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Complicated Mercy: Compensating the Wrongfully Convicted in Georgia

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Complicated Mercy: Compensating the Wrongfully Convicted in Georgia

Cover Page Footnote

J.D., 2022, University of Georgia School of Law; B.A., 2018, University of Virginia. I worked at the Georgia Innocence Project as an undergraduate. I would like to thank Clare Gilbert and Hayden Davis at the Georgia Innocence Project and Professor Melissa Redmon at the University of Georgia School of Law for their help in the note-writing process. This Note is dedicated to my family and friends for their support and to all exonerees in Georgia.

COMPLICATED MERCY: COMPENSATING THE WRONGFULLY CONVICTED IN GEORGIA

*Elizabeth O'Roark**

An exoneree's story does not end when they walk out of prison and back into society. After spending years in prison for a crime they did not commit, the exoneree must rebuild a life with years of lost income, little credit, and no retirement. Georgia is one of the few states that does not have a statute setting out how to fairly and efficiently compensate its exonerees. Exonerees must instead ask state representatives to present a resolution to the General Assembly. If the resolution passes through both chambers of the legislature, then the exoneree can receive some compensation for the trauma and loss suffered from the wrongful conviction. This confusing process results in inconsistent outcomes for exonerees, influenced by the political climate of a particular legislative session. Georgia should look to states with compensation statutes, learn from them, and pass a bill of its own. Several representatives tried to do so in the 2022 Legislative Session. House Bill 1354 passed the House but never made it out of the Senate Judiciary Committee. This Note discusses the strengths and weaknesses of that bill and improvements that could be made next term to enable it to pass through the Georgia General Assembly.

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I. INTRODUCTION

Three innocent men exonerated by DNA evidence walked up the grand stairs to the Georgia Capitol¹: Clarence Harrison,² Douglas Echols,³ and Samuel Scott.⁴ When they walked back out hours later, the legislature had awarded Harrison one million dollars but had awarded Echols and Scott nothing.⁵

Their stories begin with women surviving brutal sexual assaults. First, in 1986, a young woman waited outside a night club in Savannah, Georgia.⁶ Three men kidnapped her and took her to a house where two men raped her.⁷ She managed to escape and reach the authorities.⁸ Almost nine months later and 250 miles away, another woman was waiting at a bus stop on a rainy night in Decatur, Georgia⁹ when an attacker hit her in the face, dragged her to an embankment, and raped and sodomized her.¹⁰ He took her to two different locations before leaving her with two broken teeth and

¹ *Cleared by DNA, 1 Gets \$1 Million, 2 Get Nothing*, NBC NEWS (July 18, 2009, 8:33 PM) [hereinafter *Cleared by DNA*], http://www.nbcnews.com/id/31983859/ns/us_news-crime_and_courts/t/cleared-dna-gets-million-get-nothing/#.X27du5NKg1I.

² Clarence Harrison was exonerated by DNA evidence of rape in 2004 after serving almost eighteen years in prison. *See Clarence Harrison*, GA. INNOCENCE PROJECT, <https://www.georgiainnocenceproject.org/cases/freed-clients/clarence-harrison/> (last visited June 28, 2022) (telling Clarence Harrison's story in full).

³ Douglas Echols was exonerated by DNA evidence of rape in 2001. *See Douglas Echols*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/douglas-echols/> (last visited June 28, 2022) (telling Douglas Echols's story in full).

⁴ Samuel Scott was exonerated by DNA evidence of rape in 2001 after serving fifteen years in prison. *See Samuel Scott*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/samuel-scott/> (last visited June 28, 2022) (telling Samuel Scott's story in full).

⁵ *See Cleared by DNA*, *supra* note 1 (“Clarence Harrison walked away that day with a promise of \$1 million from the state. Douglas Echols and Samuel Scott left empty-handed . . .”).

⁶ *Douglas Echols*, *supra* note 3; *Samuel Scott*, *supra* note 4.

⁷ *See Douglas Echols*, *supra* note 3 (describing the young woman's abduction and assault); *see also Samuel Scott*, *supra* note 4 (same).

⁸ *See Douglas Echols*, *supra* note 3 (“She ran for a few blocks, stopped at a home, and summoned the police.”).

⁹ *See Clarence Harrison*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3286> (last visited June 28, 2022) (citing the date of the assault as October 25, 1986).

¹⁰ *Id.*

taking her wristwatch.¹¹ These horrific attacks spawned three more tragedies—the wrongful convictions of Echols and Scott in Savannah and Harrison in Decatur.¹²

Both prosecutions centered on the victim's identification of a perpetrator.¹³ In Savannah, after contacting the police, the victim led officers back to the house that she thought the men who had kidnapped her brought her to.¹⁴ The police found Scott, who owned the house, and Echols inside.¹⁵ The victim identified Echols as the man who held her down during the second assault.¹⁶ Later in the investigation, she identified Scott as one of her rapists from a photo array.¹⁷ In Decatur, the victim identified Clarence Harrison—also from a photo array—after police heard a rumor that someone at Harrison's home was trying to sell the watch stolen from the victim (to this day, the watch has never been found).¹⁸ Harrison's prosecution was also based on faulty analysis of the DNA evidence that would later exonerate him.¹⁹ Juries convicted all three men.²⁰ Scott was sentenced to life.²¹ Echols was sentenced to fifteen years.²² Harrison was sentenced to life plus twenty years.²³

¹¹ *Id.*

¹² *See id.* (explaining that Harrison was wrongfully convicted); *see Samuel Scott, supra* note 4 (explaining that Scott and Echols were wrongfully convicted).

¹³ *See Samuel Scott, supra* note 4 (“At trial, the prosecution relied on the identification of the house and the victim’s eyewitness identifications of the two men . . .”); *Clarence Harrison, supra* note 2 (“The case was based on the victim’s identification of Clarence and flawed expert testimony regarding DNA analysis.”).

¹⁴ *Samuel Scott, supra* note 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Clarence Harrison, supra* note 2.

¹⁹ *Id.* (explaining that the blood marker analysis used by the state’s experts was faulty because the victim’s blood markers interfered with the detection of the perpetrator’s blood markers and that further DNA testing proved Harrison’s innocence).

²⁰ *Id.* (explaining that a jury convicted Harrison on all counts); *Douglas Echols, supra* note 3 (explaining that a jury convicted both Echols and Scott in 1987 of kidnapping, rape, and robbery).

²¹ *Samuel Scott, supra* note 4.

²² *Douglas Echols, supra* note 3.

²³ *Clarence Harrison, supra* note 2.

Yet, years later, all three men were exonerated by DNA evidence in rape kits.²⁴ After Scott reached out to the Innocence Project in 1996, student interns there found the rape kit that prosecutors used as evidence that the victim had been raped²⁵—but that had not been tested to reveal who raped her—and submitted the evidence in the kit for testing in 2001.²⁶ The DNA testing excluded both Scott and Echols as the Savannah victim’s attackers.²⁷ Two years later, in 2003, Harrison wrote to the Georgia Innocence Project.²⁸ Although the district attorney’s office told Harrison throughout the 1990s that the rape kit had been destroyed, Georgia Innocence Project interns and attorneys found it, and testing proved that Harrison could not have contributed the sperm in the kit.²⁹

In many ways, these cases are similar. Echols, Scott, and Harrison were all identified by rape victims as perpetrators of their assaults, convicted because of testimony to that fact, and exonerated by DNA evidence. But, at this point, Harrison’s story diverges from Echols’s and Scott’s. The Georgia legislature awarded Harrison compensation for his wrongful conviction, but chose not to compensate Scott or Echols for their wrongful convictions.³⁰

²⁴ *Douglas Echols, supra note 3; Samuel Scott, supra note 4; Clarence Harrison, supra note 2.*

²⁵ *Samuel Scott, supra note 4* (noting how the prosecution relied on forensic testimony at trial that showed that motile spermatozoa was present on the vaginal smears contained in the rape kit, signaling recent ejaculation).

²⁶ *Id.*

²⁷ *Douglas Echols, supra note 3; Samuel Scott, supra note 4.*

²⁸ *Clarence Harrison, supra note 2.* The Georgia Innocence Project is an organization that “works to correct and prevent wrongful convictions in Georgia.” *Our Mission*, GA. INNOCENCE PROJECT, <https://www.georgiainnocenceproject.org/about/mission/> (last visited June 28, 2022).

²⁹ *Clarence Harrison, supra note 2.*

³⁰ *See Cleared by DNA, supra note 1* (noting that the Georgia legislature awarded Harrison one million dollars in compensation but did not award Scott nor Echols any compensation).

Exonerees³¹ do not have a statutory right to receive compensation in Georgia.³² Instead, in an unpredictable process subject to political whims and the state budget each year, a wrongfully convicted person must proceed through a state claims advisory board process and find a legislator to introduce and sponsor a private compensation bill into the Georgia General Assembly.³³ Spencer Lawton, the district attorney in Scott and Echols's case, not only opposed compensation but actively spread falsehoods to block it.³⁴ He "held comparable sway with" the lawmakers, who were concerned with appearing "soft on crime."³⁵ He sent a letter to the legislators claiming that Echols and Scott were still under the indictment for kidnapping and rape, even though his office had dismissed the charges.³⁶ Three innocent men appeared before the legislature seeking compensation for spending years of their lives in prison for crimes they did not commit, and two left empty handed with no recognition for the injustices they suffered.

This Note recommends that the Georgia legislature pass a statute devising a scheme for compensating the wrongfully convicted. If the Georgia legislature passes such a statute, it will make the process of compensating exonerees more just and efficient in three ways. First, the statute will provide the state with a set structure for compensating exonerees, so an exoneree's

³¹ The National Registry of Exonerations defines an exoneree as "[a] person who was convicted of a crime and later officially declared innocent of that crime, or relieved of all legal consequences of the conviction because evidence of innocence that was not presented at trial required reconsideration of the case." *Glossary*, NAT'L REGISTRY EXONERATIONS <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx#:~:text=Exoneree> (last visited June 28, 2022).

³² See Andrew Fleischman, *Ga. Needs Better Process for Compensating the Wrongfully Convicted*, DAILY REP. (June 22, 2021, 12:52 PM), <https://www.law.com/dailyreportonline/2021/06/22/ga-needs-a-better-process-for-compensating-the-wrongfully-convicted/> (stating that Georgia has "no method in place for compensating the wrongfully convicted").

³³ *Infra* Part IV.

³⁴ See *Cleared by DNA*, *supra* note 1 (discussing the prosecutor's efforts to persuade legislatures to reject Echols and Scott's request for compensation).

³⁵ *Cleared by DNA*, *supra* note 1.

³⁶ *Douglas Echols*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3199> (last updated Jan. 29, 2019).

compensation will reflect the legal factors in their case and not the politics of the day. Second, the statute will allow the decision-making body to review claims quickly and evenhandedly. Third, the statute will enhance efficiency by enabling the legislature to set a schema for executive action rather than having to resolve each exoneree's case individually.

Part II briefly discusses the factors that contribute to wrongful convictions and examples of such factors in Georgia. Part II further discusses the policy reasons behind compensating the wrongfully convicted and explains the methods that exonerees have used to obtain compensation for their wrongful convictions: lawsuits, statutes, and private legislation. Part III compares state compensation statutes across the country and explores the quality of compensation that these state statutes offer.

Part IV discusses Georgia's current means for compensating the wrongly convicted—passing private bills—and argues that using private bills to compensate the wrongfully convicted is unjust and inefficient.³⁷ Part V explains the history and content of House Bill 1354, a bill introduced to the Georgia legislature in 2022 to compensate the wrongfully convicted.³⁸ Part V also discusses the strengths and weaknesses of the bill.

Finally, Part VI proposes changes to the legislation, keeping in mind the factors that make a good compensation statute and that might encourage the Georgia General Assembly to pass such a bill. It argues that a statute should have two standards for compensation with different burdens of proof. This structure would allow more exonerees to receive compensation and would increase the amount of compensation that those who can demonstrate their innocence may receive.

³⁷ See, e.g., Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 372 (2017) (“Private legislative bills to compensate the unjustly convicted require political muscle and fortitude, if the state permits such private bills at all, and, therefore, promise to help very few of the wrongfully convicted.” (footnotes omitted)).

