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# CRIMINOLOGY

## COMPENSATION STATUTES AND POST- EXONERATION OFFENDING

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*Utilizing a data set of exonerees compiled from the Center on Wrongful Convictions at Northwestern University, this study tracks the behavior of 118 exonerees following their releases and examines the effects of more than twenty variables on the exonerees' post-release criminality. We present here our findings on the effect of victim-compensation statutes on post-exoneration offending. When treated as a dichotomous variable, compensation has no apparent effect. When treated as a continuous variable, however, a pattern emerges. Exonerees who are compensated above a threshold amount of \$500,000 commit offenses at a significantly lower rate than those who are either not compensated or compensated beneath the threshold. Prior critiques have called for more and better compensation statutes on grounds of fairness. Needless to say, the fairness*

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*argument is substantial. This research suggests that the public policy argument for compensation is compelling, too, and has the potential to transform a stagnated debate.*

## I. INTRODUCTION

As the problem of wrongful convictions has come into focus in recent years, increasing attention has been paid to government failures to compensate adequately these victims of the criminal justice system. Only twenty-seven states and the District of Columbia have compensation statutes in place.<sup>1</sup> Most of these states impose substantial barriers to recovery. Furthermore, where compensation is paid, it is often trivial. The academic community has widely condemned this state of affairs.<sup>2</sup> Most of these critiques have called for more and better compensation statutes on grounds of fairness.<sup>3</sup> Needless to say, the fairness argument is substantial. Our focus, however, is on the heretofore unexamined utility of wrongful conviction statutes. Are they useful as a crime-prevention tool?

This question has not been investigated previously. This oversight is almost certainly attributable to the practical problems of studying this population. The universe of people who have been convicted and later absolved of a crime is small, and those who receive compensation comprise a small subset of that group. Logistical challenges notwithstanding, the question begs for research. Research on prison releasees suggests that exonerees are potentially at high risk for offending following their releases. Though they are innocent of the charges for which they were incarcerated, there is no reason to think that they are immune from the detrimental effect that prison has on prisoners. It is well established that prison can habituate criminal behavior.<sup>4</sup> Furthermore, exonerees, like all prison releasees, face

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<sup>1</sup> See *Compensation for the Wrongly Convicted*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/Compensation.php> (last visited May 23, 2013).

<sup>2</sup> See Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 93 (1999); Shawn Armbrust, Note, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 166 (2004); Louise Radnofsky, *Compensating the Wrongfully Convicted*, AM. PROSPECT (July 24, 2007), <http://prospect.org/article/compensating-wrongly-convicted>.

<sup>3</sup> See *infra* notes 51–52 and accompanying text.

<sup>4</sup> While no prior data has been collected regarding the effect of prison on exonerees, abundant research shows that prison can act as a school for crime, especially for the young. The so-called prisonization hypothesis was first articulated in DONALD CLEMMER, *THE PRISON COMMUNITY* (1940). Other seminal works include EDWARD ZAMBLE & FRANK J. PORPORINO, *COPING, BEHAVIOR, AND ADAPTATION IN PRISON INMATES* (1988); Stanton Wheeler, *Socialization in Correctional Communities*, 26 AM. SOC. REV. 697 (1961); Matthew T. Zingraff, *Prisonization as an Inhibitor of Effective Resocialization*, 13

daunting challenges reentering society. People exiting prison need, but often do not have, physical and mental health care, education, food, housing, jobs, and a support network.<sup>5</sup> In the absence of these resources, former prisoners often return to criminal behavior.<sup>6</sup> Reentry problems are especially acute for exonerees because they have spent so long in prison. In our data set, the average time spent wrongfully incarcerated was 12.5 years.<sup>7</sup> Thus, there is every reason to think that exonerees may pose a substantial risk for post-release offending. There is also every reason to hope that compensating these victims may have an ameliorative effect.

This study is part of a larger project on the post-release behavior of wrongfully convicted individuals. Utilizing a data set of exonerees compiled from the Center on Wrongful Convictions at Northwestern University, the larger study tracks the behavior of 118 exonerees following their releases and examines the effects of more than twenty variables on the exonerees' post-release criminality. The variables include demographics such as the nature of the offense for which the exoneree was wrongly convicted, the basis for his exoneration, and whether the individual had a criminal record prior to the wrongful conviction, among others.

We present here our findings on the effect of victim-compensation statutes on post-exoneration offending, examining compensation as a dichotomous variable—whether compensation is provided or not—and a continuous variable—how much compensation is provided. When treated as a dichotomous variable, compensation has no apparent effect.

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CRIMINOLOGY 366 (1975).

The “school of crime” hypothesis is laid out in Patrick Bayer et al., *Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections*, 124 Q.J. ECON. 105 (2009). The prevailing modern view is that longer sentences may do more harm than good. See, e.g., Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011); Paul Nieuwebeerta et al., *Assessing the Impact of First-Time Imprisonment on Offenders' Subsequent Criminal Career Development: A Matched Samples Comparison*, 25 J. QUANTITATIVE CRIMINOLOGY 227 (2009); G. Matthew Snodgrass et al., *Does the Time Cause the Crime? An Examination of the Relationship Between Time Served and Reoffending in the Netherlands*, 49 CRIMINOLOGY 1149 (2011).

<sup>5</sup> See Cathleen Burnett, *Restorative Justice and Wrongful Capital Convictions: A Simple Proposal*, 21 J. CONTEMP. CRIM. JUST. 272, 274 (2005); Armbrust, *supra* note 2, at 175–81.

<sup>6</sup> See JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 139–54 (2003).

<sup>7</sup> Other researchers and advocacy groups report similar timelines. The Innocence Project reports an average wrongful incarceration of thirteen years for DNA cases. See *Mission Statement*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited June 4, 2013). Samuel R. Gross et al. report an average of ten years of wrongful incarceration based on a sample of DNA and non-DNA cases. See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

Compensated exonerees offend at roughly the same rate as those who were not compensated. When treated as a continuous variable, however, a pattern emerges. Exonerees who are compensated above a threshold amount of \$500,000 commit offenses at a significantly lower rate than those who are either not compensated or compensated beneath the threshold level. Generally, a history of prior offending is an indicator of risk of future offending. However, among exonerees compensated above the \$500,000 threshold, those with prior criminal histories offended after release at the same rate as those with no criminal history. Remarkably, exonerees who were compensated below the \$500,000 level committed more offenses than those who were not compensated at all, although this finding is not statistically significant.

Taken together, these findings have profound implications for how the federal and state governments treat exonerees and have the potential to shift the debate, which has heretofore been premised on fairness, to more traditional public policy grounds. Following this Introduction, this Article offers an overview of victim-compensation laws and related scholarship on their effects. Part III describes the larger project of which this study is a part and details the methodology employed. Following the presentation of results in Part IV, the Article continues by presenting two theoretical frameworks that may help make sense of the central findings. The Article concludes with possible avenues for future study and some suggestions for legal reform.

## II. A SURVEY OF VICTIM-COMPENSATION LAWS AND RELATED SCHOLARSHIP

Exonerees may seek official compensation through one of three means: tort claims, private bills, or compensation statutes. Whichever path an exoneree goes down, he encounters substantial obstacles.

Exonerees may sue the federal government under 42 U.S.C. § 1983,<sup>8</sup> or they may sue state governments through common law tort claims for malicious prosecution and false imprisonment. Exonerees rarely prevail on these claims.<sup>9</sup> The standards for either action are daunting.<sup>10</sup> Under either

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<sup>8</sup> Civil Rights Act of 1871, 42 U.S.C. § 1983 (2006).

<sup>9</sup> See Burnett, *supra* note 5, at 274 (“[T]he standards to establish constitutional violations are so low that, with the courts’ deference to the official’s actions, it is very difficult for the claimant to win.”); Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 133 (2010) (“Common law tort claims, such as malicious prosecution and false imprisonment . . . are exceedingly difficult to maintain.”); John Martinez, *Wrongful Convictions as Rightful Takings: Protecting “Liberty-Property,”* 59 HASTINGS L.J. 515, 531 (2008) (“Such claims are therefore typically unsuccessful because police can usually

cause of action, demonstrating the wrongfulness of the conviction is insufficient to substantiate the claim.<sup>11</sup> Rather, the exoneree must show a violation of a specific constitutional right. This obstacle is substantial because wrongful convictions result most commonly from erroneous eyewitness identification, false confession, tunnel vision (an unwillingness or inability to consider evidence contrary to an investigator or prosecutor's preexisting theory of the case), perjured testimony, incentivized witnesses (such as informants or jailhouse snitches), or bad science.<sup>12</sup> None of these typical errors necessarily involves a violation of constitutional rights.<sup>13</sup> Even more problematic is that in instances where a constitutional right has been violated, the offending government actors are protected by absolute immunity with respect to prosecutors and judges and by qualified immunity with respect to police officers.<sup>14</sup> Absolute immunity, as its name suggests, is unconditional.<sup>15</sup> Qualified immunity protects government actors from

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credibly testify that they had probable cause.”).

<sup>10</sup> See, e.g., *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996) (“[A] plaintiff claiming false arrest must show, *inter alia*, that the defendant intentionally confined him without his consent and without justification.”); *Fink v. Shawangunk Conservancy, Inc.*, 790 N.Y.S.2d 249, 250 (App. Div. 2005) (“To succeed on a claim for malicious prosecution, a plaintiff must show the initiation of an action or proceeding that terminated in favor of the plaintiff, lack of probable cause for the prior action or proceeding, malice and special injury.”).

