

Find the Cost of Freedom†: The State of Wrongful Conviction Compensation Statutes Across the Country and the Strange Legal Odyssey of Timothy Atkins

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† CROSBY, STILLS, NASH & YOUNG, *Find the Cost of Freedom, on SO FAR* (Atlantic Recording Corp. 1974).

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I. INTRODUCTION

Vicente Gonzales took his wife Maria to a concert to celebrate New Year's Eve 1984.¹ They dropped their kids off with the babysitter in Venice and headed to downtown Los Angeles.² The show ended late, and they were unsure whether to pick up their children or just let them spend the night with the babysitter.³ They drove to Venice and then sat in their car on a dark street outside the babysitter's house and talked about the decision.⁴

When two men crept up to the back of their car, neither Vicente nor Maria noticed until one held a gun to the back of Maria's head and the other opened the driver's side door and pulled Vicente out.⁵ Maria froze, fearing she would be shot in the head, while the second attacker grabbed Vicente's wallet, shot him in the chest with a sawed off shotgun, and threw his body back in the car on top of his wife.⁶ Vicente bled out and died.⁷ Maria said she looked back and saw the man who put the gun to her head for "one second."⁸ She described him as approximately five feet tall, 135 pounds, with a gaunt face and bulging eyes.⁹

Timothy Atkins was seventeen years old, six feet tall, and 175 pounds at the time of the crime.¹⁰ He was a couple of blocks away hanging out when the attackers ran by.¹¹ Tim knew the men.¹² They were Shoreline Crips,¹³ as were all of the young black men in the neighborhood. Tim had never done any crimes with the Crips, but he had recently joined them because they controlled the neighborhood and he wanted to avoid getting beat up every day.¹⁴ The men told Tim to watch out for police.¹⁵ "[We] just did a move," they warned, and Tim knew that meant they had

1. Reporters' Transcript on Appeal at 156, *People v. Atkins*, No. A090938 (Cal. Ct. App. June 25, 1987).

2. *Id.* at 157.

3. *Id.* at 158–59.

4. *Id.* at 159.

5. *Id.* at 160.

6. *Id.* at 161–62.

7. Order Granting Writ of Habeas Corpus at 4, *In re Atkins*, No. A090938 (Cal. Ct. App. Feb. 8, 2007).

8. *Id.*

9. *Id.*

10. *Id.*

11. Transcript of Proceedings in Claim of Timothy Atkins Day 1 (Morning) at 76, Claim No. G569329 (Cal. Victim Comp. & Gov't Claims Bd. Dec. 15, 2009) (on file with authors).

12. *Id.* at 76–77.

13. *Id.* at 77.

14. *Id.* at 71.

15. *Id.* at 77.

just committed a crime.¹⁶ He was not concerned because he had not been involved.¹⁷ In fact, Tim not only did not leave the area to avoid the police, he was drawn by the sirens to the crime scene where he stood in a crowd and watched it being processed.¹⁸

A few days later, Tim was arrested.¹⁹ Although he did not match Maria's description of the assailant, the police believed he held the pistol that night. The reason, by all accounts, was the statement of Denise Powell, a local crack addict and prostitute.²⁰ She had been bragging that she knew who was responsible for a string of break-ins around Venice.²¹ The police also believed she knew who murdered Vicente Gonzales.²² Denise was brought in for questioning and told she was not going to leave the police station until she said who committed the murder, and if she did not give the police names she would be prosecuted as an accessory.²³

Tim knew Denise Powell.²⁴ He saw her in the early morning hours after the murder while he was sitting on a stoop talking to his friend Ricky Evans.²⁵ Ricky grew up in Venice, but his family had recently moved to the San Fernando Valley, wanting to get away from the crime and violence of Venice. Ricky was just in town for one night; his family was there to celebrate the holiday with their friends and former neighbors. Denise drove up with another neighbor, Tommy Yates, and asked Tim whether he knew where they could get some drugs.²⁶ Tim and Ricky got in and the four of them drove around town, stopping at a few places to see if anyone had any to sell.²⁷

During the drive, Tim asked Denise and Tommy whether they had "hear[d] about the Mexican that got killed [that] night."²⁸ Tommy said

16. *Id.*

17. *Id.* at 78.

18. *Id.* at 78–79.

19. *Id.* at 84.

20. Reporter's Transcript of Proceedings at 36, *In re Atkins*, No. A090938 (Cal. Super. Ct. Sept. 11, 2006).

21. *Id.* at 33.

22. *Id.* at 34.

23. *Id.* at 35.

24. Transcript of Proceedings in Claim of Timothy Atkins Day 1 (Morning), *supra* note 11, at 82–83.

25. *Id.*

26. *Id.*

27. *Id.* at 83.

28. Order Granting Writ of Habeas Corpus, *supra* note 7, at 4.

he had not.²⁹ Tim told the two of them that he was not going to “ride around . . . around Venice with [them] looking for some dope because the police is hot. Somebody got killed”³⁰ After their third unsuccessful stop at a location looking for drugs, Tim asked Tommy to drop Ricky and him off back at the stoop.³¹ After they parted ways, Tim went home to bed.³²

For Denise Powell, sitting a few days later in an interrogation room with two police detectives, the early morning drive provided an out. She had been presented with a book—a “gang book”—with pages of mugshot photos of Venice Shoreline Crips and others “believed to associate.”³³ She would not be allowed to leave until she picked the two who committed the murder and she was going to jail if she did not pick two.³⁴ The detectives made that clear.³⁵ She found the pictures of Tim and Ricky and circled them.³⁶ The selections came with a story; she knew these two had murdered Vicente Gonzales because they told her about it.³⁷

The lie was mostly true, with the tiniest of embellishments, as the best lies so often are. Denise had been riding around with Tim and Ricky after the shooting. They had been talking about the shooting. But Denise added three words to the conversation. She claimed Tim said, “We offed him.”³⁸ These three made-up words would forever change the lives of Tim Atkins and Ricky Evans.

Denise believed the lie would not matter, that the police would eventually discover the real killers, and that Tim and Ricky would be absolved of responsibility. Instead, using highly questionable identification techniques, the police showed Maria Gonzales Tim’s photo, and she identified him as the man with the pistol to her head, even though he did not match the description she gave the police.³⁹

With Maria’s identification, Tim’s trial took on an inevitable tone. Denise Powell had disappeared, so her preliminary hearing testimony was read into the record.⁴⁰ The defense attorney objected, but the police testified they looked very hard in trying to produce Powell, so the judge

29. *Id.*

30. Transcript of Proceedings in Claim of Timothy Atkins Day 1 (Morning), *supra* note 11, at 83 (first omission in original).

31. *Id.* at 84.

32. *Id.*

33. Reporter’s Transcript of Proceedings, *supra* note 20, at 35.

34. *See id.*

35. *See id.*

36. *Id.*

37. *Id.* at 37.

38. Reporters’ Transcript on Appeal, *supra* note 1, at 506.

39. Order Granting Writ of Habeas Corpus, *supra* note 7, at 6.

40. Reporters’ Transcript on Appeal, *supra* note 1, at 501.

let it in.⁴¹ Without her, Tim's lawyer could not cross-examine Denise on the conversation in the car and could not challenge her with Tommy Yates's statement that Tim never said, "We offed him." The prosecution portrayed Tommy as a crack addict and criminal, which he unquestionably was, and not to be believed.⁴²

Ricky suffered a worse fate. He was not around to corroborate Tim's story because he was dead by the time the case went to trial. He had been beaten to death in jail, by eleven or twelve gang members housed in the same cell, after he and Tim tried to tell the authorities about the men Tim had seen in the laundry room the night of Vicente's murder.⁴³ Tim survived the beating, but spent two months in the hospital struggling to cope with his friend's death.⁴⁴ Ricky, who had left Venice for good, who was finally out of the gang neighborhood, had come back just to celebrate the holiday, but it was enough for him to be arrested and killed.

Tim was ultimately convicted and sentenced to thirty-two years to life in prison.⁴⁵ He lost his appeal, as most defendants do, and for the next twenty years tried to get anyone he could to listen to his story of innocence. He and his grandmother contacted lawyers and legal organizations, finally getting the attention of the newly formed California Innocence Project. His case was assigned to a second-year law student named Wendy Koen, who accomplished what the Los Angeles Police Department could not. She found Denise Powell, and Denise explained how the police had pressured her and how she had lied.⁴⁶

In 2007, Judge Michael Tynan reversed Tim Atkins's conviction.⁴⁷ Judge Tynan had presided over Tim's original trial and he knew how thin the case had been. Finally having Denise Powell in his courtroom testifying about the events from two decades earlier convinced him that Tim Atkins was an innocent man. In reversing Tim's conviction, Judge Tynan noted that Denise Powell had credibly recanted the false testimony she gave at Atkins's preliminary hearing, testimony that "was central to

41. *Id.* at 79.

42. Reporters' Transcript of Proceedings Volume 4 at 881-82, 895, *People v. Atkins*, No. A090938 (Cal. Super. Ct. Feb. 5, 1988).

43. Transcript of Proceedings in Claim of Timothy Atkins Day 1 (Morning), *supra* note 11, at 88-90.

44. *Id.* at 89-90.

45. Reporters' Transcript on Appeal, *supra* note 1, at 1022.

46. See Reporter's Transcript of Proceeding Volume 2 at 18, *In re Atkins*, No. A090938 (Cal. Super. Ct. Sept. 26, 2006).

47. Order Granting Writ of Habeas Corpus, *supra* note 7, at 10.

the question of Atkins' guilt or innocence."⁴⁸ The court also found that the testimony of Maria Gonzales, identifying Atkins as the perpetrator, was "highly questionable, if not totally unreliable."⁴⁹ The judge pointed to Maria's initial description of the assailant, that of a short, slim man with a gaunt face and bulging eyes, which he determined "differed so significantly from Petitioner's actual appearance that it was clearly the ID of another man."⁵⁰ Ultimately, Judge Tynan found that the evidence presented at the hearing pointed "unerringly to innocence"⁵¹ and worked to "completely undermine the entire structure of the [prosecution's] case."⁵²

Timothy Atkins went to prison as a teenager and walked out as a forty-year-old man. He had never held a driver's license, owned a car, paid rent or utilities, nor ever held a job outside of prison. He had been put away before the existence of the Internet, when personal computers were a novelty, when cell phones cost around \$4,000.⁵³ His parents, luckily, were still alive, and welcomed him home—but both lived off of fixed incomes and could not afford another mouth to feed so late in their lives.

Tim needed money, a common complaint among people recently paroled from prison. Unfortunately, Tim was not a parolee. He was ineligible for programs available to them, such as halfway housing or transition-to-work placement. Job openings held for recently released felons were inapplicable to him; he was not a felon, his conviction had been erased.⁵⁴ He was even denied the \$200 "gate money" most parolees are given when they are released.⁵⁵ He was, in short, destitute.

Tim's situation was not unique. Hundreds of inmates have been exonerated across the United States over the past twenty years and released into society without any resources.⁵⁶ And, although many

48. *Id.* at 6.

49. *Id.* at 4.

50. *Id.* at 6.

51. *Id.* at 2 (quoting *In re Weber*, 523 P.2d 229, 243 (Cal. 1974)).

52. *Id.* (quoting *In re Lindley*, 177 P.2d 918, 927 (Cal. 1947)).

53. *First Cell Phone a True 'Brick,'* NBCNEWS.COM (Apr. 11, 2005, 6:55 PM), http://www.msnbc.msn.com/id/7432915/ns/technology_and_science-wireless/t/first-cell-phone-true-brick. Taking inflation into account, a \$4,000 cell phone in 1984 would cost more than \$8,800 today. *CPI Inflation Calculator*, BUREAU OF LAB. STATS., http://www.bls.gov/data/inflation_calculator.htm (last visited August 4, 2012).

54. See Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105, 109, 115 (2008).

55. See Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 259 (2008).

56. Between 1989 and 2007, 210 inmates were exonerated through DNA. Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 175 (2008). Between 1973 and 2007, 126 death row inmates were exonerated. *Id.* Nearly eighty percent of these exonerees were wrongly convicted of murder. *Id.*

exonerees have been successful in filing lawsuits against the government agencies that wrongfully incarcerated them,⁵⁷ those lawsuits are fraught with legal hurdles—the greatest one being that governmental immunity blocks most suits from ever seeing a courtroom or settlement conference.⁵⁸ In Tim’s case, compounding the immunity issues that made it unlikely to succeed in a lawsuit against the police for their misconduct was the fact that the person most responsible for Tim’s twenty-three years of wrongful incarceration was Denise Powell. A lawsuit against her was not going to yield any resources for Tim.

In response to the notion that innocent people who are wrongfully incarcerated are entitled to be compensated, and the inability of the system to address that need, twenty-seven states and the District of Columbia have enacted compensation statutes.⁵⁹ Tim filed for compensation under

57. In California, eleven exonerees have been compensated for their wrongful incarceration since 2000. Marie C. Baca, *Wrongly Convicted Face Uphill Battle To Obtain Compensation*, CAL. WATCH (Mar. 5, 2011), <http://californiawatch.org/public-safety/wrongly-convicted-face-uphill-battle-obtain-compensation-9014>. Kenneth Marsh and John Stoll each received over \$700,000 in compensation for the time they spent in prison after being wrongfully convicted. Letter from Karen McGagin, Exec. Officer, Cal. Victim Comp. & Gov’t Claims Bd., to Gerald F. Uelmen, Exec. Dir., Cal. Comm’n on the Fair Admin. of Justice (Oct. 11, 2007), available at <http://www.ccfaj.org/documents/reports/incompetence/expert/CVCGCB%2010-11-07.pdf>.

58. See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350 (2011). In *Connick*, the prosecutors intentionally withheld exculpatory DNA evidence, leading to Thompson’s conviction and near execution. *Id.* at 1356–57. Upon his exoneration, Thompson filed a 42 U.S.C. § 1983 claim against the district attorney’s office for the prosecution’s blatant violation of *Brady v. Maryland*. *Id.* at 1357 (citing *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring prosecution to disclose all exculpatory evidence to the defendant)). However, the Supreme Court held that Thompson was not entitled to compensation because the violation was a single incident; he did not establish a pattern of violations by the district attorney’s office. *Id.* at 1366. This holding significantly increased the already heightened level of immunity for prosecutorial misconduct. Police officers and other judicial and governmental officials are similarly protected by an extremely high level of immunity. See *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (holding that a § 1983 claim for a local government’s decision not to train certain employees might be a valid claim if it amounts to “deliberate indifference to the rights of persons with whom the [untrained employees] come into contact”); *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978) (holding that municipalities cannot be held liable under § 1983 unless action was taken pursuant to some official municipal policy rather than on a respondeat superior theory).

