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. Variations in the availability of 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. 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-

---

2 Id.
utes would provide economic and noneconomic damages in order to re-integrate 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. 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. This section details each state’s compensatory relief showing the wide range of types of aid and the apparent shortcomings of some state statutes.

---

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.\(^15\)

---

\(^5\) Id.
\(^7\) Cal. Penal Code § 4900 (West 2015).
\(^12\) Minn. Stat. § 590.11 (2015).
place is that of New Hampshire, offering only $20,000 for the entirety of the wrongful incarceration.\textsuperscript{16}

In New York, the court determines a fair and reasonable amount of damages for the victim.\textsuperscript{17} Ohio provides $40,330 per year of incarceration, as well as lost wages and attorney’s fees.\textsuperscript{18} Oklahoma’s statute offers $175,000 for the entirety of the wrongful incarceration.\textsuperscript{19} Tennessee awards a total of $1,000,000 for the conviction’s entirety.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{23} In West Virginia, a claimant receives damages based on the court’s determination of fair and reasonable compensation.\textsuperscript{24} Finally, those wrongfully convicted in Wisconsin receive a maximum $25,000.\textsuperscript{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.\textsuperscript{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

\textsuperscript{10} N.H. REV. STAT. ANN. § 541-B_14 (2015).
\textsuperscript{11} N.Y. COURT OF CLAIMS ACT LAW § 8-b (McKinney 2015).
\textsuperscript{12} OHIO REV. CODE ANN. § 2743.48 (West 2015).
\textsuperscript{13} OKLA. STAT. tit. 51, § 154 (2015).
\textsuperscript{14} TENN. CODE ANN. § 9-8-108 (2015).
\textsuperscript{15} UTAH CODE ANN. § 78B-9-405 (West 2015).
\textsuperscript{16} VA. CODE ANN. § 8.01-195.11 (2015).
\textsuperscript{17} WASH. REV. CODE § 4.100.060 (2015).
\textsuperscript{18} W. VA. CODE § 14-2-13a (2015).
\textsuperscript{19} WIS. STAT. § 775.05 (2015).
healthcare from the state. 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.

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. 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. The Maryland compensation package includes a reasonable monetary amount plus counseling services. 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.

Montana offers only educational aid to victims of wrongful conviction. 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. 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.

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. 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.

28 FLA. STAT. § 961.06 (2015).
32 MASS. GEN. LAWS ch. 258D, §§ 5, 7 (West 2015).
34 N.J. STAT. ANN. § 52:4C (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 Iowa similarly precludes recovery if the applicant pled guilty.40 Minnesota only provides relief if a claim is filed within two years of the exoneree’s release.41 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.42 Nebraska’s statute only provides relief for damages that are shown to have proximately been the result of the wrongful imprisonment.43 New Hampshire requires that the Board of Claims find the individual innocent.44 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.45

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.46 Oklahoma limits recovery to those who did not plead guilty and those not in prison for any other action.47 In Tennessee, only those who file a claim within one year of an exoneration or pardon can recover.48 Utah compensates only those who can show innocence by clear and convincing evidence.49 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).
42 MINN. STAT. § 590.11 (West 2015).
46 N.Y. COURT OF CLAIMS ACT LAW §§ 8-b (McKinney 2015).
47 OHIO REV. CODE ANN. § 2743.48 (West 2015).
50 UTAH CODE ANN. § 78B-9-303 (West 2015).
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. Wisconsin also refuses relief to anyone who contributed to the conviction.

