to the calculation of economic damages, appropriate compensation for noneconomic damages for pain and suffering, humiliation, or the like cannot be determined solely by reference to objective factors. According to the California Supreme Court, "[n]o method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter."[257] To assist juries in their conversion of noneconomic injuries into dollars, the codes of many states contain provisions capping recovery of noneconomic damages for a variety of tort claims. California, for example, caps recovery for noneconomic damages in medical malpractice actions at $250,000.[258] Even more broadly, some states employ caps on noneconomic damages in any civil action seeking compensation for noneconomic injuries. For example, Maryland caps recovery for noneconomic damages in any personal injury action at $350,000.[259] Furthermore, some states utilize comprehensive caps that broadly limit recovery against governmental entities, which includes compensation for noneconomic injuries. For example, the laws of both Delaware and South Carolina limit the liability of any governmental entity for any act or omission to $300,000.[260] In sum, legislatively enacted caps on

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[257] Beagle v. Vasold, 417 P.2d 673, 675 (Cal. 1966).

[258] CAL. CIV. CODE § 3333.2 (West 1997); UTAH CODE ANN. § 78-14-7.1(1)(b) (1996 & Supp. 2001). *See also* MONT. CODE ANN. § 25-9-411 (2001) (applying $250,000 cap on noneconomic damages in medical malpractice actions); WIS. STAT. § 893.55-(4)(d) (1997) (capping noneconomic recovery in medical malpractice actions at $350,000); W. VA. CODE § 55-7B-8 (2000) (applying $1,000,000 cap on noneconomic recovery in medical malpractice actions).

[259] MD. CODE ANN. CTS. & JUD. PROC. § 11-108(b) (1998). *See also* COLO. REV. STAT. § 13-21-102.5(3)(a) (1997) (capping recovery for noneconomic injuries in any civil action at $250,000); KAN. STAT. ANN. § 60-19a02 (1994) (limiting noneconomic recovery to $250,000); OR. REV. STAT. § 18.560(i) (1988) (capping noneconomic damages in civil action at $500,000).

[260] DEL. CODE ANN. tit. 10 § 4013 (1999) (limiting recovery to $300,000); KAN. STAT. ANN. § 75-6105 (1989) (limiting governmental liability to total of $500,000); ME. REV. STAT. ANN. tit. 14 § 8105 (West 1964 & Supp. 1999) (capping recovery at $400,000); MINN. STAT. ANN. § 466.04 (West 1999 & Supp. 2001) (capping noneconomic recovery from municipal body at $1 million for claims arising after January 1, 2000); S.C. CODE ANN. § 15-78-120 (Law Co-op. 1976 & Supp. 2000); N.M. STAT. ANN. § 41-4-19 (Michie 1978) (limiting recovery to $1.5 million).

noneconomic injury awards provide a frame of reference for evaluating intangible damages in various settings while reducing the legislative fear of gross overcompensation.

Although noneconomic injuries associated with other wrongful acts can be severe, such as harm from medical malpractice, they are no more injurious to their victims than those accompanying a wrongful conviction are to the innocent person. The pain of being unjustly ripped away from family members, the damage to one's reputation, the mental anguish of knowing that one is innocent yet imprisoned, and the permanent impact on one's future are each at least as incalculable as any other noneconomic injury. As a result, legislatures cannot rationally limit the awards for one type incalculable harm at an abysmally low level while providing a higher amount of compensation for another type of incalculable harm. In fact, the wrongly convicted arguably deserve greater compensation than other individuals suffering similar harms because their injuries occur at the hands of the state and its agents. Regardless, the wrongly convicted deserve the opportunity to recoup at least as much compensation as is provided to remedy other noneconomic injuries.

Given that other noneconomic damages caps redress injuries just as indeterminable as those associated with the wrongly convicted, utilizing one of those caps to limit compensation for the wrongly convicted is a more rational and acceptable limit on recovery in comparison to the shockingly low caps used in current schemes. Most readily applicable are those caps that limit recovery for noneconomic injuries associated with personal injury torts. For example, instead of recovering a paltry $10,000 lump sum from California, a wrongly convicted person would have the opportunity to obtain up to $250,000, the limit for noneconomic damages associated with medical malpractice claims.[261] Absent an analogous limit on noneconomic injuries for medical malpractice claims, general caps limiting recovery for noneconomic injuries in any civil action provide another applicable limit on compensation for the wrongly convicted because a claim of wrongful conviction is a civil claim. In contrast to its statutory compensation of actual damages

