

PROTECTING THE INNOCENT: A MODEL FOR COMPREHENSIVE, INDIVIDUALIZED COMPENSATION OF THE EXONERATED

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INTRODUCTION

Tomorrow, for the first time in fifteen years, seven months, and four days, Peter Williams will choose what to wear and what to eat.¹ But those are only the most minor concerns facing Peter, who is less than a day away from being released from state prison after being exonerated through DNA evidence. Peter is thirty-eight years old; he entered prison when he was twenty-two. He has obtained his GED² during his incarceration. Before his wrongful conviction, he dropped out of high school and bounced from job to job, finally finding steady work at a hardware store. He had a few arrests for disorderly conduct and pleaded guilty to a charge of driving while intoxicated. Peter has a son, Toby, whom he has not seen since Toby was three years old.

While Peter cannot express the depth of his relief that the criminal justice system has finally recognized his innocence, he faces tomorrow with some trepidation. He knows that his incarceration has changed him and that life outside of the prison adapted to his absence long ago. He has no job, little employment history, no college degree,

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1. Peter Williams is not a real person. He instead serves as a representative figure for all of the individuals exonerated after wrongful convictions.

2. General Educational Development (GED) tests are a battery of five tests which, when passed, certify that the person has American high school-level academic skills. State of New Jersey, Department of Education, Tests of General Education Development (GED), What are the new GED Tests? (2002), <http://www.state.nj.us/education/students/ged/ged9.htm> (last visited May 20, 2008).

and almost no money. While the members of his family have remained supportive, none of them have enough space in their homes to offer him somewhere to stay for any length of time. He has developed an anxiety disorder since his incarceration; the medical unit of the prison has provided him with a sixty-day supply of his anti-anxiety medication.

Peter knows that he can never get back the years that he lost through his wrongful conviction, but he hopes to begin his life anew. He wants a job, a place to live, and an opportunity to reconnect with Toby. He dreams of getting married and having a few dogs. He wants to learn how to use a computer and get a cell phone (he saw his attorney's cell phone and has craved one of his own ever since). He has no idea how to begin this process.

The obstacles facing Peter are no different from those that challenge the more than 650,000 individuals who are released from prison and jail each year and return to their communities.³ Almost all formerly incarcerated individuals encounter some struggles in the reentry process, as evidenced by the three-year rearrest rate of sixty-seven percent⁴ and the programs established to meet the needs of these individuals.⁵ Yet Peter's case differs in one core aspect—through the action of the state, he was wrongfully convicted and incarcerated for a crime that he did not commit. Peter's lawyer has told him that he can attempt to seek indemnification for his wrongful conviction through a private bill, litigation, or a compensation statute.⁶ His lawyer also warned him that, combining the success rates from all three of these presently existing remedies, fewer than thirty-three percent of exonerated individuals receive relief for their wrongful incarcerations.⁷

Defining exonerees as "individuals . . . who have been convicted of crimes they did not commit, [who] manage to win release from

3. See, e.g., AMY L. SOLOMON ET AL., URBAN INST., UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO 2 (2006), available at http://www.urban.org/UploadedPDF/411289_reentry_portfolio.pdf.

4. *Id.*

5. For a list of sample programs, see AMY L. SOLOMON ET AL., URBAN INST., OUTSIDE THE WALLS: A NATIONAL SNAPSHOT OF COMMUNITY-BASED PRISONER REENTRY PROGRAMS 4–5 (2004), available at http://www.urban.org/UploadedPDF/410911_OTWResourceGuide.pdf.

6. As of this writing, twenty-two states, the District of Columbia, and the federal government have compensation statutes. See The Innocence Project – News and Information: Fact Sheets, <http://www.innocenceproject.org/Content/309.php> (last visited Nov. 20, 2007); 28 U.S.C. § 2513 (2000 & Supp. V 2005).

7. BARRY SCHECK, PETER NEUFELD, & JIM DWYER, ACTUAL INNOCENCE 298 (New Am. Library 2003).

prison after having proven their innocence,” one organization estimates the number of the exonerated at over 400.⁸ Exonerees prove their *actual* innocence (that they did not commit the crime in question), not simply their *legal* innocence (that their conviction was overturned on appeal because of a procedural error). Just counting those who have established their actual innocence through the use of DNA evidence, the total is 210 as of December 2007.⁹ While this number pales in comparison to the over 650,000 released from prison or jail every year, wrongful incarceration can have devastating economic, social, and psychological consequences not just on the incarcerated but also on their families and communities.¹⁰

This Note explores the woeful relief rate of the current remedies for wrongful incarceration—as well as the inadequacy of relief for even successful claimants—and calls for a new, comprehensive, individualized form of compensation for Peter and other exonerees. Part I outlines the existing alternatives by which Peter could receive compensation. Part II examines existing state compensation statutes and two model comprehensive compensation statutes, identifying their strengths and revealing how they fail to attain their goals. Part III proposes delivering comprehensive compensation through an individualized reentry plan, modeled on the individualized education plan developed in the Individuals with Disabilities Education Act.¹¹ Part IV explores at which level of government, federal or state, this new comprehensive compensation statute should be enacted.

I.

EXISTING REMEDIES

Exonerated individuals can presently receive compensation for their wrongful incarceration through private bills, litigation, and compensation statutes. The first route allows an exoneree to approach his

8. Life After Exoneration Program, The Exonerated, http://www.exonerated.org/j/index.php?option=com_content&task=blogcategory&id=16&Itemid=56 (last visited Dec. 30, 2007).

9. Innocence Project, Innocence Project Case Profiles, <http://www.innocenceproject.org/know/> (last visited Dec. 30, 2007).

10. For example, the incarceration of parents “disrupts parent-child relationships, alters the networks of familial support, and places new burdens on governmental services such as schools, foster care, adoption agencies, and youth-serving organizations.” JEREMY TRAVIS ET AL., URBAN INST., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 1 (2005), available at http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf. This constellation of harm is more tragic when an innocent parent was wrongfully convicted.

11. See 20 U.S.C. § 1414–1482 (2000 & Supp. V 2005).

state legislature for a private bill¹² that will individually compensate him for his incarceration.¹³ This approach has a very low success rate, mostly benefiting those exonerees who are well-connected or whose cases generated a great deal of political attention.¹⁴ As Professor Adele Bernhard explains, an exoneree seeking compensation through a private bill also faces serious additional challenges. Some states have interpreted their constitutions to bar private bills that benefit individuals.¹⁵ Even in those states that permit the use of private bills, the legislative process can take many years.¹⁶ Whether such a bill passes depends on speeches by legislators, which are not submitted to a fact-finding process, and the approval of the governor, which may depend finally on the condition of the state's treasury.¹⁷

Litigation encompasses a number of distinct claims, all of which must overcome substantial obstacles. Legal theories used to win compensation in court include claims against police or prosecutors under § 1983 for violation of the exoneree's constitutional rights;¹⁸ mali-

12. A private bill is "a bill relating to a matter of personal or local interest only." BLACK'S LAW DICTIONARY 175 (8th ed. 2004). Also described as a moral obligation bill, such bills are "specially drafted acts generally used to pay otherwise unenforceable claims on behalf of individuals harmed by the state." Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 93 (1999) [hereinafter Bernhard, *When Justice Fails*]. Moral obligation bills have been used to compensate the wife of a sheriff killed by a man in his custody and a child injured while in the state's custody. *Id.* at 94.

13. See Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 698 (2002); *Legislature 2007: IN BRIEF: Senate OKs \$1.2 Million to Freed Man*, ATLANTA J.-CONST., Apr. 11, 2007, at B4 (discussing the unanimous passage of the resolution to award exoneree Robert Clark \$1.2 million in the Georgia Senate).

14. See Lopez, *supra* note 13, at 700; Shawn Armbrust, Note, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 166 (2004); Michael Higgins, *Tough Luck for the Innocent Man*, A.B.A. J., Mar. 1999, at 46, 50; Bernhard, *When Justice Fails*, *supra* note 12, at 94–95.

15. Bernhard, *When Justice Fails*, *supra* note 12, at 94.

16. *Id.* at 95.

17. *Id.* at 95–96.

18. 42 U.S.C. § 1983 "creates a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution and laws of the United States." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 480 (5th ed. 2007). It allows an individual to bring a suit in federal court alleging that a state official, acting pursuant to state government authority, has violated her federal rights. *Id.* The Supreme Court has described the purpose of § 1983 as "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (citation omitted).

cious prosecution, a tort claim;¹⁹ and ineffective assistance by defense counsel.²⁰ If these claims are not time-barred by statutes of limitations, wrongly convicted individuals still must overcome the doctrines of absolute and qualified immunity, which protect prosecutors and other state actors.²¹ For example, one common § 1983 claim that an exoneree could bring is to argue that the police lacked probable cause to conduct a search or to arrest him, violating the Fourth and Fourteenth Amendments.²² Probable cause is a fairly low standard assessed upon the totality of circumstances and established where there is a “fair probability that contraband or evidence of a crime will be found in a particular place.”²³ Once probable cause exists, an officer is shielded from liability under § 1983 as long as she acts in good faith.²⁴ “Given the low threshold of probable cause and that police officers need only to act in ‘good faith’ to escape liability,” an exoneree’s suit to recover compensation based on a lack of probable cause has a low likelihood of success.²⁵ Other bases for § 1983 suits and tort claims face comparable hurdles.

Compensation statutes are codified provisions that specifically grant monetary compensation to people wrongly convicted of crimes. As of this writing, twenty-two states, the District of Columbia, and the federal government have enacted these statutes.²⁶

19. Establishing malicious prosecution requires the proof of four elements: “(1) the initiation or continuation of a lawsuit; (2) lack of probable cause; (3) malice; and (4) favorable termination of the lawsuit.” BLACK’S LAW DICTIONARY 977–78 (8th ed. 2004).

20. Lopez, *supra* note 13, at 690.

21. See Armbrust, *supra* note 14, at 163–64.

22. Lopez, *supra* note 13, at 691.

23. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); see also *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

24. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

25. Lopez, *supra* note 13, at 692–93.

26. See ALA. CODE §§ 29-2-150 to -165 (LexisNexis 2003); CAL. PENAL CODE §§ 4900–4906 (West 2000 & Supp. 2007); D.C. CODE ANN. §§ 2-421 to -425 (LexisNexis 2005); 705 ILL. COMP. STAT. ANN. 505/8-c (West 2007); IOWA CODE ANN. § 663A.1 (West 1998); LA. REV. STAT. ANN. § 15:572.8 (Supp. 2007); ME. REV. STAT. ANN. tit. 14, §§ 8241–8244 (2003); MD. CODE ANN. STATE FIN. & PROC. § 10-501 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 258D, §§ 1–9 (West Supp. 2007); MO. ANN. STAT. § 650.058 (West Supp. 2007); MONT. CODE ANN. § 53-1-214 (2007); N.H. REV. STAT. ANN. § 541-B:14 (LexisNexis Supp. 2006); N.J. STAT. ANN. §§ 52:4C-1 to -6 (West 2001); N.Y. CT. CL. ACT § 8-b (McKinney 1989); N.C. GEN. STAT. ANN. §§ 148-82 to -84 (West 2000 & Supp. 2006); OHIO REV. CODE ANN. §§ 2743.48–.49 (West 2006 & Supp. 2007); OKLA. STAT. ANN. tit. 51, § 154 (West Supp. 2007); TENN. CODE ANN. § 9-8-108 (Supp. 2006); TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001–.003, .051–.052, .101–.105, .151–.154 (Vernon 2005); VT. STAT. ANN. tit. 13, §§ 5572–77 (Supp. 2007); VA. CODE ANN. §§ 8.01-195.10 to -12

Numerous scholars concur that for reasons of fundamental fairness,²⁷ uniform treatment of similarly situated individuals,²⁸ and ease of access,²⁹ compensation statutes present the best choice among the existing remedies. Described as “accessible, reliable, and swift,” compensation statutes provide compensation based on the fact of wrongful conviction rather than some wrongdoing by the state or the political clout of the exoneree or his advocates.³⁰ Statutes acknowledge the reality that some wrongful convictions result from honest mistakes, a contingency unaddressed by the litigation alternative.³¹ Even in those cases where malice or negligence by the police or prosecutor arguably occurred, such misconduct is very difficult to prove. While they differ across jurisdictions, in general, compensation statutes require that a claimant establish his actual innocence to a certain standard of proof and show that he spent some time wrongfully incarcerated.³²

In addition to the difficulties posed by litigation, a number of states have deemed private bills unconstitutional under their respective state constitutions.³³ Some state legislatures, in the enacting paragraph of their compensation statutes, expressly acknowledge that they have passed this legislation in response to the inadequacies of other forms of relief.³⁴ New York’s statute opens with a legislative finding that:

[I]nnocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages.³⁵

(2007); W. VA. CODE ANN. § 14-2-13a (LexisNexis 2004); WIS. STAT. ANN. § 775.05 (West 2001); 28 U.S.C. § 2513 (2000 & Supp. V 2005).

27. Ashley H. Wisneski, Comment, *‘That’s Just Not Right’: Monetary Compensation for the Wrongly Convicted in Massachusetts*, 88 MASS. L. REV. 138, 147–48 (2004).

28. Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 708 (2004) [hereinafter Bernhard, *Justice Still Fails*].

29. Lopez, *supra* note 13, at 704.

30. Bernhard, *When Justice Fails*, *supra* note 12, at 101.

31. See Lopez, *supra* note 13, at 704–05.

32. See *infra* Part II.A.i.

33. John J. Johnston, Note, Reasonover v. Washington: *Toward a Just Treatment of the Wrongly Convicted in Missouri*, 68 UMKC L. REV. 411, 415–16 (2000).

34. See, e.g., N.J. STAT. ANN. § 52:4C-1 (West 2001); N.Y. CT. CL. ACT § 8-b(1) (McKinney 1989); W. VA. CODE ANN. § 14-2-13a(a) (LexisNexis Supp. 2004).