³⁸ See H.B. 172, 155th Gen. Assemb., Reg. Sess. § 28-5-114(a)(2)–(4) (Ga. 2019) (proposing to award exonerees \$50,000 for each year they were in prison and 120 hours of tuition at any public university in the state).

II. BACKGROUND

This Part explains how wrongful convictions happen, the policy reasons behind compensating the wrongly convicted, and the current avenues for the wrongfully convicted to receive compensation in the United States.

A. CAUSES OF WRONGFUL CONVICTION

Awareness of wrongful convictions across the United States is growing as DNA technology improves³⁹ and media outlets spotlight individual cases.⁴⁰ This Section discusses select causes of wrongful conviction, including eyewitness misidentification, prosecutorial misconduct, junk science, and false confessions.

1. *Eyewitness Misidentification.* In 1979, John White, later exonerated with the assistance of the Georgia Innocence Project, stood in a lineup, holding up the number three on a white piece of paper.⁴¹ James Parham stood at the end of the line, with one person in between him and White, holding up the number five.⁴² It had been two months since a brutal attack left a seventy-five-year-old victim with a fractured jaw.⁴³ After seeing the line-up, the victim picked out the police's suspect, John White, as the man who broke into her dark bedroom and raped her in the middle of the night.⁴⁴ A jury convicted White “based almost entirely on that identification.”⁴⁵ Nearly twenty-eight years later, post-conviction DNA testing

³⁹ See *DNA's Revolutionary Role in Freeing the Innocent*, INNOCENCE PROJECT (Apr. 4, 2018), <https://innocenceproject.org/dna-revolutionary-role-freedom/> (discussing the timeline of the use of DNA evidence to exonerate wrongfully convicted individuals).

⁴⁰ Shows like *Making a Murderer* and podcasts like *Serial* have brought wrongful conviction to the forefront of American media. See *Making a Murderer* (Netflix 2015–18) (telling the story of two men accused of a crime they may not have committed); *Serial*, SERIAL PRODS. (Oct. 3, 2014), <https://serialpodcast.org/season-one> (telling the story of a high schooler arrested for a murder that he may not have committed).

⁴¹ See Bill Rankin, *From 2007: Snapshot of an Eyewitness Mistake*, ATLANTA J.-CONST. (Dec. 14, 2007), <https://www.ajc.com/news/local/from-2007-snapshot-eyewitness-mistake/TxDolwbHy82ba4w1eefq8H/>.

⁴² See *id.* (“The man [later] charged with the assault—James Edward Parham—stood to White’s left.”).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

revealed that the actual culprit was James Parham, number five.⁴⁶ The police had coincidentally selected him as a filler in the lineup.⁴⁷

Scholars and advocates have identified several problems with the traditional lineup. First, the lineup administrator knows who the suspect is and can unintentionally provide cues to the eyewitness about the suspect.⁴⁸ Second, the eyewitness can assume that the perpetrator is one of the people presented in the lineup and can ignore doubts about the identification.⁴⁹ This improper identification in some cases may result from officers choosing lineup participants who do not match the witness's description, causing the suspect to stand out.⁵⁰ Third, after the lineup, when the officers confirm that the eye-witness picked the suspect, the witness's confidence in the identification is artificially increased.⁵¹ Although twenty-five states have implemented reforms suggested by the Innocence Project,⁵² traditional eyewitness identification

⁴⁶ *Id.*

⁴⁷ *Id.* (“The DNA evidence did match someone else standing in that lineup in 1979. In a stunning coincidence, the man now charged with the assault—James Edward Parham—stood to White’s left.”).

⁴⁸ See Jens Omdal, *Believing Without Seeing: The Problem of Eyewitness Misidentification*, 20 LOY. J. PUB. INT. L. 29, 34 (2018) (“Police remarks that influence a witness can be as subtle as providing comforting statements, or as indiscreet as intentionally pressuring statements such as where the officer tells the witness to identify a person.”).

⁴⁹ See *Eyewitness Identification Reform*, INNOCENCE PROJECT, <https://www.innocenceproject.org/eyewitness-identification-reform> (last visited Jan. 26, 2022) (“In a standard lineup, without instructions from the administrator, the eyewitness often assumes that the perpetrator of the crime is one of those presented in the lineup.”).

⁵⁰ See *id.* (“In a standard lineup, the lineup administrator may choose to compose a live or photo lineup where non-suspect “fillers” do not match the witness’s description of the perpetrator or do not resemble the suspect.”).

⁵¹ See *id.* (“Research shows that information provided to a witness after an identification suggesting that the witness selected the right person can dramatically, yet artificially, increase the witness’s confidence in the identification.”).

⁵² *Id.* (recommending that police officers use a “double-blind lineup,” where “neither the administrator nor the eyewitness knows who the suspect is” to prevent the administrator’s non-verbal and verbal cues from influencing the eyewitness; instruct the witness that the suspect may or may not be present in the lineup; select fillers who stand next to the suspect that resemble the description and the suspect; immediately take a confidence statement from the witness before their opinion can be biased by the belief that they chose the suspect; and document the lineup process); *cf.* Omdal, *supra* note 48, at 34 (discussing the subtle ways that police officers can influence a witness picking a suspect in a line up).

procedures are still “among the most commonly used and compelling evidence brought against criminal defendants.”⁵³

Though many studies have shown that eyewitness testimony is unreliable,⁵⁴ eyewitness testimony remains “overwhelmingly influential.”⁵⁵ In his dissent in *Watkins v. Sowders*, Justice William J. Brennan said, “There is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”⁵⁶ Though many judges and juries have confidence in human memory,⁵⁷ eyewitness misidentification contributed to sixty-nine percent of wrongful convictions in which the defendant was later exonerated by DNA evidence.⁵⁸

2. *Prosecutorial and Police Misconduct.* Police officers and prosecutors introduce human error to the criminal justice system. Police officers often face pressure from the community to find the guilty person and become subject to confirmation bias in their

⁵³ *Eyewitness Identification Reform*, *supra* note 49.

⁵⁴ See, e.g., Elizabeth F. Loftus, Geoffrey R. Loftus & Jane Messo, *Some Facts About “Weapon Focus”*, 11 L. & HUM. BEHAV. 55, 61 (1987) (finding that the presence of a weapon in a simulated robbery “reduced ability to recognize the individual holding the weapon”); C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. APPLIED PSYCH. 714, 720 (1994) (“The confidence that eyewitnesses express in their identification is extremely malleable as a function of what they are led to believe about the identification of a co-witness.”).

⁵⁵ *Watkins v. Sowders*, 449 U.S. 341, 352 n.4 (1981) (Brennan, J., dissenting) (quoting ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* 19 (1979)); see also Brandon L. Garrett, Alice Lui, Karen Kafadar, Joanne Yaffe & Chad S. Dodson, *Factoring the Role of Eyewitness Testimony in the Courtroom*, 17 J. EMPIRICAL LEGAL STUD. 556, 571 (2020) (finding in a mock trial study that an eyewitness’s confidence testifying in the courtroom is “extremely influential”).

⁵⁶ *Id.* at 352. (quoting LOFTUS, *supra* note 55, at 19).

⁵⁷ See *id.* (“[E]yewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all.” (quoting LOFTUS, *supra* note 55, at 19)); see also Christian Jarrett, *Beliefs About Memory*, 22 PSYCH. 744, 744 (2009) (explaining that a survey in Great Britain showed that “a significant portion of judges and jurors (but far fewer psychologists) hold erroneous beliefs that . . . confidence and detail are signs of memory accuracy”).

⁵⁸ See *Eyewitness Identification Reform*, *supra* note 49 (“Mistaken eyewitness identifications contributed to approximately 69% of the more than 375 wrongful convictions in the United States overturned by post-conviction DNA evidence.”).

investigations.⁵⁹ Thirty-five percent of exonerations involve misconduct by police officers.⁶⁰

Prosecutors have “enormous authority” in the criminal justice system.⁶¹ They decide whether to pursue a criminal conviction after the police finish their investigation and have control at every stage of the criminal case.⁶² This authority comes with the pressure to win convictions.⁶³ The system judges prosecutors based on how many convictions they obtain, incentivizing prosecutors to focus on winning cases rather than on bringing the right people to justice.⁶⁴

Institutional pressures to secure convictions can also lead to prosecutorial misconduct. Prosecutorial misconduct includes “any conduct by a prosecutor that violates a defendant’s rights, regardless of whether that conduct was known or should have been known to be improper by the prosecutor, or whether the prosecutor

⁵⁹ See D. Kim Rossmo & Joycelyn M. Pollock, *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, 11 NE. U. L. REV. 790, 811 (2019) (“[O]ur study found confirmation bias, in particular, held a pivotal position in the causal structure of wrongful convictions.”).

⁶⁰ SAMUEL R. GROSS, MAURICE J. POSSLEY, KAITLIN JACKSON ROLL & KLARA HUBER STEPHENS, NAT’L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT 12 (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

⁶¹ Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 714 (1999).

⁶² *Id.* (“The source of that [prosecutorial] authority is the discretion the criminal justice system vests in prosecutors to decide whether to initiate an investigation, which charges to file, when to file such charges, and whether to offer a plea bargain or request leniency.”).

⁶³ Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 205 (1988) (“Political pressures foster a ‘conviction psychology’ because prosecutors can easily demonstrate their ‘effectiveness’ by pointing to conviction statistics [E]veryone in the criminal court . . . genuinely feels he is being observed at all times” (quoting ABRAHAM S. BLUMBERG, CRIMINAL JUSTICE 87 (2d ed. 1967))).

⁶⁴ See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 135–36 (2004) (“Placing a premium on ‘winning’ at the individual and office-wide levels encourages prosecutors to secure convictions in each and every trial, a dangerous concept considering that oftentimes the strongest cases against defendants result in plea bargains and the weaker ones go to trial.”); see also George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 108–09 (1975) (explaining that a prosecutor’s work environment causes them to “view [their] job in terms of convictions rather than the broader achievement of justice”).

intended to violate legal requirements.”⁶⁵ Some examples include failing to turn over exculpatory evidence to the defendant’s attorney (i.e., a *Brady* violation), destroying evidence, knowingly using perjured testimony, and striking jurors during voir dire based on their race (a *Batson* violation).⁶⁶ Prosecutorial misconduct contributed to convictions in thirty percent of exonerations.⁶⁷ Between 2004 and 2008, researchers found 660 instances of prosecutorial error or misconduct.⁶⁸ One-hundred and thirty-three of those errors were deemed harmful, but only one prosecutor was disciplined.⁶⁹

3. *Junk Science*. Roughly half of those exonerated by DNA evidence were convicted, at least in part, on the basis of faulty forensic science.⁷⁰ In 2009, the National Academy of Sciences found that, “[w]ith the exception of nuclear DNA analysis, . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”⁷¹ Even so, judges continue to admit forensic evidence that is unreliable and not foundationally valid, relying on archaic

⁶⁵ INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK V. THOMPSON* 9 (2016) [hereinafter INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT], https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf.

⁶⁶ Henning, *supra* note 61, at 753–86 (analyzing examples of prosecutorial misconduct in detail).

⁶⁷ GROSS ET AL., *supra* note 60, at 11–12.

⁶⁸ INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT, *supra* note 65, at 12.

⁶⁹ *Id.* (relying on “reported court decisions addressing findings of prosecutorial misconduct employing a methodology with significant inherent limitations”).

⁷⁰ Jim Hilbert, *The Disappointing History of Science in the Courtroom: Frye, Daubert, and the Ongoing Crisis of “Junk Science” in Criminal Trials*, 71 OKLA. L. REV. 759, 763 (2019) (“Of the hundreds of such individuals who have been exonerated since *Daubert*, approximately half were imprisoned due to the use of faulty science in their trial.”); *see also Overturning Wrongful Convictions Involving Misapplied Forensics*, INNOCENCE PROJECT, <https://innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics/> (last visited June 28, 2022) (“False or misleading forensic evidence was a contributing factor in 24% of all wrongful convictions nationally . . .”).

⁷¹ COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., NAT’L. RSCH. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 7 (2009) [hereinafter STRENGTHENING FORENSIC SCIENCE].

precedent for admitting such evidence.⁷² Such forensic evidence is known as junk science, which includes microscopic hair analysis,⁷³ bullet lead analysis,⁷⁴ and bite mark evidence.⁷⁵

In civil cases, judges follow *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which requires judges to evaluate expert evidence before admitting it based on several factors, including the degree of acceptance of the technique in the relevant scientific community.⁷⁶ In criminal cases, however, “*Daubert* has had little or

⁷² Hilbert, *supra* note 70, at 804 (explaining that bitemark comparison evidence, shoeprint evidence, and firearms evidence are not foundationally valid, though often used in criminal courtrooms (citing PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 7–14 (2016) [hereinafter PCAST])).

