

Remedying a Lose-Lose Situation: How “No Win, No Fee” Can Incentivize Post- Conviction Relief for the Wrongly Convicted

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The law is a mighty machine. Woe to the unfortunate man who, wholly or in part innocent, becomes entangled in its mighty wheels, unless his innocence is patent or his rescue planned and executed by able counsel.

— Law Professor Edward Johnes¹

INTRODUCTION

Remedying the wrongful convictions plaguing America’s criminal justice system poses two distinct challenges. The first, and the focus of the majority of scholarly attention, is ensuring that the procedures leading to a conviction are formulated to minimize wrongful convictions. Indisputably, the most effective remedy to wrongful conviction is ensuring it does not happen in the first place. But short of that ideal solution, the second remedial objective is to ensure that wrongful convictions can be identified

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¹ MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED 159 (1991).

and overturned. In a system that accepts wrongful convictions as a collateral consequence of legitimate convictions, justice requires methods to redress the injuries suffered by innocent individuals languishing in prison.

This Article proposes a policy measure that will likely lead to an increase in exonerations by creating economic incentives for attorneys to represent clients post-conviction. The recommendation is for states to eliminate or reduce caps to indemnification statutes for wrongful convictions in order to create a steady cash flow for attorneys operating under a contingency fee arrangement to provide post-conviction legal assistance for impoverished inmates. To the extent that previous articles have discussed indemnification and removing limits to state compensation awards, they have mainly focused on the need to fully compensate a convicted individual who has been proven innocent.² This Article bolsters the need for eliminating limits to compensation statutes, not by arguing that more generous compensation is needed to make the wrongfully convicted individual whole; rather, more generous compensation will make it more likely that wrongfully convicted individuals are exonerated in the first place. Pairing indemnification statutes with a contingency-fee system for post-conviction relief can create incentives to take up the plight of a wrongfully convicted person for reasons other than moral compulsion. The current debate over compensation statutes misses this opportunity, a gap this Article seeks to fill.

This Article will proceed in four Parts. Part I will briefly describe the emphasis within legal scholarship on prophylactic measures to prevent wrongful convictions, at the expense of developing remedies for existing wrongly convicted individuals. Part II will discuss the challenges that convicted and imprisoned individuals face in securing legal counsel to advocate their claims of wrongful conviction.³ Section II.A will explore the missed opportunities created by ethical rules that prohibit contingency fee arrangements in criminal cases. It will also explore the ways in which post-conviction advocacy in criminal cases would not run afoul of these ethical rules, as most exoneration efforts are civil in nature. Section II.B will argue that even though contingent fee representation in civil suits against the state is not ethically barred, the low likelihood that a defendant

² See, e.g., John Martinez, *Wrongful Convictions As Rightful Takings: Protecting "Liberty Property,"* 59 HASTINGS L.J. 515 (2008); Keith S. Rosenn, *Compensating the Innocent Accused*, 37 OHIO ST. L.J. 705 (1976); Joseph H. King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091 (1970).

³ For the purposes of this Article, "wrongful conviction" will solely refer to individuals who are actually innocent of the crimes for which they were convicted. This population does not include individuals who were "wrongfully" convicted in the sense that they were denied some legal right, without which they may have been acquitted. For an elaboration of this definition, see *infra* Section IV.A.2.

will prevail makes it unlikely that a lawyer will represent the individual in those proceedings. Part III will then turn to indemnification statutes, describing how they arose, and their current shortcomings in making wrongly convicted individuals whole. Specifically, this Part will focus on the current caps to state compensation awards. Part IV puts forward a proposal to make compensation statutes more generous and describes how this more generous compensatory system may give rise to greater post-conviction advocacy provided by attorneys paid through a contingency fee. This proposal capitalizes on the exemption of most post-conviction exoneration work from the existing ethical bar against contingency fee arrangements in criminal cases. It also suggests that ethical codes make more explicit that the ban on contingency fees does not apply to discretionary criminal appeals. Finally, Part IV will address the perceived shortcoming of this proposal, ultimately concluding that adopting the changes would be a meaningful improvement over the status quo.

I. CAUSES AND PROPOSED REMEDIES FOR WRONGFUL CONVICTIONS

There is an extensive literature on the causes and remedies of wrongful convictions of innocent people. Most studies and proposals focus on *why* such convictions take place. Reasons commonly cited for wrongful convictions are false confessions,⁴ false eyewitness identification,⁵

⁴ See Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543 (2005) ("In fifty-one of the 340 exonerations between 1989 and 2004—15%—the defendants confessed to crimes they had not committed."). Jury conviction rates of false confessors range from 73% to 81%. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998); see also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 953 (2004) (estimating a jury conviction rate of 64%). See generally RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 195–236 (2008); Richard J. Ofshe & Richard A. Leo, *The Decision To Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997); Edward J. Sackman, *False Confessions: Rethinking a Contemporary Problem*, 16 KAN. J.L. & PUB. POL'Y 208 (2006).

⁵ See, e.g., Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices To Protect the Innocent*, 42 CREIGHTON L. REV. 595 (2009); Michael R. Leippe, Donna Eisenstadt & Shannon M. Rauch, *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 LAW & HUM. BEHAV. 194 (2009); Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH. L. REV. 33 (2008); see also C. RONALD HUFF ET AL., *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* 66 (1996) ("We believe that the single most important factor leading to wrongful conviction in the United States . . . is eyewitness misidentification, to which we could add, in good faith."); PATRICK M. WALL, *EYEWITNESS IDENTIFICATION IN CRIMINAL CASES* 5 (1965) ("The major problem, where actual guilt or innocence is involved, has been and is now the problem posed by evidence of eye-witness identification."); Brandon L. Garrett, *Innocence, Harmless Error and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 79 (2005) ("[M]istaken eyewitness identifications have long been the leading cause of wrongful convictions"); Gross et al., *supra* note 4, at 542 ("The most common cause of wrongful convictions is eyewitness misidentification. This is not news.").

ineffective assistance of counsel,⁶ erroneous recollection of conversational testimony,⁷ police perjury,⁸ and corrupt informants,⁹ among several others. Taken together, these reasons show that our adversarial criminal justice system is riddled with human error and is largely unequipped to play the truth-ascertaining function that society asks of it.

Fortunately, there are various procedural protections that can minimize the degree of harm human fallibility can cause to innocent people, and this has been the subject of much scholarly attention. Many scholars and practitioners have dedicated themselves to thinking of creative ways to minimize the rate of wrongful conviction without unduly hindering legitimate law enforcement practices.¹⁰ Despite conceding at times the political infeasibility of their proposals,¹¹ they nevertheless flesh out various improvements that range from changing police practices,¹² prosecutors' practices,¹³ and even judicial practices.¹⁴ While these

⁶ See Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263 (2009); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1 (2004); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783; Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 2 (2002); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

⁷ Steven B. Duke et al., *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1 (2007).

⁸ STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 117 (1993); Stanley Z. Fisher, *'Just the Facts, Ma'am': Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1995); Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 NOTRE DAME L. REV. 1259 (2005) (arguing that absolute immunity be repealed for law enforcement witnesses to remedy the problems stemming from perjured police testimony); Christopher Slobogin, *Testifying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037 (1996); cf. Kevin R. Reitz, *Testifying As a Problem of Crime Control: A Reply to Professor Slobogin*, 67 U. COLO. L. REV. 1061 (1996).

⁹ See Clifford S. Zimmerman, *From the Jailhouse to the Courthouse: The Role of Informants in Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 55 (Saundra D. Westervelt & John A. Humphrey, eds., 2001).

¹⁰ A.B.A., *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY: REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS* (2006) (containing detailed proposals on virtually all areas in which false convictions are inclined to occur) [hereinafter *ACHIEVING JUSTICE*].

¹¹ Elizabeth R. Jungman, Note, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1082 (2003) (acknowledging the political infeasibility of a "beyond all doubt" standard for capital cases).

¹² See, e.g., Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381 (2006); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765 (1995).

¹³ Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of*

suggested proposals could do a great deal of good in minimizing the role of human error and deficiency in stripping an innocent individual of his freedom, prophylactic measures are not enough.¹⁵

There are several proposals for making post-conviction relief more accessible.¹⁶ Nevertheless, a major shortcoming of such proposals¹⁷ is that they overlook the inability of most incarcerated individuals to obtain counsel to advocate for their post-conviction claims. Thus, even if any given legal standard for obtaining post-conviction relief was made less stringent, it is possible that an inmate would not have the necessary legal advocacy to take advantage of these policy changes. For example, it has been long recognized that the “actual innocence” standard is incredibly difficult to meet,¹⁸ but it is even harder for individuals proceeding *pro se*.¹⁹

Innocence, 84 B.U. L. REV. 125, 169–81 (2004); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399; Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

¹⁴ See, e.g., FTP HEADS OF PROSECUTIONS COMMITTEE WORKING GROUP, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE (2004), available at <http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf> (proposing various policies to curtail wrongful convictions in Canada).

¹⁵ There seems to be a disparate scholarly emphasis on the population of innocents yet to be convicted, without sufficient attention on how to exonerate the already wrongly-convicted. For example, in the recent ABA report aimed at “freeing the innocent” and “convicting the guilty,” out of nine chapters, only one focuses on the plight of the wrongfully convicted—Chapter Nine, entitled “Compensation for the Wrongfully Convicted.” No chapter specifically deals with ways to make exoneration more readily attainable for innocent individuals. ACHIEVING JUSTICE, *supra* note 10. This is not an unreasonable value judgment, and preventive measures are certainly necessary going forward. Additionally, it is natural for a scholar to want to answer the question: *why do wrongful convictions happen?* But it is deeply important to not forget the very real population of inmates innocent of their convicted crime who lack the means and the support to surmount their circumstances.

¹⁶ Many of these articles center on habeas relief after the Antiterrorism and Effective Death Penalty Act of 1996 made habeas corpus relief very difficult to obtain. Pub. L. No. 104–132, 110 Stat. 1214 (1996) [hereinafter AEDPA]. See Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997) (discussing how the AEDPA amends federal habeas corpus). For example, the AEDPA imposed a statute of limitations on habeas petitions, modified law regarding exhaustion of state remedies, and curtailed the ability of a petitioner to file a second or successive petition. AEDPA; 28 U.S.C. §§ 2244(d), 2254(b)(2)–(3), 2244(b).

¹⁷ See, e.g., Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 516 (“[I]n exercising its discretion after obtaining a conviction, a prosecutor’s office should investigate significant new evidence that suggests that the convicted defendant was innocent. If the office then concludes that the defendant was probably innocent, it should take measures, whether by supporting an application for judicial relief or by supporting a pardon application, to correct the apparent mistake.”); Cynthia E. Jones, *The Right Remedy For the Wrongly Convicted: Judicial Sanctions For Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893 (advocating that a wrongful destruction of DNA evidence should result in a sentence reduction, a new trial, or dismissal for a convicted person); Brandon Segal, *Habeas Corpus, Equitable Tolling, and AEDPA’s Statute of Limitations: Why the Schlup v. Delo Gateway Standard for Claims of Actual Innocence Fails To Alleviate the Plight of Wrongfully Convicted Americans*, 31 U. HAW. L. REV. 225 (2008).

¹⁸ *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (“To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory

Thus, motivating legal advocacy is the linchpin needed to make possible almost any of the policy proposals geared at making post-conviction relief more accessible.

II. THE DIFFICULTY OF OBTAINING COUNSEL FOR POST-CONVICTION RELIEF

There is currently not enough economic incentive for attorneys to zealously pursue post-conviction relief for wrongfully convicted individuals.²⁰ Creating such economic incentive is critical to convicted individuals because there are so few avenues available for them to otherwise obtain counsel. Since nationally, more than eighty percent of arrested individuals charged with felonies cannot even afford a trial lawyer, the number who can afford a lawyer post-conviction must be even lower considering how much money was likely spent at the trial phase.²¹

Perhaps the biggest obstacle to obtaining counsel for exoneration efforts is that states are not obligated by the Constitution (as now interpreted) to provide counsel for collateral attacks, even in death penalty cases.²² While some state constitutions require appointed counsel for collateral attacks in death penalty cases,²³ this state constitutional right

scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.”).

