



UNDOING TIME:
A PROPOSAL FOR COMPENSATION
FOR WRONGFUL IMPRISONMENT
OF INNOCENT INDIVIDUALS

Committee on Capital Punishment and
Committee on Corrections

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I. Introduction

This report 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. 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-six jurisdictions have statutes that provide a mechanism for exonerated individuals to seek compensation. Some states have private laws that provide compensation on a person-by-person basis, while others provide no compensation whatsoever. This Report 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 to be continually updated 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.

II. 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.¹ The system provides specific safeguards for a person accused of a crime: a

¹ These concepts have their underpinnings in Blackstone’s thoughtfully calculated ratio: “Better that ten guilty persons escape than that one innocent suffer.” 4 WILLIAM BLACKSTONE, COMMENTARIES 356; *see also* F. VOLTAIRE, ZADIG, ch. 6 (1747) (“It is better to risk saving a guilty person than to condemn an

prohibition against unreasonable searches and seizures,² an adversarial system of justice,³ a presumption of innocence in a criminal proceeding,⁴ a right to effective legal counsel,⁵ a right to a speedy trial,⁶ a right to a jury trial,⁷ and the right to equal protection of the law.⁸ 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*,⁹ *Gideon v. Wainwright*,¹⁰ and *Mapp v. Ohio*¹¹ symbolize these efforts.

innocent one.”); *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.”).

² U.S. CONST. amend. IV; *see, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (“If letters and private documents can thus be seized and held 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.”) (quotation marks and citations omitted).

³ *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.”).

⁴ *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.”).

⁵ U.S. CONST. amend. VI; *see, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984). *But see* Jeffrey Kirchmeier, *Drink, Drunks, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996).

⁶ U.S. CONST. amend. VI; *see, e.g.*, *Barker v. Wingo*, 407 U.S. 514 (1972).

⁷ 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).

⁸ 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.”).

⁹ 384 U.S. 436 (1966) (holdings that certain warnings must be read to a person in custody prior to interrogation).

¹⁰ 372 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).

¹¹ 367 U.S. 643 (holding that evidence obtained in violation of the Fourth Amendment must be excluded).

Yet despite the protections afforded by what appears to be a fair and just system,¹² 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 leading causes of wrongful convictions.¹³ 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.¹⁴ For example, DNA evidence ultimately proved the innocence of Steven Barnes, Timothy Cole, and Joseph Fears, Jr., who had served 19,¹⁵ 13,¹⁶ and 25 years in prison,¹⁷ respectively. According to the Innocence Project, there have been 238 exonerations due to DNA evidence; 170 have occurred since 2000.¹⁸ Even more troubling is the fact that 17 DNA exonerations occurred in death penalty cases after the exoneree served time on death

¹² Needless to say, even this system has many flaws. But to list them here is beyond the scope of this particular examination.

¹³ See The Innocence Project, *The Causes of Wrongful Conviction*, <http://www.innocenceproject.org/understand/>; Editorial, *True and Untrue Confessions*, N.Y. TIMES, Jan. 12, 2008 (noting that police interrogations and confessions are a leading cause for false convictions).

¹⁴ 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.”).

¹⁵ Rocco LaDuca, *It's Official: Barnes Exonerated on All Charges*, UTICA OBSERVER-DISPATCH, Jan. 9, 2009.

¹⁶ Elliott Blackburn, *Judge Exonerates Timothy Cole*, LUBBOCK AVALANCHE-JOURNAL, April 7, 2009 (Timothy Cole died in prison on December 2, 1999, almost ten years before he was exonerated by DNA evidence).

¹⁷ Geoff Dutton & Mike Wagner, *Savoring His First Taste of Freedom*, COLUMBUS DISPATCH, March 11, 2009.

¹⁸ The Innocence Project, *Facts on Post-Conviction DNA Exonerations*, <http://www.innocenceproject.org/Content/351.php>; The Innocence Project, *About the Organization*, <http://www.innocenceproject.org/Content/9.php>.

row.¹⁹ The Project has also calculated the average length of the time served by an exoneree to be 12 years; a total of 2,968 years served by innocent people.²⁰

Another notable study has identified 340 wrongful convictions, 196 of which did not involve DNA evidence.²¹ The study notes that more than half of these 340 exonerees served more than 10 years in prisons, about 80% had been imprisoned for at least 5 years, and the total years in prison for all 340 individuals has been calculated at 3,400 years.²² A 1987 study identified 350 cases of wrongful conviction: 326 in which the defendant was convicted of a homicide and 24 in which the defendant was sentenced to death for the crime of rape.²³ This rise in exonerations has led to reform efforts in several states which seek to give prisoners access to DNA testing.²⁴

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.²⁵ To others,

¹⁹ *Id.* There have been 133 death penalty exonerations since 1973. *See* Innocence and the Death Penalty, <http://www.deathpenaltyinfo.org/article.php?did=412> (last visited June 1, 2009).

²⁰ *Id.*

²¹ *See* Gross, *supra* note 14, at 524.

²² *Id.*

²³ *See* Karen 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., 2002) (listing various studies on exonerations and racial bias).

²⁴ *See* Solomon Moore, *Exoneration Using DNA Brings Change in Legal System*, N.Y. Times, Oct. 1, 2007 (“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.”); *District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. ____ (2009) (holding that a prisoner has no federal constitutional right to post-conviction access to the State’s evidence for DNA testing).

²⁵ This is the approach taken by Justice Scalia. For instance, in a concurring opinion, the justice noted: “Reversal 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.” *Kansas v. Marsh*, 548 U.S. 163, 192 (2006) (Scalia, J., concurring). *But see* David Grann, *Trial by Fire: Did Texas Execute an Innocent Man*, NEW YORKER, Sept. 7, 2009; Elizabeth Brandenburg, *Kansas v. March: A Thumb on the Scale of Death*, 58 MERCER L. REV. 1447, 1457-61 (2007) (discussing Justice Scalia’s concurrence).

these exonerations mean that our system has failed.²⁶ 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.”²⁷

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.²⁸ In some states, more assistance is provided to parolees than to exonerees.²⁹ 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 Report considers the different procedural, economic, and social calculations that must be taken into consideration before “justly” compensating an innocent individual. Part III of the Report summarizes the shortfalls and successes of various state

²⁶ See, e.g., Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1186-87 (2005).

²⁷ *Id.* at 28.

²⁸ See Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES, Nov. 25, 2007 (surveying more than 130 DNA exonerees and noting that dozens face severe struggles on their reentry to society); 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 (2009).

²⁹ For more background on life “after exoneration,” see Innocence Project, *After Exoneration*, http://www.newenglandinnocence.org/site/content/documents/survey_of_state_compensation_statutes.DOC (last visited Mar. 1, 2008).

statutes.³⁰ Part IV of the Report contains a proposed statute which should be considered by those states that have yet to adopt a compensation statute or are considering revising their current statute.

III. Survey and Analysis of Existing Compensation Statutes

Statutes governing compensation for wrongfully imprisoned individuals have been enacted by 24 states,³¹ the District of Columbia,³² and the federal government.³³ The

³⁰ The Report does not address every aspect of compensation statutes, nor does it elaborate on every element of the proposed statute.

