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## ARTICLES

### UNDOING TIME: A PROPOSAL FOR COMPENSATION FOR WRONGFUL IMPRISONMENT OF INNOCENT INDIVIDUALS<sup>1</sup>

MUHAMMAD U. FARIDI, HILLEL HOFFMAN, &  
PAUL A. MONTUORI\*

#### INTRODUCTION

This article focuses on a prevalent shortcoming of our criminal justice system: inadequate compensation for innocent individuals who were wrongfully imprisoned. After serving time in prison—both before and after conviction—for crimes that they did not commit, these individuals often do not have anywhere to go.<sup>2</sup> Friendships and familial relationships have gradually deteriorated, the ability to find decent work has been hindered by a criminal record, and a chance at having a sustainable livelihood has been lost.

Twenty-four states, the District of Columbia, and the federal government have statutes that provide a mechanism for exonerated

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1. An earlier version of this article is available on the New York City Bar Association's website as a joint report of the Association's Capital Punishment and Corrections committees.

2. See Fernanda Santos and Janet Roberts, *Putting a Price on a Wrongful Conviction*, N.Y. TIMES, Dec. 2, 2007, at C4, available at <http://www.nytimes.com/2007/12/02/weekinreview/02santos.html>.

individuals to seek compensation.<sup>3</sup> Some states have private laws that provide compensation on a person-by-person basis, while others provide no compensation whatsoever. This article critiques the statutory approach taken by those twenty-six jurisdictions and proposes a statute that adequately accounts for the need to compensate the innocent while considering the state's interests. The proposed statute reflects the fairest practices at this time. It is likely that any effective exoneration statute will need continual updating to reflect contemporary developments in science and technology and changes in law. Drawing upon a mixture of the best elements from now-existing laws and certain foundational principles of justice, the proposed statute is both a functioning piece of legislation for current times and a foundation for future development.

Part I of this article provides a background on the realm of wrongful convictions and argues for the need to provide compensation for wrongfully convicted individuals. Then, Part II summarizes the shortfalls and successes of various state statutes, while providing a discussion of how various elements of the existing statutory framework are incorporated into the authors' proposed statute. Part III sets forth the full text of the proposed statute, which, the authors advocate, should be considered by those states that have yet to adopt a compensation statute or are considering revising their current statutes.

## I. WRONGFUL CONVICTIONS AND THE NEED TO COMPENSATE

Fairness and justice are considered the cornerstones of the American criminal justice system. But these concepts primarily define the system prior to conviction and incarceration.<sup>4</sup> The system provides specific safeguards for a person accused of a crime: a prohibition against unreasonable searches and seizures,<sup>5</sup> an adversarial

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3. *See infra* Part II.

4. These concepts have their underpinnings in Blackstone's thoughtfully calculated ratio: "[B]etter that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES 358 (8th ed., Oxford Clarendon Press 1778); *see also In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); VOLTAIRE, ZADIG 150 (Tobias George Smollett trans., Lester G. Crocker ed., Washington Square Press 3d prtg. 1971) ("[I]t is better to run the risk of sparing the guilty than to condemn the innocent.").

5. U.S. CONST. amend. IV; *see, e.g., Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (citation omitted) (quoting *Weeks v. United States*, 232 U.S. 383, 393 (1914)) (internal quotation marks omitted) ("If letters and private documents can thus be seized and held

system of justice,<sup>6</sup> a presumption of innocence in a criminal proceeding,<sup>7</sup> a right to effective legal counsel,<sup>8</sup> a right to a speedy trial,<sup>9</sup> a right to a jury trial,<sup>10</sup> and a right to equal protection of the law.<sup>11</sup> Prior to a citizen standing trial as a defendant before a jury, a multitude of events must occur: e.g., the reading of warnings, an explanation of rights, the provision of counsel, and the exclusion of unconstitutional evidence. From these protections, it appears that the system is geared towards providing fairness and justice to a person *accused* of a crime; cases such as *Miranda v. Arizona*,<sup>12</sup> *Gideon v. Wainwright*,<sup>13</sup> and *Mapp v. Ohio*<sup>14</sup> symbolize these efforts.

Yet despite the protections afforded by what appears to be a fair and just system,<sup>15</sup> innocent people are sometimes sent to prison. Eyewitness misidentification, unreliable science, false confessions, governmental misconduct, evidence obtained from informants and jailhouse snitches, and ineffective assistance of counsel are the lead-

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and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”).

6. See, e.g., *United States v. Nixon*, 418 U.S. 683, 709 (1974) (“We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.”).

7. See, e.g., *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

8. U.S. CONST. amend. VI; see, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984). But see Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455-60 (1996) (illustrating cases of ineffective assistance of counsel where courts have not found the Sixth Amendment to have been violated).

9. U.S. CONST. amend. VI; see, e.g., *Barker v. Wingo*, 407 U.S. 514 (1972).

10. U.S. CONST. amend. VI; see, e.g., *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

11. U.S. CONST. amend. XIV; see *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”).

12. *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that certain warnings must be read to a person in custody prior to interrogation).

13. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that, in accordance with the Sixth Amendment right to counsel, states must provide counsel for an indigent defendant accused of a crime).

14. *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence obtained in violation of the Fourth Amendment must be excluded).

15. Needless to say, even this system has many flaws. But to list them here is beyond the scope of this particular examination.

ing causes of wrongful convictions.<sup>16</sup> Hundreds of individuals have been exonerated after being convicted of crimes that they did not commit. Exonerations are on the rise, partly due to recent scientific advancements in DNA testing.<sup>17</sup> For example, DNA evidence ultimately proved the innocence of Steven Barnes, Timothy Cole, and Joseph Fears, Jr., who had served nineteen,<sup>18</sup> thirteen,<sup>19</sup> and twenty-five years in prison,<sup>20</sup> respectively. According to the Innocence Project, there have been 273 exonerations due to DNA evidence, 206 of which have occurred since 2000.<sup>21</sup> Even more troubling is the fact that seventeen DNA exonerations occurred in

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16. See *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited Apr. 15, 2012); Editorial, *True and Untrue Confessions*, N.Y. TIMES, Jan. 12, 2008, available at <http://www.nytimes.com/2008/01/12/opinion/12sat2.html> (noting that police interrogations and confessions are a leading cause for false convictions).

17. Edward K. Cheng, *Reenvisioning Law Through the DNA Lens*, 60 N.Y.U. ANN. SURV. AM. L. 649, 649 (2005) (“In recent times, no development has transformed the practice of criminal justice as much as DNA evidence. In little over fifteen years, DNA profiling has produced nothing short of a paradigm shift.”); Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005) (referring to the first DNA exonerations as “the beginning of a revolution in the American criminal justice system. Until then, exonerations of falsely convicted defendants were seen as aberrational. Since 1989, these once-rare events have become disturbingly commonplace.”).

18. Rocco LaDuca, *It's Official: Barnes Exonerated on All Charges*, UTICA OBSERVER-DISPATCH, Jan. 9, 2009, available at <http://www.uticaod.com/news/x497784091/Its-official-Barnes-exonerated-on-all-charges>.

19. Elliott Blackburn, *Judge Exonerates Timothy Cole*, LUBBOCK AVALANCHE-J., Apr. 7, 2009, available at [http://lubbockonline.com/stories/040709/loc\\_426805642.shtml](http://lubbockonline.com/stories/040709/loc_426805642.shtml) (noting that Timothy Cole died in prison on December 2, 1999, almost ten years before he was exonerated by DNA evidence).

20. Geoff Dutton & Mike Wagner, *Savoring His First Taste of Freedom*, COLUMBUS DISPATCH, Mar. 11, 2009, available at [http://www.dispatch.com/content/stories/local/2009/03/11/FEARS\\_FREE.ART\\_ART\\_03-11-09\\_A1\\_G1D6LE7.html](http://www.dispatch.com/content/stories/local/2009/03/11/FEARS_FREE.ART_ART_03-11-09_A1_G1D6LE7.html).

21. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/351.php> (last visited Apr. 15, 2012); see also *About the Organization*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/9.php> (last visited Apr. 15, 2012). Further, in March 2011, Houston prosecutors formally asked a court to exonerate George Rodriguez after DNA tests ruled out his guilt in a rape for which he served 17 years in prison. *Man Who Served 17 Years Was Innocent of Rape, DA Says*, CNN.COM (Mar. 2, 2011), [http://articles.cnn.com/2011-03-02/justice/texas.rape.exoneration\\_1\\_dna-tests-new-dna-texas-man?s=PM:CRIME](http://articles.cnn.com/2011-03-02/justice/texas.rape.exoneration_1_dna-tests-new-dna-texas-man?s=PM:CRIME). Mr. Rodriguez was released in 2004 after an appeals court found that faulty scientific evidence had been used against him in his 1987 trial. *Id.* New DNA tests on certain forensic evidence ruled out Mr. Rodriguez as the perpetrator. *Id.* While Texas state officials originally denied a pardon, Harris County District Attorney Patricia Lykos agreed to review the case. *Id.* In discussing the matter, Ms. Lykos stated

[w]hen this scientific inquiry began, there was no legal requirement or mandate for any further work to be done by our office, because the case had been dismissed . . . . Instead, we acted on the most important obligation of all—to

death penalty cases after the exoneree served time on death row.<sup>22</sup> The Innocence Project has also calculated the average length of the time served by an exoneree to be thirteen years; a total of 3,524 years served by innocent people.<sup>23</sup>

Another notable study has identified 340 wrongful convictions, 196 of which did not involve DNA evidence.<sup>24</sup> The study notes that more than half of these 340 exonerees served more than ten years in prisons, about 80% had been imprisoned for at least five years, and the total years in prison for all 340 individuals has been calculated at 3,400 years.<sup>25</sup> A 1987 study identified 350 cases of wrongful conviction: 326 in which the defendant was convicted of a homicide and twenty-four in which the defendant was sentenced to death for the crime of rape.<sup>26</sup> This rise in exonerations has led to reform efforts in several states that seek to give prisoners access to DNA testing.<sup>27</sup>

To some, the fact that a person is exonerated—even after serving years on death row or otherwise in prison or jail—is evidence of the fact that the “system” works.<sup>28</sup> To others, these exonerations

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see that the truth emerges, and that justice is done. Today, we can state that an innocent man has been vindicated.

*Id.* (internal quotation marks omitted).

22. *Facts on Post-Conviction DNA Exonerations*, *supra* note 21. There have been 138 death penalty exonerations since 1973. *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/article.php?did=412> (last visited Apr. 15, 2012).

23. *Facts on Post-Conviction DNA Exonerations*, *supra* note 21.

24. Gross, *supra* note 17, at 524.

25. *Id.*

26. Karen F. Parker et al., *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 117 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (listing various studies on exonerations and racial bias).

27. *See* Dist. Attorney’s Office for Third Judicial Dist. v. Osborne, No. 08-6, slip op. at 7-8 (U.S. June 18, 2009) (holding that a prisoner has no federal constitutional right to post-conviction access to the state’s evidence for DNA testing); Solomon Moore, *DNA Exoneration Leads to Change in Legal System*, N.Y. TIMES, Oct. 1, 2007, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=980DE2DE1438F932A35753C1A9619C8B63> (“State lawmakers across the country are adopting broad changes to criminal justice procedures as a response to the exoneration of more than 200 convicts through the use of DNA evidence.”).

28. This is the approach taken by Justice Scalia. For instance, in a concurring opinion, the Justice noted:

[r]eversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.

mean that our system has failed.<sup>29</sup> Nevertheless, the question remains: what can the system do after an innocent individual has been exonerated?

The paramount objective for a wrongfully imprisoned individual is obtaining physical freedom. Yet, in order for the system to be equitable as a whole, it is necessary that the exoneree be monetarily compensated. A just government cannot wrongfully deprive its citizens of life, liberty, or property without compensation. Some jurisdictions have enacted statutes, attempting to assist exonerees with monetary and other compensation. It is fully appropriate that the state provides compensation. It is generally accepted that mistakes are an inherent part of a large criminal justice system. Given that society as a whole accepts this risk of error in order to maintain public safety, “the loss when [an error] occurs should be borne by the community as a whole and not by the injured individual alone.”<sup>30</sup>

Most exonerees, especially those who have served a substantial amount of time in prison, struggle to find housing and work after their release from prison.<sup>31</sup> In some states, more assistance is provided to parolees than to exonerees.<sup>32</sup> A lack of uniformity exists in state and federal laws dealing with compensation. This is due in no small part to the multifaceted nature of the problem. This article considers the different procedural, economic, and social calculations that must be taken into consideration before “justly” compensating an innocent individual.

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Kansas v. Marsh, 548 U.S. 163, 193 (2006) (Scalia, J., concurring). *But see* Elizabeth Brandenburg, *Kansas v. Marsh: A Thumb on the Scale of Death?*, 58 MERCER L. REV. 1447, 1457-61 (2007) (discussing Justice Scalia’s concurrence); David Grann, *Trial by Fire: Did Texas Execute an Innocent Man*, NEW YORKER, Sept. 7, 2009, available at [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann).

29. *See, e.g.*, Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1186-87 (2005).

30. Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice*, in 52 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 108, 110 (Emory R. Johnson ed., 1914).

31. *See* Jeffrey Chinn & Ashley Ratliff, “*I Was Put Out the Door With Nothing*”—*Addressing the Needs of the Exonerated Under a Refugee Model*, 45 CAL. W. L. REV. 405, 407 (2009); Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES, Nov. 25, 2007, at 138, available at <http://www.nytimes.com/2007/11/25/us/25dna.html?pagewanted=all> (surveying more than 130 DNA exonerees and noting that dozens face severe struggles on their reentry to society).

32. For more background on life “after exoneration,” *see After Exoneration*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/After-Exoneration.php> (last visited Apr. 15, 2012).

## II. SURVEY AND ANALYSIS OF EXISTING COMPENSATION STATUTES

Statutes governing compensation for wrongfully imprisoned individuals have been enacted by 24 states,<sup>33</sup> the District of Columbia,<sup>34</sup> and the federal government.<sup>35</sup> The elements that must be proven or disproved to sustain a claim for compensation, as well as the scope of a compensation award, vary significantly among these

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33. These states are Alabama, California, Connecticut, Florida, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wisconsin. See ALA. CODE §§ 29-2-150 to 165 (LexisNexis 2003); CAL. PENAL CODE §§ 4900-4906 (West 2011); CONN. GEN. STAT. § 54-102uu (2011); FLA. STAT. ANN. ch. 961 (West Supp. 2011); 705 ILL. COMP. STAT. ANN. 505/8(c) (West 2007 & Supp. 2011); IOWA CODE ANN. § 663A.1 (West 1998); LA. REV. STAT. ANN. § 15:572.8 (Supp. 2011), amended by 2011 La. Sess. Law Serv. Act 262 (H.B. 285) (West); ME. REV. STAT. ANN. tit. 14, §§ 8241-8244 (2003); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis 2009); MASS. GEN. LAWS ch. 258D, §§ 1-9 (2008 & Supp. 2010); MO. ANN. STAT. § 650.055 (West 2006 & Supp. 2011); N.H. REV. STAT. ANN. § 541-B:14(II) (2007); N.J. STAT. ANN. §§ 52:4C-1 to -6 (West 2009); N.Y. CT. CL. ACT § 8-b (McKinney 1989 & Supp. 2011); N.C. GEN. STAT. §§ 148-82 to -84 (2009); OHIO REV. CODE ANN. §§ 2743.48-.49 (West 2006 & Supp. 2011) (the constitutionality of a portion of this statute was placed in doubt by *Nelson v. Ohio*, 2010 Ohio 1777 (Ct. Cl. 2010)); OKLA. STAT. ANN. tit. 51, § 154 (West 2008); TENN. CODE ANN. § 9-8-108(a)(7) (Supp. 2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001 to .003 (West 2011); UTAH CODE ANN. § 78B-9-405 (LexisNexis 2008 & Supp. 2011); VT. STAT. ANN. tit. 13, § 5574 (2009); VA. CODE ANN. §§ 8.01-195.10 to 195.12 (2007 & Supp. 2011); W. VA. CODE ANN. § 14-2-13a (LexisNexis 2009); WIS. STAT. ANN. § 775.05 (West 2009). Additionally, Montana offers educational aid (if exonerated by postconviction DNA testing), but no monetary compensation. See MONT. CODE ANN. § 53-1-214 (2009). These statutes are available on the website of the Innocence Project, which also provides brief summaries of each. See *Reforms by State*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawView1.php> (last visited Apr. 15, 2012).