⁷³ Microscopic hair analysis is a process in which forensic scientists examine hairs found at a crime scene and the hairs of the defendant under a microscope and compare them. For a discussion of how hair analysis is performed, see STRENGTHENING FORENSIC SCIENCE, *supra* note 71, at 155–57. A 2009 National Academy of Science report stated that hair analysis was of “limited probative value” and found “no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA.” *Id.* at 161. An FBI Report revealed that eleven percent of hairs “reported as microscopically indistinguishable actually came from different sources.” Eric S. Lander, *Fixing Rule 702: The PCAST Report and Steps to Ensure the Reliability of Forensic Feature-Comparison Methods in the Criminal Courts*, 86 FORDHAM L. REV. 1661, 1672 (2018). More than seventy people have been exonerated after juries convicted them based on hair analysis. Hilbert, *supra* note 70, at 809.

⁷⁴ Bullet lead analysis is a technique by which FBI analysts attempted to link crime scene bullets to those of a suspect. For example, until 2005, “the FBI used compositional analysis of bullet lead as a forensic tool of analysis to identify the source of bullets.” PCAST, *supra* note 72, at 27. In 2004, a National Resource Council (NRC) report found that bullet lead analysis has “no scientific basis.” *Id.* (citing NAT’L RESOURCE COUNCIL, FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE 113 (2004)).

⁷⁵ Bite mark evidence results from analysis in which scientists compare a bite mark on a victim to the teeth of the defendant. PCAST, *supra* note 72, at 83. A 2010 study found that “skin deformation distorts bitemarks so substantially and so variably that current procedures for comparing bitemarks are unable to reliably exclude or include a suspect as a potential biter.” *Id.* at 28 (citing M.A. Bush, Howard I. Cooper & Robert B.J. Dorion, *Inquiry into the Scientific Basis for Bitemark Profiling and Arbitrary Distortion Compensation*, 55 J. FORENSIC SCIS. 976, 983 (2010)).

⁷⁶ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593–95 (1993) (establishing that judges should evaluate the following factors before admitting expert evidence: (1) “whether a theory or technique . . . can be (and has been) tested,” (2) “whether the theory or technique has been subjected to peer review and publication,” (3) “the known or potential rate of error,” and (4) the technique’s “degree of acceptance within [the relevant scientific] community” (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985))).

no influence on the admissibility of science—good or bad.”⁷⁷ On July 1, 2022, legislation went into effect in Georgia requiring judges to apply the *Daubert* standard in criminal cases as they do in civil cases.⁷⁸ Previously, under Georgia precedent, a trial judge in criminal court could decide “whether the procedure or technique in question ha[d] reached a scientific stage of verifiable certainty” without being required to look to the scientific community’s evaluation of the technique.⁷⁹

4. *False Confessions.* Though many may find it hard to believe that a person would confess to a crime that they did not commit, “more than 1 out of 4 people wrongfully convicted but later exonerated by DNA evidence made a false confession or incriminating statement.”⁸⁰ “The highest rates of false confessions occur among the intellectually disabled, juveniles, and the mentally ill” because they are more vulnerable to police coercion and less likely to understand the consequences of confessing.⁸¹ Furthermore, prosecutors and investigators can use tactics such as threats that defendants will be sentenced to death if they do not confess or plead guilty.⁸² Police use a “nine-step interrogation process designed to break suspects down, convince them that they are doomed, and then

⁷⁷ Hilbert, *supra* note 70, at 796; *see also* STRENGTHENING FORENSIC SCIENCE, *supra* note 71, at 107–08 (“Much forensic evidence . . . is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline.”).

⁷⁸ H.B. 478, 156th Gen. Assem., Reg. Sess. § 1 (Ga. 2022).

⁷⁹ Harper v. State, 292 S.E.2d 389, 395–96 (Ga. 1982).

⁸⁰ *Johnny Lee Gates*, GA. INNOCENCE PROJECT (May 15, 2020), <https://www.georgiainnocenceproject.org/cases/active-cases/johnny-lee-gates/>.

⁸¹ *See id.* (explaining how Johnny Lee Gates’ confession resulted in part from his mental illness). For another example of a false confession of a mentally ill individual, see Brandon L. Garrett, *The West Memphis Three and False Confessions*, HARV. UNIV. PRESS BLOG (August 23, 2011), https://harvardpress.typepad.com/hup_publicity/2011/08/west-memphis-three-false-confessions-garrett.html (describing three defendants that were exonerated by DNA evidence, even though one confessed to the crime after a lengthy interrogation with leading questions).

⁸² *See* Lauren Morehouse, *Confess or Die: Why Threatening a Suspect with the Death Penalty Should Render Confessions Involuntary*, 56 AM. CRIM. L. REV. 531, 539–40 (2019) (discussing two cases in which police officers threatened the death penalty to coerce confessions and stating that “the effect that the threat of the death penalty has on suspects in interrogations is clear—it induces innocent people to confess to crimes that they did not commit”).

make a confession appear to be a rational or risk-reducing choice.”⁸³ One can see how, after hours of interrogation, a person could admit to a crime they did not commit.

B. THE POLICIES BEHIND COMPENSATING EXONEREES

Samuel Scott, one of the Chatham County, Georgia exonerees,⁸⁴ stood outside the prison gates after his release with only twenty-five dollars, a white shirt, and a pair of pants.⁸⁵ Despite his exoneration, the original prosecutor continued to deny Scott’s innocence and actively fought to prevent Scott and Echols from receiving compensation, leaving Scott without compensation or any recognition of the suffering he endured.⁸⁶ Scott said that he felt just as devalued in society as he had in prison—like he was a ghost.⁸⁷

When an exoneree walks out of prison, the sun shines, cameras flash, and the world rejoices because justice has been done. Soon after, though, the excitement dies, and the exoneree is left with little support.⁸⁸ Ironically, the government provides more services to those who finish their prison terms and are released on parole than they do to exonerees.⁸⁹ The exoneree has the worst of both worlds.

⁸³ Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 334.

⁸⁴ See Samuel Scott, *supra* note 4.

⁸⁵ Abigail Penzell, *Apology in the Context of Wrongful Conviction: Why the System Should Say It’s Sorry*, 9 CARDOZO J. CONFLICT RESOL. 145, 157 (2007).

⁸⁶ *Id.* (quoting the prosecutor as stating, “I don’t exactly know what exoneration means, but I feel that Samuel Scott is guilty”); see Douglas Echols, *supra* note 36 (describing the prosecutor’s letter to Georgia General Assembly representatives convincing them not to award Scott or Echols compensation).

⁸⁷ See Penzell, *supra* note 85, at 157 (quoting Scott as stating that “[n]o one said we made a mistake . . . makes you feel like you kinda don’t exist” (second alteration in original)); *Cleared by DNA*, *supra* note 1 (“We’re like ghosts . . . They want to pretend we don’t exist.”).

⁸⁸ See Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 434 (2009) (“When the cameras go away and the limelight dims, however, exonerees are left with broken promises of assistance, including job offers that are rarely, if ever, fulfilled.”).

⁸⁹ See, e.g., Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), <https://www.nytimes.com/2007/11/25/us/25dna.html> (“They have programs for drug dealers who get out of prison. They have programs for people who really do commit crimes. People get out and go in halfway houses and have all kinds of support. There are housing programs for them, job placement for them. But for the innocent, they have nothing.”).

One scholar recognized that “[a]n exoneree faces the stigma of being an ex-prisoner and re-entering society as an ex-offender[] but does not qualify for services offered to ex-offenders.”⁹⁰ The same distinction holds true in Georgia⁹¹: the government provides temporary housing and various other services to parolees but not to exonerees.⁹²

Freedom is not enough. Exonerees carry the trauma of having the institutions they are supposed to trust imprison them for a crime they did not commit into the outside world after their release. A 2001 study found that twenty-eight percent of exonerees suffer from post-traumatic stress disorder, thirty-eight percent have significant amounts of anxiety, and forty percent have depression.⁹³ Fifty-seven percent never reach the income level they earned before entering prison.⁹⁴ “At the heart of any program appropriately servicing the wrongfully convicted is the acknowledgement of the trauma of serving time for someone else’s crime.”⁹⁵ Such individuals must fight for paltry portions of state dollars.

Georgia should compensate its exonerees to heal the wounds that wrongful conviction has wrought on them and on our society. If the system does not compensate exonerees and support them, then those who are wrongfully convicted and injured by the criminal justice system will continue to receive less than those who in fact committed the crimes they were convicted of. If the system supports exonerees, they will be able to reintegrate into society with more success. Furthermore, police and prosecutors should be incentivized

⁹⁰ *Id.*

⁹¹ See *House Study Committee on Compensating Wrongfully Convicted Persons*, 2014 Leg., 153d Sess. 2 (Ga. 2014) (statement of Michael Leo Owens, Associate Professor, Emory Univ.) (“Consequently, and strangely, in an age when state governments like Georgia’s willingly spend tens and hundreds of millions of dollars on institutions to try to positively reintegrate the justly convicted back into society, it sparingly spends on individuals wrongfully convicted of crimes.”).

⁹² See *Reentry Services*, ST. BD. PARDONS & PAROLES, <https://pap.georgia.gov/reentry-services> (last visited June 28, 2022) (discussing the importance of reentry services, which are not provided to exonerees, for parolees); *Reentry Partnership Housing (RPH)*, GA. DEP’T OF CMTY. AFFS., <https://www.dca.ga.gov/safe-affordable-housing/homeless-special-needs-housing/reentry-partnership-housing-rph> (last visited June 28, 2022) (discussing housing programs for parolees).

⁹³ See Weigand, *supra* note 88, at 428.

⁹⁴ *Id.*

⁹⁵ *Id.* at 432.

to refrain from engaging in conduct that leads to wrongful convictions. If governments require police and prosecutors to pay into a wrongful conviction fund using a small portion of their annual budget, it may incentivize them to act with more care.⁹⁶

C. OVERVIEW OF COMPENSATION METHODS

In the United States, there are three different paths to receiving compensation after exoneration. First, in some states, exonerees can file lawsuits against the state for the cost of their wrongful conviction.⁹⁷ Second, in other states, an exoneree must enlist a legislator to introduce a bill into the state legislature to receive compensation from the state.⁹⁸ Finally, thirty-five states have compensation statutes that set out awards for exonerees based on how much time they spent in prison.⁹⁹

1. *Lawsuits.* In theory, an exoneree may pursue a suit against the state for malicious prosecution, false imprisonment at the state level, or a violation of federal civil rights under 42 U.S.C. § 1983.¹⁰⁰ These suits may only be successful, however, in the most egregious of cases, though.¹⁰¹ To prove malicious prosecution in Georgia, for

⁹⁶ See Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 534 (2011) (“Passing wrongful-conviction compensation statutes will create political incentives for loss prevention, i.e., improving criminal justice practices, if part of the funding for the damage awards comes from the departments or offices that have the most ability to prevent constitutional violations.”).

⁹⁷ See Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 86 (1999) [hereinafter Bernhard, *When Justice Fails*] (discussing options for exonerees to file lawsuits against the state for its role in their imprisonment).

⁹⁸ See *id.* at 93–94 (discussing how exonerees can receive compensation through private legislation).

⁹⁹ See Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn’t and Why*, 18 B.U. PUB. INT. L.J. 403, 409–10 (2009) [hereinafter Bernhard, *A Short Overview*] (discussing wrongful conviction compensation statutes in different states).

¹⁰⁰ See Bernhard, *When Justice Fails*, *supra* note 97, at 86–87 (discussing suits for malicious prosecution and false imprisonment, as well as § 1983 suits); 42 U.S.C. § 1983 (providing a federal cause of action against persons acting “under color of” state law who violate a citizen’s constitutional rights).

