1-1-2004

Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated

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JUSTICE STILL FAILS: A REVIEW OF RECENT EFFORTS TO COMPENSATE INDIVIDUALS WHO HAVE BEEN UNJUSTLY CONVICTED AND LATER EXONERATED

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I. INTRODUCTION

When I surveyed the landscape in 1999, I discovered that "only fourteen states, the District of Columbia, and the federal government" had laws to compensate individuals who had been unjustly convicted and later exonerated.[1] Of those, few provided generous awards.[2] Most offered compensation so skimpy as to be insulting.[3] Many statutes were virtually inaccessible because they required a gubernatorial pardon.[4] To make matters worse, some contain inartful language, which permits states to argue that a person who confessed or entered a plea of guilty should be disqualified from recovering—even if the confession or plea was clearly false.[5]

1. Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 77 (1999).

2. *See id.* at 105-08 (discussing limitations on awards).

3. *See id.* at 105 ("Many states severely and unnecessarily limit the amount of recoverable damages."). In 1999, California limited awards to $10,000—no matter how long the claimant had spent in prison. *Id.* (citing CAL. PENAL CODE §§ 4900-4906 (West 1941)). The statute was amended in 2000 to permit awards of $100 for each day of wrongful incarceration. CAL. PENAL CODE § 4904 (West Supp. 2004).

4. The following states require a pardon: California, CAL. PENAL CODE § 4900 (West 2003); Illinois, 705 ILL. COMP. STAT. ANN. 505/8(c) (West 1999); Maine, ME. REV. STAT. ANN. tit. 14, § 8241(2)(C) (West 2003); Maryland, MD. CODE ANN., STATE FIN. & PROC. § 10-501(b) (2001); and North Carolina, N.C. GEN. STAT. § 148-82 (2003).

5. The following states disqualify persons who have pled guilty or who have in some way contributed to their own convictions: California, *see* CAL. PENAL CODE § 4902 (West 2000) (putting the burden on the claimant to prove "he did not . . . contribute to the bringing about of his arrest or conviction for the crime with which he was charged"); Iowa, *see* IOWA CODE § 663A.1(1)(b) (2003) (requiring that the claimant did not plead guilty in order to qualify as wrongfully convicted); New York,

After the publication of *When Justice Fails*, I anticipated that the continuing parade of exonerations, in state after state across the country,[6] would prompt local legislatures to enact new statutes benefiting the unjustly convicted and later exonerated in states that lacked such mechanisms and to modernize imperfect statutes in states where compensation statutes had not been revisited in years. I was wrong.

In the last five years, just two additional states—Alabama[7] and Oklahoma[8]—have created generous compensation systems, despite new studies showing that there may be thousands of innocent people wrongly convicted and sentenced to jail.[9] Only four states—California,[10] Illinois,[11] Ohio,[12] and Texas[13]—have raised dollar limitations on statutory compensation awards.[14] Other states have engaged in protracted battles over legislation, without resolving the disputes.[15]

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see N.Y. JUD. CT. ACTS LAW § 8-b(4)(b) (McKinney 1989) (stating that the claimant must prove "he did not by his own conduct cause or bring about his conviction"); New Jersey, N.J. STAT. ANN. § 52:4C-3(b) (West 2001) (same); Ohio, *see* OHIO REV. CODE ANN. § 2743.48(A)(2) (Anderson 2000 & Supp. 2002) (requiring that the claimant did not plead guilty in order to qualify as wrongfully convicted); West Virginia, *see* W. VA. CODE ANN. § 14-2-13a(e)(3) (Michie 2000) (stating that the claimant must not have "by his own conduct cause[d] or br[ought] about his conviction"); and Wisconsin, *see* WIS. STAT. ANN. § 775.05(4) (West 2001) (awarding compensation only if the claimant "did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation"). The federal compensation statute likewise excludes those who "by misconduct or neglect" caused their own prosecution. 28 U.S.C. § 2513 (2000).

6. As of April 13, 2004, the Innocence Project at the Cardozo School of Law had assisted in the exoneration of 143 wrongfully convicted individuals. INNOCENCE PROJECT, *at* http://innocenceproject.org/index.php (last visited Apr. 13, 2004).

7. ALA. CODE §§ 29-2-150 to -165 (2003).

8. OKLA. STAT. ANN. tit. 51, 154(B)(1) (West 2000 & Supp. 2004).

9. Adam Liptak, *Study Suspects Thousands of False Convictions*, N.Y. TIMES, Apr. 19, 2004, at A15 (discussing a study published by Professor Samuel Gross of the University of Michigan).

10. CAL. PENAL CODE § 4904 (West 2000 & Supp. 2004).

11. 705 ILL. COMP. STAT. ANN. 505/8(c) (West 1999).

12. OHIO REV. CODE ANN. § 2743.48(E)(2) (Anderson 2000 & Supp. 2002).

13. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052 (Vernon Supp. 2004).

14. Tennessee's House and Senate have voted to amend the state statute so as to permit awards of up to a million dollars. H.B. 2859, 103d Gen. Assemb., Reg. Sess. (Tenn. 2004) (amending TENN. CODE ANN. § 9-8-108(a)(7) (2003)). The bill is currently awaiting the signature of the Speaker of the House and the Governor. Interview with Vanessa Potkin, Staff Attorney, The Innocence Project (May 26, 2004).

15. In 2003, the following states introduced compensation bills: Pennsylvania, H.B. 1281, 187th Gen. Assemb., Reg. Sess. (Pa. 2003); Louisiana, S.B. 520, 2003 Leg.,

Even more dishearteningly, since 1999, several states have enacted legislation designed not to assist exonerees in a significant way, but only to bestow symbolic token support.[16] For example, Montana's new "compensation" statute provides only tuition support—no monetary assistance.[17]

Some states seem to have been designed to protect states against envisioned civil litigation. For example, if Missouri Senate Bill 916 becomes law, Missouri will compensate for economic loss only and will limit economic loss to the amount of income the federal government regards as the poverty level plus twenty percent.[18] Moreover, the statute would specifically forbid a monetary award to compensate for loss of civil rights and emotional duress resulting from the wrongful incarceration.[19] Noneconomic loss would be compensated exclusively by job skills training, therapy, or other social service programs.[20] Virginia has amended its code to compensate exonerees by awarding only an amount equal to "90% of the Virginia per capita personal income as reported by the Bureau of Economic Analysis of the United States Department of Commerce for each year, or portion thereof, of incarceration up to 20 years."[21] Receipt of the award will act as a waiver of the right to sue.[22] These cynical, protective statutes do not reflect public opinion as expressed by the media, and are inconsistent with other progressive reform efforts motivated by exonerations across the country.[23]

Reg. Sess. (La. 2003); Kentucky, H.B. 525, 2003 Leg., Reg. Sess. (Ky. 2003); Mississippi, S.B. 2015, 2003 Leg., Reg. Sess. (Miss. 2003); Massachusetts, H.B. 2506, 183d Gen. Ct., Reg. Sess. (Mass. 2003). Kentucky also introduced a bill in 2004. S.B. 272, 2004 Leg., Reg. Sess. (Ky. 2004).

16. MT. CODE ANN. § 53-1-214 (2003); S.B. 916, 92d Gen. Assemb., 2d Reg. Sess. (Mo. 2004); H.B. 638, 2004 Leg., Reg. Sess. (Va. 2004); S.B. 271, 2004 Leg., Reg. Sess. (Va. 2004).

17. MT. CODE ANN. § 53-1-214.

18. S.B. 916 ("Economic injury shall be the aggregate of the person's compensation for each year of incarceration based annually on the federal poverty level as defined by section 215.235, RsMo, plus twenty percent.").

19. *Id.*

20. *Id.*

21. H.B. 638; S.B. 271.

22. H.B. 638; S.B. 271.

23. Exonerations have exposed faults in many traditional police procedures. Criminal justice activists are encouraging radical reform. In some localities, that reform is happening. Police departments are experimenting with lineup procedures. New Jersey is urging its police to use sequential lineups when possible. *See generally* JOHN J. FARMER, JR., ATTORNEY GEN., OFFICE OF THE ATTORNEY GEN., ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LINEUP

As a result of states' reluctance to compensate, more exonerees are turning to the courts for vindication. Despite the difficulty of bringing lawsuits using tort theory or the civil rights laws, exonerees are increasingly suing defense lawyers, police, prosecutors, and the agencies that supervise and train them.[24] Thus far, litigation has yielded mixed results. Few exonerated individuals have been compensated.[25] And, while many have received nothing, others, no more deserving, have received enormous awards.[26] The disparity is discouraging for those who have not been compensated, complicates the debate over whether and how exonerees should be compensated, and symbolizes the arbitrariness and inequality of the criminal justice system as a whole.

With this Article, I hope to motivate state legislators to enact responsible, practical compensation statutes and encourage courts to entertain state law and civil rights claims brought by those who have been unjustly convicted and later exonerated. I begin by looking at the reasons

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IDENTIFICATION PROCEDURES, *available at* http:/www.state.nj.us/lps/dcj/agguide/photoid.pdf. (Apr. 18, 2001). Certain localities are recording police interrogations. Courts have required the change in two states: Alaska, Stephen v. State, 711 P.2d 1156, 1159 (Alaska 1985); and Minnesota, State v. Scales, 518 N.W.2d 587, 589 (Minn. 1994). In Illinois, the legislature is moving to require recording. S.B. 15, 93d Gen. Assemb., Reg. Sess. (Ill. 2003). Crime laboratories may be subjected to standards and serious peer review. For example, after Jimmy Ray Bromgard was exonerated in Montana, after serving over fifteen years in prison for a crime he did not commit, a panel of expert forensic scientists reviewed the work of the forensic scientist who had allegedly "matched" hairs found at the crime scene to Mr. Bromgard. INNOCENCE PROJECT, JIMMY RAY BROMGARD, *at* http://www.innocence project.org/case/search_profiles.php (last visited Apr. 23, 2004). The panel found the work unscientific, as well as wrong and urged the Attorney General to create an audit committee to examine the full body of the scientist's police work. *Id.*

24. S*ee* Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 104-05 (2002) (noting the lack of success of exonerees' civil rights suits against law enforcement officers and prosecutors).

25. *See* Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 98 (2004) (stating that the vast majority of exonerees have been left uncompensated due to the absence of statutes and "[e]xisting constitutional and common-law tort doctrines").