35. N.Y. CT. CL. ACT § 8-b(1). See also Higgins, *supra* note 14, at 50 (quoting Ohio Representative Vernon Sykes, who sponsored a bill in Ohio to allow exonerees to sue the state because private bills made him feel “very uncomfortable . . . [because]

Massachusetts' statute, sponsored by Republican Representative Cele Hahn, was also a deliberate response to the inequities of private bills and the difficulties of litigation.³⁶ In addition to a monetary award, the statute provides for limited physical and emotional health care, a tuition discount, and expungement of the exoneree's criminal record.³⁷ Including these provisions was a deliberate choice on the part of Representative Hahn, who wanted the bill to provide restitution in a broad sense.³⁸

Despite legislative recognition of the superiority of compensation statutes to alternative avenues of relief, these statutes present their own substantial difficulties. While compensation statutes do achieve uniformity within a state, they have not resulted in national uniformity regarding either the monetary amount of compensation received or the hurdles that the exoneree must clear in order to be deemed eligible. Although our federalist system has typically delegated decisions of criminal justice policy to the several states,³⁹ under the existing compensation statutes, the treatment of people wrongfully convicted in different states has reached an extreme level of disparity, with some states lagging far behind in the compensation that they award to exonerees. The statutes grant a sum per day,⁴⁰ a sum per year,⁴¹ a maxi-

[p]eople shouldn't have to come to us to make pleas for consideration on individual cases."). C. Ronald Huff, a professor at Ohio State University, described "[t]he new system [a]s an improvement." *Id.* Huff continued: "In the old days, most people got nothing because they couldn't get a special bill through. . . . Then somebody would get a million dollars, which the state doesn't like because they can't budget for it." *Id.*

36. See Cele Hahn, *Going to Bat for an Ex-Con*, Aug. 17, 2002, <http://www.celehahn.org/Columns020304/Celecolumns081702.html> (referencing one exoneree who received a \$500,000 annuity and one who received nothing); Kathleen Burge, *The Price of Injustice Debt to those Wrongly Jailed Stirs Debate*, BOSTON GLOBE, May 29, 2001, at B1 (identifying a Massachusetts exoneree who did not have any grounds for bringing a lawsuit for compensation).

37. MASS. GEN. LAWS ANN. ch. 258D, §§ 5(A), 7 (West Supp. 2007).

38. Hahn, *supra* note 36 (mentioning specifically education, record expungement, and free counseling).

39. See *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law.").

40. CAL. PENAL CODE § 4904 (West 2000 & Supp. 2007) (granting \$100 per day); IOWA CODE ANN. § 663A.1(6)(b) (West 1998) (granting \$50 per day); MO. REV. STAT. § 650.058(1) (West Supp. 2007) (granting \$50 per day, with no more than \$36,500 paid out in any fiscal year).

41. ALA. CODE § 29-2-159(a) (LexisNexis 2003) (granting \$50,000 per year served); LA. REV. STAT. ANN. § 15:572.8(C)(3) (Supp. 2007) (granting \$15,000 per year, not to exceed a total of \$150,000); N.C. GEN. STAT. § 148-84 (West 2000 & Supp. 2006) (granting \$20,000 per year); VT. STAT. ANN. tit. 13, § 5574(b) (Supp. 2007) (granting between \$30,000 and \$60,000 per year); WIS. STAT. ANN. § 775.05(4) (West 2001) (granting \$5,000 per year); 28 U.S.C. § 2513(e) (2000 & Supp. V 2005)

imum of \$20,000,⁴² a maximum of \$1,000,000,⁴³ or provide only vague guidance,⁴⁴ or no guidance at all,⁴⁵ on the question of damages. Montana, uniquely, provides only educational aid at the state's expense.⁴⁶

The statutes also differ in the eligibility requirements that they impose before a claimant may receive compensation. Illinois, Maryland, and North Carolina demand a full pardon from the governor,⁴⁷ while Maine mandates both a pardon and a judicial finding of innocence.⁴⁸ Missouri's compensation statute, passed in 2005, awards compensation only to individuals exonerated through the use of DNA evidence.⁴⁹ According to Missouri Senator Jason Crowell, "the primary goal of the legislation was to expand DNA testing to solve crimes," with compensation of those exonerated only a secondary goal.⁵⁰

If Peter had been convicted and imprisoned in Illinois, first he would have to receive a pardon from the Governor based on innocence.⁵¹ For his fifteen-year imprisonment, he would receive a maximum of \$35,000 and attorney's fees of no more than \$8,750 (these amounts would be slightly adjusted for inflation).⁵² In Iowa, however,

(granting \$100,000 per year for any plaintiff unjustly sentenced to death and \$50,000 per year for any other plaintiff).

42. N.H. REV. STAT. ANN. § 541-B:14(II) (LexisNexis Supp. 2006).

43. TENN. CODE ANN. § 9-8-108(a)(7)(A) (Supp. 2006).

44. MD. CODE ANN. STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2006) ("[T]he Board of Public Works may grant to an individual erroneously convicted, sentenced, and confined under State law . . . an amount commensurate with the actual damages sustained by the individual, and may grant a reasonable amount for any financial or other appropriate counseling for the individual, due to the confinement.").

45. D.C. CODE ANN. § 2-423 (LexisNexis 2005); N.Y. CT. CL. ACT § 8-b(6) (McKinney 1989); W. VA. CODE ANN. § 14-2-13a(g) (LexisNexis Supp. 2004).

46. MONT. CODE ANN. § 53-1-214(1) (2007).

47. 705 ILL. COMP. STAT. ANN. 505/8-c (West 2007); *Young v. State*, 32 Ill. Ct. Cl. 78, 78 (1978); MD. CODE ANN. STATE FIN. & PROC. § 10-501(b) (LexisNexis 2006); N.C. GEN. STAT. § 148-82 (West 2000 & Supp. 2006); *Ross v. State*, 2005 WL 1691080 at *1 (N.C. Ind. Com. 2005).

48. ME. REV. STAT. ANN. tit. 14, § 8241(2)(C)–(D) (2003).

49. MO. ANN. STAT. § 650.058(1) (West Supp. 2007). *See also* VT. STAT. ANN. tit. 13, § 5574(a)(3) (Supp. 2007) (granting compensation only if "DNA evidence establishes that the complainant did not commit the crime for which he or she was sentenced").

50. Robert Patrick, *Missouri Pays Man Imprisoned For Rape He Didn't Commit*, ST. LOUIS POST-DISPATCH, Aug. 27, 2005, at A8. Before he would vote for the bill, Senator Crowell also demanded the removal of a provision awarding compensation retroactively for those exonerated through the use of DNA evidence before the passage of Missouri's statute. Bill McClellan, *A Just Cause Loses a Champion with Rep. Byrd's Death*, ST. LOUIS POST-DISPATCH, May 22, 2005, at C1.

51. 705 ILL. COMP. STAT. ANN. 505/8-c (West 2007).

52. *Id.*

Peter must have his conviction judicially vacated or reversed based on clear and convincing evidence.⁵³ He must also prove that he did not plead guilty to the offense and that no further proceedings could be held against him relating to the offense in question.⁵⁴ Having surmounted both of those barriers, Peter would be eligible for a liquidated damages award of \$293,450, up to \$389,583 in lost wages directly related to the conviction, and “reasonable” attorney’s fees.⁵⁵

While the disparity in the current state statutes results in some exonerees receiving very little compensation, the statutes’ key flaw is that, to a great extent, they deliver only monetary relief. As Peter’s story and the experience of other exonerees demonstrate, people reentering society after incarceration face obstacles that cannot be overcome simply through financial means.⁵⁶ When Larry Fuller was exonerated in Texas on November 1, 2006, three other Texas exonerees in attendance at the exoneration hearing “said they have had a hard time finding work and getting on with their lives since their release from prison.”⁵⁷ One of them described himself as “still struggling, trying to find a place to stay, employment, health insurance.”⁵⁸ Some of the state statutes recognize these difficulties facing exonerees and the shortcomings of a purely financial remedy, serving as hints of what a new, comprehensive compensation statute must provide.

II.

EXISTING AND MODEL COMPENSATION STATUTES: CRITIQUES AND PROPOSALS

An examination of the successes and flaws of existing state compensation statutes serves as a foundation from which to construct a truly comprehensive model statute. In 2005, based on a study of current compensation statutes, the American Bar Association (ABA) drafted a recommendation “urg[ing] jurisdictions to consider [certain]

53. IOWA CODE ANN. §§ 663A.1(d), 663A.2 (West 1998).

54. *Id.* §§ 663A.1(b), (d).

55. *Id.* §§ 663A.6(b) (awarding \$50 per day for 15 years, 7 months (at 30 days a month), and 4 days), 663A.6(c) (awarding up to \$25,000 in lost wages per year of incarceration), 663A.6(d).

56. *See* The Innocence Project – News and Information: Fact Sheet, *supra* note 6 (detailing the needs of the wrongfully convicted). *See also* Dan Horn, *The Truth Set Him Free; Freedom Broke His Heart*, CINCINNATI ENQUIRER, Sept. 14, 2003, at A1 (telling the story of Johnny Reeves, an Ohio man exonerated after serving ten years in prison, who only a year and a half after receiving \$380,000 in compensation from the Ohio Court of Claims was living paycheck to paycheck).

57. Robert Tharp, *Innocent Man Released after 25 Years in Prison: Dallas: Lawyer Urges Review of Legal System*, KNIGHT RIDDER TRIB. BUS. NEWS, Nov. 1, 2006, at 1.

58. *Id.*

factors in drafting a compensation statute.”⁵⁹ The Innocence Project (IP), an organization dedicated to exonerating wrongly convicted individuals through the use of DNA evidence,⁶⁰ drafted a model statute in 2007.⁶¹ This Part analyzes and critiques the existing state compensation statutes, the ABA’s recommendation, and the IP’s model statute; suggests justifications for their provisions; and examines the questions that legislators must ask in the process of drafting a compensation statute. In light of these considerations, this Part also proposes revised model provisions.

A. Eligibility

First, the legislature must determine who will be eligible for relief under its compensation statute. Current statutes split regarding the conditions precedent for relief, with some states requiring that the conviction be judicially vacated on the grounds of innocence⁶² and others demanding gubernatorial pardons.⁶³ Mandating executive clemency, an inherently political decision, detracts from the goal of uniform treatment.⁶⁴ In the wrangling over the passage of Massachusetts’ compensation statute in 2004, Governor Mitt Romney proposed that a claimant should have to obtain both a judicial exoneration and a gubernatorial pardon in order to receive compensation.⁶⁵ This change “would have effectively made the governor a gate-keeper for any compensation under the bill, and it was . . . opposed by the Legislature.”⁶⁶

59. AM. BAR ASS’N, SECTION OF CRIM. JUSTICE, REPORT TO THE HOUSE OF DELEGATES 1 (2005), available at <http://www.abanet.org/crimjust/policy/my05108a.pdf> [hereinafter ABA REPORT].

60. The Innocence Project – About Us: Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Nov. 26, 2007).

61. Innocence Project, Model Legislation, 2007 State Legislative Sessions, http://www.innocenceproject.org/docs/Model_Compensation_Statute.pdf [hereinafter IP Model Legislation].

62. ALA. CODE § 29-2-157 (LexisNexis 2003); IOWA CODE ANN. § 663A.1(2) (West 1998); LA. REV. STAT. ANN. § 15:572.8(A) (Supp. 2007); MONT. CODE ANN. § 53-1-214(1) (2007); N.J. STAT. ANN. § 52:4C-3 (West 2001); OHIO REV. CODE ANN. § 2743.48(A)(4) (West 2006 & Supp. 2007); WIS. STAT. ANN. § 775.05(3) (West 2001).

63. 705 ILL. COMP. STAT. ANN. 505/8-c (West 2007); ME. REV. STAT. ANN. tit. 14, § 8241(2)(C) (2003) (Maine’s statute requires a judicial finding in addition to a pardon. *Id.* § 8241(2)(D)); MD. CODE ANN. STATE FIN. & PROC. § 10-501(b) (LexisNexis 2006); N.C. GEN. STAT. ANN. § 148-82 (West 2000).

64. ABA REPORT, *supra* note 59, at 6.

65. Ralph Ranalli, *Bill Would Compensate Wrongly Convicted*, BOSTON GLOBE, Dec. 24, 2004, at B1.

66. *Id.*

In accordance with these views, the IP model statute encompasses both pardons and judicial findings, requiring that the claimant establish by documentary evidence that: “On grounds consistent with innocence: a. He was pardoned for the crime or crimes for which he was sentenced and which are the grounds for the complaint; [or] b. The judgment of conviction was reversed or vacated.”⁶⁷ The language of this provision of the IP model statute is expansive, encompassing all forms of relief based on actual innocence and ensuring uniform treatment for all wrongly convicted individuals who can satisfactorily establish their innocence.

1. *Burden of Proof*

With a few exceptions, the existing compensation statutes that designate a burden of proof require clear and convincing evidence of the claimant’s innocence.⁶⁸ Vermont imposes a preponderance burden by statute,⁶⁹ as does Texas if a claimant opts to pursue litigation against the state rather than administratively awarded compensation (the statute provides for both alternatives).⁷⁰ Ohio has a lower burden—preponderance of the evidence—imposed by the courts rather than the express wording of the statute.⁷¹ The IP model statute also proposes a preponderance burden.⁷²

The higher burden of proof may be appropriate for establishing the claimant’s innocence as the criminal justice system has a strong interest in the finality of convictions.⁷³ Additionally, legislators and

67. IP Model Legislation, *supra* note 61, § 2(A)(2).

68. D.C. CODE ANN. § 2-422(2) (LexisNexis 2005); IOWA CODE ANN. § 663A.1(2) (West 1998); LA. REV. STAT. ANN. § 15:572.8(A)(2) (Supp. 2007); ME. REV. STAT. ANN. tit. 14, § 8241(2) (2003); MASS. GEN. LAWS ANN. ch. 258D, § 1(C) (West Supp. 2007); N.J. STAT. ANN. § 52:4C-1 (West 2001); N.Y. CT. CL. ACT § 8-b(1) (McKinney 1989); W. VA. CODE ANN. § 14-2-13a(f) (LexisNexis 2004); WIS. STAT. ANN. § 775.05(3) (West 2001). *See also* State v. Dohlman, 725 N.W.2d 428, 432 (Iowa 2006) (holding that a claimant must prove his innocence by clear and convincing evidence).

69. VT. STAT. ANN. tit. 13, § 5574(a) (Supp. 2007).

70. TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.102, 103.002 (Vernon 2005).

71. Walden v. State, 547 N.E.2d 962, 968 (Ohio 1989) (holding that a claimant must prove his innocence by a preponderance of the evidence); Ratcliff v. State, 640 N.E.2d 560, 562 (Ohio Ct. App. 1994).

