



# Assessing Compensation Statutes For The Wrongly Convicted

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## Abstract

As the discovery of wrongful convictions grows, so does concern in the legal community and public sphere about actual innocence. Though research on miscarriages of justice has grown tremendously, most has focused on the factors contributing to wrongful convictions, with relatively little attention paid to the post-release struggles of exonerees. Specifically, social scientists have not yet examined policies designed to assist the exonerated in their return to society. This study provides a content analysis of existing compensation statutes for the wrongly convicted. Results show that just more than half of American states have compensation statutes for exonerees, and the assistance offered varies tremendously from state to state. Assessing current statutes in comparison to a model standard indicates that whereas some jurisdictions provide fairly comprehensive packages, others offer little in the way of reentry assistance. The importance of such statutes and implications for the wrongly convicted are discussed.

## **Introduction**

Over the past 20 years, awareness of wrongful convictions has grown tremendously. Since 1989, there have been more than 300 exonerations of the wrongly convicted (Gross, Jacoby, Matheson, Montgomery, & Patil, 2005), including more than 265 through DNA testing (Innocence Project, <http://www.innocenceproject.org>), and 138 in capital cases (Death Penalty Information Center, <http://www.deathpenaltyinfo.org>).

Research on the subject has increased, and knowledge about these cases of injustice has affected the perceptions of our criminal justice system among both the public and legal community (Garrett, 2008).

Policies to right these wrongs, however, have not kept pace. Though some states have implemented reforms designed to reduce the number of wrongful convictions, increase the discovery of mistaken verdicts, and remedy the situation as best as possible, others have not acted.<sup>1</sup> Even with protective reforms in place, it seems inevitable that at least some innocent defendants will be convicted. The victims of these miscarriages of justice often desire compensation. Indeed, Campbell and Denov (2004) discuss the feelings of security and comfort that state-provided support may bring for exonerees, who acknowledge that although monetary and other reentry assistance cannot return life to what it was pre-wrongful conviction, it can provide some peace of mind. Many exonerees, however, have been unable to obtain such support. Of the first 250 individuals exonerated through DNA testing, approximately 40% have not received compensation (Innocence Project, 2009).

The lack of reentry assistance provided may be due in part to shortcomings in the existing statutory remedies for the wrongly convicted. The policies which make available such reintegration services, however, have generally not been studied by social scientists, and a full understanding of their strengths and weaknesses has yet to be developed. Though several legal scholars and advocacy groups have discussed the issue (e.g., Bernhard, 1999, 2009; Innocence Project, 2009), more methodical analysis is needed to understand the complexities of current policies. In this article, I begin to fill this void in the literature by providing an assessment of existing compensation statutes for the wrongly convicted in comparison to a model policy. First, I survey the national landscape to determine which states have compensation statutes in place and provide a detailed content analysis of existing statutes. I then assess the policies in relation to the model legislation offered by the Innocence Project, a large nonprofit organization based out of the Cardozo Law School, which works to secure postconviction DNA testing for inmates who claim factual innocence. This type of policy analysis can highlight the importance exoneration-compensation statutes and the limitations of those that do exist, providing a foundation on which to develop new policies and reforms to strengthen existing ones.

## **Methods of Compensation**

Exonerees may obtain compensation in several different ways, including private bills, litigation, and compensation statutes. The first option allows a wrongly convicted individual to attempt to obtain a private compensation bill from the state legislature, the success rate for which is very low (Bernhard, 1999; Lonergan, 2008). Only 9% of Innocence Project exonerees have received compensation through private bills. Similarly, exonerees attempting to obtain compensation through litigation, via either tort law or civil rights doctrine, face a daunting task. Lawsuits are extremely difficult to win given the high burdens of proof required and the immunity protections

of state actors, namely police and prosecutors (Bernhard, 1999, 2009). Even when litigation is possible, it can prove to be too costly and time-consuming for exonerees facing the hardships of release and reentry. As Bernhard (2009) points out, though several exonerees have won large civil awards, the vast majority have not. Only 28% of Innocence Project exonerees have received compensation through civil suits, and those individuals waited an average of almost 4 years to receive their awards (Innocence Project, 2009).

Given the difficulties of receiving compensation through litigation or private bills, scholars have argued for the creation of statutes to compensate the wrongfully convicted and provide other reintegration assistance. Of the DNA exonerees who have received compensation, approximately 33% were awarded through state statutes (Innocence Project, 2009). Bernhard (1999, 2009) categorizes compensation statutes along with crime victims' assistance legislation, arguing that such statutes provide the easiest, fairest, and most consistent method of compensating the wrongly convicted.

In addition to scholars, several legal organizations also have advocated for compensation statutes. The American Bar Association urges jurisdictions to fairly compensate individuals based on the amount of time served, including noneconomic losses and assistance in reentering the community (American Bar Association Section on Criminal Justice, 2005). The Innocence Project offers perhaps the most complete exemplar for compensating the wrongfully convicted (Innocence Project, 2009). Their recommendations include a set yearly amount of monetary compensation (at least US\$50,000), with additional amounts for time spent on death row, on parole, or as a registered sex offender. In addition, they suggest a range of other assistance, including reintegrative services, educational credits, and job-skill training.

Some jurisdictions have responded and adopted compensation statutes for exonerees, and legal scholars have provided descriptions and critiques of particular policies, but they have been neither comprehensive nor systematic. Bernhard (1999, 2009) points out that some existing statutes vary widely and are far from perfect. Among their weaknesses are the sometimes-strict eligibility requirements (e.g., requiring exonerees to obtain a full pardon), high standards of proof, limited awards, numerous disqualifiers, and short time limits. These sentiments are echoed by Lonergan (2008), who in addition addresses the lack of nonmonetary services (e.g., mental and physical health care, education assistance) present in many existing statutes.