³¹ These states are Alabama, California, Florida, Illinois, Iowa, Ohio, 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 2000 & Supp. 2006); CT Public Act No. 08-143; FLA. STAT. § 961; 705 ILL. COMP. STAT. ANN. 505/8(C) (West Supp. 2006); IOWA CODE ANN. § 663A.1 (West 1998); LA. REV. STAT. ANN. § 15:572.8 (Supp. 2006); ME. REV. STAT. ANN. tit. 14, § 8241-8244 (1964); MD. CODE. ANN. STATE FIN. & PROC. § 10-501 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 258D, §§ 1-9 (West Supp. 2006); MO. ANN. STAT. § 650.055 (West 2006); N.C. GEN. STAT. § 148-82 to -84 (2005); N.H. REV. STAT. ANN. § 541-B:14(II) (LexisNexis 2006); N.J. STAT. ANN. §§ 52:4C-1 to -6 (West 2001); N.Y. CT. CL. ACT § 8-b (McKinney 1989); OHIO REV. CODE. ANN. § 2743.48 to .49 (LexisNexis Supp. 2006); OKLA. STAT. ANN. tit. 51, § 154 (West Supp. 2006); TENN. CODE. ANN. § 9-8-108(a)(7) (Supp. 2006); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 to .003 (Vernon 2005); UTAH CODE ANN. § 78B-9-405; VA. CODE ANN. §§ 8.01-195.10 to 195.12 (2000 & Supp. 2006); 13 V.S.A. § 5574 (2007); W. VA. CODE ANN. § 14-2-13a (LexisNexis Supp. 2006); WIS. STAT. ANN. § 775.05 (West 2001). Additionally, Montana offers educational aid (if exonerated by postconviction DNA testing), but no monetary compensation. *See* MONT. CODE ANN. § 53-1-214 (2003). These statutes are available on the website of the Innocence Project, which also provides brief summaries of each. *See* Innocence Project, Reforms by State, <http://www.innocenceproject.org/news/LawView1.php> (last visited Mar. 1, 2008); *see also* Memoranda from the New England Innocence Project on State Compensation Statutes, http://www.newenglandinnocence.org/site/content/documents/survey_of_state_compensation_statutes.DOC (link to Microsoft Word file) (March 17, 2005) (summarizing the eighteen state compensation statutes then in existence).

³² *See* D.C. CODE § 2-421 to -425 (2001).

³³ *See* 28 U.S.C. § 1495 (2000); 28 U.S.C.A. § 2513 (West Supp. 2006); *see also* Am. Bar Ass'n Section of Criminal Justice Report to The House of Delegates 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: *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999) ("Bernhard I"); *Justice Fails: A Review of Recent Efforts to Compensate Individuals who have been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703 (2004) ("Bernhard II"). For model compensation statutes, see ABA Report, 1-10 (urging adoption of compensation statutes, recommending statutory provisions, and surveying existing statutes); Innocence Project, "An Act Concerning Claims for Wrongful Conviction and Imprisonment" (last updated Nov. 2007), *available at* <http://www.innocenceproject.org/docs/Compensation08.pdf> (hereinafter Innocence Project: Model Statute) (comprehensive model compensation statute); Lauri Constantine et. al., *Model*

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 jurisdictions. But there are certain commonalities or trends. This section examines several key provisions of current compensation statutes and makes recommendations on each topic. They 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) plea entered for the crime of wrongful imprisonment and other 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 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.

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).

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,³⁴ New Jersey,³⁵ and West Virginia.³⁶ The findings express the statutes' remedial purpose and provide guidance as to their intended applications, as well as offering a statutory embodiment of legislative history that can guide courts and agencies.³⁷ 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 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.³⁸

³⁴ See N.Y. CT. OF CLAIMS ACT § 8-b (McKinney 2007).

³⁵ See N.J. STAT. ANN. § 52:4C (West 2001).

³⁶ See W. VA. CODE § 14-2-13a (2007).

³⁷ See *supra* notes 33-35; 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 Ann. ch. 258D, §§ 1-9)).

³⁸ See N.J. STAT. ANN. § 52:4C-1 (West 2001).

The West Virginia statute makes similar findings, but also includes “innocent persons wrongfully 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.”³⁹

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.⁴⁰ Proof of a wrongful conviction alone almost never entitles one to compensation under these statutes.⁴¹ 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

³⁹ See W. VA. CODE § 14-2-13a(a) (2007).

⁴⁰ See Bernhard I, *supra* note 35, at 101-05 (discussing “claim filing requirements”); ABA Report, *supra* note 35, at 1, 5-7 (making recommendations on requirements).

⁴¹ See *infra* Part III.B.5.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.

I. Actual Imprisonment Requirement

a. Statutory Survey

Proof that the wrongfully convicted person was actually incarcerated is required under all existing compensation statutes.⁴² Most require that incarceration be followed by a wrongful conviction in the corresponding jurisdiction.⁴³ 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.”⁴⁴ 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.”⁴⁵ 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

⁴² See *supra* notes 33-35.

⁴³ See, e.g., N.Y. CT. OF CLAIMS ACT § 8-b(2) (McKinney 2007). But see ALA. CODE § 29-2-156 (2007) (“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 § 14-2-13a(b) (2007) (“*Any person arrested or imprisoned or convicted and subsequently imprisoned for more or one felonies or misdemeanors against the state which he did not commit may . . . present a claim for damages against the state.*” (emphasis added)).

⁴⁴ See N.Y. CT. OF CLAIMS ACT § 8-b(2) (McKinney 2007).

⁴⁵ See D.C. CODE ANN. § 2-421 (LexisNexis 2007).

conviction was set aside prior to serving a prison sentence, even if the person was detained prior to conviction (such as where bail is denied).⁴⁶

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,⁴⁷ and others for both felonies and misdemeanors.⁴⁸ 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.⁴⁹

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.

⁴⁶ Such a person, however, might seek redress in a suit for false arrest, false imprisonment, malicious prosecution or a violation of civil rights under section 1983 of title 42 of the United States Code. *See* 42 U.S.C. § 1983 (2007).

⁴⁷ *See* ALA. CODE § 29-2-156 (2007) (felony or two years pretrial detention for felony offense); CAL. PENAL CODE § 4900 (Deering 2007); OHIO REV. CODE ANN. § 2743.48(A)(2) (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 258D(1)(C) (West 2007); MONT. CODE ANN. § 53-1-214 (2005); N.C. GEN. STAT. § 148-82 (2007); OKLA. STAT. ANN. tit. 51, §§ 154(B)(1), (2)(a) (2007); VA. CODE ANN. § 8.01-195.10(B) (2007).

⁴⁸ *See* IOWA CODE § 663A.1(1)(b) (2006) (“Individual was charged . . . with the commission of a *public offense* classified as an aggravated misdemeanor or felony.” (emphasis added)); N.Y. CT. OF CLAIMS ACT § 8-b(3) (McKinney 2007); W. VA. CODE § 14-2-13a(b) (2007). The Iowa Supreme Court has held that a “simple misdemeanor is unquestionably a public offense” for purposes of the state’s compensation statute, *Wenck v. Iowa*, 320 N.W.2d 567 (Iowa 1982), but that violations of “municipal ordinances” do not qualify. *See* *Wright v. Cedar Falls*, 424 N.W.2d 456 (1988).

⁴⁹ Among these is the federal compensation statute. *See* 28 U.S.C. § 1495 (2007); *see also* MD. CODE ANN. STATE FIN. & PROC. § 10-501(a) (LexisNexis 2007); ME. REV. STAT. ANN. tit. 14, §§ 8241-2 (2007); N.J. STAT. ANN. § 52:4C-3(a) (West 2001); TENN. CODE ANN. § 40-27-109 (2007); WIS. STAT. § 775.05(2) (2006); D.C. CODE ANN. § 2-421 (LexisNexis 2007).

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 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 Section 1983 of title 42 of the U.S. Code 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.”⁵⁰ 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.⁵¹ 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.”⁵² 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

⁵⁰ Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (citations omitted) (emphasis omitted).

⁵¹ 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 (E.D. Pa. 2004) (detective who arrested suspect had qualified immunity as to suspect’s § 1983 claim alleging improper prosecution, where reasonable officer could have found probable cause for arrest, suspect was released once exonerating evidence arose, and charges against suspect were withdrawn).

⁵² Rothstein v. Carriere, 373 F.3d 275, 283 (2d Cir. 2004).

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 Section 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.⁵³ An exoneree may be left to pursue individual prosecutors or police who are unlikely to have the ability to pay compensatory damages.

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 nature⁵⁴ 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.

⁵³ Barrett v. Orange County Human Rights Comm’n, 194 F.3d 341, 350 (2d Cir. 1999) (quoting Garcia v. Salt Lake County, 768 F.2d 303, 309 (10th Cir. 1985)).

⁵⁴ 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.

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 exoneree⁵⁵ and five require that the individual did not plead guilty to the crime.⁵⁶ The District of Columbia has both requirements.⁵⁷

The former requirement is most expansively formulated in the California statute: “The claimant must prove . . . the fact that he did not, by any act or omission on his part, either intentionally or negligently, contribute to the bringing about of his arrest or conviction for the crime with which he was charged”⁵⁸ 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.⁵⁹ 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.”⁶⁰

⁵⁵ See CAL. PENAL CODE §§ 4903, 4904 (Deering 2007); N.J. STAT. ANN. § 52:4C-3(a) (West 2001); N.Y. CT. OF CLAIMS ACT § 8-b(4)(b) (McKinney 2007); VA. CODE ANN. § 8.01-195.10(B) (2007); W. VA. CODE §§ 14-2-13a(e)(3), (f)(5) (2007); WIS. STAT. § 775.05(4) (2006); D.C. CODE ANN. § 2-422(2) (LexisNexis 2007); 28 U.S.C. § 2513(a)(2) (2007).