26. For example, Mark Bravo was awarded seven million dollars for three years he spent in jail for a crime he did not commit. Monte Morin, *He's got 7 Million Ways to Tell Her 'I Love You'*, L.A. TIMES, Feb. 14, 2004, at B21. James Newsome was awarded fifteen million dollars in damages. Newsome v. McCabe, 319 F.3d 301, 307 (7th Cir. 2003) (affirming a jury verdict awarding Newsome one million dollars for each of the fifteen years he served in jail).

for enacting compensation statutes: uniformity, practicality, popular support, and fairness. Next, I dissect the arguments raised by opponents. Finally, I turn to recent judicial decisions hinting that courts may be stepping in where legislatures fear to tread.

II. COMPENSATION STATUTES

The reticence of state governments to assist the unjustly convicted is surprising. The arguments in favor of uniform compensation schemes are logically and emotionally persuasive. As I wrote in 1999:

> The necessary law is simple, clear and effective. The remedy is not expensive and does not require creation of new bureaucratic agencies. 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. 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. The debt should be recognized and paid.[27]

A. *Statutes Create a Uniform Approach to Compensating the Unjustly Convicted*

Compensation statutes bring rationality to a situation that is otherwise more akin to a lottery or popularity contest. In states without a uniform system for compensating those who have been wrongly convicted, similarly situated individuals can be treated very differently. Georgia, for example, lacks a uniform legislative compensation system. As a result, exonerees have the choice of bringing a lawsuit[28] or finding a sponsor willing to introduce a private bill in the legislature.[29] As of March 1, 2004, at least three individuals in Georgia had been exonerated.[30]

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27. Bernhard, *supra* note 1, at 73-74.

28. Courts are just beginning to relax the barriers that have discouraged lawsuits seeking redress for unjust conviction. *See* discussion *infra* Part II.

29. Private legislative bills "are specially drafted acts generally used to pay otherwise unenforceable claims on behalf of individuals harmed by the state." Bernhard, *supra* note 1, at 93.

30. INNOCENCE PROJECT, CALVIN JOHNSON, *at* http://www.innocenceproject.org/case/search_profiles.php (last visited Apr. 23, 2004); INNOCENCE PROJECT, DOUGLAS ECHOLS, *at* http://www.innocenceproject.org/case/search_profiles.php (last visited Apr. 23, 2004); INNOCENCE PROJECT, SAMUEL SCOTT, *at* http://www.innocenceproject.org/case/search_profiles.php (last visited Apr. 23, 2004).

> In 1999, Calvin Johnson, a college-educated metro Atlanta man, was released after 16 years in prison when DNA tests cleared him of rape charges. Johnson's positive, forgiving demeanor made him celebrated on national TV. He got a MARTA job, $500,000 from the state, and an apology from the district attorney. He has co-authored a book.[31]

A few years later, Sam Scott and Douglas Echols were cleared of a 1986 rape conviction by DNA testing.[32] But, neither has received any compensation.[33] No lawsuits have been filed.[34] No senators have volunteered to introduce special bills.

It may be that the first exoneration grabs more media and public attention. It may be that Calvin Johnson is more personable and attractive than either Echols or Scott. However, those distinctions do not justify the difference in treatment. If there were a uniform statute, each exoneree could file a claim. The effects of politics and personality would be minimized.

B. *Statutes Are Easy to Use and Resolve Claims Rapidly*

After fourteen years in prison, Larry David Holdren obtained permission to retest the forensic evidence material to his conviction.[35] Testing proved that he was not responsible for the crime.[36] In 1999, courts reversed the conviction and dismissed the indictment against him.[37] By then, Mr. Holdren was forty-four years old.[38]

He brought a claim under the West Virginia compensation statute.[39] Simply by reading Holdren's uncontested petition, the West Virginia Court of Claims concluded the state was liable for the wrongful conviction.[40]

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31. Bill Torpy, *Free Men, Lost Identities; DNA Cleared Them, but Prison Left Mark*, ATLANTA J.-CONST., Oct. 5, 2003, at D1.

32. *Id.*

33. *Id.*

34. *Id.*

35. Holdren v. State, No. CC-00-461 (W. Va. Ct. Cl. Apr. 2, 2002), *available at* http://129.71.164.29/Court_Claims/CC-00-191.htm.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* To make a compensation most practicable, the official record from the prison system confirming the time served in prison, paired with the judgment reversing the conviction and dismissing the indictment, should be sufficient to bring the claim before the court or administrative agency charged with considering the issue. *See, e.g.*,

Turning to damages, the court pointed out that Mr. Holdren had spent fifteen years in prison and had been enrolled in an undergraduate university program at the time of his arrest.[41] The court heard an economist estimate what Mr. Holdren might have been expected to earn during the fifteen years if his career plans had progressed uninterrupted.[42] The court considered the claimant's "impairment of future earnings . . . , as well as the loss of reputation, the loss of liberty, emotional stress, pain and suffering, and the reputation of the particular facility in which the claimant was imprisoned in determining the amount of the award."[43] Finally, the court recognized that the claimant had already partially recovered through a civil action against a third party and took that into consideration in estimating damages.[44] In a two-and-one-half-page decision, the court determined that the claimant was entitled to an award of $1,650,000, approximately $110,000 for each year spent in prison.[45]

Although some might complain that the award was too low, the claimant recovered relatively quickly and without having to finance complicated litigation. He was not required to obtain a pardon, which might have been impossible. Finally, the damages, while not copious, were sufficient to permit Mr. Holdren to complete school, purchase a home, or invest in a business should he so desire—activities he certainly would have enjoyed had he not been falsely accused and imprisoned. The award could finance the psychological therapy so many of the exonerated need.[46] The award provided a foundation upon which to begin to build a life.

W. VA. CODE. ANN. § 14-2-13a(d) (Michie 2000) (setting forth evidence required to make a claim for unjust imprisonment). The proof that convinced the prosecution and the court to dismiss should, in most cases, also establish liability. If the claimant's innocence (and thus the state's liability) is disputed, a factual hearing must be held. In those circumstances, most states require the claimant to prove innocence by clear and convincing evidence. *See, e.g.*, D.C. CODE ANN. § 2-422 (2004) (stating that a person bringing suit for damages under D.C.'s unjust imprisonment statute must prove by clear and convincing evidence he or she was unjustly imprisoned); W. VA. CODE ANN. 14-2-13a(a), (f) (outlining what a claimant must prove by clear and convincing evidence to show unjust imprisonment).

41. Holdren v. State, No. CC-00-461.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See id.* (granting an award of $1,650,000).

46. The PBS *Frontline* special documentary, *Burden of Innocence*, detailed the many problems faced by those who have served time for crimes they did not commit. *Frontline: Burden of Innocence* (PBS television broadcast May 1, 2003), *available at* www.pbs.org/wgbh/pages/frontline/shows/burden/view.

C. *Compensation Statutes Are Popular*

Any study of wrongful convictions will find innumerable media stories sympathetic to those who have been wrongly convicted.[47] If the number and length of newspaper, radio, and television stories reflect the interest of the community, not only do exoneration narratives have immense human interest value,[48] but the public overwhelmingly supports providing assistance to those who have been harmed by the criminal justice system through no fault of their own. Ofra Bikel has produced three documentaries on wrongful convictions for the Public Broadcasting Service (PBS).[49] Her most recent program, *Burden of Innocence*, detailed the difficulties faced after release from unjust incarceration and explicitly called for compensation legislation.[50] The North Carolina *Winston-Salem Journal* ran an eight-part series on Darryl Hunt's twenty-year sojourn from accusation to exoneration.[51] The newspaper's website provides links to stories, video interviews with witnesses, photographs of the evidence introduced at trial, and the actual documents used to win Hunt's release.[52] It closes with a quote from the local district attorney, Tom Keith, who finally acquiesced to the exoneration and recommended that Darryl Hunt be compensated: "It is important that the system make amends for the system."[53]

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47. I have been interviewed numerous times by reporters curious about whether persons who have been unjustly convicted and later exonerated will receive compensation. When I inform them that few are, the reporters are inevitably shocked.

48. The Pulitzer Prize has been awarded twice to newspaper reporters for investigative journalism leading to the exoneration of individuals convicted of serious crimes. Paul Henderson of the *Seattle Times* won in 1982 for reporting that proved the innocence of a man convicted of rape, *1982*, *at* http://www.pulitzer.org (last visited Apr. 22, 2004), and John Woestendiek of the *Philadelphia Inquirer* won in 1987 for reporting that included proving the innocence of a man convicted of murder, *1987*, *at* http://www.pulitzer.org (last visited Apr. 22, 2004).

49. *Frontline*, *supra* note 46.

50. *Id.*

51. *See Murder, Race, Justice: The State v. Darryl Hunt*, *The Stories*, *at* http://darrylhunt.journalnow.com/frontStories.html (last visited Apr. 22, 2004) (providing information about the series authored by Phoebe Zerwick).

52. *See Murder, Race, Justice: The State v. Darryl Hunt*, *at* http://darrylhunt.journalnow.com (last visited Apr. 22, 2004).

53. Phoebe Zerwick, *Keith to Plead for a Hunt Pardon*, WINSTON-SALEM J., Feb. 19, 2004, *available at* http://darrylhunt.com/epilogue/epilogueprint41.html. Numerous other print journalists have made the same pitch. *E.g.*, Lou Hanson, *Bring Uniformity to Compensation Bills*, VIRGINIAN PILOT (Norfolk, Va.), Jan. 12, 2004, at B10; Brendan McCarthy, *House Passes Wrongful Conviction Bill*, BOSTON GLOBE, Oct. 23, 2003, at B4; Curtis Stephen, *Wrongly Imprisoned Deserve Compensation*,

Popular support is largely responsible for the few new statutes enacted in the past five years. Despite five exonerations, Alabama had no uniform compensation system until the media focused on the case of Walter McMillian.[54] When Walter McMillian was finally released from prison,[55] after revelations that police had coerced a confession from the "witness" who implicated him and failed to disclose other exculpatory information to the defendant,[56] the *Birmingham News* published a series of articles and editorials.[57] Only then did Alabama enact a statute that

NEWSDAY (Long Island, N.Y.), Feb. 17, 2004, at A23; John Wilkens, *Freedom From Prison is Little Relief for the Falsely Accused*, SAN DIEGO UNION-TRIB., June 15, 2003, at E1; Andrew Wolfson, *Kentucky, Indiana Not Among States Compensating Exonerated Inmates*, COURIER J. (Louisville, Ky.), July 1, 2001, at 1A.

