

# STANDARDIZING EXONERATION COMPENSATION STATUTES

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## ABSTRACT

*Wrongful convictions plague the American criminal justice system and leave lasting, unimaginable harm on the innocent. Since 1989 through February 2025, the National Registry of Exonerations reported 3,658 exonerations: a total of 32,750 years behind bars that were lost. An exoneree, once labeled a defendant, becomes a victim. To right this wrong, some states aim to make a wrongfully convicted citizen whole through compensation. However, in examining the evidence of wrongful conviction compensation, a pervasive issue is uncovered in the American compensation system: victims of wrongful incarceration are deeply undercompensated due to statutory drafting. For those states with compensation statutes, variability in recovery ranges broadly from \$5,000 to \$200,000 per year of wrongful incarceration. This Article provides the foundation to examine avenues for reform of exoneration compensation statutes that address the balance of state cost compared to the price of liberty while urging legislators to reevaluate compensation statutes and suggesting across-the-board changes.*

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## INTRODUCTION

When individuals are wrongfully incarcerated, they suffer one of the greatest harms imaginable: loss of liberty. While society moves on, those wrongfully incarcerated are left behind to fight for their freedom. The wrongfully convicted struggle to make sense of this injustice.<sup>1</sup> Though the justice system has already failed them, they must now undergo the uphill battle of proving their innocence in that same justice system.<sup>2</sup> The danger of incarceration looms over<sup>3</sup> and disproportionately harms those with disabilities,<sup>4</sup> women,<sup>5</sup> and people of color.<sup>6</sup> These insurmountable losses live at the intersection of right and

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1. Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1577 (2009); Zieva Dauber Konvisser, "What Happened to Me Can Happen to Anybody" — Women Exonerees Speak Out, 3 TEX. A&M L. REV. 303, 307 (2015).

2. See Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 127 (2010).

3. See *id.* at 129; see also Kelly Shea Delvac, *California Wrongful Incarceration Compensation Law: A History That Is Still Being Written*, 44 MANITOBA L.J. 194, 198–99 (2021); Mary C. Delaney, Keith A. Findley & Sheila Sullivan, *Exonerees' Hardships After Freedom*, WIS. LAW., Feb. 2010, at 18, 20 (citing SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED (Dave Eggers & Lola Vollen eds., McSweeney's 2005)) (explaining the effects of imprisonment on exonerees); Meridith J. Heneage, *Rightful Compensation for a Wrongful Conviction: In Defense of a Compensation Statute in the State of Wyoming*, 19 WYO. L. REV. 306, 317 (2019) (explaining that exonerees suffer mental anguish and psychological harm).

4. See Farina Mendelson, *A Silent Struggle: Constitutional Violations Against the Hearing Impaired in New York State Prisons*, 20 CUNY L. REV. 559, 583 (2017); Jamelia N. Morgan, *Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 BUFF. HUM. RTS. L. REV. 81, 85 (2018); Francis X. Shen, *Neuroscience, Artificial Intelligence, and the Case Against Solitary Confinement*, 21 VAND. J. ENT. & TECH. L. 937, 1007 (2019); Bette Michelle Fleishman, *Invisible Minority: People Incarcerated with Mental Illness, Developmental Disabilities, and Traumatic Brain Injury in Washington's Jails and Prisons*, 11 SEATTLE J. FOR SOC. JUST. 401, 434–35 (2013).

5. See ACLU, STILL WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES 5 (2019), <https://www.aclu.org/report/worse-second-class-solitary-confinement-women-united-states>.

6. See, e.g., Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 470 (2010); Daniele Selby, *Why Latinx People Are Uniquely Vulnerable to Wrongful Conviction*, INNOCENCE PROJECT (Oct. 7, 2022), <https://innocenceproject.org/news/why-latinx-people-are-uniquely-vulnerable-to-wrongful-conviction/> [<https://perma.cc/Z5C6-F5EY>] (discussing how language barriers can present additional difficulties during incarceration for Latinx prisoners); Benjamin J. Bovell-Ammon, Ziming Xuan, Michael K. Paasche-Orlow & Marc R. LaRochelle, *Association of Incarceration with Mortality by Race from a National Longitudinal Cohort Study*, JAMA, Dec. 2021, at 1, 9 (discussing the impacts on the mortality of black men who have been incarcerated).

wrongful convictions. They make up the foundation for the relief a successful exoneree will receive.

Since 1989, there have been 3,658 recorded exonerations, resulting in more than 32,750 years of wrongful incarceration.<sup>7</sup> In 2023 alone, there were 153 recorded exonerations and those exonerees spent 2,230 years incarcerated for their wrongful convictions.<sup>8</sup> The true number of individuals currently unjustly incarcerated may never be discovered,<sup>9</sup> and even the National Registry of Exonerations (“Registry”) suggests that there are “far more false convictions than exonerations.”<sup>10</sup> The wrongful conviction rates represent “the tip of the iceberg.”<sup>11</sup>

The United States Department of Justice identifies two reasons to classify a conviction as wrongful: (1) that the individual “is factually innocent of the charges,” or (2) there were gross procedural errors that “violat[ed] the convicted person’s rights.”<sup>12</sup> Wrongful convictions can also be defined more narrowly through the processes that cause the wrongful conviction, such as: (1) when convictions are overturned on appeal for procedural violations; (2) when evidence leads the prosecuting agency to decline to prosecute further; or (3) “when a person

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7. For the most up-to-date exoneration numbers, see NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> [https://perma.cc/DW8C-25EJ] (last visited Feb. 12, 2025).

8. NAT’L REGISTRY OF EXONERATIONS, 2023 ANNUAL REPORT 3 (2024), <https://www.law.umich.edu/special/exoneration/Documents/2023%20Annual%20Report.pdf>.

9. See NAT’L INST. OF JUST., DEP’T OF JUST., WRONGFUL CONVICTIONS: THE LITERATURE, THE ISSUES, AND THE UNHEARD VOICES 19 (2023) [hereinafter NAT’L INST. OF JUST., WRONGFUL CONVICTIONS] (“Although we know that innocent people are convicted of crimes, we do not know how often it happens.”).

10. SAMUEL R. GROSS & MICHAEL SHAFFER, NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989 – 2012 3 (2012), [https://www.law.umich.edu/special/exoneration/documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](https://www.law.umich.edu/special/exoneration/documents/exonerations_us_1989_2012_full_report.pdf).

11. LAKIA FAISON & LAURA SMALARZ, *Perceptions of Exonerees: A Review of the Psychological Science*, 83 ALB. L. REV. 1021, 1021 (2020).

12. Nat’l Inst. Just., *Wrongful Convictions*, DEP’T OF JUST., <https://nij.ojp.gov/topics/justice-system-reform/wrongful-convictions> [https://perma.cc/V9TY-P4ED].

has been found completely innocent of the crime through scientific evidence such as DNA.”<sup>13</sup>

The leading contributing factors of wrongful convictions include perjury or false accusations,<sup>14</sup> official misconduct,<sup>15</sup> mistaken identity, misleading forensic evidence, and false confessions.<sup>16</sup> While many cases are exposed because of the development and use of DNA evidence, most cases are not well-suited for re-evaluation using advancements in DNA testing technologies.<sup>17</sup> The mainstream availability and exposure to exoneration information has brought wrongful convictions to the public eye, revealing the need to improve the accuracy of the American criminal justice system.<sup>18</sup>

Improving the accuracy of the American criminal justice system requires forward change and retroactive change. Retroactive change focuses on the individuals already harmed by errors in the justice system. This change seeks to repair the wrongfully convicted who have already been harmed. Additionally, forward change requires implementing processes to correct the underlying procedure that caused the injustice in the first place. For example, due to exonerations based on *Brady* claims,

13. Irene Oritseweyinmi Joe, *Learning from Mistakes*, 80 WASH. & LEE L. REV. 297, 306 (2023).

14. Many wrongful convictions involve multiple factors. For example, eyewitness misidentification may be paired with official misconduct where suggestive police procedures are used. See *How Eyewitness Misidentification Can Send Innocent People to Prison*, INNOCENCE PROJECT (Apr. 15, 2020), <https://innocenceproject.org/news/how-eyewitness-misidentification-can-send-innocent-people-to-prison/> [<https://perma.cc/2GLY-XR32>].

15. According to the Innocence Project, official misconduct encompasses instances when “police officers have abused their authority and violated people’s constitutional rights by using coercive interrogation techniques, lying on the stand, failing to turn over exculpatory evidence, working with unreliable informants, displaying outright prejudice, and more.” *Official Misconduct*, INNOCENCE PROJECT, <https://innocenceproject.org/official-misconduct/> [<https://perma.cc/2HJS-SQT7>] (last visited Jan. 16, 2025).

16. % *Exonerations by Contributing Factor*, NAT’L REGISTRY OF EXONERATIONS, [law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx](http://law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx) [<https://perma.cc/3QGT-K6P3>] (last visited Jan. 2, 2025).

17. H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, 32 COLO. LAW. 11, 12 (2003).

18. *Id.* at 11.

governmental units have implemented conviction integrity units to encourage best practices.<sup>19</sup> Further, in 2004, the United States Congress passed the Justice for All Act, which requires the government to preserve all biological evidence in the investigation of a federal offense.<sup>20</sup> This permits federal inmates to request DNA testing in challenging their convictions.<sup>21</sup> Retroactive change is the focus of this Article as it examines states' attempts to restore the loss of liberty of those wrongfully convicted far after the injustice took place.

However, research has uncovered that both retroactive change and forward change are difficult to achieve. In a study examining more than a century of wrongful conviction research, Gould and Leo examined system failures and causes of wrongful convictions.<sup>22</sup> They found that wrongful conviction research has been "instrumental" in assisting governmental agencies and policymakers in establishing "best practices" to prevent wrongful convictions.<sup>23</sup> However, this may not be enough: "Wrongful convictions do such harm to so many that one would expect criminal justices to seek out the lessons from past errors to prevent them. And yet, experience suggests otherwise."<sup>24</sup> By 2010, "[o]nly a handful of states have undertaken serious and systematic review of wrongful convictions,

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19. See generally *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); see, e.g., Lissa Griffin & Daisy Mason, *The Prosecutor in the Mirror: Conviction Integrity Units and Brady Claims*, 55 LOY. L.A. L. REV. 1005, 1041 (2022).

20. Justice for All Act of 2004, Pub. L. No. 108-405, sec. 411, § 3600A(a), 118 Stat. 2260, 2283 (2004) (codified as amended at 18 U.S.C. § 3600A); *Hubbard v. United States*, 533 F. Supp. 3d 968, 971–72 (D. Haw. 2020), *aff'd*, 855 F. App'x 431 (9th Cir. 2021) (dismissing Hubbard's equal protection claim), *aff'd*, 7 F.4th 1228 (9th Cir. 2021) (discussing, separate but concurrently from the equal protection opinion, what qualifies as a "federal offense" under the Act).

21. Sec. 411, § 3600(a), 118 Stat. at 2279 (codified at 18 U.S.C. § 3600(a)).

22. See Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 827, 835–36 (2010).

23. *Id.* at 831.

24. *Id.* at 867.

and when practitioners have been involved, it has often taken ‘kicking and screaming’ to introduce new approaches or technologies to improve their work.”<sup>25</sup>

This Article focuses on compensation as a retroactive solution at the intersection of economics, tort law, and criminal law. The fundamentals of tort law demonstrate the mechanics of compensation.<sup>26</sup> A person who has been wronged is given an amount, relative to the harm suffered, by the person or entity that caused that harm.<sup>27</sup> In examining compensation statutes,

tort scholars tend to give one of three accounts [for] the purpose of [compensation]: (1) individual justice; (2) compensation for accidental injuries; or (3) [to] serve[] a variety of public policy goals at once, including economic efficiency, deterrence of risky activity, injury compensation, spreading the loss associated with injuries, and even social justice.<sup>28</sup>

This Article will show that fair, state-backed compensation for the wrongfully convicted not only make exonerees whole,<sup>29</sup> thereby providing individual justice, but also exoneration compensation statutes can shield the state from civil litigation.<sup>30</sup>

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25. *Id.*

26. See generally 13 AM. JUR. PROOF OF FACTS 3D 111, Westlaw (database updated Nov. 2024) (discussing the mechanics and compensation of the tort of false imprisonment).

27. See *id.* § 6.

28. Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1771 (2009).

29. See Lauren C. Boucher, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069, 1082 (2007).

30. There are debates on whether tort reform deters actors, and this Article does not weigh in on the potential deterrence effect, if any, on government actors from wrongful conviction compensation reform. John J. Donohue III, *The Law and Economics of Tort Law: The Profound Revolution*, 102 HARV. L. REV. 1047, 1049 (1989) (discussing and comparing theories on whether tort law deters tortfeasors); cf. Boaz Segal, *Utilizing Tort Law to Deter Misconduct in the Public Sector*, 19 SEATTLE J. FOR SOC. JUST. 91, 96 (2020); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV.

While no amount of money can give time back to the innocent, compensation is a start to making the victim whole again.<sup>31</sup>

Before the enactment of a state wrongful conviction statute, three options existed for a wrongfully convicted individual: (1) a Section 1983 civil rights claim, (2) a common law tort claim, and (3) a private legislative bill.<sup>32</sup> However, each option presents significant roadblocks. Civil rights claims and common law tort claims require a showing of culpability on the part of the government, and this becomes increasingly difficult when differing levels of immunity exist and where evidence becomes lost over time.<sup>33</sup> Equally difficult is the private bill route, where a claimant must convince a political actor to take on the publicity involved with a wrongful conviction claim.<sup>34</sup>

Despite the plethora of issues with state compensation statutes as they stand, an exoneration compensation statute enacted by the state is, in theory, the most equitable approach to compensating the wrongfully convicted.<sup>35</sup> This is because a compensation statute provides all wrongfully convicted individuals the opportunity to obtain compensation when they may not otherwise be able to prove government malice or have any political connections.<sup>36</sup> Thus, “statutory compensation allows police and prosecutors to ‘speak and act freely and fearlessly in the discharge of their important official functions.’”<sup>37</sup>

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247, 285 (1988) (describing tort liability as a recognized means of deterring misconduct but casting doubt on its efficacy).

31. Karen A. Davis, *Ohio’s Wrongful Imprisonment Statute: Making It Easier to Compensate the Innocent, Exonerated, and Deserving*, 50 U. TOL. L. REV. 335, 342 (2019).

32. Kahn, *supra* note 2, at 124.

33. See Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 693 (2002).

34. See *id.* at 698–700.

35. *Id.* at 704.

36. *Id.*

37. *Id.* at 705 (quoting *Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926)).



However, the fairness stops at the concept of state-funded redress for the wrongfully convicted because of the high variability of compensation statutes.<sup>38</sup> The amount of compensation that a person can expect to receive varies greatly depending on the state of exoneration.<sup>39</sup> For those who are eligible to bring state claims through a state's exoneration compensation statute, recovery is highly variable, ranging from \$5,000 to \$200,000 per year of wrongful conviction.<sup>40</sup>

In the United States, thirty-seven states, the District of Columbia, and the federal government have enacted state-backed exoneration compensation statutes.<sup>41</sup> However, thirteen states, Guam, and Puerto Rico still have not enacted wrongful conviction statutes.<sup>42</sup> In those jurisdictions, the only remedies available—private bills and civil rights actions—are significantly more difficult for the exoneree.<sup>43</sup>

For the states that have enacted compensation statutes, the basic framework generally consists of two phases: eligibility and compensation.<sup>44</sup> First, to be eligible for compensation, a claimant must convince a decision-maker that they are innocent

38. See Adele Bernhard, *Compensation Statutes: A National Overview*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Documents/Compensation%20Statutes%20A%20National%20Overview.pdf> (June 2, 2022). The data cited is from 2022 but continues to be updated here: <https://www.law.umich.edu/special/exoneration/Pages/Compensation.aspx> (last visited Jan. 9, 2025).

39. Bernhard, *supra* note 38.

40. See *id.* Painting this inequity in the starkest terms possible, Wisconsin values one year of imprisonment less than D.C. values even a year on probation. Compare WIS. STAT. ANN. § 775.05(4) (West 2023) (compensating at a rate of \$5,000 per year of incarceration), with D.C. CODE ANN. § 2-423.02(a)(1)(A)(i)–(ii) (West 2024) (compensating at a rate of \$200,000 per year of incarceration and even \$40,000 for years mistakenly on supervision).

41. Innocence Project, *Key Provisions in Wrongful Conviction Compensation Laws*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Documents/Key-Provisions-in-Wrongful-Conviction-Compensation-Laws.pdf> (last visited Jan. 9, 2025).

42. Bernhard, *supra* note 38; Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongfully Convicted*, 82 MO. L. REV. 369, 385 (2017) [hereinafter Gutman, *Empirical Reexamination*].

43. Bernhard, *supra* note 38; Gutman, *Empirical Reexamination*, *supra* note 42, at 370–72.

44. Ashley H. Wisneski, *'That's Just Not Right': Monetary Compensation for the Wrongly Convicted in Massachusetts*, 88 MASS. L. REV. 138, 143 (2004).

per the definition of that state's statute.<sup>45</sup> Then, once the burden has been met, the decision-maker assigns a value to the loss of time due to wrongful incarceration based on a formula prescribed by the same statute.<sup>46</sup>

Wrongful conviction compensation statutes guide the decision-maker in the value-of-loss calculation and serve multiple purposes. First, compensation serves as a reparation for citizens who have been wronged by the state.<sup>47</sup> Compensation for harm by both citizens and the state has existed in the American civil and criminal justice system for centuries.<sup>48</sup> In that reparation, fairness dictates that compensation provide redress for the state's failure to protect the exoneree in the original criminal proceedings.<sup>49</sup> The judicial system acts unjustly when it punishes the innocent; checks and balances exist in the judicial system to avoid incarcerating an innocent person and allowing a guilty person to go free.<sup>50</sup> Therefore, to remedy the error and

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45. *Id.* The standard of proof is typically either a preponderance of the evidence or clear and convincing evidence. See Bernhard, *supra* note 38.

46. See Wisneski, *supra* note 44, at 143.

47. See *id.* While this Article solely discusses the monetary framework of compensation, there are many other avenues that can be addressed. For example, many states couple compensation reform with changes to the underlying causes of the wrongful conviction, such as strengthened protections for cases involving eyewitness identifications, DNA testing, and other reform. See, e.g., Natalia Ermasova, Erica Ceka, Aubrey Adams & Lisa Jackson, *Perceptions Toward Wrongful Convictions and Needed Reforms in the Criminal Justice System: Does Working Experience in Law Enforcement Matter?*, 14 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 46, 58 (forthcoming 2025) (finding that the public supports "multilevel" approaches by fixing both underlying issues and exoneration procedures); H.R. 34, 85th Leg., Reg. Sess. (Tex. 2017) (enacting "measures to prevent wrongful convictions," including best practices for eyewitness identification and lineups). Further, this Article also does not discuss the range of non-loss of liberty compensation such as education support and healthcare compensation. Innocence Project, *supra* note 41 (listing twenty states offering non-monetary services).

48. For example, 42 U.S.C. § 1983 was passed in 1871. See Scott Michelman, *Happy 150th Anniversary, Section 1983!*, ACLU D.C. (Apr. 20, 2021, 4:15 PM), <https://www.acludc.org/en/news/happy-150th-anniversary-section-1983> [<https://perma.cc/3K9F-8NR2>] (detailing the origins of President Ulysses S. Grant's Ku Klux Klan Act, which included § 1983 as a means to protect Black Americans).