59. ALA. CODE § 29-2-150 (LexisNexis Supp. 2010); CAL. PENAL CODE § 4900 (West 2012); CONN. GEN. STAT. ANN. § 54-102uu (West Supp. 2011); D.C. CODE § 2-421 (LexisNexis Supp. 2011); FLA. STAT. ANN. § 961.03 (West Supp. 2011); 705 ILL. COMP. STAT. ANN. 505/8(c) (West Supp. 2011); IOWA CODE ANN. § 663A.1 (West Supp. 2011); LA. REV. STAT. ANN. § 15:572.8 (Supp. 2010); ME. REV. STAT. ANN. tit. 14, § 8241 (Supp. 2010); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis Supp.

California’s statute, sections 4900–4906 of the California Penal Code, entitled “Indemnity for Persons Erroneously Convicted and Pardoned.”⁶⁰ California’s legislature has explained that the intent of the statute is to provide a streamlined process for wrongfully convicted individuals to receive compensation for their years of incarceration.⁶¹ The process is administrative in nature: the individual files a claim with the Victim Compensation and Government Claims Board and, assuming all goes well, he or she is awarded \$100 a day for every day of wrongful incarceration.⁶²

Tim was a prime candidate for compensation under the California statute. He had been wrongly convicted of a heinous crime he did not commit. The original trial judge had reversed his conviction finding that the evidence pointed unerringly to innocence. He had spent twenty-three long years in prison. Compensation should have been granted without delay so he could get on with the rest of his life. That did not happen.

On August 9, 2007, the California Innocence Project filed Tim Atkins’s compensation claim on his behalf. Tim had been released on February 10, 2007, so the filing was within the statutory requirement of—at the time—six months.⁶³ However, because there is no statutory requirement for a response by the government, no response was filed until *more than two years later*, on September 30, 2009. The Victim Compensation and Government Claims Board (the Board), an administrative agency tasked with hearing claims against the State of California, held a hearing in front of a hearing officer on December 15 and 16, 2009.⁶⁴ By this time, Tim Atkins had begun working at John Muir

2010); MASS. GEN. LAWS ANN. ch. 258D, § 1 (West Supp. 2011); MISS. CODE ANN. § 11-44-1 (West Supp. 2010); MO. ANN. STAT. § 650.058 (West Supp. 2011); MONT. CODE ANN. § 53-1-214 (2009); NEB. REV. STAT. § 29-4608 (Supp. 2010); N.H. REV. STAT. ANN. § 541-B:14 (LexisNexis Supp. 2010); N.J. STAT. ANN. § 52:4C-1 (West Supp. 2011); N.Y. JUD. CT. ACT § 8-b (McKinney Supp. 2012); N.C. GEN. STAT. ANN. § 148-82 (West Supp. 2010); OHIO REV. CODE ANN. § 2743.48 (LexisNexis Supp. 2011); OKLA. STAT. ANN. tit. 51, § 154 (West Supp. 2011); TENN. CODE ANN. § 9-8-108 (2011); TEX. CIV. PRAC. & REM. CODE ANN. § 103.051 (West Supp. 2011); UTAH CODE ANN. § 78B-9-405(1)(a) (LexisNexis Supp. 2010); VT. STAT. ANN. tit. 13, § 5572 (LexisNexis 2009); VA. CODE ANN. § 8.01-195.10 (LexisNexis Supp. 2011); W. VA. CODE ANN. § 14-2-13a(b) (LexisNexis Supp. 2010); WIS. STAT. ANN. § 775.05 (West Supp. 2010).

60. CAL. PENAL CODE §§ 4900–4906 (West 2012).

61. See 2009 Cal. Legis. Serv. 4394 (West) (explaining that the intent of the statute is to “remedy some of the harm caused to all factually innocent people . . . and . . . ease their transition back into society”).

62. CAL. PENAL CODE § 4904.

63. CAL. PENAL CODE § 4901 (West 2007) (current version at CAL. PENAL CODE § 4901 (West 2012)).

64. Transcript of Proceedings in Claim of Timothy Atkins Day 1 (Morning), *supra* note 11.

Charter School in Venice.⁶⁵ He worked as a gang intervention specialist, mentoring students and guiding them away from the gang lifestyle.⁶⁶

The hearing officer in Tim's compensation claim entered a proposed decision to deny the claim on February 25, 2010.⁶⁷ The claim went to the full Board on March 18, 2010. The Board is composed of a three-member panel, two political appointees selected by the Governor and the State Controller, who is elected.⁶⁸ According to the Board's website, one of its functions is to "handl[e] claims of erroneously convicted felons."⁶⁹ On March 18, 2010, the Board voted to deny Atkins's claim.⁷⁰ Atkins filed a petition for writ of mandate challenging the Board's decision on June 28, 2010.⁷¹ As of this writing, the petition awaits resolution in the courts. Because of budget cuts to the Los Angeles Unified School District, Tim lost his job in the spring of 2011 and is now unemployed.

II. EIGHT QUESTIONS ABOUT WRONGFUL CONVICTION COMPENSATION

Although compensation statutes like California's have admirable goals, Tim Atkins's case fell through some substantial cracks that prompted the Authors to write this Article. As two of the many lawyers who have worked on Tim's case over the years, it has been an incredibly frustrating journey to see him denied compensation after all that has been done to prove his innocence. California's statute is flawed and is being misinterpreted, just as other compensation statutes are flawed and misinterpreted around the country. This Article looks at those statutes and contextualizes the problems using Tim's legal odyssey as a framework. Specifically, this Article addresses the following questions:

65. Transcript of Proceedings in Claim of Timothy Atkins Day 1 (Afternoon) at 7, Claim No. G569329 (Cal. Victim Comp. & Gov't Claims Bd. Dec. 15, 2009) (on file with authors).

66. *Id.*

67. Proposed Decision (Penal Code § 4900) In the Matter of the Claim of Timothy Atkins, Claim No. G569329 (Cal. Victim Comp. & Gov't Claims Bd. Feb. 25, 2010) (on file with authors).

68. *Meet Our Board Members*, VICTIM COMPENSATION & GOV'T CLAIMS BOARD (2012), <http://www.vcgcb.ca.gov/board/members.aspx>.

69. *About the Board*, VICTIM COMPENSATION & GOV'T CLAIMS BOARD (2012), <http://www.vcgcb.ca.gov/board>.

70. Recorded Compensation Hearing Re Timothy Atkins at 15, Claim No. G569329 (Cal. Victim Comp. & Gov't Claims Bd. Mar. 18, 2010) (on file with authors).

71. See Petition for Writ of Mandate and Request for Relief; Memorandum of Points and Authorities, *Atkins v. Victim Comp. & Gov't Claims Bd.*, No. BS127140 (Cal. Super. Ct. filed June 28, 2010).

1. What should the process be for adjudicating innocence compensation claims?
2. What should the standard be for a successful claim?
3. Should the court record be given any deference in the compensation process?
4. Should contributory negligence be considered?
5. How much should exonerees be compensated?
6. What should the time requirements be for filing and responding to a compensation claim?
7. Should a denial of compensation be appealable?
8. Should compensation be applied retroactively?
9. Should compensation be assignable?

A. *What Should the Procedure Be for Determining Claims?*

California requires a claimant seeking compensation for wrongful conviction to “present a claim against the state to the California Victim Compensation and Government Claims Board.”⁷² That claim must be “accompanied by a statement of the facts constituting the claim,”⁷³ and, thereafter, the Board sets a time and place for a hearing⁷⁴ where “the claimant shall introduce evidence in support of the claim, and the Attorney General may introduce evidence in opposition thereto.”⁷⁵

These compensation hearings are minitrials where evidence is presented to prove innocence and the State has the opportunity to continue to argue the guilt of the claimant. Many detractors of compensation statutes in general, and the hearing or administrative process in particular, have argued in the past that these minitrials will be needlessly expensive, both because they are expensive to hold and because the compensation statute itself will “open the floodgates” to hundreds, if not thousands, of individuals claiming compensation.⁷⁶ However, that has not been the experience in California. Since 2000, when California revised its compensation scheme, there have been 132 claims under the statute for compensation.⁷⁷ This works out to twelve claims filed per year. Eleven individuals, or one per year, have been awarded compensation in that

72. CAL. PENAL CODE § 4900 (West 2012).

73. *Id.* § 4901.

74. *Id.* § 4902.

75. *Id.* § 4903.

76. *See, e.g.*, Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127 (2010) (arguing that compensation statutes transfer wealth from worthy government programs to the exonerated without actually deterring the risk of future errors).

77. Baca, *supra* note 57.

time.⁷⁸ The hearings can be avoided if the State agrees to the factual basis of the claim. Of the eleven successful claims in California, the State has stipulated to four.⁷⁹

There seems to be a sliding scale in the way states handle compensation claims for the wrongfully convicted. At least in theory, systems such as California's, which favor an administrative process instead of a civil suit, tend to be less onerous and are more fit to achieve the general purpose of compensation: to quickly and fairly alleviate the wrong caused by the exonerated's wrongful conviction and incarceration. The statutes of Alabama,⁸⁰ Connecticut,⁸¹ Illinois,⁸² Maryland,⁸³ New Hampshire,⁸⁴ North Carolina,⁸⁵ Tennessee,⁸⁶ and Wisconsin⁸⁷ are similar to California's statute in that they require an administrative hearing to determine eligibility for compensation, and compensation can occur without a civil suit. Nebraska,⁸⁸ Oklahoma,⁸⁹ and Texas⁹⁰ also provide for

78. *Id.*

79. Those claims belong to Kenneth Marsh, John Stoll, Rick Walker, and Kevin Baruxes.

80. ALA. CODE § 29-2-158(b) (LexisNexis 2003). Under this statute, if the petitioner meets certain eligibility criteria, he will be awarded a base amount of \$50,000 per year of wrongful incarceration without a hearing. *Id.* § 29-2-159(a). In order to be eligible for compensation for wrongful incarceration, the person must have been convicted of one or more felonies, all of which the person was innocent, and must have served time in prison as a result of those convictions, or must have been incarcerated pretrial on a state felony charge for at least two years through no fault of his or her own before having the charges dismissed on innocence. *Id.* § 29-2-156. If, however, the petitioner seeks compensation greater than the amount designated, then a hearing will be held. *Id.* § 29-2-158(b); *see also id.* § 29-2-159(c).

81. CONN. GEN. STAT. ANN. § 54-102uu(c) (West 2009).

82. 705 ILL. COMP. STAT. ANN. 505/1, 505/8(c) (West Supp. 2011).

83. MD. CODE ANN., STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2009). In Maryland, however, the decision to grant a wrongfully convicted individual compensation is discretionary. *Id.* Maryland also requires a full pardon from the Governor stating that the individual's conviction has been shown conclusively to be in error. *Id.* § 10-501(b).

84. N.H. REV. STAT. ANN. § 541-B:11(I)-(VII) (Lexis 2006).

85. N.C. GEN. STAT. ANN. §§ 148-82 to -83 (West 2009 & Supp. 2010).

86. TENN. CODE ANN. § 9-8-108(a)(7) (LexisNexis Supp. 2007).

87. WIS. STAT. ANN. § 775.05(1)-(3) (West 2009).

88. *See* NEB. REV. STAT. §§ 29-4607 to -4608 (Supp. 2010). In Nebraska, a claim for compensation is brought under the State Tort Claims Act. *Id.* § 29-4607. The petitioner must first file a claim with the Risk Manager pursuant to the State Tort Claims Act. NEB. REV. STAT. § 81-8,212 (2008). The petitioner may file a suit once the Risk Manager or State Claims Board has made a final decision on the matter. *Id.* § 81-8,213.

89. OKLA. STAT. ANN. tit. 51, § 156(A), (C) (West Supp. 2011). In Oklahoma, the petitioner must first file a claim with the Office of the Risk Management Administrator of the Department of Central Services. *Id.* If the claim is denied, the petitioner can

compensation through a state administrative process, and additionally allow for a wrongly convicted inmate to file a civil suit if the State denies the claim after the administrative process.

The process that seems to be more onerous is the one that requires the filing of a civil suit to proceed with a compensation claim. Civil suits are time-consuming and expensive, and they can make it more difficult to compensate the wrongly convicted. The District of Columbia,⁹¹ Maine,⁹² Massachusetts,⁹³ Mississippi,⁹⁴ Missouri,⁹⁵ New Jersey,⁹⁶ New York,⁹⁷ Ohio,⁹⁸ Vermont,⁹⁹ and West Virginia¹⁰⁰ all waive their immunity from civil suits by wrongfully convicted prisoners. Wrongly convicted inmates are required in these states to bring civil claims rather than utilize an administrative process. In three states—Florida,¹⁰¹ Iowa,¹⁰² and Utah¹⁰³—

proceed by filing a suit against the State. OKLA. STAT. ANN. tit. 51, § 157(A) (West 2008).

90. TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(a), (e) (Supp. 2011). In Texas, the petitioner must first file numerous documents with the State Comptroller's Judiciary Section. *Id.* § 103.051(a). If the Comptroller denies the claim, then the petitioner can bring an action for mandamus relief. *Id.* § 130.051(e).

91. D.C. CODE § 2-421 (LexisNexis 2008).

92. ME. REV. STAT. ANN. tit. 14, § 8241(1)–(2) (2003). Maine not only requires that the person show a finding of actual innocence but also that the person received a full and free pardon by the Governor. *Id.* § 8241(2)(C)–(D).

93. MASS. GEN. LAWS ANN. ch. 258D, § 1(C)–(D) (West Supp. 2011).

94. MISS. CODE ANN. § 11-44-3(1)–(3) (West Supp. 2010).

95. MO. ANN. STAT. § 650.058(1)(1)–(4) (West Supp. 2011). Missouri further requires that a petitioner be found actually innocent as a result of DNA testing. *Id.* Missouri's statute also contains a hidden caveat: if the individual seeks redress under the compensation statute, he or she is thereafter "prohibited from seeking any civil redress from the state, its departments and agencies, or any employee thereof, or any political subdivision or its employees." *Id.* This means an exonerated individual hoping to sue for more than the statutory amount, \$50 per day, must carefully consider whether to pursue compensation—potentially faster—or a proper civil suit—a larger potential award. *See id.*

96. N.J. STAT. ANN. § 52:4C-2 (West 2009).

97. N.Y. JUD. CT. ACTS § 8-b(2) (Supp. 2012).

98. OHIO REV. CODE ANN. § 2743.48(D) (West Supp. 2011).

99. VT. STAT. ANN. tit. 13, § 5572(a) (2009).

100. W. VA. CODE ANN. § 14-2-13a(b) (LexisNexis 2004).

101. FLA. STAT. ANN. § 961.03 (West Supp. 2012). In Florida, the petitioner must first file a petition with the original sentencing court to determine his or her eligibility. *Id.* § 961.03(1)(a). Then, a hearing is conducted before an administrative law judge. *Id.* § 961.03(6)(a). The administrative law judge then files his or her findings and recommendation with the original sentencing court. *Id.* § 961.03(6)(c). Finally, the original sentencing court then reviews the administrative judge's findings and recommendation and issues an order either adopting or declining to adopt the administrative judge's findings. *Id.* § 961.03(6)(d).