54. LaJuana S. Davis, *Discovery in Criminal Cases: Obtaining Evidence and Information Necessary for an Effective Defense*, 58 ALA. LAW. 352, 352 (1997). Mr. McMillan's conviction was reversed on appeal. McMillian v. State, 616 So. 2d 933 (Ala. Crim. App. 1993). The five prior exonerations included: Clarence Brandley, who had spent nearly ten years in prison, most of it on death row, until he was exonerated in 1990, *e.g.*, Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811, 822 (1995) (citing MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 119-36 (1992)); Randall Padgett, who was acquitted after his capital murder conviction and death sentence were overturned in 1995, *e.g.*, Taylor Bright, *Guilty Until Proven Innocent?*, BIRMINGHAM POST-HERALD, *available at* http://www.patrickcrusade.org/execution_2_5.htm (last visited May 28, 2004); Ronnie Mahan and Dale Mahan, who had spent over twelve years in prison before they were released in 1998, after the help of the Innocence Project in New York and DNA evidence established their innocence, *e.g.*, INNOCENCE PROJECT, DALE MAHAN, *at* http://www.innocenceproject.org/case/search_profiles.php (last visited Apr. 22, 2004); and Freddie Lee Gaines, who was convicted of two murders in 1972 and not released until 1985, *e.g.*, *After 13 Years in Prison, Innocent Man Says Alabama 'Owes Me'*, CHI. TRIB., Feb. 14, 1991, at 26, *available at* 1991 WL 9350750. Five years later, another man confessed to the crimes. *Id.* Of all these exonerees, only Freddie Gaines was compensated. *See* Phillip Rawls, *Legislature Votes to Give $1 Million to Wrongfully Convicted Minister*, ASSOCIATED PRESS, May 9, 1996, *available at* 1996 WL 4428836 (outlining the compensation received by Gaines). In 1996, the Alabama Legislature passed a private bill awarding Gaines $100,000 per year for ten years. *Id.*

55. McMillian v. State, 616 So. 2d at 949 (reversing the conviction because McMillian was denied due process of law).

56. Mr. McMillian was convicted of capital murder and spent six years on death row before an attorney representing him on appeal made a startling discovery. *See* Davis, *supra* note 54, at 352. Counsel was listening to a cassette tape that recorded statements made by one of the state's main witnesses. *Id.* The statement ended before the tape switched off, but counsel did not jump up immediately to stop the tape player. *Id.* After a few minutes, the witness's voice returned—only now, he was complaining that the police were forcing him to implicate McMillian. *Id.*

57. *E.g.*, Editorial, *Just Compensation Panel on Wrongful Convictions Should*

requires the state to pay a minimum of $50,000 dollars per year to anyone who has been wrongly convicted and later exonerated.[58]

Similarly, in Ohio, the limits on compensation awards were raised from a cap of $25,000, plus lost wages and attorney fees, to $40,333 a year, plus lost wages,[59] after a series of prizewinning newspaper articles by Connie Schultz in the Cleveland *Plain Dealer*.[60] If the press represents public opinion, the public supports laws that provide fair and reasonable compensation for those who have been unjustly convicted and later exonerated.

D. *The Opposition to a Legislative Solution*

State lawmakers who have tried to generate interest in compensation statutes report that the opposition raises two arguments.[61] First, some contend that the statutes will be increasingly expensive as an ever larger number of exonerees petition for awards.[62] Second, opponents warn that undeserving individuals will recover.[63] Both threats are unfounded.

1. *Cost*

Even in states with inflated prison populations and a vast criminal justice system, the number of individuals who are not only innocent, but who have the means to establish their innocence is small and getting

Determine Pay, BIRMINGHAM NEWS, Apr. 16, 2001, *available at* LEXIS, News Library, U.S. Newspapers File; David White, *Ex-Death Row Inmate Awaits Compensation*, BIRMINGHAM NEWS, May 30, 2001, *available at* LEXIS, News Library, U.S. Newspapers File; David White, *Wrongfully Jailed Favor Review Panel*, BIRMINGHAM NEWS, Apr. 10, 2001, *available at* LEXIS, News Library, U.S. Newspapers File.

58. ALA. CODE § 29-2-159 (2003).

59. OHIO REV. CODE ANN. § 2743.48(E)(2)(b)-(d) (Anderson 2000).

60. *See Burden of Innocence: A Special Series from the* Plain Dealer, *at* http://www.cleveland.com/burden (last visited Apr. 22, 2004) (providing links to the articles in the series). "'The Burden of Innocence' was a five-day series about Michael Green, who was falsely convicted of rape. After the series was published, another man, Rodney Rhines, came forward and confessed to the 1989 crime. Rhines subsequently was convicted and is now in prison." *Series Earns Citations, PD Staffers Win Awards*, PLAIN DEALER (Cleveland, Ohio), Mar. 8, 2003, at B1.

61. Interview with Ann Lambert, Legislative Counsel, ACLU of Mass. (Jan. 2004); Interview with Sharon Bivens, Alabama Legislative Fiscal Office (Aug. & Sept. 2000).

62. *Id.*

63. *Id.*

smaller.[64] Most postconviction exonerations have been won through DNA testing,[65] and even a quick look at a "typical" DNA case reveals why the numbers of exonerations will decrease. In each DNA exoneration, the actual perpetrator of the crime left DNA, in some form, at the scene of the crime.[66] In order to impact the verdict postconviction, the DNA must survive to be retested years later**.** [67]

The "typical" DNA exoneration is a rape case, in which the rapist ejaculates in or around the victim and leaves the scene. The victim reports the rape, is examined by a doctor, and a rape kit is prepared. The kit

64. Most exonerations have occurred in Illinois, where there have been twenty-three. See INNOCENCE PROJECT, CASE PROFILES, *at* http://www.innocenceproject.org/case/search_profiles.php (last visited Apr. 23, 2004) [hereinafter INNOCENCE PROJECT, CASE PROFILES], for the stories of the twenty-three Illinois exonerees. New York has had fourteen, and Texas and Virginia have had thirteen. *Id.* After that, the number of exonerations in each state drops dramatically: Oklahoma (8); Massachusetts (9); Pennsylvania (6); California (6); West Virginia (6); Indiana (4); Michigan and Ohio (4). *Id.* The remaining states have had only one, two, or three exonerations.

65. INNOCENCE PROJECT, CAUSES AND REMEDIES OF WRONGFUL CONVICTIONS, *at* http://www.innocenceproject.org. Of course, innocent people have been exonerated without DNA evidence. *See generally* EDWIN BORCHARD, CONVICTING THE INNOCENT (1932); JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE (1992). Witnesses recant. Actual perpetrators confess. Undisclosed exculpatory material so substantially undercuts the reliability of the conviction that courts feel compelled to vacate convictions. Many of the mid-1980s child sex abuse convictions have been reversed as courts and the public have learned to mistrust the testimony of young children and of self-styled child sex abuse therapists. *See generally* RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY, AND SEXUAL HYSTERIA (1994); Dorothy Rabinowitz, *Reckoning in Wenatchee*, WALL ST. J., Sept. 9, 1999, at A26 (documenting myriad reversals of trial court convictions stemming from townwide accusations by two child witnesses); Paul Craig Roberts, *Saved by Pursuit of the Truth*, WASH. TIMES, Apr. 6, 2000, at A16 (discussing false allegations of child abuse). However, the number of non-DNA exonerations will never be large because it is so difficult to reverse a conviction without absolute evidence of innocence.

66. DNA is found in serological material such as blood, semen, saliva, sweat, and other bodily fluids.

67. To overturn a verdict based on postconviction DNA testing, the DNA must also be "material" to the verdict. In the "typical" scenario, when the real perpetrator left DNA in semen, the DNA is clearly material in that it directly affects the ultimate decision regarding guilt or innocence. DNA might not be material, if, for example, there was semen found in a rape victim's vagina, but the rape victim had testified that the rapist used a condom and explained the presence of semen as a result of her earlier consensual sexual activity with another person. In such a case, the fact that the DNA in the semen failed to match the person convicted of the crime would be irrelevant.

preserves samples of the perpetrator's semen. The victim later identifies someone she believes is the perpetrator. The accused is subsequently charged, and possibly convicted, based on that testimony. The serological material contained in the rape kit may have been produced at trial to establish that a rape occurred, or to show that the perpetrator and the accused shared a common blood type. No DNA testing would have been done because that procedure was not available at the time of the criminal investigation. The accused is sentenced to prison. Years later, when DNA testing becomes available, the rape kit is found, and the collected material is analyzed. It shows that the convicted person is not the perpetrator. This "typical" scenario is less likely to occur in the future than it has in the past, simply because DNA testing can now be accomplished during the investigatory stage of a case.[68]

Nevertheless, there are still individuals in prison waiting to establish their innocence through DNA testing. Some are fighting to have tests conducted. Tests cost money that must be raised. Others are hoping to locate the crucial evidence. Also, some recent convictions are newly subject to challenge as the result of ever improving technology. The ability to conduct DNA testing on trace amounts of biological material—e.g., sweat clinging to clothing or saliva stuck to cigarettes—has improved,[69] and minute amounts of DNA can now be grown to a sufficient size to make testing possible.[70] Overall, however, the rate of DNA exonerations will inevitably slow. The number of convicted inmates who can locate material, relevant, and untested forensic material will dwindle, as will the number of individuals claiming compensation for unjust conviction.

Furthermore, even in states with the greatest number of exonerations, the cost of compensating deserving individuals has been minimal. In New

68. Naturally, there may be any number of innocent individuals in prison unable to win their freedom because rape kits or other physical evidence have been destroyed. Moreover, most cases—e.g., robberies, thefts, or drug offenses—involve no testable material. In those situations, innocent people are rarely able to establish their innocence.

69. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 67-69 (2000).