34. See D.C. CODE §§ 2-421 to -425 (LexisNexis 2008).

35. See 28 U.S.C. §§ 1495, 2513 (2006); see also *Report to the House of Delegates*, A.B.A. SECTION OF CRIMINAL JUSTICE 1-10 (2005), available at <http://www.abanet.org/crimjust/policy/my05108a.pdf> [hereinafter ABA Report] (discussing passage and effect of federal legislation). For a thorough discussion of compensation statutes, see generally the scholarship of Professor Adele Bernhard: Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999) [hereinafter Bernhard I]; Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703 (2004) [hereinafter Bernhard II]. For model compensation statutes, see ABA Report, *supra*, at 1-10 (urging adoption of compensation statutes, recommending statutory provisions, and surveying existing statutes); *An Act Concerning Claims for Wrongful Conviction and Imprisonment*, INNOCENCE PROJECT, [hereinafter Innocence Project: Model Statute], available at <http://www.innocenceproject.org/docs/Compensation08.pdf> (last updated Nov. 2007) (comprehensive model compensation statute); Lauri Constantine et al., *Model Prevention and Remedy of Erroneous Convictions Act*, 33 ARIZ. ST. L.J. 665, 699, 710-713 (2001) [hereinafter Arizona State Law Journal: Model Act] (model act and commentary prepared by several law students in a special seminar).

jurisdictions. But there are certain commonalities or trends. This section examines several key provisions of current compensation statutes and makes recommendations on each topic for incorporation into the proposed statute. These topics include: 1) legislative findings to guide courts and agencies in applying the statute; 2) general eligibility requirements regarding (a) the loss of liberty and type of crime for which a term of imprisonment was served, (b) conduct of the claimant in association with his or her arrest or conviction, (c) the existence of other criminal convictions, (d) the method of exoneration, and (e) the establishment of innocence of the crime of wrongful imprisonment; 3) the procedures for bringing a compensation claim, including the proper forum and the statute of limitations; 4) the calculation of the award, including the factors to be considered and burden of proof in demonstrating damages; and 5) the procedure permitting an individual whose conviction has been reversed on procedural grounds to apply for the issuance of a declaration of actual innocence in order to qualify for compensation.

#### A. *Legislative Findings in the Statutes of New York, New Jersey, and West Virginia*

##### 1. Statutory Survey

Legislative findings are included in the compensation statutes of three states: New York,<sup>36</sup> New Jersey,<sup>37</sup> and West Virginia.<sup>38</sup> The findings express the statutes' remedial purposes and provide guidance as to their intended applications, as well as offering a statutory embodiment of legislative history that can guide courts and agencies.<sup>39</sup> The New Jersey legislature, for example,

finds and declares that innocent persons who have been convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress and that such persons should have an available avenue of redress over and above the existing tort

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36. See N.Y. CT. CL. ACT § 8-b.

37. See N.J. STAT. ANN. § 52:4C.

38. See W. VA. CODE ANN. § 14-2-13a.

39. See *supra* notes 36-38; see also 2004 Mass. Legis. Serv. Ch. 444 (H.B. 4255) (West) (legislative report emphasizing the sense of immediacy underlying passage of the Commonwealth's compensation statute: "*Whereas*, The deferred operation of this act would tend to defeat its purpose, which is forthwith to provide a method of compensation for certain erroneous felony convictions, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.") (referring to MASS. GEN. LAWS ch. 258D, §§ 1-9 (2008 & Supp. 2010)).

remedies to seek compensation for damages. The Legislature intends by enactment of the provisions of this act that those innocent persons who can demonstrate by clear and convincing evidence that they were mistakenly convicted and imprisoned be able to recover damages against the State.

In light of the substantial burden of proof that must be carried by such persons, it is the intent of the Legislature that the court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, may, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf.<sup>40</sup>

The West Virginia statute makes similar findings, but also includes “innocent persons wrongly arrested,” though not convicted, among those who “should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages.”<sup>41</sup>

The insufficiency of current remedies is thus acknowledged directly in the statutes. Although the burden of proof in demonstrating actual innocence is “substantial,” typical evidentiary requirements may be relaxed to avoid an inequitable result. Overall, these considerations demonstrate that a compensation statute represents a *meaningful* avenue of relief for exonerees.

## 2. Suggested Approach for Proposed Statute

The proposed compensation statute has been drafted to include similar preliminary findings as those cited in the New Jersey statute. These findings provide useful guidance to claimants, lawyers, courts, agencies, and other parties interpreting the statute.

### B. *General Eligibility Requirements and Limitations*

While compensation statutes serve obvious remedial purposes, they generally limit eligibility for compensation to a relatively narrow class of persons.<sup>42</sup> Proof of a wrongful conviction alone almost

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40. See N.J. STAT. ANN. § 52:4C-1.

41. See W. VA. CODE ANN. § 14-2-13a(a).

42. See ABA Report, *supra* note 35, at 1, 5-7 (making recommendations on requirements); Bernhard I, *supra* note 35, at 101-05 (discussing “[c]laim [f]iling [r]equirements”).

never entitles one to compensation under these statutes.<sup>43</sup> Typical “conditions precedent” to recovery include requirements that: (1) the claimant suffered actual imprisonment following the wrongful conviction for a felony or misdemeanor; (2) the claimant did not cause or bring about his or her own conviction; (3) the claimant did not serve a sentence of imprisonment for another conviction concurrently with the wrongful conviction and is not presently serving a prison sentence; (4) the claimant be exonerated by an executive pardon or a judicial determination; and (5) an exoneration by judicial determination be proven by clear and convincing evidence of innocence. The proposed statute adopts some of these approaches while rejecting others.

### 1. Actual Imprisonment Requirement

#### *a. Statutory survey*

Proof that the wrongfully convicted person was actually incarcerated is required under all existing compensation statutes.<sup>44</sup> Most require that incarceration be followed by a wrongful conviction in the corresponding jurisdiction.<sup>45</sup> For instance, under New York’s statute, “[a]ny person convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit may . . . present a claim for damages against the state.”<sup>46</sup> The District of Columbia Code similarly provides that, “[a]ny person unjustly convicted of and subsequently imprisoned for a criminal offense contained in the District of Columbia Code may present a claim for damages against the District of Columbia.”<sup>47</sup> Under these and similarly worded provisions in other statutes, a person is not eligible for compensation if the sentence received was other than a term of imprisonment (such as probation) or if the conviction was set aside prior to serving a prison sentence,

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43. See *infra* Part II.B.5.

44. See *supra* notes 33-35.

45. See, e.g., N.Y. CT. CL. ACT § 8-b(2) (McKinney 1989 & Supp. 2011). *But see* ALA. CODE § 29-2-156 (LexisNexis 2003) (“In order to be eligible to receive compensation for wrongful incarceration a person must: (1) Have been convicted by the State of one or more felony offenses, all of which the person was innocent, and have served time in prison as a result of the conviction or convictions; or (2) Have been incarcerated pretrial on a state felony charge, for at least two years through no fault of his or her own, before having charges dismissed based on innocence.”); W. VA. CODE ANN. § 14-2-13a(b) (“Any person arrested or imprisoned or convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit may . . . present a claim for damages against the state.”) (emphasis added).

46. N.Y. CT. CL. ACT § 8-b(2).

47. D.C. CODE § 2-421 (LexisNexis 2008).

even if the person was detained prior to conviction (such as where bail is denied).<sup>48</sup>

There is greater variation among statutes regarding the classes of crimes for which a wrongfully imprisoned person may receive compensation. Some statutes provide compensation exclusively for imprisonment for felonies,<sup>49</sup> and others for both felonies and misdemeanors.<sup>50</sup> Others do not specify the types of crimes, instead referring only to convictions for criminal offenses that resulted in incarceration in the prisons of the state.<sup>51</sup>

*b. Suggested approach for proposed statute*

The proposed statute adopts a fair and straightforward formulation, recognizing that compensation should be made to persons wrongfully imprisoned for any crime recognized in the jurisdiction, regardless of the level of offense. The appropriate level of compensation may vary depending on the length and conditions of imprisonment. It is not reasonable to exclude wrongful convictions on the basis of their designation as misdemeanors, as opposed to felonies, as this distinction carries some level of arbitrariness.

It is appropriate to exclude compensation for persons who were never actually imprisoned pre-trial or post-trial. Arguably, these individuals were permitted to maintain gainful employment when they were on bail. Statutory compensation must, however, be provided for individuals who were not convicted but were nevertheless incarcerated prior to or during trial if these individuals are actually exonerated of the alleged crime under the statutory

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48. Such a person, however, might seek redress in a suit for false arrest, false imprisonment, malicious prosecution, or a violation of civil rights under 42 U.S.C. § 1983. See 42 U.S.C. § 1983 (2006).

49. See ALA. CODE § 29-2-156 (felony or two years pretrial detention for felony offense); CAL. PENAL CODE § 4900 (West 2011); MASS. GEN. LAWS ch. 258D § 1(C) (2008); MONT. CODE ANN. § 53-1-214 (2009); N.C. GEN. STAT. § 148-82 (2009); OHIO REV. CODE ANN. § 2743.48(A)(2) (West 2006 & Supp. 2011); OKLA. STAT. ANN. tit. 51, § 154(B)(1), (2)(a) (West 2008); VA. CODE ANN. § 8.01-195.10(B) (2007 & Supp. 2011).

50. See IOWA CODE ANN. § 663A.1(1)(a) (West 1998) (emphasis added) (“[I]ndividual was charged . . . with the commission of a *public offense* classified as an aggravated misdemeanor or felony.”); N.Y. CT. CL. ACT § 8-b(3); W. VA. CODE § 14-2-13a(b). The Iowa Supreme Court has held that “a simple misdemeanor is a public offense” for purposes of the state’s compensation statute, but that violation of “municipal ordinances” do not qualify. *Wright v. Cedar Falls*, 424 N.W.2d 456, 457 (Iowa 1988) (citing *Wenck v. State*, 320 N.W.2d 567, 569 (Iowa 1982)).

51. Among these is the federal compensation statute. 28 U.S.C. § 1495; see also D.C. CODE § 2-421; ME. REV. STAT. ANN. tit. 14, § 8241(2) (2003); MD. CODE ANN., STATE FIN. & PROC. § 10-501(a) (LexisNexis 2009); N.J. STAT. ANN. § 52:4C-3(a) (West 2009); TENN. CODE ANN. § 40-27-109 (2006); WIS. STAT. ANN. § 775.05(2) (West 2009).

framework. Although in these situations the exoneree may seek compensation under state common law torts, such as malicious prosecution, or federal statutory law, a person exonerated of a crime that he or she did not commit should not have to suffer through the numerous procedural hurdles and limitations under these traditional remedies.

For example, state actors may claim qualified immunity in an action brought under 42 U.S.C. § 1983, where an exoneree cannot show that the “official ‘knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or [that] he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.’”<sup>52</sup> A simple showing of probable cause to initiate a proceeding is a defense to suits for malicious prosecution and false arrest, even for exonerated individuals.<sup>53</sup> Where an exoneree was indicted by a grand jury, a malicious prosecution claim will be successful only where the exoneree can “establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith.”<sup>54</sup>

Although some wrongful imprisonments are the product of malicious or fraudulent state conduct, many are the unfortunate result of good faith failings of the criminal justice system, such as eyewitness misidentifications or inadequate legal representation. These victims of the system are left without means of relief under traditional remedies. Further, municipal liability is available under § 1983 only in exceptional circumstances, where “the combined acts or omissions of several employees acting under a governmental policy or custom . . . violate” the plaintiff’s rights.<sup>55</sup> An exoneree may be left to pursue individual prosecutors or police who are unlikely to have the ability to pay compensatory damages.

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52. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (first alteration in original) (emphasis omitted) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

53. *See, e.g., Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003) (noting that under New York law, “the existence of probable cause is a complete defense to a claim of malicious prosecution”); *Devatt v. Lohenitz*, 338 F. Supp. 2d 588, 590 (E.D. Pa. 2004) (stating that a detective who arrested suspect had qualified immunity as to suspect’s § 1983 claim alleging improper prosecution, where a reasonable officer could have found probable cause for arrest, suspect was released once exonerating evidence arose, and charges against suspect were withdrawn).

54. *Rothstein v. Carriere*, 373 F.3d 275, 283 (2d Cir. 2004) (quoting *Colon v. City of New York*, 455 N.E.2d 1248, 1251 (N.Y. 1983)).

55. *Barrett v. Orange Cnty. Human Rights Comm’n*, 194 F.3d 341, 350 (2d Cir. 1999) (quoting *Garcia v. Salt Lake Cnty.*, 768 F.2d 303, 310 (10th Cir. 1985)).

States might choose to bar double recovery, but the exoneree should be permitted to proceed under the statutory framework and common law torts. The argument that pretrial detention is comparatively short and is not punitive in nature<sup>56</sup> does not account for situations in which an individual has spent several months—if not years—in pre-trial detention, only to be later exonerated of the crime. Concerns that the statute will affect the public fisc, by permitting recovery by individuals who were incarcerated pre-trial but later exonerated of the crime, are valid. Fundamental fairness, however, requires that all persons who were wrongfully imprisoned for any length of time—pre-trial or post-trial—be compensated for the system’s failures.

## 2. Requirement that the Individual Did Not Cause His Conviction or Plead Guilty

### a. *Statutory survey*

Seven jurisdictions require that the wrongful conviction and imprisonment not be attributable to the conduct of the exoneree<sup>57</sup> and five require that the individual did not plead guilty to the crime.<sup>58</sup> The District of Columbia has both requirements.<sup>59</sup>

56. See ABA Report, *supra* note 35, at 3. As noted in the report:

Some may argue that post-conviction incarceration is no different than time spent in jail awaiting trial before acquittal. However, pretrial detention is of relatively limited duration and not intended as punishment. Similarly, incarceration before a reversal on direct appeal does not result in compensation, except in limited circumstances such as when the arrest lacked probable cause. Again, direct appeal has a predictable timeframe, and many reversals are based on evidentiary or constitutional violations that vindicate the integrity of the system, not a determination of innocence. In contrast, most of those who have been exonerated have spent years protesting their innocence with no realistic expectation that collateral attacks on their convictions will be heard, let alone result in their exoneration.

*Id.*

57. See 28 U.S.C. § 2513(a)(2) (2006); CAL. PENAL CODE §§ 4903, 4904 (West 2011); D.C. CODE § 2-422(2) (LexisNexis 2008); N.J. STAT. ANN. § 52:4C-3 (West 2009); N.Y. CT. CL. ACT § 8-b(4)(b) (McKinney 1989 & Supp. 2011); VA. CODE ANN. § 8.01-195.10(B) (2007 & Supp. 2011); W. VA. CODE ANN. § 14-2-13a(e)(3), (f)(5) (LexisNexis 2009); WIS. STAT. ANN. § 775.05(4) (West 2009).

58. See D.C. CODE § 2-425 (LexisNexis 2008) (excepting “Alford pleas” by referring to *North Carolina v. Alford*, 400 U.S. 25 (1970)); IOWA CODE ANN. § 663A.1(1)(b) (West 1998); MASS. GEN. LAWS ch. 258D § 1(C) (2008); OHIO REV. CODE ANN. § 2743.48(A)(2) (West 2006 & Supp. 2011); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(b) (West 2008). For a description of the exception under the District of Columbia statute, see *infra* note 64.

59. See D.C. CODE §§ 2-422(2), 2-425.

The former requirement is most expansively formulated in the California statute, where “[t]he claimant must prove . . . the fact that he or she did not, by any act or omission on his or her part, intentionally contribute to the bringing about of his or her arrest or conviction for the crime with which he or she was charged . . . .”<sup>60</sup> Other jurisdictions take a more limited approach, requiring that the exoneree did not cause his or her conviction by the exoneree’s own act or failure to act, or misconduct or neglect.<sup>61</sup> The New Jersey, New York, and West Virginia statutes state it more briefly: the person must “not by his own conduct cause or bring about his conviction.”<sup>62</sup>

The compensation statutes in Iowa, Massachusetts, Ohio, and Oklahoma do not contain such a requirement, but limit coverage to persons who did not plead guilty to the offense charged or to a lesser included offense.<sup>63</sup> The District of Columbia similarly excludes “any person whose conviction resulted from his entering a plea of guilty.”<sup>64</sup> This exclusion exempts guilty pleas entered “pur-

60. CAL. PENAL CODE § 4903.

61. See 28 U.S.C. § 2513(a)(2); D.C. CODE § 2-422(2); VA. CODE ANN. § 8.01-195.10(B); WIS. STAT. ANN. § 775.05(4).

62. N.Y. CT. CL. ACT § 8-b(4)(b); see also N.J. STAT. ANN. § 52:4C-3(a); W. VA. CODE §§ 14-2-13a(e)(3), (f)(5); Bernhard II, *supra* note 35, at 718 n.85 (collecting New York State cases where this provision has been used to disqualify claimants). This disqualification, according to the drafters of the New York statute,

was intended to require that the person seeking damages . . . establish that he did not cause or bring about his prosecution by reason of his own misconduct[;] . . . such misconduct would include falsely giving an uncoerced confession of guilt, removing evidence, attempting to induce a witness to give false testimony, attempting to suppress testimony, . . . concealing the guilt of another,

and even “plead[ing] guilty.” Bernhard II, *supra* note 35, at 717-18 (quoting N.Y. STATE LAW REVISION COMM’N, REPORT OF THE LAW REVISION COMMISSION TO THE GOVERNOR ON REDRESS FOR INNOCENT PERSONS UNJUSTLY CONVICTED AND SUBSEQUENTLY IMPRISONED, 1984 N.Y. Laws 2899, 2932).