¹⁹ See Myrna S. Raeder, *Postconviction Claims of Innocence*, 24 CRIM. JUST. 14, 22 (2009) available at <http://www.abanet.org/crimjust/cjmag/24-3/raeder.pdf>. (“Pro se litigants can hardly be expected to meet this criterion, but even inmates who find lawyers willing to champion their innocence are hard-pressed to find this quality of evidence.”).

²⁰ This statement can be more expanded to describe the plight of adequate criminal defense in general, at all stages of representation. For a creative set of approaches to incentivize quality criminal defense, see generally Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73 (1993) (exploring insurance models, deregulation models, and voucher models of compensation as methods to increase quality indigent criminal defense).

²¹ See CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 1 (Nov. 2000), http://www.cs.indiana.edu/sudoc/image_30000053565374/30000053565374/pdf/dccc.pdf.

²² See *Murray v. Giarratano*, 492 U.S. 1 (1989) (capital cases); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (non-capital cases). The Supreme Court has repeatedly declined to extend a federal constitutional right to counsel to a convicted person pursuing a discretionary direct appeal. *Ross v. Moffitt*, 417 U.S. 600 (1974). By extension, the Supreme Court has found no such right “when attacking a conviction that has long since become final upon exhaustion of the appellate process.” *Finley*, 481 U.S. at 555.

²³ *Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999) (“We further find that in capital cases, state post-conviction efforts, though collateral, have become part of the death penalty appeal process at the state level. We therefore find that Jackson, as a death row inmate, is entitled to appointed and compensated counsel to represent him in his state post-conviction efforts.”). *But see* *Gibson v. Turpin*, 513 S.E.2d 186, 192 (Ga. 1999) (“A law requiring appointed counsel for capital habeas petitioners is not constitutionally compelled, and therefore, the decision to create such a law rightfully belongs to the

rarely applies in non-capital cases.²⁴ Thus, wrongfully convicted individuals who cannot afford an attorney are unlikely to receive assistance pursuing their claims of innocence.

Moreover, even where states provide counsel for collateral attacks, the quality of the representation is often severely lacking. Public defender's offices are drastically underfunded and can barely satisfy the legal needs of their clients even pre-conviction.²⁵ The state of some public defender's offices is so dire that courts have sometimes granted a rebuttable presumption that defendants represented by these offices received ineffective assistance of counsel.²⁶

Fortunately, there are private organizations willing to take up the cause of the wrongfully convicted, albeit a very small number relative to the estimated need. Most notable of these, Innocence Projects²⁷—organizations committed to exonerating individuals, most often through examination of DNA evidence—have done a great service in raising public awareness of the human error that pervades our justice system.²⁸ The first Innocence Project was established in 1992, at the Cardozo Law School by Barry Scheck and Peter Neufeld, and since then they have taken root in law schools, public defender's offices, and non-profit organizations.²⁹ They have been widely hailed for their successful exonerations of 251 individuals to date, 17 of whom served time on death row.³⁰

General Assembly.”); see also *id.* (listing statutes by jurisdiction that provide state-funded counsel to indigent death-row habeas corpus petitioners).

²⁴ See Stephen B. Bright, Stephen O. Kinnard & David A. Webster, *Keeping Gideon from Being Blown Away: Prospective Challenges to Inadequate Representation May Be Our Best Hope*, CRIM. JUST., Winter 1990, at 12.

²⁵ See, e.g., Justine Finney Guyer, *Saving Missouri's Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335, 335 (2009) (“As a result of a severely underfunded system, public defenders are without resources necessary to effectively represent all of their clients.”); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 DUKE U. L. & CONTEMP. PROBS., 81, 85–86 (1995) (describing the “unconscionable caseload[s]” of public defenders as a result of a lack of funding from the states).

²⁶ See, e.g., *State v. Peart*, 621 So.2d 780, 791 (La. 1993) (creating a rebuttable presumption that indigent defendants received ineffective assistance of counsel because public defenders’ case overload had become so extreme).

²⁷ The Innocence Network, Innocence Network Member Organizations, <http://www.innocence-network.org/members.html> (last visited Apr. 27, 2010).

²⁸ See JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE* (2000).

²⁹ See *id.*; Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231 (2006); see also Wisconsin Innocence Project, Other Innocence Projects, http://www.law.wisc.edu/fjr/innocence/other_ips.htm (last visited Feb. 18, 2010) (listing information pertaining to Innocence Projects across the country).

³⁰ The Innocence Project, Facts on Post-Conviction DNA Exonerations, <http://www.innocence-project.org/Content/351.php> (last visited Feb. 19, 2010).

But funding for such organizations is also difficult to secure.³¹ Additionally, because Innocence Projects face limited resources, they are incredibly selective as to whose cases to investigate and litigate. In one article, a phone interview with a staff attorney for an Innocence Project revealed the following criteria used by Centurion Ministries to decide who was even *eligible* for exoneration assistance:

1. The inmate must have been sentenced to death or a life sentence with little chance of parole for at least 15 years;
2. The conviction must be for murder or rape;
3. If the inmate has been convicted of rape, physical evidence must exist, from which a DNA test could be conducted; if it is a murder conviction, physical evidence is not necessarily required;
4. The inmate must have exhausted all state appeals;
5. The inmate must have “no help or resources other than Centurion Ministries”;
6. The inmate must be completely innocent of the crime. This excludes from their program any person who may be considered an accessory to the crime.³²

It is not surprising that the most desperate, needy, out-of-luck inmates receive the attention of Centurion Ministries and other Innocence Projects. And yet, despite such organization’s best efforts, there remains a highly underserved population in need of similar services.³³ They are nowhere close to able to provide sufficient representation to the inestimable number of wrongfully convicted individuals populating the 2,424,279 incarcerated individuals in the United States.³⁴

Beyond the resource constraints Innocence Projects face, some commentators have argued that because of Innocence Projects’ emphasis

³¹ See Adam Cohen, *Innocent, After Proven Guilty: More Inmates Are Being Set Free Thanks to DNA Tests – And a Pioneering Law Clinic*, TIME, Sept. 13, 1999, at 26 (“The law school pays most of the bills; private foundations, including George Soros’ Open Society Institute, help with the rest.”).

³² Laura E. Munoz-Pfeffer, *Innocence Projects: Making Large Leaps Forward and Raising Public Awareness* 16 (2000) (unpublished manuscript, on file with author).

³³ See generally Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097 (2003) (laying out the factors Innocence Projects should take into consideration before deciding to take a case).

³⁴ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008, at 8 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf> (including inmates in federal and state prisons, territorial prisons, local jails, ICE facilities, military facilities, jails in Indian country, and juvenile facilities).

on DNA exonerations, they are “operating in a shrinking field.”³⁵ DNA is relatively new to the criminal justice system, first introduced as evidence in 1986, and then subject to several court challenges before being accepted as evidence in every jurisdiction.³⁶ And while the pace of DNA exonerations has greatly accelerated since the first exoneration in 1989,³⁷ it is predicted that the “need for post-conviction DNA testing will wane over time,” as exculpatory DNA evidence will be examined before conviction takes place.³⁸ The dockets of Innocence Projects are mostly comprised of cases in which their client was prosecuted *before* DNA testing became a widely-used police practice.³⁹ This may mean that going forward, Innocence Projects may play a lesser role in exonerations, and that there will be an even bigger unmet need for exoneration services.

Moreover, as Steven Duke and Samuel Gross have persuasively demonstrated, DNA evidence cannot be the panacea for wrongful convictions because it cannot be readily obtained in every case.⁴⁰ That is, DNA is most helpful in exonerating individuals convicted of rape and murder, despite the fact that most crimes are property crimes.⁴¹ Even if Innocence Projects were able to revamp their techniques⁴² and continue to secure financing into the future, they cannot in practice—or even in theory—redress the plight of all the wrongfully convicted individuals languishing in prison.

³⁵ Cohen, *supra* note 31.

³⁶ NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 1 (1999), available at, <http://www.ncjrs.gov/pdffiles1/nij/177626.pdf>.

³⁷ See The Innocence Project, Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php> (last visited Feb. 15, 2010) (explaining that of the 251 DNA exonerations, 185 have occurred in the last ten years.”).

³⁸ POSTCONVICTION DNA TESTING, *supra* note 36, at xvii.

³⁹ *Id.* at 108.

⁴⁰ See Duke, *supra* note 7, at 3 (“However, the availability of DNA evidence as a ‘gold standard’ to measure conviction accuracy is mostly limited to violent crimes by unknown perpetrators and, within that small set of cases, to those in which the perpetrator left a biological specimen. While virtually all DNA exonerations involve rape and murder convictions, most crimes are property crimes (e.g., thefts, frauds, forgeries) or ‘victimless’ crimes (e.g., illicit drug transactions, nonviolent sex crimes) in which the perpetrator is either known to the victim or leaves a paper or electronic trail.”); Gross et al., *supra* note 4, at 524 (finding that in a case-study of 340 exonerations, 196 individuals were exonerated by means other than DNA evidence).

⁴¹ See Duke, *supra* note 7, at 3.

⁴² This revamping would occur if advances in DNA testing will make DNA useful in exonerations for crimes other than rape and murder. See Jerry Markon, *Justice Department To Review Bush Policy on DNA Test Waivers*, WASH. POST, Oct. 11, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/10/AR2009101002348.html> (“DNA experts say . . . more sophisticated testing will soon bring biological evidence into federal courtrooms for a wider variety of crimes.”).

A. Ethical Ban on Contingency Fee Arrangements in Criminal Cases

Recognizing that the needs of the wrongfully convicted exceed that which can be handled by public interest or publicly funded attorneys, it is natural to turn to the private bar for much-needed exoneration services. But private attorneys do not work for free and few inmates can afford to pay their hourly rate for the amount of work exoneration entails.⁴³

One meaningful limitation to adequate criminal representation has been the ethical bar to contingency fee arrangements in criminal cases.⁴⁴ While contingent fees have become an increasingly common method of financing legal services in civil cases ranging from personal injury to civil rights litigation, professional responsibility ethics codes have unanimously banned contingent fee arrangements in criminal cases.⁴⁵ Not surprisingly, this ban has likely prevented the financing of much discretionary direct-appeal exoneration work. The Supreme Court has held that the Constitution guarantees a right to appointed counsel for a direct appeal of a criminal conviction, and indigent defendants can secure representation from a public defender's office for a direct appeal.⁴⁶ But this constitutional guarantee of counsel does not apply to discretionary criminal appeals, and as written, the ethical rules likely ban contingency fee agreements in such cases. The few ethical opinions on the question leave insufficient guidance

⁴³ See, e.g., Meagan E. Costello, Note, *Smashing the Tragic Illusion of Justice: The Reprehensibility of the Death Penalty in Virginia*, 41 CATH. LAW. 255, 270 (2002) (stating that 97% of inmates on death row in Virginia were too poor to afford an attorney).

⁴⁴ It is important to realize that the ethical rules bar *formal* contingency fee relationships in criminal cases, where the lawyer's compensation depends on obtaining a certain outcome for his client. This is not the same as a lawyer recognizing that as a practical matter, the likelihood of being paid by a client after the client has been convicted is very low. This is the case in part because, if a penalty of conviction is forfeiture of assets by the convict, that forfeiture includes even those assets used to pay an attorney's counsel fees. See Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 703-17 (1992). This murky distinction between "formal" and "practical" contingency fees has led some scholars to advocate the abolishment of the ethical ban against criminal contingent fees. See also Lindsey N. Godfrey, Note, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture*, 79 TEX. L. REV. 1699, 1725 (2001) ("Given the fact that many representations already occur on a 'practically' contingent basis, bringing that practice into the open by removing the ethical ban would protect both defendants and their attorneys.").

⁴⁵ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(2) (1983) ("A lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case."); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(C) (1980); Criminal Justice Section Standards: The Defense Function § 4-3.3(f) (1993) available at http://www.abanet.org/crimjust/standards/dfunc_blk.html; see also GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING 508 (1990) ("All states prohibit contingent fees for the defense of a criminal case.").

⁴⁶ See *Douglas v. California*, 372 U.S. 353, 353 (1963). But see *Ross v. Moffitt*, 417 U.S. 600, 617-19 (1974) (stating that there is no constitutional right to appointed counsel to pursue discretionary appeals).

for attorneys seeking to enter into such arrangements.⁴⁷ As such, the ban exacerbates the difficulty of securing counsel post-conviction for the wrongly convicted person who has lost an appeal by right.