⁵⁶ See IOWA CODE § 663A.1(1)(b) (2006); MASS. GEN. LAWS ANN. ch. 258D(1)(C) (West 2007); OHIO REV. CODE ANN. § 2743.48(A)(2) (LexisNexis 2007); OKLA. STAT. ANN. tit. 51, §§ 154(B)(2)(b) (2007); D.C. CODE ANN. § 2-425 (LexisNexis 2007) (referring to 400 U.S. 25 (1970) (excepting “Alford pleas”). For a description of the exception under the District of Columbia statute, see *infra* note 65.

⁵⁷ See D.C. CODE ANN. §§ 2-422(2), 425.

⁵⁸ See CAL. PENAL CODE § 4903 (Deering 2007).

⁵⁹ See VA. CODE ANN. § 8.01-195.10(B) (2007); WIS. STAT. § 775.05(4) (2006); D.C. CODE ANN. § 2-422(2) (LexisNexis 2007); 28 U.S.C. § 2513(a)(2) (2007).

⁶⁰ See N.Y. CT. OF CLAIMS ACT § 8-b(4)(b) (McKinney 2007); N.J. STAT. ANN. § 52:4C-3(a) (West 2001); W. VA. CODE §§ 14-2-13a(e)(3), (f)(5) (2007); see also 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.” See *id.* at 718 (quoting N.Y. State Law Revision Comm’n, Report of the Law Revision Commission to the Governor on Redress for

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.⁶¹ The District of Columbia similarly excludes “any person whose conviction resulted from his entering a plea of guilty,” but from this exclusion exempts guilty pleas entered “pursuant to *North Carolina v. Alford*”⁶² because an *Alford* plea is entered to avoid prosecution rather than to admit guilt.

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.⁶³ If so, persons who pleaded guilty would be barred from receiving

Innocent Persons Unjustly Convicted and Subsequently Imprisoned, 1984 N.Y. Laws 2899, 2932) (internal quotation marks omitted).

Some proposed statutes more narrowly define the categories of conduct attributable to the claimant. See Innocence Project: Model Statute, *supra* note 35, at § 4(A), (A)(2) (a claimant must “prove by a preponderance of the evidence that: “He did not commit or suborn perjury, or fabricate evidence to cause or bring about his conviction”); 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”).

⁶¹ See IOWA CODE § 663A.1(1)(b) (2006); MASS. GEN. LAWS ANN. ch. 258D(1)(C) (West 2007); OHIO REV. CODE ANN. § 2743.48(A)(2) (LexisNexis 2007); OKLA. STAT. ANN. tit. 51, §§ 154(B)(2)(b) (2007).

⁶² See D.C. CODE ANN. § 2-425 (LexisNexis 2007) (referring to 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, “*Alford* Plea” (8th ed. 2004) (citation omitted). This type of plea is different from a plea of *nolo contendere* in that the defendant admits that sufficient evidence exists with which the government can convince the trier of fact that the defendant is guilty.

⁶³ 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.* (citation omitted). The Innocence Project’s proposed statute has managed to avoid such “inartfulness.” See Innocence Project: Model Statute, *supra* note 35, at § 4(A)(2) (“Neither 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.”).

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.⁶⁴

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.⁶⁵ 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.⁶⁶ By the same measure, wrongful conduct such as suborning perjury or fabricating evidence, if occurring following the commission of the charged crime, would not lead to disqualification. The proposed statute only

⁶⁴ See *supra* note 62 and accompanying text.

⁶⁵ 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”).

⁶⁶ According to Bernhard,

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.

See 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.” See *id.* (footnotes omitted). “The fact that a young, mentally challenged, chemically dependant, 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.*; see also ABA Report, *supra* note 35 at 1, 7 (advocating that false confessions should not “automatically bar recovery”); Innocence Project, *Compensating the Wrongly Accused*, <http://www.innocenceproject.org/Content/309.php> (last visited Feb. 26, 2008) (“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.”).

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.” 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.⁶⁷ Texas has adopted the exclusion for concurrent sentences with similar language,⁶⁸ while Massachusetts and Oklahoma restate the eligibility condition in terms of incarceration solely for the conviction that is the subject of the compensation claim.⁶⁹ 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.⁷⁰

⁶⁷ See N.J. STAT. ANN. §§ 52:4C-6(a),(b) (West 2001); see also VA. CODE ANN. § 8.01-195.12(A) (2007).

⁶⁸ See TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(b) (Vernon 2007).

⁶⁹ See MASS. GEN. LAWS ANN. ch. 258D(1)(C)(v) (West 2007); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(d) (2007).

⁷⁰ See ALA. CODE § 29-2-161 (2007); accord VA. CODE ANN. § 8.01-195.12(A) (2007).

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.” 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.⁷¹ 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. 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.⁷² The argument for not compensating such individuals is that the state should not compensate a known criminal.⁷³ But

⁷¹ The ABA Report suggests that the burden of showing that the claimant “would have otherwise been incarcerated be placed on the government.” See ABA Report, *supra* note 35, at 1 (“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).

⁷² *Cf.* Bernhard II, *supra* note 35 at 721-722 (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 (citations omitted)).

⁷³ See Fernanda Santos and Janet Roberts, *Putting a Price on a Wrongful Conviction*, N.Y. TIMES, Dec. 2, 2007, at P.4- Week in Review, Ideas and Trends (“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,”

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.⁷⁴ 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.⁷⁵ In six jurisdictions, a pardon is the sole means of establishing innocence: California, Illinois, Maine, Maryland, North Carolina, and Tennessee.⁷⁶

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.’”)

⁷⁴See Bernhard I, *supra* note 35, at 103-04 (summarizing approaches of different jurisdictions).

⁷⁵ See ALA. CODE §§ 29-2-157, 160(a) (2007); MASS. GEN. LAWS ANN. ch. 258D(1)(B) (West 2007); N.J. STAT. ANN. § 52:4C-4 (West 2001); N.Y. CT. OF CLAIMS ACT § 8-b(5)(b) (McKinney 2007); OKLA. STAT. ANN. tit. 51, § 154(B)(1) (2007); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(2)(A)(B) (Vernon 2007); W. VA. CODE § 14-2-13a(d)(2)(3) (2007); D.C. CODE ANN. § 2-422(1) (LexisNexis 2007); 28 U.S.C. § 2513(a)(1) (2007); *see also*

Rosanna Ruiz, *Freed Man Still Awaits Pardon, Compensation*, HOUSTON CHRONICLE, Oct. 18, 2007 (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).

⁷⁶ See CAL. PENAL CODE § 4900 (Deering 2007); 705 ILL. COMP. STAT. ANN. 505/8-(c) (2007); MD. CODE ANN. STATE FIN. & PROC. § 10-501(b) (LexisNexis 2007); ME. REV. STAT. ANN. tit. 14, §§ 8241-2(c) (2007); N.C. GEN. STAT. § 148-82 (2007); TENN. CODE ANN. § 40-27-109 (2007).

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.* When the political climate changed in the late 90s, more pardons were granted and seven claims succeeded in just a two-year period. *Id.*

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 (W.D.N.C. Jan. 31, 1007) (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

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.⁷⁷ New Hampshire refers only to “a person found to be innocent,”⁷⁸ and Montana only to convictions set aside through DNA testing.⁷⁹ Iowa and Ohio refer to convictions that are vacated, dismissed, or reversed on appeal.

Some states require special determinations of innocence. The Virginia statute requires that the conviction be “vacated” pursuant to a writ of actual innocence.⁸⁰ 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.⁸¹

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.⁸² 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 state and typically hinges

innocence . . . and not to all persons whose convictions are set aside violates the Equal Protection Clause of the Fourteenth Amendment. The court disagreed, explaining that this prerequisite was “rationally related to making payments only to people whom the Governor believes are innocent.” *See id.* 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. *See id.* It rejected plaintiff’s contention that the statute violated the Establishment Clause “because it requires petitioners to seek ‘grace’ from the Governor.” *See id.*

⁷⁷ *See* LA. REV. STAT. ANN. § 15:572.8 (Supp. 2006)

⁷⁸ *See* N.H. REV. STAT. ANN. § 541-B:14(II) (LexisNexis 2007).