Some proposed statutes more narrowly define the categories of conduct attributable to the claimant. See Arizona State Law Journal: Model Act, *supra* note 35, at 711 (commenting that a claimant may be “responsible” where he “presents himself at a police station, claims to be guilty of a crime, and presents evidence of guilt that police and prosecutors could not reasonably be expected to discern to be false”); Innocence Project: Model Statute, *supra* note 35, § 4(A), (A)(2) (“[a] claimant must prove by a preponderance of the evidence that: . . . [h]e did not commit or suborn perjury, or fabricate evidence to cause or bring about his conviction.”).

63. See IOWA CODE ANN. § 663A.1(1)(b); MASS. GEN. LAWS ch. 258D § 1(C); OHIO REV. CODE ANN. § 2743.48(A)(2); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(b).

64. D.C. CODE § 2-425 (referring to *North Carolina v. Alford*, 400 U.S. 25 (1970)). An “*Alford* plea” is a “guilty plea that a defendant enters as part of a plea bargain without actually admitting guilt.” BLACK’S LAW DICTIONARY 78 (8th ed. 2004). This type of plea is different from a plea of *nolo contendere* in that the defendant ad-

suant to *North Carolina v. Alford*” because an *Alford* plea is entered to avoid prosecution rather than to admit guilt.<sup>65</sup>

The District of Columbia statute, unlike the others mentioned here, apparently draws a distinction between convictions resulting from a person’s conduct and convictions resulting from guilty pleas. Six jurisdictions expressly prohibit compensation for persons whose conduct led to their conviction and do not expressly do the same for persons who pleaded guilty. It is arguable that guilty pleas would be subsumed under the attributable conduct category in these jurisdictions.<sup>66</sup> If so, persons who pleaded guilty would be barred from receiving compensation on the ground that their convictions resulted from their own conduct. The drafters of the New York statute have interpreted the limitation in this manner.<sup>67</sup>

*b. Suggested approach for proposed statute*

The proposed statute does not bar compensation because a person entered a guilty plea or an *Alford* plea. Innocent individuals often plead guilty to crimes for a host of reasons, including ineffective assistance of counsel, overwhelming evidence of guilt based on false confessions or inaccurate forensics, financial and social reasons such as to avoid a costly, embarrassing trial, and pressure by busy defense lawyers and prosecutors.<sup>68</sup> Further, a coerced confession, even if not per se unconstitutional, or other self-incriminating events after the commission of the alleged crime should not disqualify a claimant.<sup>69</sup> By the same measure, wrongful conduct such as suborning perjury or fabricating evidence, if occurring following the

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mits that sufficient evidence exists with which the government can convince the trier of fact that the defendant is guilty.

65. See *supra* note 64.

66. See Bernhard II, *supra* note 35, at 704. Bernhard explains that some state statutes “contain inartful language, which permits states to argue that a person who confessed or entered a plea of guilty should be disqualified from recovering—even if the confession or plea was clearly false.” *Id.* The Innocence Project’s proposed statute has managed to avoid such “inartfulness.” See Innocence Project: Model Statute, *supra* note 35, § 4(A)(2) (emphasis added) (“[N]either a confession or admission later found to be false, nor a guilty plea to a crime the claimant did not commit, constitutes bringing about his own conviction under this Act.”).

67. See *supra* note 62 and accompanying text.

68. See Bernhard II, *supra* note 35, at 720 (explaining that individuals are sometimes urged to plead guilty by their attorneys “who may doubt their innocence and fear the worst outcome after trial” but this does not qualify as the sort of “illegitimate motive” that perhaps could justify disqualification); see also ABA Report, *supra* note 35, at 7 (the determination of whether a guilty plea bars recovery should be “highly fact specific.”).

69. According to Bernhard,

commission of the charged crime, should lead to disqualification. The proposed statute only bars compensation for individuals who “by any act or omission related to the conduct of the alleged offense at the time and/or place of occurrence of the alleged offense, or by falsely giving an uncoerced confession of guilt, committing or suborning perjury, or fabricating evidence, caused or brought about [their own] wrongful imprisonment.”<sup>70</sup> This provision is designed to prevent large-scale drug dealers, organized crime members, and drunk drivers from recovering damages if their illegal conduct or activities contributed to their arrest and conviction, even if they are innocent of the specific crime charged.

### 3. Requirement that the Individual Had No Other Sentence

#### a. *Statutory survey*

Under some statutes, an individual cannot seek compensation if he or she served a sentence for an unrelated conviction concurrently with the sentence for the crime for which he or she was wrongfully convicted. Further, compensation is barred if an individual is serving a prison term for a crime other than the crime for which he or she was wrongfully convicted. New Jersey is representative of this approach.<sup>71</sup> Texas has adopted the exclusion for concurrent sentences with similar language,<sup>72</sup> while Massachusetts and Oklahoma restate the eligibility condition in terms of incarceration

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The mere existence of an inculpatory statement or a confession should never defeat a claim. Only an uncoerced false confession specifically intended to distort the truth-seeking function of the police investigation should prevent recovery. In determining whether a confession was the product of coercion, courts should presume all false confessions to be the product of coercion unless they can be shown otherwise by clear and convincing evidence.

Bernhard II, *supra* note 35, at 720. Further, “multiple exonerations prove that innocent people falsely implicate themselves, despite gaining nothing for themselves in the process.” *Id.* at 718 (footnotes omitted). “The fact that a young, mentally challenged, chemically dependent, submissive, or just plain scared individual succumbs to police interrogation techniques and confesses to a crime that he or she did not commit no longer seems like misconduct that should prevent recovery years later when the truth finally surfaces.” *Id.* at 720; *see also* ABA Report, *supra* note 35 at 1, 7 (advocating that false confessions should not “automatically bar recovery.”); *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <http://ip.integreat-dev.com/Content/309PRINT.php> (last visited Apr. 15, 2012) (“Statutes should not contain provisions that require exonerees to prove that they did not ‘contribute’ to their wrongful conviction,” because, “[b]y doing so, states avoid restitution to exonerees coerced into confessing to a crime.”).

70. *See infra* text accompanying note 244.

71. N.J. STAT. ANN. § 52:4C-6 (West 2009); *see also* VA. CODE ANN. § 8.01-195.12(A) (2007 & Supp. 2011).

72. TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(b) (West 2011).

solely for the conviction that is the subject of the compensation claim.<sup>73</sup> The Alabama statute adopts both of the above limitations and adds a further condition: “A person awarded compensation and subsequently convicted of a felony crime will not be eligible to receive any unpaid amounts” of the award.<sup>74</sup>

*b. Suggested approach for proposed statute*

The proposed statute only bars compensation for an individual who was serving a concurrent sentence for a crime other than the crime for which the individual was wrongfully imprisoned.<sup>75</sup> It does not bar recovery for an individual who was convicted of another crime subsequent to being exonerated.

Barring recovery where an individual served concurrent time for more than one crime but was only exonerated for one of those crimes is a sensible limitation, assuming that the individual did not serve additional time because of the wrongful conviction. It is possible that a person may have received a lesser sentence, or no jail time at all, had the wrongful conviction never occurred. A fair approach incorporates a rebuttable presumption that some requisite extra period of incarceration was not caused by the wrongful conviction.<sup>76</sup> Although it can be argued that such an approach is not feasible in light of the multiplicity of state sentencing practices and the practical difficulties of rebutting such a presumption, the ABA Report lays out the groundwork of a just and reasonable approach which states might revise to accommodate their own sentencing practices.<sup>77</sup> The proposed statute adopts this approach.

The second condition in some state statutes, that the individual not be currently serving prison time for a separate conviction, also raises fairness issues.<sup>78</sup> The argument for not compensating such

73. MASS. GEN. LAWS ch. 258D § 1(C)(v) (2008); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(d) (West 2008).

74. ALA. CODE § 29-2-161(e) (LexisNexis 2003); accord VA. CODE ANN. § 8.01-195.12(A).

75. See *infra* text accompanying note 242.

76. The ABA Report suggests that the burden of showing “that the claimant would have otherwise been incarcerated” be “placed on the government.” ABA Report, *supra* note 35, at 1, 8 (“Claimants are eligible for compensation only if, but for this conviction, the claimant would not have been incarcerated. The government should have the burden of demonstrating that the claimant would have otherwise been incarcerated.”); see also *id.* at 8 (explaining this proposed provision).

77. ABA Report, *supra* note 35, at 1, 8.

78. Cf. Bernhard II, *supra* note 35 at 721-22 (arguing that a prior felony conviction should not preclude recovery under a compensation statute, but that damages could be adjusted to provide less to persons with criminal records).

individuals is that the state should not compensate a known criminal.<sup>79</sup> But this rationale does not always correlate to the basic tenets of fairness. The proposed statute will compensate those inmates who serve longer periods of incarceration because of a wrongful conviction, despite the fact that the inmate is also serving a concurrent sentence for another crime.

#### 4. Method of Exoneration

##### a. *Statutory survey*

There are two ways that wrongfully convicted persons may establish their innocence and qualify for compensation: executive pardon or judicial determination.<sup>80</sup> The exoneree may use either method in nine jurisdictions: Alabama, Massachusetts, New Jersey, New York, Oklahoma, Texas, West Virginia, the District of Columbia, and the federal government.<sup>81</sup> In six jurisdictions, a pardon is the sole means of establishing innocence: California, Illinois, Maine, Maryland, North Carolina, and Tennessee.<sup>82</sup>

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79. See Fernanda Santos and Janet Roberts, *Putting a Price on a Wrongful Conviction*, N.Y. TIMES, Dec. 2, 2007, at C4, available at <http://www.nytimes.com/2007/12/02/weekinreview/02santos.html> (“I believe the taxpayer would be horribly offended if their money were to be spent compensating an exonerated prisoner who has a history of serious crimes,” said a state representative in Florida, where “lawmakers have battled for three years over a compensation plan that would exclude those with prior criminal histories.”).

80. See Bernhard I, *supra* note 35, at 103-04 (summarizing approaches of different jurisdictions).

81. See 28 U.S.C. § 2513(a)(1) (2006); ALA. CODE §§ 29-2-157 to -160(a) (LexisNexis 2003); D.C. CODE § 2-422(1) (LexisNexis 2008); MASS. GEN. LAWS ch. 258D § 1(B) (2008); N.J. STAT. ANN. § 52:4C-4 (West 2009); N.Y. CT. CL. ACT § 8-b(5)(b) (McKinney 1989 & Supp. 2011); OKLA. STAT. ANN. tit. 51, § 154(B)(1) (West 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(a)(2)(A), (B) (West 2011); W. VA. CODE ANN. § 14-2-13a(d)(2)(3) (LexisNexis 2009); see also Rosanna Ruiz, *Man Freed in Rape Fights to Clear Name*, HOUS. CHRON., Oct. 18, 2007, <http://www.chron.com/news/houston-texas/article/Man-freed-in-rape-fights-to-clear-name-1814287.php> (describing how a wrongfully convicted person in Texas was “ineligible for the state reimbursement of \$50,000 for each of the 17 years he served in prison because he ha[d] not been officially pardoned” or judicially determined to be innocent).

82. See CAL. PENAL CODE § 4900 (West 2011); 705 ILL. COMP. STAT. ANN. 505/8(c) (West 2007 & Supp. 2011); ME. REV. STAT. ANN. tit. 14, § 8241(2)(c) (2003); MD. CODE ANN., STATE FIN. & PROC. § 10-501(b) (LexisNexis 2009); N.C. GEN. STAT. § 148-82 (2009); TENN. CODE ANN. § 40-27-109 (2006).

The political aspect of the pardon requirement is demonstrated by the experience in Illinois. See Bernhard I, *supra* note 35, at 102-03. In the fifty years following this statute’s enactment, “there were only two successful indemnification claims in the state, despite the occurrence of many wrongful convictions there.” *Id.* at 102. When the political climate changed in the late 1990s, more pardons were granted and seven claims succeeded in just a two-year period. *Id.* at 102-03.

There are variations among states in the types of judicial determinations required. In Louisiana, the conviction must be reversed or vacated, and there must be an additional judicial finding of factual innocence.<sup>83</sup> New Hampshire refers only to “a person . . . found to be innocent,”<sup>84</sup> and Montana only to convictions set aside through DNA testing.<sup>85</sup> Iowa and Ohio refer to convictions that are vacated, dismissed, or reversed on appeal.<sup>86</sup>

Some states require special determinations of innocence. The Virginia statute requires that the conviction be “vacated” pursuant to a writ of actual innocence.<sup>87</sup> Wisconsin permits a claims board to determine a person’s innocence after notice is given to the prosecuting attorney and the judge who imposed the sentence.<sup>88</sup>

*b. Suggested approach for proposed statute*

The proposed statute adopts the approach of the nine jurisdictions that allow actual innocence to be proven pursuant to either executive pardon or judicial determination.<sup>89</sup> Inclusion of the pardon as a vehicle for establishing innocence accords well with the conventional discretion of the executive in enforcing laws and administering sentences. Limiting the manner of proof to pardons will severely limit the reach of a compensation statute because the granting of pardons is often dictated by the political climate of the

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One federal case upheld the constitutionality of conditioning a compensation claim on a gubernatorial pardon. *See Ross v. North Carolina*, No. 5:06-CV-218-D, 2007 U.S. Dist. LEXIS 87067, at \*16-19, \*23 (E.D.N.C. Jan. 31, 2007) (citations omitted), *aff’d*, 239 Fed. Appx. 782 (4th Cir. 2007). The plaintiff “allege[d] that providing compensation only to persons receiving a pardon of innocence . . . and not to all persons whose convictions are set aside violates the Equal Protection Clause of the Fourteenth Amendment.” *Id.* at \*17 (emphasis omitted). The court disagreed, explaining that this prerequisite was “rationally related to making payments only to people whom the Governor believes are innocent.” *Id.* at \*19. A state may therefore position a pardon as the exclusive means of proving innocence for eligibility purposes. *See id.* The court went on to dismiss a “veritable smorgasbord” of other constitutional claims against North Carolina’s pardon requirement. *Id.* at \*23. It rejected plaintiff’s contention that the statute “violate[d] the Establishment Clause because it requires petitioners to seek ‘grace’ from the Governor.” *Id.* at \*16 (emphasis omitted).

83. *See* LA. REV. STAT. ANN. § 15:572.8 (2011), amended by 2011 La. Sess. Law Serv. Act 262 (H.B. 285) (West).

84. *See* N.H. REV. STAT. ANN. § 541-B:14(II) (2007).

85. *See* MONT. CODE ANN. § 53-1-214 (2009).

86. IOWA CODE ANN. § 663A.1(1)(d), (3) (West 1998); OHIO REV. CODE ANN. § 2743.48(A)(4) (West 2006 & Supp. 2011).

87. *See* VA. CODE ANN. § 8.01-195.10(B) (2007 & Supp. 2011).

88. *See* WIS. STAT. ANN. § 775.05(3) (West 2009).

89. “Judicial declarations of actual innocence” are generally considered “judicial determinations” for purposes of the proposed statute and this article. *See supra* Part II.

state and typically hinges on the advocacy efforts of local public figures such as state legislators.<sup>90</sup> In contrast, judicial determination of innocence provides exonerees with a mechanism that may be less influenced by the political climate of a particular jurisdiction. Permitting both of these methods as a means of establishing innocence assures fairness in the application of the statute while respecting traditional state prerogatives.

## 5. Actual Innocence and the Burden of Proof

### a. *Statutory Survey*

Compensation statutes also determine the procedures and requirements for establishing innocence. In states utilizing the pardon mechanism of establishing innocence, most require that the pardon was based on a finding of actual innocence, that the crime was not committed by the person, or that it was not committed at all. These limitations and their analogs are included in the statutes of California,<sup>91</sup> Illinois,<sup>92</sup> Maine,<sup>93</sup> Massachusetts,<sup>94</sup> New York,<sup>95</sup> North Carolina,<sup>96</sup> Oklahoma,<sup>97</sup> Tennessee,<sup>98</sup> Texas,<sup>99</sup> West Virginia,<sup>100</sup> District of Columbia,<sup>101</sup> and the federal government.<sup>102</sup> The burden of proof in arriving at a finding of innocence is usually not specified. A pardon arising from considerations having nothing to do with actual innocence may not be relied on to establish a compensation claim under these statutes.

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90. See Bernhard I, *supra* note 35, at 102 (describing how “the pardon requirement can be an insurmountable barrier to recovery for deserving claimants because executive clemency is entirely discretionary.”). Bernhard acknowledges that the pardon requirement will “prevent an undeserving person from obtaining an award,” but criticizes it on grounds that it “will do little to assist one who is truly innocent but is unable to rally support with the governor.” *Id.* at 102-03 (also noting how this requirement can produce “unanticipated and arbitrary results”).