1. Arguments Why Contingency Fees Do Not Belong in Criminal Cases

It is important to situate this categorical ban of contingent fees in criminal cases within the tortured history the ethical codes have had with contingency fees in general. As Pam Karlan writes, the ABA ultimately adopted canons permitting contingent fees in civil cases likely as a “bow[] to the practical realities of turn-of-the-century industrial tort litigation and the emergence of a class of litigants who could not otherwise obtain counsel.”⁴⁸ Moreover, contingency fees promised not only *more* legal representation but *better* legal representation, equalizing the litigation playing field between plaintiffs and defendants.⁴⁹ However, there were also concerns that contingent fee arrangements would result in “ambulance chasing,” and promote unethical behavior such as suborning perjury by lawyers seeking to win in order to get paid for their work.⁵⁰ Ultimately however, while the benefits outweighed the costs in civil cases, the costs were apparently too high to permit contingency fee arrangements in criminal cases.

Karlan examines whether there is sufficient justification to continue the ethical ban against criminal contingent fee arrangements by describing and rebutting the primary arguments commonly offered to support the ban.

Justification 1: Criminal cases differ from civil cases in that they do not have a res to serve as the contingency compensation. Karlan explains that this was an original justification, appearing in the Model Code’s Ethical Consideration 2-20: “Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee.”⁵¹ However, this rationale overlooks criminal cases where *res* is involved (for example, certain white-collar cases with financial fines), and civil cases where *res* is not involved (injunctive relief).⁵²

⁴⁷ See, e.g., *State v. Hilton*, 538 P.2d 977, 982 (Kan. 1975) (finding an agreement for an additional \$1000 demanded if lawyer “got [defendant] out” on probation to be improper).

⁴⁸ Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 598 (1993). According to Karlan, the debate on the 1908 Canons contained twenty-four pages devoted to a discussion of contingent fees. *Id.* at 598 n.9.

⁴⁹ *Id.* at 598.

⁵⁰ *Id.*

⁵¹ *Id.* at 602.

⁵² *Id.* at 603 (“An acquittal or a non-jail sentence may enable a defendant ‘to continue or resume economically productive work,’ and in that sense may generate funds to pay for legal services.”).

Justification 2: Indigent criminal defendants are guaranteed counsel under the Constitution, whereas indigent civil litigators are not. This argument explains not why criminal contingent fee arrangements are banned, but rather, why they would be justified in civil cases: "contingent fees [in civil cases] make legal services available to a group of litigants who would otherwise be unable to retain counsel."⁵³ Karlan rejects this argument as ignoring the positions of affluent and marginally non-indigent defendants who are not entitled to counsel, but who may nevertheless suffer great hardship retaining counsel out-of-pocket.⁵⁴ Moreover, as discussed, the Constitution does not afford counsel for discretionary appeals and other forms of representation post-conviction, proceedings that are often critical to the ultimate legal disposition of the criminal case.⁵⁵

Justification 3: Contingency fees are meant for plaintiffs, not defendants in a lawsuit. This justification of the ethical ban is predicated on the historical fact that "most contingency fee arrangements have involved the prosecution, rather than the defense, of civil actions."⁵⁶ The reason may be that it is more difficult to quantify the monetary value of a successful defense; one such arrangement was struck down in *Wunschel Law Firm v. Clabaugh*, where the fee for the defense attorney was pegged to a percentage of the difference between the damages sought and the judgment ultimately obtained.⁵⁷ But Karlan explains that, in civil suits, whether a party is the plaintiff or the defendant is really just a matter of first-mover advantage: "in a Coase-literate world . . . [i]f a client and his lawyer are willing to prosecute a taxpayer refund suit . . . then presumably they would be just as willing to litigate a tax-deficiency lawsuit brought by the government on the same basis."⁵⁸ Thus, she discounts the argument that contingency fees are somehow not meant to be used by those defending a claim, be it civil or criminal.

Justification 4: Criminal defendants are more likely to be unethical than civil defendants. Karlan entertains the idea that if most criminal defendants are in fact guilty, and thus have no trouble transgressing society's norms, allowing attorneys to make contingency fee arrangements with criminal defendants may tempt attorneys to transgress their ethical duties. A related concern is that such arrangements will make for overzealous and compromised representation, because attorneys will seek whatever outcome will get them paid, even if a client would have been

⁵³ Karlan, *supra* note 48, at 604.

⁵⁴ *Id.* at 605.

⁵⁵ *Id.* at 604.

⁵⁶ *Id.* at 606.

⁵⁷ *Wunschel Law Firm v. Clabaugh*, 291 N.W.2d 331, 337 (Iowa 1980).

⁵⁸ Karlan, *supra* note 44, at 607.

better off taking a plea.⁵⁹ She then entertains the argument in the alternative, that contingency fee arrangements will actually provide *under-zealous* representations because of the conflict of interest between the client and the attorney when confronted with a plea agreement: "her client might be better off pleading guilty to reduced charges, but the lawyer will lose her fee if he does."⁶⁰ But both of these arguments ignore that flat fees create exactly the same conflict of interest and are not banned; after all, if going to trial is in the client's best interest, but it means more uncompensated work for the attorney, the monetary conflict is just as real in the flat fee as the contingency fee arrangement.⁶¹ Ultimately, Karlan rightfully rejects this argument that somehow criminal attorneys are more readily corruptible than their civil counterparts.⁶²

Finding fundamental flaws with the standard justifications for the ethical ban, Karlan provides her own justification for its continuation. She describes it as a matter of "lemons" and "peaches:" "a criminal defense attorney simply cannot expect to develop a practice in which she represents only innocent defendants or defendants who will be acquitted at trial."⁶³ Karlan is primarily concerned that allowing contingency fee arrangements in criminal law will distort the role of the criminal defense attorney from that of an advocate into that of a judge.⁶⁴ That is, in order to maximize their chance of being paid, attorneys will be highly discerning as to which cases they take to avoid representing any "lemons." This is not a trivial concern, and could well conflict with the ethical canons requiring zealous advocacy by defense attorneys.⁶⁵ Still, this rationale makes more sense if a proposal sought to move from a public defender system to a solely contingent fee system: then, certainly, the "lemons" would be out of luck. However, it is unclear why allowing contingent fees to supplement the

⁵⁹ See, e.g., Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, 517 (1991) ("The danger of conflict of interest from a criminal contingent fee arises from the incentive for the attorney to obtain an acquittal to collect his fee. This incentive arguably conflicts with the client's interest in obtaining a plea bargain, or, if the case goes to trial, in the client's interest in instructions giving the jury the option of returning a verdict of guilty of a lesser offense than that charged in the indictment.").

⁶⁰ Karlan, *supra* note 48, at 611.

⁶¹ *Id.*

⁶² See also Lushing, *supra* note 59, at 526-27 ("This 'rationale' is hardly more than a group libel. Judging groups of people adversely derogates not only a national policy not to discriminate, but also common sense. Disparagement of the criminal bar as a basis for its regulation is doubly wrong because the negativism often rests on an impermissible identification of the lawyer with his criminal clients."); *id.* at 525 ("Lawyers who would sacrifice the client for a contingent fee are so corrupted that they are a hazard to their client regardless of the fee arrangement.").

⁶³ Karlan, *supra* note 48, at 613.

⁶⁴ *Id.* at 615-16.

⁶⁵ See MODEL RULES OF PROF'L CONDUCT pmbl. (1983) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

currently existing methods of providing indigent criminal defense would hurt the "lemons" more—many "lemons" are already out of luck.

2. *Arguments Why the Ethical Ban Should Not Extend to Post-Conviction Efforts*

Textually, it is not obvious whether Model Rule 1.5(d)(2) and Model Code DR 2-106(c), both of which state "a lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case," apply to criminal appeals.⁶⁶ What is clear, however, is that state bar associations do not always distinguish between the trial level and post-conviction proceedings. In one notable opinion, the Committee on Professional Ethics of the Florida State Bar Association unanimously decided that "[i]t is improper for an attorney to enter into a fee arrangement in a criminal case providing that the fee, paid in advance, will be refunded if the attorney is unsuccessful in obtaining post-conviction relief from a criminal conviction."⁶⁷ The Committee did not make any meaningful distinction between trial and post-conviction work, finding that the ethical ban applied to both.

Believing that the ethical rule does apply to criminal appeals, A.C. Pritchard makes a strong argument for why the ban against criminal contingency fee arrangements should be eliminated for purposes of a criminal appeal.⁶⁸ The article explains the differences between the trial level and the appellate level of a criminal case, and how the interests of justice would be better served if contingency fees were available for criminal appeals. As Pritchard explains, "[T]he justifications offered for prohibiting contingent fees in the trial context do not carry over to the appellate level. The record cannot be manipulated on appeal, and the interests of the criminal defendant and the lawyer are aligned in seeking reversal."⁶⁹ Moreover, in the trial phase "outcomes are scalar: outright acquittal to plea bargain to conviction on all charges. On appeal, outcomes are binary: affirmance or reversal."⁷⁰ The appellate "binary" outcomes align the client's and the attorney's incentives in a contingency fee arrangement, which cannot necessarily be said of the "scalar" trial phase. For these reasons, appeal efforts should also be deemed as not falling

⁶⁶ MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(2) (1983); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(C) (1980).

⁶⁷ Fla. St. B. Ass'n Comm. on Prof'l Ethics, Op. 80-5 (1980).

⁶⁸ See, e.g., A.C. Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel*, 34 AM. CRIM. L. REV. 1161, 1180-81 (1997).

⁶⁹ *Id.*

⁷⁰ *Id.* at 1178-79.

within the ethical language “representing a defendant in a criminal case.”⁷¹ Since the publication of Pritchard’s article, there has been no indication that the ethical rules have been modified to clarify the ambiguity in the rule.

Of course, there is no ethical canon that bars contingent fee representation of a wrongfully convicted individual in a civil suit arising out of a criminal case,⁷² for example a § 1983 suit against a state, or a malpractice suit against former defense counsel.⁷³ Moreover, many efforts to secure exoneration are civil in nature, such as seeking habeas relief for a wrongfully convicted individual.⁷⁴ And it is because much exoneration work is civil that this Article’s proposal to link generous compensation schemes with contingency fee agreements will be ethically sound. Thus in theory, if a lawyer believed that a prospective client were a “peach,” she could assist him with proving his actual innocence, in the hopes of then securing compensation in a subsequent civil suit through a contingent fee arrangement. The reason this arrangement does not play out in practice is that, as the next Section will demonstrate, there are far too many doctrinal bars to a wrongfully convicted person receiving sufficient compensation. Simply put, the low likelihood of success and the low payouts do not make this arrangement worth a lawyer’s time financially.

B. Limitations to Civil Remedies for Wrongful Conviction

There are several limitations to an exonerated person ever being compensated for his wrongful imprisonment, as this Section will briefly spell out. While the wrongfully convicted are in many ways the quintessential tort victims, and often are victims solely for being at the wrong place at the wrong time,⁷⁵ it is surprisingly difficult to obtain a civil

⁷¹ MODEL RULES OF PROF’L CONDUCT R. 1.5(d)(2) (1983); MODEL CODE OF PROF’L RESPONSIBILITY DR 2-106(C) (1980).

⁷² See, e.g., Pa. B. Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Informal Op. 2004-17 (2004) (holding that it is ethically permissible “to allow an arrangement whereby an attorney for a Client in a criminal case and in civil action will be compensated solely by the recovery obtained in the civil action”); Ass’n of the B. of the City of N.Y. Comm. on Prof’l & Jud. Ethics, Formal Op. 1986-3 (1986); Ill. St. B. Ass’n, Op. 84-09 (1985).

⁷³ Moreover, *The Restatement on the Law Governing Lawyers* makes clear the ethical prohibition “does not forbid a contingent fee for legal work that forestalls a criminal proceeding or work that partly relates to a criminal matter and partly to a noncriminal matter.” RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 35, cmt. f(1) (2000); see also *id.* (“A lawyer may thus contract for a contingent fee to persuade an administrative agency to terminate an investigation that might have led to civil as well as criminal proceedings or to bring a police-brutality damages suit in which the settlement includes dismissal of criminal charges against the plaintiff.”).