49. See Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 243 (2008).

50. See Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 35 (2021).

reinforce public trust in the criminal justice system, compensation serves to remedy not only the innocent person but also to repair societal trust in the judicial system.<sup>51</sup>

Second, the reparation restores citizens' trust in the judicial system.<sup>52</sup> Citizen trust is crucial to the workings of the criminal justice system.<sup>53</sup> Through this re-legitimization, compensation statutes serve two purposes: making the victim whole and preserving state integrity.<sup>54</sup> However, the trust that citizens have in their state should be based on consistent actions and commitment to change.

Third, in addition to the public perception benefit, the state also benefits from state compensation statutes through immunity provisions.<sup>55</sup> Most compensation statutes contain immunity provisions that prohibit claimants from pursuing private litigation against the state.<sup>56</sup> This Article will show that it is economically efficient to provide state-backed relief. Skeptics may argue that states cannot bear the cost of providing generous compensation statutes but the research shows that fair compensation is economically efficient: it costs more to incarcerate the wrongfully convicted than to compensate them.<sup>57</sup>

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51. *See id.* at 11–12 (emphasizing that the legislative and judicial branches work within the social contract of criminal punishment).

52. *See What Is Transitional Justice?*, INT'L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/what-transitional-justice> [<https://perma.cc/F63C-4YF3>] (last visited Jan. 9, 2025).

53. *See* Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, NAT'L INST. JUST. J., March 2002, at 23, 23, 26.

54. *See id.*; Wisneski, *supra* note 44, at 147–48.

55. *See infra* Section II.C.

56. *See, e.g.*, CONN. GEN. STAT. § 54-102uu(g) (2024) (“Any person who is compensated pursuant to this section shall sign a release providing that such person voluntarily relinquishes any right to pursue any other action or remedy at law or in equity that such person may have arising out of such wrongful conviction and incarceration.”); FLA. STAT. § 961.06(6)(d) (2024) (“Any amount awarded under this act is intended to provide the sole compensation for any and all present and future claims arising out of the facts in connection with the claimant’s conviction and incarceration. Upon notification by the department that an application meets the requirements of this act, a wrongfully incarcerated person may not recover under a claim bill.”).

57. *See infra* Section II.G.

However, two general issues arise with compensation statutes as they stand: (1) state support is not universal, as thirteen states, Guam, and Puerto Rico do not have statutes in place; and (2) states that provide compensation do so at highly variable rates.<sup>58</sup> This variability in application harms those who are at greatest risk in the criminal justice system and undermines the citizenry's concept of fairness in the American criminal justice system.<sup>59</sup>

To advocate for necessary changes in the compensatory framework, the first part of this Article will first examine the three categories of compensation statutes in the United States: (1) maximum caps on compensation, (2) flat fees, and (3) fair reasonable language. This Article seeks to enhance the discussion on compensation statutes and advocates for a more uniform standard that maximizes fairness in recovery. The National Registry of Exonerations<sup>60</sup> provided the baseline evidence for the second part of this Article, which examines the vast variability in recovery in the states using the twelve-year test. This part will show that the average length of wrongful incarceration is twelve years. Each state compensation formula was then applied to the hypothetical twelve years of wrongful incarceration to extract a dollar payout that a claimant would receive depending on the state of wrongful conviction. The variability in these results, paired with evidence of actual recovery, leads to the final part of this Article. The final part advocates for reform with three main changes to make state compensation for the wrongfully convicted equitable: (1) removing caps on compensation, (2) providing a baseline yearly compensation value that is fair,

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58. See generally *infra* Parts I and II (noting that Florida offers \$50,000 a year, capping at \$2,000,000, but that Nebraska caps any recovery at \$500,000).

59. See Joe, *supra* note 13, at 338–39 (discussing the variability of the monetary amount given from jurisdiction to jurisdiction as it relates to malpractice claims against public defender offices).

60. On file with author, obtained from NAT'L REGISTRY OF EXONERATIONS.

and (3) allowing for upward modification of compensation by the decision-maker. Improvements to compensation statutes will promote justice and fairness at a cost to the state budget. However, evidence shows that such expenditures are more conservative than continuing to incarcerate the innocent and other avenues for relief, such as civil lawsuits. This will allow the state to properly budget for eventual payouts while also compensating for the unimaginable harm of wrongful conviction.

### I. COMPENSATION FRAMEWORK

In the United States, there are three types of compensatory frameworks: (1) statutes with a maximum cap on compensation, (2) statutes with flat fee provisions, and (3) fair and reasonable statutes that have no specific monetary minimums or limits. Most states fall into the first two categories.<sup>61</sup> In the maximum cap category, legislatures dictate the maximum amount a claimant can recover regardless of the years of wrongful incarceration.<sup>62</sup> Within the maximum cap category, there is a subset of states that provide for a baseline fee but still cap maximum compensation.<sup>63</sup> In contrast, in the flat fee category, the decision-maker applies a set monetary amount to the number of years of wrongful incarceration.<sup>64</sup> Within the flat fee category is a subset of statutes within the states that have flat fee ranges, which leaves some discretion to the decision-maker by permitting the decision-maker to select a monetary value from a set range per year of wrongful incarceration.<sup>65</sup> Lastly, there are two states that do not set any monetary values on compensation

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61. See *infra* Sections I.A, I.B, and I.C.

62. See *infra* Section I.A.

63. See *infra* Section I.A.

64. See *infra* Section I.B.

65. See *infra* notes 109, 117.

and instead allow the decision-maker to compensate a claimant an amount that is fair and reasonable.<sup>66</sup>

*A. Maximum Compensation Cap Statutes*

There are two kinds of compensation statutes with maximum caps: those that include a baseline flat fee to the exoneree and those that do not. If there is a flat fee, a legislature has decided that a minimum amount of money must be paid to the person wrongfully convicted but has added a caveat that recovery may not exceed a maximum amount.<sup>67</sup> In the second type of maximum cap statute, the legislature provides no set flat fee and limits the maximum amount of compensation.<sup>68</sup>

The following states have maximum cap statutes with a baseline flat fee: Illinois, Maine, Massachusetts, Nebraska, New Hampshire, Oklahoma, and Tennessee.<sup>69</sup> Florida, Louisiana, Mississippi, North Carolina, and Wisconsin have maximum cap statutes *without* a baseline flat fee.<sup>70</sup>

Below is a table of the maximum compensation limits for statutes with a maximum cap on compensation, ordered from lowest to highest caps on compensation. Illinois is first due to its unique tiered structure.<sup>71</sup>

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66. See *infra* Section I.C.

67. See *infra* note 79.

68. See *infra* notes 74–75, 78–79, 83.

69. See *infra* Table 1.

70. See *infra* Table 1.

71. See 705 ILL. COMP. STAT. ANN. 505/8(c) (LexisNexis 2023).

**Table 1: Maximum Compensation Cap Statutes**

State	Flat Fee	Maximum Cap
Illinois <sup>72</sup>	None	< 5 Years: \$85,350 5–14 Years: \$170,000 > 14 Years: \$199,150
New Hampshire <sup>73</sup>	None	\$20,000
Wisconsin <sup>74</sup>	\$5,000/Year	\$25,000
Oklahoma <sup>75</sup>	None	\$175,000
Maine <sup>76</sup>	None	\$300,000

72. *Id.* Illinois has made strides in providing monetary compensation. At the statute's inception, it had a maximum cap on compensation of \$100,000. *Id.* at 505/8(d) (1989) (limiting tort damages overall against the state to \$100,000). In 1996, the State began to adjust the tiered payments based on the cost-of-living. *Id.* at 505/8(c) (1996). In 2008, those rates were increased to their current value of \$85,350, \$170,000, and \$199,150, respectively. *Id.* at 505/8(c) (2008).

73. N.H. REV. STAT. ANN. § 541-B:14(II) (2018). Further, while most states enact (usually arduous) requirements for obtaining relief, New Hampshire does not provide the elements to make up a prima facie case against the state for wrongful incarceration other than a vague requirement of a person found to be "innocent." *Id.* Yet, the definition section of 541 does not define "innocent." See N.H. REV. STAT. ANN. § 541-B:1. The ambiguity is an important part of the statute's drafting but is outside the scope of this Article. Further, New Hampshire showcases a unique phenomenon in the exoneration data analyzed here: an extremely low rate of exoneration. *Exonerations by State*, NAT'L REGISTRY OF EXONERATIONS [hereinafter *Exonerations by State*], <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> [<https://perma.cc/DYC6-EA54>] (Sept. 6, 2024). However, a lack of exoneration does not suggest that the justice system is flawless. See NAT'L INST. OF JUST., WRONGFUL CONVICTIONS, *supra* note 9, at 3 (noting the estimated inaccuracy of wrongful convictions). Further, in 1993, the first amendment the legislature made to the statute was lowering the statute of limitations for bringing a claim from six years to three years. N.H. REV. STAT. ANN. § 541-B:14(II) (1993) (included in N.H. 153rd Leg. Sess. H.B. 152). A comparison of demographics, culture, government, infrastructure, and geography suggests that Maine, Vermont, and Connecticut are comparable states to New Hampshire. See *The Most Similar States to New Hampshire*, OBJECTIVE LISTS, <https://objectivelists.com/2023/01/30/which-states-are-most-similar-to-new-hampshire> [<https://perma.cc/UG4Y-R9DE>] (last visited Jan. 9, 2025). Maine, like New Hampshire, also has a statute with a maximum compensation cap, and only has four documented exonerees. Compare § 541-B:14(II), with ME. REV. STAT. tit. 14, § 8242(1) (1993); *Exonerations by State*, *supra*.

74. WIS. STAT. ANN. § 775.05(4) (West 2024).

75. OKLA. STAT. ANN. tit. 51, § 154(B)(4) (West 2021).

76. ME. REV. STAT. tit. 14, § 8242(1) (1993). Before a claimant can be compensated, they must meet their burden of showing innocence by clear and convincing evidence *in addition* to the governor issuing a pardon. *Id.* § 8241(2)(C)); Donna McKneelen, "Oh Lord Won't You Buy Me a

State	Flat Fee	Maximum Cap
Louisiana <sup>77</sup>	\$40,000/Year	\$400,000
Mississippi <sup>78</sup>	\$50,000/Year	\$500,000
Nebraska <sup>79</sup>	None	\$500,000
North Carolina <sup>80</sup>	\$50,000/Year	\$750,000
Massachusetts <sup>81</sup>	None	\$1,000,000
Tennessee <sup>82</sup>	None	\$1,000,000
Florida <sup>83</sup>	\$50,000/Year	\$2,000,000

### B. Flat Fee Statutes

Alabama, California, Colorado, the District of Columbia, Hawaii, Idaho, Indiana, Kansas, Michigan, Missouri, Nevada, New Jersey, Ohio, Oregon, Rhode Island, Texas, Washington, and the Federal Government all have flat fee models, but with

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*Mercedes Benz*": A Comparison of State Wrongful Conviction Compensation Statutes, 15 ST. MARY'S L. REV. ON RACE & SOC. JUST. 185, 198 (2013). Maine only has four documented exonerees. See *Exonerations by State*, *supra* note 73. Given that the rates are so low, and the statute of recourse is only getting more restrictive, it is possible that wrongful incarcerations are being underreported and going undiscovered in Maine. See NAT'L INST. OF JUST., WRONGFUL CONVICTIONS, *supra* note 9, at 3.

77. LA. REV. STAT. ANN. § 15:572.8(H)(2)(b) (2024). The statute was initially passed in 2005, providing for a rate of \$15,000 per year of wrongful incarceration with a maximum cap of \$150,000. *Id.* § 15:572.8(H)(2) (2005) (included in La. 2005 Reg. Sess. H.B. 663). Ten years after the largely stylistic amendments in 2008, the flat fee increased to \$25,000 per year, and the cap was increased to \$250,000. *Id.* (2018) (included in La. 2018 Reg. Sess. S.B. 400). Now, as of July 2022, the rate increased to \$40,000 per year of wrongful incarceration and a maximum cap of \$400,000. *Id.* (2024) (included in La. 2021 Reg. Sess. H.B. 92).

78. MISS. CODE ANN. § 11-44-7(2)(a) (West 2009).

79. NEB. REV. STAT. ANN. § 29-4604(4) (West 2009).

80. N.C. GEN. STAT. ANN. § 148-84(a) (West 2010). In 2008, the flat fee increased from \$20,000 to \$50,000, and the maximum cap increased from \$500,000 to \$750,000. *Id.* (2008) (included in N.C. 2008 Sess. H.B. 2105).

81. MASS. GEN. LAWS ANN. ch. 258D, § 5(A) (West 2024). In 2018, the cap on compensation increased from \$500,000 to \$1,000,000. *Id.* (2018) (included in Mass. 2018 Reg. Sess. S.B. 2371).

82. TENN. CODE ANN. § 9-8-108(7)(A) (2021).

83. FLA. STAT. § 961.06(1)(a) (2024).



the important distinction of no maximum cap on recovery.<sup>84</sup> While most compensate according to years or days incarcerated, Maryland and Utah offer compensation at a varying rate based on a per capita wage or household income calculation.<sup>85</sup> Virginia was in this median household income subcategory, but in 2022, the state shifted to a standard yearly flat fee model.<sup>86</sup>

Generally, providing a flat fee creates a required amount that the state must pay the exoneree once innocence has been proven.<sup>87</sup> As each state has its own definition of innocence, the amount of recovery also varies.<sup>88</sup>

The table below orders the states from least amount of compensation to most, per year.<sup>89</sup>

**Table 2: Flat Fee Statutes**

State	Flat Fee (Yearly)
Nevada <sup>90</sup>	≤ 10 Years: \$50,000 11–20 Years: \$75,000 ≥ 21 Years: \$100,000
Iowa <sup>91</sup>	\$18,250 <sup>92</sup>

84. See *infra* Section I.B.

85. See *infra* notes 108, 115.

86. Compare VA. CODE ANN. § 8.01-195.11(A) (2022) (paying \$55,000 per year, with consumer price index adjustments), with VA. CODE ANN. § 8.01-195.11(A) (2004) (included in 2004 Sess. Va. S.B. 271) (paying “90 percent of the inflation adjusted Virginia per capita personal income as reported by the Bureau of Economic Analysis of the U.S. Department of Commerce for each year of incarceration”). The most recent form of the statute provides for non-monetary support, like housing assistance and counseling, as well as extending a \$30,000 minimum rate for years spent unduly registered as a sex offender. *Id.* § 8.01-195.11(A) (2024).

87. See *infra* Section I.B.

88. See *infra* Section I.B.

89. Nevada is not included in the ordering and rather, is placed on top, due to its tiered system for compensation.

90. NEV. REV. STAT. ANN. § 41.950(1)(a)(1)–(3) (West 2021).

91. IOWA CODE ANN. § 663A.1(6)(b) (West 2024).

92. Adjusted by multiplying the daily rate (\$50/day) by 365.

State	Flat Fee (Yearly)
Missouri <sup>93</sup>	\$36,500 <sup>94</sup>
Ohio <sup>95</sup>	\$40,330
Alabama <sup>96</sup>	\$50,000
Hawaii <sup>97</sup>	\$50,000
Indiana <sup>98</sup>	\$50,000
Michigan <sup>99</sup>	\$50,000
New Jersey <sup>100</sup>	\$50,000
Rhode Island <sup>101</sup>	\$50,000
Washington <sup>102</sup>	\$50,000

93. MO. ANN. STAT. § 650.058(1) (West 2021). On July 6, 2023, the Governor of Missouri vetoed a bill proposing to increase the daily rate from \$100 per day to \$179 per day. Letter from Michael A. Parson, Governor of Mo., to Mo. Sec’y of State Vetoing Mo. SB 189 (July 6, 2023). This was partly based on the Governor’s opinion that the eligibility standard was too vague, but more importantly that the 75% increase in rate of compensation was too high of a burden for taxpayers. *Id.* The governor also claimed that wrongful conviction often occurs at the local level and that “Missourians from every part of the state should not have to foot the bill for a local decision. Local governments should bear the financial cost of their own actions.” *Id.*

94. Adjusted by multiplying the daily rate (\$100/day) by 365.

95. OHIO REV. CODE ANN. § 2743.48(E)(2)(b) (LexisNexis 2024). This rate was increased in 2003; it was originally \$25,330 per year of wrongful incarceration. *Id.* (2003) (amended in 124th Gen. Ass. Reg. Sess. S.B. 149).

96. ALA. CODE § 29-2-159(a) (1975).

97. HAW. REV. STAT. ANN. § 661B-3(c) (West 2024). In 2016, the Innocence Project urged the Hawaii legislature to follow the standard set forth by the federal government of \$50,000 per year of wrongful incarceration. *Testimony of Dep’t of the Atty. Gen.: H.B. No. 1046, H.D. 2 Relating to Wrongful Imprisonment Before S. Comm. on Judiciary and Labor*, 28th Leg., Reg. Sess. (Haw. 2016) (statement of Mark J. Bennett).

98. IND. CODE § 5-2-23-3(a) (2019).

99. MICH. COMP. LAWS § 691.1755(2)(a) (2017).

100. N.J. STAT. ANN. § 52:4C-5(a)(1)(b) (West 2013). New Jersey compensates at the greater of either \$50,000 per year or at twice the amount of the claimant’s income prior to incarceration. *Id.* § (a)(1). To reduce over-categorization, this statute was placed in the flat fee category. In 2013, the legislature increased the flat fee amount from \$20,000 to \$50,000. *Compare id.* (using \$50,000), with N.J. STAT. ANN. § 52:4C-5(a) (West 1997) (using \$20,000 in the statute’s previous form as included in 207th N.J. Leg. S.B. 1036).

101. 12 R.I. GEN. LAWS § 12-33-4(b)(1) (2021).

102. WASH. REV. CODE § 4.100.060(5)(a) (2013).

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State	Flat Fee (Yearly)
Federal Government <sup>103</sup>	\$50,000
California <sup>104</sup>	\$51,100 <sup>105</sup>
Virginia <sup>106</sup>	\$55,000
Utah <sup>107</sup>	\$56,940
Vermont <sup>108</sup>	\$30,000–\$60,000
Idaho <sup>109</sup>	\$62,000
Kansas <sup>110</sup>	\$65,000
Oregon <sup>111</sup>	\$65,000
Colorado <sup>112</sup>	\$70,000
Texas <sup>113</sup>	\$80,000

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103. 28 U.S.C. § 2513(e).

104. CAL. PENAL CODE § 4904(a) (West 2024). California’s statute was added to the Penal Code in 1941, originally providing for \$5,000 per year of wrongful incarceration, and in 1969, the statute was amended to increase the flat fee to \$10,000 per year. 1941 STATS. CAL. 1130–1131; CAL. PENAL CODE § 4904 (West 1991) (this version of the statute is the version that was enacted in 1969). Then, in 2000, the legislature amended the statute to provide for a daily rate of \$100 per day of wrongful incarceration, which then increased to \$140 per day of wrongful incarceration. Assemb. 1799, 2000 Leg., Reg. Sess. (Cal. 2000); S. 635, 2015 Leg., Reg. Sess. (Cal. 2015). This is the current iteration of the statute, equaling to \$51,100 per year of wrongful incarceration. CAL. PENAL CODE § 4904 (West 2024).

105. CAL. PENAL CODE § 4904(a) (West 2024). Adjusted by multiplying the daily rate (\$140/day) by 365.

106. VA. CODE ANN. § 8.01-195.11(A)(1) (2024).

107. UTAH CODE ANN. § 78B-9-405(2)(a) (West 2021). Utah, on its face, seems to have a language-based model. However, compensation is calculated using the annual nonagricultural payroll wage, which can be converted to a numerical value. For simplicity, in 2021, this rate was \$4,745 per month, which converts to a yearly rate of \$56,940. See UTAH DEP’T WORKFORCE SERVS., ANNUAL REPORT OF LABOR MARKET INFORMATION tbl.22 (2022).