102. *See* IOWA CODE ANN. § 663A.1(2)–(3) (West 2010). In Iowa, the district court must first determine either that the offense was not committed by the petitioner or that the offense was not committed by any individual, including the petitioner. *Id.* § 663A.1(2)(a)–(b). The petitioner must then file a claim with the Department of

court proceedings and administrative hearings are combined. The processes in these states seem to be more onerous than in other states because the review process is three-step: an individual must first submit a claim in the court, which then determines whether the claim may proceed; the claim is then sent through an administrative review; then the administrative agency makes a recommendation back to the court, which can accept or completely dismiss the recommendation.

By far the most restrictive jurisdictions, however, are those eight states—Illinois,¹⁰⁴ Maine,¹⁰⁵ Maryland,¹⁰⁶ North Carolina,¹⁰⁷ Oklahoma,¹⁰⁸ Tennessee,¹⁰⁹ Texas,¹¹⁰ and Virginia¹¹¹—that require the inmate to have

Management. IOWA CODE ANN. § 669.3(2) (West Supp. 2011). Then, the district court will render judgment on the claim. *Id.* § 669.4.

103. *See* UTAH CODE ANN. § 78B-9-405(1)(a) (LexisNexis Supp. 2008). In Utah, a person convicted of a felony may petition the district court for a hearing to establish factual innocence for the crime for which he or she was convicted. *Id.* § 78B-9-402(2)(a). If the petitioner can show new evidence that makes his innocence a compelling issue, the judge reviewing the petition will order the Attorney General to file a response to the petition within thirty days. *Id.* § 78B-9-402(6). A hearing will follow if the Attorney General does not stipulate to the finding of actual innocence. *Id.* § 78B-9-402(6)(b)(ii). Once the court determines that the petitioner is factually innocent, the court awards the petitioner compensation. *Id.* § 78B-9-405(1)(a).

104. 705 ILL. COMP. STAT. ANN. 505/8(c) (West Supp. 2011) (stating that compensation is only permitted where “the person imprisoned received a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which he or she was imprisoned or he or she received a certificate of innocence from the Circuit Court”).

105. ME. REV. STAT. ANN. tit. 14, § 8241(2)(C) (2003) (“[A]s a condition precedent to suit, the person received a full and free pardon . . . which is accompanied by a written finding by the Governor who grants the pardon that the person is innocent of the crime for which that person was convicted . . .”). Furthermore, the Governor’s “failure to issue a written finding that the person is innocent of the crime for which he or she was convicted is final and not subject to judicial review.” *Id.* § 8241(4).

106. MD. CODE ANN., STATE FIN. & PROC. § 10-501(b) (LexisNexis 2006). (“An individual is eligible for a grant . . . only if the individual has received from the Governor a full pardon stating that the individual’s conviction has been shown conclusively to be in error.”).

107. N.C. GEN. STAT. ANN. § 148-82(a) (West 2011) (stating that compensation is available for an imprisoned felon “who was thereafter or who shall hereafter be granted a pardon of innocence by the Governor”).

108. OKLA. STAT. ANN. tit. 51, § 154(B)(2)(e)(2) (West 2008) (“[I]n the case of judicial relief, a court of competent jurisdiction found by clear and convincing evidence that the offense for which the individual was convicted, sentenced and imprisoned . . . was not committed by the individual and issued an order vacating, dismissing or reversing the conviction and sentence . . .”).

109. TENN. CODE ANN. § 9-8-108(a)(7) (Supp. 2009). Tennessee provides compensation only for those “persons wrongfully imprisoned and granted exoneration pursuant to § 40-27-109.” *Id.* Section 40-27-109 discusses the Governor’s ability to

secured either a pardon or a finding of actual innocence before even becoming eligible for compensation. Pardons are almost never given. When they are, it is usually as a political favor, in the last days of a governor's term, when political fallout from an unpopular decision is irrelevant or, at the least, can be minimized.¹¹² As such, very few people can justify a governor's grant of a pardon and must meet a very high burden—being a political friend of the outgoing governor—to get pardoned.

Declarations of actual innocence are similarly very rare. It is not enough to demonstrate that prosecutors violated the inmate's constitutional rights by withholding exculpatory evidence,¹¹³ or that the evidence in the case was entirely insufficient to support the conviction,¹¹⁴ or even that the case was dismissed in the furtherance of justice.¹¹⁵ A court must be convinced not only that the inmate was innocent of the crime, but also that no reasonable jury could ever convict the inmate for the crime.¹¹⁶ The finding of innocence thus precludes the prosecution from ever reopening the case; in many states such as California, the finding also means the records of the case are sealed or destroyed.¹¹⁷ Thus, a finding of actual innocence carries a similarly high burden an inmate must meet.

Other states do not specify a particular process for receiving compensation. Virginia recognizes that a person who has been wrongfully incarcerated may be entitled to compensation, but short of requiring the inmate to secure a full pardon, does not explain any subsequent

pardon individuals pursuant to his or her executive authority. TENN. CODE ANN. § 40-27-109 (2006).

110. TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001(a), 103.051(a)(2) (West 2011). In *State v. Young*, the Texas Court of Appeals found that an inmate who had been able to get his conviction reversed on legal insufficiency grounds was not entitled to compensation because he had not been able to also secure a finding of actual innocence, and thus the State had not waived its immunity from suit. 265 S.W.3d 697, 708 (Tex. Ct. App. 2008).

111. See VA. CODE ANN. § 8.01-195.10(B) (Supp. 2011). Virginia defines a “wrongful incarceration” as one in which “the conviction has been vacated pursuant to Chapter 19.2 (§ 19.2-327.2 et seq.) or 19.3 (§ 19.2-327.10 et seq.) of Title 19.2.” *Id.* Those sections deal with the issuance of a writ of actual innocence after presenting biological or nonbiological evidence to prove one's innocence. See *id.* § 19.2-327.2; VA. CODE ANN. § 19.2-327.10 (2008).

112. To see how politically volatile pardons are, one need look no further than Arnold Schwarzenegger's decision to grant clemency to Esteban Nuñez, the son of a political ally, as he was leaving office. *Republicans Denounce Schwarzenegger Clemency*, FOX NEWS (Mar. 20, 2011), <http://www.foxnews.com/politics/2011/03/20/republicans-denounce-schwarzenegger-clemency/>.

113. See *supra* note 58.

114. See *People v. Glimps*, 155 Cal. Rptr. 230, 234 (Ct. App. 1979).

115. *Id.* at 235.

116. See *People v. Adair*, 129 Cal. Rptr. 2d 799, 806 (2003).

117. See CAL. PEN. CODE § 851.8 (West Supp. 2012).

procedure for the petitioner to take.¹¹⁸ Similarly, Montana provides that a person whose conviction was overturned by a court based on postconviction DNA testing is entitled to receive educational aid at the State's expense, but it provides no proper procedure for the exoneree to apply.¹¹⁹

Ideally, the process for determining these compensation claims should be efficient, speedy, and low cost. Although it is understandable that there must be some sort of review process prior to allocating state money, the process should not resemble a civil suit, which could take years to resolve. The petitioners in these claims have no money. They need resources to get back on their feet. The California Innocence Project has litigated several of these claims on behalf of clients for no pay, as have other projects and pro bono attorneys around the country, but if the process is too lengthy and difficult it is unlikely that these resources will continue to be available.

The administrative hearing process, if done properly, can avoid costs on both sides of the claim, as well as adjudicative costs, and get the wrongfully convicted claimant compensated in a timely manner. Much of this efficiency hinges on the evidentiary standards and requirements of proof required by the statutes.

B. What Should the Burden of Proof Be in Compensation Claims?

Although California Penal Code section 4900 is unclear as to the burden of proof—only referring to the standard of preponderance of evidence in relation to challenging confessions as involuntary¹²⁰—the standard for compensation claims has been held to be preponderance of the evidence.¹²¹ In other words, the claimant must prove more likely than not that they are innocent of the crime of which they were convicted.

The burden of proof in the following states is preponderance of the evidence: Connecticut,¹²² Mississippi,¹²³ Illinois,¹²⁴ and Vermont.¹²⁵

118. See VA. CODE ANN. § 8.01-195.10 (Supp. 2011).

119. See MONT. CODE ANN. § 53-1-214(1) (2009).

120. CAL. PENAL CODE § 4903 (West 2011).

121. See *Tennison v. Cal. Victim Comp. & Gov't Claims Bd.*, 62 Cal. Rptr. 3d 88, 95 (Ct. App. 2007) (stating that the California Victim Compensation and Government Claims Board required a claimant to establish by a preponderance of the evidence that he did not commit the crimes for which he was convicted).

122. CONN. GEN. STAT. ANN. § 54-102uu(d) (West 2009) ("If the Claims Commissioner determines that such person has established such person's eligibility under subsection (a) of this section by a preponderance of the evidence, the Claims

The statutes of the following jurisdictions impose a clear and convincing evidence standard: the District of Columbia,¹²⁶ Florida,¹²⁷ Iowa,¹²⁸ Louisiana,¹²⁹ Maine,¹³⁰ Massachusetts,¹³¹ Nebraska,¹³² New Jersey,¹³³ New York,¹³⁴ Utah,¹³⁵ West Virginia,¹³⁶ and Wisconsin.¹³⁷

Commissioner shall order the immediate payment to such person of compensation for such wrongful incarceration.”); *see also id.* § 54-102uu(a)(2) (“A person is eligible to receive compensation for wrongful incarceration if: . . . [s]uch person’s conviction was vacated or reversed and the complaint or information dismissed on grounds of innocence, or the complaint or information dismissed on a ground consistent with innocence.”).

123. MISS. CODE ANN. § 11-44-7(1) (West Supp. 2010) (“In order to obtain a judgment under this chapter, a claimant must prove [the elements of a compensation claim] by a preponderance of the evidence . . .”).

124. *Duncan v. State*, 28 Ill. Ct. Cl. 112, 114 (1972) (“The burden is upon the claimant to prove by a preponderance of the evidence (1) that the time served in prison was unjust, (2) that the act for which he was wrongfully imprisoned was not committed by him, and (3) the amount of damages to which he is entitled.”); *Tyler v. State*, 28 Ill. Ct. Cl. 90, 98 (1972) (“[T]he claimant has satisfied the sole standard set by the legislative requirements for recovery under Section 8c—proof by a preponderance of evidence that he was innocent of the crime for which he was imprisoned.”). However, it should be noted, as explained in section 8 of the Court of Claims Act, that an individual in Illinois seeking compensation must first obtain a full pardon before beginning the process. 705 ILL. COMP. STAT. ANN. 505/8(c) (West Supp. 2011). Only after being pardoned may he or she then seek to prove his or her innocence by a preponderance of the evidence. *Id.*

125. VT. STAT. ANN. tit. 13, § 5574(a) (2009) (“A claimant shall be entitled to judgment in an action under this subchapter if the claimant establishes each of the following by a preponderance of the evidence . . .”).

126. D.C. CODE § 2-422(2) (LexisNexis 2008) (“Any person bringing suit under § 2-421 must allege and prove . . . [t]hat, based upon clear and convincing evidence, he did not commit any of the acts charged or his acts or omissions in connection with such charge constituted no offense against the United States or the District of Columbia the maximum penalty for which would equal or exceed the imprisonment served and he did not, by his misconduct, cause or bring about his own prosecution.”).

127. FLA. STAT. ANN. § 961.03(5) (West Supp. 2011) (“Any questions of fact, the nature, significance or effect of the evidence of actual innocence, and the petitioner’s eligibility for compensation under this act must be established by clear and convincing evidence by the petitioner before an administrative law judge.”).

128. IOWA CODE ANN. § 663A.1(2)(a) (West 1998) (“[T]he district court shall make a determination whether there is clear and convincing evidence to establish . . . [t]hat the offense for which the individual was convicted, sentenced, and imprisoned . . . was not committed by the individual.”).

129. LA. REV. STAT. ANN. § 15:572.8(A)(2) (Supp. 2009) (“The petitioner has proven by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted.”).

130. ME. REV. STAT. ANN. tit. 14, § 8241(2)(A)–(D) (2003) (“The State is liable for damages for wrongful imprisonment of a person if that person alleges and proves . . . by clear and convincing evidence . . . [that the person was innocent of the crime for which the person was convicted and incarcerated].”).

131. MASS. GEN. LAWS ANN. ch. 258D, § 1(C)(i) (West Supp. 2011) (“In order for an individual to prevail and recover damages against the commonwealth in a cause of action brought under this chapter, the individual must establish [the requirements of this chapter], by clear and convincing evidence . . .”).

Alabama and Ohio rely on the reversal of the conviction as sufficient grounds for a petitioner to be eligible for compensation and do not require the inmate to make any other showing.¹³⁸

As noted in the preceding subpart, Maine, Maryland, North Carolina, Oklahoma, Tennessee, Texas, and Virginia require the inmate to have secured either a pardon or a finding of actual innocence before becoming eligible for compensation.¹³⁹ It is not clear from the statutory construction in these jurisdictions whether there is any additional showing an individual must meet to receive compensation, but the relative scarcity of individuals who are able to receive a full pardon—even when innocence

132. NEB. REV. STAT. § 29-4603(3) (Supp. 2010) (“In order to recover under the Nebraska Claims for Wrongful Conviction and Imprisonment Act, the claimant shall prove each of the following [requirements of this statute] by clear and convincing evidence . . .”).

133. N.J. STAT. ANN. § 52:4C-3 (West 2009) (“The person (hereinafter titled, “the claimant”) shall establish the [requirements of this statute] by clear and convincing evidence . . .”).

134. N.Y. JUD. CT. ACTS § 8-b(5) (McKinney Supp. 2011) (“In order to obtain a judgment in his favor, claimant must prove [the requirements of this statute] by clear and convincing evidence . . .”).

135. UTAH CODE ANN. § 78B-9-404(1)(b) (LexisNexis Supp. 2008) (“The burden is upon the petitioner to establish the petitioner’s factual innocence by clear and convincing evidence.”).

136. W. VA. CODE ANN. § 14-2-13a(f)(4) (LexisNexis 2004) (“In order to obtain a judgment in his favor, claimant must prove [the requirements of this statute] by clear and convincing evidence . . .”).

