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COMPENSATING THE WRONGFULLY CONVICTED: A
PROPOSAL TO MAKE VICTIMS OF WRONGFUL
INCARCERATION WHOLE AGAIN

*By: Alanna Trivelli**

INTRODUCTION

An exoneree of a wrongful conviction who is released from prison has three basic routes to recovery in most states: he can file a civil rights lawsuit, he can present a private bill to the legislature, or he can obtain relief through a state compensation statute if the incident occurred in one of the thirty states with a statute enacted.¹ Victims who seek relief through state compensation statutes are more likely to receive some form of compensation, due to the length of time and amount of money that special legislation and civil rights lawsuits require.² Civil rights lawsuits are often barred on procedural and immunity grounds, and special legislation requires an extended period of time, a large sum of money, and political influence.

In the current criminal justice system, it is unlikely that wrongful convictions will cease to be a problem. Due to the legal standards in trials, jury bias, and current laws that allow forms of government and police misconduct with no punishment; there seems to be no way to positively identify criminals without mistakenly convicting an innocent person. The United States legal system, in theory, favors defendants, but in reality shows bias in favor of the government. Causes of wrongful convictions, including but not limited to a lack of DNA evidence, mistaken eye witness testimony, and prosecutorial and police misconduct, will not dissipate until laws are in place to protect the accused. States need to make strides to correct the damage caused by incarcerating an innocent individual. However, only thirty states, the District of Columbia, and the federal system attempt to repair damage to victims of wrongful conviction through enacted compensation statutes. Even in states that do have statutory relief in place, the award is often mediocre and does not adequately compensate the individual. State remedies vary in the amount of monetary damages available, and very few states offer any type of noneconomic damages. The current system for compensating victims of wrongful incarceration is insufficient to meaningfully repair the harm done to exonerees. This comment argues that the best attempt for a state to correct the damage is to borrow from principles of tort law and enact comprehensive statutory schemes in order to make victims of wrongful incarceration whole again.

Comprehensive and holistic state compensation statues should be enacted on grounds of fairness and justice to make victims who are wrongfully convicted and exonerated whole again to the best of a state's ability. Ideal stat-

¹ John Shaw, Note, *Exoneration and the Road to Compensation: The Tim Cole Act and Comprehensive Compensation for Persons Wrongfully Imprisoned*, 17 TEX. WESLEYAN L. REV. 593, 601 (2011).

² *Id.*

utes would provide economic and noneconomic damages in order to reintegrate an innocent person into society. States have a responsibility to fully compensate those who are injured as a result of the state's legal system. A legal system that is inaccurate loses validity in the eyes of citizens; therefore, states must take sufficient measures to validate the system when it fails. This may be accomplished through comprehensive statute reform. A state's legitimacy and ideals of justice require holistic compensation.

Part I of this comment presents a brief overview of the current state compensation systems for those who are wrongly imprisoned, including model legislation proposed by the Innocence Project and the current shortcomings of compensation statutes across the United States. Part II discusses the principles behind compensatory damages in tort law, and the foundation and reasoning for making a victim whole again. Varying forms of relief are also discussed. Part III applies these principles of tort law to the arena of wrongful convictions to show states have a responsibility to make victims of wrongful convictions whole again. Potential problems arising from this reform and suggested solutions to any of those problems are also addressed. This comment concludes with an emphasis on the legal importance of correcting the injury done to innocent victims who are wrongfully incarcerated for crimes they did not commit. Innocent exonerees deserve to be placed in a similar position upon exoneration to where they could have been without the conviction.

I. A SURVEY OF CURRENT STATE COMPENSATION STATUTES

This section provides an overview of state compensation statutes in the United States. Currently, only thirty states, the District of Columbia, and the federal system have compensation statutes enacted to give victims of wrongful conviction relief.³ States that do not have a compensation statute in place include: Alaska, Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Michigan, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming.⁴ This section details each state's compensatory relief showing the wide range of types of aid and the apparent shortcomings of some state statutes.

³ See *Compensating the Innocent*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/how-is-your-state-doing> (last visited Apr. 6, 2016).

⁴ *Id.*

A. States Providing Economic Relief Only

States that provide only monetary compensation include: Alabama, California, Connecticut, the District of Columbia, Iowa, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New York, Ohio, Oklahoma, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin.⁵ Alabama's statute gives a minimum of \$50,000 for each year of incarceration to wrongfully convicted individuals. Any additional funds must be appropriated by the legislature through a private bill.⁶ In California, a claimant can receive up to \$140 per day of incarceration.⁷ Connecticut provides no minimum or maximum award, and any award can be based on claims of loss of life, liberty, earnings, earning capacity, familial relationships, reputation, pain and suffering, mental suffering, and attorney's fees; the statute also specifies that expenses may include funds for employment training, counseling, and tuition.⁸

The District of Columbia statute requires the claimant be pardoned or the conviction overturned on grounds of innocence, and the claimant must provide clear and convincing proof of innocence.⁹ Iowa provides \$50 per day of incarceration, as well as lost wages up to \$25,000 per year plus attorney's fees.¹⁰ In Maine, a victim may recover up to \$300,000 upon receiving a pardon.¹¹ Minnesota provides reimbursement for legal fees, as well as a minimum of \$50,000 per year of incarceration with an additional \$25,000 per year of supervised release or listing on a sex offender registry.¹² In Mississippi, a claimant is eligible for \$50,000 per year of incarceration with a maximum award of \$500,000.¹³ Missouri's statute provides \$50 per day of post-conviction confinement.¹⁴ Nebraska compensates victims for damages that are shown to proximately result from the conviction and limits the award to a maximum of \$500,000.¹⁵ One of the most unfavorable statutes in

⁵ *Id.*

⁶ ALA. CODE § 29-2-150 (2015).

⁷ CAL. PENAL CODE § 4900 (West 2015).

⁸ CONN. GEN. STAT. § 54-102uu (2015).

⁹ D.C. CODE § 2-422 (2015).

¹⁰ IOWA CODE § 663A.1 (2015).

¹¹ ME. REV. STAT. tit. 14, § 8241 (2015).

¹² MINN. STAT. § 590.11 (2015).

¹³ MISS. CODE ANN. § 11-44-7 (2015).

¹⁴ MO. REV. STAT. § 650.058 (2015).

¹⁵ NEB. REV. STAT. § 29-4604 (2015).

place is that of New Hampshire, offering only \$20,000 for the entirety of the wrongful incarceration.¹⁶

In New York, the court determines a fair and reasonable amount of damages for the victim.¹⁷ Ohio provides \$40,330 per year of incarceration, as well as lost wages and attorney's fees.¹⁸ Oklahoma's statute offers \$175,000 for the entirety of the wrongful incarceration.¹⁹ Tennessee awards a total of \$1,000,000 for the conviction's entirety.²⁰ In Utah, a claimant can receive the monetary equivalent of the average payroll wage in the state for each year of incarceration up to a maximum fifteen years.²¹ Virginia gives 90% of the Virginia per capita personal income per year of recovery as well as a tuition award of \$10,000, but awards differ for victims exonerated through DNA evidence and exonerations through non-biological evidence.²²

Washington's recovery includes \$50,000 for each year in prison as well as time spent waiting for the trial, along with an additional \$50,000 for each year on death row and \$25,000 per year spent on parole, a community custody registry, or a sex offender registry; Washington also provides up to \$75,000 for child support and attorney's fees.²³ In West Virginia, a claimant receives damages based on the court's determination of fair and reasonable compensation.²⁴ Finally, those wrongfully convicted in Wisconsin receive a maximum \$25,000.²⁵

B. States Providing Economic and Noneconomic Relief

States that provide monetary and noneconomic forms of relief include: Colorado, Florida, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, North Carolina, Texas, and Vermont.²⁶ Colorado provides compensation to a person or family member of a person who has been wrongfully incarcerated, exonerated, and found to be actually innocent; a claimant may receive \$70,000 for each year of incarceration with an additional \$50,000 each year spent on death row, plus tuition waivers and

¹⁶ N.H. REV. STAT. ANN. § 541-B_14 (2015).