108. VT. STAT. ANN. tit. 13, § 5574(b) (2024).

109. IDAHO CODE ANN. § 6-3503(1)(a)(i) (West 2021).

110. KAN. STAT. ANN. § 60-5004(e)(1)(A) (West 2018).

111. OR. REV. STAT. § Ch. 105, § 1(5)(a)(A) (2022).

112. COLO. REV. STAT. § 13-65-103(3)(a) (2018).

113. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a)(1) (West 2024). In 2007, the flat fee was increased from \$25,000 to \$50,000 per year of wrongful incarceration. *Id.* (2007) (included in 80th

State	Flat Fee (Yearly)
Maryland <sup>114</sup>	\$91,431
Minnesota <sup>115</sup>	\$50,000–\$100,000
Connecticut <sup>116</sup>	\$83,572–\$167,144
District of Columbia <sup>117</sup>	\$200,000

### C. Fair and Reasonable Statutes

New York and West Virginia utilize a fair and reasonable model to determine compensation.

#### 1. New York

In New York, the statute begins with legislative intent:

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

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Leg. Sess. H.B. 814). The following year, the amount was increased to \$80,000. *Id.* (2009) (included in 81st Leg. Sess. H.B. 1736).

114. MD. CODE ANN. § 10-501(a)(1) (LexisNexis 2024). Maryland, on its face, seems to have a language-based model. However, compensation is calculated using the annual median household income of the state from the U.S. Census Bureau. *Id.* For simplicity, the 2021 rate was used, which was \$91,431. See *\$2.9 Million Paid by Maryland to Exonerated Former Prisoner*, PRISON LEGAL NEWS (Feb. 1, 2024), <https://www.prisonlegalnews.org/news/2024/feb/1/29-million-paid-maryland-exonerated-former-prisoner/> [https://perma.cc/2QE2-7YLK].

115. MINN. STAT. § 611.365(a)(2)–(3) (2024).

116. CONN. GEN. STAT. § 54-102uu(d)(2) (2024); see also discussion *infra* pp. 381–84 and note 204 (describing how Connecticut’s statute operates).

117. D.C. CODE § 2-423.02(a)(1)(A)(i) (2021).

can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned be able to recover damages against the state. In light of the substantial burden of proof that must be carried by such persons, it is the intent of the legislature that the court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, shall, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf.<sup>118</sup>

Thus, New York does not place a minimum amount one must recover for wrongful incarceration, nor does it place a statutory cap on damages. Rather, compensation is awarded in an amount that a judge determines to be fair and reasonable: “If the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him.”<sup>119</sup>

## 2. *West Virginia*

Like New York, West Virginia also utilizes the fair and reasonable language:

If the court finds that the claimant is entitled to a judgment, the court shall award damages in a sum of money as the court determines will fairly and reasonably compensate the claimant based upon the sufficiency of the claimant’s proof at

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118. N.Y. CT. CL. ACT § 8-b(1) (McKinney 2007).

119. *Id.* § 8-b(6).

trial. The damages shall depend upon the unique facts and circumstances of each claim. The claimant shall bear the ultimate burden of proving all damages associated with the claimant's claim.<sup>120</sup>

Also like New York, West Virginia's statute has a codified legislative intent section.<sup>121</sup> This section of the statute discusses the difficulty in recovery for the wrongfully convicted who have been "frustrated in seeking legal redress."<sup>122</sup> Therefore, this legislation seeks to provide "an available avenue of redress over and above the existing tort remedies."<sup>123</sup>

## II. COMPENSATION REFORM

The government plays a fundamental role in shaping the social fabric and guiding the collective behavior of its citizens. With this role, the state has a duty to set a precedent of integrity, fairness, and respect for human rights. While states may not have a legal obligation to compensate the wrongfully incarcerated, they do have a moral responsibility to do so.<sup>124</sup> The state is

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120. W. VA. CODE ANN. § 14-2-13a(d) (West 2020).

121. Compare N.Y. CT. CL. ACT § 8-b(1) (declaring legislative intent), with W. VA. CODE ANN. § 14-2-13a(a) (West 2020) (also declaring legislative intent).

122. § 14-2-13a(a).

123. *Id.*

124. See Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 93 (1999) ("After all, it is the state, through operation of one of its most essential services—the criminal justice system—that has inflicted the harm. Although it may be impossible to hold any individual law enforcement officer, or any particular municipality, liable, the state's responsibility for the injury is sufficient to generate a moral obligation."); see also Jessica R. Lonergan, Note, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 452 (2008) (concluding that "while the state has no legal duty to compensate exonerees, it has a profound moral obligation to do so"). Further, in discussing why state compensation statutes are a fairer alternative to private bills, the Innocence Project discussed the "moral responsibility bill": "The intent of private bills—that the state has a moral responsibility to exonerees—is just. However, the tremendous procedural and political challenges presented by private bill awards create yet another obstacle for the exoneree." See INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 13 (2009),

responsible for its criminal justice system and has the right to incarcerate guilty people.<sup>125</sup> However, when that state's process fails, and its criminal justice system creates the greatest harm and incarcerates an innocent person, the state is the most appropriate party to assume liability for the miscarriage of justice.<sup>126</sup>

Yet, statutory limits on compensation hamper progress.<sup>127</sup> Statutory limits on compensation became more common through American tort reform, specifically for non-economic damages, but the consequences of these caps are especially egregious in wrongful conviction compensation.<sup>128</sup> Caps on noneconomic damages disproportionately harm "the most severely injured" because the cap can lead to "gross undercompensation."<sup>129</sup>

#### A. *Wrongful Conviction Impact by State*

Wrongful convictions do not plague all states proportionally. Using population data from the United States Census

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[https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence\\_project\\_compensation\\_report-6.pdf](https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf).

125. Wisneski, *supra* note 44, at 148 ("The state clearly has the right to incarcerate people proven guilty of crimes. We also have the moral responsibility, in the cases where mistakes have been made, to provide some recompense to those who have been wronged by state action.").

126. See *Baba-Ali v. State*, 878 N.Y.S.2d 555, 566–67 (Ct. Cl. 2009), *aff'd in part, rev'd in part*, 907 N.Y.S.2d 432 (N.Y. App. Div. 2010), *aff'd as modified*, 975 N.E.2d 475 (N.Y. 2012) ("[T]he Commission viewed the State as 'the most appropriate party to assume liability' for an unjust conviction even if occasioned by a miscarriage of justice at another level of government, such as an elected county District Attorney. It was the Commission's view that because a prosecution is brought in the name of the 'People of the State of New York,' and the conviction is for an act made criminal by state law 'usually with the imprimatur of a state court,' and the convicted person generally is confined in a state correctional facility, the nexus between the State and the entire process justifies the State's assumption of what it saw as a moral obligation . . .") (citation omitted).

127. See Lopez, *supra* note 33, at 709 (describing the challenges posed by compensation caps in wrongful conviction statutes).

128. See *id.* at 705–09 (describing the relationship between compensation caps in tort law and compensation caps in wrongful conviction statutes).

129. *Id.* at 709.

Bureau<sup>130</sup> and the National Registry of Exonerations<sup>131</sup> data, the number of exonerations per state was calculated and adjusted for state population. This data can be put into perspective total exonerations per state through a state like Florida, which has a recorded eighty-four exonerations.<sup>132</sup> However, Florida's rate of exoneration is relatively low, at 3.90 exonerations per million people out of its 21 million residents.<sup>133</sup> In contrast, the District of Columbia has 30.46 exonerations as compared to its total resident population,<sup>134</sup> and Illinois has 38.48 exonerations as compared to its size.<sup>135</sup> This is pictured below using a graph plotting the number of exonerations divided by the resident population and multiplied by the million.

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130. Total population for each state was taken from the 2020 census results, available online, and combined with a list of exonerations by state maintained by the University of Michigan National Registry of Exonerations. *2020 Census Apportionment Results*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html> [<https://perma.cc/3N95-SCZF>] (June 7, 2024) (follow "Table 2. Resident Population for the 50 States, the District of Columbia, and Puerto Rico: 2020 Census").

131. *Compensation by the Numbers: State Statutory Compensation*, NAT'L REGISTRY OF EXONERATIONS [hereinafter *Compensation Chart*], <https://www.law.umich.edu/special/exoneration/Pages/Compensation.aspx> [<https://perma.cc/GK5M-3KP2>] (follow "Compensation by the Numbers: State Statutory Compensation" under "Charts, Tables, & Lists") (last visited Jan. 3, 2025). The exoneration data is available by request on the Registry's website: <https://www.law.umich.edu/special/exoneration/Pages/Spread-Sheet-Request-Form.aspx>. Combining exoneration data with 2020 Census population counts yields the exonerations-per-person-per-million-population metric used throughout this paper, which can be used to compare the exoneration rate across different state populations. The data utilized is limited by the accuracy of census and exoneration records available at the time of calculation. More importantly, a stark contrast remains, despite minor variations that may arise from under- or over-reporting.

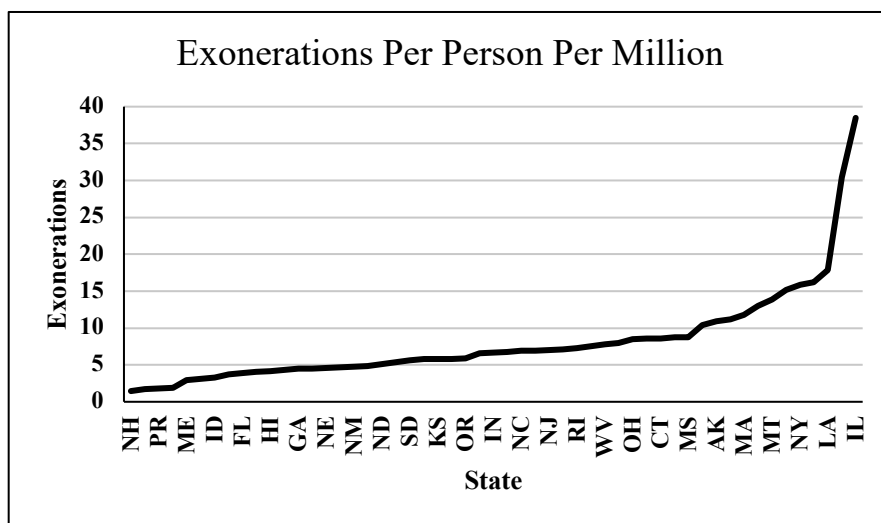
132. *See infra* App. II.

133. *See infra* App. II.

134. *See infra* App. II.

135. *See infra* App. II.



**Figure 1**

All things equal, the graph shows the large discrepancy between states on the far ends of the spectrum.<sup>136</sup> Wrongful conviction and incarceration plague each state and exoneree within that state. However, that impact is not equal. This Article advocates for reform with statutes that result in vast under-compensation and advocates for enactment of statutes in states without compensation statutes.<sup>137</sup> This impact sets the framework for the twelve-year test.<sup>138</sup>

### B. The Twelve-Year Test

Using the database of all individuals who have been exonerated in the United States since 1989, provided by the National Registry of Exonerations, individuals were categorized into one of four total categories based on state of wrongful

136. The full figure is available in Appendix II.

137. Professor Jeffrey Gutman suggests that reform of existing weak statutes may take priority for pro-compensation advocates if those statutes impact states with a large number of exonerees. See Gutman, *Empirical Reexamination*, *supra* note 42, at 387.

138. This Article does not address *why* such discrepancies exist in rates of exonerations across the states.

incarceration.<sup>139</sup> Using the data compiled by the Registry, the number of years an individual lost due to wrongful incarceration was calculated by subtracting the year an individual was convicted from the year they were exonerated.<sup>140</sup> The average number of years this population lost was 11.80 years, which was rounded up to 12 years lost. This value was used to approximate the amount of compensation an individual would be expected to receive based on the statutory requirements. In the case of a minimum or a maximum amount in each state, the maximum value was chosen for calculation.

Each compensation statute was then labeled as either a flat fee state or a maximum cap state. While some states, like Wisconsin, have both a flat fee and a maximum cap on compensation, the more restrictive category was chosen.<sup>141</sup> Several states were not included in the calculation. First, states without a wrongful conviction compensation statute were not included. Those states are Alaska, Arizona, Arkansas, Delaware, Georgia, Guam, Kentucky, Montana, New Mexico, North Dakota, Pennsylvania, Puerto Rico, South Carolina, South Dakota, and Wyoming.<sup>142</sup> Second, as New York and West Virginia are fair and reasonable states, those were not included in the graph as their

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139. Bernhard, *supra* note 38.

140. This will be termed “years lost.” In calculating years lost, the methodology has a few limitations: first, some individuals may be released before official exoneration. Many individuals are also incarcerated prior to conviction, so this analysis also does not account for the exonerates who did not make a claim for compensation, nor is it able to account for the strictness of eligibility standards across states. A factor that is not accounted for here is the actual number of exonerates who receive a compensation payout. Some individuals do not attempt the compensation process. They choose to walk away from a system that has already failed them the first time and cannot trust the system once more. See Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179, 1219 (2003).

141. For example, in Wisconsin, exonerates are entitled to \$5,000 per year of wrongful incarceration, but the maximum cap on compensation is \$25,000. Therefore, while the flat fee of \$5,000 per year for twelve years would entitle the individual to \$60,000, they would only recover the maximum of \$25,000. The \$25,000 value was used in the calculation of average recovery. See WIS. STAT. § 775.05(4) (2024).

142. Bernhard, *supra* note 38; *Compensation Chart*, *supra* note 131.

hypothetical recovery does not follow a formula.<sup>143</sup>

**Table 3: Statutes Per State**

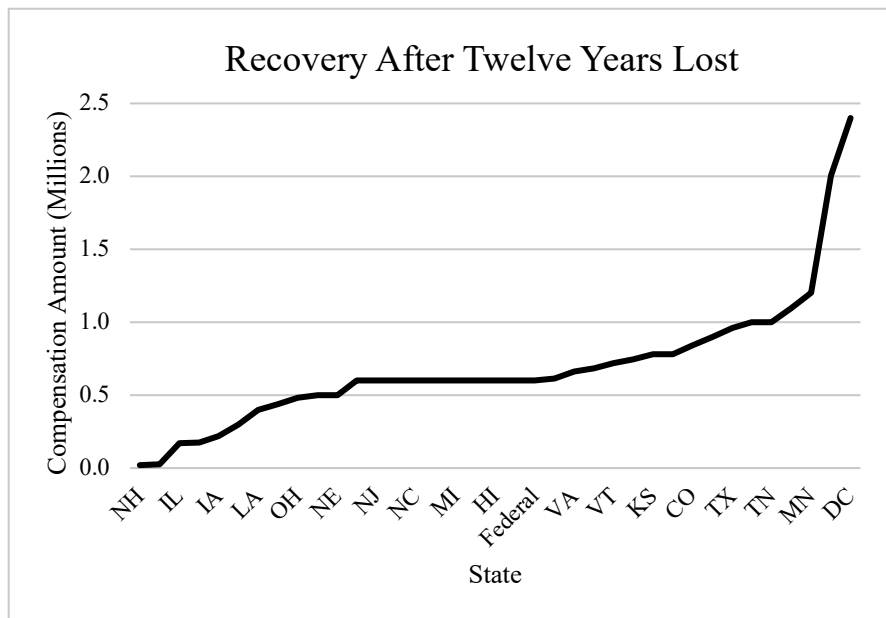
No Statute	Maximum Cap	Only Flat Fee	Fair and Reasonable
Alaska	Florida	Alabama	New York
Arizona	Illinois	California	West Virginia
Arkansas	Louisiana	Colorado	
Delaware	Maine	Connecticut	
Georgia	Massachusetts	District of Columbia	
Guam	Mississippi	Hawaii	
Kentucky	Nebraska	Idaho	
Montana	New Hampshire	Indiana	
New Mexico	North Carolina	Iowa	
North Dakota	Oklahoma	Kansas	
Pennsylvania	Tennessee	Maryland	
Puerto Rico	Wisconsin	Michigan	
South Carolina		Minnesota	
South Dakota		Missouri	
Wyoming		Nevada	
		New Jersey	
		Ohio	
		Oregon	
		Rhode Island	
		Texas	
		Utah	
		Virginia	
		Vermont	
		Washington	
		Federal Government	

Each state's compensation structure was then applied to the average number of twelve years lost to uncover a hypothetical

143. N.Y. CT. CL. ACT. § 8-b(6) (McKinney 2023); W. VA. CODE § 14-2-13a(d) (2020).

recovery rate for an individual who has been wrongfully incarcerated for twelve years. These dollar amounts were then plotted on a line graph.<sup>144</sup> The data presented with an r-squared of 0.7945, representing a strong fit between the state and the approximated compensation along an exponential model.<sup>145</sup>

**Figure 2**



Thus, the same person who was wrongfully convicted for twelve years will receive anywhere from \$20,000 in New Hampshire to \$2,005,000 in Connecticut and the greatest recovery of \$2,400,000 in the District of Columbia.<sup>146</sup> The only difference is the state of wrongful incarceration.<sup>147</sup> It is immoral to

144. The values applied to the graph can be found in Appendix I.

145. The entirety of Figure 2 can be found in Appendix I.

146. See *infra* App. I.

147. In another simple calculation for fifty years of wrongful incarceration, a claimant would still only be entitled to \$20,000 in New Hampshire but would recover \$10,000,000 in the District of Columbia. This is based on New Hampshire's \$20,000 cap on recovery and on the District of Columbia's flat fee of \$200,000 per year of wrongful incarceration. See N.H. REV. STAT. ANN. § 541-B:14 (LexisNexis 2024); D.C. CODE. ANN. § 2-423.02 (West 2024).

have this range in variability. While state size, budget, or other constraints may account for some variability, this level of disproportionality exacerbates a system already built on unfairness.<sup>148</sup> Therefore, the exoneree has already been entrenched in a system of injustice. The injustice is then perpetuated with another systemic failure: the extreme recovery ranges for compensation that are intended to help the exoneree instead exacerbate the harm.

This range in recovery exhibits the need for improved standards, particularly in the states that fall below the average rate of recovery.<sup>149</sup> At twelve years, the average number recovered is \$689,030.<sup>150</sup> The data shows that generally, states far below the average rate of recovery have maximum cap provisions, and states that are generally above the average recovery amount are flat fee states that do not cap compensation.<sup>151</sup> This range of recovery serves as the basis for the three recommended changes in Section F below.<sup>152</sup>

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148. See e.g., Lewis R. Katz, *Whren at Twenty: Systemic Racial Bias and the Criminal Justice System - Introduction*, 66 CASE W. RES. L. REV. 923, 924–25 (2016) (“In fact, except for a short period in our nation’s history, 1954 to 1965, from *Brown v. Board of Education* to *Mapp v. Ohio* to *Gideon v. Wainwright* to *Baker v. Carr*, the United States Supreme Court has promoted or facilitated injustice against African Americans.”).

149. In an adjacent area of law, criminal sentencing, the United States Sentencing Commission was established as an independent agency to reduce sentencing disparities across judicial branches. See *About the Commission*, U.S. SENT’G COMM’N, <https://www.ussc.gov> [<https://perma.cc/G5AS-SZ92>] (last visited Jan. 3, 2025); 28 U.S.C. § 994(f) (2006) (requiring the newly formed commission to pay special attention to its duty to reduce sentencing disparities amongst similarly situated defendants). Similarly, Pennsylvania also has a sentencing commission aimed to promote more uniform decisions at sentencing, recognizing that disparities in sentencing lack fairness and do not promote justice. See also PA. COMM’N ON SENT’G, <https://pcs.la.psu.edu> [<https://perma.cc/S69C-YECV>] (last visited Jan. 3, 2025); 42 PA. CONS. STAT. § 2153(a) (2019) (empowering the state sentencing commission to monitor compliance with their guidelines across all counties of the state).