137. WIS. STAT. ANN. § 775.05(3) (West 2009) (“After hearing the evidence on the petition, the claims board shall find either that the evidence is clear and convincing that the petitioner was innocent of the crime for which he or she suffered imprisonment, or that the evidence is not clear and convincing that he or she was innocent.”).

138. ALA. CODE § 29-2-157 (LexisNexis 2003) (“For purposes of determination of eligibility for compensation for wrongful incarceration, innocence shall be evidenced by at least one of the following: (1) The conviction vacated or reversed and the accusatory instrument dismissed on grounds of innocence; or (2) The accusatory instrument dismissed on a ground consistent with innocence.”); OHIO REV. CODE ANN. § 2743.48(E)(1) (West Supp. 2011) (“[T]he claimant may establish that [he or she] is a wrongfully imprisoned individual by submitting to the court of claims a certified copy of the judgment entry of the court of common pleas associated with the claimant’s conviction and sentencing, and a certified copy of the entry of the determination of a court of common pleas that the claimant is a wrongfully imprisoned individual. No other evidence shall be required of the complainant to establish that the claimant is a wrongfully imprisoned individual, and the claimant shall be irrebuttably presumed to be a wrongfully imprisoned individual.”).

139. See *supra* notes 105–11 and accompanying text.

has been “proven”—means that very few individuals will be able to meet this burden.¹⁴⁰

Missouri¹⁴¹ and Montana¹⁴² require the individual to be exonerated through DNA testing in order to be eligible for compensation. This means that any person who was exonerated by any non-DNA evidence—like Tim Atkins, who was exonerated by a witness recantation—would not be eligible for compensation. Furthermore, Missouri bars the petitioner from filing a civil suit against the State once he or she has received compensation.¹⁴³

In Tim Atkins’s case, the problem was not the standard of proof for compensation because the California standard is only preponderance of the evidence.¹⁴⁴ That standard only requires that Tim prove it was more likely than not that he was innocent.¹⁴⁵ Even though the original superior court judge made findings that Tim was innocent and that his habeas filings and evidence presented at the habeas hearing completely undermined the prosecution’s case and pointed unerringly to innocence, the compensation board found that Tim had not met his burden of proof.¹⁴⁶ More perplexing was the fact that the commissioner found Tim’s testimony credible when he took the stand at the compensation hearing and denied any involvement in the crime, and yet still the Board found that the low burden of preponderance of the evidence was not met.¹⁴⁷ Therefore, regardless of the standard of proof, there must be some sensible continuity between the record developed in the courts prior to the administrative process and the ultimate administrative decision.

140. See *supra* note 112 and accompanying text.

141. MO. ANN. STAT. § 650.058(1) (West Supp. 2011) (“Notwithstanding the sovereign immunity of the state, any 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.”).

142. MONT. CODE ANN. § 53-1-214(1) (2009) (“[A] person who was convicted in this state of a felony offense, who was incarcerated in a state prison for any period of time, and whose judgment of conviction was overturned by a court based on the results of postconviction forensic DNA testing that exonerates the person of the crime for which the person was convicted is entitled to receive educational aid at the state’s expense.”).

143. MO. ANN. STAT. § 650.058(1)(4) (West Supp. 2011) (“Any individual who receives restitution under this section shall be prohibited from seeking any civil redress from the state, its departments and agencies, or any employee thereof, or any political subdivision or its employees.”).

144. *Tennison v. Cal. Victim Comp. & Gov’t Claims Bd.*, 62 Cal. Rptr. 3d 88, 95 (Ct. App. 2007).

145. See *id.*

146. Proposed Decision (Penal Code § 4900) In the Matter of the Claim of Timothy Atkins, *supra* note 67, at 11, 16.

147. *Id.* at 18.

C. Should the Record Be Given Any Deference?

Case law in California has determined that very little deference is given to the record.¹⁴⁸ Compensation hearings are treated largely as original proceedings, even when there is a voluminous trial, appellate, and habeas record, and even when prior judges were in a better position to make determinations of fact. Similarly, the compensation statutes in the District of Columbia,¹⁴⁹ Florida,¹⁵⁰ Iowa,¹⁵¹ Louisiana,¹⁵² Maine,¹⁵³

148. See *Tennison*, 62 Cal. Rptr. 3d at 99 (holding that the hearing commissioner is not bound by any prior decisions); see also Cal. State Auto. Ass'n Inter-Ins. Bureau v. Superior Court, 788 P.2d 1156, 1159 (Cal. 1990) (“[A] stipulated judgment may properly be given collateral estoppel effect, at least when the parties manifest an intent to be collaterally bound by its terms.”); *Landeros v. Pankey*, 39 Cal. Rptr. 2d 165, 169 (Ct. App. 1995) (holding that a stipulated judgment should not be given collateral estoppel effect). In *Tennison*, the court held that when the San Francisco District Attorney’s office stipulated to the reversal of *Tennison*’s conviction, there was no intent for the Attorney General’s Office to be bound by the stipulated claim of *Tennison*’s innocence. 62 Cal. Rptr. 3d at 98.

149. D.C. CODE § 2-422(1) (LexisNexis 2008) (“Any person bringing suit under § 2-421 must allege and prove . . . [t]hat 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 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 . . .”).

150. FLA. STAT. ANN. § 961.03(5) (West Supp. 2012) (“Any questions of fact, the nature, significance or effect of the evidence of actual innocence, and the petitioner’s eligibility for compensation under this act must be established by clear and convincing evidence by the petitioner before an administrative law judge.”).

151. IOWA CODE ANN. § 663A.1(2)(a)–(b) (West Supp. 2011) (“Upon receipt of an order vacating, dismissing, or reversing the conviction and sentence in a case for which no further proceedings can be or will be held against an individual on any facts and circumstances alleged in the proceedings which resulted in the conviction, the district court shall make a determination whether there is clear and convincing evidence to establish either of the following findings That the offense for which the individual was convicted, sentenced, and imprisoned, including any lesser-included offenses, was not committed by the individual That the offense for which the individual was convicted, sentenced, and imprisoned was not committed by any person, including the individual.”).

152. LA. REV. STAT. ANN. § 15:572.8(A)(1)–(2) (West Supp. 2009) (“A petitioner is entitled to compensation in accordance with this Section if he has served in whole or in part a sentence of imprisonment under the laws of this state for a crime for which he was convicted and: (1) The conviction of the petitioner has been reversed or vacated; and (2) The petitioner has proven by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted.”); but see *id.* § 15:572.8(F) (“The petition shall contain a recitation of facts necessary to an understanding of the petitioner’s innocence that is supported by either the opinion or order vacating the conviction and sentence and/or by the existing court record of the

Massachusetts,¹⁵⁴ Mississippi,¹⁵⁵ Nebraska,¹⁵⁶ New Jersey,¹⁵⁷ New York,¹⁵⁸ West Virginia,¹⁵⁹ and Wisconsin¹⁶⁰ do not give deference to the lower court record.

case. Specific citations for each fact tending to show innocence shall be made to the existing record.”).

153. ME. REV. STAT. tit. 14, § 8241(2)(D) (2003) (“The State is liable for damages for wrongful imprisonment of a person if that person alleges and proves the following by clear and convincing evidence: . . . That the court finds that the person is innocent of the crime for which the person was convicted.”).

154. MASS. GEN. LAWS ANN. ch. 258D, § 1(C) (West Supp. 2011) (“In order for an individual to prevail and recover damages against the commonwealth in a cause of action brought under this chapter, the individual must establish, by clear and convincing evidence, that: . . . (i) he is a member of the class of persons defined in subsection (B).”); *see also id.* § 1(B)(ii) (“The class of persons eligible to obtain relief under this chapter shall be limited to the following: . . . (ii) those who have been granted judicial relief by a state court of competent jurisdiction, on grounds which tend to establish the innocence of the individual as set forth in clause (vi) of subsection (C), and if (a) the judicial relief vacates or reverses the judgment of a felony conviction, and the felony indictment or complaint used to charge the individual with such felony has been dismissed, or if a new trial was ordered, the individual was not retried and the felony indictment or complaint was dismissed or a nolle prosequi was entered, or if a new trial was ordered the individual was found not guilty at the new trial; and (b) at the time of the filing of an action under this chapter no criminal proceeding is pending or can be brought against the individual by a district attorney or the attorney general for any act associated with such felony conviction.”).

155. MISS. CODE ANN. § 11-44-7(1)(a)(i)–(ii) (West Supp. 2010) (“In order to obtain a judgment under this chapter, a claimant must prove by a preponderance of the evidence that: (a) He was convicted of one or more felonies and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and (i) He has been pardoned for the felony or felonies for which he was sentenced and which are the grounds for the complaint and the pardon is based on the innocence of the claimant which must be affirmatively stated in the pardon; or (ii) His judgment of conviction was reversed or vacated; and 1. The accusatory instrument was dismissed or nol prossed; or 2. If a new trial was ordered, he was found not guilty at the new trial . . .”).

156. NEB. REV. STAT. § 29-4603(3) (Supp. 2010) (“In order to recover under the Nebraska Claims for Wrongful Conviction and Imprisonment Act, the claimant shall prove each of the following by clear and convincing evidence . . . [t]hat he or she was innocent of the crime or crimes under subdivision (1) of this section . . .”).

157. N.J. STAT. ANN. § 52:4C-3(b) (West 2009) (“The person (hereinafter titled, ‘the claimant’) shall establish . . . by clear and convincing evidence [that] . . . [h]e did not commit the crime for which he was convicted . . .”).

158. N.Y. JUD. CT. ACTS § 8-b(5)(c) (McKinney Supp. 2012) (“In order to obtain a judgment in his favor, claimant must prove by clear and convincing evidence that . . . he did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state . . .”).

159. W. VA. CODE ANN. § 14-2-13a(f)(4) (LexisNexis 2004) (“In order to obtain a judgment in his favor, claimant must prove by clear and convincing evidence that . . . [h]e did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state . . .”).

160. WIS. STAT. ANN. § 775.05(3) (West 2009) (“After hearing the evidence on the petition, the claims board shall find either that the evidence is clear and convincing that

The compensation statutes in Alabama,¹⁶¹ Connecticut,¹⁶² Missouri,¹⁶³ Montana,¹⁶⁴ North Carolina,¹⁶⁵ Ohio,¹⁶⁶ Oklahoma,¹⁶⁷ Texas,¹⁶⁸ Utah,¹⁶⁹

the petitioner was innocent of the crime for which he or she suffered imprisonment, or that the evidence is not clear and convincing that he or she was innocent.”).

161. ALA. CODE § 29-2-157 (LexisNexis 2003) (“For purposes of determination of eligibility for compensation for wrongful incarceration, innocence shall be evidenced by at least one of the following: (1) The conviction vacated or reversed and the accusatory instrument dismissed on grounds of innocence; or (2) The accusatory instrument dismissed on a ground consistent with innocence.”).

162. CONN. GEN. STAT. § 54-102uu(c) (West 2009) (“At the hearing on such claim, such person shall have the burden of establishing by a preponderance of the evidence that such person meets the eligibility requirements of subsection (a) of this section.”); *see also id.* § 54-102uu(a)(2) (“A person is eligible to receive compensation for wrongful incarceration if . . . [s]uch person’s conviction was vacated or reversed and the complaint or information dismissed on grounds of innocence, or the complaint or information dismissed on a ground consistent with innocence.”).

163. MO. ANN. STAT. § 650.058 (West Supp. 2010) (providing compensation for those proven innocent by DNA testing).

164. MONT. CODE ANN. § 53-1-214 (2009) (providing limited compensation for those proven innocent by DNA testing).

165. N.C. GEN. STAT. § 148-84 (2011) (“If the Industrial Commission finds from the evidence that the claimant received a pardon of innocence for the reason that the crime was not committed at all, received a pardon of innocence for the reason that the crime was not committed by the claimant, or that the claimant was determined to be innocent of all charges by a three-judge panel under G.S. 15A-1469 and also finds that the claimant was imprisoned and has been vindicated in connection with the alleged offense for which he or she was imprisoned, the Industrial Commission shall [make an] award to the claimant . . .”).

166. OHIO REV. CODE ANN. § 2743.48(E)(1) (LexisNexis 2008) (“In a civil action as described in division (D) of this section, the complainant may establish that the claimant is a wrongfully imprisoned individual by submitting to the court of claims a certified copy of the judgment entry of the court of common pleas associated with the claimant’s conviction and sentencing, and a certified copy of the entry of the determination of a court of common pleas that the claimant is a wrongfully imprisoned individual. No other evidence shall be required of the complainant to establish that the claimant is a wrongfully imprisoned individual, and the claimant shall be irrebuttably presumed to be a wrongfully imprisoned individual.”).

167. OKLA. STAT. ANN. tit. 51, § 154(B)(2)(e)(2) (West 2008) (“[I]n the case of judicial relief, a court of competent jurisdiction found by clear and convincing evidence that the offense for which the individual was convicted, sentenced and imprisoned, including any lesser included offenses, was not committed by the individual and issued an order vacating, dismissing or reversing the conviction and sentence and providing that no further proceedings can be or will be held against the individual on any facts and circumstances alleged in the proceedings which had resulted in the conviction.”).

168. TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(b-1) (West 2011) (“In determining the eligibility of a claimant, the comptroller shall consider only the verified copy of the pardon or court order filed by the claimant under Subsection (a). If the pardon or court order does not clearly indicate on its face that the pardon or the court order was granted or rendered on the basis of the claimant’s actual innocence of the crime for which the claimant was sentenced, the comptroller shall deny the claim. The

Vermont,¹⁷⁰ and Virginia¹⁷¹ do give deference to the lower court record. These states recognize the value of the record that was developed in the courts and defer to that record in the compensation process.

Illinois,¹⁷² Maryland,¹⁷³ New Hampshire,¹⁷⁴ and Tennessee¹⁷⁵ do not indicate whether deference will be given to the lower court record, and this issue has yet to be litigated in the court system.

The Timothy Atkins case was one where the administrative process should have given complete deference to the court records. Tim was convicted and sentenced in front of the same judge who conducted his habeas hearing twenty-three years later and ultimately ordered him released from prison. No one knew the case better than Judge Tynan. He had read all of the filings, combed through the police reports, and listened to Denise Powell's audiotaped statements and her later recantation in his courtroom. Judge Tynan saw Maria Gonzales identify Tim in his courtroom and later considered that identification against the weight of the evidence that showed it to be false. Judge Tynan heard all of the witnesses' testimony, heard all of the lawyers' arguments, read the hundreds of pages of motions, and made his ruling based on the totality of the evidence.

There is no reason why an administrative process should operate in a vacuum against years of litigation and a voluminous record. Certainly, if new evidence has been brought to light, pointing to innocence or guilt, there should be an opportunity to introduce that evidence into the administrative process. But to require an exonerated individual to have to put on the entire case that was used to prove his or her innocence a

comptroller's duty to determine the eligibility of a claimant under this section is purely ministerial.”).