¹⁷ N.Y. COURT OF CLAIMS ACT LAW § 8-b (McKinney 2015).

¹⁸ OHIO REV. CODE ANN. § 2743.48 (West 2015).

¹⁹ OKLA. STAT. tit. 51, § 154 (2015).

²⁰ TENN. CODE ANN. § 9-8-108 (2015).

²¹ UTAH CODE ANN. § 78B-9-405 (West 2015).

²² VA. CODE ANN. § 8.01-195.11 (2015).

²³ WASH. REV. CODE § 4.100.060 (2015).

²⁴ W. VA. CODE § 14-2-13a (2015).

²⁵ WIS. STAT. § 775.05 (2015).

²⁶ *How is Your State Doing?*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/how-is-your-state-doing> (following specific state hyperlinks) (last visited Apr. 7, 2016).

healthcare from the state.²⁷ In Florida, an applicant can receive \$50,000 per year of incarceration, with a maximum of \$2,000,000 as well as reimbursement for fines and costs and 120 tuition hours.²⁸

The statute in Illinois provides for a total of \$85,350 for imprisonment up to five years, \$170,000 for imprisonment from five to fourteen years, and \$199,150 for imprisonment of more than fourteen years; the statute also reimburses attorney's fees up to a quarter of the compensation award and job search and placement services.²⁹ Louisiana awards \$25,000 per year of imprisonment with a maximum of \$250,000 and also may include costs of job or skill training for three years, medical, and counseling services for up to six years, and tuition expenses.³⁰ The Maryland compensation package includes a reasonable monetary amount plus counseling services.³¹ In Massachusetts, a victim can be awarded up to \$500,000 with consideration of physical, emotional, and educational services, plus the criminal record is expunged.³²

Montana offers only educational aid to victims of wrongful conviction.³³ In New Jersey, the statute awards compensation for double the amount of the individual's income in the year prior to incarceration or \$50,000 per year, whichever amount is greater, as well as vocational training, tuition assistance, counseling, housing aid, and health insurance.³⁴ North Carolina provides \$50,000 per year of incarceration with a maximum amount of \$750,000, as well as job skills training and tuition waivers.³⁵

Texas provides one of the most comprehensive statutes, providing \$80,000 per year of imprisonment with an annuity, as well as an additional \$25,000 per year on death row or registered as a sex offender, plus awarding compensation for child support, 120 hours of tuition, the opportunity to be a part of the Texas State Employee Health Plan, and other various reintegration services.³⁶ Lastly, in Vermont, a claimant can receive between \$30,000 and \$60,000 per year of incarceration as well as up to ten years of state health care, lost damages, reimbursement of attorney's fees, reintegration services, and mental and physical health care costs that occur

²⁷ COLO. REV. STAT. § 13-65-101 (2015).

²⁸ FLA. STAT. § 961.06 (2015).

²⁹ 705 ILL. COMP. STAT. 505/8 (2015).

³⁰ LA. REV. STAT ANN. § 15:572.8 (2015).

³¹ MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis, 2015).

³² MASS. GEN. LAWS ch. 258D, §§ 5,7 (West 2015).

³³ MONT. CODE ANN. §53-1-214 (2015).

³⁴ N.J. STAT. ANN. § 52:4C (West 2015).

³⁵ N.C. GEN. STAT. ANN. § 148-82 (West 2015).

³⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 103.001, 103.052–.054 (West 2015).

between the date of release and the date of the award; the statute also expressly stipulates that the award is not subject to state income taxes.³⁷

C. Limits on State Compensation Statutes

State compensation statutes often limit compensation through multiple constraints and in many cases completely bar recovery.³⁸ Some states preclude recovery unless there is a pardon. In California, one can recover only if he did not plead guilty in order to protect another person from prosecution.³⁹ The District of Columbia limits recovery by barring compensation if the claimant pled guilty.⁴⁰ Iowa similarly precludes recovery if the applicant pled guilty.⁴¹ Minnesota only provides relief if a claim is filed within two years of the exoneree's release.⁴² In Mississippi, there is a statutory limit on damages of \$500,000 and a claimant can only recover if he files within three years of a pardon or an overturning of a conviction that is consistent with innocence.⁴³ Nebraska's statute only provides relief for damages that are shown to have proximately been the result of the wrongful imprisonment.⁴⁴ New Hampshire requires that the Board of Claims find the individual innocent.⁴⁵ In New York, the applicant must file within two years of a pardon and he must not have brought about the conviction by his own conduct.⁴⁶

Limited recovery is also found in Ohio where only those who did not plead guilty can recover as long as they file within two years of exoneration.⁴⁷ Oklahoma limits recovery to those who did not plead guilty and those not in prison for any other action.⁴⁸ In Tennessee, only those who file a claim within one year of an exoneration or pardon can recover.⁴⁹ Utah compensates only those who can show innocence by clear and convincing evidence.⁵⁰ Virginia commands that the conviction be vacated and disqualifies recovery for those who pled guilty, unless charged with a capital of-

³⁷ VT. STAT. ANN. tit. 13, § 5572 (West 2015).

³⁸ Cf. CAL. PENAL CODE § 4903 (2015); D.C. CODE § 2-425 (2016).

³⁹ CAL. PENAL CODE § 4903 (West 2015).

⁴⁰ D.C. CODE § 2-425 (2015).

⁴¹ IOWA CODE § 663A.1 (2015).

⁴² MINN. STAT. § 590.11 (West 2015).

⁴³ MISS. CODE ANN. § 11-44-7, 11-44-9 (2015).

⁴⁴ NEB. REV. STAT. § 29-4604 (2015).

⁴⁵ N.H. REV. STAT. ANN. § 541-B:9 (2015).

⁴⁶ N.Y. COURT OF CLAIMS ACT LAW § 8-b (McKinney 2015).

⁴⁷ OHIO REV. CODE ANN. § 2743.48 (West 2015).

⁴⁸ OKLA. STAT. tit. 51, § 154 (2015).

⁴⁹ TENN. CODE ANN. § 9-8-108 (2015).