70. *Id.* at 36-40. The polymerase chain reaction (PCR), invented by Kary Mullis in 1983, is a process by which certain chemicals are added to a single gene or fragment of DNA, causing the DNA to replicate itself exponentially so there is more of the substance to test. *Kary Mullis*, *The Polymerase Chain Reaction (PCR)*, *at* http://www.karymullis.com (last visited June 5, 2004). As a result, even if only a tiny fragment of DNA is recovered, the PCR technique can be used to exonerate a defendant. *Id.*

York State, for example, the court of claims has resolved 214 wrongful conviction claims since New York's compensation statute was enacted in 1984.[71] Of that number, 154 cases were dismissed, and nineteen others were settled out of court.[72] In only twelve cases did the court actually make an award, and then, for an average of just $457,000 per case.[73]

2. *Risk of Rewarding Individuals Responsible for Their Own Convictions*

Despite our national rhetoric, generally anyone arrested and accused of a serious crime is presumed to be guilty.[74] Once a police investigation focuses on a suspect, that person is never again viewed without suspicion. Acquittals are not equivalent to a declaration of innocence.[75] An acquittal means only that the prosecution failed to meet its burden. Persons who have served time in prison convicted of crimes they did not commit report that the communities into which they are released view them with disbelief or even fear, despite their well-publicized exoneration.[76]

Bias against those who have been accused and reluctance to accept the possibility of mistake color prosecutorial attitudes toward compensation legislation. Even when DNA evidence clearly exonerates, prosecutors have trouble admitting that they convicted the wrong person.[77]

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71. Stephen, *supra* note 53, at A23.

72. *Id.*

73. *Id.*

74. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 334 (1995) (citing to a number of scholarly works that document the pervasive presumption of guilt following arrest).

75. Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1323 (1997) (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984)).

76. I have experienced this phenomenon myself. I represent Dennis Halstead, who, along with his codefendants, John Restivo and John Kogut, was released from prison in July 2003 after serving almost eighteen years in prison, when the Nassau County District Attorney agreed to vacate his conviction. The charges against Mr. Halstead and his codefendants are still pending, despite DNA evidence establishing their innocence. While waiting for one of the court proceedings, I overheard the judge's secretary express fear because one of the defendants was moving to his mother's home, which was located down the block from where the secretary's mother lives. For other examples, see SCHECK ET AL., *supra* note 69, at 223-38.

77. *See generally* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004). In case after case, even after DNA testing establishes that the convicted person could not have been the perpetrator, normally logical prosecutors will spin increasingly implausible explanations for the presence of the exculpatory material. For example, in the Darryl Hunt case, the prosecutor argued in summation that Mr. Hunt had raped the victim,

On the other hand, it is legitimate to guard against recovery by individuals whose behavior impeded the "truth-seeking" function of a police investigation, just as the doctrine of comparative negligence works to limit damage awards for those who are partially responsible for their own injury.[78] Unfortunately, the vague and inchoate suspicion of anyone who has been arrested, prosecuted, and convicted, even if falsely, tends to infect the drafting process so that the most frequent disqualifications are not logically related to legitimate concerns.

For example, lawmakers and lobbyists for prosecutors sometimes demand that compensation legislation exclude from possible recovery those individuals who have contributed to their own conviction.[79] The two types of contributory behavior most frequently identified in a statute as disqualifications are confessions and guilty pleas.[80] Neither should suffice, without more.

a. *Confessions*. New York's compensation statute precludes recovery for those who "by [their] own conduct cause or bring about [their] conviction."[81] That disqualification has been interpreted to bar persons who have given an uncoerced confession or plead guilty. Drafters of New York's statute[82] explained that the disqualification was intended to require

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ejaculated inside her, and then stabbed her to death. Phoebe Zerwick, *State: DNA Results Irrelevant; Scientific Evidence Shows Semen in Sykes Case Was Not That of Hunt or Other Possible Suspects*, WINSTON-SALEM J., Nov. 22, 2003, *available at* http://darrylhunt.journalnow.com/stories/partseven/story/html. When the DNA tests proved that Mr. Hunt had not been the rapist, the prosecutor argued—in complete contradiction to his previous statements—that Mr. Hunt must have restrained and stabbed the victim while someone else committed the rape. *Id.* Only when the police matched the DNA to another person—who immediately confessed to committing the crime on his own—did the prosecutor admit it was wrong to convict Mr. Hunt. Zerwick, *supra* note 53.

78. 57B AM. JUR. 2D *Negligence* § 799 (2004); *see* RESTATEMENT (SECOND) OF TORTS § 463 (1965) ("Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.").

79. Interview with Ann Lambert, *supra* note 61.

80. *See generally* Adele Bernhard, Table, *When Justice Fails: Indemnification of Unjust Conviction*, 7 U. CHI. L. SCH. ROUNDTABLE 345 (2000) (summarizing the various statutes).

81. *See* N.Y. CT. CL. ACT § 8-b(4)(b), (5)(d) (McKinney 1989).

82. In the early 1980s, New York Governor Mario Cuomo appointed legal scholars, jurists, and practitioners to a Law Revision Commission that would consider how and when to compensate individuals who had been unjustly convicted and later

that

> the person seeking damages . . . [must] establish that he did not cause or bring about his prosecution by reason of his own misconduct. Examples of such misconduct would include falsely giving an uncoerced confession of guilt, removing evidence, attempting to induce a witness to give false testimony, attempting to suppress testimony, or concealing the guilt of another.[83]

Of course, in 1984, when New York's statute was enacted, no one believed in the phenomenon of false confessions.[84] The idea of a false confession probably conjured the vision of a scoundrel sabotaging a police investigation to protect fellow mobsters. Today, preventing individuals from benefiting from their own intentional misconduct, such as inducing others to give false testimony or hiding evidence, remains appropriate.[85] But it no longer seems rational to consider all false confessions as misconduct, because multiple exonerations prove that innocent people falsely implicate themselves,[86] despite gaining nothing for themselves in the process.[87] Social scientists have ideas about why individuals falsely confess,

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exonerated. N.Y. STATE LAW REVISION COMM'N, REPORT OF THE LAW REVISION COMMISSION TO THE GOVERNOR ON REDRESS FOR INNOCENT PERSONS UNJUSTLY CONVICTED AND SUBSEQUENTLY IMPRISONED, 1984 N.Y. Laws 2899.

83. *Id*. at 2932.

84. Steven A. Drizin & Richard A. Leo, *The Problems of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 910 (2004) (discussing the contemporary phenomenon of false confessions and acknowledging that "most people do not appear to know that interrogation-induced false confessions even exist").

85. Courts have dismissed claims for compensation when the claimant was convicted after instructing his attorney not to let the defendant's wife testify, presumably because she was involved in the crime or because she had incriminating testimony, *e.g.*, Taylor v. State, 605 N.Y.S.2d 172, 174 (App. Div. 1993), *aff'd sub nom.* Williams v. State, 661 N.E.2d 1381, 1382 (N.Y. 1995), or when the claimant was not guilty of the crime charged (scheme to defraud), but was guilty of larceny on the same set of facts, *e.g.*, Rogers v. State, 694 N.Y.S.2d 874, 878 (Ct. Cl. 1999), or when the claimant knew the crime was committed by his twin brother, but refused to name him and was convicted as a result, *e.g.*, Stevenson v. State, 520 N.Y.S.2d 492, 494 (Ct. Cl. 1987), or when the claimant was convicted after proffering a false alibi, *e.g.*, Moses v. State, 523 N.Y.S.2d 761, 764 (Ct. Cl. 1987).

86. Patricia Smith, *Brenton Butler Didn't Do It*, N.Y. TIMES UPFRONT, Sept. 1, 2003, at 8, 8.

87. Of the first 123 exonerations that the Innocence Project assisted, as of March 4, 2004, thirty-three involved false confessions. INNOCENCE PROJECT, CASE PROFILES, *supra* note 64. S*ee generally* Drizin & Leo, *supra* note 84; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. &

but they do not understand all the dynamics involved.[88] New York's statute should be amended to make clear that no category of persons will be automatically excluded from recovery and that the circumstances of each case will be individually considered.

False confessions can be either uncoerced or coerced. An uncoerced false confession occurs when an individual, on his or her own independent volition, perhaps driven by some personal psychological compulsion, confesses to a crime he or she did not commit.[89] An uncoerced false confession could also result from an attempt to manipulate a police investigation for some illegitimate purpose, such as protecting someone else from investigation.

A coerced false confession generally results from police interrogation.[90] The same techniques that can induce true confessions can cause false confessions. Often police are eager to solve a crime, convinced that they have focused on the correct culprit, and aware that an admission will help convince the prosecutor to charge the suspect. They may, consciously or unconsciously, feed the target details of the crime so that the resulting admission is convincingly accurate.[91] In the next few years, as

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CRIMINOLOGY 429 (1998).

88. Leo & Ofshe, *supra* note 87, at 431.

89. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 160-67 (1986) (describing the defendant's confession as uncoerced when the defendant approached an off-duty police officer and told the officer of his need to confess because his conscience was troubling him).

90. *See, e.g.*, INNOCENCE PROJECT, BRUCE GODSCHALK, *at* http://www.innocence project.org/case/search_profiles.php (last visited Apr. 23, 2004) (discussing the coerced confession of Bruce Godschalk).

91.

> Police-induced false confessions arise when a suspect's resistance to confession is broken down as a result of poor police practice, overzealousness, criminal misconduct and/or misdirected training. Interrogators sometimes become so committed to closing a case that they improperly use psychological interrogation techniques to coerce or persuade a suspect into giving a statement that allows the interrogator to make an arrest. Sometimes police become so certain of the suspect's guilt that they refuse to even-handedly evaluate new evidence or to consider the possibility that a suspect may be innocent, even when all the case evidence has been gathered and overwhelmingly demonstrates that the confession is false. Once a confession is obtained, investigation often ceases, and convicting the defendant becomes the only goal of both investigators and prosecutors. . . .
>
> American police are poorly trained about the dangers of interrogation and false confession. Rarely are police officers instructed in how to avoid eliciting

more police precincts videotape interrogations, we will better understand how and why individuals falsely confess.[92]

In the meantime, multiple exonerations have educated the public about confessions. We no longer automatically accept as true a confession that results from long hours of interrogation, false promises, and pressure tactics, and we certainly do not hold innocent individuals who have been coerced into falsely confessing responsible for their own convictions. The fact that a young, mentally challenged, chemically dependant, submissive, or just plain scared individual succumbs to police interrogation techniques and confesses to a crime that he or she did not commit no longer seems like misconduct that should prevent recovery years later when the truth finally surfaces. Statutes should be amended to more accurately reflect current social science.