⁷⁹ *See* MONT. CODE ANN. § 53-1-214 (2005).

⁸⁰ *See* VA. CODE ANN. § 8.01-195.10(B) (2007).

⁸¹ *See* WIS. STAT. § 775.05(3) (2006).

⁸² “Judicial declarations of actual innocence” are generally considered “judicial determinations” for purposes of the proposed statute and this Report. *See* Part III.E.

on the advocacy efforts of local public figures such as state legislators.⁸³ In contrast, judicial determination of innocence provides exonerees 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. 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,⁸⁴ Illinois,⁸⁵ Maine,⁸⁶ Massachusetts,⁸⁷ New York,⁸⁸ North Carolina,⁸⁹ Oklahoma,⁹⁰ Tennessee,⁹¹ Texas,⁹² West Virginia,⁹³ District of Columbia,⁹⁴ and the federal government.⁹⁵ The burden of proof in arriving at a finding of innocence is

⁸³ 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.” (footnotes omitted)). 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.” See *id.* (also noting how this requirement can produce “unanticipated and arbitrary results”).

⁸⁴ See CAL. PENAL CODE § 4900 (Deering 2007).

⁸⁵ See 705 ILL. COMP. STAT. ANN. 505/8(c) (2007).

⁸⁶ See ME. REV. STAT. ANN. tit. 14, §§ 8241-2(c) (2007).

⁸⁷ See MASS. GEN. LAWS ANN. ch. 258D(1)(B)(i) (West 2007).

⁸⁸ See N.Y. CT. OF CLAIMS ACT § 8-b(3)(b)(i) (McKinney 2007).

⁸⁹ See N.C. GEN. STAT. § 148-82 (2007).

⁹⁰ See OKLA. STAT. ANN. tit. 51, § 154(B)(1), (2)(a) (2007).

⁹¹ See TENN. CODE ANN. § 40-27-109 (2007).

⁹² See TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(a)(2)(A) (Vernon 2007).

⁹³ See W. VA. CODE § 14-2-13a(d)(2) (2007).

⁹⁴ See D.C. CODE ANN. § 2-422(1) (LexisNexis 2007).

⁹⁵ See 28 U.S.C. 2513(a)(1) (2007); see also MD. CODE ANN. STATE FIN. & PROC. § 10-501(b) (LexisNexis 2007) (“An individual is eligible” for compensation “only if the individual has received from

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.

Where innocence by judicial determination is an option, the burden of proof is designated more specifically.⁹⁶ Typically, the claimant must present “clear and convincing” evidence of innocence,⁹⁷ which is regarded as a substantial burden of proof.⁹⁸ Louisiana

the Governor a full pardon stating that the individual’s conviction has been shown conclusively to be in error.”).

⁹⁶ See IOWA CODE §§ 663A.1(1), (3) (2006); N.J. STAT. ANN. § 52:4C-1 (West 2001); N.Y. CT. OF CLAIMS ACT §§ 8-b(1), (5) (McKinney 2007); OKLA. STAT. ANN. tit. 51, §§ 154(B)(2)(e)(2) (2007); VA. CODE ANN. § 19.2-327.13 (2007); W. VA. CODE §§ 14-2-13a(a), (f) (2007); D.C. CODE ANN. § 2-422(2) (LexisNexis 2007); WIS. STAT. § 775.05(3) (2006). *But see* N.H. REV. STAT. ANN. § 541-B:14(II) (LexisNexis 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) (LexisNexis 2007) (requiring the court of common pleas to find that the offense of which the individual was found guilty was either not committed by the individual or was committed by another person).

⁹⁷ See N.J. STAT. ANN. § 52:4C-1 (West 2001); *see also* IOWA CODE §§ 663A.1(1), (3) (2006); N.Y. CT. OF CLAIMS ACT §§ 8-b(1), (5) (McKinney 2007); OKLA. STAT. ANN. tit. 51, §§ 154(B)(2)(e)(2) (2007); VA. CODE ANN. § 19.2-327.13 (2007); W. VA. CODE §§ 14-2-13a(a), (f) (2007); D.C. CODE ANN. § 2-422(2) (LexisNexis 2007); WIS. STAT. § 775.05(3) (2006); Arizona State Law Journal: Model Act, *supra* note 35, at 677 (defining actual innocence to “mean . . . that a person did not perpetrate the crime(s) or any lesser included offense(s) at issue in a given case”).

⁹⁸ 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 reprosecution or not guilty.

Iowa v. McCoy, 742 N.W.2d 593, 598-99 (2007) (internal citations and quotations omitted) (quoting 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

elaborates that factual innocence may be established through “clear and convincing scientific or non-scientific evidence,” and defines “factually innocent” as “not having committed the crime for which the applicant was convicted and incarcerated and not committing any crime based on the same set of facts used in his original conviction.”⁹⁹ Massachusetts uses a “clear and convincing evidence” standard, but also requires “grounds which tend to establish the innocence of the individual.”¹⁰⁰

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,

(2004) (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.” *Id.* at 599, 600 n.7. *See also* Iowa v. Dohman, 725 N.W.2d 428, 433-36 (2006) (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*, 205 Wis. 2d 112 (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 of

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.

See Bernhard I, *supra* note 35, at 108 (citing *Cleveland v. New York*, No. 74204 (Apr. 22, 1992)) (footnote omitted); *see also 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).

⁹⁹ *See* LA. REV. STAT. ANN. § 15:572.8(A)(2), (B) (2007).

¹⁰⁰ *See* MASS. GEN. LAWS ANN. ch. 258D(1)(B)(ii), (c)(vi) (West 2007).

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.¹⁰¹

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.¹⁰² As to pardons, the statute follows the 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.¹⁰³

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.¹⁰⁴ Significantly, a judicial reversal is not necessarily the same as a finding of factual innocence: a defendant can

¹⁰¹ See ALA. CODE § 29-2-157 (2007).

¹⁰² See *supra* Part III.B.4.

¹⁰³ 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.

¹⁰⁴ See, e.g., *Vasquez v. New York*, 263 A.D.2d 539, 540 (N.Y. 1999) (holding that a reversal of the underlying criminal conviction does not establish innocence by clear and convincing evidence); *Reed v. New York*, 78 N.Y.2d 1, 7 (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); *Walden v. Ohio*, 47 Ohio St. 3d 47, 51 (Ohio 1989) (stating “[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*, 247 Wis. 512, 515 (Wis. 1945) (finding 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 (citation omitted)).

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.¹⁰⁵ In simpler terms, compensation is not for individuals who are unable to prove their innocence *in fact*.¹⁰⁶ Still, the burden of proving innocence does not require proof “beyond a reasonable doubt,” let alone metaphysical certainty.¹⁰⁷ 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.

¹⁰⁵ See, e.g., *Ambler*, 205 Wis. 2d at 1 (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).

¹⁰⁶ See Geoffrey Fattah, *Financial Compensation Bill Passes House Committee*, DESERT MORNING NEWS, Jan. 31, 2008, available at <http://deseretnews.com/article/1,5143,695248990,00.html> (discussing a state senator’s comments about a proposed senate bill to provide compensation to wrongfully 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 E. Rather, such persons are afforded an opportunity to demonstrate actual innocence before the appropriate judicial forum. See *id.* 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.

¹⁰⁷ See Bernhard, *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).

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.¹⁰⁸ Three statutes explicitly waive the state's sovereign immunity or declare the state's consent to be sued. Under the Texas statute, "[a] person may bring a suit against the state . . . and the state's immunity from suit is waived."¹⁰⁹ Maine similarly 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."¹¹⁰ 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.¹¹¹

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."¹¹² In addition to Wisconsin, seven other states provide compensation by claims boards:¹¹³ Alabama (Division of Risk Management verifies eligibility to Committee on Compensation for Wrongful Conviction);¹¹⁴ California (Board of Control recommends appropriation by legislature);¹¹⁵ Maryland (Board of Public Works makes

¹⁰⁸ 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.