⁷⁴ See, e.g., *Browder v. Dir., Dep’t of Corr. of Ill.*, 434 U.S. 257, 269 (1978) (explaining that habeas corpus review of a prior criminal conviction is a civil proceeding).

⁷⁵ See Evan J. Mandery, *Efficiency Considerations of Compensating the Wrongfully Convicted*, 41 CRIM. L. BULL. 1, 1 (2005) (“Most tort victims contribute in some way to their own injury. . . [I]n

remedy for the physical, emotional, and reputational harm experienced by the wrongfully convicted. Nevertheless, this relief is necessary because even in the best-case scenario where the wrongfully convicted person is exonerated, freedom comes with its own challenges. As Adele Bernhard has aptly written:

For most, the long awaited and hard won exoneration is the beginning of a new struggle. Exonerees face insuperable hurdles upon release. Lacking recent employment history or experience, work is difficult to secure. Without education or funds, most can't access necessary counseling or relevant training. Often without family, they live alone and lonely. Money alone can never repair damage done by an undeserved prison sentence or fully compensate for pain and suffering. A monetary award, however, does provide a springboard from which to begin life again.⁷⁶

The Innocence Project has documented several success stories, where the compensation received made a meaningful difference in the lives of several exonerated individuals. For example, Roy Brown was exonerated in 2007 after fifteen years of wrongful incarceration. But the joy of release was bittersweet as he had only a few months to live due to liver disease he developed in prison. But he soon obtained a liver transplant, winning a second battle, and was able to restart his life with the \$2.6 million he received from New York State.⁷⁷ Still, heartening as cases like his may be, they reveal the great disparities that exist between similarly situated wrongfully convicted individuals in the compensation they receive for their injuries. These inequitable results further add to the injustice courts

almost every case some blame can be allocated to the injured driver—he might, for example, have avoided the accident by driving with a superabundance of caution or by not driving at all. . . . But the wrongfully convicted are often guilty of nothing other than being themselves—of being in the wrong place in the wrong time, or of bearing a resemblance to a wrongdoer.”).

⁷⁶ See, e.g., Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why*, 18 B.U. PUB. INT. L.J. 403, 403 (2009); see also, Joseph H. King, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1097 (1970) (“Although the immediate problem of incarceration is obviously ended by the prisoner's release, freedom from imprisonment is inadequate compensation and does not satisfy the government's liability. Release simply reverses the course of the tragedy; it does nothing to repair the damage.”).

⁷⁷ INNOCENCE PROJECT, *MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION* 24 (2009) [hereinafter *MAKING UP FOR LOST TIME*].

perpetrate against innocent individuals.⁷⁸

One reason the tort system may not be well equipped to compensate wrongly convicted individuals is that few valuations are as troublesome for the legal system as the valuation of freedom. What is freedom worth? Some harms of incarceration are more readily quantifiable than others. Fees from the trial and post-conviction proceedings, and even lost-income are easier to value than the worth of building lasting relationships, having and raising children, and being a contributing member of society. Certainly the opportunity cost of a life lived in confinement is hard to compute. It requires putting a monetary figure to the value of an entirely unknowable counterfactual existence. Yet this is precisely what workmen's compensation statutes and other forms of insurance have made possible. And in the few tort lawsuits that have been successfully mounted by wrongfully convicted individuals, judges and juries have reasonably carried out this valuation. Take the case of Robert McLaughlin, who sued the state of New York and was awarded \$1.5 million for his loss of liberty, mental stress, anguish, and reputation. The court described valuing non-pecuniary losses as being:

asked to place ourselves within the experience of the claimant in his enduring quest for freedom How does one place a monetary value on seemingly mundane things like sleeping in one's own bed; a stroll through a park or a hug from a loved one. Yet those are among the very things one longs for, and which are denied to a person in prison.⁷⁹

Thus, valuation difficulties alone do not explain why it is difficult for a wrongly convicted person to be compensated.

Nevertheless, there are several reasons why wrongfully convicted individuals rarely get damages for their injuries. First, they must get their convictions vacated and dismissed. Second, there are several forms of immunity that prevent wrongfully convicted persons from suing agents causally responsible for their injury. For example, victims and witnesses

⁷⁸ Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts To Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 707 (2004) ("Few exonerated individuals have been compensated. And, while many have received nothing, others, no more deserving, have received enormous awards. The disparity is discouraging for those who have not been compensated, complicates the debate over whether and how exonerates should be compensated, and symbolizes the arbitrariness and inequality of the criminal justice system as a whole.").

⁷⁹ Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 107 (1999) (citing to *McLaughlin v. State of New York*, Court of Claims No. 75123 Decision filed Oct. 16, 1989).

are immune from civil liability for inaccurate or mistaken testimony,⁸⁰ unless the prosecution is baseless and the complaint is made with malice.⁸¹ Police are immune from civil liability for lawful arrest:

[B]ecause the courts believe that law enforcement officials should be liable only where their conduct is clearly proscribed, courts conclude that the police are protected from suit for their official actions by the doctrine of qualified immunity even where there is only arguable probable cause.⁸²

Prosecutors are immune from much civil liability in order to protect the prosecutor “‘from harassing litigation that would divert his time and attention from his official duties’ and in order to enable ‘him to exercise independent judgment when deciding which suit to bring and in conducting them in court.’”⁸³ It is even difficult to establish a malpractice claim against defense counsel.⁸⁴

Another barrier to compensation is state tort statutes of limitations. These generally provide a two to three year period for a claim to be filed, which “accrue when a plaintiff knows or has reason to know of the tortious act.”⁸⁵ In the case of wrongful conviction, the statute of limitations would

⁸⁰ *Briscoe v. Lahue*, 460 U.S. 325 (1983); see also Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 148 (2010) (“It is well settled that witnesses are afforded absolute immunity for their testimony even in cases alleging due process violations based on the use of perjured or otherwise false evidence.”).

⁸¹ Bernhard, *supra* note 79, at 87.

⁸² *Id.* at 89; see *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (law enforcement immunity); see also Bernhard, *supra* note 79, at 89 n.58 (“That is not to say that the police may not be sued for pressuring witnesses to fabricate or confabulate testimony, or to make a false identification, or for deliberately withholding exculpatory evidence.” (citing to *Snyder v. City of Alexandria*, 870 F. Supp. 672 (E.D. Va. 1994); *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989)). See generally Rosenthal, *supra* note 80, at 136–52 (describing in detail the “formidable” “doctrinal obstacles to compensation under the prevailing fault-based regime of tort law”).

⁸³ Bernhard, *supra* note 79, at 90 (citing to *Imbler v. Pachtman*, 424 U.S. 409 (1910)). This prosecutorial immunity had the potential to change pending a decision by the United States Supreme Court in *Pottawattamie County v. McGhee*, No. 08-1065 (U.S. 2009), argued November 2009. However, a \$12 million settlement ended the case before the Supreme Court had a chance to rule on it. See Jacob Sullum, *\$12 Million Prevents a Supreme Court Ruling in Prosecutorial Abuse Case*, REASON.COM, Jan. 5, 2010, <http://reason.com/blog/2010/01/05/12-million-prevents-a-supreme>.

⁸⁴ See, e.g., *Paterek v. Petersen & Ibold*, 890 N.E.2d 316, 320 (Ohio 2008) (“To establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss.”). Some states have laws that protect public defenders with immunity from suit. See, e.g., 745 ILL. COMP. STAT. ANN. § 19/5 (2000).

⁸⁵ Bernhard, *supra* note 79, at 87.

begin to toll at the time the conviction is handed down. This has not gone without redress, and some statutes of limitations do not accrue while an individual is in prison; but this is not universally true and the statutes of limitations still pose a bar to post-conviction relief.⁸⁶

Additionally, there are few causes of action that can actually be brought, each of which requires the defendant to carry a tremendous burden of proof for many elements to establish his claims.⁸⁷ These include malicious prosecution,⁸⁸ malpractice, abuse of process,⁸⁹ and false imprisonment⁹⁰ claims. The Federal Civil Rights Act⁹¹ creates the statutory basis for § 1983 federal actions against state and local police officers for deprivations of civil rights, but it requires that there be negligence on the part of the official, which is normally not found in cases where there was probable cause.⁹² In short, lawsuits rarely provide sufficient compensation for wrongly convicted individuals, so it is rational for a profit-oriented attorney hoping to be paid only out of damage recoveries to lack incentive to litigate these cases.

Lawsuits are fortunately not the only available remedial avenues for compensating the wrongfully convicted. For example, if an exoneree is unable to file a lawsuit for any reason, he can convince a legislator to introduce a private bill compensating him for his wrongful conviction. Where these bills have been passed, amounts have ranged from \$1,600 per year of wrongful imprisonment to nearly \$300,000 per year.⁹³ However,

⁸⁶ *Id.*

⁸⁷ *See id.* at 86–92.

⁸⁸ *See, e.g., Goodson v. City of Corpus Christi*, 202 F.3d 730, 740–41 (5th Cir. 2000) (“The elements of a malicious prosecution claim are: (1) the state commences a criminal prosecution against the plaintiff; (2) the defendants caused or aided the prosecution; (3) the prosecution terminated in plaintiff’s favor; (4) the plaintiff was innocent; (5) the defendants acted without probable cause; (6) the defendants acted with malice; and (7) the criminal proceeding damaged the plaintiff.”).

⁸⁹ *See* 1 AM. JUR. 2D *Abuse of Process* § 3 (2005) (“The action for abuse of process is similar to the action for malicious prosecution in that both actions are based on the imprudent use of the courts; however, they are distinguishable in that malicious prosecution concerns maliciously or wrongfully causing process to issue, while abuse of process concerns the improper use of process after it has been issued.”).

⁹⁰ *See, e.g., Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995) (“Under New York law, the elements of false imprisonment claim are (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged.”).

⁹¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

⁹² *See, e.g., Pierson v. Ray*, 386 U.S. 547, 555 (1967) (“[A] peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved.”).

⁹³ MAKING UP FOR LOST TIME, *supra* note 77, at 13; *see also id.* (“For example, Florida has awarded compensation through private bills to two men out of 10 whose wrongful convictions were overturned through DNA testing in that state. In 2005, Wilton Dedge was awarded \$2 million for 22 years of wrongful imprisonment. Three years later, exoneree Alan Crotzer also received assistance

according to the Innocence Project, “only 9 [percent] of the more than 240 people who have been exonerated through DNA testing received compensation through private bills, making it the least likely remedy for the wrongfully convicted.”⁹⁴ Moreover, securing a private bill puts the wrongfully convicted person, who has recently fought for his exoneration, in a popularity contest of having the most sympathetic or politically valuable case to rally behind.⁹⁵

The takeaway point from this brief discussion is that for several reasons, victims of wrongful convictions are rarely able to use the court system or the political process to secure significant compensation for their injuries, even after their exonerations. Because the likelihood of prevailing on a claim is low, attorneys have few incentives to litigate such cases, even on a contingency fee basis. Thus, the expected value of any post-conviction litigation is low, and it is thus not surprising that there is little hope for exoneration and compensation for the wrongly convicted languishing in prison.

III. INDEMNIFICATION STATUTES: COMPENSATION BY THE STATE

One way to increase the value of post-conviction litigation would be to have a generous statutory compensation scheme, which may provide the potential cash flow necessary for attorneys to take up the cause of wrongfully convicted individuals. Attorneys may take the cases in the hopes of obtaining a fraction of the compensation were they to bring about the exoneration (and consequent compensation) of the wrongly convicted individual.

The drive to enact indemnification statutes has been described to have began when Edwin Borchard published *Convicting the Innocent*, a book featuring sixty-five life stories of people Borchard believed were completely innocent.⁹⁶ He closed his book with a chapter dedicated to the

through a private bill, but he received only \$1.25 million though he served nearly 25 years in prison. That works out to \$90,000 per year of wrongful imprisonment for Dedge, but about \$50,000 per year for Crotzer.”).

⁹⁴ MAKING UP FOR LOST TIME, *supra* note 77, at 13.