<sup>11</sup> See *Kahn*, *supra* note 9, at 133 (“[A]ctions for malicious prosecution and false imprisonment both require a showing of intent on the part of the government, as well as an absence of probable cause for the arrest.”); *Martinez*, *supra* note 9, at 532 (“[C]laims against governmental defendants individually in their personal capacities usually fail to meet the high standards of proof required under state and federal law, which demand that claimants prove the defendants acted intentionally or recklessly; that defendants acted outside the scope of their employment; or that defendants acted while under the influence of drugs or alcohol.”).

<sup>12</sup> See Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 838–56 (2010); see also *Understand the Causes*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited Apr. 14, 2013).

<sup>13</sup> See generally *Armbrust*, *supra* note 2, at 162 nn.43–45.

<sup>14</sup> See *Burnett*, *supra* note 5, at 274 (“[T]he legal system is set up to protect officials (and jurisdictions) from liability in the performance of their duties.”); *Kahn*, *supra* note 9, at 133 (“[A]ctions for malicious prosecution and false imprisonment . . . are limited by the same immunity protections as §1983 claims.”). On the legal standards governing immunity, see *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

<sup>15</sup> See Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 HARV. J.L. & PUB. POL’Y 479, 486 (1994) (explaining that absolute immunity protects judges, legislators, prosecutors, the President, and other members of the Executive Branch from liability “within the scope of their discretionary authority, provided that the action is one of a judicial,

liability except where they have knowingly violated clearly established law.<sup>16</sup> Thus, the exoneree cannot recover in cases where the government has made a mistake or merely failed to exercise due care in avoiding a mistake. Furthermore, the exoneree bears not only the burden of proof at trial but also the burden of initiating the legal action in the first place. This latter burden may be the most substantial. After spending years and often decades in confinement, exonerees generally have no resources and no lawyers.<sup>17</sup> The idea that any prison releasee would have the sophistication to quickly initiate a lawsuit is fanciful.

Private bills are an alternative to tort claims, though no more hopeful for the exoneree. A private bill is effectively a petition, generally to the state legislature, to compensate an exoneree.<sup>18</sup> An exoneree pursuing a private bill avoids the legal immunities that protect government actors, but in many regards this is a tougher row to hoe.<sup>19</sup> The exoneree who wishes to sue requires only an attorney. The exoneree pursuing a private bill requires a lobbyist and a campaign manager. Like any political initiative, a private bill requires vigorous advocacy and is subject to the vagaries of the political process.<sup>20</sup> Some states have declared private bills unconstitutional. Moreover, generally speaking, state legislatures are poorly equipped to deal with the growing number of wrongful conviction petitions. On the whole, neither private bills nor tort claims are fruitful avenues for exonerees to

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legislative, or prosecutorial nature”).

<sup>16</sup> *Harlow*, 457 U.S. at 818; *Romero v. Kitsap Cnty.*, 931 F.2d 624, 627 (9th Cir. 1991).

<sup>17</sup> Burnett, *supra* note 5, at 278 (“[F]inding a lawyer to take the case within a given time limit could deter many individuals from returning to court who likely have pressing survival needs upon release.”); Kahn, *supra* note 9, at 136 (“Meritorious claims often are defeated due to the substantial burden facing litigants—including the costs of litigation and the difficulty of producing evidence related to a crime that took place years ago.”); see also Sandra D. Westervelt & Kimberly J. Cook, *Framing Innocents: The Wrongly Convicted as Victims of State Harm*, 53 CRIME L. & SOC. CHANGE 261, 270 (2010).

<sup>18</sup> Kahn, *supra* note 9, at 134 (“An alternative course of compensation for a wrongfully convicted individual is to seek a private bill from the state legislature, which can allocate money to the individual.”).

<sup>19</sup> Burnett, *supra* note 5, at 278–79 (“Private bills are a second strategy used to obtain compensation for a wrongful conviction. In this approach, the claimant or his or her advocate must lobby the state legislature (likely a full-time job), all the while subject to the whims of legislative scheming”).

<sup>20</sup> See Kahn, *supra* note 9, at 134 (“Positive publicity surrounding the exoneration, the political connections of the exoneree, and budgetary concerns all are much more likely to determine the fate of the bill than the merits of the claim for compensation.”); Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 699–700 (2002) (“[S]pecial legislation from a state legislature is likely only available to wronged individuals with the support of those influential in the political world of the state.”).

pursue.<sup>21</sup>

The best bet for an exoneree seeking compensation is through a preexisting statute, though the picture here is also grim. Only twenty-seven states and the District of Columbia have enacted statutes to compensate the wrongfully convicted.<sup>22</sup> While most of these statutes do not require an exoneree to show government misconduct, most states place substantial restrictions on eligibility. In some states, exonerees may not seek compensation if they somehow contributed to their convictions (by, for example, pleading guilty to the crime or falsely confessing).<sup>23</sup> In other states, only those with official pardons from the government may seek compensation.<sup>24</sup> In still others, only those who were exonerated with DNA evidence are considered eligible.<sup>25</sup>

Some states impose time constraints on exonerees who seek compensation.<sup>26</sup> Often, these statutes of limitation are extremely short. For example, California only allows an exoneree two years to file a claim.<sup>27</sup> Until recently, that period was merely six months.<sup>28</sup> Even where there is no burdensome statute of limitations, the process of securing recovery is often expensive and protracted since most statutes place the burden of proof on the litigant, who must prove his innocence about a crime that often took

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<sup>21</sup> See Armbrust, *supra* note 2, at 158–59 (“Although some wrongfully convicted individuals have received compensation through civil rights lawsuits or special bills passed by the legislature, recovery through those methods is difficult.”). On the limitations of tort claims and private bills, see Jessica R. Lonergan, Note, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 405, 407–13 (2008).

<sup>22</sup> See *supra* note 1.

<sup>23</sup> For example, Nebraska law denies compensation to those who plead guilty or falsely confess, unless that false confession was later found to have been coerced. NEB. REV. STAT. § 29-4603(4) (Supp. 2012).

In Massachusetts, an individual is not eligible for compensation if he pleaded guilty (unless the plea was withdrawn, vacated, or nullified). See MASS. ANN. LAWS ch. 258D, § 1(C)(iii) (LexisNexis Supp. 2013); see also Armbrust, *supra* note 2, at 168 nn.86–88.

<sup>24</sup> See Armbrust, *supra* note 2, at 168 n.89.

<sup>25</sup> For example, in Montana and Missouri, only wrongfully convicted persons exonerated through DNA testing are eligible for at least certain types of compensation. MO. ANN. STAT. §§ 650.057, 650.058 (West 2006 & Supp. 2013); MONT. CODE ANN. § 53-1-214(1) (2011).

<sup>26</sup> In Mississippi, an exoneree can apply within three 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).” MISS. CODE ANN. § 11-44-9 (2012). In California, a claim “must be presented by the claimant to the California Victim Compensation and Government Claims Board within a period of two years after judgment of acquittal or discharge given, or after pardon granted, or after release from imprisonment . . . .” CAL. PENAL CODE § 4901 (West 2011).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*



place many years ago.<sup>29</sup> These obstacles are cumulatively substantial. Only 41% of wrongfully convicted individuals ever receive any compensation.<sup>30</sup>

Finally, even the exoneree who satisfies the eligibility requirement, perseveres in his legal battle, and joins the successful 41% is not guaranteed to recover very much. States place caps on the amount that a litigant can recover.<sup>31</sup> Generally speaking, the compensation is inadequate in every sense.<sup>32</sup> It is too little in comparison to the harm suffered by the exoneree, and inadequate to help the exoneree land on his feet following release. States vary widely in the principles they use to determine awards.<sup>33</sup> Some states offer a flat-rate payment to exonerees. Others increase awards relative to the amount of time served. It is commonly left to the court to determine what amount fairly and reasonably compensates the individual.<sup>34</sup> Furthermore, several states set a ceiling on recovery.<sup>35</sup> In many instances, this ceiling is absurdly low.<sup>36</sup> For example, New Hampshire limits compensation to \$20,000, regardless of the amount of time served.<sup>37</sup> A few states provide meager support services beyond the financial award.<sup>38</sup>

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<sup>29</sup> Kahn, *supra* note 9, at 125 (“[T]his approach . . . demands that the wrongfully convicted person come forward with evidence related to the crime when it is often the state that possesses such evidence, and it delays for years the time it takes for a wrongfully convicted person to recover much-needed compensation.”).

<sup>30</sup> Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 120 (2008); *see also* Lopez, *supra* note 20, at 673 (reporting that “only 37% of wrongfully convicted persons actually receive compensation”).

<sup>31</sup> Kahn, *supra* note 9, at 142–44; *see also* Burnett, *supra* note 5, at 276; *Compensation for the Wrongly Convicted*, *supra* note 1.

<sup>32</sup> Lopez, *supra* note 20, at 673 (“[C]urrent statutory schemes grossly undercompensate the wrongly convicted.”).

<sup>33</sup> In California, there have been reports of exonerees being denied compensation after spending as long as five years wrongfully convicted. *See* 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>.