¹⁰⁹ See TEX. CIV. PRAC. & REM. CODE ANN. § 103.101(a) (Vernon 2007).

¹¹⁰ See ME. REV. STAT. ANN. tit. 14, §§ 8241-1 (2007).

¹¹¹ See OHIO REV. CODE ANN. § 2743.48(F)(3) (LexisNexis 2007).

¹¹² See WIS. STAT. § 775.05(2) (2006).

¹¹³ See *id.*

¹¹⁴ See ALA. CODE § 29-2-158 (2007).

¹¹⁵ See CAL. PENAL CODE § 4904 (Deering 2007).

award);¹¹⁶ New Hampshire (board of claims);¹¹⁷ North Carolina (Industrial Commissioner makes award);¹¹⁸ Oklahoma (Risk Management Administrator of the Purchasing Division of the Office of Public Affairs);¹¹⁹ and Tennessee (Board of Claims).¹²⁰

The Virginia and Texas statutes also provide for administrative-like mechanisms. In Virginia, claims are to be paid by the Comptroller, subject to approval by the General Assembly.¹²¹ Texas designates the comptroller's judiciary section as one means of recovery for innocent persons. This statute also permits suits for compensation to be brought against the state in a court of competent jurisdiction.¹²² Other jurisdictions require an action to be brought in a court of competent jurisdiction or a court of claims. These include Illinois,¹²³ Ohio,¹²⁴ New York,¹²⁵ West Virginia,¹²⁶ the federal government.¹²⁷

Other jurisdictions expressly limit or direct the mechanisms of judicial relief. Louisiana provides that all claims must be filed in one district court,¹²⁸ while Maine and Massachusetts provide that the superior court shall have original jurisdiction over claims for wrongful imprisonment.¹²⁹ New Jersey states that suits for damages for wrongful conviction may

¹¹⁶ See MD. CODE ANN. STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2007).

¹¹⁷ See N.H. REV. STAT. ANN. § 541-B:13 (LexisNexis 2007).

¹¹⁸ See N.C. GEN. STAT. § 148-84 (2007).

¹¹⁹ See OKLA. STAT. ANN. tit. 51, § 156 (2007).

¹²⁰ See TENN. CODE ANN. § 40-27-108 (2007).

¹²¹ See VA. CODE ANN. § 8.01-195.11(B) (2007).

¹²² See TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.002, 103.051, 103.101 (Vernon 2007).

¹²³ See 705 ILL. COMP. STAT. ANN. 505/8(c) (2007).

¹²⁴ See OHIO REV. CODE ANN. § 2743.48(B) (LexisNexis 2007).

¹²⁵ See N.Y. CT. OF CLAIMS ACT § 8-b (McKinney 2007).

¹²⁶ See W. VA. CODE § 14-2-13a (2007).

¹²⁷ See 8 U.S.C. § 2513 (2007).

¹²⁸ See LA. REV. STAT. ANN. § 15:572.8(c)(1) (2007).

¹²⁹ See ME. REV. STAT. ANN. tit. 14, §§ 8243 (2007); MASS. GEN. LAWS ANN. ch. 258D(3) (West 2007).

be brought in the superior court against the Department of the Treasury.¹³⁰ Iowa permits tort claims to be filed in a district court subject to prior negotiation by a state appeal board.¹³¹

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.¹³² The statute includes sections for both judicial and administrative relief, allowing each jurisdiction to choose the appropriate form. 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.¹³³

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

¹³⁰ See N.J. STAT. ANN. § 52:4C-2 (West 2001); see also *Dorsett v. N.J. State Police*, 04 CV 5652, 2007 U.S. Dist. LEXIS 10512, at *17 (D.N.J. 2007) (dismissing claim “for failure to file in the proper forum and failure to name the Department of Treasury as a defendant” (citation omitted)); *Wilson v. N.J. State Police*, 2006 U.S. Dist. LEXIS 60514, at *31-32, 35 (D.N.J. 2006) (refusing to extend supplemental pendent jurisdiction over an improperly filed claim, despite appeals “in the interests of judicial efficiency,” where “the State ha[d] not waived its sovereign immunity to be sued under this statute in federal court.” (citation and quotation marks omitted)).

¹³¹ See IOWA CODE §§ 663A.1(5), 669.3, 669.4, and 669.5 (2006).

¹³² Bernhard suggests that “existing forums” can handle compensation claims “expeditiously” given the relatively small number of cases that will arise in any year. See *Bernard 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.*

¹³³ See *supra* note 132.

convicted person is exonerated or released from prison. Two years is the most common limitation, having been adopted by ten states: Alabama,¹³⁴ Illinois,¹³⁵ Iowa,¹³⁶ Louisiana,¹³⁷ Maine,¹³⁸ Massachusetts,¹³⁹ Ohio,¹⁴⁰ New Jersey,¹⁴¹ New York,¹⁴² and West Virginia.¹⁴³

A claim must be filed within five years in North Carolina;¹⁴⁴ three years in New Hampshire¹⁴⁵ and Texas;¹⁴⁶ one year in Tennessee;¹⁴⁷ and six months in California, but at least four months prior to the next session of that state's legislature.¹⁴⁸ Montana accepts applications for educational assistance within ten years following exonerated, but limits aid to five years within this ten-year period.¹⁴⁹ 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 proposed statute adopts a three year statute of limitations.¹⁵⁰ The statute of limitations begins to run when the claimant is found actually innocent of the crime of wrongful conviction and

¹³⁴ See ALA. CODE § 29-2-162 (2007).

¹³⁵ See 705 ILL. COMP. STAT. ANN. 505/22-(c) (2007).

¹³⁶ See IOWA CODE § 663A.1(8) (2006).

¹³⁷ See LA. REV. STAT. ANN. § 15:572.8(D) (2007).

¹³⁸ See ME. REV. STAT. ANN. tit. 14, § 8244 (2007).

¹³⁹ See MASS. GEN. LAWS ANN. ch. 258D(8) (West 2007).

¹⁴⁰ See OHIO REV. CODE ANN. § 2743.48(H) (LexisNexis 2007).

¹⁴¹ See N.J. STAT. ANN. § 52:4C-4 (West 2001).

¹⁴² See N.Y. CT. OF CLAIMS ACT § 8-b(7) (McKinney 2007).

¹⁴³ See W. VA. CODE § 14-2-13a(h) (2007).

¹⁴⁴ See N.C. GEN. STAT. § 148-82 (2007).

¹⁴⁵ See N.H. REV. STAT. ANN. § 541-B:14(IV) (LexisNexis 2007).

¹⁴⁶ See TEX. CIV. PRAC. & REM. CODE ANN. § 103.003 (Vernon 2007).

¹⁴⁷ See TENN. CODE ANN. § 40-27-108(a)(7)(F) (2007).

¹⁴⁸ See CAL. PENAL CODE § 4901 (Deering 2007).

¹⁴⁹ See MONT. CODE ANN. § 53-1-214(4) (2005).

¹⁵⁰ See Innocence Project: Model Statute, *supra* note 35, at § 6. Additionally, the proposed statute provides that, “[a]n individual convicted, incarcerated 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.” *Id.*

imprisonment, whether by executive pardon¹⁵¹ or judicial determination.¹⁵² 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 is reversed on procedural rather than factual grounds,¹⁵³ the 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.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶

There may be some merit in adopting a substantially longer statute of limitations. But evidentiary and administrability considerations militate against that approach. The compensation schemes of New York, New Jersey, and West Virginia, although employing the

¹⁵¹ See Part III.B.5.b.

¹⁵² See *id.*

¹⁵³ See *infra* Part III.E.

¹⁵⁴ ABA Report, *supra* note 35, at 2 (if 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”).

¹⁵⁵ See *infra* note 195.

¹⁵⁶ See *supra* notes 152 and accompanying text.

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,” “death or unavailability of witnesses.”¹⁵⁷ 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 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.

¹⁵⁷ See *supra* Part III.A.1.

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.¹⁵⁸ In California, the claimant must establish "pecuniary injury" before the State Board of Control, which then recommends that the legislature appropriate a sum of \$100 per day of incarceration served subsequent to the claimant's conviction.¹⁵⁹ New Jersey provides that damages for mistaken imprisonment shall not exceed twice the amount of the claimant's income in the year prior to incarceration or \$20,000 for each year of incarceration, whichever is greater, and reasonable attorneys' fees.¹⁶⁰ Under

¹⁵⁸ See ALA. CODE § 29-2-159 (2007); 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.