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

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. 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

---

53 WIS. STAT. § 775.05 (2015).
54 FLA. STAT. § 961.03 (West 2015).
58 MASS. GEN. LAWS ch. 258D, §§ 1, 8 (2015).
60 N.J. STAT. ANN. § 52:4C-3-4 (West 2015).
Constitution.\textsuperscript{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.\textsuperscript{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.\textsuperscript{66} These damages should reflect consideration of lost wages, legal fees, medical, and dental expenses including physical injuries or sicknesses.\textsuperscript{67} Monetary costs also include reimbursement for tuition and fees paid for education and children’s education.\textsuperscript{68} Damages include compensation for child support payments and compensation for housing, transportation, subsistence, mental and physical health care costs, and re-integration services.\textsuperscript{69} The award is not capped at any amount, and the award is not treated as taxable income.\textsuperscript{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.\textsuperscript{71} Lastly, the statute provides a lifetime of physical and mental health care.\textsuperscript{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.

\textsuperscript{64} Id. at 2–3.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 6.
\textsuperscript{68} Id. 4–5.
\textsuperscript{69} Id. at 5.
\textsuperscript{70} Id. at 5–6.
\textsuperscript{71} Id. at 9.
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. 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. These barriers often make victims suffer even more to obtain compensation from a system that previously failed them. 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. 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. Certain remedies in tort law, such as compensatory damages, exist to restore an individual to this prior position. Remedies in
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."  

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. 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. 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.

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. The standard calculation for compensatory damages is based on economic and noneconomic losses, both tangible and intangible. 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. Past and future losses and both are compensated. 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 delay. 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.
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{94} “Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrong-

\textsuperscript{87} Damages in Tort Actions § 3.05 Economic and Noneconomic Damages (Matthew Bender 2015).
\textsuperscript{88} Dorfman, supra note 78, at 108–109.
\textsuperscript{91} Id. at 468.
\textsuperscript{92} Id.
\textsuperscript{93} Id., supra note 78, at 40.
ful conduct.” 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. 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. 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. Prison affects every aspect of an exoneree’s life, including but not limited to his physical and mental well-being, employment, social ability, and relationships. "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." 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. 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.

---

97 Id. at 307.
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. For this reason, noneconomic damages in tort law are awarded. 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.” After an individual has been in prison, regardless of the amount of time, he needs help readjusting back to life in society. 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. Providing integrative and assistive services to exonerated persons is part of making a victim whole again and ensuring an exoneree’s successful future.

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. “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.” 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.
Compensation 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.\textsuperscript{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.\textsuperscript{111} The Court has upheld general damages for proven and unproven injuries.\textsuperscript{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.\textsuperscript{113} “Compensation is a fundamental principle of damages.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{119} A verdict for 1.5 million dollars was upheld in a slip and fall case in Virginia in 1999.\textsuperscript{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.\textsuperscript{121} In Virginia, lack of medical diagnosis

\textsuperscript{110} Shuman,\textit{ supra} note 78, at 45.
\textsuperscript{111} Kennon v. Gilmer, 131 U.S. 22, 27 (1889).
\textsuperscript{112} FAA v. Cooper, 132 S. Ct. 1441, 1454 (2012).
\textsuperscript{113} Chesapeake & O.R. Co. v. Carnahan, 241 U.S. 241, 244 (1916).
\textsuperscript{114} Miller v. Robertson, 266 U.S. 243, 257 (1924).
\textsuperscript{115} Id.
\textsuperscript{118} See e.g., Crouse v. Med. Facilities of Am. XLCIII, 86 Va. Cir. 168 (2013).
\textsuperscript{120} Kearse-Jackson v. Farm Fresh, Inc., 48 Va. Cir. 196, 196 (1999).
\textsuperscript{121} Michael Bodine, \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{127} Noneconomic damages in statutes should take into account “pain and suffering, inconvenience, mental anguish, physical im-