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[261] CAL. CIV. CODE § 3333.2 (West 1997).

for the wrongly convicted, Maryland limits recovery for noneconomic damages in any other civil action to $500,000.[262]

If a state code contains neither of the previous two limitations but has a limit on damages recoverable from a governmental entity that includes noneconomic damages, it would be a more rational, albeit arbitrary, limit in comparison to the grossly undercompensating caps within current statutes. As a result, a state without a compensatory statute to redress the injuries of the wrongly convicted, such as Kansas, could enact a statute that limited total recovery for noneconomic damages to $500,000, which is the limit for noneconomic recovery from a governmental entity in Kansas.[263] Indeed, a cap on damages recoverable from a governmental body arguably applies with the greatest force because it is the state that inflicts the harm on the wrongly convicted. Whatever cap a state chooses to utilize, the reformed limit on recovery for noneconomic harm serves as a rational companion to the self-limiting cap associated with economic damages arising from the wrongful conviction.

To calibrate the recoverable noneconomic damages to the severity of the crime, the proposed remedial statute incorporates a schedule of allowable compensation that varies with the classification of the crime for which one unjustly served time. For example, Kansas utilizes a sentencing framework that categorizes felonies and punishments according to their adjudged severity using a scale that varies from I to X in conjunction with the criminal history of the offender.[264] While first degree murder is considered an "off-grid" crime and exposes an individual to the death penalty or life imprisonment,[265] convicting an individual with no prior criminal record of a severity level I crime, such as murder in the second degree,[266] presumptively would result in a sentence of 97 months in prison.[267] For the sake of comparison, rape can be a level II severity crime and comes with a presumptive sentence of 73 months in

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[262] MD. CODE ANN. CTS. & JUD. PROC. § 11-108 (1998).
[263] KAN. STAT. ANN. § 75-6105 (1989).
[264] *Id.* § 21-4704 (1995 & Supp. 1999) (applying to crimes committed after July 1, 1993).
[265] *Id.* § 21-4706 (1995).
[266] *Id.* § 21-3402 (1995 & Supp. 1999).
[267] *Id.* § 21-4704.

prison for someone with no prior criminal history.[268] Although their codes differ in their approaches to sentencing convicted criminals, states uniformly vary punishment with the severity of the crime.[269]

By grafting the legislatively selected cap on noneconomic damages onto the sentencing guidelines for a given state and determining a range of sums available, a framework for noneconomic compensation can be constructed that varies with the severity of the punishment to which the state imposed upon the unjustly convicted person. At the upper end of the schedule of compensation would be the sums allotted to those falsely convicted of the most severe crimes. For example, the range of noneconomic recovery for persons wrongly convicted of "off-grid" crimes in Kansas, which carry punishments of life imprisonment or death, could be legislatively designated to be between $400,000 and $500,000 with the upper bound reflecting the limit of compensation borrowed from the selected noneconomic damages cap.[270] The proposed schedule would then compensate all categories of crimes for which victims suffer wrongful convictions in decreasing amounts.

Crimes of lesser severity likely entail a lesser degree of noneconomic harm; therefore, a lesser sum of money is required to compensate for those injuries. For example, it is worse to be falsely convicted of murder than it is to be wrongly convicted of theft. Continuing to use Kansas as an example, then, the schedule could provide between $350,000 and $400,000 for false convictions of severity level I crimes, between $300,000 and $350,000 for erroneous convictions of severity level II crimes, and so on with diminishing differences in the ranges of available compensation as the severity scale decreases.[271] In the end, each individual wrongly convicted of a crime at the hands of state actors receives compensation for noneconomic injuries commensurate with the severity of the

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[268] *Id.* §§ 21-3502, 21-4704.

[269] *See, e.g.*, IND. CODE §§ 35-50-2-4 to -7 (1998 & Supp. 2001); OHIO REV. CODE ANN. § 2929.14 (West 1997 & Supp. 2000); COLO. REV. STAT. § 18-1-105 (1997); TEX. PENAL CODE ANN. § 12.04 (Vernon 1994); WASH. REV. CODE § 9.94A.505 (1998 & Supp. 2002).

[270] KAN. STAT. ANN. § 75-6105.

[271] For example, the difference in noneconomic damage between a false conviction for a severity level X felony and a severity level IX felony is unlikely to be vast. As a result, statutory compensation for a level X felony could be between $1-$5,000 while that for a level IX felony could be between $5,000-$10,000.

criminal penalty imposed or projected, such as death in capital cases.