⁵⁰ UTAH CODE ANN. § 78B-9-303 (West 2015).

fense.⁵¹ In West Virginia, those whose conduct brought about their own conviction are barred from recovery and the claim must be filed two years after the pardon or dismissal.⁵² Wisconsin also refuses relief to anyone who contributed to the conviction.⁵³

Many other states also place limits on recovery. In Florida, a claimant must be found innocent by a prosecuting attorney or administrative court.⁵⁴ Illinois requires a pardon by the Governor or a certificate of innocence from the Circuit Court.⁵⁵ A claimant in Louisiana must prove factual innocence.⁵⁶ Maryland commands a Governor's pardon.⁵⁷ Massachusetts grants recovery only where the applicant files within two years of release, and the state refuses recovery to those who pled guilty.⁵⁸ Montana, offering only educational aid, limits those who can recover to those who are exonerated through post-conviction DNA testing.⁵⁹ New Jersey precludes recovery to those who pled guilty and limits the time of recovery to two years of the release or pardon.⁶⁰ North Carolina requires a pardon.⁶¹ Lastly, Vermont bars awards unless a claimant files within three years of the exoneration.⁶²

D. The Innocence Project Model Legislation for Compensation

The Innocence Project, a national non-profit organization that assists wrongfully convicted individuals, provides a model statute for compensation which the organization believes adequately repairs the damage done to those wrongfully convicted. The legislation provides for services a victim can access immediately following release.⁶³ The standard of proof recommended is a preponderance of the evidence, and those eligible include recipients of pardons, those whose judgments have been vacated or reversed, and anyone whose crime fell under a statute that violated a state or federal

⁵¹ VA. CODE ANN. § 8.01-195.10 (2015).

⁵² W. VA. CODE ANN. § 14-2-13a (2015).

⁵³ WIS. STAT. § 775.05 (2015).

⁵⁴ FLA. STAT. § 961.03 (West 2015).

⁵⁵ 705 ILL. COMP. STAT. 505/8 (2015).

⁵⁶ LA. STAT ANN. § 572.8 (2015).

⁵⁷ MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2015).

⁵⁸ MASS. GEN. LAWS ch. 258D, §§ 1,8 (2015).

⁵⁹ MONT. CODE ANN. §53-1-214 (2015).

⁶⁰ N.J. STAT. ANN. § 52:4C-3-4 (West 2015).

⁶¹ N.C. GEN. STAT. § 148-82 (2015).

⁶² VT. STAT. ANN. tit. 13, § 5576 (2015).

⁶³ *Model Legislation: An Act Concerning Claims for Wrongful Conviction and Imprisonment*, THE INNOCENCE PROJECT 1 (DEC. 2014), available at <http://www.innocenceproject.org/free-innocent/improve-the-law/CompensationModelBill2015.pdf>.

Constitution.⁶⁴ The model statute does not preclude relief to those who falsely confessed or entered a guilty plea. The legislation expressly claims that damages should not be offset by the state, and includes a provision for automatic expunging of the criminal record if the claimant files within three years of the exoneration.⁶⁵

The model statute recommends a minimum \$62,500 per year of imprisonment, with an additional \$62,500 per year on death row, and a minimum of \$31,000 per year on parole, probation, or registered as a sex offender.⁶⁶ These damages should reflect consideration of lost wages, legal fees, medical, and dental expenses including physical injuries or sicknesses.⁶⁷ Monetary costs also include reimbursement for tuition and fees paid for education and children's education.⁶⁸ Damages include compensation for child support payments and compensation for housing, transportation, subsistence, mental and physical health care costs, and re-integration services.⁶⁹ The award is not capped at any amount, and the award is not treated as taxable income.⁷⁰

If a conviction was reversed or vacated, the statute proposes three years of immediate services including housing, education, training, transportation, subsistence monetary aid, and re-integration services.⁷¹ Lastly, the statute provides a lifetime of physical and mental health care.⁷² Although the Innocence Project's model statute provides both monetary and economic compensation, recovery under the statute does not achieve comprehensive and holistic relief. The recovery is still limited in time to those who file within three years, and limits persons who are eligible. Part IV, Section B of this comment discusses a more thorough and inclusive scheme of compensation that all states should adopt in order to truly compensate those who are wrongly incarcerated.

⁶⁴ *Id.* at 2–3.

⁶⁵ *Id.*

⁶⁶ *Id.* at 6.

⁶⁷ *Model Legislation: An Act Concerning Claims for Wrongful Conviction and Imprisonment*, THE INNOCENCE PROJECT 1 (DEC. 2014), available at <http://www.innocenceproject.org/free-innocent/improve-the-law/CompensationModelBill2015.pdf>.

⁶⁸ *Id.* 4–5.

⁶⁹ *Id.* at 5.

⁷⁰ *Id.* at 5–6.

⁷¹ *Id.* at 9.

⁷² *Model Legislation: An Act Concerning Claims for Wrongful Conviction and Imprisonment*, THE INNOCENCE PROJECT 1, 3–4 (DEC. 2014), available at <http://www.innocenceproject.org/free-innocent/improve-the-law/CompensationModelBill2015.pdf>.

E. Shortcomings in the Current System

While some states provide noneconomic and economic relief for exonerates, there are major shortcomings in the system as a whole that would be addressed by enacting comprehensive statutes. The first major problem is that twenty states do not have any legislation in place for compensating the wrongfully convicted. In almost half of the United States, people who are wrongly incarcerated for crimes they did not commit are not guaranteed any recovery. In those jurisdictions, individuals have no outlet of relief aside from lawsuits and proposing legislation.⁷³ The time and money that lawsuits and legislation require, coupled with the slim chances of recovery due to immunity statutes and politics, often leave victims in states lacking compensation statutes empty handed.

Because of the limits of state compensation statutes discussed in Part I, Section C of this comment, as well as procedural barriers and other bars to compensation, state statutes are sometimes an obstacle within themselves instead of serving as a meaningful way to repair damage done to those who have been innocently convicted of crimes they did not commit.⁷⁴ These barriers often make victims suffer even more to obtain compensation from a system that previously failed them.⁷⁵ Shortcomings in the system not only interfere with principles of fairness and justice that govern compensating the wrongfully convicted, but also deteriorate the legitimacy of the system in the public's eyes and the victim's eyes.⁷⁶ The lack of consistency in state compensation statutes across the United States also undermines the importance of repairing harm done to innocent people on behalf of the state whose system miscarried justice.

II. PRINCIPLES OF TORT LAW: MAKING THE VICTIM WHOLE AGAIN

Tort law in the United States includes damages and theories behind these damages to compensate individuals who have been wronged. One goal of tort damages is to make the victim whole again by restoring him to the position prior to the wrong done to him, thus in effect, making him as if the wrong never occurred.⁷⁷ Certain remedies in tort law, such as compensatory damages, exist to restore an individual to this prior position. Remedies in

⁷³ Shaw, *supra* note 1.