Experts typically call for comprehensive reentry assistance, and statutory compensation can provide such support, helping exonerees to overcome many of the hurdles they face on release. In the following section, I describe some of these struggles, adopting the framework of exonerees as victims of state harm (Westervelt & Cook, 2010). This framework builds on the traditional victimology of state-harms (see Kauzlarich, Matthews, & Miller, 2001) by highlighting the role of the state in creating and exacerbating the problems faced by the wrongly convicted. The state-harms framework provides a valuable model for understanding the post-release hardships faced by exonerees. Such awareness of post-release issues provides a better appreciation for the importance of adequate compensation and reentry assistance.

## **Post-release Struggles of the Wrongfully Convicted**

On release, exonerees must deal with a wide range of issues that impact themselves and those around them. Nearly all experience financial hardships, often lacking the transitional funds for necessities such as housing (Innocence Project, 2009; Westervelt & Cook, 2010). Some exonerees have reported the embarrassment of having to rely on family members or friends for assistance. For example, Herman Atkins, Sr., an exoneree from California who served more than 11 years in prison, stated, “At the age of 34, I had to go back to my parents as if I was a child and say, ‘Mama, or daddy, I need this, that, and the other’” (Innocence Project Video, 2010).

The post-release struggles of the exonerated are not restricted solely to monetary woes. Research shows that years of wrongful imprisonment can have long-lasting ramifications (Grounds, 2004). The wrongly convicted often must deal with long-term personality change, posttraumatic stress and other psychiatric disorders, and the difficulties of coping with stigma, grief, and loss. Families often have changed dramatically by the time of release, and exonerees are forced to negotiate conflicting feelings of bitterness, depression, and social rejection (Campbell & Denov, 2004; Grounds, 2004; Westervelt & Cook, 2008, 2010). Some family members, as well as other community members, continue to believe in the exoneree’s guilt, refusing to accept that the person was wrongly convicted.

Physical health problems also are common among exonerees, often due to substandard prison health care. Common ailments include malnutrition, muscular atrophy, asthma, skin rashes, and premature aging (Innocence Project, 2009; Westervelt & Cook, 2010). Furthermore, once released, exonerees may have difficulty obtaining health care, which is often determined by employment, another barrier for the wrongly convicted (Westervelt & Cook, 2010). Exonerees often lack the educational training and job-skills necessary to build successful careers on release (Campbell & Denov, 2004; Grounds, 2004; Westervelt & Cook, 2008, 2010). In fact, Westervelt and Cook (2010) found employment troubles to be the most frequently cited difficulty faced by exonerees.

Like other institutionalized individuals, exonerees report struggling with the practical skills involved in everyday life, such as grocery shopping and sleeping. Years of a tightly controlled, regimented lifestyle lead to difficulties of adaptation on release (Grounds, 2004; Westervelt & Cook, 2010). They may struggle to adjust to a world that is vastly different from the one they knew before imprisonment. Technological struggles are paramount for exonerees, some of whom had never seen a computer or cell phone (Innocence Project, 2009; Westervelt & Cook, 2010). Calvin Johnson, Jr., a Georgia exoneree, summarizes the feeling well, reporting that he felt like a “baby in a brand new world” upon his release (Innocence Project Video, 2010).

The post-exoneration struggles of the wrongly convicted are similar in many respects to those faced by all parolees. Exonerees’ situations, however, are unique. Campbell and Denov (2004) argue that the post-release experiences of the wrongly convicted differ from those of ordinary parolees in two distinct ways. First, many exonerees

demonstrate “an increased intolerance of injustice” (p. 154). Their experiences have often instilled in them an extreme sense of cynicism and suspicion of authority, and they often display empathy for other victims of injustice. Second, exonerees often desire an acknowledgement of error on the part of the government and compensation for harms suffered. Paradoxically, although all prisoners must deal with issues relating to institutionalization, prior research provides anecdotal evidence that exonerees may be afforded less in the way of reentry services than are guilty prisoners upon release, including lack of access to halfway houses or drug rehabilitation programs. Indeed, reentry programs are often designed specifically for actual offenders and are not available to those who are actually innocent (Westervelt & Cook, 2010).

Another way to distinguish exonerees from parolees and others released from incarceration is to adopt a framework from within which their unique struggles can be better understood and the importance of compensation and reentry assistance emphasized. One possibility is to adopt the idea of exonerees as victims of state harm. Westervelt and Cook (2010) do so, developing six main points in their argument: (a) victims tend to be among the least socially powerful actors; (b) victimizers generally fail to recognize and understand the nature, extent, and harmfulness of institutional policies and, if suffering is acknowledged, it is often neutralized within the context of a sense of entitlement; (c) victims are often blamed for their suffering; (d) victims must generally rely on the victimizer, an associated institution, or civil social movements for redress; (e) victims are easy targets for repeated victimization; and (f) illegal state policies and practices are manifestations of the attempt to achieve organizational, bureaucratic, or institutional goals.

Though a full examination of these six points is beyond the scope of the current article, several of them are appropriate for discussion here. As Westervelt and Cook (2010) note, the wrongly convicted tend not to be among the socially powerful, at least when it comes to the criminal justice process. It is not uncommon for these cases to involve an indigent defendant with an underfunded lawyer matched up against a well-funded, or at least better funded, prosecutor. The state also controls the media representations of the case, which often paint negative constructions of the defendant and “legitimate activities of state agents” (p. 261). In addition, the victimizers frequently fail to recognize the harmfulness of their actions and, when acknowledged, the suffering of exonerees is neutralized. It is common for state agents to continue to deny the actual innocence of exonerees long after release. Furthermore, state actors, particularly police and prosecutors who engage in harmful behavior that leads to wrongful conviction, are rarely held accountable for their actions. It is then these same actors on whom the wrongfully convicted must often rely to reinvestigate the case, discover previous errors, and retry the case (Westervelt & Cook, 2010).

If a mistake is discovered and remedied, and exoneration does occur, the freed individual is often the target of repeated victimization. This is sometimes the direct result of the actions taken by state actors, such as when exonerees are subjected to post-release police surveillance. More often, however, the failures of the state to acknowledge its mistake and provide meaningful reintegration assistance have indirect

consequences for exonerees, including lack of access to health care and employment (Westervelt & Cook, 2010).