72. IP Model Legislation, *supra* note 61, § 4(A).

73. *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 555 (1998) (“Finality is essential to both the retributive and the deterrent functions of criminal law.”); Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) (“[T]he State . . . [has an] interest in the finality of convictions that have survived direct review within the state court system.”); McCleskey v. Zant, 499 U.S. 467, 491 (1991) (“One of the law’s very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known.”); Teague v. Lane, 489 U.S. 288, 309 (1989)

the public may fear false positives (legitimate convictions found to be false) more than false negatives (wrongful convictions found to be lawful).⁷⁴ This higher burden of proof is unlikely to adversely affect meritorious claims of innocence. In a thorough study of wrongful convictions, Professor Bernhard failed to find a single case that was dismissed due to the “burden of proof or where the burden was even discussed as claim determinative.”⁷⁵

2. *Guilty Pleas and False Confessions*

Legislators must also consider whether the claimant’s behavior at the trial that resulted in his wrongful conviction should affect his eligibility for relief. In an express reaction to the many states that expressly or implicitly bar claims from exonerees who pled guilty or falsely confessed to the crime,⁷⁶ the IP model statute carefully delineates the species of misconduct that will render a claimant ineligible for

(“[T]he principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.”).

74. See Bernhard, *When Justice Fails*, *supra* note 12, at 108 (The clear and convincing standard “may be reassuring to lawmakers and the general public.”).

75. *Id.* See also Jonathan L. Entin, *Being the Government Means (Almost) Never Having to Say You’re Sorry: The Sam Sheppard Case and the Meaning of Wrongful Imprisonment*, 38 AKRON L. REV. 139, 164–65 (2005) (“[I]t is not at all clear that choosing the preponderance standard [in Ohio] rather than a higher one has made any difference to the resolution of wrongful-imprisonment claims.”).

76. ALA. CODE § 29-2-156(2) (LexisNexis 2003) (“incarcerated . . . through no fault of his or her own”); CAL. PENAL CODE § 4903 (West 2000 & Supp. 2007) (“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”); D.C. CODE ANN. § 2-422(2) (LexisNexis 2005) (“he did not, by his misconduct, cause or bring about his own prosecution”); IOWA CODE ANN. § 663A.1(1)(b) (West 1998) (no guilty pleas); MASS. GEN. LAWS ANN. ch. 258D, § 1(C)(iii) (West Supp. 2007) (no guilty pleas); N.J. STAT. ANN. § 52:4C-3(c) (West 2001) (“not by his own conduct cause or bring about his conviction”); N.Y. CT. CL. ACT § 8-b(4)(b) (McKinney 1989) (“not by his own conduct cause or bring about his conviction”); OHIO REV. CODE ANN. § 2743.48(A)(2) (West 2006 & Supp. 2007) (no guilty pleas); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(b) (West Supp. 2007) (no guilty pleas); VA. CODE ANN. § 8.01-195.10(B) (2007) (“[he] did not by any act or omission on his part intentionally contribute to his conviction”); W. VA. CODE ANN. § 14-2-13a(e) (LexisNexis 2004) (“he did not by his own conduct cause or bring about his conviction”); WIS. STAT. ANN. § 775.05(4) (West 2001) (“he or she did not by his or her act or failure to act contribute to bring about the conviction”); 28 U.S.C. § 2513(a)(2) (2000 & Supp. V 2005) (“he did not by misconduct or neglect cause or bring about his own prosecution”). See also Ciancanelli v. Bd. of Control, 56 Cal. Rptr. 738, 740 (Cal. Ct. App. 1967) (holding that under Cal. Penal Code § 4903, a claimant must also prove that he did not intentionally or negligently contribute to his conviction); State v. Moore, 847 N.E.2d 452, 457 (Ohio Ct. App. 2006) (holding that, while a valid guilty plea will preclude recovery, a void guilty plea does not disqualify a claimant from compensation under OHIO REV. CODE § 2743.48).

compensation: “He did not commit or suborn perjury, or fabricate evidence to cause or bring about his conviction. Neither a confession, admission or dream statement later found to be false nor a guilty plea to a crime the claimant did not commit constitutes perjury under this clause.”⁷⁷ The ABA also recommends that a guilty plea or a false confession should not serve as an automatic bar to recovery.⁷⁸

It may appear that a claimant contributed to the errors that resulted in his wrongful conviction through a false guilty plea or false confession and should not be permitted to recover damages, but this is an overly simplistic understanding given the troubling phenomena of false confessions and guilty pleas.⁷⁹ Even truly innocent defendants sometimes plead guilty, often at the urging of counsel or to avoid the heavier sentence that could be imposed if found guilty at trial.⁸⁰ A guilty plea thus is indicative of neither participation in the crime charged nor bad faith conduct during the criminal investigation and plea bargaining process.⁸¹

IP data concerning false confessions demonstrates why they also should not preclude receipt of compensation. The psychological techniques that police use to induce guilty suspects to confess can also cause innocent individuals to confess falsely.⁸² The IP found that over one quarter of the exonerations studied were based on false confessions.⁸³ Juveniles are particularly susceptible to certain police tactics, rendering them more likely to confess to crimes that they did not commit.⁸⁴

False confessions and guilty pleas should bar recovery only if a factual analysis reveals that the claimant intended, through his plea or confession, to impede the investigation, prevent another individual from being charged with the crime, or otherwise manipulate the po-

77. IP Model Legislation, *supra* note 61, § 2(B)(2).

78. ABA REPORT, *supra* note 59, at 1.

79. Shelley Fite, Comment, *Compensation for the Unjustly Imprisoned: A Model for Reform in Wisconsin*, 2005 WIS. L. REV. 1181, 1210–11 (2005).

80. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 477–79 (1998) (finding that in twelve percent of the cases reported in the article, individuals confessed falsely in order to avoid harsher punishment); Bernhard, *Justice Still Fails*, *supra* note 28, at 721.

81. Bernhard, *Justice Still Fails*, *supra* note 28, at 721.

82. SCHECK ET AL., *supra* note 7, at 116.

83. *Id.* at 120.

84. See Jessica Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions about Maturity and Morality*, 61 AM. PSYCHOLOGIST 286, 291 (2006).

lice.⁸⁵ The burden of proof to establish such intentional misconduct must rest with the state. As an innocent person will rarely confess to a crime in the absence of some form of coercion, legislation should create a presumption in favor of the claimant, which the state must overcome to prohibit recovery.

3. *Prior Criminal History*

An issue addressed by a number of the state statutes is the implication of other criminal convictions on eligibility for relief. While some of the state statutes and the ABA recommendation preclude any recovery at all for a claimant who served concurrent sentences but was only exonerated of one of the crimes,⁸⁶ Louisiana's statute takes a more reasonable approach, reducing the amount of compensation received by the amount of time served as a sentence for the other crime.⁸⁷ This rule for concurrent sentences would also apply to crimes committed during incarceration.⁸⁸

Professor Bernhard argues that courts should have the power to adjust damages based on an exoneree's prior criminal record,⁸⁹ but her proposal creates the opportunity for the arbitrary exercise of discretion. Judges might weigh criminal histories differently, detracting from the ultimate goal of uniform treatment. Moreover, even if a claimant had a criminal record before his wrongful conviction, this does not decrease the harm imposed by the state. Lost years are lost years regardless of an individual's past history.

85. Bernhard, *Justice Still Fails*, *supra* note 28, at 721. Examples of the kinds of manipulation that should prevent compensation can be found in Vermont's statute, which does not bar recovery based on guilty pleas or false convictions, but does demand that the "complainant did not fabricate evidence or commit or suborn perjury." VT. STAT. ANN. tit. 13, § 5574(a)(4) (Supp. 2007).

86. IOWA CODE ANN. § 663A.1(1)(e) (West 1998); MASS. GEN. LAWS ANN. ch. 258D, § 1(C)(v) (West Supp. 2007); OKLA. STAT. ANN. tit. 51, § 154(B)(2)(d) (West Supp. 2007); ABA REPORT, *supra* note 59, at 1, 8.

87. LA. REV. STAT. ANN. § 15:572.8(C)(5) (Supp. 2007).

88. Crimes committed during incarceration potentially raise difficult questions, especially if the crime committed in prison bears a longer sentence than did the wrongful conviction. In such a situation, even once the individual was exonerated of the original crime, he would still have to spend additional time in prison as a result of the second offense, which he committed only because he was initially wrongfully incarcerated. Particularly if the in-prison crime was in reaction to the violence inherent in incarceration, the exoneree could argue that he was led to commit the second crime by the state's wrongful action.

89. Bernhard, *Justice Still Fails*, *supra* note 28, at 721–22, 722 n.99 (citing Johnson v. State, 588 N.Y.S.2d 722, 725 (Ct. Cl. 1992), in which the court awarded only \$40,000 for wrongful confession in light of the claimant's criminal history).

According to the theoretical underpinnings of incarceration, once an individual is released from prison and parole, he has served his debt to society and should no longer be punished.⁹⁰ Reducing a wrongfully convicted individual's compensation award because of past crimes runs counter to this theory. American criminal jurisprudence is averse to the use of an individual's past acts or criminal convictions in the determination of guilt or innocence.⁹¹ The policy underlying the principle that a prior conviction cannot be used to establish guilt—where it may have some probative value—also dictates that past criminal history should not enter into the calculation of compensation. While it is reasonable for a statute to reduce compensation for the years served on a concurrent sentence, these considerations weigh against reducing the financial compensation and other assistance given to exonerees with prior criminal histories.

4. *Statute of Limitations*

Every existing statute and the two models impose a statute of limitations in which the claimant must file or be ineligible for relief. The limitations period ranges from six months⁹² to any time preceding the death of the claimant.⁹³ The IP model statute's period of three years⁹⁴ is perhaps longer than truly necessary for an exoneree to find an attorney and file a claim, particularly as most already have attorneys to assist them with the exoneration process itself.⁹⁵ In these compensation cases, the claimants do not need any time to discover the injury, as the harm is clear at the moment of exoneration, as is the right to compensation if the exoneree is properly instructed by the judge who presides over the exoneration hearing. Both the claimant and the state have an interest in the quick resolution of wrongful conviction cases—the state seeks closure, while the claimant needs the compensation award to begin rebuilding his life. Yet claimants may need some time to build a case demonstrating their innocence through clear and convincing evidence. Weighing these factors, while a three-

90. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 136 (2003) (“[A]n American ideal is that a criminal who has finished his term of criminal supervision has ‘paid his debt to society’ and is seen as fit to rejoin it.”).

91. See *People v. Zackowitz*, 172 N.E. 466, 468 (1930) (“Inflexibly the law has set its face against the endeavor to fasten guilt upon him by proof of character or experience predisposing to an act of crime.”).

92. CAL. PENAL CODE § 4901 (West 2000 & Supp. 2007).

93. ALA. CODE § 29-2-160(b) (LexisNexis 2003).

94. IP Model Legislation, *supra* note 61, § 6.

95. See The Innocence Project – About Us: About the Innocence Project, <http://www.innocenceproject.org/about/> (last visited Nov. 1, 2007) (detailing lawyers' roles in securing exonérations).

year statute of limitations is more solicitous of the exoneree, a two-year limitations period appears adequate.⁹⁶

B. Financial Compensation

As discussed in Part I, the existing statutes vary greatly in the amount of financial compensation that they provide to successful claimants.⁹⁷ The ABA recommendation offers no guidance on the appropriate amount of damages, other than to say that it should be in proportion to time served and encompass both economic and non-economic damages.⁹⁸ The IP model statute closely resembles the federal provision, which grants \$100,000 per year of incarceration for a claimant unjustly sentenced to death and \$50,000 per year of incarceration for all other claimants.⁹⁹ In the federal statute, these amounts are caps on the level of compensation,¹⁰⁰ while in the IP model statute, they are minimums.¹⁰¹

1. Adjustments and Caps on Compensation

Even if prorated for any partial year served, the amounts in the IP model statute and the federal statute seem lower than necessary to truly compensate exonerated individuals for their economic and non-economic losses stemming from wrongful conviction and incarceration. Although the value of a year of liberty is in some sense incalculable, the annual compensation rate should begin to reimburse an exoneree for the harms caused by the state. These harms include, among others, lost wages and emotional distress from the fact of wrongful conviction and incarceration, in addition to the wrongful deprivation of liberty. According to the United States Census, the median income in 2005 was \$46,326, while the median income for African-American households was \$30,858.¹⁰² Even though the demographics of the exoneree population may justify using this lower figure for median income,¹⁰³ \$50,000 remains insufficient to ade-

96. Professor Bernhard concurs. See Bernhard, *When Justice Fails*, *supra* note 12, at 109.

97. See *supra* Part I.

98. ABA Report, *supra* note 59, at 1.

99. 28 U.S.C. § 2513(e) (2000 & Supp. V 2005).

100. *Id.*

101. IP Model Legislation, *supra* note 61, § 4(B)(1)(a).

102. CARMEN DE NAVAS-WALT ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-231, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 4–5 (2006).

103. In the first 180 exoneration cases, sixty-one percent of the exonerees were African-American. The Innocence Project – Understand the Causes: Eyewitness Identifi-

quately compensate a claimant for lost wages and the non-economic harms of wrongful incarceration itself.

An examination of tort awards and settlements in wrongful imprisonment cases also provides guidelines. A New York plaintiff who was falsely arrested and incarcerated for eleven months pending his trial on a murder charge was awarded \$2.7 million for false arrest and imprisonment (approximately \$3 million per year) and \$7.1 million for malicious prosecution.¹⁰⁴ A Florida man who was mistakenly confined in a cell for eight and a half hours and then released without being charged was awarded \$250,000 in compensatory damages (approximately \$25.7 million per year) by a jury.¹⁰⁵ A California man spent nearly five months in jail accused of murder before the state dropped the charges because time-coded outtakes from the HBO show “Curb Your Enthusiasm” showed him at a Dodgers baseball game.¹⁰⁶ He brought a police misconduct suit, which the Los Angeles City Council agreed to settle for \$320,000 (approximately \$768,000 per year).¹⁰⁷

Based on these figures for median income and tort false imprisonment claims, the statutory levels should rise to \$100,000 per year for all claimants who did not serve their time on death row, an amount which would not overly burden the state.¹⁰⁸ While this per annum amount is less than that awarded in any of the false imprisonment tort cases, the very purpose of a statutory grant is to provide certain relief

cation, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Nov. 1, 2007).