The mere existence of an inculpatory statement or a confession should never defeat a claim. Only an uncoerced false confession specifically intended to distort the truth-seeking function of the police investigation should prevent recovery. In determining whether a confession was the product of coercion, courts should presume all false confessions to be the product of coercion unless they can be shown otherwise by clear and convincing evidence. Moreover, the results of a pretrial ruling on the admissibility of the confession should be irrelevant.[93]

> confessions, how to understand what causes false confessions, or how to recognize the forms false confessions take or their distinguishing characteristics. Instead, some interrogation manual writers and trainers persist in the unfounded belief that contemporary psychological methods will not cause the innocent to confess—a fiction so thoroughly contradicted by all of the research on police interrogation that it can be labeled a potentially deadly myth. This fiction perpetuates the commonly held belief that only torture can cause an innocent suspect to confess, and it allows some police to rationalize accepting coerced and demonstrably unreliable confession statements as true.

Leo & Ofshe, *supra* note 87, at 440-44 (footnotes omitted).

92.

> Only four states and the city of Washington have decided to require recorded interrogations . . . . The Center on Wrongful Convictions at Northwestern University recently surveyed 238 law enforcement agencies around the country that currently record the questioning of felony suspects. It found that "virtually every officer with whom we spoke, having given custodial recordings a try, was enthusiastically in favor of the practice."

Editorial, *Recording Police Questioning*, N.Y. TIMES, June 15, 2004, at A22, *available at* LEXIS, News Library, N.Y. Times File; *see supra* note 23.

93. *See, e.g.*, Dodrill v. Ludt, 764 F.2d 442, 444 (6th Cir. 1985) ("[T]he general

The standard applied to determine admissibility at trial is whether the statement was "voluntarily made."[94] In determining voluntariness, coercive techniques are not necessarily determinative.[95] As a result, although police interrogation techniques may create false confessions, they do not always render confessions "involuntary" as a matter of law or inadmissible at trial.[96] Thus, in the end, veracity is not a factor in the determination of admissibility,[97] and consequently, a pretrial ruling on admissibility should play no role in deciding whether to award compensation.

b. *Other Disqualifications: Guilty Pleas and Prior Convictions.* Guilty pleas should not be an automatic bar to recovery. Although most unjustly convicted individuals chose to go to trial, a number have pled guilty.[98] Sometimes, individuals plead guilty at the insistence of counsel, who may doubt their innocence and fear the worst outcome after trial. Whether the plea was caused by the accused's inability to understand or assess his rights and predicament, or whether the plea was compelled by counsel's ineffectiveness, it should not act as a disqualification. Once again, if it were determined that the plea was entered to intentionally manipulate an ongoing investigation or to protect another from being charged with the crime, that activity could act as a disqualification. But, without evidence of illegitimate motive, when an innocent person pleads guilty to a crime he or she did not commit, the plea is neither symptomatic of unworthy behavior nor proof of complicity in the crime. Thus, any rationale for using it as a disqualification falls away.

Finally, no claimant should be precluded from compensation because of a prior felony conviction. Damages, of course, can be adjusted, so that a

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rule is that a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel.").

94. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 303 (1991) ("The admissibility of a confession . . . depends on whether it was voluntarily made.").

95. For example, in New York State, while physical threats will render a resulting "confession" inadmissible, People v. Gaddy, 523 N.Y.S.2d 301, 302 (App. Div. 1987), false promises will not, People v. Richardson, 609 N.Y.S.2d 981, 982 (App. Div. 1994).

96. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 164 n.2 (1986) ("Even when there is a causal connection between police misconduct and the defendant's confession, it does not automatically follow that there has been a violation of the Due Process Clause.") (citing Frazier v. Cupp, 394 U.S. 731, 739 (1969)). Furthermore, the Court in *Connelly* held that a confession's lack of reliability "is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause . . . ." *Id.* at 167.

97. *Id.*

98. *See* INNOCENCE PROJECT, CASE PROFILES, *supra* note 64.

person with a criminal record might recover less. Courts can award damages according to the same equitable principles that guide the assessment of damages in more routine personal injury actions.[99] The difficulty of putting a price tag on freedom or loss of opportunity does not mean that courts are inept at the task.[100]

III. LITIGATION

Litigation is difficult, time-consuming, and expensive—even when plaintiffs assert conventional and well-accepted legal claims.[101] When a plaintiff seeks vindication for a new category of harm or for a harm that was previously unrecognized, such as wrongful conviction, that plaintiff must formulate new legal strategies. Such creative litigation is challenging indeed.

A. *Preliminary Considerations*

1. *Actionable Conduct*[102]

Some wrongful convictions result from unfortunate, but inevitable accidents for which no individual or entity can be blamed. Let us say that a rape victim, shaky and understandably scared of all strange men, believes that she glimpses her assailant standing on a dimly lit street corner near her home. She calls the police and identifies the man she spots as the rapist. On the basis of that information, the police have probable cause to arrest.[103] If the accused has no alibi, and there is no reason to doubt the

99. New York decisions provide plenty of examples of judges wrestling with the value of years lost and opportunities stolen. *See, e.g.*, Johnson v. State, 558 N.Y.S.2d 722, 725 (Ct. Cl. 1992) (awarding only $40,000 for wrongful conviction in light of the claimant's prior criminal record and numerous incarcerations).

100. *See id.*

101. Plaintiffs navigate legal minefields to recover damages when police and prosecutors (and the cities, counties, and municipalities that hire, train, and supervise them) cause harm, even when the harm consists of such routine abuses of power as: excessive force, warrantless search, false arrest, and malicious prosecution. *See generally* MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 2:1 (3d ed. 1999); SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 2003).

102. The titles of the sub-sub-headings under the sub-heading *Preliminary Considerations* are borrowed from chapter titles in AVERY ET AL., *supra* note 101.

103. Generally, a finding of probable cause precludes a determination of malicious prosecution. *E.g.*, Wasilewicz v. Vill. of Monroe Police Dep't, 771 N.Y.S.2d 170, 171 (App. Div. 2004) (citing Gisondi v. Town of Harrison, 528 N.E.2d 157 (N.Y.

victim's sanity or powers of observation, her accusation will undoubtedly evolve into a prosecution. The accused may easily be convicted, even though innocent, because of the persuasiveness of the victim's false identification.[104] In such a case, built primarily on the victim's identification and with very little police or prosecutorial involvement, there would be no cause of action against the police, prosecution, or victim.

2. *Individual, Supervisory, and Local Governmental Liability*

Even in those cases in which it is possible to attribute the wrongful conviction to law enforcement behavior, immunity doctrine protects most participants in the criminal justice system from liability for damages. For starters, a state cannot be sued for damages under § 1983 in either state or federal court—unless the state has waived its immunity and subjected itself to suit.[105] Thus, if state employees' activities resulted in a wrongful conviction, the state itself could not be sued; plaintiffs could proceed only

1988); Kandekore v. Town of Greenburgh, 663 N.Y.S.2d 274 (App. Div. 1997)). This Article does not discuss litigation in those circumstances when an arrest was made without probable cause, which might give rise to a state law claim for false arrest or malicious prosecution. Further,

> [w]hen a defendant is arrested and jailed on the basis of probable cause to believe that he has committed a crime, and only later does police fraud enter the picture with the effect of perpetuating the seizure without good cause, there is a question not as yet authoritatively resolved whether the Fourth Amendment has been violated.

Gauger v. Hendle, 349 F.3d 354, 359 (7th Cir. 2003).

104. When forced to choose between a victim's identification testimony and an accused's alibi evidence, juries have believed eyewitnesses and convicted, despite the heavy burden on the prosecution to prove guilt beyond a reasonable doubt. *See, e.g.*, People v. Daniels, 453 N.Y.S.2d 699, 702 (App. Div. 1982) (reversing a conviction in a case in which a jury believed an eyewitness identification over the defendant's alibi evidence).

105. Hans v. Louisiana, 134 U.S. 1, 16, 19-20 (1890) ("The suability of a state, without its consent, [is] a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted."). Sometimes it is difficult to know whether a particular governmental official is protected by the doctrine of state sovereign immunity. *See, e.g.*, McMillian v. Monroe, 520 U.S. 781, 793 (1997) (holding that a county sheriff represents the state, not the county); Pusey v. City of Youngstown, 11 F.3d 652, 658-59 (6th Cir. 1993) (holding that a city prosecutor was acting as a state employee); Scott v. O'Grady, 975 F.2d 366, 370 (7th Cir. 1992) (stating that a county sheriff was a state employee working pursuant to a state court order).

against individual actors who, more often than not, lack "deep pockets."

Cities and other municipal entities are not protected by state immunity and can be sued under § 1983 for the activities of their employees, but only if those activities were both unconstitutional and performed in accordance with the "custom" or "policy" of the municipality.[106] In other words, if a police officer's unconstitutional acts were not authorized or sanctioned by the entity that employs him or her, the officer might be personally liable under § 1983, but the entity would not be.[107] Should the officer's unconstitutional behavior be proven to be consistent with the rules of his department, his training, or the instructions of a municipal policymaker,[108] the municipality might be liable for the activities.[109]

3. *Absolute and Qualified Immunity*

Doctrines of absolute and qualified immunity protect individual officials.[110] Absolute immunity is a status immunity that protects prosecutors from suit for decisions made and actions taken "initiating a prosecution and . . . presenting the State's case."[111] Judges are protected by

106. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

107. If the plaintiff is limited to recovering against an individual officer or two, the value of the claim is substantially reduced, because the officer might be judgment proof, and the employing entity might refuse to indemnify the officer.

108. A municipality may be liable for failure to train or supervise prosecutors to ensure that they meet their constitutional obligation to turn over exculpatory material to the defense. Ricciuti v. N.Y. City Transit Auth., 124 F.3d 123, 132 (2d Cir. 1997) (reversing summary judgment on a claim of failure to adequately train); Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992) (holding that the city could be liable for failure to train and supervise prosecutors on their obligation to disclose exculpatory evidence); Johnson v. Kings County Dist. Attorney's Office, 763 N.Y.S.2d 635, 649 (App. Div. 2003) (holding that a citizen might recover compensatory, but not punitive, damages from the city under a theory of willful failure to train or supervise employees).