When the state does not provide compensation and reintegration services, it exacerbates an already difficult situation facing the wrongly convicted. Exonerees must often rely on nonprofit organizations for assistance (Westervelt & Cook, 2010). Though helpful, this may do little to alleviate exonerees' feelings of victimization at the hands of the state and their desire for an official acknowledgment of error (Campbell & Denov, 2004; Westervelt & Cook, 2010). To address these issues, statewide statutory compensation statutes may be the strongest remedy.

Though such statutes may not fully address every struggle faced by exonerees on release, they can go a long way toward easing wrongfully convicted individuals back into society, providing some sense of comfort and allowing the wrongly convicted to rebuild their lives.

Though there may be several possible viewpoints from which to examine post-exoneration struggles, the state harms framework is appropriate for several reasons. First, by highlighting the role of the state in wrongful convictions, it addresses the concerns of many exonerees, who often focus "on the state's active contribution to their feelings of victimization" (Westervelt & Cook, 2010, p. 259). Thus, compensation and reentry assistance provided by the state may assist exonerees in overcoming these feelings and rebuilding their lives. Second, the state harms framework is fairly comprehensive, addressing the social status of the wrongly convicted, the organizational roots of wrongful convictions, post-release victimization, and the difficulties inherent in obtaining redress for the harms suffered. Finally, Westervelt and Cook (2010) provide an important step in the theoretical development of wrongful conviction scholarship, which can help guide analysis of related policies such as compensation statutes. Their analysis provides a theoretical foundation on which we can more fully develop the study of wrongful convictions, which includes policies designed to prevent, discover, and remedy them.

## **The Current Study**

Though previous surveys of compensation statutes have been informative, they have typically focused on legal descriptions of particular statutes and qualitative assessments of specific aspects of those policies. They do not shed light on the extent to which weaknesses or limitations are found in existing compensation statutes nationwide and provide no real indication of how strong or weak each state's policy is when taken as a whole. In this study, I provide a detailed content analysis of existing statutes and compare each with the model policy provided by the Innocence Project. Though the statutes vary widely and often contain intricacies that are difficult to assess, it is important to compare existing legislation against a standard to develop a more complete and objective understanding of the strengths and weaknesses of current policies and the changes that must be made to strengthen them.

**Table 1.** Monetary and Other Beneficial Provisions

Provision	Number of statutes	Percentage of existing statutes
Monetary compensation	27	96.4
Per year served <sup>a</sup>	15	53.6
Set amount per year	10	35.7
Range per year	2	7.1
Based on state income	2	7.1
Additional money for time on death row	0	0
Additional money for time on parole or sex offender registry	1	3.6
Maximum total compensation limit	14	50.0
Other assistance	16	57.1
Employment assistance/training	5	17.9
Education assistance	8	28.6
Counseling/mental health services	5	17.9
Physical health services	4	14.3
Court costs/fines	5	17.9
Detention facility costs	2	7.1
Child support payments	1	3.6
Reentry/reintegration services	4	14.3
Attorney fees	8	28.6
Lost wages/income	3	10.7
Record expungement	4	14.3
Immediate	3	10.7
Separate hearing	1	3.6

a. The numbers for monetary compensation per year served add up to 14 rather than 15 due to the unique wording of the New Jersey statute, which states that exonerees are entitled to yearly compensation equal to either twice the claimant's income in the year prior to conviction or US\$20,000, whichever is greater.

## Method

### *Content Analysis*

State statutes were found online through the Innocence Project and WestLaw searches. Information was also gathered from Bernhard (2009) and the New York State Bar Association's Task Force on Wrongful Convictions (2009) report. The statutes were then reliably coded<sup>2</sup> across 10 dimensions. A total of 55 variables were coded. Descriptive statistics were run across all dimensions, providing a detailed breakdown of existing compensation provisions.

*Dimension 1: Monetary compensation.* First, a dichotomous variable was created to indicate whether jurisdictions provide monetary compensation. If monetary compensation

**Table 2.** Eligibility Requirements, Disqualifications, and Limitations

Provision	Number of statutes	Percentage of existing statutes
Limitation on type of crime	13	46.4
Required pardon	4	14.3
Explicit disqualifications	20	71.4
Prior felony conviction	1	3.6
Subsequent felony conviction	5	17.9
Concurrent sentence	12	42.9
Guilty plea	6	21.4
Contributing to conviction	7	25.0
Fabricating evidence/suborning or committing perjury	3	10.7
Waived appellate rights	1	3.6
Minimum time served	1	3.6

**Table 3.** Other Provisions

Provision	Number of statutes	Percentage of existing statutes
Statute of limitations <sup>a</sup>	20	71.4
<3 years	13	46.4
3 years	4	14.3
>3 years	2	7.1
Burden of proof	25	89.3
Preponderance	8	28.6
Clear and convincing	12	42.9
DNA	3	10.7
Other	2	7.1
Award nontaxable	4	14.3 <sup>b</sup>
Civil redress against state	10	35.7
Prohibited or waived	7	25.0
Permitted	3	10.7
“Upon Death” provision	10	37.0 <sup>b</sup>
Compensation terminated	4	14.8 <sup>b</sup>
Annuity with beneficiary provisions	3	11.1 <sup>b</sup>
Estate/survivors eligible	3	11.1 <sup>b</sup>
Survivors may file claim on behalf of exoneree	2	7.4 <sup>b</sup>

a. The numbers for statute of limitations add up to 20 rather than 21 due to the unique wording of the Florida statute, which states claimant has only 90 days to petition for determination of status as a wrongfully incarcerated person and thus eligible for compensation and then has 2 years to file an application.

b. Percentage calculated out of the 27 states that provide monetary compensation (excludes Montana).



was available, five additional dichotomous variables were coded, indicative of the following: whether there is a set yearly amount of compensation<sup>3</sup>; whether the state provides additional compensation for time on death row; whether there is additional compensation for time spent on parole or as a registered sex offender; whether the yearly amount is based on state income; and whether there is a total maximum amount of compensation. The amounts provided for by these different statutes were also recorded.