104. *Sital v. City of New York*, No. 7058/03, Supreme Court, Twelfth Judicial District, Bronx County, New York (Aug. 23, 2007); Denise Buffa, *\$10M for Bad Bronx Slay Bust*, N.Y. POST, Aug. 24, 2007, at 5.

105. *Stakey v. Stanford*, No. 2:05-cv-00598-MMH-DNF (M.D. Fla. filed Apr. 6, 2007); Aisling Swift, *Naples Man Awarded \$250K for False Imprisonment*, NAPLES NEWS.COM, Apr. 20, 2007, http://www.naplesnews.com/news/2007/apr/20/naples_man_awarded_250000_false_jailing_sheriff/.

106. See Patrick McGreevy, *L.A. to Pay Man Cleared of Murder; He Will Get \$320,000 after “Curb Your Enthusiasm” Footage Proves He Was at a Game at Time of Crime*, L.A. TIMES, Mar. 8, 2007, at B1.

107. *Id.*

108. In 2006, there were four exonerations in New York, an unusually high number for a single state. The Innocence Project – Know the Cases: Browse Profiles, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Oct. 8, 2007). They served a combined total of 67 years in prison. *Id.* At \$100,000 per year of incarceration, the monetary compensation for these four individuals would cost New York \$6.7 million. It is projected that in the 2007–2008 fiscal year, New York State will have a balance of approximately \$1.2 billion in undesignated reserves (from which this money could be drawn). NEW YORK STATE 2007–08 ENACTED BUDGET FINANCIAL PLAN 3 (2007), available at <http://www.budget.state.ny.us/pubs/enacted/2007-08EnactedBudgetReport.pdf>.

without the risk of litigation, justifying a lesser yearly payment.¹⁰⁹ The increased emotional burden of serving a death sentence merits at least an additional \$50,000 per year served. While even more may be warranted, an additional \$50,000 reasonably balances the rights of exonerates and the exigencies of the state.

Any statute that sets compensation amounts must provide for a method of adjusting the figures to keep pace with inflation and the rises in costs of living. The ABA recommendation does not suggest any precise figures, so it does not address this issue.¹¹⁰ The IP model statute provides for “inflation from the date of enactment.”¹¹¹ The Virginia statute demonstrates another adjustment method by setting the level of compensation at ninety percent of the Virginia per capita personal income.¹¹² Ohio adjusts the dollar figure specified in the statute every second year based on the “yearly average of the previous two years of the consumer price index.”¹¹³ Even if the initial statutory figure is not tied to a real-world figure, the statute must provide for regular adjustments based on economic indicators.¹¹⁴

One challenge to providing adequate compensation for the wrongfully convicted is the concern about controlling costs. Some legislators have responded by including caps on the total level of compensation in the statutes that they enact. Louisiana’s statute, for example, awards \$15,000 per year of incarceration to an exoneree, with a statutory maximum grant of \$150,000.¹¹⁵ What the supporters of caps ignore, however, is that the process of exoneration itself effectively controls costs, rendering a cap unnecessary. Exoneration is finite; the current number of annual exonerations is small¹¹⁶ and is likely to decrease due to the inherent nature of DNA technology. Only a small subset of cases involves biological evidence from the perpetrator that

109. See Betsy J. Grey, *Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims*, 9 N.Y.U. J. LEGIS & PUB. POL’Y 663, 693 (2006) (discussing no-fault compensation systems, which “in exchange for equity, efficiency, and a minimal burden of proof, . . . sharply reduce the amount of compensation to a fraction of what could be recovered under the traditional tort system”).

110. ABA Report, *supra* note 59, at 7–10.

111. IP Model Legislation, *supra* note 61, § 4(B)(1)(a)(i).

112. VA. CODE ANN. § 8.01-195.11 (2007).

113. OHIO REV. CODE ANN. § 2743.49 (West 2006 & Supp. 2007).

114. See IP Model Legislation, *supra* note 61, § 4(B)(1)(a)(i).

115. LA. REV. STAT. ANN. § 15:572.8(C)(3) (Supp. 2007).

116. According to the Innocence Project, the largest number of annual exonerations—twenty-four—occurred in 2002 spread over fifteen states. The Innocence Project – Know the Cases: Browse Profiles, *supra* note 108.

can be tested for a DNA sample.¹¹⁷ While DNA technology grows increasingly sophisticated, allowing for the obtaining of useable results from smaller and different types of samples,¹¹⁸ the pool of cases in which biological evidence can be tested remains circumscribed.

Notions of fairness also support the elimination of an arbitrary cap; an exoneree should be fully compensated for each year of his wrongful imprisonment.¹¹⁹ A cap could result in an exoneree not receiving full compensation for each year he served or two exonerees who served different amounts of time receiving the same award. The interests of equity and uniformity dictate that each claimant should receive the statutory amount for each year of incarceration, which a cap on compensation could prevent.

2. *Additional Financial Compensation*

In addition to the sum of money awarded per year of incarceration, a statute should reimburse an exoneree for costs associated with his wrongful conviction, including reasonable attorney's fees and any fines.¹²⁰ The IP model statute conflates these expenses with the per annum payment, proposing that the annual amount should be adjusted upward from \$50,000 based on these expenses, as well as any injuries or sickness suffered as a result of incarceration.¹²¹ Ease of administration and ensuring uniformity of compensation weigh in favor of setting a fixed sum per annum and calculating reimbursement of expenses separately. While the claimant should be reimbursed for his expenses,¹²² the final award should not be reduced by any expenses

117. See Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 735 (2001) (“[DNA testing] can be performed only in a small minority of situations in which significant biological evidence from the real culprit is collected properly at the scene of the crime.”). The perpetrator’s DNA is most likely to be present in sexual crimes. See *id.* at 735–36.

118. See Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 51 (“DNA testing has become increasingly sophisticated.”). One of these new technologies, Y-STR DNA, which tests the DNA on the Y chromosome, served to exonerate James Waller in January 2007. See Ralph Blumenthal, *A 12th Dallas Convict Is Exonerated by DNA*, N.Y. TIMES, Jan. 18, 2007, at A14.

119. See Fite, *supra* note 79, at 1208.

120. These costs could include attorney’s fees for the trial, appeals, civil actions, proceedings for post-conviction relief, and the compensation hearing; any fines, penalties, or other court costs; and any fees or other expenses imposed by the corrections system.

121. IP Model Legislation, *supra* note 61, § 4(B)(1)(a)(ii).

122. For examples of state statutes with this provision, see, e.g., IOWA CODE ANN. § 663A.1(6)(a) (West 1998); N.J. STAT. ANN. § 52:4C-5(b) (West 2001); OHIO REV. CODE ANN. § 2743.48(E)(2) (West 2006 & Supp. 2007); TEX. CIV. PRAC. & REM.

incurred by the state associated with the claimant's prosecution or imprisonment.¹²³

The IP model statute also proposes that the state should reimburse the claimant for any reasonable reintegration expenses that he incurred between his release from incarceration and the date of the award.¹²⁴ As an alternative to ex post reimbursement, Virginia's statute provides an ex ante transition grant of \$15,000 to cover expenses between the date of release and the date of the compensation award and then deducts this \$15,000 from the final award.¹²⁵ The statute does not include any details about this grant,¹²⁶ neglecting to mention when it is paid, what a claimant must do to receive it, or what happens if an individual does not succeed on his claim. A more fully developed version of this grant could provide critical support for an exonerated individual while he prepares his compensation claim.

Virginia's approach has merit because it addresses the reality that an exoneree may not have access to the money necessary to meet expenses before receiving relief under the statute. Additionally, if the per annum payment is adequate, deducting the transitional grant from the final award will not impose any real hardship. It also saves the claimant from having to demonstrate his reentry expenses and their reasonableness at the hearing.

Vermont, instead of granting a specific sum of money for transition assistance, provides "[c]ompensation for any reasonable reintegrative services and mental and physical health care costs incurred by the claimant for the time period between his or her release from mistaken incarceration and the date of the award."¹²⁷ This approach has

CODE ANN. § 103.105(a)(1) (Vernon 2005); VT. STAT. ANN. tit. 13, § 5574(b) (Supp. 2007); WIS. STAT. ANN. § 775.05(4) (West 2001); *see also* ABA REPORT, *supra* note 59, at 1; IP Model Legislation, *supra* note 61, §§ 4(B)(1)(a)(ii), 4(B)(4).

123. For examples of state statutes adopting this approach, *see, e.g.*, ALA. CODE § 29-2-160(d) (LexisNexis 2003); IOWA CODE ANN. § 663A.1(7); LA. REV. STAT. ANN. § 15:572.8(C)(4) (Supp. 2007); MASS. GEN. LAWS ANN. ch. 258D, § (5)(B) (West Supp. 2007); OHIO REV. CODE ANN. § 2743.48(F)(1); TEX. CIV. PRAC. & REM. CODE ANN. § 103.105(b); VT. STAT. ANN. tit. 13, § 5574(c)(2); *see also* IP Model Legislation, *supra* note 61, § 4(B)(7).

124. IP Model Legislation, *supra* note 61, § 4(B)(3).

125. VA. CODE ANN. § 8.01-195.11(C) (2007). The legislative history does not explain the rationale for setting the amount of the grant at \$15,000.

126. The statute reads:

"Any person who is convicted of a felony by a county or city circuit court of the Commonwealth and is wrongfully incarcerated for such felony shall receive a transition assistance grant of \$15,000 to be paid from the Criminal Fund, which amount shall be deducted from any award received . . ." *Id.*

127. VT. STAT. ANN. tit. 13, § 5574(b)(3).

both advantages and disadvantages when compared with that of Virginia. In Vermont, an exoneree receives compensation for reintegrative services on top of the financial award granted by the statute. Yet Vermont provides only for “reasonable” expenses, ostensibly requiring the exoneree to meet some burden of proof before receiving reimbursement. Virginia also appears to award its grant before the compensation hearing, rather than reimbursing expenses at the time of the hearing, a difference in timing that could prove critical to an exoneree with no access to the funds necessary to support himself between his exoneration and the time of his compensation hearing.

Both the ABA recommendation and the IP model statute advocate the inclusion of lost wages in the computation of financial compensation.¹²⁸ These and similar lost wages provisions in the state statutes¹²⁹ result in a higher valuation of the wrongful conviction of an executive than a factory employee.¹³⁰ Compensating exonerated individuals based solely on their hypothetical lost wages introduces into the statutory remedy the problem of unequal justice that plagues the private bill alternative. It also requires the court to make multiple assumptions about the hypothetical life histories of the two individuals had they not been wrongly imprisoned. Courts must do so in other kinds of claims, such as wrongful death actions, but the process is fraught with difficulty and uncertainty.¹³¹ Wrongful death claimants often have to acquire the services of expert witnesses to prove the amount of lost wages.¹³²

As both the exonerated individual and the state have an interest in awarding compensation as quickly as possible so that the individual can rebuild his life, the balance weighs against using the cumbersome

128. See ABA REPORT, *supra* note 59, at 8; IP Model Legislation, *supra* note 61, § 4(B)(a)(ii)(a)(i).

129. See, e.g., IOWA CODE ANN. § 663A.1(6)(c) (West 1998); OHIO REV. CODE ANN. § 2743.48(E)(2)(c) (West 2006 & Supp. 2007).

130. In enacting compensation legislation in Massachusetts, a battle broke out between the bill’s supporters and then Governor Mitt Romney, who wanted to base compensation awards primarily on lost earnings. Ranalli, *supra* note 65, at B1. Concerned about equities, supporters argued that Governor Romney’s proposal would “gut” the bill, “since many of those who are wrongly convicted are poor and are convicted in the first place because they cannot afford a good attorney.” *Id.* Joseph Savage, an attorney and chairman of the New England Innocence Project, said that basing the award on lost wages was “taking away with one ha[n]d what you were giving with the other.” *Id.* The final version of the Massachusetts bill reflected a compromise, using lost income as only one factor in the award determination. *Id.*

131. See William P. Jennings & Penelope Mercurio, *Selection of an Appropriate Discount Rate in Wrongful Death and Personal Injury Cases*, 14 J. CONTEMP. L. 195, 197–99 (1988).

132. *Id.* at 197.

procedure employed in the wrongful death context. Additionally, the per annum level of compensation could be set high enough to encompass at least some portion of theoretical lost wages without undervaluing the harm caused by the wrongful incarceration of an individual with a low-paying job.

3. *Structuring the Delivery of Financial Compensation*

Several of the state statutes address the question of whether the compensation award should be paid in a lump sum or installments.¹³³ Alabama, which grants \$50,000 per year of compensation, directs that the total may be dispensed either as a lump sum or in installments.¹³⁴ Louisiana's statute provides that a total award of over \$100,000 may be disbursed in the form of an annuity to be paid over a period of five years.¹³⁵ Tennessee's statute also presents a choice between a lump sum payment and monthly installments, but it makes the installment option the default.¹³⁶ All or a portion of the total can be commuted to a lump sum payment on motion of the claimant, but the commutation is discretionary—based on a consideration of special needs, the best interest of the claimant, and “whether that person has the ability to wisely manage and control the commuted award irrespective of whether there exist special needs.”¹³⁷ While perhaps paternalistic, Tennessee's statute recognizes that individuals recently released from incarceration may not have the financial skills or knowledge to manage a large sum of money to provide for the future. Tennessee addresses this challenge by creating a statutory presumption in favor of monthly installments; another option would be for the state to provide the services of a financial consultant as part of the compensation award.

Maryland's statute responds more comprehensively to this challenge, allocating in addition to an “amount commensurate with the actual damages sustained by the individual . . . a reasonable amount for any financial . . . counseling for the individual.”¹³⁸ Maryland's

133. ALA. CODE § 29-2-160(a) (LexisNexis 2003); LA. REV. STAT. ANN. § 15:572.8(J) (Supp. 2007); MD. CODE ANN. STATE FIN. & PROC. § 10-501(c) (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 258D, § 5(A) (West Supp. 2007); TENN. CODE ANN. § 9-8-108(a)(7)(D) (Supp. 2006); VA. CODE ANN. § 8.01-195.11(B) (2007).