¹⁵⁹ See CAL. PENAL CODE § 4904 (Deering 2007).

¹⁶⁰ See N.J. STAT. ANN. § 52:4C-5 (West 2001).

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.¹⁶¹

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 \$20,000 for each year of imprisonment, up to a maximum of \$500,000.¹⁶² Texas entitles the claimant to \$25,000 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.¹⁶³ Illinois has the following maximums: \$15,000 for up to five years of imprisonment, \$30,000 for five to fourteen years of imprisonment, and \$35,000 for more than fourteen years of imprisonment.¹⁶⁴ Louisiana limits recovery to \$15,000 per year of incarceration, not to exceed \$150,000. 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.¹⁶⁵ Wisconsin provides that the

¹⁶¹ See 28 U.S.C. 2513(e) (2007); John G. Browning, *Legally Speaking: Compensating the Exonerated*, SOUTHEAST TEXAS RECORD, Nov. 28, 2007, available at <http://www.setexasrecord.com/arguments/204519-legally-speaking-compensating-the-exonerated> (noting the “surprising . . .” generosity of Uncle Sam when it comes to compensation).

¹⁶² See N.C. GEN. STAT. § 148-84 (2007).

¹⁶³ See TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (Vernon 2007); see also § 103.052 (claimant may request one year of counseling at no charge). The Texas system has come “under fire” for the “relatively low amount it provides.” See Browning, *supra* note 163. An attorney for the West Texas Innocence Project points out that the available compensation is 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.” See *id.* (internal quotation marks omitted); see also David Ellison, *For This Bill, Ex-Con will be Key Lobbyist; Measure Aims to Increase Compensation for the Wrongly Convicted*, HOUSTON CHRONICLE, Sep. 6, 2006, at B1 (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.”).

¹⁶⁴ See 705 ILL. COMP. STAT. ANN. 505/8-(c) (2007). Under this statute, attorneys’ fees may not exceed 25% of the award granted, and costs of living adjustments may not exceed 5%. See *Id.*

¹⁶⁵ See LA. REV. STAT. ANN. § 15:572.8(c)(3) (2007); see also *In re Williams*, No. 538401 2007 WL 4792141 (Dist. Ct. La. May 25, 2007); (awarding statutory maximum plus “One Thousand dollars . . . for payment of tuition, books and other materials necessary for job skill training at the Louisiana Technical

claims board shall award an amount that will equitably compensate a claimant, not to exceed \$25,000 and at a rate not greater than \$5,000 per year.¹⁶⁶

Three statutes do not base compensation directly on the length of incarceration, but still limit total possible recovery. Oklahoma limits total recovery to \$175,000.¹⁶⁷ Maine imposes a limit of \$300,000 for all claims, including court costs and interest.¹⁶⁸ 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.¹⁶⁹

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, including for an action for compensation. Liquidated damages are limited to \$50 per day of wrongful imprisonment and lost wages or earned income up to \$25,000 per year.¹⁷⁰

In Ohio, a wrongfully imprisoned individual may recover fines, court costs, and reasonable attorneys' fees related to all criminal proceedings, appeals and the action to be released from prison. 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.¹⁷¹ The statute also permits the state

College . . . , as well as . . . Five Thousand dollars . . . for medical and counseling service . . . , calculated at the rate of . . . \$90 for each . . . weekly visit up to a maximum of 3 years.”).

¹⁶⁶ See WIS. STAT. § 775.05(4) (2006). Compensation shall include attorneys' fees, costs and disbursements. *See 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. *See id.*

¹⁶⁷ See OKLA. STAT. ANN. tit. 51, §§ 154(B)(4) (2007).

¹⁶⁸ See ME. REV. STAT. ANN. tit. 14, §§ 8242 (2007).

¹⁶⁹ See N.H. REV. STAT. ANN. §§ 541-B:14, and B:18 (LexisNexis 2007).

¹⁷⁰ See IOWA CODE §§ 663A.1(6)(a)-(d) (2006).

¹⁷¹ See OHIO REV. CODE ANN. §§ 2743.48(E)(2)(a)-(d) (LexisNexis 2007).

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.¹⁷²

Massachusetts permits recovery up to \$500,000 for lost income, the length and conditions of incarceration, and any other injuries. 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.¹⁷³

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. The award may be divided into an initial payment of 20 percent, and an annuity for the remaining 80 percent.¹⁷⁴ 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.¹⁷⁵ Montana offers only educational aid, and only to the wrongfully convicted who were exonerated based on the results of postconviction forensic DNA testing. This aid may cover tuition and related expenses for any community college, state college or tribally controlled community college for any person.¹⁷⁶

¹⁷² *See id.*

¹⁷³ *See* MASS. GEN. LAWS ANN. ch. 258D(5) (West 2007).

¹⁷⁴ *See* VA. CODE ANN. § 8.01-195.11 (2007). Bernhard refers to this 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 707.

¹⁷⁵ *See* VA. CODE ANN. § 8.01-195.11 (2007).

¹⁷⁶ *See* MONT. CODE ANN. § 53-1-214 (2005). 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”).

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.¹⁷⁷ 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 imprisonment.¹⁷⁸ The board of claims in

¹⁷⁷ See N.Y. CT. OF CLAIMS ACT § 8-b(6) (McKinney 2007); W. VA. CODE § 14-2-13a) (2007); *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 710 (footnotes omitted).

Another statute worth noting here is that of Wisconsin. See WIS. STAT. § 775.05(4) (2006). The statute describes the standard for determining compensation as "equitable," but such characterization is questionable given the stringent limits on recovery and difficulty of transcending those limits. See *supra* note 168 and accompanying text.

¹⁷⁸ See D.C. CODE ANN. § 2-423 (LexisNexis 2007).

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 \$1,000,000.¹⁷⁹ 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.¹⁸⁰

Texas is the only state which provides the exoneree with monthly annuity payments for the duration of the exoneree’s life.¹⁸¹ 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.”¹⁸² The applicant is not permitted to “sell, mortgage or otherwise encumber, or anticipate the payments, wholly or partly, by assignment or otherwise.”¹⁸³

¹⁷⁹ See TENN. CODE ANN. § 40-27-108(a)(7) (2007). 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.

See 2004 Tennessee Laws Pub. Ch. 880 (H.B. 2859), enacting report.

¹⁸⁰ See MD. CODE ANN. STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2007).

¹⁸¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 103.053(a) (Vernon 2007 and Supp. 2009).

¹⁸² *Id.* § 103.053(b).

¹⁸³ *Id.* § 103.053(c).

Some statutes introduce other conditions regarding recovery. Four jurisdictions expressly prohibit the awarding of punitive damages: Maine,¹⁸⁴ Massachusetts,¹⁸⁵ Oklahoma,¹⁸⁶ and the District of Columbia.¹⁸⁷

Alabama, Iowa, Louisiana, Ohio, and Texas do not allow compensation awards to be reduced by expenses incurred by the state relating to the arrest, prosecution, and imprisonment of the individual (including the costs of food, clothing, shelter, and medical care).¹⁸⁸ 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.¹⁸⁹

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 nonexhaustive 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;¹⁹⁰ (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,

¹⁸⁴ See ME. REV. STAT. ANN. tit. 14, §§ 8241-3 (2007).

¹⁸⁵ See MASS. GEN. LAWS ANN. ch. 258D(5)(A) (West 2007).

¹⁸⁶ See OKLA. STAT. ANN. tit. 51, § 154(C) (2007).

¹⁸⁷ See D.C. CODE ANN. § 2-423 (LexisNexis 2007).

¹⁸⁸ See ALA. CODE § 29-2-160 (2007); IOWA CODE § 663A.1(7) (2006); LA. REV. STAT. ANN. § 15:572.8(c)(4) (2007); OHIO REV. CODE ANN. § 2743.48(F)(1) (LexisNexis 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 103.105(b) (Vernon 2007).

¹⁸⁹ See MASS. GEN. LAWS ANN. ch. 258D(5)(B) (West 2007).