¹⁰¹ See Bernhard, *When Justice Fails*, *supra* note 97, at 86 (explaining that neither common law torts nor civil rights law gives exonerees “redress”).

example, exonerees must not only show that they were arrested and prosecuted and ultimately proved their innocence but also that: (1) there was no probable cause for their arrest, and (2) they were prosecuted with actual malice.¹⁰² For a false imprisonment claim against the police, the exoneree must show—if they were arrested under a warrant—that the officer did not procure the warrant in good faith.¹⁰³ A Section 1983 claim, which provides a federal statutory cause of action against a local police officer for the deprivation of civil rights, further requires that the police officer did not have probable cause to arrest the defendant.¹⁰⁴

It is difficult, however, for an exoneree to win a lawsuit and recover damages for the cost of wrongful conviction without the necessary compensation statutes in place.¹⁰⁵ First, to recover under common law and statutory remedies, the exoneree must prove that those who prosecuted and convicted them acted with actual malice—a high burden.¹⁰⁶ Second, most of the actors—police, witnesses, and prosecutors—are immune from suit under the doctrines of qualified and absolute immunity.¹⁰⁷ Third, the statute of limitations on exonerees' claims will have likely long passed by the time the exoneree is released from prison.¹⁰⁸

¹⁰² See O.C.G.A. § 51-7-40 (2022) (“A criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action.”).

¹⁰³ See O.C.G.A. § 51-7-21 (2022) (“If imprisonment is by virtue of a warrant, neither the party who procured the warrant in good faith nor the officer who executed the warrant in good faith shall be liable for false imprisonment even if the warrant is defective in form or is void for lack of jurisdiction.”).

¹⁰⁴ See 42 U.S.C. § 1983 (providing an avenue for relief after the state violates an individual’s constitutional rights); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (“[A] peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved.”).

¹⁰⁵ See Bernhard, *When Justice Fails*, supra note 97, at 86 (describing the difficulty of winning lawsuits for wrongful conviction cases).

¹⁰⁶ See *id.* (“Neither the common law torts of wrongful arrest nor malicious prosecution, nor the Civil Rights Act of 1871 provide redress.” (footnote omitted)).

¹⁰⁷ See *id.* at 87–92 (describing immunities available for each party).

¹⁰⁸ See *id.* at 87 (“In wrongful conviction cases, years in excess of statutory time can elapse between the time plaintiffs learn of the tortious conduct and their eventual exoneration.”).

Police officers, prosecutors, and witnesses all have some level of immunity from lawsuits.¹⁰⁹ Police officers have qualified immunity from civil suits, meaning that they cannot be sued for violating a person's constitutional rights unless they violated clearly established law.¹¹⁰ As long as they had probable cause to arrest the suspect, officers have "no duty to continue to investigate other evidence which might prove the innocence of the accused or which might point to another suspect."¹¹¹ Similarly, witnesses are only liable if the prosecutor's claim was "baseless" and the witness's complaint was "made with malice."¹¹² If witnesses were liable for their testimony, they might be unlikely to participate in criminal trials, where they give their time but do not receive any compensation in return.¹¹³ Prosecutors have absolute immunity as long as they are "acting in the exercise of their discretion" and "within the scope of [their] duties."¹¹⁴ Furthermore, exonerees will not have the option to sue the state government itself due to the doctrine of sovereign immunity.¹¹⁵ Though the Georgia Tort Claims

¹⁰⁹ See *id.* ("[T]he doctrine of immunity . . . protects witnesses, police, the prosecution and the judiciary from legal liability for errors committed in the prosecution of crime."). Police are protected by qualified immunity, and witnesses and prosecutors are protected by absolute immunity. See *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (holding that prosecutors are protected by absolute immunity); *Pierson*, 386 U.S. at 555 (explaining that police officers are entitled to qualified, not absolute, immunity); *Briscoe v. Lahue*, 460 U.S. 325, 345 (1983) (finding that witnesses are protected by absolute immunity for their testimony); see also *Kelly v. Curtis*, 21 F.3d 1544, 1552–53 (11th Cir. 1994) (concluding that officers had no affirmative duty to make the district attorney aware of the exculpatory lab report and were thus entitled to qualified immunity).

¹¹⁰ See *Bernhard, When Justice Fails*, *supra* note 97, at 87–88 (explaining police officers' qualified immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

¹¹¹ *Bernhard, When Justice Fails*, *supra* note 97, at 87–88.

¹¹² See *id.* at 87 ("A person who is misidentified by a victim or a witness cannot recover damages from either. Complainants and witnesses are protected from liability by the doctrine of immunity, unless the prosecution is baseless and the complaint is made with malice.").

¹¹³ See *Briscoe*, 460 U.S. at 333 (explaining that witnesses may be reluctant to testify if they could face subsequent liability for their testimony).

¹¹⁴ *Bernhard, When Justice Fails*, *supra* note 97, at 90 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976)).

¹¹⁵ See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (explaining that it is a fundamental aspect of sovereignty that the state be immune from suit).

Act waives sovereign immunity for some torts, it specifically excludes malicious prosecution, false arrest, and false imprisonment from the statute's limited waiver of sovereign immunity.¹¹⁶

Statutes of limitations further limit lawsuits. For example, Section 1983 actions related to events that occurred in Georgia have a two-year statute of limitations,¹¹⁷ so an exoneree may not realize they have a cause of action before it is gone. No exoneree has received compensation in Georgia, thus far, through a lawsuit.¹¹⁸

2. *Private Legislation.* Many states that do not have other avenues for wrongful conviction compensation allow legislators to pass private bills “with the sole and exclusive function of making a monetary award” to a specific exoneree.¹¹⁹ Private legislation is not reserved for exonerees alone.¹²⁰ For example, states pass private legislation when the state incurs a debt and “has no other means” to repay it.¹²¹ These bills arise out of a moral obligation for the state to pay its debts to its citizens.¹²² Private legislation has been

¹¹⁶ O.C.G.A. § 50-21-24(7) (2022) (excluding malicious prosecution, false arrest, and false imprisonment from the Act's weakening of sovereign immunity).

¹¹⁷ See, e.g., Hafez v. Madison, 348 F. App'x 465, 467 (11th Cir. 2009) (“The statute of limitations for a section 1983 claim arising out of events occurring in Georgia is two years.”).

¹¹⁸ All of the Georgia exonerees who received compensation did so through the private bill process. See, e.g., H.R. Res. 108, 148th Gen. Assemb., Reg. Sess. 2 (Ga. 2005) (providing one million dollars in compensation to Clarence Harrison after he spent almost eighteen years in prison).

¹¹⁹ Bernhard, *A Short Overview*, *supra* note 99, at 407–08.

¹²⁰ See Bernhard, *When Justice Fails*, *supra* note 97, at 93–94 (giving examples of individuals receiving state compensation outside of wrongful convictions, such as a child who was severely injured in state custody, a construction company for the state's debts, and the wife of a sheriff after a prisoner in his custody killed him).

¹²¹ See Bernhard, *A Short Overview*, *supra* note 99, at 408 (“The ‘private bill’ mechanism . . . may sound anachronistic, but it is still used across the country in those unusual situations when a state incurs a legitimate debt and has no other means of repaying that debt.”).

¹²² See Bernhard, *When Justice Fails*, *supra* note 97, at 93–97 (discussing “moral obligation bills” in multiple states); *id.* at 93 (“The state, as well as an individual, may be honorable and may voluntarily recognize just obligations which it fairly and honestly ought to pay, even though they do not constitute purely legal claims [that could be] enforced under compulsion of judgment and execution.” (alteration in original) (quoting *Williamsburgh Sav. Bank of Brooklyn v. State*, 153 N.E. 58, 61 (N.Y. 1926)).

instrumental in providing compensation to exonerees in states without established statutory compensation schemes.¹²³

Compensation through a private bill, however, is a discretionary award, not a “right recognized by the legal process,” and thus leaves exonerees at the mercy of politics.¹²⁴ Some scholars and advocates, including Jeffrey S. Gutman, Clinical Professor of Law at George Washington University, criticize private legislation for requiring “political muscle”¹²⁵ and the “grace and favor” of both the legislature and the public to obtain the compensation that they are owed.¹²⁶ An exoneree may be more likely to get an award because of public interest in the case and political connections, rather than the actual facts of their case.¹²⁷ Furthermore, passing legislation is a “cumbersome, multistep, slow process” in which the exoneree’s compensation may be determined by “the fiscal health of the state” in that year.¹²⁸ Ultimately, legislatures do not have the factfinding resources to properly review individual cases.¹²⁹ Overall, a small minority of exonerees receive compensation through private legislation.¹³⁰

¹²³ See, e.g., Ga. H.R. Res. 108 (providing one million dollars in compensation to Clarence Harrison after he spent almost eighteen years in prison).

¹²⁴ Bernhard, *A Short Overview*, *supra* note 99, at 408 (“The private bill is not a perfect solution because it’s an award granted through the political system . . .”).

¹²⁵ Gutman, *supra* note 37, at 372.

¹²⁶ *House Study Committee on Compensating Wrongfully Convicted Persons*, 153d Gen. Assemb., Reg. Sess. 2 (Ga. 2014) (statement of Michael Leo Owens, Associate Professor, Emory Univ.).

¹²⁷ 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, 134 (2010) (“Positive publicity surrounding the exoneration, the political connections of the exoneree, and budgetary concerns all are much more likely to determine the fate of the bill than the merits of the claim for compensation.”).

¹²⁸ See Bernhard, *A Short Overview*, *supra* note 99, at 408 (“The private bill [avenue] can be a long and arduous process depending upon . . . the fiscal health of the state.”).

¹²⁹ See *id.* (“[B]ecause there is no fact-finding mechanism in the political process, there is no way to know, when the private bill is introduced, whether the person on whose behalf the bill has been introduced is really innocent.”).

¹³⁰ See INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 13 (2009), https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf (“Only 9% of the more than 240 people exonerated through DNA testing received compensation through private bills [as of 2009] . . .”).

3. *Statutes.* Statutes provide an established route for exonerees to receive compensation—as opposed to private legislation, under which the exoneree must chart their own path. Statutes relieve exonerees from the burden of proving the state’s fault in a tort or civil rights lawsuit, making it possible for exonerees to receive compensation when it is not clear that a specific individual is to blame or that a given individual acted with malice.¹³¹ Under most state statutes, exonerees only need to show that they are innocent and that they served time in prison because of the wrongful conviction in order to recover.¹³² Some state statutes require exonerees to file a civil suit in state trial court.¹³³ Others require exonerees to file their claims with a claims advisory board¹³⁴ or a state administrative entity, such as a Department of Corrections.¹³⁵ In addition to providing monetary compensation, some of these statutes also provide nonmonetary services such as state health insurance, tuition benefits, employment training resources, and counseling.¹³⁶ Some statutes further provide that the exoneree’s conviction will be expunged.¹³⁷ In addition to the federal statute,

¹³¹ See Bernhard, *A Short Overview*, *supra* note 99, at 409 (“Compensation statutes provide money and services to exonerated individuals without regard to fault or blame.”).

¹³² See *id.* at 409 (“These statutes do not require claimants to discover why the prosecution was erroneous, or who made mistakes which ‘caused’ the investigation to go awry, or even what those mistakes might have been.”).

¹³³ These states include “Colorado, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Mississippi, Missouri, New Jersey, Ohio, Vermont, Washington, and West Virginia.” 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. U. L. REV. 694, 707 n.36 (2019).

¹³⁴ “Connecticut, Michigan, Nebraska, Tennessee, and Wisconsin” require exonerees to file claims with claims advisory boards. *Id.* at 707–08 n.37.

¹³⁵ States that require exonerees to file claims with a state administrative entity include “Alabama (Division of Risk Management), Maryland (Board of Public Works), Montana (Department of Corrections), North Carolina (Industrial Commission), Oklahoma (Office of Management and Enterprise Services, Risk Management Division), [and] Texas (Comptroller).” *Id.* at 708 n.38.

¹³⁶ See Gutman, *supra* note 37, at 427–28 (listing the different services that states provide).