<sup>34</sup> *Id.*

<sup>35</sup> For example, in Louisiana, exonerees are eligible for \$25,000 per year of wrongful conviction. However, there is a cap of \$250,000 for physical harm and injury suffered by the exoneree. LA. REV. STAT. ANN. § 15:572.8(H)(2) (2012). In Iowa, the statute allows for \$50 per day of wrongful imprisonment. Iowa also provides attorneys’ fees in some cases and lost wages up to \$25,000 a year. *See* IOWA CODE ANN. § 663A.1 (West 1998). In Wisconsin, regardless of number of years wrongfully incarcerated, the maximum total lump sum is \$25,000. WIS. STAT. ANN. § 775.05 (West 2009).

<sup>36</sup> On the wide variation in damage payments, *see* Armbrust, *supra* note 2, at 169 nn.98–104 and accompanying text; Lonergan, *supra* note 21, at 411–12.

<sup>37</sup> N.H. REV. STAT. ANN. § 541-B:14(II) (LexisNexis 2006 & Supp. 2012).

<sup>38</sup> Even the states that take the progressive step of providing medical care to exonerees require a showing that their health conditions are directly related to the erroneous

In response to the inadequacy of compensation, the American Bar Association (ABA) and the Innocence Project, among other organizations, have promulgated model reform legislation to increase awards to exonerees.<sup>39</sup> These proposals retain the adversarial process as a framework for determining compensation, but attempt to estimate more realistically the damages actually suffered by the exoneree. For example, the ABA proposal includes compensation for pain and suffering, and for lost pay while incarcerated.<sup>40</sup> In contrast to all current legislation, which dictates limits on the amount an exoneree may receive, the Innocence Project model statute establishes a minimum of \$50,000 per year incarcerated, with an additional \$50,000 per year served on death row.<sup>41</sup> These proposals for legislative reform also attempt to deal more realistically with the challenges faced by exonerees upon reentering society. They call for the government to provide, or cover the cost of, physical and psychological services. The Innocence Project's model legislation recommends lifelong physical and mental health care provided through the state employees' health-care system if the exoneree's employer does not already provide health care.<sup>42</sup> This attempt to address the needs of former prisoners reentering society is particularly significant since, as will be discussed below, exonerees often receive less in the way of reentry services than typical releasees or parolees.<sup>43</sup>

The academic community, too, has condemned the deficiencies of wrongful compensation statutes and offered various suggestions for reform.

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convictions. *See, e.g.*, MASS. ANN. LAWS ch. 258D, § 5(A) (LexisNexis Supp. 2013) (requiring the state 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”).

<sup>39</sup> *See* AM. BAR ASS’N, SECTION OF CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES (2005), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_policy\\_my05108a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_my05108a.authcheckdam.pdf); THE INNOCENCE PROJECT, MODEL LEGISLATION, 2011 STATE LEGISLATIVE SESSIONS: AN ACT CONCERNING CLAIMS FOR WRONGFUL CONVICTION AND IMPRISONMENT (2010), available at [http://www.innocenceproject.org/docs/2011/modelbills/Compensation\\_Model\\_Bill\\_2011.pdf](http://www.innocenceproject.org/docs/2011/modelbills/Compensation_Model_Bill_2011.pdf).

<sup>40</sup> AM. BAR ASS’N, *supra* note 39, at 1.

<sup>41</sup> THE INNOCENCE PROJECT, *supra* note 39, § 4B.

<sup>42</sup> *See id.* § 4B(2).

<sup>43</sup> *See* Burnett, *supra* note 5, at 273 (“Ironically, wrongfully convicted persons are not eligible for [state-sponsored support or reentry programs] and so have fewer resources available to them to resume their lives than those who have rightfully served their prison time.”); CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 115 (Gerald Uelman & Chris Boscia eds., 2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> (“Ironically, even the limited resources made available to the convicted felons who have served their sentences and are released from prison are not available to those whose convictions have been set aside.”).

A leading voice, Adele Bernhard, has argued in favor of lifting “antiquated restrictions” on recovery and increasing potential awards.<sup>44</sup> Daniel S. Kahn has proposed shifting the burden of proof to the state to prove that a claimant is guilty, as opposed to requiring an exoneree to demonstrate his innocence.<sup>45</sup> Alberto Lopez has proposed a rival model statute.<sup>46</sup> These scholars follow in the footsteps of Yale’s Edwin Borchard, who in 1932 condemned the failure to compensate the wrongfully convicted as a national shame.<sup>47</sup>

Many of these critics of the status quo have drawn attention to the inadequacy of money to redress the physical, psychological, and financial issues that confront exonerees upon their reentry to society. Shawn Armbrust argues for “holistic” compensation—“a combination of financial compensation, job training services, and medical care.”<sup>48</sup> Cathleen Burnett proposes to apply the restorative justice model and create comprehensive individualized plans to reintegrate the wrongfully convicted into society.<sup>49</sup> Lopez’s model statute includes compensation for noneconomic harms.<sup>50</sup>

Almost uniformly, these cries for reform by advocacy groups and scholars have been predicated on appeals to fairness.<sup>51</sup> This is true both

<sup>44</sup> Bernhard, *supra* note 2, at 74.

<sup>45</sup> See Kahn, *supra* note 9, at 148–57.

<sup>46</sup> See Lopez, *supra* note 20.

<sup>47</sup> EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE*, at xiii (1932).

<sup>48</sup> Armbrust, *supra* note 2, at 160 n.29.

<sup>49</sup> See Burnett, *supra* note 5, at 280.

<sup>50</sup> Lopez, *supra* note 20, at 716.

<sup>51</sup> See, e.g., Stuart Beresford, Commentary, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals*, 96 AM. J. INT’L L. 628, 633 (2002) (“[T]he international community has a moral obligation to compensate an individual for losses incurred as a result of the application of its coercive powers.”); Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 708 (2004) (“Most importantly, a legislative remedy is the only reliable and fair response to the inevitable mistakes that occur as a byproduct of the operation of a criminal justice system as large as ours.”); Bernhard, *supra* note 2, at 74 (“The state whose actions have put individuals in prison for crimes they did not commit owes a debt to those who through no fault of their own have lost years and opportunity.”); Lonergan, *supra* note 21, at 452 (“[W]hile the state has no legal duty to compensate exonerees, it has a profound moral obligation to do so. Justice demands restitution for those whom the legal system—whether by mistake or malice—wrongfully incarcerates.”); Martinez, *supra* note 9, at 537 (“[F]reedom alone is not enough for the person who has been chewed up by the criminal justice system and then spit out as wrongfully convicted, lacking compensation for the harm suffered.”); Teresa E. Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 691 (2008) (“Although wrongful convictions may be an inevitable consequence of our criminal justice system, it would seem that a person wrongly deprived of his liberty is entitled to a civil

with respect to the strand of scholarship that calls for increased financial awards and for those who argue that monetary compensation is inadequate. Armbrust, for example, invokes traditional retributive language in defending the need for nonmonetary compensation.<sup>52</sup> In the tradition of restorative justice, Burnett rejects identifying and punishing the offender—here the state—in favor of identifying the needs of the victim. Ultimately, though, her claim is also premised on a sense that the community bears a “responsibility” to the exoneree.<sup>53</sup>

Indeed, the fairness argument is substantial. Wrongfully convicted individuals are victims in the truest sense. They have done nothing to bring about the harm they have suffered. In a retributive sense, they deserve compensation, inadequate though it may be. Perhaps because the fairness argument is so convincing, little attention has been paid to the social benefits that flow from compensating the wrongfully convicted. Only a handful of scholars have focused on the potential usefulness of compensation statutes. Joseph King, one of the earliest advocates of compensation statutes, defended them in part as a means of reducing errors.<sup>54</sup> Following King’s lead, others, including one of the authors of this Article, have defended compensation statutes under law and economics principles.<sup>55</sup> In the area of torts, law and economics generally favors

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remedy to compensate for the mistakes of the criminal system.”); Joseph H. King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1092 (1970) (arguing that “when the exercise of state power results in an erroneous confinement, the government whose police power made such confinement possible should to the extent feasible redress the victim’s injury, regardless of whether any government agent has played a culpable role”). One notable exception is Khan, *supra* note 9, at 124 (“Yet it is now quite clear, if it was not before, that wrongfully convicted persons require compensation, not just for lost wages and the pain and suffering endured while incarcerated, but also for the substantial obstacles they face when they attempt to reenter and regain their life after prison.”).

<sup>52</sup> See Armbrust, *supra* note 2, at 160 (“Although it is not clear whether the state has a legal obligation to compensate the wrongfully convicted, there certainly is a moral obligation to do so. The wrongfully convicted clearly have suffered an injustice at the hands of the state and many others, and the state is in the best position to provide meaningful compensation . . .”).

<sup>53</sup> Burnett, *supra* note 5, at 280–81 (“Immediately, the victim’s needs are the primary concern and the community recognizes its responsibility for helping with restoration, focusing on reintegration.”).

<sup>54</sup> See generally King, *supra* note 51.

<sup>55</sup> See Evan J. Mandery, *Commentary: Efficiency Considerations of Compensating the Wrongfully Convicted*, 41 CRIM. L. BULL. 287 (2005); John J. Johnston, Comment, *Reasonover v. Washington: Toward a Just Treatment of the Wrongly Convicted in Missouri*, 68 UMKC L. REV. 411 (2000). But see Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127 (2010).

placing liability on the cheapest cost avoider.<sup>56</sup> With respect to wrongful convictions, the government is in a far better position than defendants to avoid wrongful convictions.<sup>57</sup> Placing liability on the government would create an incentive—which currently does not exist—for prosecutors to avoid wrongful convictions.<sup>58</sup>

Wholly absent from the literature are study and argument regarding the impact that compensation statutes have on the post-release behavior of the exonerated. This is an efficiency argument that is different in kind from the concern with reducing wrongful convictions. It is possible that compensation statutes can be defended solely because they enable exonerees to lead productive lives or help them avoid leading unproductive lives. No scholar has examined the post-release behavior of exonerees.