¹⁹⁰ See Arizona State Law Journal: Model Act, *supra* note 35, at 711 (providing for “reasonable attorney’s fees” as part of “compensatory damages”).

prosecution, conviction, and wrongful imprisonment;¹⁹¹ 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.¹⁹² The claimant is entitled to receive educational assistance, 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.¹⁹³ 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.¹⁹⁴

The statute does not place limits on compensation, and this may raise an objection to enactment.¹⁹⁵ However, punitive or exemplary damages are not recoverable. The

¹⁹¹ 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.

¹⁹² See Santos and Roberts, *supra* note 75 (discussing the necessity of providing medical and social services to exonerees). “One of the biggest challenges is that once 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, in 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.”).

¹⁹³ See *id.*

¹⁹⁴ See ABA Report, *supra* note 35, at 9 (advocating for a similar provision).

¹⁹⁵ Cf. Santos and Roberts, *supra* note 75. 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?” See *id.*

“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.¹⁹⁶ Putting an artificial cap on compensation could lead to something less than a truly comprehensive remedy.¹⁹⁷ Of course, a wrongfully imprisoned person will never truly be made fully whole.¹⁹⁸ The individual can only be *fairly* and *reasonably* compensated in light of

¹⁹⁶ See Browning, *supra* note 163 (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 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.

Browning, supra note 163.

¹⁹⁷ 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.”).

¹⁹⁸ In some sense, “the wrongly convicted may actually suffer a loss greater than death.” See Santos and Roberts, *supra* note 75 (paraphrasing Stan V. Smith, “a forensic economist and expert on compensation for loss of life”); see also Ellison, *supra* note 165 (Anthony Robinson, exoneree, explains 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. See Santos and Roberts, *supra* note 75 (quoting Darryl Hunt who was exonerated in North Carolina after serving 18 years for murder). That an exonerated person will forever “battl[e] emotional scars,” see *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,

potentially quantifiable factors.¹⁹⁹ The term “reasonable,” in particular, connotes that the judge or agency must proceed with an eye towards the preservation of public resources.²⁰⁰ 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.”²⁰¹ 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’ compensation statute.²⁰² The value, in terms of preserving limited state resources, of placing an artificial cap on awards for wrongful imprisonments is

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. New York, 142 N.Y.S. 2d 630, 631-32 (N.Y. Ct. Cl. 1955) (awarding over one-hundred thousand dollars); *see also* Bernhard, *supra* note 35, at 107 (discussing and quoting from McLaughlin v. New York, No. 75123 (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.”)).

¹⁹⁹ 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.

²⁰⁰ This point is illustrated by New York’s compensation statute, which, like the proposed statute, does not limit damages. *See* N.Y. CT. OF CLAIMS ACT § 8-b(6) (McKinney 2007). The New York statute appears to grant judges even greater deference in determining the award. *See supra* note 179 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 717.

²⁰¹ Bernhard II, *supra* note 35, at 717.

²⁰² Bernhard I, *supra* note 35, at 106.

therefore questionable.²⁰³ Further, states save substantial resources by releasing wrongfully convicted individuals, as imprisonment costs about \$20,000 per year for each inmate.²⁰⁴ On balance, the state will not be unduly burdened if no cap on compensation is incorporated.

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 payments²⁰⁵ 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.²⁰⁶ 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

²⁰³ 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).

²⁰⁴ 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, *Wrongfully Convicted People Get Pittance for Years in Prison*, CHICAGO SUN TIMES, Aug. 11, 2006, at 41.

²⁰⁵ See TEX. CIV. PRAC. & REM. CODE ANN. § 103.053 (Vernon 2007 and Supp. 2009).

²⁰⁶ Jeff Carlton, *Texas DNA Exonerees Find Prosperity After Prison*, ASSOCIATED PRESS, Sept. 4, 2009 (“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.”).

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.²⁰⁷

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.²⁰⁸ In the absence of an express burden of proof, the 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.²⁰⁹

Some statutes follow both trends. Under New York’s statute, the court, upon finding that the claimant is entitled to judgment, “shall award damages in such sum of money as

²⁰⁷ See TENN. CODE ANN. § 40-27-108(a)(7)(D) (2007).

²⁰⁸ One statute expressly includes a burden of proof. See *infra* notes 209-11 and accompanying text.

²⁰⁹ See *supra* Part III.A.1.

the court determines will fairly and reasonably compensate him.”²¹⁰ The West Virginia statute contains a similar provision.²¹¹ The legislative findings in these statutes require courts to “give due consideration” to evidentiary shortcomings in the “interests of justice” when evaluating compensation claims.²¹² 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.”²¹³ 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.”²¹⁴

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 “shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000. . . .”²¹⁵ 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.”²¹⁶

Like Louisiana, Alabama has preconfigured award amounts but also provides a means for

²¹⁰ See N.Y. CT. OF CLAIMS ACT § 8-b(6) (McKinney 2007).

²¹¹ See W. VA. CODE § 14-2-13a(g) (2007).

²¹² See N.J. STAT. ANN. § 52:4C (West 2001); W. VA. CODE § 14-2-13a (2007). 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. See *id.*; see also MASS. GEN. LAWS ANN. ch. 258D(1)(F), 5(A) (West 2007) (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 “reasonabl[e]” damages).

²¹³ See LA. REV. STAT. ANN. § 15:572.8(c)(3) (2007).

²¹⁴ See *id.*; see also N.H. REV. STAT. ANN. § 541-B:10 (LexisNexis 2007). Under New Hampshire’s statute, the Board of Claims “shall not be bound by the common law or statutory rules of evidence, but may admit all testimony having a reasonable probative value.” See N.H. REV. STAT. ANN. § 541-B:10. When the Board “by majority vote finds that payment to a claimant is justified,” the Governor shall draw a warrant for such payment out of money in the state treasury. See *id.*

²¹⁵ See WIS. STAT. § 775.05(4) (2006). But see *supra* note 179.

²¹⁶ See TENN. CODE ANN. § 9-8-108(a)(7)(A) (2007).

expanding the award: the Committee on Compensation for Wrongful Conviction may recommend “additional compensation” as “warrant[ed] . . . from the evidence.”²¹⁷ The District of Columbia statute states, rather plainly, that upon “a finding by the judge of unjust imprisonment . . . the judge may award damages.”²¹⁸

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.”²¹⁹ 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.²²⁰ 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.²²¹

Texas is the only state which expressly provides a burden of proof in judicial proceedings for calculating the compensation award.²²² Before the comptroller in an administrative proceeding,²²³ “[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.*”²²⁴ Under this statute, the burden of proof is treated the same for the determination of innocence and calculation of compensation.

²¹⁷ See ALA. CODE § 29-2-159 (2007).

²¹⁸ See D.C. CODE ANN. § 2-423 (LexisNexis 2007).

²¹⁹ See MD. CODE ANN. STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2007) (Board also “may grant a reasonable amount for any financial or other appropriate counseling for the individual, due to the confinement”).

²²⁰ See OHIO REV. CODE ANN. § 2743.48(E)(1), (2) (LexisNexis 2007).

²²¹ See *id.*

²²² See TEX. CIV. PRAC. & REM. CODE ANN § 103.102.

²²³ See *id.* at § 103.051(b)(2) (Vernon 2007).

²²⁴ See *id.* at § 103.102. (emphasis added); see also CAL. PENAL CODE § 4904 (Deering 2007) (burden of proof not explicit, but “pecuniary injury” must be demonstrated in order to receive damages).

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 it is presumed 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.”²²⁵

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

²²⁵ See *supra* Part III.B.5.b.

crime.²²⁶ 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.

IV. 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 Report have concluded that each model has its own benefits.

²²⁶ See *supra* Part III.B.4.

An Act to Compensate Innocent Individuals Wrongfully Imprisoned

Section 1. Legislative Findings.

1. 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.
2. Innocent individuals who were imprisoned but were not convicted have an avenue of redress under this Act over and above the existing tort remedies.²²⁷
3. 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 destruction of evidence or other factors not caused by such individuals or those acting on their behalf.²²⁸

²²⁷ See W. VA. CODE § 14-2-13a(a) (2007).

²²⁸ See N.J. STAT. ANN. § 52:4C-1 (West 2001); N.Y. CT. OF CLAIMS ACT § 8-b(1) (McKinney 2007); W. VA. CODE § 14-2-13a(a) (2007).

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,²²⁹
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 be or will be held against the individual on any facts and circumstances alleged in the proceedings which had resulted in the imprisonment.²³⁰

Section 3. Exclusions from Eligibility.