*Dimension 2: Other assistance.* To assess any other assistance provided by compensation statutes, 11 dichotomous variables were created. The first indicated whether the state provides any other assistance, and the remaining variables assessed individual types of assistance, including the following: employment assistance/job skills training; counseling or mental health services; physical care or medical services; child support payments; education assistance; other reintegrative or reentry services; remuneration for costs or fines imposed at the time of sentence or court costs; detention facility fees; attorney fees; and lost wages. Any limits placed on attorney fees and lost wages were noted.

It is important to note that several statutes provide for these forms of assistance to be included or considered in determining the amount of compensation. States that explicitly mention each type of assistance were coded 1 and those that do not were coded 0.

*Dimension 3: Record expungement.* Statutes were coded to indicate whether they provided for immediate record expungement, a separate hearing to address expungement or contained no provision.

*Dimension 4: Eligibility.* A dichotomous variable was created to indicate whether there is a restriction on the type of crime for which an individual must have been convicted to be eligible for compensation. The restriction was then noted. Two additional dichotomous variables were created to indicate whether each statute requires a pardon to be eligible and if there is a provision for compensation for pretrial incarceration.

*Dimension 5: Disqualifications and limitations.* As with other assistance, a series of dichotomous variables was created to indicate whether an exoneree is disqualified from receiving compensation for each of the following: prior felony conviction; concurrent sentence; subsequent felony; contributing to or bringing about conviction; fabricating evidence or committing or suborning perjury; entering a guilty plea; or waiving any appellate rights or postconviction remedies. Exceptions to or limitations on the above disqualifications were noted. Any minimum on the amount of time that must have been served to receive compensation was recorded. Finally, the total number of explicit disqualifications expressed in each statute was noted.

Several statutes explicitly state that exonerees who have been the subject of a claim bill for compensation, or those that have a pending lawsuit for compensation, are not included under this statute. These have not been included as disqualifications because individuals excluded by these provisions would have already received, or are in the process of attempting to obtain, compensation.

*Dimension 6: Statute of limitations.* A dichotomous variable was created to indicate whether there is a stated time limit within which an exoneree must apply for compensation. The limit was noted for those statutes that included such a provision.

*Dimension 7: Burden of proof.* A variable was created to indicate whether the required burden of proof for each statute was preponderance of the evidence, clear and convincing evidence, DNA evidence, or other.

The provisions for states included under “Other” were noted.

*Dimension 8: Tax provision.* A dichotomous variable was created to indicate whether each statute explicitly excludes the compensation award from taxation. Any limitations on these provisions were recorded.

*Dimension 9: Civil redress.* Several states allow for civil redress against the state even if the exoneree receives compensation under their statutes. A variable was created to indicate whether each statute allowed for further civil redress, expressly prohibited further civil redress, or contained no provision.

*Dimension 10: “Upon Death” provision.* Some of the existing statutes include provisions to address a situation in which the exoneree dies prior to receiving compensation. Each statute was coded to indicate if the exoneree’s heirs or estate are eligible for the remaining compensation, if the statute allows for an annuity that may include beneficiary provisions, if compensation ends on the exoneree’s death, or if it contained no provision.

### *Comparison to Model Compensation Statute*

The Innocence Project offers a model compensation statute that proposes a US\$50,000 per year minimum, with an additional US\$50,000 for each year spent on death row, and US\$25,000 for each year spent on parole, probation, or as a registered sex offender. The model also suggests a slew of other assistance, including mental and physical health care, educational credits, and compensation for child support payments, among others. It states that the monetary award is nontaxable and does not require a pardon or particular type of offense to be eligible for compensation (Innocence Project, 2009; see Table 4).

To assess the overall quality of states’ statutes, the Innocence Project model was coded in the same fashion as the others. Each statute was then compared with this model across 34 attributes. If a statute did not have a provision about a certain area for which the Innocence Project did, it received a 0; if there was a provision, but it fell below the model standard, it received a 1 (e.g., a statute that provides a yearly amount of monetary compensation less than the recommended US\$50,000 per year); if the provision matched the model, it received a 2; and any provisions that exceeded the Innocence Project model received a 3. For the dichotomous variables, such as the presence or absence of specific disqualifications or other forms of assistance, statutes were scored either 0 or 2, depending on whether they met the model standard. If a state included a provision which the Innocence Project model did not, such as the “Upon Death” provisions, they were given one extra point. With this scoring system, a statute which matched all of the model standards would receive a score of 60.<sup>4</sup> While this system is arguably not perfect, it represents, to my knowledge, the first attempt to quantitatively assess and rank the quality of existing compensation statutes for the wrongly convicted.

**Table 4.** Comparison to Innocence Project Model Legislation

Model provision	Number of existing statutes matching model	Percentage of existing statutes matching model	Percentage of all jurisdictions meeting model standards
<b>Monetary compensation</b>			
US\$50k/year minimum	5	17.9	9.8
US\$50k/year on death row	0	0	0
US\$25k/year on parole/sex offender registry	1	3.6	2.0
No maximum	13	46.4	25.5
<b>Other assistance</b>			
Employment assistance/training	5	17.9	9.8
Education for exoneree and dependents	0	0	0
Counseling/mental health services	5	17.9	9.8
Physical health services	4	14.3	7.8
Court costs/fines	5	17.9	9.8
Child support payments	1	3.6	2.0
Reentry/reintegration services	4	14.3	7.8
Attorney fees	8	28.6	15.7
Lost wages/income	3	10.7	5.9
Immediate record expungement	3	10.7	5.9
No crime-type restriction	15	53.6	29.4
No required pardon	24	85.7	47.1
Only one disqualification or less	15	53.6	29.4
3-year statute of limitations or longer	6	21.4	11.8
Burden of proof: Preponderance	8	28.6	15.7
Nontaxable	4	14.3	7.8
Civil redress permitted	3	10.7	5.9