This dearth of research and commentary may be philosophical—as noted above, the fairness argument is compelling—but is more likely practical. The universe of exonerees is small, and post-release behavior is difficult and expensive to track. While the authors believe that fairness requires compensating the wrongfully convicted, we hope to move the conversation beyond the philosophical. Our study of post-exoneration offending suggests that the positive consequences that flow from compensating the wrongfully convicted may be a sufficient justification for more and better compensation statutes.

### III. METHODOLOGY

#### A. THE LARGER PROJECT

The current study is part of a larger project on post-exoneration offending, which seeks to examine the post-release offending behavior of wrongfully convicted individuals and the risk they pose. The exonerees' legal histories were obtained through the Center on Wrongful Convictions (CWC) at the Bluhm Legal Clinic at Northwestern University School of Law. We restricted our focus to individuals released between 1999 and 2009 because complete criminal record information is only available from 1999 onward, and with respect to the end date, to allow at least three years for adequate follow-up. The data set was compiled from exonerations from

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<sup>56</sup> Johnston, *supra* note 55, at 414 (arguing that compensation is appropriate “to *shift the risks of ‘accident’ to the party better suited to handle them*”) (emphasis added).

<sup>57</sup> See Mandery, *supra* note 55, at 287 (“Wrongfully convicted individuals are victims in the truest sense. . . . Most tort victims contribute in some way to their own injury. . . . [T]he wrongfully convicted are often guilty of nothing other than being themselves—of being in the wrong place in the wrong time, or of bearing a resemblance to a wrongdoer.”).

<sup>58</sup> Mandery extends the incentive argument to call for prosecutors and jurors to pay, at least in part, for wrongful convictions in which they played a role. *Id.* at 298–301.

four states: Illinois, Florida, New York, and Texas.<sup>59</sup> Inclusion criteria for CWC exoneration cases include: cases in which a sentence was long enough to be reviewed on appeal, cases that have been reviewed, and cases that have available exculpatory evidence.<sup>60</sup> The current study also included cases that do not involve DNA. Furthermore, seventeen of the cases from Texas derived from a single mass exoneration in Tulia, Texas.<sup>61</sup> These cases form a distinct subset because they were not individualized exonerations.

We obtained post-exoneration offending data through background checks provided by Maximum Reports, Inc., a commercial data supplier. Maximum Reports, like all commercial data suppliers, requires an “identifier”—typically a date of birth or social security number. CWC case histories included such an identifier in approximately one-third of the cases. In thirteen cases, an exoneree had returned to prison and the identifier was obtainable from the state correctional department. For the remaining cases, we conducted independent searches.<sup>62</sup> We excluded all cases for which we failed to find an identifier. Thus, the number of cases included in the study

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<sup>59</sup> Cost limitations restricted us to performing criminal history searches in only four states. We selected the four leading exoneration states for which criminal history data is publicly available. The top seven states in order are Illinois, New York, Texas, California, Louisiana, Massachusetts, and Florida. See Gross et al., *supra* note 7, at 541. Criminal history data from California, Louisiana, and Massachusetts is not publicly available, and thus Florida was included in the sample. It so happens that Illinois, New York, Texas, and Florida each has a compensation statute. As we note below in our discussion of limitations and directions for future research, it would be interesting to compare post-exoneration behavior among exonerees in states with and without compensation statutes. This research will be challenging, though, as exonerations are heavily concentrated in states with compensation statutes. More than 40% of exonerations occur in the top four states, and the top ten states account for more than two-thirds of American exonerations. See *id.* at 541.

<sup>60</sup> E-mail from Robert L. Warden, Exec. Dir., Ctr. for Wrongful Convictions, to Amy Shlosberg, Assistant Professor, Farleigh Dickinson Univ. (Feb. 25, 2013, 11:56 AM) (on file with the Journal of Criminal Law and Criminology).

<sup>61</sup> Dates of birth or other identifying information were not available for the other Tulia exonerees. Inclusion of the Tulia cases does not affect our findings with respect to the effect of compensation. Although we chose to include the Tulia exonerees, other researchers have made a different choice. See Gross et al., *supra* note 7, at 535 (“We do not include them here because the processes that produced the false convictions and the mass exonerations in these singular episodes are fundamentally different from those in the individual cases on which we focus . . .”).

<sup>62</sup> We used several different sources to obtain these records, including sex offender registries, attorney contacts, recorded court decisions, Westlaw, LexisNexis, social media websites, and general Internet search engines. Finding identifiers is the distinctive challenge of this research. For current prisoners, the identifiers are generally available from state correctional departments. For all but the thirteen individuals who had returned to prison for a new offense, this was not a viable option.

was substantially smaller than the pool provided by the CWC.<sup>63</sup> The final set included 118 exoneration cases. These included thirty-one exoneration cases from Illinois, seventeen from Florida, twenty-four from New York, and forty-six from Texas.

Each exoneration history at the Bluhm Legal Clinic contains specific information regarding the exoneration, including a case chronology, legal citations, and original case materials. This allows for the evaluation of various aspects of the exoneration and their potential link to post-exoneration offending. All of the included cases were coded for the following independent variables: sex, age at time of arrest, age at time of release, race, number and nature of prior offenses (if any), nature of the offense that brought about the erroneous conviction, factors that led to the erroneous conviction (false eyewitness testimony, false confession, etc.), evidence (DNA or non-DNA), expungement status (whether there is any evidence of the wrongful conviction on record), the procedural posture of the exoneration (e.g., executive pardon), and compensation.

The dependent variable, post-exoneration offending, was measured dichotomously (yes or no) and continuously (number of offenses). Unfortunately, some states only publicize reconviction and resentencing data, omitting rearrest data, an important variable in recidivism research. Our study used only reconviction as an indicator of post-exoneration offending. In addition to the number of post-exoneration offenses, we also measured the amount of time between release and recidivism and the type of post-exoneration offense.

#### B. THE COMPENSATION STUDY

The final independent variable, compensation, is our focus here. From the data gathered from CWC, compensation information was provided for about one-third of the sample. Thus, Internet and LexisNexis searches were conducted to obtain the missing information. All four states included in this study have compensation statutes.<sup>64</sup> Compensation was coded both as a

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<sup>63</sup> CWC had records of 196 known exonerations in Florida, Illinois, New York, and Texas between 1999 and 2009. This included forty-four cases in Illinois, nineteen cases in Florida, forty-nine cases in New York, and eighty-four cases in Texas. If a case identifier was located, that case was included in the study.

<sup>64</sup> In Florida, a wrongfully convicted individual found innocent by a prosecuting authority or administrative court judge is entitled to \$50,000 (adjusted for cost-of-living increases) annually, up to a maximum of \$2 million, as long as he has no prior felony convictions. FLA. STAT. ANN. §§ 961.04, 961.06 (West 2012). He is also entitled to 120 hours of tuition at a career center, community college, or state university, and reimbursement for any fines or costs imposed at the time of his sentence. *Id.* § 961.06. These statutes were effective as of 2008. *Id.* In Illinois, exonerees who have been granted a pardon by the Governor or a certificate of innocence by the circuit court are eligible for the following

dichotomous variable (whether the exoneree received it or not) and on a continuous scale (how much he received if he received any) to test the association between amount of compensation and post-exoneration offending. Where compensation was awarded, the compensation amount ranged from \$100 to \$18.5 million. Since there was such variation in compensation, a cutoff point of \$500,000 was established. We calculated this number by removing the cases that received no compensation and then finding the median point of the remaining cases. Using this cutoff point, we also created a trinary ordinal variable for highly compensated (\$500,000 and greater), minimally compensated (less than \$500,000), and not compensated.

At the bivariate level, chi square tests were used to determine if there was a statistically significant relationship between post-exoneration offending and the dichotomous compensation variable. Furthermore, t-tests were used to test whether there was a significant difference between post-exoneration offending and how much (in dollars) was received. We used ANOVA tests to determine whether there was a mean difference in number of post-exoneration offenses by compensation type (none, less than

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compensation: \$85,350 for those who served up to five years, \$170,000 for those who served between five and fourteen years, and \$199,150 for those who served more than fourteen years. 705 ILL. COMP. STAT. ANN. 505/8(c) (West 2007 & Supp. 2013). The law also reimburses attorneys' fees up to 25% of the compensation award and provides job search services, placement services, and reentry services. *Id.*; 20 ILL. COMP. STAT. ANN. 1015/2 (West Supp. 2013). The New York statute, which was made effective in 1984 and amended in 2007, provides that if the wrongfully convicted person "did not by his own conduct cause or bring about his conviction" and files a claim within two years of his pardon of innocence, he shall receive "damages in such sum of money as the court determines will fairly and reasonably compensate him." N.Y. JUD. CT. ACTS LAW § 8-b4, -b6 (McKinney 1989 & Supp. 2013). The statute allows the Court of Claims to award any amount—there is no floor or ceiling. *Id.* § 8-b6. In Texas, the 2009 Tim Cole Act (named after Timothy Cole, the recipient of the state's first posthumous pardon) established the Timothy Cole Advisory Panel on Wrongful Convictions. H.B. 498, 81st Leg., Reg. Sess. (Tex. 2009), available at <http://texashistory.unt.edu/ark:/67531/metaph148951/m1/1/>. Whereas payments to exonerees previously had been a lump sum, the Tim Cole Act dictates that compensation be paid out in a mix of monthly payments with an up-front lump sum and an annuity that can be passed on through a recipient's estate. TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.052, 103.053 (West 2011). Additionally, the Act states that a wrongfully convicted person is entitled to \$80,000 per year of wrongful incarceration and \$25,000 per year spent on parole or as a registered sex offender. *Id.* § 103.052. The wrongfully convicted person is also entitled to compensation for child support payments, tuition for up to 120 hours at a career center or public institution of higher learning, reentry and reintegration services, and the opportunity to buy into the Texas State Employee Health Plan. *Id.* §§ 103.052, 103.054. This statute, originally enacted in 2001, was amended in 2011 to include a provision precluding payments to anyone who served time for a wrongful conviction at the same time he was serving out a legitimate sentence for which he would have been in prison anyway. *Id.* § 103.001 (West Supp. 2012).