134. ALA. CODE §§ 29-2-159(a), 29-2-160(a).

135. LA. REV. STAT. ANN. § 15:572.8(J).

136. TENN. CODE ANN. § 9-8-108(a)(7).

137. *Id.* § 9-8-108(a)(7)(D).

138. MD. CODE ANN. STATE FIN. & PROC. § 10-501(a)(1).

statute also allows for the grant to be paid in a lump sum or installments but does not indicate a preference for either form of payment.¹³⁹

Virginia takes an intermediate approach with respect to how the monetary compensation is distributed, paying an initial lump sum of twenty percent of the compensation award and giving the remaining eighty percent to the State Treasurer to purchase an annuity on behalf of the claimant.¹⁴⁰ The annuity must provide equal monthly payments to the exonerated individual for a period of twenty-five years, beginning no later than one year after the Treasurer receives the money.¹⁴¹ The claimant may not sell the annuity or use it to obtain a mortgage or other loan, but the annuity will contain a beneficiary provision, insuring the continuation of payments in the event of the individual's death.¹⁴²

The very text of the Virginia provision makes its shortcomings clear. An individual has no access to the total amount of his compensation for a large purchase, such as a house or an education, which would provide a stable foundation for his future. Annuities that propose to pay a certain sum per year for a certain number of years do not take into account the fact that people released from incarceration generally have poorer health than the population at large, which may result in shorter life spans.¹⁴³ Additionally, the very fact of incarceration, particularly if it spans a long number of years and if the exoneratee was incarcerated at a young age, makes it less likely for him to have beneficiaries.¹⁴⁴

A compensation statute must take one of two approaches to address these concerns. If the statute creates a presumption in favor of installment payments, it must also create a procedure by which the claimant can petition to have the installments commuted into a lump sum. The process encoded in the Tennessee statute takes into consideration special needs warranting commutation, the best interest of the

139. *Id.* § 10-501(c).

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

141. *Id.*

142. *Id.*

143. See 2 NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE RELEASED INMATES ix (2002), available at http://www.doh.state.fl.us/Disease_ctrl/tb/Corrections/Legal/HealthStatus-Inmates-DistV2-1-142.pdf; RAND CORP., RAND RES. BRIEF NO. RB-6013-PSJ, PRISONER REENTRY: WHAT ARE THE PUBLIC HEALTH CHALLENGES 1 (2003), available at http://www.rand.org/pubs/research_briefs/RB6013/RB6013.pdf (“[S]oon-to-be-released offenders tend to be sicker on average than the U.S. population.”).

144. One method to address the health concerns of exonerates that weigh against installment payments is to provide health care in addition to compensation. See *infra* Part II.C.

claimant, and the claimant's ability to manage a lump sum award.¹⁴⁵ To address the third component of Tennessee's three-pronged test, a state should provide the claimant who takes a lump sum with the services of a financial counselor for at least a few years after the date of the award. Alternatively, a statute could pay the award in a lump sum and provide financial counseling to all claimants.

None of these five state statutes discusses the state or federal tax consequences of the different forms of awarding a monetary grant.¹⁴⁶ A comprehensive compensation statute should address this lapse so that a successful claimant could make a decision between the different payment options with information about any relevant tax liabilities.

C. *Physical and Mental Health Care*

Another form of assistance offered by a few of the state statutes is physical and mental health care, which is often required by individuals leaving incarceration.¹⁴⁷ A study in 2005 found that over half of prison and jail inmates suffered from mental health problems.¹⁴⁸ Communicable and chronic diseases are also more prevalent in the inmate population than in the general population.¹⁴⁹ HIV/AIDS is five times as prevalent in the incarcerated population; hepatitis C is nine to ten times as prevalent; and active tuberculosis is four to seventeen times as prevalent.¹⁵⁰ Eight to nine percent of inmates have asthma; five percent have diabetes; and more than eighteen percent have hypertension.¹⁵¹ All of these chronic diseases require regular care and medication. Particularly in the interim between exoneration and employment, the state must provide access to medical care and counseling and the insurance to address these health issues.

145. TENN. CODE ANN. § 9-8-108(a)(7)(D) (Supp. 2006).

146. *But see* CAL. PENAL CODE § 4904 (West 2000 & Supp. 2007) (stating that any monetary grant awarded pursuant to it "shall not be treated as gross income to the recipient under the Revenue and Taxation Code"); VT. STAT. ANN. tit. 13, § 5574(c)(1) (Supp. 2007) (stating that the judgment awarded "shall not be subject to any state taxes, except for the portion of the judgment awarded as attorney's fees").

147. LA. REV. STAT. ANN. § 15:572.8(C)(3)(b) (Supp. 2007); MD. CODE ANN. STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 258D, § 5(A) (West Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.052(c), .105(a)(3) (Vernon 2005); VT. STAT. ANN. tit. 13, § 5574(b)(3) (Supp. 2007).

148. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES I (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf>.

149. 2 NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, *supra* note 143, at ix.

150. *Id.*

151. *Id.*

The statistics regarding the prevalence of infectious and chronic diseases in the prison population suggest that an individual leaving prison is likely to be in poorer health than he would have been had he never been imprisoned. This decrease in overall health is an especially heavy price to pay for the wrongfully convicted individual. Given the relationship between imprisonment and physical and mental illness, some existing compensation statutes provide the care necessary to address any health problems that are “shown to be *directly related* to the individual’s erroneous felony conviction and resulting incarceration.”¹⁵²

Under Massachusetts’ statute, for example, the court may, as part of the judgment of compensation, order the commonwealth to “provide the claimant with services that are reasonable and necessary to address any deficiencies in the individual’s physical and emotional condition that are shown to be *directly related* to the individual’s erroneous felony conviction and resulting incarceration.”¹⁵³ The broad language in this provision—“any deficiencies”—potentially gives the claimant access to a broad range of physical and mental health services if he can establish a causal relationship between his incarceration and his poor health.¹⁵⁴

This direct relationship requirement places a heavy burden of proof on the claimant. The challenges of proving causation, particularly in situations involving physical illness, have been well-documented in toxic tort cases.¹⁵⁵ Plaintiffs must establish with a “reasonable certainty” that the toxicity caused their illnesses,¹⁵⁶ illnesses that also occur in the general population without exposure to toxic chemicals. Under the statutes requiring a direct causal relationship, so must exonerated individuals prove that they developed their

152. MASS. GEN. LAWS ANN. ch. 258D, § 5(A) (emphasis added); see also TEX. CIV. PRAC. & REM. CODE ANN. § 103.105(a)(3).

153. MASS. GEN. LAWS ANN. ch. 258D, § 5(A) (emphasis added).

154. *Id.*; see also Kathleen Burge, *The Price of Injustice Debt to those Wrongly Jailed Stirs Debate*, BOSTON GLOBE, May 29, 2001, at B1 (quoting a lawyer who works with the wrongfully convicted saying that many of them need psychotherapy, as well as schooling).

155. See, e.g., *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1554 (D. Colo. 1990) (granting summary judgment against toxic tort plaintiffs because they had failed to meet their burden on causation); *Backes v. Valspar Corp.*, 783 F.2d 77, 80 (7th Cir. 1986) (“We are mindful of the formidable difficulties of proving causation in toxic-waste cases . . .”). See also L. Grant Foster, *A Case Study in Toxic Tort Causation: Scientific and Legal Standards Work Against Recovery for Victims*, 19 ENVTL. L. 141, 162 (1988) (“[A plaintiff] would encounter a possibly insurmountable obstacle if he were to face a court that is unaware of or insensitive to a toxic tort victim’s difficulties in pleading causation.”).

156. *Backes*, 783 F.2d at 80.

health problems *because* of their incarceration. While this may not pose much difficulty in the case of an infectious disease, particularly if the exoneree can present records of a pre-incarceration medical exam, it is much more difficult to establish causation for chronic conditions such as hypertension. Also, depending on the lapse in time between the exoneration and the compensation hearing, the claimant may have additional health problems directly related to incarceration that are not yet apparent at the time of the hearing.

In addition to this burden of proof, Massachusetts also allocates to the claimant the responsibility of including in his claim: (1) the nature of the services sought and (2) the agencies, departments, or commissions of the commonwealth that could render these services.¹⁵⁷ The first part of this allocation requires a wrongly incarcerated individual to identify his current health care needs and anticipate those that might arise in the future. The second portion of the assignment of the burden appears counter-intuitive, as it is the court or the commonwealth, not the claimant, who is more likely to possess the knowledge about which agencies, departments, or commissions could best address the claimant's health care needs. Identifying the party with better access to the relevant information is often part of the calculus of assigning pleading burdens.¹⁵⁸

Vermont's statute provides for mental and physical health care in an unusual way—by granting an exoneree “up to ten years of eligibility for the Vermont Health Access Plan.”¹⁵⁹ This method has various advantages: it does not require the exoneree to prove a causal relationship between any health problems and his wrongful incarceration; it does not mandate that the exoneree identify all of his health concerns at the compensation hearing; and it provides for preventative and routine health care.

Adopting Vermont's approach, the IP model statute proposes reimbursing the claimant for expenses for reasonable mental and physical health care costs incurred between the time of release and the date of the award in addition to “[u]p to ten years of physical and mental

157. MASS. GEN. LAWS ANN. ch. 258D, § 5(A) (West Supp. 2007).

158. See Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 73 (2004) (“Typically, burdens of pleading and production are allocated to the party most likely to possess the necessary information.”); Kelly J. Wilhelm, *Allocating the Burden of Pleading Successor Corporation Status in Texas Products Liability Cases*, 48 BAYLOR L. REV. 529, 534 (1996) (“One textbook lists the following factors to be weighed when determining the pleading allocation question: unusual course of events, access to evidence, and the underlying policies of the substantive law.”).

159. VT. STAT. ANN. tit. 13, § 5574(b)(2) (Supp. 2007).

health care through the state employees' health care system, to be offset by any amount provided through claimant's employers during that time period."¹⁶⁰ Providing exonerees with state-employee health insurance or another form of state health insurance¹⁶¹ is an equitable remedy that does not entail the creation of a new bureaucracy.¹⁶² It also simplifies the compensation hearing by relieving the claimant from having to meet a difficult burden of proof and relieving the court from having to evaluate a claim for each specific ailment.

Yet considerations of justice and administrability weigh in favor of eliminating the ten-year cap on the insurance contained in both Vermont's statute and the IP model statute. Physical and mental health deficiencies resulting from a wrongful conviction can easily persist for longer than ten years and may plague an exoneree for the entirety of his life. These illnesses could prevent him from working at all or from obtaining the type of employment that would offer adequate health benefits. The state's responsibility for the physical and emotional harm that it caused does not cease after ten years. One option is for the state to provide health care for ten years, with the possibility of extension if an exoneree proved the existence of a chronic disease or other enduring medical condition caused by his incarceration. Yet this imposes a burden on both the exoneree and the judicial or administrative body that hears his claim for extension. A simpler and more workable approach would be to provide health care for the rest of the exoneree's life, exempting the time when he has health coverage through employment or government plans such as Medicare.

States already have health insurance plans in place that cover large numbers of people.¹⁶³ In light of the small number of exonerations per year per state,¹⁶⁴ providing state health insurance to these individuals would only impose a marginal additional cost. For this

160. IP Model Legislation, *supra* note 61, § 4(B)(2).

161. Vermont's statute grants "up to ten years of eligibility for the Vermont Health Access Plan," a state insurance plan for adults. VT. STAT. ANN. tit. 13, § 5574(b)(2); Vt. Dep't for Children & Families, Econ. Servs. Div., DCF Economic Services VHAP Program, http://www.dsw.state.vt.us/Programs_Pages/Healthcare/vhap.htm (last visited Sept. 12, 2007).

162. Armbrust, *supra* note 14, at 181.

163. Vermont, for example, offers the Vermont Health Access Program (VHAP), an insurance program for adults that covers routine and emergency medical care. Vt. Dep't for Children & Families, Econ. Servs. Div., DCF Economic Services VHAP Program, *supra* note 161. New York provides a variety of state-sponsored health insurance programs. See New York State Dep't of Health, Health Insurance Programs, http://www.health.state.ny.us/health_care/ (last visited Dec. 29, 2007).

164. See The Innocence Project – National View, <http://www.innocenceproject.org/news/StateView.php> (last visited Nov. 15, 2007). Only three states have had more than ten exonerees. *Id.*

small investment, a state can provide a critical service that will allow an exoneree to rebuild his life after his wrongful incarceration. These financial and equitable considerations justify providing such insurance for the remainder of an exoneree's life.

D. Education Assistance

A key component of any comprehensive compensation statute is education assistance. While most of the existing studies have researched the effect of providing education while individuals are incarcerated, not after release, they have found a correlation between education in prison and reentry success, as measured by a reduction in the rates of rearrest and re-conviction.¹⁶⁵ One "study indicates that education in prison can pave the way for a somewhat smoother life outside the cell."¹⁶⁶ Education after prison, if an individual elects to pursue it, is likely to have the same effect, providing access to better jobs as well as the prestige that comes with a college or higher degree.

Both model statutes fail to expressly provide for education assistance. Arguably, the provision in the IP model statute for "re-integrative services"¹⁶⁷ and the directive in the ABA recommendation that "[j]urisdictions should assist the innocent to reenter the community"¹⁶⁸ can be read to encompass educational aid. Yet a comprehensive statute must grant education assistance explicitly.

A number of the state compensation statutes contain provisions for assistance with post-release education, although they take dramatically different forms.¹⁶⁹ The benefit, as conceived by Massachusetts, grants financial assistance in pursuing education. Massachusetts' statute empowers courts to grant orders entitling claimants to receive a fifty percent discount on tuition and fees at any Massachusetts state or community college, including the University of Massachusetts.¹⁷⁰ The total liability of the commonwealth, including both the monetary

165. See STEPHEN J. STEURER & LINDA G. SMITH, CORRECTIONAL EDUC. ASS'N, EDUCATION REDUCES CRIME: THREE-STATE RECIDIVISM STUDY, EXECUTIVE SUMMARY 12 (2003), available at <http://www.ceanational.org/PDFs/EdReducesCrime.pdf>; Jamie Stockwell, *Study Finds Value in Inmate Education*, WASH. POST, Nov. 23, 2000, at M21; Editorial, *Education as Crime Fighter*, CHRISTIAN SCI. MONITOR, Sept. 18, 2000, at 10.