169. UTAH CODE ANN. § 78B-9-405(1)(a) (LexisNexis 2008) (“If a court finds a petitioner factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or under this part, and if the petitioner has served a period of incarceration, the court shall order that, as provided in Subsection (2), the petitioner shall receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of 15 years, the monetary equivalent of the average annual nonagricultural payroll wage in Utah, as determined by the data most recently published by the Department of Workforce Services at the time of the petitioner's release from prison.”).

170. VT. STAT. ANN. tit. 13, § 5574(a)(1)–(4) (2009) (providing for compensation for those proven innocent by DNA testing).

171. VA. CODE ANN. § 8.01-195.10(B) (Supp. 2011) (“‘*Wrongful incarceration*’ or ‘*wrongfully incarcerated*’ means incarceration for a felony conviction for which (i) the conviction has been vacated pursuant to Chapter 19.2 (§ 19.2-327.2 et seq.) or 19.3 (§ 19.2-327.10 et seq.) of Title 19.2, or the person incarcerated has been granted an absolute pardon for the commission of a crime that he did not commit . . .”).

172. 705 ILL. COMP. STAT. ANN. 505/8 (West Supp. 2011).

173. MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis 2009).

174. N.H. REV. STAT. ANN. § 541-B:1-B23 (LexisNexis 2006 & Supp. 2009).

175. TENN. CODE ANN. § 9-8-108 (Supp. 2009).

second time is a complete waste of resources and cannot possibly be what legislatures intended in passing the compensation statutes. In sum, the court records should be given deference.

D. Should Contributory Negligence Be Considered?

California Penal Code section 4903 requires that a claimant prove not only that he or she is innocent of the crime of which he or she was convicted, but also that “he or she did not, by any act or omission on his or her part, intentionally contribute to the bringing about of his or her arrest or conviction for the crime with which he or she was charged.”¹⁷⁶

The compensation statutes of the District of Columbia,¹⁷⁷ Nebraska,¹⁷⁸ New Jersey,¹⁷⁹ New York,¹⁸⁰ Virginia,¹⁸¹ West Virginia,¹⁸² and Wisconsin¹⁸³ are similar to California’s compensation statute, while the statutes of Mississippi¹⁸⁴ and Vermont¹⁸⁵ prohibit exonerees from receiving

176. CAL. PENAL CODE § 4903 (West 2011).

177. D.C. CODE § 2-422(2) (LexisNexis 2008) (“[A claimant must prove that], based upon clear and convincing evidence . . . he did not, by his misconduct, cause or bring about his own prosecution.”).

178. NEB. REV. STAT. § 29-4603(4) (Supp. 2010) (“[A claimant must show that] he or she did not commit or suborn perjury, fabricate evidence, or otherwise make a false statement to cause or bring about such conviction or the conviction of another, with respect to the crime or crimes under subdivision (1) of this section, except that a guilty plea, a confession, or an admission, coerced by law enforcement and later found to be false, does not constitute bringing about his or her own conviction of such crime or crimes.”).

179. N.J. STAT. ANN. § 52:4C-3(c) (West 2009) (“[A claimant must establish he] did not by his own conduct cause or bring about his conviction.”).

180. N.Y. JUD. CT. ACTS § 8-b(5)(d) (McKinney Supp. 2012) (“[A claimant must prove] he did not by his own conduct cause or bring about his conviction.”).

181. VA. CODE ANN. § 8.01-195.10(B)(iii) (Supp. 2011) (“[Incarceration is considered wrongful if] the person incarcerated did not by any act or omission on his part intentionally contribute to his conviction for the felony for which he was incarcerated.”).

182. W. VA. CODE ANN. § 14-2-13a(f)(5) (LexisNexis 2009) (“[A claimant must prove he] did not by his own conduct cause or bring about his conviction.”).

183. WIS. STAT. ANN. § 775.05(4) (West 2009) (“[A petitioner must show] he or she did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation . . .”).

184. MISS. CODE ANN. § 11-44-7(1)(c) (West Supp. 2010) (“[A claimant must prove he] did not commit or suborn perjury, or fabricate evidence to bring about his conviction.”).

185. VT. STAT. ANN. tit. 13, § 5574(a)(4) (Supp. 2010) (“[A claimant is entitled to judgment if the] complainant did not fabricate evidence or commit or suborn perjury during any proceedings related to the crime with which he or she was charged.”).

compensation if they committed or suborned perjury or fabricated evidence.

In Alabama,¹⁸⁶ Connecticut,¹⁸⁷ Florida,¹⁸⁸ Illinois,¹⁸⁹ Iowa,¹⁹⁰ Louisiana,¹⁹¹ Maine,¹⁹² Maryland,¹⁹³ Massachusetts,¹⁹⁴ Missouri,¹⁹⁵ Montana,¹⁹⁶ New Hampshire,¹⁹⁷ North Carolina,¹⁹⁸ Ohio,¹⁹⁹ Oklahoma,²⁰⁰ Tennessee,²⁰¹ Texas,²⁰² and Utah²⁰³ contributory negligence is not a part of the statute.

In the Timothy Atkins case, the Attorney General argued that Tim contributed to his arrest by running when the police came to arrest him.²⁰⁴ The argument was that Tim's manifestation of his guilt by running contributed to his arrest and conviction.²⁰⁵ In addressing this portion of the argument, the Board "didn't give it much weight" but found it was "a piece of circumstantial evidence" showing he was not entitled to compensation.²⁰⁶

At the time of Tim's initial arrest, he was seventeen years old and serving a probationary term for another offense; his probationary status, not his consciousness of guilt, was the reason he tried to avoid contact with the police before he was arrested.²⁰⁷ The idea that Tim Atkins could be denied compensation for twenty-three years of wrongful conviction because he ran from the police when they initially approached him is contrary to the goals of the compensation laws, which are to recognize wrongful convictions and compensate those who suffer the consequences. Contributory negligence should not be considered as part

186. ALA. CODE §§ 29-2-150 to -165 (LexisNexis Supp. 2010).

187. CONN. GEN. STAT. ANN. § 54-102uu (West Supp. 2011).

188. FLA. STAT. ANN. §§ 961.01-.07 (West Supp. 2011).

189. 705 ILL. COMP. STAT. ANN. 505/8 (West Supp. 2011); 20 ILL. COMP. STAT. ANN. 1015/2 (West Supp. 2011).

190. IOWA CODE ANN. § 663A.1 (West Supp. 2011).

191. LA. REV. STAT. ANN. § 15:572.8 (Supp. 2011).

192. ME. REV. STAT. ANN. tit. 14, § 8241 (Supp. 2010).

193. MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis 2009).

194. MASS. GEN. LAWS ANN. ch. 258D, §§ 1-9 (West Supp. 2011).

195. MO. ANN. STAT. § 650.058 (West Supp. 2011).

196. MONT. CODE ANN. § 53-1-214 (2009).

197. N.H. REV. STAT. ANN. §§ 541-B:1-23 (LexisNexis 2006 & Supp. 2010).

198. N.C. GEN. STAT. ANN. §§ 148-82 to -84 (West 2009 & Supp. 2010).

199. OHIO REV. CODE ANN. §§ 2743.48-.49 (West Supp. 2011).

200. OKLA. STAT. ANN. tit. 51, § 154 (West 2008).

201. TENN. CODE ANN. § 9-8-108 (Supp. 2009).

202. TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001-.003 (West 2011).

203. UTAH CODE ANN. § 78B-9-405 (West 2008).

204. Transcript of Proceedings in Claim of Timothy Atkins Day 2 (Morning) at 26, No. G569329 (Cal. Victim Comp. & Gov't Claims Bd. Dec. 16, 2009) (on file with authors).

205. *Id.*

206. Recorded Compensation Hearing Re Timothy Atkins, *supra* note 70, at 10.

207. Transcript of Proceedings in Claim of Timothy Atkins Day 1 (Afternoon), *supra* note 65, at 22-23.

of the compensation process because it creates situations where the government reaches to place blame on the claimant when the claimant did not cause the wrongful conviction. If at all, contributory negligence should only be considered if it was the proximate cause of a wrongful conviction, and it is unlikely that Tim Atkins's jury convicted him of murder based on the fact that he ran.

E. How Much Should Exonerees Be Compensated?

An amount of damages for a wrongful conviction is hard to quantify. In terms of real dollars lost due to time out of the job market, opportunity costs, and the cost of all of the legal proceedings, each case will be different. The personal costs of a wrongful conviction are staggering to the individual and the individual's family.

California Penal Code section 4904 requires that once the claimant has proven "pecuniary injury" the amount of appropriation "shall be a sum equivalent to one hundred dollars (\$100) per day of incarceration."²⁰⁸ The statutes of Alabama,²⁰⁹ Florida,²¹⁰ Iowa,²¹¹ Louisiana,²¹² Mississippi,²¹³

208. CAL. PENAL CODE § 4904 (West Supp. 2012).

209. ALA. CODE § 29-2-159(a) (LexisNexis Supp. 2010) (\$50,000 per year).

210. FLA. STAT. ANN. § 961.06(1)(a) (West Supp. 2011) (\$50,000 per year). In addition, Florida provides for tuition and fees for up to 120 hours at a career center or higher education institution, *id.* § 961.06(1)(b), reimbursement of any fine, penalty, or court fees paid, *id.* § 961.06(1)(c), and reasonable attorney's fees incurred in connection with the wrongful conviction, *id.* § 961.06(1)(d). The total compensation may not exceed \$2 million. *Id.* § 961.06(1)(e).

211. IOWA CODE ANN. § 663A.1(6)(b) (West 1998) (\$50 per day). Iowa's statute also provides for reimbursement for "any fine, surcharge, other penalty, or court costs imposed and paid and any reasonable attorney's fees and expenses incurred in connection with all criminal proceedings and appeals regarding" the wrongful conviction. *Id.* § 663A.1(6)(a). The petitioner may also receive "[t]he value of any lost wages, salary, or other earned income which directly resulted from the individual's conviction and imprisonment, up to twenty-five thousand dollars per year," *id.* § 663A.1(6)(c), as well as "reasonable attorney's fees for services provided in connection with an action under this section," *id.* § 663A.1(6)(d).

212. H.B. 505, 36th Leg., Reg. Sess. (La. 2010), available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=707968> (\$50,000 per year). Louisiana's forthcoming statute will also provide compensation for three years of job-skills training and six years of medical and counseling services. *Id.* The total amount of compensation may not exceed \$500,000. *Id.*

213. MISS. CODE ANN. § 11-44-7(2)(a) (West Supp. 2010) (\$50,000 per year). A petitioner may also receive reasonable attorney's fees associated with bringing a claim. *Id.* § 11-44-7(2)(b). The total compensation may not exceed \$500,000. *Id.* § 11-44-7(2)(a).

Missouri,²¹⁴ New Jersey,²¹⁵ North Carolina,²¹⁶ Ohio,²¹⁷ Texas,²¹⁸ Utah,²¹⁹ and Virginia²²⁰ have similarly defined the precise amount of compensation, while the statutes of Connecticut,²²¹ the District of Columbia,²²² Illinois,²²³

214. MO. ANN. STAT. § 650.058(1) (West Supp. 2011) (\$50 per day). However, Missouri's statute also limits an individual's maximum payment on their claim to no more than \$36,500 per year, meaning there are no lump-sum payment options available as in other states. *Id.* § 650.058(1)(4).

215. N.J. STAT. ANN. § 52:4C-5(a) (West Supp. 2011) ("Damages awarded under this act shall not exceed twice the amount of the claimant's income in the year prior to his incarceration or \$20,000.00 for each year of incarceration, whichever is greater."). In New Jersey, a petitioner may also receive reasonable attorney's fees. *Id.* § 52:4C-5(b).

216. N.C. GEN. STAT. § 148-84(a) (Supp. 2010) (\$50,000 per year). The total compensation may not exceed \$750,000. *Id.* A petitioner may also receive "job skills training for at least one year" and "[e]xpenses for tuition and fees." *Id.* § 148-84(c)(1)-(2).

217. OHIO REV. CODE ANN. § 2743.48(E)(2)(b) (LexisNexis Supp. 2011) (\$40,330 per year). Ohio also provides compensation for any fines or court costs, as well as reasonable attorney's fees incurred in connection with all criminal proceedings and in connection with obtaining the petitioner's discharge from confinement. *Id.* § 2743.48(E)(2)(a). A petitioner in Ohio can also receive "[a]ny loss of wages, salary, or other earned income" as a direct result of his or her imprisonment and the amount of any "cost debts the department of rehabilitation and correction recovered from the wrongfully imprisoned individual." *Id.* § 2743.48(E)(2)(c)-(d). Ohio also compensates for the reasonable attorney's fees associated with the action to obtain compensation. *Id.* § 2743.48(F)(2).

218. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a)(1) (West Supp. 2011) (\$80,000 per year). In Texas, a wrongfully convicted individual may also obtain "compensation for child support payments owed by the person on whose imprisonment the claim is based that became due and interest on child support arrearages that accrued during the time served in prison but were not paid." *Id.* § 103.052(a)(2). If a person entitled to compensation was released on parole or required to register as a sex offender, that person receives \$25,000 for each year the person was on parole or registered as a sex offender. *Id.* § 103.052(b).

219. UTAH CODE ANN. § 78B-9-405(1)(a) (LexisNexis Supp. 2008) (average annual nonagricultural payroll wage in Utah). As of 2009, that average was \$37,764 per year. GOVERNOR'S OFFICE OF PLANNING AND BUDGET, 2010 ECONOMIC REPORT TO THE GOVERNOR 23 (2010), available at [http://www.governor.utah.gov/DEA/ERG/2010 ERG.pdf](http://www.governor.utah.gov/DEA/ERG/2010%20ERG.pdf).

220. VA. CODE ANN. § 8.01-195.11(A) (2007) (providing ninety percent of the inflation-adjusted state per capita personal income). In 2011, the most recent year these numbers are available, Virginia's adjusted state per capita income was \$45,920, meaning that an inmate incarcerated in that year would be entitled to no more than \$41,328. See Council on Va.'s Future, *Personal Income*, VA. PERFORMS (July 19, 2012), <http://vaperforms.virginia.gov/indicators/economy/personalIncome.php>. In addition, Virginia only provides compensation for up to twenty years of incarceration. VA. CODE ANN. § 8.01-195.11(A). A wrongfully convicted individual in Virginia is also entitled to "a transition assistance grant of \$15,000," which is deducted from the initial award, *id.* § 8.01-195.11(C), as well as reimbursement up to \$10,000 for tuition within Virginia's community college system, *id.* Finally, regardless of the size of the award, Virginia limits any individual's initial award to a lump sum of twenty percent of the total award; the remainder is put into an annuity to be paid out over twenty-five years on a monthly basis. *Id.* § 8.01-195.11(B).