\$500,000, or \$500,000 or more). We tested the effect of compensation above the threshold amount on the risk of future offending. We stratified the relative risk of post-release offending of those with and without a prior history of offending. Lastly, we regressed compensation, age at release, and prior convictions against post-exoneration offending.

#### IV. RESULTS

##### A. DESCRIPTIVE STATISTICS

Table 1 presents simple descriptive statistics. Sixty-seven (56.8%) of the exonerees in our sample were black, thirty-four (28.8%) were white, and fourteen (11.9%) were Hispanic. The remaining two exonerees were coded as “other.” All but five of the exonerees were male, and the average exoneree was approximately twenty-seven years old at time of arrest, with ages ranging from twelve to sixty-seven. The average age at release was thirty-nine. The youngest releasee was nineteen. The oldest was sixty-two. More than one-third of the exonerees included in this sample were from Texas ( $n = 46$ ), a quarter were from Illinois ( $n = 31$ ), about 20% were from New York ( $n = 24$ ), and the remaining 14% ( $n = 17$ ) were from Florida.

Sixty-seven (56.8%) of the exonerees were convicted of at least one crime prior to the crime for which they were wrongfully convicted. Fifty (42.4%) exonerees in our sample had no prior record. The average number of prior convictions across the sample was just under two. Among those with prior convictions, the average number of those convictions was 2.9. Seventy-four (62.7%) of the exonerees were sentenced to a finite custodial or prison term. Twenty-two (18.6%) were sentenced to life without parole (LWOP). Seventeen (14.4%) were sentenced to death, four (3.4%) received a noncustodial sentence, and one case was missing from the analysis. Consistent with prior research, the average exoneree in our sample spent more than eleven years in prison, as measured from the date of conviction to the date of release.<sup>65</sup> The maximum term of incarceration was almost twenty-seven years. Almost half of our sample (49.2%) was comprised of non-DNA exoneration cases. This is uncommon among the limited prior research on exonerees.

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<sup>65</sup> See Gross et al., *supra* note 7, at 524 (reporting an “average of more than ten years each [for the wrongfully incarcerated]”). The Innocence Project reports an average of 13.5 years behind bars for the wrongfully convicted. See *Compensating the Wrongly Convicted*, THE INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Compensating\\_The\\_Wrongly\\_Convicted.php](http://www.innocenceproject.org/Content/Compensating_The_Wrongly_Convicted.php) (last visited May 24, 2013).

**Table 1**  
*Descriptives of Sample Characteristics*

	<b>n</b>	<b>%</b>	<b>M</b>	<b>SD</b>
<b>Gender</b>				
Male	113	95.8		
Female	5	4.2		
<b>Race</b>				
African-American	67	56.8		
White	34	28.8		
Hispanic	14	11.9		
Other	2	1.9		
<b>State</b>				
Florida	17	14.4		
Illinois	31	26.3		
New York	24	20.3		
Texas	46	39.0		
<b>Age at Arrest (Mean)</b>			26.8	7.9
<b>Age at Release</b>			39.1	9.9
<b>Prior Conviction(s)</b>				
No	50	42.4		
Yes	67	56.8		
<b>Number of Prior Convictions (Across Sample)</b>			1.7	2.4
<b>Number of Prior Convictions (Among Those with Priors)</b>			2.9	2.5
<b>Sentence</b>				
LWOP	22	18.6		
Death	17	14.4		
Finite Custodial	74	62.7		
Noncustodial	4	3.4		
<b>Post-Exoneration Offense (PEO)?</b>				
No	73	61.9		
Yes	45	38.1		
<b>PEOs (Across Sample)</b>			.98	1.8
<b>PEOs (Among Those with PEOs)</b>			2.5	1.9
<b>DNA Exoneration</b>				
No	58	49.2		
Yes	60	50.8		
<b>Time Incarcerated (Mean in Years)</b>			11.2	7.1

## B. POST-EXONERATION OFFENDING

Table 2 presents data on post-exoneration offending. Forty-five (38.1%) of the exonerees in our sample were convicted of at least one crime after they were released. Seventy-three members (61.9%) of the cohort did not offend post-exoneration. Rates of offending varied by state. Florida has the highest rate of post-exoneration offending, at 58.8%. New York had the lowest rate (8.3%). Individual state compensation statutes may offer a partial explanation. Florida's statute is extremely restrictive. In Florida, an individual with a prior felony conviction is not eligible for compensation, and compensation is capped at \$50,000 annually.<sup>66</sup> New York, by contrast, has no ceiling on compensation.<sup>67</sup> The explanatory power of the statutes is substantially limited, though, and we present the variation here only by way of description. Although as noted above, it is difficult to prevail under the alternative methods of lawsuit and private bill, those who succeed generally receive much more substantial awards than those who are compensated by statute.

**Table 2**  
*Post-Exoneration Offending by State*

State (n)	Yes (%)	No (%)
Texas (46)	21 (45.7%)	25 (54.3%)
Illinois (31)	12 (38.7%)	19 (61.3%)
New York (24)	2 (8.3%)	22 (91.7%)
Florida (17)	10 (58.8%)	7 (41.2%)
Total (118)	45 (38.1%)	73 (61.9%)

We coded post-exoneration offenses (PEOs) as violent (aggravated assault, battery, involuntary manslaughter, or child abuse), property-related (burglary, theft, larceny, breaking and entering and shoplifting, or drug-related), or other (gambling, probation violation, giving false information, driving without a license, resisting arrest, interfering with an emergency call, obstruction of justice, reckless conduct, or an equipment violation). Among the forty-five exonerees who offended following their releases, twenty committed a violent offense, thirteen committed a property crime, twenty committed a drug offense, and sixteen committed an offense classified as "other." Note that several of the exonerees committed more than one offense.

<sup>66</sup> In Florida, an exoneree is entitled to \$50,000 annually with a maximum award of \$2 million. FLA. STAT. ANN. § 961.06.

<sup>67</sup> New York's compensation statute has a provision that allows the Court of Claims to award any amount. There is no floor or ceiling. N.Y. JUD. CT. ACTS LAW § 8-b6.

## C. COMPENSATION

Overall, seventy-one exonerees (60.2%) in our sample received compensation. This is higher than the compensation level of 41% found by Garrett.<sup>68</sup> Our figure may be inflated due to the inclusion of cases stemming from the mass exoneration in Tulia, Texas.<sup>69</sup> Forty-five individuals (38.1%) had not received compensation at the time of coding. This includes those seven cases in which compensation is pending (5.9%). In two cases, it was not possible to determine whether the exoneree had been compensated or not.

The avenue that successful exonerees used to receive compensation was determinable in approximately 73% of cases (n = 52). As Table 3 displays, a majority of the exonerees whose mode of compensation was determinable received funds through state compensation statutes. Among the remaining compensated exonerees, sixteen successfully filed and won a civil suit and six were compensated as the result of a private bill.

**Table 3**  
*Mode of Compensation*

<b>Mode of Compensation</b>	<b>n</b>	<b>%</b>
State Statute	30	57.6
Civil Suit	16	30.7
Private Bill	6	11.5

When exonerees did receive compensation, the amount varied greatly. The least amount of compensation received was \$100, while the largest reward was \$18.5 million. Of the 111 cases in which the amount of

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<sup>68</sup> See Garrett, *supra* note 30, at 120. As noted above, our sample was constructed from states with compensation statutes.

<sup>69</sup> The Tulia cases ended with a series of executive pardons and, in March 2004, a settlement of a federal civil rights claim for \$5 million. Adam Liptak, *\$5 Million Settlement Ends Case of Tainted Texas Sting*, N.Y. TIMES, Mar. 11, 2004, at A14. For the wrongfully convicted defendants, who had spent a cumulative seventy-one years in prison, this amounted to a little more than \$84,500 per year. See Rob Warden, *Town of Tulia: Texas "Officer of the Year" Chalked up 38 Wrongful Convictions*, CTR. ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/tx/town-of-tulia.html> (last visited May 24, 2013). Although, as noted above, *see supra* note 61, inclusion of the Tulia cases does not affect our findings regarding the effect of compensation; the Tulia exonerees generally had more prior convictions and offenses following their releases than the other members of the sample. Thirteen of the seventeen Tulia exonerees included in the sample had prior offenses. Twelve committed a PEO.

compensation could be determined,<sup>70</sup> approximately half received less than \$100,000 (or nothing) and more than 70% received less than \$500,000. Only 29% of the exonerees received compensation in excess of \$500,000.