150. See *infra* App. I.

151. See *infra* App. I.

152. The federalism argument is not lost here as “the anti-commandeering principle prohibits Congress from requiring a State’s legislature to enact any particular law, or requiring State executive department officials to assist in the enforcement of a federal statute . . . .” Thomas R. Bender, *State Medical Marijuana Laws, the Federal Controlled Substances Act and Criminal Prosecutions*, 63 R.I. BAR J. 13, 14 (2014) (citing *Reno v. Condon*, 528 U.S. 141, 151 (2000) (holding the

*C. The Harm of Maximum Cap Statutes*

Maximum caps on compensation place a limit on the value of human life. If the belief truly is that there is no value equivalent of human life, then legislatures must take action to remove maximum limits on compensation and leave the discretion to the decision-maker to evaluate the individual harm caused by the wrongful conviction and incarceration. When states place limits on compensation, the exoneree is first penalized when they are wrongfully incarcerated, and then the same system that penalized them is used to restrict their recovery through a maximum cap: “the statutory damage caps represent the clash between scarce public funds and the remedy for the harm suffered by the wrongfully convicted where ‘any award is bound to be a mere token.’”<sup>153</sup> To truly place value on human life, states should aim to remove maximum caps on compensation.

Proponents of maximum caps on recovery support the need to recognize state financial interests and budgetary limitations.<sup>154</sup> However, caps in and of themselves create a contradiction within the compensation system: “[Caps] hurt those who suffer the worst harms. The longer a person is wrongfully imprisoned, the less compensation they get per year.”<sup>155</sup> Once the cap is reached, the yearly value of their wrongful imprisonment begins to decrease: “These damage caps also mean that those wrongfully convicted are entitled to much less than what a

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Driver’s Privacy Protection Act constitutional because it “does not require the States in their sovereign capacity to regulate their own citizens” according to federal policy)). However, this Article is not suggesting that the federal government mandate a change, but instead, the Article presents a model for states themselves to adopt that enhances fairness, especially in states that statistically undercompensate, even considering adjustment for state population.

153. See Lopez, *supra* note 33, at 705 (citing *Hoffner v. State*, 142 N.Y.S.2d 630, 632 (N.Y. Ct. Cl. 1955)).

154. See generally *infra* Section II.G.

155. Nino C. Monea, *Low Income, Poor Outcome: Unequal Treatment of Indigent Defendants*, 67 WAYNE L. REV. 345, 393 (2022).

plaintiff could seek for the similar tort of false imprisonment.”<sup>156</sup> Effectively, a state with a maximum cap on compensation has now insulated itself from large lawsuits by opening an avenue for relief through compensation statutes.<sup>157</sup>

### 1. Wisconsin

Wisconsin has the lowest documented minimum flat fee of all states: \$5,000 per year of incarceration with a maximum cap on compensation at \$25,000.<sup>158</sup> The statute reads:

If the claims board finds that the petitioner was innocent and that he or she did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation, the claims board shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment.<sup>159</sup>

Jeffrey Gutman, a contributor to the National Registry of Exonerees, examined this low compensatory scheme in Wisconsin and found the results “stunning.”<sup>160</sup> He noted that

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156. *Id.* (highlighting that a falsely accused plaintiff in California, who spent four hours in jail, was compensated the same—\$10,000—as if he had spent ten years wrongfully convicted on death row).

157. Because there is typically police and prosecutorial immunity in civil cases, unlike with exoneration compensation statutes, individuals seeking exoneration are more likely to collect relief via a compensation statute than by filing a lawsuit. See Jeffrey Gutman, *States Must Rethink Wrongful Conviction Compensation Laws*, LAW360 (Sept. 12, 2021, 8:02 PM), <https://www.law360.com/articles/1419525/states-must-rethink-wrongful-conviction-compensation-laws> [<https://perma.cc/U3UC-GTLR>].

158. WIS. STAT. § 775.05(4) (2023).

159. *Id.* For ease of categorization, Wisconsin was placed in the flat fee with a maximum cap category despite the statute technically permitting less than \$5,000 per year of wrongful incarceration. *Id.*

160. JEFFREY GUTMAN, COMPENSATION UNDER THE MICROSCOPE: WISCONSIN, NAT’L REGISTRY OF EXONERATIONS 3 [hereinafter GUTMAN, COMPENSATION: WISCONSIN],

[t]he monetary value of an exoneree's years lost to wrongful incarceration is worth 106.5 times more in Connecticut than in Wisconsin . . . [a]n exoneree's statutory compensation turns largely on the fortuity of the state in which they were wrongly convicted.<sup>161</sup>

Although an exoneree can request additional compensation, the State has made acquiring it difficult. Gutman found:

[o]f the 16 Wisconsin exonerees awarded compensation, only one, Robert Lee Stinson, appears to have been provided additional compensation from the Wisconsin legislature following a Claims Board recommendation. In 2014, four years after the Claims Board approved a \$25,000 award, the legislature awarded him an additional \$90,000, giving him a total of \$115,000 for 23.1 years lost. According to the Claims Board decision in the case, Stinson simply requested \$5,000 for each of the 18 years he spent in prison beyond the five years for which he was initially compensated.<sup>162</sup>

However, the legislature providing such additional compensation is not the norm. Indeed, Wisconsin's legislature is reluctant to award additional recovery. Made famous by the Netflix documentary "Making a Murderer," Steven Avery was initially wrongfully convicted of rape.<sup>163</sup> After serving eighteen

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<https://www.law.umich.edu/special/exoneration/Documents/Under%20The%20Microscope%20Wisconsin.pdf>; *Compensation*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Compensation.aspx> [<https://perma.cc/GK5M-3KP2>] (last visited Jan. 4, 2025).

161. GUTMAN, COMPENSATION: WISCONSIN, *supra* note 160.

162. *Id.* at 3.

163. *Steven Avery*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/steven-avery/> [<https://perma.cc/3Y3J-9C95>] (last visited Jan. 9, 2025); *Netflix Announces New Original*



years in prison, he was exonerated using DNA evidence.<sup>164</sup> Upon release, he filed a claim for compensation and was awarded the maximum of \$25,000.<sup>165</sup> This amounts to \$3.86 per day of incarceration.

In 2004, he filed a federal lawsuit seeking \$36 million against the county of conviction, which settled for \$400,000.<sup>166</sup> Despite his later notoriety, the \$25,000 compensation cap presents the shortcomings of the statute.<sup>167</sup> The initial \$36 million demand in the federal lawsuit was broken down by \$18 million in compensatory damages and \$18 million in punitive damages.<sup>168</sup> The demand valued compensatory damages at a value of \$1 million per year of wrongful incarceration for the loss of his mind, marriage, and contact with his children.<sup>169</sup>

Wisconsin's statute shows the potential harm that compensation caps have on exonerees.<sup>170</sup> For Avery's eighteen years of wrongful incarceration, he received \$3.86 per day of wrongful incarceration.

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*Documentary Series Making A Murderer*, NETFLIX MEDIA CTR. (Nov. 9, 2015), <https://about.netflix.com/en/news/netflix-announces-new-original-documentary-series-making-a-murderer> [https://perma.cc/HM9W-YVAZ].

164. *Steven Avery*, *supra* note 163.

165. JR Ross, *Freed Man to Get \$25,000*, LAKE GENEVA REG'L NEWS, [https://lakegenevanews.net/news/state-and-regional/freed-man-to-get-25-000/article\\_5adc5242-d984-5b19-a693-51ba241554e8.html](https://lakegenevanews.net/news/state-and-regional/freed-man-to-get-25-000/article_5adc5242-d984-5b19-a693-51ba241554e8.html) [https://perma.cc/6SAV-23SJ] (Mar. 15, 2023); Robert Imrie, *What's 18 Years in Prison Worth? Doyle Supports Increasing \$25,000 Man Would Get*, WIS. STATE J. (Sept. 13, 2003), [https://madison.com/whats-18-years-in-prison-worth-doyle-supports-increasing-25-000-man-would-get/article\\_ab36c7d6-b583-11e5-821b-b34f09689ceb.html](https://madison.com/whats-18-years-in-prison-worth-doyle-supports-increasing-25-000-man-would-get/article_ab36c7d6-b583-11e5-821b-b34f09689ceb.html) [https://perma.cc/75YU-ZTZD].

166. Maurice Possley, *Steven Avery*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3003> [https://perma.cc/2HCD-U7BS] (Dec. 9, 2019).

167. *See* Ross, *supra* note 165.

168. Chad Konecky, *The Two Sides of the Truth*, B.C. L. SCH. MAG. ONLINE (Summer 2016), <https://lawmagazine.bc.edu/2016/06/the-two-sides-of-the-truth/> [https://perma.cc/EAH9-HGK8].

169. *Id.*

170. *Compare* Lopez, *supra* note 33, at 717 (affirming that the entire spectrum of false convictions, ranging from murder to less serious crimes, causes non-economic harm that should be financially compensated), *with* Possley, *supra* note 166 (detailing how the cap eviscerated Avery's potential recovery).

## 2. *Nebraska*

While Nebraska's compensatory scheme offers a significantly higher cap on compensation at \$500,000, the statute serves as an example of the harm that still stems from statutory compensation caps. Their legislature decided:

A claimant under the Nebraska Claims for Wrongful Conviction and Imprisonment Act shall recover damages found to proximately result from the wrongful conviction and that have been proved based upon a preponderance of the evidence . . . In no case shall damages awarded under the act exceed five hundred thousand dollars per claimant per occurrence.<sup>171</sup>

Therefore, regardless of how long a person is incarcerated, the *most* they can be compensated is \$500,000.<sup>172</sup> While \$500,000 seems like a significant amount, it is only significant for those who fall under the cap. For example, in *Dean v. State*, James Dean and Ada JoAnn Taylor were exonerated using DNA evidence after spending five-and-a-half years and nineteen years, respectively, wrongfully incarcerated.<sup>173</sup> While the court awarded \$500,000 to Taylor, it awarded a lesser amount to Dean because he had served only five years in prison compared to the nearly twenty years served by Taylor.<sup>174</sup> However, the review court found that if both sustained damages exceeding the cap, "each would be entitled to recover that amount even if Taylor's actual damages exceeded those of Dean."<sup>175</sup> Therefore, in this case, had the initial determination stood, Dean's five years at a

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171. NEB. REV. STAT. § 29-4604(1), (4) (2009).

172. *Id.*

173. *Dean v. State*, 849 N.W.2d 138, 144 (2014).

174. *Id.* at 151.

175. *Id.*

recovery of \$300,000 amounts to \$60,000 per year lost, while Taylor's \$500,000 for her nineteen years lost amounts to roughly \$26,000 per year lost. With absolutely nothing in the record to support this disparity, Taylor simply recovers less because she spent more time wrongfully incarcerated.<sup>176</sup> This disparity is illustrative of the harm that arbitrary caps pose for exonerees.

### 3. Florida

Florida provides an example of a cap that still yields relatively high recovery. Florida's statute provides,

Monetary compensation for wrongful incarceration . . . shall be calculated at a rate of \$50,000 for each year of wrongful incarceration, prorated as necessary to account for a portion of a year . . . .<sup>177</sup>

The total compensation awarded under paragraphs (a), (c), and (d) may not exceed \$2 million.<sup>178</sup>

However, in Florida, only ten exonerees were awarded compensation, and the National Registry of Exonerations noted that

only 13.9% of Florida exonerees who were incarcerated received compensation. That's about one-third of the national average. The total amount paid was \$13,176,901.24, which covered exonerees who had 243.9 lost years or 26.4% of the total lost years of all Florida exonerees.<sup>179</sup>

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176. *See id.* at 150 (explaining that the application of statutory caps on compensation awards occurs after all findings of facts but is an unrelated legal determination based).

177. FLA. STAT. § 961.06(1)(a) (2024).

178. *Id.* § 961.06(1)(e).

179. JEFFREY GUTMAN, COMPENSATION UNDER THE MICROSCOPE: FLORIDA, NAT'L REGISTRY OF EXONERATIONS [hereinafter GUTMAN, COMPENSATION: FLORIDA], <https://www.law.umich.edu/special/exoneration/Documents/UTM%20Florida.pdf> (last visited Jan. 9, 2024).

Before the statute's passage in 2008, only three exonerees were compensated through a private legislature bill.<sup>180</sup> After the statute passed, two exonerees did not qualify pursuant to the statute but received compensation through a private legislature bill, and only five exonerees were compensated pursuant to the statute:

1. Leroy McGee, \$179,167.00 for 3.6 years lost;
2. James Bain, \$1,754,794.51 for 35.1 years lost;
3. Luis Diaz, \$1,297,569.28 for 25.9 years lost;
4. James Richardson, \$1,045,370.45 for 20.9 years lost; and
5. Hubert Myers, \$2,000,000.00 for 42.6 years lost.<sup>181</sup>

Florida's compensation statute exhibits that eliminating compensation caps is not the end of the discussion on increasing fairness in exoneration compensation recovery. Rather, exonerees recover generous awards despite the compensation cap.<sup>182</sup> Effectively, because relatively few exonerees spend the number of years wrongfully incarcerated exceeding the cap, Florida's cap on compensation impacts very few exonerees.<sup>183</sup>

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180. *Id.*

181. *Id.*

182. Another issue to explore in a future article is the statute of limitations for filing a claim. While Florida's statute provides for generous awards, its eligibility process is not exoneree-friendly. For example, Florida's compensation statute only allows for ninety days to file a claim, while New York's compensation statute allows for two years. Compare FLA. STAT. § 961.03(1)(b)(1) (2024), with N.Y. CT. CL. ACT LAW § 8-b(7) (McKinney 2007).

183. FLA. STAT. § 961.06(1)(a), (e) (2024) (compensating at \$50,000 per year, up to a cap of \$2,000,000, which is reached after forty years of compensation); see also *Compensation Chart*, *supra* note 131 (showing the average recovery is \$1.3 million, representing approximately twenty-six years at the statutory rate); *FL Innocence List*, FLORIDIANS FOR ALTERNATIVES TO THE DEATH PENALTY, <https://www.fadp.org/fl-innocence-list> [<https://perma.cc/PS2Z-3VYC>] (last visited Jan. 9, 2025) (claiming average time to exoneration from investigation request is eight years on death row); *Frequently Asked Questions*, INNOCENCE PROJECT OF FLORIDA, <https://www.floridainnocence.org/faq> [<https://perma.cc/2KKR-4SFR>] (Oct. 2018) (claiming the average for their investigations is five to seven years).

However, Florida's compensation statute also has a yearly flat fee that is not variable, which presents issues discussed in the following section.

#### D. *The Harm of Flat Fee Statutes*

Flat fees create inherent limitations on compensation and corresponding inequalities in recovery. Each wrongful conviction experience is different in its own way. Flat fees create an arbitrary value assigned to a year of liberty lost, which does not always account for individual experiences.<sup>184</sup> These statutes sanitize the human stories of exonerees.<sup>185</sup>

Instead, an arbitrary flat fee is chosen, which has most frequently been \$50,000 per year of wrongful incarceration.<sup>186</sup> However, this number is not chosen because it adequately encompasses the loss suffered per year of wrongful incarceration but rather because it was a compromise reflecting the very least that Congress could do for the wrongfully incarcerated.<sup>187</sup> While some states provide additional compensation for educational benefits, employment training, medical services, and reentry services, this is assessed separately from the loss of liberty calculation.<sup>188</sup> While these services are needed for exonerees reentering society after years of wrongful incarceration, they still do not account for the individual experience of loss of

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184. See Gutman, *Empirical Reexamination*, *supra* note 42, at 373.

185. *Id.* at 402.

186. See *supra* Table 2.

187. Gutman, *Empirical Reexamination*, *supra* note 42, at 405–06 (“Many of the more recent state caps are keyed to the \$50,000 per-year metric contained in the 2004 amendment to the federal wrongful conviction compensation statute. That \$50,000 annual cap did not, however, reflect Congress’s judgment that such an amount fully compensates those wrongly convicted. Indeed, the Senate report specifically noted that the \$50,000 cap was less than initially proposed and less than many members wished. It was a compromise reflecting a realization that it did not represent full compensation for damages but instead was the very least that the Congress should do.” (internal citations omitted)).

188. See *id.* at 408–09.

liberty while in prison. Further, those services typically also have a predetermined value.

Despite the arbitrary yet common amount of \$50,000 per year awarded to exonerees, many states depart from that amount.<sup>189</sup> This includes the strikingly low amount awarded to the wrongfully convicted in Iowa.

### 1. *Iowa*

Iowa compensates exonerees “[a]n amount of liquidated damages in an amount equal to fifty dollars per day of wrongful imprisonment.”<sup>190</sup> This amounts to \$18,250 for each year an individual was wrongfully imprisoned. In Iowa, of seventeen documented exonerees, only five filed state claims.<sup>191</sup> Of those five, only two were awarded compensation.<sup>192</sup>

One such claimant, Terry Cox Sr., was sentenced to twenty-five years in prison, and upon appeal, his conviction was vacated.<sup>193</sup> The district court found that he was wrongfully imprisoned for the conviction pursuant to the wrongful conviction statute.<sup>194</sup> As a result, this allowed Cox to file a claim with the State Appeal Board based on his status as a wrongfully imprisoned person. In 2002, the State Appeal Board, Attorney General, and the district court approved a settlement for \$197,812.33.<sup>195</sup> This was a “record settlement . . . under Iowa law” as Cox spent

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189. See *supra* Table 2. In 2014, the Innocence Project proposed a model bill, for 2015 legislation, with a flat fee of \$62,500 per year of wrongful incarceration. MODEL LEGISLATION: AN ACT CONCERNING CLAIMS FOR WRONGFUL CONVICTION AND IMPRISONMENT, § 4(B)(1)(a) (INNOCENCE PROJECT) (on file with *Drexel Law Review*).

190. IOWA CODE ANN. § 663A.1(6)(b) (West 2024).

191. *Compensation Chart*, *supra* note 131.

192. *Id.*

193. Maurice Possley, *Terry Cox, Sr.*, NAT'L REGISTRY OF EXONERATIONS (July 19, 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3957> [<https://perma.cc/43KA-JBDF>].

194. *Cox v. State*, 686 N.W.2d 209, 211 (Iowa 2004).

195. *Id.*

four years wrongfully imprisoned,<sup>196</sup> amounting to almost \$50,000 per year of wrongful incarceration. If Cox had not sued and received the settlement, he would have been entitled to only \$73,000 for his four years.<sup>197</sup>

In contrast, Mark Leckington did not receive a record settlement and was compensated an amount consistent with the statute of \$19,875 in 2008, when a judge declared he was wrongfully imprisoned from June 2005 to May 2006.<sup>198</sup> Leckington received 39% of what Cox Sr. received per year of wrongful incarceration.

Despite the daily rate, there is a discrepancy in compensation for the two exonerees. An injustice trifecta—Iowa’s already low compensation rate for its exonerees, an extremely low yield of compensation to exoneree ratio, and a discrepancy of actual recovery—exhibits the need for transparency and reform. Although Iowa does not have a maximum cap on compensation, the rate of \$18,250 per year is far below market rate of what other flat fee states offer.<sup>199</sup>

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196. Erin Jordan, *Wrongful Imprisonment Compensation Rare in Iowa*, THE GAZETTE (June 1, 2014, 8:00 AM), <https://www.thegazette.com/news/wrongful-imprisonment-compensation-rare-in-iowa/> [<https://perma.cc/T599-TQ67>].