⁹⁵ See Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 699–700 (2002) (“[S]pecial legislation from a state legislature is likely only available to wronged individuals with the support of those influential in the political world of the state.”, “[M]ost unjustly convicted individuals neither possess nor are fortunate enough to acquire supporters with sufficient political savvy to obtain compensation in this manner.”); see also Bernhard, *supra* note 79, at 94 (“[T]he success of any such private bill depends more on the political connections of the person introducing the bill and the political climate of the day than on the merits of the case.”); Shawn Armbrust, Note, *When Money Isn’t Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 166 (2004) (“In many situations, the only individuals who can receive compensation in a special bill are those with a legislator or well-connected lawyer to champion their cause.”).

⁹⁶ EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* (1932).

need for a civilized society to indemnify. In what has been characterized as an “appeal[] to national pride,”⁹⁷ he argued that the United States should not lag behind the many European countries that had already enacted indemnification legislation.⁹⁸ Borchard further pointed out that this disregard for the “plight of the individual injured by the defective or tortuous operation of the governmental machine” is incompatible with the American ethos of “recognition of the individual’s rights against the State.”⁹⁹ He then traces the history of compensation for wrongful conviction. In Greece and Rome, which lacked distinction between civil and criminal law and where crimes were prosecuted by the individual victim, the private complainant. This complainant, the *calumniator*, was liable to the defendant for a wrongful accusation.¹⁰⁰ When the prosecution of crime became the function of the state, little attention was given to indemnification, until eighteenth century France, where the cause was vocally taken up by Voltaire.¹⁰¹ Borchard traces the evolution of the idea as it developed in other European countries, such as Italy, Spain, England, Portugal, Poland, Austria, and Germany.¹⁰²

Borchard then lays out the theoretical justifications for compensation by the State, rebutting the primary criticisms of such a system. The major argument Borchard presents against compensation is that when the State administers its justice system, “[t]o err is not illegal, . . . [i]f an innocent individual is by mistake convicted, this is a burden which, as a citizen of the State, he must bear;” this is an “assumption of the risk” argument, Borchard explains, adding that where there was intentional wrong or illegality, the law does give wrongfully convicted individuals “ample redress.”¹⁰³ Borchard offers the rebuttal that such a rationale only applies to the burdens citizens bear *as a whole*, the general duties of citizenship, not the special sacrifices asked from the individual for the sake of the entire community.¹⁰⁴ The other arguments against compensation—” the

⁹⁷ Bernhard, *supra* note 79, at 77.

⁹⁸ BORCHARD, *supra* note 95, at 375 (“European countries, for the most part, have by general statute recognized the government’s obligation to indemnify the victims of such distressing error and injustice; the United States, apart from narrowly construed statutes in California, North Dakota, and Wisconsin, has not.”).

⁹⁹ *Id.* at 376.

¹⁰⁰ *Id.* at 380.

¹⁰¹ *Id.* at 380.

¹⁰² *Id.* at 380–84.

¹⁰³ *Id.* at 388.

¹⁰⁴ BORCHARD, *supra* note 95, at 388 (“When we ask a citizen to become a juryman or a witness, when his diseased animal is killed for fear of contagion, when his house is destroyed to prevent the spread of conflagration, when his property is taken by eminent domain for public use, compensation is made for the special sacrifices he makes for the general benefit of society.”).

State acting lawfully can legally injure no one” and “without fault no liability”—both seem outdated notions in civil law that have been supplanted by decades of doctrinal developments, such as workmen’s compensation laws.¹⁰⁵

Thus, Borchard not only provided compelling narratives of wrongfully convicted individuals that marshaled sympathy for their cause, but also put his weight behind state indemnification as the best approach to make wrongfully convicted individuals whole. He poignantly explains, “When . . . by a misguided or mistaken operation of the governmental machine there is a miscarriage of justice . . . [t]he least a community can do to repair the irreparable is to appease the public conscience by making such restitution as it can by indemnity.”¹⁰⁶

Three decades after Borchard’s appeal for indemnification, another leading article argued that “when the exercise of state power results in an erroneous confinement, the government whose police power made such confinement possible should to the extent feasible redress the victim’s injury, regardless of whether any government agent has played a culpable role.”¹⁰⁷ King took up where Borchard left off, explaining “today, enough years have passed and enough victims of erroneous confinements have languished in prisons and asylums.”¹⁰⁸ He criticized the “inadequacies of fault-based remedies and the uncertain private bills” and urged for a “statutory scheme of strict governmental liability as the necessary solution.”¹⁰⁹ King also encouraged a no-fault liability system because “if compensation is to wait on culpable acts giving rise to a cause of action in tort for damages, many erroneous confinements will go unremedied.”¹¹⁰

More recent articles have gone even further, arguing that money is not enough in terms of compensation.¹¹¹ They argue that imprisoned individuals may not have the skills to properly manage their money.¹¹² While paternalistic, an in-kind compensation approach that includes

¹⁰⁵ *Id.* at 389.

¹⁰⁶ *Id.* at 392.

¹⁰⁷ King, *supra* note 76, at 1092.

¹⁰⁸ *Id.* at 1112.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1096.

¹¹¹ See Armbrust, *supra* note 94, at 160 n.29 (“The term ‘holistic compensation,’ as used in this Note, means compensation that does more than just provide the wrongfully convicted with monetary damages. Rather, it addresses the unique needs that face the wrongfully convicted as they are released from prison with a combination of financial compensation, job training services, and medical care.”); Jessica A. Longergan, Note, *Protecting the Innocent: A Model for Comprehensive Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 405 (2007-08).

¹¹² *Id.* at 174 (“Furthermore, because the wrongfully convicted may not be in a position to best manage their money upon release, any sums reserved for counseling or medical care might not actually be used for those purposes.”).

services such as job training and education, or medical insurance, will make it more likely that the victim of wrongful conviction can more readily transition into life on the outside. Only ten states currently include provisions for services within their compensation law, including Connecticut (providing expenses for employment training and counseling); Vermont (offering up to ten years in the state health plan); and North Carolina (offering job skills training and expenses for tuition).¹¹³ Texas stands out as particularly generous in terms of providing social services, offering job training, tuition credits, and access to medical and dental treatment.¹¹⁴

One key justification for indemnification statutes is that none of the above criticisms and concerns for compensating the wrongfully convicted has deterred the passage of numerous victim's compensation acts. As Bernhard explains, "[t]he success of the campaign for crime victims' compensation statutes teaches many lessons . . . the legislation does not need to be supported by a 'legal' obligation, nor does it need to further a collateral criminal justice goal."¹¹⁵ Arguing that crime victims' legislation "wasn't enacted because crime victims had a legal right to compensation, or even because it was useful," Bernhard concludes that the moral rightness of the cause enabled the swift passage of these laws.¹¹⁶ It may be that certain members of the public will never quite view wrongfully convicted individuals with the same sympathy as they do a crime victim. However, that bias does not meaningfully explain why the valuation, administrative, and economic criticisms should preclude generous compensation for victims of wrongful conviction but allow it for crime victims.

Today, Borchard's position has won out, at least at first glance. According to the most recent comprehensive study conducted regarding compensation statutes by the Innocence Project, twenty-seven states, the District of Columbia, and the federal system have enacted special statutes to provide indemnification for the wrongfully convicted.¹¹⁷ In what can be

¹¹³ MAKING UP FOR LOST TIME, *supra* note 77, at 16.

¹¹⁴ *Id.* at 22. The provisions were passed through the Tim Cole Act, "in honor of an innocent man who died in prison and was later posthumously exonerated." *Id.*

¹¹⁵ Bernhard, *supra* note 79, at 100. One such goal is deterrence of wrongdoing by officials. However, it is not obvious that compensation statutes actually serve this function. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000) (arguing that compensation schemes do not necessarily deter constitutional torts by the government because "[w]e cannot assume that government will internalize social costs just because it is forced to make a budgetary outlay").

¹¹⁶ Bernhard, *supra* note 79, at 100.

¹¹⁷ See MAKING UP FOR LOST TIME, *supra* note 77 (detailing research into the currently existing indemnification statutes); see also The Innocence Project, *Compensating the Wrongly Convicted*, <http://innocenceproject.org/Content/309.php> (last visited Jan. 11, 2009); The Innocence Project,

viewed as a no-fault insurance for wrongful conviction,¹¹⁸ the statutes do not require attribution of fault to prosecutors or victims or witnesses; they simply provide money and services to exonerated individuals. Under most statutes, claimants need prove only that they served time in prison as a result of the wrongful conviction and that they are in fact innocent.¹¹⁹

A. Small Sums for Lost Lives: Caps to Compensation

In a recent report released by the Innocence Project,¹²⁰ research indicates that while states have become more amenable to some form of compensation,¹²¹ the statutes are still parsimonious with the amounts that wrongfully convicted individuals are eligible to receive. Moreover, there is great variability across the existing twenty-seven compensating statutes:

[The variability ranges] from a flat maximum total of \$20,000 regardless of the number of years spent wrongfully imprisoned in New Hampshire, to \$80,000 per year of wrongful imprisonment with no maximum total in Texas. The state of Montana offers no money at all, only educational aid to be used in the state university or community college system.¹²²

States also differ as to whether they will exclude you from compensation if the wrongfully convicted individual falsely confessed, pled guilty, or was exonerated without concrete DNA testing.¹²³ The median amount of financial assistance is approximately \$24,000 per year, less than half of the median U.S. household income per year.¹²⁴ Perhaps worst of all, twenty-three states lack compensation statutes entirely. Few exonerated individuals have actually received compensation from the state; according to the Innocence Project, of 240 individuals who have been

Reforms by State, <http://www.innocenceproject.org/news/LawView1.php> (last visited Jan. 11, 2009) (detailing state compensation laws as selected from an interactive map).

¹¹⁸ See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135 n.1 (1970) ("A pure market approach to primary cost avoidance would require allocation of accident costs to those acts or activities (or combinations of them) which could avoid the accident costs most cheaply."). In the case of compensation statutes, the justification is that the government can better avoid the accident costs of wrongful conviction than an unsuspecting victim.

¹¹⁹ MAKING UP FOR LOST TIME, *supra* note 77, at 4.

¹²⁰ MAKING UP FOR LOST TIME, *supra* note 77.

¹²¹ *Id.* at 4 ("At last, in recent years, states have begun to recognize a responsibility to the wrongfully convicted. In the last decade, 13 additional states have adopted compensation statutes.").

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 15 (the median household income per year in the United States is \$50,000).

exonerated through DNA testing nationwide, thirty-three percent received statutory compensation.¹²⁵

In light of these disparities and concerned with the unmet needs of the wrongfully convicted, the Innocence Project put forth the following recommendations:

- Provide a minimum of \$50,000, untaxed, per year of wrongful imprisonment and \$100,000, untaxed, per year on death row. This amount is based on the federal government's standard created through the Innocence Protection Act of 2004;¹²⁶
- Cover limited and appropriate attorney's fees associated with filing for compensation;¹²⁷
- Provide immediate services including housing, transportation, education, workforce development, physical and mental health care through the state employee's health care system and other transitional services;¹²⁸ and
- Issue an official acknowledgment of the wrongful conviction.¹²⁹

The Project's recent report on compensation statutes featured proposed legislation that would bring these recommendations into effect.¹³⁰ The thrust of justifying the recommendations is the positive impact they will have on the lives of exonerated individuals. This Article goes a step further and argues that eliminating or reducing caps to compensation statutes will make it more likely that wrongly convicted individuals are exonerated in the first place. Thus this Article provides a compelling justification for states to make compensation statutes more generous that may appeal even to legislators who do not believe that the state is morally obliged to compensate the wrongly convicted.

¹²⁵ MAKING UP FOR LOST TIME, *supra* note 77, at 7; *see also* Lopez, *supra* note 95, at 673 (“[O]nly 37% of wrongfully convicted persons actually receive compensation.”).

¹²⁶ 28 U.S.C. § 2513(e) (2006) (“The amount of damages awarded shall not exceed \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and \$50,000 for each 12-month period of incarceration for any other plaintiff.”).

¹²⁷ MAKING UP FOR LOST TIME, *supra* note 77, at 5.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at App'x.