⁷⁴ Jean Coleman Blackerby, Note, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179, 1219 (2003).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 KAN. L. REV. 39, 45 (1994).

tort attempt “to make the victim of a wrong whole by providing him with the compensatory damages necessary for re-directing him, economically if not physically, from his post-wrong position back to the position he occupied in the pre-wrong status quo.”⁷⁸

While the wrong committed to the victim is now part of history and cannot be undone, compensatory damages seek to position the victim in a place as if the wrong had not occurred.⁷⁹ Compensatory damages aim to correct the wrong and make the plaintiff whole, or leave the plaintiff in no worse condition following the defendant’s injury to the person, property, economic interest, or rights than the plaintiff would have been in otherwise.⁸⁰ The purpose behind these types of damages is to give the victim a monetary award to restore him to the situation he would be in if the wrong was never committed.⁸¹

Compensatory damages include, but are not limited to, property damage, lost wages, medical expenses, lost profits, value of destroyed goods, physical pain, mental suffering, lost financial support, and loss of consortium.⁸² The standard calculation for compensatory damages is based on economic and noneconomic losses, both tangible and intangible.⁸³ Damages flowing from injury to a person, which are recoverable, include physical and mental medical expenses and treatment, loss of earnings, impairment of earning capacity, loss of physical function, loss of services, education, aggravation of older mental or physical conditions, pain and suffering, emotional distress, loss of enjoyment of life, loss of consortium, grief, humiliation and loss of favorable reputation.⁸⁴ Past and future losses and both are compensated.⁸⁵ Economic damages include, but are not limited to, loss of investments and the value thereof, loss of business, loss of profit, and loss due to delay⁸⁶ These are commonly defined as objective and verifiable money losses while noneconomic damages are generally referred to as subjective

⁷⁸ Avihay Dorfman, *What is the Point of Tort Remedy?*, 55 AM. J. JURIS. 105 (2010).

⁷⁹ *Id.* at 108.

⁸⁰ *Damages*, CORNELL UNIV. LEGAL INFO. INSTITUTE, <https://www.law.cornell.edu/wex/damages> (last visited Apr. 7, 2016).

⁸¹ DAMAGES IN TORT ACTIONS § 3.01 COMPENSATORY DAMAGES: INTRODUCTION (Matthew Bender 2015).

⁸² *See id.*

⁸³ DAMAGES IN TORT ACTIONS § 3.04 PROVING THE DAMAGES TO BE COMPENSATED (Matthew Bender 2015).

⁸⁴ DAMAGES IN TORT ACTIONS § 3.03 PROVING THE UNDERLYING TORT (Matthew Bender 2015).

⁸⁵ *Id.*

⁸⁶ *Id.*

and non-monetary losses.⁸⁷ Compensatory damages awards consider anything that might restore the victim to his pre-wronged position.

While harms in the past may never be undone, tort remedies seek to reshape the present and future to seem more hopeful for an individual, and in this way try to undo the harm done.⁸⁸ The goal is not to take away the injury, but rather to pursue placing the victim in the same place as he was situated in before the injury occurred. “Our sense of fairness requires that, as a matter of ‘corrective justice,’ victims who suffer injury because their rights have been wrongly denied should have recourse to a system that requires injurers to pay compensation.”⁸⁹ No victim should suffer more in attempting to recover for injuries. Damages should be provided using a holistic method to give the plaintiff a sense of satisfaction even though the defendant mistreated him, and that satisfaction extends to any losses that occurred due to the mistreatment.⁹⁰

Two theories of tort law should be compared in the context awarding damages. One theory clings tightly to the belief of making the victim whole again views tort damages as stipulating to conditions under which a court should command someone to pay for the damage a claimant is facing.⁹¹ The other theory views tort law as simply wrongs and redress, obligating people to refrain from causing injuries to others and if an injury is caused, then redress needs to be obtained and remedy is the main focus.⁹² Regardless of which theory is applied, there is a human need for harmed people to pursue vindication for their damage beyond meager compensation for the loss’s economic worth.⁹³ This need is the underlying justification for intangible and noneconomic injuries.

While the Supreme Court’s focus on damages in tort is typically punitive damages, the Court has repeatedly affirmed the theory behind compensatory damages.⁹⁴ “Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrong-

⁸⁷ DAMAGES IN TORT ACTIONS § 3.05 ECONOMIC AND NONECONOMIC DAMAGES (Matthew Bender 2015).

⁸⁸ Dorfman, *supra* note 78, at 108–109.

⁸⁹ F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 446 (2006).

⁹⁰ John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 445 (2006).

⁹¹ *Id.* at 468.

⁹² *Id.*

⁹³ Shuman, *supra* note 78, at 40.

⁹⁴ *See, e.g., Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986).

ful conduct.”⁹⁵ Damages of this type can include a plaintiff’s own monetary loss as well as other economic harms, and also harms such as damage of reputation, personal embarrassment, and mental distress and suffering.⁹⁶ The Court has acknowledged that while deterrence is an important purpose of damages, it sometimes operates through use of compensatory damages that are founded in defining what a plaintiff actually lost.⁹⁷ The principle of compensatory damages may be applied to wrongful conviction relief to provide an adequate remedy for wrongfully convicted victims.

III. APPLYING PRINCIPLES OF TORT LAW TO WRONGFUL CONVICTIONS

A. Making Exonerees Whole Again

States have a responsibility to make exonerees whole again by not only providing monetary compensation, but also affording noneconomic needs and access to services to address impacts of imprisonment.⁹⁸ Prison affects every aspect of an exonerees life, including but not limited to his physical and mental well-being, employment, social ability, and relationships.⁹⁹ “To properly account for systemic injustices and to restore public confidence in the judicial system, changes must occur to ensure that the wrongly convicted will be made as whole as possible after their release.”¹⁰⁰ Making an exoneree whole is therefore not only crucial for the individual, but also critical in ensuring confidence in the legal system in the citizens’ eyes. In tort law, damages should not only be satisfactory for the victimization and harm itself but also should account for the mistreatment that occurred.¹⁰¹ This theory should be applied to wrongful convictions. There is no doubt that exonerees are victimized by the system that wrongly convicted them; thus, damage awards should take responsibility for that as well as for the mistreatment to the individual because of the system’s uneven power balance.

⁹⁵ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (quoting *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 582 U.S. 424, 432 (2001)).

⁹⁶ *Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

⁹⁷ *Id.* at 307.

⁹⁸ Jennifer L. Chunias & Yael D. Aufgang, *Essay From the Innocence Project: Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105, 125 (2008).

⁹⁹ *Id.* at 111.

¹⁰⁰ Blackerby, *supra* note 74, at 1223.

¹⁰¹ Goldberg, *supra* note 90, at 442.

In both tort law and wrongful convictions, there is difficulty assigning equivalence between economic damages and the injury to the victim.¹⁰² For this reason, noneconomic damages in tort law are awarded.¹⁰³ This translates into the goal of damages for the wrongly convicted as well. “Money is not what makes individuals whole. The only way to truly restore individuals to any semblance of their previous lives is to reintegrate them into society so they can function as normal citizens.”¹⁰⁴ After an individual has been in prison, regardless of the amount of time, he needs help readjusting back to life in society.¹⁰⁵ This includes monetary assistance, educational assistance, physical or mental healthcare, and aid for other personal challenges.

There is little to no assistance for the wrongfully convicted as they attempt to re-enter society, but if tort principles were applied to exonerations, these individuals would have a chance to be fully reintegrated and restored to their pre-conviction situation.¹⁰⁶ Providing integrative and assistive services to exonerated persons is part of making a victim whole again and ensuring an exoneratee’s successful future.¹⁰⁷

It is a moral obligation on the part of the states that wrongfully convict an individual to compensate that victim. Corrective justice recognizes a responsibility to repair or “correct” an injury.¹⁰⁸ “Under the corrective justice theory, imposing tort damages on individuals embodies a widely accepted moral obligation on the part of a wrongdoer to make the injured party whole.”¹⁰⁹ This theory can be utilized regardless of whether blame is placed on the state for the wrongful conviction. The theory simply focuses on the victim: when a victim loses rights, there is a duty to fully restore him and his rights. This burden falls on the state in conviction cases because it is the state legal system that caused the damage. Therefore, the causation element is satisfied and corrective justice applies. Using corrective justice as a justi-

¹⁰² DAMAGES IN TORT ACTIONS § 3.01 COMPENSATORY DAMAGES: INTRODUCTION (Matthew Bender 2015).