109. Pembar v. City of Cincinnati, 475 U.S. 469, 483-84 (1986).

110. *See, e.g.*, Morley v. Walker, 175 F.3d 756, 759 (9th Cir. 1999) ("Although § 1983 does not expressly provide a defense of official immunity, our courts have repeatedly recognized that absolute and qualified immunity shield certain types of official conduct from § 1983 actions.") (citing Kalina v. Fletcher, 522 U.S. 118, 125-26 (1997); Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993); Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

111. Imbler v. Pachtman, 424 U.S. at 431. Activities prosecutors undertake as investigators, including taking statements at the scene of a crime or directing the police investigation, enjoy only qualified immunity.

absolute immunity for the work that they do in their official capacity.[112] Testifying witnesses are protected as well.[113]

Police officers, however, have only "qualified immunity."[114] Providing the police with less immunity makes sense because the police play the largest role in shaping an investigation. Police arrange lineups through which identifications are made. They take statements, which form powerful evidence at trial. They interview or fail to interview witnesses. They collect or fail to preserve evidence.

On the other hand, many mistakes police make in the course of a criminal investigation are immunized if it was objectively reasonable for the officers to have believed, even incorrectly, that their behavior was lawful.[115] Because police are active decisionmakers and because judicial interpretation of the law is in constant flux, courts protect police officers from having to "predict[] the future course of constitutional law"[116] and encourage them to err on the side of active, vigorous enforcement.[117]

In making determinations about liability, courts distinguish between negligent failure to investigate and a reckless or intentional failure.[118] They consider such factors as: urgency, the quantum of existing evidence, the

112. Pierson v. Ray, 386 U.S. 547, 554 (1967).

113. Complainants and witnesses are protected from liability unless the prosecution is baseless and the complaint is made with malice. *See generally* Anthony v. Baker, 955 F.2d 1395 (10th Cir. 1992); White v. Frank, 855 F.2d 956 (2d Cir. 1988); Nardelli v. Stanberg, 377 N.E.2d 975 (1978).

114. Malley v. Briggs, 475 U.S. 335, 340 (1986) (citing Pierson v. Ray, 386 U.S. at 557).

115. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

116. Pierson v. Ray, 386 U.S. at 557.

117. *See* Butz v. Economou, 438 U.S. 478, 506 (1978) (stating that qualified immunity "encourag[es] the vigorous exercise of official authority").

118. *See* AVERY ET AL., *supra* note 101, at 2-27. *Compare* Wilson v. Lawrence County, 260 F.3d 946, 952-53 (8th Cir. 2001) (holding that officers' were not entitled to qualified immunity when the defendant's confession was coerced and involuntary), *and* BeVier v. Hucal, 806 F.2d 123, 128-29 (7th Cir. 1986) (holding that officer should have made further inquiry of witnesses at the time of arrest, which might have discredited the basis for the arrest in a child neglect case), *with* Schertz v. Waupaca County, 875 F.2d 578, 583 (7th Cir. 1998) (holding that once police officers have probable cause, they have no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence), *and* Romero v. Fay, 45 F.3d 1472, 1477-78 (10th Cir. 1995) (holding that the police were not liable for the failure to investigate the accused's alibi witnesses), *and* Simmons v. McElveen, 846 F.2d 337, 339 (5th Cir. 1988) (finding police not liable for their failure to compare fingerprints left on a cigarette box dropped by the assailant with prints of the accused).

difficulty of continuing the investigation, and the seriousness of the charges in making that determination.

Nonetheless, police are not shielded from liability for all conduct. They are not protected if their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[119] Naturally, there has been litigation over the definition of a "clearly established" constitutional right,[120] and whether claimants are required to prove that the police acted "bad faith" when they violated the right.[121] In resolving civil rights claims, courts resolve immunity questions first.[122] If a court determines that a plaintiff has not alleged a violation of a clearly established right, the court will not address whether the proof is sufficient to establish the violation.[123]

Judicial reluctance to interfere with the specifics of police work will further erode. Exonerations force courts to take a less deferential look at policing.

B. *New Theories to Vindicate the Unjustly Convicted*

In the next section, I look at a half-dozen recent cases in which lawyers have used creative strategies to recover damages for individuals wrongly accused, tried, and, in some cases, convicted. I have not limited the discussion to cases in which plaintiffs were convicted and subsequently exonerated, because some strategies used by those who were wrongly accused but acquitted are equally applicable to suits on behalf of exonerees. I do not purport to capture every imaginative use of federal civil rights laws to vindicate those who have been wrongfully convicted, nor do I analyze all the issues in great depth. Finally, because state law claims are state-specific and variable, I do not explore or even inventory them. I intend to provide an introduction to a complex and evolving subject and to

119. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see, e.g.*, Malley v. Briggs, 475 U.S. at 341 (discussing the *Harlow* standard in denying an officer's claim of immunity).

120. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 617 (1999) (stating that for a legal rule to be "clearly established," there must be controlling precedent).

121. *See, e.g.*, Gomez v. Toledo, 446 U.S. 635, 640 (1980) (holding that a plaintiff need not allege bad faith in a case against an official with qualified immunity).

122. *See, e.g.*, Romero v. Fay, 45 F.3d at 1475-77 (ascertaining first whether the plaintiff "sufficiently asserted the violation of a constitutional right" and answering any other qualified immunity questions before addressing the merits).

123. *See, e.g.*, Home v. Coughlin, 191 F.3d 244, 250 (2d Cir. 1999) (finding qualified immunity and therefore not reaching the merits).

encourage more litigation.

1. *Failure to Disclose Exculpatory Evidence*

In a criminal prosecution, the state must disclose to the defense all exculpatory or helpful evidence[124] that is material to the prosecution.[125] Police have an affirmative duty to disclose such material to the prosecution,[126] and the prosecution must in turn reveal it to the defense.[127]

Brady material can take many shapes and forms, including: a prior criminal record, psychiatric history, or other information relevant to witness credibility,[128] failure to make an identification of the accused,[129] identification of someone other than the accused,[130] information suggesting that someone other than the accused is the perpetrator,[131] cooperation agreements with witnesses,[132] or a witness's prior inconsistent statement.[133] Not surprisingly, the failure to disclose exculpatory material and impeachment material to the defense has contributed to a substantial number of wrongful convictions.[134]

If a convicted defendant locates *Brady* material that was not disclosed, that person can attack the conviction and bring a motion for a new trial.[135] If the undisclosed evidence was material and likely to have changed the outcome of the trial, the conviction will be reversed, and a new

124. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that information is exculpatory if it is "favorable to the accused" either because it would "tend to exculpate him" or because it undermines the credibility of a material witness).

125. Kyles v. Whitley, 514 U.S. 419, 434-36 (1995) (holding that evidence is material if it undermines confidence in the outcome of the trial).

126. Walker v. City of New York, 974 F.2d 293, 299 (2d Cir. 1992).

127. Brady v. Maryland, 373 U.S. at 87.

128. Giglio v. United States, 405 U.S. 150, 154-55 (1972).

129. People v. Davis, 614 N.E.2d 719, 722 (N.Y. 1993).

130. *See* United States v. Bagley, 473 U.S. 667, 676 (1985) ("Impeachment evidence . . . falls within the *Brady* rule.") (citing Giglio v. United States, 405 U.S. at 154).

131. *See id.* ("[E]xculpatory evidence . . . falls within the *Brady* rule.") (citing Giglio v. United States, 405 U.S. at 154).

132. People v. Steadman, 623 N.E.2d 509, 512 (N.Y. 1993).

133. *See* United States v. Bagley, 473 U.S. at 676 ("Impeachment evidence . . . falls within the *Brady* rule.") (citing Giglio v. United States, 405 U.S. at 154).

134. *See* INNOCENCE PROJECT, CASE PROFILES, *supra* note 64.

135. *See* Giglio v. United States, 405 U.S. at 154 ("A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'") (quoting Naupe v. Illinois, 360 U.S. 264, 271 (1959)) (alterations in original).

trial will be ordered.[136]

Once the criminal case has been resolved, either by acquittal after the retrial or dismissal, the exonerated person might be able to use the *Brady* violation as the basis for a civil rights lawsuit.[137] The exoneree would argue that the failure to disclose evidence that substantially undercut the police case against the accused or that clearly pointed to the accused's innocence was a violation of the suspect's constitutional due process rights; such violations are actionable under § 1983 if there is a loss of liberty as a result of the violation.[138] Because prosecutors are absolutely immune for even an intentional concealment of *Brady* material,[139] the only way an exonerated plaintiff could recover would be to establish the police had the exculpatory or impeachment material and failed to turn it over to the prosecution.

Many questions and difficulties arise. Plaintiffs must establish that the harm suffered—the conviction and time in jail—resulted directly from the constitutional violation.[140] Plaintiffs must further show that the undisclosed material was *Brady* material, i.e., that it was either exculpatory or valuable for its impeachment potential.

The reversal of a highly publicized child sexual assault case gave the New York Appellate Division, First Department, an opportunity to rule that a city agency's failure to disclose exculpatory evidence to the district attorney and the district attorney's failure to search for, gather, and disclose that material to the defense constitutes a violation of the plaintiff's civil rights.[141] Mr. Ramos was convicted and sentenced to prison for the

136. United States v. Bagley, 473 U.S. at 677 (citing Giglio v. United States, 405 U.S. at 154).

137. *See* Walker v. City of New York, 974 F.2d 293, 299 (2d Cir. 1992) (addressing a case in which an exonerated person brought action against the City of New York under § 1983).

138. *See* 42 U.S.C. § 1983 (2003) (stating every person who, acting under color of state law, subjects another to the deprivation of rights under the Constitution shall be liable for injuries).

139. *See supra* notes 110-12 and accompanying text (discussing absolute immunity for prosecutors under § 1983).

140. *See, e.g.*, Jones v. L.A. Cmty. Coll. Dist., 702 F.2d 203, 207 (9th Cir. 1983) (stating that a § 1983 plaintiff is entitled "to compensation [only] for actual harm resulting directly" from the violation of federal rights) (citing Carey v. Piphus, 435 U.S. 247, 260 & n.15 (1978); Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773, 781 (9th Cir. 1982)).