221. CONN. GEN. STAT. ANN. § 54-102uu(d) (West 2009) ("If the Claims Commissioner determines that such person has established such person's eligibility under subsection (a) of this section by a preponderance of the evidence, the Claims

Maine,²²⁴ Maryland,²²⁵ Massachusetts,²²⁶ Nebraska,²²⁷ New Hampshire,²²⁸
New York,²²⁹ Oklahoma,²³⁰ Tennessee,²³¹ Vermont,²³² West Virginia,²³³

Commissioner shall order the immediate payment to such person of compensation for such wrongful incarceration. In determining the amount of such compensation, the Claims Commissioner shall consider relevant factors including, but not limited to, the evidence presented by the person under subsection (c) of this section as to the damages suffered by such person and whether any negligence or misconduct by any officer, agent, employee or official of the state or any political subdivision of the state contributed to such person's arrest, prosecution, conviction or incarceration.”).

222. D.C. CODE § 2-423 (LexisNexis 2008) (“Upon a finding by the judge of unjust imprisonment in accordance with the standards set by § 2-422, the judge may award damages. Punitive damages may not be awarded.”).

223. 705 ILL. COMP. STAT. ANN. 505/8(c) (West Supp. 2011) (“[T]he amount of the award is at the discretion of the court; and provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than \$85,350; for imprisonment of 14 years or less but over 5 years, not more than \$170,000; for imprisonment of over 14 years, not more than \$199,150; and provided further, the court shall fix attorney’s fees not to exceed 25% of the award granted.”); *see also* 20 ILL. COMP. STAT. ANN. 1015/2 (West Supp. 2011) (“Each local office of the Department shall provide each person to whom this Section applies with job search and placement services, including assessment, resume assistance, interview preparation, occupational and labor market information, referral to employers with job openings to which the person is suited and referral to such job training and education program providers as may be appropriate and available through the partnering agencies with which the local office is affiliated.”).

224. ME. REV. STAT. ANN. tit. 14, § 8242(1) (2003) (“In any action for damages permitted by this chapter, the claim for and award of damages, including costs, against the State may not exceed \$300,000 for all claims arising as a result of a single conviction.”).

225. MD. CODE ANN., STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2006) (“Subject to subsection (b) of this section, the Board of Public Works may grant to an individual erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit an amount commensurate with the actual damages sustained by the individual, and may grant a reasonable amount for any financial or other appropriate counseling for the individual, due to the confinement.”).

226. MASS. GEN. LAWS ANN. ch. 258D, § 5(A)–(B) (West Supp. 2011) (“Upon a finding or verdict that the claimant has met the requirements of section 1 by the requisite standard of proof and is not barred from compensation by section 2, the court or the jury shall determine the damages that shall be payable to the claimant. In making such determination, the court or jury shall consider, but not be limited to, the consideration of: the income the claimant would have earned, but for his incarceration; the particular circumstances of the claimant’s trial and other proceedings; the length and conditions under which the claimant was incarcerated and; any other factors deemed appropriate under the circumstances in order to fairly and reasonably compensate the claimant. The court, in its discretion, may admit expert testimony on these or any factors. The court may include, as part of its judgment against the commonwealth, an order requiring the commonwealth to provide the claimant with services that are reasonable and necessary to address any deficiencies in the individual’s physical and emotional condition that are shown to be directly related to the individual’s erroneous felony conviction and resulting incarceration through documentary or oral evidence presented to the court or jury by the

claimant as part of the claim if the claimant provided in his original claim for compensation under this chapter: (i) the nature of the services that he seeks; and (ii) the agencies, departments or commissions of the commonwealth from which he seeks to receive such services. Any such agency, department or commission so named in the claim shall be entitled to reasonable notice of the court proceedings pertaining to the possible ordering of such services and shall be given an opportunity to be heard on whether such agency is the appropriate entity to provide such services if so ordered. The court may also include in its judgment an order that entitles any claimant who wishes to apply for and receive educational services from any state or community college of the commonwealth including, but not limited to, the University of Massachusetts at Amherst and its satellite campuses, a 50 per cent reduction of the tuition and fees applicable to such services at said institutions. Once the damages have been determined, the court shall enter a judgment against the commonwealth for the claimant in an amount certain, payable in either a lump sum or in annuity installment payments set by the court; provided, however, that any such annuity installment payments shall have fixed limits on their annual amount and on the time period which they shall be paid to the claimant. A judgment against the commonwealth may not include punitive or exemplary damages. The total liability of the commonwealth for any judgment entered under this chapter shall not exceed \$500,000.”).

227. NEB. REV. STAT. § 29-4604(1) (Supp. 2010) (“A claimant under the Nebraska Claims for Wrongful Conviction and Imprisonment Act shall recover damages found to proximately result from the wrongful conviction and that have been proved based upon a preponderance of the evidence.”). Damages, however, may not exceed \$500,000. *Id.* § 29-4604(4).

228. N.H. REV. STAT. ANN. § 541-B:14(II) (LexisNexis Supp. 2010) (“If a claim is filed against the state for time unjustly served in the state prison when a person is found to be innocent of the crime for which he was convicted, such a claim shall be limited to an award not to exceed \$20,000.”).

229. N.Y. JUD. CT. ACTS § 8-b(6) (McKinney Supp. 2011) (“If the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him.”).

230. OKLA. STAT. ANN. tit. 51, § 154(B)(4) (West 2008) (“The total liability of the state and its political subdivisions on any claim within the scope of The Governmental Tort Claims Act arising out of wrongful criminal felony conviction resulting in imprisonment shall not exceed One Hundred Seventy-five Thousand Dollars (\$175,000.00).”).

231. TENN. CODE ANN. § 9-8-108(a)(7)(A) (Supp. 2007) (“Compensation payable to such persons shall be determined by the board considering all factors the board considers relevant including, but not limited to, the person’s physical and mental suffering and loss of earnings; provided, however, that the maximum aggregate total of such compensation shall not exceed one million dollars (\$1,000,000) . . .”).

232. VT. STAT. ANN. tit. 13, § 5574(b) (2009) (“A claimant awarded judgment in an action under this subchapter shall be entitled to damages in an amount to be determined by the trier of fact for each year the claimant was incarcerated, provided that the amount of damages shall not be less than \$30,000.00 nor greater than \$60,000.00 for each year the claimant was incarcerated, adjusted proportionally for partial years served.”). In Vermont, the damage award may also include “[e]conomic damages, including lost wages and costs incurred by the claimant for his or her criminal defense and for efforts to prove his or her innocence,” up to ten years of eligibility for state health insurance, “reasonable reintegrative services and mental and physical health care costs incurred by the claimant for the time period between his or her release from mistaken incarceration and the date of the award,” and reasonable attorney’s fees. *Id.* § 5574(b)(1)–(4).

233. W. VA. CODE ANN. § 14-2-13a(g) (LexisNexis 2004) (“If the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him.”).

and Wisconsin²³⁴ do not provide for a specific amount of compensation per year. Rather, in those states the ability to award compensation is discretionary. Montana is the only state that does not provide monetary compensation and where the exoneree can only receive educational assistance.²³⁵

One of the shortcomings of a compensation system based on years of incarceration alone is that it fails to recognize the costs associated with being wrongfully arrested, wrongfully tried, and wrongfully convicted. This process takes a tremendous psychological toll and can have devastating financial consequences. The inmate whose case is reversed relatively quickly may be grossly undercompensated because he or she has not suffered years of incarceration. Under California's system, if an individual is wrongfully arrested, held for a period of one year awaiting trial, wrongfully convicted, and then serves a year in prison before the case is reversed, he or she would only be entitled to \$36,500²³⁶—hardly compensation for what may have been a life-changing ordeal.

F. What Should the Time Requirements Be for Filing and Responding to a Compensation Claim?

As noted above, the purpose behind the enactment of California's compensation law was to provide a quick, streamlined process by which recently released individuals could receive compensation for their years of incarceration, to "remedy some of the harm caused to all factually innocent people who have been wrongfully convicted," and to "remove some of the obstacles to compensation for the factually innocent and . . . ease their transition back into society."²³⁷ Unfortunately, however,

234. WIS. STAT. ANN. § 775.05(4) (West 2009) ("If the claims board finds that the petitioner was innocent and that he or she did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation, the claims board shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment. Compensation awarded by the claims board shall include any amount to which the board finds the petitioner is entitled for attorney fees, costs and disbursements. If the claims board finds that the amount it is able to award is not an adequate compensation it shall submit a report specifying an amount which it considers adequate to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172(2).").

235. MONT. CODE ANN. § 53-1-214(1)-(2) (2009).

236. See CAL. PENAL CODE § 4904 (West Supp. 2012) (providing for compensation of \$100 per day of wrongful incarceration).

237. 2009 Cal. Legis. Serv. 4394 (West).

compensation claims are slow to resolve. The reason, quite simply, is because there are no time limits on the litigation.

California Penal Code section 4901 provides that an individual seeking compensation under the statute must present his or her claim “within a period of two years after judgment of acquittal or discharge given, or after pardon granted, or after release from imprisonment.”²³⁸ This time frame was enacted in 2010; before that time, the claimant had six months to bring a claim before the Board.²³⁹ The wording of section 4901 has created a host of problems as to what constitutes “release from imprisonment,” which is not clearly defined either by the statute or in the California Code of Regulations, which has been applied to the statute. If, for example, an individual is paroled, and part of the justification for parole is because he or she demonstrates factual innocence, is he or she released from imprisonment for the purposes of the statute? After all, he or she is still on parole and still subject to rules and regulations that, should he or she violate them, mean a swift return to prison through a largely informal and administrative process.

The real issue, however, is how long the time frame for adjudication can be after the claim is filed. Although not expressly required, in California, the Board will not rule on a claim—or even take evidence—before hearing from the Attorney General and hearing the State’s position on the issue. Many claimants wait months or even years before the Attorney General takes a position on the claim. There is often a lengthy wait for an available hearing date, and then, posthearing, the Board has no time limit within which to render its decision.

In terms of response times, Vermont mandates the shortest period, at just twenty days.²⁴⁰ Florida and Nebraska are next, requiring a response from the State within thirty days.²⁴¹ In Texas, the State must respond

238. CAL. PENAL CODE § 4901 (West 2012).

239. CAL. PENAL CODE § 4901 historical and statutory notes (West 2011).

240. VT. STAT. ANN. tit. 13, § 5572(c) (2009) (“The Vermont Rules of Civil Procedure shall apply to [wrongful conviction compensation] actions brought under this subchapter, and the plaintiff shall have a right to trial by jury. The Vermont Rules of Appellate Procedure shall apply to appeals from orders and judgments issued under this subchapter.”); VT. R. CIV. P. 12(a)(1)(A) (stating that when presented with a complaint, a defendant shall serve an answer “within 20 days after being served with the summons and complaint, unless the court directs otherwise”).

241. FLA. STAT. ANN. § 961.03(2) (West Supp. 2011) (“The prosecuting authority must respond to the petition within 30 days.”); NEB. REV. STAT. § 81-8,216 (2008) (“In all suits brought under the State Tort Claims Act, the district courts shall follow the rules of civil procedure applicable to private litigants, and costs shall be allowed in all courts to the successful claimant to the same extent as if the state was a private litigant.”); *id.* § 25-503.01(1) (“The summons shall be directed to the defendant or defendants, and contain the names of the parties and the name and address of the plaintiff’s attorney, if any, otherwise the address of the plaintiff. It shall notify defendant that in order to defend the lawsuit an appropriate written response shall be filed with the court within

within forty-five days after an application for compensation is filed.²⁴² Oklahoma is next; once a claim is filed, the State has just ninety days after the date of filing to enter a denial.²⁴³ If that time passes without any filing, the claim is deemed “denied” and the suit may commence.²⁴⁴ Oklahoma’s quick turnaround is likely because there is no separate statute governing compensation time limitations; compensation claims are governed, like all governmental claims in the state, under the Oklahoma Governmental Tort Claims Act.

Although specifying a set time for filing a claim, the statutes of the following jurisdictions do not specify a time limitation for the government’s response to a claim: Alabama,²⁴⁵ Connecticut,²⁴⁶ Iowa,²⁴⁷

thirty days after service, and that upon failure to do so the court may enter judgment for the relief demanded in the complaint.”).

242. TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(c) (West 2011) (“The comptroller must make a determination of eligibility and the amount owed as required by Subsection (b) not later than the 45th day after the date the application is received.”).

243. OKLA. STAT. ANN. tit. 51, § 157(A) (West 2008) (“A person may not initiate a suit against the state or a political subdivision unless the claim has been denied in whole or in part. A claim is deemed denied if the state or political subdivision fails to approve the claim in its entirety within ninety (90) days, unless the state or political subdivision has denied the claim or reached a settlement with the claimant before the expiration of that period. If the state or a political subdivision approves or denies the claim in ninety (90) days or less, the state or political subdivision shall give notice within five (5) days of such action to the claimant at the address listed in the claim. If the state or political subdivision fails to give the notice required by this subsection, the period for commencement of an action in subsection B of this section shall not begin until the expiration of the ninety-day period for approval. The claimant and the state or political subdivision may continue attempts to settle a claim, however, settlement negotiations do not extend the date of denial unless agreed to in writing by the claimant and the state or political subdivision.”).

244. *Id.*

245. ALA. CODE § 29-2-162 (LexisNexis 2003) (“Any person applying for compensation under this article based on exoneration that was granted before May 21, 2001, or the dismissal of an accusatory instrument that occurred before May 21, 2001, shall file his or her application within two years after May 21, 2001. Any persons applying for compensation under this article based on an exoneration that was granted on or after May 21, 2001, or the dismissal of any accusatory instrument that occurred on or after May 21, 2001, shall file his or her application within two years after the exoneration or dismissal.”).

246. CONN. GEN. STAT. ANN. § 54-102uu(f) (West 2009) (“Any person claiming compensation under this section based on a pardon that was granted or the dismissal of a complaint or information that occurred before October 1, 2008, shall file such claim not later than two years after October 1, 2008. Any person claiming compensation under this section based on a pardon that was granted or the dismissal of a complaint that occurred on or after October 1, 2008, shall file such claim not later than two years after the date of such pardon or dismissal.”).