¹³⁷ See *id.* at 428 n.334 (“The statutes of several states—Colorado, Florida, Hawaii, Illinois, Massachusetts, Michigan, Missouri, and Washington—provide for expungement or sealing.”).

thirty-seven states have passed statutes to compensate the wrongly convicted.¹³⁸ Notably, Georgia is not one of these states.¹³⁹

Compensation statutes are not a perfect solution, though. A compensation bill can be introduced to the legislature, only to be slowly negotiated down to a paltry award for all future exonerees. For example, Louisiana provides \$25,000 for each year that the exoneree was in prison with a cap at \$250,000 in total compensation, not including an additional award of \$80,000 in compensation for loss of life opportunities.¹⁴⁰ Furthermore, individual exonerees may benefit from taking their cases to the courtroom or legislative floor.¹⁴¹ Such individuals can tell their compelling and tragic stories to a jury or the legislators, unrestricted by a statutory cap on their potential awards, and have the opportunity to receive more money than they might with a statute in place.¹⁴² On the other hand, compensation statutes allow more people, like Douglas Echols and Samuel Scott, to receive compensation, unfettered by the capricious political process of legislative sessions.

¹³⁸ See *Compensating the Wrongfully Convicted*, INNOCENCE PROJECT, <https://innocenceproject.org/compensating-wrongly-convicted/> (last visited June 28, 2022) (“The federal government, the District of Columbia, and 37 states have compensation statutes of some form.”).

¹³⁹ See *id.* (listing Georgia as one of the thirteen states without a compensation statute).

¹⁴⁰ LA. STAT. ANN. § 15:572:8 (2021). One scholar suspects that the legislature passed the original version of this statute, which only provided exonerees with \$15,000 per year of incarceration, to limit the state’s liability rather than to help exonerees. See Bernhard, *A Short Overview*, *supra* note 99, at 410 (“Apparently the statute was designed primarily to indemnify the state from its own wrongdoing and only secondarily to assist the wrongly convicted.”).

¹⁴¹ For example, in 2020, Philadelphia, a city in a state with no compensation statute, agreed to pay exoneree Chester Hollman, III \$9.8 million in a settlement after he took his case to court. See Jeremy Roebuck, *Philly to Pay \$9.8M to Man Exonerated Who Spent 28 Years in Prison After Wrongful Conviction for Murder*, PHILA. INQUIRER (Dec. 30, 2020), <https://www.inquirer.com/news/chester-hollman-settlement-philly-exoneration-lawsuit-netflix-undisclosed-20201230.html>.

¹⁴² See, e.g., *Cleared by DNA*, *supra* note 1 (explaining how Clarence Harrison received one million dollars from the state after telling his story before the legislature).

III. EVALUATING STATE WRONGFUL CONVICTION COMPENSATION STATUTES

It is impossible to determine how to adequately compensate the wrongfully convicted. Wrongfully convicted individuals lose years of their lives, opportunities to develop financial security, and time with family and friends, among other unquantifiable losses. We can, however, begin to evaluate these statutes through the lens of three factors: (1) breadth of coverage, (2) quality of the remedy, and (3) the agency or choice provided to the exoneree.¹⁴³

A. BREADTH OF COVERAGE: HOW MANY ARE COMPENSATED?

Compensation statutes are ineffective when so few exonerees who apply for compensation receive awards that exonerees feel the process is futile.¹⁴⁴ When evaluating breadth of coverage, scholars look to see how many people are getting substantial compensation compared to how much time they spent in prison.¹⁴⁵ A state statute with broad coverage results in high percentages of (1) exonerees filing for state compensation, (2) awarded claims, (3) exonerees with awards, and (4) lost years compensated.¹⁴⁶ Some statutes impose a

¹⁴³ See Gutman, *supra* note 37, at 385–86 (evaluating wrongful conviction compensation statutes by the breadth of coverage, which the author calls efficiency, and quality of the remedy); see also Gutman & Sun, *supra* note 133, at 702–03 (evaluating the fairness of each state's compensatory system by focusing on “the extent to which substantial numbers seek either form of compensation, the extent to which substantial numbers of claimants are awarded some compensation and the extent to which a substantial percentage of years lost to wrongful conviction is compensated”).

¹⁴⁴ For example, after Alabama's compensation law was passed in 2001, only four of the forty-seven exonerees who applied for compensation had been awarded compensation as of 2017. See Innocence Staff, *Alabama Slow to Compensate the Wrongfully Convicted*, INNOCENCE PROJECT (Oct. 25, 2017), <https://innocenceproject.org/alabama-slow-to-compensate-wrongfully-convicted/>. A loophole in the statute states that compensation funds “will only be paid if the state legislature appropriates money out of the general fund budget,” allowing the government to shirk its responsibilities to these applicants. *Id.*

¹⁴⁵ See Gutman & Sun, *supra* note 133, at 702–03 (“[T]he fairness of the system is viewed from the perspective of what we call compensatory coverage—the notion that it is better for a system to compensate a greater percentage of injured persons, and within that group, the most seriously harmed, than to compensate a smaller group more generously.”).

¹⁴⁶ *Id.* at 760 (explaining the four “breadth of coverage” factors for state compensation statutes).

high burden of proof for innocence on the exoneree, with the effects of restricting the number of people who can obtain compensation and of denying compensation to those exonerees who contributed to their conviction by, for example, confessing or pleading guilty.¹⁴⁷ Other statutes include short statutes of limitations in the legislation.¹⁴⁸ One group of scholars has argued that Mississippi is the best state when considering the number of exonerees who received compensation compared to the number that applied for it.¹⁴⁹ Despite this conclusion, they conceded that Mississippi is “hardly the most generous state.”¹⁵⁰ As of 2017, in the United States, only 34.66% of exonerees had received state statutory awards.¹⁵¹

1. *Burden of Proof.* To recover under compensation laws, exonerees must prove their innocence—not merely reasonable doubt regarding their guilt—all over again. Different states have different standards that exonerees must meet to qualify for compensation.¹⁵² Legislators must weigh the concern that many innocent people will go uncompensated with the concern that the guilty will receive undue compensation.¹⁵³

The standard of proof for innocence varies across the states. Under the different state statutes, exonerees may have to prove their innocence by clear and convincing evidence, by a preponderance of the evidence, or by DNA evidence, meaning that they can only be compensated if they prove their innocence using DNA evidence.¹⁵⁴ Many states—such as Louisiana, Iowa, and New

¹⁴⁷ *Id.* at 719–20, 720 n.79 (discussing how in states with more restrictive statutes, exonerees are less likely to be compensated).

¹⁴⁸ For example, Tennessee requires exonerees to file their claims within one year of their exoneration. TENN. CODE ANN. § 9-8-108 (a)(7)(F) (2021) (stating that a claim “must be filed with the board no later than one (1) year from the date that the claimant is granted exoneration”).

¹⁴⁹ Gutman & Sun, *supra* note 133, at 785 (“Breadth of coverage—the prospect of at least some compensation encompassing as many years lost to wrongful incarceration as is possible—serves as a competing measure of fairness. If we adopt that perspective, we can answer the question we started with: why it is that Mississippi is the best state in which to be exonerated.”).

¹⁵⁰ *Id.*

¹⁵¹ Gutman, *supra* note 37, at 395.

¹⁵² See *infra* notes 159–165 and accompanying text.

¹⁵³ See Gutman, *supra* note 37, at 371 (“[T]here is a hypervigilant worry of compensating those who are viewed as potentially undeserving.”).

¹⁵⁴ See *infra* notes 159–160 and accompanying text.

Jersey—require exonerees to prove their innocence by a clear and convincing evidence standard to receive compensation.¹⁵⁵ This standard “places a heavy burden on persons who often do not possess the resources to carry that burden.”¹⁵⁶ For example, the original trial witnesses may be difficult to locate, and important evidence that the defendant would need to prove such a high standard may have long since been destroyed by the government.¹⁵⁷ Even if the exoneree was acquitted at a retrial, the acquittal only proves the existence of reasonable doubt about their guilt, not proof of their innocence.¹⁵⁸ Missouri has an even more difficult standard than clear and convincing evidence: the exoneree must prove actual innocence with DNA evidence.¹⁵⁹ This standard renders many exonerees ineligible for compensation.¹⁶⁰ In many cases, DNA evidence did not provide the basis for exoneration.¹⁶¹

¹⁵⁵ LA. STAT. ANN. § 15:572.8(A)(2) (2021) (requiring that the petitioner prove “by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted”); IOWA CODE § 663A.1(2)–(3) (2021) (requiring that exonerees prove by clear and convincing evidence that they did not commit the crime they were convicted of); N.J. STAT. ANN. § 52:4C-1 (2021) (stating that those “who can demonstrate [innocence] by clear and convincing evidence” can recover under the statute).

¹⁵⁶ Kahn, *supra* note 127, at 125.

¹⁵⁷ *See id.* at 151 (explaining that some states, like New Jersey, recognize the “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 [the exoneree] or those acting on their behalf” (quoting N.J. STAT. ANN. § 52:4C-1)).

¹⁵⁸ *Id.* at 150 (“Even where the claimant has been acquitted at a retrial, that only establishes that the claimant is not guilty beyond a reasonable doubt, not that he or she is innocent of the crime.”).

¹⁵⁹ MO. REV. STAT. § 650.058(1) (2021) (stating that an exoneree who is “later determined to be actually innocent of such crime solely as a result of DNA profiling analysis may be paid restitution”).

¹⁶⁰ *Id.* (requiring that exonerees prove innocence using DNA evidence); *see also infra* Section III.A.2.

¹⁶¹ Only 552 of the 3,012 current exonerations recorded by The National Registry of Exonerations involved DNA evidence. *Exonerations by Year: DNA and Non-DNA*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> (last visited May 26, 2022). The Innocence Project only lists 375 DNA exonerations because those are the cases in which DNA evidence was integral to establishing innocence. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Jan. 29, 2022); *Browse Cases*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Jan. 29, 2022) (explaining that the National Registry of Exonerations list includes

On the other hand, a lower standard of proof allows more exonerees to receive compensation. Some states require that defendants prove their innocence by a preponderance of the evidence—anything greater than fifty percent certainty of their innocence—providing a more manageable standard.¹⁶² For even broader access to recovery, states could shift the burden of proof to the state, making recovery the default and requiring the government to prove the person’s guilt to prevent them from receiving compensation.¹⁶³ Such a shift would make it much easier for exonerees to receive compensation but may be difficult to pass through a legislature that is skeptical of exonerees’ claims.

2. *Restrictions.* Some states restrict which exonerees may be compensated because legislators are concerned that guilty people will receive undue compensation from the state. Examples of such restrictions include preventing recovery if the exoneree contributed to the conviction by, for example, making a false confession;¹⁶⁴ pleading guilty;¹⁶⁵ or having prior felony convictions.¹⁶⁶ Another

more DNA exonerees than The Innocence Project’s because it includes those exoneree’s cases in which “DNA evidence was not central to establishing innocence”).

¹⁶² See, e.g., MISS. CODE ANN. § 11-44-7(1) (2009) (“In order to obtain a judgment under this chapter, a claimant must prove [innocence] by a preponderance of the evidence . . .”); CONN. GEN. STAT. § 54-102uu(c) (2021) (“[S]uch person shall have the burden of establishing by a preponderance of the evidence that such person meets the eligibility requirements . . .”); 735 ILL. COMP. STAT. 5/2-702(g) (2016) (“In order to obtain a certificate of innocence the petitioner must prove [innocence] by a preponderance of evidence . . .”).

¹⁶³ See Kahn, *supra* note 127, at 126 (“So long as eligibility requirements are drafted stringently and as long as there is a reasonable cap on damages, shifting the burden to the state could more quickly compensate a broader range of innocent individuals who were wrongfully convicted and, at the same time, avoid compensating guilty individuals and increasing costs for states to an unsustainable level.”).

¹⁶⁴ See, e.g., WIS. STAT. § 775.05(4) (2021) (requiring that the exoneree 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”); N.Y. CT. CL. ACT § 8-b (2021) (requiring that the exoneree “did not by his own conduct cause or bring about his conviction”).

¹⁶⁵ See, e.g., OHIO REV. CODE ANN. § 2743.48(A)(2) (West 2022) (requiring that “[t]he individual was found guilty of, but did not plead guilty to, the particular charge”); OKLA. STAT. tit. 51, § 154(B)(2)(b) (2021) (requiring that “the individual did not plead guilty to the offense charged”); IOWA CODE § 663A.1(1)(b) (2021) (requiring that the claimant did not plead guilty to receive compensation).