166. Stockwell, *supra* note 165, at M21.

167. IP Model Legislation, *supra* note 61, § 8.

168. ABA REPORT, *supra* note 59, at 2.

169. LA. REV. STAT. ANN. § 15:572.8(C)(3)(c) (Supp. 2007); MASS. GEN. LAWS ANN. ch. 258D, § 5(A) (West Supp. 2007); MONT. CODE ANN. § 53-1-214 (2007); VA. CODE ANN. § 8.01-195.11(C) (2007).

170. MASS. GEN. LAWS ANN. ch. 258D, § 5(A).

award (payable in a lump sum or in annuity installment payments) and any additional services, may not exceed \$500,000.¹⁷¹

Virginia's provision for educational assistance consists of "reimbursement up to \$10,000 for tuition for career and technical training within the Virginia community college system contingent upon successful completion of the training."¹⁷² This entitlement is very limited—both in its amount and in the uses to which it may be put. Furthermore, the statute directs the individual to seek reimbursement from the community college itself,¹⁷³ an organization not at fault for the wrongful conviction and thus less accountable.

Montana's statute provides no free-standing financial grant at all, substituting a well-designed education benefit as the sole form of compensation.¹⁷⁴ The educational aid includes "expenses for tuition, fees, books, board, and room at any: (a) Montana community college; (b) unit of the Montana university system . . . ; or (c) accredited Montana tribally controlled community college."¹⁷⁵ The individual can choose any available degree or program at the listed institutions.¹⁷⁶ Exonerated individuals are eligible for the privilege of receiving educational aid for ten years after their release; the state will pay their expenses for five years of education during this ten-year period or until they complete the degree or program, whichever is less, provided that the individual "continues to make satisfactory progress in the courses or program attempted."¹⁷⁷

This statute, recognizing the unique obstacles faced by those being released from incarceration, also mandates state assistance in meeting admission criteria, including aid in obtaining a GED or completing other adult education programs.¹⁷⁸ This aid program addresses education for exonerates in a holistic manner, providing not only tuition but also assistance in accessing the educational opportunity presented. An exonerated individual is not left alone to navigate the complex maze of applying for admission to post-secondary education but can rely on the state to provide assistance with the process.¹⁷⁹

171. *Id.*

172. VA. CODE ANN. § 8.01-195.11(C).

173. *Id.*

174. MONT. CODE ANN. § 53-1-214. The education provision in Louisiana's compensation statute, amended and reenacted in 2007, is very similar, perhaps having used Montana's education benefit as a model. LA. REV. STAT. ANN. § 15:572.8(C)(3)(c).

175. MONT. CODE ANN. § 53-1-214(1).

176. *Id.* § 53-1-214(4).

177. *Id.*

178. *Id.* § 53-1-214(2).

179. *Id.*

Such a benefit is attractive to wrongly convicted individuals in states without compensation statutes. James Tillman, exonerated in Connecticut in 2006, is an aspiring minister and has said that “he would welcome financial assistance to help him go to school,” such as that offered in Montana.¹⁸⁰

Just as the compensation statute should set an annual amount of monetary compensation so that the state can estimate its financial responsibility under the statute, some confines are necessary to cabin the potential liability of the state under the education provision. The state should offer a certain number of years of education or completion of the program chosen by the wrongfully convicted individual, whichever is longer, conditioned on remaining a student in good standing for the duration.¹⁸¹ Allowing the individual to finish the program begun ensures the utility of the educational benefit, while having a cap on the number of years prevents him from taking advantage of the state and remaining a student for life.

Montana’s statute, and others that provide a form of educational assistance, also confine the choice of education institutions to state community colleges and universities and, in Montana’s case, state tribally controlled community colleges.¹⁸² As state institutions are typically much less expensive than private institutions,¹⁸³ this also limits the extent of the state’s liability.

E. Employment Assistance

Neither of the model statutes expressly provides for assistance in obtaining employment after exoneration, a flaw which a comprehensive statute should remedy.¹⁸⁴ Individuals released from incarceration face numerous obstacles in obtaining employment, including ques-

180. Matt Burgard, *Tillman Facing New Realities*, KNIGHT RIDDER TRIB. BUS. NEWS, July 14, 2006, at 1.

181. *See, e.g.*, MONT. CODE ANN. § 53-1-214(4) (2007).

182. *Id.* § 53-1-214(1); MASS. GEN. LAWS ANN. ch. 258D, § 5(A) (West Supp. 2007); VA. CODE ANN. § 8.01-195.11(C) (2007).

183. In-state tuition and room and board for the 2007–08 academic year at the University of Massachusetts at Amherst is \$17,368. About UMass Amherst: Facts – University of Massachusetts Amherst, <http://www.umass.edu/umhome/about> (last visited Nov. 15, 2007). Tuition and room and board at Amherst College, a private college in Massachusetts, for the 2007–08 academic year is \$45,000, more than twice the cost at the state university. AC Financial Aid: First Year and Transfer Aid: Costs, <http://www.amherst.edu/~finaid/firstyear/costs.html> (last visited Nov. 15, 2007).

184. Louisiana’s statute instructs the court to order payment that it finds “reasonable and appropriate” for the exoneree to “pay the costs of job-skills training for one year.” LA. REV. STAT. ANN. § 15:572.8(c)(3)(a) (Supp. 2007). A proposed model compensation statute for the state of Wisconsin expressly provides for “reintegration assistance,” which includes “job-training assistance.” Fite, *supra* note 79, at 1205. The

tions on job applications about criminal history and bias against formerly incarcerated individuals.¹⁸⁵ Even if a wrongly convicted person has had his record sealed or expunged, he continues to “face[] a competitive workplace with no employment history, no recent references, and a lack of technical skills frequently required to perform many jobs in our computerized society.”¹⁸⁶

Due to the small size of the population of exonerees, few studies about their reentry experiences have been conducted. The Life After Exoneration Program (LAEP) conducted a study of sixty exonerees nationwide in 2005 and found that two-thirds were not financially independent, a result that underscores the need for employment assistance.¹⁸⁷ Research examining the effect of obtaining employment on the reintegration and recidivism of the general population of formerly incarcerated individuals also provides critical insights.¹⁸⁸ Whether release from incarceration resulted from the completion of a rightfully imposed sentence or exoneration, the newly freed individual must re-enter society after a period of absence. For the general population, reentry success is often measured by recidivism rates, and “[r]esearch consistently shows that finding quality steady employment is one of the strongest predictors of desistance from crime.”¹⁸⁹

Employment assistance should consist of a variety of components. In a study of strategies used by state parole agencies to increase employment rates, services provided included: vocational assessment and career guidance, job readiness and pre-employment instruction,

justification for this inclusion is “to help exonerated convicts reintegrate into society.” *Id.* at 1209.

185. See Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 641–42.

186. Lopez, *supra* note 13, at 720.

187. Life After Exoneration Program, *The Exonerated*, *supra* note 8.

188. See, e.g., John Rakis, *Improving the Employment Rates of Ex-Prisoners under Parole*, 69 FED. PROBATION 7, 7 (2005).

189. Pager, *supra* note 185, at 647; see also Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1610–11 (2004) (“Employment is closely linked to reduced recidivism rates. ‘Research from both academics and practitioners suggests that the number one factor which influences the reduction of recidivism is an individual’s ability to gain ‘quality’ employment.’”); Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 201 (2004) (“[S]tudies show that being employed, particularly in jobs that pay greater than the minimum wage, is associated with lower rates of re-offending.”); Marlaina Freisthler & Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 532 (2005) (“So strong is the inverse correlation between employment and recidivism that employment is considered a ‘rehabilitative necessity.’”).

assistance in securing documents for employment, job placement assistance, surety bonding, the Work Opportunity Tax Credit (WOTC), employer career fairs, and post-placement guidance and follow-up.¹⁹⁰ All of these services—excepting surety bonding and the WOTC, which apply specifically to former offenders and other high-risk individuals—would also prove helpful to exonerees.¹⁹¹

Given the limited size of the wrongfully convicted population and the fact that exonerees face many of the same barriers to employment as other formerly incarcerated individuals, it is logical to house employment assistance for exonerees in institutions and organizations that work with this larger population.¹⁹² Ideally, all of these individuals should have access to a continuum of employment assistance provided by corrections, parole, and community-based agencies.¹⁹³ Any organizations working with wrongfully convicted individuals after their exonerations must be aware of the unique challenges that they face, including the dilemma presented by an expunged record, which results in a resume gap without the explanation that a criminal history provides.

Rather than the vague language used in the model statutes, a comprehensive compensation statute should detail the employment services offered to exonerees and the organizations responsible for their provision. This level of clarity will both assign accountability and help to ensure the full and timely delivery of employment assistance.

F. Housing Assistance

In its recommendation, the ABA urges jurisdictions to “assist the innocent to reenter the community.”¹⁹⁴ It includes in its list of possible reentry aid, “assistance in obtaining housing or food stamps.”¹⁹⁵ None of the existing statutes provides for housing, a critical shortcoming since access to adequate housing is strongly correlated with suc-

190. Rakis, *supra* note 188, at tbl. 1.

191. An argument can be made for extending the Federal Bonding Program and the WOTC to wrongly convicted individuals as well. Some employers may view exonerees as high-risk employees because they have little recent work experience and may bear resentment toward society due to their wrongful incarceration. The WOTC, which gives employers financial incentives for hiring individuals from specific groups, could ostensibly include exonerees by construing them as a targeted group in need of special assistance in obtaining employment.

192. Armbrust, *supra* note 14, at 177.

193. Rakis, *supra* note 188, at 11.

194. ABA REPORT, *supra* note 59, at 2.

195. *Id.* at 9.

cessful reentry.¹⁹⁶ As the justification for compensation statutes is redress by the government for state-imposed harms, an appropriate form of relief would be expedited access to public housing, which is also a government institution. Corinne A. Carey, a researcher at Human Rights Watch, argues that public housing is the best alternative for all individuals reentering the community after incarceration: “People leaving prison and jail are typically among Americans with the most dire housing needs. For them, publicly supported housing is the only realistic option for safe and stable places to live.”¹⁹⁷

The state should place the exoneree in an available public apartment or give him a Section 8 voucher.¹⁹⁸ If no vacancies exist at the time, he should be housed in an adequate facility—at least a safe unit with basic necessities—at the state’s expense in the interim. Even after he moves into public housing, the state should continue to cover his housing expenses for a statutorily established period of time long enough for him to begin his process of readjustment, obtain physical and mental health care, and search for employment. Given the small annual number of exonerees per state,¹⁹⁹ this provision would not constitute a large expenditure.

G. Record Expungement

The opportunity to have his criminal record expunged or sealed as part of his compensation claim presents an invaluable opportunity for a wrongfully incarcerated individual.²⁰⁰ Massachusetts Representative Patricia Jehlen recognized this in drafting Massachusetts’ compensation statute, justifying her inclusion of this provision with the case of Neil Miller, who, despite being exonerated, could not find a job because he “could not convince employers that he was innocent.”²⁰¹ To obtain not only employment, but also housing, loans, and almost any service that requires an application or a background check,

196. See SOLOMON, *supra* note 5, at 81–83.

197. Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 552 (2005).

198. Section 8 vouchers allow individuals to rent privately-owned apartments for a low cost, with a public housing authority paying the remainder of the rent. See U.S. Dep’t of Hous. & Urban Dev., Section 8 Rental Voucher Program, <http://www.hud.gov/progdesc/voucher.cfm> (last visited Nov. 15, 2007).

199. See The Innocence Project – National View, *supra* note 164.

200. For a survey of the many ways criminal records are currently used, see generally James Jacobs & Tamar Crepet, *The Expanding Scope and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177 (2008).

201. Stephanie Ebbert, *Bill Would Compensate Those Wrongly Convicted*, BOSTON GLOBE, NOV. 30, 2002, at B1.

having a clean record is a vital part of the reentry package for someone who has been exonerated.

Despite the suitability of public housing as an option for individuals reentering the community, many find themselves barred as a collateral consequence of their criminal conviction. Constrained by the inadequate supply of public housing stock, authorities have responded by using criminal records to exclude applicants.²⁰² In light of these policies, expunging the record of the wrongful conviction is a necessary step in order to place exonerees in these apartments.

Of all of the current compensation statutes and the model statutes, only the ABA recommendation and Massachusetts' and Missouri's statutes provide for expunging the criminal record of an exoneree.²⁰³ Given the numerous collateral consequences of possessing a criminal record, expungement of the wrongful conviction is critical. Fundamental fairness demands that an individual not be saddled with the burdens of a record of a crime that he never committed. While even comprehensive compensation can never truly make a wrongly convicted individual whole, expungement ensures that he will at least "be treated as if the conviction had never occurred for purposes of any collateral sanction or discretionary disqualification."²⁰⁴ Sealing of records is not an adequate substitute for expungement. Certain agencies, including the criminal justice system, law enforcement agencies, some licensing agencies, and adoption agencies, continue to have access to sealed records.²⁰⁵ Although both sealing and expungement "permit the individual to deny the existence of the sealed or expunged information," only expunged records are completely destroyed.²⁰⁶

The Massachusetts provision serves as a model of how the ABA approach could be expanded in a comprehensive statute. The ABA's provision offers very little detail, instructing only that "[t]he erroneous judgment of conviction should be expunged from the innocent's criminal record."²⁰⁷ Massachusetts' statute calls for either sealing or ex-

202. Carey, *supra* note 197, at 553.

203. ABA REPORT, *supra* note 59, at 2; MASS. GEN. LAWS ANN. ch. 258D, § 7(A) (West Supp. 2007); MO. ANN. STAT. § 650.058(4) (West Supp. 2007).

204. Myrna S. Raeder, Andrew E. Taslitz & Paul C. Giannelli, *Convicting the Guilty, Acquitting the Innocent: Recently Adopted ABA Policies*, CRIM. JUST., Winter 2006, at 14, 26.

205. Debbie A. Mukamal, *Confronting the Employment Barriers of Criminal Records: Effective Legal and Practical Strategies*, 33 CLEARINGHOUSE REV. 597, 602 (2000).