**Table 4**  
*Amount of Compensation*

Compensation Amount	n	%	Cumulative %
\$0	45	40.5	40.5
> \$0 ≤ \$100k	13	11.7	52.3
> \$100k ≤ \$500k	21	18.9	71.2
> \$500k ≤ \$1mil	1	0.9	72.0
> \$1mil ≤ \$10mil	29	26.1	98.2
> \$10 mil	2	1.8	100.0

Table 5 displays the bivariate relationship between post-exoneration offending and compensation. Although not statistically significant when examining compensation dichotomously, those exonerees who received compensation were less likely to commit a post-exoneration offense (63.4% did not reoffend). The mean amount of compensation for those with no post-exoneration offense was \$1.7 million, as compared to \$720,000 for those who had at least one post-exoneration offense. This suggests that compensation has a positive effect on exonerees; the more they are compensated, the less likely they are to offend after exoneration.

A significant finding emerges when we distinguish between those who were compensated less than \$500,000 and those who received more than \$500,000 ( $p < .01$ ). As the table displays, those who received more than \$500,000 were less likely to offend after exoneration (we interchangeably refer to this as “success”). Among this higher compensation group, more than 80% succeeded. There is an even split among those who received less than \$500,000 (50% had a PEO; 50% did not). Individuals in this group were no less likely to offend.<sup>71</sup>

<sup>70</sup> In four cases, the amount of compensation could not be determined.

<sup>71</sup> Once compensation emerged as significant, we compared the profiles of the compensated exonerees and the uncompensated exonerees. In general they are quite similar. Among those who were compensated ( $n = 71$ ), sixty-eight (95.8%) were males and three (4.2%) were female. Among those who were not compensated ( $n = 45$ ), forty-three (95.6%) were male and two (4.4%) were female. For those compensated, the average age at arrest was 27.5 years, the average age at release was 40.2, and the average number of years between conviction and release was 11.5. For those uncompensated, the average age at arrest was 25.8, the average age at release was 38.0, and the average number of years between conviction and release was 11.0. Of the compensated, fifty-seven (80.3%) were

**Table 5**  
*Bivariate Analysis of PEO by Compensation (Binary and Trinary)*

	% (n)	Success (no PEO) 62.9% (n = 73)	Failure (PEO) 37.1% (n = 43)
<b>Compensation<sup>+</sup></b>			
No	38.8% (n=45)	62.2%	37.8%
Yes	61.2% (n=71)	63.4%	36.6%
<b>Compensation<sup>*++</sup></b>			
Nothing	38.8% (n=45)	60.0%	40.0%
Under \$500K	29.3% (n=34)	50.0%	50.0%
\$500K or more	28.4% (n=33)	81.8%	18.2%
<b>Mean Compensation<sup>**</sup></b>		\$1,700,000	\$720,000

\*Significant at .01 level

\*\*Significant at .05 level

<sup>+</sup>There were 2 cases with unknown compensation statuses.

<sup>++</sup>The exact amount of compensation is unknown for four cases. For the purposes of comparison between compensation categories, we used 116 for the denominator for the compensation figures.

As Table 6 reflects, there was a statistically significant difference between groups as determined by one-way ANOVA ( $F(2, 64.55) = 3.088$ ,  $p = .05$ ). The variances of the groups were not similar and thus we referred to the Robust Tests of Equality of Means Table instead of the ANOVA Table (displayed below). Tukey post-hoc tests revealed that the number of post-exoneration offenses was statistically significantly lower for those who received \$500,000 or more in compensation (.45) compared to those who received less than \$500,000 (1.58). There were no statistically significant differences between those who received no compensation (.84) and those who received any amount of compensation. These findings suggest that compensation can potentially decrease not only the likelihood but also the frequency of post-release offending. This relationship is strongest when the compensation exceeds \$500,000.

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nonwhite and thirteen (18.3%) were white. Among the uncompensated, twenty-five (55.6%) were nonwhite and twenty (44.4%) were white. The mean date of release for both groups was 2002. Seventy percent of the compensated exonerees were released in 2004 or earlier. Sixty-two percent of the uncompensated exonerees were released in 2004 or earlier.

**Table 6**  
*Analysis of Variance*

	Statistic	df	df2	Sig
Welch	3.088	2	64.759	.05*

\*Significant at .05 level

When compensation is greater than \$500,000, there is a substantial reduction in the relative risk (RR) of post-release offending among those with a prior history of offending. The overall RR is reduced from 1.65 to .442 for those with a history of prior offending. More importantly, there is no difference in the RR of exonerees with a history of prior offending (.442) and those without (.441). A RR of less than 1 indicates a decreased likelihood of post-release offending among those who received compensation at a threshold amount. The reduction of risk confirms the ANOVA results. Compensation above a threshold amount decreases the likelihood of post-release offending and suggests that compensation is an important protective factor against post-release offending. Due to small cell values, we are cautious in relying on these findings.

Table 7 presents a multivariate model regressing compensation, age at release, and prior convictions against the binary outcome of post-exoneration offending. Age at release and prior offending are widely recognized as the most significant predictors of post-release offending.<sup>72</sup> Moreover, it is plausible to imagine an interrelationship here among age at release, prior offending, and compensation.<sup>73</sup> The full model containing all

<sup>72</sup> Of course, all of the available research concerns recidivism as opposed to post-release offending. The two most significant predictors of recidivism are prior record and age at release. See ALLEN J. BECK & BERNARD E. SHIPLEY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 2-3 (1989); PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 7-10 (2002); Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 137 (2009); Daniel S. Nagin & Raymond Paternoster, *On the Relationship of Past to Future Participation in Delinquency*, 29 CRIMINOLOGY 163, 165 (1991). Other significant predictive factors include institution type, length of imprisonment, and certain characteristics of the offender. See, e.g., Nagin et al., *supra*, at 137. In our study, time served and age at release were highly correlated ( $R = .62$ ), and including both variables in the model did not explain additional variance in post-release offending.

<sup>73</sup> The data on compensation and prior offending is not normally distributed. Both the variables for the amount of compensation and the number of prior convictions have a large number of zeros. Thirty-seven of the exonerees received no compensation and thirty-eight had no prior convictions. We tried a number of transformations to compensate for these skews, including logs and various dichotomizations. An interaction term was created combining prior convictions and compensation. The addition of this variable did not change

predictors was statistically significant  $\chi^2(4) = 21.320, p = .000$ . The model as a whole explained between 18.2% (Cox and Snell pseudo  $R^2$ ) and 25.0% (Nagelkerke pseudo  $R^2$ ) of the variance in post-exoneration offending. Age was not a significant predictor of post-exoneration offending. However, the number of prior convictions was significant (Exp  $\beta = 1.393$ ). We included an interaction term combining prior convictions and compensation, but the addition of this variable did not significantly improve the model. Including race in the model also did not explain additional variance.<sup>74</sup>

Compensation in modest amounts (between zero and \$500,000) made no significant difference on post-exoneration offending behavior. However, generous compensation (greater than \$500,000) had a significant protective effect ( $p = .039$ ). Because both the variables for the number of prior convictions and the amount of compensation have a high proportion of zeros, we view examining risk ratios, as in Table 5 *supra*, as more appropriate.<sup>75</sup>

**Table 7**  
*Logistic Regression Analysis: Post-Exoneration Offending by Compensation, Age at Release, and Prior Convictions*

	<b>B</b>	<b>SE</b>	<b>Wald</b>	<b>Exp(B)</b>
0 < Compensation < 500K	.499	.509	.962	1.647
Compensation > 500k	-1.298	.629	4.262	.273*
Age at Release (in Days)	.000	.000	2.397	1.000
Number of Prior Convictions	.331	.116	8.106	1.393***
Constant	.491	.960	.190	1.520
Model Summary				
Model $\chi^2 = 20.200$ ***; -2LL = 105.754				
Nagelkerke pseudo $R^2 = .260$ ; Cox & Snell pseudo $R^2 = .190$				
n = 96				

\* $p < .05$ , \*\* $p < .01$ , \*\*\* $p < .001$

the model. Ultimately, we settled on dummy variables for \$500,000 and above, and for less than \$500,000 but more than 0; none is used as the reference category. These categories fit the data the best and produced the best logistic regression.

<sup>74</sup> While including race did not explain additional variance, compensation—which previously failed to reach significance in a one-tailed test—emerged as significant at the .05 level.

<sup>75</sup> For those exonerees who offended post-release ( $n = 45$ ), we used Cox regression to determine whether age at release, length of incarceration, and compensation amount were related to the length of time until their offenses (interchangeably referred to as “failure”). Among these individuals, the median time to failure was twenty-seven months with a range between fourteen days and ten years. The mean time to failure was thirty-five months with a standard deviation of thirty-one months. Age at release, days wrongfully convicted, and compensation amount were included as covariates in the hazard model. None of these predictors, or the model itself, emerged as significant.



## V. DISCUSSION

Our principal finding, that compensation above \$500,000 significantly reduces post-exoneration offending but compensation below that threshold has no significant effect, is consistent with two theoretical perspectives. The first is a wealth of literature on the barriers to successful reentry, which are substantial for all prison releasees and overwhelming for exonerees because they have been incarcerated for so long. It may be that a certain minimum amount of money—and that minimum would be substantial—is necessary for an exoneree to get his life on track. The second perspective is research suggesting that perceptions of systemic procedural fairness affect criminal conduct. It may be that exonerees who receive substantial compensation feel fairly treated by the system and thus offend less often. We discuss these perspectives serially, though they are neither mutually exclusive nor exclusive of other potential explanations.