²²⁹ See D.C. CODE ANN. § 2-421 (LexisNexis 2007).

²³⁰ See OKLA. STAT. ANN. tit. 51, §§ 154(B)(2)(e)(1), (2) (2007).

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 exclusion 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;²³¹
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;²³²
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.²³³

Section 4. Jurisdiction. [*Judicial Relief*]

²³¹ See *id.*; ABA Report, *supra* note 35, at 1.

²³² See ALA. CODE § 29-2-161 (2007).

²³³ See, e.g., CAL. PENAL CODE § 4903 (Deering 2007); VA. CODE ANN. § 8.01-195.10(B) (2007); Innocence Project: Model Statute, *supra* note 35, at § 4(A)(2). See also *supra* note 65.

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.²³⁴

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,²³⁵ except as otherwise provided by this chapter.

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.²³⁶
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

²³⁴ See MASS. GEN. LAWS ANN. ch. 258D(3) (West 2007); OHIO REV. CODE ANN. § 2743.48(D) (LexisNexis 2007).

²³⁵ See, e.g., ALA. CODE § 29-2-154 (2007); N.H. REV. STAT. ANN. § 541-B:10) (LexisNexis 2007).

²³⁶ See OHIO REV. CODE ANN. § 2743.48(F)(3) (LexisNexis 2007).

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.²³⁷

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 the court determines will fairly and reasonably compensate such individual,²³⁸ including but not limited to:
 - (a) the amount of any fine, surcharge, other penalty or court costs imposed and paid, and any reasonable attorneys' fees and other

²³⁷ See *id.* at § 2743.48(E)(1).

²³⁸ See N.Y. CT. OF CLAIMS ACT § 8-b(6) (McKinney 2007); W. VA. CODE § 14-2-13a(g) (2007).

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 postconviction relief which are related to the wrongful imprisonment;²³⁹

- (b) 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,²⁴⁰ 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,²⁴¹ including prison labor and involuntary servitude;
- (c) any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction and wrongful imprisonment;²⁴²
- (d) any user's fees or copayments recovered from such individual for services rendered while in the custody of a correctional institution,

²³⁹ See IOWA CODE § 663A.1(6)(a) (2006); OHIO REV. CODE ANN. § 2743.48(E)(2) (LexisNexis 2007).

²⁴⁰ See TENN. CODE ANN. § 40-27-108(a)(7)(A) (2007).

²⁴¹ See MASS. GEN. LAWS ANN. ch. 258D(5)(A) (West 2007).

²⁴² See OHIO REV. CODE ANN. § 2743.48(E)(2)(c) (LexisNexis 2007).

including, but not limited to, medical care, housing, supervision or any other ancillary services.²⁴³

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, 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.²⁴⁴
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.²⁴⁵
6. A judgment or award of damages pursuant to this chapter may not include punitive or exemplary damages.²⁴⁶

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

²⁴³ See *id.* at §§ (E)(2)(d)(i), (ii), and (iii).

²⁴⁴ See ALA. CODE § 29-2-160(d) (2007); IOWA CODE § 663A.1(7) (2006); MASS. GEN. LAWS ANN. ch. 258D(5)(B) (West 2007).

²⁴⁵ See N.J. STAT. ANN. § 52:4C-5(b) (West 2001). The criteria for calculating attorneys' fees may be found in subdivision 4 of Alt. Section 5.

²⁴⁶ See ME. REV. STAT. ANN. tit. 14, §§ 8242-3 (2007); MASS. GEN. LAWS ANN. ch. 258D(5)(A) (West 2007); OKLA. STAT. ANN. tit. 51, § 154(C) (2007); D.C. CODE ANN. § 2-423 (LexisNexis 2007).

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 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.²⁴⁷

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

²⁴⁷ See OHIO REV. CODE ANN. § 2743.48(E)(1) (LexisNexis 2007).

award such sum of money as it determines will equitably²⁴⁸ compensate such individual, including but not limited to:

- (a) 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 postconviction relief which are related to the wrongful imprisonment;
- (b) 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,²⁴⁹ 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;

²⁴⁸ See WIS. STAT. § 775.05(4) (2006).

²⁴⁹ See TENN. CODE ANN. § 40-27-108(a)(7)(A) (2007).

- (c) any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction and wrongful imprisonment;
 - (d) 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.
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.²⁵⁰

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.²⁵¹

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 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.²⁵² 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

²⁵⁰ See N.H. REV. STAT. ANN. § 541-B:18 (LexisNexis 2007).

²⁵¹ See ME. REV. STAT. ANN. tit. 14, §§ 8242-3 (2007); MASS. GEN. LAWS ANN. ch. 258D(5)(A) (West 2007); OKLA. STAT. ANN. tit. 51, § 154(C) (2007); D.C. CODE ANN. § 2-423 (LexisNexis 2007).

²⁵² See MASS. GEN. LAWS ANN. ch. 258D(5)(A) (West 2007).

be heard on whether such agency is the appropriate entity to provide such services if so ordered.²⁵³

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.²⁵⁴
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.²⁵⁵

²⁵³ *See id.*

²⁵⁴ *See* MONT. CODE ANN. §§ 53-1-214(1), (2) (2005); MASS. GEN. LAWS ANN. ch. 258D(5) (West 2007).

²⁵⁵ *See* MONT. CODE ANN. § 53-1-214(4) (2005).

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.²⁵⁶
5. If requested by the individual, the state shall pay the costs of job-skills training for one year.²⁵⁷
6. The court [*or 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.²⁵⁸

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

1. The court [*or the board of claims*] in its discretion may direct payment of compensation in lump sum, installments, or in annuity payments²⁵⁹ 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.²⁶⁰ In determining whether to commute the compensation to a lump

²⁵⁶ See TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(c) (Vernon 2007).

²⁵⁷ See LA. REV. STAT. ANN. § 15:572.8(c)(3)(a) (2007).

²⁵⁸ Innocence Project: Model Statute, *supra* note 35, § 4(B)(4).

²⁵⁹ See TEX. CIV. PRAC. & REM. CODE ANN. § 103.053 (Vernon 2007 and Supp. 2009).

²⁶⁰ See ALA. CODE § 29-2-160 (2007); MD. CODE ANN. STATE FIN. & PROC. §§ 10-501(c), (d)(1)(2) (LexisNexis 2007).

sum payment, the court [*or 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.²⁶¹

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 [*or the board of claims'*] discretion. 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.²⁶²
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.²⁶³
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

²⁶¹ See TENN. CODE ANN. § 40-27-108(a)(7)(D) (2007).

²⁶² See TEX. CIV. PRAC. & REM. CODE ANN. § 103.053 (Vernon 2007 and Supp. 2009).

²⁶³ See ALA. CODE § 29-2-160 (2007).

this chapter prior to his or her death, the estate of such individual shall be eligible to receive said compensation.²⁶⁴ 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 years²⁶⁵ 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, including 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

²⁶⁴ *See id.*

²⁶⁵ *See id.* at § 162; IOWA CODE § 663A.1(8) (2006); MASS. GEN. LAWS ANN. ch. 258D(8) (West 2007); N.Y. CT. OF CLAIMS ACT § 8-b(7) (McKinney 2007); OHIO REV. CODE ANN. § 2743.48(H) (LexisNexis 2007); W. VA. CODE § 14-2-13a(h) (2007).

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.²⁶⁶

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.²⁶⁷

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*

²⁶⁶ See Innocence Project: Model Statute, *supra* note 35, at § 6.

²⁶⁷ *Id.*

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 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 agency's office*] for each such individual.²⁶⁸

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.

²⁶⁸ See OHIO REV. CODE ANN. §§ 2743.48(B)(1) and (2) (LexisNexis 2007).

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 this Act with respect to the filing of an action or proceeding for compensation.²⁶⁹

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.

V. Conclusion

Society is morally obligated to financially compensate and provide services to those who were wrongfully imprisoned. The system must compensate those who fell victims to its inadequacies. The New York City Bar Association 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

²⁶⁹ See generally VA. CODE. ANN. §§ 19.2-327.10, 19.2-327.11, 19.2-327.12, 19.2-327.13.

recommended statute in this Report offers a preliminary framework for a state that does not currently have a statute to compensate the wrongly imprisoned.