\textsuperscript{122}Macdonald v. Corrigan, 85 Va. Cir. 165, 166 (2012).
\textsuperscript{123}Kimberly A. Clow et al., Public Perception of Wrongful Conviction: Support for Compensation and Apologies, 75 ALB. L. REV. 1415, 1419 (2012).
\textsuperscript{124}Id. at 1417–1418.
\textsuperscript{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).
\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{132} These victims are tired of combatting the justice system and should not be forced to jump through hoops to be restored to justice.\textsuperscript{133} The claims should also be low cost, as the claimants often do not have money upon release.\textsuperscript{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.\textsuperscript{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

\begin{thebibliography}{99}
\bibitem{129} Kimberly A. Clow et al., \textit{Public Perception of Wrongful Conviction: Support for Compensation and Apologies}, 75 ALB. L. REV. 1415, 1418 (2012).
\bibitem{130} \textit{Id.} at 1417–1418.
\bibitem{132} Chunias & Aufgang, \textit{supra} note 98, at 122–23.
\bibitem{133} See \textit{id.} at 114.
\end{thebibliography}
awards, accompanied by education and social services, for all those who have been wrongly convicted and later exonerated.”

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. For example, money can sufficiently compensate lost income. Having immediate access to funds makes a great impact on an exoneree upon regaining their freedom. Awards that place exonerees in a well-enough position to achieve basic needs give victims a chance to survive without resorting to a life of crime. 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.” 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. Because these victims face such severe injuries, justice demands increased compensation through economic damages and remedial services. Fair compensation statutes should include economic and noneconomic recovery to assist exonerees 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.

138 Mandery et al., supra note 131, at 576.
139 Lopez, supra note 128, at 703.
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, 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.


\(^{146}\) 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/right-convicted-get-year-texas/#.Vs3pJPEy 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,


\(^{149}\) 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.

there are no restrictions or caps on payments through the Feinberg fund.\textsuperscript{156} These funds use the principles of tort law in their recovery, thus making them adaptable to wrongful convictions.\textsuperscript{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.\textsuperscript{158} The method behind the funding is determining how much life is truly worth.\textsuperscript{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.\textsuperscript{160} The fund offers free financial advice to eligible victims.\textsuperscript{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.\textsuperscript{162} "The number of wrongfully convicted individuals is not high enough to seriously burden state treasuries."\textsuperscript{163} Therefore, the excuse of a lack of funding is not sufficient for a state’s failure to enact comprehensive compensation statues.

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 statues often claim that innocent people convicted of crimes is simply the “cost of doing business” in the current

\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} See id.
\textsuperscript{161} Id.
\textsuperscript{162} See id.
\textsuperscript{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.
\(^{167}\) Chunias & Aufgang, supra note 98, at 128.
\(^{168}\) McKnee, supra note 125, at 210.
D. The Need for Restoration and Legitimacy

Tort damages assist in providing restoration to a harmed victim.\textsuperscript{169} Theories behind tort damages suggest that culture values the litigant and wishes him restoration.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{173} Apologies force the injurer to take responsibility for the indignity that occurred while showing the victim respect.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\begin{itemize}
\item \textsuperscript{169} Shuman, \textit{supra} note 78, at 50.
\item \textsuperscript{170} Shuman, \textit{supra} note 78, at 64.
\item \textsuperscript{171} Shuman, \textit{supra} note 78, at 41–42.
\item \textsuperscript{172} Shuman, \textit{supra} note 78, at 48.
\item \textsuperscript{173} Shuman, \textit{supra} note 78, at 68.
\item \textsuperscript{174} Shuman, \textit{supra} note 78, at 68.
\item \textsuperscript{175} Shuman, \textit{supra} note 78, at 68.
\item \textsuperscript{176} Clow et al., \textit{supra} note 123, at 1419–20.
\item \textsuperscript{177} Clow et al., \textit{supra} note 123, at 1428.
\end{itemize}
entity 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.”

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. 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.

IV. CONCLUSION

“Victims of wrongful conviction are often re-victimized post exoneration because the government fails to provide them with meaningful assistance.” 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. 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. 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. States that do not provide sufficient comprehensive compensation in turn fail the exoneree a second time by further harming the individual. 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.\textsuperscript{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.\textsuperscript{197}

\textsuperscript{196} Owens & Griffiths, supra note 148, at 1296.
\textsuperscript{197} Chunias & Aufgang, supra note 98, at 106.