## A. BARRIERS TO SUCCESSFUL REENTRY

All former prisoners face a substantial challenge reentering society. The majority of prison inmates will eventually be released and returned to communities.<sup>76</sup> Most will return to prison within three years of their releases.<sup>77</sup> Releasees return home with most of their needs unmet and many lose essential rights of citizenship.<sup>78</sup> Additionally, there are barriers to employment.<sup>79</sup> Research shows that employment is critical to successful reintegration<sup>80</sup> and is among the strongest predictors of desistance from

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<sup>76</sup> The U.S. Department of Justice estimates that nearly 95% of prison inmates will eventually be released. For example, in 2002, approximately 595,000 inmates were released to communities. See TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REENTRY TRENDS IN THE UNITED STATES 1 (2002).

<sup>77</sup> Approximately two-thirds (62.5%) of released prisoners are rearrested for a new crime within three years of release, 47% are convicted of a new crime, and 41% are sent back to prison or jail. See BECK & SHIPLEY, *supra* note 72, at 5. These statistics were updated in 2002. Approximately 68% of releasees are rearrested for a new offense (almost exclusively a felony or a serious misdemeanor), 47% are convicted of a new crime, 25% are sentenced to prison for a new crime, and 52% are returned to prison either under a new sentence or for technical violations of their releases. See LANGAN & LEVIN, *supra* note 72, at 1.

<sup>78</sup> See PETERSILIA, *supra* note 6, at 105 (“[C]onvicted felons may lose many essential rights of citizenship, such as the right to vote and to hold public office . . . . Their criminal record may also preclude their receiving government benefits and retaining parental rights . . . and nearly always limits firearm ownership. The restrictions on employment and housing create formidable obstacles to law-abidingness.”).

<sup>79</sup> *Id.* at 113 (“[E]mployers are increasingly forbidden from hiring [ex-offenders] for certain jobs . . . child care, education, security, nursing, and home health care . . .”).

<sup>80</sup> See Shawn Bushway & Peter Reuter, *Labor Markets and Crime*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 191 (James Q. Wilson & Joan Petersilia eds., 2004) (reviewing the relationship between employment and reoffending); Mark W. Lipsey, *What*

crime.<sup>81</sup> When returning home, releasees also lack support networks. This, too, can lead them to turn to crime.<sup>82</sup> Some post-release offending may be attributable to the effect that prison has on inmates. The interruption of normal personal and professional development and the time spent in a hostile environment can lead to “prisonization.” This refers to an individual’s adaptation to the prison environment, which may include adoption of criminal values, techniques, and subcultures.<sup>83</sup> Prisonization may lead to post-release offending.<sup>84</sup>

Although exonerees are not criminals in any sense, they face the same obstacles as ordinary releasees. In fact, there is every reason to believe that the exonerees’ experiences may be worse. With respect to prisonization, exonerees are at special risk. Some evidence suggests that a convict’s length of imprisonment is positively related to his likelihood of recidivism.<sup>85</sup> Furthermore, exonerees’ experiences may be worse than those of guilty inmates.<sup>86</sup> Not-guilty inmates employ a number of different coping strategies to survive prison.<sup>87</sup> While some passively cooperate with prison officials, others maintain their innocence in the face of unfavorable responses from parole boards and prison administrators, who interpret their “denials” as a lack of responsibility, an indication of dangerousness, or unwillingness to reform. As a result, prison administrators are less likely to recommend the innocent inmate for privileges.<sup>88</sup> Given this, exonerees

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*Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents?*, in WHAT WORKS: REDUCING REOFFENDING—GUIDELINES FROM RESEARCH AND PRACTICE 63, 74–76 (James McGuire ed., 1995) (describing a meta-analysis suggesting employment to be an effective measure in reducing recidivism); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV. 529, 529–30 (2000).

<sup>81</sup> Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 647.

<sup>82</sup> The Urban Institute *Returning Home* study found that strong family support reduced recidivism. See *Families and Reentry*, URB. INST., <http://www.urban.org/projects/reentry-portfolio/families.cfm> (last visited June 4, 2013).

<sup>83</sup> See Nagin et al., *supra* note 72, at 126–27.

<sup>84</sup> Although there is no research on exonerees and post-release offending, research has established a strong link between prior incarceration and future offending. This relationship can be explained by prisonization or exposure to an inmate subculture. For a review of this topic, see *id.*

<sup>85</sup> See *id.* at 169–77 for a review of the literature.

<sup>86</sup> Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful Imprisonment*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 139, 152–53 (2004).

<sup>87</sup> See generally *id.*

<sup>88</sup> On the other hand, maintaining one’s innocence also helps exonerees reject the label that society and the criminal justice system have ascribed to them. See *id.* at 150–52. Perhaps by rejecting this label exonerees are less likely to internalize criminal norms and subcultures, leading them to commit fewer crimes upon their releases.

would apparently have the most compelling claims on state resources to assist their reentries to society.

Yet, ironically, exonerees often have access to fewer resources and state support programs after release than they would if they had actually committed a crime.<sup>89</sup> Exonerees may not qualify for ex-offender services because they are technically not ex-offenders or parolees.<sup>90</sup> Thus, exonerees cannot take advantage of prerelease counseling, job training, substance abuse treatment, and housing assistance, and have no go-to person, as parolees commonly do.<sup>91</sup> Typically, released exonerees receive no more than “clothing for the day, a bus ticket, and what is called ‘gate money.’”<sup>92</sup> Gate money generally ranges from \$10 to \$150.<sup>93</sup> With this in pocket, they attempt to reenter society and find employment, although they have years missing from their resumes and, in many cases, a criminal record that has not been expunged.<sup>94</sup> What little research that has been conducted on the experience of exonerees reveals, surprisingly, that the overwhelming majority need jobs. A study of sixty exonerees conducted by the Life After Exoneration Program showed that two-thirds had not achieved financial independence.<sup>95</sup> People leaving prison, generally speaking, are “typically among Americans with the most dire housing needs.”<sup>96</sup> One exoneree said:

It just didn’t seem fair that you take 18 years of a person’s life and you think you can send them out into the world and everything’s going to be all right because now they have their freedom? Yeah, freedom is very important but you also have to have a lot of different things set up for people . . . .<sup>97</sup>

These needs have been impliedly recognized, albeit in piecemeal and inadequate fashion, by individual states in their compensation statutes. For example, Vermont and Virginia provide funding for transition assistance—money to carry the exoneree through from his release to his final award.<sup>98</sup>

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<sup>89</sup> See Burnett, *supra* note 5, at 274.

<sup>90</sup> See Armbrust, *supra* note 2, at 161.

<sup>91</sup> Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES, Nov. 25, 2007, at 38.

<sup>92</sup> See Burnett, *supra* note 5, at 273.

<sup>93</sup> See Campbell & Denov, *supra* note 86, at 150–53.

<sup>94</sup> See Amy Shlosberg et al., *The Expungement Myth*, 75 ALB. L. REV. 1229 (2012).

<sup>95</sup> *Over 500 Exonerees: A Number that Keeps Growing Every Month*, LIFE AFTER EXONERATION PROGRAM, [http://www.exonerated.org/index.php?option=com\\_content&view=article&id=94&Itemid=87](http://www.exonerated.org/index.php?option=com_content&view=article&id=94&Itemid=87) (last visited Apr. 14, 2013).

<sup>96</sup> Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 552 (2005).

<sup>97</sup> ILL. CRIMINAL JUSTICE INFO. AUTH., *THE NEEDS OF THE WRONGFULLY CONVICTED: A REPORT ON A PANEL DISCUSSION 2* (2002), available at <http://www.icjia.state.il.us/public/pdf/ResearchReports/Needs.pdf>.

<sup>98</sup> VT. STAT. ANN. tit. 13, § 5574(b)(3) (2009); VA. CODE ANN. § 8.01-195.11(C) (2007).

A few state statutes offer physical and medical health care.<sup>99</sup> A handful provide for education assistance.<sup>100</sup> The Innocence Project and the ABA provide for some components of holistic compensation in their legislative proposals.<sup>101</sup>

Given these facts, our finding that substantial compensation reduces post-exoneration offending makes intuitive sense. Those who do not need to worry about paying rent, feeding their families, and meeting basic needs have overcome the most substantial barriers to reentry and will be less likely to resort to crime. It takes a lot of money to achieve these ends, particularly because these needs endure in perpetuity. Exonerees require food and shelter and medical care for years, not days. It makes perfect sense that it takes hundreds of thousands of dollars for them to establish lives where their risk of offending resembles that of ordinary citizens.

#### B. PERCEPTIONS OF PROCEDURAL FAIRNESS

In *Why People Obey the Law*, Tom Tyler argues that, in most instances, people do not conform to the law because they are deterred by the consequences of breaking it.<sup>102</sup> Rather, most people, under most circumstances, follow the law because they respect it, because they view the institutions that uphold the law as legitimate, and because they feel respected and valued by it.