¹⁶⁶ See, e.g., FLA. STAT. § 961.04 (2017) (requiring that a claimant has never been “convicted of, or pled guilty or nolo contendere to . . . any violent felony” or to “more than one felony” in order to receive compensation).

cumbersome requirement mandates that exonerees be pardoned by the governor or certified as innocent by a district attorney before they can receive compensation.¹⁶⁷

The requirement that exonerees not contribute to their conviction or plead guilty ignores the realities and intense pressures that those who are interrogated and accused of crimes have faced. Exonerees may contribute to their convictions by “confessing to the crime or making an admission even when that confession or admission was elicited through extreme psychological pressure—so long as the pressure did not amount to physical abuse.”¹⁶⁸ As discussed in Section II.A, many innocent people give false confessions due to interrogation tactics designed to elicit confessions or the defendant’s mental illness or youth at the time of the interrogation.¹⁶⁹ In the end, having such a restriction mostly hurts those who were juveniles or mentally ill at the time of their conviction and interrogation, rather than preventing guilty persons from receiving compensation.¹⁷⁰

Some statutes bar states from granting wrongful conviction compensation to those who were convicted of a previous felony or were concurrently serving time for an offense that they did not commit and one that they did.¹⁷¹ Allowing the state to punish a person for a crime they did not commit because they committed other crimes does not hold the justice system accountable for its mistakes. Furthermore, a person should not be considered guilty of a crime even after being proven innocent just because they have been proven guilty of a separate crime in the past. Instead of barring recovery completely, statutes should require that exonerees receive

¹⁶⁷ See, e.g., ME. STAT. tit. 14, § 8241(2)(C) (2021) (making receipt of compensation contingent on a “free and full” pardon from the governor).

¹⁶⁸ Bernhard, *A Short Overview*, *supra* note 99, at 411.

¹⁶⁹ See *supra* Section II.A.4.

¹⁷⁰ In a 2020 report by the National Registry of Exonerations, seventy percent of exonerees who suffered from mental illness or an intellectual disability and thirty-six percent of those who were under the age of eighteen falsely confessed to the crime of which they were accused. AGE AND MENTAL STATUS OF EXONERATED DEFENDANTS WHO CONFESSED, NAT’L REGISTRY EXONERATIONS (2020), <https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf> (breaking down the age and mental status of exonerated defendants who falsely confessed).

¹⁷¹ See *supra* note 166.

compensation only for additional years that they spent in prison beyond the sentence served for the crime they did commit.

Additionally, some statutes make compensation contingent on the desires of one or more state actors by restricting compensation to those who have received official pardons.¹⁷² For example, in Maine, an exoneree must be pardoned by the governor to be compensated.¹⁷³ Requiring a pardon, or the approval of any state actor, recalls many of the issues with private bills because the exoneree's case must have enough public recognition and political support to merit the governor's attention and time.¹⁷⁴ The exoneree's eligibility for compensation may also depend on the wealth of the state at the time that the exoneree requests compensation, a factor wholly unrelated to the harm that they endured while wrongfully imprisoned.¹⁷⁵

B. QUALITY OF THE REMEDY: HOW MUCH?

1. *Financial Remedy.* It is difficult to calculate adequate compensation for the years of one's life lost in prison on a wrongful conviction.¹⁷⁶ Many states look to the federal statute when drafting their own wrongful conviction compensation statutes.¹⁷⁷ The federal statute awards exonerees \$50,000 for each year in prison and \$100,000 for each year on death row.¹⁷⁸ Many statutes have caps on wrongful conviction compensation: for example, New Hampshire caps compensation at \$20,000 total,¹⁷⁹ and Oklahoma caps

¹⁷² See Bernhard, *A Short Overview*, *supra* note 99, at 410–11 (explaining that some states require the exoneree to be pardoned by the governor, putting their compensation at “the will of the executive”).

¹⁷³ ME. STAT. tit. 14, § 8241(2)(C) (2021) (making receipt of compensation contingent on a “free and full” pardon from the governor).

¹⁷⁴ See Bernhard, *A Short Overview*, *supra* note 99, at 411 (explaining that requiring that an exoneree be pardoned “throws the process back into the political maelstrom”).

¹⁷⁵ See *id.* (explaining that compensation also depends on “the wealth of the state coffers”).

¹⁷⁶ Gutman, *supra* note 37, at 397 (“Establishing an appropriate level of monetary compensation for the wrongfully convicted is a profoundly difficult exercise.”).

¹⁷⁷ *Id.* at 405–07.

¹⁷⁸ 28 U.S.C. § 2513. Representative Maxine Walters introduced a bill on June 11, 2020, to raise annual compensation for exonerees to \$70,000 and to adjust that number for inflation annually. H.R. 7193, 116th Cong. § 2 (2020). The bill was “referred to the Committee on the Judiciary” but never passed. *Id.*

¹⁷⁹ N.H. REV. STAT. ANN. § 541-B:14(II) (2018).

compensation at \$175,000.¹⁸⁰ Caps make it harder to individualize damages for wrongful conviction but give comfort to legislators concerned about “episodic, unplanned, and potentially large payouts” to exonerees.¹⁸¹ Other states have a more malleable standard for calculating damages: in Connecticut, for example, the state starts by awarding twice the amount of the average median household income for the state for each year that an exoneree spent in prison.¹⁸² Connecticut then adds or subtracts from that amount based on factors such as the person’s age, income, vocational training and level of education at the time of conviction, and the loss of familial relationships, as well as any time spent on death row.¹⁸³

2. *Services.* A truly comprehensive statute must also include services that help exonerees reintegrate into society. In 2018, Kansas passed a robust wrongful conviction compensation statute.¹⁸⁴ The statute provides \$65,000 in compensatory damages and additional benefits, including participation in the state healthcare program, housing assistance, counseling, personal financial literacy, and tuition assistance to exonerees.¹⁸⁵ The Kansas law also accounts for expungement of the conviction.¹⁸⁶ Including such provisions likely does not cost the state significantly more, but these provisions make a significant difference for exonerees, who struggle reintegrate into society.¹⁸⁷

¹⁸⁰ OKLA. STAT. tit. 51, § 154(A)(2) (2021).

¹⁸¹ Gutman, *supra* note 37, at 373.

¹⁸² CONN. GEN. STAT. § 54-102uu(d)(2) (2016) (“[T]he 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 . . .”).

¹⁸³ *See id.* (“The Claims Commissioner may decrease or further the award amount by twenty-five per cent based on an assessment of relevant factors . . .”); *id.* § 54-102uu(c) (delineating some of the factors that the Claims Commissioner may consider).

¹⁸⁴ *E.g.*, Innocence Staff, *Kansas Governor Signs One of the Strongest Compensation Laws in the Country*, INNOCENCE PROJECT (May 15, 2018), <https://innocenceproject.org/kansas-governor-signs-compensation-law/> (“Today, Kansas Governor Jeff Colyer signed one of the strongest laws in the nation providing state compensation for innocent people who were wrongfully convicted (House Bill 2579).”).

¹⁸⁵ KAN. STAT. ANN. § 60-5004(e)(1)(A), (4) (2018).

¹⁸⁶ *Id.* § 60-5004(h)(1) (“Upon entry of a certificate of innocence, the court shall order the associated convictions and arrest records expunged and purged from all applicable stated and federal systems . . . regardless of whether the claimant has prior criminal convictions.”).

¹⁸⁷ *See supra* Section II.B.

C. CHOICE: WHO DECIDES?

Wrongful conviction deprives exonerees of agency.¹⁸⁸ Many states provide services to exonerees, but Professor Gutman suggests that state compensation statutes should give exonerees the choice between different services and the choice to pursue litigation or statutory compensation.¹⁸⁹ Restoring choice to exonerees and recognizing that exonerees know their own needs helps them to rebuild their lives and regain agency lost after years in prison.¹⁹⁰ Furthermore, if exonerees have the opportunity to choose which services they need to get back on their feet with the help of a knowledgeable reentry specialist who can give them advice on what services would best meet their needs, exonerees can receive both the benefits of a statutory remedy's efficiency and the individualized relief that usually follows litigation.¹⁹¹

IV. CURRENT COMPENSATION PROCESS IN GEORGIA

Georgia has a private bill system of compensation, meaning that exonerees must convince both chambers of the Georgia General Assembly to pass a bill in order to receive compensation.¹⁹² First, the exoneree must file a claim with the Claims Advisory Board (the Board) within two years of the event giving rise to the claim.¹⁹³ A claim must be filed with the Board by November 15, before the

¹⁸⁸ See Gutman, *supra* note 37, at 436 (“The wrongly convicted were, during their incarceration, largely denied the freedom to choose.”).

¹⁸⁹ See *id.* at 438 (“[T]he exonerated are better served by moving from a depersonalized compensation regime to one that offers an election of remedy that permits them, to some degree, to select a remedial path better suited for their personal needs and circumstances.”).

¹⁹⁰ See *id.* at 436 (“Choice, which allows for the collaboration between reentry specialists, attorneys as counselors, and other professionals to assist in the decision-making, may help at least some of the exonerated obtain what they need to rebuild their lives.”).

¹⁹¹ See *id.* (“Choice, even if necessarily limited, navigates a path between a prescribed and capped award, which ignores individual circumstances, and . . . adversarial litigation . . .”).

¹⁹² See O.C.G.A. § 28-5-83 (2021) (explaining that the General Assembly considers compensation bills as it would any other bill).

¹⁹³ *Id.* § 28-5-86 (“No claim or resolution for the payment of compensation under this part shall be considered by the board or the General Assembly unless notice of claim has been filed with the board within two years after the date of the event giving rise to the claim.”).

introduction of a resolution into the Georgia General Assembly.¹⁹⁴ Second, the Board investigates the claim and may hold a hearing to determine whether to recommend compensation for that exoneree to the General Assembly.¹⁹⁵ The Board “makes its own judgment concerning whether the exoneree should receive compensation and passes its judgment to the House Appropriations Committee.”¹⁹⁶ Third, the House Appropriations Committee reviews the compensation claim, and the resolution follows the same procedure as all other bills to become law.¹⁹⁷ As of the writing of this Note, twelve exonerees have been compensated through the private bill system in Georgia.¹⁹⁸

¹⁹⁴ *Id.* § 28-5-80 (“No such resolution may be introduced unless a notice of claim has been filed with the board on or before the fifteenth day of November immediately preceding the introduction of the resolution . . .”).

¹⁹⁵ *Id.* § 28-5-83 (“Upon receipt of a notice of claim, the board may begin its investigation thereof . . .”).

¹⁹⁶ *Id.* (“[T]he board shall prepare a statement including its findings, its determination of the merits of the claim, its recommendation as to the payment thereof, and such other information as the board deems advisable. Such statement shall be immediately transmitted to the chairman of the House Appropriations Committee . . .”).

¹⁹⁷ The House Appropriations Committee either recommends or does not recommend the bill, and then it must pass both chambers of the General Assembly. *Id.* (“The resolution shall be acted upon in the same manner as provided by law and the rules of the House and Senate for action upon bills.”).

¹⁹⁸ Calvin Johnson, Jr., H.R. Res. 1053, 136th Gen. Assemb., Reg. Sess. (Ga. 2000) (providing \$500,000 for 16 years in prison); Clarence Harrison, Ga. H.R. Res. 108, 148th Gen. Assemb., Reg. Sess. (Ga. 2005) (providing \$1 million for 17.81 years in prison); Robert Clark, H.R. Res. 102, 143rd Gen. Assemb., Reg. Sess. (Ga. 2007) (providing \$1.2 million for 24 years in prison); Willie Otis “Pete” Williams, H.R. Res. 1078, 144th Gen. Assemb., Reg. Sess. (Ga. 2008) (providing \$1.2 million for 21.5 years in prison); John Jerome White, H.R. Res. 161, 145th Gen. Assemb., Reg. Sess. (Ga. 2009) (providing \$500,000 for 22.5 years in prison); Lathan Rydell Word, H.R. Res. 73, 149th Gen. Assemb., Reg. Sess. (Ga. 2013) (providing \$400,000 for 11.76 years in prison); Kenneth Gardiner, H.R. Res. 24, 157th Gen. Assemb., Reg. Sess. (Ga. 2021) (providing \$1 million for 25 years in prison); Mark Jones, H.R. Res. 25, 157th Gen. Assemb., Reg. Sess. (Ga. 2021) providing \$1 million for 25 years in prison); Dominic Luci, H.R. Res. 26, 157th Gen. Assemb., Reg. Sess. (Ga. 2021) providing \$1 million for 25 years in prison); Dennis Perry, H.R. Res. 593, 158th Gen. Assemb., Reg. Sess. (Ga. 2022) (providing \$1.23 million for 20 years in prison); Kerry Robinson, H.R. Res. 626, 158th Gen. Assemb., Reg. Sess. (Ga. 2022) (providing \$480,000 for 17 years in prison); *Terry Lee Wanzer*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3716> (last updated June 28, 2019) (providing \$100,00 for 18 years in prison in 1996).