197. The Writer reached out to the State Appeal Board Administrator, who indicated that records of this settlement have been purged due to age. Cox also attempted to bring a separate action against the state, which was barred due to his settlement under the wrongful conviction compensation statute. *See generally Cox*, 686 N.W.2d at 211–12 (dismissing the state tort suit after the settlement); IOWA CODE ANN. § 663A.1(6)(b) (West 2024) (providing the statutory basis for Mr. Cox’s settlement for wrongful conviction).

198. Compare Ken Otterbourg, *Mark Leckington*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6453> [<https://perma.cc/85SS-3XU2>] (Nov. 11, 2022) (totaling almost \$20,000 for one year wrongfully incarcerated), *with Cox*, 686 N.W.2d, at 211 (receiving \$197,812.33). Leckington was also compensated attorneys’ fees. Otterbourg, *supra*.

199. *See infra* App. I (calculating the amount of compensation an individual would be expected to receive in their state based on the statutory requirements rounded to twelve years in order of least to greatest compensation).

## 2. *Connecticut*

Connecticut offers the higher end of recovery for those wrongfully convicted. Again, this analysis does not consider the difficulty in obtaining that compensation, only the value set to that recovery. The statute, inspired by a legislative act to compensate James Tillman after DNA evidence exonerated him, reads<sup>200</sup>

In determining the amount of such compensation, the Claims Commissioner shall award an amount that is at a minimum, but may be up to two hundred per cent of the median household income for the state for each year such person was incarcerated, as determined by the United States Department of Housing and Urban Development, adjusted for inflation using the consumer price index for urban consumers, provided the amount for any partial year shall be prorated in order to compensate only for the portion of such year in which such person was incarcerated. The Claims Commissioner may decrease or further the award amount by twenty-five per cent based on an assessment of relevant factors including, but not limited to, the evidence presented by the person under subdivisions (1) to (6), inclusive, of subsection (c) of this section.<sup>201</sup>

While the Commissioner can settle compensation under \$35,000, any larger awards must be sent to the General Assembly for review.<sup>202</sup>

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200. CONN. GEN. ASSEMB. JUDICIARY COMM., JOINT FAVORABLE REPORT, H.B. 6673 (2007), <https://www.cga.ct.gov/2007/jfr/h/2007HB-06673-R00JUD-JFR.htm> [<https://perma.cc/6H7Q-K5SU>].

201. CONN. GEN. STAT. § 54-102uu(d)(2)(A) (2024).

202. *Id.* § 54-102uu(d)(1)–(2) (providing review and procedure for claims above \$35,000).



Although the statute may have been clearer with an extra comma, a review of a Connecticut Government publication shows that the statute indeed compensates equal to or double the median household income.<sup>203</sup> Conversely, the Claims Commissioner may also *reduce* the award, despite the Commission's recommendation, by 25%.<sup>204</sup>

In deciding an exoneree's award, the Claims Commissioner first awards the median household income for each year they were incarcerated.<sup>205</sup> Then, the Commissioner has the discretion to increase that amount up to double the median household income or decrease the award.<sup>206</sup> The exoneree is, therefore, guaranteed to walk away with somewhere between the household income and twice the household income for each year. Because of this automatic minimum amount awarded, this statute is placed in the flat fee category. The median household income in 2021 was \$83,572.<sup>207</sup> 200% of this income would be \$167,144.

This variable, yearly rate seems to account for individualized circumstances that most flat fee statutes do not. In 2016, the statute was amended to remove language that required the claimant to present evidence of damages suffered, such as loss

203. MICHELLE KIRBY, WRONGFUL INCARCERATION COMPENSATION, OFF. OF LEGIS. RSCH. 2 (2017), <https://www.cga.ct.gov/2017/rpt/pdf/2017-R-0057.pdf>.

204. *See id.* ("Connecticut law requires the claims commissioner to award a claimant, for each year of incarceration, an amount equal to or up to twice the median household income for the state, as determined by the U. S. Department of Housing and Urban Development, adjusted for inflation using the consumer price index (CPI) for urban consumers. Under the law, this amount is prorated for any partial year the claimant served in incarceration. The commissioner has the discretion to decrease or increase the award amount by 25% based on an assessment of relevant factors . . .").

205. *See id.* There is an argument that tying recovery to household income disproportionately harms those who are in the affluent, high-income group class. Economists may argue that the wealthier exoneree may deserve greater recovery because the loss of time impacts the wealthier more. However, this Article seeks to remove the connection between the baseline fee and household income because the loss of a year encompasses much more than the loss of a job or income for one year. *Id.*

206. *See id.*

207. *Connecticut*, DATA USA, <https://datausa.io/profile/geo/connecticut> [<https://perma.cc/VB3L-DN6H>] (last visited Nov. 21, 2024); CAMILLE SEABERRY, KELLY DAVILA & MARK ABRAHAM, CONNECTICUT METRO COG 2023 EQUITY PROFILE 13 (2023).

of liberty and enjoyment of life, loss of earnings, loss of familial relationships, loss of reputation, physical pain and suffering, mental pain and suffering, attorneys' fees, and other expenses.<sup>208</sup> This was replaced with proof of:

- (1) the [person's] age, income, vocational training, and level of education at the time of conviction;
- (2) loss of familial relationships;
- (3) damage to reputation;
- (4) severity of the crime accused and whether a death sentence was imposed;
- (5) whether the claimant was required to register as a sex offender; and
- (6) any other damages that such person has suffered relating to the arrest, prosecution, conviction, and incarceration.<sup>209</sup>

For example, Miguel Roman served over twenty years for a murder he did not commit.<sup>210</sup> DNA evidence cleared him of wrongdoing in 2008 and led to the conviction of another man in 2011.<sup>211</sup> Miguel Roman received \$6 million in compensation, allocated as follows: \$2.6 million for loss of liberty and enjoyment of life, \$940,000 for loss of earnings and earning capacity, \$500,000 for loss of relationships, \$300,000 for loss of reputation, \$1.6 million for physical and mental injuries, and \$60,000 for costs and expenses.<sup>212</sup> The \$2.6 million in loss of liberty compensation results in \$130,000 per year of wrongful incarceration.

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208. Pub. Act No. 16-127, Conn. S.B. 458 § 29(c) (2016) (amending CONN. GEN. STAT. ANN. § 54-102uu(a)(2)(c) (West 2008) to remove evidentiary requirements on damages).

209. *Id.*

210. See generally *Miguel Roman*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3597> [<https://perma.cc/55JE-SUY2>] (Feb. 5, 2018); Mark Pazniokas, *State to Pay Innocent Man \$6M for 20 Years in Prison*, CT MIRROR (Feb. 8, 2016, 6:50 PM), <https://ctmirror.org/2016/02/08/state-to-pay-innocent-man-6m-for-20-years-in-prison/> [<https://perma.cc/MW9W-E5U4>].

211. See Pazniokas, *supra* note 210.

212. *Id.*

Later, in 2016, Carlos Ashe<sup>213</sup> was one of four co-defendants who were compensated on grounds consistent with innocence.<sup>214</sup> Each man was awarded “\$2.4 million for loss of liberty, \$1.1 million for loss of earnings and future earnings capacity, \$200,000 for loss of reputation, \$100,000 for physical and mental injuries, [and] \$200,000 for legal fees and expenses.”<sup>215</sup> Adjusted for seventeen years of wrongful incarceration, the loss of liberty damage amounts to \$141,176 per year.<sup>216</sup>

Based on these two anecdotes, Connecticut’s recovery scheme falls at the higher end of compensation limits, allowing greater recovery for the wrongfully convicted.

### 3. *District of Columbia*

The most generous in terms of compensation for the wrongfully convicted is the District of Columbia, which compensates \$200,000 per year for wrongful incarceration.<sup>217</sup> Under the statute:

Within 60 days after a petition for compensation is approved, the Director shall compensate the petitioner [f]or the physical injury of wrongful

213. See generally Maurice Possley, *Carlos Ashe*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4250> [<https://perma.cc/TDM2-FKA4>] (Jan. 18, 2016).

214. *Wrongfully Convicted in New Haven 1996 Slaying, 4 Seek \$33M Award*, NEW HAVEN REG. (Jan. 10, 2016), [www.nhregister.com/connecticut/article/Wrongfully-convicted-in-New-Haven-1996-slaying-4-11338439.php](http://www.nhregister.com/connecticut/article/Wrongfully-convicted-in-New-Haven-1996-slaying-4-11338439.php) [<https://perma.cc/SQZ3-HV2L>].

215. See Mark Pazniokas, *Questions About a \$16.8 Million Award — and the Meaning of Innocence*, CT MIRROR (Feb. 5, 2016, 5:00 AM), <https://ctmirror.org/2016/02/05/questions-about-a-16-8-million-award-and-the-meaning-of-innocence/> [<https://perma.cc/4LDY-A7BU>].

216. The yearly compensation figure comes from dividing the total compensation for loss of liberty, \$2.4 million, by the years spent incarcerated, seventeen years. See Possley, *supra* note 213. The recovery for Ashe and others in this award was criticized for eligibility reasons, not value of compensation reasons. See *id.* (noting the backlash against the commissioner’s decision to award compensation because the prosecutorial misconduct leading to their release was “consistent with innocence,” instead of requiring petitioners to prove actual innocence); see also CONN. GEN. STAT. § 54-102uu(a)(2) (2024) (amended in 2016 via Pub. Act No. 16-127, S.B. 458 to expressly allow victims of prosecutorial misconduct to recover without proving innocence).

217. D.C. CODE § 2-423.02(a)(1)(A)(i) (2024); see also *supra* Table 2.

conviction and incarceration of the petitioner . . . \$200,000 for each year of incarceration, to include a pro-rated amount for partial years served.<sup>218</sup>

Before the statute's enactment, Kirk Odom was one of five men wrongfully convicted in the District of Columbia based on false FBI hair analysis.<sup>219</sup> He "served more than twenty-one years in prison . . . [before he] was released on parole in 2003 . . . [and] was required to register as a sex offender."<sup>220</sup> Almost ten years after his release, DNA evidence exonerated him from the original sexual assault of which he was convicted.<sup>221</sup> He received compensation in 2013 for \$9,654,000 for his wrongful conviction.<sup>222</sup> This amounted to "\$1,000 for every day he was in prison, \$250 for every [day] he was [on] parole, and \$200 for every day between his exoneration and when his compensation trial came to an end."<sup>223</sup>

Before 2017, no set value was placed on compensation for exonerees. Instead, upon a finding of innocence, the "judge may award damages."<sup>224</sup> This was viewed as a relatively progressive statute as it did not set a cap on damages.<sup>225</sup> The D.C. City Council's moral obligation was codified when "[t]he Judiciary

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218. § 2-423.02(a)(1)(A)(i).

219. Maurice Possley, *Kirk Odom*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3943> [<https://perma.cc/ATX3-TZBX>] (Mar. 2, 2015).

220. *Id.*

221. *Id.*

222. *Id.* Odom also received a settlement from the U.S. government for \$1.2 million in compensation. *Id.*

223. Martin Austerhuhle, *What's the Price of Justice? D.C. Proposes Capping Payments to People Unjustly Imprisoned*, WAMU 88.5 (Apr. 28, 2017), <https://wamu.org/story/17/04/28/whats-price-justice-d-c-proposes-capping-payments-people-unjustly-imprisoned/> [<https://perma.cc/KMZ3-MUUG>].

224. District of Columbia Unjust Imprisonment Act of 1980, Pub. L. No. 3-143, § 4.

225. See Gutman, *Empirical Reexamination*, *supra* note 42, at 379.

Committee explained that the bill was “[g]rounded upon the principle of fundamental fairness.”<sup>226</sup>

The Act makes the District strictly liable to qualifying claimants for “monetary compensation for harm imposed as a result of the unjust imprisonment,” with the amount of the District’s obligation to be calculated without any statutory “ceiling” or other “arbitrary” limit and “in accordance with the traditional legal methods of assessing damages[.]” The Council stated: “Setting a ceiling on the amount of damages that can be awarded may serve to restrict recovery of the damages actually suffered by a person who has been unjustly imprisoned in an arbitrary fashion, and consequently is contrary to the purpose of this bill.”<sup>227</sup>

Despite classifying compensation caps as “arbitrary,” in 2017, the statute was amended to include the \$200,000 flat fee (which lawmakers described as a cap).<sup>228</sup> Attorney General Karl Racine proposed the cap with both support and opposition, justifying it by saying, “[t]he balance that we are trying to strike is to have the most generous cap possible to compensate wrongly convicted individuals and also allow the city a measure of fiscal management and control.”<sup>229</sup> This was purposely set to be as generous as possible.<sup>230</sup> Had the flat fee been in place during Odom’s compensation in 2013, he would have recovered half of

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226. *Id.* (citing COUNCIL OF D.C., COMM. ON JUDICIARY, REPORT 2 (July 9, 1980); *Odom v. District of Columbia*, No. 2013-CA-3239, 2015 D.C. Super. LEXIS 2, at \*16 (D.C. Super. Ct. Feb. 27, 2015)).

227. *Odom*, 2015 D.C. Super. LEXIS 2, at \*27 (citing COUNCIL OF D.C., COMM. ON JUDICIARY, REPORT ON BILL 3-251, The “District of Columbia Unjust Imprisonment Act” (July 9, 1980) (internal citations omitted)).

228. See Austermuhle, *supra* note 223; see also Fiscal Year 2018 Budget Support Act of 2017, 64 D.C. Reg. 7652 (July 31, 2017) (codifying the flat rate that Attorney General Racine referred to as an arbitrary cap in the Austeruhle article).

229. Austeruhle, *supra* note 223.

230. *Id.*

the amount to which he was entitled.<sup>231</sup> The move to a flat fee system stirred a public debate on the message a cap sends on the price of human life.<sup>232</sup>

Post 2017, exoneree Troy Burner received state compensation in 2022.<sup>233</sup> Burner was released in 2018 after spending nearly twenty-four years in prison.<sup>234</sup> For his twenty-four years lost, Burner received \$5 million in compensation.<sup>235</sup> In his reflection upon release, Burner focused on the stigma following release from prison, despite his exoneration:

I can't get time back, but our system must be definitive in its intention to restore as much as possible to the wrongfully convicted. And for those that return home for a second chance, regardless of their committing offense, they have earned the right to be truly free from continued punitive measures and free to be with family.<sup>236</sup>

Burner's story is a reminder that compensation is a crucial step to an exoneree's healing, but there is still so much to be done. Wrongful conviction and incarceration impact human beings, and reform efforts will similarly impact our fellow citizens. Therefore, despite the contested public discourse over the yearly flat fee, the District of Columbia's compensation of \$200,000 per year continues to be the most generous of this

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231. *Id.*; see *Odom*, 2015 D.C. Super. LEXIS 2, at \*48–49.

232. See Auster Muhle, *supra* note 223.

233. Maurice Possley, *Troy Burner*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5802> [<https://perma.cc/ME73-4ML2>] (July 10, 2022).

234. *Id.* Burner was released in 2018, twenty-four years after his incarceration, thanks to a sentence reduction motion, but was only exonerated in 2020. *Id.*

235. *Id.*

236. *The Collateral Consequences of Exoneration*, THE CRIME REP. (Dec. 23, 2021), [<https://perma.cc/6G3W-F6US>].

category, sitting in stark contrast to Iowa's statutory recovery scheme.<sup>237</sup>

#### 4. Median Household Income: Maryland and Utah

Maryland and Utah use a version of household income to calculate the flat fee awarded to exonerees.<sup>238</sup> Rather than arbitrarily selecting a flat fee, the fee is calculated according to the state average or median income.<sup>239</sup> This is done through each state's respective income reporters. Regardless of what the state's average income is (and how much the exoneree was subsequently awarded), exonerees are guaranteed some form of compensation if they qualify;<sup>240</sup> hence, Utah's and Maryland's statutes are put in the flat fee category. Using an income-dependent level of compensation provides a baseline flat fee for the wrongfully convicted.

Moreover, tying loss of liberty to the median household income does not sufficiently encompass loss of time and reputation, stigma of incarceration, trauma of incarceration, and long-term psychological harm caused by wrongful incarceration. Losing a year of life by being locked in a cell is not the equivalent of losing your job for one year.<sup>241</sup> Tying recovery to household income disregards and devalues the most harmful aspects of wrongful incarceration.<sup>242</sup> Therefore, while the per capita

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237. See *supra* note 190 and accompanying discussion; IOWA CODE ANN. § 663A.1(6)(b) (West 2024); D.C. CODE § 2-423.02(a)(1)(A)(i) (2024).

238. See MD. CODE ANN., STATE FIN. & PROC. § 10-501(a)(1) (West 2003) (codifying 2023 version via Md. S.B. 569); UTAH CODE ANN. § 78B-9-405(2)(a) (West 2021).

239. See STATE FIN. & PROC. § 10-501(a)(1); § 78B-9-405(2)(a).

240. See STATE FIN. & PROC. § 10-501(a)(1); § 78B-9-405(2)(a).

241. See Lopez, *supra* note 33, at 715 (discussing compensation for "[t]he pain of being unjustly ripped away from family members, the damage to one's reputation, the mental anguish of knowing that one is innocent yet imprisoned, and the permanent impact on one's future").

242. See generally *supra* pp. 381–82 (discussing how the compensation for those wrongfully convicted in Connecticut is determined based on the median household income); Gutman, *Empirical Reexamination*, *supra* note 42.

income is a useful factor in the selection of a fair flat fee, it should not be the only consideration.

a. Maryland

Maryland moved from a fair and reasonable compensation practice to a flat fee through median household income calculation. In 2003, the statute provided compensation for those wrongfully convicted:

[G]rant to an individual erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit 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.<sup>243</sup>

Now, in practice, Maryland ultimately compensates at a flat fee rate.<sup>244</sup> To get to that flat fee, however, the statute uses “the State’s most recent annual median household income.”<sup>245</sup> In 2021, the State’s annual median household income, as published in the American Community Survey of the United States Census Bureau, was \$91,431.<sup>246</sup> Further, the statute reads:

On receipt of an order by an administrative law judge granting a petition under subsection (b) of this section, the Board of Public Works shall compensate an individual erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit in an amount equal

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243. STATE FIN. & PROC. § 10-501(a)(1).

244. See STATE FIN. & PROC. § 10-501(a)(1).

245. See STATE FIN. & PROC. § 10-501(a)(1).

246. *Maryland*, DATA USA (2022), <https://datausa.io/profile/geo/maryland> [perma.cc/B6ZS-QJ7B].



to the product of the total number of days that the individual was wrongfully confined after the erroneous conviction multiplied by a daily rate of the State's most recent annual median household income as published in the American Community Survey of the U.S. Census Bureau in the year the order of eligibility is issued under subsection (b) of this section and divided by 365 days to the nearest whole cent.<sup>247</sup>

Maryland multiplies the days incarcerated by the daily rate of median income for the state and then divides by 365 to the nearest whole cent. The statute allows a wrongfully incarcerated individual to recover the median yearly income while they are imprisoned.<sup>248</sup>

Exoneree Melvin Thomas spent nineteen years in prison for a crime he did not commit.<sup>249</sup> In 2020, a Baltimore Circuit judge granted the motion to vacate his conviction, and one year later, the Board of Public Works awarded him \$1.6 million for his wrongful conviction through the state's exoneration compensation statute.<sup>250</sup> In a press release, the State Attorney apologized: "Let me say to Mr. Thomas, I represent the State and the State has wronged you. We ask for your forgiveness and commit to working with you as you gain your freedom and reenter society[.]"<sup>251</sup> Melvin Thomas spent nearly half of his life in prison

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247. STATE FIN. & PROC. § 10-501(a)(1).