Louisiana,²⁴⁸ Maine,²⁴⁹ Massachusetts,²⁵⁰ Mississippi,²⁵¹ Montana,²⁵²
Nebraska,²⁵³ New Hampshire,²⁵⁴ New Jersey,²⁵⁵ New York,²⁵⁶ North
Carolina,²⁵⁷ Ohio,²⁵⁸ Tennessee,²⁵⁹ and West Virginia.²⁶⁰

247. IOWA CODE ANN. § 663A.1(8) (West 1998) (“Actions under this section shall be commenced within two years of entry of the district court order adjudging the individual to be a wrongfully imprisoned person.”).

248. LA. REV. STAT. ANN. § 15:572.8(I) (Supp. 2010) (“Any petitioner claiming compensation in accordance with this Section based on a disposition enumerated in Paragraph (A)(1) of this Section that occurs on or after September 1, 2005, shall file a petition within two years from the date on which the conviction was reversed or vacated.”). If the wrongfully convicted individual’s conviction was reversed or vacated prior to September 1, 2005, the individual had until September 1, 2008 to file his or her claim. *Id.* § 15:572.8(J).

249. ME. REV. STAT. ANN. tit. 14, § 8244 (2003) (“Every claim for wrongful imprisonment permitted under this chapter is forever barred from the courts of this State unless an action is begun in the courts within 2 years after the date of the full and free pardon of the conviction on which the claim is based.”).

250. MASS. GEN. LAWS ANN. ch. 258D, § 8 (West Supp. 2011) (“A claim for compensation brought under this chapter shall be commenced within 2 years after either the grant of a pardon or the grant of judicial relief and satisfaction of other conditions described in subsection (B) of section 1. Any action by the commonwealth challenging or appealing the grant of such judicial relief shall toll the 2 year period. Every action brought pursuant to this chapter that is not commenced within the time required by this section is forever barred from consideration by the courts of the commonwealth.”).

251. MISS. CODE ANN. § 11-44-9(1) (West Supp. 2009) (“An action for compensation brought by a wrongfully convicted person under the provisions of this chapter shall be commenced within three (3) years after either the grant of a pardon or the grant of judicial relief and satisfaction of other conditions described in Section 11-44-3(1); provided, however, that any action by the state challenging or appealing the grant of said judicial relief shall toll the three-year period. Persons convicted, incarcerated and released from custody prior to July 1, 2009, shall commence an action under this chapter not later than June 30, 2012.”).

252. MONT. CODE ANN. § 53-1-214(4) (2009) (“The privilege of receiving aid under this section remains active for 10 years after the release of a person who qualifies for aid under subsection (1). State education aid must continue for up to a total of 5 years of aid within the 10-year aid period or until the degree or program for which the person is authorized under subsection (1) is completed, whichever is less, as long as the person continues to make satisfactory progress in the courses or program attempted. Aid is available for completion of any degree or program available from the institutions listed in subsection (1), at the recipient’s choice.”).

253. NEB. REV. STAT. § 81-8,227(1) (Supp. 2010) (“Except as provided in subsection (2) of this section, every tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the Risk Manager in the manner provided by such act. The time to begin suit under such act shall be extended for a period of six months from the date of mailing of notice to the claimant by the Risk Manager or State Claims Board as to the final disposition of the claim or from the date of withdrawal of the claim under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.”); *see also id.* § 81-8,227(2) (“The date of a qualifying pardon from the Board of Pardons, a final order by a court vacating a conviction, or a conviction that was reversed and remanded for a new trial and no subsequent conviction was obtained, whichever is later, shall be the date the claimant’s claim shall accrue under the Nebraska Claims for Wrongful Conviction and Imprisonment Act for purposes of complying with the notice and filing requirements of the State Tort Claims Act. The Nebraska Claims for

Wrongful Conviction and Imprisonment Act applies to a claimant who would have had a claim if the act had been in effect before August 30, 2009, or who has a claim on or after such date. If a claimant had a qualifying pardon from the Board of Pardons, a final order by a court vacating a conviction, or a conviction that was reversed and remanded for a new trial and no subsequent conviction was obtained, before August 30, 2009, the claimant's claim shall accrue under the Nebraska Claims for Wrongful Conviction and Imprisonment Act on August 30, 2009, for purposes of complying with the notice and filing requirements of the State Tort Claims Act.”)

254. N.H. REV. STAT. ANN. § 541-B:11(II) (LexisNexis 2006) (“When a claim has been filed with any agency, the head of the agency shall make or cause to be made a preliminary investigation and provide the attorney general with the results of such investigation.”).

255. N.J. STAT. ANN. § 52:4C-4 (West 2009) (“The suit, accompanied by a statement of the facts concerning the claim for damages, verified in the manner provided for the verification of complaints in civil actions, shall be brought by the claimant within a period of two years after his release from imprisonment, or after the grant of a pardon to him; provided, however, that any eligible claimant released or pardoned during the five-year period prior to May 2, 1996 shall have two years from the effective date of this act to file a suit.”).

256. N.Y. JUD. CT. ACTS § 8-b(7) (McKinney 1989) (“Any person claiming compensation under this section based on a pardon that was granted before the effective date of this section or the dismissal of an accusatory instrument that occurred before the effective date of this section shall file his claim within two years after the effective date of this section. Any person claiming compensation under this section based on a pardon that was granted on or after the effective date of this section or the dismissal of an accusatory instrument that occurred on or after the effective date of this section shall file his claim within two years after the pardon or dismissal.”).

257. N.C. GEN. STAT. § 148-82(a) (Supp. 2010) (“Any person who, having been convicted of a felony and having been imprisoned therefor in a State prison of this State, and who was thereafter or who shall hereafter be granted 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, may as hereinafter provided present by petition a claim against the State for the pecuniary loss sustained by the person through his or her erroneous conviction and imprisonment, provided the petition is presented within five years of the granting of the pardon.”); *see also id.* § 148-82(b) (“Any person who, having been convicted of a felony and having been imprisoned therefor in a State prison of this State, and who is determined to be innocent of all charges and against whom the charges are dismissed pursuant to G.S. 15A-1469 may as hereinafter provided present by petition a claim against the State for the pecuniary loss sustained by the person through his or her erroneous conviction and imprisonment, provided the petition is presented within five years of the date that the dismissal of the charges is entered by the three-judge panel under G.S. 15A-1469.”).

258. OHIO REV. CODE ANN. § 2743.48(H) (LexisNexis Supp. 2011) (“[T]o be eligible to so recover, the wrongfully imprisoned individual shall commence a civil action under this section in the court of claims no later than two years after the date of the entry of the determination of a court of common pleas that the individual is a wrongfully imprisoned individual.”).

259. TENN. CODE ANN. § 9-8-108(a)(7)(F) (Supp. 2009) (“Any claim for compensation under this subdivision (a)(7) must be filed with the board no later than one

The District of Columbia²⁶¹ and the States of Maryland,²⁶² Missouri,²⁶³ Utah,²⁶⁴ Virginia,²⁶⁵ and Wisconsin²⁶⁶ have no time limits on any filings, responses, or decisions by claimants or the government in compensation cases.

In the Timothy Atkins case, the amount of time for resolving his case was completely contrary to the notion of compensating individuals so that they can get their lives back together. As noted above, the California Innocence Project filed the compensation claim on Tim's behalf on August 9, 2007. The government did not get around to filing its response until *more than two years later*, on September 30, 2009.²⁶⁷

G. Should a Denial of Compensation Be Appealable?

In California, there is no right to appeal the Board's decision to deny compensation. However, an individual denied relief may file a petition for writ of mandate in the superior court.²⁶⁸ The statutes of Mississippi,²⁶⁹

(1) year from the date that the claimant is granted exoneration pursuant to § 40-27-109 . . .”).

260. W. VA. CODE ANN. § 14-2-13a(h) (LexisNexis 2009) (“Any person claiming compensation under this section based on a pardon that was granted before the effective date of this section or the dismissal of an accusatory instrument that occurred before the effective date of this section shall file his claim within two years after the effective date of this section. Any person claiming compensation under this section based on a pardon that was granted on or after the effective date of this section or the dismissal of an accusatory instrument that occurred on or after the effective date of this section shall file his claim within two years after the pardon or dismissal.”). However, a person only has one year to file his or her claim if it is “based on the dismissal of a felony charge or charges against him when another person is subsequently charged, arrested and convicted of the same felony charge or charges based upon a dismissal of the felony charge or charges that occurred before the effective date of this section.” *Id.* § 14-2-13a(i).

261. See D.C. CODE §§ 2-421 to -425 (LexisNexis 2008).

262. See MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis 2009).

263. See MO. ANN. STAT. § 650.058 (West Supp. 2011).

264. See UTAH CODE ANN. § 78B-9-402 (LexisNexis 2008 & Supp. 2010).

265. See VA. CODE ANN. § 8.01-195.11 (Supp. 2011).

266. See WIS. STAT. ANN. § 775.05 (West 2009).

267. Letter from Edmund G. Brown Jr., Attorney Gen., State of Cal., to Kevin D. Kwong, Hearing Officer, Cal. Victim Comp. & Gov't Claims Bd. (Sept. 30, 2009) (on file with authors).

268. See *Diola v. State Bd. of Control*, 185 Cal. Rptr. 511, 514 (Ct. App. 1982) (“Code of Civil Procedure section 1094.5 provides for review ‘for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal . . .’ The claims procedure (Pen. Code, §§ 4900–4906) at issue provides for the submission of a claim for erroneous conviction and imprisonment to the Board of Control (§ 4900), a hearing (§ 4902), the introduction of evidence (§ 4903), and a decision based upon the evidence (§ 4904). Plainly, these provisions meet the express

Nebraska,²⁷⁰ New Hampshire,²⁷¹ North Carolina,²⁷² Vermont,²⁷³ and Wisconsin²⁷⁴ expressly permit an appeal, while Florida's statute explicitly states that the decisions are not appealable.²⁷⁵ Maine explicitly states that the Governor's decision not to enter a finding of innocence is not appealable.²⁷⁶

Iowa's compensation statute provides for no express right of appeal,²⁷⁷ but subsequent case law demonstrates such claims are appealable.²⁷⁸

The statutes of Alabama,²⁷⁹ Connecticut,²⁸⁰ the District of Columbia,²⁸¹ Illinois,²⁸² Louisiana,²⁸³ Maryland,²⁸⁴ Massachusetts,²⁸⁵ Missouri,²⁸⁶

requirements of section 1094.5." (quoting CAL. CIV. PROC. CODE § 1094.5 (West 2012))).

269. MISS. CODE ANN. § 11-44-11 (West Supp. 2009) ("Any party aggrieved by a decision as to a claim brought under this chapter is entitled to appeal the decision as in other civil cases.").

270. NEB. REV. STAT. § 81-8,216 (2008) ("In all suits brought under the State Tort Claims Act, the district courts shall follow the rules of civil procedure applicable to private litigants, and costs shall be allowed in all courts to the successful claimant to the same extent as if the state was a private litigant. Judgments shall be subject to appeal in the same manner as other judgments of the district court.").

271. N.H. REV. STAT. ANN. § 541-B:10(IV) (LexisNexis 2006) ("The findings and recommendations of the board or any payment of a claim authorized by said board shall only be subject to a judicial appeal by the petitioner in accordance with RSA 541. The board may by unanimous action order a rehearing on any matter before it, if in its opinion there are sufficient equitable reasons on behalf of any party to the proceedings so that a rehearing should be granted; provided, however, no rehearing on any matter shall be permitted after the board has authorized a payment of a claim.").

272. N.C. GEN. STAT. § 148-84(a) (2009) ("The determination of the Industrial Commission shall be subject to judicial review upon appeal of the claimant or the State according to the provisions and procedures set forth in Article 31 of Chapter 143 of the General Statutes.").

273. VT. STAT. ANN. tit. 13, § 5572(c) (2009) ("The Vermont Rules of Appellate Procedure shall apply to appeals from orders and judgments issued under this subchapter.").

274. WIS. STAT. ANN. § 775.05(5) (West 2009) ("The findings and the award of the claims board shall be subject to review as provided in ch. 227.").

275. FLA. STAT. ANN. § 961.03(8) (West Supp. 2011) ("The establishment of the method by which a person may seek the status of a wrongfully incarcerated person and a finding as to eligibility for compensation under this act in no way creates any rights of due process beyond those set forth herein, nor is there created any right to further petition or appeal beyond the scope of the method set forth herein.").

276. ME. REV. STAT. tit. 14, § 8241(4) (2003 & Supp. 2009) ("A Governor's failure to issue a written finding that the person is innocent of the crime for which the person was convicted is final and not subject to judicial view.").

277. IOWA CODE ANN. § 663A.1 (West 1998).

278. See *State v. Dohlman*, 725 N.W.2d 428 (Iowa 2006).

279. ALA. CODE §§ 29-2-150 to -165 (LexisNexis 2003 & Supp. 2009).

280. CONN. GEN. STAT. ANN. § 54-102uu (West 2009).

Montana,²⁸⁷ New Jersey,²⁸⁸ New York,²⁸⁹ Ohio,²⁹⁰ Oklahoma,²⁹¹ Tennessee,²⁹² Texas,²⁹³ Utah,²⁹⁴ Virginia,²⁹⁵ and West Virginia²⁹⁶ do not specify if an appeal is permitted.

In the Timothy Atkins case, the appellate process has been Kafkaesque, starting with the following letter, which somewhat misses the purpose of compensation proceedings—to compensate the wrongfully convicted, not compound their damages:

Justin Brooks
California Innocence Project
225 Cedar Street
San Diego, CA 92101-3046

Re: Timothy L. Atkins, PC 4900 Claim No. G569329

Dear Mr. Brooks:

The Legal Office of the California Victim Compensation and Government Claims Board (Board) prepared the administrative record in response to your Petition for Writ of Mandate regarding PC 4900 Claim No. G569329.

The administrative record contains 2884 pages. The Board charges \$.10 per page, for a total amount due of \$288.40. Please make the check payable to the California Victim Compensation and Government Claims Board and send it to the address listed below. The Board will not release the administrative record until the check clears.

If you have any questions, you may call the Legal Office at (916) 491-3605.