## Results<sup>5</sup>

### *Content of Existing Compensation Statutes (see Tables 1-3)*

*Dimension 1: Monetary compensation.* The first state compensation statute for wrongful convictions was passed in Wisconsin in 1913. As of May 2011, only 27 states and the District of Columbia had one in place.<sup>6</sup> Of these, 27 (96.4%) provide monetary assistance of some sort; only Montana does not. Fifteen of the statutes provide a

monetary amount based on time served, either per year or per day of incarceration. Two of these are based on state income, two provide a range of money per year served, and one, New Jersey, provides the larger of either twice the claimant's income in the year prior to conviction or US\$20,000. Ten states provide a set yearly amount of monetary compensation, ranging from US\$5,000 to US\$80,000, with a median of US\$45,150. States that do not provide monetary compensation based on time served provide a set amount for the entirety of the conviction or leave the decision up to the deciding judge or committee. No states provide extra money for time served on death row, but one state, Texas, offers an additional US\$25,000 for time spent on parole or as a registered sex offender as the result of the wrongful conviction. Fourteen statutes have a cap on the maximum amount of compensation, ranging from US\$20,000 to US\$2,000,000 with a median of US\$400,000.

*Dimension 2: Other assistance.* Sixteen statutes (57.1%) explicitly provide some form of other assistance. The most common are education assistance and repayment for attorney fees, each found in eight states. In Illinois, repayment for attorney fees may not exceed 25% of the total award, and Mississippi limits attorney fees to 10% to 25% of the award, depending on the court proceedings.<sup>7</sup> Other forms of assistance include employment or vocational assistance (five statutes), counseling or mental health services (five statutes), repayment of court costs or fines imposed at the time of the sentence (five statutes), physical health or medical services (four statutes), repayment for lost wages or income (three statutes), and repayment for detention facility costs (two statutes). The least common form of other assistance is repayment for child support payments, which is provided only in Texas. Several states provide for reentry or reintegrative services but do not specify the services included.

*Dimension 3: Record expungement.* Only four states (14.3%) address the expungement of the exoneree's criminal record. Three provide immediate expungement, and one, Massachusetts, states that a separate hearing will be conducted to address record expungement.

*Dimension 4: Eligibility.* Even with statutes in place, exonerees may be ineligible for compensation. Thirteen statutes (46.4%) have a restriction on the type of crime for which the exoneree must have been convicted to be eligible. Twelve of these are restricted only to felonies, and one is restricted to felonies or aggravated misdemeanors. Four statutes (14.3%) require a pardon for eligibility, and only one state, Alabama, provides compensation for pretrial incarceration, though it is restricted to cases in which there was no conviction and the incarceration lasted at least 2 years.

*Dimension 5: Disqualifications and limitations.* Twenty statutes (71.4%) have at least one stated disqualification, some with as many as five. The most common disqualification, found in 12 statutes, is for a situation in which the exoneree is serving a concurrent sentence for a crime of which he or she is presumably guilty. One state, Missouri, states that this restriction does not include cases in which the concurrent sentence was due to a parole violation caused by the wrongful conviction. Five states also disqualify exonerees from receiving compensation if they are convicted of felonies subsequent to

exoneration. Other disqualifications make it difficult or impossible for an exoneree who falsely confessed or pleaded guilty to receive compensation. Some are explicit in restricting guilty pleas, whereas others are worded to disqualify those who “contributed to” or “brought about” their convictions or those who “fabricated evidence.” It is important to note that a few states, including California and Nebraska, make exceptions for involuntary or coerced false admissions, although these require the claimant to prove that the statements were indeed involuntary, which can be an onerous burden. Other states will make exceptions to the plea disqualification for defendants who made Alford pleas<sup>8</sup> (Washington, D.C.), pleas that were withdrawn or vacated (Massachusetts), or pleas obtained in cases in which a capital offense was charged (Virginia).

*Dimension 6: Statute of limitations.* Twenty statutes (71.4%) provide a statute of limitations, ranging from 1 to 10 years. Florida’s statute states that the claimant has only 90 days to petition for determination of status as a wrongfully incarcerated person and thus eligible for compensation and then has 2 years to file an application. Of the other 19 states, the average time limit is 2.6 years ( $SD = 2.0$ ), which falls under the 3-year standard proposed by the Innocence Project.

*Dimension 7: Burden of proof.* Twenty-five statutes (89.3%) explicitly state the required burden of proof, ranging from preponderance of the evidence to exculpatory DNA evidence only. The most commonly stated burden of proof is clear and convincing evidence, present in 12 statutes. Maryland requires the evidence to be “conclusive,” and Ohio’s statute states that once a claimant establishes that they were wrongfully convicted (by providing certified copies of the court judgments), he or she “shall be irrebuttably presumed to be a wrongfully imprisoned individual.”

*Dimension 8: Tax provision.* Only 4 of the 27 states that provide monetary compensation explicitly state that the compensation award is not subject to taxes and/or not to be treated as gross income. Two of these statutes do make an exception for the portion awarded as attorney fees under this provision, allowing that amount to be taxed.

*Dimension 9: Civil redress.* Only three states (10.7%) overtly allow further civil redress against the state. Seven states prohibit such action, and the remaining 18 do not address the issue.

*Dimension 10: “Upon Death” provisions.* Only 10 states (37.0%, excluding Montana) attend to a situation in which the exoneree dies before receiving the full amount of compensation. Four maintain either that compensation ends on death or that payment cannot be made to anyone other than the pardoned individual. Three allow for an annuity that provides beneficiary provisions, and three state that the exoneree’s heirs or estate are eligible for compensation. Only two states explicitly allow a claim to be filed on behalf of an exoneree who dies before filing for compensation.