The current system has several problems. First, the amount that Georgia exonerees receive from the state under this process has not always been consistent, and few records show why exonerees received the specific amounts awarded.¹⁹⁹ Different exonerees may also receive different protections based on how the compensation provision is drafted.²⁰⁰ Second, the process for receiving compensation by private bill is confusing, and navigating it requires considerable political savvy.²⁰¹ Third, the board is not required to include attorneys or those who have an understanding of wrongful conviction and its causes. Finally, the current Claims Advisory Board can only recommend compensation if a claimant can show that a state agency or department is at fault for the injury.²⁰² A wrongful conviction statute in Georgia would address these disparities and ensure that the compensation process is simpler and more equitable.

V. 2022 LEGISLATIVE SESSION: THE WRONGFUL CONVICTION COMPENSATION ACT

During the 2022 Georgia legislative session, Representatives Holcomb, Houston, Efstraction, and Hugley proposed Georgia House Bill 1354, entitled the Wrongful Conviction Compensation Act.²⁰³ The bill would have created a Wrongful Conviction Review Panel (the Panel) to review claims for wrongful conviction compensation.²⁰⁴ The panel would have been comprised of a judge who presides over felony criminal matters in a state court appointed by the Chief Justice of the Georgia Supreme Court; a current district attorney appointed by the governor; a criminal defense attorney appointed by the governor; an attorney, forensic science expert, or law professor with expertise in wrongful convictions appointed by the Speaker of the House of Representatives; and an

¹⁹⁹ See *supra* note 198 for variations in compensation.

²⁰⁰ See *supra* note 198 for discussion of past compensation bills.

²⁰¹ See *supra* notes 192–197 and accompanying text; Bernhard, *When Justice Fails*, *supra* note 97, at 94 (discussing the difficult process for exonerees passing a private compensation bill and the dangers of requiring a political process for compensating exonerees).

²⁰² See O.C.G.A. § 28-5-80(a) (“Any resolution relative to a claim against the state or any of its departments or agencies must be introduced in the House of Representatives.”).

²⁰³ H.B. 1354, 158th Gen. Assemb., Reg. Sess. (Ga. 2022).

²⁰⁴ *Id.* § 28-5-111 (c)(1).

attorney, forensic science expert, or law professor with expertise in wrongful convictions appointed by the President of the Senate.²⁰⁵ This panel would have been authorized to determine whether an exoneree receives compensation and the amount of the compensation.²⁰⁶ It would have prepared a written recommendation for the appropriate compensation to the Claims Advisory Board, which the Board would accept as its own and send to the Chief Justice of the Supreme Court of Georgia.²⁰⁷ If the Chief Justice accepted the recommendation before September 1, they would include the compensation recommended in the amended budget for the judiciary for the next fiscal year.²⁰⁸

The panel would be able to recommend that an exoneree or “claimant” receive between \$50,000 and \$100,000 for each year that they were imprisoned, along with reasonable attorney’s fees and other expenses “in connection with all associate criminal and habeas corpus proceedings, obtaining discharge from confinement, and filing of a claim for compensation under this part.”²⁰⁹ The panel would be able to recommend that the exoneree receive up to twenty-five percent of the award up front, but the remainder would be paid out over the course of several years based on the exoneree’s age through an annuity.²¹⁰

To be eligible for compensation, the claimant would be required to meet several criteria by a preponderance of the evidence.²¹¹ First, the claimant would have to show that they were “convicted of one or more felonies and subsequently incarcerated.”²¹² Second, the claimant would have to proclaim that they are innocent.²¹³ Third,

²⁰⁵ *Id.* § 28-5-111(c)(2)(A)–(E).

²⁰⁶ *Id.* § 28-5-112(d)(1)–(2).

²⁰⁷ *Id.* § 28-5-115(a)–(b). Note that in the language of the bill, the Claims Advisory Board “shall adopt the recommendation of the panel as its own.” *Id.* The bill therefore seems to require that the board pass along the panel’s recommendation. If this was not the intention, this Note recommends that the statute set out a standard of review that the Claims Advisory Board may use to review the Panel’s decision.

²⁰⁸ *Id.* § 28-5-115(c).

²⁰⁹ *Id.* § 28-5-114(b)(1)–(2).

²¹⁰ *Id.* § 28-5-114(d)(2)–(3). The government would pay out the remainder of the compensation to a claimant over the age of sixty over ten years and a claimant under the age of sixty over twenty years. *Id.*

²¹¹ *Id.* § 28-5-112(a).

²¹² *Id.* § 28-5-112(a)(1).

²¹³ *Id.* § 28-5-112(a)(2).

the claimant would have to show that they “did not commit or suborn perjury, fabricate evidence, or engage in conduct intended to bring about the conviction”²¹⁴ Importantly, the bill excludes an admission of guilt “later found to be false” or a guilty plea from its definition of perjury.²¹⁵ Fourth, the claimant would have to show that they were “exonerated of the crime” for which they are seeking compensation.²¹⁶ The bill explains that a claimant is considered “exonerated” when they had their “judgment of conviction reversed or vacated, or w[ere] granted a new trial, and upon retrial, acquitted;” or “[r]eceived a pardon based on innocence.”²¹⁷

Then, in order to receive compensation, the claimant would have to establish to the Panel by a preponderance of the evidence that (1) “the claimant received a pardon based on innocence for the conviction;” (2) “the claimant was exonerated based on grounds of innocence;” or (3) “the claimant did not commit the crime for which the claimant was convicted and . . . did not commit any lesser included offenses.”²¹⁸ The panel would be allowed to also “give due consideration, in the interest of justice to the difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence, and other factors not caused by the claimant or those acting on his or her behalf.”²¹⁹

The bill passed the Georgia House of Representatives on March 15, 2022 by a vote of 157 to 11.²²⁰ The Senate Judiciary Committee, however, did not hold a vote to pass the bill on to the Senate floor.²²¹ In the committee hearing, members questioned whether innocent exonerees should be eligible for compensation when their wrongful

²¹⁴ *Id.* § 28-5-112(a)(3).

²¹⁵ *Id.*

²¹⁶ *Id.* § 28-5-112(a)(4).

²¹⁷ *Id.* § 28-5-111(a)(1)(A)–(C).

²¹⁸ *Id.* § 28-5-112(b)(1)–(2). It seems that once an individual can show that they are eligible for consideration, the standard to determine compensation will be easily overcome. Several of the prongs from the two standards overlap. *Id.* §28-5-112(a)(1)–(4).

²¹⁹ *Id.* § 28-5-112(c).

²²⁰ *HB 1354*, GA. GEN. ASSEMBLY, <https://www.legis.ga.gov/legislation/62105> (last visited May 15, 2022).

²²¹ *Hearing on H.B. 1354 Before the S. Comm. on the Judiciary*, 158th Gen. Assemb., Reg. Sess. (Ga. 2022) (statement of Sen. Brian Strickland, Chairman, S. Comm. on the Judiciary), <https://vimeo.com/showcase/9076408?video=701714879>.

conviction was not caused by the State's own wrongdoing.²²² When he decided not to hold a vote, the chair of the committee explained that the General Assembly had time to further consider this issue in the 2023 Legislative term, given that exonerees could follow the private legislation process in the meantime.²²³

A. THE BILL'S STRENGTHS

The compensation bill proposed in the 2022 legislative session has many strengths. First, the bill awards exonerees a minimum of \$50,000 for each year of imprisonment and attorney's fees.²²⁴ The minimum monetary figure matches the federal wrongful conviction compensation statute.²²⁵ Most importantly, the bill only requires that exonerees prove their innocence by a preponderance of the evidence, not by the clear and convincing or reasonable doubt standard.²²⁶ More Georgia exonerees should, therefore, benefit from

²²² See *id.* (statement of Sen. John Kennedy, Secretary, S. Comm. on the Judiciary) (explaining that he would be more interested in the bill if the standard for compensation required the exoneree to show prosecutorial misconduct or that the "state did something wrong"); see also *id.* (statement of Sen. Brian Strickland, Chairman, S. Comm. on the Judiciary) (asking why the bill required the exoneree to prove their innocence rather than prosecutorial misconduct or other misconduct of the state).

²²³ See *id.* (explaining that the committee would not hold a vote yet so that it could further consider the bill and stating that "we have the luxury of having a process" in place for compensating exonerees).

²²⁴ H.B. 1354, 158th Gen. Assemb., Reg. Sess., § 28-5-114(a)(1)–(4) (Ga. 2022).

²²⁵ 28 U.S.C. § 2513(e) (providing \$50,000 for every year that an exoneree spent incarcerated). One difference between the federal statute and the Georgia bill is that under the Georgia bill, the panel may award exonerees between \$50,000 and \$100,000 per year on a case-by-case basis, while under the federal statute, the board may only award an upward variance if the exoneree was on death row. Compare Ga. H.B. 1354 §28-5-114(a)(1) (allowing the panel to recommend an award between \$50,000 and \$100,000 a year), with 28 U.S.C. § 2513(e) (providing \$100,000 for every year that an exoneree spent on death row).

²²⁶ Compare Ga. H.B. 1354, with IOWA CODE § 663A.1(2)–(3) (2021) (requiring that exonerees prove by clear and convincing evidence that they did not commit the crime they were convicted of), and N.J. STAT. ANN. § 52:4C-1 (2021) (stating that those "who can demonstrate [innocence] by clear and convincing evidence" can recover under the statute), and H.B. 172, 155th Gen. Assemb., Reg. Sess. (Ga. 2019) (requiring that exonerees prove their innocence beyond a reasonable doubt).

the statute than they would under a statute featuring a higher burden of proof.²²⁷

The compensation bill also does not bar exonerees who have pled guilty or offered a false confession from receiving compensation.²²⁸ Furthermore, the bill does not bar an exoneree from filing a civil suit if they are compensated through the statute's process.²²⁹ Instead, it requires, first, that if the exoneree has already won a judgment or settled a claim before coming to the Panel, the amount recovered—minus attorney's fees and other costs—will be deducted from the Panel's recommended award.²³⁰ Second, it requires that if the exoneree wins a judgment or settles after they received an award under Georgia House Bill 1354, they will reimburse the state for the amount awarded by the panel—minus attorney's fees and costs.²³¹ The reimbursement, however, cannot exceed the amount of the judgment or settlement.²³²

Furthermore, the Wrongful Conviction Compensation Panel is an improvement on the Claims Advisory Board. Because it is comprised of a judge, prosecutor, criminal defense attorney, and two wrongful conviction experts, it will be better equipped to review these compensation claims than the Claims Advisory Board.²³³ Having experts review these claims may benefit an exoneree more than a jury panel's review as well because most people in an average jury pool will not have the same knowledge as the experts on the panel about how wrongful convictions occur and how to best help exonerees. Though courts provide an established factfinding process, the Georgia Constitution's gratuities clause likely will not allow courts to decide how to distribute funds to exonerees.²³⁴ The

²²⁷ See Gutman & Sun, *supra* note 133, at 719–20, 720 n.79 (discussing how the burden of proof in a compensation statute affects the number of exonerees compensated).

²²⁸ Ga. H.B. 172 § 28-5-112(a)(3) (establishing eligibility requirements for compensation).

²²⁹ Ga. H.B. 1354 § 28-5-116 (a)–(b).

²³⁰ *Id.* § 28-5-116 (a).

²³¹ *Id.* § 28-5-116 (b).

²³² *Id.*

²³³ See *id.* § 28-5-111(c)(1)(A)–(E) (discussing the make-up of the panel).

²³⁴ GA. CONST. art. III, § VI, para. VI (“[T]he General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public . . .”); *id.* art. I, § II, para. IX (“Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the

clause requires that the legislature “define the types of victims eligible to receive compensation and to vary the amounts of compensation according to need.”²³⁵ Furthermore, as discussed above, the bill does not preclude the exoneree from also pursuing possible claims in court, which leaves the courtroom doors open to exonerees seeking further relief.