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281. D.C. CODE §§ 2-421 to -425 (LexisNexis 2008).
282. 705 ILL. COMP. STAT. ANN. 505/8 (West Supp. 2011); 20 ILL. COMP. STAT. ANN. 1015/2 (West Supp. 2011).
283. LA. REV. STAT. ANN. § 15:572.8 (Supp. 2009).
284. MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis 2009).
285. MASS. GEN. LAWS ANN. ch. 258D, §§ 1-9 (West Supp. 2011).
286. MO. ANN. STAT. § 650.058 (West Supp. 2011).
287. MONT. CODE ANN. § 53-1-214 (2009).
288. N.J. STAT. ANN. §§ 52:4C-1 to -6 (West 2009).
289. N.Y. JUD. CT. ACTS § 8-b (McKinney Supp. 2011).
290. OHIO REV. CODE ANN. § 2305.02 (LexisNexis 2010); OHIO REV. CODE ANN. § 2743.48 (LexisNexis Supp. 2011).
291. OKLA. STAT. ANN. tit. 51, § 164 (West 2008). Oklahoma's Government Tort Claims Act controls claims for compensation after wrongful conviction, and the Act does not explicitly provide for the right to an appeal. *See id.* While there have been appeals of other types of claims under the Act, there has not been an appeal of the denial of a compensation claim. *See, e.g.,* Carswell v. Okla. State Univ., 62 P.3d 786 (2002) (hearing an appeal of a denial of motion for reconsideration of remittitur of jury verdict assessing damages against the university). Presumably, however, such an appeal would be authorized as others have been.
292. TENN. CODE ANN. § 9-8-108 (Supp. 2009).
293. TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001-.003 (West 2011).
294. UTAH CODE ANN. §§ 78B-9-401 to -405 (LexisNexis 2008 & Supp. 2010).
295. VA. CODE ANN. § 8.01-195.10-.12 (Supp. 2011).
296. W. VA. CODE ANN. § 14-2-13a (LexisNexis 2009).

Sincerely,

Andrea Burrell
Senior Legal Typist²⁹⁷

In order to proceed on his challenge to the denial of his claim, Tim Atkins needed to present the administrative record to the court. This meant that he had no choice but to pay almost three hundred dollars to the Board for the privilege of challenging the Board's decision.

H. Should Compensation Be Applied Retroactively?

In California, the compensation statute does not specify whether or not compensation may be retroactively applied; that is, whether a person who was exonerated prior to the enactment of the statute can benefit from it. However, California does require that the claim must be presented to the California Victim Compensation and Government Claims Board within two years after the judgment of acquittal or discharge, the granting of a pardon, or after release from imprisonment.²⁹⁸ There has been no litigation to determine whether the statute will apply retroactively if an exoneree fails to meet the deadline because he or she was exonerated prior to the enactment of Penal Code section 4900.

Iowa,²⁹⁹ Montana,³⁰⁰ Nebraska,³⁰¹ North Carolina,³⁰² Tennessee,³⁰³ and Vermont³⁰⁴ are like California in that they set a statute of limitations for an exoneree to file his or her compensation claim, and case law has not addressed the issue of retroactivity.

297. Letter from Andrea Burrell, Sr. Legal Typist, Legal Office of the Cal. Victim Comp. & Gov't Claims Bd., to Justin Brooks, Cal. Innocence Project (July 22, 2010) (on file with authors).

298. CAL. PENAL CODE § 4901 (West 2012) (“[N]o claim not so presented shall be considered . . .”).

299. IOWA CODE ANN. § 663A.1 (West Supp. 2010).

300. MONT. CODE ANN. § 53-1-214(4) (2009) (“The privilege of receiving aid under this section remains active for 10 years after the release of a person who qualifies for aid . . .”).

301. NEB. REV. STAT. §§ 29-4602 to -4608 (Supp. 2010).

302. N.C. GEN. STAT. § 148-82 (Supp. 2010) (setting five-year limitation for presenting petition).

303. See TENN. CODE ANN. § 9-8-108 (Supp. 2009).

304. VT. STAT. ANN. tit. 13, § 5576(a) (2009) (“[A]n action for compensation under this subchapter shall be commenced within three years after the person is exonerated pursuant to subchapter 1 of this chapter through the person's conviction being reversed or vacated, the information or indictment being dismissed, the person being acquitted after a second or subsequent trial, or through the granting of a pardon.”).

The statutes of Alabama,³⁰⁵ Connecticut,³⁰⁶ Florida,³⁰⁷ Louisiana,³⁰⁸ Maine,³⁰⁹ Massachusetts,³¹⁰ Mississippi,³¹¹ New Jersey,³¹² New York,³¹³

305. ALA. CODE § 29-2-162 (LexisNexis 2003) (“Any person applying for compensation under this article based on exoneration that was granted before May 21, 2001, or the dismissal of an accusatory instrument that occurred before May 21, 2001, shall file his or her application within two years after May 21, 2001.”).

306. CONN. GEN. STAT. § 54-102uu(f) (West 2009). (“Any person claiming compensation under this section based on a pardon that was granted or the dismissal of a complaint or information that occurred before October 1, 2008, shall file such claim not later than two years after October 1, 2008. Any person claiming compensation under this section based on a pardon that was granted or the dismissal of a complaint that occurred on or after October 1, 2008, shall file such claim not later than two years after the date of such pardon or dismissal.”).

307. FLA. STAT. § 961.03(1)(b) (West Supp. 2011) (“The person must file the petition with the court: 1. Within 90 days after the order vacating a conviction and sentence becomes final if the person’s conviction and sentence is vacated on or after July 1, 2008. 2. By July 1, 2010, if the person’s conviction and sentence was vacated by an order that became final prior to July 1, 2008.”).

308. LA. REV. STAT. ANN. § 15:572.8(I)–(J) (Supp. 2011). If an inmate was exonerated prior to the date the statute was enacted, he or she was given three years from the enactment date to file a claim or was forever barred. *Id.* § 15:572.8(J). If the inmate was exonerated after the enactment of the statute, he or she has two years from the date on which the conviction was reversed or vacated. *Id.* § 15:572.8(I).

309. ME. REV. STAT. ANN. tit. 14, § 8244 & historical and statutory notes (Supp. 2009) (“Any claim that, pursuant to this Act, constitutes a right of action but for the 2-year statute of limitations established in this Act is maintainable if brought within one year of the effective date of this Act. Application to the Governor for a hearing under this Act by a person convicted of a criminal offense prior to the effective date of this Act must be made to the Governor within 3 months of the effective date of this Act.” (quoting Act of July 1, 1993, 1993 Me. Legis. Serv. ch. 480 (West)) (internal quotation marks omitted)). It is unclear whether Maine still recognizes the statute as applying retroactively. *See id.*

310. MASS. GEN. LAWS ANN. ch. 258D, § 8 (West Supp. 2010) (“A claim for compensation brought under this chapter shall be commenced within 2 years after either the grant of a pardon or the grant of judicial relief and satisfaction of other conditions . . .”). However, the legislative history of the statute states “a person convicted, incarcerated or released from custody before the effective date of this act shall commence an action pursuant to chapter 258D within 3 years of the effective date of this act.” Act of Dec. 30, 2004, 2004 Mass. Legis. Serv. ch. 444 (West).

311. MISS. CODE ANN. § 11-44-9(1) (West Supp. 2010) (“An action for compensation brought by a wrongfully convicted person under the provisions of this chapter shall be commenced within three (3) years after either the grant of a pardon or the grant of judicial relief and satisfaction of other conditions Persons convicted, incarcerated and released from custody prior to July 1, 2009, shall commence an action under this chapter not later than June 30, 2012.”).

312. N.J. STAT. ANN. § 52:4C-4 (West Supp. 2011) (“The suit . . . shall be brought by the claimant within a period of two years after his release from imprisonment, or after the grant of a pardon to him; provided, however, that any eligible claimant released or pardoned during the five-year period prior to May 2, 1996 shall have two years from the effective date of this act to file a suit.”).

313. N.Y. JUD. CT. ACTS § 8-b(7) (McKinney Supp. 2012) (“Any person claiming compensation under this section based on a pardon that was granted before the effective date of this section or the dismissal of an accusatory instrument that occurred before the

Oklahoma,³¹⁴ and West Virginia³¹⁵ apply retroactively if the exoneree meets the deadlines specified within the statutes.

The compensation statutes in New Hampshire³¹⁶ and Utah³¹⁷ do not apply retroactively.

The District of Columbia,³¹⁸ Ohio,³¹⁹ and Wisconsin³²⁰ set a cutoff date for the date of exoneration within the statute.

Illinois,³²¹ Maryland,³²² Missouri,³²³ and Texas³²⁴ do not address whether the compensation can be applied for retroactively and do not set a statute of limitations for filing the claim.

effective date of this section shall file his claim within two years after the effective date of this section.”).

314. OKLA. STAT. ANN. tit. 51, § 156(H) (West Supp. 2011) (“[P]ersons whose basis for a claim occurred prior to the effective date of this act, the claim must be submitted within one (1) year after the effective date of this act.”).

315. W. VA. CODE ANN. § 14-2-13a(h) (LexisNexis 2009) (“Any person claiming compensation under this section based on a pardon that was granted before the effective date of this section or the dismissal of an accusatory instrument that occurred before the effective date of this section shall file his claim within two years after the effective date of this section.”).

316. *Slovenski v. State*, 561 A.2d 1072, 1075 (N.H. 1989) (holding that despite the remedial nature of the legislation, the statute does not apply retroactively).

317. UTAH CODE ANN. § 78B-9-402(13) (LexisNexis Supp. 2010) (“The procedures governing the filing and adjudication of a petition to determine factual innocence apply to all petitions currently filed or pending and any new petitions filed on or after the effective date of this amendment.”).

318. D.C. CODE § 2-424 (LexisNexis Supp. 2011) (“This subchapter shall apply to any person whose release from unjust imprisonment occurred on or after June 1, 1979.”).

319. OHIO REV. CODE ANN. § 2743.48(5)(B)(1) (LexisNexis Supp. 2011) (“When a court of common pleas determines, on or after September 24, 1986, that a person is a wrongfully imprisoned individual, the court shall provide the person with a copy of this section and orally inform the person and the person’s attorney of the person’s rights under this section to commence a civil action against the state in the court of claims because of the person’s wrongful imprisonment and to be represented in that civil action by counsel of the person’s own choice.”).

320. WIS. STAT. ANN. § 775.05(2) (West 2009) (“Any person who is imprisoned as the result of his or her conviction for a crime in any court of this state, of which crime the person claims to be innocent, and who is released from imprisonment for that crime after March 13, 1980, may petition the claims board for compensation for such imprisonment.”).

321. See 705 ILL. COMP. STAT. ANN. 505/8(c) (West Supp. 2011).

322. See MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis 2009).

323. See MO. ANN. STAT. § 650.058 (West Supp. 2010).

324. See TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (West 2011).

I. Should Compensation Be Assignable?

Mississippi,³²⁵ Tennessee,³²⁶ and Texas³²⁷ allow for the award to be passed on to the exoneree's estate or heirs in the event the exoneree dies prior to the full payment.

Nebraska does not allow the compensation to be assigned, nor can it survive the claimant's death.³²⁸ Similarly, Virginia does not allow the estate or personal representative of a decedent to seek a claim for compensation for wrongful incarceration.³²⁹

III. CONCLUSION

Compensation statutes demonstrate the old legal adage that "hard cases make bad law." State legislatures have responded to the increasing numbers of stories of wrongfully incarcerated individuals exonerated after years, sometimes decades, behind bars. The statutes reviewed in this Article were surely drafted and enacted as an attempt to rectify this growing concern. Although made with the best of intentions, the language and processes involved in many of these laws mean that many individuals who rightly deserve compensation will be frustrated in their attempts to be made whole after their ordeals.

State legislatures drafting or revising a compensation statute or statutory scheme must be mindful of the three goals of these laws.

First, compensation statutes must be *efficient*, so that individuals who are entitled to compensation may be compensated as quickly as possible, in order to get "back on their feet" and on with their lives. This means

325. MISS. CODE ANN. § 11-44-13 (West Supp. 2009) ("If a claimant dies prior to the full payment of any claim awarded under this chapter, the remaining payments shall be made to his or her estate or heirs. If any potential claimant dies prior to the filing of a claim, the claim may be filed by and on behalf of his or her estate or heirs.").

326. TENN. CODE ANN. § 9-8-108(7)(C) (Supp. 2009) ("If the person dies without leaving a surviving spouse or surviving minor children, the payments shall cease. Upon the death of the claimant, any monthly installments left remaining shall be paid to the claimant's surviving spouse and surviving minor children in equal portions. The amount payable to the surviving spouse, if any, shall be paid until the surviving spouse's death or remarriage. If the surviving spouse dies or remarries, then the amount that was payable to the surviving spouse shall be divided equally among the claimant's surviving minor children. Each child shall receive such child's share until reaching majority status or death, whichever occurs first, at which time the amount shall be redistributed equally among the remaining minor children.").

327. See TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(c) (West 2011) ("If a deceased person would be entitled to compensation under Subsection (a)(2) if living, including a person who received a post-humous pardon, the person's heirs, legal representatives, and estate are entitled to lump-sum compensation under Section 103.052.").

328. NEB. REV. STAT. § 29-4604(5) (Supp. 2010).

329. VA. CODE ANN. § 8.01-195.10 (Supp. 2011).

that the compensatory scheme should be streamlined, avoiding unnecessary litigation and form-over-substance procedures that may prevent individuals from quickly obtaining relief.

Second, statutes must be *inclusive*, so that all individuals who should be entitled to compensation can receive it. This means that the compensatory scheme must be clear about who is entitled to relief, and should also include those individuals whose convictions were reversed before the statute was enacted.

Finally, compensation statutes must be *meaningful*, so that individuals who receive compensation can properly be made whole. This means that the award should be large enough to address properly the unjust years of incarceration and flexible enough to account for those individuals whose cases deserve special merit because they have been particularly harmed through their ordeal.

To that end, the Authors propose the following suggestions. At a minimum, compensation statutes should:

1. Utilize an administrative review process, rather than civil suits, to resolve claims. As stated above, civil lawsuits can be onerous, costly, and time-consuming affairs often taking years to resolve. In contrast, a properly designed administrative process could appropriately address the needs of wrongly incarcerated individuals much more quickly.
2. Establish time limits not only on the time to *file* claims, but also on the time to *respond* to and *resolve* claims.
3. Give deference to the record developed in the proceedings leading to the reversal of the inmate's conviction. The standards wrongfully convicted individuals must meet in order to reverse their convictions will always be higher than the proper standards they should have to show to get compensation. It makes no sense to disregard the factual findings and rulings of a judge, who often is the one most able to evaluate all of the evidence, and require individuals seeking relief to put on another "minitrial" to establish the same facts again in front of a hearing officer.
4. Not predicate an individual's success in getting compensation on the grant of a pardon or finding of factual innocence. Although these findings can obviously help to establish an individual's innocence, the difficulty in securing either of

these can seriously hinder those individuals who properly should be given compensation relief.

5. Set compensation at a base minimum so in cases where there is relatively quick reversal the individual is compensated for the wrongful arrest, pretrial detention, and wrongful conviction. In addition to the base amount, the individual should be compensated a minimum tax-free amount for each year of incarceration.
6. Allow individuals who are denied relief in the administrative process to appeal their decisions to the courts.
7. Permit individuals whose convictions were overturned before the law's enactment to apply for compensation as well.
8. Allow for compensation to be assignable to the inmate's heirs and relatives.