### *Comparison to Innocence Project Model (see Table 4).*

None of the existing statutes match the model standard across all dimensions. Only four (14.3%) meet the recommended minimum yearly amount of US\$50,000, and

one, Vermont, provides a yearly range of US\$30,000 to US\$60,000 that may or may not meet this standard. Only one state (3.6%), Texas, exceeds the model, providing US\$80,000 per year of wrongful incarceration. It is important to note that several states allow the fact-finder to determine the appropriate amount of compensation for unjust conviction, without setting a yearly amount. This system can be either positive or negative. On one hand, it may result in awards much greater than the recommended US\$50,000 per year; on the other, much smaller amounts may be awarded. A system based on judicial interpretation leaves much room inconsistency in repaying exonerees for their time lost to wrongful conviction, and I contend that this ambiguity and resulting sense of uncertainty is a weak point in many existing statutes.

Texas is the only state which matches the model in providing additional money for time served on parole or as a registered sex offender. No state provides additional compensation for time spent on death row. In addition, the Innocence Project suggests that no maximum cap be placed on the amount of monetary compensation available. Thirteen states (46.4%) follow this suggestion; others only allow for a certain total amount of compensation, marked either by a certain dollar amount or a certain number of years imprisoned for which the exoneree is eligible for compensation. For example, the Texas statute places no cap on the amount of compensation an exoneree may receive. In contrast to this, Wisconsin law stipulates that exonerees are eligible for compensation in the amount of US\$5,000 per year, but only up to 5 years, making the maximum amount of monetary compensation only US\$25,000.

No states match the Innocence Project's model across all forms of other assistance, which explicitly mentions eight forms of such help. Texas is the closest to this figure, offering six other forms of assistance. Two statutes (7.1%), however, do mention one type of other assistance that is not offered by the Innocence Project model: repayment for detention facility costs and fees that were paid by the wrongly convicted individual.

Only 12 states (42.9%) match the model standard on both aspects of eligibility, including no restriction on crime type and no pardon requirement. Nine states (32.1%) meet or exceed the model across all disqualifications or limitations. The Innocence Project only has 1 stated disqualification, and 15 statutes (53.6%) mention either 0 or 1 explicit disqualification.

The model law suggests a 3-year statute of limitations, a standard met by only 4 statutes (14.3%) and exceeded only by 2 (7.1%). Only eight statutes (28.6%) match the burden of proof of preponderance of the evidence, and only four (of 27 with monetary compensation; 14.8%) meet or exceed the no-tax provision; two of these exceed this provision by not including a limitation for the amount awarded as attorney's fees. Immediate record expungement is emphasized in the Innocence Project model, and only three existing statutes (10.7%) meet this standard. The model also allows further civil redress against the state, and only three statutes (10.7%) match this.

The Innocence Project model does not include any provisions for a situation in which the exoneree dies before or in the process of receiving compensation. Thus, the 5 statutes (17.9%) that do not explicitly terminate compensation upon death appear to

**Table 5.** Assessment Scores of Statutes Compared With Model Legislation

Jurisdiction	Score	Year effective
Texas	43	2009
Connecticut	41	2008
Vermont	38.5 <sup>a</sup>	2007
Louisiana	36	2008
Ohio	33	2010
North Carolina	32	2008
California	31	2010
Illinois	31	2008
Maryland	30	2003
Maine	29	1993
Montana	29	2003
New Hampshire	29	2007
Tennessee	29	2010
Wisconsin	29	1987
Iowa	28	2008
Mississippi	28	2009
West Virginia	28	1987
Utah	27	2008
Alabama	26	2001
Florida	26	2008
Missouri	26	2006
New Jersey	26	1997
New York	26	2007
Massachusetts	24	2004
District of Columbia	23	1981
Nebraska	22	2009
Oklahoma	21	2003
Virginia	18	2010

a. Vermont's statute offers a range of monetary compensation per year served (US\$30,000-US\$60,000) that may or may not match the model standards. Thus, it was given a score of 1.5 for that particular provision.

exceed the model standard, as do the 2 statutes (7.4%) that allows a claim to be filed on behalf of a deceased exoneree.

Using the scoring system described above to assess and rank the existing compensation statutes, the score for meeting the model standard across all dimensions would be a 60. The overall quality of compensation statutes appears to vary widely. As mentioned earlier, no statutes meet the model standard. Scores ranged from 18 (Virginia) to 43 (Texas), with an average of 28.9 ( $SD = 5.6$ ). The scores for all statutes are presented in Table 5.

## Discussion

Awareness of wrongful convictions has been growing steadily in recent decades. Given that compensation statutes provide the strongest method for remunerating exonerees (Bernhard, 1999, 2009), the fact that, nearly 100 years after the first compensation statute was passed, only about half of the states have a statute in place may seem surprising. However, it is important to note that wrongful convictions have only been garnering consistent national attention since the late 1980s, when DNA began adding a new level of scientific certainty to the notion of actual innocence. Indeed, it appears as though there is a shift toward the adoption of compensation statutes, as the number of them has nearly doubled since 2003, when only 16 states had such a policy in place (Bernhard, 2004). Still, the variability and ambiguity among the compensation statutes that do exist is remarkable. A more detailed examination of the statutes on the opposite ends of this scale may provide further insight into these disparities.

Texas appears to provide the most complete compensation statute for the wrongly convicted. Their statute provides US\$80,000 per year of wrongful incarceration, as well as an additional US\$25,000 for each year spent on parole or as a registered sex offender, with no maximum limit. In addition to monetary damages, the state provides vocational training and tuition and fees at a state university or college. The compensation package also includes counseling for 1 year and assistance in obtaining other support services and medical care. Texas is also the only state to pay child-support for exonerees. The statute also provides any other reentry or reintegrative services that are available to parolees or other inmates released on mandatory supervision. Eligibility for compensation in Texas is not restricted to certain crime-types and no pardon is required. The statute has a 3-year statute of limitations and requires proof by a preponderance of the evidence.