91. See CAL. PENAL CODE § 4900 (West 2011).

92. See 705 ILL. COMP. STAT. ANN. 505/8(c) (West 2007 & Supp. 2011).

93. See ME. REV. STAT. ANN. tit. 14, § 8241(2)(c) (2003).

94. See MASS. GEN. LAWS ch. 258D § 1(B)(i) (2008).

95. See N.Y. CT. CL. ACT § 8-b(3)(b)(i) (McKinney 1989 & Supp. 2011).

96. See N.C. GEN. STAT. § 148-82 (2009).

97. See OKLA. STAT. ANN. tit. 51, § 154(B)(1), (2)(a) (West 2008).

98. See TENN. CODE ANN. § 40-27-109 (2006).

99. See TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(a)(2)(A) (West 2011).

100. See W. VA. CODE ANN. § 14-2-13a(d)(2) (LexisNexis 2009).

101. See D.C. CODE § 2-422(1) (LexisNexis 2008).

102. See 28 U.S.C. § 2513(a)(l) (2006); see also MD. CODE ANN., STATE FIN. & PROC. § 10-501(b) (LexisNexis 2009) (“An individual is eligible . . . only if the individual has received from the Governor a full pardon stating that the individual’s conviction has been shown conclusively to be in error.”).

Where innocence by judicial determination is an option, the burden of proof is designated more specifically.<sup>103</sup> Typically, the claimant must present “clear and convincing” evidence of innocence,<sup>104</sup> which is regarded as a substantial burden of proof.<sup>105</sup>

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103. See D.C. CODE § 2-422(2); IOWA CODE ANN. § 663A.1(1), (3) (West 1998); N.J. STAT. ANN. § 52:4C-1 (West 2009); N.Y. CT. CL. ACT § 8-b(1), (5) (McKinney 1989 & Supp. 2011); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(e)(2) (West 2008); VA. CODE ANN. § 19.2-327.13 (2008); W. VA. CODE ANN. § 14-2-13a(a), (f) (LexisNexis 2009); WIS. STAT. ANN. § 775.05(3) (West 2009). *But see* N.H. REV. STAT. ANN. § 541-B:14(II) (2007) (referring to “a person . . . found to be innocent of the crime for which he was convicted,” presumably by judicial determination); OHIO REV. CODE ANN. § 2743.48(A)(5) (West 2006 & Supp. 2011) (requiring the court of common pleas to find “that the offense of which the individual was found guilty . . . either was not committed by the individual or was not committed by any person.”).

104. N.J. STAT. ANN. § 52:4C-1; *see also* D.C. CODE § 2-422(2); IOWA CODE ANN. § 663A.1(1), (3); N.Y. CT. CL. ACT § 8-b(1), (5); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(e)(2); VA. CODE ANN. § 19.2-327.1; W. VA. CODE ANN. § 14-2-13a(a), (f); WIS. STAT. ANN. § 775.05(3); Arizona State Law Journal: Model Act, *supra* note 35, at 677 (defining “[a]ctual innocence [to] mean[ ] that a person did not perpetrate the crime(s) or any lesser included offense(s) at issue in a given case.”).

105. Recently, the Iowa Supreme Court elaborated on the “fact-intensive process” of proving innocence by clear and convincing evidence:

The burden imposed on a wrongfully imprisoned person is difficult to meet because it requires the person to prove a negative. . . . Essentially, it means the person must show he or she was actually innocent of the crime, or no crime occurred. . . . Thus, . . . it is not enough for the person seeking the right to sue for compensation . . . to merely establish that a reviewing court determined the conviction was not supported by substantial evidence. Such a finding only signifies [that] a reasonable fact finder could not be convinced of guilt beyond a reasonable doubt. When the crime of conviction was committed by someone, the person seeking the right to sue as a wrongfully imprisoned person must affirmatively establish by clear and convincing evidence that he or she did not commit the crime or any lesser included crime.

Normally, a transcript of the evidence at a criminal trial, by itself, will not provide the evidence necessary to establish innocence . . . . [A] wrongfully imprisoned person must establish more than the absence of guilt in law to establish innocence . . . . The person must be factually innocent, not merely procedurally free from reprobation or not guilty.

*State v. McCoy*, 742 N.W.2d 593, 597-99 (Iowa 2007) (internal citations omitted) (citing *Elkins v. United States*, 364 U.S. 206, 218 (1960); *State v. Dohlman*, 725 N.W.2d 428, 433, 435 (Iowa 2006); Hugo Adam Bedau, Michael A. Radelet & Constance E. Putnam, *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 *DRAKE L. REV.* 587, 598 (2004) (alterations omitted) (acknowledging that an acquittal or reversal of a conviction may constitute an adjudication of “procedural innocence,” but “[w]hether such a defendant was also factually innocent is a further question never settled just by the fact that some appellate court correctly found procedural or due process objections to the defendant’s conviction or sentence”).

The court added that “[t]o prove a negative by clear and convincing evidence, it is not enough for a wrongfully imprisoned person to merely create questions and doubts about his or her involvement in the crime of conviction.” *Id.* at 599. The person must instead “affirmatively answer those doubts and questions” until there is no serious remaining belief “about the person’s criminal involvement in the crime of conviction.”

Louisiana elaborates that factual innocence may be established through “clear and convincing scientific or non-scientific evidence,” and defines “factually innocent” as “not [having] commit[ted] the crime for which [the applicant] was convicted and incarcerated [and not] commit[ting] any crime based upon the same set of facts used in his original conviction.”<sup>106</sup> Massachusetts uses a “clear and convincing evidence” standard, but also requires “grounds which tend to establish the innocence of the individual.”<sup>107</sup>

In other states, eligibility turns on whether the prosecutor has certified innocence or whether the accusatory instrument has been dismissed on grounds of innocence. In Alabama, an individual is eligible for compensation if the conviction is vacated or reversed and the accusatory instrument is dismissed on grounds of innocence, or the accusatory instrument is dismissed on grounds consistent with innocence.<sup>108</sup>

*b. Suggested approach for proposed statute*

The proposed statute, as described earlier, permits innocence to be demonstrated pursuant to either an executive pardon or a judicial determination.<sup>109</sup> As to pardons, the statute follows the ma-

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*Id.* at 599 & n.7. *See also Dohman*, 725 N.W.2d at 433-36 (claimant “failed to prove by clear and convincing evidence” that he did he not commit vehicular manslaughter, which requires as an element that the driver be intoxicated; expert testimony at trial established that the claimant’s blood alcohol fell within .081 and .096 at the time of the accident and that once .08 is reached, “most drivers’ driving skills are measurably impaired.”); *Ambler v. Rice*, No. 95-2328, 1996 WL 543880, at \*2 (Wis. Ct. App. Sep. 26, 1996) (burden not satisfied in light of the “evidence of opportunity and motive, including numerous death threats made against the victim, the concoction of an alibi, and incriminating statements [the defendant] made in front of correctional officers after he was acquitted.”).

By contrast, in one New York case, the claimant managed to demonstrate clear and convincing evidence:

innocence of a murder simply by testifying that he had been in another state at the time of the crime and by discrediting the credibility of the prosecution’s alleged eyewitness—whose testimony was the only evidence linking him to the crime—with information about her character that had not been available to the defense at the first trial. Ordinary testimony was sufficient to meet the burden.

Bernhard I, *supra* note 35, at 108 (footnote omitted) (citing *Cleveland v. New York*, Ct. Cl. No. 74204 (Apr. 22, 1992)). *See generally* Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1 (2002) (providing examples of cases, old and new, where factual innocence was established or was inferable from the circumstances).

106. *See* LA. REV. STAT. ANN. §§ 15:572.8(A)(2), (B) (Supp. 2011).

107. *See* MASS. GEN. LAWS ch. 258D §§ 1(B)(ii), (C) (2008).

108. *See* ALA. CODE § 29-2-157 (LexisNexis 2003).

109. *See supra* Part II.B.4.

majority of “pardon” jurisdictions in requiring a specific finding by the executive that the claimant was actually innocent of the crime charged, including innocence of any lesser included offenses arising out of the same facts and circumstances, without specifying the burden of proof. A more stringent standard would infringe on traditional executive prerogatives. Additionally, a pardon might often take into account all of the facts surrounding a case.<sup>110</sup>

In a majority of “judicial determination” jurisdictions, the burden of proof is clear and convincing evidence of innocence of the crime, including innocence of any lesser-included offenses arising out of the same facts and circumstances. As illustrated by the case law on the subject, this standard will filter out frivolous or otherwise meritless claims.<sup>111</sup> Significantly, a judicial reversal is not necessarily the same as a finding of factual innocence: a defendant can more readily show that procedural or constitutional violations tarnished his or her trial or that the guilt was not free from all doubt than an exoneree can show that he or she is innocent by clear and convincing evidence, so as to gain monetary compensation.<sup>112</sup> In simpler terms, compensation is not for individuals who are unable to prove their innocence *in fact*.<sup>113</sup> Still, the burden of proving in-

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110. Still, there may be some concern that executives will be less willing to grant pardons, or at least pardons based on determinations of innocence, if those pardoned are explicitly given a cause of action against the state.

111. See, e.g., *Reed v. State*, 574 N.E.2d 433, 435 (N.Y. 1991) (finding that a reversal of the underlying criminal conviction is not equivalent to a finding of innocence in a subsequent civil proceeding for wrongful imprisonment involving a lower standard than proof beyond a reasonable doubt); *Vasquez v. State*, 693 N.Y.S.2d 220, 221 (N.Y. Sup. Ct. 1999) (holding that a reversal of the underlying criminal conviction does not establish innocence by clear and convincing evidence); *Walden v. State*, 547 N.E.2d 962, 966 (Ohio 1989) (stating that “[a]s a general rule, a verdict or judgment of acquittal in a criminal trial is . . . not necessarily a finding that the accused is innocent” for purposes of a wrongful imprisonment claim); *Le Fevre v. Goodland*, 19 N.W.2d 884, 885 (Wis. 1945) (finding that a determination that the state’s evidence was insufficient to prove the defendant guilty beyond a reasonable doubt is not equal to finding the defendant is innocent beyond a reasonable doubt); see also ABA Report, *supra* note 35, at 6-7 (explaining that in those “rare situations where statutory bars prohibit evidence, . . . ethical obligation[s] of defense counsel . . . will . . . prevent a bogus claim of actual innocence”).

112. See, e.g., *Ambler v. Rice*, No. 95-2328, 1996 WL 543880, at \*1 (Wis. Ct. App. Sep. 26, 1996) (appellate court had ordered a new trial because the trial judge had “refused to allow Ambler’s attorney to impeach the credibility of the prosecution’s primary witness”; defendant acquitted upon retrial but denied compensation due to failure to satisfy the “clear and convincing evidence” standard).

113. See Geoffrey Fattah, *Financial Compensation Bill Passes House Committee*, DESERET MORNING NEWS (Jan. 31, 2008), <http://www.deseretnews.com/article/695248990/Financial-compensation-bill-passes-House-committee.html> (discussing a state senator’s comments about a proposed senate bill to provide compensation to wrongfully

nocence does not require proof “beyond a reasonable doubt,” let alone metaphysical certainty.<sup>114</sup> It is not so severe as to hamper truly meritorious claims.

### C. *Procedures for Bringing a Compensation Claim*

In addition to requirements relating to the imprisonment, conduct, and exoneration of the wrongfully convicted individual, certain procedural formalities must be followed in order to receive compensation. Generally, the action must be brought in a statutorily determined forum, against a predetermined state defendant (which may be the “state” itself), and within a prescribed period of time. The proposed statute provides a specific statute of limitations, but channels suits into the judicial or administrative forum where actions against the state ordinarily arise.

#### 1. Proper Forum

##### a. *Statutory survey*

All of the compensation statutes recognize that compensation for wrongful imprisonment is a liability of the state, rather than any individual public official.<sup>115</sup> Two other statutes explicitly waive the state’s sovereign immunity or declare the state’s consent to be sued. Maine provides that, “[n]otwithstanding any immunity of the State from suit, including the Maine Tort Claims Act, . . . the State is liable for the wrongful imprisonment of a person.”<sup>116</sup> Ohio, meanwhile, consents to be sued by a wrongfully imprisoned individual and to liability on its part to the extent provided in its compensation statute.<sup>117</sup> Texas formerly had a similar provision but repealed it

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convicted persons in Utah). Under the proposed statute, individuals whose convictions are overturned on procedural grounds are not automatically precluded from receiving compensation. *See infra* Part II.E. Rather, such persons are afforded an opportunity to demonstrate actual innocence before the appropriate judicial forum. *See infra* Part II.E. For instance, at least one New York court has held the state to be liable for an unjust conviction based solely on the testimony of eyewitness who later recanted. *See* Noeleen G. Walder, *State Held Liable for Unjust Murder Conviction Where Only Witness Admitted Testifying Falsely*, N.Y. L.J., July 6, 2009, at 1, 7.

114. *See* Bernhard I, *supra* note 35, at 108 (noting that it “might be expected that only DNA exclusion cases could meet the clear and convincing standard, and that such a high standard would needlessly thwart meritorious claims,” but that has not been the case).

115. But in some cases an individual public official may be sued for violation of federal civil rights or in tort, depending on the laws of the jurisdiction.

116. ME. REV. STAT. ANN. tit. 14, § 8241(1) (2003).

117. OHIO REV. CODE ANN. § 2743.48(F)(3) (West 2006 & Supp. 2011).

when it changed its statute to provide only an administrative remedy.<sup>118</sup>

The remaining jurisdictions simply acknowledge that a wrongfully convicted person has a cause of action either in the courts or before a claims board. Under the Wisconsin statute, for instance, wrongfully convicted and imprisoned persons “may petition the claims board for compensation for such imprisonment.”<sup>119</sup> In addition to Wisconsin, seven other states provide compensation by claims boards:<sup>120</sup> Alabama (Division of Risk Management verifies eligibility to Committee on Compensation for Wrongful Conviction);<sup>121</sup> California (Victim Compensation and Government Claims Board recommends appropriation by legislature);<sup>122</sup> Maryland (Board of Public Works makes award);<sup>123</sup> New Hampshire (board of claims);<sup>124</sup> North Carolina (Industrial Commissioner makes award);<sup>125</sup> Oklahoma (Risk Management Administrator of the Department of Central Services);<sup>126</sup> and Tennessee (Board of Claims).<sup>127</sup>

The Virginia statute also provides for administrative-like mechanisms. In Virginia, claims are to be paid by the Comptroller, subject to approval by the General Assembly.<sup>128</sup> Other jurisdictions require an action to be brought in a court of competent jurisdiction or a court of claims. These include Illinois,<sup>129</sup> Ohio,<sup>130</sup> New York,<sup>131</sup> West Virginia,<sup>132</sup> and the federal government.<sup>133</sup>

Other jurisdictions expressly limit or direct the mechanisms of judicial relief. Louisiana provides that all claims must be filed in one district court,<sup>134</sup> while Maine and Massachusetts provide that

118. TEX. CIV. PRAC. & REM. CODE ANN. § 103.101(a) (West 2011) *repealed by* 2009 Tex. Sess. Law Serv. ch. 180 § 12(2) (West).

119. WIS. STAT. ANN. § 775.05(2) (West 2009).

120. *See id.*

121. ALA. CODE § 29-2-158 (LexisNexis 2003).

122. CAL. PENAL CODE § 4904 (West 2011).

123. MD. CODE ANN., STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2009).

124. N.H. REV. STAT. ANN. § 541-B:13 (2007).

125. N.C. GEN. STAT. § 148-84 (2009).

126. OKLA. STAT. ANN. tit. 51, § 156 (West 2008).

127. TENN. CODE ANN. § 9-8-108 (Supp. 2011).

128. VA. CODE ANN. § 8.01-195.11(B) (2007 & Supp. 2011).

129. 705 ILL. COMP. STAT. ANN. 505/8(c) (West 2007 & Supp. 2011).

130. OHIO REV. CODE ANN. § 2743.48(B) (West 2006 & Supp. 2011).

131. N.Y. CT. CL. ACT § 8-b (McKinney 1989 & Supp. 2011).

132. W. VA. CODE ANN. § 14-2-13a (LexisNexis 2009).

133. 28 U.S.C. § 2513 (2006).

134. LA. REV. STAT. ANN. § 15:572.8(C)(1) (Supp. 2011), *amended by* 2011 La. Sess. Law Serv. Act 262 (H.B. 285) (West).

the superior court shall have original jurisdiction over claims for wrongful imprisonment.<sup>135</sup> New Jersey states that suits for damages for wrongful conviction may be brought in the superior court against the Department of the Treasury.<sup>136</sup> Iowa permits tort claims to be filed in a district court subject to prior negotiation by a state appeal board.<sup>137</sup>

*b. Suggested approach for proposed statute*

Given the variety of judicial and administrative mechanisms for receiving compensation among the various jurisdictions, the proposed statute, rather than electing any specific mechanism, provides that compensation claims shall be brought in the appropriate forum for claims against the state as determined by state law.<sup>138</sup> The statute includes sections for both judicial and administrative relief, allowing each jurisdiction to choose the appropriate forum. This approach not only avoids general confusion regarding the application of the statute, but also respects traditional state judicial-governance prerogatives. It is also consistent with the procedural reality that the compensation action is against the state. Further, federal courts have tended to honor state-prescribed compensation procedures and have not hesitated to dismiss improperly filed suits.<sup>139</sup>

2. Statute of Limitations

*a. Statutory survey*

Many compensation statutes provide a statute of limitations for bringing compensation actions. This period generally begins to run when the wrongfully imprisoned convicted person is exonerated or

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135. ME. REV. STAT. ANN. tit. 14, § 8243 (2003); MASS. GEN. LAWS ch. 258D, § 3 (2010).