In a structural sense, calculating noneconomic compensation using a sliding scale of this nature simply mirrors the schemes many states utilize to pay court-appointed attorneys.[272] In Alabama, for example, court-appointed attorneys receive compensation that varies with the severity of the defendant's crime. Court-appointed attorneys representing persons charged with Class A felonies under Alabama law may receive no more than $3,500 for their work, attorneys representing people charged with Class B felonies may receive no more than $2,500, and so on.[273] Other states vary their compensatory sums according to the severity of the defendant's potential penalty. Florida's schedule of compensation for court-appointed counsel allows for a maximum of $3,500 for attorneys whose clients are at risk of capital punishment and the lesser sum of $3,000 for attorneys representing clients who could receive life sentences.[274] In light of their experience with other compensatory schedules that vary with criminal severity, the proposed schedule for noneconomic compensation provides a ready-made formula that is both easy for state legislatures to enact and for courts to implement.

Not only does this step-wise schedule of diminishing compensation equitably remedy noneconomic injuries, but it also preserves a more meaningful role for the jury, the body charged with determining the damages owed to an individual claimant. A flat, low statutory cap on noneconomic recovery directs the jury to bestow a full recovery on a given claimant in light of the egregious nature of the prison experience. On the other hand, the possibility of an overall higher recovery combined with a range of compensatory sums allows a jury to more closely scrutinize the particular injuries suffered by a given claimant and tailor a remedy to suit. Even claimants falsely convicted of crimes of equal severity in terms of

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[272] *E.g.*, D.C. CODE ANN. § 11-2604(b) (2001); HAW. REV. STAT. § 802-5(b) (1993); IOWA CODE § 815.7 (1994 & Supp. 2001); NEV. REV. STAT. § 7.125(2) (1989); N.H. REV. STAT. ANN. § 604-A:5 (1997); S.C. CODE ANN. § 17-3-50(A) (Law Co-op. 1976 & Supp. 2000); UTAH CODE ANN. § 77-32-304.5(f) (1999).

[273] ALA. CODE §§ 15-12-21(d)(1)-(6) (1995 & Supp. 2000).

[274] FLA. STAT. ANN. ch. 925.036(2)(c)-(d) (Harrison 1998).

sentencing guidelines may have differences in their noneconomic injuries. For example, the injury to a banker's reputation and future job prospects as a result of a false theft conviction is likely to be greater than that of a truck driver. The range of available compensatory sums contemplates such differences within categories of crime of equal severity and allows the jury to adjust compensation accordingly. Ultimately, the range of dollar amounts associated with the schedule of compensation gives the trier of fact the opportunity to individualize the remedy.

Combining the economic and noneconomic damages obtainable under the proposed statutory scheme represents a balance that more closely approaches the "middle of the road" between the interests of legislators and those of the wrongly convicted than is provided by the majority of current statutory compensation provisions. This revised compensatory approach could serve as a model both for reform in states with low caps and for initial enactment in states without any statutory compensation scheme. To assuage the budgetary concerns of state legislators, the proposal contains factual or rational caps on damages thereby limiting the total liability of the state. Indeed, the noneconomic damages compensatory strategy contains multiple caps that vary with the severity of the crime of the erroneously convicted and the maximum recoverable amount is only available to individuals subjected to the most severe penalties. In theory, the total amount of recoverable damages remains infinite in light of the unlimited amount obtainable for economic damages. In reality, however, the amount of economic compensation will be low because most defendants are either indigent or work at low paying jobs prior to their wrongful convictions. As a result, the proposal adds a measure of predictability to the amount of liability that a state is likely to incur in any given case.

Even if state legislators fear the possibility of unlimited recovery from an unlimited number of claimants, they nevertheless retain the legislative ability to restrict access to the statutory remedy by increasing the burden of proof from a preponderance of the evidence to clear and convincing evidence. However, experience demonstrates that the number of successful claimants will be small

regardless of the amount of available compensation.[275] For example, New York has granted recovery in only six of sixty-two claims filed between 1984 and 1999 despite having one of the most liberal compensation statutes in the nation.[276] Similarly, West Virginia, whose 1987 statute is the mirror image of the New York compensatory scheme, had paid a mere two claims as of 1999.[277] Although the proposed scheme is more restrictive than the New York or West Virginia provisions in that it limits compensation, it nonetheless represents a demonstrably greater commitment to moral and compensatory justice on the part of state legislators without severely threatening to impact the state budget.