This theory has its roots in Thibaut and Walker's control theory, which demonstrated that people are generally satisfied with an outcome, regardless of what that outcome is, if they regard the process that generated that outcome as fair.<sup>103</sup> Results affect perception, but procedural fairness has a greater impact on satisfaction. Thibaut and Walker's particular theory of procedural fairness, however, still depends heavily on outcomes. They argue that while people generally do not focus on outcomes, they do focus on the degree to which they influence the decisionmaking process, under the assumption that more influence gives them a greater likelihood of

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& Supp. 2012).

<sup>99</sup> See Lonergan, *supra* note 21, at 147.

<sup>100</sup> LA. REV. STAT. ANN. § 15:572.8(H)(2)(c) (2012); MASS. ANN. LAWS ch. 258D, § 5(A) (LexisNexis Supp. 2013); MONT. CODE ANN. § 53-1-214 (2011); VA. CODE ANN. § 8.01-195.11(C).

<sup>101</sup> See AM. BAR. ASS'N, *supra* note 39, at 1 ("The award should include non-economic losses, such as pain and suffering, humiliation, loss of consortium, and loss of reputation . . ."); THE INNOCENCE PROJECT, *supra* note 39, at 4-5 (proposing a consideration of economic damages, noneconomic damages, physical and mental health, tuition, and attorneys' fees).

<sup>102</sup> TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

<sup>103</sup> JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

success.

Drawing on this work, Lind and Tyler formulated the “group value theory” of procedural justice.<sup>104</sup> While the group value theory recognizes that people are invested in procedural fairness for its “instrumental” value, they also judge institutions and processes based on factors that do not affect outcomes. For example, even if people know that having a “voice” will not affect the outcome, they still prefer processes that give them one.<sup>105</sup> Likewise, they are concerned with “interpersonal aspects” of the process, such as whether they were treated politely and with respect<sup>106</sup> and whether or not the authority was motivated to be fair,<sup>107</sup> even if such factors do not affect outcomes. According to this theory, people perceive the way they are procedurally treated by a group or authority as a reflection of how much they are valued by the group or authority, and fair procedures are good for more than procuring fair results. The theory suggests, for example, that if one prisoner was convicted via fair means and another inmate was convicted via unfair procedures, such as coercive police tactics, the former will feel more valued and respected by the criminal justice system even if they both received the same sentence. These process evaluations, along with the degree to which the inmates feel respected as human beings, in turn influence the inmates’ generalized judgments regarding the fairness and legitimacy of the criminal justice system and their relation to it. Critically, these differences in evaluations affect behavior. The prisoner who regards his sentence as having been fairly produced is more likely to follow the law in the future.<sup>108</sup>

Compensation can ameliorate perceptions of unfairness. In a series of laboratory studies, Tyler Okimoto had undergraduate participants imagine or experience procedurally unfair situations and then manipulated whether the victim of the injustice received compensation.<sup>109</sup> He also varied the relevance of the participants’ group membership and the stated intent of the compensation to determine whether compensation was viewed in relational

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<sup>104</sup> E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 230 (1988).

<sup>105</sup> See Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 *J. PERSONALITY & SOC. PSYCHOL.* 72, 79–80 (1985).

<sup>106</sup> See TYLER, *supra* note 102, at 164.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 178 (“People obey the law because they believe that it is proper to do so, they react to their experiences by evaluating their justice or injustice, and in evaluating the justice of their experiences, they consider factors unrelated to outcome, such as whether they have had a chance to state their case and been treated with dignity and respect.”).

<sup>109</sup> Tyler G. Okimoto, *Outcomes as Affirmation of Membership Value: Material Compensation as an Administrative Response to Procedural Injustice*, 44 *J. EXPERIMENTAL SOC. PSYCHOL.* 1270 (2008).

or merely instrumental terms.<sup>110</sup> Not surprisingly, those who received compensation viewed the procedural justice of the scenario more favorably than those who did not receive compensation. Furthermore, they viewed compensation as a symbolic gesture that reflected positively on their standing within the group.<sup>111</sup>

Taken together, this research offers a second viable explanation for the link between compensation and offending: procedural fairness is a central problem with respect to exonerees, as wrongful convictions are often accompanied by unfair procedures. In some cases, the very people who are responsible for ensuring truth and justice—law enforcement officials and prosecutors—lose sight of these obligations and instead focus solely on securing convictions.<sup>112</sup> DNA exonerations have exposed official misconduct at every level and stage of a criminal investigation.<sup>113</sup> In exonerees' accounts of the criminal justice system, procedural unfairness is a recurring theme.<sup>114</sup> Upon release, exonerees generally exhibit "profound cynicism and mistrust regarding the fairness and legitimacy of authority figures."<sup>115</sup>

Qualitative research supports the potential ameliorative effect of compensation in this context. A cohort of Canadian exonerees interviewed

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<sup>110</sup> See *id.* at 1280. In one condition, an authority figure who commits a procedural injustice is described as a senior student and teaching assistant from either the participant's school or a competing school. According to group value theory, the procedural injustice should only be interpreted in relational terms if it is committed by a member of one's social group, and compensation should only be interpreted as an attempt at recompense under such circumstances. True to the theory, compensation only made a significant impact when it was offered by the authority figure from the student's own institution.

<sup>111</sup> See *id.* ("[T]he benevolent act of compensating shows the injustice victim that he or she is a valued and respected group member, verifying the importance of that victim's membership in the group.").

<sup>112</sup> See *Government Misconduct, THE INNOCENCE PROJECT*, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Apr. 14, 2013).

<sup>113</sup> *Id.* Common forms of misconduct by law enforcement officials include: employing suggestion when conducting identification procedures, coercing false confessions, lying or intentionally misleading jurors about their observations, failing to turn over exculpatory evidence to prosecutors, and providing incentives to secure unreliable evidence from informants. Common forms of misconduct by prosecutors include: withholding exculpatory evidence from the defense; deliberately mishandling, mistreating, or destroying evidence; allowing witnesses they know or should know are not truthful to testify; pressuring defense witnesses not to testify; relying on fraudulent forensic experts; and making misleading arguments that overstate the probative value of testimony.

<sup>114</sup> See generally Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 165 (2004).

<sup>115</sup> See Campbell & Denov, *supra* note 86, at 155.

by Campbell and Denov placed substantial importance on compensation.<sup>116</sup> They viewed its “symbolic” value as greater than its “actual” value.<sup>117</sup> While the Canadian exonerees acknowledged that money helped them meet practical needs, this seemed less important to them than seeing the responsible parties take ownership of their actions and admit their mistakes or wrongdoing. Commonly, they sought a formal apology or, at least, an admission of responsibility from the government, suggesting that the exonerees care deeply about restoring their status as valued group members.<sup>118</sup> This is consistent with Okimoto’s observation that compensation’s symbolic value derives from what it communicates to exonerees about their standing in the group. The Okimoto study did not measure behavior, but when it is combined with Tyler’s findings on the relationship between perceived legitimacy and compliance, it does suggest a possible progression from wrongful conviction to perceived procedural injustice to the use of compensation to improve these perceptions to, finally, decreased law-breaking, depending on how much compensation is received.

If compensated exonerees feel more valued than uncompensated exonerees, it stands to reason that highly compensated exonerees would feel more valued than minimally compensated exonerees, and that these restored perceptions of social value and institutional legitimacy will foster increased compliance with the law. Given the difficulties of securing compensation in the United States, it stands to reason that a minimally compensated exoneree would feel undervalued. And given that this population is comprised of people who have experienced the most profound unfairness, it makes intuitive sense that only substantial compensation can restore an exoneree’s sense of value.

More research is needed to confirm this hypothesis. Qualitative research, along the lines of Campbell and Denov, would be especially useful to see whether the experience of the American exoneree is consistent with his Canadian counterpart. Our research has a notable limitation. Compensation is not part of a social experiment. The exonerees we studied were not randomly assigned to either receive or not receive compensation. As noted, the road to compensation is a long and difficult one, and probably only the most dedicated exonerees ever succeed. This fact introduces a selection bias because certain individuals’ willpower, determination, and ability to sacrifice short-term gains for long-term ones may be responsible for both their receiving compensation and their abstention from crime.

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

## VI. CONCLUSION

The fairness argument for compensating wrongfully convicted individuals is substantial. Our research suggests that the public policy reasons for compensation are compelling, too. These results can only be taken as tentative given the size of the data set. As we note, this is a consequence of the challenges of obtaining identifying information for exonerees.<sup>119</sup> Among other things, it would be interesting to see whether exonerees act differently following release in states without compensation statutes. We also see substantial potential value in qualitative research that endeavors to understand the real-world forces that lead some exonerees to offend following their releases. Despite these open questions, it is clear that substantial compensation may considerably reduce post-release offending. Theory suggests that this is because compensation helps exonerees overcome the substantial barriers to reentry that they face and because it makes them feel valued by society. This perception of being treated procedurally fairly may contribute to desistance.

The phrase “substantial compensation” bears emphasis. Our research suggests that insubstantial compensation is of little benefit. This is consistent with the same theoretical perspectives. Insubstantial compensation neither enables the exoneree to reenter society successfully nor leaves him feeling valued by the criminal justice system. Given how difficult it is to secure compensation, a trivial award may only add insult to injury. These findings suggest that compensation is only a mitigating factor when the amount exceeds \$500,000. Many states provide a cap on compensation that is much lower than this amount.<sup>120</sup> Of course, even trivial compensation costs money, so the current situation in the United States is the worst of all possible worlds.

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<sup>119</sup> See *supra* note 62.

<sup>120</sup> See, e.g., *supra* note 35.