136. N.J. STAT. ANN. § 52:4C-2 (West 2009); *see also* Dorsett v. N.J. State Police, 04 CV 5652, 2007 U.S. Dist. LEXIS 10512, at \*17 (D.N.J. Feb. 15, 2007) (dismissing claim “for failure to file in the proper forum and failure to name the Department of Treasury as a defendant”); Wilson v. N.J. State Police, 04 CV 1523 2006 U.S. Dist. LEXIS 60514, at \*31-32, 35 (D.N.J. Aug. 15, 2006) (refusing to extend supplemental pendent jurisdiction over an improperly filed claim, despite appeals “[i]n the interests of judicial efficiency,” where “the State ha[d] not waived its sovereign immunity to be sued under this statute in federal court”).

137. IOWA CODE ANN. §§ 663A.1(5), 669.3, 669.4, 669.5 (West 1998).

138. Bernhard suggests that “[e]xisting forums” can handle compensation claims “expeditiously” given the relatively small number of cases that will arise in any year. *See* Bernhard I, *supra* note 35, at 109. “Furthermore the legal issues arising are neither so technical nor so unique as to justify creation of a specialized agency.” *Id.*

139. *See supra* note 136.

released from prison. Two years is the most common limitation, having been adopted by ten states: Alabama,<sup>140</sup> Illinois,<sup>141</sup> Iowa,<sup>142</sup> Louisiana,<sup>143</sup> Maine,<sup>144</sup> Massachusetts,<sup>145</sup> Ohio,<sup>146</sup> New Jersey,<sup>147</sup> New York,<sup>148</sup> and West Virginia.<sup>149</sup>

A claim must be filed within five years in North Carolina;<sup>150</sup> three years in New Hampshire<sup>151</sup> and Texas;<sup>152</sup> one year in Tennessee;<sup>153</sup> and two years in California.<sup>154</sup> Montana accepts applications for educational assistance within ten years following exoneration, but limits aid to five years within this ten-year period.<sup>155</sup> No time limitation is expressed in the compensation statutes of five jurisdictions: Maryland, Oklahoma, Virginia, Wisconsin, and the District of Columbia.

#### b. Suggested approach for proposed statute

In accord with the approach taken by the Innocence Project in its proposed statute, the statute proposed herein adopts a three-year statute of limitations.<sup>156</sup> The statute of limitations begins to run when the claimant is found actually innocent of the crime of wrongful conviction and imprisonment, whether by executive pardon<sup>157</sup> or judicial determination.<sup>158</sup> This means that the limitations period contained in the proposed statute applies only with respect to the damages phase of a compensation claim. Thus, if a conviction were reversed on procedural rather than factual grounds,<sup>159</sup> the

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140. ALA. CODE § 29-2-162 (LexisNexis 2003).

141. 705 ILL. COMP. STAT. ANN. 505/22(c) (West 2007 & Supp. 2011).

142. IOWA CODE ANN. § 663A.1(8) (West 1998).

143. LA. REV. STAT. ANN. § 15:572.8(D) (Supp. 2011).

144. ME. REV. STAT. ANN. tit. 14, § 8244 (2003).

145. MASS. GEN. LAWS ch. 258D § 8 (2010).

146. OHIO REV. CODE ANN. § 2743.48(H) (West 2006 & Supp. 2011).

147. N.J. STAT. ANN. § 52:4C-4 (West 2009).

148. N.Y. CT. CL. ACT § 8-b(7) (McKinney 1989 & Supp. 2011).

149. W. VA. CODE ANN. § 14-2-13a(h) (LexisNexis 2009).

150. N.C. GEN. STAT. § 148-82 (2009).

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

152. TEX. CIV. PRAC. & REM. CODE ANN. § 103.003 (West 2011).

153. TENN. CODE ANN. § 9-8-108(a)(7)(F) (Supp. 2011).

154. CAL. PENAL CODE § 4901 (West 2011).

155. MONT. CODE ANN. § 53-1-214(4) (2009).

156. See Innocence Project: Model Statute, *supra* note 35, § 6. Additionally, the proposed statute provides that, “[p]ersons convicted, incarcerated and released from custody prior to the effective date of this Act shall commence an action under this Act within three years of said effective date.” *Id.*

157. See *supra* Part II.B.5.b.

158. See *supra* Part II.B.5.b.

159. See *infra* Part II.E.

statute of limitations would not yet become applicable. It would begin to run when the person is declared factually innocent in a later judicial proceeding.

Questions regarding time constraints in seeking or applying for executive or judicial determinations of actual innocence are beyond the scope of the proposed statute. Over two-fifths of compensation jurisdictions, as well as other proposed statutes, have determined that a two-year timeframe is sufficient for one to present a claim of wrongful conviction and imprisonment.<sup>160</sup> A period greater than two years is preferable due to practical and equitable considerations. Reintegration into society often delays and disrupts the process of retaining counsel and formulating a legal claim. One concern is that upon release from prison most exonerees are preoccupied with reorienting their lives.<sup>161</sup> Before starting to navigate the relatively complex compensation process, a claimant should be given adequate time to readjust to life outside of prison. Additionally, finding suitable legal counsel could take considerable time. These concerns may have been recognized by the Innocence Project and those jurisdictions with limitation periods of longer than two years.<sup>162</sup>

There may be some merit in adopting a substantially longer statute of limitations. But evidentiary and administration considerations militate against that approach. The compensation schemes of New York, New Jersey, and West Virginia, although employing the two year alternative, support this assertion. These statutes provide, in their preliminary findings, that when determining actual innocence, “due consideration” is to be given “to difficulties of proof” beyond the control of the claimant, including the “passage of time” and “death or unavailability of witnesses.”<sup>163</sup> Read together, the statute of limitations and preliminary findings represent a legislative determination that although traditional evidentiary requirements should be relaxed, problems of proof would become too difficult to overcome if compensation actions could be initiated indefinitely after exoneration. A statute of limitations of three years

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160. ABA Report, *supra* note 35, at 2 (stating that the two-year timeframe applies if a notice requirement is not fulfilled); Arizona State Law Journal: Model Act, *supra* note 35, at 712; *see also* Bernhard I, *supra* note 35 (describing two years as “reasonable”).

161. *See infra* note 203.

162. *See supra* note 156 and accompanying text.

163. *See, e.g.*, N.J. STAT. ANN. § 52:4C (West 2009).

will help avoid evidentiary problems while preserving judicial and administrative resources.

States should also consider extending the limitations period in at least some cases to avoid unfairness. These include cases in which the claimant is delayed in bringing the claim because of health problems, a mental disability, an extreme hardship, or other justifiable reasons. Courts and agencies may also apply traditional equitable exceptions when it is practically impossible for the claimant to meet the statute of limitations. But an explicit exception for special circumstances will better ensure that wrongfully convicted and imprisoned persons are not deprived of a realistic opportunity to obtain reasonable compensation.

#### D. *Calculation of the Award*

In many jurisdictions monetary losses relating to wrongful imprisonment, as well as less tangible factors, may be considered in determining the appropriate award. The proposed statute follows the latter approach, allowing consideration of a range of factors, but leaving it up to the enacting jurisdiction to determine the evidentiary burden in establishing damages.

##### 1. Prescribed Criteria and Discretionary Considerations

###### a. *Statutory survey*

In those states that offer compensation to wrongfully imprisoned persons, there is great variation with respect to how to determine the amount of the award. Most compensation schemes fall into one or more of the following categories. They (1) prescribe or limit the amount awardable for each year of incarceration or specify precisely which losses are recoverable; (2) limit the total possible award; (3) provide a list of factors that may be considered, such as lost income; (4) offer great deference to courts or claim boards in determining the appropriate amount; or (5) authorize payment for medical, educational, or other services. Others merely affirm the availability of an action for damages.

A few statutes do not place caps on the total amount recoverable, but instead limit the amount awardable for each year or day of incarceration, or in some other fashion. Alabama's statute allots \$50,000 for each year of incarceration and additional compensation at the discretion of the Committee on Compensation for Wrongful

Incarceration.<sup>164</sup> In California, the claimant must establish “pecuniary injury” before the board, which then recommends that the legislature appropriate a sum of \$100 per day of incarceration served subsequent to the claimant’s conviction.<sup>165</sup> New Jersey provides that damages for mistaken imprisonment “shall not exceed twice the amount of the claimant’s income in the year prior to his incarceration or \$20,000.00 for each year of incarceration, whichever is greater” and “reasonable attorney fees.”<sup>166</sup> Under federal law, the United States Court of Federal Claims may award damages up to \$100,000 per year for any plaintiff sentenced to death, and \$50,000 per year for any other plaintiff.<sup>167</sup>

For statutes that link compensation to the duration of wrongful imprisonment, the award is more commonly subject to a maximum total recovery. North Carolina enables the Industrial Commissioner to award a claimant \$50,000 for each year of imprisonment, up to a maximum of \$750,000.<sup>168</sup> Texas entitles the claimant to \$80,000 multiplied by the number of years of incarceration, if the time served is less than 20 years, or \$500,000 if the time served is twenty years or more.<sup>169</sup> Illinois has the following maximums: \$85,350 for up to five years of imprisonment, \$170,000 for five to fourteen years of imprisonment, and \$199,150 for more than four-

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164. ALA. CODE § 29-2-159 (LexisNexis 2003); see also Bernhard II, *supra* note 35, at 705 (referring to this statute as one of the few “generous compensation systems”). As with this statute, the other statutes that link compensation to the length of incarceration do so on a pro rata basis. For brevity purposes, this fact will be omitted hereafter when describing these statutes.

165. CAL. PENAL CODE § 4904 (West 2011).

166. N.J. STAT. ANN. § 52:4C-5 (West 2009).

167. 28 U.S.C. 2513(e) (2006); John G. Browning, *Legally Speaking: Compensating the Exonerated*, SOUTHEAST TEX. REC. (Nov. 28, 2007, 9:30 AM), <http://www.setexasrecord.com/arguments/204519-legally-speaking-compensating-the-exonerated> (noting the “surprising[ ]” generosity of Uncle Sam when it comes to compensation).

168. See N.C. GEN. STAT. § 148-84 (2009).

169. See TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (West 2011). A prior version of the Texas statute that awarded only \$25,000 per year came “under fire” for the “[relatively low] amount it provide[d].” Browning, *supra* note 167. An attorney for the West Texas Innocence Project pointed out that the available compensation at that time was “a joke. I don’t know of anybody who says ‘I’ll go to prison for 20 years of my life if you’ll give \$25,000 [a year] at the end of it.’” *Id.* (alteration in original); see also David Ellison, *Ex-con Fights for Bill to Help the Wrongly Convicted*, HOUS. CHRON., Sep. 6, 2006, at B1, available at <http://www.chron.com/news/houston-texas/article/Ex-con-fights-for-bill-to-help-the-wrongly-1861447.php> (Following a ten-year prison stay for a wrongful rape conviction, Anthony Robinson earned a law degree from a law school in Texas. He is described by a state senator as the “poster child for why we need to have Texas mirror the federal standard.”).

teen years of imprisonment.<sup>170</sup> Louisiana limits recovery to \$25,000 per year of incarceration, not to exceed \$250,000; the district court, if it is “reasonable and appropriate,” may also “order payment” for job-skills training, medical and counseling services, and tuition and fees at community colleges and units of the state university.<sup>171</sup> Wisconsin provides that “the claims board shall find the amount which will equitably compensate [a claimant], not to exceed \$25,000 and at a rate . . . not greater than \$5,000 per year.”<sup>172</sup>

Three statutes do not base compensation directly on the length of incarceration, but still limit total possible recovery. Oklahoma limits total recovery to \$175,000.<sup>173</sup> Maine imposes a limit of \$300,000 for all claims, including court costs and interest.<sup>174</sup> In New Hampshire, the claimant may receive up to \$20,000 and, at the discretion of the board of claims, may also receive attorneys’ fees.<sup>175</sup>

Other states employ more complicated calculation schemes. The Iowa statute provides that damages recoverable by a wrongfully imprisoned person are limited to restitution for fines, surcharges, penalties, court costs, reasonable attorneys’ fees for criminal proceedings, appeals, and costs of any civil actions or post-conviction proceedings, and actions for compensation.<sup>176</sup> Liquidated damages are limited to \$50 per day of wrongful imprisonment and lost wages or earned income up to \$25,000 per year.<sup>177</sup>

In Ohio, a wrongfully imprisoned individual may recover fines, court costs, and reasonable attorneys’ fees related to all criminal

170. 705 ILL. COMP. STAT. ANN. 505/8(c) (West Supp. 2011). Under this statute, attorneys’ fees may not exceed 25% of the award granted, and costs of living adjustments may not exceed 5%. *See id.*

171. LA. REV. STAT. ANN. § 15:572.8(H)(2) (Supp. 2011), *amended by* 2011 La. Sess. Law Serv. Act 262 (H.B. 285) (West); *see also In re Williams*, No. 538401, 2007 WL 4792141 (La. Dist. Ct. May 25, 2007), *judgment vacated by In re Williams*, 984 So.2d 789 (La. Ct. App. 2008) (awarding statutory maximum plus “One Thousand dollars . . . for payment of tuition, books and other materials necessary for job skill training at the Louisiana Technical College, . . . as well as . . . Five Thousand dollars . . . for medical and counseling services . . . calculated at the rate of . . . \$90 for each . . . weekly visit up to a maximum of 3 years”).

172. WIS. STAT. ANN. § 775.05(4) (West 2009). Compensation shall include “attorney fees, costs and disbursements.” *Id.* If the claims board finds that a larger amount is necessary it must submit a report specifying the amount to each house of the legislature. *Id.*

173. OKLA. STAT. ANN. tit. 51, § 154(B)(4) (West 2008).

174. ME. REV. STAT. ANN. tit. 14, § 8242 (2003).

175. N.H. REV. STAT. ANN. §§ 541-B:14, -B:18 (2007).

176. IOWA CODE ANN. §§ 663A.1(6)(a)-(d) (West 1998).

177. *Id.*

proceedings, appeals, and the action to be released from prison.<sup>178</sup> Damages are limited to \$43,300 for each year of incarceration, subject to adjustment by the state auditor and any loss of wages or income that directly resulted from wrongful arrest, prosecution, conviction and imprisonment.<sup>179</sup> The statute also permits the state to seek reimbursement for costs from the individual for services at the detention facility, including sick calls and fees related to housing, feeding, and supervision.<sup>180</sup>

Massachusetts permits recovery up to \$500,000 for lost income, the length and conditions of incarceration, and any other injuries.<sup>181</sup> The court may also direct the Commonwealth to provide services to address any deficiencies in the claimant's physical and emotional condition caused by the wrongful imprisonment and to permit the claimant to receive educational services from any state or community college at 50% of the cost.<sup>182</sup>

Virginia authorizes the Comptroller, with the approval of the General Assembly, to award compensation equal to ninety percent of the Commonwealth's per capita income, for each year of incarceration up to twenty years.<sup>183</sup> The award may be divided into an initial payment of 20 percent, and an annuity for the remaining 80 percent.<sup>184</sup> The claimant is also eligible to receive a tuition assistance grant of \$15,000, which is deducted from the total award, and reimbursement up to \$10,000 for tuition, career, and technical training in a Virginia community college contingent upon successful completion of the training.<sup>185</sup> Montana offers only educational aid, and only to the wrongfully convicted who were exonerated based on the results of post-conviction forensic DNA testing.<sup>186</sup> This aid may cover tuition and related expenses for any community college,

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178. OHIO REV. CODE ANN. §§ 2743.48(E)(2)(a)-(d) (West 2006 & Supp. 2011).

179. *Id.*

180. *Id.*

181. MASS. GEN. LAWS ch. 258D § 5 (2008).

182. *Id.*

183. VA. CODE ANN. § 8.01-195.11 (2007 & Supp. 2011).

184. *Id.* Bernhard refers to this as an example of a “cynical, protective statute[ ]” that does “not reflect public opinion as expressed by the media, and [is] inconsistent with other progressive reform efforts motivated by exonerations across the country.” See Bernhard II, *supra* note 35, at 706.