This proposed compensation scheme is also more just from the perspective of the wrongly convicted because it provides them with more money from which to begin their lives anew. The wrongly convicted deserve greater compensation not only because of the injustice of wrongful imprisonment, but also because their ordeals forever alter their lives regardless of later exoneration. Not only will a wrongly convicted person forever face questions about his true innocence of the crime, but he will also encounter everyday hardships while trying to resume his life outside of prison. For example, many job applications contain a question about the criminal history of the applicant. The wrongly convicted person must at least admit to being arrested and may have to reveal that he was convicted.[278] Explaining that the state wrongly convicted him and made reparations is be no easy task. Even if an explanation is articulated and accepted by a potential employer, the wrongly convicted person faces a competitive workplace with no employment history, no recent references, and a lack of technical skills frequently required to perform many jobs in our computerized society.[279] In this light, the most damaging injury inflicted upon the wrongly convicted is not

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[275] See Higgins, *supra* note 43, at 48-49 (compiling survey of claims and award amounts in 1999 revealing that recently, all 16 jurisdictions with statutory compensation have paid total of only 49 claims).

[276] *Id.* at 49.

[277] *Id.*

[278] C.J. Chivers, *Long Wait for DNA Result Can Be Justice Delayed*, N.Y. TIMES, Nov. 19, 2000, § 1, at 49 (reporting difficulties finding employment of one wrongly convicted person).

[279] *See* Donna J. Robb, *Wrongly Convicted Man Struggles to Rebuild His Life*, CLEVELAND PLAIN DEALER, Aug. 1, 2001, at B3 (providing one case history).

necessarily the time lost behind bars, but the stigma that follows them for the rest of their lives. Greater compensation not only redresses the damage directly associated with incarceration, but also eases the radical transition to freedom and all of its consequences. For example, using awards granted according to a liberal scheme for comparison, New York awarded $750,000 to Willie Fisher after serving an eleven-year prison sentence[280] and $766,000 to J.L. Ivey after a five-year incarceration for murders each did not commit.

V. CONCLUSION

On a fundamental level, remedies implement the substantive policies embraced by society. Within the confines of our society and the treatment of its criminals, "the fundamental value determination of the American criminal justices system [is] that it is far worse to convict an innocent person than to let a guilty person go free."[281] Given the meager compensatory sums of money allotted as alms to the wrongly convicted by the state, the "fundamental value" is a dog with little to no bite and possesses only symbolic meaning on the cold pages of old books. Instead of putting its money where its mouth is, society at this point apparently prefers to quell its fear of crime regardless of the cost to innocent individuals. As evidence of the lack of concern over the plight of the wrongly convicted, one need look no further than to the meager amounts that states offer exonerated individuals who unjustly waste portions of their lives behind bars for crimes they did not commit. Michael Ray Graham Jr. spent fourteen years of his life in prison for a crime he did not commit. For his troubles, he received ten dollars for transportation home and a coat from the state upon his release from prison. Convicting the innocent serves no socially-redeeming purpose. Regardless of any sense of moral justice, the truly guilty remain free to commit crimes and often continue to do so at the expense of the innocently imprisoned.

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[280] Peter Kerr, *Man Who Was Wrongly Jailed in Slaying is Awarded $750,000*, N.Y. TIMES, Jan. 14, 1986, at B2.

[281] People v. Bull, 705 N.E.2d 824, 842 (Ill. 1998).

Although placing a dollar value on the loss of liberty illustrates one of the worst problems in the law, refusing to enact equitable compensatory statutes or adhering to statutes that grossly undercompensate the wrongly convicted inflicts yet another wound upon the wrongly convicted. Indeed, "[t]he greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal that reflects unfavorably on all participants in the criminal justice system."[282] As a result, the severity of the injuries inflicted upon the wrongly convicted demand increased compensation through improved remedial approaches. Dividing the damages of the unjustly convicted into economic and noneconomic with associated caps that reflect the political reality of the legislative environment suits the interests of both state legislators and the wrongly convicted. State legislators avoid having monstrously large verdicts that impair state budgets while appearing to be concerned with the cause of social justice. The wrongly convicted avoid the alarmingly low compensatory sums awarded under most current compensatory frameworks. By seeking a middle ground between the interests of both camps, the statutory schedule of compensation puts a few teeth back into the bite of a time-honored fundamental value of our criminal justice system and acknowledges that convicting the innocent is not just the stuff of "unreal" dreams.

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[282] Dennis Hevesi, *Overturning Conviction is Upheld*, N.Y. TIMES, July 17, 1994, § 1, at 25 (quoting appellate court that upheld overturning rape conviction of Alberto Ramos).