248. *Id.*

249. Maurice Possley, *Melvin Thomas*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5886> [https://perma.cc/CRU6-ZAGF] (Dec. 18, 2023).

250. *Id.*; *Board Approves Compensation for Melvin Thomas, Baltimore Man Wrongfully Convicted for Attempted Murder*, CBS NEWS BALT. (Apr. 22, 2021, 8:57 AM) [hereinafter *Board Approves Compensation*], <https://www.cbsnews.com/baltimore/news/board-approves-compensation-for-melvin-thomas-baltimore-man-wrongfully-convicted/> [https://perma.cc/JYT3-64SX].

251. *Board Approves Compensation*, *supra* note 250.

for a crime he did not commit, and for this loss of time, he was compensated roughly \$84,805 per year of incarceration.<sup>252</sup>

However, of all documented Maryland exonerees, the average year of exoneration was in 2012.<sup>253</sup> Therefore, as the average year of exoneration was 2012, this is the best value to obtain an accurate yearly recovery. In 2012, the average household income was \$55,466.<sup>254</sup> While any calculation should adjust for inflation, household income should be just one consideration rather than the entire calculation.

b. Utah

Utah utilizes a similar structure to Maryland.<sup>255</sup> In effect, it maintains a flat fee but calculates it using the average nonagricultural payroll wage.<sup>256</sup> In 2021, the average nonagricultural payroll wage amounted to \$56,940 per year.<sup>257</sup> Per the statute:

If a court finds a petitioner factually innocent under Part 3, Postconviction Testing of DNA, or under this part, and if the petitioner has served a period of incarceration, the court shall order that the petitioner receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of 15 years, the monetary equivalent of the

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252. *Id.*

253. Data from the National Registry of Exonerations was used to identify all Maryland exonerees, utilizing the year of exoneration to determine that the average year of exoneration is 2012. See *Exoneration Detail List*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> [<https://perma.cc/3CAN-4LKW>] (last visited Jan. 6, 2025).

254. *Maryland Average Wage Per Job (Constant 2017 Dollars): 2012-2022*, OPEN DATA PORTAL, <https://opendata.maryland.gov/Demographic/Maryland-Average-Wage-Per-Job-Constant-2012-Dollar/s5ct-e4qp> [[perma.cc/NP4D-3N37](https://perma.cc/NP4D-3N37)] (Mar. 6, 2024).

255. Compare UTAH CODE ANN. § 78B-9-405(2)(a) (West 2021), with MD. CODE ANN., STATE FIN. & PROC. § 10-501(a)(1) (West 2024).

256. See § 78B-9-405(2)(a).

257. UTAH DEP'T OF WORKFORCE SERVS., *supra* note 107, at tbl.22. The average wage was \$4,745 permonth in 2021. *Id.* This number was multiplied by twelve to get the yearly value.

average annual nonagricultural payroll wage in Utah, as determined by the data most recently published by the Department of Workforce Services at the time of the petitioner's release from prison.<sup>258</sup>

Harry Miller<sup>259</sup> was exonerated in Utah in 2007 after spending three years in prison for a crime he did not commit, stemming from a case of mistaken identity.<sup>260</sup> He received \$124,763 in compensation, amounting to roughly \$41,587 per year of wrongful incarceration.<sup>261</sup>

In 2013, Debra Brown was exonerated after spending seventeen years in prison for a crime she did not commit.<sup>262</sup> She was determined innocent when it was proven that she had an alibi for the time of the alleged murder.<sup>263</sup> For those fifteen years, she was compensated \$570,780, amounting to \$38,052 for each qualifying year.<sup>264</sup>

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258. § 78B-9-405(2)(a).

259. Stephanie Denzel, *Harry Miller*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3468> [<https://perma.cc/2ZFM-ETQW>] (last visited Jan. 13, 2025).

260. Stephen Dark, *An Innocent Man*, SALT LAKE CITY WEEKLY (June 22, 2011), <https://www.cityweekly.net/utah/an-innocent-man/Content?oid=2156520> [<https://perma.cc/585E-QWL8>].

261. See Denzel, *supra* note 259 (dividing total compensation by the three years Miller was wrongfully incarcerated to get the yearly amount).

262. Maurice Possley, *Debra Brown*, NAT'L REGISTRY OF EXONERATIONS (July 12, 2013), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4222> [<https://perma.cc/AF88-2LHA>].

263. Matthew K. Jensen, *Debra Brown Released from Prison After Murder Exoneration*, HERALD J. NEWS (May 9, 2011), [https://www.hjnews.com/news/debra-brown-released-from-prison-after-murder-exoneration/article\\_6771523c-7a7d-11e0-be3c-001cc4c002e0.html](https://www.hjnews.com/news/debra-brown-released-from-prison-after-murder-exoneration/article_6771523c-7a7d-11e0-be3c-001cc4c002e0.html) [<https://perma.cc/7YSX-G7PS>].

264. *Id.*; see also *Brown v. State*, 308 P.3d 486, 501–02 (Utah 2013) (upholding the decision finding Ms. Brown factually innocent by allowing the courts to consider both new and old evidence in the determination). Sadly, the requirements for proving factual innocence have become more stringent in Utah after Ms. Brown's release. See *Thompson v. State*, 554 P.3d 988, 994–95 (Utah 2024) (stating that *Brown* was statutorily overruled by a new factual innocence statute, UTAH CODE ANN. § 78B-9-404(8) (West 2024), that restricts courts from considering old evidence in factual innocence determinations). The Court in *Thompson* actually reversed the lower court's factual innocence determination, illustrating the danger and lack of closure exonerees face against the state. *Id.* at 998.

Varying recovery may be connected to the variable rate of Utah's nonagricultural pay wage during the years that were lost per each exoneree as each exoneree did not recover in the same year. For example, Utah's average year of exoneration is 2006,<sup>265</sup> and in 2006, the average monthly, nonagricultural wage was \$2,883,<sup>266</sup> resulting in a recovery of \$34,596 per year of wrongful conviction. This exemplifies the risk of tying loss of liberty to a changing value, such as a state's average wage rate; the legislature is insinuating that loss of income is equivalent to the loss of liberty during one year of wrongful incarceration.

5. *Virginia: Shifting from per-capita based to flat fee*

Like Maryland and Utah, Virginia had a per capita income standard, but in 2022, it moved to a designated flat fee of \$55,000 per year of wrongful incarceration.<sup>267</sup> The statute currently 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 may be awarded compensation for each year of incarceration, or portion thereof. The amount of compensation per year shall be \$55,000, adjusted on July 1 of each fiscal year by the year-over-year by the percentage increase in the Chained Consumer Price Index for All Urban Consumers (C-CPI-U), as published by the Bureau of Labor Statistics of the U.S. Department of Labor, or any predecessor or successor index. Calculations made

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265. See *Exoneration Detail List*, *supra* note 253.

266. UTAH DEP'T OF WORKFORCE SERVS., UTAH ANNUAL REPORT OF 2006 LABOR MARKET INFORMATION 52 (2007).

267. VA. CODE ANN. § 8.01-195.11(A)(1) (West 2024); VA. CODE ANN. § 8.01-195.11(A) (West 2022) (prior form, codified by Va. 2022 Reg. Sess. S.B. 755, which introduced this compensation structure).

pursuant to this section shall be made by the State Treasurer and rounded up to the nearest dollar.<sup>268</sup>

Originally, the statute provided compensation for the wrongfully incarcerated in an amount equal to 90% of the inflation-adjusted per capita personal income.<sup>269</sup>

Because of lobbying efforts by the Innocence Project at the University of Virginia School of Law, Virginia also removed many bars to recovery.<sup>270</sup> For example, prior to legislative changes, Virginia was the only state compensation statute in which the state legislature alone, and not a court, determined whether an exoneree met statutory standards for compensation.<sup>271</sup> These legislative changes created an initial lump sum for recovery,<sup>272</sup> permitted recovery eligibility for those who took *Alford* pleas,<sup>273</sup> affixed the rate of compensation at \$55,000 per year (adjusted for inflation, a rare addition),<sup>274</sup> and ensured the award was not taxable.<sup>275</sup>

The lobbying efforts resulted in compensation being awarded to six exonerees through individual bills, including Lamar Barnes, who spent nearly twenty years wrongfully

268. § 8.01-195.11(A)(1).

269. “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 may be awarded compensation in an amount equal to 90 percent of the Virginia per capita personal income as reported by the Bureau of Economic Analysis of the United States Department of Commerce for each year, or portion thereof, of incarceration up to 20 years.” VA. CODE ANN. § 8.01-195.11(A) (2004) (codified in 2004 Va. S.B. 271).

270. See Mike Fox, *Innocence Project at UVA Law Helps Obtain \$6.25 Million in Compensation for Clients, Proposes Reforms*, UNIV. OF VA. SCH. OF L. (May 3, 2022), <https://www.law.virginia.edu/news/202205/innocence-project-uva-law-helps-obtain-625-million-compensation-clients-proposes> [<https://perma.cc/R4LK-VH5U>].

271. JEFFREY GUTMAN, GEO. WASH. UNIV. L. SCH., PAPER NO. 2023-19, COMPENSATION UNDER THE MICROSCOPE: VIRGINIA 3 (2023) [hereinafter GUTMAN, COMPENSATION: VIRGINIA].

272. § 8.01-195.11(B).

273. An *Alford* plea is a guilty plea that allows the defendant to maintain innocence. See generally *North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970) (discussing and affirming the constitutionality of allowing a defendant to enter a plea of guilty while at the same time maintaining their innocence).

274. § 8.01-195.11(A)(1).

275. H.D. 397, 2022 Leg., Reg. Sess. (Va. 2022).

incarcerated.<sup>276</sup> The legislature approved compensation in the sum of \$1,097,980.02 for the nearly twenty years he was wrongfully incarcerated.<sup>277</sup> This amount equals \$54,899 per year.

While the statute provides the legislature with guidance on exoneration and recovery, it depends on the “continued bipartisan approach taken by the legislature and the apparent reluctance of prosecutors to oppose compensation.”<sup>278</sup>

### *E. The Harm of Fair and Reasonable Statutes*

Theoretically, fair and reasonable statutes permit the greatest recovery because there are no upper limits to recovery.<sup>279</sup> However, there are also no baseline awards or required precedent. The statutes require the court to evaluate evidence of the claimant’s hardships to calculate an “incalculable loss.”<sup>280</sup> The basis of the statute is founded on the principle that “no two stories . . . of criminal justice are alike.”<sup>281</sup> To fully compensate an individual for a horrific injustice, the damages must be unique to that individual.<sup>282</sup>

#### *1. New York*

With its current iteration, to determine what is fair and reasonable, the court considers a variety of variables such as: (1) the crime involved, (2) time wrongfully imprisoned, (3) the mental anguish of wrongful imprisonment, (4) loss of relationships, (5) physical pain and suffering, and (6) any other factors

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276. See, e.g., H.D. 1255, 2022 Leg., Reg. Sess. (Va. 2022).

277. *Id.*

278. GUTMAN, COMPENSATION: VIRGINIA, *supra* note 271, at 10.

279. See discussion *supra* Section I.C. Fair and reasonable statutes may provide an advantage to the more affluent claimant who has greater access to courts and may provide more compelling or creative arguments for recovery using counsel. However, this argument is not addressed here.

280. *Baba-Ali v. State*, 878 N.Y.S.2d 555, 564–66 (N.Y. Ct. Cl. 2009).

281. *Id.* at 568.

282. See *id.*

the claimant presents.<sup>283</sup> This is typically presented through witnesses, experts, affidavits, and reports.<sup>284</sup>

However, broad discretion does not necessarily mean generous recovery. In 1992, the estate for Robert Johnson recovered \$40,000 for 747 days of wrongful incarceration.<sup>285</sup> This was on the lower end of the spectrum, and the court held:

Certainly his lack of daily freedom was shown. However, as stated above, no evidence of lost wages was introduced. Moreover, in light of his prior criminal record, numerous incarcerations, and that he was guilty of a crime this time as well, we find that his loss of reputation, humiliation and pain were far less than a claimant with an unblemished record or an innocent mind would have suffered.<sup>286</sup>

This results in roughly \$20,000 per year of wrongful incarceration. The problem with lowering recovery for a past record of incarceration is that it conflates wrongful incarceration with potentially legitimate incarceration. Devaluing the loss of liberty using past incarceration is dangerous and contrary to the goals of remedying wrongful convictions and ensuring public trust in the criminal justice system.<sup>287</sup> To comport with those goals, the following section of this Article makes a recommendation for change.

As fair and reasonable compensation is tailored to the individual, the value of recovery varies greatly from Johnson's

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283. *Id.* at 558.

284. *See, e.g., id.* at 559 (relying on expert testimony and reports to determine rate of compensation).

285. *Johnson v. State*, 588 N.Y.S.2d 722, 723, 725 (N.Y. Ct. Cl. 1992).

286. *Id.* at 725.

287. *See* REBECCA VALLAS, SHARON DIETRICH & BETH AVERY, *A CRIMINAL RECORD SHOULDN'T BE A LIFE SENTENCE TO POVERTY* 1 (2021). This narrative also ignores the reality that many people with criminal records are themselves victims of systemic issues like poverty, discrimination, and lack of educational opportunities. *Id.*

recovery. In 1998, Kerry Kotler was compensated when DNA evidence exonerated him, only after he served ten years, eight months, and two days incarcerated.<sup>288</sup> The Appellate Division, Second Department affirmed the Court of Claims determination that “[Kotler] was unjustly convicted and imprisoned and awarded him the principal sum of \$1,510,000.”<sup>289</sup> This results in an amount of \$125,000 per year for his non-pecuniary damages.<sup>290</sup>

In 2013, the Court of Claims ordered the State of New York to pay Daniel Gristwood \$5,485,394 in damages for nine years of wrongful incarceration for the crimes of attempted murder and possession of a weapon, both of which he did not commit.<sup>291</sup> The court found by clear and convincing evidence that Gristwood’s confession was coerced.<sup>292</sup> The court also found that Gristwood, by clear and convincing evidence, satisfied all the requirements of the Court of Claims Act Section 8-b(5) and was entitled to damages for time spent wrongfully incarcerated.<sup>293</sup>

The judge determined that of those damages, “\$2,700,000.00 [was] for past anguish and loss of liberty; \$1,920,000.00 [was] for pain and suffering; \$332,400.00 [was] for past lost earnings; \$432,394.00 [was] for impairment of earnings; and \$100,000.00

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288. *Kotler v. State*, 680 N.Y.S.2d 586, 586–87 (N.Y. App. Div. 1998); *see also Kerry Kotler*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3363> [<https://perma.cc/LQR4-RJLT>] (May 7, 2020).

289. *Kotler*, 680 N.Y.S.2d at 587.

290. Terry Jane Ruderman, *The Wrongly Convicted May Recover Civil Damages, but Must Meet Exacting Standards of Proof*, N.Y. STATE BAR ASS’N J., Feb. 2002, at 30, 32.

291. *Gristwood v. State*, 971 N.Y.S.2d 71, 71 (N.Y. Ct. Cl. 2013) (ordering money damages for wrongful incarceration); *Gristwood v. State*, 990 N.Y.S.2d 386, 391 (N.Y. App. Div. 2014) (affirming damages award); *see also Maurice Possley*, *Daniel Gristwood*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3266> [<https://perma.cc/F925-XJBN>] (Feb. 27, 2017).

292. *Gristwood v. State*, No. 114040, slip op. at 13–15 (N.Y. Ct. Cl. Apr. 1, 2011).

293. *Id.* at 15.



[was] for psychological treatment.”<sup>294</sup> Daniel Gristwood’s award for loss of liberty amounts to \$300,000 per year lost. The State appealed the judgment, which the Appellate Division upheld.<sup>295</sup>

New York’s Exonerated Five are among the most-known exonerates who were wrongly incarcerated for a crime they did not commit.<sup>296</sup> In 2016, the five men received \$3.9 million in state compensation.<sup>297</sup> Korey Wise, who served the longest prison time (13.3 years) received \$1.5 million,<sup>298</sup> Yusef Salaam (who served 6.7 years)<sup>299</sup> and Kevin Richardson (who served 5.5 years) received \$650,000,<sup>300</sup> while Raymond Santana (who

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294. *Gristwood*, 971 N.Y.S.2d at 71; *Value of Wrongful Conviction Claims in New York*, DIETRICH L. FIRM, P.C., <https://www.calljed.com/value-of-wrongful-conviction-claims-in-new-york.html> [<https://perma.cc/J82H-W8EY>] (last visited Nov. 18, 2024).

295. *Gristwood*, 990 N.Y.S.2d at 391.

296. James Ford, *The Central Park Five Endorse New Legislation to Help Fight Wrongful Convictions*, PIX11, <https://pix11.com/news/local-news/the-central-park-five-endorse-new-legislation-to-help-fight-wrongful-convictions/> [<https://perma.cc/NUQ8-T89U>] (Oct. 29, 2019, 7:21 PM). The Exonerated Five are also known as the “Central Park Five.” See, e.g., The Associated Press, *Once Wrongly Imprisoned, Member of ‘Central Park Five’ Is Running for Office*, NBC NEWS (June 21, 2023, 10:19 AM), <https://www.nbcnews.com/news/nbcblk/wrongly-imprisoned-member-central-park-five-running-office-rcna90365> [<https://perma.cc/6EBW-73J2>].

297. Jeremy Fuster, *Central Park 5 Received Additional \$3.9 Million Settlement from New York in 2016 (Report)*, THE WRAP (June 9, 2019, 3:44 PM), <https://www.thewrap.com/central-park-five-received-additional-3-9-million-settlement-from-new-york-in-2016-report/> [<https://perma.cc/JKH8-6GRC>]. The five men also received \$41 million in a federal settlement in 2014. Ken Otterbourg, *Yusef Salaam*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3604> [<https://perma.cc/4AYF-PDKK>] (Sept. 10, 2023).

298. See *Korey Wise’s Story*, UNIV. OF COLO. BOULDER, <https://www.colorado.edu/outreach/korey-wise-innocence-project/about-us/korey-wises-story> [<https://perma.cc/JKL8-5EEY>] (last visited Nov. 18, 2024); Alfred Joyner, *How Much Was the Central Park Five Settlement? ‘When They See Us’ Victims Sued New York City for \$41M*, NEWSWEEK (June 19, 2019, 9:00 AM), <https://www.newsweek.com/central-park-five-settlement-when-they-see-us-41m-1444765> [<https://perma.cc/C54V-ALM7>].

299. *Yusef Salaam*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/yusef-salaam/> [<https://perma.cc/VU47-9NGR>] (last visited Jan. 13, 2025).

300. *Kevin Richardson*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/kevin-richardson/> [<https://perma.cc/7K24-59AY>] (last visited Jan. 13, 2025); Joyner, *supra* note 298.

served 5 years) received \$500,000,<sup>301</sup> and Antron McCray (who served 6 years) received \$600,000.<sup>302</sup>

The compensation journey for those exonerated in New York is exemplary of the range of compensation for those who do not fall under a cap or flat fee system.<sup>303</sup> Courts are given broad discretion to consider factors in an equitable compensation scheme. The Exonerated Five sought to improve the compensatory scheme by moving from a fair and reasonable scheme to a flat fee scheme, suggesting that a fair approach would be to offer compensation at \$1,000,000 “for every year of wrongful incarceration.”<sup>304</sup> This legislation would be groundbreaking. This Bill is currently in the assembly committee. The proposed changes are italicized:

6. If the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him or her, *provided, if the claimant was incarcerated, such sum shall not be less than an award calculated at a rate of one million dollars per year during which the claimant was incarcerated and was not under sentence for a separate crime. The court may also award reasonable attorneys’ fees incurred in the claimant’s defense at trial, including any post-trial motions or appeals, in the process of vacating*

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301. *Raymond Santana*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/raymond-santana/> [https://perma.cc/9MAS-UBAE] (last visited Jan. 9, 2025); Joyner, *supra* note 298.