¹⁰³ *See id.* (“An economic recovery may assuage damaged feelings or make the suffering of the plaintiff more bearable.”).

¹⁰⁴ Shaw, *supra* note 1, at 613.

¹⁰⁵ *See* Shaw, *supra* note 1, at 613 (“It just doesn't seem fair that after you take...years of a person's life and you think now that you can send them into the world and everything's going to be all right...you also have to have a lot of different things set up for people.”).

¹⁰⁶ *See* Blackerby, *supra* note 74, at 1215–1216.

¹⁰⁷ *See* Chunias & Aufgang, *supra* note 98, at 111.

¹⁰⁸ John C. P. Goldberg & Benjamin C. Zipursky, *Tort Law and Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 9 (John Oberdiek, ed. 2014).

¹⁰⁹ Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated- How to Fund Wrongful Conviction Compensation Statutes*, 44 IND. L. REV. 503, 527 (2011) (quoting Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 798 (2007)).

fication for state compensation statutes would ensure a holistic and comprehensive damages plan to make exonerees whole again.

The Supreme Court of the United States continually reaffirms the purpose behind compensatory damages.¹¹⁰ There is not a set measure to determining compensation for pain and suffering, both physical and mental, or for the loss of time for a career, or for permanent physical injury.¹¹¹ The Court has upheld general damages for proven and unproven injuries.¹¹² Damages for future pain and medical expenses have also been upheld by the Court wherever evidence shows future effects of an injury may occur.¹¹³ “Compensation is a fundamental principle of damages.”¹¹⁴ When an injury occurs, a party is authorized to be placed in the same position as he would have been prior to the injury.¹¹⁵ This language reaffirms the central purpose behind compensation, to make a victim whole again. The understanding of this concept goes to proof of harm being offered so reasonable damages can be provided.¹¹⁶ It may be difficult to put an economic amount on certain types of damages, but “just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.”¹¹⁷

It is difficult to assess a proper compensation award for a person wrongfully convicted. However, an appropriate amount of compensation should still be awarded. Personal injury verdicts in Virginia span through wide ranges, but some plaintiffs recover millions of dollars for simple accidents.¹¹⁸ As a point of comparison, in the same state, Victor Burnette received \$226,000 after losing eight years of his life due to a wrongful rape conviction.¹¹⁹ A verdict for 1.5 million dollars was upheld in a slip and fall case in Virginia in 1999.¹²⁰ In the same state, Thomas Haynesworth recovered just over one million dollars after spending twenty-seven years behind bars for a crime he did not commit.¹²¹ In Virginia, lack of medical diagnosis

¹¹⁰ Shuman, *supra* note 78, at 45.

¹¹¹ Kennon v. Gilmer, 131 U.S. 22, 27 (1889).

¹¹² FAA v. Cooper, 132 S. Ct. 1441, 1454 (2012).

¹¹³ Chesapeake & O.R. Co. v. Carnahan, 241 U.S. 241, 244 (1916).

¹¹⁴ Miller v. Robertson, 266 U.S. 243, 257 (1924).

¹¹⁵ *Id.*

¹¹⁶ Doe v. Chao, 540 U.S. 614, 621 (2004).

¹¹⁷ Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 302–3 (1986).

¹¹⁸ See e.g., Crouse v. Med. Facilities of Am. XLCIII, 86 Va. Cir. 168 (2013).

¹¹⁹ Frank Green, *Wrongful-Imprisonment Compensation Comes with Strings*, RICHMOND TIMES DISPATCH, Jan. 16, 2012, http://www.richmond.com/archive/article_451c2cde-db3d-5fdd-afc0-570f53e187b4.html.

¹²⁰ Kearsse-Jackson v. Farm Fresh, Inc., 48 Va. Cir. 196, 196 (1999).

¹²¹ Michael Bodine, *Virginia Makes Amends for Wrongful Imprisonment*, CAPITAL NEWS SERVICE, May

can carry over 2.5 million dollars due to a shortened life expectancy, but losing twenty-seven years of a life receives millions less.¹²² This grotesque paradox is unacceptable and is clear evidence that state compensation statutes need reform nationwide.

B. Need for Comprehensive Legislation for Compensating Wrongful Convictions

All states should adopt a holistic and comprehensive plan for compensating those individuals who have been wrongfully convicted on behalf of the state's legal system. This section addresses some aspects of a holistic scheme, and shows why comprehensive plans are necessary. Monetary relief is necessary to compensate victims, but money does not fully restore an exoneree. Economic damages fail to help with many problems victims face, such as a lack of job skills, lack of education, inexperience, mental and physical disorders, damaged reputation, lack of social or familial ties, and trouble adjusting to life outside prison.¹²³ Therefore, comprehensive services are necessary in order to restore those re-entering society as an innocent victim the system betrayed.

Noneconomic damages should be provided in the form of services. Some examples of needed assistance are employment training and counseling.¹²⁴ Everyday needs are often completely unavailable upon release. "The most daunting concerns for many of these exonerees are for the most basic and fundamental human needs such as housing, food, clothing, medical costs, transportation, identification documents, and other necessities."¹²⁵ These needs are not considered in most statutes. Money also does not aid in job training and access to job services, psychological help, or medical help.¹²⁶ Financial awards can assist in opening the door to some of these amenities, but ultimately services need to be provided. Healthcare, job opportunities, and educational opportunities are fundamental services that victims need after prison release.¹²⁷ Noneconomic damages in statutes should take into account "pain and suffering, inconvenience, mental anguish, physical im-

15, 2012, <https://capitalnews.vcu.edu/2012/05/15/virginia-makes-amends-for-wrongful-imprisonment/>.

¹²² *Macdonald v. Corrigan*, 85 Va. Cir. 165, 166 (2012).

¹²³ Kimberly A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 ALB. L. REV. 1415, 1419 (2012).

¹²⁴ *Id.* at 1417–1418.

¹²⁵ Donna McKneelen, *Oh Lord Won't You Buy Me a Mercedes Benz? A Comparison of State Wrongful Conviction Compensation Statutes*, 15 SCHOLAR 185, 188 (2013).

¹²⁶ Shawn Armbrust, Note, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 170 (2004).