Finally, the bill reduces the amount of political influence on the compensation process because the Chief Justice of the Supreme Court of Georgia would submit the Panel’s award to the legislature as a part of the judiciary’s amended budget. An exoneree does not need to find sponsors and votes for a standalone resolution.²³⁶ Under this process, the likeability of an exoneree, the appeal of their story, or the political power of the district attorney in the county where the exoneree was convicted would not be in the spotlight; only the overall expenditures of the state that year would be relevant.²³⁷ At the same time, this structure also follows the Georgia Constitution’s requirement that the legislature give final approval of compensation awards.²³⁸

B. THE BILL’S WEAKNESSES

This Section will consider the weaknesses of the bill based on two goals for such a bill: first, passing a bill that will best serve exonerees, and second, passing a bill at all. Part VI will propose possible solutions to these problems.

There are a few problems with the bill when considering how to pass a statute in Georgia that best serves exonerees. First, the bill does not provide any services such as health insurance, education credits, counseling, or job training. Second, the bill does not provide

General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.”).

²³⁵ *Id.* art. III, § VI, para. VI.

²³⁶ See Ga. H.B. 1354 § 28-5-115(c) (explaining that after approval by the Chief Justice of the Supreme Court of Georgia, the recommendation of the panel would be incorporated into the proposed budget for the judiciary that year).

²³⁷ See *Cleared by DNA*, *supra* note 1 for an example of a county district attorney influencing the legislature’s compensation decision (discussing how Spencer Lawton, the district attorney in Echols and Scott’s case, actively and successfully campaigned against their compensation resolution before the Georgia General Assembly).

²³⁸ See GA. CONST. art. III, § VI, para. VI.

a standard for how the Panel should determine how much a specific exoneree should receive between \$50,000 and \$100,000 besides stating that the Panel should “strive for consistency between claimants.”²³⁹ A revision providing the Panel with some guidance as to how to best compensate exonerees within the range provided would facilitate consistency between exonerees and fairness to each individual so that bias would not infect a particular case. Third, the bill requires that 75% of the award be paid out in an annuity over ten or more years without requiring that the exoneree receive the present value of their award. Finally, the bill provides a three-year statute of limitations from the date that the exoneree meets one of the eligibility requirements.²⁴⁰ Ideally, the Panel would have more flexibility to hear meritorious claims where the statute of limitations has passed.

The bill also has one weakness in terms of its ability to pass through both chambers of the Georgia General Assembly. As discussed above, some members of the Senate Judiciary Committee have expressed concern that this bill would compensate exonerees whether or not government officials engaged in misconduct.²⁴¹ Though the focus of a compensation statute should be on the fact that an innocent person lost years of their life in prison for a crime they did not commit, instead of on how egregious the government conduct was that led to the conviction, if addressing the concerns of the opponents would allow the bill to pass, legislators should consider addressing them.

VI. REVISING THE WRONGFUL CONVICTION COMPENSATION ACT

Though the bill is a step in the right direction, this Section suggests revisions to the bill. Certain changes will improve the quality of compensation exonerees receive and will increase the likelihood that the Georgia General Assembly will pass the bill.

²³⁹ Ga. H.B. 1354 § 28-5-114(e); *see also id.* § 28-5-114(b)(1) (providing the range of possible compensation amounts but not a standard to help the board to determine how much compensation to provide to an exoneree).

²⁴⁰ *Id.* § 28-5-113(a).

²⁴¹ *See supra* note 238 and accompanying text.

A. PROPOSED CHANGES TO H.B. 1354

First, the bill should provide access to services such as healthcare and education and assign a caseworker to the exoneree to help them choose the services that would help them the most. Second, the bill should provide factors for the Panel to consider when deciding how much to award an exoneree. To address opponents' concerns about compensating exonerees when there was no government misconduct, the bill could allow the panel to consider government misconduct as a factor in deciding how much to award an exoneree. Third, the bill should ensure that exonerees receive the present value of portions of the award that are paid out through an annuity over time. Fourth, the Panel should have the flexibility to allow for exceptions to the three-year statute of limitation in the interest of justice.

1. *Including Government Services in Award and Allowing for Choice Between the Services.* A successful compensation statute recognizes that exonerees need nonmonetary support.²⁴² Exonerees leave prison with no support system, no credit history, no recent job history, and often with medical and mental health conditions.²⁴³ If exonerees meet the preponderance of the evidence standard, they should be assigned a case worker to discuss the services to which they have access.²⁴⁴ Each exoneree would be able to choose between several options of housing assistance, job assistance, financial advising, state health insurance, mental health counseling, and education credits. Case workers would work with exonerees to choose the services that would actually benefit them individually. For example, if an exoneree has the education for a desired job but needs access to health insurance while applying for that job, the exoneree could decline the education credits and receive health insurance instead. At a minimum, the bill should give every

²⁴² See Gutman, *supra* note 37, at 408–10 (discussing the importance of providing services to exonerees and the different statutory methods that states use to address this need).

²⁴³ See *id.* at 420–30 (discussing the needs of exonerees).

²⁴⁴ See, e.g., TEX. HEALTH CODE ANN. § 614.021 (b)(1)–(3) (2021) (“The office shall develop a plan to use existing case management functions to assist wrongfully imprisoned persons who are discharged from the Texas Department of Criminal Justice in” accessing medical and dental services, mental health resources, and other services that may be available to exonerees.).

exoneree the option to receive state health insurance to help them with high medical costs that often accompany their prolonged incarceration.²⁴⁵ Legislators should look both to Kansas's and Texas's compensation statutes as guides for how to provide necessary services to exonerees.²⁴⁶

2. *Amount of Award.* The bill should either provide that all exonerees who meet the standards provided under the bill receive a determined amount of compensation or provide guidance to the Panel on how much to compensate each exoneree.

If a bill provided that all exonerees receive the same amount of compensation, it would add consistency to the system and remove possible bias. For example, the statute could require that all exonerees who prove their innocence by a preponderance of the evidence receive \$70,000 per year of their incarcerations, to be increased every year based on inflation.²⁴⁷

At a minimum, the Panel should have factors to help guide it in its decision-making regarding compensation. If the Panel must review certain factors in every case, its analysis would be more structured, and bias would be less likely to affect its compensation decisions. Possible factors that the Panel would consider could include whether government misconduct was involved in bringing about the conviction, whether the government should have known that its evidence did not justify continuing the prosecution, whether the exoneree had children at the time of the conviction, what type of annual income the exoneree could have had, what effects the incarceration had on the exoneree's mental and physical health, and the weight of evidence in support of innocence. The list would not be exhaustive and no one factor would be determinative. For

²⁴⁵ See *Returning Home: Access to Healthcare After Prison*, NAT'L CONF. OF STATE LEGISLATURES (July 2009) <https://www.ncsl.org/documents/health/returninghome.pdf> ("Incarcerated people experience increased rates of mental illness, substance abuse, and chronic and infectious disease. These populations also frequently are adversely affected by socioeconomic risk factors for poor health, including lower educational attainment and higher rates of poverty. Given this risk, such populations are in clear need of significant health services. Particularly upon release from an institution or correctional facility, former inmates may require substantial assistance in securing health care benefits and access.").

²⁴⁶ See TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(d) (providing health insurance coverage to exonerees); KAN. STAT. ANN. § 60-5004(e)(1)(A), (4) (2018) (providing health insurance among other services to exonerees).

²⁴⁷ See H.R. 7193 (suggesting Congress raise the rate of compensation to \$70,000).

example, even if there is no clear government misconduct in a given case, other factors such as the toll that imprisonment took on the exoneree's physical health and the amount of the evidence of the exoneree's innocence could weigh in favor of recommending a higher amount of compensation.

It is important to note that lack of government misconduct should not be a bar to compensation under the statute. First, it can be very difficult to prove government misconduct.²⁴⁸ Evidence that would show misconduct may be unavailable to exonerees due to the passage of time.²⁴⁹ Second, in many wrongful conviction cases, there is no explicit government misconduct.²⁵⁰ For example, a wrongful conviction arising from a rape could be based on the victim's incorrect identification of the defendant and flawed testing of a hair sample—neither resulting from intentional misconduct on the part of police or prosecutors.²⁵¹ Third, even in these cases where there is no clear government misconduct, the state still made a mistake and put an innocent citizen, who it had a duty to protect, in prison. When deciding whether to put the monetary burden on a government agency that was likely negligent in putting an innocent person in prison or on the innocent person who lost years of their life for a crime they did not commit, it seems only fair to put that burden on the government entity. As discussed throughout this Note, exonerees need help after spending years in prison where they were not able to earn income, contribute to social security, or build a life for themselves.²⁵² The state should compensate them for the loss incurred as a result of its prosecution.

3. Ensuring that the State Pays the Exoneree the Present Value of the Award if the Award is Paid Out Through an Annuity. As previously discussed, House Bill 1354 requires that the state pay 25% of the compensation award in a lump sum and then requires

²⁴⁸ See Gutman, *supra* note 37 (“[S]uch misconduct is not present in some cases and difficult to prove in others.”).

²⁴⁹ See Gutman & Sun, *supra* note 133 (“It also goes without saying that a wrongful conviction may have been the result of unconstitutional acts or omissions, but as years pass evidence is lost and proving it may become increasingly challenging.”)

²⁵⁰ See *id.* at 722–23 (discussing how wrongful convictions can result without government misconduct).

²⁵¹ See *id.* (providing eye witness misidentification and faulty forensic testing as an example where the government did not necessarily engage in misconduct).

²⁵² See *supra* Section II.B.

that the state pay the rest of the money out through an annuity prorated annually over the course of twenty years for those under sixty, and over the course of ten years to those ages sixty and older.²⁵³ For example, if the panel awarded an exoneree one million dollars, he would receive \$250,000 upfront and \$750,000 in twenty annual payments of \$37,500. The problem with this compensation structure is that the exoneree will not receive the value of the remaining award that they would have if they received it all at once. The exoneree loses the opportunity to invest that money so that it can grow over the course of twenty years, and due to inflation, the future payments will be worth less in the future. Therefore, the state should be required to purchase an annuity that will pay out the present value of the exoneree's award. States like Texas, for example, have required that an annuity be paid out at its present value.²⁵⁴

4. *Statute of Limitations.* Finally, a revised bill should allow the Panel to waive the three-year statute of limitations for exonerees to bring these cases in the interest of justice. If policymakers include this language in the bill, the Panel could award compensation to exonerees who need it in cases where the exoneree's delay was minimal or their need is particularly great.

VII. CONCLUSION

Passing a wrongful conviction compensation statute in Georgia would provide exonerees with a path to rebuilding their lives and reintegrating into society. Under the current system, exonerees must go through the confusing Claims Advisory Board process and hope that they have enough public support for the members of the General Assembly to approve their compensation, with no guarantee that they will get protections or equitable compensation as compared to those who have come before them. Furthermore, a statute would disincentivize police and prosecutors from allowing wrongful convictions to occur in the first place by making compensation more likely.

²⁵³ Ga. H.B. 1354 § 18-5-114(d)(1).

²⁵⁴ TEX. REV. CIV. STAT. ANN. § 103.053 (Vernon 2015) ("Standard annuity payments are based on a present value sum equal to the amount to which the person is entitled . . .").

Georgia House Bill 1354 provides the foundation for a successful statute, but the bill fails to provide many services that could be instrumental to rebuilding an exonerated individual's life. The bill could also provide further guidance for the Panel it creates in deciding how much to compensate exonerees in order to discourage bias and to promote consistency in the system.

An improved bill should first provide exonerees with services such as state government health insurance, education credits, counseling, and job search help. It should also provide a case manager to exonerees to help them to choose the services that would be most helpful to them in rebuilding their lives. Furthermore, setting out factors, such as whether government misconduct contributed to the conviction, for the Panel to consider when deciding how much to compensate exonerees could help to facilitate compromise with those concerned about innocent people receiving compensation in cases lacking government misconduct. Finally, a bill should ensure that exonerees who receive their award in an annuity receive the present value of the award intended by the Panel and that the Panel can consider an exoneree's claim for compensation after the statute of limitation has run in certain cases.

Georgia should account for the mistakes that its justice system has made. In the United States, we are attached to the idea that our justice system is the best in the world. If we want to be able to reach the high standards that we as a state and country set for ourselves, then we should reckon with our justice system's past mistakes and atone for them.