206. *Id.*

207. ABA REPORT, *supra* note 59, at 2.

pungement of those records “maintained by the criminal history systems board, the probation department, and the sex offender registry that directly pertain to the claimant’s erroneous felony conviction.”²⁰⁸ Massachusetts also permits the claimant to request a separate hearing for the sealing or expungement of records pertaining to the wrongful conviction maintained by other state agencies and law enforcement entities.²⁰⁹

While many of the details in the Massachusetts statute protect the exoneree and assist his reentry, a less solicitous feature of the provision allows the commonwealth and directly affected agencies the opportunity to protest the expungement or sealing of the records.²¹⁰ In making its determination, the court must balance:

the interests of privacy and justice . . . [against] the probable effect of such expungement or sealing on relevant law enforcement entities and their ability to appropriately investigate and prosecute other persons for the felony which forms the basis of the claim or other crimes that may relate to the information contained in such records, documents and materials.²¹¹

If a court fairly conducts this balancing analysis, it seems impossible that the state interest in retaining this information tied to the name of the exonerated individual could ever outweigh his interest in having his record cleared of a conviction for a crime that he never committed. It seems unlikely that the records related to a wrongly convicted individual will help law enforcement uncover the actual perpetrator; at most, such records will provide very marginal assistance. Yet these records, if they are not expunged, will have a large negative effect on the reentry prospects of the exoneree, creating an obstacle between him and housing, employment, and other opportunities. Balancing the small utility to the state against the grave harm to the exoneree, a court will likely find that the scale tips in favor of the exoneree and expungement.

Missouri’s statute also provides for automatic record expungement but without providing law enforcement an opportunity to protest the expungement order.²¹² The language of Missouri’s statute makes clear that the purpose of expungement is to assist with reentry by “restor[ing] such person to the status he or she occupied prior to such arrest, plea or conviction and as if such event had never taken

208. MASS. GEN. LAWS ANN. ch. 258D, § 7(A).

209. *Id.* § 7(B).

210. *Id.* §§ 7(A), (B).

211. *Id.* § 7(A).

212. MO. ANN. STAT. § 650.058(4) (West Supp. 2007).

place.”²¹³ After expungement as defined in Missouri’s statute, an exoneree may decline to mention either the conviction or the expungement on an employment or any application without being subject to a charge of perjury or giving a false statement.²¹⁴

A comprehensive compensation statute must address all of the substantive areas discussed in the previous sections. Yet a model statute must also direct how these services will be delivered to the exoneree, the subject of the next Part.

III.

DELIVERING COMPREHENSIVE COMPENSATION

The final section of the IP model statute calls for an assessment of the need for immediate services—such as housing, re-integrative services, and health care—upon release by staff at the state’s Department of Social Services.²¹⁵ This general provision does not go nearly far enough in establishing how the substantive assistance of a comprehensive compensation statute should be provided to successful claimants. A more detailed statutory plan for the delivery of services is required. A model for such a plan that can be adapted to the reentry context is found in the Individuals with Disabilities Education Act (IDEA),²¹⁶ which mandates the creation of individualized education programs (IEPs) for the education of children with disabilities.²¹⁷ The key to an IEP can be found in its name—that it is *individualized*, a program designed to complement a particular child’s needs and abilities. Each disabled child needs a different kind of assistance in order to learn and succeed; the IEP model provides exactly this.

Exonerees also have particularized needs and abilities that would not be best served by a generalized compensation structure. Just as IDEA directs the development of individualized education plans, a comprehensive compensation statute should provide for the creation of individualized reentry plans (IRPs) crafted on a case-by-case basis to meet the specific concerns of each exoneree. While exonerees are clearly not the same as children with disabilities and do not require the same amount of oversight and guidance, the individualized treatment that they require due to the negative effects of incarceration is similar.

213. *Id.*

214. *Id.*

215. IP Model Legislation, *supra* note 61, § 8.

216. 20 U.S.C. §§ 1400–1482. (2000 & Supp. V 2005).

217. *Id.* § 1414(d)(2)(A).

A. *The Basic Structure of the IEP Model*

The “cornerstone of a quality education for each child with a disability,”²¹⁸ an IEP is a written document, prepared by a team of stakeholders, that is individualized to meet the child’s unique needs. It contains both an assessment of the child’s current level of education performance and annual measurable goals.²¹⁹ Other elements include “a statement of the special education and related services . . . to be provided to the child,”²²⁰ “the projected date for the beginning of the services . . . and the anticipated frequency, location, and duration of those services,”²²¹ and “a statement of . . . how the child’s progress toward the annual goals . . . will be measured.”²²²

The Office of Special Education and Rehabilitative Services publication *A Guide to the Individualized Education Program* breaks the special education process under IDEA into ten steps:

1. Child is identified as possibly needing special education and related services.
2. Child is evaluated.
3. Eligibility is decided.
4. Child is found eligible for services.
5. IEP meeting is scheduled.
6. IEP meeting is held and the IEP is written.
7. Services are provided.
8. Progress is measured and reported to parents.
9. IEP is reviewed.
10. Child is reevaluated.²²³

A crucial component of this process is the assembly of the IEP Team responsible for developing, administering, and modifying the evolving IEP. IDEA dictates the composition of the IEP Team, which must include the child’s parents; “at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment)”;

“at least one special education teacher”;

“a representative of the local educational agency”;

“an individual who can interpret the instructional implications” of the initial evaluation and regular progress assessments;

“other individuals who

218. OFFICE OF SPECIAL EDUC. AND REHABILITATIVE SERVS., U.S. DEP’T OF EDUC., *A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 1* (2000) [hereinafter IEP GUIDE].

219. 20 U.S.C. § 1414(d)(1)(A)(i)–(ii).

220. *Id.* § 1414(d)(1)(A)(iii).

221. *Id.* § 1414(d)(1)(A)(vi).

222. *Id.* § 1414(d)(1)(A)(viii).

223. IEP GUIDE, *supra* note 218, at 2–4.

have knowledge or special expertise . . . , including related services personnel”; and, “whenever appropriate, the child.”²²⁴

In addition to establishing the procedure for administering special education services, IDEA provides procedural safeguards to guarantee the protection of parents’ and children’s rights under the Act.²²⁵ Parents have access to all records pertaining to their child and the right to participate in meetings.²²⁶ If the parents disagree with the school’s recommendations or lack of response, they can request mediation or a due process hearing.²²⁷ The hearing takes place in front of the state or local educational agency;²²⁸ if the initial hearing occurs at the local level, either party can appeal the decision to the state educational agency, which conducts an impartial review and issues an independent decision.²²⁹

B. Adapting the IEP Model to the Exoneree Compensation Context

Drawing parallels to the IEP model created by IDEA, a comprehensive compensation statute could develop an individualized reentry plan (IRP) for exonerees to deliver its substantive assistance. After a successful hearing under the statute, a claimant would be awarded financial compensation and services. While transferring the monetary award is fairly simple, providing services requires a more complex structure, which could resemble the ten-step process developed in the special education context.

Such an individualized assessment and service provision is necessary because each exoneree faces unique challenges. Although more than 650,000 people leave prison and jail each year, only an infinitesimal fraction of those have been exonerated.²³⁰ They have different needs—such as record expungement—and a different relationship with the state than the general reentry population. In a comprehensive model, exonerees receive services not provided to the reentry population at large; an individualized plan is critical to help the exoneree take full advantage of all of the components of his compensation.

Step 1: Exonerated individual is identified as possibly needing reentry and related services. This would occur at the hearing at which

224. 20 U.S.C. § 1414(d)(1)(B)(i)–(vii).

225. *Id.* § 1415(a), (d).

226. *Id.* § 1415(b)(1).

227. *Id.* §§ 1415(b)(5), (e), (f); *see also* IEP GUIDE, *supra* note 218, at 15–16.

228. 20 U.S.C. § 1415(f)(1).

229. *Id.* § 1415(g).

230. *See supra* notes 2–6 and accompanying text.

the exoneree established his eligibility for compensation under the comprehensive statute.²³¹ If a claimant qualified for compensation under the statute, then he would also be identified as needing reentry and related services.

Step 2: Exoneree is evaluated. This initial assessment should follow the resolution of the compensation hearing within a statutorily mandated time period. In IDEA, the initial evaluation must occur within sixty days of receiving parental consent for the evaluation.²³² As many of the reentry services to be provided under the statute, such as housing and medical care, are critical to daily existence, the sixty day time frame of IDEA would be too long. The statutory period should be at most thirty days from the consent of the exoneree himself, with a stipend to cover expenses in the interim.

The IP model statute proposes that the staff at the state Department of Social Services perform the evaluation of the exoneree.²³³ The ABA recommendation expands this to include “a probation department or an existing department with responsibilities for mental health services.”²³⁴ Social or mental health service departments would be a better home for the assessment process than probation, as probation departments often play more of a supervisory role. Additionally, social and mental health service departments generally employ caseworkers who could become part of the IRP team.

The assessment is best conducted in an interview format, with a checklist of subject areas to address. New York University School of Law’s reentry clinic developed an interview instrument to identify the reentry obstacles of formerly incarcerated individuals that could serve as a starting point for developing this assessment tool.²³⁵ The interview form includes open-ended questions about education, housing, employment, and family. To this list, any thorough assessment must at least add questions about physical and mental health, substance abuse, and legal concerns.

Step 3: Eligibility is decided; and Step 4: Exoneree is found eligible for services. These two steps are unnecessary at this point in the process, as the compensation hearing serves to determine eligibility for services. Whereas the purpose of the initial evaluation in the

231. For a discussion of what an exoneree must prove in order to claim compensation under a comprehensive statute, see *supra* Part II.A.

232. 20 U.S.C. § 1414(a)(1)(C).

233. IP Model Legislation, *supra* note 61, § 8.

234. ABA REPORT, *supra* note 59, at 9.

235. N.Y.U. Sch. of Law Offender Reentry Clinic, Center for Employment Opportunities Interview Form (2006) (on file with the *New York University Journal of Legislation and Public Policy*).

IEP process is to discover whether the child requires special education services, the IRP evaluation is meant to discover which services to provide. In the IRP model, eligibility for services is a given for any claimant who meets the statutory qualifications as determined at the compensation hearing.

Step 5: IRP meeting is scheduled. This stage in the process is marked by the assembly of the IRP team. Key team members include the exonerated individual; the caseworker who performed the initial assessment; the lawyer who represented the exoneree at the compensation hearing; a primary care physician; a mental health provider, such as a social worker, psychologist, or psychiatrist (this could be the caseworker); a financial consultant; and personnel who will provide access to the services found necessary in the evaluation, such as housing, education, and employment.

One member of the team must take a leadership role, coordinating the delivery of services, serving as a point person if the services provided are inadequate, and addressing any new obstacles that arise by making referrals to the appropriate agency or organization. Defense counsel or the caseworker most naturally fills this role, as long as he or she has knowledge of and contacts in the community. Some defense attorneys may view this sort of work as outside of their traditional function or comfort zone.²³⁶ Public defender officers that take a holistic approach will more easily integrate this type of assistance into their mission.²³⁷ Many such holistic offices already provide social services and view their clients as complete individuals, facing a number of intertwined obstacles, of which their interaction with the criminal justice system is only one piece.²³⁸

Step 6: IRP meeting is held and the IRP is written. The IRP should address the needs identified in the initial assessment and describe the present life circumstances of the exonerated individual and annual measurable goals in each of the service categories. As in the IEP model, simply identifying these goals is insufficient; the IRP must specifically delineate how to assess progress and establish realistic benchmarks developed with a focus towards the exoneree's aspirations. For each substantive compensation category, the IRP must state

236. See Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 *FORDHAM URB. L.J.* 1067, 1069 (2004).

237. See *id.* at 1087; see also Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 *AM. J. CRIM. L.* 367, 400–01 (2004).

238. See Lee, *supra* note 237, at 400–01.

as precisely as possible what services will be provided and who will be responsible for providing them. Examples include medical treatment overseen by the primary care physician, assistance opening bank accounts and investing the compensation award by the financial consultant, and enrollment in a named GED program overseen by either the case manager or a representative of an education agency.

In the description of each service, the IRP also must detail when it will begin and its expected frequency and duration. For some of the services, a substantive endpoint may prove more appropriate than a temporal one; for example, employment services may cease, at least temporarily, when the exoneree obtains a job. If the exoneree lost that job, employment services would resume at least until any durational endpoint established in the IRP.

Step 7: Services are provided. After the completion of the IRP, services begin according to their respective start dates. To address the possibility that the exonerated individual may disagree with the content of the services or the way they are being offered, the statute must create a right of action parallel to that found in IDEA.²³⁹ As a first effort at resolution, the exonerated individual, with the assistance of his caseworker, would approach the service provider to develop a mutually acceptable solution. If this failed, they would attempt to reach a compromise through formal mediation. As a last resort, the exoneree could request a fair hearing in front of the judicial body that presided over the compensation hearing.²⁴⁰

Step 8: Progress is measured. Using the goals and benchmarks developed in the IRP, the case manager should evaluate the exoneree's progress in each of the substantive categories. Services may have to be modified regularly to address any changes in the exoneree's needs, which will likely evolve as he integrates back into his community.

Step 9: IRP is reviewed. IDEA schedules these reviews annually;²⁴¹ given the potentially rapid shifts in an exoneree's need for services, however, yearly reassessments may not be sufficient. The coordinator, whether case manager or defense counsel, should have the discretion to initiate the IRP review and revision session when the exoneree's progress in reintegration is substantial enough to demand a large-scale reworking. Any changes to either the written IRP or the

239. See 20 U.S.C. § 1415 (2000 & Supp. V 2005).

240. The exact identity of this judicial body depends on the level of government that enacts the compensation statute and where it chooses to situate the power to award compensation to wrongly convicted individuals. For further discussion, see *infra* Part IV.

241. 20 U.S.C. § 1414(d)(4)(A)(i).

IRP Team must respond to the intervening evaluations. This reassessment would require a commitment of time and resources by the coordinator, meaning that any legislature that enacted such a structure for the delivery of comprehensive compensation would have to ensure that it remain fully funded.

Step 10: Exoneree is reevaluated for continuing eligibility. In the IEP model, the last step in the process involves a periodic reevaluation of the child to determine if she continues to have a disability that makes her eligible for special education services.²⁴² Exonerees may obtain a degree of reentry success that renders at least some of the compensatory services provided by a comprehensive statute unnecessary. Some legislators may even want to establish presumptive end dates for at least some of the substantive categories in order to incentivize exonerated individuals to reconstruct their lives.