141. Ramos v. City of New York, 729 N.Y.S.2d 678, 692-95 (App. Div. 2001), *aff'd*, 762 N.Y.S.2d 807 (App. Div. 2003).

sexual abuse of a small child.[142] When accused, Mr. Ramos was a college student, working part time as a teacher's aide.[143] The Human Resources Administration (HRA) conducted the investigation into the accusation.[144] The child was examined physically and psychologically, and experts determined that the child had been abused.[145]

HRA investigators knew that the child had a history of strangely inappropriate sexual behavior and had made other false complaints.[146] For some reason, HRA was slow to release the material to the prosecution, and the assistant district attorney assigned to the trial failed to inform the defense about the material.[147] As a result, Mr. Ramos served almost a decade in prison convicted by the testimony of the youngster, doctors, and social worker "validators" who believed that abuse had occurred.[148] During discovery in a civil case brought by the child and her mother against the day care center for failure to protect the child, the previously undisclosed reports surfaced.[149] Mr. Ramos brought a motion to set aside his conviction.[150] After the conviction was vacated as a result of the *Brady* violation and the indictment was dismissed, Mr. Ramos sued for damages in state court.[151] He asserted against the investigating agency, HRA, the tort of malicious prosecution, on the theory that the *Brady* information would have erased any probable cause justifying his arrest and prosecution.[152] He charged the city under § 1983 with violating his due process right to a fair trial by permitting the assistant district attorney to ignore her duty to disclose *Brady* material.[153]

On appeal from the trial court decision denying the city's request for summary judgment, the First Department held the *Brady* violation actionable under § 1983.[154] The court found that a valid state law malicious prosecution claim was asserted against the city for HRA's selectively

142. *Id.* at 685.
143. *Id.* at 682.
144. *Id.*
145. *Id.* at 683.
146. *Id.* at 682-83.
147. *Id.* at 683-84.
148. *See id.* at 685 (noting that judgment was rendered on June 12, 1985 and that Ramos was released on June 2, 1992).
149. *Id.*
150. *Id.*
151. *Id.* at 685-86.
152. *Id.* at 686.
153. *Id.*
154. *Id.* at 692.

reported misleading information and intentional withholding of material and relevant exculpatory information.[155] The court also found New York City responsible under § 1983 for the local district attorney's failure to institute adequate policies and to ensure that assistant district attorneys recognize and act on their responsibilities to search for, collect, and disclose *Brady* material.[156] The court found that when a municipal employee acts in violation of a person's federal civil rights, pursuant to municipal policy or custom, then it is the municipality that acts improperly, even if the individual employee is immune.[157] The suit was eventually settled for five million dollars to compensate for the seven years spent in jail.[158]

Very strong facts facilitated the Appellate Division's decision. Discovery established that the Office of the Bronx District Attorney routinely ignored the *Brady* rights of accused persons. The district attorney who tried the case against Mr. Ramos testified that her decision not to disclose the exculpatory materials was made in conformity with her training.[159] That testimony could have convinced a jury that office policy and training led her to withhold the information that should have been disclosed.[160] Particularly convincing were facts that no prosecutor in the office had ever been disciplined for failure to disclose *Brady* material and that ten other cases had been reversed for *Brady* violations.[161]

Similar issues arose in *Carroccia v. Anderson*.[162] After being tried and acquitted in criminal court, John Carroccia brought an action complaining that the police had violated his due process right to a fair trial by failing to inform the prosecution of exculpatory evidence discovered during the

155. *Id.* at 689.

156. *Id.* at 692-93.

157. *Id.* at 692 (citing Walker v. City of New York, 974 F.2d 293, 296 (2d Cir. 1992)). "When a District Attorney evinces a pattern of ignoring law enforcement improprieties and misconduct, or fails to train and supervise ADA's regarding *Brady* and other legal obligations, such management failures correlate with defects in the District Attorney's role as a local policymaker." *Id.* at 693 (citations omitted). Thus, "where prosecutors, pursuant to policy or custom, conceal exculpatory evidence," they are county employees, not state employees. *Id*. (citations omitted).

158. Sean Gardiner, *$5 Million Cannot Undo 7 Years: City Settles over Wrong Conviction*, NEWSDAY (New York, N.Y.), Dec. 17, 2003, *available at* http://injusticebusters.com/2003/Ramos_Albert.htm.

159. Ramos v. City of New York, 729 N.Y.S.2d at 695.

160. *Id.*

161. *Id.*

162. Carroccia v. Anderson, 249 F. Supp. 2d 1016 (N.D. Ill. 2003).

course of the investigation.[163] The police knew that the wife of the man Carroccia was accused of killing had a "flawed alibi."[164] They knew she did not have a "normal reaction upon hearing of her husband's murder," and they knew she "possessed firearms, which she claimed to have used."[165] While the police might not have been civilly liable for their failure to conduct a thorough investigation, or for focusing on a single suspect too early in the investigation, the court permitted the due process claim under § 1983 on the theory that the "'officers withheld information or evidence necessary for the fair and impartial trial guaranteed by the U.S. Constitution . . . .'"[166] In other words, the court did not hold the police liable for failure to act upon the receipt of new information, but held them liable for their failure to tell the prosecutors about the new information so that the prosecutors could have evaluated the case in light of all the developments, and perhaps dismissed the case, sparing the plaintiff the humiliation and anxiety of a trial.[167]

2. *Failure to Accurately Describe Investigation as a* Brady *Violation*

The failure of the police to accurately describe an interrogation or identification procedure can be a violation of the *Brady* doctrine.[168] Thus, when police shape evidence and conceal that activity from the prosecution, they violate the defendant's due process rights.[169] For example, if the police stage an identification procedure geared to ensure identification of the person they believe to be guilty, and then fail to accurately describe the rigged procedure so that the prosecution can independently evaluate the

163. *Id.* at 1020.

164. *Id.*

165. *Id.*

166. *Id.* at 1023 (quoting Ienco v. City of Chicago, 286 F.3d 994, 999 (7th Cir. 2002)). It was irrelevant that Carroccia was acquitted at trial. A favorable outcome does not render the trial fair, or neutralize police failure to comply with *Brady* obligations. *Id.*

167. *Id.* at 1023-24.

168. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution's failure to disclose favorable evidence to the defendant "violates due process where the evidence is material either to guilt or punishment").

169. *See* Manning v. Miller, 355 F.3d 1028, 1033 (7th Cir. 2004) (finding that the defendant had a viable *Brady* claim because investigators created false evidence); Ienco v. City of Chicago, 286 F.3d at 1000 ("Neither the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity."); Jones v. City of Chicago, 856 F.2d 985, 989, 994, 995 (7th Cir. 1988) (condemning police for concealing the weakness of the identification, evidence leading to other individuals, and lack of probable cause for arrest of accused).

reliability of the resulting identification, the police have violated *Brady*.

That is exactly what happened in James Newsome's case. James Newsome was convicted of murdering Edward Cohen.[170] During the investigation, two officers displayed photos to the identifying witnesses before the lineup "to improve the chance that [the witnesses] would pick Newsome."[171] The court held that the officers would not be entitled to qualified immunity if they induced the witnesses to falsely testify and then concealed their improper activities from the prosecution.[172] Swayed by the importance placed on eyewitness testimony by jurors and by recent studies showing how easily such testimony can be manipulated, the court found that the manipulation of the identifications "would not by itself support an award of damages," but "obstruct[ing] the ability of the prosecutors and defense counsel to get at the truth in the criminal trial" would support the jury's award of damages,[173] which in this case amounted to fifteen million dollars.[174]

Not all of the federal circuit courts are comfortable permitting civil rights suits for police failure to disclose exculpatory information. For example, the Fourth Circuit requires plaintiffs to establish bad faith on the part of the police—at least when plaintiff's proof of innocence (and thus injury and entitlement to damages) is equivocal, and when the asserted police misconduct is overshadowed by the prosecutorial misconduct that is protected by immunity.[175] In 1982, Lesly Jean was arrested and convicted of sexual assault.[176] During the investigation, a police officer and the victim were hypnotized to help them recall more details about the perpetrator's appearance.[177] Their descriptions changed as the result of the hypnotism and various suggestions made by the investigating officers.[178] The full picture of how the investigation proceeded and the extent of the hypnotic influence on the witnesses was not disclosed to the defense in a timely

170. Newsome v. McCabe, 319 F.3d 301, 302 (7th Cir. 2003).

171. *Id.* at 303.

172. *Id.* at 302.

173. *Id.* at 304 (referring to discussion in *Newsome v. McCabe*, 260 F.3d 824, 824 (7th Cir. 2001)).

174. *Id.* at 303; Editorial, *When Believing Isn't Seeing*, CHI. TRIB., Sept. 30, 2002, at 16.

175. Jean v. Collins, 221 F.3d 656, 660-61 (4th Cir. 2000).

176. Jean v. Collins, 155 F.3d 701, 704 (4th Cir. 1998) (en banc), *vacated by* 526 U.S. 1142 (1999).

177. *Id.* at 703-04.

178. *Id.* at 704.

manner.[179] As a result, Mr. Jean's postconviction writ of habeas corpus was granted, and he was released from prison.[180] The state did not retry his case.[181] Neither innocence nor guilt was ever established. Mr. Jean brought a § 1983 action asking for damages as a result of a due process violation.[182]

Although enough exculpatory material had been withheld to undercut the court's confidence in the verdict, the court refused to impose liability on the police for the *Brady* violation, holding that the police are not liable for failure to transmit information to the prosecution unless they act in bad faith.[183] The decision seems to have been prompted by a couple of factors.

First, as the court reviewed the facts, it was clear that some of the information relating to the hypnosis of the officer and victim had been disclosed to the prosecution and that the prosecution had kept it under wraps.[184] The prosecutor stated that "the officers had 'informed [him] of the existence of the hypnosis and identification procedures'" and that "'there were some changes in [the witness's] description after hypnosis'. . . ."[185] Thus, the court stated that it would be unfair to blame the police—who are only qualifiedly immune—when the prosecution was more at fault and also protected by absolute immunity.[186] Further, the court was not convinced by plaintiff's assertion that the police knew that they had failed to disclose all of the material in their possession, or understood that the material was exculpatory.[187] Moreover, the court may have been influenced by the fact that Jean had not conclusively established his innocence.