IV. PROPOSAL: INCREASING POST-CONVICTION RELIEF BY FUELING CONTINGENCY FEE REPRESENTATION THROUGH GENEROUS STATUTORY COMPENSATION

A previously unexplored justification for more generous compensation statutes is the incentive effects such statutes may create for post-conviction representation. As discussed, convicted individuals have considerable difficulty motivating anyone to look at their claims, which often have been rejected by a jury of their peers and a panel of appellate judges. Also, proceeding *pro se* in a web of jurisdictional, procedural, and ever-changing legal doctrines is not usually an option for almost all wrongfully convicted individuals. Generous compensation, guaranteed by statute, may motivate counsel to put up resources into investigating cognizable claims of innocence.

The foremost reason that generous compensation statutes can encourage post-conviction relief is that the no-fault structure of the statute only requires individuals to demonstrate, for the most part, two facts: (1) that they are absolutely innocent; (2) that they served time for a conviction. The latter fact is almost ministerial to demonstrate. Thus the work that must be done in order to obtain compensation is the actual exoneration. Whatever evidence of actual innocence an attorney wants to present to the state proving an inmate is entitled to compensation is the same evidence that would grant that inmate a new trial or a pardon.

The ideal outcome would be the creation of a professionalized group of attorneys dedicated to this type of work, who would otherwise not have the economic incentive to participate in post-conviction relief and exoneration efforts. A good analogue is the rise of the personal injury lawyer, which followed the generous insurance compensation schemes that states adopted over time as they moved toward a no-fault concept of tort law.¹³¹ The simple economic reality is that caps to damages deter the likelihood of lawyers litigating even *winnable* claims. Take for example an article describing the valuation of medical malpractice claims from the point of view of contingency fee attorneys. A number of lawyers expressed that “they would not take a low value medical malpractice case even if there was obvious malpractice.”¹³² One lawyer explained, “we don’t take [low value medical malpractice cases] because the damages may not be of a size that we can dedicate the office forces to handling that kind of case. You just can’t stop the world and handle a \$25,000 malpractice case. You just

¹³¹ See Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs’ Personal Injury Bar*, 30 L. & SOC. INQUIRY 269 (2005) (discussing the rise of the plaintiffs’ bar in response to tort reform).

¹³² Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 659 (2006).

can't do it."¹³³ This lawyer estimated his office expends \$60,000 in out of pocket expenses in a malpractice case.¹³⁴ Thus, with the limits on statutes as they are in many states, it is unlikely that a contingency fee arrangement would be worth an attorney's efforts.

Moreover, this proposal makes it more likely that wrongly convicted people who do not have sufficient resources to substantiate their innocence will get investigative support. This is because the bar to convincing an attorney of a colorable claim of innocence is lower than convincing any individual or institution with the power to exonerate. An innocent person who can describe certain facts, but lacks the means to back them up, has much more success getting the interest of a profit-motivated attorney specializing in wrongful conviction claims, than a prosecutor, governor, or judge. Thus, once there is a group of professionals dedicated to this type of work, who can be funded separately from public defenders and innocence projects or other public interests groups, these private lawyers can dedicate a portion of their annual budget to investigating claims of innocence. This is not different from what the Innocence Project has done successfully for the two decades of its existence, but it can be done on a larger scale.

Thus, this Article proposes that all states and the federal government adopt indemnification statutes for wrongful convictions that are substantially more generous than those currently in place. Attorneys taking up exoneration efforts, such as securing pardons or filing habeas petitions, will not run afoul of ethical rules banning contingent fees in criminal cases. The ethical codes should, however, be amended to clarify that post-conviction discretionary appellate work is excluded from the ethical ban, as Pritchard persuasively argued over a decade ago.¹³⁵ Together, these changes have a strong potential to exonerate innocent individuals who would otherwise be forgotten.

A. Generous Indemnification

1. How Much Compensation Is Needed?

The strongest criticism to this proposal, presciently discussed by Borchard as early as the 1930s, is cost: "open[ing] already cramped treasuries to what seem[] unlimited inroads."¹³⁶ However, the check against this scenario is not limiting damages that a wrongfully convicted person is entitled to, but rather ensuring a high bar is set for an inmate to

¹³³ *Id.* at 660.

¹³⁴ *Id.* (this figure does not include hourly rates).

¹³⁵ See Pritchard, *supra* note 68, at 1180–81.

¹³⁶ BORCHARD, *supra* note 95, at 387.

demonstrate wrongful conviction.¹³⁷ Moreover, concern for the fiscal impact of eliminating compensation caps is a self-defeating argument so long as states want to perpetuate the idea that wrongful convictions are rare. If that were so, how would allowing full compensation for the few that take place somehow bankrupt the state? Nor is this proposal likely to have high administrative costs. Considering that many states already have such statutes, making them more generous will not necessarily lead to more claims for relief to process. It is likely that the people eligible for compensation are already seeking it out. For penniless exonerates, some compensation is surely better than none and thus the system currently in place roughly reflects the administrative cost of a system without compensation limits.

While the Article does not offer a specific monetary sum for what a wrongful conviction is worth, the proposal requires that all states need to at the very least adopt indemnification statutes, and ideally make them as generous as the recently enacted federal compensation statute. The compensation statute passed through the Innocence Protection Act is meaningfully more generous than many of the state statutes described above.¹³⁸ The Act offers wrongfully convicted individuals up to \$50,000 for each year they were wrongfully incarcerated, and up to \$100,000 for each year the plaintiff was wrongfully on death row.¹³⁹ Given that the average length of time exonerates served is thirteen years, and the total number of years served is approximately 3,196, it would seem there would be a great deal of money at stake that could motivate the private bar to become more active in exoneration work.¹⁴⁰ Attorneys seeking gainful employment may then find exoneration work to be a more lucrative

¹³⁷ See *infra* Part IV.A.2.

¹³⁸ The Innocence Protection Act of 2004, H.R. 5107, 108th Cong. (2004) (codified at 28 U.S.C. 2513 (2006)) ("Any person suing under section 1495 of this title must allege and prove that: (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution; (b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received; (c) No pardon or certified copy of a pardon shall be considered by the United States Court of Federal Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired; . . . (e) The amount of damages awarded shall not exceed \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and \$50,000 for each 12-month period of incarceration for any other plaintiff.").

¹³⁹ *Id.*

¹⁴⁰ The Innocence Project, Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php> (last visited Jan. 13, 2010).

business model than even charging a flat fee to plead out a case during the trial phase. In what would truly be in line with Adam Smith's prediction, a lawyer intending "only his own gain . . . led by an invisible hand to promote an end which was no part of his intention," can bring about justice for the wrongly convicted currently languishing in prison without hope.¹⁴¹

An even better outcome would be for states to adopt the Innocent Project's Model Legislation for 2010 State Legislative Sessions: An Act Concerning Claims for Wrongful Conviction and Imprisonment (Model Legislation).¹⁴² The Model Legislation goes beyond the Federal minimum by setting \$50,000 as the minimum instead of the maximum of eligible compensation. The proposal recommends considering the following factors for increasing the award beyond \$50,000 per year of wrongful imprisonment:

- Inflation;¹⁴³
- Economic damages including, but not limited to, lost wages, costs associated with criminal defense, and medical expenses after release;¹⁴⁴
- Non-economic damages including, but not limited to, physical injuries or sickness arising out of incarceration and non-physical injuries or sickness arising out of physical injuries or sickness resulting from incarceration;¹⁴⁵ and
- Compensation for each year served on parole, probation, or as a registered sex-offender.¹⁴⁶

Moreover, the Model Legislation requests that states provide physical and mental health care for the wrongfully convicted, reimburse any tuition and fees paid for the education of the wrongfully convicted and any biological children, compensate for interest and principal of child support payments, compensate for reasonable services incurred by wrongfully convicted individual to transition back into society, and provide reasonable attorneys' fees for bringing a claim under the proposed legislation.¹⁴⁷ This

¹⁴¹ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R.H. Campbell & A.S. Skinner, eds., 1981)).

¹⁴² MAKING UP FOR LOST TIME, *supra* note 77, app. B.

¹⁴³ *Id.* at 4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ MAKING UP FOR LOST TIME, *supra* note 77, app. B, at 4-5 (the total is calculated at 10% of the damage award but not to exceed \$75,000).

last provision, increasing the compensation award to factor in that a lawyer will likely charge a percentage of the damages, is highly consistent with this Article's argument to link contingency fee agreements to generous indemnification statutes.

States should retain flexibility in choosing just how generous the compensation statute should be, but this Article predicts a direct relationship between generosity and number of legitimate claims of innocence brought to light. Few can dispute that there is currently a non-zero number of inmates who have suffered a grave injustice and have no recourse. Passing generous compensation statutes is a win-win proposition for the states: either this wrongly convicted population is small, in which case eliminating the caps and creating more generous compensation statutes allows for an expressive solidarity with the wrongfully convicted but at little actual cost. Or the population is in fact large, and these statutes create an avenue to redress the harm that is ongoing to these individuals. Redressing the harm is done not only by compensating them for their injuries, but by bringing their innocence to light through legal assistance they would not otherwise have obtained.

2. Eligibility for Compensation: The Challenges to Showing Actual Innocence

The maximum monetary award allowed is not the only factor that determines whether an indemnification statute is generous and will incentivize attorneys to participate in post-conviction representation. Arguably as important is the stringency of the statute as to who is eligible to receive compensation. Adele Bernhard categorizes the compensation statutes that existed in 1999 according to: conditions precedent (besides imprisonment for unjust conviction), standard of proof, who decides, time limits for filing, maximum awards, and what contributory acts by the wrongfully convicted person will bar compensation.¹⁴⁸ This Subsection will discuss the range of options available under each category, articulate the option the Innocence Project proposes in its Model Legislation, and argue that for this Article's policy to have maximum effect, states should adopt the most generous version it can reasonably afford.

Virtually all of the statutes currently require that claimants be found *actually innocent*. DNA testing is the most accepted way of proving innocence, but as previously discussed, it is not available in every case. Determining who counts as "wrongfully convicted" for the purposes of the statute gets to the heart of what it means to have a just system of criminal administration in this country. Who are we most concerned with as a society? Are we only interested in the individual who was falsely found to

¹⁴⁸ Bernhard, *supra* note 76, at 417 (last updated Aug. 11, 2008).

have perpetrated a crime that never even took place or was committed by someone else, or are we also concerned about people who were found guilty of crimes despite lacking the requisite intent? Perhaps we even consider individuals who committed lesser crimes than the ones they were convicted of as “wrongfully” imprisoned and deserving of compensation.

The state statutes that exist have very differing views as to what level of “innocence” needs to be established for indemnification eligibility. In Missouri, for example, eligibility requires a person determined to be “actually innocent” only by DNA evidence.¹⁴⁹ In other states, such as Utah, a district court must determine factual innocence, which means a person did not: “(a) engage in the conduct for which the person was convicted; (b) engage in conduct relating to any lesser included offenses; or (c) commit any other felony arising out of or reasonably connected to the facts supporting the indictment or information upon which the person was convicted.”¹⁵⁰ Ohio has a fairly lax standard, that “the individual’s conviction was vacated or was dismissed, or reversed on appeal,” and that there will be no more prosecutions for any act associated with that conviction.¹⁵¹ Many statutes require that a pardon be secured.¹⁵² Moreover, some statutes require that the wrongfully convicted person did not contribute to the bringing about of his arrest or conviction, which may prevent people who falsely confessed or pled guilty¹⁵³ from receiving compensation.¹⁵⁴ States also differ as to how much evidence is necessary to

¹⁴⁹ MO. REV. STAT. § 650.058 (2006) (“[A]ny individual who was found guilty of a felony in a Missouri court and was later determined to be actually innocent of such crime solely as a result of DNA profiling analysis may be paid restitution. The individual may receive an amount of fifty dollars per day for each day of post-conviction incarceration for the crime for which the individual is determined to be actually innocent. . . . [T]he term “actually innocent” shall mean: (1) The individual was convicted of a felony for which a final order of release was entered by the court; (2) All appeals of the order of release have been exhausted; (3) The individual was not serving any term of a sentence for any other crime concurrently with the sentence for which he or she is determined to be actually innocent, unless such individual was serving another concurrent sentence because his or her parole was revoked by a court or the board of probation and parole in connection with the crime for which the person has been exonerated . . .”).

¹⁵⁰ UTAH CODE ANN. § 78B-9-402 (West 2010).