The Texas compensation statute stands in stark contrast to that of Virginia. Under Virginia statute, exonerees are entitled to yearly monetary compensation equal to 90% of the state's per capita personal income,<sup>9</sup> with a maximum of 20 years. Though the monetary compensation is not grossly inadequate, it does not provide any additional money for time on death row, parole, or as a registered sex offender, and the only other assistance provided is reimbursement for career or technical training up to US\$10,000. The statute provides no medical or counseling services and is restricted only to felonies. The statute also does not explicitly state a time limit or burden of proof, leaving these issues open to judicial interpretation and creating more uncertainty for exonerees. Though not especially strong, this Virginia statute at the same time stands in stark contrast to the 23 states that have no compensation statute in place. Comparing this statute with the one in Texas, however, provides a clear picture of the vast discrepancies present among existing statutes.

Overall, this analysis suggests that there is much room for improvement in compensating the wrongly convicted. The monetary compensation provided by existing statutes seems, for the most part, inadequate. Though it is impossible to put a dollar value on years lost, amounts as low as US\$5,000 per year (as provided in Wisconsin) or



US\$20,000 for the entirety of a wrongful conviction regardless of the length of time served (as provided in New Hampshire) arguably are insufficient. Interestingly, no states provide additional compensation for time spent on death row, although 138 individuals to date have been exonerated after being sentenced to death (Death Penalty Information Center, <http://www.deathpenaltyinfo.org>), and researchers have acknowledged the severe psychological consequences of facing a court-ordered death (Westervelt & Cook, 2010). The unique experiences of wrongfully convicted individuals in capital cases have even been recognized at the federal level, where the compensation statute provides an additional US\$50,000 for each year spent on death row. In addition, the fact that so few statutes explicitly exempt compensation awards from taxation may lead to further confusion and uncertainty (Raeder, 2008) and leave the door open for further subjective judicial interpretation.

The other forms of assistance provided by current statutes also seem to fall short in several key ways. The lack of attention paid to record expungement in existing statutes is noteworthy. This issue was discussed by one exoneree, Alan Gell, who expressed frustration at having to pay a lawyer to have his record expunged of a crime which he did not commit (Westervelt & Cook, 2010). A lingering criminal record may frustrate and anger exonerees and can have long-lasting effects on their lives, including restricted employment opportunities, limited access to health care and housing, increased social stigma and rejection, and feelings of anger or bitterness (Westervelt & Cook, 2010). In addition, statutes vary widely on education and employment assistance provided. These are critical issues for exonerees, many of whom were imprisoned for the years during which they could have been pursuing secondary or further education or building a career. Indeed, of the first 250 DNA exonerees, 6% were below 18 at the time of their conviction, and 21% were below the age of 21. On average, they were 27 years old at the time of their wrongful convictions and 42 when exonerated (Innocence Project, 2010). Failure to assist these individuals with educational and vocational training can interfere with their ability to rebuild their lives, yet many current statutes have overlooked the issue.

Restrictions present in current statutes may disallow many exonerees from receiving reparation. Among the most interesting and common disqualifications are those that restrict compensation for individuals who are seen to have contributed to their own convictions. In practice, such a disqualification can eliminate exonerees who falsely confessed or plead guilty from receiving compensation. This may disallow a significant minority of exonerees from obtaining post-release assistance. For example, the statute in New York has such a limitation in place, and of the first 27 DNA exonerations in the state, 12 cases involved a false confession. This means that approximately 44% of exonerees may be disqualified from receiving statutory compensation due to one stated limitation. Moreover, this phenomenon is not unique to New York; approximately one fourth of known wrongful convictions nationally involved some type of false admission (Innocence Project, 2010). Given the wealth of psychological research explaining the characteristics of interrogations and individuals that may lead to false confessions,<sup>10</sup> such limitations may disproportionately restrict compensation

for certain groups of people, such as juveniles or the mentally impaired. The strict time limits stated in several statutes also may be difficult for some exonerees to negotiate. Exonerees often struggle to find basic necessities on release and may be unable in many instances to file for compensation, which requires legal and financial resources, within a time limit as short as one year.

Comparing existing compensation statutes to the model proposed by the Innocence Project provides important insight into current efforts to assist the wrongly convicted in reentering society and rebuilding their lives. None of the existing statutes stand up to the standards proposed by the Innocence Project model across all dimensions. The scores, however, indicate that some states have fairly strong compensation statutes whereas others do not. Texas, Connecticut, and Vermont, for instance, appear to provide the most comprehensive assistance packages; however, states such as Virginia and Oklahoma appear to be making a weaker effort to compensate exonerees. It is important to recognize that although the factors identified to contribute to wrongful convictions (e.g., false admissions, eyewitness misidentifications) are not state-specific, whether the wronged person receives compensation and reentry assistance is dependent on jurisdiction. Thus, exonerees in states that provide little or no compensation and reintegration assistance may feel as though they are being victimized yet again by the legal system, further exacerbating the harms suffered at the hands of the state.

There is reason to be optimistic, however. Only in recent years has research focused on the post-release struggles of exonerees and the importance of compensation. The model legislation proposed by the Innocence Project, for example, was only recently developed. Thus, there is reason to believe that as more wrongful convictions are discovered, and research on the post-release experiences of exonerees continues to grow, states may begin to develop improved policies to provide meaningful reentry assistance for wrongly convicted individuals.

### *Limitations and Future Research*

Though informative, the results of this analysis should be regarded with some level of caution due to several limitations. First, this analysis applies equal weight to all aspects of compensation statutes. For example, monetary compensation is not regarded as being any more or less important than other aspects of compensation statutes, such as record expungement or eligibility restrictions. Although certain aspects of compensation may in fact be more important than others, it seems that any weighting of particular provisions by persons other than exonerees themselves would be fairly arbitrary. In the future, researchers may work with exonerees themselves to determine what aspects of compensation packages are most important and develop a weighting system based on the needs and desires of those who are directly affected by such policies.

Second, this research does not speak to the practical utilization of existing policies. If a state has a broad compensation statute in place, but denies the claims of a majority of exonerees, then it may not be accurate to conclude that that state is doing a better

job of addressing wrongful convictions than a state with a weaker policy. Future research can examine the compensation claims of exonerees to determine how many are actually made, the proportions that are granted or denied, and the reasons for such decisions. Studies of this sort may provide greater insight into the strengths and weaknesses of compensation statutes and allow for a stronger assessment of state efforts to assist the wrongly convicted after exoneration.