¹²⁷ Shaw, *supra* note 1, at 617.

pairment, loss of capacity to enjoy life, loss of reputation, [and] loss of consortium, which may be substantial for the wrongly accused.”¹²⁸

The state can also provide other benefits to make victims whole again after suffering through wrongful incarceration. For instance, a false conviction should automatically be expunged from the victim’s record as to not further impede a job search and to help reduce the stigma associated with criminal behavior.¹²⁹ When an exoneration occurs without an expungement, it forces victims into explaining a false record to any potential employers. Additionally, a formal apology would assist in removing the label of “criminal” and disgrace associated with that label.¹³⁰

Furthermore, compensation statutes should be efficient, moving quickly without being procedurally barred. “Procedural fairness is a central problem with respect to exonerees, as wrongful convictions are often accompanied by unfair procedures.”¹³¹ When procedure fails an individual in the trial process, procedural barriers in the recovery process diminish hope of returning to society normally. The need for these resources is immediate, and victims should not have to wait months or years to recover what is rightfully theirs.¹³² These victims are tired of combatting the justice system and should not be forced to jump through hoops to be restored to justice.¹³³ The claims should also be low cost, as the claimants often do not have money upon release.¹³⁴ If a victim is exonerated but cannot afford to pursue compensation, the statute fails the very purpose it exists. The criminal justice system should not be opposed to correcting factual errors, so there is no need for a war to prove innocence between exonerees and disapproving legal standards, disinclined courts, flawed criminal investigations, insufficient representation, and a lack of resources.¹³⁵ Accepting errors and correcting the damage is the first step to a successful criminal justice system. “Ideally, compensation statutes should provide generous, rapid, and certain damage

¹²⁸ Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 712 (2002).

¹²⁹ Kimberly A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 ALB. L. REV. 1415, 1418 (2012).

¹³⁰ *Id.* at 1417–1418.

¹³¹ Evan J. Mandery et al., *Criminology: Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553, 581 (2013).

¹³² Chunias & Aufgang, *supra* note 98, at 122–23.

¹³³ *See id.* at 114.

¹³⁴ Justin Brooks & Alexander Simpson, *Find the Cost of Freedom: The State of Wrongful Conviction Compensation Statutes Across the Country*, 49 SAN DIEGO L. REV. 627, 641 (2012).

¹³⁵ Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 131 (2008).

awards, accompanied by education and social services, for all those who have been wrongly convicted and later exonerated.”¹³⁶

In addition to providing services, economic damages should still serve as a major aspect of compensation statutes. Economic costs stem from hardships incurred during incarceration, including lost opportunity, lost wages, and physical injury.¹³⁷ For example, money can sufficiently compensate lost income. Having immediate access to funds makes a great impact on an exonerate upon regaining their freedom. Awards that place exonerates in a well-enough position to achieve basic needs give victims a chance to survive without resorting to a life of crime.¹³⁸ Economic needs should not be capped because needs differ based on different situations. “The statutory damage caps on compensation for the wrongly convicted implicate the same special legislation and separation of powers concerns that other courts have used to strike down other damages recovery caps.”¹³⁹ A case-by-case approach for monetary awards is more appropriate.

Effective and just compensation statutes ideally would be inclusive so that all deserving individuals may recover for the damage resulting from a wrongful conviction, and the relief should be meaningful so as to make the victims whole again.¹⁴⁰ Because these victims face such severe injuries, justice demands increased compensation through economic damages and remedial services.¹⁴¹ Fair compensation statutes should include economic and noneconomic recovery to assist exonerates in every aspect of their new life.

C. Potential Problems and Solutions

States that do not wish to enact comprehensive compensation for victims of wrongful convictions will likely pose four main contentions with the proposed system. The first concern is the lack of justification for noneconomic damages. The second concern is funding and resources. Third, states may propose the cost of doing business argument, claiming they do not need to take responsibility for these wrongs. Lastly, states might attempt to argue that victims of this type cannot truly be made whole again, so the task is unachievable and a waste of money and resources.

¹³⁶ Adele Bernhard, Symposium, *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, 404 (2009).

¹³⁷ John Johnston, Note, *Reasonver v. Washington: Toward a Just Treatment of the Wrongly Convicted in Missouri*, 68 UMKC L. REV. 411, 411-12 (2000).

¹³⁸ Mandery et al., *supra* note 131, at 576.

¹³⁹ Lopez, *supra* note 128, at 709.

¹⁴⁰ Brooks & Simpson, *supra* note 134, at 667.

¹⁴¹ Lopez, *supra* note 128, at 722.

Regarding the first of these concerns, opponents of noneconomic damages argue that these types of damages do not work in the system because they have no real dollar value to fix or replace the harm, money does not truly compensate, and there is no measure for noneconomic damages and thus an inconsistency in rewards; therefore, opponents argue noneconomic damages should not be included in rewards.¹⁴² This criticism is not applicable to noneconomic damages awarded in wrongful conviction cases. Pain and mental trauma do have some calculable dollar value.¹⁴³ These are real injuries that can be alleviated with services such as counseling and medical treatment. If comprehensive systems were in place, there would be a way to provide monetary compensation for pain and suffering while additionally offering a treatment based healing process.

Money may truly compensate for types of noneconomic harm not provided by services. Monetary damages serve as a starting point for exonerees to begin again. Financial compensation, while only the first step in a holistic recovery system, acts as a form of reparation in assisting victims as they start a new life. While monetary rewards play a significant role in making the victim whole again, a system with exclusively monetary rewards fails to fully compensate victims.¹⁴⁴

Finally, it is possible to measure noneconomic harm as it relates to wrongful convictions. Services that provide education, healthcare, financial assistance, and other services are calculable and certain.¹⁴⁵ Providing these services to exonerees actually reduces the likelihood that a reward will be erratic and unpredictable.¹⁴⁶ States would ideally have services in place before a victim needs to access them. If all of this were in place, simply waiting for an exoneree to use them, there would be no chaos upon granting a victim access. The process would be very predictable and streamlined. For the reasons discussed, the criticisms of noneconomic damages do not relate to wrongful convictions.

¹⁴² Hubbard, *supra* note 89, at 493.

¹⁴³ See, e.g., *Musick v. United States*, 781 F. Supp. 445, 453 (W.D. Va. 1991) (awarding \$100,000 for past and future pain and mental anguish).

¹⁴⁴ See Stephanie Slifer, *How the Wrongfully Convicted are Compensated for Years Lost*, CBS NEWS (Mar. 27, 2014, 6:33 AM), <http://www.cbsnews.com/news/how-the-wrongfully-convicted-are-compensated>.

¹⁴⁵ See *Compensating the Wrongly Convicted*, THE INNOCENCE PROJECT (June 4, 2015 10:40 AM), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/compensating-the-wrongly-convicted>.

¹⁴⁶ See, e.g., *Wrongly Convicted get \$80,000 a Year in Texas*, NBC NEWS (Sep. 4, 2009 2:33 PM), http://www.nbcnews.com/id/32692576/ns/us_news-life/t/wrongly-convicted-get-year-texas/#.Vs3plPEy dW0 (describing Texas' comprehensive wrongful conviction compensation statute, which provides a set amount of money in addition to social services).