In any event, the discussion could have ended with a determination that Jean had failed to make out his case, but it did not. Analogizing to *Arizona v. Youngblood*,[188] the Fourth Circuit held that, absent "bad faith,"

179. *Id.*
180. *Id.* at 704-05.
181. *Id.* at 705.
182. *Id.*
183. Jean v. Collins, 221 F.3d 656, 660-61 (4th Cir. 2000).
184. *Id.*
185. *Id.* at 662.
186. *Id.*
187. *Id.*
188. Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (holding that there is no due process violation for failure to preserve potentially exculpatory material in absence of bad faith).

a *Brady* violation is not a constitutional violation actionable though § 1983.[189] The decision is misguided.

The Fourth Circuit's bad-faith requirement is unfairly protective of the police and sends the wrong message to law enforcement. Holding the police accountable would have had the salutary effect of requiring police to accurately describe their investigation and ensuring that all details are transmitted to the prosecution. In state criminal work, police conduct investigations on their own with very little direction and assistance from the prosecution. Only the police have access to witnesses' inconsistent statements, hesitations, and misidentifications made during the investigation. Although the ultimate duty to evaluate the case and decide what to disclose falls upon the prosecution, none of that discretionary decision making can occur unless the police disclose what they have uncovered.

It would have been better to insist that police make extensive notes regarding their investigations and strictly mandate that all information be turned over to the prosecution. Recordkeeping advances truth seeking.[190] Imposition of a bad-faith requirement permits police to bury information with the excuse that they did not know they were supposed to disclose it, and gives tacit permission to leave the tape machine off, fail to record witness interviews and tips, and to keep street files.[191]

3. *Fabrication of Evidence: False Confessions and Fake Science*

When a police officer creates false information likely to influence a jury's decision and passes that information along to prosecutors, he or she violates the accused's constitutional right to a fair trial,[192] and that harm is actionable.[193] False evidence can be concrete: a suspect's bootprint

189. Jean v. Collins, 221 F.3d at 662.

190. *See generally* David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455 (1999).

191. "Street files" are police files withheld from prosecutors. *See, e.g.*, Jones v. City of Chicago, 856 F.2d 985, 995 (7th Cir. 1988).

192. Miller v. Pate, 386 U.S. 1, 7 (1967) (citing Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

193. Manning v. Miller, 355 F.3d 1028, 1030-31 (7th Cir. 2004) (holding that the appellee's claim was actionable because the FBI agents did not qualify for immunity when they provided a jailhouse informant with details of the crime they wanted to charge the accused with and induced him to create a false story); Spurlock v. Satterfield, 167 F.3d 995, 1006-07 (6th Cir. 1999) (stating that the appellant was not protected by either absolute or qualified immunity because his actions, which included manufacturing a false statement by a jailhouse informant, violated the accused's clearly

planted at the scene of the crime in order to "solidify" the evidence,[194] or intangible: a "confession," the details of which were suggested to the suspect.[195]

Confessions are powerful evidence of guilt.[196] While many varieties of evidence are equivocal, a confession is generally direct, straightforward, and inculpatory. Imagine a homicide investigation: A married woman is killed at home. She was having an affair. She had an insurance policy benefiting her husband. After her corpse is found, police discover that a ground floor window in the home is open. There are fingerprints on the window frame that do not match those of anyone who lives in or regularly visits the home. If the husband claimed to have returned from work to find his wife lying murdered on the carpet, he would be suspected and investigated, but the police would probably continue to pursue other leads while they questioned him. However, if the husband confessed, the case would likely be closed. The jury would find the evidence against the husband convincing. The open window would be explained away.[197] Until recently, jurors refused to believe that innocent people confessed to crimes they did not commit.[198] Thus, confessions were trusted, and attempts to deny confessions were not.

The power of confessions encourages police to obtain them in as many cases as possible. That desire prompts police to spend time interrogating suspects and encourages hard-to-detect cheating, such as feeding details to the suspect so that the resulting statement will have convincing verisimilitude.

Courts have held that it is a violation of a suspect's constitutional

established constitutional rights).

194. Jones v. Cannon, 174 F.3d 1271, 1289 (11th Cir. 1999).

195. Stano v. Dugger, 901 F.2d 898, 902-03 (11th Cir. 1990).

196. *See* Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) ("No other class of evidence is so profoundly prejudicial.").

197. *See* Leo & Ofshe, *supra* note 87, at 429 ("Because a confession is universally treated as damning and compelling evidence of guilt, it is likely to dominate all other case evidence and lead a trier of fact to convict the defendant. A false confession is therefore an exceptionally dangerous piece of evidence to put before anyone adjudicating a case. In a criminal justice system whose formal rules are designed to minimize the frequency of unwarranted arrest, unjustified prosecution, and wrongful conviction, police-induced false confessions rank amongst the most fateful of all official errors.").

198. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 134 (1997).

rights to induce a false confession and use it against the suspect at trial.[199] Moreover, arranging for the target of an investigation to be lodged in a jail cell with a known informant—who had previously falsified information and perjured himself—and then using the resultant overheard confession is actionable if the confession is proved to be false.[200]

> No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice.[201]

Courts have not hesitated to find a constitutional violation, and juries have not hesitated to award damages. In May 2004, a Long Island jury awarded Shonnard Lee two million dollars because police arrested him without probable cause and lied when they said Lee had confessed.[202]

C. *Suits Against Defenders for Ineffective Assistance of Counsel*

Courts are reconsidering their traditional disinclination to hold public defenders liable for those actions that directly contributed to wrongful convictions. Currently, while courts have refused to extend immunity protection to public defenders, they have not yet dismantled the barriers that make "it difficult for criminal defendants to sue their counsel."[203] For example, "[o]n the one hand, the U.S. Supreme Court has held that when a public defender" acts as an individual attorney representing an individual client, "that lawyer is not a state actor and is thus not amenable to suit under the federal civil rights laws."[204] On the other hand, state malpractice tort theory is difficult to use against public defenders.[205] Moreover, some

199. *See* Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (affirming the "clearly established" test of voluntariness in determining that use of a coerced confession violates due process).

200. Manning v. Miller, 355 F.3d 1028, 1032-33 (7th Cir. 2004).

201. Ricciuti v. N.Y. City Transit Auth., 124 F.2d 123, 130 (2d Cir. 1997).

202. Chau Lam, *$2M in Faulty Arrest; Jury Concludes Ex-LI Man Was Charged Without Sufficient Evidence and That Cops Fabricated Confession*, NEWSDAY (Long Island, N.Y.), May 19, 2004, at A7.

203. Adele Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel*, CRIM. JUST., Fall 2003, at 37, 41.

204. *Id.* (citing Polk County v. Dodson, 454 U.S. 312 (1981)).

205. *Id.*

"states treat individual public defenders as civil servants with individual immunity."[206] Finally, "damages won against public defender offices are often capped."

Commentators abhor these protections because they see them as violations of accuseds' rights and obstacles to improving the performance of public defenders.[207] "Their voices are being heard."[208]

In Nevada, a former client of the public defender in Clark County claimed the defender organization used the polygraph exam to differentiate between clients.[209] "Miranda claimed that the chief defender required" all clients to undergo lie detector tests "and provided fewer investigative and defense resources to those who failed."[210] Miranda asserted this practice was a deliberate pattern—not an isolated instance—and that it was part of an unwillingness to properly supervise and train attorneys.[211] "Miranda claimed that no investigation was conducted on his case as a result of the test results."[212]

> Affirming the district court determination, the Ninth Circuit found that Miranda's allegations, if proven, would be sufficient to establish against the public defender office and the county a claim of deliberate indifference to constitutional rights, reachable under the leading Supreme Court decisions on state and municipal liability, such as *Monell v. Department of Social Services*.[213]

It is unlikely that another public defender office has used polygraph tests as Miranda alleged Nevada did.[214] But unfortunately, "[m]ost public defender organizations provide little guidance"—in training or

206. *Id.* (citing Scott v. City of Niagara Falls, 407 N.Y.S.2d 103, 105 (N.Y. Sup. Ct. 1978)).

207. *Id.* (citing Harold H. Chen, Note, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis,* 45 DUKE L.J. 783 (1996); David A. Sadoff, Note, *The Public Defender as Private Offender: A Retreat from Evolving Malpractice Liability Standards for Public Defenders*, 32 AM. CRIM. L. REV. 883 (1995); David J. Richards, Note, *The Public Defender Defendant: A Model Statutory Approach to Public Defender Malpractice Liability*, 29 VAL. U. L. REV. 511 (1994)).

208. *Id.*

209. *Id.* (citing Miranda v. Clark County, 319 F.3d 465 (9th Cir. 2003)).

210. *Id.* at 41-42.

211. *Id.* at 42.

212. *Id.* (citing Miranda v. Clark County, 319 F.3d at 468).

213. *Id.* (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)).

214. *Id.*

supervision—to their staff.[215] Following the lead of the Miranda decision, other innocent public defender clients, upon release from jail, are likely to sue the defender office that provided representation for its failure to train and supervise staff.[216] "The Miranda v. Clark County decision condemned an affirmative policy as systemically ineffective, but there is no reason why another organization's omissions or failures might not likewise be considered bureaucratic malfeasance establishing liability."[217]

As more innocent individuals are exonerated, the public and courts will demand more from police and prosecutors.[218] "The police are already paying for careless work through larger jury verdicts and settlements. . . . The defense bar may find itself in the same position soon."[219]

IV. CONCLUSION

In the absence of generous, practical, and popular compensation statutes, exonerees will turn to the courts for vindication. Eventually their lawsuits will be successful. Exonerees have compelling stories and sympathetic claims. Moreover, each exoneration reveals unprofessional, if not criminal, law enforcement activity. While compensation statutes are more equitable—and ultimately less expensive for states—courts will not wait for the legislature to act.

215. *Id.*

216. *Id.*; *see, e.g.*, Mary Gallagher, *First Exoneration, Next Compensation?*, N.J. L.J., Feb. 13, 2004, at 4 (stating that John Dixon is suing "the New Jersey Public Defender's Office, alleging that for 10 years it turned a deaf ear to his requests for DNA testing"). Dixon served ten years in jail, after pleading guilty. *Id.* He claims to have been influenced by his attorney to enter the plea and then immediately regretted his decision. *Id.* He says the court would not allow him to change his mind and that his requests for testing, made for the first time at sentencing, were brushed aside by the court and Dixon's public defender.

217. Bernhard, *supra* note 203, at 42.

218. *Id.*

219. *Id.*