302. *Antron McCray*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/antron-mccray/> [https://perma.cc/NF7F-DHD6] (last visited Jan. 9, 2025); Fuster, *supra* note 297.

303. See generally Meghan Keneally, *Will the State Pay You for a Wrongful Conviction? Depends on the State.*, ABC NEWS (Apr. 17, 2019, 5:31 AM), <https://abcnews.go.com/US/state-pay-wrongful-conviction-depends-state/story?id=62436623> [https://perma.cc/EA52-49NA] (discussing the disparate impacts of state exoneration compensation laws that impose award limits compared to others that set no maximum cap).

304. Ford, *supra* note 296.

*or reversing his or her criminal conviction, and in the pursuit of a claim under this section.*<sup>305</sup>

If amended, New York would be the first state to have the fair and reasonable language and the groundbreaking flat fee of \$1,000,000 per year of wrongful incarceration.

## 2. West Virginia

In West Virginia, notable compensation under the West Virginia fair and reasonable statute, ordered from lowest to highest *yearly* rate of recovery, include:

1. Dewey Davis and Gerald Davis, father and son, who spent eight years in prison for a crime they did not commit.<sup>306</sup> Dewey Davis received \$750,000 and Gerald Davis received \$500,000 in compensation.<sup>307</sup> This results in **\$93,750** and **\$62,500**, respectively, per year of wrongful conviction.
2. Davie Hurt spent thirteen years in prison and was exonerated in 2014.<sup>308</sup> The state compensated him \$1.25 million.<sup>309</sup> This results in **\$96,153** per year of wrongful incarceration.

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305. Assemb. 818 § 2(6), 2023-24 Leg., Reg. Sess. (N.Y. 2023).

306. *Dewey Davis*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3156> [<https://perma.cc/5RR2-K4MB>] (Feb. 5, 2018); *Gerald Davis*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3157> [<https://perma.cc/4DVU-FVP3>] (Feb. 5, 2018).

307. *Dewey Davis*, *supra* note 306.

308. Greg Jordan, *Judge Overturns Conviction, Orders Man Released After 13 Years in Prison*, REGISTER-HERALD (Apr. 19, 2011), [www.register-herald.com/news/judge-overturns-conviction-orders-man-released-after-13-years-in-prison/article\\_81033ed6-91fa-5c95-9efd-04438e634977.html](http://www.register-herald.com/news/judge-overturns-conviction-orders-man-released-after-13-years-in-prison/article_81033ed6-91fa-5c95-9efd-04438e634977.html) [<https://perma.cc/KW6T-9QA7>]; Maurice Possley, *Davie Hurt*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4482> [<https://perma.cc/2KL6-SRJ5>] (Apr. 27, 2018).

309. Possley, *supra* note 308.

3. James E. Richardson served ten years for a crime he did not commit in West Virginia.<sup>310</sup> Under the statutory scheme, he received \$1 million from the state.<sup>311</sup> This results in **\$100,000** per year of wrongful conviction.
4. In 2000, Larry Holdren was exonerated after spending sixteen years in prison.<sup>312</sup> He was awarded \$1.65 million in compensation.<sup>313</sup> This amounts to **\$103,125** per year of wrongful incarceration.
5. Jason Lively was exonerated in 2020 after spending fifteen years incarcerated, with eleven of those years in solitary confinement.<sup>314</sup> The Legislative Claims Commission recommended damages in the amount of \$1.56 million.<sup>315</sup> The amount

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310. Michael S. Perry, *James E. Richardson, Jr.*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3576> [<https://perma.cc/S5KE-MK42>] (June 1, 2020).

311. *Id.* Mr. Richardson also received \$1 million from the county. *Id.*

312. *Larry Holdren*, INNOCENCE PROJECT, [www.innocenceproject.org/cases/larry-holdren/](http://www.innocenceproject.org/cases/larry-holdren/) [<https://perma.cc/5ASH-N9ZK>] (last visited Jan. 9, 2025).

313. *Larry Holdren*, NAT'L REGISTRY OF EXONERATIONS, [www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3299](http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3299) [<https://perma.cc/R6FJ-RJTG>] (Dec. 27, 2019); *Holdren v. State*, No. CC-00-461 (W. Va. Ct. Cl. Apr. 2, 2002); Newton N. Knowles, *Exonerated, but Not Free: The Prolonged Struggle for a Second Chance at a Stolen Life*, 12 HASTINGS RACE & POVERTY L.J. 235, 243 (2015) ("[W]hile some might contend that the award was too low, this [sum] allowed Holdren to recover relatively quickly . . .").

314. Henry Culvyhouse, *Commission Recommends \$1.6 Million for W.Va. Man over 15-Year Wrongful Imprisonment*, TIMES W. VIRGINIAN (Dec. 28, 2023) [hereinafter *Culvyhouse, Commission Recommends \$1.6 Million*], [https://www.timeswv.com/news/west\\_virginia/commission-recommends-1-6-million-for-w-va-man-over-15-year-wrongful-imprisonment/article\\_b850d67c-a4fa-11ee-8eaf-5bfbe8256997.html](https://www.timeswv.com/news/west_virginia/commission-recommends-1-6-million-for-w-va-man-over-15-year-wrongful-imprisonment/article_b850d67c-a4fa-11ee-8eaf-5bfbe8256997.html) [<https://perma.cc/3K4C-3YGY>]; see generally *State v. Lively*, 697 S.E.2d 117 (W. Va. 2010) (affirming Mr. Lively's criminal conviction).

315. *Culvyhouse, Commission Recommends \$1.6 Million*, *supra* note 314. The West Virginia Senate approved a \$1.56 million recovery for Mr. Lively in February 2024. Henry Culvyhouse, *W.Va. Senate Approves \$1.56M for Jason Lively Wrongful Imprisonment*, TIMES W. VIRGINIAN (Feb. 19, 2024) [hereinafter *Culvyhouse, W.Va. Senate Approves \$1.56M*], [https://www.timeswv.com/news/west\\_virginia/w-va-senate-approves-1-56m-for-jason-lively-wrongful-imprisonment/article\\_6716a112-cec4-11ee-ba69-47d36e65f86a.html](https://www.timeswv.com/news/west_virginia/w-va-senate-approves-1-56m-for-jason-lively-wrongful-imprisonment/article_6716a112-cec4-11ee-ba69-47d36e65f86a.html) [<https://perma.cc/7ATU-HFNC>].

was calculated with the following considerations: \$492,338 for future medical treatment, \$101,625 in lost wages, and \$975,000 for loss of liberty and freedom.<sup>316</sup> His compensation amounted to **\$104,000** per year of wrongful incarceration.

6. William O'Dell Harris spent eight years wrongfully imprisoned.<sup>317</sup> He settled a wrongful conviction lawsuit with the State of West Virginia for \$1.8 million.<sup>318</sup> Yearly, this is **\$257,142** in compensation.
7. In 1992, Glen Woodall was exonerated after spending five years wrongfully incarcerated.<sup>319</sup> He received \$1 million in compensation from the State of West Virginia.<sup>320</sup> Yearly, this is **\$200,000** in compensation for his wrongful incarceration.

These examples of compensation show that the previous statutory schemes, which typically offer compensation of around \$50,000 per year of wrongful incarceration, are woefully insufficient. When left to decision-makers tasked with finding a fair and reasonable compensation amount that is fair to the individual before them, all are far above \$50,000 per year of wrongful incarceration.<sup>321</sup>

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316. Culvyhouse, *Commission Recommends \$1.6 Million*, *supra* note 314.

317. *William O'Dell Harris*, INNOCENCE PROJECT, [www.innocenceproject.org/cases/william-odell-harris/](http://www.innocenceproject.org/cases/william-odell-harris/) [https://perma.cc/NND2-PBJ5] (last visited Jan. 9, 2025).

318. *William Harris*, NAT'L REGISTRY OF EXONERATIONS, [www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3285](http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3285) [https://perma.cc/4JBV-35YJ] (Feb. 5, 2018).

319. *Glen Woodall*, INNOCENCE PROJECT, [www.innocenceproject.org/cases/glen-woodall/](http://www.innocenceproject.org/cases/glen-woodall/) [https://perma.cc/DP5P-U3LW] (last visited Jan. 9, 2025).

320. *Glen Woodall*, NAT'L REGISTRY OF EXONERATIONS, [www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3764](http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3764) [https://perma.cc/5Z2R-52V7] (last visited Jan. 9, 2025).

321. *See, e.g., Gristwood v. State*, 990 N.Y.S.2d 386, 391 (N.Y. App. Div. 2014) (affirming Daniel Gristwood's award for loss of liberty due to wrongful incarceration, which averaged \$300,000 for each year he was incarcerated).

*F. Three Suggestions for Change*

The evidence paired with each type of compensation statute shows the variability in recovery between states. To increase fairness in recovery, three changes are suggested: (1) maximum caps on compensation should be removed, (2) a baseline flat fee should be included, and (3) discretion should be shifted to the decision-maker to make upward modifications to the flat fee.

This, in turn, generally increases the average amount of compensation for which a claimant would be entitled. Larger compensatory schemes serve two purposes: (1) they adequately provide compensation for the victim of a wrongful conviction, and (2) they serve as a deterrent for the wrongdoing agency and incentivize policy changes.<sup>322</sup>

When a maximum cap on compensation is in place, those who are incarcerated for relatively short periods of time will be compensated the same as those who are incarcerated for decades.<sup>323</sup> This removes all discretion from the decision-maker and intrudes upon its ability to determine the actual damages an individual should receive. As the statutes currently stand, the decision-maker varies. Some examples are the original court of conviction,<sup>324</sup> court of claims,<sup>325</sup> compensation commission panels,<sup>326</sup> a claims commissioner,<sup>327</sup> victim's compensation boards,<sup>328</sup> the legislature,<sup>329</sup> or an ultimate decision only after a pardon by the governor.<sup>330</sup>

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322. Jeffrey S. Gutman & Lingxiao Sun, *Why Is Mississippi the Best State in Which to Be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, 11 NE. L. REV. 694, 783 (2019).

323. *See supra* Section II.C.

324. *See, e.g.*, COLO. REV. STAT. § 13-65-102(5)(a) (2024).

325. *See, e.g.*, 705 ILL. COMP. STAT. 505/8(c) (2024).

326. *See, e.g.*, MINN. STAT. § 611.363(1) (2024).

327. *See, e.g.*, CONN. GEN. STAT. § 54-102uu(b) (2024).

328. *See, e.g.*, CAL. PENAL CODE § 4901(a) (West 2024).

329. *See, e.g.*, MONT. CODE ANN. § 53-1-214(1) (2024).

330. *See, e.g.*, N.C. GEN. STAT. § 148-82(a) (2024).

For these reasons, caps on maximum compensation should be removed in their entirety. While the removal of caps may increase costs to the state,<sup>331</sup> removals will also create an incentive for government actors to correct the flaws in the system that created the wrongful incarceration at inception. In addition, practices in other areas of civil law already account for awards of what is deemed to be “excessive” damages without resorting to caps. For example, “[w]hen an award of damages is so excessive that they could only be based on bias, passion or prejudice, *remittitur* [is] appropriate.”<sup>332</sup> Similar mechanisms can be created on appeal here.

Further, once maximum caps are removed, states should also incorporate a flat fee that guarantees a baseline for recovery. First, the flat fee should contain a provision for modification based on yearly inflation. This Article does not suggest a flat fee, as more data is needed to determine the appropriate number.<sup>333</sup> A baseline flat fee sets a value that recognizes that the harm caused by wrongful conviction exceeds legitimate incarceration. However, this baseline should be calculated by a central organization with resources to create a model fee.

Once that flat fee has been determined, this Article also suggests that equitable compensation requires the decision-maker possess the discretion to make upward modifications based on individual circumstances. This ensures that damages are commensurate with the experience of the individual. This Article recommends greater discretion for *upward* modification to the

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331. Cf. Austerhuhle, *supra* note 223 (explaining that the government needs to strike a balance between having a generous cap to compensate wrongly convicted individuals and limiting recovery to ensure effective fiscal planning).

332. Sanchez v. Brokop, 398 F. Supp. 2d 1177, 1181 (D.N.M. 2005) (emphasis added).

333. While the federal rate of \$50,000 per year of wrongful incarceration has been the standard, that standard should be raised. The Innocence Project and other proponents of change suggest at least \$100,000 per year of wrongful incarceration. Lonergan, *supra* note 124, at 420–21. This would appropriately account for the balance that needs to be struck between cost to the state and fair compensation. *See id.* at 421–22.

decision-maker; however, the structure of who the decision-maker is should be left to the state. This Article urges states to maintain a system of checks and balances to ensure fairness in the decision.

This Article argues that progress made through legislative changes suggests that states are already open to increasing monetary compensation for the wrongfully convicted. Following the advocacy of the Innocence Project, changes made to the federal standard may be the solution to nationwide change.<sup>334</sup> If the federal government sets the tone of compensation, then other states may follow. Over time, changes to compensation, already highlighted in this Article, include the following:

State	Monetary Increase	Type of Increase
California	\$140 per diem <sup>335</sup>	Flat Fee
Illinois	\$70,350–\$164,150 <sup>336</sup>	Maximum Cap
Louisiana	\$25,000	Flat Fee
	\$250,000 <sup>337</sup>	Maximum Cap
Massachusetts	\$500,000 <sup>338</sup>	Maximum Cap
New Jersey	\$30,000 <sup>339</sup>	Flat Fee
North Carolina	\$30,000	Flat Fee
	\$250,000 <sup>340</sup>	Maximum Cap

334. *See id.*

335. Compare 1941 Cal. Stat. 1131, with CAL. PENAL CODE § 4904(a) (West 2024).

336. Compare 705 ILL. COMP. STAT. 505/8(c) (1989), with 705 ILL. COMP. STAT. 505/8(c) (2024).

337. Compare LA. STAT. ANN. § 15:572.8(H)(2) (2008), with LA. STAT. ANN. § 15:572.8(H)(2)(b) (2024).

338. Compare MASS. GEN. LAWS ANN. ch. 258D, § 5 (West 2018), with MASS. GEN. LAWS ANN. ch. 258D, § 5(a) (West 2024).

339. Compare N.J. STAT. ANN. § 52:4C-5(a) (West 2013), with N.J. STAT. ANN. § 52:4C-5(a)(1)(a)–(b) (West 2024).

340. Compare N.C. GEN. STAT. ANN. § 148-84(a) (West 2008), with N.C. GEN. STAT. ANN. § 148-84(a) (West 2024).



State	Monetary Increase	Type of Increase
Ohio	\$15,300 <sup>341</sup>	Flat Fee
Texas	\$30,000 <sup>342</sup>	Flat Fee

The changes suggested in this Article will comport with already-existing trends to increase compensation and will more fairly distribute compensation for both economic and non-economic damages.

Economic damages include lost wages and opportunities and documented physical harm suffered by the wrongfully incarcerated.<sup>343</sup> These damages account for the undeniable loss created by wrongful incarceration.<sup>344</sup> Maryland already attempted to tie compensation to economic damages through an income-dependent compensatory scheme.<sup>345</sup> However, the second type of damages, non-economic damages, addresses injury caused by loss of liberty, pain and suffering, humiliation associated with incarceration, and intangible damages that may not have a set value and also are far more difficult to calculate.<sup>346</sup> These are the most difficult to determine but also the most crucial to compensate. Our society highly values personal liberty.<sup>347</sup> When an individual person's freedom is unjustly deprived, society suffers an egregious loss.<sup>348</sup> The three suggestions for change represent a holistic approach to repairing the societal harm caused by wrongful convictions.

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341. Compare OHIO REV. CODE ANN. § 2743.48(E)(2)(b) (LexisNexis 2003), with OHIO REV. CODE ANN. § 2743.48(E)(2)(b) (LexisNexis 2024).

342. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a)(1) (West 2007), with TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a)(1) (West 2024).

343. See Lopez, *supra* note 33, at 712.

344. See *id.*

345. See *supra* Section II.D.

346. See Lopez, *supra* note 33, at 712.

347. See *What Are the Most Important American Values*, USAHELLO, <https://usahello.org/life-in-usa/culture/american-values/> [https://perma.cc/2EV3-D8Q7] (Aug. 19, 2022).

348. See Lopez, *supra* note 33, at 722.

For those who have met the eligibility requirement and are found eligible for compensation, which at times is as stringent as requiring DNA exoneration or a pardon,<sup>349</sup> limits on compensation continue to harm those who suffered the greatest damages. Therefore, states with compensation statutes should adopt the three recommended changes, and those without compensation statutes should adopt compensation statutes to properly compensate the wrongfully incarcerated. Not only is there a moral obligation,<sup>350</sup> but the cost of continuing to wrongfully incarcerate those individuals far outweighs any recovery they will receive,<sup>351</sup> and the relative cost of compensation under a statute is more conservative and budget-friendly than judgments from civil lawsuits.<sup>352</sup> However, budgetary decisions are not always a unanimous or bipartisan effort. The following section of this Article addresses the financial implications of wrongful conviction compensation.

### G. *Cost of Reform*

While states may fear the financial impact of increasing compensation recovery, this Article argues that improving recovery amounts costs far less than continuing to incarcerate the wrongfully convicted. In Hawaii, the House of Representatives addressed the financial impact of wrongful convictions in 2016, indicating that the statute intends to balance the need for redress for the wrongfully convicted with the State's limited

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349. See Chelsea N. Evans, *A Dime for Your Time: A Case for Compensating the Wrongfully Convicted in South Carolina*, 68 S.C. L. REV. 539, 563 (2017).

350. See Lopez, *supra* note 33, at 710.

351. See Janani Umamaheswar, *The Relational Costs of Wrongful Convictions*, 31 CRITICAL CRIMINOLOGY 707, 711 (2023).

352. See Lopez, *supra* note 33, at 719.

resources.<sup>353</sup> The House Fiscal Agency in Michigan analyzed the financial impact of providing monetary compensation:

Senate Bill 291 would have an indeterminate, but potentially significant, fiscal impact on the state. However, the impact would occur more immediately, as individuals exonerated prior to the effective date of the bill would be required to commence action for reimbursement within 18 months after the effective date of the bill. After that period, costs to the state would most likely stabilize, assuming fewer individuals would be eligible to apply in any given year.<sup>354</sup>

In Utah, lobbying efforts required proponents of the bill to provide the legislature with monetary awards in states without compensation bills to show that the proposed legislative changes were moderate and that passing a legislative bill for compensation was more cost-effective than the unpredictability of other avenues for relief.<sup>355</sup> Similarly, Washington's legislature commented on the cost-effectiveness of a state-backed wrongful compensation bill: "Right now wrongly convicted people have no other option but to sue, and there are several lawsuits pending now. The compensation package would probably be less than one payoff lawsuit."<sup>356</sup>

In California, the Chief Justice Earl Warren Institute on Law and Social Policy conducted a study on wrongful convictions in California and found that wrongful convictions and failed

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353. See H.R. 1046, 28th Leg., Reg. Sess. § 1 (Haw. 2016).

354. SUSAN STUTZKY & ROBIN RISKO, HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: WRONGFUL IMPRISONMENT COMPENSATION ACT 6 (2017).