Another concern is that states may lack the necessary funding and resources to back comprehensive compensation statutes.¹⁴⁷ If a state can provide services to criminals leaving jail, it surely can provide services to victims falsely accused of crimes leaving jail. “In an age when state governments willingly spend tens and hundreds of millions of dollars to try to positively reintegrate the justly convicted back into society, the unjustly convicted must scrape, toil, and fight for arguable paltry portions of state dollars to positively reintegrate them.”¹⁴⁸ Some states provide compensation for innocent exonerees through the use of criminal fines collected through just convictions.¹⁴⁹ Other states access money for damage awards through police and prosecutor budgets.¹⁵⁰ If an exoneree were to file a civil suit, some entity of the government would pay for the judgment; therefore, states should embrace the obligation to award damages and thus, governments could better prepare for this payment instead of trying to deny recovery.¹⁵¹ Scholars suggest that if the government was held liable in this way, there would be a real incentive for the government to avoid constitutional harms and make better future investments.¹⁵²

In the alternative, states could create a separate fund to cover compensation costs. If a fund were set up correctly, interest could be produced and the fund would replenish itself while providing victims with sufficient compensation.¹⁵³ This would require a large initial investment by the state, but the state would not take a substantial hit every time a person became eligible for compensation and the states would be more prepared to provide more foreseeable and practicable damages.¹⁵⁴ The state may also set up victim compensation funds. One example of such fund is the Feinberg fund compensated victims of the 9/11 terrorist attacks to avoid lawsuits while still adequately helping victims.¹⁵⁵ This is an appropriate model for comprehensive statutes because the primary goal is to help victims; therefore,

¹⁴⁷ See Fernanda Santos & Janet Roberts, *Putting a Price on a Wrongful Conviction*, N.Y. TIMES, Dec. 2, 2007, http://www.nytimes.com/2007/12/02/weekinreview/02santos.html?_r=http://www.nytimes.com/2007/12/02/weekinreview/02santos.html?_r=0.

¹⁴⁸ Michael Owens & Elizabeth Griffiths, *Uneven Reparations for Wrongful Convictions: Examining the State Politics of Statutory Compensation Legislation*, 75 ALB. L. REV. 1283, 1284 (2011/2012).

¹⁴⁹ Mostaghel, *supra* note 108, at 523.

¹⁵⁰ Mostaghel, *supra* note 108, at 534.

¹⁵¹ Mostaghel, *supra* note 108, at 537.

¹⁵² Mostaghel, *supra* note 108, at 524–525.

¹⁵³ Mostaghel, *supra* note 108, at 540.

¹⁵⁴ Mostaghel, *supra* note 108, at 544.

¹⁵⁵ *Sept. 11, BP Oil Spill Fund-Master Kenneth Feinberg: Compensation Fills Need in Wake of Mass Catastrophes*, UNIV. OF VA. SCH. OF LAW, (Apr. 15, 2014), http://www.law.virginia.edu/html/news/2014_spr/feinberg_jefferson_medal.htm.

there are no restrictions or caps on payments through the Feinberg fund.¹⁵⁶ These funds use the principles of tort law in their recovery, thus making them adaptable to wrongful convictions.¹⁵⁷ The 9/11 compensation fund was based on donations, but the state could appropriate funds to take responsibility for injustices the state caused.

These types of funds are specially targeted toward handling fragile victims, and allow victims to tell their story in a meaningful way and receive compensation.¹⁵⁸ The method behind the funding is determining how much life is truly worth.¹⁵⁹ This is directly applicable to wrongful convictions, as these victims lost years of their life and all of the opportunities included in those years. While these types of funds acknowledge that money is a poor substitute for loss, they calculate awards based on what the victim would have earned over a lifetime if it were not for the tragedy, as well as providing additional funds for pain and suffering and other circumstances.¹⁶⁰ The fund offers free financial advice to eligible victims.¹⁶¹ For exonerees released from prison, this is a necessary service that should be available on behalf of the state. States could operate compensation systems by using a victim compensation fund similar to the Feinberg fund from 9/11 to create more predictable and meaningful damages.¹⁶² “The number of wrongfully convicted individuals is not high enough to seriously burden state treasuries.”¹⁶³ Therefore, the excuse of a lack of funding is not sufficient for a state’s failure to enact comprehensive compensation statutes.

Comprehensive statutes would ideally also require noneconomic resources for the wrongfully convicted. States already have systems in place for those on welfare and justly convicted persons re-entering society; therefore, expanding these resources to exonerees is plausible. Because states already have a wealth of resources to offer, there is no excuse for services not to be extended to exonerees to aid them as they face distinct problems re-entering the community.

States without compensation statutes often claim that innocent people convicted of crimes is simply the “cost of doing business” in the current

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

¹⁶⁰ Kenneth R. Feinberg, *Money Admonitions From 9/11*, N.Y. TIMES, Mar. 25, 2015, <http://www.nytimes.com/2015/03/26/your-money/money-admonitions-from-9-11.html>.

¹⁶¹ *Id.*

¹⁶² *See id.*

¹⁶³ Armbrust, *supra* note 126, at 181–182.

criminal justice regime, and therefore do not feel the need to take responsibility for these mistakes.¹⁶⁴ As one scholar argues, “The cost-of-doing-business argument should be repudiated for four reasons: (1) it does not save the state money; (2) it leads to treatment that is unfair; (3) it creates incentives to continue unfair treatment; and (4) it leads States to violate the Constitution.”¹⁶⁵ States do not put forth the “cost of doing business” argument in any other legal context. When states violate personal rights in every other aspect, they are held accountable for repairing the damage, whether through the federal government or the state itself. It is unfair to simply state that a person’s life is a “cost of doing business.” Because of the current imperfect system that is in place, states have a greater responsibility to protect individual rights and restore innocent victims. Seeking justice should be the state’s ultimate goal. Justice is not served when an innocent person is jailed. To restore the balance, states must take responsibility and compensate those who have been injured due to the state’s imperfect system.

Lastly, states argue that making a victim of wrongful incarceration whole again is an insurmountable task.¹⁶⁶ These individuals cannot regain the years spent behind bars; regardless, they should be compensated using monetary and noneconomic damages by the state that is accountable for the administration of the legal system that wrongfully incarcerated them.¹⁶⁷ Compensation and services do not truly correct the disturbance of an innocent person’s life, but comprehensive plans are extremely helpful in assisting recovery and integration back into the community.¹⁶⁸ The same can be said of tort law that victims cannot truly be made whole again because the harm is now part of history and cannot be undone. To argue that it does not fully compensate and so no attempt will be made to try to help these individuals negates the legal system’s purpose. This does not excuse a failure to act in order to attempt to restore the victim to their pre-injured position. The same principles from tort theory apply in order to do everything possible to try to right the wrong and make a victim of wrongful conviction truly whole again, and this responsibility falls on the state that incarcerated them.

¹⁶⁴ See David R. Dow, *Fictional Documentaries and Truthful Fictions: The Death Penalty in Recent American Film*, 17 CONST. COMMENT. 511, 529 (2000).

¹⁶⁵ Mostaghel, *supra* note 108, at 529.

¹⁶⁶ See Laurin Sellers, *Freed Brevard Man Ponders Next Move*, ORLANDO SENTINEL, May 17, 2005, http://articles.orlandosentinel.com/2005-05-17/news/0505170249_1_dalemberte-dedge-brevard.

¹⁶⁷ Chunias & Aufgang, *supra* note 98, at 128.

¹⁶⁸ McKneelen, *supra* note 125, at 210.

D. The Need for Restoration and Legitimacy

Tort damages assist in providing restoration to a harmed victim.¹⁶⁹ Theories behind tort damages suggest that culture values the litigant and wishes him restoration.¹⁷⁰ This applies to wrongful convictions because the re-establishment of the claimant, to make him whole again, does not relate to deterring the wrongdoer; instead the amount of damages is based wholly on the claimant's request.¹⁷¹ Because wrongful convictions are not always based on government misconduct, deterrence is not the main goal. Rather, the goal is restoring the victim. "What should matter for both injured persons and a society concerned with compensation of the injured is whether the tort process has a differential restorative effect for both tangible and intangible loss."¹⁷²

The proposed system includes a public manifestation that the exoneree is innocent. There are multiple methods to achieve this, but one form is a public apology. Apologizing not only validates the exoneree's injury but also serves to take responsibility as well as aid in restoring the victim.¹⁷³ Apologies force the injurer to take responsibility for the indignity that occurred while showing the victim respect.¹⁷⁴ Apologies are used in damages in defamation claims in tort law and translate well into wrongful convictions because the same issues are at stake.¹⁷⁵ In both contexts, harm to an individual's reputation needs to be undone. A public apology is one way to accomplish that and restore the individual's legitimacy in society's view.