¹⁵¹ OH. REV. CODE ANN. § 2305.02 (West 2010); *id.* § 2743.48; *see also* D.C. CODE § 2-422 (West 2010) (requiring for proof of unjust imprisonment, that person’s “conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing was found not guilty of such offense . . . or that he has been pardoned upon the stated ground of innocence and unjust conviction; and (2) That, based upon clear and convincing evidence, he did not commit any of the acts charged”).

¹⁵² *See, e.g.*, ME. REV. STAT. ANN. tit. 14, §§ 8241-8244 (West 2010) (requiring “written finding by the Governor who grants the pardon that the person is innocent of the crime for which that person was convicted”); N.C. GEN. STAT. §§ 148-82 to 148-84 (West 2010) (eligibility requires “a pardon of innocence by the Governor upon the grounds that the crime with which the person was charged either was not committed at all or was not committed by that person”).

¹⁵³ *See, e.g.*, IOWA CODE ANN. § 663A.1(b) (West 2010).

¹⁵⁴ *See, e.g.*, CAL. PENAL CODE § 4903 (West 2010); N.J. STAT. ANN. § 52:4C-3 (2006).

establish wrongful conviction. Most courts require wrongful conviction to be demonstrated by “clear and convincing” evidence,¹⁵⁵ although some only require “preponderance of the evidence.”¹⁵⁶ Maryland requires “conclusive evidence.”¹⁵⁷

The diversity in the state’s approaches is not necessarily bad, as each state can choose to strike its own balance between reaching the largest number of people who have suffered harm at the hands of the state, and providing as much compensation as possible within the budgetary constraints it faces. States should be mindful of the relative benefits of each standard in bringing about its goals. For example, a statute that requires exoneration through DNA evidence leaves out a host of individuals who could never establish their innocence through that approach. A statute requiring “clear and convincing” or “conclusive evidence” will be far less generous than one that only requests a “preponderance of the evidence.” For the compensation scheme to have the largest effect on incentivizing post-conviction work on a contingency fee, this Article recommends that states cast the widest net possible for eligibility.

The Model Legislation requires a wrongful conviction “[o]n grounds not inconsistent with innocence,” demonstrated when the person is:

- a. pardoned for the crime or crimes for which he was sentenced and which are the grounds for the complaint;
- b. The statute, or application thereof, on which the accusatory instrument was based, violated the Constitution of the United States or the [State];
- c. The judgment of conviction was vacated; or
- d. The judgment of conviction was reversed.¹⁵⁸

This formulation of “actual innocence” or rather, a standard not “inconsistent with innocence” is a major improvement over the restrictive eligibility criteria in the compensation statutes that exist. Additionally, the Model Legislation only requires a claimant to establish through a *preponderance of the evidence* that he was wrongfully convicted, and “neither a confession or admission later found to be false, nor a guilty plea to a crime the claimant did not commit constitutes bringing about his own

¹⁵⁵ See, e.g., ME. REV. STAT. ANN. tit. 4 § 8241 (West 2010); N.J. STAT. ANN. § 52:4C-3 (West 2010); OKLA. STAT. tit. 51 § 154 (West 2010).

¹⁵⁶ See, e.g., *Walden v. State*, 547 N.E.2d 962 (Ohio 1989).

¹⁵⁷ MD. CODE ANN., STATE FIN. & PROC. § 10-501 (2006).

¹⁵⁸ MAKING UP FOR LOST TIME, *supra* note 77, app. B.

conviction under this Act.”¹⁵⁹ It is clear that the Model Legislation is seeking the widest-reaching compensation scheme possible, and that is certainly consistent with an effort to incentivize attorneys to deem these claims worth investigating and pursuing. States should adopt as generous a scheme as is politically feasible in order to give wrongfully convicted individuals the best chance at exoneration.

Finally, states vary widely as to who decides whether someone has provided sufficient evidence to collect under the compensation statutes. In many states a court of claims is in charge of administering the compensation. Some states set up administrative bodies to dispose of wrongful conviction claims, such as the Board of Public Works in Maryland,¹⁶⁰ the Industrial Commission in North Carolina,¹⁶¹ and the Committee on Compensation for Wrongful Incarceration in Alabama.¹⁶² In other states, the legislature plays a meaningful role in determining compensation.¹⁶³ In states where courts decide compensation eligibility and amount, such as the state superior court, court of claims, or the state civil court, no state allows juries to play a role in the determination.¹⁶⁴ The Model Legislation proposes that all claims of wrongful conviction and imprisonment “shall be presented to and heard by the state’s civil court or the state’s other appropriate administrative structure that handles similar compensation claims.”¹⁶⁵ Like the Model Legislation, this Article does not take a position as to which of these institutions is more competent to effectively dispose of wrongful conviction claims. Where such bodies already exist, making statutes more generous does not require any meaningful changes to how these institutions decide who should be compensated. States that have yet to adopt compensation statutes for the wrongfully convicted should examine their administrative and court structure to see which institution has most experience processing such claims.

B. Revising the Ethical Prohibition Against Criminal Contingency Fees

One outstanding issue is whether the proposed arrangement of having lawyers work to exonerate an individual in the hopes of collecting statutory

¹⁵⁹ *Id.*

¹⁶⁰ MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2010).

¹⁶¹ N.C. GEN. STAT. ANN. § 148-83 (West 2009).

¹⁶² ALA. CODE § 29-2-151 (West 2009).

¹⁶³ See, e.g., MONT. CODE ANN. § 53-1-214 (2009); VA. CODE ANN. §§ 8.01-195.10 to .11 (West 2010).

¹⁶⁴ See, e.g., LA. REV. STAT. ANN. § 15:572.8 (2010).

¹⁶⁵ MAKING UP FOR LOST TIME, *supra* note 77, app. B.

indemnification is barred by ethical rules. As discussed previously,¹⁶⁶ the answer depends on the nature of the exoneration work. Much of the work that needs to be done, such as filing habeas petitions or petitioning a governor for a pardon, is civil in nature and would not run afoul of the ethical prohibition. Seeking collateral review of a conviction is a civil inquiry into the validity of a conviction and sentence, and since such representation would not be ethically barred, generous compensation statutes may provide a legitimate incentive for attorneys to collaterally attack the convictions of the wrongly imprisoned. However, as the rules are currently written, there is not clear guidance as to whether the rule precludes contingency fee arrangements in discretionary direct appeals.

Pritchard's arguments support exempting exoneration efforts from the ethical ban against criminal contingent fee arrangements.¹⁶⁷ The wrongfully convicted are no longer "defendants" under the ethics codes; they are victims of injustice that need to be able to finance representation that neither the Constitution nor public sympathy affords them. A minor modification to the Model Code and Model Rules will promote precisely the type of attorney behavior the criminal justice system should encourage.

Thus the Model Code and Model Rules should be modified to explicitly exclude post-conviction exoneration work from the ethical ban against criminal contingency fees. This can be done through a comment added to Model Rule 1.5(d)(2) and Model Code DR 2-106(c), clarifying that the language "a lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case," does not apply to post-conviction exoneration efforts.¹⁶⁸ The ethical concerns for contingency fee arrangements in post-conviction relief are simply not present. Looking back to Karlan's article, it is clear that the common justifications for the ban on criminal contingent fee arrangements *in general* no longer hold true.¹⁶⁹ She even explicitly articulates that one major justification for the ban—that indigent defendants are constitutionally entitled to counsel—does not hold true for all types of post-conviction relief.¹⁷⁰

¹⁶⁶ See *supra* Part II.A.2.

¹⁶⁷ Pritchard, *supra* note 68.

¹⁶⁸ Model Rules of Prof'l Conduct R. 1.5(d)(2) (1983); Model Code of Prof'l Responsibility DR 2-106(C) (1980).

¹⁶⁹ See also Lushing, *supra* note 59, at 546 ("The prohibition on criminal contingent fees springs from irrelevant conceptual thinking, unverified concerns regarding conflict of interest, and prejudice against criminal attorneys and what they do. These concerns do not provide sufficient reason to bar lawyers and clients from entering into beneficial agreements.").

¹⁷⁰ Karlan, *supra* note 48, at 604 n.43 (citing *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (states not constitutionally required to provide attorneys to indigent death-row inmates seeking state postconviction relief), *Ross v. Moffitt*, 417 U.S. 600, 610–11 (1974) (states not constitutionally required to provide appointed counsel for discretionary appeals)).

Furthermore, the justification she puts forward, that lawyers should not be sorting out the “peaches” from the “lemons” at the expense of zealous advocacy, is not applicable to exoneration advocacy.¹⁷¹ That is, the difference between post-conviction exoneration efforts and pre-conviction defense efforts is that society *does not mind* attorneys trying to distinguish the “peaches” from the “lemons.”¹⁷² That is precisely what Innocence Projects have been doing for almost the last two decades. Actually guilty people seeking to prove their innocence would only be frivolously burdening an already stretched-thin criminal justice system. It is less costly, administratively, to have private counsel bear the burden of separating out the claims that are likely to win from those that are not.¹⁷³

Thus the major upside to encouraging contingency fee arrangements in the post-conviction context is that the desire to collect compensation under the statute will ensure that lawyers conduct a thorough search for meritorious wrongful conviction claims. While our justice system does not have the resources to dedicate to these investigations, and innocence projects and public defenders are similarly strained for resources, this proposal can reallocate the responsibility for sorting meritorious from unmeritorious claims to private attorneys. The profit motive will motivate private attorneys to find the innocent among the convicted, providing services otherwise unavailable to those innocent individuals languishing in prison with little hope of exoneration.

C. Possible Limitations to Post-Conviction Contingency-Fee Representation

1. Diverting Too Much Compensation Away from Those Most in Need of Government Assistance?

In a recent article, Lawrence Rosenthal takes issues with what he describes as “widespread support for expanding the damages remedies available to those who have been wrongfully accused or convicted.”¹⁷⁴ Rosenthal objects to indemnification of the wrongly convicted as what he terms as a “perverse wealth transfer—from those most in need of government assistance to the exonerated—without reducing the risk of error in the criminal process.”¹⁷⁵ Rosenthal makes a compelling point that

¹⁷¹ *Id.*

¹⁷² See Karlan, *supra* note 48.

¹⁷³ For example, it is less costly than say having a truth commission assigned to hear all claims of innocence without any filtering out of the frivolous ones. See Davis Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91 (2000).

¹⁷⁴ Rosenthal, *supra* note 80, at 127.

¹⁷⁵ *Id.*

it is “far from clear that wrongful conviction insurance represents the form of social insurance in most urgent need of public funding.”¹⁷⁶

After all, there are no publicly funded social insurance programs for “severe hardships,” such as “natural disasters,” and the indigent may be in “no better position to obtain private insurance against these costs than for the risk of wrongful conviction.” Rosenthal concedes that while hardships such as natural disasters are not the government’s fault, to the extent that indemnification is “based on loss spreading and not fault, it is far from clear that the losses associated with wrongful prosecutions and convictions are those in most urgent need of spreading.”¹⁷⁷ Rosenthal concludes that “[u]nless we are to rethink the entire edifice of tort immunity, the fact that the activities of the government cause a loss is no reason to select wrongful prosecution and conviction for special treatment.”¹⁷⁸

Rosenthal’s points are well taken, and especially if you believe his estimate that indemnification would have cost “more than \$3.4 billion if all of the exonerations between 1989 and 2003 are considered under the standard of compensation set in Newsome.”¹⁷⁹ He is particularly concerned that the budgetary impact of a generous indemnification program will require “concomitant reduction in the funding of other, more politically vulnerable programs.”¹⁸⁰ Programs “most likely to be cut are those that provide services to the poor,” such as “subsidized early childhood education, the remediation of inner-city environmental hazards, the provision of social services to troubled families, or the provision of health care.”¹⁸¹

This Article suggests that Rosenthal both overstates the costs of indemnification and understates the benefits. First, as Section IV.A.1 addresses, there is little reason to believe that this proposal will open “already cramped treasuries to what seem[] unlimited inroads.”¹⁸² States will retain flexibility in choosing just how generous the compensation statute should be, and can balance its other budgetary priorities as needed. States should set a level of compensation high enough to sufficiently

¹⁷⁶ *Id.* at 134.