355. See Creighton C. Horton II, *Legislative Update Working Together for Justice: Utah's Exoneration and Innocence Assistance Bill*, 2008 UTAH L. REV. 107, 109 (2008).

356. H. 63-1341, Reg. Sess., at 5 (Wa. 2013).

prosecutions cost taxpayers \$220 million.<sup>357</sup> This cost was broken down between prosecution, defense, incarceration, and compensation.<sup>358</sup> Specifically: \$80 million spent incarcerating the wrongfully convicted; \$68 million for trials and appeals, including prosecutors, defense attorneys, judges, trial courts, and appellate courts; \$5 million for compensation through Victim Compensation Funds; and \$68 million to settle lawsuits against the state and counties.<sup>359</sup>

In New York in 2019, it costs state prisons an average of nearly \$115,000 per year to incarcerate a single person.<sup>360</sup> This amounts to more than \$3.5 billion spent every year.<sup>361</sup> Advocates in New York already suggest that increasing funding to behavioral health and social support, which promote long-term benefits and stability, will reduce the number of people incarcerated.<sup>362</sup> This, in turn, will lower costs, as the state will have to pay for fewer people in its prisons.

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357. REBECCA SILBERT, JOHN HOLLWAY & DARYA LARIZADEH, CRIMINAL INJUSTICE: A COST ANALYSIS OF WRONGFUL CONVICTIONS, ERRORS, AND FAILED PROSECUTIONS IN CALIFORNIA'S CRIMINAL JUSTICE SYSTEM 60 (2015), [http://static1.squarespace.com/static/55f70367e4b0974cf2b82009/t/56a95c112399a3a5c87c1a7b/1453939730318/WI\\_Criminal\\_InJustice\\_booklet\\_FINAL2.pdf](http://static1.squarespace.com/static/55f70367e4b0974cf2b82009/t/56a95c112399a3a5c87c1a7b/1453939730318/WI_Criminal_InJustice_booklet_FINAL2.pdf). Using an inflation calculator, \$220 million in 2015 converts to a little more than \$291 million in 2024 dollars. Ian Webster, *Value of \$220,000,000 from 2015 to 2024*, CPI INFLATION CALCULATOR, <https://www.official-data.org/us/inflation/2015?amount=220000000> [<https://perma.cc/J8CN-CLJ7>] (last visited Jan. 9, 2025).

358. SILBERT ET AL., *supra* note 357, at 60.

359. *Id.*

360. Jullian Harris-Calvin, Sebastian Solomon, Benjamin Heller & Brian King, *The Cost of Incarceration in New York State*, VERA (Oct. 31, 2022), <https://www.vera.org/the-cost-of-incarceration-in-new-york-state> [<https://perma.cc/3TAP-9R6B>].

361. *See id.*; *New York Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/NY.html> [<https://perma.cc/2JQ9-A8NL>] (last visited Nov. 18, 2024).

362. N.Y. STATE DEP'T OF CORRS. & CMY. SUPERVISION, LEGISLATIVE REPORT ON REENTRY PLANNING AND ACCESS TO SOCIAL SERVICES 11 (2022).

However, costs of incarceration vary across states.<sup>363</sup> In Wyoming, the state spent \$135,978 per prisoner in 2020, while Mississippi spent \$18,000 per prisoner.<sup>364</sup>

In sum, the cost of reform can be compared to the cost of continuing incarceration. And data shows that the “cost of compensating the wrongly convicted under state statutes is between 0.03% and 0.035% of corrections expenditures.”<sup>365</sup>

Indirectly, wrongful conviction compensation may trigger political pressure on prosecutors. Political pressures cause an increased focus on office-wide high conviction rates, which may help district attorneys leverage budget deals, placing a high value on securing convictions.<sup>366</sup> Compensation reform has the potential to impact a prosecutor’s career if prosecutors feel pressure to secure convictions.<sup>367</sup> This bleak incentive is coined “conviction psychology.”<sup>368</sup> One scholar suggests that “conviction psychology” perpetuates the prosecutor’s ethical motivation for public service.<sup>369</sup> This ethical motivation is at odds with post-conviction innocence claims.<sup>370</sup> Therefore, a prosecutor

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363. *State Incarceration*, SOC. STUD. LAB (Mar. 6, 2021), <https://socialstudieslab.org/starters/2021/3/4/r113o447wv0bhry3687d4zq8nm1i8k-k6hy5> [<https://perma.cc/4EGT-TN4R>].

364. *Id.*

365. Gutman, *Empirical Reexamination*, *supra* note 42, at 394.

366. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 135 (2004).

367. Medwed, *supra* note 366, at 134–35, 134 n.39 (“Political pressures foster a ‘conviction psychology’ because prosecutors can easily demonstrate their ‘effectiveness’ by pointing to conviction statistics.” (quoting Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 226 (1988))). However, it is very likely that individual prosecutors are not immediately impacted by the cost-benefit analysis of compensation payouts. *See id.* at 157 n.156. This Article only suggests that societal and political pressures may have a trickle-down effect on prosecuting offices. More research is needed to more directly test this theory, perhaps through the lens of conviction integrity offices throughout the United States. *See generally Conviction Integrity Units*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [<https://perma.cc/4ZSH-TFAE>] (June 25, 2024) (finding that, in 2023, Conviction Integrity Units and Innocence Organizations were responsible for 63% of the total exonerations).

368. Medwed, *supra* note 366, at 137 & n.49 (citing George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 99, 109–10 (1975)).

369. *Id.* at 138–39.

370. *Id.* at 139.

evaluating a post-conviction innocence claim “may struggle to accept the possibility that he convicted an innocent man, not to mention that a guilty person may remain at large.”<sup>371</sup> Therefore, the suggestion is that prosecutors have a political incentive to fight post-conviction claims and let the adversarial system work itself out.<sup>372</sup>

Public perception and the function of the American adversarial criminal justice system pit the state against the defendant. With this mindset, there is a suggestion that “[t]he bigger the compensation that the state has to pay, . . . the more reluctant agents of the state might be to cooperate in an exoneration.”<sup>373</sup> Perhaps this is because of the connection between punitiveness and political conservatism, which is often linked to a “tough on crime” mentality.<sup>374</sup>

Further, when exonerees attempt to move past the crime for which they were wrongfully convicted, they oftentimes self-report a social stigmatization.<sup>375</sup> Even years after exoneration, exonerees expressed concerns about being in public due to the fear of public response to their original crime wrongful conviction.<sup>376</sup> When this public response was tested through studies on public perception of exonerees, responders denied having a

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371. *Id.* at 140.

372. *Id.* at 157.

373. Will Baude, *The Unintended Consequences of Compensating the Exonerated*, WASH. POST (Jan. 30, 2014, 12:05 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/30/the-unintended-consequences-of-compensating-the-exonerated/> [<https://perma.cc/P65N-K8M8>]. There is a counterargument here that state agents are insulated from claims and therefore are not stakeholders in the process who oppose compensation and that principles of deterrence do not impact government decision-making. See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (concluding that prosecutors “enjoy[]” immunity from civil redress).

374. See James D. Unnever & Francis T. Cullen, *The Social Sources of Americans’ Punitiveness: A Test of Three Competing Models*, 48 CRIMINOLOGY 99, 112 (2010).

375. See Faison & Smalarz, *supra* note 11, at 1024.

376. See *id.* at 1025.

negative perception of exonerees; however, their behavior showed otherwise:<sup>377</sup>

To summarize, studies that have asked members of the public to self-report their attitudes towards exonerees show that the public acknowledges the stigmatization of exonerees by society as a whole, but most members of the public deny personally stigmatizing exonerees while sometimes simultaneously expressing stigmatizing views of exonerees. This discrepancy between people's reports of the attitudes of society at large and their own self-reported attitudes may be a reflection of people's deliberate attempts to appear egalitarian and unbiased. It is one thing to recognize that one's social group holds negative views of stigmatized individuals and another to admit to personally endorsing those negative views.<sup>378</sup>

In a study on exoneree stigmatization, undergraduate students were given a newspaper article about the subjects: a paroled offender, an exoneree, and a person without a prior conviction.<sup>379</sup> After reading the article, the students responded to a survey on their feelings toward the individuals in the article.<sup>380</sup>

The results indicated that the exoneree was viewed as less good-natured, warm, intelligent, and confident than the person without a prior conviction but as more good-natured, warm, intelligent, confident, tolerant, honest, and deserving of monetary assistance than the paroled

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377. See *id.* at 1026–27 (citing Kimberly A. Clow, Isabella M. Blandisi, Rose Ricciardelli & Regina A. Schuller, *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 ALB. L. REV. 1415, 1423–24 (2012)).

378. *Id.* at 1028.

379. Adina M. Thompson, Oscar R. Molina & Lora M. Levett, *After Exoneration: An Investigation of Stigma and Wrongfully Convicted Persons*, 75 ALB. L. REV. 1373, 1384 (2011).

380. Faison & Smalarz, *supra* note 11, at 1031.

offender. These results suggest that exonerees are viewed more positively than actual offenders but less positively than non-convicted persons.<sup>381</sup>

State funding of generous compensatory schemes requires using state funds to pay the exact exoneree who fears the public even years after exoneration. While there may be overall public support for releasing the wrongfully convicted, this Article suggests that the breakdown exists in the payout stage. One key factor is evaluating the public perception of increasing funding for compensation and the messaging it sends to state citizens.

Additionally, to pave the way for potential reform, all states must first accept that they have a responsibility to provide an avenue for relief for the wrongfully convicted. While states do not have a legal obligation to compensate the wrongfully incarcerated, they do have a moral responsibility to do so.<sup>382</sup> “The state clearly has the right to incarcerate people proven guilty of crimes. [The state] also ha[s] the moral responsibility, in the cases where mistakes have been made, to provide some recompense to those who have been wronged by state action.”<sup>383</sup>

[T]he Commission viewed the State as “the most appropriate party to assume liability” for an unjust conviction even if occasioned by a miscarriage of justice at another level of government, such as an elected county District Attorney. It was the Commission’s view that because a prosecution is brought in the name of the “People of the State of New York,” and the conviction is for an act made criminal by state law “usually with the imprimatur of a state court,” and the convicted person generally is confined in a state correctional

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381. *Id.*

382. Lonergan, *supra* note 124, at 452.

383. Wisneski, *supra* note 44, at 148.



facility, the nexus between the State and the entire process justifies the State's assumption of what it saw as a moral obligation[.]<sup>384</sup>

Providing compensation at a fair rate allows the exoneree to escape the stigma of incarceration. When exonerees are able to provide for themselves financially, their chance of re-entry is increased, and their burden on society is subsequently reduced, thus benefiting the state and its citizens as a whole.<sup>385</sup>

For any avenue for relief to have an impact on reducing wrongful convictions, the monetary compensation must be proportional to the loss of liberty. This value will then serve as a proper incentive for government actors. The cost associated with this reform must increase. However, “[a]rmed with that data, thoughtful legislators from both parties can work to reduce future state costs by enacting legislation aimed at preventing wrongful conviction in the first instance.”<sup>386</sup>

When an individual is wrongfully convicted of a crime, the prosecuting agency wastes valuable resources on the wrong individual.<sup>387</sup> Certainly, some wrongful convictions may be inevitable; according to the National Exonerations Registry, “about 45% of wrongful convictions do not arise from the misconduct of prosecutors or police. Some are simply the product of mistakes, like erroneous but uncoerced identifications.”<sup>388</sup>

By investing in compensation statutes, the state serves a vital deterrent effect: it creates an incentive for government actors to create competent systems and act to reduce or prevent wrongful convictions altogether.

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384. *Baba-Ali v. State*, 878 N.Y.S.2d 555, 566–67 (N.Y. Ct. Cl. 2009).

385. See Karen A. Davis, Comment, *Ohio's Wrongful Imprisonment Statute: Making It Easier to Compensate the Innocent, Exonerated, and Deserving*, 50 U. TOL. L. REV. 335, 344 (2019).

386. Gutman, *supra* note 157.

387. Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Wrongful Convictions*, 20 CRIMINOLOGY & PUB. POL'Y 691, 719 (2021).

388. Gutman, *supra* note 157.

## CONCLUSION

Wrongful incarceration plagues all states, yet thirteen states, Guam, and Puerto Rico still do not compensate the wrongfully convicted. In those states, citizens who have lost years of their lives, fighting for their freedom, have no automatic recourse for their unjust and wrongful incarceration.

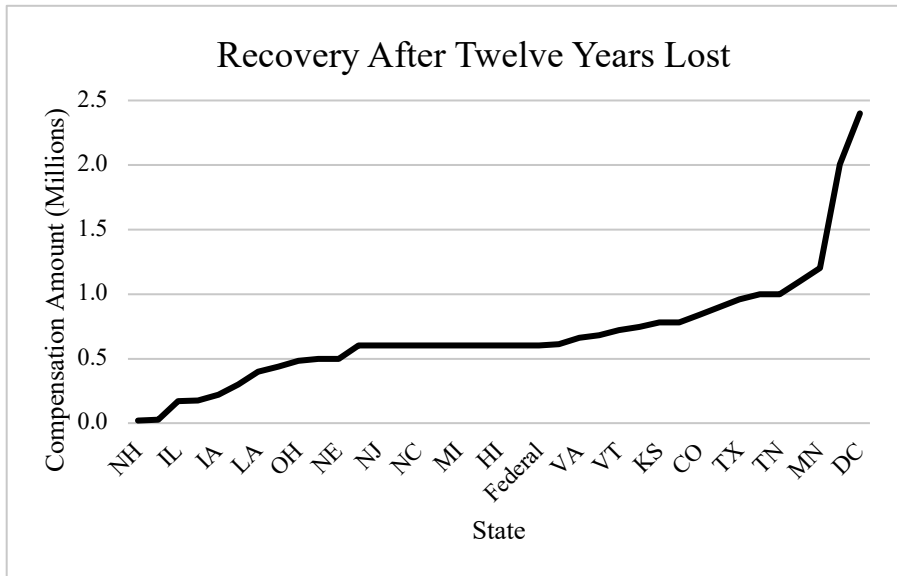
Of the states with compensation statutes, recovery varies greatly: from \$5,000 per year of wrongful incarceration in Wisconsin to \$200,000 in the District of Columbia. The state of wrongful incarceration becomes a crucial element of recovery after the fact. With such high variability, fairness and justice are not being achieved. Compensating the wrongfully convicted is a vital component of the American social fabric. If a state truly cares about repairing the damage its system causes it must first accept that not all incarceration is alike: incarcerating an innocent person causes exponentially more harm than justified incarceration.

This Article advocates for across-the-board revisions to compensation statutes as they stand by removing caps on compensation, adding a baseline flat fee for recovery that comports with the values in the loss of liberty, and including provisions of discretion for the decision-maker to account for individual circumstances while incarcerated. These changes will result in transparency and a fair application of justice to those individual members of society who have been horribly wronged for criminal convictions, while simultaneously strengthening our society.

**APPENDIX I: RECOVERY FOR TWELVE YEARS LOST**

<b>State</b>	<b>Recovery for Twelve Years Lost</b>	<b>Type of Statute</b>
New Hampshire	\$20,000.00	Max. Cap
Wisconsin	\$25,000.00	Max. Cap
Illinois	\$170,000.00	Max. Cap
Oklahoma	\$175,000.00	Max. Cap
Iowa	\$219,000.00	Max. Cap
Louisiana	\$400,000.00	Max. Cap
Maine	\$300,000.00	Max. Cap
Missouri	\$438,000.00	Max. Cap
Ohio	\$483,960.00	Max. Cap
Mississippi	\$500,000.00	Max. Cap
Nebraska	\$500,000.00	Max. Cap
Hawaii	\$600,000.00	Flat Fee
Federal	\$600,000.00	Flat Fee
Florida	\$600,000.00	Max. Cap
New Jersey	\$600,000.00	Flat Fee
Alabama	\$600,000.00	Flat Fee
North Carolina	\$600,000.00	Max Cap
Michigan	\$600,000.00	Flat Fee
Indiana	\$600,000.00	Flat Fee
Washington	\$600,000.00	Flat Fee
Rhode Island	\$600,000.00	Flat Fee
California	\$612,000.00	Flat Fee

<b>State</b>	<b>Recovery for Twelve Years Lost</b>	<b>Type of Statute</b>
Virginia	\$660,000.00	Flat Fee
Utah	\$683,280.00	Flat Fee
Vermont	\$720,000.00	Flat Fee
Idaho	\$744,000.00	Flat Fee
Oregon	\$780,000.00	Flat Fee
Kansas	\$780,000.00	Flat Fee
Colorado	\$840,000.00	Flat Fee
Nevada	\$900,000.00	Flat Fee
Texas	\$960,000.00	Flat Fee
Massachusetts	\$1,000,000.00	Max Cap
Tennessee	\$1,000,000.00	Max Cap
Maryland	\$1,097,172.00	Flat Fee
Minnesota	\$1,200,000.00	Flat Fee
Connecticut	\$2,005,728.00	Flat Fee
District of Columbia	\$2,400,000.00	Flat Fee



**APPENDIX II: EXONERATIONS PER MILLION**

<b>State</b>	<b>State Population</b>	<b>Total Exonerations</b>	<b>Exonerations Per Person per Million</b>
New Hampshire	1,377,529	2	1.45
South Carolina	5,118,425	9	1.76
Puerto Rico	3,285,874	6	1.83
Colorado	5,773,714	11	1.91
Maine	1,362,359	4	2.94
Arizona	7,151,502	22	3.08
Idaho	1,839,106	6	3.26
Minnesota	5,706,494	21	3.68
Florida	21,538,187	84	3.90
Delaware	989,948	4	4.04
Hawaii	1,455,271	6	4.12
Arkansas	3,011,524	13	4.32
Georgia	10,711,908	48	4.48
Tennessee	6,910,840	31	4.49
Nebraska	1,961,504	9	4.59
Vermont	643,077	3	4.67
New Mexico	2,117,522	10	4.72
Kentucky	4,505,836	22	4.88
North Dakota	779,094	4	5.13
Iowa	3,190,369	17	5.33

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<b>State</b>	<b>State Population</b>	<b>Total Exonerations</b>	<b>Exonerations Per Person per Million</b>
South Dakota	886,667	5	5.64
Alabama	5,024,279	29	5.77
Kansas	2,937,880	17	5.79
Utah	3,271,616	19	5.81
Oregon	4,237,256	25	5.90
Washington	7,705,281	51	6.62
Indiana	6,785,528	45	6.63
California	39,538,223	268	6.78
North Carolina	10,439,388	72	6.90
Wyoming	576,851	4	6.93
New Jersey	9,288,994	65	7.00
Nevada	3,104,614	22	7.09
Rhode Island	1,097,379	8	7.29
Virginia	8,631,393	65	7.53
West Virginia	1,793,716	14	7.81
Maryland	6,177,224	49	7.93
Ohio	11,799,448	100	8.48
Pennsylvania	13,002,700	111	8.54
Connecticut	3,605,944	31	8.60
Missouri	6,154,913	54	8.77
Mississippi	2,961,279	26	8.78

<b>State</b>	<b>State Population</b>	<b>Total Exonerations</b>	<b>Exonerations Per Person per Million</b>
Oklahoma	3,959,353	41	10.36
Alaska	733,391	8	10.91
Wisconsin	5,893,718	66	11.20
Massachusetts	7,029,917	83	11.81
Guam	153,836	2	13.00
Montana	1,084,225	15	13.84
Texas	29,145,505	441	15.13
New York	20,201,249	321	15.89
Michigan	10,077,331	163	16.18
Louisiana	4,657,757	83	17.82
District of Columbia	689,545	21	30.46
Illinois	12,812,508	493	38.48



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