185. VA. CODE ANN. § 8.01-195.11.

186. MONT. CODE ANN. § 53-1-214 (2009).

state college, or tribally controlled community college for any person.<sup>187</sup>

Some state statutes afford substantial deference to courts or claims boards in assessing the amount of compensation. The New York and West Virginia statutes, for example, provide that if a claimant is entitled to judgment, damages shall be awarded in an amount that the court determines will fairly and reasonably compensate him.<sup>188</sup> Judicial deference is also important in the District of Columbia Code, which states without further qualification that the judge may award damages upon a finding of unjust imprison-

187. *Id.* Compensation under this statute does not extend beyond this type of assistance. See Bernhard II, *supra* note 35, at 706 (referring to the benefits under this statute as “symbolic token support”).

188. See N.Y. CT. CL. ACT § 8-b(6) (McKinney 1989 & Supp. 2011); W. VA. CODE ANN. § 14-2-13a(g) (LexisNexis 2009); see also Bernhard II, *supra* note 35, at 710 (promoting compensation statutes for their facility in resolving disputes, citing New York’s as a prime example). Bernhard recounts the compensation suit of Larry David Holdren, who was wrongfully imprisoned in West Virginia for fourteen years:

Simply by reading Holdren’s uncontested petition, the West Virginia Court of Claims concluded the state was liable for the wrongful conviction. Turning to damages, the court pointed out that Mr. Holdren had spent fifteen years in prison and had been enrolled in an undergraduate university program at the time of his arrest. The court heard an economist estimate what Mr. Holdren might have been expected to earn during the fifteen years if his career plans had progressed uninterrupted. The court considered the claimant’s “impairment of future earnings . . . , as well as the loss of reputation, the loss of liberty, emotional stress, pain and suffering, and the reputation of the particular facility in which the claimant was imprisoned in determining the amount of the award.” Finally, the court recognized that the claimant had already partially recovered through a civil action against a third party and took that into consideration in estimating damages. In a two-and-one-half-page decision, the court determined that the claimant was entitled to an award of \$ 1,650,000, approximately \$110,000 for each year spent in prison.

Although some might complain that the award was too low, the claimant recovered relatively quickly and without having to finance complicated litigation. He was not required to obtain a pardon, which might have been impossible. Finally, the damages, while not copious, were sufficient to permit Mr. Holdren to complete school, purchase a home, or invest in a business should he so desire—activities he certainly would have enjoyed had he not been falsely accused and imprisoned. The award could finance the psychological therapy so many of the exonerated need. The award provided a foundation upon which to begin to build a life.

Bernhard II, *supra* note 35, at 709-10 (alteration original) (citations omitted) (citing *Holdren v. State*, No. CC-00-461 (W. Va. Ct. Cl. Apr. 2, 2002)).

Another statute worth noting here is that of Wisconsin. The statute describes the standard for determining compensation as “equitabl[e],” but such characterization is questionable given the stringent limits on recovery and difficulty of transcending those limits. WIS. STAT. ANN. § 775.05(4) (West 2009); see *supra* note 172 and accompanying text.

ment.<sup>189</sup> The board of claims in Tennessee also has considerable leeway in determining compensation: it may consider all relevant factors, including, but not limited to, the person's physical and mental suffering and loss of earnings, but may not grant an award in excess of \$1,000,000.<sup>190</sup> The Maryland statute, which calls for an amount commensurate with the actual damages sustained by the claimant, and a reasonable amount for any financial or other appropriate counseling for the individual due to the confinement, provides more guided deference, though no cap on recovery.<sup>191</sup>

Texas is the only state which provides the exoneree with monthly annuity payments for the duration of the exoneree's life.<sup>192</sup> These payments are based on a present value sum equal to the total amount of the award and "on a five percent per annum interest rate and other actuarial factors within the discretion of the comptroller."<sup>193</sup> The applicant is not permitted to "sell, mortgage or otherwise encumber, or anticipate the payments, wholly or partly, by assignment or otherwise."<sup>194</sup>

Some statutes introduce other conditions regarding recovery. Four jurisdictions expressly prohibit the awarding of punitive damages: Maine,<sup>195</sup> Massachusetts,<sup>196</sup> Oklahoma,<sup>197</sup> and the District of Columbia.<sup>198</sup>

Alabama, Iowa, Louisiana, and Ohio do not allow compensation awards to be reduced by expenses incurred by the state relating to the arrest, prosecution, and imprisonment of the individual (in-

189. D.C. CODE § 2-423 (LexisNexis 2008).

190. TENN. CODE ANN. § 9-8-108(a)(7) (Supp. 2011). This statute was enacted in response to the case of Clark McMillan, who was exonerated by DNA evidence after "serv[ing] twenty-two and a half years for a crime that he did not commit" and who, as a result of his wrongful conviction, . . . sustained the following injuries: pain and suffering; severe mental anguish; emotional distress; loss of income; infliction of physical illness; inadequate medical care; humiliation, indignities, and embarrassment; degradation; injury to reputation; permanent loss of natural psychological development; and McMillan also endured restrictions on his liberty and all forms of personal freedom, such as diet, sleep, personal contact, educational opportunity, vocational opportunity, athletic opportunity, personal fulfillment, sexual activity, family relations, reading, television, movies, travel, enjoyment, and expression.

2004 Tenn. Pub. Acts Ch. 880 at 2.

191. MD. CODE ANN., STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2009).

192. TEX. CIV. PRAC. & REM. CODE ANN. § 103.053(a) (West 2011).

193. *Id.* § 103.053(b).

194. *Id.* § 103.053(c).

195. ME. REV. STAT. ANN. tit. 14, § 8242 (2003).

196. MASS. GEN. LAWS ch. 258D § 5(A) (2008).

197. OKLA. STAT. ANN. tit. 51, § 154(C) (West 2008).

198. D.C. CODE § 2-423 (LexisNexis 2008).

cluding the costs of food, clothing, shelter, and medical care).<sup>199</sup> The Massachusetts statute contains a similar provision. It further directs that the award not be offset by the value in reduction in tuition and fees for educational services or the value of services provided to the claimant as part of the award.<sup>200</sup>

*b. Suggested approach for proposed statute*

The proposed statute provides for fair and just compensation of the wrongfully imprisoned individual and payment for reasonable and necessary services. In awarding compensation, the reviewing court or agency is to consider the following non-exhaustive list of factors to the extent it considers relevant: (1) costs incurred, including attorneys' fees (where the attorney has not been paid to represent the exoneree, such as a legal aid or public defender attorney compensated by the state), in connection with criminal and civil proceedings relating to the wrongful conviction and imprisonment, including the action to obtain compensation;<sup>201</sup> (2) the conditions of incarceration, including, but not limited to, any physical and mental suffering caused by imprisonment; (3) loss of wages or salary that directly resulted from the arrest, prosecution, conviction, and wrongful imprisonment;<sup>202</sup> and (4) fees expended by the claimant for medical care, housing, supervision, and other services rendered while imprisoned.

Additionally, the state may be ordered to provide medical and mental health services for conditions related to the wrongful imprisonment; without showing this link, the claimant may request free counseling from the state department of mental health or its equivalent.<sup>203</sup> The claimant is entitled to receive educational assis-

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199. See ALA. CODE § 29-2-160 (LexisNexis 2003); IOWA CODE ANN. § 663A.1(7) (West 1998); LA. REV. STAT. ANN. § 15:572.8(H)(c)(3) (Supp. 2011), amended by 2011 La. Sess. Law Serv. Act 262 (H.B. 285) (West); OHIO REV. CODE ANN. § 2743.48(F)(1) (West 2006 & Supp. 2011).

200. MASS. GEN. LAWS ANN. ch. 258D § 5(B) (2008).

201. See Arizona State Law Journal: Model Act, *supra* note 35, at 711 (providing for "reasonable attorney's fees" as part of "compensatory damages").

202. Although no compensation statute has an offset for windfall profits to a celebrity inmate, and neither does the proposed statute, an enacting state may want to consider including one. Such a provision would call for the reduction of any award by the amount the claimant has profited from wrongful conviction and which the inmate would not have earned in the event of an (earlier) acquittal or dismissal. Yet this type of situation is a rarity, and one that could be dealt with adequately under the "fair" and "reasonable" standard of the proposed statute, as currently written.

203. See Santos & Roberts, *supra* note 79 (discussing the necessity of providing medical and social services to exonerees). "One of the biggest challenges is that once

tance, including payment for tuition and related expenses at a state or community college, and may elect to receive one year of job-skills training at the state's expense.<sup>204</sup> Finally, the compensation award may not be offset by any expenses assumed by the state in connection with the arrest, prosecution, and imprisonment of the exoneree.<sup>205</sup>

The statute does not place limits on compensation, and this may raise an objection to enactment.<sup>206</sup> However, punitive or exemplary damages are not recoverable. The "lost opportunity costs" of wrongful imprisonment are tremendous and may well amount to the destruction of a person's livelihood, physical and emotional well-being, and personal relationships.<sup>207</sup> Putting an artificial cap

an innocent person comes out of prison, they are not equipped with the tools to reintegrate into society, and that's something that money alone can't solve," a New Jersey state representative explained. *Id.* (internal quotation marks omitted). This representative "introduced a bill to set aside \$1.25 million a year for programs for exonerated prisoners." *Id.* Meanwhile, "[i]n New York, a bill has been drafted that would allow the wrongly convicted to receive services from agencies that already serve other needy populations, such as families on welfare." *Id.*; see also Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 181 (2004) ("Because the problems exonerated individuals face upon release are not easily calculable, it is important to provide resources for job training and health care to ensure that the wrongfully convicted are fully compensated for the problems their loss of liberty has created.").

204. See *supra* note 171 and accompanying text.

205. See ABA Report, *supra* note 35, at 9 (advocating for a similar provision).

206. Cf. Santos & Roberts, *supra* note 79 (stating that, in response to a proposed compensation bill in Pennsylvania, a state representative asked, "Once you open up those floodgates, where do you get all the money to pay for these falsely charged people? . . . How much money is it going to require? How much is a person worth?").

207. See Browning, *supra* note 167 (illustrating the inadequacies of the Texas compensation statute by citing the case of Greg Wallis, who could only recover \$25,000 for each of the fifteen years he served for a wrongful rape conviction). According to Browning,

Besides the emotional and psychological toll taken by years behind bars, individuals like Greg Wallis [who was exonerated by DNA evidence in 2006 after serving over fifteen years for a wrongful conviction of rape] have to cope with the economic realities of a career interrupted and a return to the workforce. . . .

Think about it. You've been convicted for a crime you know you didn't commit. You've been plucked from family and friends and thrown into a human cesspool for years as you struggle to survive the grim realities of prison life-gang violence, murder, rape and degradation.

Then, if you've been among the fortunate few to have been vindicated by genetic testing, you're released into a world that in many ways you don't recognize. As you struggle to adjust and get your life back, how much do you think each year that's been stolen from you is worth?

Something tells me that for most of us, that figure would be higher than \$25,000.

on compensation could lead to something less than a truly comprehensive remedy.<sup>208</sup> Of course, a wrongfully imprisoned person will never truly be made fully whole.<sup>209</sup> The individual can only be *fairly* and *reasonably* compensated in light of potentially quantifiable factors.<sup>210</sup>

The term “reasonable,” in particular, connotes that the judge or agency must proceed with an eye towards the preservation of

*Id.*

208. See *id.*; Bernhard I, *supra* note 35, at 105-07 (discussing how “unreasonable limitations [on awards have] discourage[d] claim filings” in several states and also have discouraged lawyers from taking up these cases); see also ABA Report, *supra* note 35, at 7 (suggesting that if any cap is enacted, it should correspond with “other existing caps in the jurisdiction, such as those for medical malpractice or other tort claims”); Arizona State Law Journal: Model Act, *supra* note 35, at 711 (“The court shall compensate the claimant for proven losses without limitation as to amount,” but “may not award exemplary damages.”).

209. In some sense, “the wrongly convicted may actually suffer a loss greater than death.” Santos & Roberts, *supra* note 79 (paraphrasing “Stan V. Smith, a forensic economist and expert on compensation for loss of life”); see also Ellison, *supra* note 169 (quoting Anthony Robinson, exoneree, explaining how “it’s just sad that people don’t realize that even if you gave them a million dollars a year, the injury goes beyond what the compensation can possibly give to make up for it”). Despite physical freedom, an exonerated person may experience daily the “nightmare” of the wrongful imprisonment. Santos & Roberts, *supra* note 79 (quoting Darryl Hunt who was exonerated in North Carolina after serving 18 years for murder). That an exonerated person will forever “battl[e] deep emotional scars,” *id.*, regardless of compensation, does not mean that such a person should be denied a comprehensive remedy in terms of both a financial award and the provision of health and other services. As the New York Court of Claims put it:

The claimant has been humiliated, degraded, shamed and suffered a loss of reputation and earnings. For this he must be paid, and for this money damages can be compensatory. But all the wealth of the State of New York could not compensate the claimant for the mental anguish suffered through nearly twelve years of false imprisonment, under the impression that he would be there for the rest of his life. How can a man be repaid who has been branded a murderer and whose only hope is an early death to release him from the sentence erroneously passed on him? For this, any award is bound to be a mere token, but it should compensate as well as the medium allows.

*Hoffner v. State*, 142 N.Y.S.2d 630, 631-32 (N.Y. Ct. Cl. 1955) (awarding over one hundred thousand dollars); see also Bernhard I, *supra* note 35, at 107 (discussing *McLaughlin v. State*, No. 75123 (N.Y. Ct. Cl. Oct. 16, 1989), where the court awarded \$1.5 million for various non-pecuniary injuries, including “loss of liberty [for over six years of wrongful imprisonment], mental stress anguish and reputation”).

210. Dedication of resources to reentry and discharge planning is an important, and an increasingly necessary element of rehabilitating all former inmates, exonerated or otherwise. The need to curb future criminal activity should be treated as a paramount goal. Recognizing that the innocent inmate, while innocent, has nonetheless been exposed to a prison environment, the proposed statute contemplates that exonerated inmates will be afforded the full benefits of reentry planning (such as career training) that a jurisdiction has to offer.

public resources.<sup>211</sup> However, it is worth noting that even in states that do provide statutory access to compensation for wrongful imprisonment, the number and quantity of awards has been minimal. In New York, of the more than 200 wrongful conviction claims heard by the New York Court of Claims in the past two decades, there were over 150 dismissals, 19 out-of-court settlements, and only 12 actual awards. The twelve exonerees received an average of just \$457,000 per case.<sup>212</sup> Similarly, in Wisconsin there have been only two successful claims in the last 55 years, while only one claim has been paid as the result of Texas's compensation statute.<sup>213</sup> The value, in terms of preserving limited state resources, of placing an artificial cap on awards for wrongful imprisonments is therefore questionable.<sup>214</sup> Further, states save substantial resources by releasing wrongfully convicted individuals, as imprisonment costs at least \$20,000 per year for each inmate, and escalating.<sup>215</sup> On balance, the state will not be unduly burdened if no cap on compensation is incorporated.

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211. This point is illustrated by New York's compensation statute, which, like the proposed statute, does not limit damages. N.Y. Cr. CL. Act § 8-b(6) (McKinney 1989 & Supp. 2011). The New York statute appears to grant judges even greater deference in determining the award. *See supra* note 188 and accompanying text. Still, in New York, a state with one of the highest levels of exonerations, "the cost of compensating deserving individuals has been minimal." Bernhard II, *supra* note 35, at 715.

212. Bernhard II, *supra* note 35, at 715-16.

213. Bernhard I, *supra* note 35, at 106-07.

214. *See id.* at 106 (noting that "[t]he number of wrongful convictions occurring in any state is simply not great enough to" justify severe restrictions on the amount recoverable).

215. As explained in the *Chicago Sun Times*,

Considering the costs borne by taxpayers for criminal court buildings, court clerk staff, judges, prosecutors, police officers and prisons, larger payments to the wrongfully convicted would represent a mere drop in the bucket.

Such statutory compensation should be swift and meaningful. The U.S. government pays up to \$50,000 per year for persons wrongfully convicted of non-capital federal crimes (and more for those who landed on Death Row). Ohio awards \$40,300 per year plus lost income. California provides \$100 per day, or \$35,200 per year.

Sound like a lot? Consider this: The cost of housing a prison inmate is about \$20,000 per year. Assuming Michael would have lived another 30 years or so in prison, the State of Illinois actually saved \$600,000 by his release.

Karen Daniel, Editorial, *Wrongfully Convicted People Get Pittance for Years in Prison*, CHI. SUN TIMES, Aug. 11, 2006, at 41; *see also* CHRISTOPHER REINHART, COST OF INCARCERATION AND COST OF A CAREER CRIMINAL, Conn. Office of Legislative Research, Doc. No. 2008-R-0099 (2008), available at <http://www.cga.ct.gov/2008/rpt/2008-R-0099.htm> (stating that "the annual cost to incarcerate an inmate in . . . Connecticut in FY 06" was \$44,165).