¹⁷⁷ *Id.* at 134.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 134–35; *see also* Newsome v. McCabe, 319 F.3d 301, 302–03 (7th Cir. 2003) (awarding \$1 million for each of fifteen years that James Newsome was wrongfully incarcerated). It is hard to imagine that a state that currently caps indemnification to \$10,000 total for time wrongly imprisoned will move to a compensation scheme of \$1 million per year of wrongful incarceration. More importantly, the proposal this Article sets forth nowhere approximates the standard of compensation set in *Newsome*.

¹⁸⁰ Rosenthal, *supra* note 80, at 135.

¹⁸¹ *Id.*

¹⁸² BORCHARD, *supra* note 95, at 387.

motivate attorneys to investigate and bring to light legitimate claims of innocence, but not so high as to jeopardize their ability to provide other critical services to their citizens. Moreover, to the extent that states would like to keep up the appearance that the incidence of wrongful conviction is low, there is little reason to believe that indemnification for wrongful conviction would be as expensive as other important social insurance programs.

Second, this Article's proposal complicates Rosenthal's premise that while "compensation would improve the lot of the exonerated, . . . if we cannot expect it to reduce the incidence of error in the criminal justice system, it lacks any additional systemic benefits."¹⁸³ This Article disputes the idea that indemnification cannot reduce the incidence of error in criminal justice outcomes. The argument Rosenthal puts forward to support his claim is that no-fault liability does not lead the government to internalize the costs of wrongful prosecutions and convictions, and thus does not encourage it to take precautions that would reduce the rate of wrongful conviction. This is because, as Darly Levinson famously argued, the "government is not a revenue or profit-maximizer, but instead responds to political costs and benefits."¹⁸⁴ Thus "we cannot be confident that any regime of governmental liability will achieve an efficient outcome because the government lacks the incentive to minimize costs and maximize profits that exists in the private sector."¹⁸⁵

However, this Article argues that the reduction in wrongful conviction will not necessarily come on the front end—that is from changes in prosecutorial or police practices. Rather, by affecting the incentives of attorneys to investigate and pursue claims of innocence, there may be "systematic benefits" that may very well be worth the cost of indemnification. This Article's proposal does not require the government to internalize the cost of its conviction errors, but rather it creates a stream of income for the private bar to fund exoneration efforts that would not otherwise exist.

There is no doubt that the cost of this Article's proposal needs to be balanced against the cost of other well-intentioned social justice policy initiatives. But so long as it is "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free," it is critical that states do not abdicate responsibility by ignoring the plight of the wrongly convicted.¹⁸⁶ A well-crafted indemnification scheme can go a long way in empowering an unknown

¹⁸³ Rosenthal, *supra* note 80, at 136.

¹⁸⁴ *Id.* at 129 (citing Levinson, *supra* note 114).

¹⁸⁵ *Id.*

¹⁸⁶ *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

number of innocent people currently without recourse.

2. *Diverting Too Much Compensation Away from the Victim to the Lawyer?*

Another shortcoming of the proposal to link contingency fee arrangements to generous state compensation schemes is that money that would otherwise have gone to the wrongfully convicted individual will now be directed to an attorney's coffers. There is no reason to believe that without ethical regulation, attorneys will not exploit the desperate position of a convict and take an unreasonable amount of the compensation received under the statute. It would seem disproportionate for an attorney to take one-third of the compensation received for, say, twenty years of wrongful imprisonment for simply taking an exonerated person through the application process. The task of demonstrating that someone who has been exonerated has served time is ministerial. What this proposal has in mind is motivating lawyers to perform work to actually obtain the exoneration, and then pegging their compensation to what they would receive under a generous indemnification statute.

In a recent case, Patrick Waller, a wrongly convicted man freed by DNA evidence, sued his civil lawyer and an Innocence Project of Texas official, saying they were seeking to obtain too much of the nearly \$1.3 million he received for spending sixteen years in prison.¹⁸⁷ Waller had recently received compensation under a new state compensation law that attorney Kevin Glasheen lobbied for on behalf of his thirteen wrongly convicted clients.¹⁸⁸ Glasheen sought to recover \$650,000 in fees, plus a \$130,000 referral fee for the chief counsel for the Innocence Project of Texas.¹⁸⁹ Waller credited his lead attorney Gary Udashen as primarily responsible for his exoneration, who is only receiving about \$100,000 from Glasheen.¹⁹⁰ The major concern was that Glasheen, in charging all thirteen of his clients this fee, would receive at least \$8 million, more than any individual exoneree.¹⁹¹ Glasheen countered that he should not be punished for using the legislative advocacy approach, a quicker solution to getting his clients paid.¹⁹²

¹⁸⁷ Jeff Carlton, *Texas Man Freed by DNA Sues Over 'Excessive' Attorney Fees*, N.J. L.J. Dec. 24, 2009, <http://www.njj.com>.

¹⁸⁸ *Id.* The lobbying efforts increase paying the wrongly convicted from \$50,000 for each year of incarceration to \$80,000 per year, plus a lifetime \$80,000 annuity—a compensation package that is the most generous in the nation.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

The Waller-Glasheen stand-off illuminates that for exonerations to take place, given the legal system as we currently have it and with few exceptions, attorneys must be compensated for their efforts. The less compensation available to attorneys, the less likely it is that they will take on cases that have a low probability of success. The lack of incentive is what currently accounts for the lack of post-conviction litigation opportunities for the wrongly convicted. Thus, while it may not seem “just” that an attorney walks away with the money meant to compensate a victim for his pain and suffering, this is no different than the way contingency fees generally operate.

Moreover, rules of professional conduct already have ethical prohibitions against unreasonable fees.¹⁹³ Both the Model Code and the Model Rules employ an elaborate eight-part test to determine whether a fee has been excessive, which includes:

- (1) The time and labor required, the novelty and difficulty of the legal questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent.¹⁹⁴

Thus there is no reason to assume that the criminal contingency fee

¹⁹³ See MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(A) (1980) (“A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.”); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(B) (“A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.”); MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (1983) (“A lawyer's fee shall be reasonable.”). But see Gabriel J. Chin & Scott C. Wells, *Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys' Fees in Criminal Cases*, 41 B.C. L. REV. 1 (1999) (discussing the lack of enforcement of ABA rules against excessive fees in the absence of other forms of misconduct).

¹⁹⁴ MODEL RULES OF PROF'L CONDUCT R. 1.5(A)(1)-(8) (1983); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(B)(1)-(8) (1980).

setting lends itself more likely to exploiting the client than other fee structures, such as the hourly rate, or a stair-step fee.¹⁹⁵ If the client thinks the fee is excessive, all he or she has to do is not pay the attorney, which would invariably result in a court determining the reasonableness of the fee based on these eight factors. Moreover, courts or legislatures could per se prevent overcharging by setting maximum contingent fee allowed per exoneration case, just as is now done with civil plaintiff contingent fees.¹⁹⁶

3. *Inability to Aggregate Claims*

The ideal manifestation of this Article's proposal would be the rise of a private bar dedicated to investigating and litigating post-conviction innocence claims, funded through a generous indemnification program when such claims are successful. The rise of the personal injury bar gives hope that contingency fees can provide indigent parties with lawyers to pursue claims that might otherwise be ignored. After all, a "thorough study of contemporary class actions . . . attributes gains in wealth for plaintiffs to the development of an enterprise of liability."¹⁹⁷ In other tort actions, the "aggregation" of claims allows "claim[s] where damages for each plaintiff are too low to justify a lawyer's decision to represent one plaintiff," to go forward and "make[] the lawsuit profitable."¹⁹⁸ For example, when hemophiliacs litigated against blood-clotting products, "the formation of a class turned a history of plaintiff defeats into a payout of

¹⁹⁵ See, e.g., Lushing, *supra* note 59, at 531-32 ("The possibilities for overreaching are not especially characteristic of a contingent fee, certainly not when compared with an hourly arrangement, which naturally induces hour padding, or with a stairstep fee, which creates a similar incentive to prolong litigation. Indeed, problems caused by contingent fees and hourly and stairstep arrangements all pale beside those generated by the common criminal defense practice of obtaining a nonrefundable retainer.").

¹⁹⁶ *Id.* at 534; see, e.g., CONN. GEN. STAT. § 52-251(c) (2010) (limiting attorney contingency fees in personal injury, wrongful death, and property damage actions along a sliding scale not to exceed 1/3 of first \$300,000; 25% of next \$300,000; 20% of next \$300,000; 15% of next \$300,000; and 10% of damages exceeding \$1.2 million); DEL. CODE tit. 8 § 6865 (limiting attorneys fees on a sliding scale not to exceed 35% of first \$100,000; 25% of next \$100,000; and 10% of all damages exceeding \$200,000) (2010); FLA. CONST. art I, § 26 ("In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000.00 in all damages received by the claimant. . . . [and] 90% of all damages in excess of \$250,000.00"); 735 ILL. COMP. STAT. 5/2-1114 (2010) (limiting attorneys fees in malpractice action on a sliding scale not to exceed 1/3 of first \$150,000; 25% of \$150,000 to \$1 million; 20% of damages over \$1 million); NEV. REV. STAT. § 7.095 (2007) (limiting attorneys fees in malpractice action on a sliding scale not to exceed 40% of first \$50,000; 33 1/3% of next \$50,000; 25% of next \$500,000; 15% of any amount over \$600,000); UTAH CODE § 78B-3-411 (2007) (limiting contingency fee in medical malpractice case not to exceed 1/3 of award).

¹⁹⁷ Anita Bernstein, *The Enterprise of Liability*, 39 VAL. U. L. REV. 27, 52 (2004) (citing DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000)).

¹⁹⁸ *Id.*

about \$620 million in compensation.”¹⁹⁹ And more famously, in tobacco litigation “wealth accreted, not only for state governments but class members and individual litigants, only after the plaintiff’s bar became established as an enterprise.”²⁰⁰

Innocence claims cannot, by definition, be aggregated. Unlike victims of a harmful carcinogen, the victims of wrongful conviction cannot band together against a common agent of harm. Each individual seeking indemnification has to establish his or her claim on an individual basis. Post-conviction contingency-fee litigation likely cannot generate the level of wealth that other tortuous behavior has generated for attorneys. An argument can be made that when more claims of innocence are investigated, the investigation may reveal evidence that certain individuals or institutions systematically led to wrongful convictions. This evidence might give rise to a class action lawsuit that might generate profits. However, these lawsuits would be subject to the very meaningful limitations on civil liability for wrongful conviction discussed in Section II.B. Ultimately, the inability to aggregate claims of wrongful conviction greatly limits the extent to which private attorneys may get rich through pursuing innocence claims.

Still, the strength of this Article’s proposal is that it promises to fund the pursuit of innocence claims in a way not currently feasible. Post-conviction work tends to be pro-bono or done by lawyers lucky enough to have secured a salaried position at a criminal justice organization. This proposal can make more likely for lawyers to make a living off of the contingency fees they collect from pursuing innocence cases, especially if there is a large number of rightful claims of innocence that have not been vindicated. Currently, there is close to no economic incentive to pursue post-conviction claims of innocence outside of moral compulsion. Generating incentives to make post-conviction exoneration work not only economically feasible, but even profitable, is critical if such claims are ever to come to light.

CONCLUSION

In the epilogue to his book, *Journey Toward Justice*, Dennis Fritz explains that with the help of several members of the Innocence Project, he “successfully sued the state of Oklahoma and received a financial settlement that has allowed [him] to provide a quality life for [him] and [his] family.”²⁰¹ Fritz had been wrongfully incarcerated for eleven years

¹⁹⁹ *Id.* at 53.

²⁰⁰ *Id.*

²⁰¹ DENNIS FRITZ, *JOURNEY TOWARD JUSTICE* 457 (2006).

and come within five days of execution. Since his exoneration, Fritz has become the subject of a *New York Times* Best Selling book by John Grisham, *An Innocent Man: Murder and Injustice in a Small Town*.²⁰² While neither the exoneration, nor the fame, nor the damages award can ever full compensate Dennis Fritz for his pain and suffering, his position is enviable from the point of view of the wrongfully convicted still languishing in jail. Making compensation statutes more widespread and more generous is not only just, but especially if coupled with a slight modification to ethical rules concerning contingency fee arrangements, will likely increase the exoneration rate of the wrongly convicted.

²⁰² JOHN GRISHAM, *AN INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006).