Examples of statutory end points include, in the education category, completion of the educational program or eight years of education and, in the employment category, acquisition of a full-time job with benefits or six years of job assistance. When the expiration date of services approaches, these periodic reevaluations could serve as an opportunity for the exoneree to discuss the need for an extension with the members of the IRP team. As the IRP team will likely not have the statutory authority to consent to additional outlays of expenses to cover service extensions, the enacting statute should establish a procedure by which the exoneree can return to the judicial body that granted the compensation award to petition for extensions.

This IRP model will likely prove successful for assisting exonerees in reentry because it will address the particular obstacles that they face as a result of their wrongful convictions. Such a model could respond to an exoneree's specific needs, which are often interrelated—in order to attend college or hold a job, he must have stable housing, for example—and are best met through the development of a plan particular to the exoneree that takes his entire situation into account and is overseen by a single case manager.

IV.

ENACTING THE STATUTE: TARGETING A LEVEL OF GOVERNMENT

Having designed a comprehensive compensation statute based on the IRP model, the question remains at which level of government it makes sense to enact such a statute. Choices include a completely

242. *Id.* § 1414(a)(2).

new federal statute that resembles IDEA or state statutes to replace the existing ones.

A. *The Federal Solution*

A federal statute can best achieve the key goal of ensuring uniform treatment of similarly situated wrongly convicted individuals. The model used in IDEA provides federal funds to the states to assist them in providing free public education to children with disabilities.²⁴³ States may use the federal funding for special education and related services, but only if they do so in line with the requirements delineated in the Act.²⁴⁴ These requirements have been developed in great detail in federal regulations.²⁴⁵ In addition to grants to states, IDEA also authorizes funding for national research programs.²⁴⁶

A proposed act more topically relevant that adopts the same model of providing federal funds to states in order to implement programs is the Second Chance Act, the latest versions of which were introduced in the House and Senate in March 2007.²⁴⁷ The caption of the House Act reads: "To reauthorize the grant program for reentry of offenders into the community in the Omnibus Crime Control and Safe Streets Act of 1968, to improve reentry planning and implementation, and for other purposes."²⁴⁸ The Act authorizes grants to states for certain delineated types of reentry programs and also funds reentry research on the federal and state level.²⁴⁹ A similar Act was introduced in the Senate as the Recidivism Reduction and Second Chance Act of 2007.²⁵⁰

While both IDEA and the Second Chance Act operate through providing grants to the states to minimize federalism concerns, which

243. *Id.* § 1411(a)(1).

244. See RICHARD APLING & NANCY LEE JONES, CRS REPORT FOR CONGRESS ORDER CODE RS20366, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): OVERVIEW OF MAJOR PROVISIONS 2 (2002), available at http://digital.library.unt.edu/govdocs/crs//data/2002/upl-meta-crs-2207/RS20366_2002Jan11.pdf.

245. See Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300 (2006).

246. APLING & JONES, *supra* note 244, at 3.

247. Second Chance Act of 2007: Community Safety Through Recidivism Prevention, H.R. 1593, 110th Cong. (2007); Recidivism Reduction and Second Chance Act of 2007, S. 1060, 110th Cong. (2007).

248. H.R. 1593.

249. *Id.* Title I and Title II, Subtitles A, B, and C authorize grants to the States. Title II, Subtitle D focuses on the reentry of prisoners housed in the federal system and on reentry research. See also Beth A. Colgan, *Teaching a Prisoner to Fish: Getting Tough on Crime by Preparing Prisoners to Reenter Society*, 5 SEATTLE J. FOR SOC. JUST. 293, 327 (2006).

250. S. 1060.

are particularly heightened in the area of criminal justice,²⁵¹ this method of legislating presents its own difficulties. A controversy has developed around IDEA regarding whether the federal government is fully funding the program.²⁵² To address this concern, on January 17, 2007, a bill titled “Full Funding for IDEA Now Act” was introduced in the House.²⁵³ The Act’s purpose is to

attain the Federal Government’s goal under part B of the Individuals with Disabilities Education Act (20 U.S.C. 1411 et seq.) of providing 40 percent of the national current average per pupil expenditure to assist States and local educational agencies with the excess costs of educating children with disabilities and to make such funding mandatory.²⁵⁴

The funding gap is significant. Thirty-one years after the enactment of IDEA, which authorized Congress to contribute up to forty percent of the national average per pupil expenditure (APPE) for each special education student, local school districts receive only 17.73% of the APPE.²⁵⁵ The burden of making up the shortfall rests on states and local school districts, which, by one estimate, would have had an additional \$381.8 billion to spend on education if the federal government had lived up to its funding promises.²⁵⁶ The Full Funding for IDEA Now Act remains in the House Subcommittee on Early Childhood, Elementary, and Secondary Education.²⁵⁷

In addition to the challenges apparent in receiving authorized funding exemplified by the IDEA funding shortfall, a federal comprehensive compensation bill could also face political opposition. One argument weighing against compensating exonerees—as well as conducting post-conviction DNA testing—is the importance of finality in criminal justice.²⁵⁸ Many actors, including prosecutors and victims, seek and value the finality attendant to a conviction.²⁵⁹ Although in

251. See *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (“The States possess primary authority for defining and enforcing the criminal law.”).

252. APLING & JONES, *supra* note 244, at 3–4.

253. Full Funding for IDEA Now Act, H.R. 526, 110th Cong. (2007).

254. *Id.* § 2.

255. IDEA FUNDING COALITION, IDEA FUNDING: TIME FOR CONGRESS TO LIVE UP TO THE COMMITMENT 3 (2006), <http://www.nea.org/lac/idea/images/mandatory2006.pdf>. See also COUNCIL FOR EXCEPTIONAL CHILDREN, FULL FUNDING FOR IDEA (2006), <http://www.cec.sped.org/Content/NavigationMenu/PolicyAdvocacy/IDEAResources/FullFundingFY07Feb2006.pdf>.

256. IDEA FUNDING COALITION, *supra* note 255, at 3.

257. THOMAS, Library of Cong., H.R. 526, Status, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00526:@@@X> (last visited Dec. 30, 2007).

258. See *supra* note 73 and accompanying text.

259. See *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 14 (2002) (statement of Paul A.

the case of a false conviction, the sense of finality was mistaken, the process of exoneration and compensation shatters that peace of mind, reopening the prosecutor's case and potentially reawakening the victim's pain.

Moreover, both the Second Chance Act and comprehensive compensation legislation can be viewed as in conflict with the "tough on crime" rhetoric that currently dominates debate about the criminal justice system.²⁶⁰ While these legislative initiatives focus on improving reentry success of both offenders and exonerees, "[t]he 'tough on crime' movement refers to a set of policies that emphasize punishment as a primary, and often sole, response to crime."²⁶¹ As "tough on crime" politicians usually oppose rehabilitation programs,²⁶² if they viewed comprehensive compensation legislation as an intensive reentry plan, they would likely speak out against it. The bill's supporters would need to frame it as a distinct remedy outside of the punishment-rehabilitation dichotomy. Thus, "tough" legislators could retain their stance on crime while providing aid to another class of individuals harmed by crime—those wrongfully convicted for criminal offenses committed by others.

Despite these obstacles, a federal comprehensive compensation bill presents a viable option. Opting for federal legislation means that the battle for enactment must be fought on only one front, rather than fifty-two (each state, the District of Columbia, and the federal government). Additionally, the recent legislative history of the Second Chance Act suggests that political will for such compensation legislation may exist at the federal level.²⁶³ A version of the Second Chance Act has been introduced in each of the past three Congresses.²⁶⁴ One

Logli, State's Attorney, Winnebago County, IL); NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 2-3 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/177626.pdf>.

260. POLITICAL RESEARCH ASSOCS., DEFENDING JUSTICE: AN ACTIVIST RESOURCE KIT, CONSERVATIVE AGENDAS & CAMPAIGNS, THE RISE OF THE MODERN "TOUGH ON CRIME" MOVEMENT 43 (2005), available at <http://www.publiceye.org/defendingjustice/pdfs/chapters/toughcrime.pdf>.

261. *Id.*

262. *Id.*

263. The latest version of the bill in the House had ninety-two cosponsors. THOMAS, Library of Cong., H.R. 1593, About Cosponsors, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01593:@@P> (last visited Dec. 30, 2007). The latest Senate version had thirty-four cosponsors. THOMAS, Library of Cong., S. 1060, About Cosponsors, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN01060:@@P> (last visited Dec. 30, 2007).

264. Second Chance Act of 2004, H.R. 4676, 108th Cong. (2004); Second Chance Act of 2004, S. 2789, 108th Cong. (2004); Second Chance Act of 2005, H.R. 1704,

spur for the 2004 version from the 108th Congress came from President George W. Bush's 2004 State of the Union Address,²⁶⁵ in which he proposed

a four-year, \$300 million prisoner re-entry initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.²⁶⁶

This redemption argument for reentry services bears even more weight in the case of the wrongly convicted.

The 2007 House and Senate versions also endorse the vision of individualized services embodied in the IRP model. The bills create grants for Comprehensive and Continuous Offender Reentry Task Forces, which assess prisoners before their release from incarceration and develop reentry plans that address housing, employment, drug treatment, physical and mental health care, and case management.²⁶⁷

Political support for assisting the wrongly convicted is also evidenced by the current federal compensation provision, enacted in 2004.²⁶⁸ The Innocence Protection Act provides for DNA testing for inmates in the federal system and the preservation of biological evidence.²⁶⁹ It also established the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program to award grants to states to help defray the costs of post-conviction DNA testing and incentive grants to states to ensure consideration of claims of actual innocence.²⁷⁰ The adoption of this legislation demonstrates the existence of congressional will to help identify and exonerate the wrongly convicted and to spend the money necessary to do so. Combining the moral imperative for remuneration found in the compensation provision of the Act with the call for individualized assessment in the Second Chance Act of 2007 pro-

109th Cong. (2005); Second Chance Act of 2005, S. 1934, 109th Cong. (2005); Second Chance Act of 2007, H.R. 1593, 110th Cong. (2007); Second Chance Act of 2007, S. 1060, 110th Cong. (2007).

265. See H.R. 4676 § 2(4); S. 2789 § 2(22).

266. President George W. Bush, State of the Union Address (Jan. 20, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

267. See H.R. 1593 § 112; S. 1060 § 112.

268. Justice for All Act of 2004, Pub. L. No. 108-405 (codified in scattered sections of 10, 18, 28, 42 U.S.C.). The federal compensation statute, codified at 28 U.S.C. § 2513, is § 431.

269. See Justice for All Act of 2004 § 411 (codified at 18 U.S.C. §§ 3600, 3600A).

270. See *id.* §§ 412 (codified at 42 U.S.C. § 14136e), 413 (codified at 42 U.S.C. § 14136).

vides the theoretical underpinnings of a federal comprehensive compensation statute.

B. The State Solution

The reasons for and against enacting legislation at the state level are mostly the inverse of the same arguments at the federal level. Of particular concern is the difficulty of pursuing legislation in fifty-two jurisdictions, especially in those that do not currently have compensation statutes or believe in the adequacy of their existing statutes, and attempting to ensure uniformity.

Yet pursuing the state alternative presents some advantages. A state bill can directly command the mandatory creation of delineated programs, while federal legislation can only withhold funding if states do not provide specified services.²⁷¹ Additionally, states can shape their legislation to take advantage of the agencies and organizations that already exist at the state and local level.

Arguably, the political will necessary to enact comprehensive compensation legislation may coalesce more rapidly at the state level, at least in those states that currently have relatively generous compensation statutes or those contemplating the adoption of a new compensation statute. The Second Chance Act of 2007 has been introduced by the present Congress, but in its two preceding incarnations, it could not muster the support to get out of committee in either the House or the Senate.²⁷² A concerted campaign in support of such legislation could produce results in some states more quickly than at the federal level, giving deserved relief to at least some exonerees. Success in administering such a program in a few states could also convince other states or the federal government to adopt similar bills.

Weighing these considerations, a federal solution would be best overall, but if such a bill cannot achieve enough momentum in Congress, a state-by-state solution would at least begin to provide relief to exonerees.

271. See *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the “Federal Government may not compel the States to enact or administer a federal regulatory program”).

272. See THOMAS, Library of Cong., H.R. 4676, Status, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR04676:@@L&summ2=m&> (last visited Oct. 1, 2007); THOMAS, Library of Cong., S. 2789, Status, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN02789:@@L&summ2=m&> (last visited Oct. 2, 2007); THOMAS, Library of Cong., H.R. 1704, Status, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR01704:@@L&summ2=m&> (last visited Oct. 9, 2007); THOMAS, Library of Cong., S. 1934, Status, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN01934:@@L&summ2=m&> (last visited Oct. 2, 2007).

CONCLUSION

Any advocacy effort to persuade a legislature, federal or state, to enact a comprehensive, individualized, compensation statute will ultimately rest on this principle: while the state has no legal duty to compensate exonerees, it has a profound moral obligation to do so. Justice demands restitution for those whom the legal system—whether by mistake or malice—wrongfully incarcerates.²⁷³ If the compensation provided by a society for a wrongful deprivation of liberty reveals how it values freedom, then the United States has strayed far from its core founding principles.

The most recent federal compensation statute was adopted as part of the Innocence Protection Act, embedded in the Justice for All Act of 2004.²⁷⁴ Although the federal bill is arguably generous, the current nationwide system of compensation neither protects innocence nor provides justice for all. Protecting innocence demands more than access to DNA testing; it requires holistic support of those whose innocence the DNA tests reveal. Under no conceptions of the words “justice” or “all” could the hugely divergent existing remedies be said to provide what the Act demands.

The Second Chance Act, in its very title, embodies the ideas of redemption and opportunity at the core of our national mythology. In the context of the wrongfully convicted, those who seek a new chance, an opportunity to do better, are not the exonerees themselves, but society as a whole. The stories of Peter Williams and the many like him reveal that we must redeem ourselves, our criminal justice system, and our commitment to the presumption of innocence. Providing for truly comprehensive compensation is a critical element of this redemption.

273. In 1998, an Assistant State’s Attorney in Illinois cited an article stating that “false convictions of defendants who are actually innocent occur in only 0.5% of all cases.” Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims after Herrera v. Collins*, 71 TEMP. L. REV. 489, 489 (1998). While the percentage may be “only” 0.5%, this translates into a very large number of actual wrongful convictions.

274. See Justice for All Act of 2004 §§ 431–32.