Restoration is centered on making a claimant feel valued and rebalancing the power between the exoneree and the system that caused the damage. Compensation is a starting point to recognizing the injury.¹⁷⁶ When society assists wrongly incarcerated persons, and exhausts all possible options to aid in the restoration process, the problems exonerees face upon re-entering society are greatly diminished.¹⁷⁷ Restoring a victim is the foundation to making an individual whole again. Restoration is necessary because when no one apologizes or accepts responsibility for a wrongful conviction, soci-

¹⁶⁹ Shuman, *supra* note 78, at 50.

¹⁷⁰ Shuman, *supra* note 78, at 64.

¹⁷¹ Shuman, *supra* note 78, at 41–42.

¹⁷² Shuman, *supra* note 78, at 48.

¹⁷³ Shuman, *supra* note 78, at 68.

¹⁷⁴ Shuman, *supra* note 78, at 68.

¹⁷⁵ Shuman, *supra* note 78, at 68.

¹⁷⁶ Clow et al., *supra* note 123, at 1419–20.

¹⁷⁷ Clow et al., *supra* note 123, at 1428.

ety does not accept the exoneree as innocent, and the stigma of the crime stays with the individual long after release.¹⁷⁸

Holistic compensation statutes meaningfully lend to a state's legitimacy. Claimants desire to be treated fairly and with respect, and they will trust an authority more if the authority treats them with dignity, leading to long-term satisfaction.¹⁷⁹ Compensation serves as a process of restoration and closure as the state takes responsibility for the harm done.¹⁸⁰ Through the use of money and healing services, an innocent victim can successfully be restored. A state taking responsibility for its mistakes reinstates not only the exoneree's faith in the system but also the public perception and confidence in the system that they feel seeks justice.¹⁸¹ Therefore, the need for restoration goes beyond the individual alone to serve society's perception. "If compensated exonerees feel more valued than uncompensated exonerees... restored perceptions of social value and institutional legitimacy will foster increased compliance with the law."¹⁸²

A state's choice not to enact a compensation statute is a choice to extend the harm of a wrongfully convicted individual, thereby making the person feel even more diminished in society.¹⁸³ When released from prison, exonerees often feel a deep mistrust for the system and a diminished legitimacy for the authority that can only be reconciled by comprehensive compensation.¹⁸⁴ If the system has the capacity to fail in such a deep way as to wrongly send someone to prison, that individual has no hope that the system can function properly in any context. Individuals recognize the way they are procedurally handled by the state as a reflection of the individual's value, thus fairness in the system produces more than fair outcomes; it also produces a sense of restoration in the victim.¹⁸⁵ An individual that does not respect a system that failed them has no reason to follow its laws. If a state cannot take responsibility for its own mistakes, how then can it expect its own citizens to take responsibility?¹⁸⁶ For a state to maintain its legitimacy, it must be held accountable to compensate victims its own system wrongly jailed.¹⁸⁷

¹⁷⁸ McKneelen, *supra* note 125, at 189.

¹⁷⁹ Shuman, *supra* note 78, at 63-64.

¹⁸⁰ Clow et al., *supra* note 123, at 1420.

¹⁸¹ Clow et al., *supra* note 123, at 1438.

¹⁸² Mandery et al., *supra* note 131, at 582.

¹⁸³ Owens & Griffiths, *supra* note 148, at 1311.

¹⁸⁴ Mandery et al., *supra* note 131, at 581.

¹⁸⁵ Mandery et al., *supra* note 131, at 580.

¹⁸⁶ See Blackerby, *supra* note 74, at 1185.

¹⁸⁷ Blackerby, *supra* note 74, at 1185.

“A comprehensive plan of reform must be both preventative and compensatory. Only by working both to decrease the risk of executing the innocent and to restore the innocence those who were wrongfully convicted will the judicial system regain its legitimacy.”¹⁸⁸ A lack of responsibility on the state’s behalf in effect excuses the mistakes and misconduct within the system, and therefore citizens have reason to believe their misconduct will be excused as well.¹⁸⁹ A government only has legitimacy if the citizens respect it and agree to follow its rules. For a state to be a legitimate sovereign, it must take responsibility for errors in the system and make meaningful measures to repair the damage. It is uncontested that exonerations alter the way society views the criminal justice system; therefore, states have a necessary obligation to restore the legitimacy within the system for the benefit of the government, public, and exonerees.¹⁹⁰

IV. CONCLUSION

“Victims of wrongful conviction are often re-victimized post exoneration because the government fails to provide them with meaningful assistance.”¹⁹¹ Fairness and justice are contradicted when a state releases wrongfully incarcerated individuals into the world as if nothing happened, therein worsening the harm without meaningful compensation.¹⁹² Upon release from prison, these victims are not in a sufficient state, economically, or otherwise. When exonerees cannot find jobs, housing, transportation, and basic health needs, the state has failed them a second time by not taking care of someone wrongfully incarcerated. When a state fails to seek justice in the criminal system, the state has the obligation of accepting responsibility for the mistake and compensating those who were harmed.¹⁹³ States that are willing to accept that responsibility and enact a holistic and comprehensive statute for compensation add to the state’s legitimacy and can restore the exoneree.¹⁹⁴ States that do not provide sufficient comprehensive compensation in turn fail the exoneree a second time by further harming the individual.¹⁹⁵ For the reasons set forth in this comment, it is in the state’s best in-

¹⁸⁸ Blackerby, *supra* note 74, at 1225–26.

¹⁸⁹ Mostaghel, *supra* note 108, at 532.

¹⁹⁰ Garrett, *supra* note 135, at 57.

¹⁹¹ Clow et al., *supra* note 123, at 1417.

¹⁹² Mostaghel, *supra* note 108, at 531.

¹⁹³ Shaw, *supra* note 1, at 596.

¹⁹⁴ Shaw, *supra* note 1, at 600.

¹⁹⁵ Blackerby, *supra* note 74, at 1202.

terest to enact holistic compensation statutes applying tort law principles to achieve comprehensive relief for the wrongfully convicted.

States need to compensate innocent persons because it is an individual's right to be restored when the state's wrongful conduct caused the injury.¹⁹⁶ A state therefore owes a duty to its citizens. Claimants who were wrongfully convicted and who faithfully return to the system that harmed them deserve sufficient compensation so as to truly make them whole again. These individuals have suffered enough and deserve to be economically and non-economically compensated to the best of the state's ability to put them in a position as if the wrongful incarceration had never occurred. If nothing else, the state has a moral obligation to provide a comprehensive and holistic statutory mechanism to make whole wrongly convicted individuals.¹⁹⁷

¹⁹⁶ Owens & Griffiths, *supra* note 148, at 1296.

¹⁹⁷ Chunias & Aufgang, *supra* note 98, at 106.