Finally, this analysis has used the model legislation provided by the Innocence Project as the standard against which to compare existing statutes. This model, however, is not the only one that may be used, and it may not represent the gold standard. However, using their model legislation seems appropriate for several reasons. First, the Innocence Project is the largest and arguably most influential organization dedicated to wrongful convictions and regularly works with exonerees themselves in their reentry to society. The model they provide also seems like a viable policy rather than an unrealistic ideal. Still, future analyses may compare different models and use these policies to assess existing statutes, focusing on any differences in the results.

More generally, research should continue to analyze policies relating to wrongful convictions beyond compensation statutes. Several states have responded to issues surrounding actual innocence and have begun implementing policies to address them. For example, several jurisdictions have enacted reforms to increase the accuracy of eyewitness identifications and reduce the likelihood of obtaining false confessions (see generally, Norris, Bonventre, Redlich, & Acker, 2011). The nature and effectiveness of these policies should be analyzed closely and systematically. Research of this sort can be helpful in developing a more complete understanding of wrongful convictions, including the types of reforms that can address them and move the discussion toward a more theoretical understanding of criminal justice as it relates to actual innocence. Indeed, Zalman (2006) argues that criminal justice scholars need to begin examining wrongful convictions as a policy issue.

In this context, this article should be viewed as a first step toward building a theoretical understanding of wrongful conviction policy. Its purpose has been to highlight the variation that exists among compensation statutes for the wrongly convicted; the next step is to understand the source of such variation. Are such policies simply reactions to large numbers of exonerations? Is the development of compensation statutes and other wrongful conviction policies a partisan political issue? Do structural and cultural characteristics of jurisdictions affect the passage of such laws? What is the role of the media in the development of wrongful conviction policy? These questions and others must be addressed by scholars in the future if we are to fully understand the issue of wrongful conviction.

A starting point may be to draw on the “punitive turn” scholarship (see Garland, 2001). Many scholars of public policy, criminal justice, sociology, and political science have attempted to explain why certain states apply punishment differently than others and why governments have adopted more punitive criminal justice policies over the past several decades (e.g., Beckett & Sasson, 2004; Castellano & McGarrell, 1991; Jacobs & Helms, 1996; Simon, 2007). Yet these scholars have, for the most

part, neglected policies on the other end of the spectrum, those designed to achieve justice or protect the due process rights of defendants.<sup>11</sup> Researchers may draw on this vast body of literature to begin developing underlying explanations and theories for how and why states respond to wrongful convictions. This line of research may contribute significantly to actual innocence scholarship, an area that has been described as “theoretically impoverished” (Leo, 2005, p. 213). Though the results presented in this study are largely descriptive, they are a crucial first step toward developing theoretical explanations for the processes involved in forming wrongful conviction policies.

## **Conclusion**

Individuals who are victims of state harm are deserving of governmental assistance in making their recovery, and the wrongly convicted can fit into this category. This study has described and assessed states’ statutory efforts to provide such assistance. Results show that just more than half of American jurisdictions currently have compensation statutes in place and no uniform template exists for such policies. The statutes vary widely across many dimensions, including monetary and other assistance, limitations, and disqualifications. Some states provide fairly comprehensive compensation statutes, whereas others provide little or no support. Although having a compensation statute is certainly better than not, the mere fact that one is in place does not ensure that the wrongly convicted, who have often suffered in almost-unimaginable ways and had their lives forever altered by the failings of our criminal justice system, are receiving adequate assistance.

The results presented here help us understand the strengths and weaknesses of existing compensation statutes, providing an evaluation that may help lawmakers in developing new policies or reforming existing ones. Furthermore, this study helps lay a foundation for future scholars to develop a theoretical understanding of the development of compensation statutes and, more generally, how and why states are reacting to wrongful convictions as they are.

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## Notes

1. For example, several states have now implemented reforms improving their eyewitness identification procedures and interrogation practices, providing DNA oversight, and altering the use of jailhouse informants or snitches, among others. For a more complete discussion, see Norris, Bonventre, Redlich, and Acker (2011).
2. To establish intercoder reliability, I enlisted the help of two graduate students. After instructing each about the project and the coding system, approximately one third of the statutes were randomly selected to be coded by the assistants. Agreement between coders ranged from 83.6% to 100%. All discrepancies were discussed and a consensus reached.
3. Some states provided for a set amount of compensation for each day served in prison. I multiplied these figures by 365 and categorized them along with the statutes that provide for set yearly amounts.
4. The Innocence Project model contained 30 attributes that were coded here. The remaining 4 were beneficial provisions contained in at least 1 state statute for which the model did not have a provision. Thus, receiving 2 points for matching all model provisions would yield a score of 60 (30 provisions  $\times$  2 points each).
5. Statutes current as of May 2011.
6. The Federal government also has an exoneration-compensation statute, but this study focused exclusively on individual states.
7. Mississippi's policy provides for attorney's fees up to 10% of award if a compensation claim is prepared and filed; 20% for litigating if claim is contested by the Attorney General; and 25% if claim is appealed.
8. Alford pleas allow defendants to simultaneously plead guilty and claim innocence because they do not wish to take the risk associated with going to trial (*North Carolina v. Alford*, 1970).
9. According to the official website of the state, Virginia's per capita personal income in 2009 was US\$43,874. This means that an exoneree would be entitled to US\$39,486.60 per year of incarceration, with a maximum cap of US\$789,732. See <http://vaperforms.virginia.gov/indicators/economy/personalIncome.php>
10. See generally, Kassin et al. (2010). The authors discuss how situational characteristics of the interrogation itself (e.g., length of interrogation) and dispositional characteristics of the suspect (e.g., mental illness) may increase the likelihood of obtaining a false confession.
11. An exception to this is Davies and Worden (2009), who examine several aspects of indigent defense funding at the state level.

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