Under the proposed statute, the awarding authority in its discretion may direct payment of compensation in lump sum, installments, or following Texas's lead, in annuity payments<sup>216</sup> as it deems appropriate. Upon release from prison, many exonerees lack the experience to manage personal finances. The annuity payments are a way to guarantee that exonerees will receive some support for the rest of their lives.<sup>217</sup> The payments will be based on a present value sum equal to the total amount of the award and on market interest rate per annum and other actuarial factors within the discretion of the jurisdiction's awarding entity. The annuity payments may not be accelerated, deferred, increased, or decreased. The applicant may not sell, mortgage or otherwise encumber, or anticipate the payments, wholly or partly, by assignment or otherwise. In determining whether to commute the compensation to a lump sum payment, the awarding authority must consider whether there exists special needs warranting such payment, whether it will be in the best interests of the individual and whether that individual has the ability to wisely manage and control the commuted award irrespective of whether there exist special needs.<sup>218</sup>

## 2. The Burden of Proof in Demonstrating Damages

### a. *Statutory survey*

A majority of the jurisdictions that recognize judicial exonerations require "clear and convincing" evidence of innocence. The burden of proof is less clear for establishing the appropriate amount of compensation in jurisdictions that do not limit an individual to a fixed amount per year of incarceration. Although it is difficult to categorize the relevant statutes, two general trends are observable: (1) conventional evidentiary requirements are relaxed; and (2) standards of fairness and reasonableness in determining appropriate damages are employed. But these formulations provide little direct guidance about the rigor or thoroughness with which damages must be established.<sup>219</sup> In the absence of an express burden of proof, the

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216. See TEX. CIV. PRAC. & REM. CODE ANN. § 103.053 (West 2011).

217. Jeff Carlton, *Texas DNA Exonerees Find Prosperity After Prison*, ASSOC. PRESS, Sept. 4, 2009, available at <http://www.guardian.co.uk/world/feedarticle/8691540> ("The monthly payments are expected to be a lifeline for exonerees such as Wiley Fountain, 53, who received nearly \$390,000 in compensation . . . but squandered it by, as he said, 'living large.' He ended up homeless, spending his nights in a tattered sleeping bag behind a liquor store.").

218. See TENN. CODE ANN. § 9-8-108(a)(7)(D) (Supp. 2011).

219. One statute expressly includes a burden of proof. See *infra* notes 222-224 and accompanying text.

requisite standard presumably would be based on some default as determined by state law (whether statute, regulation, or case law). But it seems appropriate to apply the requisite standard of proof, whatever it may be, in a manner consistent with the above described trends, so as to not vitiate the meaningful remedy intended by these statutes.<sup>220</sup>

Some statutes follow both trends. Under New York's statute, the court, upon "find[ing] that the claimant is entitled to a judgment, . . . shall award damages in such sum of money as the court determines will fairly and reasonably compensate him."<sup>221</sup> The West Virginia statute contains a similar provision.<sup>222</sup> The legislative findings in these statutes require courts to "give due consideration" to evidentiary shortcomings in the "interest of justice" when evaluating compensation claims.<sup>223</sup> In like manner, under the Louisiana statute, in making its determination on actual innocence and compensation, "[t]he court may consider any relevant evidence regardless of whether it was admissible in, or excluded from, the criminal trial in which the applicant was convicted."<sup>224</sup> Through fixing awards on a temporal basis, the court is to further "order payment" for medical care, job training, and educational services as it "finds reasonable and appropriate."<sup>225</sup>

Several statutes of other states also speak in terms of reasonableness or fairness, or provide the judge or agency at least some discretion in calculating the award. The Wisconsin claims board

220. See *supra* Part II.A

221. N.Y. CT. CL. ACT § 8-b(6) (McKinney 1989 & Supp. 2011).

222. See W. VA. CODE ANN. § 14-2-13a(g) (LexisNexis 2009).

223. N.J. STAT. ANN. § 52:4C (West 2009); see also W. VA. CODE ANN. § 14-2-13a(a). Based on the surrounding text, this statement appears particularly geared toward the burden of proving actual innocence. But it seems pervaded by an equitable spirit "regarding the weight and admissibility of evidence" in general in compensation suits. *Id.*; see also MASS. GEN. LAWS ch. 258D §§ 1(F), 5(A) (2008) (granting the trier of fact similar leeway in assessing evidence, and also stating that evidence should not be excluded on several federal or state constitutional grounds; provision appearing in the introductory section of the statute, which deals mostly with the threshold requirement of proving innocence, and not explicitly referring to the determination of damages; a later provision provides significant discretion in determining "fair[]" and "reasonable[]" damages).

224. LA. REV. STAT. ANN. § 15:572.8(D) (Supp. 2011).

225. *Id.* § 15:572.8(H), amended by 2011 La. Sess. Law Serv. Act 262 (H.B. 285) (West); see also N.H. REV. STAT. ANN. § 541-B:10 (2007). Under New Hampshire's statute, the Board of Claims "shall not be bound by common law or statutory rules of evidence, but may admit all testimony having a reasonable probative value." *Id.* § 541-B:10(II). When "the board by majority vote finds that payment to a claimant is justified," "the governor shall draw [a] warrant for said payment out of any money in the state treasury." *Id.* § 541-B:13.

“shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000.”<sup>226</sup> Tennessee’s Board of Claims shall “consider[ ] . . . all factors . . . relevant including, but not limited to, the person’s physical and mental suffering and loss of earnings.”<sup>227</sup> Like Louisiana, Alabama has preconfigured award amounts but also provides a means for expanding the award: the Committee on Compensation for Wrongful Conviction may recommend “additional compensation” as warranted “from the evidence.”<sup>228</sup> The District of Columbia statute states, rather plainly, that “[u]pon a finding by the judge of unjust imprisonment . . . the judge may award damages.”<sup>229</sup>

Other statutes refer to damages being equal or commensurate to losses actually incurred due to the wrongful conviction and imprisonment. Under the Maryland statute, for example, the Board of Public Works may grant an individual “an amount commensurate with the actual damages sustained by the individual.”<sup>230</sup> In Ohio, a person is “irrebuttably presumed to be a wrongfully imprisoned individual” for purposes of receiving compensation once the requisite judicial determination is received.<sup>231</sup> The claimant must then present “requisite proof” of fines, attorneys’ fees, court costs, lost wages, and other losses to receive a sum of money equal to his or her damages.<sup>232</sup>

Prior to the recent repeal of its statute, Texas was the only state which expressly provided a burden of proof in judicial proceedings for calculating the compensation award.<sup>233</sup> Before the comptroller in an administrative proceeding,<sup>234</sup> “[t]he petitioner must *establish by a preponderance of the evidence* that the petitioner is entitled to compensation and *the amount of compensation to which petitioner is entitled.*”<sup>235</sup> Under this statute, the burden of proof was treated the

226. WIS. STAT. ANN. § 775.05(4) (West 2009). *But see supra* note 188.

227. TENN. CODE ANN. § 9-8-108(a)(7)(A) (Supp. 2011).

228. ALA. CODE § 29-2-159(c) (LexisNexis 2003).

229. D.C. CODE § 2-423 (LexisNexis 2008).

230. MD. CODE ANN., STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2009) (“[Board also] may grant a reasonable amount for any financial or other appropriate counseling for the individual, due to the confinement.”).

231. OHIO REV. CODE ANN. § 2743.48(E)(1) (West 2006 & Supp. 2011).

232. *Id.* § 2743.48(E)(2).

233. TEX. CIV. PRAC. & REM. CODE ANN § 103.102 (West 2011), *repealed by* 2009 Tex. Sess. Law Serv. ch. 180 § 12(2)7 (West).

234. *See Id.* § 103.051(b)(2).

235. *Id.* § 103.102, *repealed by* 2009 Tex. Sess. Law Serv. ch. 180 § 12(2)7 (West) (emphasis added); *see also* CAL. PENAL CODE § 4904 (West 2011) (burden of proof not explicit, but “pecuniary injury” must be demonstrated in order to receive damages).

same for the determination of innocence and calculation of compensation.

*b. Suggested approach for proposed statute*

As with the large majority of compensation statutes, the proposed statute does not adopt a specific standard of proof in the compensation stage. Instead the presumption is that the standard will be consistent with what is required in any judicial or administrative proceeding to recover damages from the state. This approach will avoid confusion about which standard to apply and will avoid having two evidentiary standards, one for innocent inmates and one for all other parties who claim they have been injured by the state. The applicable standard should be construed so as to effectuate the remedial purpose of the statute: to provide fair and equitable awards to wrongfully imprisoned persons despite potential constraints in the presentation of evidence.

*E. Issuance of Declaration of Actual Innocence*

The proposed statute permits an individual whose conviction has been reversed to apply for the issuance of a declaration of actual innocence. This will enable individuals whose convictions are reversed on procedural grounds to establish that they were actually innocent of the crime for which they were convicted and imprisoned. Many courts will not address the issue of innocence if there is a procedural ground to set aside the conviction. A significant number of persons, for this reason, would be precluded from receiving compensation in the absence of this provision. This provision provides an effective cure to a potential deficiency in the *technical* exoneration.

Actual innocence must be established by “clear and convincing evidence.”<sup>236</sup> This standard is applicable to the “ordinary” judicial determination of actual innocence under the statute such as where a conviction is reversed because the individual, in fact, did not commit the crime.<sup>237</sup> A declaration of actual innocence satisfies the same procedural prerequisites as do other judicial exonerations (as well as executive pardons) based on actual innocence, and is functionally equivalent for purposes of the statute.

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236. See *supra* Part II.B.5.b.

237. See *supra* Part II.B.4.

### III. PROPOSED STATUTE

As discussed in the previous section, twenty-four states, the District of Columbia, and the federal government have statutes governing compensation for individuals who are wrongfully imprisoned. Although some of these statutes are of recent origin, others were enacted more than twenty years ago. Given the diversity of these statutes and the wealth of provisions governing every aspect of awarding compensation, a proposed statute should borrow from previously enacted statutes with modification necessary for fairness and to provide just compensation.

The proposed statute contains alternate sections depending on whether a state decides to use a judicial or administrative determination of innocence. The drafters of this article have concluded that each model has its own benefits.

#### AN ACT TO COMPENSATE INNOCENT INDIVIDUALS WRONGFULLY IMPRISONED

##### *Section 1. Legislative Findings*

The Legislature finds and declares that innocent individuals who have been wrongfully imprisoned have been frustrated in seeking legal redress and that such individuals should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages. By enactment of the provisions of this chapter, the Legislature intends that those innocent individuals who can demonstrate that they were wrongfully imprisoned be able to recover damages against the State.

1. Innocent individuals who were imprisoned but were not convicted have an avenue of redress under this Act over and above the existing tort remedies.<sup>238</sup>
2. In light of the burden of proof that must be carried by such individuals, it is the intent of the Legislature that the courts, in exercising their discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this chapter, may, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruc-

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238. See W. VA. CODE ANN. § 14-2-13a(a) (LexisNexis 2009).

tion of evidence or other factors not caused by such individuals or those acting on their behalf.<sup>239</sup>

### *Section 2. Individuals Eligible for Relief*

An individual who meets all of the following criteria is eligible for relief under this Act:

1. the individual has been wrongfully imprisoned for any criminal offense contained in the laws of this state or any subdivision thereof, and<sup>240</sup>
2. the individual can prove that he or she is actually innocent of the criminal offense for which he or she was wrongfully imprisoned in the following manner: (i) in the case of a pardon, a determination was made pursuant to law by the pardon and parole board or by the governor that the offense for which the individual was imprisoned, including any lesser included offenses arising out of the same facts and circumstances, was not committed by the individual; or (ii) in the case of judicial relief, a court of competent jurisdiction has issued a declaration of actual innocence pursuant to section 10 of this Act or has found by clear and convincing evidence that the offense for which the individual was imprisoned, including any such lesser included offenses, was not committed by the individual and issued an order vacating, dismissing, or reversing the charges or conviction and sentence and providing that no further proceedings can or will be held against the individual on any facts and circumstances alleged in the proceedings which had resulted in the imprisonment.<sup>241</sup>

### *Section 3. Exclusions from Eligibility*

An individual shall not be eligible to receive compensation under this chapter if such individual:

1. was also serving a concurrent sentence for a crime not covered by this statute; provided, however, that this exception shall not apply to a claimant who would not have been incarcerated on the concurrent sentence but for the conviction covered by this statute; and provided further, that this exclu-

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239. See N.J. STAT. ANN. § 52:4C-1 (West 2009); N.Y. CT. CL. ACT § 8-b(1) (McKinney 1989 & Supp. 2011); W. VA. CODE ANN. § 14-2-13a(a) (LexisNexis 2009).

240. See D.C. CODE § 2-421 (LexisNexis 2008).

241. See OKLA. STAT. ANN. tit. 51, §§ 154(B)(2)(e)(1), (2) (West 2008).

sion shall not apply to any period of incarceration due to the conviction covered by this statute that exceeds the term of imprisonment imposed on the claimant for the concurrent sentence, or if no such term was imposed by a court, the statutory maximum for the term of such concurrent sentence;<sup>242</sup>

2. was the subject of an act of the legislature that authorized an award of compensation for his or her wrongful imprisonment and the individual has received the award;<sup>243</sup>
3. by any act or omission related to the conduct of the alleged offense at the time and/or place of occurrence of the alleged offense, or by falsely giving an uncoerced confession of guilt, committing or suborning perjury, or fabricating evidence, caused or brought about his or her wrongful imprisonment.<sup>244</sup>

*Section 4. Jurisdiction. [Judicial Relief]*

A civil action for damages under this chapter shall be brought in the court of claims [*or in the superior court or district court*] that has jurisdiction under the laws of this state to hear actions for damages against the state. Such actions shall be governed by the rules of civil procedure applicable to such proceedings, except as otherwise provided by this chapter.<sup>245</sup>

*Alt. Section 4. Jurisdiction [Administrative Relief]*

A proceeding for compensation under this chapter shall be brought before the board of claims [*or administrative body*] that has jurisdiction under the laws of this state to hear claims against the state and shall be governed by the rules of administrative procedure applicable to such proceedings,<sup>246</sup> except as otherwise provided by this chapter.

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242. See *id.*; ABA Report, *supra* note 35, at 1.

243. See ALA. CODE § 29-2-161 (LexisNexis 2003).

244. See, e.g., CAL. PENAL CODE § 4903 (West 2011); VA. CODE ANN. § 8.01-195.10(B) (2007 & Supp. 2011); Innocence Project: Model Statute, *supra* note 35, § 4(A)(2); see also *supra* note 66.

245. See MASS. GEN. LAWS ch. 258D § 3 (2008); OHIO REV. CODE ANN. § 2743.48(D) (West 2006 & Supp. 2011).

246. See, e.g., ALA. CODE § 29-2-154; N.H. REV. STAT. ANN. § 541-B:10 (2007).

*Section 5. Wrongful Imprisonment—Cause of Action [Judicial Relief]*

1. The state consents to be sued by a person who has been imprisoned where such imprisonment was wrongful, and to liability on its part because of that fact, only as provided in this chapter. However, nothing in this chapter shall affect any liability of the state or of its employees to a wrongfully imprisoned individual on a claim for relief that is not based on the fact of wrongful imprisonment, including a claim for relief that arises out of circumstances occurring during the wrongfully imprisoned individual's confinement in a state or local correctional institution.<sup>247</sup>
2. A civil action may be brought against the state by an individual who was wrongfully imprisoned if such individual satisfies all of the eligibility requirements of section two and is not barred by any of the exclusions from eligibility in section three. In such action the individual may establish that he or she is a wrongfully imprisoned individual by (a) submitting a certified copy of the determination of the pardon and parole board or the governor that the offense for which the individual was imprisoned, including any lesser included offenses, was not committed by the individual; or (b) by submitting a certified copy of the entry of the judgment of a court of competent jurisdiction, determining that based on clear and convincing evidence the offense for which the individual was imprisoned, including any lesser included offenses, was not committed by the individual, and that such charges or conviction and sentence shall be or has been reversed or dismissed, and that no further proceeding can or may be held against the individual based on any facts and circumstances alleged in the proceedings which resulted in the wrongful imprisonment. No other evidence shall be required of the individual to establish that he or she is a wrongfully imprisoned individual, and the individual shall be irrebuttably presumed to be a wrongfully imprisoned individual.<sup>248</sup>
3. In such action, if the court finds that the wrongfully imprisoned individual has satisfied the requirements of subdivision two, the court shall award damages in such sum of money as

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247. See OHIO REV. CODE ANN. § 2743.48(F)(3).

248. See § 2743.48(E)(1).

the court determines will fairly and reasonably compensate such individual,<sup>249</sup> including but not limited to:

- i. the amount of any fine, surcharge, other penalty or court costs imposed and paid, and any reasonable attorneys' fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, if applicable, in connection with obtaining the wrongfully imprisoned individual's discharge from confinement in a state or local correctional institution, and any fees and expenses incurred in connection with any civil actions and proceedings for post-conviction relief which are related to the wrongful imprisonment;<sup>250</sup>
  - ii. an amount to compensate the individual for each full year of imprisonment or a pro-rata amount for each part of a year so imprisoned, including, but not limited to, considering the individual's physical and mental suffering,<sup>251</sup> and taking into account the length and conditions under which the individual was imprisoned and any other factors deemed appropriate to compensate fairly the individual for such imprisonment,<sup>252</sup> including prison labor and involuntary servitude;
  - iii. any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction, and wrongful imprisonment;<sup>253</sup>
  - iv. any user's fees or copayments recovered from such individual for services rendered while in the custody of a correctional institution, including, but not limited to, medical care, housing, supervision, or any other ancillary services.<sup>254</sup>
4. In awarding compensation under this section, a court shall not offset the award by any expenses incurred by the state or any political subdivision of the state in connection with the arrest, prosecution, and imprisonment of the individual,

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249. See N.Y. CT. CL. ACT § 8-b(6) (McKinney 1989 & Supp. 2011); W. VA. CODE ANN. § 14-2-13a(g) (LexisNexis 2009).

250. See IOWA CODE ANN. § 663A.1(6)(a) (West 1998); OHIO REV. CODE ANN. § 2743.48(E)(2).

251. See TENN. CODE ANN. § 9-8-108(a)(7)(A) (1999 & Supp. 2011).

252. See MASS. GEN. LAWS ch. 258D § 5(A) (2008).

253. See OHIO REV. CODE ANN. § 2743.48(E)(2)(c).

254. See § 2743.48(E)(2)(d)(i)-(iii).

- including, but not limited to, expenses for food, clothing, shelter, or medical care; nor shall the court offset the award by the value of the reduction in tuition or fees for educational services or the value of other services to be provided to the wrongfully imprisoned individual pursuant to this chapter.<sup>255</sup>
5. In such civil action the wrongfully imprisoned individual shall be entitled to the assistance of counsel, and in addition to the award of monetary damages provided in section two, such individual shall also be entitled to reasonable attorneys' fees.<sup>256</sup>
  6. A judgment or award of damages pursuant to this chapter may not include punitive or exemplary damages.<sup>257</sup>

*Alt. Section 5. Wrongful Imprisonment—Proceeding for Compensation [Administrative Relief]*

1. An individual who was wrongfully imprisoned may bring a proceeding before the board of claims [*or appropriate administrative body*] if such individual satisfies all of the eligibility requirements of section two of this chapter and is not excluded from eligibility by any of the provisions of section three of this chapter. In such proceeding the individual may establish that he or she is a wrongfully imprisoned individual by (a) submitting a certified copy of the determination of the pardon and parole board or the governor that the offense for which the individual was convicted, sentenced and imprisoned, including any lesser included offenses, was not committed by the individual; or (b) by submitting a certified copy of the entry of a judgment of a court of competent jurisdiction, determining that based on clear and convincing evidence the offense for which the individual was wrongfully imprisoned, including any lesser included offenses, was not committed by the individual, and that such charges or conviction and sentence has been dismissed or reversed, and that no further proceeding can or may be held

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255. See ALA. CODE § 29-2-160(d) (LexisNexis 2003); IOWA CODE ANN. § 663A.1(7); MASS. GEN. LAWS ch. 258D § 5(B).

256. See N.J. STAT. ANN. § 52:4C-5(b) (West 2009). The criteria for calculating attorneys' fees may be found in subdivision 4 of Alt. Section 5.

257. See D.C. CODE § 2-423 (LexisNexis 2008); ME. REV. STAT. ANN. tit. 14, § 8242(3) (2003); MASS. GEN. LAWS ch. 258D § 5(A); OKLA. STAT. ANN. tit. 51, § 154(C) (West 2008).

against the individual based on any facts and circumstances alleged in the proceedings which resulted in the wrongful imprisonment. No other evidence shall be required of the individual to establish that he or she is a wrongfully imprisoned individual, and the individual shall be irrebuttably presumed to be a wrongfully imprisoned individual.<sup>258</sup>

2. If the board of claims finds that the wrongfully imprisoned individual is eligible for relief and is not excluded from eligibility, the board may award such sum of money as it determines will equitably<sup>259</sup> compensate such individual, including but not limited to:
  - i. the amount of any fine, surcharge, other penalty or court costs imposed and paid, and any reasonable attorneys' fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, if applicable, in connection with obtaining the wrongfully imprisoned individual's discharge from confinement in a state or local correctional institution, and any fees and expenses incurred in connection with any civil actions and proceedings for post-conviction relief which are related to the wrongful imprisonment;
  - ii. an amount to compensate the individual for each full year of imprisonment or a pro-rata amount for each part of a year so imprisoned, considering all the factors the board considers relevant, including, but not limited to, the individual's physical and mental suffering,<sup>260</sup> and taking into account the length and conditions under which the individual was imprisoned and any other factors deemed appropriate to fairly compensate the individual for such imprisonment, including prison labor and involuntary servitude;
  - iii. any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction and wrongful imprisonment;
  - iv. any user's fees or copayments recovered from such individual for services rendered while in the custody of a

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258. See OHIO REV. CODE ANN. § 2743.48(E)(1).

259. See WIS. STAT. ANN. § 775.05(4) (West 2009).

260. See TENN. CODE ANN. § 9-8-108(a)(7)(A) (Supp. 2011).

correctional institution, including, but not limited to medical care, housing, supervision or any other ancillary services.

3. In awarding a sum of money under this section, the board shall not offset the award by any expenses incurred by the state or any political subdivision of the state in connection with the arrest, prosecution and imprisonment of the individual, including, but not limited to, expenses for food, clothing, shelter or medical care; nor shall the court offset the award by the value of the reduction in tuition or fees for educational services or the value of other services to be provided to the wrongfully imprisoned individual pursuant to this chapter.
4. In such proceeding the wrongfully imprisoned individual shall be entitled to the assistance of counsel, and in addition to the award of monetary damages provided in section two, such individual shall also be entitled to reasonable attorneys' fees. In determining the amount of allowable fees, the board of claims shall consider, among other things, the nature, length, and complexity of the services performed, the usual and customary charge for work of like kind, and the benefits resulting to the wrongfully imprisoned individual as a result of the legal services performed.<sup>261</sup> Attorney fees shall not be awarded to lawyers who have been compensated for providing representation to the wrongfully imprisoned individual.
5. A judgment or award of damages pursuant to this chapter may not include punitive or exemplary damages.<sup>262</sup>

### *Section 6. Additional Relief*

1. The court [*or the board of claims*] may include as part of its determination an order requiring the state to provide the wrongfully imprisoned individual with any services that are reasonable and necessary to address any of the deficiencies in the individual's physical and emotional condition that are shown to be directly related to the individual's wrongful imprisonment through documentary or oral evidence submitted to the court [*or the board of claims*] by the individual as

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261. See N.H. REV. STAT. ANN. § 541-B:18 (2007).

262. See D.C. CODE § 2-423; ME. REV. STAT. ANN. tit. 14, §§ 8242(3); MASS. GEN. LAWS ch. 258D, § 5(A); OKLA. STAT. ANN. tit. 51, § 154(C).

part of his or her claim for compensation under this chapter, including, but not limited to, the nature of the services the individual seeks, and the agencies of the state from which the individual seeks or may seek to receive such services.<sup>263</sup> Any such agency so named in the claim shall receive reasonable notice from the court [*or the board of claims*] of the proceedings pertaining to the possible ordering of such services and shall be given an opportunity to be heard on whether such agency is the appropriate entity to provide such services if so ordered.<sup>264</sup>

2. The court [*or the board of claims*] may also include in its determination an order entitling a wrongfully imprisoned individual to receive educational aid and services at state expense. Aid under this section shall include expenses for tuition, fees, books, board and room at any state funded university or college or any community college, and shall include assistance in meeting any admission standards or criteria required at such institutions, including, but not limited to, assistance in satisfying requirements for a certificate of equivalency of completion of secondary education and assistance in completing any adult education program or courses.<sup>265</sup>
3. The privilege of receiving educational aid under subdivision two shall remain active for ten years after the release of the wrongfully imprisoned individual who qualifies for such aid, and such aid shall continue for up to a total of five years of aid within the ten year period or until the degree or program for which the individual receives aid is completed, whichever is less, as long as the individual continues to make satisfactory progress in the course or program attempted. Aid shall be provided for completion of any degree or program available at the institutions listed in subdivision two, at the individual's choice.<sup>266</sup>
4. If requested by the wrongfully convicted individual, the state department of mental health shall provide appropriate counseling to the individual at a mutually agreed-on location at no charge to the individual.<sup>267</sup>

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263. See MASS. GEN. LAWS ch. 258D § 5(A).

264. See *id.*

265. See *id.*; MONT. CODE ANN. §§ 53-1-214(1), (2) (2009).

266. See MONT. CODE ANN. § 53-1-214(4).

267. See TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(c) (West 2011).

5. If requested by the individual, the state shall pay the costs of job-skills training for one year.<sup>268</sup>
6. The court [*for the board of claims*] may also include in its determination an order entitling a wrongfully imprisoned individual to receive child support payments owed by the claimant that became due, and interest on child support arrearages that accrued, during the time served in prison but were not paid.<sup>269</sup>

### *Section 7. Methods of Payment; Eligibility of Estate to Receive Compensation*

1. The court [*for the board of claims*] in its discretion may direct payment of compensation in lump sum, installments, or in annuity payments<sup>270</sup> as it deems appropriate, but no part of such compensation shall be directed to any person other than the individual so pardoned or exonerated, nor shall the individual so pardoned or exonerated pay any part of the sum received to any persons for services rendered in connection with its collection, provided, however, that this section shall not preclude any contingent fee arrangement with counsel that is permitted under state law or local court rule.<sup>271</sup> In determining whether to commute the compensation to a lump sum payment, the court [*for the board of claims*] shall consider whether there exists special needs warranting such payment, whether it will be in the best interests of the individual and whether that individual has the ability to wisely manage and control the commuted award irrespective of whether there exist special needs.<sup>272</sup>
2. Annuity payments, if granted, shall be based on a present value sum equal to the total amount of the award. The annuity payments are payable in equal monthly installments for the life of the claimant and must be based on market interest rate per annum and other actuarial factors within the court's [*for the board of claims*'] discretion. The annuity payments may not be accelerated, deferred, increased, or

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268. See LA. REV. STAT. ANN. § 15:572.8(H)(2)(a) (Supp. 2011), amended by 2011 La. Sess. Law Serv. Act 262 (H.B. 285) (West).

269. Innocence Project: Model Statute, *supra* note 35, § 4(B)(4).

270. See Tex. Civ. Prac. & Rem. Code Ann. § 103.053.

271. See ALA. CODE § 29-2-160 (LexisNexis 2003); MD. CODE ANN., STATE FIN. & PROC. §§ 10-501(c), (d)(1)(2) (LexisNexis 2009).

272. See TENN. CODE ANN. § 9-8-108(a)(7)(D) (Supp. 2011).

decreased. The applicant may not sell, mortgage or otherwise encumber, or anticipate the payments, wholly or partly, by assignment or otherwise.<sup>273</sup>

3. In the event that the individual awarded compensation dies prior to receiving the full amount of his or her compensation, the individual's estate shall be eligible to receive any remaining compensation.<sup>274</sup>
4. Any right to apply for compensation under this chapter shall cease upon the death of the wrongfully imprisoned individual if the individual is not survived by any family members or domestic partners who were dependent upon the individual prior to the individual's wrongful imprisonment, but if such individual has commenced a civil action or administrative proceeding for compensation pursuant to section five of this chapter prior to his or her death, the estate of such individual shall be eligible to receive said compensation.<sup>275</sup> In the case of a posthumous exoneration of an innocent individual, a family member [*spouse, child, parent, sibling, or a domestic partner as defined by the laws of the jurisdiction in which the partner resided*] of an innocent individual shall have the right to seek compensation under this section for the loss of financial support or companionship caused by the individual's wrongful imprisonment.

### *Section 8. Statute of Limitations*

1. An action [*or administrative proceeding*] under this chapter shall be commenced within three years<sup>276</sup> of service on a wrongfully imprisoned individual of a determination by the board of pardon and parole or by the governor that the offense for which such individual was wrongfully imprisoned, including any lesser included offenses, was not committed by the individual; within three years of service on a wrongfully imprisoned individual of the entry of judgment of a court of competent jurisdiction determining that the offense for which the individual was wrongfully imprisoned, includ-

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273. See TEX. CIV. PRAC. & REM. CODE ANN. § 103.053.

274. See ALA. CODE § 29-2-160.

275. See *id.*

276. See § 29-2-162; IOWA CODE ANN. § 663A.1(8) (West 1998); MASS. GEN. LAWS ch. 258D § 8 (2008); N.Y. CT. CL. ACT § 8-b(7) (McKinney 1989 & Supp. 2011); OHIO REV. CODE ANN. § 2743.48(H) (West 2006 & Supp. 2011); W. VA. CODE ANN. § 14-2-13a(h) (LexisNexis 2009).

- ing any lesser included offenses, was not committed by the individual, and ordering that the charges or conviction and sentence of such individual be dismissed or reversed, and further ordering that no further proceedings can or may be held against the individual on any facts and circumstances alleged in the proceeding which had resulted in the conviction; an individual wrongfully imprisoned and released from custody prior to the effective date of this act shall commence an action within five years of the effective date of this act.<sup>277</sup>
2. The three-year period under this section shall toll if the individual who was wrongfully imprisoned shows by clear and convincing evidence that he or she could not file suit under this Act due to health-related conditions, including mental disabilities, or other justifiable hardships.
  3. Notwithstanding any other provision of law, failure to file any applicable Notice of Claim shall not bar filing of a claim under this Act.<sup>278</sup>

*Section 9. Notification of Right to Commence a Civil Action or Administrative Proceeding*

1. When a court [*or pardon authority*] determines that an individual is a wrongfully imprisoned individual or issues a declaration of actual innocence pursuant to section 10, the court [*or pardon authority*] shall provide the individual with a copy of this statute and orally inform the individual and his or her attorney of the individual's rights under this statute to commence a civil action against the state in the courts [*or administrative agency*] of this state because of the individual's wrongful imprisonment and to be represented in a civil action [*or administrative proceeding*] by counsel of the individual's own choice.
2. The court [*or pardon authority*] described in subdivision one shall notify the clerk of the court in which a civil action may be commenced [*or the administrative agency*], in writing, within seven days of the entry of its determination, that the individual is a wrongfully imprisoned individual, of the name and proposed mailing address of the individual, and of the fact that the person has the rights to commence a civil

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277. See Innocence Project: Model Statute, *supra* note 35, § 6.

278. See *id.*

action [*or administrative proceeding*] and to have legal representation as provided in this section. The clerk of the court in which a civil action may be commenced [*or the administrative agency*] shall maintain in the clerk's office [*or agency's office*] a list of wrongfully imprisoned individuals for whom notices are received under this section and shall create files in the clerk's office [*or the agency's office*] for each such individual.<sup>279</sup>

### *Section 10. Issuance of Declaration of Actual Innocence*

1. A wrongfully imprisoned individual whose conviction has been reversed or vacated, or against whom charges have been dismissed, on grounds other than actual innocence may petition a court of competent jurisdiction for a declaration of actual innocence. The petition shall be heard by a civil or criminal court in the judicial district in which the individual was convicted and sentenced to imprisonment. The petition shall contain all of the relevant allegations of fact known to the petitioner at the time of filing, including all relevant documents and test results, and shall enumerate and include all relevant previous records, applications, petitions, appeals, and their dispositions. A copy of the petition shall be served on the prosecuting attorney who prosecuted the individual's criminal case, and such prosecuting attorney, if available, shall appear on behalf of the state.
2. Upon consideration of the petition and the response by the state, the previous records in the case, and the record of any hearing held by the court in connection with the petition, the court may either summarily dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted; or upon a finding that the petitioner has, based on petition submitted under the preceding subsection, proven by clear and convincing evidence that the offense for which the individual was wrongfully imprisoned, including any such lesser included offenses, was not committed by the individual, the court may issue a declaration of actual innocence as a judgment of the court. Such declaration and judgment shall satisfy the requirements of section five of

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279. See OHIO REV. CODE ANN. §§ 2743.48(B)(1), (2).

this Act with respect to the filing of an action or proceeding for compensation.<sup>280</sup>

*Section 11. Right of Appeal*

Any party is entitled to the rights of appeal afforded parties in a civil action following a decision on such motions as set forth in section [XX] of said Chapter [XXX] of the [State] code.

CONCLUSION

Society is morally obligated to financially compensate and provide services to those who were wrongfully imprisoned. The system must compensate those who have fallen victim to its inadequacies. This article suggests that states without compensation statutes adopt the proposed recommended statute. Since the proposed statute takes provisions from statutes currently in use, it provides a common and workable approach to provide just and fair compensation to the exonerees. Although a legislature might fine-tune the requirements, the recommended statute in this article offers a preliminary framework for a state that does not currently have a statute to compensate the wrongfully imprisoned.

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280. See generally VA. CODE ANN. §§ 19.2-327.10-13 (2008).